OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
From July 1, 1966 to June 30, 1967

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1967
Letter of Transmittal

August 1, 1967

HONORABLE MILLS E. GODWIN, JR.
 Governor of Virginia
 State Capitol
 Richmond, Virginia

My dear Governor Godwin:

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, 1966 through June 30, 1967.

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.

With the greatest regret, I note the passing of the Honorable Kenneth Cartright Patty, First Assistant Attorney General, who died on March 27, 1967, having served as an Assistant Attorney General for thirty years, and as Attorney General in 1957-1958. It will be impossible to completely fill the void that he leaves.

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>Robert D. McIlwaine, III</td>
<td>Petersburg City</td>
<td>First Assistant</td>
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<tr>
<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
<td>Assistant</td>
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<tr>
<td>Reno S. Harp, III</td>
<td>Richmond City</td>
<td>Assistant</td>
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<td>M. Harris Parker</td>
<td>Greensville County</td>
<td>Assistant</td>
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<td>William B. Bagwell, Jr.</td>
<td>Nottoway County</td>
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<td>A. R. Woodroof</td>
<td>Amherst County</td>
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<td>Paul D. Stotts</td>
<td>Chesterfield County</td>
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<td>Curtis R. Mann</td>
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<td>Richard N. Harris</td>
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<td>J. Patrick Keith</td>
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<td>Overton P. Pollard</td>
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<td>Charles Shepherd Cox, Jr.</td>
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<td>William M. Phillips</td>
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<tr>
<td>Eleanor W. Tilley</td>
<td>Smyth County</td>
<td>Secretary</td>
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<td>Mabel G. Hurt</td>
<td>Tazewell County</td>
<td>Secretary</td>
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<td>Madge V. Howell</td>
<td>Richmond City</td>
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<td>Agnes Reid Pickral</td>
<td>Pittsylvania County</td>
<td>Secretary</td>
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<td>Mary Kathryn Church</td>
<td>Richmond City</td>
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<td>Rosalie W. Waite</td>
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<td>Charlotte R. Gasser</td>
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<td>Cheryl Ruffin</td>
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<td>Lillian Cersley</td>
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<td>Ellen Nelson</td>
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<td>Helen Lee Moody</td>
<td>Henrico County</td>
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<td>Deidre Leigh Mitchell</td>
<td>Nansemond County</td>
<td>Secretary</td>
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<tr>
<td>Olga M. Bruggeman</td>
<td>Richmond City</td>
<td>File Clerk</td>
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<tr>
<td>Frances T. Robertson</td>
<td>Richmond City</td>
<td>Receptionist</td>
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</tbody>
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ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1967

Edmund Randolph ............................................ 1776-1786
James Innes ..................................................... 1786-1796
Robert Brooke ................................................... 1796-1799
Philip Norborne Nicholas ..................................... 1799-1819
James Robertson ................................................ 1819-1834
Sidney S. Baxter ............................................... 1834-1852
Willis P. Bocock .............................................. 1852-1857
John Randolph Tucker ........................................ 1857-1865
Thomas Russell Bowden ...................................... 1865-1869
Charles Whittlesey (military appointee) .................... 1869-1870
James C. Taylor ............................................... 1870-1874
Raleigh T. Daniel ............................................. 1874-1877
James G. Field ............................................... 1877-1882
Frank S. Blair ................................................ 1882-1886
Rufus A. Ayers ............................................... 1886-1890
R. Taylor Scott ............................................... 1890-1897
R. Carter Scott ............................................... 1897-1898
A. J. Montague ............................................... 1898-1902
William A. Anderson ......................................... 1902-1910
Samuel W. Williams .......................................... 1910-1914
John Garland Pollard ........................................ 1914-1918
*J. D. Hank, Jr. ................................................ 1918-1918
John R. Saunders ............................................. 1918-1934
†Abram P. Staples ............................................ 1934-1947
‡Harvey B. Apperson .......................................... 1947-1947
§J. Lindsay Almond, Jr. ...................................... 1948-1957
**Kenneth C. Patty ........................................... 1957-1958
A. S. Harrison, Jr. ........................................... 1958-1961
***Frederick T. Gray ......................................... 1961-1962
Robert Y. Button ............................................ 1962-

*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


Commonwealth of Virginia v. Green Motor Lines, Inc. Appeal from order of the Hustings Court, City of Richmond, granting refund of registration fees in the amount of $5,086.00. Reversed and final judgment for the Commonwealth.


Court, John M. and Mildred E. v. Commonwealth. From Circuit Court, James City County and City of Williamsburg. Appeal from decision denying petitions alleging erroneous assessment of taxes. Affirmed.


Fox, Oscar William, Jr. v. Commonwealth. Appeal from order of State Corporation Commission granting Commonwealth's judgment in the amount of $5,494.00 for unpaid license fees. Judgment affirmed.

Henson, Jefferson, Jr. v. Commonwealth. From Circuit Court, City of Williamsburg and County of James City. Appeal from conviction of robbery. Affirmed.

Hubbard, Lillie Echols v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction of several misdemeanors. Affirmed.

Johnson, Charlie, Adm'r., etc. v. Walter A. Page, etc. Petition for a writ of mandamus to require trial judge to overrule certain objections in trial court proceeding. Denied.


Markley, Melvin M. v. Joseph R. Blalock, etc. Appeal from order granting writ of habeas corpus. Reversed.


Shumate, Lewis Hampton, Jr. v. Commonwealth. From Circuit Court, Washington County. Appeal from conviction for driving under the influence of intoxicants. Affirmed.


Stevens, George Calvin v. Commonwealth. From Hustings Court, City of Portsmouth. Appeal from conviction of maiming. Reversed and remanded.

Taylor, Johnny Paul v. Commonwealth. From Corporation Court, City of Norfolk, Part II. Appeal from conviction of burglary. Reversed and remanded.


CASES PENDING IN THE SUPREME COURT OF APPEALS

Ashby, George Stanley v. Commonwealth. From Corporation Court, City of Norfolk, Part II. Appeal from conviction of a crime against nature.

Brickhouse, Elvin, Jr. v. Commonwealth. From Corporation Court, City of Norfolk. Appeal from a conviction of rape and robbery.

Brown, Grover C. v. Commonwealth. From Hustings Court, City of Portsmouth. Appeal from conviction for incest.

Bull, Fred, Jr. v. Commonwealth. From Hustings Court, City of Richmond, Part II. Appeal from conviction of robbery. Pending.

Bunting, Dwight Arlyn v. Commonwealth. From Corporation Court, City of Alexandria. Appeal from a conviction of rape.

Burnley, Robert Thomas v. Commonwealth. From Corporation Court, City of Charlottesville. Appeal from conviction of rape.

Callands, Clarence Kidd v. Commonwealth. From Corporation Court, City of Lynchburg. Upon a conviction of grand larceny.

Clemmer, Jack Dean v. Commonwealth. From Circuit Court, Augusta County. Appeal from conviction of driving motor vehicle while intoxicated.

Durham, Luther v. Commonwealth. From Circuit Court, Dinwiddie County. Appeal from conviction of murder.

Elkins, Ronald David v. Commonwealth. From Hustings Court, City of Richmond. Upon a conviction for robbery.

Fadely, Barry Calvin v. Commonwealth. From Circuit Court, Shenandoah County. Upon a conviction of involuntary manslaughter.

Fish, Vernon Lee v. Commonwealth. From Hustings Court, City of Portsmouth. Two appeals from convictions for maiming.

Fogg, Bernard Ross v. Commonwealth. From Corporation Court, City of Norfolk. Appeal from a conviction of robbery and rape.

Foster, George Kent v. Commonwealth. From Corporation Court, City of Lynchburg. Upon a conviction for larceny.

Herron, Israel Wesley v. Commonwealth. From Circuit Court, Roanoke County. Appeal from conviction of statutory rape.

Jennings, Page Lewis, Estate of v. Commonwealth, etc. Appeal by Commonwealth from order granting refund of inheritance taxes paid under protest.

Jones, Ronald Louis v. Commonwealth. From the Corporation Court, City of Norfolk. Upon conviction for burglary on indictment numbered one and conviction for attempt to commit robbery on indictment numbered two.

Morris, Ralph Junior v. Commonwealth. From Circuit Court, Rockingham County. Upon a conviction of murder.

One 1963 Chevrolet Pickup Truck and Thomas J. Mull v. Commonwealth. From Circuit Court, Botetourt County. Appeal from judgment of forfeiture.

Perry, Jesse Thomas v. Commonwealth. From Circuit Court, City of Suffolk. Upon a conviction for a felony, to-wit: operating a lottery.

Safer, John H., et al. v. Commonwealth. From Circuit Court, Arlington County. Appeal from order refusing to grant refund of State recordation taxes.


Simmons, Howard Stuart v. Commonwealth. From Circuit Court, Wythe County. Upon a conviction of a felony, to-wit: unlawful burning of a railroad bridge.

Stegall, James F. v. Commonwealth. From Corporation Court, City of Lynchburg. Appeal from conviction of grand larceny.


Thompson, Robert Herman, Jr. v. Commonwealth. From Hustings Court, City of Richmond, Part II. Appeal from conviction of robbery.


CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

Carter, Frederick v. City of Norfolk. Appeal from judgment of Supreme Court of Appeals of Virginia affirming judgment of the Corporation Court, City of Norfolk, Part II, for assessment of costs in traffic cases. Certiorari denied.

Durham, Luther, Jr. v. Commonwealth. Appeal from judgment of Supreme Court of Appeals of Virginia denying an appeal from conviction of murder in the Circuit Court, Frederick County. Certiorari denied.


Marshall, Norman Thomas, et al. v. Dr. George Oliver, etc., et al. Appeal from judgment of Supreme Court of Appeals of Virginia, affirming Circuit Court, City of Richmond, in denying admittance of three students to Richmond Professional Institute. Certiorari denied.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

McLeod, Fergus Neil v. Commonwealth. Appeal from judgment of Supreme Court of Appeals of Virginia denying appeal from conviction of murder by Circuit Court, Arlington County. Application for certiorari pending.

CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


Belvin, Ernest L. v. McCauley, Walter L. Garnishee summons to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Bankers Telephone Employees Insurance Company. Pending.


Boekhout, Myrtle v. Drs. Lublin and Watkins. Suit for personal injury against staff physician at Medical College of Virginia. Pending.


City Hall Tavern, Inc. v. A.B.C. Board. Suit to enjoin enforcement of Board's order suspending license to sell alcoholic beverages and attacking validity of A.B.C. Board regulation. Dismissed.


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


CASEx TRIED OR PENDING IN THE CIRCUIT, HUSTINGS, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS IN THE STATE.


Coit, Grace L. re Estate of. Corporation Court, City of Charlottesville. Suit to construe provisions of will. Will construed and decree entered.


Conley, Nita F. v. Chesapeake Insurance Company, et al. Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Chesapeake Insurance Company. Pending.

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


Ferguson, Grady H., et al. v. Edgar E. Evans, Jr., et al. Circuit Court, Franklin County. Motion for judgment for damages alleged to have arisen out of highway construction project. Dismissed.


Gibbs, Thomas Madison, Sr. v. Virginia Real Estate Commission. Law and Equity Court, City of Richmond. Appeal from an order revoking license. Pending.


Grasty, William T., Co-executor v. C. H. Morrison, etc. Circuit Court, City of Richmond. Suit by Co-executor to nullify State inheritance tax returns. Pending.


Hanbury, Carol v. Lewis H. Vaden, etc. Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Florida Insurance Exchange, Inc. Pending.


Kahn, Leon S. v. Commissioner of Mental Hygiene, etc., et al. Circuit Court, Arlington County. Suit to enjoin employment of plaintiff's wife by the State. Pending.


Luck, Bertha, Admrx., etc. v. The Central Mutual Telephone Company. Circuit Court, Prince William County. Suit to distribute stocks and dividends held in name of Manassas-Dumfries Telephone Company, dissolved in 1928 for failure to pay taxes due State. Pending.


McClanahan, Rosa v. Douglas B. Fugate, etc. Circuit Court, Buchanan County. Injunction and petition for mandamus to compel the institution of condemnation proceedings. Pending.


Mutual Fire Insurance Company v. Marvin V. Templeton and Sons, Inc., et al. Circuit Court, City of Richmond. Motion for judgment against contractor and Highway Department for damages. Pending.


Powell and Company, Inc. v. Department of Taxation, etc. Circuit Court, Augusta County. Application for correction of erroneous tax assessment. Pending.


Powers, Pearl H. v. Virginia A.B.C. Board. Law and Equity Court, City of Richmond. Petition for mandamus to compel issuance of beer license. Pending.


State Board of Pharmacy v. Textile Workers Union of America, etc. Circuit Court, City of Richmond. Suit to enjoin illegal practice of pharmacy. Pending.

Stevens, Shelton Horsley v. Lewis H. Vaden, etc. Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Bankers and Telephone Employees Insurance Company. Pending.
REPORT OF THE ATTORNEY GENERAL


Thomas, Raymond Arthur v. Lewis H. Vaden, etc. Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Florida Insurance Exchange, Inc. Pending.

Turner, J. N., et al v. Lewis H. Vaden, etc. Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Bankers and Telephone Employees Insurance Company. Pending.


Virginia Iron, Coal & Coke Company, etc. v. H. H. Harris, etc., et al. Circuit Court, City of Richmond. Motion for judgment for damages in highway construction. Pending.


Wilson, Lillian v. D. B. Fugate, etc., et al. Circuit Court, City of Richmond. Motion for judgment for damages for removal of house. Pending.


Wright Contracting Company v. Department of Highways, et al. Circuit Court, City of Richmond. Claim against Highway Department arising out of construction project. Dismissed without prejudice. (Two cases)


Commonwealth of Virginia v. Oscar William Fox, Jr. Motion under § 56-304.12 for judgment in the sum of $6,632.00 for unpaid registration and license taxes (fees). Pending.

Commonwealth of Virginia v. Oscar William Fox, Jr. Motion under § 56-304.12 for judgment in the sum of $5,494.00 for unpaid registration and license taxes (fees). Judgment in favor of the Commonwealth. Appealed to the Supreme Court.


Commonwealth of Virginia v. Robert D. Howell, d/b/a Jen Distributors. Motion under § 56-304.12 for unpaid registration and license fees. Registration cards and identification markers cancelled and no new authority to be issued unless Virginia license secured.


Commonwealth of Virginia v. John G. Roadcap, Jr. Motion under § 56-304.12 for unpaid registration and license fees. Judgment in amount of $298.00 with interest at 6% for Commonwealth.

Allen, Melvin Edward v. C. H. Lamb, Commissioner, etc. Law and Equity Court, City of Richmond. Injunction order entered temporarily enjoining Commissioner from suspending operator's license, registration certificate and registration plates under § 46.1-442, pending determination of declaratory judgment action. Pending.


Commonwealth of Virginia v. Shell Oil Company. Circuit Court, City of Richmond. Motion for judgment filed for collection of penalty in the sum of $32,328.58 for failure to make timely filing of fuel tax reports and payment of taxes in accordance with §§ 58-713 and 58-746. Paid in full and case dismissed.
Eastern Air Lines, Incorporated v. Commissioner, etc. Law and Equity Court, City of Richmond. Petition of appeal from decision of Commissioner filed pursuant to § 58-754, requesting refund of fuel tax in the sum of $27,033.04 in accordance with § 58-753.3. Demurrer by Commissioner overruled. Appealed to Supreme Court.


Golson, Samuel E., Martha Golson and Lucy Davis, Trustees, etc. v. Chester H. Lamb, Commissioner, et al. Hustings Court, Part II, City of Richmond. Injunction filed enjoining and restraining Commissioner from transferring or permitting to be transferred, title to 1962 Volkswagen bus until the further order of this Court. Order entered dismissed, agreed, compromised and settled.


Moore, Ballard v. Commissioner, etc. 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 for licensee to drive a motor vehicle upon the highways. Operator's license surrendered. Pending.

Quarles Petroleum, Inc. v. C. H. Lamb, Commissioner, etc. Circuit Court, City of Richmond. Appeal from Commissioner's assessment of fuel tax penalty paid in the amount of $1,645.94. Dismissed.

Robertson, Oscar Leonard v. C. H. Lamb, Commissioner, et al. Law and Equity Court, 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. Injunction expired and not extended.

Selquist, Stephen John v. Commissioner, etc., et al. Circuit Court, Fairfax County. Appeal from an order revoking operating privilege for a period of sixty days pursuant to § 46.1-419. Revocation expired—dismissed.


Shell Oil Company v. Commissioner, etc., et al. Circuit Court, City of Richmond. Action for refund of alleged erroneous collection of fuel tax under Title 58, Chapter 13. Under advisement.

Shell Oil Company v. Commissioner, etc., et al. Circuit Court, City of Richmond. Action for refund of alleged erroneous collection of fuel tax under Title 58, Chapter 13. Under advisement.

Sherwood, Frank M. and Helen Langan v. Commissioner, etc. Appeal from an action of the Commissioner suspending the operator's licenses and privileges in accordance with the provisions of §§ 46.1-442 and 46.1-446 of the Code. Pending.

Smiley, James I. v. C. H. Lamb, Commissioner. Hustings Court, Part II, City of Richmond. Bill of Complaint filed to enjoin Commissioner from denying plaintiff motor vehicle salesman's license. Order entered directing plaintiff to follow administrative remedy in accordance with § 46.1-536 and retaining equity cause on court's docket for such other action as may be appropriately allowed. Pending.

Southern Materials Company, Incorporated v. C. H. Lamb, Commissioner, et al. Law and Chancery Court, City of Norfolk. Appeal from an action of the Commissioner pursuant to § 58-744 imposing tax on all fuel used by supplier in a motor vehicle or delivered directly into the fuel supply tanks of its own motor vehicles. In accordance with § 58-747 an assessment was made, based on an audit of the records in the amount of $3,808.91. Judgment in favor of the Commonwealth.

The Home Indemnity Company and Winifred S. Hawkes v. C. H. Lamb, Commissioner, et al. Law and Equity Court, City of Richmond. Petition for Declaratory Judgment under the provisions of §§ 8-578 through 8-585. Order of suspension entered by the Commissioner pursuant to § 46.1-449. Injunction entered pending the maturing of this cause.

The Shenandoah Valley National Bank v. C. H. Lamb, Commissioner, et al. Motion for judgment for the Division to issue duplicate title so that the automobile may be sold. Commissioner dismissed in the proceeding as defendant.

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


CASES TRIED OR PENDING IN THE COURTS OF RECORD OF THE STATE IN WHICH THE VIRGINIA EMPLOYMENT COMMISSION (UNEMPLOYMENT COMPENSATION) WAS INVOLVED


In the Matter of Oceana Drugs, Inc., and John S. McFall, individually and t/a Oceana Drug. Circuit Court, City of Virginia Beach. Dismissed as to the Virginia Employment Commission.


HABEAS CORPUS CASES

Approximately 509 cases were tried in courts of record of the Commonwealth and 49 cases in United States District Courts. In addition, 29 cases were briefed and argued on appeal before the Supreme Court of Appeals of Virginia and before the United States Court of Appeals for the Fourth Circuit. Approximately 222 answers and 21 briefs in opposition to petitions for writs were filed in the Supreme Court of Appeals of Virginia. Approximately 604 answers were filed in courts of record of the Commonwealth and 305 in United States District Courts.

CASES BEFORE FEDERAL POWER COMMISSION

Application of Appalachian Power Company to construct dams in Grayson County for hydroelectric purposes. Project No. 2317. Commonwealth of Virginia has intervened as a party to protect State's interest in the proposed recreation and economic development in that area. Pending.
EXTRADITION HEARINGS CONDUCTED AND REPORTS SUBMITTED PURSUANT TO REQUEST OF THE GOVERNOR

July 1, 1966
  Preston L. Wolfrey
July 1, 1966
  Lester L. Huffman
July 1, 1966
  Houston K. Kilpatrick
  Forest D. McGuire
July 6, 1966
  Masel Franklin Vaughan
July 6, 1966
  Opie Sowards
July 6, 1966
  Rubin V. Ross
  Laura Ross
July 18, 1966
  James Jordan
July 18, 1966
  Gordon Leslie
August 23, 1966
  Karl Kologiski
August 23, 1966
  Robert London
August 23, 1966
  James N. Atkinson
August 23, 1966
  Vernon Elmore Whittington
October 31, 1966
  Odell B. McDaniel
November 31, 1966
  John W. Davenport
December 5, 1966
  Cecil Dodd
December 19, 1966
  George Harrison, Jr.
December 19, 1966
  James Marshall
January 20, 1967
  Marion Burton
January 20, 1967
  Harold Michael Dixon
January 20, 1967
  William Preston Racey
January 20, 1967
  Bill O. Keene
February 10, 1967
  James Cary Murrell
February 10, 1967
  Daniel David Davis
February 10, 1967
  Fred Smith
February 10, 1967
  Bonnie Louise Simpler
March 9, 1967
  Otis Ronald Coleman
March 9, 1967
  Chris Darnel Hurt
April 3, 1967
  Arthur Uptain
April 3, 1967
  Charles Belcher
April 3, 1967
  William Wiggins, Jr.
April 10, 1967
  Aubrey Earl Southward
May 12, 1967
  Robert F. Freeman
June 23, 1967
  Robert Case alias
  Tony Adams
June 23, 1967
  Fred Carpenter
June 23, 1967
  James F. Roberts
  Donna Griffis alias
  Donna Griffis Roberts
HONORABLE MAURICE B. ROWE, Commissioner
Department of Agriculture and Commerce

This is in reply to your letter of May 2, 1967, requesting my opinion regarding the registration of mildew resistant paints as economic poisons.

Your letter reads in part as follows:

"The Department of Agriculture and Commerce has always maintained that when a paint has a fungicidal or mildewcidal active ingredient and/or when a claim for mildew resistance is made, the paint itself is considered an economic poison.

"The Du Pont Company maintains that the addition of these chemicals is merely to protect the paint and makes no claim that the building will be protected from mildew. Therefore, they feel that the paint is not an economic poison; and therefore, does not require registration.

"Our question to you is whether or not such paints are economic poisons."

Section 3.1-221, Code of Virginia (1950) as amended, requires that all economic poisons distributed, sold, or offered for sale within this State shall be registered with the Commissioner of Agriculture and Commerce. It being clear that all economic poisons must be registered, the question is whether mildew resistant paints are economic poisons.

Section 3.1-198, Code of Virginia (1950), as amended, provides as follows:

"The term ‘economic poison’ means: (1) Any substance or mixture or substance intended for preventing, destroying, repelling, or mitigating, any... fungi...."

Section 3.1-199 provides that:

"The term ‘fungi’ means all non-chlorophyll-bearing thallophytes... as, for example, mildews...."

In my opinion, when any substance or mixture of substances prevents, destroys, repels, or mitigates mildew, and the purpose intended of these substances or mixture of substances is such, this would be an economic poison. Therefore, a paint which had the intended purpose of preventing mildew, or claims to prevent mildew, would be an economic poison.
AIR POLLUTION CONTROL—Local Ordinances—Compatibility with rules, regulations, orders or requirements of State Air Pollution Control Board.

ORDINANCES—Local—Air pollution—Compatibility with rules, regulations, orders or requirements of State Air Pollution Control Board.

May 15, 1967

HONORABLE RICHARD W. AREY
Executive Secretary, State Air Pollution Control Board

This is in reply to your letter of May 12, 1967, in which you request my opinion as to whether or not the action by a city or county to adopt air pollution control regulations under an existing ordinance would be an amendment to that ordinance, and therefore would require approval of the State Air Pollution Control Board under § 10-17.30(b) of the Code of Virginia.

The question seems to include the answer, since “to adopt air pollution control regulations” indicates the adopting of an ordinance or an amendment to an existing ordinance. The named statute states, under paragraph (a) thereof, that existing ordinances adopted prior to June 27, 1966, shall continue in force until superseded as provided in § 10-17.19. If the local ordinance so adopted will be used, no further action is needed. Paragraph (b) of the same section, however, provides that the governing body of any locality preparing to adopt an amendment to an existing ordinance after such date shall first obtain the approval of the State Board.

Therefore, if the regulations are to be different from those spelled out in the existing ordinance, I must answer your question in the affirmative. If not, no amendment is necessary and, consequently, approval of the State Board is not required.

AIR POLLUTION CONTROL—Proposed Ordinance of City of Falls Church and Model Air Pollution Control Ordinance—Constitutionality of.

May 16, 1967

HONORABLE RICHARD W. AREY
Executive Secretary, State Air Pollution Control Board

This is in reply to your letter of April 27, 1967, in which you request my opinion on the legality and conformance with the State Constitution of a proposed Air Pollution Control Ordinance for the City of Falls Church revised April 10, 1967, and Model Air Pollution Control Ordinance prepared by the Metropolitan Washington Council of Governments adopted July 14, 1966.

Legislation for air pollution control, which is new to the laws of this State, was enacted by Chapter 497, Acts of Assembly of 1966, and is embodied in Chapter 1.2, Title 10 of the Code of Virginia, §§ 10-17.10 to 10-17.30, inclusive. This creates the State Air Pollution Control Board, prescribes the powers and duties of the Board, permits the creation of local air pollution control districts and communities and prescribes their powers and duties. It further provides for enforcement of rules, regulations and orders of the Board and appeals therefrom and prescribes punishment for failure to comply with same. Lastly, it designates when local air pollution ordinances are superseded by such rules, regulations and orders.
Section 10-17.19 states that the Board may create, within any area of the State, local air pollution control districts comprising a city or county or a part or parts of each, or two or more cities or counties, or any combination or parts thereof. In any district or other air pollution control community thus created, a local air pollution control committee shall be appointed by the State Board and when such local committee is created, all local ordinances, rules and regulations relating to air pollution, insofar as they affect that particular area, shall be superseded by the rules and regulations of the State Board. Until such time as local authority to adopt ordinances relating to air pollution has been superseded as prescribed in § 10-17.19, however, § 10-17.30 provides that the governing body of any locality adopting any such ordinance or amendment shall first obtain the approval of the State Board as to the provisions of such ordinance or amendment.

The last clause, found in § 10-17.30, provides the only specific guidelines for ordinances so adopted by the governing body of any locality relating to air pollution control after June twenty-seven, nineteen hundred sixty-six and it must be assumed that such ordinances, in addition to being approved by the State Board, must fall within the limitations of the Constitution of Virginia and not in conflict with the statutes of this State. It is my understanding that the Model Air Pollution Control Ordinance is being considered as a possible model for local ordinances relating to air pollution control, which may be adopted in the future. It is my further understanding that I am not asked to pass upon the legality of various technical provisions thereof which have been devised on the basis of scientific data not made available to this office.

In examining this Model Ordinance, it appears that Section 6, Reporting of Information, Part “(3) such other information as the (Department) may require,” should include after the word “information” the words “related to air pollution.” This is suggested to remove such clause from the constitutional question of invasion of privacy, by eliminating the unlimited requirement for information. I would question the limitation found in Emission of Gases, Vapors and Odors, C. (2), page 10, prohibiting the use of fuels containing in excess of one percent sulphur, if this would prohibit the use of coal as a fuel. Informal information received indicates that coal often contains in excess of one percent sulphur. It is my understanding that the provisions as to motor vehicles, found under Operation of Equipment (2)(c) on page 11, are based on legislation or proposed legislation of the federal government. As a practical matter, the prohibition against permitting the engine of a motor vehicle to idle more than three minutes, as stated in (2)(a) on the same page, may be unreasonable in certain emergencies, especially in the light of the dependence of power brakes upon operation of the motor.

Considering the Model Ordinance in general and providing for the exceptions enumerated and further interpretation of the scientific data as previously indicated, I am of the opinion that it is basically legal and in conformance with the State Constitution.

The proposed Air Pollution Control Ordinance for the City of Falls Church has drawn heavily from the model ordinance previously herein considered and, insofar as technical terms and definitions found in such model ordinance are employed, again, no attempt will be made to pass upon the appropriateness thereof. In regard to Virginia Code references, a correction should be made on the first page, fourth line, to change the date from 1952 to (1950) following Code of Virginia. On page 3, the third word in the eighth line should be country instead of county. I suggest adding the words “related to air pollution” following the word “information” under part (3) of Reporting and Information on page 6, for the same reason previously herein expressed in respect to similar language employed in the Model Ordinance. The same comment previously herein made in respect
REPORT OF THE ATTORNEY GENERAL

to the Model Ordinance is applicable to the prohibition as to fuels containing over one percent sulphur content, set forth in Section 27-9.32, page 10, of the Falls Church Ordinance, although, under the latter, it becomes effective January 1, 1970. Likewise, the comments previously made in respect to a similar clause in the Model Ordinance apply to Section 27-9.521, page 12, of the Falls Church Ordinance, respecting the operation of the motor of certain type vehicles longer than three minutes while the vehicle is stationary.

It is noted that the word "owner" is defined in the same words used in the statute, § 10-17.10(c), while the word "person" is not defined. The ordinance, however, has apparently substituted the word "person" for "owner," as the word "person" is used throughout the ordinance. Accordingly, the word "person" should be defined in the ordinance just as the word "owner" is defined in the statute, so as to include every firm, partnership, association, corporation, etc., as well as every natural person. Otherwise, the word "owner" should be substituted for "person" whenever used in the ordinance.

In regard to making rules and regulations and issuing orders and enforcing these in the courts, § 10-17.18, paragraph (e) is as follows:

"(e) The Board, in making rules and regulations and issuing orders, and the courts in enforcing the provisions of this chapter, shall take into consideration all of the facts and circumstances bearing upon the reasonableness of the activity involved and the regulations proposed to control it, including:

"(1) The character and degree of injury to, or interference with safety, health or the reasonable use of property which is caused or threatened to be caused;

"(2) The social and economic value of the activity involved;

"(3) The suitability or unsuitability of such activity to the area in which it is located; and

"(4) The practicability, both scientific and economic, of reducing or eliminating the discharge resulting from such activity."

This language sets the tenor of the State statute and must be employed whenever the Board sees fit to act as provided in § 10-17.19. Under the circumstances, it would appear highly desirable that local ordinances inculcate such language as a guide to the personnel authorized to execute the terms of the ordinance. In the instant case, this is the "Department," which is defined as "The office of the City Manager."

It is suggested that the word "final" be inserted before the word "order" in 27-13.1 on page 16, so that judicial review will be available from a final order of the "Department," rather than an interlocutory order, and administrative remedies as provided in the ordinance under Enforcement, pages 13 and 14, may first be exhausted.

In reference to penalties, page 17 of the ordinance, a fine of $10.00 might be inclined to engender laxities both on the part of the violator and the personnel enforcing it. The statute, under § 10-17.29, puts some teeth into enforcement with a fine of not less than fifty dollars nor more than five hundred dollars for each violation within the discretion of the court. This is not to say, however, that the ordinance is rendered illegal because of the lighter fine, but the maximum of $10.00 would be very limiting to the court trying a case thereunder.

With the exceptions herein noted, I am of the opinion that the Falls Church ordinance is within legal and constitutional limitations.
REPORT OF THE ATTORNEY GENERAL

ALCOHOLIC BEVERAGE CONTROL LAWS—Towns—May require license to manufacture, bottle or sell alcoholic beverages—May impose local merchants' license tax measured by sales.

TOWNS—Authority—Alcoholic beverages—May require license to manufacture, bottle or sell alcoholic beverages—May impose local merchants' license tax measured by sales.

HONORABLE JOHN P. BEALE
Commissioner of the Revenue of Westmoreland County

This is in response to your letter of May 26, 1967, which is as follows:

"I have been requested by the Town of Colonial Beach to write your office and ask your honored opinion of the legality of part of their license code. They write an on premises beer license for $50.75 and an off premises beer license for $25.75. In addition to this, they have a license on gross sales which also includes the sale of the beer both on and off premises. The Town Officials want to know if it is legal for them to write the beer license and in addition to this beer license to charge the merchants on gross sales including the sale of beer or if they should exclude from the gross sales the sale of beer both on and off premises."

Section 4-96 of the Code of Virginia (1950), as amended, reads as follows:

"No county, city or town shall, except as otherwise provided in §§ 4-38 or 4-97, pass or adopt any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia. And all local acts, including charter provisions and ordinances of cities and towns, inconsistent with any of the provisions of this chapter, are hereby repealed to the extent of such inconsistency."

Section 4-38 of the Code reads, in part, as follows:

"(a) Provision for licenses and taxes.—In addition to the foregoing State licenses provided for in this chapter, the governing body of each city and town in the State is hereby authorized to provide by ordinance for the issuance of city and town licenses, and to charge and collect license taxes therefor, to persons licensed by the Board to manufacture, bottle or sell alcoholic beverages within such city or town. The license taxes which may be charged and collected by such cities and towns shall not exceed the following sums:

* * *

"(7) For each retail on-premises wine and beer license for a hotel, restaurant or club, and for each retail off-premises wine and beer license, in a city of the first class one hundred and fifty dollars, in a city of the second class seventy-five dollars, and in a town thirty-seven dollars and fifty cents, per annum;

"(8) For each retail on-premises beer license for a hotel, restaurant or club, and for each druggist license, in a city of the first class, one hundred dollars, in a city of the second class, fifty dollars, and in a town, twenty-five dollars, per annum."

You will note from the foregoing that the amount of the on-premises retail beer license issued by the Town of Colonial Beach may not exceed
$25.00. There is no provision authorizing the town to issue a retail off-premises beer license, but it may issue a retail off-premises wine and beer license for an amount not exceeding $37.50.

Your question with reference to gross sales is answered by subsection (e) of § 4-38 of the Code, which subsection, in part, is as follows:

"Merchants' and restaurants' license taxes. The governing body of each . . . town in the State, in imposing local merchants' license taxes measured by purchases, local retail merchants' license taxes measured by sales, and local restaurant license taxes measured by sales, may include alcoholic beverages in the base for measuring such local license taxes the same as if the alcoholic beverages were nonalcoholic; and no local alcoholic beverage license authorized by this chapter shall be construed as exempting any licensee from any local merchants' or local restaurant license tax, but such local merchants' and local restaurant license taxes may be in addition to the local alcoholic beverage license taxes authorized by this chapter. . . ."

As § 4-38 of the Code is quite lengthy, I have set out only the portions thereof that seems necessary to reply to your specific questions. The entire section, however, should be invited to the attention of the governing body of the Town of Colonial Beach.

**ALCOHOLIC BEVERAGE CONTROL LAWS—Transportation of Beverages—Limitation in § 4-118.2 on quantity.**

**January 24, 1967**

HONORABLE PAUL REIBER  
Member, House of Delegates

This is in reply to your letter of October 26, 1966, which reads as follows:

"In the above-referenced Chapter [Chapter 711] of the Acts of Assembly 1966, the Code of Virginia was amended to limit certain transportation of beverages defined in Section 4-99 (special kinds of beer) to specified quantities. However, there are two specifications of the quantity regulated. In the first paragraph the amendment provides 'quantities in excess of one case' are prohibited. In paragraphs 2 and 3, however, the quantity is described as 'in excess of one gallon.'"

"Would you favor me with your construction of the last paragraph which imposes a penalty on 'any person who shall transport beverages . . . in excess of one gallon . . . ?'"

Chapter 711 of the 1966 Acts of Assembly appears as § 4-118.2 in the Code of Virginia (1950), as amended, which Code section reads as follows:

"Transportation of certain beverages.—The transportation of beverages defined in § 4-99, other than beverages purchased from persons licensed to sell the same in this State, and those beverages which may be manufactured and sold without any license under the provisions of this chapter, within, into or through this State in quantities in excess of one case is prohibited except in accordance with regulations adopted by the Board pursuant to this section.

"The Board may adopt such regulations governing the transportation of beverages defined in § 4-99, other than beverages pur-
chased from persons licensed to sell the same in this State and those beverages which may be manufactured and sold without any license under the provisions of this chapter, within, into or through this State in quantities in excess of one gallon, that it may deem necessary to confine such transportation to legitimate purposes; and the Board may issue transportation permits in accordance with such regulations.

"Any person who shall transport such beverages, other than those purchased from persons licensed to sell the same in this State and those beverages which may be manufactured and sold without any license under the provisions of this Chapter, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars or confinement in jail for not exceeding twelve months, or both, in the discretion of the jury or of the court trying the case without a jury."

I am advised that the Virginia Alcoholic Beverage Control Board has not as of this date passed any regulation with reference to the subject matter of this statute. There being no regulation, it is difficult to see how there can be any conviction at this time under the third paragraph of the statute. This is so because the third paragraph seems to envision a transportation that violates a regulation of the Board adopted pursuant to the second paragraph of the statute.

Such a construction of the statute, however, does not necessarily mean that the statute has no vitality in the absence of a regulation passed by the Board. The first paragraph of the statute must also be taken into consideration, and the language there is that the transportation of certain beverages "in quantities in excess of one case is prohibited except in accordance with regulations adopted by the Board." While there is no penalty provided in the first paragraph of this statute, under § 4-116 of the Code, it is indicated that a person violating a provision of Chapter 2 of Title 4 of the Code [of which § 4-118.2 is a part] for which no other penalty is provided shall be deemed guilty of a misdemeanor and punished accordingly. It thus appears that the transportation of certain beverages in quantities in excess of one case may constitute a misdemeanor.

While what constitutes a "case" does not seem to have been defined by the General Assembly or the Board, no reason is perceived as to why the term is not subject to judicial construction.

ALCOHOLIC BEVERAGE CONTROL LAWS—Unlicensed Restaurants—Not to have alcoholic beverages on premises.

October 25, 1966

HONORABLE ALFRED W. WHITEHURST
Commonwealth's Attorney, City of Norfolk

This is in reply to your letter of October 19, 1966, which is as follows:

"The question has been presented to this office concerning the use of alcohol in a restaurant which has no A.B.C. license. The situation is that the restaurant itself does not sell or dispense any alcohol, but is privately rented for an evening. The club or people privately renting the restaurant bring their alcohol and have the usual cocktail hour. The question that arises, under Section 4-61,
is does this bar that is set up have to be in an area of the restaurant that is private, where no food or beverages of any kind is sold; or, though the restaurant owner has no A.B.C. license and his entire restaurant is privately rented for this one night, does it make any difference where the bar is set up?"

Section 4-61 of the Code of Virginia (1950), as amended, is as follows:

"Possession without license to sell alcoholic beverages upon premises of restaurant, soda fountain, etc.—No alcoholic beverages shall be kept or allowed to be kept upon any premises or upon the person of any proprietor or person employed upon the premises of a restaurant, soda fountain or other place where food or refreshments of any kind are furnished for compensation, except such alcoholic beverages as such person owning or operating such place of business is authorized by license under this chapter to purchase and to sell at such place of business; provided, however, that the restrictions in this regulation shall not apply to any residence as defined in subsection (21) of § 4-2, nor to private dining rooms approved by the Virginia Alcoholic Beverage Control Board in restaurants licensed by the said Board while such rooms are in use for private meetings or parties limited in attendance to members and guests of a particular group, association or organization."

"Any person convicted of a violation of the provisions of this section shall be guilty of a misdemeanor and punished as provided in § 4-92."

Since the restaurant in the situation you have outlined has no license to sell alcoholic beverages, is not a residence, and apparently does not come within the other exception pertaining to private dining rooms approved by the Alcoholic Beverage Control Board, it seems clear to me that no alcoholic beverages may be kept or allowed to be kept upon its premises. It does not appear to be material under § 4-61 whether or not the restaurant is "privately rented" for the occasion.

ALCOHOLIC BEVERAGE CONTROL LAWS—Whiskey by the Drink—Restaurants, hotels and clubs.

August 25, 1966

HONORABLE WILLIAM P. KELLAM
Member, Senate of Virginia

This is in reply to your letter of August 17, 1966, which is as follows:

"It would be appreciated if you would advise me whether or not under Virginia's existing ABC Law the ABC Board can authorize a hotel, restaurant, or other club to serve whiskey by the drink.

"It would also be appreciated if you could set forth in your opinion just how far the ABC Board can go in authorizing such an activity."

Section 4-28 of the Code of Virginia (1950), as amended, is as follows:

"Beverages sold at retail only at government stores. — No alcoholic beverage having an alcoholic content of more than fourteen per centum by volume shall be sold at retail in the State of Virginia, except at government stores. Nothing in this section shall be construed to prohibit sales by druggists as authorized by § 4-49, nor such sales as are authorized by § 4-85, as amended."
The provisions of the foregoing section clearly prohibit the sale of whiskey by hotels, restaurants or clubs.

Under the provisions of § 4-25, the Virginia Alcoholic Beverage Control Board may issue on-premises beer licenses, or on-premises wine and beer licenses, to hotels, restaurants and clubs as defined in the A.B.C. Act. Such licenses authorize the sale and consumption of beer, or wine and beer, as the case may be, in the dining rooms, and, if the licensee be a hotel or club, in other designated rooms. The provisions of § 4-60 of the Code in general prohibit a licensee from selling or keeping on the licensed premises any alcoholic beverages other than those for which the license is issued. The provisions of §§ 4-61 and 4-61.1 would prohibit restaurants, clubs, or other places where food or refreshments of any kind are furnished for compensation, from keeping or allowing to be kept any alcoholic beverages other than those for which a license may have been issued. There are, however, important exceptions. The following language appears in § 4-61:

"... the restrictions in this regulation shall not apply to ... private dining rooms approved by the Virginia Alcoholic Beverage Control Board in restaurants licensed by the said Board while such rooms are in use for private meetings or parties limited in attendance to members and guests of a particular group, association or organization."

Another exception appears in § 4-89, which in part is as follows:

"The provisions of this chapter shall not be construed to prevent:

*   *   *

"(d) Any club licensed under the provisions of this chapter from keeping for its members any alcoholic beverages lawfully acquired by such members, provided such alcoholic beverages shall not be sold, dispensed or given away in violation of any provisions of this chapter; and it shall be lawful for any member to consume on the club premises any alcoholic beverages lawfully acquired. ..."

Finally, the definition of "public place" has pertinence to the question you are interested in. This definition appears in § 4-2 (20) and is as follows:

"'Public place' shall mean any place, building or conveyance to which the public has, or is permitted to have, access including restaurants, soda fountains, hotel dining rooms, lobbies and corridors of hotels, and any highway, street, lane, park or place of public resort or amusement; but shall not include hotel dining rooms or hotel ball rooms while in use for private meetings or private parties limited in attendance to members and guests of a particular group, association or organization and shall not include private dining rooms approved by the Board in restaurants licensed by the Board while such rooms are in use for private meetings or private parties limited in attendance to members and guests of a particular group, association or organization."

I think it is clear that under the A.B.C. Act no hotel, restaurant or club may sell whiskey under any circumstances; however, the serving and consumption of whiskey is permitted in clubs licensed by the Board, at private functions in the approved private dining rooms of restaurants licensed by the Board, and at private functions in hotel dining rooms and hotel ball rooms of hotels licensed by the Board.
ALCOHOLIC BEVERAGE CONTROL LAWS—Wholesaler and Retailer—Prohibited from acting in same capacity.

July 19, 1966

HONORABLE GEORGE M. COCHRAN
Member, Senate of Virginia

This is in reply to your letter of July 6, 1966, which is as follows:

"I have received a letter from an attorney practicing in another city in Virginia, the body of which reads as follows:

‘On November 30, 1964, I incorporated the Cavalier Store, Inc. and became secretary and director of this company. The company is a small retail delicatessen holding an On and Off Premises A.B.C. license.

‘On May 12, 1966, I incorporated the Sims Wholesale Company, Inc. and became a director and secretary of this company. This company holds the wholesale Schlitz distributorship for this area. I have nothing to do with the management of either company, but only perform perfunctory legal duties for each, such as transcribing the minutes and filing certain required forms with the State Corporation Commission.

‘This morning, an A.B.C. inspector has advised that the regulations of the A.B.C. Board prohibit my serving both of these companies and that I must resign from one or the other, as their interests are conflicting. This strikes me, as I described to you, as a most unreasonable restriction or limitation on the practice of Law. I would appreciate, as you suggested, this matter be taken up with the Attorney General for an Opinion as to the legitimacy of such a regulation.’

“I would appreciate an opinion from you on this matter."

Section 4-79 of the Code of Virginia (1950), which was amended by Chapter 622 of the 1966 Acts of Assembly, reads in part as follows:

“(a) Prohibited matters.—If any manufacturer, bottler or wholesaler of alcoholic beverages, whether licensed in this State or not, or any officer or director of any such manufacturer, bottler or wholesaler, shall have any financial interest, direct or indirect, in the business for which any retail license is issued, under the provisions of this chapter, or in the premises where the business of any person to whom such retail license has been issued is conducted, or either directly or indirectly shall sell, rent, lend, buy for, or give to any person who holds any retail license issued under the provisions of this chapter, or to the owner of the premises on which the business of any such person so licensed is conducted, or to any governmental instrumentality, or employee thereof, selling alcoholic beverages at retail, within the exterior limits of the Commonwealth of Virginia, including all territory within these limits owned by or ceded to the United States of America, any money, equipment, furniture, fixtures or property, with which the business of such retailer is or may be conducted, or for any other purpose, including a gift as an inducement or remuneration for other purchases of such beverages, he shall be guilty of a misdemeanor.”

See § 4-115 for comparable statute pertaining to “beverages” as defined in § 4-99 of the Code.
Another statute that may be of some pertinence is § 4-32, which reads as follows:

"No retail licenses to manufacturers, bottlers and wholesalers. — No retail on-premises wine and beer license, retail on-premises beer license, retail off-premises wine and beer license, retail off-premises beer license, retail on-and-off-premises wine and beer license, retail on-and-off-premises beer license, druggist's license and banquet license, shall be issued to any manufacturer, bottler or wholesaler of alcoholic beverages, whether licensed in this State or not, nor to any officer or director of any such manufacturer, bottler or wholesaler, nor to any partnership, association or corporation, any partner, member or stockholder of which is an officer or director of any such manufacturer, bottler or wholesaler, nor in any instances where such manufacturer, bottler or wholesaler and such retailer are under common control, directly or indirectly, by stock ownership or otherwise; provided, that this section shall not apply to corporations operating dining cars, buffet cars, club cars or boats."

The legislative intent discernible in statutes of this nature seems to be directed at the evil known as the "tied house," the purpose generally being to prevent the integration of wholesale and retail outlets for the sale of alcoholic beverages, and to remove the retailer from financial obligation to or control by the wholesaler.

Section 23 of the Regulations of the A.B.C. Board is as follows:

"No person licensed to sell alcoholic beverages or beverages at retail shall employ or have connected with him in any capacity whatsoever in his licensed business any person, or any employee of any such person, who is engaged in the manufacturing, bottling or wholesaling of alcoholic beverages or beverages.

"No person licensed to manufacture, bottle or wholesale alcoholic beverages or beverages shall employ or have connected with him in any capacity whatsoever in his licensed business any person, or any employee of any such person, who is engaged in the retailing of alcoholic beverages or beverages."

I am advised that this regulation was adopted in 1952. In my view the scope of this regulation is broad enough to prevent one who is a director and secretary of a corporation holding a wholesale license from serving in the same capacity in a corporation holding a retail license to sell alcoholic beverages.

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ANIMALS—Rabid—Hunting and Trapping—Authority of board of supervisors to expend funds to control.

BOARDS OF SUPERVISORS—Authority—To authorize expenditure of funds to hunt and trap rabid foxes and skunks.

March 15, 1967

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

This will acknowledge receipt of your letter of March 14, 1967, which reads as follows:

"Bedford County appears to be faced with a problem involving rabies, particularly among the wild foxes and skunks."
It will be appreciated if you will advise whether or not it would be legal for the board of supervisors to employ one or more individuals to hunt and trap the foxes and skunks in selected areas of Bedford County on property as to which the permission of the landowners is obtained, and to pay the individuals doing the hunting and trapping from public funds.

I am unable to find any statute that specifically authorizes a board of supervisors to expend the public funds in the manner stated in your letter. As you know, under §§ 29-159 and 29-160, a board of supervisors may pay certain bounties out of the dog fund but these sections do not seem to cover the payment of bounties for the animals mentioned.

At the 1966 session of the General Assembly, by Chapter 473, § 29-159.1 was added to the Code authorizing the payment of bounties from the dog license fund for the killing of foxes, but under these provisions the population bracket would not include Bedford County.

I am of the opinion that under the general provisions of the powers of counties found in § 15.1-510 of the Code the county may adopt an ordinance setting forth the necessity for employing one or more persons for the purpose set forth in your letter and appropriate funds to cover their compensation.

APPEAL—Civil Cases—Indigents—Not entitled to at expense of Commonwealth.

ATTORNEYS—Entitlement—Civil Cases—Appeal—Indigent not entitled to at expense of Commonwealth.

March 6, 1967

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

This is in response to your letter of February 2, 1967, which reads as follows:

"In August, 1966, an inmate of the penitentiary mailed to the Clerk of the Circuit Court of Carroll County some papers which purported to be a motion for judgment wherein the inmate was plaintiff and the Sheriff of Carroll County was defendant, alleging that the Sheriff breached his obligations of office and failed to obtain for the inmate medical attention while the inmate was incarcerated in the Carroll County Jail in late 1965. The inmate requested the court to permit him to proceed under Section 14.1-183 of the Code of Virginia which provides as follows:

"'Any person who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party.'"

"'With the concurrence of the defendant Sheriff the court entered an order appointing counsel for the inmate and permitted him to proceed under Section 14.1-183. A committee was appointed for the inmate, a proper notice of motion was filed to which the Sheriff answered, and a jury trial was had upon the pleadings, which re-"
sulted in a verdict for the Sheriff. The court had appointed Mr. John W. Parsons and Mr. Phil M. Sadler, two prominent attorneys in this judicial circuit to represent the inmate in this proceeding. Following the verdict of the jury they made timely motions to set it aside which the court overruled.

"Now the inmate desires the Circuit Court, still under the auspices of Section 14.1-183, to appoint him counsel to appeal this adverse verdict to the Supreme Court of Appeals of this state. The Supreme Court of Appeals in the case of *Tyler v. Garrison*, 120 Va. 697, 91 S.E. 749 (1917), held that Section 14.1-183 does not permit appointment of counsel for the prosecution of an appeal in a civil case.

"Your opinion is requested as to whether, under the circumstances related above, the Circuit Court is either required or permitted in a civil action for damages to appoint counsel for the prosecution of an appeal as the inmate desires. The question may be simply put: is the holding in *Tyler v. Garrison* still the law of this Commonwealth?"

The Supreme Court of Appeals held in *Cabaniss v. Cunningham*, 206 Va. 330, 143 S.E. 2d 911, that an indigent prisoner is entitled to an appeal at the expense of the Commonwealth from a criminal conviction. Moreover, the Supreme Court of Appeals of Virginia has provided for the appointment of counsel and the preparation of the record at the expense of the Commonwealth in an appeal by an indigent prisoner from an adverse judgment in a habeas corpus proceeding.

I am of opinion, however, that under the facts and circumstances as set forth in your letter, the Supreme Court of Appeals' decision in *Tyler v. Garrison*, 120 Va. 697, 91 S.E. 2d 749, is controlling and that the indigent is not entitled to appeal at the expense of the Commonwealth.

ARREST—After Arrest Misdemeanant Must Be Taken to Nearest Available Justice of Peace.

BAIL—Misdemeanant Taken Before Nearest Justice of Peace.

September 14, 1966

HONORABLE J. T. RODGERS
Justice of the Peace, Rockingham County

This will acknowledge receipt of your letter of August 25, 1966, in which you ask —

"How a deputy sheriff can take a prisoner 12 miles to a city justice of the peace when . . . he could have brought the prisoner back to the country justice in two miles. . . ."

From what you state, it appears that after you have issued a warrant for the arrest of a person who has allegedly committed an offense in Rockingham County, the prisoner is taken by the arresting officer to Harrisonburg and there admitted to bail by a justice of the peace.

Section 39-4 of the Code provides:

". . . 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 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.

This office has ruled that, under this section of the Code, upon the request of a person arrested for a misdemeanor, the arresting officer should take him before the nearest available justice of the peace for the purpose of being admitted to bail. See, Report of the Attorney General (1955-1956), at p. 7.

I would suggest that you contact the law enforcement officers—that is, the Commonwealth's attorney and the judge of the county court—for a solution of your problem.

ASSESSORS—County Real Estate—May compute corrected assessment, but not make entries in land books.

COMMISSIONERS OF REVENUE—Have Sole Responsibility for Land Books.

May 9, 1967

HONORABLE OLIVER D. RUDY
Commonwealth's Attorney for Chesterfield County

This is in answer to your letter of April 28, 1967, which reads as follows:

"Under Chapter 345 of the Acts of Assembly of 1942 the Board of Supervisors of Chesterfield County was authorized to provide for the annual assessment and equalization of assessments of real estate in the County and authorized further to establish a real estate assessment office with an assessor or assistants.

"Under Section 3 of Chapter 345 all duties imposed and all powers conferred by law on the Commissioner of the Revenue with respect to the assessment of real estate is transferred to and vested in the assessor except that the Commissioner is still charged with the responsibility of preparing the land books.

"The following question has arisen in Chesterfield County. If the assessor makes a corrected assessment, does he have the authority to follow through with the corrected assessment and show the amount of tax resulting from the correction, or is the ascertainment of the amount of tax solely the responsibility of the Commissioner of the Revenue?

"I would appreciate your opinion on this question."

By Section 3 of Chapter 345, Acts of Assembly (1942), cited by you, all duties imposed and all powers conferred by law on the commissioner of the revenue with respect to the assessment of real estate are transferred to and vested in the assessor or assessors, except that the commissioner of the revenue is required to continue to prepare the land book and make disposition of the copies thereof as required by law. The land book is required to be prepared by the commissioner of the revenue on the basis of the assessments made by the assessor or assessors and certified to him. Transfers in the land book are to be verified by the commissioner of the revenue.

In view of the foregoing, I am of the opinion that whenever the assessor corrects an assessment he has the authority to certify the corrected assessment to the commissioner of the revenue who will act thereon and make appropriate certification to the treasurer. Moreover, the assessor may also
extend the assessment by applying the tax rate to the corrected assessment and computing the amount of tax due, but he is not permitted to make any entries or changes in the land book or to prepare the land book in any way. This remains the sole responsibility of the commissioner of the revenue.

ATTORNEYS—City—Must be resident of city when appointed or elected. CITIES—City Attorney—Must be resident when appointed or elected.

March 20, 1967

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This is to acknowledge receipt of your letter of March 17, 1967, in which you request my opinion on the question of whether or not the City Attorney of the City of Colonial Heights must reside within the corporate limits of that city.

As you point out, the qualifications for the office of City Attorney are set forth in § 10.5 of the charter of Colonial Heights, Chapter 213, Acts of the General Assembly of 1960. There is nothing in this section pertaining to residence and which would require the City Attorney to be a resident of said city. However, your attention is directed to § 15.1-51 of the Code of Virginia, last amended by Chapter 97, Acts of 1966, which provides in part:

"***Every city and town officer except members of the police and fire department and town attorney shall, at the time of his election or appointment, have resided one year next preceding his election or appointment in such city or town unless otherwise specifically provided by charter."

(Italics supplied).

Cities are defined by § 116 of the Constitution of Virginia as being incorporated communities having a population of five thousand or more, and towns as being incorporated communities having a population of less than five thousand. The exception as set forth in the above-mentioned statutes only applies to Town Attorneys and has no application to City Attorneys.

I am therefore of the opinion that the City Attorney for the City of Colonial Heights must be a resident of said city at the time of his appointment or election.

ATTORNEYS—Entitlement—Indigent not entitled to in bringing petition for writ of coram vobis.

ATTORNEYS—Entitlement—Indigent entitled to in appeal on adverse judgment in habeas corpus proceeding.

April 21, 1967

HONORABLE RUTH M. BAILEY, Clerk
Hustings Court of the City of Petersburg

This is in response to your letter of March 28, 1967, which reads in part as follows:

"In a recent case in the Hustings Court of the City of Petersburg the party who had filed a petition for a Writ of Coram Vobis re-
quested that he be assigned counsel for an appeal from an order of the court denying his petition. I am unable to find any provision in the Code of Virginia for the appointment of an attorney in such a case and payment of his fees by the state. I would appreciate it if you would advise me as to what should be done in this case."

The writ of error coram vobis, which is provided for by § 8-485 of the Code of Virginia, has been held to be in the nature of a civil action. Dobie v. Commonwealth, 198 Va. 762, 769 (1957). The Supreme Court of Appeals of Virginia, in the case of Tyler v. Garrison, 120 Va. 697 (1917), held that § 14.1-183 of the Code of Virginia is not applicable to civil matters. In addition, I am unable to find any statute authorizing or directing the appointment of counsel to be paid by the State for indigents seeking appellate review of civil judgments. I am, therefore, of opinion that there is no provision contained in the Code of Virginia for the appointment of an attorney under such circumstances as set forth above, nor is there any provision for the payment of counsel fees by the State.

The second paragraph of your letter reads as follows:

"I have also been concerned with the question of statutory authority for appointment and payment of attorneys to represent petitioners in Writ of Habeas Corpus cases who desire to appeal from an order of the court denying their petition."

There is no specific statutory authority for the appointment of counsel to represent indigent prisoners seeking to appeal an adverse decision in a habeas corpus proceeding. The Supreme Court of the United States has held that an indigent is entitled to the same rights on an appeal of a collateral attack as he enjoys on an appeal of his criminal conviction. Lane v. Brown, 372 U.S. 477. It would seem, therefore, that a court should appoint counsel under such a situation, and the court is vested with the right to appoint counsel to assist an indigent. Barnes v. Commonwealth, 92 Va. 794, 23 S.E. 2d 784.

The payment of such counsel is provided for by Item 88(g) of the 1966 Appropriation Act, and the same is set forth below:

"The expenses incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner, including the payment of counsel fees as fixed by the court; the expenses shall be paid upon receipt of an appropriate order from a court."

It has been customary for the Supreme Court of Appeals of Virginia to set the fee of court-appointed counsel in its order denying the petition for a writ of error or in the mandate where the case is fully briefed and argued.

In view of the foregoing, I am of opinion that the Court is vested with the authority for the appointment of counsel to assist an indigent prisoner in appealing an adverse judgment in a habeas corpus proceeding and that the payment of such counsel is fixed by the Supreme Court of Appeals of Virginia and the monies paid out of the Criminal Fund, as provided for in the Appropriation Act.


February 6, 1967

HONORABLE ROBERT L. POWELL
Commonwealth's Attorney for Giles County

This is in reply to your letter of February 2, 1967, which reads as follows:

"Our Court has asked me to write to you for your opinion as to whether or not two attorneys can be paid the maximum fee as provided by § 14.1-184 of the Code."
“Please give me your opinion based on the assumption that the two lawyers practice individually and also your opinion on the assumption that the two lawyers practice as partners.”

This office has heretofore approved the payment of separate fees of $250.00 each to attorneys appointed under the provisions of § 14.1-184 of the Code. Whether or not it is a case requiring the service of more than one attorney is a matter within the discretion of the court. The statute under consideration does not, in our judgment, limit the payment to $250.00 in any one case, but the limit applies to the compensation that may be paid to an attorney who is required by the court to defend an indigent person charged with a crime of the nature set forth in the statute. If the court feels that it is a case requiring the appointment of more than one attorney, it may, in its discretion, allow the maximum compensation to each attorney. The fact that two attorneys so appointed are partners would not, in my opinion, affect their entitlement to separate fees.

This question first arose in the Circuit Court of the City of Richmond. The judge who heard the case interpreted the statute as above set out and certified a fee of $250.00 for each of the lawyers that he had appointed. On our advice, the Comptroller paid the voucher in accordance with the court’s direction.

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**BAIL AND RECOGNIZANCE—Forfeiture of Cash Security— Sufficiency of constructive service.**

**BAIL AND RECOGNIZANCE—Forfeiture of Cash Security—Procedure in form of scire facias and in rem.**

May 18, 1967

**HONORABLE LEROY MORAN**
Commonwealth's Attorney for the City of Roanoke

I am in receipt of your letter of May 11, 1967, in which you present the following situation and inquiries:

"The accused was arrested and charged with a felony, attempted statutory burglary. He signed a recognizance bond for $1,000 and gave $1,000 cash as security. He failed to appear at the preliminary hearing and is now a fugitive. The Municipal Court, criminal division, forfeited the bond and requested that the Commonwealth Attorney proceed in the Municipal Court, civil division, on a scire facias so that the cash security could be turned over to the State. It appears to me, in reading pertinent sections of the Code of Virginia, that in order to successfully prosecute the scire facias personal service of process on the accused is necessary. Obviously this is impossible. My questions, then, are as follows:

"(1) Under the above stated facts is it legal for the cash security to be turned over to the State without further proceedings by scire facias?"

"(2) If the State must proceed by scire facias may substitute service be had on the accused?"

Pertinent to the resolution of your questions are the following provisions of §§ 19.1-130, 19.1-132 and 19.1-137 of the Code of Virginia (1950), as amended:

"§ 19.1-130.—When a person charged with a criminal offense is admitted to bail by a court or an officer authorized by law so to do for his appearance before a court or judge having jurisdiction of the case, for a
hearing thereon, he may instead of entering into a recognizance with
surety give his personal recognizance and deposit, or cause to be de-
posited for him, in cash, the amount of bail he is required to furnish,
with such court or officer, who shall give to the person whose funds are
so deposited an official receipt therefor."

"§ 19.1-132. * * *

"If there be default in any such recognizance, and if the case be not
tried in the absence of the defendant and the money disposed of as here-
inafter provided for, the forfeiture thereof shall be noted of record and
proceedings had thereon, as provided by law, and the money so deposited
shall be held subject to the order of the court upon the final disposition
of such proceedings." (Italics supplied).

"§ 19.1-137.—When a person, under recognizance in a criminal case,
either as party or witness, fails to perform the condition thereof, if it be
to appear before a court of record, his default shall be recorded therein,
and if it be to appear before a judge of a court not of record, his default
shall be entered by the judge of such court, on the page of his docket
whereon the case is docketed, and he shall notify the attorney for the
Commonwealth of the same. The process on any such forfeited recog-
nizance shall be issued from the court before which the appearance was
to be, and wherein such forfeiture was recorded or entered. Any such
process issued by a judge when the penalty of the recognizance so for-
feited is in excess of one thousand dollars shall be made returnable to the
circuit court of his county, and when not in excess of one thousand dol-
ars it shall be made returnable before, and tried by, such judge, who
shall promptly transmit to the clerk of the circuit court of his county an
abstract of such judgment as he may render thereon, which shall be
forthwith docketed by such clerk." (Italics supplied).

When a person who has given his personal recognizance and posted cash bail
as permitted by § 19.1-130 fails to comply with the condition or conditions of his
recognizance, his default is recorded or entered and his recognizance is thereupon
situation, § 19.1-132 directs that proceedings shall be "had thereon as provided
by law," and § 19.1-137 declares that "process on any such forfeited recognizance
shall be issued" from the appropriate court. Generally, such process is in the form
of a scire facias to try the forfeited recognizance.

In light of the above-quoted statutes and the foregoing summary, it would
appear that the applicable law envisions the issuance of process to try a forfeited
recognizance, and it is questionable whether a valid judgment may be rendered —
even in the situation you present — without such process or proceedings by
scire facias. Under such circumstances, I am of the opinion that the safer and
more appropriate course for you to follow would be to cause an order of publica-
tion to be had against the accused in scire facias proceedings. This view is con-
sistent with that expressed in the enclosed opinion by Attorney General (later
Justice) Abram P. Staples in an analogous situation involving the forfeiture of
cash security posted by a non-resident of the Commonwealth. See, Report of the
Attorney General (1943-1944), p. 7. As pointed out by the Supreme Court of
Appeals of Virginia in Badalson v. Lamb, 195 Va. 1018, 1022, and Lamb v. Lowe,
195 Va. 1024, 1029, the actual forfeiture of a cash bail is a proceeding in rem
against a fund under the court's control. In such proceedings, constructive notice
or service is sufficient. See, 50 C.J.S. 547-550, Judgments: §§ 907 et seq.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Adoption of Local Sales Tax—Must be by ordinance.

BOARDS OF SUPERVISORS—Authority—May adopt ordinance containing exemptions from personal property tax.

ORDINANCES—Exemptions from Personal Property Tax—Boards of supervisors may adopt.

TAXATION—Local Sales Tax—County must adopt by ordinance.

February 15, 1967

HONORABLE EVELYN A. FAUCETTE
Commissioner of the Revenue of Alleghany County

This will acknowledge your letter of February 13, 1967, in which you ask two questions as follows:

“Can the Board of Supervisors of a County make a resolution instead of an ordinance to adopt the 1% local sales tax and to exempt from taxation household goods and personal effects?

“Also kindly advise what procedures must be followed in order to adopt the local 1% tax and to exempt household effects to become effective June, 1967.”

The answer to your first question is in the negative. Section 58-441.49(c) of the Code provides that the council of any city and the governing body of any county desiring to impose a local sales tax may do so by the adoption of an ordinance. Section 58-829.1 authorizes the exemption of certain household goods and personal effects from the personal property tax by ordinance duly adopted.

The procedure for adoption of ordinances is set forth in § 15.1-504 of the Code. No doubt the Commonwealth’s attorney of your county is familiar with this Code section and is in position to advise the board of supervisors as to how to adopt such an ordinance.

BOARDS OF SUPERVISORS—Adoption of Ordinance—Public hearing necessary if required by statute.

ORDINANCES—County—Public hearings necessary if required by statute.

August 16, 1966

HONORABLE CHARLES J. ROSS, Clerk
Board of Supervisors of Madison County

This will acknowledge your letter of August 15, 1966, which reads as follows:

“Will you please advise the Board of Supervisors of Madison County the proper procedure to follow to effect the adoption of an ordinance under the provisions of § 15.1-504, Code of Virginia, as amended by the 1966 Acts of General Assembly. The Board specifically wants to know if a public hearing is required prior to final adoption. The provision of imposing a capitation tax et cetera does not apply to this inquiry.”
Section 15.1-504 of the Code does not provide for a public hearing in connection with the adoption of an ordinance. There are, however, other statutes requiring a public hearing. For example, § 15.1-431 requires public hearings with respect to ordinances adopted under Chapter 11 of Title 15.1. Sections 15.1-459 and 15.1-493 are examples of types of ordinances that require a public hearing. In every instance, I believe it would be advisable to refer to the statute authorizing the adoption of an ordinance so as to determine whether that statute requires a public hearing.

BOARDS OF SUPERVISORS—Appropriations—County not authorized to compensate State employees.

CITIES—Appropriations—Not authorized to compensate State employees.

HONORABLE JOHN W. GARBER, Director
Division of Personnel

November 23, 1966

This will acknowledge your letter of November 16, 1966, which reads as follows:

"Under § 32-40.2 of the Code of Virginia, the City of Alexandria and the County of Arlington are seeking agreement with the State Department of Health for the operation of the local department of health as a district health department within the State Department of Health.

"In the process sought, the employees of the local health department would become State employees in the State Department of Health. Salary scales fixed by the Governor for positions in the State Department of Health are considerably lower than many salaries and salary scales currently in effect in the local health departments.

"Fearing the loss of essential personnel if present employees face a substantial reduction in salary on becoming employees of the State Health Department, the local jurisdictions are seeking to prevent loss of pay in individual cases by providing the difference in the State and local salaries from local funds. May these local supplements be provided for the salaries of individuals who will, at that time, be employees of the State in the absence of specific legislative authority to do so?"

In the case of Roper v. McWhorter, 77 Va. 214, the Supreme Court of Virginia stated at p. 223, as follows:

"... the board of supervisors, like every other quasi corporate body, being the mere creature of the statute, it has only such powers as are expressly conferred upon it, or necessarily implied in furtherance of the object of its creation."

Again, in Board of Supervisors of Nottoway County v. Powell, 95 Va. 635, the Supreme Court of Virginia, at p. 637, citing the case of Roper v. McWhorter, supra, made this observation:

"The powers and duties of the Board of Supervisors are fixed by statute, and it has no other powers than those conferred expressly, or by necessary implication."
Both of these statements have been cited in subsequent opinions of the Supreme Court of Virginia, the most recent case being *Ernst v. Patrick County*, 158 Va. 565, at p. 567.

As pointed out in your letter, in the event the county of Arlington and the city of Alexandria separately or jointly form a district Health Department, as permitted under § 32-40.2 of the Code, and such district Health Department enters into a contract with the State Department of Health for the operation of the local health departments, the employees thereof will become employees of the State. These employees will thereafter be subject to the powers of the Governor under the Virginia Personnel Act, as set forth in Chapter 10 of Title 2.1 of the Code of Virginia. In the Virginia Personnel Act it is provided in § 2.1-114(3) that the Governor shall establish and maintain:

"(3) A compensation plan for all employees, and he shall, from time to time, make necessary amendments thereto. The compensation plan shall be uniform, and for each class of positions there shall be set forth a minimum and a maximum rate of compensation and such intermediate rates as shall be considered necessary or equitable."

The county of Arlington operates under the county manager form of government as established by Article 3, Chapter 13 of Title 15.1 of the Code. The general powers of the board of supervisors of the county are set forth in § 15.1-625, and under § 15.1-631 the board is required to appoint a county manager whose powers and duties are set forth in § 15.1-637 and paragraph (3) of this section provides as follows:

"(3) Subject to such limitations as may be made by general law, fix, with the approval of the board of county supervisors, the compensation of all officers and employees whom he or a subordinate may appoint or employ."

I am unable to find anything in the general law with respect to the powers of counties or within the provisions of the county manager form (Article 3, Chapter 13, Title 15.1) which would directly or by implication authorize the county board of supervisors to make appropriations for the purpose of compensating employees of the State, or to supplement the compensation made by the State. The powers delegated to the county manager do not authorize him to pay compensation to any persons other than officers and employees of the county.

I have examined the charter of the city of Alexandria and I can find no provision therein which would authorize the council of that city to make appropriations supplementing the salaries of employees of the State who are performing services in the Department of Health.

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**BOARDS OF SUPERVISORS—Appropriations—May not pay office rent for federal agency.**

September 27, 1966

HONORABLE CATESBY G. JONES, JR.
Commonwealth's Attorney for Gloucester County

This is in reply to your letter of September 22, 1966, which reads as follows:

"By a recent resolution of the Board of Supervisors of Gloucester County, it was resolved that a certain sum of money be
appropriated for rent of office space for the Agricultural Stabilization and Conservation Service of the U. S. Department of Agriculture for the fiscal year commencing July 1, 1966.

"I would appreciate your letting me know whether such an expenditure is authorized by state law."

I know of no statute that would authorize a board of supervisors of a county to make an appropriation to pay the office rent of a Federal agency. In this connection, you are referred to an opinion to Hon. R. H. Pettus, dated June 17, 1960, Report of Attorney General (1959-1960), at p. 28, which is in point.

Under § 15.1-522 of the Code the boards of supervisors of counties are now vested with the powers and authority of councils of cities and towns. This has been construed to mean only those powers delegated to cities and towns under general law and does not include those powers granted in city and town charters.

I am unable to find any provision of general law which would authorize a city or town to make an appropriation of this nature.

BOARDS OF SUPERVISORS—Appropriations—To incorporated town.

TOWNS—Appropriation from County.

HONORABLE KERMIT L. RACEY
Commonwealth's Attorney for Shenandoah County

August 15, 1966

This will acknowledge receipt of your letter of August 11, 1966, which reads as follows:

"The Board of Supervisors of Shenandoah County recently made a donation of $1,000.00 to the Town of Mt. Jackson toward the construction of a community airport which is otherwise being developed under a plan by which the Federal Government supplies one-half of the funds, the state supplies one-fourth and the local citizens or community supply the other one-fourth.

"The land on which the airport is to be constructed will be titled in the name of the Town of Mt. Jackson, and will be operated by it for the interest of the entire county.

"Consequently, the Board of Supervisors has asked me to obtain an opinion from your office as to whether or not such donation is in violation of the provisions of §§ 15.1-24 and 15.1-25, Code of Virginia, 1950, as amended, or other pertinent state laws. The donation was made out of the general funds in the county."

In my opinion, this donation is not authorized under §§ 15.1-24 and 15.1-25 of the Code; however, § 15.1-544 was amended at the recent session of the General Assembly so as to provide as follows:

"The boards of supervisors may direct the raising, by levy, of such sums as may be necessary to defray the county charges and expenses and all necessary charges incident to or arising from the execution of their lawful authority; and may appropriate such sums as the board may desire to any incorporated town or towns within the boundaries of the county."
REPORT OF THE ATTORNEY GENERAL

In my opinion, if the appropriation was made subsequent to June 26, 1966, it was valid under the amendment cited. If the appropriation was made prior to June 27, 1966, I believe the board of supervisors should pass a resolution ratifying the same.

BOARD OF SUPERVISORS—Authority—May allow volunteer rescue squad to build on county property.

January 17, 1967

HONORABLE WILLIAM C. CARTER
Commonwealth's Attorney for Cumberland County

This will acknowledge your letter of January 17, 1967, which reads as follows:

"The Cumberland County Board of Supervisors has requested my office to seek the opinion of the Attorney General as to whether or not the Cumberland County Board of Supervisors has the right to allow to be constructed upon county property a building to be used to house the Cumberland County Volunteer Rescue Squad.

"The property is owned by Cumberland County and adjoins the property on which the Court House and adjacent county buildings are located.

"It would not be the intention of the Board to donate the land or pay for the construction of said building."

Section 15.1-25 of the Code authorizes the governing bodies of counties, cities and towns to make gifts of property, real or personal, and to appropriate money from the general fund to any nonprofit life saving crew or rescue squad. In my opinion, this section is sufficient authority for the board of supervisors to permit such a rescue squad to erect a building upon property owned by the county.

Section 15.1-257 of the Code of Virginia was amended by Chapter 241, Acts of Assembly (1964), so as to delete from that section certain restrictions upon the use of the court house square.

BOARD OF SUPERVISORS—Authority—May contribute funds to towns within boundaries of county for development of airport.

BOARD OF SUPERVISORS—Tie Breaker—May not be commissioner in chancery.

COMMISSIONERS IN CHANCERY—May not be tie-breaker.

June 21, 1967

HONORABLE GEORGE S. CUMMINS
Commonwealth's Attorney for Nottoway County

I am in receipt of your letter of June 9, 1967, in which you present the following situation and inquiries:

"Our four man Board of Supervisors at its last meeting had a tie vote on a proposal to include in the forthcoming budget a
$10,000.00 item to cover a proposed appropriation of that amount to the Town of Crewe for work on its municipal airport. The airport lies out in the county a couple of miles from Crewe and is on private property, being leased from the landowner for ten years with an option to purchase thereafter.

“The services of the County tie breaker were required to decide if the item should be put in the budget and he voted in favor of its inclusion approximately ten days ago. The tie breaker is the Mayor of Blackstone, Virginia.

“Having been asked for my views on the legality of the proposed appropriation, I am of the opinion that (1) such an appropriation may constitute an expenditure of public tax monies for improvements upon privately owned property that may never become public property of the Town of Crewe and would not become public property of the County of Nottoway, and (2) pursuant to Sections 15.1-50 and 15.1-535 of the Code of Virginia the Mayor of Blackstone cannot legally serve as tie breaker and his recent vote was invalid. The tie breaker for Nottoway is also a commissioner in chancery, and I note that your opinion of November 22, 1965 to Judge Hooker indicates that a commissioner in chancery may not so serve.”

With respect to your first question, I am of the opinion that the contemplated appropriation to the town of Crewe may legally be made. Section 5.1-31 of the Virginia Code provides that “incorporated towns . . . of the Commonwealth may acquire, by purchase, lease, . . . or otherwise, within or without the limits of any such . . . town . . . whatever land may be reasonably necessary for the purpose of establishing . . .” airports. (Emphasis supplied.) Moreover, § 15.1-544 of the Code of Virginia (1950), as amended by Chapter 495, Acts of Assembly (1966), authorizes the boards of supervisors of the various counties to “appropriate such sums as the board may desire to any incorporated town or towns within the boundaries of the county.” See also, § 5.1-36.1. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated April 16, 1965, concerning the power of political subdivisions to acquire property for airports by lease, and a copy of another opinion of this office, dated June 24, 1966, concerning the power conferred by § 15.1-544 upon boards of supervisors to make appropriations to towns within the boundaries of counties. See, Reports of the Attorney General (1964-1965), p. 14; (1965-1966), p. 9. The views expressed in these opinions are consistent with those here stated with respect to your initial inquiry.

With regard to your second inquiry, you state in your communication that the tie breaker for Nottoway County is also a commissioner in chancery of the county. It would thus appear, as you point out, that the situation you present would fall squarely within the purview of the recent opinion of this office, dated November 22, 1965, in which it was ruled that a commissioner in chancery may not be appointed a tie breaker for the county under the provisions of § 15.1-535 of the Virginia Code. See, Report of the Attorney General (1965-1966), p. 43.

BOARDS OF SUPERVISORS—Authority—May not operate railroad.

HONORABLE RALPH G. LOUK
Commonwealth’s Attorney for Fairfax County

This will acknowledge your letter of January 16, 1967, requesting my advice as to whether or not the Board of Supervisors of Fairfax County
can participate with other political subdivisions in purchasing and operating the Washington and Old Dominion Railroad property.

Your inquiry raises two questions. First, whether Fairfax County can acquire and operate a railroad, and second, whether the County can join with other political subdivisions for the same purpose.

In regard to the first question, I am of the opinion that §15.1-292, Code of Virginia (1950), as amended, does not confer authority upon the County to acquire and operate a railroad for general transportation purposes. This section and the following sections of Article 1, Chapter 9, Title 15.1 of the Code relate generally to utility facilities such as water, electricity, gas and sewer, and the only express reference to railroads is the word "rails" found in §15.1-292.

Section 15.1-304 defines projects authorized under the above mentioned Article and railroads are not set forth in this section.

In contrast to the above, airports are authorized projects as spelled out in §15.1-304 and the General Assembly in Chapter 3, Title 5.1 of the Code specifically set forth the provisions to govern the establishment and operation of municipal or county owned airports. Had the General Assembly intended for counties to have the authority to acquire and operate railroads in the same manner, I am of the opinion that similar specific legislation would have been enacted and in the absence of such legislation, I feel that the county is without authority to acquire the railroad.

In view of the above answer to the first question, it is obvious that the second question must be answered in the negative. Since Fairfax County is without authority to acquire a railroad by itself, it cannot join with other political subdivisions in such an acquisition.

BOARDS OF SUPERVISORS—Authority—May not pay counsel fees for defense of dog warden.

HONORABLE DOUGLAS S. MITCHELL  
Commonwealth's Attorney for King and Queen County

July 19, 1966

In your letter of July 15, 1966, you ask whether the Board of Supervisors of King and Queen County can legally pay counsel fees for a dog warden sued for killing a dog, either with or without a court order directing the dog to be killed.

I can find no statute empowering a board of supervisors to appropriate money for this purpose.

In an opinion directed to the Commonwealth's attorney of Nottoway County, found in the Report of the Attorney General (1949-1950), page 34, it was said that a county could not pay either the amount of the judgment or the attorney's fees in a suit against a sheriff for false arrest. Similarly, in an opinion directed to the Commonwealth's attorney for Louisa County, found in the Report of the Attorney General (1960-1961), page 111, it was said that the county could not appropriate money to pay the owner of a dog killed by a dog warden in order to prevent a suit against the warden.

I believe the same reasoning is applicable in the situation mentioned by you, and that the fees in question may not be paid by the county.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Authority—May participate in cost of changing channel of river in promoting industrial development.

INDUSTRIAL DEVELOPMENT—Boards of Supervisors—May participate in cost to change channel of river to promote.  May 3, 1967

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

This is in reply to your letter of April 27, 1967, asking whether or not the Board of Supervisors of Smyth County has the authority to make an appropriation from the general county fund for the purpose of changing the course of the Middle Fork of the Holston River at a point where it runs through property owned by private persons within the town of Marion designated as an industrial park. You indicate that the property is located at the eastern corporate limits of the town and that the river is the primary drainage avenue for the watershed area of the middle third of Smyth County. The Board of Supervisors has been asked by the Marion Chamber of Commerce to participate in the cost of changing the channel of the Middle Fork of this river in an effort to induce a new industry to locate its plant upon the property through which the river runs. It appears that the channel floods frequently and has already damaged an adjoining industrial plant. The new industrial prospect is reluctant, according to your letter, to locate its plant upon the property without some provision being made to reduce the possibility of flooding and, apparently, it has been determined that this can be most effectively accomplished by changing the channel. Your letter indicates that the purpose of changing the channel is to attract the industrial prospect. And if the channel is changed, the prospect will be most receptive to locating its plant on the site. Specifically, you ask:

"Please advise whether or not the Board of Supervisors has authority to participate in the cost of changing the channel of this river pursuant to §§ 15.1-10 and 15.1-10.1 of the Code of Virginia of 1950, as amended, or any other section or provision of law in Virginia."

In my opinion, under the circumstances you describe, the provisions of § 15.1-10.1 of the Code grant the Board of Supervisors the authority to participate in the cost of changing the channel. The provisions of that section relating to the limit of expenditures are to be noted.

Your description of the situation indicates that the purpose of the expenditure would be directly related to "securing and promoting industrial development" of your county. For that reason, I believe that the expenditure is authorized by § 15.1-10.1.

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BOARDS OF SUPERVISORS—Authority—No authority to loan money to private corporation for water system.

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

This is in reply to your letter of April 12, 1967, in which you outline plans of the Lick Creek Water System, Incorporated, with registered office in Wise County, to construct certain water mains from Wise County into Russell County for the purpose of supplying water to a private industrial
corporation plant and to a number of families residing in Russell County, and pose the following questions:

"Does the Board of Supervisors have power and authority to enter into the proposed arrangement, that is, the making of a temporary loan to the Lick Creek Water System, Incorporated, conditioned, of course, on available funds?

"If the temporary loan cannot be legally made by the Board, can a grant be made?"

You state that Lick Creek has applied to Farmers Home Administration, an agency of the United States government, for a permanent loan for the establishment of this water main and that, pending the processing of this loan, has applied to the Board of Supervisors of Russell County, Clinch River Industrial Development Corporation and the lessee of the Clinch River plant for a temporary loan of $50,000.00, approximately three-fifths of which, i.e., $30,000.00, would come from Russell County. Such temporary loan would be secured by a lien on the water main to be constructed and pledge of the revenue to be derived by Lick Creek from resale of the water.

Under the provisions of § 15.1-522 of the Code of Virginia, the boards of supervisors of counties are now vested with the powers and authority of councils of cities and towns. This has been construed to mean those powers delegated to cities and towns under general law, to the exclusion of powers granted by a city or town charter. I find no statute under the general laws, however, which would authorize a loan such as the one in question. Further, Section 185 of the Constitution of Virginia, with exceptions not here applicable, prohibits granting the credit of any county, city or town, directly or indirectly, to or in aid of any person, association or corporation or becoming interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work.

In respect to your first question, therefore, it is my opinion that the Board of Supervisors of Russell County has no power or authority to enter into the proposed loan arrangement. In relation to your second question, I find no statute which would authorize the making of a grant to the named corporation for the stated purposes and, accordingly, I am of the opinion that there is no authority for making such grant.

BOARDS OF SUPERVISORS—Authority—Not authorized to defend civil actions against employees.

TREASURERS—Liability for Illegal Expenditure.

HONORABLE CHARLES A. REID
Treasurer of Greensville County

This will acknowledge receipt of your letter of July 27, 1966, which reads as follows:

"The Minutes of the October 14, 1965, meeting of the Board of Supervisors of Greensville County contain the following:

"In Re:
Cost of Civil Action against R. A. Allen, Sheriff.

"'The Board, by unanimous action, doth appropriate a sum not to exceed $750.00 to bear the defense of Civil action against R. A. Allen, Sheriff of Greensville County.'

August 3, 1966
"The Board of Supervisors of Greensville County under date of July 14, 1966, drew General County Fund warrant-check Number 17896 on The First National Bank, Emporia, Virginia, payable to the order of Harold L. Townsend, Attorney, in the amount of $500.00 in settlement of attorney fees for services rendered R. A. Allen, Sheriff, in the case of John J. Moseley, Administrator, etc. vs. Ruben A. Allen, Sheriff, et als.

"It is my opinion that Section 114 of the Constitution of Virginia prohibits Counties from becoming liable for the acts of sheriffs. I have therefore deferred signing the above referred to check. Will you please advise me if the Board of Supervisors of Greensville County has a legal right to pay the cost of the defense of a civil suit against the Sheriff of the County? Will you further advise me what liability a County Treasurer would assume if he knowing that the above authorized expenditure was contrary to law, nevertheless signed such a check upon presentation thereof to him bearing the signatures of the Chairman and Clerk of the Board of Supervisors?

"I will appreciate your clarifying for me the difference between the liability for attorneys fees incurred by County School Boards in defense of suits instituted against them and that of a Board of Supervisors in a case of a suit against the County Sheriff.

"What liability does a Board of Supervisors have for the acts of a General Registrar in case of a civil suit against the General Registrar?"

As you have pointed out, Section 114 of the Constitution provides that counties shall not be made responsible for acts of the sheriff. Since the county cannot be liable for the acts of the sheriff, it follows that there is no responsibility on the board of supervisors to employ counsel to represent the sheriff in a civil action. There is no statute that authorizes a board of supervisors to appropriate funds for such purpose.

Whether or not a treasurer who is of the opinion an expenditure is illegal would be personally liable for the payment thereof when the same is approved by the board of supervisors, in the manner required by §§ 15.1-547 through 15.1-550 of the Code, has never been decided by the Supreme Court of Appeals of Virginia. Ordinarily, a treasurer is justified in honoring a warrant which has been properly signed and countersigned by the chairman of the board of supervisors as required by the Code sections which I have cited, and I doubt if a treasurer would be held personally liable in case the expenditure was illegal. In those cases in which the treasurer is in doubt as to his authority to honor a warrant, he should consult the Commonwealth's attorney of his county and obtain from him a ruling with respect to the matter and be guided thereby. You will note that § 15.1-550 places an obligation upon the Commonwealth's attorney in connection with the allowance of claims.

With respect to the authority of the county to appropriate money for the purpose of employing counsel to represent the county school board, you are referred to § 22-56.1, which specifically authorizes a school board to employ counsel to represent it in the defense of suits instituted against the board.

With respect to your final question, as to whether or not there is any liability upon the board of supervisors in case of a civil suit against a general registrar of the county, I am not aware of any statute specifically placing any such liability on the board. You will note that under § 24-112 of the Code, the Commonwealth's attorney is required to represent a
registrar in an appeal involving a person's right to register, and any necessary expense incurred would seem to be an obligation of the county.

BOARDS OF SUPERVISORS—Authority—To compel removal of nuisance—Abandoned wells.

HONORABLE H. RATCLIFF TURNER
Commonwealth's Attorney for Henrico County

This is in reply to your letter of June 27, 1966, relating to abandoned wells which are considered dangerous. You request my advice as to whether or not under the provisions of § 15.1-522 of the Code (which vests boards of supervisors with the same powers as the councils of cities) the county of Henrico may invoke the provisions of § 15.1-867 of the Code, which latter section authorizes municipal corporations to compel the abatement or removal of a nuisance, and certain dangerous objects which constitute a menace to health and safety. In my opinion, since § 15.1-867 is a general law the answer to your question must be in the affirmative.

You also present these questions:

"(2) Whether or not abandoned wells which are not adequately covered would fall within the class of nuisances referred to in § 15.1-867?"

"(3) If the authority is available to Henrico County and if wells do fall within the provisions of § 15.1-867 is it necessary that an ordinance be adopted by the Board of Supervisors of Henrico County in order to exercise such authority?"

The first sentence of § 15.1-867 of the Code is as follows:

"A municipal corporation may compel the abatement or removal of all nuisances, including but not limited to the removal of weeds from private and public property and snow from sidewalks. . . ." (Emphasis added.)

While the question is not entirely free from doubt, it would seem that the section is broad enough to authorize a municipal corporation to compel the abatement of unsafe abandoned wells.

In answer to your question (3), in my opinion, it is necessary that the county adopt an ordinance. The ordinance should declare abandoned wells in excess of a certain depth and diameter to constitute a menace to the safety of the public and provide that, if after reasonable notice—thirty days would seem to be reasonable—the owner or owners, occupant or occupants of the property have not removed or abated the nuisance the board of supervisors will require the nuisance to be removed at the expense of the property owner or the occupant thereof. I feel that § 15.1-852 implies the adoption of ordinances to exercise the powers that are set forth in the succeeding sections of Article 4, Chapter 18, Title 15.1 of the Code. The enactment of an ordinance in this situation is necessary to the same extent as an ordinance is required by § 15.1-13 to enable a municipal corporation to exercise the powers set forth in Title 15.1 of the Code.

I wish to call your attention to the fact that § 15.1-522 was amended by Chapter 495 of the Acts of Assembly (1966) so as to make the section applicable to all counties throughout the State. Furthermore, a provision was added prohibiting the counties from exercising powers under this section within the corporate limits of any incorporated town located in the county except by agreement with the town council.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Clerk—Cannot be relieved of duties unless deputy appointed.

CLERKS—County—Must serve as clerk to board of supervisors unless duty delegated to deputy.

September 22, 1966

HONORABLE LUCY A. ALLEN, Clerk
Circuit Court of Clarke County

This is in reply to your letter of September 20, 1966, in which you refer to the manifold duties of your office and request my advice as to whether or not you may resign as clerk of the board of supervisors.

Section 15.1-532 of the Code provides that except as otherwise specifically authorized by law the county clerk shall be ex officio clerk of the board of supervisors. This section prescribes the duties in connection therewith. Sections 15.1-533 and 15.1-534 relate to the compensation for such services.

In my opinion, unless the county clerk is relieved from this duty by some other provision—for example, § 15.1-122—I do not believe that the clerk can escape the performance of the duties described in § 15.1-532.

The duties of a clerk may be delegated to a deputy appointed under § 15.1-48. This section provides that deputy clerks "may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law." I know of no other provision of law that would prevent a deputy from performing the duties of the clerk of the board of supervisors if requested to do so by the clerk.

BOARDS OF SUPERVISORS—Compensation to Registrar—Copying registration books in absence of purge.

REGISTRAR—Copying Registration Books—Compensation in absence of purge.

November 14, 1966

HONORABLE L. VICTOR McFALL
Commonwealth's Attorney for Dickenson County

This is in reply to your letter of November 8, 1966, which reads as follows:

"A registrar in Dickenson County has copied her registration books and submitted a bill to the Board of Supervisors based on the rate of 35¢ for each name and accompanying information copied as shown on the enclosed photographic copy of two pages from the registration book. She did the same work six years ago and was paid as she now requests.

"The only authority I can find for paying her is Code § 24-101. Does this section or any other provisions of the law authorize the Board to pay 35¢ for the work mentioned? The statute provides for 10¢ per name copied but does not mention pay for filling in the 13 other columns on the registration book. The registration books were not purged but the Board is anxious to pay the maximum amount they have the authority to pay."
Since this was not a purge pursuant to a directive by the electoral board under § 24-96 of the Code, the compensation prescribed in § 24-101 does not apply. I call attention to § 24-55 of the Code which reads as follows:

"Registrars shall receive as compensation for their services the sum of ten dollars each for each day's service including the days on which they are required by law to sit for the purpose of registering persons applying to be registered. The governing body of any city, town or county may supplement the compensation herein prescribed."

It would seem that under this section the board of supervisors may allow such compensation as in their judgment is proper.

There is no statute relating to the copying of books in the absence of a purge, except § 24-93 of the Code, and no compensation for the registrar is prescribed for that service. However, § 24-55 would empower the board to pay for that service.

If the board feels, as your letter indicates, that the registrar has performed a necessary service, I am of the opinion it may allow such reasonable compensation as it wishes to allow.

The sections prescribing fees for certain services are not to be construed as preventing the board from paying for a service such as has been rendered in this instance.

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BOARDS OF SUPERVISORS—Contracts—Under § 15.1-67 member may complete teaching contract entered into prior to taking office.

PUBLIC OFFICERS—Member of Board of Supervisors—May complete teaching contract, under § 15.1-67, entered into prior to taking office.

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

January 27, 1967

This will acknowledge your letter of January 25, 1967, which reads as follows:

"The Judge of the Circuit Court of Frederick County, Virginia, has appointed a person to fill the unexpired term of a deceased member of the Board of Supervisors. The new supervisor at the time of his appointment was employed under the public school system as a teacher of an adult class concerning farm machinery, operated under the county public school system, and his salary is paid out of state and local funds. He continues to serve in this capacity. The class will end in a few more weeks.

"Under § 15.1-67 of the Code of Virginia for 1950, as amended, would his continued employment in the school system be a violation of said statute?"

Section 15.1-67 of the Code provides that no supervisor and certain other officers listed shall become interested in any contract with the county or the school board, etc. This statute, being penal in nature, must be strictly construed in favor of the officer.

This section is different from §§ 15.1-618, 15.1-656 and 15.1-717 of the Code relating to counties that adopt a form of government provided in Chapters 13
and 14 of Title 15.1 of the Code, which provide that no members of the boards of supervisors or other county officers shall be interested in any contract.

This office has expressed the opinion that § 15.1-67, which is applicable to counties generally and which are not operating under any of the special forms of government referred to above, does not prohibit members of the board of supervisors from completing a contract entered into prior to his election or appointment to office. Therefore, in my opinion, this person may complete his tenure of employment without being in violation of § 15.1-67 of the Code.

This distinction was pointed out in an opinion to Honorable Robert C. Goad, Commonwealth’s Attorney of Nelson County, dated September 22, 1959, Report of the Attorney General (1959-1960), at p. 15.

BOARDS OF SUPERVISORS—Conveyance of Property to School Board—May be done without consideration.

SCHOOLS—School Board—Conveyance of property from board of supervisors without consideration.

September 13, 1966

Honorable A. D. Johnson
Commonwealth’s Attorney for Isle of Wight County

This will acknowledge receipt of your letter of September 12, 1966, which reads as follows:

“The School Board of Isle of Wight County, with the permission of the Board of Supervisors, has been using a small part of the County ‘poorhouse farm’ land as the location for school bus repair and maintenance purposes. The School Board desires to acquire title to the piece of land it has been using and has requested the Board of Supervisors to convey said land to the School Board pursuant to § 15.1-262 of the Code.

“I will appreciate your opinion as to whether or not the Board of Supervisors may convey said land to the School Board pursuant to § 15.1-262, supra, as a gift without a money consideration or purchase price, or whether or not there must be a purchase price or money consideration for the conveyance.”

I know of no reason why the board of supervisors may not convey the property in question to the school board without the school board being required to pay the county a consideration therefor. This is a mere transfer of the title to property by the board of supervisors to another agency of the county to be used for a public purpose. I am not sure that it would be necessary to go through the procedure set forth in § 15.1-262 of the Code, but this is probably advisable in order that there would be no question as to the title vested in the school board in the event it should at some later time decide to dispose of the property.


BOARDS OF SUPERVISORS—Counties Adopting Urban County Executive Form of Government—Authority to fix salary of chairman.

February 14, 1967

HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

This will acknowledge your letter of February 10, 1967, which reads as follows:

"The question has arisen as to whether the Board of Supervisors under the Urban County Executive Form of Government which goes into effect in Fairfax County on January 1, 1968, is limited in setting the salary of the Chairman to $10,000 under the provisions of § 15.1-779 of the Virginia Code, or whether § 14.1-46 prevails in that the Board of Supervisors may fix a higher salary for the Chairman than the other members of the Board.

"You will note that § 15.1-729 indicates that the Chairman shall be elected by all the voters of the County and not by district, but shall have all other rights, privileges and duties as other members of the Board.

"In other words, may the Urban County Board fix the salary of its Chairman without regard to the limitation of $10,000 as provided under § 15.1-779 because of the provisions of § 14.1-46.

"I would appreciate your opinion as several members of the Board have been asked this question by some voters of Fairfax County."

In my opinion, any county that adopts the Urban County Executive Form of government ceases to be subject to the provisions of § 14.1-46 of the Code, and the compensation of the members of the board of supervisors, including the chairman, shall be fixed under the provisions of § 15.1-779 of the Code. Under this section, the maximum annual compensation is $10,000 unless otherwise authorized by an Act of the General Assembly. Section 14.1-46 applies to the counties generally, and not to counties operating under a special form of government which contains a provision for determining such compensation.

BOARDS OF SUPERVISORS—Eligibility for Office—Constitutional and statutory requirements must be met.

July 1, 1966

HONORABLE JOHN D. HOOKER
Judge, Seventh Judicial Circuit

This will acknowledge receipt of your letter of June 30, 1966, which reads as follows:

"Mr. X moved from the State of North Carolina to Henry County, Virginia, on April 1, 1966, with the positive intention of making Virginia his permanent residence. He is under consideration for appointment to the Board of Supervisors and I would appreciate advice from your office as to whether or not in order to be eligible for this appointment it is necessary that he be a resident
REPORT OF THE ATTORNEY GENERAL

of Virginia for one year, a resident of Henry County for six months, a resident of his magisterial district for thirty days prior to the appointment, and a qualified voter."

In my opinion you have correctly stated the provisions with respect to eligibility for this office. Your conclusion is in accord with the provisions of § 15.1-51 of the Code and Section 32 of the Constitution. It would appear that this person will not have been a resident of Virginia for one year until April 1, 1967. Under the provisions of Section 18 of the Constitution he will have to have been a resident of this State for one year before qualifying to vote.

BOARDS OF SUPERVISORS—Eligibility for Re-election Where Territory in Which Serving Is Annexed.

February 28, 1967

HONORABLE PAUL X BOLT
Commonwealth's Attorney for Grayson County

This will acknowledge your letter of February 24, 1967, which reads as follows:

"I have a question concerning § 15.1-995, Code of Virginia, 1950 as amended, titled 'Tenure and Re-election of County Officer or County Court Judge Whose Home Site becomes Part of City.'

"I would appreciate your opinion as to whether or not this section applies to a county supervisor whose home site has become a part of the city through annexation, and therefore, whether or not he would be eligible to succeed himself in office from the magisterial district from which he was originally elected."

Section 15.1-1053 of the Code is the applicable section. You will note that under this section any county or district officer who resides in the territory annexed by a city at the time of the annexation may continue in office until the end of the term for which he was elected. This section further provides that the provisions of § 15.1-995 of the Code (which is found in Chapter 22, Title 15.1, relating to Transition of Towns to Cities) shall prevail with respect to re-elections of such officers.

Although § 15.1-995 relates to county officers, the language of § 15.1-1053 makes it applicable to district officers in cases where the district officer lives in an annexed territory. Therefore, in my opinion, the member of the board of supervisors in question would be eligible to run for the same office and to qualify to succeed himself as a member of the board of supervisors in case he should be elected.

BOARDS OF SUPERVISORS—Employment of County Attorney—Referendum not needed if allowed by other statutes.

COUNTIES—Employment of County Attorney.

December 13, 1966

HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

This will acknowledge your letter of December 8, 1966, which reads as follows:

"I have recommended to the Board of Supervisors that the county employ a County Attorney under the provisions of Title
15.1-608 of the Virginia Code, and the Board has agreed to do this as of January 1, 1967, or as soon thereafter as the County Attorney may be hired.

"Fairfax County has the County Executive Form of Government as provided in Chapter 13, Article 2 of the Code and beginning January 1, 1968, as a result of a referendum held last November 8, Fairfax County will have the Urban County Executive Form of Government under the provisions of Chapter 15, Article 2 and Article 4. Title 15.1-769 of the Urban County Executive Form of Government also provides for the appointment of County Attorney by the Board of Supervisors.

"A question has been raised as to whether Chapter 489 of the Acts of Assembly, Regular Session 1964, prevents the appointment of a County Attorney without a referendum as therein provided since Fairfax County has a population of more than 100,000. It is my opinion that the word 'may' is controlling and that the intent of the General Assembly was not to repeal the provisions of Title 15.1-608 and Title 15.1-709 but to provide an additional manner in which the office of County Attorney may be created in all counties having a population of more than 100,000.

"I would appreciate your advising me whether or not the Board of Supervisors of Fairfax County may create the office of County Attorney under the provisions of Title 15.1-608, and if my interpretation of Chapter 489 is correct."

Chapter 489 of the Acts of Assembly (1964), applies to any county in the State having a population of one hundred thousand or more, but which has not adopted, as provided in Section 110 of the Constitution, one of the forms of county government in which provision is made for the appointment of a county attorney by the board of supervisors. There is no indication in this Act of any intention to modify or repeal the provisions of Article 2, Chapter 13 of Title 15.1, relating to the County Executive Form of government, or the general provisions set forth in Article 4 of Chapter 15 of Title 15.1, relating to the forms of county organizations and government provided for in Articles 2 and 3 of Chapter 15, Title 15.1. The general rule as stated under the heading "Statutes," Section 169, 25 RCL, is stated as follows:

"Repeals by implication are not favored, and will not be indulged if there is any other reasonable construction. The presumption is always against the intention to repeal where express terms are not used, and the implication, in order to be operative, must be necessary ...."

I can find nothing in Chapter 489, Acts of Assembly (1964) which would take it out of the general rule.

BOARDS OF SUPERVISORS—Limitations on Authority to Borrow Money.

TREASURERS—Negotiating for Loan of Money—May negotiate for but not conclude loan to county.

May 22, 1967

HONORABLE W. A. HOWLETT
Treasurer of Carroll County

This is to acknowledge receipt of your letter of May 16, 1967, in which you enclosed a copy of an order entered by the Board of Supervisors of
Carroll County on May 9, 1967. The pertinent portion of this order is as follows:

"Upon motion duly seconded and carried the Board of Supervisors of Carroll County doth authorize, direct and empower W. A. Howlett, Treasurer of Carroll County, to negotiate and obtain a loan, in the name of Carroll County, from Carroll County Bank in an amount sufficient to pay any outstanding indebtedness which might occur in constructing the water system of Carroll County to furnish water to John Oster Mfg. Co. and the New Comprehensive High School."

In this connection, you present the following inquiry:

"Is this a legal order, as there is no specific amount of money mentioned or specified and is it obligatory upon me as treasurer to comply with this directive in this or even in a more proper form?"

With certain specific exceptions, Section 115-a of the Virginia Constitution forbids counties to contract debts unless such action has been approved by the qualified voters of the county. The exceptions specified in Section 115-a of the Virginia Constitution include (1) debts to meet casual deficits in the revenue, (2) those created in anticipation of the collection of the revenue of the county for the then current year, or (3) debts to redeem a previous liability. In American-LaFrance v. Arlington County, 164 Va. 1, the Supreme Court of Appeals of Virginia held that approval by a majority of the citizens voting on the question properly submitted to them was a prerequisite to the power of the board of supervisors to create an obligation for any purpose, payable at some future time beyond the termination of the current fiscal year. Moreover, §§ 15.1-545 and 15.1-546 of the Virginia Code impose specific limitations upon the authority of the boards of supervisors of the various counties of the State with respect to their power to borrow money. See, also, Reports of the Attorney General (1955-1956), p. 11; (1963-1964), p. 62.

It does not clearly appear from the above-mentioned order that the contemplated indebtedness falls within the scope of the above-specified exceptions or statutes, nor does the order reveal the amount of the indebtedness, the conditions upon which the debt is to be contracted, or the terms upon which it is to be repaid. Although I am not aware of any specific statute which compels a county treasurer to negotiate a loan on behalf of the board of supervisors, I am of the opinion that a county treasurer may negotiate for such a loan. However, no such loan may be concluded except by formal action of the board of supervisors specifying the amount of the loan contracted and agreeing on behalf of such board of supervisors to the terms and conditions upon which the loan is contracted and is to be repaid.

BOARDS OF SUPERVISORS—Local Planning Commission—Membership may be increased to statutory limit by resolution.

October 12, 1966

HONORABLE CHARLES J. ROSS, Clerk
Board of Supervisors of Madison County

This will acknowledge receipt of your letter of October 10, 1966, which reads as follows:

"Several months ago the Board of Supervisors, by resolution, created a local planning commission as provided by § 15.1-437 of the Code of Virginia. To this commission were named eleven members. No vacancies have taken place in the membership of this commission up to this time."
"The Board of Supervisors desires your good advice as to whether or not additional members may be presently added to the original appointed commission without the occurrence of a vacancy as indicated in § 15.1-437."

Section 15.1-437 of the Code provides that the local planning commission shall consist of not less than five nor more than fifteen members. In my opinion, the board of supervisors may increase the membership of this commission to fifteen. In doing so, the terms of the four additional members should be fixed so as to as nearly as possible comply with the third sentence of the second paragraph of § 15.1-437 of the Code.

It is provided in § 15.1-427 that the governing body of a county may by resolution or ordinance create a local planning commission. If the original planning commission was adopted by the passage of an ordinance, in my opinion, it will be necessary that the amendment increasing the number from eleven to fifteen shall be adopted in accordance with the procedure set forth in § 15.1-504, as amended by Chapter 612 of the Acts of Assembly (1966). If the commission was created by resolution of the board of supervisors, it will be necessary that a subsequent resolution be passed amending the original resolution. In other words, the same procedure must be followed in enlarging the membership as was followed in the first instance.

BOARDS OF SUPERVISORS—Method of Electing—To be decided by the voters.

Honorable Lucas D. Phillips
Member, House of Delegates

October 18, 1966

This will acknowledge your letter of October 17, 1966, which reads as follows:

"Pursuant to a resolution adopted by the Board of Supervisors of Loudoun County, Virginia, the Circuit Court of Loudoun County has entered an order providing for a referendum in the November general election as provided for in §§ 15.1-583, 15.1-584 and 15.1-589.1. The questions to be submitted to the voters are:

"Shall the county adopt the county executive form?"

"Shall the county board of supervisors be elected by the qualified voters of each magisteral district or by the qualified voters of the county at large?"

"In the event a majority of the votes are cast against the first question and the executive form of government is defeated and still a majority of the voters vote in favor of electing the county board of supervisors by the qualified voters of the county at large, would the voters of the county then vote for the members of the board of supervisors at large in future elections?"

If the majority of the voters cast their votes against adoption of the county executive form of government, the vote upon the second question will be of no effect. In other words, if the county executive form of government is rejected by a majority of the voters, the county government and the method of electing the board of supervisors will remain the same as it now exists.

Of course, if the county executive form of government is adopted, then the method of electing the board of supervisors will depend upon how the majority of the voters voted on the second question.
The form of the question with respect to the adoption of the county executive form of government is contained in § 15.1-584 of the Code, and the form of question with respect to the method of electing the members of the board of supervisors is found in § 15.1-589.1. This would be in accordance with the last paragraph of § 15.1-589.1, as amended by Chapter 463, Acts of Assembly (1966), which reads as follows:

"In any election pursuant to §§ 15.1-582 to 15.1-585, the question provided for in this section shall be submitted to the voters, in addition to the question or questions required by § 15.1-584."

BOARDS OF SUPERVISORS—Ordinances Affecting Unincorporated Towns—Notice of public hearing necessary.

ORDINANCES—County—Affecting unincorporated towns—Notice of public hearing necessary.

November 22, 1966

HONORABLE E. GARNETT MERCER, JR. Commonwealth's Attorney for Lancaster County

This will acknowledge your letter of November 18, 1966, which reads, in part, as follows:

"The Board of Supervisors are again considering the adoption of a subdivision ordinance for the County of Lancaster, making the same effective in all the unincorporated territory of the county including the area of municipal jurisdiction of the three incorporated towns within the county.

"Pursuant to § 15.1-468 of the Code, the Mayors of the three incorporated towns were advised by registered mail under date of September 19, 1966, that the Board of Supervisors of Lancaster County would at its regular meeting to be held at Lancaster Courthouse in Lancaster, Virginia, on November 29, 1966, at 2:00 P. M., consider for final adoption a subdivision ordinance for the county of Lancaster, in accordance with the provisions of § 15.1-465, et seq., copies of the ordinance being enclosed with the notice; said registered notice to the Mayors being more than 45 days prior to the said public hearing to be held on November 29, 1966.

"Subsequent to the mailing by registered mail of the notice to the three towns, the board of supervisors at their regular meeting in October, 1966, adopted a proposal to amend two sections and add a new section to the proposed subdivision ordinance. Accordingly, the three towns were under date of November 7, 1966, notified by registered mail of the proposal to amend two sections and add a new section to the proposed subdivision ordinance to be considered for adoption at the hearing on November 29, 1966, copies of which were enclosed.

"Due notice has been published in the Rappahannock Record, a newspaper published in Lancaster County, of the proposal to adopt the subdivision ordinance at the regular meeting of the Board of Supervisors of Lancaster County, on November 29, 1966, at 2:00 P. M., which notice is and will be published on November 10, 17 and 24. This newspaper advertisement of the proposal to adopt the ordinance gives a brief statement of the contents of the proposed ordinance and contains the statement that 'a full text of the said pro-
pos ed ordinance is on file in the Clerk's Office of the Circuit Court of Lancaster County, Virginia, where all interested parties may examine the same. However, this notice does not specifically mention the proposal to amend two sections and add a new section to the proposed subdivision ordinance, a copy of the amendments and new section is on file in the Clerk's Office along with the text of the proposed subdivision ordinance.

"The proposal to amend the proposed subdivision ordinance as indicated coming subsequent to the mailing of notice to the three towns does not meet the requirement of the 45 days notice required by § 15.1-468 given for the original proposal, and therefore, leaves in doubt the sufficiency of the notice to the three towns and the advertisement in the newspaper.

"It would, therefore, be very much appreciated if your office would advise me as to the following:

1. Is the newspaper advertisement of the public hearing of the Board of Supervisors on the proposal to adopt the subdivision ordinance as indicated sufficient without the newspaper notice containing specific mention of the amendments?

2. Can the Board of Supervisors on November 29, 1966, adopt the proposed subdivision ordinance together with the proposed amendments thereto and the same be effective within the three incorporated towns as well as in the county at large?

3. Under the circumstances, as outlined, must the Board of Supervisors limit the subdivision ordinance to the original proposal excluding the proposed amendments?"

Your questions will be answered in the order presented.

(1) In my opinion, the notice of the public hearing is sufficient compliance with § 15.1-431 of the Code, subject to the suggestion with respect to further publication contained in my answer to question (2). At the public hearing on November 29, the proposed changes in the original draft of the ordinance should be thoroughly explained to persons who are attending the hearing. A somewhat related question was presented by the late Julius Goodman, Commonwealth's Attorney of Montgomery County, and our opinion with respect to the question raised by him is dated April 11, 1961, Report of the Attorney General (1960-1961), at p. 70.

(2) In my opinion, the board of supervisors cannot adopt the proposed ordinance at its meeting on November 29, 1966, due to the fact that the forty-five day period required under § 15.1-468 will not have elapsed. In order to comply with this statutory provision the board of supervisors may adjourn the meeting to a later date which may be held at least forty-five days after November 7. Provisions with respect to adjourned meetings are found in §§ 15.1-537 and 15.1-542 of the Code. Public announcement of the adjournment and the date on which the adjourned meeting will be held should be made at the meeting on November 29. Furthermore, in order to remove any possible question as to the publication of the notice, in my opinion, a second notice should be published for two weeks, setting forth the fact that the board has adjourned its meeting of November 29 to the date fixed for the holding of the adjourned meeting and stating that at that time it will act upon the passage of the ordinance, giving reference to the place or places within the county where copies of the proposed ordinance and proposed amendments to the original draft may be examined.

(3) In view of the answers to questions (1) and (2), I do not deem it necessary to comment upon question (3).
BOARDS OF SUPERVISORS—Ordinances—Limitations on regulation of peddling and parking.

ORDINANCES—County—Limitations on regulation of peddling and parking.

February 3, 1967

HONORABLE CATESPY GRAHAM JONES, JR.
Commonwealth's Attorney for Gloucester County

This is in reply to your letter of January 28, 1967, which I quote as follows:

"The Board of Supervisors of my County has requested me to draft an ordinance restricting peddling on the streets of Gloucester Court House lying within Sanitary District Number 1.

"I find that 46.1-254 of the 1950 Code of Virginia enables our governing body to prohibit parking of motor vehicles 'in pursuance of Commercial purposes.'

"Before I draft this ordinance, I would very much like to know the meaning of 'pursuance of commercial purposes,' inasmuch as this ordinance will only be aimed at peddlers. We do not wish to restrict commercial vehicles loading, unloading and parked for their respective conveniences in pursuing commercial matters not related to peddling.

"I am also wondering whether or not the law permits the governing body to apply this to one section of the County, namely, Gloucester Court House.

"Finally, I would like to know whether I could legally incorporate in the proposed ordinance a provision similar to the second paragraph of 46.1-252.1 of the Code whereby ownership of such vehicle shall constitute a prima facie presumption that said owner was guilty of such violation."

In regard to your first query, Black's Law Dictionary defines the word "commercial" as "relating to or connected with trade and traffic or commerce in general." The word "commerce" is defined therein as, "the exchange of goods, productions, or property of any kind." It includes "not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and the transportation of persons as well as of goods, both by land and by sea." In my interpretation, § 46.1-254 has reference to commercial purposes in general and does not authorize a county to adopt an ordinance which confines its application to only one type of commerce. The statute excludes "motor carriers when picking up or discharging passengers" but no other type of commerce. Neither am I of the opinion that this statute permits the governing body to apply this only to one section of the county, namely Gloucester Court House.

In respect to your final question, § 46.1-252.1 has reference to the regulation of parking on county owned property, except in the case of a county which maintains its own system of secondary highways. Under that section, "proof that the vehicle described in the complaint, summons or warrant was parked in violation of such ordinance, regulation or rule, together with proof that the defendant was at the time of such parking the registered owner of the vehicle, as required by Chapter 3 (§ 46.1-41 et seq.) of this title, shall constitute in evidence a prima facie presumption that such registered owner of the vehicle was the person who parked the vehicle at
the place where, and for the time during which, such violation occurred." A similar clause is found in § 46.1-252, Code of Virginia (1950), as amended, relative to local parking regulations in cities and towns. Since § 46.1-254 does not include a similar clause, I am not of the opinion that you could legally incorporate such provision in any ordinance adopted pursuant to this section.

BOARDS OF SUPERVISORS—Ordinances—Not to set forth type of provisions real estate contract must contain.

REAL ESTATE—Contracts—County ordinance not to set forth type of provisions contract must contain.

ORDINANCES—May not Require Provisions of Real Estate Sales Contracts.

COUNTIES—Ordinances—May not require provisions of real estate sales contracts.

October 13, 1966

HONORABLE WILLIAM R. DURLAND
Member, House of Delegates

This is in reply to your letter of October 11, 1966, which reads as follows:

"I am a member of a committee appointed by the Fairfax County Board of Supervisors. That committee is in the process of suggesting possible improvements in local and state legislation pertaining to home building.

"Would you please let me know your opinion on the following questions? Is it an unconstitutional impairment of contracts for the Board of Supervisors to:

"1. Require that every real estate contract in Fairfax County include specifications of all structures to be built on said property?

"2. Require that every real estate contract in Fairfax County include compulsory arbitration clauses?

"3. Require that every real estate contract in Fairfax County state that the home purchaser may designate the settlement attorney of his choice to be named in said contract?"

Since it is manifest that the proposals set forth in your communication are prospective in nature rather than retroactive, I am of the opinion that such proposals would not be affected by any considerations of unconstitutional impairment of the obligations of contracts. That provision of the Federal Constitution which prohibits States from enacting laws impairing the obligation of contracts (Article I, Section 10) does not apply to laws enacted prior to the making of a contract, the obligation of which is alleged to be impaired, but only to statutes enacted after the making of a contract. See, 12 Am. Jur. 15, Constitutional Law: Obligation of Contracts, Section 387.

However, I know of no provision of Virginia law which purports to authorize local governing bodies to enact or enforce ordinances containing the requirements specified in the proposals you present. While the General Assembly of Virginia has empowered local governing bodies to enact ordinances relating to zoning and land subdivisions, it has nowhere undertaken to authorize enactment of local ordinances declaring the type of provisions which real estate contracts must contain, thus limiting the freedom of citizens to negotiate and conclude contracts of their own choosing.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Provision of Office Space for Treasurer or Deputy.

HONORABLE E. E. BROOKS, Clerk
Circuit Court of Wise County

July 28, 1966

This will acknowledge receipt of your letter of July 26, 1966, which reads as follows:

"The Board of Supervisors of Wise County at its regular meeting requested that I secure an opinion from you on the following two questions:

1. May the Board of Supervisors appropriate and expend funds to secure office space and utilities outside of the court house for Deputy Treasurers?

2. If so, shall the funds be paid to the Deputy Treasurers or to the landlord and utility companies?"

Under the provisions of §§ 15.1-258 and 58-916 of the Code of Virginia there is a duty upon the board of supervisors to furnish office space for the treasurer of a county. If the office space available in the court house is not adequate for the use of the treasurer and his deputies, the board may appropriate funds for the purpose of providing space elsewhere. The board may also make appropriation for the payment of the necessary utilities.

If the board of supervisors rents the office for such purpose, in my opinion, it would be preferable for the board to authorize the payment of the rent and other expense, such as utilities, in the same manner it authorizes the payment of other obligations of the county. I do not feel that the payment should be made to the treasurer or one of his deputies, because the contract would be between the county, the property owner, and the company furnishing the utilities.

BOARDS OF SUPERVISORS—Referendum—Cannot be rescinded after filing with court.

JUDGES—Referendum—Once called by court cannot be set aside.

HONORABLE RUSSELL W. YOWELL
Judge, Madison County Court

August 29, 1966

This will acknowledge receipt of your letter of August 26, 1966, which reads as follows:

"There are two questions we would like to have an opinion on at your convenience.

"FACTS: A County Board of Supervisors, acting under § 15.1-698 of the Code of Virginia, 1950, passes a resolution, asking for a referendum of the voters on a change in the form of County Government, and files this resolution with the Judge of the Circuit Court. The Court, thereupon, issues an order to election officials requiring them to take the sense of the voters on the question at the next general election."
"QUESTION ONE: Is it legally possible for the Board of Supervisors now to rescind the above resolution at this stage, and to request the Circuit Court to rescind its order for a referendum on the proposed charge?

"QUESTION TWO: Assuming that the Board of Supervisors rescinded its action as above stated, could the Circuit Court rescind its own action in calling for a referendum on the matter?"

In my opinion, it is too late for the board of supervisors to rescind the resolution calling for a referendum under § 15.1-698 of the Code. The resolution could probably have been rescinded prior to the time it was filed with the court, but, in my opinion, after it was filed it could not be recalled by the board of supervisors. The board of supervisors, under this section, has the power to initiate a referendum but there is nothing in this section which confers upon a board of supervisors the power to prevent a referendum after it has been initiated.

The Code section under consideration makes it mandatory upon the court to call a referendum if a petition is filed by one of the two methods provided for therein. Since I am of the opinion that it is not within the power of the board to withdraw the petition, it follows that the court is without authority to set aside the order calling for the referendum.

BOARDS OF SUPERVISORS—Required to Appropriate Funds for Public Assistance.

PUBLIC WELFARE—Boards of Supervisors—Required to appropriate funds for payment of public assistance.

May 16, 1967

HONORABLE E. M. JONES, Clerk
Circuit Court of Rappahannock County

I am in receipt of your letter of May 10, 1967, in which you present the following questions involving consideration by the Board of Supervisors of Rappahannock County of the budget prepared by the local board of public welfare:

"1. Does the Board of Supervisors have the authority to reduce the total amount of the Budget requested by the County Department of Public Welfare?

"2. Does the Board of Supervisors have authority to reduce the amount of Local Funds requested by the County Department of Public Welfare?

"3. Does the Board of Supervisors have authority to reduce or eliminate a particular item in the requested budget of the Board of Public Welfare?"

I am of the opinion that the above-quoted questions should be answered in the negative. In this connection, I am forwarding to you copies of several opinions of this office in which questions substantially identical to those which you present were considered and discussed. See, Reports of the Attorney General (1938-1939), pp. 193, 194; (1940-1941), p. 124; (1955-1956), pp. 161, 163. As you will note from the enclosed opinions, this office has consistently ruled that Section 64 of the Public Assistance Act of 1938 (now § 63-105 of the Virginia Code) requires the governing bodies of the various counties and cities of the Commonwealth to appropriate sufficient sums to
provide for the payment of public assistance, including the cost of administration, under the provisions of Title 63 of the Virginia Code. As the enclosed opinions point out, it is not necessary for a board of supervisors to appropriate the full amount requested by a local board of public welfare at one time, and implicit in these opinions, of course, is the assumption that the budget submitted by a local board of public welfare contains the "supporting data setting forth the amount of money needed to carry out the provisions" of Title 63, as specified in § 63-69 of the Virginia Code.

In your communication, you also present the following concluding inquiry:

"The Board has heard by the 'grape vine' that it is required to approve the Budget as requested by the Board of Welfare or the Commonwealth will reduce County Funds such as A.B.C. profits in the amount the Board of Supervisors reduces the Welfare Budget, and apply these funds to the Department of Public Welfare, is this true?"

It would appear that the information you have received relates to the authorization contained in §§ 63-135, 63-136, 63-157, 63-158, 63-199 and 63-200 of the Virginia Code. Typical of the provisions of these statutes is the language of §§ 63-135 and 63-136 of the Virginia Code which provides:

"§ 63-135.—If any county or city, through its appropriate authorities or officers, shall fail or refuse to provide for the payment of assistance in such county or city in accordance with the provisions of this chapter, the State Board shall through appropriate proceedings require such authorities and officers to exercise the powers conferred and perform the duties imposed by this chapter."

"§ 63-136.—For so long as such failure or refusal shall continue the State Board shall authorize and direct the Commissioner under rules and regulations of the State Board, to provide for the payment of assistance in such county or city out of funds appropriated for the purpose of carrying out the provisions of this chapter. In such event the Commissioner shall at the end of each month file with the State Comptroller and with the board of supervisors, council or other governing body of such county or city a statement showing all disbursements and expenditures made for and on behalf of such county or city, and the Comptroller shall from time to time as such funds become available deduct from funds appropriated by the State, in excess of requirements of the Constitution of Virginia, for distribution to such county or city such amount or amounts as shall be required to reimburse the State for expenditures incurred under the provisions of this section. All such funds so deducted and transferred are hereby appropriated for the purposes set forth in § 63-109 and the first paragraph of § 63-110 and shall be expended and disbursed as provided in § 63-111."

BOARDS OF SUPERVISORS—Rubber Stamp Signature of Chairman—No authority for such practice. December 14, 1966

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

This will acknowledge receipt of your letter of December 13, 1966, which reads as follows:

"Will you please give us an official opinion on whether or not the Chairman of the Board of Supervisors may legally countersign
REPORT OF THE ATTORNEY GENERAL

county check-warrants with a rubber stamp facsimile of his signature."

I enclose copy of an opinion of this office, dated August 27, 1953, to Miss R. F. Eldridge, Treasurer of Buckingham County (Report of the Attorney General (1953-1954), at p. 224), which relates to the question as to whether or not a county treasurer may use a rubber stamp in signing checks. It was held in that opinion that there was no authority for such practice.

In my opinion, the same principle would apply in connection with the countersigning of warrants by the chairman of the county board of supervisors.

BOARDS OF SUPERVISORS—Sewer Connection Fees—Authority to establish different amounts if reasonable.

SEWERAGE—County Sewer System—Connection Fees—Authority to establish different amounts if reasonable.

HONORABLE A. Dow Owens
Commonwealth’s Attorney for Pulaski County

This will reply to your letter of March 10, 1967, in which you present the following situation and inquiry:

“By resolution dated the 25th day of February, 1966, the Pulaski County Board of Supervisors, established the Pulaski County Sewerage Authority pursuant to the provisions of Chapter 28, Title 15.1 of the Code. Thereafter, the Authority with the concurrence of the Board of Supervisors established certain sewer connection fees.

“I have been requested by the members of the Authority to secure your opinion as to whether or not the Authority can establish a definite date for the payment of the connection fee and after such date increase the connection fee for those persons who have failed to pay the same by the designated date.”

Particularly pertinent to the resolution of the question you pose are §§ 15.1-1250(i) and 15.1-1261 of the Code of Virginia (1950), as amended. The former provision empowers the Authority to fix, charge and collect rates, fees and charges for use of or for the services furnished by the sewer system operated by it and directs that the owner or lessee or tenant of affected real estate “shall pay such rates, fees, rents and charges to the authority, or its agent, at the time when and place where the same may be due and payable...” (Italics supplied). The latter provision relates specifically to sewer connections and empowers the Authority to provide, by regulation, for “a charge for making any such connection in such reasonable amount as the authority may fix and establish.” (Italics supplied).

In light of the provisions of the Virginia Code outlined above, I am of the opinion that the Authority may exact an additional amount, in the nature of a penalty, for non-payment of sewer connection fees when due; however, as penalties are not favored in the law, I believe that the amount of the additional charge so exacted must be reasonable. Further in this connection, I do not believe that the statutes in question would permit the Authority to establish an entirely separate sewer connection charge based solely upon non-payment of a previously established connection charge when due.
This would appear to be especially true in light of the language of § 15.1-1261 which expressly directs that sewer connection charges shall be in such "reasonable amount" as the Authority may fix and establish.


BORADS OF SUPERVISORS—Travel Expense—Optional as to substantiating with receipts.

August 9, 1966

HONORABLE W. B. Moseley, Member
Board of Supervisors of Brunswick County

This will acknowledge receipt of your letter of August 2, 1966, which reads as follows:

"I would like to know if it is lawful for officials of a county to take trips to conventions, or anyplace, and present a bill to the county Board of Supervisors for payment of expenses if this bill that is presented is not substantiated by attached paid bills from the trip. If this is lawful, all other county officials, such as deputy sheriffs or others, should not be required to turn in bills for expenses.

"I personally think all officials taking trips and expecting to be paid by the county out of the taxpayers' money should keep paid bills on such trips and have these attached to the bill that is presented to the supervisors for payment. Either this should be done, or the official should come before the Board of Supervisors before said trip and have a specified amount set up that will be paid by the county."

The basis for reimbursement by a county, for travel on county business, is set forth in § 14.1-7 of the Code which provides that such reimbursement may be on a basis not in excess of that provided in § 14.1-5 for travel on State business. I understand that some counties require the account to be submitted on a form similar to that used by the State as required by § 14.1-10 of the Code, but this procedure is optional with the local governing body.

The statutory procedure to be followed by a board of supervisors in considering and allowing claims is contained in §§ 15.1-547 through 15.1-551 of the Code. There is nothing in these sections requiring supporting receipts for expenditures by county officials. However, under § 15.1-551, a board of supervisors has the power to adopt such a requirement.


BORADS OF SUPERVISORS—Zoning—Trailer Courts—Reconsideration of action in denial of application.

TRAILER COURTS—Zoning—When board of supervisors may reconsider applications.

March 31, 1967

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney for Dinwiddie County

This is in reply to your letter of March 21, 1967, which reads as follows:

"The Board of Supervisors of Dinwiddie County have requested me to obtain an opinion from you with reference to a zoning change. The facts are briefly these:
"A Mr. Wilkinson, who was operating a trailer court prior to the enactment of the zoning ordinance, on October 26, 1965, requested the Planning Commission to rezone from Residential-1 to Residential R-2 and Use Permit to add ten additional trailers to his trailer court. Prior to this request the area in which Mr. Wilkinson's trailer court is located was zoned Residential, limited, District R-1. The Planning Commission heard the matter on November 17, 1965 and recommended that the Rezoning and Use Permit be denied and Mr. Wilkinson requested the Board of Supervisors to hear the matter who denied the request on January 5, 1966. On August 8, 1966, Mr. Wilkinson filed a petition before the Board of Zoning Appeals for a Special Exception permit to add ten trailers to his trailer court in Restricted R-1 area which request was denied on September 6, 1966, and no appeal was taken from this ruling. Mr. Wilkinson filed another application before the Planning Commission requesting that the area in which his trailer court is located be rezoned from Residential R-1 to Residential R-2 and Use Permit for ten additional trailers and on February 20, 1967 the Planning Commission approved the request and on March 15, 1967, Mr. Wilkinson appeared before the Board of Supervisors and requested their approval of the application filed on February 6, 1967, and after some discussion the Board continued the matter until April 5, 1967.

"Mr. Wilkinson's trailer court is located in Residential-1 area and no changes have taken place in said area since the zoning ordinance was approved.

"The opponents to the request of Mr. Wilkinson argued before the Board of Supervisors that in view of the fact that the application filed October 26, 1965 by Mr. Wilkinson to rezone the area from R-1 to Residential R-2 and Use Permit for ten additional trailers was refused and no changes have taken place in the area that the Board of Supervisors cannot at this time change this ruling to permit the rezoning of said area from R-1 to R-2 and grant a Use Permit for the addition of ten trailers to Mr. Wilkinson's court. The Board of Supervisors desire to know whether they have a right to hear this matter again and whether or not they have a right to grant Mr. Wilkinson's application of February 6, 1967."

I know of no provision of law which would prohibit the Board of Supervisors from hearing the matter again, nor do I know of any provision of law which would prohibit them from granting the application of February 6, 1967, if they are so disposed.

Some zoning ordinances limit the number of applications which may be filed by one party on the same subject within a given period of time after there has been a denial, but I find no such limitation in your County's ordinance. I assume that there is no such limitation in the rules and regulations adopted by the Planning Commission to govern its hearings, since it has already heard the matter a second time. The arguments of the opponents, which you describe, certainly may be considered on their merits, but I find nothing to support the suggestion that the Board is prohibited, as a matter of law, from granting the application. Thus, in my opinion, the Board may again hear the application on its merits, and grant or deny it.

BOUNDARY—Line—Between Virginia and Maryland—Not affected by artificial change in low-water mark by property owner.

April 25, 1967

HONORABLE ROBERT R. GWATHMEY, III
Member, House of Delegates

This is in reply to your letter of April 10, 1967, which reads as follows:

"The owners of the property known as Belevedere Beach in King George County are desirous of making certain improvements on the property. Filling in and making the pier which extends out into the Potomac more substantial are among these improvements.

"At the present time they are permitted to serve liquor by the drink by virtue of the fact that the restaurant which is on the pier is located in Charles County, Maryland. It is their understanding and mine that the low water mark is the boundary line between Maryland and Virginia. However, once the pier is substantiated by filling in and construction underneath it, the low water mark will be changed at that point.

"I would appreciate an opinion from your office as to whether or not this proposed construction would in fact change the state boundary so as to place the restaurant on the pier in Virginia. It has been my understanding that any man-made improvements such as this which only change the water line in one location do not change the boundary line, and further, that the boundary line continues to be the low water mark as it generally runs along the banks of the Potomac. In effect, the boundary line at the exact point of the pier would be an imaginary line across the pier from the low water mark on one side to the low water mark on the other side."

As I am sure you are aware, it is indicated in § 7.1-7 of the Code of Virginia (1966 Replacement Volume) that the compact between Virginia and Maryland fixes the boundary between the States at the location you are interested in as the low-water mark of the Potomac, and that the low-water mark is measured ". . . from low-water mark at one headland to low-water mark at another, without following indentations, bays, creeks, inlets, or affluent rivers. . . ."

The rights of a riparian owner were recently noted by the Supreme Court of Appeals of Virginia in Thurston v. Portsmouth, 205 Va. 909, and include the ". . . right to build a pier or wharf out to navigable water, subject to any regulations of the State." (205 Va. at 912.)

In Oklahoma v. Texas, 265 U.S. 493 (1924), it was held that where the boundary between two states is a river bank, the boundary follows gradual changes attributable to accretion. In Steelman v. Field, 142 Va. 383, a case involving the accretion doctrine, it was said that the title of the Commonwealth to public waters shifts with the shifting sands. It was also indicated in Oklahoma v. Texas, supra, and specifically stated in what seems to be the leading case of County of St. Clair v. Lovingston, 23 Wall. 46, 23 L.Ed. 59 (1874), that accretions attributable in part to artificial means accrue to the riparian owner. I believe this is the majority view though there appears to be a split of authority on the point.

Accretions, however, are imperceptible changes, though the process may be instituted or hastened by artificial structures. From the factual situation you have given, I doubt that you are concerned with the doctrine of accretion. You state that ". . . once the pier is substantiated by filling in and
construction underneath it, the low water mark will be changed at that point.” (Emphasis added). This is not, of course, an imperceptible change.

In *State v. Sause*, (Or.) 342 P. (2d) 803 (1959), many of the authorities were reviewed and it was specifically held that artificial changes made in his bank by a riparian owner do not change his boundary.

While I am not aware of any Virginia case specifically in point, the case of *Lambert's Point Co. v. Norfolk & W. R. Co.*, 113 Va. 270, seems to have some relevancy. There it was held that while a railroad company had a right to fill in and build a wharf out to the port warden's line, and that the improvement belonged to the railroad company, it could not thereby increase its riparian rights to the detriment of those of the adjoining owner. The issue in the case involved the apportionment of water front between adjoining riparian owners.

In my opinion, an artificial change in the low-water mark, occasioned by an owner in the lawful exercise of his right to construct a pier, would not change the boundary line between Virginia and Maryland.

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**CENTRAL CRIMINAL RECORDS EXCHANGE—Persons Having Authority to Arrest for Felony—Required to make report of each arrest.**

May 26, 1967

Honorable Walter A. Evans, Director
Division of Central Criminal Records Exchange

This is in reply to your letter of May 1, 1967, in which you ask my opinion relative to the interpretation to be placed upon § 19.1-19.3 of Chapter 1.1, Title 19.1 of the Code of Virginia with respect to certain simulated conditions and raise several questions, related directly or indirectly. For the sake of brevity, I shall combine and quote the essential conditions set forth in both examples in Example 2, since this seems to cover the present manner of proceeding and is the one to which your questions refer, and consider these in the order presented, as follows:

"Example 2. A warrant is issued for the arrest of a person charged with an offense committed in one locality (Richmond). Investigation reveals that the wanted person is now residing in another locality (Fredericksburg). Richmond would now forward the original warrant to Fredericksburg. When the wanted person is apprehended, he is arrested by Fredericksburg authorities on the original warrant for the offense committed in Richmond. The arrested person is then brought back to Richmond, by Richmond authorities, to stand trial."

"Based on Example 2, Fredericksburg, although basically making a 'fugitive' arrest, now records an arrest for the original offense committed in Richmond. When the prisoner is returned to Richmond, Richmond authorities also record an arrest for the original offense. These cities, Fredericksburg and Richmond, are used only as examples."

"Under the procedure now in use, it appears possible that the Exchange could receive, in compliance with 19.1-19.3(a), a record of arrest from each locality for the same offense. Such action would create duplicate records in the files of the Exchange."
"1. Assuming that the original offense is reportable, should both localities report to the Exchange?"

In regard to the requirements for reporting arrests, paragraph (a) of § 19.1-19.3 is as follows:

"(a) On and after January one, nineteen hundred sixty-eight, every State official or agency having the power to arrest, the sheriffs of counties, the police officials of cities and towns, and any other local law-enforcement officer or conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange, on forms provided by it, of any arrest on a charge of treason or of any felony or any of the following offenses punishable as misdemeanors: Bribery; petit larceny; obtaining money or property under false pretenses; indecent exposure; vagrancy; or any violation of the laws relating to the manufacture, possession or sale of narcotics, prostitution, the keeping of bawdy places, child abuse, or obscenity. Such reports shall contain such information as shall be required by the Exchange and shall be accompanied by fingerprints of the individual arrested and information as to whether a photograph of the individual is available."

This section requires that a person having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange of any arrest on one of the named charges. One report, and only one, is required for each such arrest and, therefore, I shall answer this question in the negative.

"2. If not, am I correct in assuming that only the locality in which the original offense occurred should report the arrest?"

As I interpret the quoted language of § 19.1-19.3(a), this section places the duty of reporting an arrest for any of the named offenses upon the authorized person who makes the arrest. Such reports shall contain the information required by the Exchange and shall be accompanied by fingerprints of the individual arrested and information as to whether a photograph of the individual is available. I am of the opinion, therefore, that when a person commits a crime in one locality and is arrested in another, the person actually making the arrest should report it, rather than such report being made on second-hand knowledge obtained by the locality in which the original offense occurred. I further quote from your letter:

"Again citing Example 2, Fredericksburg makes an arrest, using a Richmond warrant, for an offense committed in Richmond. The arrested person is taken before a Fredericksburg magistrate and bonded for his appearance in the Richmond court, thereby, bypassing Richmond law enforcement authorities. Based on this use of Example 2, the following questions are raised:

"1. Is Fredericksburg or Richmond responsible for reporting the arrest?"

For the same reasons previously stated herein, supra, I am of the opinion that Fredericksburg is responsible for reporting the arrest under these circumstances.

"2. If Fredericksburg is responsible for reporting the arrest, would the Fredericksburg or Richmond court be responsible for reporting the disposition of the charge?"
In regard to this question, I quote paragraph (b) of § 19.1-19.3, which is as follows:

“(b) On and after January one, nineteen hundred sixty-seven, the clerk of each court of record and court not of record shall make a report to the Central Criminal Records Exchange of any dismissal, nolle prosequi, acquittal, or conviction of, or failure of a grand jury to return a true bill as to, any person charged with an offense listed in subsection (a) of this section. No such report of conviction shall be made by the clerk of a court not of record unless the period allowed for an appeal has elapsed and no appeal has been perfected. In the event that the records in the office of any clerk show that any conviction has been nullified in any manner, he shall also make a report of that fact. For each such report made by a clerk of a court of record, he shall be allowed a fee of fifty cents, to be paid from the appropriation for criminal charges.”

As you know, pursuant to paragraph (c) of § 19.1-19.3, the Governor has proclaimed the effective date of this section to be January 1, 1968, to coincide with the effective date for receipt of reports from law enforcement officers and agencies, as required by paragraph (a) of the same section. The report contemplated by this section is to be made by the court which has jurisdiction for the criminal proceedings. Thus, under the stated conditions, the Richmond court would be responsible for reporting the disposition of the charge.

“3. If Richmond is responsible for reporting the arrest, would it be the duty of Fredericksburg to forward the fingerprints and arrest record to the Richmond authorities in order that Richmond could file with the Exchange?”

As indicated in my answer to question 1 of this series, Fredericksburg rather than Richmond is responsible for reporting the arrest. There is nothing in this chapter which places any burden upon Fredericksburg to forward fingerprints and arrest record to Richmond, under the stated circumstances, as the only requirement as to the arrest reports is that these be submitted, along with fingerprint and the other required data, to the Central Criminal Records Exchange. Any cooperation between the two localities for any other purpose remains unaffected.

You further state that you are advised that the magistrates or justices of the peace of some localities are recording multiple charges on a single warrant, a procedure which, if occurring in the future, will complicate plans being formulated to enable the courts to report arrest dispositions to the Exchange. In this connection, you pose the two following questions:

“1. Is it legal to record more than one offense on a single warrant of arrest?

“2. If it is not legal, by what method should all magistrates and justices of the peace be so advised?”

In regard to question numbered 1, although it may be better practice not to do so, there appears no law to prohibit the inclusion of more than one offense on the same warrant. In the case of Hundley v. Commonwealth, 193 Va. 449, the Supreme Court sustained the action of the lower court in refusing to sever the charges in the warrant, which included drunk driving and reckless driving, and stated that several misdemeanors may be tried under one warrant in this jurisdiction. In an opinion found in the Report of the Attorney General (1951-1952), p. 172, the view is expressed that it would be a proper practice to include them in the same warrant, if the offenses are of the same nature and are committed on the
same day. I should think that, in cases of this nature, if they should occur in the future, the situation as to reporting would be similar to instances of several felony counts in one indictment.

My answer to the foregoing question, being in the affirmative, renders it unnecessary to reply to your question numbered 2 in this series, since the second question is based upon a negative reply to the first.

CITIES—Council Member—Public school teacher may not serve.

HONORABLE J. THOMPSON WYATT
Commonwealth's Attorney for the City of Petersburg

August 24, 1966

This is in reply to your letter of August 22, 1966, which reads as follows:

"A citizen of Petersburg was elected a member of its Council at the election of June 14th, 1966, for a term of four years beginning September 1, 1966. The councilman elect has heretofore been a teacher in the city's public schools and has a contract of employment for pay with the City School Board to teach in one of the public schools for the term beginning August 30th, 1966, and expiring June 30th, 1967.

"In view of the principle of law with respect to conflict of interests and pertinent statutes, as well as § 2-5 of the Petersburg City Charter, approved and set out in the 1962 Acts of the General Assembly, Pages 372, et sequel, I find it necessary to ask your opinion as to whether or not the councilman elect is entitled to qualify and assume the duties of the office on September 1, 1966, and, if so, would he be entitled, during the term for which he is elected, to perform said teaching services for the City of Petersburg for pay, or would becoming a councilman render void his said contract of employment by the City School Board.

"The City operates under a City Manager unicameral form of government. The Council consists of five elected members who select the City's Mayor from such Members. The Council appoints the nine members of the City School Board and fills vacancies and the School Board employs and recommends salaries for teachers, which recommendations have to be approved by the Council.

"The City Council meets twice per month. It is believed that matters concerning the operation of schools come before it in at least a majority of the Council meetings. At some time prior to December 31st, 1966, the council will have to vote on the levy and tax rate on tangible personal property and real estate for calendar year of 1967, and out of funds so derived appropriations will have to be made for school operations for the year of 1967. At present the Council is engaged in the construction of school buildings and is having surveys made for further proposed constructions which will no doubt require regular appropriations by the Council."

In my opinion, the councilman-elect may not be employed as a school teacher by the city school board at any time during the term for which
he was elected as a member of city council. Such employment would come within the prohibitions of § 15.1-73 of the Code. This section provides

"No member of the council . . . during the term for which they are elected or appointed, shall be a contractor or subcontractor with the corporation . . . nor shall they be interested, directly or indirectly, in any contract . . . or any services to be performed for the city . . . for pay under any contract . . . Every such contract . . . shall be void and the . . . councilman . . . making such contract shall forfeit to the Commonwealth the full amount stipulated for thereby."

In addition to the foregoing provisions of § 15.1-73, there is a further provision as follows:

"No officer of a city or town, who alone or with others is charged with the duty of auditing, settling or providing, by levy or otherwise, for the payment of claims against such city or town, shall, by contract, directly or indirectly, become the owner of or interested in any claim against such city or town. Every such contract or subcontract shall be void, and if any such claim be paid, the amount paid, with interest, may be recovered back by the city or town, within two years after payment, by action or motion in the circuit or corporation court having jurisdiction over such city or town."

This provision, of course, applies, inasmuch as the members of the council provide by levy for the money for the payment of all claims against the city. Any contract made by a person with the school board of the city is a contract with the city within the scope of this section. This opinion is consistent with several prior opinions of this office. I enclose copy of one opinion, dated July 31, 1957, to the Commonwealth's attorney of Wise County, which relates to this subject (Report of Attorney General (1957-1958), at p. 24). This opinion related to a member of the board of supervisors rather than to a member of the city council and, therefore, involved an interpretation of § 15-504 (now § 15.1-67) of the Code. This section and § 15.1-73 are similar except that § 15.1-67 does not contain the third paragraph of § 15.1-73, quoted above.

An opinion of a former Attorney General, published in the Report of the Attorney General (1947-1948), at p. 141, does not cite nor discuss the applicable statute cited in the opinion to the Commonwealth's attorney of Wise County. I enclose copy of that opinion.

This office has rendered several opinions relating to other types of contracts in which county and city officials were interested, such as selling insurance, etc., which are subject to the prohibitions of the Code sections referred to above, and which express the views herein set forth.

CITIES—Planning Commission—Change in number of members requires amendment of ordinance pursuant to § 15.1-431.

PLANNING COMMISSION—Change in Number of Members—effected by ordinance amendment pursuant to § 15.1-431.

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

December 13, 1966

This will acknowledge receipt of your letter of December 9, 1966, which reads as follows:

"I would appreciate it if you would let me have your opinion on the following question:
"Under the authority of Virginia Code § 15.1-437, may the membership of a local City Planning Commission be enlarged from five to not more than fifteen members by an amendatory ordinance without first complying with the requirements of § 15.1-493?"

"It should be indicated that the present city ordinance establishing a local Commission of five members was first adopted by the City Council on October 20, 1948 pursuant to the then Virginia Code §§ 15-899 to 15-914. The zoning ordinance of the City was first adopted in the year 1941. Both ordinances now appear in the same chapter of the City Code, although in separate Articles."

The City Planning Commission, to which you refer and which was established in 1948, was created under the provisions of § 15-901 of the Code. Under that section it was necessary that the Commission be created by an ordinance.

Under § 15.1-429 of the Code, the Planning Commission so established was continued. In order to increase the local Planning Commission so as to consist of not less than five nor more than fifteen members, as permitted under § 15.1-437 of the Code, it will be necessary that the ordinance adopted in 1948 be amended. The procedure for amending this ordinance, in my opinion, is contained in § 15.1-431 and not in § 15.1-493, as suggested in your letter. Section 15.1-493 relates to substantive changes in zoning ordinances and not to an amendment of an ordinance previously creating a Planning Commission.

CITIES—School Funds—City treasurer’s responsibility.

SCHOOLS—School Funds—Responsibility of city treasurer.

TREASURERS—Responsibility for school funds.

March 3, 1967

HONORABLE RUSSELL M. CARNEAL
Member, House of Delegates

This is in reply to your letter of February 21, 1967, in which you state that the city of Williamsburg contemplates adopting an ordinance implementing the provisions of an amendment to the Charter of the city (Chapter 264, Acts of Assembly [1956]), authorizing the Council to establish a Department of Finance and to appoint a Director of Finance.

As I understand the Charter provisions, the Director of Finance will perform the duties and functions for the city of the treasurer elected under the provisions of Section 5 of the Charter of the city of Williamsburg, found in Chapter 393, Acts of Assembly (1932). You request my advice as to whether or not under § 22-133.1 of the Code, relating to the handling of school funds where a county and city have established a joint school, the Director of Finance may continue to perform the duties prescribed by that section. In my opinion, this may not be done.

Section 5 of the Charter (Chapter 393, Acts of Assembly [1932]), provides that the treasurer of James City County and the city of Williamsburg shall be elected by the joint vote of the two jurisdictions. The charter provisions permitting the establishment of a Finance Department and the appointment of a Director of Finance do not affect the provisions as to the election of a city treasurer.

Section 22-133.1 of the Code provides that "the treasurer of a county or city in which a joint school is located shall be the fiscal agent of such
school and shall receive and disburse the revenues thereof; all disburse-
ments therefrom shall be by warrant signed by the chairman and clerk of
the board of control for such school and countersigned by such treasurer
as fiscal agent.”

In my opinion, so long as the city of Williamsburg continues to have a
city treasurer, he is not divested of the duties and powers to be exer-
cised in § 22-133.1 of the Code and such duties and powers may not be
performed and exercised by a Director of Finance who is appointed by
the city council.

CIVIL PROCEDURE—Interrogatories Under Rule 4:8 of Rules of Court
—Service.

May 26, 1967

HONORABLE GEORGE S. DEBAZAR, JR., Clerk
Hustings and Circuit Courts of the City of Newport News

I am in receipt of your letter of May 22, 1967, in which you present the
following inquiry:

“Will you please advise me if interrogatories issued pursuant to
Rule 4:8 may be served as provided by Rule 3:15 or should they
be served by attaching a summons issued by the Clerk appended
to the interrogatories?”

Rule 4:8 of the Rules of the Supreme Court of Appeals of Virginia
which was adopted November 29, 1966, and became effective February 1,
1967, provides:

“Any party may serve upon any adverse party written interrogatories
to be answered by the party served or, if the party served is a public
or private corporation or a partnership or association, by any
officer or agent, who shall furnish such information as is avail-
able to the party. Interrogatories may be served after commence-
ment of the action and without leave of court, except that, if
service is made by the plaintiff within 14 days after such commence-
ment, leave of court granted with or without notice must first be
obtained. The interrogatories shall be answered separately and
fully in writing under oath. The answers shall be signed by the
person making them; and the party upon whom the interrogatories have
been served shall serve a copy of the answers on the party submitting
the interrogatories within 14 days after the service of the interro-
gatories, unless the court, on motion and notice and for good
cause shown, enlarges or shortens the time. Within 10 days after
service of interrogatories a party may serve written objections thereto
together with a notice of hearing the objections at the earliest
practicable time. Answers to interrogatories to which objection is
made shall be deferred until the objections are determined.

“Interrogatories may relate to any matters which can be in-
quired into under Rule 4:1(b), and the answers may be used to the
same extent as provided in Rule 4:1(d), for the use of the deposi-
tion of a party. Interrogatories may be served after a deposition
has been taken, and a deposition may be sought after interroga-
tories have been answered, but the court, on motion of the de-
ponent or the party interrogated, may make such protective order
as justice may require. The number of interrogatories or of sets
of interrogatories to be served is not limited except as justice
requires to protect the party from annoyance, expense, embar-
rassment, or oppression. The provisions of Rule 4:5(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this Rule." (Italics supplied.)

Rule 3:15 of the Rules of the Supreme Court of Appeals of Virginia prescribes:

"All pleadings except the notice of motion for judgment shall be served on each counsel of record by delivering or mailing a copy to him on or before the day of filing.

"At the foot of such pleadings shall be appended either acceptance of service or a certificate of counsel that copies were served as this Rule requires, showing the date of delivery or mailing." (Italics supplied.)

In light of the language of the rules italicized above, I am of the opinion that interrogatories may be served by delivering or mailing a copy thereof to the party from whom answers are sought and each counsel of record, with either acceptance of service or a certificate of counsel appended as prescribed in Rule 3:15. While interrogatories are not technically "pleadings" within the scope of Rule 3:15, service by delivery or mail with appended acceptance or certificate is precisely defined by this rule. Moreover, Rule 4:8 clearly contemplates that service may be made "by the plaintiff" and that the party upon whom interrogatories have been served shall "serve" a copy of his answers. It would thus appear that service of both the interrogatories and the answers is required by Rule 4:8, and I am of the opinion that service of the answers by a summons issued by the clerk of the court is clearly not intended by Rule 4:8. On the whole, therefore—although the matter is not entirely free from doubt—I am of the opinion that service of interrogatories upon a party and each counsel of record by delivery or mail with appended acceptance of service or certificate of counsel would be sufficient.

CLERKS—Compensation—Minimum and maximum.

November 29, 1966

HONORABLE THOMAS P. CHAPMAN, JR., Clerk
Circuit Court of Fairfax County

This will acknowledge your letter of November 25, 1966, which reads as follows:

"I shall appreciate a ruling from you as to what minimum salary the county of Fairfax should pay me as clerk of the courts for the calendar year beginning January 1, 1966, and continuing until such time as there may be further amendments to the law. I refer specifically to Code §§ 14.1-143; 14.1-145; 14.1-148; 14.1-152; 14.1-155; 14.1-155.1. I am excluding Code § 14.1-164 which apparently does not fall within the provisions of § 14.1-155.1."

Under § 14.1-164 of the Code, the minimum salary to be paid by Fairfax County to the county clerk for the county is $1,000. Under § 33-160, if the clerk performs the duties provided in Chapter 2, Title 33, the minimum compensation is $100.00 per year. I am assuming you do not have reference to the maximum compensation which may be authorized by the Compensation Board; however, I have been advised by the Compensation Board that in reply to your letter of March 25, 1966, to Mr. John M. Rasnick.
REPORT OF THE ATTORNEY GENERAL

Jr., Executive Secretary of the Board, you were advised that your assumption that the maximum payable out of the fees of the office is $24,393.60, is correct.

The compensation allowed to clerks under the various sections of the Code cited in your letter of March 25, 1966, to Mr. Rasnick relate only to the maximum compensation; there is no reference in these sections to a minimum compensation.

CLERKS—Compulsory School Attendance Ordinance—Fine paid into State treasury.
ORDINANCES—Violation of Compulsory School Attendance Ordinance—Fine paid into State treasury.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your request for an opinion with respect to the following inquiry to you from the clerk of the Circuit Court of Page County, Virginia. The clerk's letter is as follows:

"We are enclosing herein a copy of the 'Compulsory School Attendance Ordinance' adopted by and currently in effect in Page County and also a copy of a warrant upon which a citizen of the County was tried, convicted and fined for violation thereof.

"For our information and guidance in this case and also in possible future cases, will you please advise us if the fine, if and when collected, should be paid into the County Treasury or into the State Treasury."

The Compulsory Public School Attendance Law, as set forth in Article 4, Chapter 12, Title 22 of the Code—§§ 22-275.1 through 22-275-25—is of statewide application, enforceable only in those political subdivisions of the State that by local ordinance make it effective therein. Violations of the Compulsory Public School Attendance Law in those jurisdictions which have adopted the same are violations of a State statute. Therefore, all fines collected for violation thereof are payable into the State treasury.

CLERKS—Confession of Judgment—No obligation to see if it is or is not a demand note.
CLERKS—Confession of Judgment—Acts in ministerial capacity only.

HONORABLE S. L. FARRAR, JR., Clerk
Circuit Court of Amelia County

This will acknowledge your letter of December 16, 1966, enclosing photostatic copy of a note dated July 16, 1966, executed by Loye C. Poore, et als, payable to Producers Cooperative, Inc., Richmond, Virginia, in the amount of $12,436.68, which note is payable on demand. The note appoints two persons, either of whom may act, as attorney in fact for the makers, with
the power to confess judgment. On the margin of the note, this memorandum appears:

"Payable
half of account in fall of 1967
half of account in fall of 1968"

On December 9, 1966, one of the attorneys in fact confessed judgment upon the note.

The third paragraph of your letter reads as follows:

"Since this confession has taken place, the question has arisen in my mind whether a judgment can be confessed before the due date of a note. You will notice in this note, the Attorney in Fact was authorized to confess judgment for the amount then due thereon. It does not say the Attorney in Fact would have to wait until there was default at maturity to do this. There is also a question in my mind as to what capacity a Clerk acts in a confession procedure, that is, if he acts in a ministerial capacity or a magisterial capacity. As the defendants are given notice of the confession by having a copy served on them by the Sheriff and by having a right of appeal to the Courts, I am of the opinion the Clerk acts only in a ministerial capacity and not in a more or less judicial capacity in passing on the legal questions that may be involved. I would like your opinion on this as the same would be helpful to me in further proceedings of this nature."

In my opinion, the clerk acts purely in a ministerial capacity. If the makers of the note feel that confession of judgment was not proper, they have the right to have the matter reviewed by the circuit court by following the procedure set forth in § 8-357 of the Code. It is the duty of the clerk to cause to be served upon the judgment debtors a certified copy of the order in the manner prescribed in § 8-362, which you state was done in this instance.

With respect to the marginal notation, I do not feel that it was incumbent upon the clerk to decide whether or not such notation had the effect of causing the obligation to no longer be a demand note.

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CLERKS—Fees—Recordation of typewritten single-spaced instrument.

RECORDATION—Fees—Typewritten single-spaced instrument.

October 27, 1966

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

This will acknowledge your letter of October 26, 1966, which reads as follows:

"On page 38 of Opinions of the Attorney General from July 1, 1965, to June 30, 1966, does your letter of June 12, 1966, addressed to Honorable J. E. Crockett, Clerk, hold true after the effective date of the 1966 Acts of Assembly? You will note that § 14.1-112 (2) of the 1966 Acts as re-written left out the words 'which has been typewritten single space.'"

At the time the opinion to Mr. Crockett was written, the amendment to § 14.1-112 of the Code had not become effective because the Act (Chapter
217, Acts of Assembly, 1966) making the amendment did not contain an emergency clause. The amendment became effective the first moment of June 27, 1966. The effect of the amendment is to provide that commencing June 27, 1966, the fee for recording a typewritten paper, single spaced, is "a minimum of $4.00 up to three pages and $1.00 for each page over three, but with no additional charge for recording less than one-half a page." In other words, if a typewritten single-spaced paper contains three and one-half pages or more, but not four and one-half pages, the fee would be based on four pages. Prior to the amendment made by Chapter 217, the fee for recording such a paper would double the amount that may now be charged.

CLERKS—Fees—Recording and indexing will when no qualifications.

RECORDATION—Wills—Fees when no qualifications.

October 27, 1966

Honorable J. Phil Bennington, Clerk
Circuit Court of Grayson County

This will acknowledge your letter of October 26, 1966, which reads as follows:

"I would like to know the fee I am supposed to charge for recording a will, when no one qualifies as administrator or executor. I know the fee when a will is recorded and someone qualifies as administrator. I am wondering if we charge the same fee for both."

In those instances where there is no qualification the fees allowed under § 14.1-112(4) of the Code would not be applicable.

A clerk would be entitled to the recording and indexing fees mentioned in § 14.1-112(2), and any other fees that may be authorized in connection with the probate of a will.

CLERKS—Fees—Transfers of separate tracts of real estate under will.

May 24, 1967

Honorable John H. Powell, Clerk
Circuit Court of Nansemond County

This will acknowledge receipt of your letter of May 17, 1967, in which you request my advice as to the correct transfer fee in a case where more than one tract of real estate is conveyed by a will.

Section 58-816 of the Code provides that "for making an entry transferring to one person lands before charged to another, one dollar, which shall be paid by the person to whom the transfer is made, and shall be a compensation for all tracts in the commissioner's county or city conveyed by the same deed." (Emphasis supplied.) This section is silent as to the transfer of several tracts of land under a will.

In view of the failure to include within the statutory language a special provision for the transfer of separate tracts of real estate under a will, I am of the opinion that a transfer fee of one dollar may be charged on each tract of real estate transferred under a will.
HONORABLE J. N. HARRIS, Deputy Clerk
Circuit Court of Pittsylvania County

This is in reply to your letter of January 13, 1967, in which you enclosed a form of deed of trust being used by the county of Pittsylvania for the purpose of securing a repayment of funds advanced under Chapter 15 of Title 32 of the Code of Virginia, relating to hospitalization and treatment of indigent persons. Reimbursement of the amount advanced is provided for in § 32-295 of the Code. You have requested my advice as to whether or not the recordation tax and clerk’s fees are properly chargeable when a deed of trust of this nature is recorded.

There is no statute expressly exempting from the recordation tax a deed of trust securing the payment of money due a county. Section 58-64 of the Code expressly exempts deeds conveying property to the State or to any county, city, town, district or other political subdivision of the State, but deeds of trust securing levels of government are not mentioned in this section, nor are they mentioned in § 58-55 on deeds of trust or mortgages. However, the Honorable C. H. Morrissett, State Tax Commissioner, has taken the view for a period of about forty years that the recordation tax does not apply in a case of this nature. I quote from a letter from Judge Morrissett as follows:

"The basis of our view, with respect to deeds of trust securing levels of government, is that the recordation tax statutes do not expressly provide for any tax on such deeds of trust, and that this implies an exemption as to them. The applicable principle was applied in a writ tax case by the Virginia Supreme Court of Appeals. (Pelous v. City of Richmond, 183 Va. 805.) The court held that no writ tax was assessable against the city under what is now § 58-71 of the Code of Virginia. Moreover, the principle was well applied in a deed of trust recordation tax case by the Attorney General's opinion of December 12, 1951, addressed to the Clerk of Courts of the City of Norfolk. (Opinions 1951-52, p. 163.)"

The opinion of the Attorney General to which Judge Morrissett referred relates to deeds of trust securing the Housing Authority established under Title 36 of the Code of Virginia.

With respect to the clerk’s fee, I know of no statutory provision which would require the clerk to record a deed of trust of this nature without collecting the usual clerk’s fee.

HONORABLE J. FULTON AYRES, Clerk
Circuit Court of Accomack County

This will acknowledge receipt of your letter of January 7, 1967, which reads as follows:
"A Lease Agreement involving personal property, a copy of which is herewith enclosed, has been presented to this office with a request in a letter that it be recorded.

"I am of the opinion that it should be filed and indexed under the Uniform Commercial Code since it involves personal property solely, but I cannot find anything in the Code to enlighten me.

"Prior to January 1, 1966, most conditional sales contracts (with some exceptions) containing leases, had to be recorded at length on our deed book.

"I shall thank you for a ruling as to the place that this instrument should be filed."

In my opinion, this paper should be recorded in the miscellaneous lien book. Section 17-61 of the Code is the applicable statutory provision and reads, in part, as follows:

"All deeds, mortgages, deeds of trust, homestead deeds and leases of personal property, bills of sale, and all other contracts or liens as to personal property not mentioned in §§ 43-27 and 55-88 to 55-90, which are by law required or permitted to be recorded, all mechanics' liens, all other liens not directed to be recorded elsewhere and all other writings relating to or affecting personal property which are authorized to be recorded shall, unless otherwise provided, be recorded in a book to be known as miscellaneous liens..." (Italics supplied.)

I enclose copy of an opinion dated May 4, 1961, to Honorable G. Garland Wilson, and reported in Report of the Attorney General (1960-1961), at p. 256, which, you will note, stated that due to the provisions of § 43-4.1 of the Code, as enacted by Chapter 81 of the Acts of Assembly (1960), the use of miscellaneous lien books, as set forth in § 17-61 of the Code, had been repealed by implication. Since that opinion was written, however, § 43-4.1 of the Code was amended by Chapter 338, Acts of Assembly (1964), so as to read as follows:

"Notwithstanding the provisions of § 43-4, or any other section of this title, or any other provision of law requiring documents to be recorded in the miscellaneous lien book or the deed books in the clerk's office of any court, on and after July one, nineteen hundred sixty-four all memoranda or notices of liens, in the discretion of the clerk, shall be recorded in the miscellaneous lien books or the deed books in such clerk's office, and shall be indexed in the general index of deeds, and such general index shall show the type of such lien." (Italics supplied.)

Section 43-4.1 is in Chapter 1 of Title 43, relating to mechanics' and materialmen's liens, and, in my opinion, the proper construction of this section, since the 1964 amendment, is that it relates solely to the recording of memoranda or notices of liens under Chapter 1 of Title 43. The effect of this section, however, is to continue the use of miscellaneous lien books.

Therefore, in my opinion, the document which we have under consideration, being a lease of personal property, should be recorded in the miscellaneous lien book as provided by § 17-61 of the Code.

The document proposed to be recorded has been acknowledged by one of the parties thereto before a notary public and, therefore, under §§ 55-106 and 55-113 of the Code, it is, in my judgment, a recordable instrument.
HONORABLE WILLIAM C. CARTER
Commonwealth's Attorney for Cumberland County

August 12, 1966

I am in receipt of your letter of August 5, 1966, in which you inquire whether or not the Clerk of the Circuit Court of Cumberland County is authorized to record in the judgment lien docket an instrument (entitled Notice of Agreement to Reimburse) which was forwarded to him by the New Jersey Department of Public Welfare and which purports to relate to certain real property in Cumberland County owned by a recipient of public assistance in Essex County, New Jersey. You also inquire whether or not Virginia has any type of reciprocal agreements with other States in this field.

I am of the opinion that both of your inquiries should be answered in the negative. I have been unable to discover any provision of Virginia law which authorizes the docketing in this State of notices from other States of the character specified in your communication. Moreover, I am advised by the Virginia Department of Public Welfare that the Commonwealth does not have any reciprocal agreements with other States relating to matters of this nature.

HONORABLE C. G. BLANKENSHIP
Justice of the Peace, Pulaski County

October 6, 1966

This will acknowledge receipt of your letter of October 3, 1966, which reads as follows:

“1. Can a clerk working for a town and/or municipal government on a salary be a justice of the peace and collect fees and use same for his or her own personal benefit?

“2. Can a man, wife and/or spouse be a justice of the peace where her husband is employed by the state working on salary?”

With respect to your question No. 1, I am not aware of any State law that would prevent a person employed by a town on a salary basis as a clerk from holding the office of justice of the peace and collecting the fees allowed for his services as a justice of the peace. It may be that some of the town charters contain provisions which would prevent an employee of the town from being a justice of the peace for such town.

In answer to your second question, I know of no State statute that would prevent a person from holding the office of justice of the peace if
his or her spouse is employed by the State. Section 39-7 of the Code prevents any person from holding the office of justice of the peace if such person's spouse is a law enforcement officer or is otherwise charged with the duty of enforcing any law of the State or any political subdivision.

CLERKS—Transmission of Orders to Superintendent of State Penitentiary.

August 29, 1966

HONORABLE J. T. MARTZ, Clerk
Circuit Court of Loudoun County

I have your letter of July 20, 1966, in which you make reference to § 19.1-296 of the Code which was amended at the last session of the General Assembly. This provision of law reads, in part, as follows:

"... The clerk of the court in which the person is sentenced shall forthwith transmit to the superintendent of the penitentiary and abstract of the judgment and within thirty days from the date of the judgment shall forthwith transmit to the superintendent of the penitentiary a certified copy or copies of the order of trial and a certified copy of the complete final order, and if he fail to do so he shall forfeit one hundred dollars... ."

Your letter reads, in part, as follows:

"What does order of trial mean in this case? Does it include copies of warrants, indictments, waivers, Probation Officer's pre-sentence report, a complete transcript of the testimony of the trial or does it just mean the Court orders signed by the Judge?"

It is quite clear from the reading of the language quoted above that the Clerk is required to transmit to the superintendent of the penitentiary a certified copy of the judgment order of conviction. This would be the final sentencing order. In addition, he is required to transmit copies of the orders of trial. This would mean the copies of the orders pertaining to the trial itself and would commence with the order wherein the accused enters his plea and terminate with the judgment order of conviction. This would not include copies of the warrants, indictments, waivers, Probation Officer's pre-sentence reports, a complete transcript of the testimony, the order appointing counsel, or orders continuing the matter. To state it more concisely, the Clerk is required to forward only certified copies of the orders actually pertaining to the trial itself and the judgment order of conviction.

COMMISSIONERS OF REVENUE—Assessments—Cannot change.

TAXATION—Assessment—Commissioner of revenue cannot change.

December 19, 1966

HONORABLE J. A. McCLANAHAN
Commissioner of the Revenue of Wise County

This will acknowledge your letter of December 12, 1966, which reads as follows:

"Last year the Circuit Court of Wise County appointed four Assessors and they have completed the reassessment of the property in Wise County. We did not have an Equalization Board."
"My question is, if I feel that the Board of Assessors evaluated a piece of property too high, may I in my discretion correct and change this assessment; or, must this assessment be corrected by the Circuit Court of Wise County?"

"I would also like to point out § 58-1141 of the Code of Virginia and ask if this gives me the power to change an assessment made by the Board of Assessors?"

In my opinion, § 58-1141 of the Code does not confer upon the commissioner of the revenue the power to make changes in the assessments to which you refer. We have contacted the Department of Taxation, and it concurs in our conclusion.

It would seem that the proper procedure for any person aggrieved by such assessment would be by application to the circuit court pursuant to the provisions of § 58-1144, et seq., of the Code. You will note that § 58-1151 provides that the remedies contained in those sections apply to general reassessments.

COMMISSIONERS OF REVENUE—Assessments—Standing timber—May be made separately if deed recorded.

TAXATION—Standing Timber—Assess separately where deed of conveyance recorded.

HONORABLE W. A. BEALE
Commissioner of the Revenue of Sussex County

January 23, 1967

This will acknowledge receipt of your letter of January 18, 1967, which reads as follows:

"I have had an inquiry from an attorney questioning my authority to assess, on the County Land Book, standing timber which had been purchased by a timber dealer.

"A deed conveying the timber only on a certain portion of real estate to Mr. Robert Ragsdale was recorded in the Clerk's office here in Sussex County in 1965. In accordance with established policy, I assessed this timber for taxation in 1966.

"Please give me an opinion on § 58-803 and § 58-804(f) of the Tax Code of Virginia in regard to my authority and obligation in this instance."

Under the provisions of §§ 58-803 and 58-804(f) of the Code, it is the duty of the commissioner of the revenue to assess separately the standing timber on a tract of land in those instances where the standing timber has been conveyed to someone else by the landowner, provided the deed conveying the timber has been admitted to record. In this connection, I call your attention to an opinion dated November 10, 1950, to Honorable C. G. Avery, Treasurer of Charles City County, copy of which I enclose. This opinion appears in Report of the Attorney General (1950-1951), at p. 295. You will note that in the opinion to Mr. Avery the Attorney General at that time directed attention to § 58-809 of the Code in support of his conclusion that the deed conveying the timber must be recorded before the commissioner of the revenue can make an assessment of the timber separate from the land.
I note from the letter to you from counsel for the purchaser of the timber that he is of the opinion that the Code sections under which these assessments of timber are made are unconstitutional. In my opinion, there is no constitutional provision which would prevent the legislature from enacting the statutes under consideration. Section 168 of the Constitution of Virginia expressly empowers the General Assembly to define and classify taxable subjects.

COMMISSIONERS OF REVENUE—Authority Over Employees.

March 9, 1967

HONORABLE C. L. MARCUM
Commissioner of the Revenue of the City of Norton

This will acknowledge receipt of your letter of February 27, 1967, which reads as follows:

"I am enclosing a copy of an opinion rendered by . . . the City Attorney for the City of Norton. I would like very much to have an opinion on the following questions:

"(1) On page 3 of the city attorney's opinion, paragraph 5, he states that the City Manager and the City Council have the right to remove or appoint the employees in the Commissioner of Revenue's office. Also note paragraph 6.

"(2) What authority does the City Manager have in regard to the Assistant to the Commissioner of the Revenue? Does he have the authority to set days off, vacation, office hours, sick leave and holidays; and also, to move her to the office of the Treasurer or other duties as he may dominate?

"(3) Page 4, paragraph 1, what other duties can the City Council assign to the Commissioner of the Revenue?"

We have discussed this question with the Honorable C. H. Morrissett, State Tax Commissioner, who, by virtue of § 58-857 of the Code, is authorized to exercise supervision over the office of the commissioners of revenue in the various localities with respect to their duties.

Although the section relating to the office of the commissioner of the revenue is contained in Article 4 of the City Charter, relating to financial administration, this does not, in our opinion, confer upon the director of finance authority over the employment of personnel in the office of the commissioner of the revenue. Section 4.3 of the Charter provides that the director of finance shall appoint and remove all officers and employees of his department, excepting Constitutional officers. The italicized phrase should not, in our opinion, be construed to relate only to the individuals who have been elected under the Constitution to hold certain offices but it should be construed to apply to the office being operated by these officers.

The State Tax Commissioner advises that he knows of no instance where the personnel of the commissioner of the revenue is under the control of any other officer of the city. To give such an intent to the provisions of the Charter would be contrary to the traditional view and practice in Virginia that an officer elected by the people pursuant to the Constitution is charged with the obligation to perform certain duties connected with that office and should not have his control over the office
impaired by an officer appointed by a council or other local governing body.

With respect to the power of the city manager, Section 3.909 of the Charter cannot be construed in our opinion to include officers and employees who do not come under control of the city council, such as the commissioner of the revenue. The reference in the memorandum of the city attorney that the director of finance in Norton is somewhat related to the director of finance of counties would have no application to the commissioner of the revenue of a city. Under Section 110 of the Constitution, a county may adopt a form of government abolishing the office of the commissioner of the revenue, but under Section 117 of the Constitution, the legislature is forbidden to grant a charter that would purport to abolish the office of commissioner of the revenue.

The State Compensation Board established under Title 14.1 of the Code fixes the compensation of the commissioner of the revenue, as well as the salary of his personnel and this is done at his request, as provided in § 14.1-50 of the Code. The amount of compensation allowed by the State Board of Compensation for deputies and other personnel in the office of the commissioner of the revenue is based upon the judgment of the Board as to what assistance is necessary in order for that officer to perform his duties in an efficient manner. See, § 14.1-51 of the Code. It is not the prerogative of any of the city officials or the city council to determine the extent to which the commissioner of the revenue needs personnel in his office, except in the manner set forth in § 14.1-51. The foregoing answers paragraphs (1) and (2) of your letter.

With respect to paragraph (3), I am enclosing copy of an opinion furnished by this office on February 24, 1967, to the Commissioner of the Revenue of the City of Franklin, which, in part, relates to this question. There is nothing in the Charter of the city, or any general law, that would authorize the council of the city of Norton to require a deputy or employee in the office of the commissioner of the revenue to work part time in another office of the city in the absence of having first obtained the consent of the commissioner of the revenue to such an arrangement.

COMMISSIONERS OF REVENUE—Deed to Real Estate—Recorded in name of grantee not “Unknown Owner.”

REAL ESTATE—Deeds—Recorded in name of grantee not unknown owner.

RECORDATION—Deeds—Recorded in name of grantee not unknown owner.

December 12, 1966

HONORABLE BOYD W. GWYN
Commissioner of the Revenue of Gloucester County

This will acknowledge your letter of December 9, 1966, which reads as follows:

"The Grantor of a parcel of land transferred it with special warranty to the grantee, although the grantor never had ownership of it. The reference parcel consisted of 300 plus acres of marsh land that had never been assessed for approximately 100 years.

"On this date, I found a record in the Clerk's office that proves who was the last living owner which happened to be in the year of 1842."
"Should my office proceed under the status of § 58-770.1 'Unknown owner,' or should I transfer as recently deeded? The unknown owner situation comes into play because at present I do not know who the heirs of the above estate are. It is also worthy to note the recent deed in reference failed to carry a derivative clause."

In my opinion, the commissioner of the revenue is required under § 58-803 of the Code to enter the land in question on the land book in the name of the grantee shown in the deed. Section 58-770.1, relating to "Unknown owner," does not apply. Upon the recordation of the deed to the grantee named therein he became the owner of record, even though some person may subsequently successfully challenge the validity of his title to the property.

COMMISSIONERS OF REVENUE—Not to Divulge Information—See § 58-46 of the Code.

COMMISSIONERS OF REVENUE—Duties Set Out in Title 58 of the Code.

February 24, 1967

HONORABLE W. D. JOHNSON, SR.
Commissioner of the Revenue of the City of Franklin

This is in reply to your letter of February 22, 1967, relating to Section 5.07 of the Charter of the City of Franklin (Acts of Assembly, 1962, Chapter 155), which section reads as follows:

"The Commissioner of the Revenue shall perform such duties not inconsistent with the laws of the Commonwealth in relation to the assessment of property and licenses as may be required by the council for the purpose of levying city taxes and licenses. He shall have power to administer such oaths as may be required by the council in the assessment of licenses taxes or other taxes for the city. He shall make such reports in regard to the assessment of both property and licenses, or either, as may be required by the council or by the director of finance. He shall perform such other duties as may be required of him by the council."

You present the following questions:

"1. Can the Commissioner of the Revenue legally give to the City Manager who is also the Director of Public Finance, a listing of the City Business Licenses from information submitted by the licensees, other than in total or statistic form?

"2. Referring to the last paragraph of Sec. 5.07 of the City Charter, 'He (Commissioner of the Revenue) shall perform such other duties as may be required of him by the Council.' How far do the duties of the Commissioner of the Revenue extend in this regard?"

In connection with your question (1), you refer to § 58-46 of the Code, which reads as follows:

"It shall be unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties. Any violation of the provisions of this section shall be punished by
a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both; provided, however, that the Governor may at any time, by written order, direct that any information herein referred to shall be made public or be laid before any court; and, provided, further, that this inhibition does not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken or published in the line of duty under the law.”

In my opinion, the Charter provision which you cited does not have the effect of modifying or repealing § 58-46 of the Code; but you are bound by that provision and are prohibited by this section from furnishing the city manager any information forbidden therein. However, a mere list of licensees, without amounts, would not be a violation of this section of the Code.

The provision mentioned in your question (2) is vague and therefore difficult to interpret. Under Section 14.01 of the City Charter, the commissioner of the revenue is elected to that office and is responsible for the performance of the duties required of such officer under the provisions of general law. It would seem questionable whether the council could require him to perform other duties that would interfere with his statutory duties. Section 119 of the State Constitution provides in part as follows:

“In every city there shall be elected one commissioner of the revenue for a term of four years.

“The duties and compensation of such officers shall be prescribed by law.”

Section 117(d) of the Constitution provides:

“Any laws or charters enacted pursuant to the provisions of this section shall be subject to the provisions of this Constitution relating expressly to judges and clerks of courts, attorneys for the Commonwealth, commissioners of revenue, city treasurers and city sergeants.”

The duties and compensation of a commissioner of the revenue for cities and counties are set out in Title 58 of the Code and their compensation is subject to the provisions of Chapter 1, Article 8, Title 14.1 of the Code, and these provisions implement the requirements of Section 119 of the Constitution, and, in my opinion, are controlling.

COMMONWEALTH ATTORNEYS—Candidate for Election—Residency requirements.

ELECTIONS—Candidate for Commonwealth's Attorney—Residence requirements.

HONORABLE HENRY S. HATHAWAY
Commonwealth's Attorney for Richmond County

March 2, 1967

This will acknowledge receipt of your recent letter which reads as follows:

“I was appointed Commonwealth Attorney for Richmond County, Virginia, by Judge Weymouth on October 3, 1965, at the retirement of Mr. W. A. Jones, and have served since that date. I was
at that time and am now a resident of Northumberland County, Virginia, and am registered to vote and do vote at Reedville, Northumberland County, Virginia.

"I would like your opinion as to whether or not I am eligible to become a candidate for Commonwealth Attorney of Richmond County, Virginia, in the primary election to be held this year if no one else offers as a candidate for that office.

"It has been suggested that if no one is a candidate for this office and no one is elected, that I could be appointed by the judge of the circuit court on January 1, 1968."

Section 15.1-51 of the Code provides that every county officer with certain exceptions shall, at the time of his election, have resided six months next preceding his election in the county for which he was elected, subject to the exception that if no practicing lawyer, who has resided in the county for a period of six months at the time of his election, shall offer for election, it shall be lawful to elect a non-resident as attorney for the Commonwealth for such county. There are no comparable provisions with respect to running in a primary for nomination. However, if you, as a non-resident, should be nominated by default pursuant to § 24-350 of the Code, it is my opinion that under the provisions of this section, you would not be entitled to run in the general election, if any other lawyer who meets the residence requirements is a candidate in the general election.

Furthermore, in my opinion, if a resident lawyer offers himself as a candidate in the primary and no other lawyer who can qualify under the residence provision should file as a candidate, he would be the nominee for the general election under the provisions of § 24-350 of the Code.


TREASURERS—Compensation—Maximum amount.

HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

In your letter of September 27, 1966, you enclosed correspondence between Mr. Otis Johnson, Treasurer of the City of Hampton, and the State Compensation Board concerning the treasurer's request for a salary increase from $13,000 to $14,000. The board fixed the treasurer's 1966 salary at $13,500.

Hampton's 1960 population was 89,258. Under § 14.1-55 of the Code of Virginia (1950), as amended, the annual salaries for treasurers in cities within Hampton's population category are set at $9,900 to $13,500. However, § 14.1-55 also states: "Notwithstanding the repeal of §§ 14-8.1, 14-68, 14-68.1, 14-68.2, 14-68.3 and 14-75, effective July 1, 1964, the prior authority of such sections is continued in effect as to persons holding office on such date." I understand that Mr. Johnson was in office on that date.

The former § 14-75 provided: "The maximum limits of the salaries provided by this article [Article 8, Title 14, entitled 'Commonwealth's attorneys, treasurers and commissioners of revenue'] are hereby increased to the extent of $1,500.00 in the case of . . . cities adjoining . . . another city . . .
of more than one hundred thousand inhabitants." Hampton adjoins Newport News, which had a 1960 population in excess of one hundred thousand.

Similarly, the successor to § 14-75, the present § 14.1-62, enacted by the same 1964 act which enacted the present § 14.1-55, provides: "The maximum limits of the salaries provided by this article are hereby increased to the extent of $1,500.00 . . . in case of cities adjoining . . . another city or county of more than one hundred thousand inhabitants . . . notwithstanding the repeal of § 14-75, effective July 1, 1964, the prior authority of such section is continued in effect as to every person holding office on such date." The effect of §§ 14.1-55 and 14.1-62 and the former § 14-75 was to increase the maximum permissible for the Hampton treasurer to $15,000. This, of course, does not mean that the Compensation Board erred in establishing the salary at less than the permissible maximum. In any event, the matter is not now open to question, since § 14.1-52 requires any appeal from a final decision of the Compensation Board to be filed in court within forty-five days from the date of the board's decision.

When the board next meets to consider the treasurer's salary, it will be governed by § 14.1-62.1, enacted in 1966, which provides in part: "The maximum limits of the salaries provided in §§ 14.1-55 through 14.1-58 are hereby increased as follows: . . . in cities and counties whose population is more than seventy thousand, ten per centum." The same act which enacted § 14.1-62.1 amended and reenacted § 14.1-55, retaining the $9,900.00 to $13,500.00 bracket formerly in this section, for cities of Hampton's population category. The combined effect of § 14.1-55, as amended, and § 14.1-62.1 is to set the maximum for the Hampton treasurer at $14,850.00.

CONFICT OF LAWS—Comity—Usurious contract performed in another state.

August 5, 1966

HONORABLE EMMORY H. CROCKETT
Commonwealth's Attorney for Lee County

This will acknowledge receipt of your letter of August 3, 1966, which reads as follows:

"I would appreciate your advising me of your opinion on the following set of facts:

"A Kentucky lending institution is approached at their office in Kentucky, by a Virginia resident who negotiates a loan at the company's office in Kentucky. The loan contract specifies 7% interest and an annual service charge of 2%. To secure the said loan, the Virginia resident, while at the office of the lender in Kentucky, executes a deed of trust on Virginia real estate. On default action must be brought in Virginia.

"Question: Assuming that the interest rate and the service charge is legal in the State of Kentucky, is the same enforceable in the State of Virginia where the borrower resides even though the terms as to interest rate and service charge, under Virginia law would be illegal by Virginia statute?"

In my opinion, upon the basis of facts presented, your question must be answered in the affirmative. The contract was made in Kentucky and its place of performance is in that State. Therefore, in my opinion, the fact
that the rate of interest would be usurious in Virginia is no bar to enfor-

cement of the deed of trust in the event of default. See, Building and Loan As-

sociation v. Tinsley, 96 Va. 322; Michie's Jurisprudence, Vol. 4, Conflict of Laws,

Article 25, p. 54.

CONSERVATION AND ECONOMIC DEVELOPMENT—Forestry—
Reseeding—Liability on both cutter and owner even with contract re-
quiring one to do so.

December 22, 1966

HONORABLE GEORGE W. DEAN
State Forester

This is to acknowledge receipt of your letter of December 19, 1966, in
which you request my opinion on the following questions which are set
forth in your letter as follows:

"The purchaser shall have 24 months from the date of this con-
tract to cut and remove timber, and any timber not so cut and re-
moved before that date will revert back to the grantors. The
grantors agree to pay the taxes on the property and to reseed with
young pine seedlings and/or poplar to meet the requirements of
the State Forestry Commission so that no seed trees will have to
be left.

"We recognize that sections 10-81; 10-82; and 10-83 of the Vir-
ginia Seed Tree Law provide exceptions to the requirements under
Sections 10-76 and 10-76.1.

"Our questions are these:

"(1) Can a mill operator place full responsibility on the land-
owner for compliance with the Seed Tree Law by use of the para-
graph noted above? (This assumes that the landowner did not
apply for and receive an alternate management plan as provided
under Section 10-83.)

"If the answer to Question Number 1 is yes,

"(2) a. Would the landowner's professed or actual ignorance of
the need to secure an alternate management plan prior to cutting
alleviate his responsibilities under the law?"

I quote from § 10-76, Code of Virginia (1950):

"Every landowner who cuts, or permits to be cut, or any person
who is responsible for cutting, or actually cuts, or any person who
procures another to cut, or any person who owns the timber at
the time of cutting and knowingly and wilfully allows to be cut,
for commercial purposes, timber from one acre or more of land
on any acre on which loblolly pine . . . shall . . . reserve and leave uncut
and uninjured not less than four cone-bearing loblolly, shortleaf, pond or
white pine trees fourteen inches or larger in diameter . . . ." (Italics
supplied).

From what you say, the mill operator is the person or company which
actually cut the pine timber from the area and the landowner is the com-
pany or person who owned the timber at the time of cutting and has per-
mitted the pine timber to be cut. This being the situation, both the so-
called mill operator and landowner are amenable to prosecution under
§ 10-76 and § 10-79. The fact that they have entered into a contract in
which the landowner has assumed responsibility to reseed with young pine seedlings does not relieve the mill operator from criminal responsibility. Whether the cutting was knowingly and wilfully done is a question of fact and must be determined by the court hearing the case.

Therefore, in my opinion, Question No. 1 should be answered in the negative. Both parties should be charged with the violation of the statute if the Commonwealth's Attorney deems the evidence sufficient to justify prosecution. (Section 10-79.)

CONTRACTORS—Supplier and Installer of Crane—Classified as general contractor under § 54-113.

HONORABLE H. DOUGLAS HAMNER, JR., Director
Division of Engineering and Building

June 15, 1967

I am in receipt of your letter of June 12, 1967, in which you inquire whether or not a person, firm or corporation bidding on a contract to furnish, erect and install a gantry crane for the Virginia State Ports Authority would come within the definition of a general contractor set out in § 54-113 of the Virginia Code and be subject to the applicable provisions of Chapter 7, Title 54, of the Virginia Code. From our conversations of June 8, 1967, concerning this matter, I understand that the erection and installation of the crane in question would entail the construction of concrete and metal uprights, the foundations therefor, metal spans connecting the uprights and the suspension of the actual crane and arm from these structures.

In light of these circumstances, I am of the opinion that a person, firm or corporation bidding on the contract under discussion would come within the purview of § 54-113 of the Virginia Code. In this connection, I am forwarding to you a copy of two previous opinions of this office, dated November 7, 1957, and October 29, 1963, in which situations substantially similar to that which you present were considered and a similar conclusion reached. See, Reports of the Attorney General (1957-1958), p. 62; (1963-1964), p. 53.

CORPORATIONS—Doing Business—Foreign corporation may advertise in newspaper in this State and deemed to be not doing business in the State.

BANKS—Advertising—May advertise in newspaper in this State and not be doing business in the State.

April 14, 1967

HONORABLE WILLIAM M. LIGHTSEY
Member, House of Delegates

This is in reply to your letter of March 31, 1967, which reads in part as follows:

"Section 13.1-102.1 of the 1950 Code of Virginia, as amended, reads as follows:

"Without excluding other activities which may not constitute transacting business in this State, the investment by a foreign corporation in notes, bonds or other instruments secured by deeds of trust on property located in this State, the employment by it of
attorneys at law, surveyors and appraisers in connection there-
with, the servicing and collection thereof in this State through
corporations authorized to do business in this State, the acquisi-
tion of such property at foreclosure sale, and the holding of title
thereto for a reasonable time, while liquidating such investment,
shall not be deemed transacting business in this State, provided
the foreign corporation does not maintain an office or other place
of business in this State, and provided, further, that the foreign
corporation does not advertise for business in this State."

"The Riggs National Bank, of Washington, D. C., is advertising
in the Northern Virginia Sun, Arlington, as per copy attached.
This bank does not maintain an office or other place of business
in Virginia, and the business transactions are concluded in the Dis-
trict of Columbia.

"The Northern Virginia Sun, although having a circulation
primarily in Virginia, sends through the mail copies of the paper
to subscribers in the District of Columbia.

"Does this advertising by the Riggs National Bank as exemplified
by the ad submitted, constitute a violation of the foregoing section
of the Code, which among other provisions contains the following
language—'and provided, further, that the foreign corporation
does not advertise for business in this State'?"

In my opinion, mere advertising in the Northern Virginia Sun by the
Riggs National Bank, with no other activity in Virginia, does not con-

COUNTIES—Appropriations—May not be made for consultants and pro-
motional expenses of development corporation.

INDUSTRIAL DEVELOPMENT—Counties—Appropriation may not be
made for organization of development corporation.

HONORABLE WADE S. COATES
Commonwealth's Attorney for Tazewell County

This is in reply to your letter of August 3, 1966, which reads as follows:

"Clinch Development Corporation, a stock corporation, was char-
tered by the State Corporation of Virginia in May, 1966 with an
authorized capital of $500,000.00.

"Its sole purpose is to promote the Industrial Development of
the Upper Clinch Valley with its particular emphasis in Tazewell
County. The Corporation is now soliciting for stock subscriptions
to be payable on call of the corporation. The Corporation is now
in contact with two prospective companies who are interested in
locating industrial plants in Tazewell County.

"The Clinch Development Corporation has secured the services
of professional consultants in order to assist officers of the
Corporation in securing sufficient subscriptions to meet the au-
thorized capital structure. None of the officers of the corporation
receive any salary and they are donating their own time and effort
without pay in order that the entire amount of subscriptions may
be available for Industrial Development.
The officers of the Clinch Development Corporation have asked the Board of Supervisors to appropriate the sum of $20,000.00 to defray the fees and expenses of the professional consultants and other promotional expenses. The Board of Supervisors evidence an interest and have referred the matter to me for study and advice to the Board.

It would appear that § 15.1-10.1 of the Code of Virginia of 1950, as amended, may authorize this appropriation as the section provides for the securing and promoting the industrial development of the county. However, it appears this section may be in conflict with Section 185 of the Constitution of Virginia.

I would appreciate your advising me as to your opinion whether or not Section 185 of the Constitution of Virginia or any other statute would prohibit the Board of Supervisors of Tazewell County from making such a grant.
does expenditure of those funds require action by the Board of Supervisors?

"May the County Treasurer pay warrants drawn on funds received as school construction loans from the Literary Fund and the Supplemental Retirement Fund without specific appropriation by the Board of Supervisors?"

You are referred to an opinion dated June 3, 1960, to Honorable C. Harrison Mann, Jr., Report of the Attorney General (1959-1960), at p. 66. Questions 8 and 9 submitted by Mr. Mann are similar to the questions presented by you. Question 8 relates to funds derived from a bond referendum. The answers to Mr. Mann's questions will be found at the bottom of page 70 of our opinion.

Although the question presented by Mr. Mann did not relate to funds derived from a loan from the Literary Fund and the Supplemental Retirement Fund, the same answer would be applicable. Section 15-575 of the Code, referred to in the opinion to Mr. Mann is now § 15.1-160, and § 15-577 referred to in that opinion, is now § 15.1-162.

If there is a conflict between § 22-147 of the Code and the sections found in Title 15.1, the latter apply, since they were amended at the Extra Session of the General Assembly held in 1959.

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

ORDINANCES—Automobile Graveyards—Licensing—May regulate maintenance and operation if established after April 4, 1966.

October 11, 1966

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

This will reply to your letter of October 4, 1966, in which you present the following situation and inquiries:

"Some citizens of Montgomery County have become concerned about the establishment of an automobile graveyard which is more than 500 feet from a secondary road, and this apparently is in compliance with the automobile graveyard statute. They have expressed concern that the accumulation of these junked automobiles creates an unsightly and undesirable situation near a subdivision on the outskirts of the Town of Blacksburg, Montgomery County, Virginia.

"I have advised them that the graveyard complies with State laws in that regard, and they have now petitioned the Court to empanel a grand jury pursuant to Section 48-1 of the Code of Virginia, as amended, to inquire into whether the existence of this automobile graveyard is a nuisance.

"I am advised by the Commissioner of the Revenue that the operator of this business has not secured a business license. It is further my impression that this automobile graveyard or junkyard..."
REPORT OF THE ATTORNEY GENERAL

has been in existence since sometime before April 4, 1966, and, therefore, would probably not come within the provisions of Section 33-279.3 (f).

"My question, therefore, is:

"First: Does the issuance of a license to do business and compliance with the provisions of Section 33-279.3 preclude the inquiry into the question of the business being a public nuisance under Section 48-1 of the Code of Virginia?

"Second: Would the failure on the part of the operator of the automobile graveyard to secure a business license prior to April 4, 1966, cause this business to be within the provisions of Section 33-279.3(f)?

"Sometime after 1959, another automobile graveyard was commenced immediately adjacent to U. S. Route No. 11, and my predecessor in office instituted a misdemeanor warrant, but because the statute, as then written, did not provide for a punishment, this case was dismissed. The operator of this junkyard has not secured a business license for such, but continues to operate under a garage license. My question, therefore, is:

"Third: Would a junkyard which is immediately adjacent to a primary highway fall within the provisions of Section 33-279.3 (f), if the operator of such junkyard has secured a business license for the operation of a garage, and not for the operation of a junkyard?"

Your questions will be considered and discussed in the order stated:

In connection with your first inquiry, I am forwarding to you copies of two previous opinions of this office, dated September 30, 1960, and September 8, 1964, in which this office ruled that the General Assembly of Virginia—by enacting § 33-279.3 of the Virginia Code—had preempted the field with respect to the locating and fencing of automobile graveyards along public highways in the Commonwealth, leaving to the various political subdivisions of the State the power of taxing such establishments and regulating the manner of their maintenance and operation. See, Report of the Attorney General (1960-1961) p. 19; (1964-1965) p. 60. In light of the views expressed in these opinions, I believe that a person who (1) has secured a license to operate an automobile graveyard or junkyard and (2) has complied with the provisions of § 33-279.3 of the Virginia Code may not lawfully have his establishment declared a public nuisance pursuant to the provisions of § 48-1 et seq., upon any ground involving the fencing or location of such establishment. However, I do not believe that the existence of the two conditions specified in the preceding sentence would preclude inquiry by a special grand jury into the question of whether or not such business constituted a public nuisance because of the manner of the maintenance or operation of such establishment.

With respect to the second and third inquiries, I am of the opinion that an establishment which (1) constitutes an "automobile graveyard" or a "junkyard" within the definitions set forth in §§ 33-279.3(b)(2) and 33-279.3(b)(3), respectively, of the Virginia Code, and (2) was in existence prior to April 4, 1966, would not fall within the scope of § 33-279.3(f) merely because its operator failed to secure a proper business license for such establishment prior to April 4, 1966.
COUNTIES—Bond Issues—May finance any project defined in § 15.1-172(h), which includes hospitals.

BOND ISSUES—Counties—May finance any project defined in § 15.1-172(h), which includes hospitals.

January 3, 1967

HONORABLE W. P. PARSONS
Commonwealth's Attorney for Wythe County

This will acknowledge receipt of your letter of December 23, 1966, which reads as follows:

"I request your opinion on whether or not Wythe County may sell its bonds pursuant to § 15.1-185, et seq., of the Virginia Code in order to raise money to contribute to a nonstock, nonprofit charitable hospital proposed to be constructed in Wythe County. Enclosed is a copy of the Articles of Incorporation of the hospital in question, Wythe County Community Hospital. The charter was granted by the State Corporation Commission on August 12, 1966."

Section 15.1-25 of the Code authorizes counties to furnish aid to nonprofit organizations conducting a hospital which may be by gifts of real or personal property, or money to be appropriated from their respective treasuries. Section 15.1-185 authorizes counties in the manner stated therein and in subsequent sections of Article 3, Chapter 5, Title 15.1, to finance any project by the issuance of bonds. "Project" is defined in § 15.1-172(h) of the Code, and you will note that it provides that the word "project" means any improvement or undertaking for which the county is authorized by law to appropriate money and, further, that the word "hospitals" is included as one of the various projects that may be financed by the issuance of general obligation bonds.

In light of the provisions of the statutes cited herein, I am of the opinion that your question must be answered in the affirmative.

COUNTIES—Executive Secretary—May issue licenses but not collect fees.

TAXATION—License for Trailer Camps—County executive secretary may issue but not collect fees.

January 31, 1967

HONORABLE A. D. JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of January 30, 1967, in which you state that the board of supervisors of your county is considering the adoption of a trailer camp ordinance to provide for the assessment and collection of license taxes under the provisions of Chapter 6, Article 1.1 of Title 35 of the Code. You state that the Board contemplates providing in the ordinance that the application for license shall be made to and issued by the County Executive Secretary. You raise a question as to whether or not the County Executive Secretary may be designated in said ordinance to receive the applications and issue trailer camp licenses because you doubt whether or not he qualifies as an officer of the county.

Section 35-64.2 of the Code reads as follows:

"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, or park any trailer on an individual lot not in a trailer park or camp in any political subdivision without first obtaining a license issued by the governing body of such political subdivision, or such officer of said political subdivision as might be designated by said governing body."

By reference to § 15.1-116 of the Code, you will observe that reference is made to the "tenure of office" and "duties of the office" of an Executive Secretary. While the Executive Secretary is not an officer within the meaning of the Constitution or the generally accepted use of that term, I believe he is the type of officer that may be designated for the purpose of issuing these licenses.

However, I wish to direct your attention to the fact that the county treasurer is the only official of the county who may collect the license fees and, therefore, the ordinance should provide for the payment of the license fees to the treasurer and the presentment of a receipt therefor to the County Executive Secretary when applying for a license.

In this connection, you are referred to two opinions of this office (Report of the Attorney General (1957-1958), at pp. 49 and 50). These opinions are dated April 24, 1958, and April 17, 1958, and were furnished to Honorable Stanley A. Owens, Commonwealth's Attorney of Prince William County. Although these opinions involve the collection of the license tax on the sale of automobile tags by the county, it is, nevertheless, applicable to any license tax that may be provided by county ordinance.

If you do not have the 1957-1958 Volume of our Reports, I will be glad to furnish you with copies of these opinions. In these opinions we point out that under § 58-958 of the Code only the treasurer may collect "the levies and other amounts payable into the treasury of a political subdivision."

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COUNTIES—Immune from Tort Liability.

TORTS—Counties—Immune from liability.

September 29, 1966

HONORABLE R. E. TRICE, JR.
Commissioner of the Revenue of Louisa County

This will acknowledge receipt of your letter of September 27, 1966, which reads as follows:

"My wife, who is deputy Commissioner of the Revenue, had a bad fall down the back steps of the Court House and is still under the doctor's care.

"The accident happened on July 29th, and of course there are considerable doctor bills, medicines and X-rays, etc.

"I have been told the county does not carry any liability insurance and I would like to know if the county is not liable for the bills in connection with this accident."

This office has previously held that a county may not be held liable for damages sustained by officers and employees of the county. The Supreme Court of Virginia, in the case of Mann v. County Board, 199 Va. 169, has held that a county is immune from such liability and cannot waive such immunity.

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COUNTIES—Imposition of General Admissions or License Tax.

TAXATION—General Admissions or License Tax—Imposition by county.

December 16, 1966

HONORABLE ROBERT D. HUFFMAN, Clerk
Board of Supervisors of Page County

This will acknowledge receipt of your letter of December 13, 1966, which reads as follows:

"We have been requested by the Board of Supervisors of Page County, Virginia, to procure an official opinion from you on whether or not the Board of Supervisors may legally impose a general admissions tax or a County license tax in Page County, including the incorporated towns therein, measured by the gross receipts of certain enterprises within the County and towns, charging admissions, pursuant to the provisions of § 58-266.1 of the Code of Virginia, as amended, or any other applicable statute."

There is no general statute authorizing counties to impose an admission tax, and for that reason the provision with respect to admission taxes contained in § 58-441.49(a) would not apply to your county.

With respect to a county license tax, measured by the gross receipts, such tax may be imposed under the provisions of § 58-266.1 of the Code. However, such tax may not be imposed upon a business or profession in the limits of a town, if the town imposes a town license tax on the same privilege. See, paragraph (7) of § 58-266.1.

Your attention is directed to §§ 58-283, 58-284.1 and 58-302.1, in which the imposition of license tax is authorized, subject to any limitation that appears in §§ 58-302.1 and 58-441.49 of the Code.

COUNTIES—May Not Pledge Credit to Secure Loan to Hospital.

CITIES—City of Covington—May not pledge credit to secure loan to hospital.

May 24, 1967

HONORABLE C. W. ALLISON, JR.
Commonwealth's Attorney for Alleghany County
HONORABLE WILLIAM E. CARSON
City Attorney for the City of Covington

This is in reply to your letter of April 27, 1967, supplemented by information contained in your letter of May 11, 1967. The letter of April 27, 1967, reads as follows:

"The Alleghany Memorial Hospital was created pursuant to an Act of the Assembly of 1941, and is governed by a commission appointed by the Board of Supervisors of Alleghany County and the City Council of the City of Covington.

"The hospital commission proposes to borrow the sum of $100,000.00 to be used in the construction of a proposed addition to the hospital. Under the act creating the commission, it cannot pledge the hospital property to secure its obligations, and has asked that the Board of Supervisors of Alleghany County and the City Council of the City of Covington to pledge the full faith
and credit of the city and the county, respectively, to secure this obligation. This pledge may be either in the form of a formal resolution adopted and filed with the lending institution, or actual endorsement of the note issued in evidence of the debt, the payment of which may extend over a period of years.

"Question: Does the City Council and the Board of Supervisors have the authority to pledge the full faith and credit of the county and the city to secure said note for $100,000.00, either in the form of a resolution or by actual endorsement of the note without the same being submitted to a referendum of the voters?

"Question: Would the said council and board have the authority to endorse the said note or to pass the said resolution if the note was so drawn as to mature within a 12-month period from the date of its issuance, with the understanding with the lending institution that said note could be renewed annually for an additional 12-month period?

"These queries submitted to you jointly by the City of Covington and the County of Alleghany through its City Attorney and the Commonwealth’s Attorney.”

In your letter of May 11, 1967, you advise that the Acts of Assembly authorizing the creation of the Alleghany Memorial Hospital are found in the Acts of 1946, at page 577.

In my opinion, the City is prohibited by its charter from pledging the credit or endorsing the note which you describe. Thus, the answer to both questions with reference to the City is in the negative. The second paragraph of Section 5.12 of the charter of the City of Covington, as amended by the Acts of Assembly of 1958, at page 80, reads as follows:

"Bonds or notes evidencing short term loans for the purpose of paying current expenses or debts of the City may be issued, when authorized by the Council; provided, however, that any such bonds or notes may be renewed from time to time but shall mature not later than twelve months after the date of issue, and the aggregate amount thereof outstanding at any one time shall not exceed an amount equal to twenty-five per centum of the revenue from all sources collected by the City in the preceding fiscal year.”

In my opinion, the proposed pledge or endorsement for securing the obligation is inconsistent with this provision. The City is limited to “short-term loans for the purpose of paying current expenses or debts of the City.” The proposed pledge or endorsement, in my opinion, involves much more than a mere “short-term loan” for the payment of “current expenses or debts.” It is, therefore, prohibited by this charter provision. It would appear unnecessary to comment upon the question of submission to the voters. In my opinion, the City cannot make the proposed pledge or endorsement regardless of whether submission to the voters is required.

It is my further opinion that the County Board of Supervisors is also prohibited from making the proposed pledge or endorsing the proposed note. Refer to §§ 15.1-545 and 15.1-546 of the Code. The latter section specifically prohibits the “extension of any such loan.” That section also speaks of “temporary loans.” Again, it would appear that what is proposed is something other than a “temporary loan,” within the meaning of § 15.1-546, and would involve loan renewals or extensions prohibited by § 15.1-546. Again, it is unnecessary to comment upon the question of submission to the voters, since, in my opinion, the County may not make the pledge or endorse the note whether or not the question is submitted to the voters.
In summary, it is my opinion that neither the City Council nor the Board of Supervisors may pledge the respective credits of the City and the County, nor may they endorse any note in connection with the proposal contained in your letter.

COUNTIES—Open-Space Land Act—Assessment of easement—At Market value for tax purposes.

TAXATION—Easements on Open-Space Land—Assessment to reflect change in market value.

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

You inquired whether it is possible for scenic and development easements to be sold to Loudoun County in such a way that the fair market value of the land would correspond to its value for agricultural uses only, and that the tax assessment could be correspondingly limited.

Section 169 of the Constitution provides: "Except as hereafter provided, all assessments of real estate . . . shall be at their fair market value, to be ascertained as prescribed by law . . . ."

Section 10-152 of the Code of Virginia (1950), as amended, part of the Open-Space Land Act enacted by the 1966 General Assembly, provides that a county or other public body may acquire "any interests or rights in real property that will provide a means for the preservation or provision of permanent open-space land" and may "designate any real property in which it has an interest to be retained and used for the preservation and provision of open-space land."

Section 10-155 of the Code provides: "Where an interest in real property less than the fee is held by a public body for the purposes of this chapter, assessments made on the property for taxation shall reflect any change in the market value of the property which may result from the interest held by the public body."

This clearly covers the situation where a county or other public body acquires an easement in real estate which prohibits the land from being used for certain purposes, such as housing development or other non-agricultural purposes.

The fair market value of land within the meaning of Section 169 of the Constitution is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it and is bought by one who had no necessity of having it. Tuckahoe Woman's Club v. Richmond, 199 Va. 734 (1958); American Viscose Corporation v. Roanoke, 205 Va. 192 (1964). In First and Merchants National Bank v. Amherst County, 204 Va. 584 (1963), the court held that an assessment was erroneous which failed to take into account the limited interest held by the taxpayers under the conveyance to them, which reserved an easement and otherwise severely restricted effective use of the property.

Thus it can be seen that an easement greatly limiting the use of land—such as one obtained by a county under the Open-Space Land Act—might well greatly affect the fair market value of property. This being so, in my opinion, the provisions in § 10-155, requiring assessments to reflect any change in value resulting from the interest held by the county, is a valid provision prescribing by law how to ascertain fair market value within the meaning of Section 169 of the Constitution.

September 23, 1966
COUNTIES—Ordinances—Regulating construction of buildings, installation of plumbing, electrical and heating equipment.

COUNTIES—Building Permits—§ 58-766.1 applies solely to obtaining a permit.

ORNIDANCES—Counties—Establishing building, plumbing, electrical and heating equipment codes.

November 18, 1966

HONORABLE WILLIAM W. JONES
Commonwealth's Attorney for Nansemond County

This will acknowledge your letter of November 16, 1966, in which you state that the county of Nansemond is considering the adoption of building, plumbing, electrical and gas codes for the county. You refer to several sections of the Code [of Virginia (1950), as amended], including §§ 15.1-864 and 15.1-522. Section 15.1-864 would not be applicable since this is merely a charter provision that may be inserted by reference in municipal charters (see, Board of Supervisors v. Corbett, 206 Va. 167).

I believe that §§ 15.1-510.1 through 15.1-510.5 of the Code authorize the county to adopt codes relating to the construction of buildings, the installation of plumbing and the installation of electrical facilities and gas heating equipment, as well as other types of heating equipment. These sections are new, having been enacted by Chapter 290 of the Acts of Assembly (1966).

With respect to the fees that may be established in an ordinance adopting any of these codes, there is no express provision. In my opinion, reasonable charges of that nature may be prescribed.

The last paragraph of your letter reads as follows:

"I would also appreciate your opinion as to whether or not the statutory limit for the obtaining of a building permit, as provided by § 58-766.1, prevents the charge for inspection fees provided for in a county Building Code, or whether this section applies solely to the obtaining of the permit from the Commissioner of Revenue."

In my opinion, this section applies solely to obtaining the permit.

COUNTIES—Ordinances—Regulation of trailer camps.

TRAILER CAMPS—Regulation and Inspection.

July 25, 1966

HONORABLE MACK I. SHANHOLTZ, M.D.
Commissioner of Health

In your letter of July 20, 1966, you inquire whether Article VI, paragraph 2, of the proposed Bath County trailer ordinance is in conflict with § 35-66 of the Code of Virginia (1950), as amended, or any other provision of State law.

Article VI of the proposed ordinance, entitled "Inspection", provides:

"1. The Health Official is hereby authorized and directed to make inspections to determine the condition of trailer lots, trailer camps or non-conforming trailer sites in order that he may per-
form his duty of safeguarding the health and safety [of] occupants of such camps and of the general public.

“2. The governing body may designate other persons to inspect trailer camps or non-conforming trailer sites and such other persons so designated by the governing body shall have like authority to inspect the same as has the Health Official.”

Article I, §§ 2 and 9, of the proposed ordinance define “health official” as head of the Bath County Health Department or his designated deputy, and “governing body” as the Bath County Board of Supervisors and its duly authorized representatives.

Section 35-66 of the Code of Virginia states:

“All trailer camps shall, in order to protect the public health, comfort, safety and general welfare, be subject to inspection, regulation and control as to cleanliness and general sanitation. The State Board of Health shall provide for inspection of such camps.”

I am aware of no provision of law forbidding local authorities to provide for similar inspection. On the contrary, § 35-62 of the Code of Virginia expressly authorizes the governing body of any county “to regulate by ordinances the location and operation in the county of trailer camps,” and to require licenses. Section 35-62 further states that a governing body “may prescribe by ordinances the lots or areas of the county where such trailer camps may be located, may prescribe the size of the lots to be used for such trailer camps, may prescribe the water supply, sewage and garbage disposal facilities to be maintained at such trailer camps, provided such sanitary regulations are not in conflict with the lawful regulations of the State Board of Health, may prescribe safety measures for the heating facilities maintained in such trailers, and may prescribe such other measures as are reasonably necessary to protect the health, safety, and welfare of the people of the county and the occupants of such trailer camps.”

Therefore, provided the regulations found in the ordinance or adopted thereunder are not in conflict with State regulations, the county regulations, including Article VI, paragraph 2, are enforceable.

The adoption of an ordinance of this nature does not relieve the State Board of Health from providing for inspection of such camps as required by Section 35-66.

COUNTIES—Requirement of Scenic and Development Easements—Unconstitutional.

TAXATION—Land Use Tax—Unconstitutional.

July 29, 1966

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

This will acknowledge your letter of July 22, 1966, in which you enclosed a letter to you from Mr. Huntington Harris. The letter from Mr. Harris points out that a committee has been appointed by the Board of
Supervisors of Loudoun County to investigate the possibilities of imposing a land use tax—that is, a tax which would be related to the income it produces rather than on the market value. Mr. Harris concedes that a land use tax is prohibited under the present provisions of the State Constitution, but suggests a plan may be devised and put into operation whereby the sale of scenic and development easements to the county on agricultural land, in such a way that the fair market value of the land so treated would correspond to its value for agricultural uses only and the tax upon it would be correspondingly limited to its income producing capacity. Mr. Harris presents the following question:

“In the absence of any general legislation on the matter, does the County have within its present powers any right to acquire such easements, or must the whole matter be deferred to the next session of the State Legislature?”

I can find no statutory authority upon which to base an affirmative answer to the first part of this question. Furthermore, any scheme whereby the public funds of a county would be used for the purpose of aiding private property owners in such way would probably be contrary to the provisions of Section 185 of the Constitution.

I enclose copy of an opinion dated December 15, 1965, to Senator FitzGerald Bemiss, which may be of interest to you and your committee, although it does not relate to the exact question under consideration here.

COUNTIES—Sanitary Districts—Bonds valid obligation of county.

SANITARY DISTRICTS—Bonds—Valid obligation of county.

August 1, 1966

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney for Augusta County

This is in reply to your letter of July 29, 1966, requesting my opinion with respect to the question presented in a letter from Mr. Thomas R. Nelson, dated July 25, 1966. The question is:

“... whether or not a single $170,000.00 bond with interest payable annually along with an amortization payment on the debt to mature the bond in thirty-four years would be a valid obligation of Augusta County and the sanitary district created pursuant to Chapter 2, Title 21 of the Code.”

Section 21-130 of the Code of Virginia provides in part that sanitary district bonds “shall bear interest at a rate not exceeding six per centum per annum, payable semi-annually, both principal and interest to be payable at such place or places as may be determined by the governing body ....”

Examination of authorities cited to Mr. Nelson by counsel for the Farmers Home Administration, copy of which was submitted to this office, indicates that annual payment of interest is permissible, and that the clause "interest at a rate not exceeding six per centum per annum, payable semi-annually" simply fixes the maximum interest rate.

In 43 Am. Jur., Public Securities and Obligations, § 304, pages 520-21, it is stated:
"The general rule is that a political subdivision, under a statute authorizing a certain rate of interest per annum upon its obligations and securities, has the power to provide for such rate payable at intervals of less than a year, because a statutory provision for a certain rate per annum fixes only the rate and not the time for payment... On the other hand, it is held that a statute authorizing the issuance of bonds by a political subdivision, providing that the rate of interest should not exceed a stipulated per cent per annum and should be payable semi-annually, is not to be construed as requiring payment of interest semi-annually."

*Borner v. Prescott*, 136 N. W. 552 (Wis. 1912), involved a statute providing that bonds "shall bear interest not exceeding six per cent per annum payable semi-annually." The court sustained the validity of the bond issue with interest at four and one-half per cent, payable *annually*, because "the legislative intent was not to require the interest to be paid semi-annually, but to limit it so that the amount paid for use of money borrowed should not exceed semi-interest at the rate named."

The *Borner* case was cited in *Rands v. Clarke County*, 139 P. 1090 (Wash. 1914), applying a statute providing that bonds could "bear interest at a rate not exceeding six per cent per annum, payable semi-annually." The court said:

"Manifestly, it was the legislative intent by this provision of the statute to limit the rate of interest for which bonds could be lawfully issued, not to fix a hard and fast rule as to the character of the bonds that could be issued. Bonds which do not exceed the statutory rate of interest are therefore lawful, notwithstanding the interest thereon may be payable annually instead of semi-annually."

In light of these authorities, in my opinion, the answer to the question is in the affirmative.

**COUNTIES—Taxation—Not to make special assessment on town that is part of county school system for use of schools.**

**BOARDS OF SUPERVISORS—Special Levy on Town for Schools—Not to assess town that is part of county school system for use of schools.**

**SCHOOLS—Town Cannot be Required to Contribute to County School Fund.**

*Honorable Edward P. Harrow*
Commissioner of the Revenue of Middlesex County

October 26, 1966

This will acknowledge receipt of your letter of October 25, 1966, which reads as follows:

"The County of Middlesex is contemplating the adoption of a local merchant and professional license tax. In Middlesex County there is a town, namely Urbanna, which has a town merchant and professional license tax which the town is eliminating thereby enabling the county to adopt this tax which would be imposed on the entire county. As a result of the town eliminating its tax, the county is attempting to arrive at some solution whereby the
town can be reimbursed by the county for the loss of revenue it will sustain.

"A question has arisen as to whether or not the county has the authority to assess the town of Urbanna for its children who are attending the Public Schools of Middlesex County. The town has no school system and it is thought by the officials of Middlesex that the above can be done. We would, however, appreciate an opinion from your office just as soon as possible relating to this matter."

The answer to your question is in the negative. As you point out, the town of Urbanna is not a separate school system and, therefore, it is a part of the school system of Middlesex County.

In this connection you are referred to §§ 22-218 and 22-219 of the Code. You will note that under § 22-218 it is provided that the public schools in each county shall be free to each person who comes within the age limit set forth therein. Section 22-219 relates to the power to adopt regulations with respect to tuition charges against those persons who do not come within the definition set forth in § 22-218 of the Code.

There is no statute under which the board of supervisors may require the town of Urbanna, through its governing body, to make any contribution or payment to the county school fund.

COUNTIES—Training Facilities for Police—Joint establishment and maintenance.

February 10, 1967

HONORABLE C. HARRISON MANN, JR.
Member, House of Delegates

This will acknowledge your letter of February 8, 1967, in which you refer to an opinion issued by this office on January 11, 1966, to you (Report of the Attorney General, 1965-1966, at p. 71). In that opinion we stated that under the provisions of § 15.1-21 of the Code the counties mentioned in your inquiry could jointly maintain a training facility for the police force of those counties, provided each of the counties was authorized to establish and maintain such a facility alone.

You have cited Section 2 of Chapter 160, Acts of General Assembly (1946), which, under the provisions of Section 1 of the same Act, applies to Arlington County. Said Section 2 reads as follows:

"The said county board or other governing body of such county establishing such a police department shall have power to make provision for financing said department in the general county levy, for the retirement and relief of the members of said police department, and shall have full power to do all things deemed by said board advisable or necessary to establish, organize and administer said department and to carry out the provisions of this act."

You have also cited Section 2 of Chapter 361, Acts of Assembly (1940), which applies to Fairfax County, and request my advice as to whether or not under the provisions of these two sections the counties of Arlington and Fairfax separately would have the power to establish and maintain a facility for training their police force.

In my opinion the two provisions cited by you are sufficiently broad to enable the board of supervisors separately to establish a training fa-
ility for the purpose of carrying out the provisions of the respective Acts. You request my advice, in the event my answer to your first question is in the affirmative, whether "these political subdivisions assume, since § 15.1-21 provides (in subsection (d)(2)) that an agreement between two or more political subdivisions may provide for 'the manner of acquiring, holding and disposing of real and personal property used in the joint or cooperative undertaking,' that this would permit the political subdivisions to acquire and hold jointly the police training facility real property and the construction thereon located in one of those political subdivisions?"

The answer to this question is in the affirmative.

COUNTIES—Urban County Executive Form—Magisterial Districts—Not abolished under this form of government.

JUSTICE OF PEACE—Urban County Executive Form of Government—Magisterial districts not abolished.

February 14, 1967

HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

This will acknowledge receipt of your letter of February 10, 1967, stating that Fairfax County has adopted the Urban County Executive Form of government established under the provisions of Articles 1 and 2, Chapter 15, Title 15.1 of the Code of Virginia. The board of county supervisors has created eight service districts in the manner set forth in § 15.1-787 of the Code. You refer to the second paragraph of this section and request my advice as to whether justices of the peace shall be elected from these districts. The paragraph referred to reads as follows:

"These districts shall serve as (a) the electoral divisions for elections of members of the urban county board of supervisors, (b) sanitary districts under the provisions of article 7 (§ 15.1-791), and (c) shall have such other functions as are specified herein."

In my opinion, the justices of the peace must be elected from the several magisterial districts of the county. These districts are not abolished under the Urban County Executive Form of Government. Apparently only those counties adopting one of the forms of government provided in Articles 2 and 3, Chapter 14, Title 15.1 may abolish magisterial districts.

COUNTIES, CITIES AND TOWNS—Acquisition of Property for Public Medical Center—Joint venture authorized.

HEALTH—Public Medical Centers—Established by joint political subdivisions—Board of Health sole State agency to administer Federal construction funds.

October 6, 1966

HONORABLE W. L. PERSON, JR.
Commonwealth's Attorney for the City of Williamsburg

This will reply to your letter of October 3, 1966, which reads as follows: "The County of James City and the City of Williamsburg are
planning to purchase jointly a parcel of property located in the City of Williamsburg. The purpose of the joint purchase is to provide a site for a joint Medical Center which will be operated by the local Public Health Service and the State Health Department. The Federal Government is expected to share in the costs expended for the purchase of said property and the construction of the building.

* * *

"I would appreciate your opinion as to whether the County and City may purchase property jointly for a Medical Center in view of your opinion dated September 20, 1962, appearing in *Opinions of the Attorney General* (1963) in regard to joint ownership of a trash dump. If your answer to the foregoing is that the City and County may purchase property jointly for the aforesaid purpose, is it mandatory that the governing bodies proceed under Section 32-276 of the Code of Virginia (1950, as amended)?"

In this connection, I am of the opinion that the joint acquisition of property for the purpose in question would not be precluded by the views expressed or the positions taken in the prior opinion of this office to which you refer. See, Report of the Attorney General (1962-1963), p. 36. On the contrary—were it not for the existence of § 32-276, *et seq.* of the Virginia Code—it would appear that § 15.1-510 prescribing the general powers of counties to adopt measures designed to secure and promote the health, safety and general welfare of the inhabitants thereof, the comparable provisions of the charter of the City of Williamsburg and the general provisions of § 15.1-21 authorizing the joint exercise of powers by political subdivisions, would be sufficiently broad to empower the City of Williamsburg and the County of James City to initiate the project under consideration.

However, it appears that the General Assembly has made express provision for the establishment and operation of medical centers by two or more political subdivisions in Chapter 14 of Title 32 of the Virginia Code. This enactment sets forth a comprehensive and detailed statutory scheme for the establishment, construction, administration and operation of hospitals or health centers by two or more political subdivisions. In light of the fact that the General Assembly has accorded the subject in question specific consideration and prescribed a precise procedure to be followed in this field, I am constrained to believe that the governing bodies of the various political subdivisions of the Commonwealth must comply with the provisions of §§ 32-276, *et seq.* of the Virginia Code in the joint establishment and operation of medical centers. This would appear to be particularly true in view of the fact that the general powers conferred upon counties by § 15.1-510 of the Virginia Code must be exercised in a manner "not inconsistent with the general laws of this State" and in view of the further circumstance that the State Board of Health is designated by §32-290 as the sole agency of the State to accept, allocate and disburse federal grants for the construction of nonprofit hospitals and related facilities.
COUNTIES, CITIES AND TOWNS—City of Covington and County of Alleghany—May not subsidize ambulance service of hospital.

HOSPITALS—Alleghany Memorial Hospital—Ambulance service may not be subsidized by City of Covington and County of Alleghany.

June 7, 1967

HONORABLE C. W. ALLISON, JR.
Commonwealth’s Attorney for Alleghany County

This is in reply to your letter of May 11, 1967, regarding the Alleghany Memorial Hospital. Your letter reads in part as follows:

"The Alleghany Memorial Hospital which is a creature of the Acts of Assembly of 1946, page 577, has created an ambulance service under the theory that it will be operated at a loss and asked the governing bodies of Covington and Alleghany County to subsidize its loss.

"I realize that under this act and existing statutes, and in particular § 15.1-25 of the Code, governing bodies may make gifts to hospitals, but my query is would they be authorized to enter into a perpetual agreement whereby they would subsidize any losses that occur from the operation of such a service?"

In my opinion, the two political subdivisions, the City of Covington and the County of Alleghany, may not enter into the perpetual agreement subsidizing ambulance service losses as proposed in your letter.

Section 4 of the Acts of Assembly of 1946, Chapter 344, page 578, authorizing the creation of the Alleghany Memorial Hospital, provides:

"The political subdivisions for which the commission is created are hereby authorized to make appropriations to the commission from available funds, or from funds provided for the purpose by bond issues, for the construction, improvement, maintenance and operation of any hospital or health center operated or proposed to be operated by the commission."

This Act was amended by Acts of Assembly of 1950, Chapter 174. The Acts of 1946 and 1950 are codified as Chapter 14, Title 32 of the Code of Virginia (1950). The section quoted above is § 32-281 of the Code. It seems clear that the proposed perpetual agreement involves neither appropriations by the city and county from "available funds," nor does it involve any bond issue. The acts creating the hospital commission authorize these two methods as the only means by which the political subdivisions involved may finance such a hospital. A perpetual agreement would involve a commitment of funds not yet available, whereas the Act requires that appropriations be from available funds. Obviously, no bond issue is contemplated. Thus, what is proposed is an indebtedness not authorized by the above section.

Secondly, I find no provision of general law or of the charter of the City of Covington which would permit the proposal. In fact, provisions which I do find negate any authorization for the proposal. As to the county, reference is made to §§ 15.1-545 and 13.1-546, dealing with means by which counties may become indebted. Reference is also made to § 5.11 of the charter of the City of Covington, specifying the means by which the city may become indebted. As indicated, entry into the proposed perpetual agreement would involve the incurrence of indebtedness. I find nothing in the provisions of general law or the city charter which would authorize this means of indebtedness on the part of the city or county.
COUNTIES, CITIES AND TOWNS—Contiguous—Construing.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This is in reply to your letter of June 21, 1967, in which you request my opinion as to whether the Cities of Newport News and Norfolk are contiguous within the meaning of § 47-1 of the Code of Virginia.

You have reference to paragraph (3) of § 47-1, which is as follows:

"A notary for a city shall also have authority to act as such in counties and cities contiguous thereto, and a notary for a county shall also have authority to act as such in cities contiguous thereto."

In the interpretation of a word used in a statute but not defined by statute it has been held that the principal or primary meaning should be applied. The word "contiguous," according to usual lexicon definition, means "touching" or being in "actual contact." Further, it is so considered in 21A M. J., Words and Phrases, p. 261, citing the case of Holston Salt and Plaster Co. v. Campbell, 89 Va. 396. That case, quoting Worcester with approval, states "What is adjacent may be separated by the intervention of some other object; what is contiguous must touch on one side."

Since the Cities of Newport News and Norfolk are separated by several miles, including the body of water known as Hampton Roads, I am of the opinion that they are not contiguous within the meaning of § 47-1 as it applies to the authority of a Notary appointed for one of such cities.

COUNTIES, CITIES AND TOWNS—Post Mortem Fee—How payment made.

POST MORTEM EXAMINATION—Fee—How payment made.

HONORABLE GEORGE S. CUMMINS
Commonwealth's Attorney for Nottoway County

In your letter of July 22, 1966, you ask whether the State should make any payment to a county for a medical examiner's fee for a post-mortem examination arising from the death of a resident of that county occurring in that county. You also ask whether the State should make full payment of this fee in the event the examination concerns the death of a person who is a nonresident of a county where the death took place.

Section 19.1-42 of the Code of Virginia (1950), as amended, provides that:

"For each investigation under this chapter, including the making of the required reports, the medical examiner shall receive a fee of fifteen dollars, this to be paid by the State, unless the deceased is a legal resident of the county or city in which his death occurred, in which event such county or city shall be responsible for the fee."

Clearly, when the medical examiner of a county investigates the death of a nonresident of the county, § 19.1-42 requires the entire $15.00 fee
to be paid by the state. The statute appears to state just as plainly that the full $15.00 should be paid by the county when the decedent was a resident of the county in which the death took place.

However, in the Appropriation Act, Item 294 (Acts of Assembly, 1966, page 1475) the legislature, in appropriating money for post-mortem examinations, has provided "that, from the amount so set aside, the State shall reimburse cities and counties five dollars for each fifteen dollar fee paid by them pursuant to" § 19.1-42. Thus the State participates to the extent of one third of the cost of investigating deaths of residents.

COUNTIES, CITIES AND TOWNS—Subdivision Ordinances—Relating to deposit of funds for road construction.

SUBDIVISIONS—Ordinances—Deposit of funds for road construction by developer.

BOARDS OF SUPERVISORS—Subdivision Ordinances—Deposit of funds for road construction by developer.

HONORABLE ELSA B. ROWE
Treasurer of Northumberland County

January 31, 1967

This will acknowledge receipt of your letter of January 24, 1967, which reads as follows:

"I am enclosing a copy of a resolution passed by our Board of Supervisors at their meeting on January 23, 1967.

"Since the third paragraph of the resolution places the money on deposit to the Treasurer of Northumberland County I am asking if the interest on the certificate of deposit can be properly paid by the Bank of Northumberland, Inc., to American Central Corporation."

The resolution which was enclosed, reads as follows:

"Be it resolved by the Northumberland County Board of Supervisors at its regular monthly meeting on Jan. 23, 1967 at Heathsville, Virginia as follows:

"The American Central Corporation by its attorney Roland M. Dameron, Jr. deposited fifteen thousand six hundred dollars ($15,600.00) in a checking account in the Bank of Northumberland, Inc. to the 'Credit of Northumberland County Board of Supervisors', for the completion of roads in Sherwood Forrest Shores; and

"Whereas, the Board of Supervisors has this day approved the transfer of said funds from the said checking account to a saving account in the Bank of Northumberland, Inc. as follows: One year saving certificate payable to the Treasurer of Northumberland County for the completion of roads in Sherwood Forrest Shores, with the interest being paid annually to the American Central Corp.; and

"Whereas it is ordered that a copy of this resolution be furnished the Bank of Northumberland, Inc., American Central Corp. and Roland M. Dameron, Jr., Attorney.

"Roland E. Covington, Jr. Chairman of Board"
After discussing this question with the Honorable J. Gordon Bennett, Auditor of Public Accounts, I find that he has had some correspondence with one of the officials of your county regarding this matter and that apparently this deposit was made for the purpose of complying with the provisions of § 15.1-466(f) of the Code. Mr. Bennett states that he was of the opinion the procedure was contrary to the above Code section.

In the case presented, the deposit is made to the county treasurer and the certificate of deposit is interest bearing. Therefore, in my opinion, it is the duty of the treasurer to collect the interest. The statute involved does not contain any language authorizing the board of supervisors to require funds deposited to the credit of a county, or the treasurer thereof, to yield interest payable to private persons or corporations. If the facts are as Mr. Bennett understands them to be, the security required in paragraph (f) of § 15.1-466 should be provided by one of the statutory methods.

COURTS—Authority—May alter penalty of bonds of guardians or committees for incapacitated persons.

CLERKS—Bonds for Guardians or Committees—May not alter penalty unless original bond set by clerk.

HONORABLE DANIEL WEYMOUTH, Judge
Twelfth Judicial Circuit

June 9, 1967

I am in receipt of your letter of June 2, 1967, in which you present the following situation and inquiries:

"Having in mind your opinion of February 19, 1964, to Robert D. Huffman, Clerk of the Circuit Court of Page County—your Opinions and Report July 1, 1963 to June 30, 1964, page 41—relating to authority of Clerk to accept new or increased bond of a fiduciary without a court order, I am somewhat confused by the 1966 amendment to Section 26-3 of the Code (the second paragraph).

"We have before us in our Circuit a fairly large sum belonging to an incapacitated person in another Circuit. A guardian was appointed by the Court of Record pursuant to Section 37-140 of the Code in the place of residence of such incapacitated person and gave bond for $500.00, without surety, before the Court. This order dispenses with surety, the filing of an inventory as well as the duty to settle accounts. Several weeks thereafter the fiduciary (guardian) voluntarily appeared in the Clerk's Office of the Court of appointment and gave a new bond before the Clerk for $8,000.00 with corporate surety. According to the guardian the Judge of such Court contends no court order is necessary—that the second paragraph of Section 26-3 takes care of it—that the Clerk has such authority.

"Code Section 37-140 expressly provides 'shall give such bond as is required by the court or judge'.

"The first paragraph of Section 26-3 expressly provides for notice and definitely limits the procedure for new and additional bonds to the court with the court determining the penalty and surety.

"The second paragraph says 'Upon motion'. Can the motion be made before the Clerk? It further says 'a new bond may be given
before the court, or before the clerk thereof, in such penalty and with such sureties as may appear to the court or the clerk to be proper: Can the Clerk change the penalty?

"If the Clerk can take new bonds, etc., without court orders, then what is to prevent the Clerk from reversing the situation, that is, taking smaller new bonds without surety where the Court has already ordered a large bond with surety?"

Pertinent to a consideration of the questions you present are those provisions of §§ 37-140, 37-144 and 37-144.1 of the Virginia Code which prescribe:

"§ 37-140.—On petition of any person in interest to the circuit court of the county, or to any court having jurisdiction for the appointment of guardians or committees of infants or mentally-ill persons of the city, in which any person who by reason of advanced age or impaired health, or physical disability, has become mentally or physically incapable of taking proper care of his person or properly handling and managing his estate, resides, the court or the judge in vacation, after reasonable notice to such person and after hearing on the petition if convinced that he is incapacitated to the extent above-mentioned, may appoint some suitable person to be the guardian or committee of his person or property, and the guardian or committee shall have the same rights and duties which pertain to committees and trustees appointed under §§ 37-136, 37-138 or 37-141, and shall give such bond as is required by the court or judge.” (Italics supplied.)

"§ 37-144.—The court, or judge thereof in vacation, making such appointment shall take from such committee a bond in such penalty and with such surety as it may deem sufficient.” (Italics supplied.)

"§ 37-144.1.—Whenever in this title provision is made for the appointment of a committee or trustee by a court of record or the judge thereof, the clerk of such court shall also have the authority to take the required bond, and pass upon the sufficiency of the surety thereon.” (Italics supplied.)

In light of the language of the statutes italicized above, it seems clear (1) that a guardian or committee appointed by a court pursuant to § 37-140 of the Virginia Code must give such bond as is required by the court, (2) that the court must take from the appointed guardian or committee a bond in such penalty as it, i.e., the court, deems sufficient, and (3) that the clerk of the court is "also" authorized by § 37-144.1 to take the bond mentioned in §§ 37-140 and 37-144.1 and pass upon the sufficiency of the surety thereon. In this connection, it should be noted that the provisions of § 37-144.1 only authorize the clerk to take the required bond and pass upon the sufficiency of the surety thereon, and I am of the opinion that the phrase “required bond” means the bond required by the court, i.e., one in such penalty as the court has deemed sufficient. Section 37-144.1 of the Virginia Code does not, in my opinion, authorize the clerk of the court to fix the penalty of the bond, but only to take the bond in the penalty fixed by the court and pass upon the sufficiency of the surety thereon.

Section 26-3 of the Code of Virginia (1950), as amended, to which you refer, provides:

"The court under whose order or under the order of whose clerk any such fiduciary derives his authority, on the application of any surety or his personal representative, shall, or, when it appears proper on such report of the clerk or a commissioner or on
evidence adduced before it by any party interested, may, at any
time, whether such fiduciary shall or shall not have before given
bond, or whether he shall have given one with or without sureties,
order him to give before such court, or before the clerk thereof, a new
bond in a reasonable time to be prescribed by it in such penalty
and with or without sureties as may appear to it to be proper and
may, if such order be not complied with, or whenever from any
cause it appears proper, revoke and annul the powers of any such
fiduciary; but no such order shall be made unless reasonable
notice appear to have been given to such fiduciary by the com-
misssioner who made such report, or by the surety or his represen-
tative making the application aforesaid, or by the service of
a rule or otherwise; and no such order or revocation shall in-
validate any previous act of such fiduciary.

"Upon motion of any such fiduciary, surety or other party in in-
terest, a new bond may be given before the court, or before the clerk
thereof, in such penalty and with such sureties as may appear to the
court or the clerk to be proper; which new bond shall have the effect
provided by § 49-14." (Italics supplied.)

The italicized language of the above-quoted statute constitutes the
amendment inserted by the General Assembly in 1966. See, Acts of As-
sembly (1966), Chapter 328, pages 516-517. So far as the authority ap-
parently conferred by the amendatory language upon clerks of courts to
accept new bonds "in such penalty and with such sureties as may appear to the
... clerk to be proper" is concerned, I believe the amendment may reason-
ably be construed to confer such authority upon clerks with respect to
new bonds in those situations in which clerks of courts are authorized
by law to fix the penalty of the original bond. One such situation would be that
discussed in the prior opinion of this office to which you refer, i.e., pro-
bate matters, in which the clerk of a court is expressly empowered by
§ 64-73 to "appoint and qualify executors, administrators and curators of
decedents, and require and take from them the necessary bonds in the
same manner and with like effect as the court could do if in session."

In light of this view, it would appear that the 1966 amendment to § 26-3
has the effect of altering the conclusion expressed in that opinion, which—
as its date indicates—was rendered by this office prior to the adoption
p. 41. However, in light of the precise language of §§ 37-140, 37-144 and
37-144.1 authorizing the setting of the penalty of a bond only by the
court in those situations involving the appointment of guardians or com-
mittees for incapacitated persons as defined in § 37-140, I am constrained
to believe that the language of the 1966 amendment to § 26-3 should not
be construed to authorize clerks of courts to alter the penalty of a bond
which only the court—not the clerk—is authorized to set in the first in-
stance.

COURTS—Circuit Court of Nansemond—Each term of court is a regular
term.

COURTS—Regular Grand Jury Impaneled—One of statutory terms to be
designated by judge for such.

November 16, 1966

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

This will acknowledge receipt of your letter of November 14, 1966, re-
lating to §§ 17-127(5) and 19.1-147 of the Code. Under the first section
mentioned, the county of Nansemond will have four regular terms of court. You state that in the past, five terms of court were held each year and that the term in March was designated as the regular term, at which time a regular grand jury was impaneled.

You request my opinion as to—

"...whether or not Nansemond County Circuit Court still has to have one Regular Term, at which a Regular Grand Jury is summoned, or whether all of the terms are now Regular Terms. These sections on the terms of court and the section pertaining to Regular and Special Grand Juries are somewhat confusing and I would appreciate it very much if you will clarify this for me.

"I might add that heretofore at the March Term, which was designated as the term for the Regular Grand Jury, and which was known as our Criminal Term, civil cases could only be tried by consent of both parties. In other words, will all of our grand juries now be Regular Grand Juries or can the court still specify one term for the Regular Grand Jury?"

It seems clear from the wording of § 17-127(5) that each term of court in Nansemond County is, by statute, a regular term.

Under the provisions of § 19.1-147 of the Code, one of the statutory terms of court may be designated by the judge as the term during which a regular grand jury will be impaneled, and during the other terms special grand juries will be impaneled.

COURTS—Circuit—Terms—Change in number by order of judge.

July 25, 1966

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth's Attorney for Hanover County

In your letter of July 21, 1966, you ask whether the Circuit Courts of Hanover and Caroline Counties are required to hold six bi-monthly terms of court each year.

As you point out, in 1944 § 5893i was added to the Code of Virginia (1919), providing that "in each of the counties... comprising the Fifteenth Judicial Circuit... there shall be held five terms of the circuit court in each year, beginning as follows:... Hanover—third Monday in January, March, May, September and November... Caroline—Second Monday in February, April, June, October and December...."

Section 5893i was replaced by § 17-127 of the Code of 1950, which provides in part:

"Unless otherwise provided,... in each of the counties there shall be held bimonthly terms of the circuit court of such county... the judge of the court may, in any county in which more than five terms are provided, by an order to be entered on the common-law order book of the court, omit one of the terms thereof during each year, unless the public business shall require that all of the terms be held for the proper transaction of business. The number of terms of the courts and the days for the commencement of the same shall be as fixed by law at the time this Code takes effect...." (Emphasis added.)

The last clause quoted appears to provide that the number of terms shall not be changed from the law in effect at the time the 1950 Code became effective; that is, as stated in § 5893i of the prior Code.
REPORT OF THE ATTORNEY GENERAL

Since this statute might be construed otherwise, however, it would seem advisable to eliminate any chance of confusion by entering orders omitting one of the bi-monthly terms for each court, as permitted by § 17-127. This may not be done retroactively. *Virginia Beach Development Company v. Murray*, 113 Va. 692, 75 S.E. 81 (1912).

**COURTS NOT OF RECORD—Recording Preliminary Hearing—Section 17-30.1 not applicable.**

**CRIMINAL PROCEDURE—Preliminary Hearing—Recorded if requested.**

**September 27, 1966**

**HONORABLE JOSEPH M. WHITEHEAD**
Commonwealth's Attorney for Pittsylvania County

This will acknowledge receipt of your letter of September 10, 1966, referring to § 17-30.1 of the Code of Virginia and requesting my advice as to whether or not this section allows payment for the recording of evidence and incidents of trial at a preliminary hearing by a court reporter.


You will note, however, that we called attention to § 19.1-105 of the Code and also to § 14.1-184 and stated that the expense in this connection could be paid out of the criminal fund provided in § 19.1-315. In this connection, I suggest that you examine two recent cases as follows: *Cabiness v. Cunningham*, 206 Va. 330, and *Thacker v. Peyton*, 206 Va. 771. In light of these cases, if a defendant at a preliminary hearing should request that a recording be made of the testimony it would appear that it might be advisable to comply with this request.

**COURTS—Not of Record—Saturday closing at discretion of judge.**

**August 18, 1966**

**HONORABLE HAROLD B. SINGLETON**
Judge, Amherst County Court

This is in reply to your letter of August 16, 1966, in which you request my advice as to whether or not it is necessary to obtain the permission of the board of supervisors in order to close the county court on Saturdays. You state that a member of the board of supervisors has an opinion from someone to the effect that the board's permission is necessary.

Section 16.1-31 of the Code, to which you refer, does not require the consent of the board of supervisors, but specifically states that whether or not the office shall be closed is within the discretion of the judge of the court.

Accordingly, I am of the opinion that no consent of the board of supervisors is required.

No doubt the information furnished a member of the board of supervisors was based upon the provisions of § 17-41 of the Code which relates
to clerks' offices of courts of record and which provides that the board of supervisors must give its consent before such clerks' offices can be closed on Saturdays.

CRIMES—Abduction—Parent may be guilty.

MOTOR VEHICLES—Chauffeur's License—Not required if duty only occasional.

HONORABLE JOHN D. BUCK
Commonwealth's Attorney for the City of Radford

In your letter of September 20, 1966, you state that:

On March 21, 1966, the Juvenile and Domestic Relations Court of the City of Richmond granted custody of three infant children to their mother, and granted to their father the right to visit them each day between 2 and 2:30 p.m. On May 16, 1966, the Law and Equity Court of the City of Richmond granted to the mother a divorce from bed and board, but divested itself of jurisdiction concerning questions of custody and support of the children because of the decree of the Juvenile and Domestic Relations Court. Thereafter, the mother and the three children moved to Radford. On August 20, 1966, the father came to Radford and took the children for his regular afternoon visit. However, without permission of their mother, he left Virginia with the children and was apprehended in Jacksonville, Arkansas, where he is awaiting extradition.

You ask whether the father was guilty of violation of § 18.1-36 of the Code of Virginia (1950), as amended, which provides:

"Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes the person of another, with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of 'abduction'; but the provisions of this section shall not apply to any law enforcement officer in the performance of his duty. The terms 'abduction' and 'kidnapping' shall be synonymous in this Code." (Emphasis added.)

In 1 Am. Jur. 2d Abduction and Kidnapping, § 19, p. 173, it is stated that whether in the absence of a specific exception excluding a parent "the crime of kidnapping may be committed by the taking or removal of a child . . . by a parent . . . usually depends on whether an order or decree awarding custody has been granted . . . [A] parent . . . commits the crime of kidnapping by taking a child from one to whom its custody has been awarded by the court . . . ."

Section 18.1-36 was enacted in 1960 to replace the former § 18-47, which provided:

"If any person, other than the father or mother of a child, illegally seize, take, or secrete a child from the person having lawful charge of such child, he shall be confined in the penitentiary not less than two nor more than five years, or in the discretion of the jury, in jail not exceeding one year and be fined not exceeding one thousand dollars." (Emphasis added.)

By excluding the exception for parents formerly found in § 18-47, the legislature must have intended to change the law, and to render a parent liable for prosecution under the circumstances set out in your letter.

September 26, 1966
You also ask if it would be in the best interest of the public to extradite the father to Virginia. This is a matter for your judgment, upon which I do not feel free to comment.

You further inquire:

An employee is hired by the City of Radford to perform general labor. Part of his duties is to occasionally drive a truck on the highways to and from a commercial gravel company to obtain stone for street repairs. He was not hired as a truck driver. My question is whether or not this type of employee is required to have a chauffeur's license.

Under § 46.1-1, paragraph (2), Code of Virginia (1950), as amended, the word "chauffeur" is defined as "every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property." The given facts indicate that the employee is hired by the City of Radford to perform general labor and that he will only drive occasionally. There is no indication that a vehicle to be driven on such occasion would in any way qualify as a common carrier.

Accordingly, it is my opinion that a chauffeur's license is not required for this person and he may operate in such manner on an operator's license.

CRIMES—Failure to Appear on Date to Which Case Continued—Not punishable as misdemeanor under § 46.1-178.

August 26, 1966

HONORABLE WILLIAM R. SHELDON
Associate Judge, Chesterfield County Court

This is in reply to your letter of August 23, 1966, in which you request an opinion from this office as to whether a person who has appeared in accordance with a summons issued pursuant to § 46.1-178, Code of Virginia (1950), as amended, at which time he was granted a continuance to a later date, can be found guilty of a misdemeanor under this section for failure to appear on the date to which the case has been continued.

The named section provides that whenever any person is arrested for a violation of any provision of Title 46.1, Code of Virginia (1950), as amended, punishable as a misdemeanor, with certain exceptions not material to the instance question, the arresting officer shall "take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice." This section further states that: "Such officer shall thereupon and upon the giving by such person of his written promise to appear at such time and place forthwith release him from custody." Paragraph (c) of this section is as follows:

"(c) Any person who wilfully violates his written promise to appear, given in accordance with this section, shall be guilty of a misdemeanor, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested."

This section makes it a misdemeanor for a person who has given his written promise to appear under § 46.1-178 to wilfully violate such written promise. It has reference to the written promise to appear given by such person to the arresting officer. The purpose is to prevent violations and to
punish violators of this section, which permits a person so arrested to be released on his own recognizance without posting bond.

We are now concerned with a situation in which the arrested person fulfilled his written promise to appear on the date given in the summons. At the time of such appearance he requested and was granted a continuance to another specified date. He failed to appear at such later date. Under these conditions, I am not of the opinion that paragraph (c), quoted herein, is applicable and, therefore, I shall answer your question in the negative.

CRIMES—Grand Larceny by False Pretenses Not From the Person—Must be of the value of $100.00.

March 1, 1967

HONORABLE GEORGE S. CUMMINS
Commonwealth's Attorney for Nottoway County

This is in reply to your letter of February 22, 1967, which I quote, in part, as follows:

"Is there a penal distinction between the crimes of (1) Grand or Petit Larceny, and (2) Larceny by False Pretense?

"For example, if one should commit several acts of selling fraudulent advertising subscriptions, for which in each instance the victim was charged $35.00, and assuming all of the elements of false pretense were present, could he be properly indicted, tried and punished, if found guilty, as for a felony under Section 18.1-118 of the Code, or would the case, because of the $35.00 limited amount, be restricted to a warrant, trial and conviction as for a misdemeanor (petit larceny) under Section 18.1-101 of the Code?

"In short, wouldn't the fraudulent obtaining from another of as little as $35.00 by false pretense constitute a felony?"

In my interpretation, there are two offenses described in § 18.1-118, Code of Virginia (1950), as amended, namely, (1) obtaining by false pretense, with intent to defraud, money or other property which may be the subject of larceny and (2) obtaining by false pretense, with such intent, the signature of any person to a writing, the false making whereof would be forgery. We are not presently concerned with the latter, for which the penalty is confinement in the penitentiary not less than two nor more than ten years. The portion of this statute with which we are concerned is as follows:

"If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof. . . ."

A review of this statute reveals that it has remained unchanged, as it appeared in the Code of 1873, insofar as the portion here under consideration is concerned. In the case of Dull v. Commonwealth, 25 Gratt. (66 Va.) 965, decided in 1875, the court interpreted the language quoted herein as making the offense larceny, to all intents and purposes. I find no case that would overrule this decision, nor any statute indicating a different intent. It appears, therefore, that the quoted language of the statute covers grand or petit larceny, according to the value of the subject, as prescribed in §§ 18.1-100 and 18.1-101, Code of Virginia (1950), as amended. These
statutes were amended by Chapter 247, Acts of Assembly of 1966, to substitute one hundred dollars in place of fifty dollars as the basis for distinguishing between grand and petit larceny not from the person.

Applying the foregoing to your questions, I am of the opinion that the fraudulent obtaining of less than one hundred dollars by false pretense, under the stated conditions, specifically thirty-five dollars, would not constitute a felony, but a misdemeanor.

CRIMES—Larceny—Property in trust fraudulently moved without consent—Within or from State.

CRIMES—Larceny—Intrusted property—Not taken unless demand made and property not produced.

December 22, 1966

HONORABLE GEORGE S. CUMMINS
Commonwealth’s Attorney for Nottoway County

This is in reply to your letter of December 20, 1966, from which I quote the following:

"Section 18.1-116 of the Code reads as follows, in part:

"'Whenever any person is in possession of any personal property, including motor vehicles, in any capacity, the title or ownership of which he has agreed in writing shall be or remain in another, or on which he has given a lien, and such person so in possession shall fraudulently sell, pledge, pawn or remove such property from the premises where it has been agreed that it shall remain, and refuse to disclose the location thereof, or otherwise dispose of the property or fraudulently remove the same from the State, without the written consent of the owner or lienor or the person in whom the title is, or, if such writing be a deed of trust, without the written consent of the trustee or beneficiary in such deed of trust, he shall be deemed guilty of the larceny thereof.'"

"I would like your opinion on the following questions, based upon the assumption that the purchaser moved the chattel to another city in Virginia and, at no time after the removal, was the seller able to locate the purchaser or have any knowledge of the whereabouts of the chattel;

"(1) Is it necessary for the chattel to have been moved out of the State of Virginia before Section 18.1-116 of the Code would apply?

"(2) Would it make any difference that the purchaser did not 'refuse to disclose the location thereof' when, in fact, the seller never had an opportunity to reach the purchaser to make such request?"

I shall answer your question numbered (1) in the negative. If the person in possession, under such circumstances, ‘shall fraudulently sell, pledge, pawn or remove such property from the premises where it has been agreed that it shall remain, and refuse to disclose the location thereof,’ the statute applies. The emphasized language, in my opinion, indicates that a violation of the statute may occur without removal ‘from the State.’"
In my interpretation, the answer to your question numbered (2) is in the affirmative. The statute cited, in addition to the portion you quote, contains the following:

"In any prosecution hereunder, the fact that such person after demand therefor by the lienholder or person in whom the title or ownership of the property is, or his agent, shall fail or refuse to disclose to such claimant or his agent the location of the property, or to surrender the same, shall be prima facie evidence of the violation of the provisions of this section."

The prima facie case is made only after demand therefor has been made. Thereafter failure or refusal to comply is a necessary element to constitute the crime. The failure to do so must be under such conditions that it amounts to a refusal. Like all criminal statutes, this section must be strictly construed against the Commonwealth.

CRIMES—Malicious Burning—Proper charge is under § 18.1-80 when persons are within the building.

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

This is in reply to your letter of October 11, 1966, which reads, in part, as follows:

"A business building which is used for mill work (sawing, carpentry, etc.) is maliciously burned while persons were working therein. This is a separate building, is not used as a dwelling, nor occupied other than by workmen performing their duties.

"Would the proper charge fall under § 18.1-79 or § 18.1-80, 1950 Code of Virginia, as amended?"

In my opinion, the first sentence of § 18.1-80 is applicable because the building was burned while persons were working therein, and the language of that sentence includes the burning of a building "at a time when any person is therein."

Section 18.1-79 seems to apply to an unoccupied structure that is not part of a dwelling house.

CRIMES—Perjury—Swearing falsely to oath.

PERJURY—Swearing Falsely to Oath or Affidavit.

HONORABLE L. VICTOR McFALL
Commonwealth's Attorney for Dickenson County

In your letter of July 22, 1966, you ask:

"May a person be convicted of perjury who appears before the County Judge for the purpose of becoming a surety in a criminal case, and after an oath is lawfully administered by the Court states falsely that he owns certain property and the bond is refused because of this fact?"
Section 18.1-397 of the Code of Virginia (1950), as amended, provides in part:

"Every person or attorney who shall file a false affidavit shall be guilty of perjury and shall be punished as provided by law."

Section 18.1-273 provides in part:

"If any person to whom an oath is lawfully administered on any occasion wilfully swear falsely on such occasion touching any material matter or thing . . . he shall be guilty of perjury."

These statutes would be applicable to a false affidavit or other false statement under oath in connection with becoming a surety on a bond in a criminal case.

CRIMINAL PROCEDURE—Arrest—Person drunk inside motor vehicle parked on service station yard.

MOTOR VEHICLES—Arrest—Person drunk inside motor vehicle parked on service station yard.

CRIMES—Being Drunk in Public—Person drunk inside motor vehicle parked on service station yard.

REGISTRAR—Central Registrar Appointed—No one else may register voters.

ELECTIONS—Central Registrar Appointed—No one else may register voters.

December 21, 1966

HONORABLE C. F. CALLIS
Justice of the Peace, Lunenburg County

This is in reply to your letter of December 10, 1966, posing two unrelated questions, which I shall quote and consider separately and in the order presented:

QUESTION: "We would like to know if an officer checks an automobile which is parked on the public highway or other public place such as a service station yard and finds a drunk therein can this person be arrested for being drunk in public?"

As indicated in my letter of November 16, 1966, this office has previously expressed the view, in Report of the Attorney General (1963-1964), p. 81, that a person found drunk in a motor vehicle being driven on the public highways may be prosecuted under § 18.1-237, Code of Virginia (1950), as amended, the essential portion of which is as follows:

"If any person arrived at the age of discretion profanely curse or swear or get or be drunk in public he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one nor more than twenty-five dollars." (Emphasis supplied.)

The opinion cited refers to an opinion found in Report of the Attorney General (1960-1961), p. 91, which in turn refers to a prior opinion found in Report of the Attorney General (1956-1957), p. 77. In each of these, it was held that a public highway is a public place and a person of the age of discretion found drunk in an automobile being driven on the public highway would be subject to arrest under the statute herein cited and quoted. If the law applies to a person found drunk in a vehicle traveling
on the public highway, I see no reason why it should not apply equally to
a person in the same circumstances found in a vehicle parked on the
public highway. As to a person found drunk in a motor vehicle parked on
a service station yard, this may or may not qualify under § 18.1-237,
supra, as "drunk in public," depending on the facts of the particular case.

QUESTION: "If a County Board of Elections has appointed a
central registrar for said county does anyone else have the legal
authority to register anyone?"

By the term "central registrar," I assume you have reference to
"general registrar" as authorized in § 24-118.1, Code of Virginia (1950), as
amended. This section states, in part, as follows:

"The governing body of any county may in the month of May
of any year and biennially thereafter provide by resolution for the
creation of the office of general registrar of the county . . . The
appointment of such general registrar shall automatically abolish
the office of registrar for each and all of the election districts of
such county as provided by law, as of the date of qualification of
the general registrar, and each and every such district registrar
shall thereupon promptly deliver to the general registrar all the
books, papers and documents pertaining to their office."

If such general registrar has been appointed for the county and has
qualified pursuant to this section, I am of the opinion that no one else has
the legal authority to register persons for the purpose of voting, unless
such registrar has one or more assistants duly appointed as provided in
§ 24-118.8.

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CRIMINAL PROCEDURE—Arrest and Confinement—Deserter from
armed forces—Authority of State officer.

SERVICEMEN—Arrest and Confinement by State Officers.

March 8, 1967

HONORABLE ROBERT L. DEHAVEN
Sheriff of Frederick County

This is to acknowledge receipt of your letter of February 28, 1967, in
which you state as follows:

"We have been unable to find any provisions for committing
A.W.O.L.'s and deserters from the armed forces to jail by judges,
clerks or Justice of the Peace pending the arrival of the armed
forces to take them into custody.

"We would like your opinion in this matter."

Article 8, Chapter 47, Title 10 U.S.C.A., § 808, provides:

"Any civil officer having authority to apprehend offenders under
the laws of the United States or of a State, Territory, Common-
wealth, or possession, or the District of Columbia may summarily
apprehend a deserter from the armed forces and deliver him into
the custody of those forces."

This statute is the authority for any State officer who has authority to
arrest to apprehend a serviceman who is A.W.O.L. or a deserter. Hence,
judges and justices of the peace who are conservators of the peace under § 19.1-20 of the Code have the authority to apprehend a deserter and deliver him to the custody of the armed forces. A clerk of a court, although he has authority to issue warrants of arrest under § 19.1-90, does not have the authority to arrest.

The authority to arrest under the above-cited statute would necessarily imply that the person making the arrest would be empowered to place the serviceman in confinement, if necessary, pending delivery to a representative of the armed forces.

CRIMINAL PROCEDURE—Blood Analysis—Steps set forth in § 18.1-55.1, relating to taking, handling, etc., of blood samples, procedural not substantive.

MOTOR VEHICLES—Blood Analysis—Steps set forth in § 18.1-55.1, relating to taking, handling, etc., of blood samples, procedural not substantive.

March 13, 1967

HONORABLE D. R. TAYLOR, Judge
Juvenile and Domestic Relations
Court of the County of James City

I am in receipt of your letter of March 10, 1967, in which you present for consideration a situation involving application of the Virginia "implied consent" law. Section 18.1-55.1 et seq., Code of Virginia (1950), as amended. In particular, you call my attention to that portion of § 18.1-55.1(dl) of the Virginia Code which provides:

"The officer taking possession of the other container (hereinafter referred to as second container) shall, immediately after taking possession of said second container give to the accused a form provided by the Chief Medical Examiner which shall set forth the procedure to obtain an independent analysis of the blood in the second container, and a list of those laboratories and their addresses approved by the State Health Commissioner; such form shall contain a space for the accused or his counsel to direct the officer possessing such second container to forward that container to such approved laboratory for analysis, if desired. 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."

In connection with the above-quoted provision, you pose the following question:

"If, in accordance with this Section of the Code, the accused duly indicates to the officer having possession of the second container his preference for delivery of the second container to a designated laboratory or doctor, whose name and address is duly set out on
the form prescribed and approved by the State Health Commissioner and the Chief Medical Examiner, and instead the officer mails the second container to a laboratory or doctor who is not on the form prescribed by the State Health Commissioner or Chief Medical Examiner, is the accused subject to conviction of a violation of 18.1-54, especially in view of the fact that the above Section prescribes that the container shall be mailed to the approved laboratory as directed by the accused or his counsel?"

I am of the opinion that the accused would be subject to conviction for violation of § 18.1-54 of the Virginia Code which prohibits the operation of a motor vehicle while under the influence of intoxicants. Pertinent with respect to this conclusion are the provisions of § 18.1-55.1(s) of the Virginia Code which declare:

"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.)

In light of the language of the statute italicized above, I am of the opinion that the failure of the officer to mail the container in question to an approved laboratory as specified in the statute to which you refer would not, per se, be grounds for dismissing the prosecution for violation of § 18.1-54 of the Virginia Code. Indeed, § 18.1-55.1(s) specifically states that a failure to comply with one or more of the steps prescribed for the taking, handling, identification and disposition of a blood sample "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. . . ." It would be possible, of course, under the language of the terminal clause of § 18.1-155.1(s) of the Virginia Code, for the accused to show that the failure under consideration resulted in his being deprived of evidence which might have resulted in an acquittal and that his rights were thus prejudiced as a result of noncompliance with the prescribed statutory procedure.

I am forwarding to you copies of several previous opinions of this office in which situations substantially similar to that which you present were considered and discussed. These opinions will be found in the Report of the Attorney General (1964-1965), pp. 74, 182 and 184.


August 1, 1966

Honorable Alvin W. Frinks, Clerk
Corporation and Circuit Courts,
City of Alexandria

This section provides in part:

"The clerk of the court in which the person is sentenced shall forthwith transmit to the superintendent of the penitentiary an abstract of the judgment and within thirty days from the date of the judgment shall forthwith transmit to the superintendent of the penitentiary a certified copy or copies of the order of trial and a certified copy of the complete final order. . . ."

I assume you wish to know what is meant by "abstract of the judgment," "order of trial" and "complete final order."

By "order of trial" is meant the order setting out the plea and other incidents of the arraignment of the accused, the submission of the case to the jury or to the court sitting without a jury, and the verdict of the jury or court, including the punishment fixed, if any. Unless there is a motion for a new trial, some other post-verdict motion, or an order for a pre-sentence report, the order of trial in most cases would also be the final order, and a copy of only one order would have to be transmitted to the superintendent. In other cases, where further proceedings are necessary before the punishment is fixed, the "final order," showing final disposition of the prosecution, would have to be entered, and a copy thereof sent to the superintendent.

By "abstract of judgment" is meant a brief statement of the verdict of the court or jury, and the punishment imposed, including the time, if any, to be credited on a sentence because of confinement in jail. Copies of abstract forms used by the Hustings Court of the City of Richmond are enclosed.

CRIMINAL PROCEDURE—Driving Without License or While License Revoked—Conviction of one bars prosecution under other.

MOTOR VEHICLES—Driving Without License or While License Revoked—Conviction of one bars prosecution under other.

August 19, 1966

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

This is in reply to your letter of August 12, 1966, in which you present the factual situation and pose the question which I quote, as follows:

"A motorist charged with operating a motor vehicle without a license is convicted of said offense in the Municipal Court and pays his fine. Subsequent to said conviction, police learn that said motorist's operator's license had been revoked.

"Is not Section 19.1-259 of the Code of Virginia, a bar to a prosecution for driving on a revoked license?"

The pertinent part of § 19.1-259 is as follows:

"If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

The laws of this State prohibit any person, with exceptions not here applicable, from driving any motor vehicle on any highway in this State
without either an operator's or a chauffeur's license. This is found in § 46.1-349, Code of Virginia (1950), as amended. Likewise, § 46.1-350 prohibits any person from driving on the highways of this State while his license or privilege to drive a motor vehicle is suspended or revoked, as therein stated.

In offenses in connection with the use of motor vehicles, prosecution for one of several distinct offenses arising out of one transaction is generally no bar to prosecution for another in the absence of statutes providing otherwise. See, 22 C. J. S. Criminal Law § 293. Under § 19.1-259, which is controlling in this State, however, if the same act be a violation of two or more statutes, conviction under one of such statutes shall be a bar to prosecution under the other or others. In each of the two statutes under consideration, §§ 46.1-349 and 46.1-350, the prohibition is against driving on the highway while not licensed by law to drive. No particular manner of driving is required to constitute the violation in either instance.

The given facts show that the person has been convicted of the offense of driving on the highway without a license. Subsequent to the conviction for this offense, it was learned that his license was revoked when such driving occurred. In my opinion he may not now be prosecuted for the latter named offense, as the same act, namely, driving a motor vehicle on the highway, is a violation under both statutes, and I shall answer your question in the affirmative.

CRIMINAL PROCEDURE—Extradition Hearing—Indigent felon has right to court appointed counsel.

August 30, 1966

HONORABLE MARVIN M. MURCHISON, JR.
Commonwealth's Attorney for the City of Newport News

This is in response to your letter of August 15, 1966, in which you inquire if an indigent charged with a felony in another State, when brought before a judge in an extradition hearing is entitled to court-appointed counsel. It would appear that the provisions of § 19.1-241.1 of the Code control. The foregoing provision reads, in part, as follows:

"In any case in which a person is charged with a felony and appears for any hearing before any court without being represented by counsel, such court shall, before proceeding with the hearing, appoint an attorney at law to represent him and provide such person legal representation throughout every stage of proceeding against him."

I believe that the procedures provided for by § 19.1-241.3 for the determination of indigency should be followed and that the attorney would be compensated pursuant to the provisions of § 19.1-241.5 of the Code.

I am, therefore, of the opinion that under the circumstances set forth above, an indigent felon is entitled to court-appointed counsel in connection with a request for extradition at the time of his hearing in a municipal court.
CRIMINAL PROCEDURE—Fees for Summonsing Witnesses—Paid by defendants.

WITNESSES—Fees for Summonsing—Paid by defendants.

July 6, 1966

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This will acknowledge receipt of your letter of July 1, 1966, to which is attached a letter to you from J. Livingstone Dillow, who represented a person who was convicted of a misdemeanor in a county court on an appeal to the Circuit Court of Bland County. At the request of Mr. Dillow the clerk issued summonses for certain witnesses on behalf of the defendant and delivered them to the sheriff who executed the same. Upon trial of the case in the circuit court the defendant was acquitted. Mr. Dillow presents the following question:

"Is the clerk entitled to charge the defendant for executing these summonses and is the sheriff entitled to a fee for executing these summonses?"

Mr. Dillow makes the additional statement:

"It has always been my belief that in criminal cases, a defendant has the right to require the issuance of summonses for witnesses and to have these summonses executed without cost. I have always believed that the clerk was required to issue the summons and the Sheriff required to serve them without fees. The Clerk and Sheriff would keep a record of the service and if the defendant is convicted, these fees might be taxed as a part of the costs."

You are referred to an opinion dated April 22, 1954, to Honorable W. Carrington Thompson, Commonwealth's Attorney of Pittsylvania County, Report of the Attorney General (1953-1954), at p. 89. In that opinion the following statement is made:

"It is my opinion that defendants in criminal cases are liable for the above prescribed fees for the issuance and execution of witness summonses, regardless of whether they are convicted or acquitted, unless they come within the poverty exception set out in § 14-180 of the Code. If the defendant is convicted, then the clerk's fee for issuing witness summonses is included within the lump sum charge of either five or ten dollars.

"An officer cannot, in my opinion, demand these fees in advance for issuing and executing witness summonses in criminal cases. Section 14-166 of the Code sets out the cases where an officer may demand his fees in advance, and that section specifically provides that he may not demand them in advance in criminal cases."

In the opinion I have cited, it was held that the word "officer" as used in § 14-166 included a sheriff.

Section 14-122, referred to in the above mentioned opinion, is now § 14.1-111. Section 14-180 is now § 14.1-183 and § 14-166 is now § 14.1-169.

Section 14.1-87 of the Code reads as follows:

"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."
I can find no statute which would allow payment out of the State treasury to the sheriff or clerk for fees in connection with the issuance and service of the summonses on behalf of the defendant.

CRIMINALPROCEDURE—Fines—Paid into State treasury where offenses committed against State—Into county treasury where violation of county ordinances.

May 29, 1967

HONORABLE R. TURNER JONES
Commonwealth's Attorney for Highland County

This is in reply to your letter of May 24, 1967, which is as follows:

"The Board of Supervisors of Highland County, in the year 1966, passed an ordinance prohibiting the sale of beer of any kind in the county on Sunday, and provided a penalty for the violation of the ordinance. There has been a violation of the ordinance, a warrant has been obtained against the offender on the regular state warrant, and there has been a conviction for violating the ordinance. My question is whether or not the fine imposed on the offender should be paid to the county or to the state.

"Similarly, the Board of Supervisors, some six years ago, adopted an ordinance providing for the county to assess a local license on motor vehicles at the cost of $10.00 per vehicle. There have been several convictions on a regular state warrant for a violation of the ordinance and the penalty imposed has been that provided for in the ordinance. The fines collected from these convictions have heretofore been paid to the state treasury, and here again my question is whether these fines should be paid to the local county treasurer."

The office of the warrant is to recite the offense charged. In Robinson v. Commonwealth, 206 Va. 766, the Court said:

"It is true that a warrant is not required to describe an offense with that particularity demanded of an indictment, but it still must recite the offense charged." (206 Va. at 769. Emphasis added.)

In 19 M.J., Warrants, § 3, it is said:

"... a warrant which charges a statutory offense is sufficient when it substantially follows the language of the statute, if it fully informs the accused of the particular offense with which he is charged, and the court can determine the statute upon which the charge is based."

It is possible for the same act to violate a county ordinance and a state statute, and it would be necessary to construe the particular warrant in each case to determine the nature of the charge. I am enclosing copy of an opinion given by former Attorney General Abram P. Staples to Honorable A. Dunston Johnson, dated August 13, 1947, which may be of some value to you in this connection.

Since a person cannot be convicted of an offense with which he is not charged, and since in each of the cases you cited you state that the convictions were for violations of county ordinances, I assume the warrants...
adequately charged the offenses for which the persons were convicted. If so, the fines should be paid into the county treasury. Code § 14.1-44. If the convictions were for offenses committed against the State, the fines should be paid into the State treasury. Code §§ 14.1-44 and 19.1-346.

**CRIMINAL PROCEDURE—Grand Jury—Cannot commit witness to secrecy.**

**HONORABLE JOHN S. HANSEN**  
Member, House of Delegates

January 26, 1967

This is in reply to your letter of January 25, 1967, in which you state that a witness who had been summoned before the Grand Jury in Colonial Heights was instructed by the Jury that he could not discuss with anyone the testimony he had given before the Jury. You have requested my advice as to whether or not a Grand Jury has authority to prevent a witness who has testified before it from revealing his testimony after he has appeared before the Grand Jury.

It is unquestionably the policy of the law that the investigations and deliberations of the Grand Jury should be conducted in secrecy and that for most intents and purposes its proceedings should not be divulged by the members of the Grand Jury. However, I am not familiar with any rule or statute which authorizes the Grand Jury to prohibit a witness who has been before it from disclosing the nature of his evidence after he has been discharged by the Grand Jury.

In this connection I conferred with Mr. Stafford, the Commonwealth’s Attorney, and he states that as soon as he learned that some of the witnesses had been instructed by the Grand Jury in the manner under consideration, he advised the Grand Jury against that type of procedure and no other witnesses were so instructed.

**CRIMINAL PROCEDURE—Indictments—Charging third and fourth time offenses.**

**HONORABLE ROYSTON JESTER, III**  
Commonwealth’s Attorney for the City of Lynchburg

June 2, 1967

This is in response to your letter of May 10, 1967, in which you enclosed copies of two indictments charging third and fourth time offenses of petit larceny. You inquire as to the sufficiency of these indictments. The indictment for third offense petit larceny reads in part as follows:

“That John Doe on or about the 21st day of November, 1958, was convicted of petit larceny, in the Municipal Court for the City of Lynchburg, Virginia, and his punishment was fixed and he was sentenced by the Judge of the said Court to pay a fine of $25.00; and that thereafter, the said John Doe, on the 6th day of May, 1960, was again convicted of petit larceny, in the Corporation Court for the City of Lynchburg, Virginia, and his punishment was fixed and he was sentenced by the Judge of the said Court to serve 60 days in jail; and that the said John Doe having been twice previously convicted of petit larceny, as aforesaid, upon the said 20th
day of July, 1966, within the said City, one pair of gloves, of the
value of $5.00, of the goods and chattels of Bill Brown, then and
there being found, then and there unlawfully and feloniously did
steal, take and carry away..."

This indictment conforms with the language of § 19.1-293 of the Code of
Virginia. It is the purpose of an indictment to inform the accused of the
nature and character of the crime charged against him, to the end that he
may prepare his defense, Livingston v. Commonwealth, 184 Va. 830, 36
S.E. 2d 574. I am of opinion that the indictment meets the requirements as
laid down by the Supreme Court of Appeals in the cited case.

You inquire as to whether or not it is proper to allege specifically the
previous convictions of petit larceny and whether or not this prejudices
the accused. In similar situations involving previous convictions for murder
in one case, for robbery in another, and the recidivist statute of Texas, the
Supreme Court of the United States upheld the constitutionality of listing
the prior convictions in the indictment. Spencer v. Texas, 17 L. Ed. 2d 606.

In view of the foregoing, I am of opinion that the indictment is sufficient
in law and that no constitutional rights of the accused are prejudiced by
the listing of his previous convictions for petit larceny.

The indictment which you enclosed for fourth offense petit larceny is
set forth in part below:

"The Grand Jurors of the Commonwealth of Virginia in and for
the body of the City of Lynchburg, and now attending the Corpora-
tion Court for the said city, upon their oaths present: That John
Doe previously, on or about the 21st day of January, 1963 having
been sentenced to eighteen months in the penitentiary by the
Corporation Court for the City of Lynchburg, Virginia, for petit
larceny, third offense, on or about the 20th day of July, 1966,
within the City of aforesaid, one pair of gloves, of the value of
$3.00, of the goods, property and chattels of Bill Brown, then and
there being found, then and there unlawfully and feloniously did
steal, take and carry away ...

For the reasons hereinbefore stated, I am of opinion that this indictment
is also sufficient at law. Of course, the defendant can request a bill of
particulars to ascertain the previous convictions which form the basis for
the indictment.

CRIMINAL PROCEDURE—Insanity Hearing—Physicians paid per
§ 19.1-233.

MENTAL HYGIENE AND HOSPITALS—Physicians on Staff of Hos-
pital Paid for Sitting on Commissions.

PHYSICIANS—Mental Hospitals—Payment for sitting on commissions.

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney for Augusta County

November 18, 1966

This will acknowledge your letter of November 16, 1966, which reads
as follows:

"As you know, pursuant to § 19.1-228, whenever a person is
charged with a felony and his sanity is questioned, it is necessary
to have a local commission to determine whether or not the ac-
cused should be sent away for mental evaluation or observation.
"Here in Staunton, we have been using doctors on the staff of Western State Hospital.

"I would greatly appreciate your advising me as to whether or not it is proper in your opinion for the Commonwealth of Virginia to pay doctors at Western State Hospital who are presently employees of the Commonwealth of Virginia. I enclose a photostatic copy of a letter which was received by our clerk which is self-explanatory."

The photostatic copy of the letter from one of the doctors states that they wish to be assured of a fee of $25.00 per hour each for the time spent in making the examination, as well as travel time and travel expenses.

Under § 19.1-233 of the Code it is provided that physicians appointed by the court shall be paid at the rate of $15.00 per diem and mileage to be paid out of the criminal fund. I do not believe that the court could authorize compensation in excess of that provided for in this section.

In my opinion, the fact that these physicians are in the regular employment of the State at the hospital does not prevent them from being paid the compensation prescribed above since the service being rendered is not in the course of their regular employment.

CRIMINAL PROCEDURE—Juror—Intimidation—Threats or force necessary.

HONORABLE STANLEY E. SACKS
Member, House of Delegates

January 25, 1967

This is in reply to your letter of January 19, 1967, which reads, in part, as follows:

"Certain insurance companies issuing policies of automobile liability insurance, in Virginia, have engaged in the following conduct:

"(1) Together with other companies have agreed to publish, or have published, in newspapers, magazines, periodicals and similar writings of wide-spread circulation, accounts or stories that jury verdicts in personal injury cases are being rendered by juries in amounts that are causing policyholders' premiums to be increased, with the intention of influencing prospective jurors who will thereafter sit on juries to render lesser or smaller verdicts.

"(2) Circulating to each policyholder notices or bulletins advising them that such policyholder is having his insurance rate or premium increased as a result of high jury verdicts, with the intention of influencing that policyholder in his role as a juror, if he should thereafter sit on a jury to return a lesser verdict for fear of raising his own or others' insurance rates.

"My inquiry is whether or not there is any law, statute or other regulation in the Commonwealth that outlaws or prohibits such conduct and such tampering with juries."

I am not aware of any statutory provision that is being violated under the state of facts presented by you in paragraphs (1) and (2). Section
18.1-310 of the Code relates to attempts to intimidate jurors and other officers by threats or force. There is nothing in the examples given by you suggesting that any threat or force is being used. Furthermore, this relates to jurors and not to persons who might at some time be summoned to serve on a jury.

CRIMINAL PROCEDURE—Preliminary Hearing—Not required when person not arrested until after indictment returned.

HONORABLE JOHN PAUL CAUSEY
Commonwealth’s Attorney for King William County

In your letter of September 9, 1966, you state:

“A person is arrested on a felony charge, is granted a preliminary hearing and is bound over to the Grand Jury following such hearing. In the course of investigation of this particular felony, it appears that the accused is involved in or has committed other felonies. Can indictments for these other felonies be presented to the Grand Jury at the same time that the indictment is presented for the felony for which he is under arrest without the requirement of preliminary hearing as to these other felonies?”

Section 19.1-163.1 of the Code of Virginia (1950), as amended, provides:

“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.”

In Webb v. Commonwealth, 204 Va. 24, 129 S. E. 2d 22 (1963), the court held a motion to quash the indictment, on the ground that no preliminary hearing was held, was properly denied. The court said of the statute: “It applies to a person who has been arrested on a felony charge prior to an indictment by a grand jury. Here the defendant had not been arrested or charged with any offense prior to the return of the indictment. 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. . . . The grand jury here found that there was reasonable cause to believe that the defendant had committed a felony before he was arrested and its action preempted the defendant’s right to a preliminary hearing.”

Previously, this office has ruled that a preliminary hearing is not required where the defendant is not arrested for a violation until after the indictment is returned. Reports of the Attorney General (1963-1964), at p. 102; (1960-1961), at p. 99.

If the person mentioned in your letter has not yet been arrested on warrants charging the “other felonies,” then in my opinion, no preliminary hearing on such felonies is necessary before his indictment for those felonies. On the other hand, if warrants have been issued and served charging these other felonies, then a preliminary hearing must be held as to each felony so charged.
HONORABLE SAMUEL A. GARRISON, III  
Assistant Commonwealth's Attorney  
for the City of Roanoke

This is to acknowledge receipt of your letter of January 20, 1967, in which you state in part:

"This is a request for an opinion with reference to Virginia Code Ann. (1960 Repl. Vol.), Section 19.1-163.1, which provides:

"'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.'

"Our inquiry is as follows: If, after a person is arrested and charged with a criminal offense, but before a preliminary hearing on the charge is held, the Commonwealth's Attorney desires to enter a nolle prosequi in the case and release the accused from custody, may he do so and yet present an indictment to the grand jury against the same person on the same charge?

** **

"Was the new statute designed to assure a hearing on a charge before presentation to the grand jury (1) only if the accused remains under arrest (in jail or on bond), or (2) if he is ever arrested on the charge, whether he remains charged or not?"

The purpose of the aforesaid section which was enacted in 1960 (Chapter 389) was to afford the accused under arrest or under bond resulting from arrest the means of determining the charges against him and the evidence that the Commonwealth has to sustain the charges, thus overruling the long established doctrine last enunciated in the case of Benson v. Commonwealth, 190 Va. 744, 58 S.E. (2d) 312, to the effect that a preliminary hearing or examination of the one accused of a felony is not necessary where an indictment has been found against him by a grand jury. The prohibition in the statute against an indictment only applies to a situation when the person is held or bonded by virtue of an arrest. Once the charges are dismissed by the examining authority (court not of record) an indictment may be found against him on the same charge. Benson v. Commonwealth, supra. The accused is in the same position when a nolle prosequi is entered on motion of the Commonwealth's Attorney and the prohibition of the statute is thereby lifted.

The requirement of a preliminary hearing of one arrested on a charge of felony is not jurisdictional. Webb v. Commonwealth, 204 Va. 24.

The answer to your question (1) is in the affirmative. The answer to your question (2) is in the negative.
CRIMINAL PROCEDURE—Pre-trial Investigation—Court of record may order for minors and adults.

COURTS OF RECORD—Authority—May order pre-trial investigations of adults and minors.

January 24, 1967

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

This is to acknowledge receipt of your letter of January 18, 1967, in which you state in part:

"I have for trial in Prince Edward County three co-defendants, two of whom are under the age of 21, but over 18, charged with grand larceny. The other defendant is over the age of 21, charged with the same offense. My question involves whether it would be proper for the court to order a pre-trial investigation of the two minors and whether it would be proper to order a pre-trial investigation of the adult."

From what you state, I take it that the cases against these minors were certified by the Juvenile and Domestic Relations Court to the Circuit Court for proper action, as provided in § 16.1-176 of the Code of Virginia (1950), as amended; and, further, that the said Juvenile and Domestic Relations Court did not require an investigation, which is permitted under § 16.1-176(b). We quote from that section:

"In all cases under this section the court may, unless such information is otherwise available to it from a prior investigation and report to another court, require an investigation of the physical, mental and social condition and personality of the child or minor and the facts and circumstances surrounding the violation of the law which is the cause of his being before the court... if the court requiring the investigation is a court of record, such investigation may be made by the officer provided for in § 53-243."

I am of the opinion that the court could order such an investigation relative to the minors under the aforesaid section and the same to be conducted by the district probation officer.

As to the investigation concerning the actions of the adult, I do not find any specific authority for a court of record to order such a pre-trial investigation. However, I can find no prohibition in the statutes which would prevent such a court to order such an investigation if same would further the administration of justice. I am of the opinion that the court would have the authority to do this.

CRIMINAL PROCEDURE—Prior Traffic Record—Includes operation of motor vehicle on highway without valid operator's license.

MOTOR VEHICLES—Prior Traffic Record—Includes operation of motor vehicle on highway without operator's license.

March 2, 1967

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

This is in reply to your letter of February 23, 1967, in which you seek my advice as to whether prior convictions of "operating a motor vehicle
on the highways of the Commonwealth without a valid operator's license" may be considered by the court or jury trying the case before imposing sentence on a person found guilty of a traffic offense, pursuant to § 19.1-186.2, Code of Virginia (1950), as amended.

The named section, which was enacted by Chapter 238, Acts of Assembly of 1964, is 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 term "prior traffic record," as used in the quoted section, is stated in § 19.1-186.1, found in the same chapter and enacted at the same time, to include a conviction for "any moving traffic violation described or enumerated in paragraphs (a) and (b) of § 46.1-412." Paragraph (a) of § 46.1-412, in part, specifies: "a violation of any law of this State pertaining to the operator or operation of a motor vehicle."

Under § 46.1-349, Code of Virginia (1950), as amended, with certain exceptions not here applicable, no person shall drive any motor vehicle on any highway in this State until such person has satisfactorily passed an examination and obtained an operator's or chauffeur's license. A violation of this section is a misdemeanor and any such offense certainly pertains to the operator or operation of a motor vehicle. Accordingly, it is my interpretation that prior convictions of operating a motor vehicle on the highways of this State without a valid operator's license would qualify as "prior traffic record" within the purview of § 19.1-186.2, herein previously quoted.

CRIMINAL PROCEDURE—Recognizance—Satisfaction and discharge in certain misdemeanor cases.

JUVENILES—Recognizance—Satisfaction and discharge—§ 19.1-18 not applicable.

HONORABLE SAMUEL A. GARRISON, III
Assistant Commonwealth's Attorney
for the City of Roanoke

May 2, 1967

This is in reply to your letter of April 19, 1967, in which you quote the entire statutory language of § 19.1-18, Code of Virginia (1950), as amended, which reads as follows:

"When a person is in jail or under a recognizance to answer a charge of assault and battery or other misdemeanor, or has been indicted for an assault and battery or other misdemeanor, for which there is a remedy by civil action, unless the offense was committed by or upon a sheriff or other officer of justice, or riotously, or with intent to commit a felony, if the party injured appear before the judge or justice who made the commitment or took the recognizance, or before the court in which the indictment is pending, and acknowledge in writing that he has received satisfaction for the injury, such judge, justice, or court may, in his or its discretion, by an order, supersede the commitment, dis-
charge the recognizance, or dismiss the prosecution, upon payment by the defendant of costs accrued to the Commonwealth or any of its officers.”

You pose relative questions thereto, which I shall quote:

“Query one: Does the above section apply in the case of traffic offenses which result in ‘injury’ to another person; e.g., running a stop sign, reckless driving, speeding, etc.?”

“Query two: Does the above section apply to offenses committed by juveniles?”

Your attention is directed to the language of § 19.1-18, “or other misdemeanor,” following “assault and battery.” The Supreme Court of Appeals in the case of Glidewell v. Murray-Lacy and Company, 124 Va. 563, 98 S.E. 665, construed same as not being limited by the preceding language. The statute was viewed as extending the meaning of “or other misdemeanor” to include “all others ‘for which there is a remedy by civil action.’” The traffic offenses that you address your question to, i.e., running a stop sign, reckless driving and speeding, are not misdemeanors which are civilly actionable per se. Because they do not fall into those classes of misdemeanors which necessarily involve the infliction of a civil wrong, it is my opinion that § 19.1-18 does not apply to said traffic offenses.

Your second question pertains to the applicability of § 19.1-18 to offenses committed by juveniles. The statutory provisions in respect to juvenile court jurisdiction, practice and procedure generally are found in §§ 16.1-158 through 16.1-217. In light of these sections inclusive and §§ 16.1-177 and 16.1-177.1 in particular, it is my opinion that § 19.1-18 does apply to juvenile offenders.

Sections 16.1-177 and 16.1-177.1 are set forth below:

“In the hearing and disposition of cases properly before a court of record having criminal jurisdiction of such offenses if committed by an adult the court may sentence or commit the juvenile offender in accordance with the criminal laws of this State or may in its discretion deal with the juvenile in the manner prescribed in this law for the hearing and disposition of cases in the juvenile court.”

“If a child fourteen years of age or over is charged with an offense which, if committed by an adult, would be a misdemeanor, and the court deems that such child cannot be adequately controlled or induced to lead a correct life by use of the various disciplinary and corrective measures available to the court under this law, then the court may, in such cases try such child and impose the penalties which are authorized to be imposed on adults for such violations.”

CRIMINAL PROCEDURE—Satisfaction and Discharge in Petit Larceny.

October 20, 1966

Honorable Royston Jester, III
Commonwealth's Attorney for the City of Lynchburg

This will acknowledge receipt of your letter of October 17, 1966, which reads as follows:

“This letter is being written at the request of the Judge of the Municipal Court for the City of Lynchburg, for whom a copy of this letter is designated.
"The inquiry is whether or not pursuant to § 19.1-18 of the 1950 Code of Virginia, as amended, permitting acknowledgment and satisfaction, if the same is permissible under a charge of petit larceny.

"The facts briefly stated are that two college students, stole certain articles from two stores in a shopping center. The value of the merchandise involved was less than $100.00.

"Restitution has been made to each of the merchants and the merchants do not now desire to pursue the matter.

"The Judge of the Municipal Court is uncertain as to whether or not the section dealing with acknowledgment of satisfaction is applicable in a petit larceny case."

It is noted from the papers attached to your letter that the alleged stealing by these girls took place in October, 1966, and the amount involved was $59.07. Section 18.1-101 of the Code was amended, effective June 27, 1966, so as to classify this type of offense as a misdemeanor.

In my opinion, the provisions of § 19.1-18 of the Code apply. The facts in this case seem to be analogous to the facts in the case of Orndorf v. Bond, 185 Va. 497.

CRIMINAL PROCEDURE—Search Warrants—Length of time valid.

WARRANTS—Search—Length of time valid.

HONORABLE MARVIN M. MURCHISON
Commonwealth's Attorney for the City of Newport News

This will acknowledge receipt of your letter of August 15, 1966, which reads as follows:

"I have been requested by Chief W. F. Peach, Chief of Police, to ascertain a ruling from your office as to the length of time a search warrant is valid after it has been procured from a Justice of the Peace.

"I would appreciate your advice at your earliest convenience."

There is no statute in Virginia with respect to the limit of time a search warrant can be held without being executed. In an opinion by Attorney General Staples, Report of the Attorney General (1937-1938), p. 147, he made this statement:

"... from the very nature of the warrant, namely, that it is usually issued for the purpose of finding a definite thing in a definite place and at a certain time, I am of opinion that, generally speaking, it should be executed promptly after coming into the officer's hands..."

What constitutes a reasonable time depends upon the facts and circumstances of the case. See, Michie's Jurisprudence, Vol. 16, Art. 7, p. 368, under the subject of Search and Seizures. There is a discussion of this subject in 79 C.J.S., Art. 83(c), p. 893, to which you are referred.
CRIMINAL PROCEDURE—Search Warrants—Name of informant.

HONORABLE L. VICTOR MCFALL
Commonwealth’s Attorney for Dickenson County

In your letter of July 22, 1966, you ask:

“Is the person swearing out a search warrant required to give the name of his informer at the time the search warrant is written or at any subsequent time?”

Section 19.1-85 of the Code of Virginia (1950), as amended, contains no such requirement.

In Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), it was contended that the search warrant was defective because the affidavit supporting it did not state the names of the affiant police officer’s informants, and the informants were not produced. The court held that the commissioner issuing the warrant “need not have required the informants or their affidavits to be produced.” 362 U.S. at 272, 4 L. Ed. 2d at 708.


Thus, it seems clear that revealing names of informants is not necessary to sustain the validity of a search warrant on a motion to suppress evidence seized under the warrant. This does not mean that the prosecution may always refuse, at trial, to reveal names of informants. See, e.g., Rovario v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

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CRIMINAL PROCEDURE—Sentences—Credit for time served.

WELFARE AND INSTITUTIONS—Prisoner Sentences—Credit for time served.

HONORABLE W. L. PAINTER, Director
Department of Welfare and Institutions

This is in reply to your letter of April 19, 1966, in which you inquired as to the proper credit, if any, to be given certain prisoners in three specific situations which you outlined. Following are the situations which you gave and my answers:

(1) “In 1948, prisoner A was given three two-year sentences in the Botetourt County Circuit Court to run consecutively. He completed serving these sentences on May 19, 1953, but was detained in custody to serve other sentences hanging over him. On March 7, 1966, the Botetourt County Circuit Court declared the three above sentences null and void and said that A would not be retried. Judge Abbott felt that he was without jurisdiction to allow A credit on present sentences for the time he had served on the three sentences which were declared null and void. Is the prisoner entitled to such credit?”

Your recitation of the facts does not indicate the nature of the proceeding in which the judgments of 1948 were declared void. It appears that
under present case law a Virginia court does not have authority to allow credit for fully served sentences which are later declared void in a habeas corpus action, if the sentences are fully served prior to the filing of the habeas corpus petition. See Smyth v. Holland, 199 Va. 92; Smyth v. Midgett, 199 Va. 727. The Supreme Court of Appeals has recently granted a writ of error in the case of Christian v. Peyton, in which credit was given in a situation in which fully served sentences had been subsequently declared void in a coram vobis action. As yet, however, the Court has not heard the appeal nor rendered an opinion.

In any event, I do not feel that your department should grant credit to prisoner A unless there is an express order of a court of competent jurisdiction allowing such credit. Section 53-24 of the Code of Virginia provides that:

"The Director [of the Department of Welfare and Institutions] shall file and preserve a copy of the judgment furnished by the clerk of the court of conviction of each convict, and keep a register describing the term of his confinement, for what offense, and when received into the penitentiary."

I do not believe that this section authorizes your department to grant prisoner A credit without the existence of a proper court order.

(2) "On February 6, 1958, prisoner B received a ten-year sentence by the Albemarle County Circuit Court. He was serving this sentence when the Court declared the sentence null and void on April 13, 1965, and a new trial ordered. In the meantime, B had been tried, convicted and sentenced in three other courts: On April 29, 1958, he was given a one-year sentence by the Richmond Hustings Court; on May 12, 1958, a one-year sentence by the Richmond Hustings Court, Part II; and on July 25, 1958, a two-year sentence by the Circuit Court of Henrico County. B was retried on June 11, 1965, on the Albemarle indictment and was again convicted but at the second trial given a twenty-year sentence. The second court order was silent as to credit for time served on the original ten-year sentence. Should B receive credit for the time served on the original ten-year sentence? If so, should this time be credited to the remaining valid sentences imposed in the Richmond area or be credited toward his new twenty-year sentence?"

The Supreme Court of Appeals has expressed the view that a prisoner who is retried on an original indictment after successfully attacking a criminal conviction is entitled to credit for the time served under the first sentence. Thus, it would appear from the facts related that prisoner B should have been given such credit in the order of conviction at his retrial. See Cave v. Cunningham, 203 Va. 737; Smyth v. Midgett, 199 Va. 727; Fitzgerald v. Smyth, 194 Va. 681; Stonebreaker v. Smyth, 187 Va. 250; McDorman v. Smyth, 188 Va. 474.

Again, however, I feel that prisoner B should not be given the credit as an administrative action by your department, but rather credit should only be given pursuant to a proper court order. There are, of course, legal remedies available to the prisoner who feels that he has been erroneously denied credit for time served.

(3) "Prisoner C was convicted June 6, 1955, in the Circuit Court of Botetourt County and sentenced to serve three years for larceny of an auto. C was paroled from this sentence on December 18, 1961, after serving all but seven months. C was committed to the penitentiary again on June 14, 1962, with a new felony conviction. He served the new felony conviction and then served the seven months remaining on the Botetourt sentence which was completed
October 27, 1964. On September 10, 1965, an order was entered by the Virginia Supreme Court of Appeals declaring null and void the June 6, 1955, conviction although this sentence had been fully served. C has other valid sentences to serve. The Circuit Court for the County of Botetourt entered an order on March 7, 1966, saying that C would not be retried on the original indictment but was silent as to any credit due C for time served. Should he receive credit for all time served on the void Botetourt sentence against those remaining sentences?

Your third situation does not indicate the nature of the action in which prisoner C obtained an order voiding his fully served sentence. Again, the case law in Virginia is to the effect that a habeas corpus petitioner may not receive credit for time served on sentences fully served prior to the institution of the action. However, as in the previous examples, I feel that credit should only be given pursuant to a proper court order and not as an administrative act.

CRIMINAL PROCEDURE—Subdivision Ordinance Violation—Effect of sale made outside county limits—One year statute of limitation on this violation.

November 30, 1966

Honorable William W. Jones
Commonwealth's Attorney for Nansemond County

This is to acknowledge receipt of your letter of November 16, 1966, in which you request my opinion on certain questions arising from the violation of the Nansemond County Subdivision Ordinance. I shall answer your questions seriatim. I quote from your letter:

(1) "The defendant is a non-resident of Nansemond County, who owns property in Nansemond County. The defendant executes and delivers, beyond the borders of Nansemond County, a deed which is in violation of the Nansemond County Subdivision Ordinance. The deed is subsequently recorded by the purchaser in the Nansemond County Clerk's Office, located within the City of Suffolk. Has the defendant committed an offense within Nansemond County for which the Nansemond County Courts would be proper venue?"

I assume that this ordinance was duly adopted by the Board of Supervisors of Nansemond County and meets the requirements of Article 7, Chapter 11, Title 15.1, Code of Virginia (1950), as amended. This being the situation, the provisions of § 15.1-473 are applicable. This section prohibits the recordation of a plat of a subdivision unless and until it has been approved by the local commission or governing body of the county (§ 15.1-473(c)). However, the failure to meet these requirements does not prevent recording of the instrument or passage of title between the parties to the instrument (§ 15-473(c)). Subsection (d) of § 15.1-473 reads as follows:

"Any person violating the foregoing provisions of this section shall be subject to a fine of not more than one hundred dollars for each lot or parcel of land so subdivided or transferred or sold; and the description of such lot or parcel by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties or from the remedies herein provided."
REPORT OF THE ATTORNEY GENERAL

This being a violation of a State statute, if such violation exists, prosecution would have to be made under this statute, rather than a local ordinance.

The question is where did the sale of this property take place? Of course, if the sale or transfer took place in Nansemond County, then the grantor can be prosecuted there. However, you say that the execution and the delivery of the deed took place outside Nansemond County. I do not think that the recordation is a part of the sale or transfer. It is mere publication of evidence that the sale or transfer has taken place. The sale is completed when the delivery of the deed is accomplished.

This question is therefore answered in the negative.

If the public authorities in Nansemond desire to prosecute, then prosecution must be had in the county or city wherein the grantor (landowner) actually executed and/or delivered the deed.

I quote further from your letter:

(2) "If the defendant violates the Subdivision Ordinance by execution and delivery of a deed, which deed is not recorded by the purchaser until more than a year later, can the defendant be prosecuted for violation of the ordinance after recordation of the deed, or does the one-year statute of limitations for the prosecution of misdemeanors prevent prosecution?"

As stated above, I do not think that the recordation of the deed is an essential ingredient of the offense. Unless the grantor has concealed his act or himself, the statute of limitations begins to run when he executes and delivers the deed. In the case of a misdemeanor, prosecution must be commenced within one year after there was cause therefor (§ 19.1-8).

From what you state, I am inclined to believe that the prosecution would be barred after one year from the date the deed was executed or delivered, unless the actions of the accused amounted to fleeing from justice.

DEEDS OF TRUST—Farmers Home Administration—Employee may release.

February 7, 1967

HONORABLE F. E. DILLARD, Clerk
Circuit Court of Alleghany County

This is in reply to your letter of February 3, 1967, which reads as follows:

"Attached for your perusal a copy from the United States Department of Agriculture in regard to the release of a deed of trust in the sum of $13,500.40.

"Please advise if a clerk has authority to release this deed of trust without a power of attorney or a release deed. There is not recorded here a power of attorney for Mr. James G. Dunlap.

"Please advise if I have authority to release the deed of trust on Mr. Dunlap’s statement that he is registered in the Federal Registers."

I enclose herewith a photocopy of page 14111 of the Federal Register, Volume 31, No. 215, issued on November 4, 1966. You will note that Section 1800.23 refers to the State Office Staff and County Office employees of the Farmers Home Administration, and specifically states that they are au-
The letter to you from Emily A. Kindel of Raleigh, North Carolina, dated February 1, 1967, points out that Mr. Dunlap is FHA Supervisor for Alleghany County. Therefore, in my opinion, Mr. Dunlap may make a marginal release of any deed of trust securing Farmers Home Administration by showing his official title under his signature.

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**DOG LAWS—County Dog Warden—Enforcement of game laws.**

**DOG LAWS—County Ordinance—Does not have to parallel State law in every respect.**

**HONORABLE F. PAUL BLANOCK**

Commonwealth’s Attorney for Mathews County

In your letter of August 8, 1966, you state:

> “The County of Mathews has passed an ordinance vesting the enforcement of the dog laws in a dog warden. Enclosed herewith please find photocopy of said ordinance marked ‘A’.

> “Approximately two years later a second ordinance was adopted as per photocopy enclosed herewith marked ‘B’.

> “It would be appreciated if you would render an opinion in regard to these two ordinances. I would appreciate being advised as follows:

> 1. Is ordinance ‘A’ valid and sufficient?

> 2. Does ordinance ‘B’ amend ordinance ‘A’?

> 3. If both ordinances are valid, can the dog warden enforce the state dog laws pursuant to both ordinances?

> 4. Can a county partially parallel the state dog laws without paralleling all the applicable state dog laws?

> “From the records, it appears that both ordinances were advertised according to law and duly adopted.”

I will answer your questions in the same order.

1. Ordinance “A” provides for appointment of a dog warden to execute the duties of a game warden, as permitted by § 29-184.2 of the Code of Virginia (1950), as amended. It appears valid and sufficient.

2. Ordinance “B” imposes penalties for making a false statement to secure a dog license and for failure to pay the dog license tax; provides for killing of an unlicensed dog pursuant to court order; imposes penalties for permitting dogs to run at large; provides for revocation of licenses if kennel dogs are permitted to run at large, and provides penalties for presenting false claims. In each case, Ordinance “B” substantially follows the provisions of § 29-213 of the Code. Ordinance “B” does not cover the same ground as Ordinance “A”, and there is nothing in the Ordinance “B” repealing or amending any part of Ordinance “A” either expressly or by implication.
3. Section 29-184.2 of the Code expressly empowers a dog warden to enforce both "the dog laws and local ordinances enacted pursuant to § 29-184.4."

4. Section 29-184.4 of the Code permits boards of supervisors to "enact local ordinances corresponding in nature and scope, and not in conflict with, the provisions of" the State dog laws. This does not mean that such a local ordinance must parallel State law in every respect.

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**DOG LAWS—Enforcement by Counties, Cities and Towns.**

**COUNTIES, CITIES AND TOWNS—Enforcement of Dog Laws.**

**GAME AND INLAND FISHERIES—Dog Warden—Has same duties and powers as game warden.**

_Honorable John F. Ewell_
Commonwealth's Attorney for Warren County

July 18, 1966

This will acknowledge receipt of your letter of July 14, 1966, which reads as follows:

"Acting under the provisions of § 29-184.2, of the Code of Virginia of 1950, as amended, the Board of Supervisors of Warren County has enacted an ordinance vesting the enforcement of the dog laws in a dog warden, and such dog warden has duly been appointed and entered upon the services of his duties.

"The Town of Front Royal has enacted an ordinance making it unlawful for any dogs to run at large between 8:00 P.M. and 7:00 A.M., except when in charge of the owner or keeper and securely controlled, by a chain or otherwise. The Town of Front Royal has also enacted ordinances prohibiting the keeping of noisy dogs and vicious dogs. Warren County has no ordinance pertaining to roaming, noisy or vicious dogs.

"Under the provisions of § 29-194, of the Code of Virginia, the governing bodies of towns are authorized to prohibit the running at large of dogs during such months as they may designate, and it shall be the duty of the game warden to enforce the provisions of that section.

"Section 29-184.2 (d) provides that all other provisions of Chapter 9 of Title 29 would apply mutatis mutandis to such county dog warden.

"I have three questions on which I would appreciate your opinion.

"1. Is the dog warden and/or the game warden of Warren County required to enforce the Town ordinance with respect to dogs running at large between the hours of 8:00 P.M. and 7:00 A.M.?

"2. Is the dog warden and/or the game warden of Warren County required to enforce dog ordinances of the Town of Front Royal with respect to noisy dogs and vicious dogs?

"3. In the event the Town of Front Royal adopted an ordinance pursuant to § 29-194 of the Code of Virginia making it unlawful to
permit a dog to run at large at any time, would the dog warden and/or the game warden of Warren County be required to enforce such ordinance?"

Section 29-194 of the Code is a State law which may be enforced by county, city or town, within their respective jurisdictions. I do not feel that it is necessary for the governing body of a locality to pass an ordinance but the authority given by this section may be exercised by mere resolution designating the months during which dogs may not be allowed to run at large. This position was taken by a former Attorney General in an opinion to H. T. Morrison, dated March 17, 1954, and published in Report of the Attorney General (1953-1954), at p. 58, copy of which I enclose. In an opinion dated June 25, 1951, the Attorney General took a different view of § 29-194, holding it to be an enabling act authorizing a county to pass an ordinance in conformity therewith. Since the penalty is fixed for a violation and a duty is imposed on game wardens (who are State officers) to enforce the statute, I am of the opinion that the ruling made by a former Attorney General to Mr. Morrison is a correct interpretation of the statute. If it is a mere ordinance of the town, I do not feel that there would be any duty imposed on a game warden, or county dog warden, to enforce the provisions of the town ordinance.

It will be noted that the section prescribes the punishment for any violation of said section and that it shall be the duty of the game warden to enforce its provisions. Section 29-184.2 provides that in any county in which dog wardens are appointed a dog warden and deputy dog warden shall have all the duties and powers of a game warden in the enforcement of the dog laws. A game warden under the provisions of § 29-30 would have the authority and, in my opinion, the duty to enforce the provisions of this statute in any county, or town located therein, in which it has been made effective by proper resolution. Therefore, in my opinion, to the extent that your questions apply to the provisions of § 29-194, they should be answered in the affirmative.

Since violations would be against State law, all warrants should so state and all fines would be payable into the State treasury.

With respect to the ordinance prohibiting the keeping of vicious dogs and noisy dogs, unless there is some provision in the town charter authorizing the adoption and enforcement of such an ordinance, I know of no statutory provision that authorizes the same.

DOG LAWS—Kennel Taxes—May not exceed those provided by State law.

August 5, 1966

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

This will acknowledge receipt of your letter of August 4, 1966, which reads as follows:

"... Section 29-184 of the Code, as amended, dealing with dog license taxes was amended in 1964, authorizing certain counties to prescribe by ordinance a single license tax for dogs regardless of sex, not to exceed $5.00.

"Our Board of Supervisors is seriously considering making the tax $2.00 per dog, and would also like to raise the present tax on kennels.
"My question is whether they would have authority to raise the kennel taxes provided for in said section."

In my opinion your question must be answered in the negative. You will note that the next to the last paragraph of § 29-184 provides that "For a female dog, four dollars; provided that no ordinance adopted by a city or county under the provisions of this section shall provide for kennel fees in excess of those provided by State law."

This provision was placed in the section by the same Act (Chapter 653, Acts of 1964) that amended the section so as to permit a single license tax for all dogs, regardless of sex, in an amount not to exceed $5.00.

DOG LAWS—Rabies in Livestock—Payment from dog fund only if caused by dog not personally owned.

October 25, 1966

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

This will acknowledge receipt of your letter of October 22, 1966, which reads as follows:

"We have in Bedford County an instance where a number of angus cattle have died, the cause of death having been diagnosed as rabies.

"I shall appreciate an opinion from you as to whether or not it will be legal for the county to pay, from county funds, either the dog fund or otherwise, the owner of these cattle their fair market value. It is not known how these animals were infected with rabies. Presumably this was by means of a bite by a rabid dog or fox or skunk, but this is speculation.

"It is noted that it is provided by § 29-209 of the Code dealing with 'Disposition of dog fund' that after making certain payments therein provided for,—'and if the remainder is sufficient, all damages to livestock or poultry, . . . .' It also is noted that § 29-203 of the Code provides for the payment for the treatment of persons exposed to rabid animals.'"

Section 29-202 of the Code authorizes payment of compensation to a person who has any livestock or poultry killed by any dog not his own. The provisions of this section and § 29-209 do not authorize payment of such compensation where the injury or death is caused by a fox or skunk or other animal having rabies.


The third paragraph of § 29-209 provides as follows:

"Should there not be a sum sufficient in the dog fund of the counties of Augusta, Rockbridge, Smyth, Prince William, Wythe, or Albemarle, respectively, to defray all costs in such county, including the payment of claims as provided in § 29-202, then the governing body of such county may appropriate a sufficient amount from the general fund of such county to provide payment of such costs and claims."
REPORT OF THE ATTORNEY GENERAL

You will note that this provision authorizing the governing body to make appropriation from the general fund in an amount sufficient to pay claims under § 29-202 is limited to the counties mentioned therein, which does not include the county of Bedford.

DOG LAWS—Running at Large—Under § 29-194 notice required before there is violation of local ordinance.

DOG LAWS—Running at Large—Henrico County—Confinement and disposition of stray dogs—No authority while dogs properly licensed.

May 4, 1967

HONORABLE DONALD R. HOWREN
Commonwealth's Attorney for Henrico County

This is in reply to your letter of April 20, 1967, with which you enclosed a copy of the amendments to the Henrico County dog ordinance. You state that the authority for the Board of Supervisors to adopt the amendments was pursuant to § 29-194 of the Code of Virginia and request my opinion on the two questions which I quote as follows:

"1. Is our ordinance rendered invalid or unconstitutional in that it fails to provide for notice to be given the dog owner prior to picking up a dog running at large?

"2. Does the County of Henrico have authority for its ordinance § 2-21.1 concerning the impoundment and disposition of dogs picked up running at large?"

The amendment embodied in paragraph (g) of Section 2-21 of the ordinance states the penalty for any dog to run at large within the County at any time during any month of the year. This provision of the ordinance, as well as the meaning of the term “run at large” therein expressed, falls within the scope of § 29-194 upon which it is based. The named statute, however, states that “any person who after having been notified by any landowner, game warden or other officer of the law that his dog is running at large, permits his dog to run at large thereafter, shall be deemed to have violated the provisions of this section, and shall be liable to a fine of not less than five nor more than twenty-five dollars for each violation.”

In relation to your question numbered 1, I am enclosing a copy of an opinion found in the Report of the Attorney General (1950-1951), p. 23, which responds to the question of whether notification is required before there is a violation. You will observe that the opinion holds that an ordinance enacted pursuant to § 29-194 is bound by the limitations as to the notice and amount of punishment fixed by such section. I find no opinion to the contrary regarding ordinances enacted under authority of this section. The City of Radford opinion, Report of the Attorney General (1958-1959), p. 112, was based on a charter provision and the case of King v. County of Arlington, 195 Va. 1084, was addressed to a point on which the State law is silent. I must conclude, therefore, that paragraph (g) of Section 2-21 of the Henrico County ordinance, which requires no notice, is invalid under such opinion.

If paragraph (g) of Section 2-21 be revised to conform to the language of § 29-194, there appears authority for penning dogs found running at large in violation of the ordinance in the County Dog Pound. The other requirements of Section 2-21.1 are apparently in order, with the exception
of reference to disposition of unclaimed dogs impounded for five days. There is nothing to show what is meant by the clause "may be disposed of as provided elsewhere in this ordinance, Section 2-17 and Section 2-18." Under the terms of § 29-194.1 only dogs found running at large without the tag required by § 29-191 may be destroyed or otherwise disposed of. Accordingly, with respect to your question numbered 2, I am not of the opinion that the County of Henrico has authority to make such disposition of dogs running at large while properly licensed.

DOG LAWS—Sheep Killed by Dogs—Reimbursement for—Owner may not recover where his dog participated in killing.

June 29, 1967

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney for Augusta County

This is in reply to your letter of June 16, 1967, in which you present the factual situation and related question which I quote, as follows:

"One of the citizens of Augusta County who raises sheep has made a claim for compensation to the County under Section 29-202 of the Code. Evidence has established the fact that his dog, as well as another dog, caused the damage to the sheep. He is asking that he be reimbursed for one-half of his claim.

"My question is whether or not under the wording of § 29-202, he is precluded from any recovery from the County, inasmuch as his dog was involved."

Section 29-202 of the Code states, in pertinent part, as follows:

"Any person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive as compensation therefor a reasonable value of such livestock or poultry."

The owner is entitled to receive compensation for his livestock killed or injured by any dog not his own. There is no compensation under this section for livestock killed or injured by a dog owned by the owner of such livestock. It follows that, if such owner's dog participated in the death or injury to the specific livestock for which the compensation is claimed, there can be no recovery. If such owner at the same time has other livestock killed or injured solely by a dog not his own, however, he may be compensated for such other livestock. Thus, it becomes a matter of evidence to be determined by the facts in any given situation.

If I correctly interpret the given facts in the instant case to mean that the damage to the sheep for which compensation is sought was caused by the concerted action of the owner's dog and another dog together, I am of the opinion that such owner is precluded from any recovery under this section.
DOG LAWS—Vaccinations—Licensed non-graduate veterinarian may perform.

July 28, 1966

HONORABLE MACK I. SHANHOLTZ, M.D.
Commissioner of Health

In your letter of July 21, 1966, you refer to § 29-188.1(a) of the Code of Virginia (1950), as amended, which provides:

“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 by a currently licensed veterinarian.”

You state that only graduates of accredited schools of veterinary medicine are licensed in Virginia, but that Virginia dogs are vaccinated against rabies by persons living in West Virginia, where licenses are issued both to graduate veterinarians and to non-graduate veterinarians. In addition, you state that certain rural county courts in West Virginia appoint laymen to vaccinate dogs against rabies.

You ask:

“Shall rabies vaccination certificates signed by persons from West Virginia other than a licensed graduate veterinarian be recognized as satisfactory evidence of vaccination when a person applies for a dog license in Virginia?”

Section 29-188.1(a) was rewritten in 1964, and the clause requiring vaccination to be “by a currently licensed veterinarian” was added in 1966.

Since this section does not limit vaccinations to those performed by veterinarians licensed in Virginia, it seems clear that a currently licensed non-resident graduate veterinarian may perform vaccinations which will meet the requirements of the statute. Similarly, since § 29-188.1(a) does not specifically require a veterinarian to be a graduate of a school of veterinary medicine, in my opinion a non-graduate veterinarian, currently licensed under the laws of another state, would also qualify for this purpose. I do not believe, however, that the requirements of the statute would be met by a vaccination performed by an unlicensed person, such as court-appointed laymen mentioned by you.

ELECTIONS—Absentee Ballots—Educationally handicapped person—May be helped by person of his choice to execute ballot.

May 31, 1967

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

I have your letter of May 24, 1967, in which you ask the question whether a person who cannot read or write may be helped by a notary public in the voting of a ballot when he votes by absentee ballot.

Section 24-334.1 of the Code of Virginia was adopted prior to the Federal Voting Rights Act of 1965. By reason of this Federal act, I am of the opinion that this Code section should be construed to also include the person who cannot read or write.
Therefore, I am of the opinion that the educationally handicapped person who has been duly registered can be helped in voting by absentee ballot by a person of his choice who is not a candidate for any office (see, § 24-335). A notary public, or other person authorized in § 24-334, who executes the coupon referred to in § 24-333 would not be eligible to assist the handicapped person.

ELECTIONS—Assistant Registrars—Appointed only when registrar physically or mentally impaired.

ELECTIONS—Registrars—Disability defined.

May 22, 1967

Honorable Jennings L. Looney, Clerk
Circuit Court of Buchanan County

I have your letter of May 18, 1967, in which you refer to § 24-55.1 of the Code of Virginia. You then ask the following question:

"I desire an opinion from your office on the question as to when the assistant registrars are to perform their duties. In other words, when is a registrar disabled to perform the duties of his office? If the registrar is physically able to perform the duties of his office, and does not have the time on account of other work, can an assistant registrar be appointed to perform his duties?"

The section referred to above provides that the electoral board of each county may appoint one or more discreet persons who "whenever requested so to do by the electoral board, shall perform the duties of any registrar in such county whenever by reason of disability such registrar is unable to perform such duties of his office."

Disability is defined by Webster's Dictionary as "inability to pursue an occupation because of physical or mental impairment."

The wording of this section is different from § 24-58, which refers to assistants of general registrars.

In answer to your question, I am of the opinion that if the registrar is physically able to perform his duties and does not have time on account of other work, he does not qualify under this section to have an assistant registrar appointed, as he is not disabled within the meaning of this section of the Code.

ELECTIONS—Assistant Registrars—May not be appointed except upon disability of registrar.

ELECTIONS—Registrar—Justice of peace ineligible to serve.

PUBLIC OFFICERS—Compatibility—Justice of peace may not serve as registrar.

June 1, 1967

Honorable E. R. Hubbard
Justice of the Peace, Wise County

I have your letter of May 30, 1967, in which you ask the following questions:

"(1) Can the Clerk of our Electoral Board or its Members appoint more than one Registrar for one Precinct in Wise County?"
Or does the Precinct Registrar have the right and power to appoint an assistant to serve with him?"

Section 24-55.1 of the Code of Virginia provides that the electoral board of each county may appoint an assistant registrar whenever any registrar in such county by reason of disability is unable to perform the duties of his office.

In response to your second question, I am enclosing copy of the Virginia Election Laws.

"(3) Can a Justice of the Peace be town or county precinct registrar?"

Section 24-66 of the Code of Virginia provides that a person who acts as registrar is ineligible to hold any office to be filled by election of the people. I assume that you are elected a Justice of the Peace and, therefore, would be ineligible to be a registrar.

ELECTIONS—Candidates—Must be qualified to vote in precinct for which candidacy filed.

April 25, 1967

HONORABLE C. HARRISON MANN, JR.
Member, House of Delegates

I have your letter of April 24, 1967, which reads as follows:

"A question has arisen as to eligibility of two candidates for the Democratic Committee of Arlington in the Democratic Primary to be held on July 11, 1967. For the purpose of these questions it is to be assumed that both candidates have met all the requirements of the Democratic Committee of Arlington as to timely filing and payment of the prescribed fee.

"Candidate A is a resident of the precinct for which he filed. At the time of filing he was not a registered voter. He will have lived in the State, county and precinct from which he filed the required period of time to register by the time of the Primary on July 11th.

"Candidate B is a resident of the precinct for which he filed. At the time of filing he was not a registered voter in the precinct for which he filed, but was a registered voter in another precinct in Arlington. He will have lived in the precinct for which he filed the prescribed period of time to permit a transfer of his voting registration from one Arlington precinct to another Arlington precinct by the time of the Primary on July 11th.

"Query: In the case of both Candidates A and B, was it necessary that they be qualified to vote in the precinct for which they filed at the time of filing, or is it sufficient that they be qualified to vote in the precinct for which they filed at the time of the Primary in which they seek to be a candidate?"

Under date of April 22, 1966, this office wrote to the Chairman of the Russell County Electoral Board. This is found in the printed Opinions of the Attorney General (1965-1966), at page 108, and a copy is enclosed here-with.
I am of the opinion that it is sufficient for both Candidates A and B that they be qualified to vote in the precinct for which they filed at the time of the Primary in which they seek to be a candidate.

ELECTIONS—Candidates—Procedures required for qualification where town becomes city of second class.

March 31, 1967

HONORABLE J. VAUGHAN BEALE
Commonwealth's Attorney for Southampton County

Your letter of March 29, 1967, reads, in part, as follows:

"As you know, the Town of Franklin became a city of the second class in December, 1961, which city is located in Southampton County, Virginia. The present Commonwealth's Attorney now resides in the City of Franklin, Southampton County, Virginia, the Clerk and Sheriff both reside in the Town of Courtland, Virginia, and all three desire to qualify as candidates for his respective office in the July 11, 1967, Democratic Primary.

"First, each candidate desires your advice as to whether he should qualify before the Chairman of the County Democratic Committee and also before the Chairman of the City of Franklin Democratic Committee. Second, each candidate desires your advice as to whether the required filing fee be paid to the Treasurer of Southampton County or whether it should be divided and one-half ($\frac{1}{2}$) paid to the Treasurer of Southampton County and the other one-half ($\frac{1}{2}$) paid to the Treasurer of the City of Franklin. Third, each candidate desires your advice as to whether or not the petition to accompany his Declaration must be signed by fifty (50) qualified voters in both the County of Southampton and the City of Franklin or just by fifty (50) qualified voters of the county and/or city."

You are familiar with § 15.1-994 of the Code. You will note the last sentence thereof provides that

"... the qualified voters residing in such city shall be entitled to vote for such officers at the general election for county officers and the wards of the city shall be treated, for such election purpose, as precincts of the county, as if such city had not been declared to be a city of the second class."

It is, therefore, clear to me that your questions should be answered as follows:

(1) The candidates should qualify before the Chairman of the County Democratic Committee.

(2) The required filing fee should be paid to the Treasurer of Southampton County.

(3) It is only necessary that the petition to accompany the declaration be signed by fifty (50) qualified voters of the county and/or city; and it is immaterial as to whether the people signing the said petition reside within the county or city so long as they are qualified voters.

You are familiar with the opinion dated May 15, 1951, found in the printed volume of the Report of the Attorney General (1950-1951), at page 45. I am not advised at this time of any reason to change the conclusion of that opinion.
ELECTIONS—Challenger—Must be qualified voter.

ELECTIONS—Election Judge or Clerk—School teacher may act.

August 12, 1966

MR. H. J. T. WEBNER, Secretary
Louisa County Electoral Board

This will acknowledge receipt of your letter of August 10, 1966, which reads as follows:

"In our recent 'Primary' we had an event that makes it quite important that we have your definition of the word 'elector' as used in § 24-253, on p. 109 of the Virginia Election Laws edition for 1966.

"Our case was a man from out of the county and out of the 8th Congressional District who tried to challenge voters. The fact that he did not know the names of the persons he tried to challenge is aside from the point. We felt that because he was from Charlottesville and as a student in the law school at the University that precluded him being considered an 'elector' in that primary.

"The other question has reference to § 24-198, p. 97. Is a teacher in our county school system in any way disqualified to be appointed as Judge or Clerk of Election in a precinct?

"We have been appointing a few every year. This past few months we have had a resignation because a person who has been so acting had accepted a position as teacher."

An elector is one who is entitled to vote. Section 18 of the Virginia Constitution states who is entitled to vote. This section, in part, is as follows:

"Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town six months, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered... shall be entitled to vote..."

I am of the opinion that § 24-253 of the Code must be construed in conformity with the language of Section 18 of the Constitution as above quoted and that an elector, to be entitled to challenge a voter, must possess the above qualifications. To be specific, an elector to be entitled to challenge a voter must be entitled to vote at the precinct at which he attempts to make the challenge.

With respect to your question regarding a public school teacher acting as a judge or clerk of an election, § 24-198 of the Code does not prohibit such service. A teacher is not an elected officer within the meaning of that section. For the same reason, § 24-31 does not prevent a public school teacher from being appointed judge of an election.

ELECTIONS—Democratic Party Plan—Party committee may determine contested reorganization.

March 14, 1967

HONORABLE W. ROY SMITH
Member, House of Delegates

I am in receipt of your letter of March 11, 1967, in which you present for my consideration the following situation and inquiries:

"Following the last reorganization of the Petersburg Democratic Committee, in late 1965, a protest of the method of reorganization
was lodged with the Fourth District Committee by several persons who had served as members of the local committee before the contested reorganization.

"On April 13, 1966 the Fourth District Committee declared the reorganization void, ruling that notice of the elections held for the purpose of reorganization was improperly given, and not in conformity with the requirements of the Democratic Party Plan.

* * *

"The decision of the Fourth District Committee, rendered nearly a year ago, has not been appealed. Neither has the Committee as constituted in November 1965 'reassembled' to provide for a new election.

"Statements recently appearing in the press indicated that the 'new' Committee, i.e. the committee declared by the District Committee to have been organized not in conformity with the Democratic Party Plan, proposes to meet soon to determine the method by which the Democratic Party in Petersburg will select its nominee to run for election to the House of Delegates in the November General Election.

"In the light of the foregoing facts, my questions are:

"(1) Does the Committee elected in 1965 which election has been declared void by the Fourth District Committee, have any power to act for the Democratic Party in the City of Petersburg with reference to the selection of the nominees of the Party to run in a General Election?

"(2) Does the Committee as constituted in November 1965 have any power to act for the Democratic Party in the City of Petersburg with reference to the selection of the nominees of the Party to run in a General Election?

"(3) In the event that the answer to both of the questions above is in the negative, is there, under the circumstances existing, any method by which the Democratic Party can select a nominee to run in the General Election in November as a candidate for election to the House of Delegates to represent the City of Petersburg?"

From your communication, it appears that the decision of the Fourth District Committee as announced by its Chairman declared:

"The Democratic Party Plan provides that whenever an election of a city committee is to be by some method other than a primary election, then in such case, notice of the time, place, and method for election of said committeemen shall be given by publication in a newspaper at least 10 days prior to the time for such election.

"The Fourth District Committee is of the opinion that the notice was improperly given because the method of election was not clearly set forth.

"The Committee therefore takes the position that the election of (city) committee was void and the committee as constituted in November 1965 should reassemble and provide for a new election after proper notice is given, which members so elected would constitute the Democratic Committee of the City of Petersburg for the same length of time as the committee supposedly elected in December 1965 would have held office."
Under the Democratic Party Plans the Democratic Committee of the Fourth Congressional District was vested with the power to hear and determine the complaint filed with it as set forth in your letter. The District Committee considered the complaint and held that the Democratic Committee of Petersburg selected in 1965 was not organized in conformity with the requirements of the Party Plans and, therefore, declared that the election of that Committee was void. The Committee that was declared void by action of the Fourth District Democratic Committee not having appealed to the State Central Committee, the decision of the Fourth District Committee is still in effect. For this reason, the answer to question (1) is in the negative.

With respect to question (2), the Democratic Committee that was previously elected and which continues in existence until reorganized in my judgment has the power to provide for the nomination of a candidate for the House of Delegates of Virginia in the general election to be held in November, 1967. That committee, under the procedure set forth in the Party Plans, may provide that the nominee for said office may be elected either by primary to be held on July 11, 1967, or by a convention to be held in the manner provided in the Party Plans.

Because of the answer to question (2), it is not necessary to consider question (3) set out in your letter.

ELECTIONS—Democratic Primary—Last date for filing.

CIVIL PROCEDURE—Judgments—When executions to be issued.

Honorable Margaret B. Brown, Clerk
Circuit Court of Culpeper County

This will acknowledge receipt of your letter of January 23, 1967, in which you request the last date for filing in the Democratic Primary this year. The primary election will be held on July 11, 1967. Under § 24-345.3 of the Code, candidates for the General Assembly must file at least ninety days prior to the primary, which is April 12, 1967. Under § 24-370, candidates for county offices must also file not later than April 12, 1967.

You also requested my advice as to whether a clerk is required to issue an execution within twenty-one days after the date of a judgment.

Section 8-399 of the Code of Virginia is as follows:

"On a judgment for money it shall be the duty of the clerk of the court in which such judgment was rendered to issue a writ of fieri facias at the expiration of twenty-one days from the date of the entry of the judgment and place the same in the hands of the proper officer of such court to be executed and take his receipt therefor unless he be otherwise directed by writing by the beneficiary of such judgment, his agent or attorney. For good cause the court may order an execution to issue on judgments and decrees at an earlier period."

In my opinion, unless the judgment creditor, his agent or his attorney gives a clerk the written notice mentioned in this section, it is the duty of the clerk to issue an execution at the expiration of twenty-one days from the date the judgment was entered and deliver the same to the proper officer, taking his receipt therefor.
ELECTIONS—Judge, Clerk, or Precinct Committeeman—Employee of redevelopment and housing authority may serve.

February 23, 1967

Mr. Reid M. Spencer, Member
Electoral Board of the City of Norfolk

This will acknowledge your letter of February 22, 1967, which reads as follows:

"We would appreciate a ruling on the following questions:

"Can an employee of the Norfolk Redevelopment & Housing Authority serve as a Judge or Clerk of Election?

"Can an employee of the Norfolk Redevelopment & Housing Authority run for Precinct Committeeman of the City Democratic Committee?"

With respect to your first question, the qualifications to act as clerk or judge of election are contained in § 24-198 of the Code. This section does not contain any provision that would prohibit an employee of a redevelopment and housing authority from serving in either capacity.

Section 24-31 of the Code also relates to qualifications of judges of election but the provisions of this section would not prohibit an employee of the redevelopment and housing authority from serving as judge of an election.

With respect to your second question, I am not familiar with any provision of law which would prevent an employee of a redevelopment and housing authority from being a candidate for precinct committeeman of the City Democratic Committee, nor do I know of any provision that would prevent such an employee from serving on such committee should he be elected.

ELECTIONS—Judge or Clerk—Member of board of supervisors may not serve.

ELECTIONS—Judge or Clerk—Justice of peace may not serve.

October 27, 1966

Honorable Rufus V. McCoy, Sr.
Member, House of Delegates

This will acknowledge receipt of your letter of October 26, 1966, which reads as follows:

"Please send me a few copies of the latest Civil Rights Voting Act.

"I would like to have your opinion on whether a member of the Board of Supervisors can legally serve as an election judge on November 8, 1966. Can an appointed justice of the peace serve as an election official? Could an elected official serve as clerk of an election?"

I regret that I do not have any extra copies of the Federal Civil Rights Voting Act.
Your attention is directed to § 24-198 of the Code, which reads as follows:

“No person shall act as a judge or clerk of any election who is a candidate for, or the deputy or employee of any person who is a candidate for, any office to be filled at such election, or who is the deputy of any persons holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof.”

Under the provisions of this section, the answer to each of your questions is in the negative. Even though a justice of the peace may have been appointed instead of having been elected, he is, nevertheless, holding an elective office within the terms of this section and, therefore, would be disqualified from serving either as a judge of election or clerk of election.

ELECTIONS—List of Registered Voters—Preparation not mandatory.

April 3, 1967

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

I have your letter of March 31, 1967, in which you advise that you have been requested to make up a voting list and the person so requesting it has advised you that such a list is being prepared by at least one other county in Virginia. You then ask,

“If we had to make up a list of the registered voters, who would pay the costs of getting such a list compiled and printed?

“Please let me know what I am supposed to do in this situation.”

When the Supreme Court of the United States declared the capitation tax to be unconstitutional as a prerequisite to registering and voting, it no longer was necessary to furnish a certified list of poll tax payments. See the opinion of the Attorney General dated May 4, 1966, to Walter B. Gentry, Treasurer, which is found in the printed volume of the Opinions of the Attorney General (1965-1966), at page 112. A copy of this opinion is enclosed herewith.

This opinion is in agreement with a bulletin issued by the Honorable Levin Nock Davis, Secretary, State Board of Elections.

As it is no longer necessary to have a list of poll tax payments, I do not know of any statute, or of any regulation by the State Board of Elections, requiring the preparation and posting of a list of all registered voters. By the same token, I know of nothing that would prevent such a list being prepared and published by the officials of the locality and arrangements were made locally by such locality to pay the cost thereof.

Section 24-113 of the Code of Virginia provides “Registration books shall be kept and preserved by the registrar and shall at all times be open to public inspection.”

Therefore, the public, or an individual, is entitled to see the registration books at any time. However, this must be subject to being done during normal office hours and so as not to interfere with the registrar’s need to use the books.
ELECTIONS—Primary—Candidate must file before midnight ninety days prior to primary.

January 6, 1967

HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

This will acknowledge your letter of January 5, 1967, relating to the filing of declarations of candidacy for the primary election to choose nominees for council of the city of Hampton. This primary, pursuant to § 24-349(a) of the Code, will be held on the fourth day of April, 1967.

Under § 24-370 of the Code, it is provided that any person proposing to be a candidate in such primary shall file a written declaration of candidacy at least ninety days before the primary. Therefore, the deadline for filing was January 4, 1967.

Under § 24-401 of the Code, any such candidate is required to pay to the treasurer of the city his filing fee, and a receipt therefor must accompany and be attached to the declaration of candidacy. It is provided in § 24-347 as follows:

"Primaries to be conducted in accordance with chapter.—A primary when held shall be conducted in all respects under the provisions of this chapter." (Chapter 14, Title 24 of the Code.)

You state that the City Democratic Committee adopted a resolution requiring all declarations of candidacy to be filed with the Chairman of the City Democratic Committee not later than 5:00 P.M. on January 4, 1967. A notice to that effect, signed by the Chairman, was published in the Daily Press of Newport News on December 8, 1966.

One of the candidates failed to file the necessary papers by 5:00 P.M., as required by the City Committee; however, this candidate filed the declaration, together with the receipt for the filing fee, with the Chairman of the City Committee at 8:15 P.M. on January 4, 1967. You present the following request:

"It is requested you kindly rule on whether or not the Hampton Democratic Committee had the right to duly resolve that the deadline for the Democratic Primary filing would be 5:00 p.m., the closing deadline for offices of the Clerk of the Court of Record and the City Treasurer, on January 4, 1967, and the closing of the office of the Chairman of the Democratic Committee on January 4, 1967, or is the deadline for filing midnight, January 4, 1967."

As pointed out, the statutory requirement for filing is ninety days before the date of the primary. In my opinion, the City Committee was without authority to limit the time of filing to 5:00 P.M., on the ninetieth day before the primary. I am aware of the fact that § 24-370, in addition to requiring the declaration of candidacy to be filed at least ninety days before the primary, further provides that the candidate must comply with the rules and regulations of the proper committee of his party. I do not construe this language to constitute a modification of the ninety day requirement so as to authorize the committee to require the filing of the declaration before the last day for filing has expired.

Section 15 of the Democratic Party Plans provides as follows:

"City and county committees shall have power to provide for the nomination of candidates for county, city and other local offices and for the election of Party Committee members and delegates to Party Conventions by either mass meetings, conventions or primaries as the respective committees may see fit."
Whenever such nominations for office or elections of committee-men or delegates are ordered to be made by primary election such primary elections shall be held in conformity with all the provisions of the State Primary Law."

You will note that this section specifically provides that when a primary election is ordered it shall be held "in conformity with all the provisions of the State Primary Law."

Therefore, in my opinion, the declaration of candidacy which was filed after 5:00 P.M., but before midnight, on January 4, 1967, was filed within the time required by law and that the person involved, if his papers are otherwise in order, is entitled to be certified to the electoral board as a candidate in said primary.

ELECTIONS—Primary—Candidate must file with party chairman.

February 8, 1967

HONORABLE RUTH E. HOLLAND, Clerk
Circuit Court of Isle of Wight County

This will acknowledge receipt of your letter of February 7, 1967, which reads as follows:

"I have been advised that a citizen of this county, who has always been known as an Independent, is planning to run for one of the county offices. If this is true could he now take the Oath and run as a Democrat in the Primary? It may be that he is still an Independent and only intends to have his name on the ballot in the fall, but I would like to know my position in case he does file for the primary."

Notices of candidacy in a primary for a county office must be filed with the chairman of the party. See, § 24-374 of the Code. If any question can be raised as to the sufficiency of the declaration of candidacy, including the affidavit required by the party plans, I think it will have to be raised by the chairman or the party committee of which he is chairman. The chairman certifies the candidates to the electoral board. See, § 24-375 of the Code. I do not believe there is any duty upon the clerk in connection with determining whether or not a person is entitled to have his name placed on the ballot in a primary.

ELECTIONS—Primary—Time for calling by Democratic chairman directory not mandatory.

April 4, 1967

HONORABLE T. DIX SUTTON
Member, House of Delegates

This is in reply to your letter of March 29, 1967, which reads in part as follows:

"Section 24-351 of the Code of Virginia provides that the Chairman and Secretary of the local committee shall notify the State Board of Elections of the action taken to hold a primary election, which notice shall be given one hundred and ten (110) days prior to the date set by law for the primary election. . . ."
"In Henrico County there has been no meeting of the Demo-
cratic Committee and no action has been taken by that Com-
mittee to call a primary. Consequently no notice has been given
to the State Board of Elections as required under § 24-351 of
the Code.

"The Chairman of the Henrico Democratic Committee has been
quoted in the press as saying that the Committee will meet on
April 4th and at that time will call a primary to be held July
11th.

"Will you please let me know if, in your opinion, the Henrico
Democratic Committee may at this late date call a primray elec-
tion to be held July 11, 1967?"

In my opinion, the primary may be called in accordance with the pro-
cEDURE proposed by the Chairman of the Henrico Democratic Committee.

In addition to the facts which you recite, I have been informed by the
State Board of Elections that, on March 6, 1967, it received from the
Democratic Legislative District Committee for the Thirty-sixth District
(Henrico County and City of Richmond), notice that there would be a
primary in that district for members of the House of Delegates. I also
understand that it has been the invariable custom for many years in
Henrico County to hold primaries for the nomination of Democratic
candidates for local, as well as for State-wide offices. Thus, it is a virtual
certainty that the public in Henrico County assumes that there will be
a Democratic primary in July.

I mention these additional facts because the situation in your county
is almost identical to that which existed in the City of Danville when the
Honorable Abram P. Staples, then Attorney General, wrote to the Honor-
able E. Walton Brown, on June 17, 1935, in answer to an inquiry similar
to yours, and opined that the primary could be called. (See Report of
the Attorney General (1934-1935), p. 68.) (See, also, § 24-346(e.).)

Further, the case of Huffman v. Kite, 198 Va. 196, 93 S.E. 2d 328 (1956),
is totally persuasive. There, the Supreme Court of Appeals of Virginia
stated, at 198 Va. p. 200:

"The general rule most certainly is, that where a statute di-
rects a public officer to do a thing within a certain time, without any
negative words restraining him from doing it afterwards, the naming
of the time will be regarded as merely directory, and not as a limita-
tion upon his authority. Barnes v. Badger, 41 Barb. 98, 99, quoted
with approval in Fallon v. Hattener, 229 App. Div. 397, 242 N. Y. S.
93, 96.

"In many cases, statutory provisions as to the precise time
when a thing is to be done are not regarded as of the essence,
but are regarded as directory merely. This rule applies to statutes
which direct the doing of a thing within a certain time without
any negative words restraining the doing of it afterwards. Thus,
where a statute prescribes a time within which a public officer
is to perform official acts affecting the rights of others, the gen-
eral rule is that it is directory as to the time, unless from the
nature of the act the designation of time must be considered a
limitation on the power of the officer. *** 50 Am. Jur., Statutes,
§ 23, p. 46."

Thus, in my opinion, the last sentence of § 24-351 is merely directory
and not mandatory, and the citizens of Henrico County may not be de-
prived of their customary Democratic primary by the omission which you
have described.
ELECTIONS—Purge of Registration Books—Whenever electoral board deems proper—Procedure under §§ 24-106, et seq.

February 23, 1967

MR. H. J. T. WEBNER, Secretary
Louisa County Electoral Board

This will acknowledge your letter of February 21, 1967, which reads as follows:

"In a recent 'purge' of the register of voters for one of our precincts we found the names of many people who had not voted in five or more years. We use the 'loose leaf-locked' binders in which each person is checked off each time he votes.

"May these names be removed? Are there any procedures that we must follow when we do remove them?

"We also found several names of people who had moved out of the precinct and/or the county but still regularly send in for their 'ballots by mail.' May we inform them to change their registration to their present place of abode?

"Where the Election Law says 'notify by Registered mail' may we use 'Certified Mail' which is much less expensive?"

Under the provisions of § 24-106 of the Code, the electoral board of your county may direct the registration books of any precinct to be purged whenever the board deems the same to be proper. The procedure for purging the books in counties having a general registrar commences at § 24-106 of the Code. Any purging of the books under this and the following sections must be in strict compliance with this procedure.

With respect to your question presented in the third paragraph of your letter, the answer is in the negative. Any person who has resided in Louisa County and who has established his voting place in that county does not automatically lose the same by moving to another county or to another State. The very fact that these people have been voting by mail is evidence that they have not changed their residence for voting purposes but prefer to maintain the same in Louisa County.

With respect to the fourth paragraph of your letter, I call your attention to the fact that § 24-107 of the Code provides that the notices to be sent in connection with the purging of the registration books may be sent by certified mail. Under the provisions of § 24-323 and § 24-327 of the Code, a person voting by mail may return the ballot by either certified or registered mail.

I have requested the Secretary of the State Board of Elections to mail you the latest copy of the Virginia election laws.

ELECTIONS—Registration and Voting—Residence requirements must be met.

July 26, 1966

MRS. LESLIE C. CURDYS
General Registrar, City of Norfolk

This will acknowledge receipt of your letter of July 21, 1966, which reads as follows:

"The City of Norfolk owns property located in the City of Chesapeake and operates the Norfolk Prison Farm there.
"Is there any way for the employees of the City of Norfolk, who live on that property, to register and vote in the City of Norfolk?"

As I understand your letter, these employees have never qualified to vote in the city of Norfolk. The fact that they are residing on property owned by the city which is located outside the corporate limits of the city, does not qualify them to register and vote in the city of Norfolk. Only those persons who meet the residence requirements of Section 18 of the Constitution and § 24-17 of the Code may register and vote in the city.

This, of course, would not prevent persons from registering and voting in Norfolk who have previously established their residence in the city of Norfolk and are residing temporarily on the prison farm and who intend to maintain their place of residence in the city of Norfolk.

ELECTIONS—Registration Books—May be inspected at reasonable times.
ELECTIONS—Sample Ballot—May be taken into voting booth.

August 22, 1966

Mr. H. J. T. Webner, Secretary
Louisa County Electoral Board

This is in reply to your letter of August 19, 1966, in which you state, in part, as follows:

"... Par. 24-113 (page 61) of the Electoral Laws states that: '... the Registers be at all times open to public inspection...'

"Before the Primary last June, the person who was not 'an elector' in Louisa County, recruited several 'teenagers' whom he brought into the office of the Registrar and we insisted that they go to the duplicate registers in the office of the Clerk of the Court in order to copy names of all registered voters. Does this paragraph include any such mass use of the Registers?

"(2) Some judges at the precincts testify that several voters went into the voting booths with 'sample ballots' or other notes in their hands. We find no law touching on that. Do we have the right to have them leave such data with a judge while the voter is in the booth?..."

This office has held on several occasions that registration books may be inspected at reasonable times. For your information, I enclose copies of the following opinions relating to that subject:

Opinion to W. M. Ferguson

Opinion to J. N. Colosanto
December 28, 1945
(Report of 1945-1946, p. 72)

Opinion to J. N. Colosanto
July 24, 1951
(Report of 1951-1952, p. 72)
With respect to your question (2), there is no statute prohibiting a voter from carrying a sample ballot into the polling booth. In an opinion dated October 31, 1932, to John D. Crowle, Jr., Secretary of the Electoral Board at Staunton, Virginia, the late Attorney General John R. Saunders, Report of the Attorney General (1932-1933), at p. 53, made the following statement:

"... A voter may carry with him into the voting booth an informative ballot for the purpose of aiding in the preparation of his official ballot, provided he receives the informative ballot before he obtains his official ballot from the judges of election. ..."

This ruling, you will note, has been in effect for more than thirty years and has never been challenged, so far as the records of this office indicate. Therefore, your question (2) is answered in the negative.

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ELECTIONS—Registration Books—Remain in custody of registrar except in use on election day.

REGISTRAR—Books—In custody of registrar except when in use on election day.

July 11, 1966

Miss Sue D. Kuczko
General Registrar, City of Norton

This will acknowledge receipt of your letter of July 9, 1966, which reads, in part, as follows:

"It has come to my attention that the Clerk of the Circuit Court intends to order me on Wednesday, July 13, 1966, the day subsequent to the primary election, to bring the City of Norton registration books to the Court House, and leave them for insertion in the master index. That is to copy the names, addresses, occupation, voting record, military record into the master index. The City of Norton registration books are in loose leaf binders, are easily torn out of the book and contain a great deal of information, such as the voting record in past elections."

You have stated in your letter that you have complied with § 24-78 by furnishing the clerk of the Circuit Court of Wise County, which is the court that has jurisdiction in the city of Norton, with a list of the persons registered by you. You are not required to deliver your books to the clerk in case he should make such request as you have indicated.
Section 24-113 of the Code provides as follows:

"Registration books shall be kept and preserved by the registrar and shall at all times be open to public inspection."

This section makes it necessary that you keep the books in your custody at all times, except when they are in use on election day, in accordance with the provisions of § 24-114 of the Code.

Of course, under the provisions of § 24-113 you are required to permit inspection of the books at reasonable times. In that connection, I enclose copy of an opinion of this office construing this section. (Opinion to Mr. James N. Colosanto, dated December 28, 1943, Report of the Attorney General (1943-1946), at p. 72.)

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ELECTIONS—Tie-breakers—May be compensated for performance of duty.

BOARDS OF SUPERVISORS—Authority—May compensate tie-breaker for performance of duty.

April 3, 1967

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

Your letter of March 30, 1967, reads as follows:

"The Board of Supervisors of Sussex County has asked that I write you to determine whether or not they can compensate a tie-breaker appointed pursuant to 15.1-535 and if so to what extent he may be compensated."

I cannot find any statute relative to compensation of a tie-breaker. However, I am of the opinion that a tie-breaker is entitled to compensation for the days, if any, on which he performed duties as such. I am advised by the Honorable J. Gordon Bennett, Auditor of Public Accounts, that tie-breakers have been compensated in other areas of the State.

Finding nothing in the statutes about such compensation, I cannot state what is an adequate or reasonable compensation, but I am of the opinion that he would be entitled to the same per diem for the days he actually performed his duties as tie-breaker as a member of the board of supervisors.

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ELECTIONS—Voting Residence—Controlled by intent of voter.

September 8, 1966

HONORABLE JOHN Y. HUTCHESON, Secretary
Mecklenburg County Electoral Board

This will acknowledge receipt of your letter of September 6, 1966, which reads as follows:

"We have had right much dissention in the Town of Clarks-ville and Clarksville District about people voting who are not supposed to be residents of that vicinity. In the last election two men who were raised there, and whose father and mother live there, and
who own their homes and have businesses and families in Wash-
ington, D. C., came to vote. Their votes were challenged on the
grounds that they were not residents of that precinct.

“They claimed that they had never moved their residence, al-
though they had been domiciled in Washington many years.

“I would appreciate it if you would advise me under these
circumstances, should they have been permitted to vote.”

The question of residency for the purpose of voting is controlled
by the intent of the voter. Once a person has established his voting residence, he
does not lose it by moving to another place unless he decides to abandon
his voting residence and establish it at the place to which he has moved.

This office has always taken the position that a person could move to
another county or State and by intention maintain his voting residence at
the place he first qualified to vote. I enclose copy of an opinion dated
June 8, 1939, published in Report of the Attorney General (1938-1939), at
p. 104, which is in point. A discussion of this subject is found in the case

EMINENT DOMAIN—Commission of Outdoor Recreation—Lacks power.

August 23, 1966

HONORABLE JOHN WARREN COOKE
Member, House of Delegates

This is in reply to your letter of August 22, 1966, in which you refer to
Chapter 176, Acts of General Assembly (1966), creating the Commission of
Outdoor Recreation. You request my advice as to whether the Commission
may exercise the right of eminent domain for the purpose of acquiring
property.

This Chapter, as introduced by Senate Bill 106, in Article 6(h) contained
language conferring the power of eminent domain on the Commission.
This language was stricken from the bill and the act does not now contain
any provision which would authorize the Commission to exercise such
power. No State agency may ever exercise such power unless it has been
expressly conferred by the General Assembly. You state further that
despite the fact that the statute in question does not specifically confer the
power of eminent domain, the board of supervisors and other officials of
New Kent County, in which a portion of the State park is to be located,
are concerned with the question as to whether the State may have inherent
powers of eminent domain under which the property may be condemned
for public use.

It is stated in Vol. 29A, CJS, Art. 2, p. 169, under the subject of Eminent
Domain, as follows:

“The power of eminent domain lies dormant in the sovereign
until legislative action is had pointing out the occasions, modes,
agencies, and conditions for its exercise. . . .”

This underlying principle prevails in this State, and is supported by the
following language in the case of Talbot v. Mass. Life Ins. Co., 177 Va. 443:

“The right of eminent domain, which is defined to be the right on
the part of the state to take or control the use of private property
for the public benefit when public necessity demands it, is inherent
in every sovereignty, and is inseparable from sovereignty, unless
denied to it by its fundamental law. Vattel, book 1, ch. 20; Cooley's
Const. Lim. 523; Kohl v. United States, 91 U. S. 367. The right,
however, must be exercised upon such terms, and in such manner,
and for such public uses as the legislature may direct. 2 Kent's
Com., 340; 2 Min. Insts. 22, and cases cited. The whole subject,
from its nature, belongs exclusively to the legislative department
of the government, subject to the limitation imposed by the con-
sitution in respect to just compensation for the property taken;
and, hence, all questions affecting the rights of the parties in a
case like this, must be determined not with reference to the deci-
sions of the courts of other states, based on the peculiar statutes
of those states, but according to the provisions of our own
statutes...”

Therefore, in my opinion, under the provisions of the statute establishing
the Commission of Outdoor Recreation, the power of eminent domain may
not be exercised in connection with the development of that project.

EMINENT DOMAIN—Municipalities—Writ tax not applicable.

CIVIL PROCEDURE—Eminent Domain—Municipalities—Writ tax not
applicable.

August 24, 1966

Honorable Cecil W. Johnson, Clerk
Hustings Court, City of Portsmouth

This is in reply to your letter of August 10, 1966, in which you made the
following inquiries:

“Since the decision in the case of Prince William v. Fairfax, 206
Virginia 730 wherein the Court held that ‘condemnation proceed-
ings are legal and not equitable in nature,’ attorneys are filing all
condemnation suits on the law side of this Court. Under Section
58-71 of the Code of Virginia, as amended, a writ tax is required
on all law cases based upon the amount in controversy. In suits
brought by the Portsmouth Redevelopment and Housing Authority
it is impossible to tell the amount in controversy until such time
as the Commissioners have determined the value of the property.

“Will you please give me an opinion as to how I may determine
what writ tax to charge in these instances. Also I would like to
note that under Section 17-28 of the Code of Virginia it is provided
that ‘In any proceeding brought for the condemnation of property,
all proceedings, orders, judgments and decrees of the Court shall be
recorded in the Chancery order book of the Court.’

“Will you please advise me as to whether or not all decrees in
condemnation proceedings should be recorded in the chancery
order book and the common law order book since the aforemen-
tioned decision, or if not, in which order book.”

In answer to your inquiry regarding the proper manner to determine the
writ tax to charge in condemnation cases brought by the Portsmouth Re-
development and Housing Authority, I am of the opinion that no writ tax
is applicable in such cases. In the case of Pelouse v. Richmond, 183 Va. 805,
the Supreme Court of Appeals of Virginia held that no provision having
been made by the Legislature requiring a municipal corporation to pay a
writ tax upon its actions and suits brought in court that it was presumed that the Legislature did not intend to require such a tax from municipalities.

It would logically follow that the reasoning in the Pelouze case, *supra*, would be applicable to suits and actions brought by other political subdivisions of the State and that no writ tax would be applicable in such cases.

With reference to your inquiry regarding the proper order book for recording final decrees in condemnation proceedings, I am of the opinion that such decrees should be recorded in the chancery order book. The basis for this opinion is set forth in the opinion rendered by this office on July 24, 1963, and contained in the Report of the Attorney General (1963-1964), p. 136. For your information, a copy of this opinion is enclosed.

**EMINENT DOMAIN—State Institution—Applicable to Longwood College.**

**STATE INSTITUTIONS—Longwood College—Eminent domain may be exercised.**

October 27, 1966

MR. RONALD G. LAWHORNE
Business Manager and Treasurer,
Longwood College

This is in reply to your letter of October 26, 1966, in which you state that condemnation proceedings have been commenced in the Circuit Court of Prince Edward County in the name of "Commonwealth of Virginia, Board of Visitors of Longwood College, a corporation," for the purpose of acquiring certain real estate. You state that the question has been raised as to whether or not the provisions of Chapter 159 of the Acts of Assembly (1964), which enacted §§ 23-182 through 23-191 of the Code of Virginia, establishing Longwood College as a separate State higher educational unit, preclude the college from exercising the power of eminent domain.

In my opinion, there is no merit to this contention. Longwood College is, in my opinion, a "State institution" within the meaning of that term as used in § 25-232 of the Code of Virginia and, therefore, enjoys the right of eminent domain to the same extent as the other higher educational institutions mentioned in that section.

Section 23-182 established a corporation composed of the Board of Visitors of Longwood College under the style of "The Visitors of Longwood College." I notice that the suit was brought in the name of "Commonwealth of Virginia, Board of Visitors of Longwood College, a corporation." It probably would have been better to have filed this petition as "The Visitors of Longwood College, on behalf of Longwood College, an institution of the Commonwealth of Virginia."

A deed of conveyance to the college, in my opinion, should be made to "The Visitors of Longwood College, an institution of the Commonwealth of Virginia."
EMPLOYMENT AGENCIES—Prohibited From Advertising Services as Free if Fee Charged.

ADVERTISING—Employment Agencies—Prohibited from advertising services as free if fee charged.

July 20, 1966

HONORABLE EDMOND M. BOGGS, Commissioner
Department of Labor and Industry

In your letter of July 7, 1966, you ask whether an employment agency which receives fees from employers or from employees is forbidden to advertise that its services are rendered free.

Section 40-15 of the Code of Virginia (1950), as amended, provides in part:

"No agency shall advertise its services as free if any person assumes any liability or contingent liability for any fees."

By "agency" is meant "employment agency," which is defined in § 40-9.1(4) as: "Any person, firm, corporation, association or business who shall advertise through any means for the purpose of assigning or directing a person to some other employer to work and charges any fee or commission for such service. ..." "Fee" is defined in § 40-9.1(1) as "Anything of value ... received by an employment agency from or on behalf of any person seeking employment or employees in payment for any service, either directly or indirectly." (Emphasis added.)

The prohibition against advertising its services as free, found in § 40-15, applies in any case in which a fee is received. It makes no difference whether the fee is paid by the employer or by the employee. It also makes no difference how such advertising is accomplished. If the name of the agency, by use of the word "free" or otherwise, creates the impression that no fee is charged, when in fact a charge is made, then, in my opinion, § 40-15 is violated.

ESCHEATS—Delinquent Real Estate Taxes—Treasurers may accept.

ESCHEATS—Recovery of Property—Claimants must file pursuant to §§ 55-176 through 55-181.

TAXATION—Delinquent Real Estate Taxes—Property escheated to State not subject to sale.

December 13, 1966

HONORABLE RANDOLPH W. CHURCH
State Librarian

This will acknowledge receipt of your letter of December 8, 1966, requesting an opinion with respect to a series of questions presented to you by Jerome S. Howard, Jr., Commissioner of the Revenue of the city of Roanoke. The letter from Mr. Howard reads as follows:

"Mr. James P. Hart, Jr., Escheator for the City of Roanoke, has submitted to your office a list of escheated lots in accordance with existing escheat statutes.

"Recently, this office has had several inquiries from persons who may have some claim to these escheated lots."
"Since this is the first experience we have had with escheating lands, I would greatly appreciate your answers to the following questions and any other helpful information which could be furnished.

"1. Has the escheat action taken thus far precluded the City Delinquent Tax Collector from accepting delinquent tax payments from persons who may have claim to the land?

"2. One lot on the escheators list is owned by the City of Roanoke, erroneously appearing thereon, because of a property transfer error. What procedure is necessary to remove this lot from the escheators list?

"3. What procedure should the City of Roanoke follow to recover the delinquent real estate taxes assessed against these lots?

"4. What procedure should the claimants use to recover these lots?"

I shall answer the questions in the order presented.

1. I see no objection to the city treasurer accepting payment of delinquent taxes assessed against any property included in the escheat proceedings as shown by the verdict returned pursuant to § 55-175 of the Code of Virginia. I know of no statute under which liability for taxes assessed against such property is extinguished when the property escheats to the State.

2. In my opinion, it will be necessary for the city to follow the same procedure required of other claimants to property that has been found to have escheated to the State.

3. The lots in question, having been found to have escheated to the State, are no longer subject to sale for any taxes delinquent thereon. In my opinion, the procedure provided in §§ 58-1014, et seq., of the Code may be followed.

4. The procedure for claimants who wish to recover escheated property is to file a petition in the circuit court and is set forth in §§ 55-176 through 55-181 of the Code.

I call attention to the fact that the action taken by the escheator was not for the purpose of escheating the property, but is merely a statutory means by which the State furnishes an authentic record of her title. See, Sands v. Lynham, 27 Gratton (68 Va.), p. 291.

FEES—City Sergeant—Allowed on fieri facias upon return of "no effects."

SHERIFFS AND SERGEANTS—City Sergeant—Fee allowed on fieri facias upon return of "no effects."

March 21, 1967

HONORABLE MERVIN A. GAGE
City Sergeant for the City of Hopewell

This is in reply to your letter of March 16, 1967, in which you request a ruling on the question of whether or not a fee of fifty cents is allowed the City Sergeant for a return of "No Effects" on each fieri facias so returned to the clerk of court after the expiration of the sixty-day period.
Under the provisions of Article 3 of Chapter 6, Title 16.1, Code of Virginia (1950), as amended, § 16.1-98 provides that, upon a judgment being rendered in a court not of record, a fieri facias shall be issued thereon immediately, except this may be suspended by the court for a ten-day period in event of appeal. Such writ of fieri facias shall be made returnable within sixty days to the court from which it was issued, pursuant to § 16.1-99 of this article. From the wording of your letter, including the allusion to returns made after sixty days, it will be assumed that you have reference to such proceedings.

In respect to the allowance of fees, § 14.1-93 prescribes that: "Whenever on any decree of judgment in a civil case any fieri facias issued by the clerk of any court is placed in the hands of any officer and no levy is made or forthcoming bond is taken thereon, and a return is made by the officer, the officer so making a return thereon shall be allowed a fee of fifty cents for making the return." It is my opinion that this section applies where returns of "No Effects" are made on the fieri facias issued by the clerk and, therefore, the fee of fifty cents should be allowed the City Sergeant in any case in which he makes such return thereon.

**FIREWORKS—Prohibited Use—Roman candles.**

November 22, 1966

HONORABLE EMMORY H. CROCKETT
Commonwealth's Attorney for Lee County

This is to acknowledge receipt of your letter of November 3, 1966, in which you state, in part:

"I have been asked to secure a construction of the statute [§ 59-218 as amended] by your office as to whether or not the words 'fountains', is construed to include what is known as 'Roman candles' and, if so, whether 'Roman candles' could be used or ignited on private property under the meaning of this statute."

The subject of fireworks is dealt with in Chapter 15, Title 59 (§§ 59-214 to 59-219, inclusive), Code of Virginia (1950), as amended.

Section 59-214 reads as follows:

"Except as otherwise provided in this chapter, it shall be unlawful for any person, firm or corporation to transport, manufacture, store, sell, offer for sale, expose for sale, or to buy, use, ignite or explode any firecracker, torpedo, skyrocket, or other substance or thing, of whatever form or construction, containing nitrates, chlorates, exalates, sulphides of lead, barium, antimony, nitroglycerine, phosphorus or any other explosive or inflammable compound or substance, and intended, or commonly known, as fireworks."

You will note that this section prohibits the use, ignition or exploding, _et cetera_, of any type of fireworks. The only exception to this all-inclusive coverage is found in § 59-218, Code of Virginia, as amended by Chapter 168, Acts of 1958:

"This chapter shall not apply to sparklers, fountains, Pharoh's serpents, caps for pistols, nor shall it apply to pinwheels commonly known as whirligigs or spinning Jennies, when used, ignited or exploded on private property with the consent of the owner of such property."
This 1958 amendment strengthened the law as it not only deleted Roman candles, as you state, from the exception, but also deleted firecrackers not in excess of two inches long and one-quarter inch in diameter. The amendment also added the term "fountains." This term is commonly applied to a small cone shape contrivance usually no more than five or six inches high which is placed on the ground and, when lighted, has the appearance of a fountain. The Roman candle, on the other hand, is a tubular contrivance held in the hand or hands and, when lighted, emits a flaming ball of fire for a considerable distance. It is of greater intensity and more dangerous to operate than the fountain. The two species of fireworks are entirely different.

I am of the opinion that the term "fountains" does not include Roman candles, and that it is unlawful to use or ignite Roman candles on private property.

GAME AND INLAND FISHERIES—Bee Hives Destroyed by Bears—No compensation.

January 6, 1967

HONORABLE J. KENNETH ROBINSON
Member, Senate of Virginia

This will acknowledge your letter of January 5, 1967, which reads as follows:

"Mr. George Grites has asked me to inquire of your office whether or not any precedent exists with regard to an individual's recourse in an instance where property is destroyed by bears.

"Mr. Grites is particularly interested with regard to the instance of bears getting into bee yards in an attempt to get the honey and destroying the hives in which the bees are kept as well as causing the loss of the bees.

"If there are any instances on record of cases that would assist him in deciding a course of action with regard to this problem, I would appreciate some knowledge of them."

Chapter 420, Acts of the General Assembly (1962), authorizes several counties to require hunters of bear and deer to purchase special stamps, the proceeds to be used for the payment of damages to crops, fruit trees, livestock or farm equipment by deer, bear or big game hunters in the county. The counties of Clarke, Frederick, Loudoun and Shenandoah are included in this authorization, subject to the adoption of the necessary ordinance.

In my opinion, bees, although they may be hived and thus property, fail to come within any of the classifications or categories for which compensation may be paid for damages caused by bears. In the absence of statutory authority, neither the county nor the State can compensate for loss in a case like the one presented by you.
GAME AND INLAND FISHERIES—Motorboat Equipment—Life preservers, etc., must comply with Commission regulations.

MOTORBOATS—Life Preservers, Etc.—Must comply with regulations.

HONORABLE CHESTER F. PHELPS, Executive Director
Commission of Game and Inland Fisheries

July 5, 1966

This will acknowledge receipt of your letter of July 1, 1966, which reads as follows:

"Section 62-174.6(f) of the Code of Virginia, provides that 'every motorboat shall carry at least one life preserver, or life belt, or ring buoy, or other device of the sort prescribed by the regulations of the Commission for each person on board. . . .'"

"I should like to have your opinion as to whether or not the phrase ' . . . of the sort prescribed by the regulations of the Commission . . .' means that the said life preserver, life belt or ring buoy must be of a type prescribed by regulations of the Commission."

Subsection (f) of the above Code section, in its entirety, is as follows:

"Every motorboat shall carry at least one life preserver or life belt, or ring buoy, or other device of the sort prescribed by the regulations of the Commission for each person on board, so placed as to be readily accessible; provided, that every motorboat carrying passengers for hire shall carry so placed as to be readily accessible at least one life preserver of the sort prescribed by the regulations of the Commission for each person on board."

In my opinion, the phrase " . . . of the sort prescribed by the regulations of the Commission . . . " relates to "life preserver," "life belt" and "ring buoy" as well as to any "other device" that may be approved by the Commission by proper regulation. There is nothing contained in this section that would justify the conclusion that a life preserver, life belt, or ring buoy which does not comply with regulations of the Commission, would be in compliance with the statute.

GAME AND INLAND FISHERIES—Permits Allowing Fox Hounds to Run at Large—Authority to issue in Commissioner.

DOG LAWS—Fox Hounds—Permits to run at large.

HONORABLE ANDREW J. ELLIS
Commonwealth's Attorney for Hanover County

April 20, 1967

This is in reply to your letter of April 10, 1967, which reads as follows:

"Pursuant to the provisions of Section 29-184.2 of the 1950 Code of Virginia, as amended, Hanover County has adopted an ordinance vesting the enforcement of dog laws in a County Dog Warden.

"The ordinance provides that all regulations, provisions and punishments of Sections 29-183 to 29-213, both inclusive, of the Code of Virginia shall apply mutatis mutandis to the County, and further prohibits dogs running at large during the months of April,
May and June. Running at large is defined as roving, running or self-hunting off the property of the owner or custodian and not under the owner or custodian’s immediate control.

"Section 29-212 of the Code authorizes the Commissioner of Game and Inland Fisheries to issue permits to residents of the State permitting fox hounds to run at large.

"I would appreciate your advising me your opinion as to the following two questions:

"1. Would the authority of the Commissioner of Game and Inland Fisheries to issue permits under Section 29-212 of the Code be retained by the Commission even though the County of Hanover has adopted a dog ordinance or would this authority be vested in the Board of Supervisors?

"2. May a permit be granted pursuant to the provisions of Section 29-212 allowing fox hounds to run at large during the prohibited months?"

In answer to your first question, the authority to issue permits under § 29-212 is specifically granted to the “Commission.” The adoption of the dog ordinance by the County of Hanover, pursuant to § 29-184.4, does not, in my opinion, vest such authority in the Board of Supervisors. Section 29-184.4 authorizes the enactment of local ordinances “corresponding in nature and scope, and not in conflict with, the provisions of this chapter...” In my opinion, § 29-184.4 does not empower the governing body of your county to divest the Commission of the authority granted it under § 29-212.

Consequently, the answer to your second question is in the affirmative. Section 29-212 grants the Commission authority to issue permits, permitting fox hounds “to run at large at any time.”

However, I am informed by the Law Enforcement Division of the Commission of Game and Inland Fisheries that, to their knowledge, no permit has ever been issued pursuant to § 29-212.

GENERAL ASSEMBLY—Members—Cannot serve as judge of any court. JUDGES—Cannot Serve as Member of General Assembly.

August 15, 1966

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This will acknowledge receipt of your letter of August 12, 1966, which reads as follows:

"I have been approached by the Town of Amherst in reference to serving as Assistant Judge of their Town Court. I do not wish to resign my position as a member of the General Assembly, therefore I would like to know whether I can serve as a member of the General Assembly and also serve as Assistant Town Judge."

Section 44 of the Constitution provides, among other things, that “... no judge of any court... shall be a member of either house of the General Assembly during his continuance in office and the election of any such
person to either house of the General Assembly, and his qualification as a member thereof, shall vacate any such office held by him. . . ."

In my opinion, the municipal court of a town is a court established under Section 87 of the Constitution and during the time you are a member of the General Assembly, Section 44 of the Constitution prohibits your holding the office of assistant judge of such court without vacating membership in the General Assembly.

HIGHWAYS—Boards of Supervisors—Construction of road not within primary or secondary system.

BOARDS OF SUPERVISORS—Appropriations—Cannot construct road.

August 1, 1966

HONORABLE KERMIT L. RACEY
Commonwealth's Attorney for Shenandoah County

This is in response to your letter of June 29, 1966, in which you pose the following question:

"May a Board of Supervisors spend money from the general funds of the county to build a road not within the primary or secondary highway systems of the state?"

By § 33-46, Code of Virginia (1950), as amended, the control and supervision over the secondary system of State highways is placed exclusively in the State Highway Department. This section is a codification of a portion of the original "Byrd Road Law" (Chapter 415, Acts of 1932), and is applicable in all counties except those which exercised the option to continue the county road system (now limited to Arlington and Henrico).

Except for the limited purposes mentioned in § 33-138 of the Code, the governing bodies of counties are prohibited from levying for the construction and maintenance of roads. Section 33-138 provides in part as follows:

"The boards of supervisors or other governing bodies of the several counties shall not make any levy of county or district road taxes or contract any further indebtedness for the construction, maintenance or improvement of roads. . . ."

As was stated by the Supreme Court of Appeals of Virginia in the case of Henrico v. City of Richmond, 177 Va. 754, at page 797, "The manifest purpose of the 1932 Act was to relieve the county taxpayers of the cost of the construction and maintenance of the county roads."

It is true that the local governing bodies are authorized to establish new roads in their respective counties, which shall, upon such establishment, become parts of the secondary system of State highways (§ 33-141), but the extent of their expenditures is limited by that section to participation in the costs of acquiring the necessary right of way. See, Report of the Attorney General (1962-1963), p. 104.

I am unaware of any authority for appropriating from the general fund of the county, funds for the construction of a public road under the circumstances which you have outlined. The above-mentioned statutes and language contained in the decision of the Supreme Court of Appeals indicate that, except for those few exceptions enumerated, none of which would apply
here, the obvious intent is to preclude counties from levying for public roads and thus relieve county taxpayers of the financial burden of construction and maintenance of such roads.

In view of these limitations, I am of the opinion that the Board of Supervisors of Shenandoah County may not legally make an appropriation from the General Fund of the county for the construction of the public road in question. For further opinions on this subject see Report of the Attorney General (1947-1948), p. 8, and Report of the Attorney General (1963-1964), p. 152.

HIGHWAYS—Boundary Lines—Establishment—Between roadways and adjacent property owners.

June 16, 1967

HONORABLE RICHARD F. GEORGE, Clerk
Circuit Court of Fluvanna County

This is in reply to your letter of May 24, 1967, which reads in part as follows:

"Our County Surveyor has asked me to write you for a ruling regarding land boundary along several types of roads. In the following situations he wants to know whether the boundary line should be to the center of the road, the edge of the road, or to the edge of the total right of way of the road or highway.

"1. A state maintained road where the state has never secured any right of way but perhaps by virtue of public use down through the years would belong to the state.

"2. A secondary highway where all the adjoining landowners join in a right-of-way deed, perhaps an omnibus deed, granting a right of way of a certain width.

"3. A strip of land for a highway purchased outright from the owner by the state or an interstate road or highway."

I will answer your inquiry as to each situation in order in which they are set forth in your letter.

1. Where the State or county has never acquired any right of way for the highway, but has the right to use such highway by virtue of an easement for travel, the boundary of the adjoining property would generally extend to the center of the highway. However, there may be cases in which the property owners abutting the highway can show that the road is located entirely on the property of the property owner on one side of the highway and in such cases that landowner's property would extend under the entire width of the highway.

2. In situations where the adjoining landowners have executed an omnibus deed pursuant to § 33-145 of the Code, the boundary line of the adjacent property would be the edge of the right of way as spelled out in such deed.

3. In situations where the Highway Department has purchased from the adjacent property owners the land for the highway, the boundary line of the adjacent property would be the edge of the right of way as established by such deed.
REPORT OF THE ATTORNEY GENERAL

HOMESTEAD EXEMPTIONS—Wages Exempt—How computed.

GARNISHMENT—Wages—Amount exempt from attachment under § 34-29.

July 11, 1966

HONORABLE JOHN V. FENTRESS, Clerk
Circuit Court of Virginia Beach

This will acknowledge your letter of July 7, 1966, which reads as follows:

"Your opinion is respectfully requested concerning the interpretation of § 34-29, Code of Virginia, 1950, as amended. My inquiries are as follows:

"1. Do the minimum and maximum exemptions detailed in § 34-29 refer to the employee's gross pay from which ' . . . all deductions for taxes and other withholdings for the benefit of the employee . . . ' are to be taken, or, do the exemptions refer to the amount of the 'take home' pay of the employee?

"2. If the section refers to gross pay and the employee has ' . . . deductions for taxes and other withholdings for the benefit of the employee . . . ' which exceed the amount of the exemption, who has first claim on the employee's remaining salary; his normal deductions or the garnishee?

"3. Section 34-29 states that 'All sums of wages over and above the maximum exemption, in addition to the twenty-five per centum of the sum between the minimum and maximum, shall be subject to attachment by garnishee summons. . . .' For purposes of illustration consider the following example:

"Total wages of householder paid monthly $350.00
"Maximum exemption—per § 34-29 150.00

"Amount subject to garnishment $200.00
"Additional sum subject to garnishment as provided in § 34-29—(25% of $50.00—the difference between minimum and maximum exemptions) $12.50

"Total amount subject to garnishment $212.50

"If the above example is stated correctly, does a contradiction exist in § 34-29? It would appear from the illustration that the employee's maximum exemption is limited to $137.50 rather than $150.00. Using the formula provided, is it possible for an employee's wage to be such that his maximum exemption would ever reach $150.00?"

You are referred to an opinion of this office to Honorable Francis M. Hoge, which is published in the Report of the Attorney General (1963-1964), at p. 158, which relates to § 34-29 of the Code and in which we furnish an example in an attempt to clarify this section. You will note that in the example used we substracted the minimum exemption from the total wage for the period for which it was earned and applied the formula on that basis.

With respect to your question (1), the exemptions are based on the gross pay. Withholding taxes and social security are withheld from the amount exempted from garnishment.
With respect to question (2), the garnishment normally attaches to the amount of wages in excess of the statutory exemption. However, if the mandatory deductions, such as income and social security taxes, total more than the maximum exemption, in my opinion, these amounts would have priority over the judgment creditors garnishee.

Your third question, I believe, is answered in the opinion to Judge Hogé, to which I have referred. In that opinion, we construed the act so as to apply the percentage formula to the difference between the total weekly wage and the minimum exemption—that is, 75% of the difference between the minimum exemption and the total wage (but not in excess of the maximum) as the amount exempted to the wage earner after applying the minimum.

In the example presented by you, the $200.00 is the amount subject to garnishment, because the maximum has been withheld. In such cases the formula is not applied.

In the illustration used by you, the minimum is $50.00. The difference between the minimum and the total wage is $300.00. 75% of $300.00 is $225.00. This amount, added to the minimum of $50.00, totals $275.00, which, except for the maximum limit, the wage earner would be entitled to under the “in addition” formula. However, since the exemption may not under any circumstance exceed the statutory maximum of $150.00, the amount subject to the garnishee summons is $200.00.

In any case where an employer is in doubt as to the amount that should be withheld, it would seem that he should file with the court a statement as provided for in §8-443 of the Code and let the court determine the amount which should be paid to the garnishee and to the employee, respectively.

HOUSING AUTHORITIES—Charlottesville—Referendum necessary on each construction site.

January 31, 1967

HONORABLE EDWARD O. MCCUE, JR.
Member, Senate of Virginia

This is in reply to your letter of January 28, 1967, relating to §14-a of the Charter of the City of Charlottesville (Chapter 332, Acts of Assembly, 1962).

You state that a petition may be filed seeking a referendum, and you present the following questions:

"(1) Is it necessary that a separate petition be filed for each of the applications or can one petition be filed on all three of the applications? I might point out that the three sites represent one housing project which happens to be broken up into three separate locations.

"(2) In the referendum provided for under said section should the question be presented to the voters as one question, ‘whether or not the voters favor the three sites’ or should there be three separate questions presented to the voters as to ‘whether or not they favor Site One, as to whether or not they favor Site Two and as to whether or not they favor Site Three?’"

You will note that the first paragraph of §14-a provides that prior to undertaking the project the city shall obtain approval on each construction site. In my opinion, this makes it necessary that the voters, in the event of a referendum, shall be given an opportunity to vote separately as to each site—either for or against each site.
HONORABLE RALPH G. LOUK  
Commonwealth's Attorney for Fairfax County

This will acknowledge receipt of your letter of December 16, 1966, in which you request my opinion with respect to the following questions, presented to you by Mr. Paul W. McGann, Chairman of the Fairfax County Redevelopment and Housing Authority, which letter is dated December 13, 1966:

1. Are the provisions of § 15.1-456, § 36-28, or any other section of the Virginia Code, applicable to any of the following new forms of low-rental housing which might be provided in Fairfax County by the Housing Authority?

   "'Turn-key' housing—(New multi-family housing, purchased by an Authority from a private developer when it has been completed and is ready for occupancy).

   "Section 23 Leased Housing—(Housing leased by Authority from private owners for sub-leasing).

   "'Acquisition' Housing—(Used housing purchased by Authority from owner for sub-leasing).

2. Are the provisions of § 15.1-456 applicable to low-rental housing constructed by the Housing Authority?"

You call attention to § 36-28 of the Code, which reads as follows:

"All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated. In the planning and location of any housing project, an authority shall take into consideration the relationship of the project to any larger plan or long-range program for the development of the area in which the housing authority functions."

In my opinion, under this section any housing project established under the provisions of Chapter 1, Title 36 of the Code, must comply with all the conditions set forth in § 36-28. Where the housing authority purchases or leases property already completed, it is assumed that the builders of such property have complied with the planning, zoning, subdivision and building laws.

With respect to § 15.1-456, I know of no reason why the provisions of this section would not apply to a housing project to the same extent as they would apply to any other project.

You referred to the terminal paragraph of § 36-19 of the Code, which reads as follows:

"No provisions of law with respect to the acquisition, operation or disposition of property by other political subdivisions or public bodies shall be applicable to an authority unless the legislature shall specifically so state."

This provision, in my opinion, in no way relates to controls that may be exercised by counties, cities and towns pursuant to the provisions of Chapter 11, Title 15.1 of the Code.
REPORT OF THE ATTORNEY GENERAL

JAILS AND PRISONERS—Attorney-client Relationship—Censoring of written communications.

ATTORNEYS—Attorney-client Relationship—Censoring written communications to prisoner.

HONORABLE J. A. WILKERSON
City Sergeant, City of Lynchburg

July 21, 1966

This is in response to your letter of June 14, 1966, which reads as follows:

"I would like an opinion on § 53-150 of the State Code of Virginia, relating to communication with prisoners confined in city jails. Am I to interpret this section that correspondence between a prisoner and his counsellor is to be censored."

It is clear that an attorney is entitled to confer with his client in complete privacy. Bobo v. Commonwealth, 187 Va. 774, 48 S. E. 2d 213. The Supreme Court of Appeals has pointed out that the counsel of the prisoner is put in a favorite class by the provisions of § 53-150. Enoch v. Commonwealth, 141 Va. 411, 126 S. E. 2d 222. I do not, however, find any prohibition of the censoring of mail between attorney and client contained in the language of § 53-150. Indeed, it has been found at the penitentiary that this is necessary to the proper operation of the institution.

I am, therefore, of the opinion that you may censor written communications between an attorney and his prisoner client held in your jail.


HONORABLE CHARLES H. LEAVITT
City Sergeant, City of Norfolk

March 9, 1967

This is in response to your letter of February 9, 1967, which reads in part as follows:

"In those cases where a defendant is confined in the City Jail and has been found guilty and sentenced by a Court of Record to confinement in the State Penitentiary, and appointed counsel has moved for a stay of execution in order to perfect an appeal, and no bond can be given in awaiting the appeal, and counsel has indicated that no further interviews or counseling with the defendant is needed in the perfection of an appeal, and the defendant has been confined in the jail since arrest pending trial and during appeal for a period of several months and has become a serious security problem, and it becomes evident that from the standpoint of the defendant's welfare or the welfare of other inmates as it relates to security, health, rehabilitation and comfort, can the inmate, under these circumstances be transferred to the Penitentiary pending the seeking of a writ or pending appeal?"

Your attention is directed to the provisions of § 53-21 of the Code of Virginia, which provides that the penitentiary is for "the confinement of convicts sentenced to confinement therein by the courts of this Commonwealth."
The Director of the Division of Corrections advises that, until a sentence is final, a prisoner cannot under normal conditions be received into the prison population, processed as an inmate according to law, given a number, and a specific place of confinement fixed. In the example in your letter it appears that the prisoner's sentence is not yet final, in that the appellate court has not acted in connection therewith.

Your attention, however, is directed to the provisions of § 53-8 of the Code, which reads as follows:

"The Director is authorized to transfer, or to require to be transferred, any person accused or convicted of an offense against the laws of the Commonwealth or of any other state or country, or any witness held in any case to which the Commonwealth is a party, if confined in any penal institution within the Commonwealth, from any penal institution in which such person is confined to such other penal institution in the State as is designated by the Director."

Under the circumstances set forth in your letter, I would suggest that you write the Director of the Department of Welfare and Institutions setting forth the facts as enumerated in your letter, with the request that the Director transfer the prisoner to the State Penitentiary. If the Director of the Department of Welfare and Institutions agrees, I am of opinion that said transfer can be accomplished pursuant to the provisions of § 53-8 of the Code, as set forth above. The prisoner can then be processed in the usual manner, given a number, and assigned by the Classification Committee to a place of confinement which in the opinion of the Committee is proper.

JAILS AND PRISONERS—Cost of Prosecution—Jail sentence for failure to pay—Determined by court.

March 14, 1967

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

This is in reply to your letter of February 28, 1967, which I quote, in part, as follows:

"When a defendant is sentenced in a felony case and the execution of the sentence is suspended and the defendant is placed under the supervision of a probation officer during his good behavior for x number of years, upon condition that he pay the costs assessed against him, and the Judge gives the defendant a certain number of days or months in which to pay the said costs, and the defendant fails to pay the costs within that period, can the Clerk issue a capias for the defendant to be placed in jail to serve time for the costs?

"You will note that the payment of the costs is a condition of the probation, and if the Clerk can issue a capias for the defendant to be placed in jail to serve time for the said costs would this also mean that he would have to serve his penitentiary sentence?"

With respect to your first question, I am not of the opinion that the Clerk could issue a capias under such conditions. The matter of whether a jail sentence should be imposed on the defendant for failure to pay such costs is one to be determined by the court which imposed and suspended the sentence during good behavior and on certain conditions contained in the original order.
REPORT OF THE ATTORNEY GENERAL

Several prior opinions, including the one reflected in the letter of December 16, 1952, of which you furnished me a copy, expressed the view that the court could act under § 19.1-328, Code of Virginia (1950), as amended, (former § 19-303), to impose a jail sentence for failure to pay fine and costs, whether defendant was convicted of a misdemeanor or felony. See, also, letter to you dated August 10, 1953, Report of the Attorney General (1953-1954), p. 110. The duration of such sentence for failure to pay fine or costs is limited by law as prescribed in § 19.1-334, Code of Virginia (1950), as amended, (former § 19-309).

Having thus answered your first question, your second question needs no further reply.

JAILS AND PRISONERS—Escape—From county jail before trial by person held without bond.

February 10, 1967

HONORABLE OLIVER D. RUDY
Commonwealth's Attorney for Chesterfield County

This is in reply to your letter of February 2, 1967, which I quote as follows:

"I would like to ask your opinion on what seems to me to be a conflict in the Code of Virginia regarding escaped prisoners. The pertinent Code sections are 53-291, 53-9, 18.1-288, 18.1-289 and 18.1-290.

"Section 53-291 as rewritten by the 1966 Session of the General Assembly appears to make it a felony for any inmate in a penal institution as defined in § 53-9 to escape from such penal institution or from any person in charge of such inmate.

"Section 53-9 defines a penal institution as, 'every prison, prison camp or prison farm heretofore or hereafter established with funds appropriated from the State treasury, and every jail, jail farm, lockup or other place of detention owned, maintained or operated by any political subdivision of the Commonwealth.'

"Read in conjunction, these two statutes would seem to make it a felony for anyone who is an inmate in the Chesterfield County Jail to escape whether by force or otherwise.

"Section 18.1-288, et seq., however, makes a clear distinction between whether or not the inmate in the jail has been convicted, sentenced or is in jail awaiting trial.

"Under § 18.1-289 if a person is lawfully imprisoned in jail and not sentenced on conviction of a criminal offense (and I take that section to mean if he has not yet been tried) escapes from jail by force or violence other than by setting fire thereto . . . he shall be confined in jail not exceeding one year. This clearly makes such an escape a misdemeanor.

"Section 18.1-288 would seem to indicate that before a felony can be charged the person must have been confined in jail or convicted of a criminal offense and must have escaped by force or violence.

"I am aware that § 53-291 comes under Chapter 12 entitled 'Crimes by Convicts,' and I believe the intent of the Legislature
probably was to make an escape by a convicted felon a felony in itself regardless of whether or not force was used.

"I would appreciate it if you would answer the following questions for me:

"1. Can a person being held in the County Jail because he cannot get bond, who has not been tried, be charged with a felony under § 53-291 if he escapes?

"2. If the answer to the first question is in the affirmative, then what would be the effect of § 18.1-289 which would seem to make the same offense, if committed with force and violence, a misdemeanor only, if he has not been tried and/or convicted?

"3. If the two sections make the same offense a felony and a misdemeanor, would they not be construed strictly against the Commonwealth and the Commonwealth forced to try such a defendant as a misdemeanor?"

A general rule of construction is that two statutes covering the same subject matter must be interpreted in such manner as to give reasonable force to the intent expressed in each. I agree with your interpretation that the intent of the Legislature in § 53-291 was to make an escape by a convicted felon a felony in itself, regardless of whether or not force was used. The definition of "penal institution," found in § 53-9, by its own terms, applies to Title 53, Code of Virginia (1950), as amended. There is no indication that this definition is applicable to Title 18.1, Code of Virginia (1950), as amended, and, by reasonable interpretation, the contrary is indicated.

In regard to the questions you have raised, I have previously expressed the view, in Report of the Attorney General (1964-1965), p. 138, that § 18.1-290 pertains to escape from jail and not escape from a penal institution. I am of the opinion that the same holds true for § 18.1-288, which is a companion statute. It is noted that this section makes it a felony for a person previously sentenced to confinement in the penitentiary to escape from jail by force or violence. This does not appear to be in conflict with § 53-291, as the latter, also, makes such escape a felony, although it goes one step further and includes escape from a penal institution whether or not it is by force or violence. Section 18.1-288 does not cover the latter named step or refer to it in any way.

In my opinion, § 53-291, which pertains to felonies by convicts, would not apply to a person held in the county jail before trial because of failure to secure bond. Accordingly, I shall answer your question No. 1 in the negative. Having so answered this question, your question No. 2 is automatically eliminated, since it is contingent upon an affirmative answer to question No. 1.

In regard to your question No. 3, if there should be two such conflicting sections, my answer would be in the affirmative. I am not of the opinion, however, that the stated conditions indicate the necessity of making an election between charges of a felony or a misdemeanor for the same offense, for the reasons herein set forth.
JUDGMENTS—Marking Satisfied or Discharged—Clerk determines from direction of judgment creditor.

CLERKS—Marking Judgments Satisfied or Discharged—Determine from direction of judgment creditor.

Honorable H. C. DeJarnette, Clerk
Circuit Court of Orange County

February 24, 1967

This will acknowledge receipt of your letter of February 22, 1967, which reads, in part, as follows:

"Section 8-380 indicates, however, that payment or discharge—shall be entered by the clerk in whose office the same is so docketed whenever it shall appear from the return of an execution issued from his office, or from a certificate of the clerk from whose office such execution is issued, that the same has been satisfied, in whole or in part, or upon the direction of the judgment creditor or his attorney.

"My question is: what form of 'direction' should be required of the judgment creditor or his attorney, before the clerk is required to 'enter' the fact of payment or discharge?"

It would seem that it is in the discretion of the clerk to determine the form of direction in writing that should be required. I assume that a clerk would be justified in relying upon a letter, affidavit, or other writing signed by the judgment creditor or from the attorney who represented the judgment creditor in obtaining the judgment. Generally, I believe these directions are made upon the judgment lien docket where the judgment is recorded.

JURIES—Composition—Second class city—Selection from city or county.

August 29, 1966

Honorable C. H. Davidson, Jr.
Commonwealth's Attorney for Rockbridge County

This will acknowledge receipt of your letter of August 26, 1966, which reads as follows:

"On January 1, 1966, Lexington became a city of the second class pursuant to Chapter 22, § 15.1-978 through § 15.1-998 of the 1950 Code of Virginia, as amended.

"For the first time this year, we will be trying felony cases before a jury for offenses occurring within the city. Please give me your opinion as to whether the jury should be composed solely of citizens within the city, or whether it could be composed of citizens from the county as well as the city.

"Section 15.1-997 refers to the jurisdiction of the Court but is silent as to the composition of the jury. Section 15.1-1144 refers to the selection of juries where a political subdivision was created as a result of consolidation. Lexington became a city as a result of the Transition Statutes and not by consolidation."

In my opinion, under § 15.1-997 of the Code, the jury in criminal and civil cases should be selected in the same manner as the jury was selected when the city was a town. The statute expressly provides that there shall be one and the same circuit court for the city and the county.
The city of South Boston occupies the same position under Chapter 22 of Title 15.1 of the Code, as the city of Lexington. Upon inquiry to the county of Halifax, I find that the juries in all cases are selected from the county as a whole (including the city of South Boston) without regard to whether they live within the county or within the city, and without regard to where the alleged crime was committed.

JUSTICE OF PEACE—Bail—Cash deposits—May be taken in lieu of recognizances with surety.

COURTS NOT OF RECORD—Cash Deposits—Justice of peace may take in lieu of recognizances with surety.

BAIL—Justice of Peace May Take Cash Deposit in Lieu of Recognizance With Surety.

January 10, 1967

HONORABLE C. H. SHIELD, JR., Judge
Hustings Court of the City of Newport News

This will acknowledge receipt of your letter of January 5, 1967, which reads as follows:

"It has been brought to my attention that Route # 64 of the Department of Highways, an Expressway that goes through a portion of Newport News, occasionally has State Troopers bring in a person for speeding and I am concerned whether or not a Justice of the Peace may take a cash deposit under § 19.1-130 and § 19.1-131 of the Code of Virginia since § 19.1-131 provides:

"... provided, however, that no justice of the peace shall receive any such cash deposit unless and until he shall have given bond before the clerk of the circuit court of his county in the penalty of five hundred dollars, with approved security, and conditioned for the faithful performance of his duties and the proper accounting for all money that may come into his hands.'

"It appears that under this statute, strictly construed, we have no provision for anyone taking a cash deposit for any such violation. Therefore, I would like your views on this matter.

"Enclosed herewith, is § 12-42 of the Newport News City Code pertaining to motor vehicles."

Section 19.1-131 of the Code apparently applies only to a justice of the peace of a county. Under § 19.1-115, any court of record may appoint a commissioner in chancery as a bail commissioner for the city of Newport News. Under § 19.1-116, the bail commissioner and the clerks of the courts named therein can admit persons to bail. Under § 19.1-127, the officer admitting a person to bail may do so with or without security. In my opinion, these officers may take a cash deposit in lieu of recognizances with surety, as permitted under § 19.1-130.
JUSTICE OF PEACE—Fees—Warrant of arrest.


September 7, 1966

HONORABLE W. E. BUNN
Justice of the Peace, City of Portsmouth

This will acknowledge receipt of your letter of September 6, 1966, which reads as follows:

"When a Justice of Peace collects for a Criminal Warrant of Arrest from the State he receives $1.00. I understand this.

"My question is when the Justice of Peace collects from the party taking out the Warrant of Arrest, the Plaintiff, is the correct fee $2.00?"

I enclose two opinions of this office relating to your question:


You will see from these opinions that it is not the purpose of § 14.1-128 (formerly § 14-136) of the Code to provide that a justice of the peace may collect a fee from the plaintiff—the person upon whose complaint a criminal warrant is issued, but if the person against whom the warrant was issued is found not guilty, the justice of the peace may collect a $1.00 fee from the Commonwealth. If the defendant is found guilty, the judgment for costs should include a fee of $2.00 (formerly $1.50) for the justice of the peace. If the judgment appears uncollectible, the justice of the peace may waive the $2.00 fee and collect the $1.00 fee from the State, as pointed out in one of the opinions enclosed herewith.

The statute does not allow the justice of the peace in a criminal case at any time to collect a fee from the plaintiff.

____________

JUSTICE OF PEACE—Issuance of Warrant—One spouse against the other when charges properly founded.

WARRANTS—One Spouse Against the Other—Justice of peace may issue when charges properly founded.

February 24, 1967

HONORABLE MARVIN V. CULPEPPER, SR.
Justice of the Peace, City of Chesapeake

This is in reply to your letter of February 10, 1967, in which you request my opinion on the questions which I quote as follows:

"Is is proper for a Justice of the Peace to issue a warrant for a husband or wife against each other for larceny of a car owned by the two regardless of whose name is on the title or in regards to household property destroyed or damaged by one or the other?

"Another thought I would like your opinion in the case where they are not legally separated, would it make any difference?
"Also, could a wife or husband respectively charge the other at home for disorderly conduct, curse and abuse, or drunk in their own home?"

In respect to the first question, I shall assume by the words "issue a warrant for a husband or wife against each other," you mean "issue a warrant for a husband against his wife or for a wife against her husband." Under Virginia law, either a husband or a wife may own a motor vehicle or household property in his or her own right. In the case of a motor vehicle, the ownership is denoted by the name appearing on the title, subject, however, to the rights of any valid lienor. The marriage relationship, standing by itself, does not give a husband or wife the right to dispose of property belonging to the spouse. I am of the opinion, therefore, that it is proper for you to issue a warrant on complaint of one spouse against the other if you see good reason to believe that the offense complained of has been committed.

For the foregoing reasons, I shall answer your second question in the negative.

In regard to your final question, the crime of disorderly conduct, under existing statutes, has reference to behaving in a riotous or disorderly manner in a public place. I find no statute covering disorderly conduct, as such, in the home. Nor do I find any law making it a crime for a person to be drunk at home. Under § 18.1-255, Code of Virginia (1950), as amended, however, a person who curses or abuses another in his presence or hearing, or otherwise uses such language under circumstances reasonably calculated to provoke a breach of the peace shall be guilty of a misdemeanor. In my opinion, this offense could occur in a home, and there appears no reason why a husband or wife may not charge the offending spouse when such charges are properly founded.

JUSTICE OF PEACE—May Be Treasurer of Incorporated Town.

August 2, 1966

HONORABLE E. C. WESTERMAN, JR.
Commonwealth’s Attorney for Botetourt County

This will acknowledge your letter of July 29, 1966, which reads as follows:

"I would appreciate it if you would let me know whether or not a Justice of the Peace may also hold the appointed position of Treasurer of an incorporated town."

I am not familiar with any statute which would prevent a justice of the peace of a county from being appointed to the position of treasurer of an incorporated town within the county. Of course, the charter of the town should be examined to determine whether or not it contains any provision which would prevent the town treasurer from acting as justice of the peace. This office has previously held that there is nothing in general law which would prevent a member of the town council from serving as justice of the peace, and I believe the same principle would apply with respect to the question under consideration here.
REPORT OF THE ATTORNEY GENERAL

JUSTICE OF PEACE—Status—Upon rearrangement of magisterial districts.

SCHOOLS—School Boards—Members—Filling of vacancies upon rearrangement of magisterial districts.

March 3, 1967

HONORABLE H. SELWYN SMITH
Commonwealth’s Attorney for Prince William County

This will acknowledge receipt of your letters of February 21 and March 1, 1967, relating to the rearranging of the Magisterial Districts in Prince William County. You wish my advice (1) whether the court should declare vacant the various offices of justice of the peace and appoint new justices of the peace within the county and, (2) whether or not there is any vacancy in any of the school boards.

With respect to the office of justice of the peace, this office has heretofore ruled on several occasions that under the provisions of § 39-4 of the Code, the jurisdiction of a justice of the peace is county-wide. Therefore, in our opinion, there is no necessity for the court to take any action with respect to these officers except that the court may wish to appoint one or more justices of the peace in the new Magisterial District to fill a vacancy, which appointment should be until January 1, 1968. I assume there will be elections for this office in each of the districts in the county at the general election in 1967.

With respect to the school board, § 22-68 of the Code provides that:

“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.”

Since one new district has been added, it will be necessary for an additional member of the school board to be elected to represent that district. It is stated under Section 133 of the Constitution that each magisterial district shall constitute a separate school district unless otherwise provided by law. There is no general law which would affect this requirement.

If any of the present school board members, by virtue of the redistricting, has ceased to be a resident of the magisterial district from which he was elected, it would seem that there is a vacancy and that this vacancy would have to be filled under the provisions of § 22-65 of the Code. Of course, the member from the new district would have to be appointed under the provisions of § 22-61 of the Code.

The newspaper article referred to relating to justices of the peace of Fairfax County would not affect the situation in your county. Fairfax County has adopted the Urban County Executive Form of government provided for in Article 2 of Chapter 15 of Title 15.1 of the Code and has established electoral divisions for the election of members of the board of supervisors pursuant to § 15.1-787 of the Code, and this office expressed the opinion that this did not abolish the magisterial districts for the purpose of electing justices of the peace.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURTS—Fines Assessed and Collected for City Violations—May be paid to city treasurer.

TREASURERS—City—May receive fines collected by juvenile and domestic relations courts for city violations.

HONORABLE W. W. MOORE, JR., Judge
Juvenile and Domestic Relations Court,
City of Danville

Your letter of March 16, 1967, reads as follows:

"The Danville Juvenile and Domestic Relations Court has in previous years been making all payments for fines to the state. would you advise me as to whether or not it would be permissible for this court to pay fines into the city treasury wherever the city code law runs parallel with the state law. This would particularly apply to the traffic violations and some domestic relations cases such as a husband assaulting his wife."

Section 14.1-44 of the Code of Virginia refers to county or municipal courts. Part of this section is as follows:

"... Fines collected for violations of city, town or county ordinances shall be paid promptly into the treasury of the city, town or county whose ordinance has been violated. . . ."

I do not find any similar statute with reference to the juvenile and domestic relations court. However, I do not see any difference in principle between the procedures to be followed by these courts. Therefore, if there is a proceeding brought before your Court for a violation of city ordinances and a fine is assessed and collected, I see no reason why the payment should not be made by the Juvenile and Domestic Relations Court to the city treasurer.

I have talked with Mr. J. Gordon Bennett, State Auditor, who is in agreement with this.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Adult family situation involving felony except murder and manslaughter.

COURTS NOT OF RECORD—Preliminary Hearing—Jurisdiction in adult family situation involving murder and manslaughter.

HONORABLE D. C. WRAY, JR.
Judge, Augusta County Court

I am in receipt of your letter of September 27, 1966, in which you call my attention to § 16.1-158(8) of the Virginia Code and present the following inquiry:

"Whenever a felony is alleged to have been committed by one member of a family against another member of the family, both being adults, which court not of record has jurisdiction to hold the preliminary hearing, the appropriate County or City Court or the appropriate Juvenile and Domestic Relations Court?"
In pertinent part, § 16.1-158(8) of the Virginia Code provides:

"... Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction ... over all cases, matters and proceedings involving:

* * *

"(8) all offenses except murder and manslaughter committed by one member of the family against another member of the family; and the trial of all criminal warrants in which one member of the family is complainant against another member of the family, provided, that in prosecution for other felonies over which the court shall have jurisdiction, said jurisdiction shall be limited to that of examining magistrate." (Italics supplied.)

In light of the language italicized above, I am of the opinion that, if the felony involved in the situation you present is either murder or manslaughter, the Juvenile and Domestic Relations Court would have no jurisdiction in the premises and the appropriate county or municipal court not of record should conduct the preliminary hearing. If the felony involved in the situation you present is one other than murder or manslaughter, it would be one over which the Juvenile and Domestic Relations Court would have jurisdiction, but that jurisdiction would be limited by the concluding proviso of the above-quoted statute to that of examining magistrate. I am therefore of the opinion that in the latter instance, i.e., an adult family situation involving a felony other than murder or manslaughter, the appropriate Juvenile and Domestic Relations Court should conduct the preliminary hearing.

JUVENILE AND DOMESTIC RELATIONS COURTS—Juvenile Detention Commission—Membership of joint or regional commission.

JUVENILE AND DOMESTIC RELATIONS COURTS—Juvenile Detention Commission—Judge may not be member.

March 6, 1967

HONORABLE J. M. H. WILLIS, JR.
Commonwealth's Attorney, City of Fredericksburg

This will acknowledge receipt of your letter of March 1, 1967, which reads, in part, as follows:

"The City Attorney of the City of Fredericksburg has asked me to write asking your opinion with respect to the following questions:

" 'May a city and two counties, each having a population of less than 25,000, establish a joint or regional Juvenile Detention Commission, each appointing an even number (not less than two) members to serve as members of the commission, under the provisions of State Code §§ 16.1-202.2 and 16.1-202.3?'

" 'Assuming that the Commission consists of six members, is it proper to count among the six those persons who are Judges of the Juvenile and Domestic Relations Courts under the provisions of § 16.1-202.4?' "
The provisions of § 16.1-202.3 of the Code, in my opinion, require that the Commission shall consist of not less than six members. In those cases where each political subdivision has a population of less than 25,000, in order to meet this requirement, each jurisdiction should appoint an equal number to the Commission, in this case, two from each political subdivision.

With respect to your second inquiry, the answer is in the negative. The statute contemplates that the ex officio members shall be in addition to the minimum number to be appointed.

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional—City
of Staunton and Augusta County may use same courtroom.

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney for the City of Staunton

July 8, 1966

In your letter of June 29, 1966, you ask whether it is necessary to have separate courtrooms for the trial of cases arising in Staunton and in Augusta County before the regional Juvenile and Domestic Relations Court for Augusta County and the cities of Staunton and Waynesboro. You refer to § 16.1-143.2 of the Code of Virginia (1950), as amended, which provides in part:

"Hearings shall be conducted in the city or county wherein the offense occurs. . . . In each participating city or county a clerk's office shall be kept open. . . ."

You state that the Juvenile and Domestic Relations Court of Augusta County has been held in a courtroom in the Augusta County building, while the Juvenile and Domestic Relations Court of the City of Staunton has been held in another building adjoining the police station. Staunton is the county seat of Augusta County.

In my opinion, a single courtroom in Staunton will suffice for hearings on matters arising both within the city of Staunton and within Augusta County since such a courtroom is both within the city and within the county. See, Board of Supervisors v. Cox, 98 Va. 270, 36 S.E. 380 (1900), holding that the County of Norfolk had power to condemn land within the city of Portsmouth for use as a clerk's office for the county. The court said at page 274:

"The courthouse and clerk's office, although situate within the limits of the city and the jurisdiction of its court, are, nevertheless, also within the territorial limits of the county. The fact that a city is established within the territorial limits of a county does not alter the boundaries of the county, nor curtail its territorial limits, although its court, by the incorporation of the city, is deprived of civil and criminal jurisdiction within the limits of the city."

Under the statute, the regional court must have a separate courtroom in Waynesboro for the hearing of cases arising there.
LABOR LAWS—Railroad Labor Law—Controlling as to railroad employees.

March 9, 1967

HONORABLE ORBY L. CANTRELL
Member, House of Delegates

This is to acknowledge receipt of your letter of March 2, 1967, in which you state in part:

"I have been asked by some railway employees (clerical) to get an opinion from you as to whether they have to belong to the Brotherhood of Railway and Steamship Clerks in order to be employed in this capacity.

"One of these gentlemen handed me a dues card which has the notation on the bottom which says, dues are due and payable on the first day of each calendar month. A member who fails to pay his dues is automatically suspended at 12 o'clock midnight on the last day of the second month for which he owes dues and no notice of suspension is required."

Inasmuch as these are railroad employees, their union is under the purview of Chapter 8, Title 45, U.S.C.A., known as the Railroad Labor Law. I quote from Section 152 thereof:

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, . . . all employees shall become members of the labor organization representing their craft or class. . . ."

As Congress has preempted this field, the laws of the States are not effective. Hence, § 40-70, Code of Virginia (1950), which provides that no person shall be required by an employer to become or remain a member of a labor union as a condition of employment or the continuation of employment, is inoperative in so far as labor unions of railroad employees are concerned.

This should not be confused with the application of § 14(b) of the Taft-Hartley Act, Title 29, U.S.C.A., § 151 et seq., which definitely recognizes that the States can prohibit the execution or application of agreements (between labor unions and employees) requiring membership in a labor organization as a condition of employment.

LAND REGISTRATION ACT—Referendum Requirements—Exception of Warwick County no longer enforceable.

March 16, 1967

HONORABLE GEORGE S. DESHAZOR, JR., Clerk
Hustings Court of the City of Newport News

This will acknowledge your recent letter relating to Chapter 62, Acts of Assembly (1916), under which the “Uniform Land Registration Act,”
commonly known as the "Torrens System," was enacted. You direct
attention to Section 89 of this Act, in which it is provided that the same
shall not apply to land in any city or county, subject to certain excep-
tions, until it shall be determined by a referendum in the manner pro-
vided in said section that a majority of the voters voting in such referendum
are in favor of the adoption of such system of land registration. The
county of Warwick was one of the political subdivisions excepted from
the referendum requirements; the city of Newport News was not excepted.

At the request of the Judge of the Hustings Court of the City of New-
port News, you have requested my opinion as to whether or not in view
of the merger of the county of Warwick with the city of Newport News,
the provisions of said Registration Act remain effective as to the lands
lying in the former county of Warwick without submitting the question
to the voters under the referendum clause.

Under the provisions of Chapter 706 of the Acts of Assembly (1952),
the county of Warwick was incorporated as the city of Warwick, a city
of the first class. Subsequently, the cities of Warwick and Newport News
were consolidated, which consolidation was validated and ratified by Chap-

Under the provisions of Section 89 of Chapter 62, Acts of Assembly
(1916), the Act does not apply to the city of Newport News unless
adopted in a referendum. The Act would apply in Warwick County with-
out resorting to a referendum. However, since Warwick County has
ceased to be a political subdivision of the State but is now an integrated
part of a city that comes within the scope of the referendum clause, I
see no escape from the conclusion that the exception in the Act relating to
Warwick County can no longer be enforced.

LOTTERIES—What Constitutes—Element of consideration includes do-
nations.

HONORABLE SAMUEL A. GARRISON, III
Assistant Commonwealth's Attorney for the City of Roanoke

June 1, 1967

I am in receipt of your letter of May 31, 1967, in which you present
the following situation and inquiry:

"A local church group desires to raise money for the church's
building fund by raffling off a color television set. Members of
the group are given books of 'tickets' which they are authorized
to distribute to any person who donates $1 to the Church Build-
ing Fund. The tickets are numbered, and for each ticket there
is a stub with a corresponding number. On the face of the ticket
is printed, inter alia, the following words: '$1 DONATION.' On a
given date the group plans to conduct a drawing to determine the
winner of the television set. Each stub, which corresponds with
a ticket that has been distributed to a 'donor', will be placed in
a large fish bowl, and the minister of the church will, while blind-
folded, draw the winning stub from the fish bowl. In order to
gain possession of a numbered ticket and therefore have a chance
to win the television set, it is necessary to donate $1 to the
Church Building Fund. Donations are solicited from the public
at large.

"Query, is the above fund raising scheme an illegal lottery
within the meaning of Virginia Code section 18.1-340?"
In conformity with the opinion of the Supreme Court of Appeals of Virginia in *Maughs v. Porter*, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. Since it appears that participation in the above-outlined venture is limited to persons who make a donation, and that such a donation is a condition to an individual's eligibility to receive the prize, I am of the opinion that the enterprise under consideration would not come within the scope of §18.1-340.1 of the Virginia Code. It is thus clear from your communication that each of the constituent elements of a lottery is present in the undertaking concerning which you inquire and is therefore forbidden by §18.1-340 of the Virginia Code. Finally, in this connection, this office has previously ruled that the Virginia lottery laws contain no exception for charitable organizations. See, Report of the Attorney General (1954-1955), p. 114.

MINES—Board of Examiners—Authority over examinations and qualifications of candidates.

January 23, 1967

HONORABLE T. K. SUTHERLAND
Member, Board of Mine Examiners

This will acknowledge your letter of January 19, 1967, which reads as follows:

"Relative to Chapter 1, Section 45.1-4, of the Mining Laws of Virginia, subsection (2), Qualifications of Mine Inspectors, line 19-20:

'Also shall be subject to the Mine Inspector's examination, as prescribed by the Board and given by the Chief.'

"Who grades these examinations and certifies the applicant—the Board or Chief?"

Sections 45.1-7 through 45.1-14 of the Code relate to the Board Examiners and §45.1-12 relates specifically to examinations.

Section 45.1-9, relating to expenditures from the Examiners' fund, created by the examination fees mentioned in §45.1-8, reads in part as follows:

"The cost of printing certificates and other necessary forms and the incidental expenses incurred by the Board in conducting examinations and reviewing examination papers shall also be paid out of the Examiners' fund. . . ."

The second sentence of §45.1-12 reads as follows:

"Such rules, when formulated, shall be made a part of the permanent record of the Board, and such of them as relate to candidates shall be published for their information and guidance at least ten days prior to each examination, and shall be of uniform application to all candidates."

Although there is language in §45.1-12—especially in paragraph (a) thereof—indicating that the examinations may be given by the Chief Mine Inspector, I do not feel that it is contemplated by this section that the entire procedure with respect to the examinations, including the grading of the papers, shall be left to the Chief Mine Inspector. I think it is the duty of the Board of Examiners to supervise examinations and pass upon the qualifications of all persons who have taken the examination.
With respect to the issuance of the certificates, in my opinion, the Board may by resolution authorize the certificates to be issued by the Chairman of the Board or the Secretary of the Board or by the Chief Mine Inspector. However, the minutes of the Board meeting should show that the Board has considered the applications and has approved the issuance of the certificates. This would appear to be in compliance with § 45.1-11 of the Code.

MOTOR VEHICLES—Accidents on Private Property—Investigation.

September 30, 1966

HONORABLE G. M. LAPSLEY, Director
Division of Statutory Research & Drafting

This is in reply to your letter of September 22, 1966, which I quote, in part, as follows:

"The Virginia Traffic Safety Study Commission committee studying Motor Vehicle Administration, the Chairman of which is Senator Hunter B. Andrews, at its first meeting September 14, 1966 requested that we write to obtain your opinion on the following question:

"What are the dimensions of police authority to enter and conduct investigations on private property with regard to traffic accidents occurring on private property, attendant personal injuries and property damage, and related circumstances?

"The committee raises this question in connection with the growing number of private traffic areas such as shopping centers and parking lots."

Under present law, the authority of the police to investigate motor vehicle accidents is inferred, there being no statute, to my knowledge, expressly directing it. Where a crime is committed involving the use of a motor vehicle, I see no reason why the police would not have the same authority to investigate as in the case of other crimes. Motor vehicle law, in general, is directed to the operation of motor vehicles upon the public highways. There are exceptions, however, and certain instances in which police authority to investigate accidents is implied, though not specifically stated.

In regard to the duty of a driver involved in an accident in which a person is killed or injured or property is damaged to stop at the scene and render aid and give certain information to the injured party or to the police, § 46.1-176, Code of Virginia (1950), as amended, applies, as stated in paragraph (f) thereof, "irrespective of whether such accident occurs on the public streets or highways or on private property." In cases involving violations under this section it follows, by indirection, that any police officer charged with the duty to investigate the matter is authorized to enter the scene and conduct an investigation whether it be on the street or highway or on private property.

Section 46.1-190 provides, in part, that: "A person shall be guilty of reckless driving who shall: (k) Drive or operate any automobile or other motor vehicle upon any driveway or premises of a church, or school, or of any recreational facilities or of any business property open to the public, recklessly or at a speed or in a manner so as to endanger the life, limb or
property of any person." In my opinion, as a matter of public policy, this statute carries with it the implied authority for proper police investigation of any accident occurring in any of the named locations. Otherwise, the statute would be of little force, since the reason for its enactment must have been to prevent injury to persons and property and, often, accident investigation offers the only means of determining whether a violation has occurred.

I am advised by a representative of the Department of State Police that they make investigations of all accidents occurring in the areas named in the last quoted statute and all motor vehicle crashes involving personal injury or death, irrespective of location, when same come to their attention and have not already been investigated by another law enforcement agency.

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MOTOR VEHICLES—Blood Analysis—Impaired driving instruction given when blood sample exceeds .15% by weight of alcohol.

November 9, 1966

HONORABLE VIRGIL H. GOODE
Commonwealth's Attorney for Franklin County

I am in receipt of your letter of October 27, 1966, in which you inquire whether or not an instruction on "impaired driving" under § 18.1-56.1 of the Virginia Code should be given in every instance of a prosecution under § 18.1-54 of the Virginia Code, even in those cases in which a blood test is made and the results of both analyses of an accused's blood sample exceed .15 per cent by weight of alcohol.

In this connection, § 18.1-56.1 provides, *inter alia*, that in "every prosecution under § 18.1-54 of this Code or any similar ordinance of any county, city or town the offense with which the accused is charged shall be deemed to include the offense punishable under this section; . . ." I am therefore of the opinion that—in every prosecution under § 18.1-54—an instruction on "impaired driving" should be given if there is any evidence from which a jury could rationally conclude that the accused was guilty of the lesser offense. This would be true even in those cases in which the results of both analyses of an accused's blood sample exceed .15 per cent, for the statutory presumption raised by § 18.1-57 upon a showing of .15 per cent by weight of alcohol in an accused's blood sample is a rebuttable one, and evidence on behalf of the accused may tend to overcome the presumption. See, Report of the Attorney General (1955-1956), p. 131.

It is possible to conceive of a case in which there is a direct conflict in the evidence, and such evidence as exists tends to support only one of two diametrically opposed propositions: (1) that the accused is guilty of operating a motor vehicle while under the influence of intoxicants in violation of § 18.1-54 of the Virginia Code or (2) that the accused is entirely innocent of any offense. In such a case, there would exist no evidence upon which a jury could rationally conclude that the accused was guilty only of the offense of "impaired driving", and an instruction upon the latter offense should not be given. However, such special cases are unlikely to occur, and I am of the opinion that an instruction on impaired driving would be proper in almost every case involving a prosecution under § 18.1-54 of the Virginia Code.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Blood Analysis—Implied consent—Accused must be arrested within two hours of alleged offense.

September 1, 1966

HONORABLE T. CARLYLE LEA, JR., Judge
Juvenile and Domestic Relations Court,
Rappahannock County

I am in receipt of your letter of August 26, 1966, in which you inquire whether or not the amended Virginia "implied consent" law—specifically § 18.1-55.1(b) of the Virginia Code—permits the introduction in evidence of the results of a blood test in those instances in which an accused's blood sample is withdrawn more than two hours after the alleged offense, provided the accused is arrested within two hours of the alleged offense.

I am of the opinion that your inquiry should be answered in the affirmative. Section 18.1-55.1(b) provides that any person who operates a motor vehicle upon a public highway in Virginia shall be deemed to have consented to have a sample of his blood taken to determine the alcoholic content thereof "if such person is arrested for a violation of § 18.1-54 . . . within two hours of the alleged offense." I am therefore of the opinion that if a person is arrested within two hours of an alleged offense and consents to the withdrawal of a sample of his blood, the actual withdrawal of the blood sample need not take place within the two-hour period. Of course, the view expressed above is subject to the qualification contained in § 18.1-55.1(c) that if an accused refuses to submit to a blood test and so declares in writing or the fact of such refusal is certified as prescribed in subparagraph (c), then no blood sample may be taken even though the accused may thereafter request the same within a two-hour period.

October 25, 1966

HONORABLE VIRGIL H. GOODE
Commonwealth's Attorney for Franklin County

In response to your inquiry of October 24, 1966, I am of the opinion that § 18.1-56.1 of the Virginia Code—which defines the offense of operating a motor vehicle while one's ability to do so is impaired by the presence of alcohol in his blood—would be applicable in every prosecution under § 18.1-54 of the Virginia Code, or any similar ordinance of any city, county or town, regardless of whether or not an accused has submitted to a blood test or a blood sample has been taken in accordance with the provisions of the Virginia "implied consent" law set forth in § 18.1-55.1 of the Virginia Code.
MOTOR VEHICLES—Blood Analysis—Refusal of accused to test—Does not prevent conviction.

CRIMINAL PROCEDURE—Blood Analysis—Refusal of accused to test—Does not prevent his conviction.

April 4, 1967

HONORABLE RICHARD W. DAVIS, Judge
Municipal Court of the City of Radford

I am in receipt of your letter of April 3, 1967, in which you present the following situation and inquiry:

"Would you please advise me by return mail as to whether or not an accused can be convicted under § 18.1-56.1 (driving automobile, engine, etc. while ability to drive is impaired by alcohol) if the accused has declined to take a blood test and there is no evidence before the court concerning the alcohol content of the accused's blood."

I am of the opinion that a person may be convicted for violation of § 18.1-56.1 of the Virginia Code even though that person has declined to submit to a blood test and there is thus no direct evidence before the court concerning the amount of alcohol by weight in his blood. Section 18.1-56.1 not only prescribes and defines the offense of operating a motor vehicle while one's ability to do so is impaired by the presence of alcohol in his blood, but further declares that every prosecution of an accused for operating a motor vehicle while under the influence of intoxicants (drunk driving) in violation of § 18.1-54 shall be deemed to include the offense of operating a motor vehicle while one's ability to do so is impaired by the presence of alcohol in his blood (impaired driving) in violation of § 18.1-56.1 of the Virginia Code. Indeed, the latter statute expressly forbids the arrest, prosecution and conviction of an individual for violation of its provisions except as a lesser included offense of a prosecution for violation of § 18.1-54 or of any similar ordinance of any county, city or town.

In this connection, § 18.1-55.1(i) in part provides:

"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. (Italics supplied.)"

In light of the above-quoted language and a series of prior opinions of this office, it is clear that an accused, who has refused to submit to a blood test, may be convicted upon other relevant admissible evidence for a violation of § 18.1-54 of the Virginia Code. Equally clear is it in my opinion that an accused may also be convicted of the lesser included offense prescribed in § 18.1-56.1 of the Virginia Code. The effect of the statutory presumption raised in the latter statute is to assist the prosecution in discharging the burden resting upon it to establish the accused's guilt of the lesser included offense beyond a reasonable doubt, but the unavailability of such a presumption because of an accused's refusal to submit to a blood test would not prevent his conviction of such an offense on the basis of other admissible evidence.
MOTOR VEHICLES—Conviction for Speeding—Bars subsequent conviction for reckless driving.

CRIMINAL PROCEDURE—Conviction for Speeding—Bars subsequent conviction for reckless driving.

November 30, 1966

HONORABLE A. D. JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of November 23, 1966, in which you refer to a factual situation in which a defendant charged with operating a motor vehicle “78 miles per hour in a 55 mile per hour zone (radar),” was found “guilty of speeding” and fined $70.00 and his operator's license was suspended for sixty days. The conviction was appealed to the circuit court and in this relation you request my opinion as to the correctness of your conclusions, which I quote as follows:

“‘It appears (1) that the language in the warrant charging the defendant with operating a motor vehicle at '78 miles per hour in a 55 mile per hour zone' actually charges the defendant with reckless driving under Section 46.1-190(i) of the Code, (2) that the county court found the defendant 'guilty of speeding,' (3) that the fine imposed by the county court was within the limits authorized by law for speeding, (4) that the county court was without authority to suspend the operator's license of the defendant for sixty days for a first conviction for speeding, (5) that the judgment of the county court of 'guilty of speeding' acquitted the defendant of reckless driving, and (6) that the defendant may not be prosecuted on appeal in the circuit court for reckless driving.”

In reference to conclusion numbered (1), I am of the opinion that the charge of reckless driving should be clothed in more definitive language, as in the given facts the judgment of the trial court seems indicative of a failure to differentiate between the offenses of reckless driving and speeding. The finding was “guilty of speeding,” whereas the court's suspension of driver's license for sixty days is not authorized under such conviction but is authorized under a conviction for reckless driving. Such authorization under a conviction for reckless driving is found in § 46.1-422, Code of Virginia (1950), as amended, but there is no similar provision on a conviction for first offense of speeding. Every person accused has a right to know the offense with which he is charged and a charge which confuses the court is not a charge of sufficient clarity for the accused. Some such language as “reckless driving, to wit: driving a motor vehicle upon the highways of this State at 78 miles per hour in a 55 mile per hour zone (radar),” might have been more aptly employed. This would have placed the defendant on notice that he was being charged with a specific instance of reckless driving under paragraph (i) of § 46.1-190, or a parallel ordinance, instead of the offense of speeding.

I am in agreement with conclusions numbered (2), (3), (4), (5) and (6). In connection with conclusions numbered (5) and (6), § 19.1-259 states, in part, “If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others.” Accordingly, I am of the opinion that, on appeal of the conviction for speeding, the defendant may not be prosecuted in the circuit court for reckless driving.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—County License Fees—Refund to non-domiciliary servicemen.

COUNTIES—Motor Vehicle License Fees—Refund to non-domiciliary servicemen.

HONORABLE G. DUANE HOLLOWAY
Commonwealth's Attorney for York County

July 27, 1966

This is in reply to your letter of June 27, 1966, in which you request my advice as to whether or not the Board of Supervisors of York County may adopt an appropriate resolution or ordinance to refund a part or all of the money expended by non-domiciliary servicemen for the purchase of county license tags.

You refer to my opinion of April 14, 1966, in which I expressed the view that non-domiciliary servicemen may not be required to purchase county license tags for their motor vehicles. You further state that a number of non-domiciliary servicemen had purchased county license tags for the year 1966 when my opinion was issued and some of these have since requested refund of the amount so expended.

Counties, incorporated cities and towns are authorized under § 46.1-65, Code of Virginia (1950), as amended, to "levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers." Unlike the procurement of State registration and license plates pursuant to § 46.1-41 which, as held in the case of Commonwealth v. Conner, 162 Va. 406, does not involve an assessment, § 46.1-65 provides that any political subdivision named therein may levy and assess the local tax. An examination of the copy of the Ordinance you furnished this office with your letter of July 21, 1966, reveals a requirement that the license tax thereby levied be assessed by the Treasurer.

It is provided in § 58-1152.1, Code of Virginia (1950), as amended, that the "governing body of any city or county may provide by ordinance for the refund of any local levies erroneously paid." This section states that: "If such ordinance be passed, and the commissioner of the revenue is satisfied that he has erroneously assessed such applicant with any local levies as provided in §§ 58-1141 and 58-1142, he shall certify to the tax collecting officer the amount erroneously assessed." It further provides that, if such levies have been paid, the tax collecting officer or his successor in office shall refund to the applicant the amount erroneously paid. I am not of the impression that the fact that the ordinance provides for assessment by the Treasurer, as in the instant case, or some other officer, rather than the Commissioner of the Revenue, would act to defeat the purpose of the statute.

In consideration of the foregoing, I shall answer your question in the affirmative. By the limitation contained in § 58-1152.1, however, no refund shall be made in any case when more than three years have elapsed since payment of the amount erroneously assessed.

MOTOR VEHICLES—County Licenses—Vehicles operated by common carrier exempt under certain conditions.

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

August 23, 1966

This is in reply to your letter of August 15, 1966, which I quote, in part, as follows:

"There is a common carrier in my county exempted under the provisions of Section 46.1-66 (6). This common carrier operates.
under a certificate of public necessity number VCC-KCC-84. This common carrier is principally engaged in the transportation of motor fuel and other petroleum products. This exempted common carrier has leased trucks to a lessee which trucks are used principally to transport lumber and manufactured wood products. The lease provides that the lessor is considered the owner for registration purposes and does not vest the lessee with the right to purchase upon the performance of conditions as stated in the agreement. My question is, therefore, do the provisions of 46.1-66 (6) exempt a common carrier from requirements of purchasing county license tags on trucks which the exempted common carrier leases?"

The part of § 46.1-66, Code of Virginia (1950), as amended, to which you refer in the facts presented and the question posed, is as follows:

“(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

* * *

“(6) The motor vehicle, trailer or semitrailer is operated by a common carrier of persons or property operating between cities and towns in this State and not in intracity transportation or between cities and towns on the one hand and points and places without cities and towns on the other and not in intracity transportation...""

The exemption found in the quoted language of the statute has reference to a motor vehicle, trailer or semitrailer operated by a common carrier of persons or property under the stated conditions. It does not necessarily apply to every motor vehicle, trailer or semitrailer owned by a common carrier. In fact, no reference to ownership is found in the statute. The determining factor is whether or not the vehicle is operated by a common carrier under the stated conditions.

In the given facts, an exempt common carrier owns certain trucks which are not operated by such carrier but are leased to another. The lessee operates them principally to transport lumber and manufactured wood products. The facts do not show whether or not the lessee is a common carrier. My answer to your question, therefore, must be contingent upon whether or not such lessee is a common carrier within the confines of this paragraph, the vehicles operated by the lessee are exempt thereunder. Otherwise, I am of the opinion that there is no exemption for these vehicles under paragraph (6) of § 46.1-66, as I do not believe the exemption found in this paragraph extends to vehicles owned by an exempt common carrier but operated by a lessee who is not exempt.
REPORT OF THE ATTORNEY GENERAL

while under the influence of intoxicants, the twelve months restriction begins to run on the date of conviction or on the date the license is surrendered.

This depends upon whether you have reference to the date the restriction begins or the date from which the one-year period of revocation shall be counted. Pursuant to the terms of § 18.1-59, Code of Virginia (1950), as amended, a conviction for an 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 or operate a motor vehicle. For a first offense the period is one year and for a second or subsequent offense within ten years, the period is three years from the date of conviction. Thus, it is clear that this statute deprives the person so convicted of the right to drive from the date of conviction, and if he thereafter drives a motor vehicle he is in violation of § 46.1-350.

In addition to the foregoing, the Commissioner of the Division of Motor Vehicles is required to revoke the license of any person so convicted, and in this regard we must consider § 46.1-417, the pertinent part of which is as follows:

"The Commissioner shall forthwith revoke, and not thereafter reissue during the period of one year, the license of any person, resident, or nonresident, upon receiving a record of his conviction or a record of his having been found not innocent in the case of a juvenile of any of the following crimes, committed in violation of either a State law or of a valid town, city or county ordinance paralleling and substantially conforming to a like State law and to all changes and amendments of it:

* * *

"(b) Violation of the provisions of § 18.1-54 or 18.1-60, or violation of a valid town, city or county ordinance paralleling and substantially conforming to §§ 18.1-54 to 18.1-61..."

When does this one year period begin to run? It begins to run as prescribed in § 46.1-441, which is as follows:

"Wherever it is provided in this title that the operator's or chauffeur's license, or the registration certificates or license plates of any person be suspended or revoked for a period of time on conviction of certain offenses, or after a hearing before the Commissioner of Motor Vehicles as provided by law, such period shall be counted from one hundred eighty days after said conviction becomes final or after the order of the Commissioner, as a result of such hearing, becomes final, or shall be counted from the date on which said license, certificate or plates are surrendered to the Commissioner or his agent, or to the court or clerk thereof, regardless of whether or not the record of conviction has been received by the Commissioner or his agent, whichever period shall first commence; provided, however, that the provisions of this section shall not apply in any case where the person whose license is subject to suspension or revocation gives a false name or otherwise conceals his identity."

This section has been interpreted by the Supreme Court of Appeals of Virginia as establishing the date from which a revocation shall be counted rather than the date the revocation begins. See, White v. Commonwealth, 203 Va. 816. In that case, the Commissioner had issued an order revoking the operator's license for a period of four months from the date he surrendered his license because of his three convictions for violating the lawful
speed limit. It was held that the revocation became effective from the date of the Commissioner's order but that the period of revocation should be counted from the date of surrender of the license or from one hundred eighty days after the conviction became final, whichever period first commenced.

Under § 46.1-425, upon conviction of a person for an offense requiring the revocation of his license, the court is required to order the surrender of the license of such person and retain custody of the license until "(1) the time allowed by law for appeal has elapsed, when it shall be forwarded to the Commissioner [Division of Motor Vehicles], or (2) an appeal is effected and proper bond posted, at which time it shall be returned to the accused."

In any instance in which the license is surrendered to the court and forwarded to the Commissioner in accordance with this section, the period of revocation is counted from the date of conviction, this being the date license was surrendered to the court. Where the license is not surrendered on the date of the conviction, however, I am of the opinion that the period of revocation under the Commissioner's order shall be counted from the date such license is later surrendered to the court or to the Commissioner or from one hundred eighty days after the conviction, whichever period is first commenced. As previously indicated, this does not affect the application of § 18.1-59, which deprives a person of the right to drive from the date of conviction for driving under the influence of intoxicants.

MOTOR VEHICLES—Drunk Driving Conviction—Dismisses any reckless driving charge.

CRIMINAL PROCEDURE—Drunk Driving Conviction—Dismisses any reckless driving charge.

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

November 28, 1966

This will reply to your letter of November 23, 1966, in which you present the following inquiry:

"Under the provisions of the Impaired Driving Statute, Section 18.1-56.1 of the Code, if any person is charged with a violation of 18.1-54 of the Code and reckless driving growing out of the same act and the charge of driving under the influence is reduced under Section 18.1-56.1 to impaired driving, is the prosecution of the reckless driving precluded under Section 19.1-259.1 of the Code?"

I am of the opinion that your inquiry should be answered in the negative. Section 19.1-259.1 of the Virginia Code, to which you refer, prescribes:

"Whenever any person is charged with a violation of § 18.1-54 or any similar ordinance of any county, city, or town and reckless driving growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge."

(Italics supplied.)

In terms, the above-quoted statute precludes a prosecution for reckless driving only in those instances in which an accused is charged with the operation of a motor vehicle while "under the influence" of alcoholic intoxicants in violation of § 18.1-54 of the Virginia Code and is convicted of that offense. The offense defined in § 18.1-56.1 is that of operating a motor
vehicle while one's ability to do so "is impaired by the presence of alcohol" in his blood. While the latter crime is a lesser included offense of a violation of § 18.1-54, it is nevertheless a separate and distinct offense, having a specific statutory definition, an exclusive statutory presumption and a different statutory penalty. An individual convicted of a violation of § 18.1-56.1 has not been convicted of a violation of § 18.1-54 and has not been convicted of the specific offense which, under § 19.1-259.1 of the Virginia Code, requires dismissal of a reckless driving charge. I am therefore of the opinion that § 19.1-259.1 of the Virginia Code does not compel dismissal of a reckless driving charge in those instances in which an accused has been convicted of a violation of § 18.1-56.1 of the Virginia Code.

MOTOR VEHICLES—Electronic Devices for Measuring Speed—Placing of signs—Presumption that signs erected.

MOTOR VEHICLES—Speeding—Convictions under § 46.1-198.

HONORABLE CALVIN W. BERRY, Judge
Municipal Court of the City of Danville

This is in reply to your letter of April 13, 1967, in which you request my opinion on the statement of facts and related questions which I shall quote, as follows:

"The City of Danville has in effect an ordinance paralleling Virginia Code Section 46.1-198. On one primary highway system leading into the City of Danville there is no sign in compliance with Section 46.1-198. While this sign was absent a number of persons have been convicted of speeding based on the use of radar. Some of these convictions were on a plea of guilty, after which a fine and costs were imposed. Some convictions were the result of a trial, after which a fine and costs were imposed. Some convictions were the result of a trial, after which a fine and costs were imposed.

"On this statement of facts, were these people legally convicted? If these convictions were illegal, do I have the authority to refund the fine and costs in connection with each conviction? My attention has been called to 36A CJS, Par. 17, page 457."

Cities and towns are authorized under paragraph (d) of § 46.1-198 of the Code to adopt and use radio microwaves or other electrical devices to measure speed. No operator of a motor vehicle may be arrested under such city ordinance unless signs have been placed on the primary highway system leading into such city. The statute further provides, however, that there shall be a prima facie presumption that such signs were in place at the time of commission of the offense.

In view of the statutory presumption that the signs were in place when the offense was committed, sufficient evidence to overcome this presumption would be necessary to make a conviction under this section illegal. The same would be true of trial under a parallel city ordinance. As I understand the related evidence, no such evidence was offered at these trials, as such evidence would certainly not be consistent with a plea of guilty. I must conclude, therefore, that the categorical statement that the signs were down refers to information not presented at trial but discovered at some later time.

If the foregoing analysis of the situation be correct, I am of the opinion that these people were legally convicted. Having so answered your first
question in the affirmative, no further consideration need be given your second question, which is predicated upon a negative answer to the first. In this connection, I might say that 36A C.J.S., § 17, p. 457, to which you refer, appears to relate only to compulsory payment of fines. The same reference states that when the accused had the right to appeal, but paid the fine before appealing, the payment will be deemed voluntary and cannot be recovered back.

MOTOR VEHICLES—License Plates—For Hire—Not needed for escort car of overweight vehicle.

HONORABLE F. NELSON LIGHT, Judge
Pittsylvania County Court

This is in reply to your letter of September 13, 1966, in which you request an opinion from this office as to whether or not a "for hire" license is required for an "escort car" used by a contractor in connection with the movement of overweight house trailers.

You refer to paragraph (35) of § 46.1-1, Code of Virginia (1950), as amended, which I quote, as follows:

"The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a 'truck lessor' as defined herein."

This section refers to the transportation of passengers, or property, for compensation. When an owner or operator of any motor vehicle, trailer or semitrailer receives compensation for the service of transporting either passengers or property over the highways of this State, the "for hire" licenses are required. An automobile used under the stated conditions is transporting neither passengers nor property for compensation.

The fees for the registration of motor vehicles "designed and used for the transportation of passengers upon the highways of this State" are found in §§ 46.1-149 and 46.1-150, Code of Virginia (1950), as amended. The fees for the registration of motor vehicles "not designed and used for the transportation of passengers" are prescribed in § 46.1-154. There appears no provision under any of these statutes, nor elsewhere in the Code, for treating a passenger car used in the stated manner as a "for hire" vehicle.

In consideration of the foregoing, it is my opinion that a passenger car so used is not required to be licensed as a "for hire" vehicle and I shall answer your question in the negative.
HONORABLE H. G. Potts, Judge  
Clarke County Court

This is in reply to your letter of January 19, 1967, in which you request my opinion in regard to the factual situation and question posed, which I quote, as follows:

"A operates a landscaping business and in connection with his business owns and operates '54 International cab over two axle truck, with a bed on the rear seven feet wide, five feet in length. The vehicle has a hitch on the rear and is used to tow a low, flat trailer which has three axles with single wheels. The trailer is used to haul a back hoe or small dozer, and the bed of the truck is usually used to haul track, gasoline and oil cans, buckets, equipment and tools. This trailer is licensed as a combination for weight, Va. Y 3868—60 International Trailer Va. Tr. 15084. No compensation is charged for the transportation of any property on said vehicle.

"The question is whether the above described vehicle under the circumstances above mentioned is required to have and display operating authority from the State Corporation Commission under the provisions of Section 56-304.2 of the Code of Virginia of 1950, as amended."

The given facts show that no compensation is charged for the transportation performed by the vehicle in question. Operating authority from the State Corporation Commission, in the form of a registration card and an identification marker in the case of a vehicle transporting property on any highway not for compensation, is required by § 56-304.2, Code of Virginia (1950), as amended, for "any road tractor, or any tractor truck, or any truck having more than two axles."

By reference to § 46.1-1, Code of Virginia (1950), as amended, it will be seen that paragraph (25) thereof defines a "road tractor" as, "Every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon independently or any part of the weight of a vehicle or load so drawn." Likewise, paragraph (32) of the same section defines a "tractor truck" as, "Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the load and weight of the vehicle attached thereto."

Since the vehicle you describe is so constructed as to carry a load, it can neither be a road tractor nor a tractor truck under the definitions stated. While no statutory definition of truck appears, the vehicle in question obviously is a truck but, in this connection, § 56-304.2 refers only to any truck having more than two axles. The truck you describe has only two axles. In my interpretation, therefore, the vehicle in question is not included within the purview of § 56-304.2, and, accordingly, I am of the opinion that it is not required to have and display any operating authority from the State Corporation Commission. I am advised by a representative of the Division of Motor Vehicles, however, that this vehicle should operate on "T" plates instead of "Y" plates. I understand there is no difference in the cost.
MOTOR VEHICLES—Local Licenses—Authority of towns and counties to impose—Limited to one license tag in addition to that of the State.

COUNTIES, CITIES AND TOWNS—Motor Vehicles—Local licenses—Limitation on charging of license fees.

May 31, 1967

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of May 22, 1967, in which you refer to the Town of Hurt in Pittsylvania County, established by the Legislature in January, 1967, and raise the question, which I quote as follows:

“Our Question is: Whether or not the Town of Hurt will be able to charge license fees upon motor vehicles when the residents of this town are already being charged license fees upon their motor vehicles by Pittsylvania County?”

Section 46.1-65 of the Code of Virginia, to which you refer, provides that counties, incorporated cities and towns may charge license fees upon motor vehicles, trailers and semitrailers. In paragraph (d) of this section I direct your attention to the following passage: “. . . Nothing herein contained shall be construed as depriving any town now imposing such licenses and taxes from increasing the same or as depriving any town not now imposing the same from hereinafter doing so, but subject to the limitations provided in the foregoing paragraph. . . .” The same section authorizes mutual agreements between the governing bodies of any county and any town in such county wherein each imposes the license tax, so that not more than one license tag in addition to the State tag shall be required. This section also prescribes that if the county and town located therein each imposes the license fees, the owner of a vehicle subject to such fees shall be entitled to a credit on the fees imposed by the county to the extent of the fees he has paid to such town.

In consideration of the foregoing, it is my opinion that the Town of Hurt may impose motor vehicle license fees under the stated conditions, by appropriate ordinance consistent with the enabling statute, and I shall answer your question in the affirmative.

MOTOR VEHICLES—Local Licenses—Exemption to non-domiciliary member of armed forces not affected by purchase of Virginia license plates.

TAXATION—Motor Vehicles—Member of armed forces—Assessable in locality where owner is resident.

October 19, 1966

HONORABLE D. R. TAYLOR, Judge
Municipal Court, City of Williamsburg

This is in reply to Miss Mary Inman's letter of October 11, 1966, requesting that I express my opinion in a letter to you on two questions, which I shall quote as follows:
“(1) A serviceman, otherwise exempt, having voluntarily brought himself within the jurisdiction of the State by registering his motor vehicle and purchasing State licenses, is, or is not liable to local license tax?

“(2) Has his act of having purchased state license for his motor vehicle, removed this specific personal property from the exemption under the Soldiers' and Sailors' Act and placed it under jurisdiction of the State for purposes of personal property tax?”

The answer to both questions is in the negative. In reference to question number (1), I have previously expressed the opinion that, because of the Soldiers' and Sailors' Civil Relief Act, the local license tax may not be imposed on a non-domiciliary serviceman who is in this State because of military or naval orders. Such serviceman is exempt regardless of whether he registers his motor vehicle in his State of domicile or in the State of Virginia. See, Report of the Attorney General (1965-1966), p. 194.

In regard to question number (2), the Soldiers’ and Sailors’ Civil Relief Act also controls as to personal property tax on motor vehicles owned by non-domiciliary servicemen in this State because of military or naval orders. Under § 46.1-1 (16) (c), Code of Virginia (1950), as amended, to which you obviously have reference, 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 Title 46.1. A personal property tax, of course, is assessed by the locality pursuant to Title 58, Code of Virginia (1950), as amended. Although § 46.1-65 (c) of Title 46.1 provides that localities may require payment of the personal property tax on a motor vehicle before issuing a license therefor, I am not of the opinion that this would apply to a non-domiciliary serviceman.

MOTOR VEHICLES—Local Licenses—Fee not to be imposed on non-domiciliary member of armed forces—Refunds.

August 29, 1966

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

This is in reply to your letter of August 25, 1966, setting forth, in part, an Accomack County ordinance imposing an annual license fee and tax of $5.00 on automobiles and trucks and, on behalf of the County Treasurer, posing the questions contained in the following paragraph, which I quote:

“Mr. Fletcher requests your opinion on whether or not the foregoing ordinance applies to a serviceman stationed in Accomack County who is a resident of another State; and, in the event it does not, what action he should take with regard to requests for refunds from such servicemen.”

My answer to the question of whether or not the ordinance applies to servicemen stationed in Accomack County who are residents of another state is in the negative. I have previously expressed the opinion that license
taxes levied by a county may not be imposed upon a non-domiciliary serviceman stationed in Virginia under military or naval orders. In this connection, I am enclosing a copy of my letter of April 14, 1966, to the Commonwealth's Attorney for Essex County.

The handling of refunds is a matter which I believe should rest in the good judgment of the local authorities. In my letter of July 27, 1966, to the Commonwealth's Attorney for York County, I expressed the opinion that a county may adopt an appropriate ordinance to refund money expended for the purchase of county license tags by non-domiciliary servicemen stationed therein because of military or naval orders. The opinion was based on Article 2 of Chapter 22, Title 58, Code of Virginia (1950), as amended, and § 58-1152.1 thereof in particular. A copy of that letter is enclosed for your convenience.

MOTOR VEHICLES—Local Licenses—Refund of portion of purchase price upon surrender of license plates.

May 1, 1967

HONORABLE G. HUGH TURNER
Treasurer of Franklin County

This is in reply to your letter of April 28, 1967, in which you request an opinion regarding the propriety of a refund on county motor vehicle license fees under certain conditions and pose the questions contained in the following passage, which I quote:

"If a person sells or in some way gets rid of his car that he has bought county license for and brings the license in to us, can there be a refund of a portion of the purchase price? Would like to know if we can refund in accordance with the State refund."

The authority for counties to impose motor vehicle license fees is contained in § 46.1-65 of the Code of Virginia. No provision for refund of a portion of the purchase price of the license tag, upon disposition of the vehicle so licensed, is contained in § 46.1-65. This section provides, however, that such license fees shall be imposed in such manner, on such basis, and for such periods as the proper authorities of such counties may determine and subject to proration for fractional periods of years in the manner prescribed in § 46.1-165. The last named section provides that licenses issued during the year for the remaining fraction of the license year shall be prorated as therein stated.

Section 46.1-97 of the Code of Virginia provides for refund of the unused portion of the State license fee to any person who disposes of a vehicle for which such license was issued and does not purchase another vehicle, upon surrender of the license plates and registration to the Commissioner. In respect to your specific questions, however, the question of making refunds of portions of the county license fees is one which, in my opinion, rests in the discretion of the local authorities. I see no reason why the
County of Franklin could not adopt, by appropriate ordinance, a clause for making such refunds. I believe it would be proper that any such refund clause be patterned after § 46.1-97 and parallel such statute.

MOTOR VEHICLES—Operator's License—Age limit set by statute.
August 29, 1966

HONORABLE JOEL T. BROYHILL
Member of Congress

This is in reply to your letter of August 24, 1966, in which you request my advice as to the law relative to the issuance of a driver's license to a person fifteen years of age who obtained a learner's permit a month before the effective date of the new law. You also enclose a letter which you received from a person who sets forth certain information regarding an application for operator's license made by his fifteen year old daughter and requests interpretation of the law thereto pertaining.

By Chapter 36, Acts of Assembly of 1966, § 46.1-357, Code of Virginia (1950), as amended, relating to the issuance of driver's licenses to certain minors, was amended. On and after June 27, 1966, the effective date of this amendment, the statute provides, in part, that:

"No operator's license shall be issued to any person under the age of eighteen years except . . ."

"(1) An operator's license may be issued to a minor of the age of sixteen years . . ."

* * *

"(3) The Division upon receiving from any person over the age of fifteen years eight months, an application for a temporary instruction permit may in its discretion issue such a permit. . . ."

The statute is clear and unequivocal in respect to the age limit for obtaining either an operator's license or a temporary instruction permit, as will be seen from the essential language quoted herein, and I find nothing to permit or indicate any intention to permit the issuance of an operator's license to a person under the age of sixteen years, regardless of whether or not such minor had been issued a temporary instruction (learner's) permit before the 1966 amendment became effective.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Operator’s License—Revocation—Duty upon commissioner on two convictions within year for speeding.

March 10, 1967

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in reply to your letter of March 9, 1967, which I quote, in part, as follows:

“In Re: Va. Code Sec. 46.1-197

“In reference to the above mentioned section, there appears to be a conflict between the statute and the practices of the Division of Motor Vehicles. In reading the above mentioned statute, it speaks of two convictions within a year and not two offenses. It is my understanding that the Division of Motor Vehicles will pick up a person’s permit for two offenses committed within a year.

“I would like to have the following question answered:

“1. Does Va. Code Sec. 46.1-197 mean two convictions within a year, or two offenses?”

In respect to your specific question, § 46.1-197 requires the suspension of license “when any person shall be convicted for the second or subsequent time within a period of one year.” This section, however, is directed to the judge or jury trying the case and not to the Division of Motor Vehicles, which is required to take action under § 46.1-419, Code of Virginia (1950), as amended.

The last named section requires the Commissioner of the Division of Motor Vehicles to revoke the license of any person, resident or nonresident, upon receiving records of two or more successive and distinct convictions of violations committed within a twelve-month period of any provision of law establishing the lawful rates of speed of motor vehicles and making such violation punishable as a crime. Generally, when a court or jury suspends a person’s license under § 46.1-197 and the Division of Motor Vehicles is likewise required to revoke such person’s license on the basis of the same convictions pursuant to § 46.1-419, the periods of suspension and revocation are concurrent. This is true because of the requirement contained in § 46.1-441, Code of Virginia (1950), as amended, that the period of revocation be counted from the date the license is surrendered to the Commissioner or to the court.

MOTOR VEHICLES—Operator’s License—Revocation for two or more convictions of speeding.

July 6, 1966

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in reply to your letter of June 22, 1966, which I quote, as follows:

“I have been approached by our local town judge in reference to a conflict which now exists in the interpretation of Va. Code Sec-
tion 46.1-197. It appears that the Division of Motor Vehicles is enforcing the suspension of permits under this section where it clearly states that no license will be suspended where the violation occurred in cities and towns.

"It is my opinion that if a person violates a city or a town ordinance in reference to speeding, then the town or city will have the authority under their own ordinance to suspend the permit, and that it would not be a reportable offense to the Division of Motor Vehicles under this code section.

"Your opinion on this matter will be greatly appreciated."

All convictions for offenses pertaining to the operator or operation of any motor vehicle, except parking regulations, are required to be reported to the Division of Motor Vehicles by the county or municipal court or clerk of the court of record trying the case, pursuant to §§ 46.1-412 and 46.1-413, Code of Virginia (1950), as amended. This includes each conviction for a violation of an ordinance of any county, city or town, as well as any law of this State.

The Commissioner of the Division of Motor Vehicles is required by § 46.1-419 to revoke the license of any person upon receipt of two or more successive convictions for violations committed within a twelve month period of any provision of law or ordinance duly enacted in pursuance thereof, establishing the lawful rates of speed of motor vehicles and making the violation thereof punishable as a crime. This office has consistently interpreted this section as applicable to all speeding convictions, regardless of whether the violations were charged under State law or local ordinance and as unaffected by the terms of § 46.1-197, which has reference only to action by the judge or jury trying the case. For your convenience, I am enclosing a copy of an opinion found in Report of the Attorney General (1960-1961), p. 222.

It will be noted that § 46.1-197 states that: "Nothing contained in this section shall apply to speed violations which occur in cities and towns. Nor shall the provisions of this section apply in any case unless the applicable legal speed limit is forty-five miles per hour or more." In my opinion, this precludes the cities and towns from applying this section to violations occurring therein, which, in turn, prevents its application to violations of city or town ordinances pertaining to the lawful rates of speed.

MOTOR VEHICLES—Operator’s License—Suspension under § 46.1-442 not terminated by statute of limitations.

March 8, 1967

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is in reply to your letter of February 28, 1967, in which you request my opinion in relation to the situation and questions set forth in the paragraphs which I quote, as follows:

"On March 19, 1946, a judgment for damages arising out of a motor vehicle accident was rendered in the Trial Justice Court of Norfolk County. Upon receipt of an abstract of this judgment, an
order of suspension was entered against the judgment debtor as prescribed in Section 2154 (a24), now Section 46.1-442 of the Code of Virginia of 1950. So far as the record reveals, this judgment remains unsatisfied to this date.

"The judgment debtor, by counsel, now contends that inasmuch as the 'Statute of Limitation,' that is twenty years has run, then the suspension heretofore referred to is of no effect regardless of the provisions of Section 46.1-444 and 46.1-459(b).

"If you are of the opinion that the 'Statute of Limitation' terminates the requirement of the statutory administrative suspension order as to satisfaction of the judgment as prescribed in Section 46.1-444, will you further furnish your opinion as to the application of Section 46.1-459(b) relating to the giving of proof of financial responsibility in the future under this particular circumstance; and further, is there any administrative duty upon this Division to make inquiry as to whether the judgment has been revived?"

The statutes controlling in the situation described are now found in Chapter 6 of Title 46.1, Code of Virginia (1950), as amended, known as the "Virginia Motor Vehicle Safety Responsibility Act" and remain unchanged in all essentials here concerned since the suspension action was taken in 1946. The applicable portion of § 46.1-442, to which you refer, is as follows:

"The Commissioner shall suspend the operator's or chauffeur's license and all of the registration certificates and registration plates issued to any person who has failed for a period of thirty days to satisfy any judgment in an amount and upon a cause of action as hereinafter stated, immediately upon receiving an authenticated report as hereinafter provided to that effect." (Emphasis supplied)

Section 46.1-443 states that the action required in § 46.1-442 shall be taken by the Commissioner of the Division of Motor Vehicles "upon receiving proper evidence that the person has failed for a period of thirty days to satisfy any judgment, in an amount and upon a cause of action as stated in §§ 46.1-442 and 46.1-389(c)." Section 46.1-389(c) provides that "judgment" shall mean any judgment for fifty dollars or more arising out of a motor vehicle accident because of injury to or destruction of property or any judgment for damages resulting from bodily injury to or death of any person arising out of ownership, use or operation of a motor vehicle, "which has become final by expiration without appeal in the time within which an appeal might be perfected or by final affirmance on appeal rendered by a court of competent jurisdiction of this State or any other state or court of the United States or of the Dominion of Canada or its provinces."

Section 46.1-444, which controls in the matter of methods of satisfying any such judgment, is as follows:

"(a) Every judgment for damages in any motor vehicle accident herein referred to shall for the purpose of this chapter only be deemed satisfied:

"(1) When paid in full or when fifteen thousand dollars has been credited upon any judgment or judgments rendered in excess of
that amount because of bodily injury to or death of one person as
the result of any one accident;

“(2) When, subject to the limit of fifteen thousand dollars be-
cause of bodily injury to or death of one person, the judgment has
been paid in full or when the sum of thirty thousand dollars has
been credited upon any judgment or judgments rendered in excess
of that amount because of bodily injury to or death of two or more
persons as the result of any one accident; or

“(3) When the judgment has been paid in full or when five
thousand dollars has been credited upon any judgment or judg-
ments rendered in excess of that amount because of injury to or
destruction of property of others as a result of any one accident.

“(b) Payments made in settlement of any claims because of
bodily injury, death or property damage arising from a motor
vehicle accident shall be credited in reduction of the amount pro-
vided in this section.”

In respect to the duration of suspensions under § 46.1-442, the pertinent
language of § 46.1-459 is as follows: “The suspensions required by the
provisions of § 46.1-442 shall continue except as otherwise provided by
§§ 46.1-446 and 46.1-448 until the person satisfies the judgment or judg-
ments as prescribed in § 46.1-444 and gives proof of his financial respon-
sibility in the future.” Sections 46.1-446 and 46.1-448, referred to in the last
quoted paragraph, respectively, provide for the payment of the judgment in
installments after obtaining a court order to that effect and allowing a
license on consent of the judgment creditor, notwithstanding default, if
the judgment debtor furnishes proof of financial responsibility in the future,
as provided by law. From the stated facts, neither of these exceptions apply
in the case under consideration.

There is no indication anywhere in this chapter that the limitations im-
posed upon judgments by §§ 8-396 and 8-397, Code of Virginia (1950), as
amended, will be treated as satisfying a judgment so as to terminate the
suspension of licenses required by § 46.1-442. In any event, an obvious intent
of the suspension of license under § 46.1-442 is to engender satisfaction of
the judgment for the benefit of the injured party. The judgment debtor
shall not have his license restored until he satisfies the judgment and gives
proof of financial responsibility in the future. The doctrine of liberal con-
struction for this chapter is adopted in § 46.1-390, which states: “It is the
legislative intent that this chapter be liberally construed so as to effectuate
as far as legally and practically possible and feasible its primary objective
to promote and further greater safety in the operation of motor vehicles
in this State.” It is noted that, under § 46.1-394, “A discharge in bankruptcy
listing a claim for damages arising out of the operation of a motor vehicle
shall not relieve the judgment debtor from any of the requirements of this
chapter.”

As I construe these statutes, it is not the rendering of the judgment
against a person, but his failure to satisfy the judgment within thirty days
(formerly fifteen days) after the same becomes final, which requires the
suspension of his licenses pursuant to § 46.1-442. The suspension under this
section is not predicated upon the judgment, since the judgment may be
satisfied within thirty days and there will be no suspension under this law.
There are many people who have such judgments rendered against them,
but never have their licenses suspended because the judgments are satisfied
within thirty days after becoming final. Thereafter, according to § 46.1-
REPORT OF THE ATTORNEY GENERAL

459(b), quoted supra, such suspension shall continue until the person satisfies the judgment as prescribed in § 46.1-444 and gives proof of his financial responsibility in the future.

In consideration of the foregoing, I am not of the opinion that the twenty-year limitation terminates the administrative suspension ordered pursuant to § 2154(a24), now § 46.1-442. Having so answered this question, your question as to a requirement for furnishing proof of financial responsibility needs no further response. As to your final question, it follows that there is no administrative duty upon the Division to make inquiry as to whether the judgment has been revived.

MOTOR VEHICLES—Operator’s License—When required for nonresident servicemen—When not.

August 26, 1966

HONORABLE FRED W. BATEMAN
Member, Senate of Virginia

This is in reply to your letter of August 23, 1966, in which you present two factual situations and pose relative questions which I shall quote and consider separately and in the order presented, as follows:

"FACTS: A member of the armed forces who is a bona fide resident of a foreign state, who has been duly licensed as an operator and who meets the other requirements of 46.1-355, resides in quarters on a military post. During his tour of duty at the military post, he purchases an automobile and finances it through a local lending institution and the vehicle is titled and licensed in Virginia; however, the vehicle is exempt from personal property tax and requirements to purchase a city license plate.

"QUERY: Does the definition of non-resident as modified by 46.1-1 (16) (c) of the 1950 Code of Virginia make this member of the armed forces a resident of this state so as to deprive him of the permissive authority contained in 46.1-355 for this member of the armed forces to operate a vehicle on Virginia highways on his home state driver’s license?"

In this regard, § 46.1-1 (16) (c) states, in part, that "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." In various opinions this office has consistently held that such a military post, over which exclusive jurisdiction has been ceded to the United States, is not "an address within this State." In my opinion, non-resident servicemen residing on any such military reservation retain their status as nonresidents and, therefore, I shall answer this question in the negative.

"FACTS: Same as above except there are no quarters available on the post for assignment to the member of the armed forces when he reports for duty and he purchases a house in a subdivision just off the post, filing an affidavit of non-residency with the local Commissioner of Revenue and continuing to be a bona fide resident of his home state."
"QUERY: Would this change the answer to the fact situation above?"

A nonresident serviceman residing on a military post does not come within the statute for the reason stated. When any such nonresident serviceman lives off the post, however, this technicality is removed. The part of § 46.1-1 (16) (c), already quoted herein, is very clear and unambiguous. If he has registered a motor vehicle, listing his Virginia address in the application, he is deemed a resident for the purposes of "this title," which includes § 46.1-355. There is no reason for not applying this law in the latter instance. In my opinion, this change in the factual situation brings a serviceman under the statute and, accordingly, I shall answer this question in the affirmative.

You further advise me that certain local police officers have expressed the belief that traffic citations were issued to servicemen living off post because "they were required to have city tags." This is incorrect, as the requirement for obtaining an operator's license is controlled by statute and unaffected by local ordinance. It will be seen, therefore, that neither the Supreme Court case nor my opinion based thereon, to which you refer, has any bearing on this matter.

MOTOR VEHICLES—Pedestrian Crosswalk—May be at intersection or elsewhere.

August 12, 1966

MR. C. P. CARDWELL, JR.
Vice-President and Director of College Hospitals,
Medical College of Virginia

This is in reply to your letter of August 9, 1966, in which you request my advice as to whether or not paragraph (4a), (a) and (b) of § 46.1-1, Code of Virginia (1950), as amended, permit the City of Richmond to mark the street and establish a crosswalk at a location on 12th Street midway between Broad and Marshall Streets. You state that there has been a crosswalk there, until recent repaving obliterated the lines, which has been used for many years by the students, faculty, employees and patients of the Medical College of Virginia. The named sections of the Code of Virginia are new having been enacted by Chapter 643, Acts of Assembly of 1966, and are as follows:

"(4a) ‘Crosswalk’—(a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway;

"(b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface." (Emphasis supplied.)

The emphasized portion of paragraph (b) indicates an alternative for the placement of a pedestrian crosswalk. It may be at an intersection or elsewhere. According to Black's Law Dictionary, the word "elsewhere" means "in another place; in any other place." In my interpretation, it follows that the definition of "crosswalk" includes any portion of a roadway
at an intersection or at any other place on such roadway which is distinctly indicated for pedestrian crossing by appropriate markings on the surface.

In consideration of the foregoing, I am of the opinion that the City of Richmond is permitted by law to establish a crosswalk at the named location and I shall answer your question in the affirmative.


May 1, 1967

HONORABLE OLIVER D. RUDY
Commonwealth’s Attorney for Chesterfield County

This is in reply to your letter of April 24, 1967, in which you direct my attention to the reciprocal provisions of §§ 46.1-179.1, 46.1-179.2 and 46.1-179.3 of the Code of Virginia and present the facts and questions which I quote as follows:

“Recently, a Chesterfield police officer charged a resident of the City of Washington with a violation of § 6-71, paragraph (b), of the Code of the County of Chesterfield, Virginia, to-wit: speeding. The driver was also charged with having no operator’s license, on a county warrant. Under the reciprocal sections the operator of the automobile was permitted to sign a summons for his appearance in court on the date specified in the summons. At the time of the arrest the police officer was informed by the operator of the vehicle that the operator had a valid Virginia license, but he had since moved to Washington, D. C. The Virginia license was subsequently confirmed by the police officer. The automobile which was involved in the matter was registered in Washington, D. C. and bore District of Columbia tags. The police officer has prepared the report required by § 46.1-179.2.

“My questions are as follows:

“1. If a certified copy of this report is sent to the District of Columbia and the driver is not licensed to drive under the laws of the District of Columbia, is there any way of enforcing the provisions of these Code sections?

“2. Under these circumstances could the Division of Motor Vehicles of Virginia revoke the Virginia operator’s license in order to enforce the provisions of these sections?

“3. Could the State of Virginia revoke this operator’s Virginia license even though he had a Washington permit which was subsequently revoked by the licensing authority there?”

In answer to question numbered 1, under the factual situation outlined, such enforcement is in the hands of the District of Columbia authorities, since this is the jurisdiction of which the violator is a resident. In pursuance of the reciprocal provisions of these statutes, the sequence should be as follows: The arresting officer shall report the fact of the failure
of the nonresident to comply with the terms of his personal recognizance to the Division of Motor Vehicles, under § 46.1-179.2(c). Upon receipt of the arresting officer's report, the Division of Motor Vehicles shall transmit a certified copy of such report to the official in charge of the issuance of licenses in the reciprocating State (District of Columbia), under § 46.1-179.3(a). Upon receipt of this certification of noncompliance by the District of Columbia, the latter should forthwith suspend such person's privilege to drive, whether or not he holds a valid license. This is true because the privilege to drive is included under the definition of "license" in § 46.1-179.1, subsection (d) (2).

Considering now question numbered 2, there appears no authority for the Division of Motor Vehicles to revoke the Virginia operator's license to enforce the provisions of these sections. Any suspension must be effected by the state of residency, which, in this instance, is the District of Columbia.

As intimated in the foregoing response to the first and second questions, I shall answer your question numbered 3 in the negative. The action to suspend the operator's license, if he has one issued by the District of Columbia, or otherwise the action to suspend his privilege to drive a motor vehicle, should be taken by the District of Columbia. There is no authority for the State of Virginia to suspend or revoke the operator's license under such circumstances.

MOTOR VEHICLES—Registration and Licensing—For hire—Required when transporting water for sale.

April 20, 1967

Honorable Joseph A. Massie, Jr.
Commonwealth's Attorney for Frederick County

This is in reply to your letter of April 12, 1967, which I quote, in part, as follows:

"I have had several inquiries put to me concerning what requirements, if any, there are for the registration of trucks hauling and selling water.

"For an example, a man owns a truck upon which he can place a large tank, which may be removable when the truck is to be used for other purposes. This man will go to a municipal water supply, purchase water, haul it to a customer, and sell it.

"What registration should he have for this truck?

"(1) If the truck is operated in connection with another business, such as an automobile repair shop.

"(2) If the truck is operated in connection with farming operations."

According to § 46.1-1(35), Code of Virginia (1950), as amended, the terms operation or use for rent or for hire as a property carrier for compensation, and the term business of transporting property, whenever used in the Motor Vehicle Code, mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly. This should be considered along with § 56-275.1, Code of Virginia (1950), as amended, which provides that any person who purchases
articles, merchandise, commodities or things at one point and transports
them in a motor vehicle to another point for sale, in the sale price of
which is reflected a charge for transportation, shall be deemed to be
operating for compensation.

I am of the opinion that the transporting of water under the above-
quoted conditions does come within the requirements of § 46.1-1(35) and,
therefore, such truck should be registered as a "for hire" vehicle. In
reference to your question numbered (1), I fail to see any connection
between the operation of an automobile repair shop and the business of
buying, transporting and selling water. Consequently, I do not believe
this would obviate the fact that for hire registration is required for such
truck. The same is true for farming operations under question num-
bered (2).

MOTOR VEHICLES—Registration and Licensing—Not necessary for
machine defined as "backhoe."

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

This is in reply to your letter of November 14, 1966, in which you seek
my advice as to the registration and license requirements of the ma-
chinery therein described.

The description and pictures furnished indicate that this is an excavating
apparatus mounted on a three-axle truck. The law does not define the
word "backhoe." Webster's Third New International Dictionary defines
it as "an excavating machine in which the bucket is rigidly attached to
a hinged stick on the boom and is drawn toward the machine in opera-
tion."

The matter has been discussed with representatives of the Division of
Motor Vehicles and the Department of State Police, as well as with
dealers in excavating equipment. It appears that the equipment described
does qualify as a type of backhoe, so long as it operates as a single unit
performing within the definition quoted herein and not otherwise.

Section 46.1-45, Code of Virginia (1950), as amended, states, in part,
that: "No person shall be required to obtain the annual registration cer-
tificate and license plates or to pay the fee prescribed therefor, pursuant
to the provisions of this chapter, for any backhoe operated on any high-
way a distance not in excess of ten miles from the operating base of
such backhoe." I am of the opinion, therefore, that the described ma-
chinery may be operated within the limits of this statute without regis-
tration and license plates.

MOTOR VEHICLES—Registration Fee—Required where vehicle used
for private rather than purely for State, county and municipal purposes.

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is in reply to your letter of June 6, 1967, requesting my opinion in
regard to the following, which I quote:
"The City of Martinsville, Virginia, is the registered owner of eight buses which are licensed under the provisions of § 46.1-49, which provides that such plates shall be issued without fee.

"We are informed that the City has entered into a lease with the City Transit Company, Inc. This corporation presumably will operate such buses, and we are informed that application has been made to the State Corporation Commission to consider the corporation's request for the necessary authority to operate as a common carrier and to provide charter service.

"Under such arrangement, will you advise me whether the motor vehicles involved should be continued to be licensed without fee, or whether they should be classified as are all other buses owned by private concerns. As a corollary to the above question, will you also give me your opinion as to whether fuel tax refunds should be granted to them under these circumstances?"

Section 46.1-49 of the Code states that no registration fee shall be collected for license plates and registration on motor vehicles owned by the State and counties, cities and towns thereof and used purely for State, county and municipal purposes. To the extent stated, it is an exception enumerated in § 46.1-41 of the Code, which requires every person, railway, express and public service company owning a motor vehicle to obtain registration and title before such vehicle is operated upon any highway in this State. The latter named section does not place a tax on property but a license fee for operation of the vehicle over the highways of this State.

I am advised that City Transit Company, Inc., is chartered as a public service corporation, authorized to issue ten thousand shares of stock, and is authorized to carry passengers and baggage over the highways and public roads of this State and over the highways and streets of the City of Martinsville or other towns and cities in this State. The State Corporation Commission has issued this corporation a certificate as a common carrier of passengers and, upon its application, has issued warrants and classification plates pursuant to § 56-304 of the Code for the eight buses in question.

Since the foregoing information indicates use of the vehicles for private purposes rather than **purely for State, county and municipal purposes**, I am of the opinion that the buses so used should be classified as all other buses similarly operated by private concerns.

Section 58-712 of the Code exempts from tax gasoline or other like products of petroleum sold and delivered, as therein specified, to and for the exclusive use of the State or any political subdivision thereof. This statute offers no exemption on such motor fuel sold to private corporations for their use and, accordingly, I shall answer your second question in the negative.

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**MOTOR VEHICLES—Sales and Use Tax.**

**TAXATION—Motor Vehicles—Sales and Use Tax.**

HONORABLE C. H. LAMB, Director
Division of Motor Vehicles

This is in reply to your letter of June 14, 1966, in which you present a series of questions pertaining to Chapter 12.1, Title 58 of the Code, relating to "Virginia Motor Vehicle Sales and Use Tax Act."
I shall state your questions and answer the same in the order set forth in your letter.

"(1) When the reported sale price of a used vehicle represents a sum insufficient, in the judgment of the Commissioner, to pay the Sales or Use Tax prescribed by this Chapter, based on information obtained from industry publications, National Market Reports of Used Car Valuation applicable at that time, and other sources of information or data which are customarily employed in ascertaining the maximum sale price of such used motor vehicles, can the Commissioner apply § 58-685.17 to estimate the tax due, or is he bound by the statement of the applicant for title that such sale price is in fact the true amount upon which the tax should be computed? In sales between individuals, where no dealer is involved, is the applicant's statement on the title application as to the amount of sale price sufficient to assess and collect the tax, or should the values from the above mentioned publications be considered as governing such transactions?"

In all transactions, the tax is based upon the actual sale price of the motor vehicle. In § 58-685.11(6), sale price is defined as follows:

"'Sale price' shall mean the total price paid for a motor vehicle and all attachments thereon and accessories thereto, without any allowance or deduction for trade-ins or unpaid liens or encumbrances, but exclusive of any federal manufacturer's excise tax."

Subsections (a) and (b) of § 58-685.12 provide that the tax shall be 2% of the sale price.

The provisions of § 58-685.17 apply only in cases where no sale price is stated or in the judgment of the Commissioner the person applying for a certificate of title has not disclosed the actual sale price. The value of a motor vehicle as shown by the various publications mentioned in this question is a basis for assessment of tax. If the value is substantially in excess of the reported sale price it may justify the Commissioner in requesting an explanation or further verification from the applicant. If the applicant refuses to disclose the sale price an assessment may be made under § 58-685.17 based upon the published value of the automobile. Of course, the purchaser of the car may dispute the accuracy of the assessment and may defend the same in court by producing evidence to support his statement.

"(2) On the sale of new cars, is the separate charge for transportation to be subject to the Tax?"

There is no provision in the Act with respect to this matter. If the separate charge for transportation is part of the total sale price paid for the automobile, it is taxable.

"(3) When the vehicle is owned by an individual who seeks to establish joint ownership with another by adding one or more names, does the Tax apply? Where a vehicle is owned jointly and one or more of the registered owners are to be dropped from the title certificate, does the Tax apply? In the preceding two situations, please consider, also, the problem relating to vehicles purchased on and after September 1, upon which tax was originally collected; and those vehicles owned prior to September 1, for which no tax has been applicable. If the tax applies on transactions where joint ownership is established in lieu of the former ownership by a single individual, is the tax assessed on the basis of the full sale price of the vehicle at that time, or on one-half
In the cases cited in this question, the tax will be based upon the consideration paid. If there is no consideration passing between the parties, there will be no tax. For example, if a husband desires to title the property in the joint ownership of himself and his wife, unless the wife is making payment to the husband, there is no tax. Furthermore, if a car owner makes a gift of a motor vehicle to any person, there is no tax upon the transaction.

"(4) a. When there is a change of name of a corporation, company, partnership or individual trading as a specific name, which results in retitling of a motor vehicle in the new name, does the Tax apply to such transaction?

"(4) b. When such retitling is necessitated by a change of name only and does not involve a change in the ownership or possession of the vehicle, does the Tax apply?"

The answers to both of these questions are in the negative unless there is a sale for a consideration.

"(5) a. If a nonresident serviceman stationed in Virginia, as a result of military or naval orders, or who is absent from his state of domicile under these same orders, elects to register and license his vehicle in Virginia, is he then subject to the Tax in addition to the title fee and the license plate fee?

"(5) b. Under these same circumstances, would the fact that the automobile is owned jointly by the serviceman and his spouse or another in the armed services, does the Tax apply, and if so, is it applicable in full or in proportion to the joint ownership thus presented?"

(a) In my letter of April 14, 1966, to the Commonwealth's Attorney for Essex County and on several other recent occasions, I expressed the opinion that a revenue raising tax may not be enforced against a nonresident serviceman stationed in Virginia by reason of military or naval orders. This interpretation of the Soldiers' and Sailors' Civil Relief Act was expressed by the United States Supreme Court in the case of California v. Buzard, 15 L. ed. 2d. 436, decided January 18, 1966. The court further concluded that, under this Act, only those taxes which are essential to the functioning of the host State's licensing and registration laws are applicable to the motor vehicles of nonresident servicemen. It is my opinion, therefore, that this tax may not be imposed on nonresident servicemen, and I shall answer your question in the negative.

(b) You seem to raise two questions, one relating to joint ownership by servicemen and the other relating to joint ownership by a serviceman and his wife. My answer to Question 5(a) would be the same as to joint ownership between two nonresident servicemen. A resident serviceman has no immunity under the Soldiers' and Sailors' Civil Relief Act. In the case of husband and wife, unless the wife makes payment for her interest in the vehicle, there is no tax. If the wife does make payment for such interest, the tax will be based upon the consideration paid, less any applicable credit for tax paid another State.

"(6) a. In light of the language contained in §§ 58-685.12 and 58-685.14 in those cases when a motor vehicle is illegally used in Virginia by virtue of the owner not applying for title and license and is thereafter removed from the jurisdiction, junked or skip-titled, is the owner who is in violation of the titling requirements subject to assessment of the Tax?"
"(6) b. If this is answered in the affirmative, is the value of such motor vehicle controlled by the price and value of the vehicle at the time such vehicle began its illegal operation or will the tax be ascertained based on the value at the time of apprehension and subsequent application for title and license?"

The answer to subsection (a) of this question is in the negative. It is assumed that you have reference to situations involving a violation of the provisions of § 46.1-64 subject to the penalties prescribed for such violation. The Act under consideration here does not provide for a titling tax in such cases.

Inasmuch as I have answered 6(a) in the negative, no answer is required to your question 6(b).

"(7) Does the applicant's statement on the title application that a 1966 model vehicle was purchased new out of the state or country, control the exemption in § 58-685-12(b)?"

Unless the applicant has made a false statement on the title application such statement will apply and entitle the person to the exemption referred to therein.

"(8) Is a homemade trailer for which application is made after September 1, 1966, exempt from the tax under § 58-685.12(b), as a new vehicle?"

Assuming that a person applying for title is the person who built the trailer, the answer to this question is yes. Any such homemade trailer is exempt from the tax levied and imposed under § 58-685.12(b). Separate parts purchased for a motor vehicle or trailer are taxed under the "Virginia Retail Sales and Use Tax Act," Chapter 8.1 of Title 58, Code of Virginia (1950), as amended, enacted by Chapter 151, Acts of Assembly of 1966.

"(9) Are vehicles leased to the United States or local government, which are subject to title and license, exempt from the Tax when such lease terminates or expires and such vehicle is then leased to a private person?"

The exemption found in § 58-685.13 as to motor vehicles sold to or used by the United States or its governmental agencies or the State of Virginia or its political subdivisions no longer applies when such ownership or use terminates. I shall, therefore, answer this question in the negative.

"(10) Are vehicles titled by Consuls or Diplomatic Officers who are exempt from payment of annual registration fees, subject to this tax? (These vehicles are currently subject to Virginia Title Fees.)"

There appears no provision in the Act to exempt vehicles titled by consular or diplomatic officers and accordingly, I shall answer this question in the affirmative.

"(11) In cases of nonresidents first titling vehicles in Virginia where no previous sales tax has been paid, does the Division impose the tax on the basis of the market values at the time Virginia application for title is made, or on the basis of the original sale price of the vehicle?"

The tax imposed in this case would be based upon the sale price of the vehicle, but not on those purchased prior to September 1, 1966.
"(12) When application for Virginia title is made after September 1, 1966, is the applicant's statement that such sale was consummated prior to that date sufficient to exempt this sale from the Tax? If so, how long after September 1, should such exemption be granted on this statement that the sale was consummated prior to the effective date of the Tax Act?"

This question is in two parts. The answer to the first part depends upon whether or not the statement is true. If you have reason to doubt the truth of the statement, you may call for supporting evidence. There is no limitation of time, with respect to the second part of your question.

"(13) When the Commissioner estimates and assesses tax because of an insufficient sum submitted under § 58-685.17, may he then retain and/or cancel the aforementioned title, if sufficient tax is not collected; (a) as to the owner of the vehicle; (b) as to the lienholder of record shown on the application?"

This question is answered in the negative with respect to (a) and (b). There is no provision in the statute for the cancellation of the title; however, the Commissioner may withhold the issuance of a title until satisfactory payment of the tax is made.

"(14) What is the jurisdiction of legal action for the Division to institute suit for collection of unpaid tax?"

The jurisdiction for any such action is not prescribed in the Act under consideration and in my opinion, therefore, is controlled by the laws generally applicable for the collection of taxes by suit. Any such action under Article 9, Chapter 20, Title 58, Code of Virginia (1950), as amended, shall be instituted in the appropriate court of the county or city wherein the taxes are assessed or payable or wherein the person against whom they are assessed resides. In the case of Commonwealth v. Ford, 29 Gratt. (70 Va.) 683, the court held that unless otherwise especially provided the State may sue in any of the courts in which other parties may prosecute suits of like character.

"(15) Is the tax applicable when transfer of ownership on the title certificate is directed as a result of a Court Decree, or inheritance either by Will or descent and distribution, or in cases of bankruptcy orders, divorces, legal separations, dissolving of partnerships, or other transfers of ownership by operation of law?"

The answer to this question depends upon the sale price of the automobile. If the new owner was not required to pay anything for the automobile, it is not subject to tax.

"(16) What evidence must be required and retained by the Commissioner to grant exemption allowed under § 58-685.20 so that a complete and proper record of tax transactions can be available for inspection by the Auditor of Public Accounts?"

The Act makes no specific requirement as to evidence of this nature but gears the credit to the tax paid by the user to another state by reason of the imposition of a similar tax on or for purchase or use of the property. A receipt or statement or other acceptable data furnished by the state or the vendor to which the tax was allegedly paid should be required and retained by your office for auditing purposes. This evidence should be submitted by the applicant.

"(17) Who assumes the expense of any audit required by § 58-685.12(c) relating to certain common carriers of passengers? In
this connection, should the audit only consider those vehicles used both within and without Virginia as in § 46.1-149(5a)?”

In regard to the first question, no specific provision for audit or bearing the expense thereof is made in this section. It states, however, that the Commissioner may require such evidence of the total number of vehicles and the miles travelled by all such vehicles as he deems appropriate. If there be instances in which such evidence may be obtained from a common carrier only by audit, I am of the opinion that such carrier should bear the cost of the required audit. It would appear that the audit made pursuant to § 46.1-149, paragraph 5(a), would suffice in instances in which licensed under that section. In regard to the second question here, paragraph (c) of § 58-685.12 applies only to motor vehicles used by common carriers of passengers within and without the State and I shall answer this question in the affirmative.

“(18) a. Is a vehicle purchased in one of the ten non-title states, or foreign countries, subject to the tax when the dealer makes application for a Virginia Title in order that he may sell the vehicle in Virginia?

“(18) b. If a dealer titles a vehicle in his name for the purpose of recording a lien, is the tax applicable even though such dealer retains ownership and possession, and the vehicle is a part of his inventory offered for sale?”

(a) The application by a dealer for a Virginia title in a situation such as you describe does not represent a sale as defined in paragraph (5) of § 58-685.11 since neither ownership or possession is thereby transferred. I shall, therefore, answer this question in the negative.

(b) Likewise excluded is a situation in which the dealer titles a vehicle in his name for the purpose of recording a lien while he retains ownership and possession and such vehicle remains a part of his inventory offered for sale. Accordingly, I shall also answer this question in the negative.

“(19) Can vehicles exempted from license plates under § 46.1-45 and excluded from the definition of a motor vehicle under § 58-685.11 (3), obtain a title by paying only the title fee, where license plates are not required to be purchased nor actually purchased? If so, should the owner subsequently decide to operate such vehicle for highway use and subsequently purchase his license plates for the vehicle, does the tax then apply? If so, is the value of the vehicle in question that value at the time title was obtained, or the later moment in time when the vehicle was subsequently licensed and utilized for highway use?”

The exemption from the requirement for obtaining annual registration certificate and license plates or paying a fee therefor found in § 46.1-45, Code of Virginia (1950), as amended, makes no reference to the procurement of title. Vehicles “not required to be licensed by the State” are exempt from the tax imposed by Chapter 587, Acts of Assembly of 1966. I find no requirement that every vehicle titled must be licensed, except when it is to be operated upon the highway. I am of the opinion that titles may be obtained for motor vehicles, trailers or semitrailers which are exempt from registration and license plates under § 46.1-45 by paying only the title fee and, therefore, I shall answer your first question in this category in the affirmative. In regard to your second question here, since the tax must be paid and collected “at the time the owner applies to the Division of Motor Vehicles for, and obtains a certificate of title therefor,” there appears to be no provision for collection of the tax upon subsequent pur-
chase of license plates for highway use. My answer to this question renders unnecessary any further consideration of your third question in this category.

“(20) § 58-685.11(3) exempts from the definition of a motor vehicle, ‘Vehicles which can be moved or drawn on the highways only under special permits and which are permanently attached to the real estate as housing.’ Will mobile homes, which can only be moved or drawn on the highways under a special permit, as provided in § 46.1-44, for which a title is desired and which may be mounted on a permanent foundation as living quarters, be subject to the Tax?”

The provisions for special temporary registration or permit set forth in § 46.1-44, by its own terms, do not apply to a mobile home or house trailer which is subject to a license, but only to such mobile homes or house trailers which exceed the size permitted upon the highways by law. Under § 58-685.11(3), which you cite, “vehicles which can be moved or drawn on the highways only under special permits and which are permanently attached to the real estate as housing” are exempt from the definition of “motor vehicle.” As I interpret this, it refers to those vehicles which are exempted by § 46.1-41 from title requirement because they may be moved or drawn upon the highway only under special permit under § 46.1-44. Any such vehicle for which no certificate of title is required is exempt from the two per cent tax imposed by Chapter 587. I shall, therefore, answer this question in the negative.

“(21) If application is made whereby one person assumes another person’s obligation to pay the remaining payments on a lien or encumbrance recorded against the vehicle in the records of this Division, and no money changes hands nor is any sale price indicated in such a transaction, upon what basis and value is the Tax to be assessed?”

In this instance the tax would be based on the amount of the debt assumed by the purchaser of the car.

MOTOR VEHICLES—Taxation—Personal Property—Student residing nine months in Virginia.

TAXATION—Motor Vehicles—Personal Property—Student residing nine months in Virginia.

HONORABLE ORA A. MAUPIN
Commissioner of the Revenue,
City of Charlottesville

November 9, 1966

This is in reply to your letter of November 2, 1966, from which I quote the following:

“I would appreciate your advising me whether or not, in your opinion a student, domiciliary resident of the state of New York, who rented an apartment in Charlottesville for the nine months school term and having an automobile titled in his name, and registered with the state of New York would be taxable with tangible personal property tax on the automobile under Sec. 58-834, Code of Virginia.
"As Commissioner of the Revenue, I made the assessment on the automobile as of January 1, 1966 and the student signed the personal property tax form as being the owner. When he received the 1966 personal property tax bill on the car from the Treasurer he has refused payment of the taxes and cites Sec. 46.1-66, and Sec. 46-1 as the basis for not paying the taxes."

In my interpretation, § 46.1-66, cited by the student, has no effect on the situation under consideration, which is controlled by Title 58, Code of Virginia (1950), as amended. Furthermore, the provision in clause (1) of § 46.1-66, that no county, city or town shall impose a tax or license fee upon a motor vehicle when a similar tax or license fee is imposed by the county, city or town of which the owner is a resident, would not exempt him, as it has reference only to a county, city or town in the State of Virginia. Clause (2) of the same section would not exempt him, because he is deemed a resident of Virginia, and hence, of the city in which he resides, by the terms of § 46.1-1(16) (c), since he has resided in this state for a period of over six months.

I am not of the opinion that the place of issuance of the registration and license tags governs in determining the situs of the vehicle for the purpose of personal property taxation. Neither is the power of the locality to impose the tax affected by the fact that the automobile is registered outside of the State of Virginia. See, Report of the Attorney General (1957-1958), p. 274. There appears no other reason why an automobile owned and kept by a student in Charlottesville for nine months of the year should not be subject to assessment for personal property taxation under § 58-834, and, accordingly, it is my opinion that your assessment was correct.

MOTOR VEHICLES—Traffic Offenses—Record may be used before sentencing.

CRIMINAL PROCEDURE—Prior Traffic Offenses—Record may be used before sentencing.

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth’s Attorney for Pittsylvania County

October 6, 1966

This is in reply to your letter of October 3, 1966, from which I quote the following:

"In complying with the requirements of Chapter 8.1, Section 19.1-186.1 and Section 19.1-186.2, Code of Virginia of 1950, as amended, relating to prior traffic records to be used by the court or jury before passing sentence, I would appreciate your opinion as to whether or not the offenses of larceny of an automobile, unauthorized use of an automobile, driving under the influence and manslaughter are included within the definition of the term traffic offense as described in Title 46.1, Article 2, Section 412, Paragraphs (A) and (B), Code of Virginia, 1950, as amended."

You refer to § 19.1-186.2, which states, in part: "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."

Under § 19.1-186.1, paragraph (b), the term "prior traffic record" means "the record of prior suspensions and revocations of an operator’s or chauffeur’s license, and the record of prior convictions of traffic offenses described in paragraph (a) of this section." Referring to
paragraph (a) of § 19.1-186.1, we find that the term "traffic offense," for the purposes of this chapter, "shall mean any moving traffic violation described or enumerated in paragraphs (a) and (b) of § 46.1-412." The traffic violations described or enumerated in the latter include 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 or any motor vehicles except parking regulations; (3) any theft of a motor vehicle or unauthorized use thereof or theft of any part attached thereto;

"(b) A person is charged with manslaughter or any other felony in the commission of which a motor vehicle was used."

Considering these statutes and assuming that you are referring to manslaughter in which a motor vehicle was used, I shall answer your question in the affirmative. The 1966 amendment added part (3) of paragraph (a) of § 46.1-412, as quoted herein, relative to theft or unauthorized use of a motor vehicle. I am of the opinion that a prior conviction of any of the offenses which you mention may be considered by the court or jury pursuant to § 19.1-186.2.

MOTOR VEHICLES—Traffic Violations—Issuance of summons in lieu of warrant.

ARREST—Motor Vehicle Violations—Issuance of summons in lieu of warrant.

July 8, 1966

HONORABLE DONALD R. HOWREN
Commonwealth's Attorney for Henrico County

In his letter of June 27, 1966, your predecessor referred to § 46.1-179 of the Code of Virginia (1950), as amended, which provides:

"If any person is: (1) Arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person; (2) believed by the arresting officer to have committed a felony; (3) believed by the arresting officer to be likely to disregard a summons issued under § 46.1-178; (4) charged with reckless driving; the arresting officer, unless he issues a summons, shall take such person forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons required by § 46.1-178, who shall determine whether or not probable cause exists that such person is likely to disregard a summons, and may issue either a summons or warrant as he shall determine proper."

The question asked is whether the last clause, providing that the judicial officer before whom the arrested person is brought shall decide whether to issue a warrant or a summons, applies only in situations covered by item (3), where the arresting officer believes the accused would be likely to disregard a summons.

In my opinion, the clause in question applies to all situations listed in § 46.1-179. The main change made in the statute in 1966 was to increase the number of situations in which one accused of violating the traffic laws of the State may be released without bail. This is accomplished by per-
mitting the judicial officer in any one of the listed situations to issue a summons, rather than a warrant, when he determines it proper.

Your predecessor also asked who would have the responsibility of preparing and paying for summons forms to be used by judicial officers under § 46.1-179. This question has been discussed with the Comptroller, who agrees that the expense of such summons forms, like forms for warrants issued by such judicial officers, should be borne by the Commonwealth. This office will prepare a form of summons if requested.

MOTOR VEHICLES—Virginia Motor Vehicle Sales and Use Tax—Levy of tax where sale is related transaction.

TAXATION—Virginia Motor Vehicle Sales and Use Tax—Levy of tax where sale is related transaction.

June 2, 1967

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This will acknowledge receipt of your letter of May 23, 1967, in which you present the following set of facts and related questions:

"A prospective purchaser of a motor vehicle, either new or used, visits a Virginia dealer and purchases a motor vehicle from him. Application for title and license is executed, and the Sales Tax is paid on the purchase price of the vehicle without any allowance for trade-in. In due course, this Division titles and licenses such motor vehicle in the name of the purchaser and checks and records the Sales Tax paid. Subsequently, the new registered owner of the motor vehicle becomes dissatisfied with the particular motor vehicle, thus purchased, and complains of defects, either real or imaginary, to the selling dealer. In the instances under consideration, the dealer delivers to the registered owner a second motor vehicle, charging him, in some cases, the slight difference in price which may be occasioned by extra accessories or equipment on such second vehicle. An application for the transfer of license plates is made to this Division as well as an application for title to this second vehicle. In the instances under controversy, the motor vehicle owner then claims that the Sales Tax based on the total sales price of this second vehicle is not applicable to his situation on the grounds that such second vehicle is merely a replacement for the first vehicle purchased, such replacement being made because of the alleged defects in the first motor vehicle bought by him.

"I would respectfully request your opinion as to whether in such situations as outlined above the provisions of the Virginia Motor Vehicle Sales and Use Tax Act contemplate that such a series of transactions are in reality two separate and distinct sales within the meaning of the Act, and whether the Tax should be levied and collected on the gross sales price of each of such vehicles.

"In the event your answer should be in the negative, please advise me of any legal guidelines which could be used by this Division to separate transactions upon which no Sales Tax is to be collected, and those transactions which should be treated as two separate sales, and which would require the payment of the Tax on each such vehicle purchased."
Both transactions that you refer to are individual transfers of ownership and possession of a motor vehicle. Yet, they are related transactions. As such, they cannot be regarded as separate and distinct sales. In reality, there has been but one enterprise between the dealer and purchaser.

As relates to your inquiry as to whether the sales tax should be levied and collected on the gross sales price of both vehicles involved in your fact pattern, my answer is that it should not. It follows that the tax can only once be levied and collected on the actual consideration that passes between the purchaser and dealer as there has been but one over-all dealing between them.

The tax levy statute is found in § 58-685.12, which provides, in part:

"**

"(a) Two per cent (2%) of the sale price of each motor vehicle sold in this State."

Whether a sales tax is proper in the event of the second transaction of your hypothetical example will depend on whether there has been any additional consideration. To be sure, it is evident from the definition of "sale price" and § 58-685.12 that the sales tax on the second transaction is to be based on the actual additional amount of consideration paid. If there is none, then there will be no additional sales tax. On the other hand, if additional consideration does pass between the purchaser and dealer, the additional sales tax will be based on the amount of that additional consideration.

You next ask what legal guidelines should be implemented to delineate transactions upon which no sales tax is to be collected and those transactions which should be treated as two separate sales and which would require the payment of the tax on each such vehicle purchased.

Motor vehicle sales statutorily exempted from the tax are found in § 58-685.13. Other than those enumerated type sales, there are no sales upon which the tax is not to be collected.

As seen from the discussion of your above hypothetical factual situation, there are instances in which related transactions, when taken together, constitute in actuality one dealing. In these instances, to be sure, the tax is to be collected, but only once upon the actual consideration passed between the purchaser and dealer. Whether a given two transactions are to be characterized as related or separate and distinct is a discretionary matter, one in which you should decide on an individual basis. In the event that a gross sales price has in fact been paid in each of two transactions, which are not related, then the tax should be levied and collected on the gross sales price of each transaction.

NEWSPAPERS—Legal Advertisements—Newspaper must meet requirements of § 8-81.

PUBLIC NOTICES—Legal Advertisements—Newspaper must meet requirements of § 8-81.

May 9, 1967

HONORABLE EDWARD T. CATON, III
Member, House of Delegates

I am in receipt of your letter of May 1, 1967, in which you inquire whether or not "the Virginia Beach Sun News, entered as third-class matter with the
United States Post Office," meets the requirements of § 8-81 of the Virginia Code.

Section 8-81 of the Code of Virginia (1950) provides:

"Whenever there are required by law to be published by any county, city or other municipality or municipal corporation, or by any municipal board or official board, or body, or office, or officials, or by any person or corporation, any ordinances, resolutions, or notices or advertisements of any sort, kind or character by printing and publishing the same in a newspaper, such newspaper must in addition to any qualifications otherwise required by law meet the following qualifications, namely: such newspaper shall be entirely printed in the English language, shall have been entered as second class mail matter under the postal laws and regulations of the United States and shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or have agreed to pay a stated price for a subscription for a definite period of time." (Italics supplied.)

In light of the language italicized above, it would appear that if the Virginia Beach Sun News is entered as third-class mail matter under the United States postal laws and regulations, it would not meet the requirements of the above-quoted provision of Virginia law.

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NON SUPPORT—Payments to Wife and Children—County or city must pay to court originally sentencing prisoner for nonsupport.

November 2, 1966

HONORABLE W. W. MOORE, JR., Judge
Juvenile and Domestic Relations Court, City of Danville

This is to acknowledge receipt of your letter of October 31, 1966, in which you state in part:

"The City of Danville operates a City Prison Farm where our court sends prisoners who have been sentenced for failing to support their wife and children, in accordance with Section 20-61 of the Code of Virginia. Would you advise me as to whether Section 20-63 of the Supplement of Volume IV would apply inasmuch as we send men convicted of non-support to the local city farm?"

Section 20-63, Code of Virginia (1950), as amended, provides in part:

"It shall be the duty of the governing body of the county or city within the boundaries of which any work is performed under the provisions of this chapter to allow and order payment at the end of each calendar month, out of the current funds of the county or city, to the court which originally sentenced the prisoner for the support of his wife or child or children, a sum not less than five nor more than twenty-five dollars for each week in the discretion of the court during any part of which any work is so performed by such prisoner."

The only other section in Chapter 5, Title 20, of the Code, concerning work performed by convicted persons is § 20-62, which provides that the convicted person "may be committed to the farms, work houses, or work squads instead of the convict road force." Hence, if a prisoner is com-
mitted to a city or county jail farm and actually performs work on said farm, the city or county must pay a sum not less than five nor more than twenty-five dollars to the court which originally sentenced the prisoner for the support of his wife, child or children. Therefore, your question is answered in the affirmative. Section 20-63 of the Code applies to men convicted of nonsupport and sent by your court to the local city farm.

NOTARIES PUBLIC—Residence—Commission not forfeited by living temporarily out of State.

April 20, 1967

Honorable Rhea F. Moore, Jr., Clerk
Circuit Court of Tazewell County

I have your letter of April 18, 1967, which reads as follows:

“A lady notary public has posed a question to this office relative to her ability to continue as a notary upon marriage. In this instance, she and her husband plan to live at least temporarily in the State of West Virginia, but she will continue to work in a bank in Virginia. Since legal residence in Virginia is a prerequisite to being appointed a notary, will her removal to West Virginia for domicile purposes thereby invalidate her commission?”

It would appear from Section 32 of the Constitution of Virginia that a person must be a resident of the State in order to be appointed a notary. However, I find nothing specific in the Constitution or the Code that says that a notary who was a resident of the State at the time of appointment and moves temporarily out of the State thereby immediately forfeits the commission. You will note that § 47-1 provides that the appointment shall be for the term of four years and shall be removable by the Governor “at will for misconduct, incapacity or neglect of official duties” but does not provide for removal because of change of residence from Virginia.

On December 28, 1950, this office wrote a letter to Mrs. Thelma Young Gordon, which is set forth in the printed volume of the Report of the Attorney General (1950-1951), at page 209, which answered the following question:

“Does enlistment in the Navy by a Notary Public forfeit his title to office or position or vacate the same?”

This question was answered in the negative and it is stated therein that “a Notary Public does not forfeit his title to office merely by reason of entry into the armed forces.” It is true that a person enlisting in the Navy did not thereby lose his domicile in Virginia but at least the chances were very great that he was transferred physically out of the State and this was held not to cause him to forfeit his title.

I am, therefore, of the opinion that the answer to your question is that this lady Notary Public does not forfeit her commission by living temporarily in the State of West Virginia and she may continue to act as a Notary Public in the territory within Virginia for which she was appointed during the remainder of her present appointment.
ORDINANCES—Amendment or Repeal—Action required to accomplish.

October 11, 1966

HONORABLE CHARLES J. ROSS, Clerk
Board of Supervisors of Madison County

This will acknowledge your letter of October 10, 1966, which reads as follows:

"Several years ago and prior to the 1966 Acts of the General Assembly, the Board of Supervisors of Madison County adopted a local revenue producing motor vehicle ordinance in accordance with § 15.1-504 of the Code of Virginia. This ordinance, among other things, requires a motor vehicle owner wishing to transfer the indicia of license to pay fifty cents to effect such transfer. The Board now wishes to delete this provision and requirement from the ordinance.

"With this under consideration, the Board seeks your good advice on the following:

"(1) To properly amend this ordinance, is it necessary to publish the full ordinance, as amended, once a week for four successive weeks, etc., or may the complete amendment only be published together with a statement that a copy of the full text of the ordinance is on file in the Clerk's Office of the Circuit Court of the County?

"(2) Is it necessary to have any publication after the adoption of the amended ordinance?"

The procedure for amending an existing ordinance is the same as required in connection with the original adoption of such ordinance; however, in my opinion, it is not necessary that the entire existing ordinance be published but only that portion affected by the amendment. In this connection you are referred to an opinion dated September 22, 1964, to Honorable L. J. Hammack, Jr., Commonwealth’s Attorney of Brunswick County (Report of the Attorney General (1964-1965), at p. 242).

Inasmuch as the ordinance in question pertains to the county motor vehicle license tax, the provisions of paragraphs (a), (b) and (c) of § 15.1-504 of the Code must be followed. These provisions are as follows:

"No governing body shall adopt or amend any ordinance imposing a county capitation tax, county motor vehicle license tax, county license tax on professions or businesses, including wholesale merchants, or county tax on amusements, except under the conditions hereinafter set forth, and any such ordinance adopted without compliance with such conditions shall be void and of no effect:

“(a) Any such ordinance may only be introduced at a regular meeting of the governing body and may not be adopted prior to the second regular meeting following introduction and only then if not less than sixty days have elapsed between introduction and adoption;

“(b) The proposed ordinance shall be published once a week for four successive weeks in a newspaper published in the county, or if there be none such, in a newspaper having general circulation in the county; and

“(c) The proposed ordinance shall be published at the front door of the county courthouse and at each post office in the county.”
In my opinion, publication of the section of the ordinance being amended will be sufficient. I do not feel that publication is required of those sections of the existing ordinance that are not affected by the amendment.

With respect to your second question, the answer is in the negative.

ORDINANCES—Motor Vehicle License Tax—Amendment—Must follow provisions of § 15.1-504 (a), (b), and (c).

MOTOR VEHICLES—Local Licenses—Amendment of ordinances must follow provisions of § 15.1-504 (a), (b), and (c).

May 15, 1967

HONORABLE A. D. JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of May 10, 1967, with which you enclosed a copy of the motor vehicle license tax ordinance adopted for Isle of Wight County in 1958, with a request for my opinion as to whether or not a change from license plates to "stickers" or "decals" requires an amendment thereof and, if so, whether or not the procedure for such amendment must be in accordance with § 15.1-504, paragraphs (a), (b) and (c) of the Code of Virginia.

Examination of the ordinance reveals that, under paragraph (6) thereof, a license plate must be issued for each vehicle. Section 7 of the ordinance requires the owner to attach and display the license plate to the front or rear of the motor vehicle so as to be clearly readable and visible in a manner similar to license plates required by the State of Virginia. Section 17, paragraph (b), makes it unlawful for any person, firm, association or corporation subject to the ordinance to fail to display and keep displayed on the motor vehicle for which issued the license plate required by such ordinance.

Considering these sections in relation to the statute to which the ordinance indirectly refers, I am of the opinion that an amendment would be required to make the proposed changes, to the use of a sticker or decal displayed on the windshield in lieu of the license plate displayed in the manner provided by statute for State license plates. Further, it is prescribed in § 15.1-504 that no governing body shall amend any ordinance imposing a county motor vehicle license tax except under the conditions set forth in paragraphs (a), (b) and (c) thereof, and that any ordinance adopted without such compliance shall be void and of no effect. I am of the opinion, therefore, that the proposed amendment must be in accordance with paragraphs (a), (b) and (c) of this section.

ORDINANCES—Subdivision—Application of county subdivision regulations in area subject to municipal jurisdiction.

SUBDIVISIONS—Ordinances—Application of county subdivision regulations in area subject to municipal jurisdiction.

March 2, 1967

HONORABLE E. GARNETT MERCER, JR.
Commonwealth's Attorney for Lancaster County

This will acknowledge receipt of your letter of February 28, 1967, which reads as follows:
"The Board of Supervisors on December 23, 1966, adopted a Subdivision Ordinance for Lancaster County, pursuant to § 15.1-468. The Board of Supervisors undertook to make this Ordinance applicable to the two mile area subject to the municipal jurisdiction of the three incorporated towns within the county. Two of the towns made no objection to the Ordinance but the third town filed written objection to the Ordinance.

"It would be very much appreciated if your office would advise me as to the following:

"1. Is the Ordinance as now adopted by the Board on December 23, 1966, effective in the unincorporated territory of the county as well as within the unincorporated area subject to municipal jurisdiction around the two towns which raised no objection; leaving only the unincorporated area subject to municipal jurisdiction of the third town outside of the operation of the Ordinance for the time being?

"2. If the county and the objecting town can reach agreement on the appropriate provisions of the Ordinance, will this have the effect of having the unincorporated areas of the county and the two areas around the two towns (consenting) subject to municipal jurisdiction subject to one set of regulations as provided by the existing Ordinance while the unincorporated area subject to the municipal jurisdiction of the third (objecting) town under a different set of subdivision regulations?"

Under the provisions of § 15.1-467 of the Code, a town would have jurisdiction to adopt a subdivision ordinance that would include all territory in the county a distance of two miles from the corporate limits of the town. Under § 15.1-468 of the Code, when a county proposes to adopt a subdivision ordinance it must give the notice therein required to any town located within the area proposed to be affected by the county ordinance. This section provides further that no such county ordinance shall be effective in the area of a county subject to municipal jurisdiction (within a distance of two miles from the corporate limits of a town as provided by paragraph (c) of § 15.1-467), until the county gives written notice of the proposed ordinance, with a request to review and approve or disapprove the same. In those instances where the county gives such notice and the towns fail to give notice of disapproval within forty-five days, the ordinance becomes effective. Therefore, your question (1) is answered in the affirmative, assuming the statutory notice was given.

With respect to your question (2), in that area of which the objecting town has jurisdiction, the ordinance would not apply unless the objecting town withdraws its objections or the disagreement between the town and the county is resolved by an order of the circuit court, as provided in § 15.1-469. If the objecting town and the county agree on the type of regulations within the two-mile area of the objecting town, whether or not these regulations will be different from the regulations applying to such area adjacent to the other two towns, depends upon the provisions of such regulations.
REPORT OF THE ATTORNEY GENERAL

PARENTS—Support by Children.

CHILDREN—Support of Parents.

HONORABLE LEROY MORAN
Commonwealth's Attorney for the City of Roanoke

July 29, 1966

This is to acknowledge receipt of your letter of July 25, 1966, in which you request my opinion on the following question:

"Where there is reason to believe that a parent in necessitous circumstances is entitled by virtue of Section 20-88 to support by his children, the statutory conditions to such duty of support being satisfied, is a general creditor of the parent a proper party complainant in a criminal prosecution against the children brought under the provisions of said statute?"

Reference is hereby made to portions of § 20-88 which are as follows:

"It shall be the joint and several duty of all persons sixteen years of age or over of sufficient earning capacity or income, after reasonably providing for his own immediate family, to provide or assist in providing for the support and maintenance of his or her mother or aged or infirmed father, he or she being then and there in necessitous circumstances.

"... If there be more than one person bound to support the same parent or parents, the persons so bound to support shall jointly and severally share equitably in the discharge of such duty ... Where the court ascertains that any person has failed to render his proper share in such support and maintenance it may, upon complaint of any party or on its own motion, compel contribution by that person to any person or authority which has theretofore contributed to the support or maintenance of the parent or parents."

The purpose of this statute is to provide continuing support to parents in necessitous circumstances by their children. The term "to any person or authority which has theretofore contributed to the support" includes only those persons who are legally liable for the support of the parent. It does not include persons who have supplied the parent with goods or services without any legal obligation to do so. The procedure under § 20-88 cannot be used to collect debts of necessitous parents. I agree with you that the language in the second paragraph of that section (20-88) refers primarily to the right of a supporting child to seek contribution from his siblings and does not refer to criminal actions.

The question, therefore, is answered in the negative.

PARK AUTHORITIES—Authority to Borrow Money—Limited to issuance of revenue bonds.

May 5, 1967

HONORABLE WILLIAM M. LIGHTSEY
Member, House of Delegates

This is in reply to your letter of April 20, 1967, which reads in part as follows:

"I should appreciate it if you would furnish me with an opinion concerning the powers of the Northern Virginia Regional Park
Authority to borrow money from banks and other private lending institutions, to be used for the Authority's land acquisition and development program, giving deeds of trust upon unencumbered park lands owned by the Authority as security for such loans. The Authority desires to arrange such loans from time to time if it may properly do so, since the method is considerably less cumbersome and expensive than the issuance of revenue bonds under Code § 15.1-1237, but objection has been expressed to the effect that statutory provision for revenue bonds may constitute the exclusive method of borrowing available to the Authority.

In my opinion, the Northern Virginia Regional Park Authority may borrow money only in accordance with the provisions of Title 15.1, Chapter 27, of the Code, specifically, § 15.1-1237. I can find no provision of law which can be construed as granting the Authority the power to borrow money from banks and other private lending institutions by the use of deeds of trust upon unencumbered park lands owned by the Authority.

PINE TREE SEED LAW—Pine Seedlings—Furnished Highway Department for use on highway rights of way.

HIGHWAYS—Rights of Way—Pine seedlings furnished for planting thereon.

March 27, 1967

HONORABLE GEORGE W. DEAN
State Forester

This is with reference to your letter of March 21, 1967, in which you made inquiry regarding whether § 10-36 of the Code of Virginia (1950), as amended, required the Division of Forestry to furnish the State Highway Department without cost pine seedlings for use in planting along the highways for bank stabilization and erosion control.

In your letter you state that it is believed that the original intent of the Act was to furnish tree seedlings to agencies of the Commonwealth for timber reforestation purposes. Since receipt of your letter, I have reviewed § 10-36 and I can find no limitation set forth in this section regarding the use of such seedlings by agencies of the Commonwealth.

The section reads in part as follows:

"... Seedlings from this nursery shall be furnished to the Commonwealth without expense for use upon its forest reservations or other public grounds or parks. . . ." [Emphasis Added]

In view of the above quoted language, I am of the opinion that such seedlings should be furnished to the Highway Department for use on highway rights of way since such rights of way are public grounds.

I can find no language which would support your belief that the Legislature intended to place a limitation on the purpose for which agencies of the Commonwealth would use the seedlings obtained from the Division of Forestry.
POLICE OFFICERS—Off-duty Police Officers—No obligation on State to defend in case of suit.

POLICE OFFICERS—Off-duty Police—No indemnification provided by state.

HONORABLE W. D. REAMS, JR.
Commonwealth’s Attorney for Culpeper County

March 28, 1967

This is in reply to your letter of March 22, 1967, in which you draw my attention to § 18.1-301 of the Code of Virginia and relate certain facts and pose the questions which I quote, as follows:

“A deputy sheriff requested two off-duty officers to assist him in attempting to apprehend two escaped convicts. The off-duty officers complied and in the course of their investigation located a suspicious car and approached believing the convicts to be inside. The deputy tapped on the door glass and stated—police officers, come out of there. The car was idling at the time and the occupant of the car rose up from where he was lying on the front seat; put the car in reverse; crashed into the police car; pulled forward striking the deputy sheriff and knocked him to the ground, at which time the deputy and one of the officers drew their side arms and fired upon the vehicle in order to stop him from more damage and possibly more injuries. The person in the car was then arrested and charged with felonious assault with an automobile upon an officer.

“In an action by the driver of the car against all three of the officers, does the State pursuant to the above captioned statute, have any obligation to defend the deputized officers? Also, who is responsible for indemnifying such private citizens who were ordered by the mandate of the statute to assist in the performance of such duties?”

Section 18.1-301 makes it a misdemeanor for any person to refuse or neglect to assist any sheriff or other officer when required by him to do so under the stated circumstances. It was held in the case of Byrd v. Commonwealth, 158 Va. 897, among other things, that when one is called to assist an officer he, during the time that duty rests upon him, is justified in doing whatever the officer himself might lawfully do. Notwithstanding these considerations, however, I find no statute which would obligate the State to defend the two deputized officers in any such action and, therefore, I shall answer your first question in the negative.

In respect to your second question, I am of the opinion that the matter of indemnification of such private citizens is a responsibility of the individual concerned or may be chargeable against any bond which may have issued to cover such contingencies. All police officers appointed by the Superintendent of State Police or by the Commissioner of the Division of Motor Vehicles engaged in the enforcement of criminal laws are required to be bonded and an action may be maintained upon such bond by any person injured or damaged by the unlawful, negligent or improper conduct of any such officer. These provisions are found in §§ 52-7 and 46.1-39, respectively, of the Code of Virginia. I find no similar statute in regard to other police officers, however, and there is, of course, no such provision for private citizens who may be called upon to aid a police officer.
PRACTICE OF LAW—Licensed Bill Collector—May not represent his principal in court.

March 31, 1967

HONORABLE GRADY W. DALTON
Member, House of Delegates

I have your letter of March 29, 1967, enclosing a letter to you from R. B. Benson, dated March 13, 1967. Your letter reads, in part, as follows:

“A Richlands merchant working with his bill collector obtained a judgment against a customer. The amount collected and paid to the court was $69.30 including costs of $10.75. The collector, as agent and in the presence of the merchant, asked the Clerk of the Court to pay to them the above amount, after costs. The Clerk refused, saying, ‘You'll have to get an attorney to represent you before you can get your money.’ In this case, no attorney had been employed in the obtaining of the judgment. The merchant was trying to save a 30% to 40% attorney's fee.

* * *

“The question is: Is it proper or legal for a Clerk of the Court to withhold funds in this manner and to require the merchant to obtain the services of a lawyer in order to obtain release of funds due him?”

The question involved here really is whether or not a licensed bill collector who is not a licensed attorney can represent his principal in court.

This question, with a different factual background, is covered in a letter dated February 10, 1966, to the Honorable Beverly T. Fitzpatrick, Roanoke, Virginia, which is found in the printed volume of the Report of the Attorney General 1965-1966, at page 242. A copy of this opinion is enclosed herewith.

I think that you will agree from reading this opinion that a licensed bill collector who is not an attorney at law cannot represent his principal in court.

PRISONERS—Costs for Medical Expenses for Injuries—May be paid out of appropriation for criminal charges.

May 17, 1967

HONORABLE MERVIN A. GAGE
City Sergeant for the City of Hopewell

I am in receipt of your letter of May 11, 1967, in which you present the following situation and inquiry:

“It is the custom of the Police upon bringing prisoners to the City Jail to book them after they are brought to the jail. We recently had an incident, where the Police brought a prisoner to jail, and while booking him, the prisoner fell and injured his head before being placed in the lock-up, and had to have medical treatment. There seems to be a question as to which department, the Police Department or the Office of the City Sergeant, is responsible for this accident.”

From your communication, there does not appear to be any reason for either the Police Department or the Office of the City Sergeant to be responsible for the accident you describe. In this connection, however, I
am forwarding to you a copy of a previous opinion of this office, dated June 17, 1948, in which it was ruled that the costs incurred for hospital and medical services required for a prisoner after his arrest but before his confinement could be paid from the appropriation for criminal charges pursuant to § 4960 (now § 19.1-315) of the Virginia Code. See, Report of the Attorney General (1947-1948), p. 133. It would thus appear that, in the situation you present, the court in which the criminal case is heard may allow such amount as it deems reasonable in this regard, such allowance to be paid out of the State treasury from the appropriation for criminal charges.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Board of Opticians—What constitutes illegal advertising.

OPTICIANS—Advertising—What constitutes illegal advertising.

July 28, 1966

HONORABLE THOMAS W. MOSS, JR.
Member, House of Delegates

This is in reply to your letter of July 27, 1966, in which you enclose copy of a newspaper advertisement of an optician which contains the following language:

"Registered Optician serves you and your family in the comfort and convenience of your home."

You state that the Virginia State Board of Opticians, through the Director of the Department of Professional and Occupational Registration, has notified this optician that in his judgment the advertisement is in violation of § 54-398.23(5) of the Code. You request my advice as to whether or not this form of advertisement is in violation of this statutory provision.

Section 54-398.23(5) of the Code provides as follows:

"The Board shall revoke or suspend the certificate of registration of any person for any of the following causes:

* * *

"(5) If such person shall advertise or offer any gift or premium or discount in any form or manner in conjunction with the practice of an optician, or directly or indirectly advertise that any one class of duly licensed eye examiners is preferable to any other class qualified and authorized under the laws of Virginia to make visual or eye examinations and to prepare prescriptions for eyeglasses, or advertise in any manner that would tend to mislead or deceive the public, or engage in any form of house to house canvassing or soliciting for the sale of spectacles or other ophthalmic products or services."

The particular portion of paragraph (5) which the State Board of Opticians considers to be violated is:

"Engage in any form of house to house canvassing or soliciting for the sale of spectacles or other ophthalmic products or services."

The statute involved is penal in nature and thus must be strictly construed against the imposition of the prescribed penalty. In my opinion, applying this rule of construction, the insertion of the above language in a
newspaper advertisement does not constitute any form of house to house canvassing or soliciting within the meaning of the statute. The term “house to house” indicates that the type of canvassing prohibited by the statute would be a more direct approach—such as distributing hand bills by leaving them on the porch of a person's home or soliciting by telephone.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Clinical Psychologists—Examination not waived.

September 27, 1966

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This will reply to your letter of September 26, 1966, in which you present the following situation and inquiry:

"Section 54-102.6(c), Code of Virginia, sets forth that the Board shall waive the examination as a prerequisite for the licensure of a psychologist meeting certain educational and experience requirements, providing the applicant applies for such a license before July 1, 1967, and further conditioned upon the fact that he was rendering psychological services to the public in this State on or before July 1, 1966. While a distinction is made elsewhere in the applicable statutes, the above Section does not mention the clinical psychologist. The Board has received a number of requests from clinical psychologists for licensing by the foregoing exemption.

"Based on the foregoing, does the Virginia Board of Psychologists Examiners have the authority to waive the examination under the conditions specified for individuals seeking licensure as clinical psychologists as distinguished from the psychologist?"

I am constrained to believe that your inquiry must be answered in the negative. Section 54-102.6(b) of the Virginia Code provides that the Virginia Board of Psychologists Examiners:

". . . shall issue a license to practice psychology to any candidate meeting the applicable requirements of subsection (a) of this section other than a candidate desiring to engage in the practice of clinical psychology, as defined in § 54-273 (10). As to any candidate seeking licensure for the practice of clinical psychology, after his passage of such examination the Board shall forward the application, together with its recommendation as to the issuance of a license, and ten dollars of the fee collected for his examination under the provisions of § 54-102.5 (b) to the State Board of Medical Examiners for licensure as provided in § 54-309.1." (Italics supplied.)

In light of the above-quoted provision, it is clear that licenses to practice psychology are issued by the Virginia Board of Psychologists Examiners, while licenses to practice clinical psychology are issued by the Virginia Board of Medical Examiners pursuant to § 54-309.1 upon recommendation of the Virginia Board of Psychologists Examiners. Moreover, an application for a license to practice clinical psychology and recommendation thereon can be forwarded to the Board of Medical Examiners by the Board of Psychologists Examiners only after the applicant in question has passed the examination prescribed in § 54-102.6(a)(4) of the Virginia Code.
So far as clinical psychologists are concerned, the above outlined procedure is not altered by § 54-102.6(c) of the Code which provides:

"Notwithstanding the foregoing provisions of this section, the Board shall, until July one, nineteen hundred sixty-seven, waive the requirement of paragraph (4) of subsection (a) of this section and upon application and the payment of a fee of twenty-five dollars, grant a license to practice as a psychologist to any applicant who: [meets stated qualifications]." (Italics supplied.)

It seems clear that the provisions of subsection (c) are limited to instances involving applications for licensure to practice as a psychologist and do not authorize the Virginia Board of Psychologists Examiners to waive the requirement of an examination with respect to an applicant for licensure to practice as a clinical psychologist, whose application must be forwarded to the Virginia Board of Medical Examiners for licensure.

I am therefore of the opinion that the Virginia Board of Psychologists Examiners is not authorized to waive the examination prescribed in § 54-102.6(a)(4) with respect to applications for licensure to practice as a clinical psychologist.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Licensed Registered Professional Hairdresser—May operate barber shop.

February 27, 1967

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in reply to your letter of February 21, 1967, in which you request my opinion in the matter which I quote as follows:

"Section 54-112.1 exempts barbers licensed under the provisions of Chapter 4.1 of Title 54 from the provisions of Chapter 6.1 of Title 54. Section 54-83.5 exempts persons practicing beauty culture from the provisions of Chapter 4.1 of Title 54.

"In view of the foregoing exemptions, which, in effect, exempt registered barbers from complying with the provisions of the Hairdressers Act and also exempt registered professional hairdressers from the provisions of the Barbers Act, is it permissible for a licensed registered professional hairdresser to open a place of business for the purpose of rendering barbering services to male clientele provided the registered professional hairdresser secures a license for such establishment as provided for in either Chapter 4.1 or 6.1 of Title 54 of the Code?"

Under Chapter 4.1 of Title 54, Code of Virginia (1950), as amended, known as the "Virginia Barber Act," § 54-83.5 states, in part, as follows:

"The provisions of this chapter shall not be construed to apply to:

"(c) Persons practicing beauty culture."

Likewise, under Chapter 6.1, Code of Virginia (1950), as amended, which provides for the registration and regulation of professional hairdressers or beauty parlors, § 54-112.1 states, in part, as follows:

"Nothing in this chapter shall apply to:

"(1) Barbers licensed under the provisions of chapter 4.1 (§ 54-83.2 et seq.) of this title."
Further, § 54-112.26 of the same chapter contains this sentence: "No person, firm or corporation shall operate or attempt to operate a beauty parlor or salon in which cosmetics are used or cosmetic treatments given or where human hair is cut, curled or treated in any manner, except as provided in § 54-112.1 of this Code, unless licensed to do so under the provisions of this chapter." The exception under § 54-112.1, of course, would include barbers licensed under Chapter 4.1, which, as indicated in the language previously quoted herein, are expected from the requirements of Chapter 6.1.

In consideration of the foregoing, it is my interpretation that persons licensed under the requirements of either of these two chapters are excepted from the requirements of the other and, accordingly, I shall answer your question in the affirmative.

PROFESSIONS AND OCCUPATIONS—Pawnbrokers—Licensing of partnerships and corporations—One bond required.

January 13, 1967

HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County

This will acknowledge your letter of January 12, 1967, which reads as follows:

"Two local residents of Mathews County are engaged as partners in a retail sales business under a trade name. They desire to expand their business to include the business of pawnbroking.

"Code § 54-840 defines a pawnbroker, and § 54-841 sets forth the license requirements for the business of pawnbroker. Section 54-841 does not make reference to applications for pawnbrokers' licenses by firms, partnerships or corporations, but only to applications for such licenses by individual persons.

"Code § 58-392 provides for an annual license tax of two hundred and fifty dollars for the privilege of transacting business as a pawnbroker.

"I would like to have an opinion from you on the following questions:

"1. Can a partnership or corporation be issued a pawnbroker's license in the name of the partnership or corporation?

"2. If a partnership cannot be issued a pawnbroker's license in its name, can the partners make a joint application in their names for one license to be issued to them jointly as individuals?

"3. Can one of the partners secure the license in his name and conduct the business of pawnbroker for the benefit of the partnership?

"4. If a license can be issued to the individual partners jointly, or if both partners are required to secure separate licenses, is it necessary that each partner post a twenty-five hundred dollar bond to comply with Code § 54-844, and each partner pay the annual license tax of two hundred fifty dollars to comply with Code § 58-392?"
"5. If each partner is required to be licensed, is it necessary for them to keep separate records and submit separate daily reports, required by Code §§ 54-851 and 54-853, notwithstanding that the business is conducted as a partnership?"

Your questions will be answered in the order presented.

In my opinion, the answer to question (1) must be in the affirmative. In the second paragraph of § 54-853 of the Code, relating to daily reports, it is stated as follows:

"Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not less than ten dollars nor more than five hundred dollars for each offense."

This language clearly indicates that a firm or corporation may be issued a license.

Upon inquiry to the State Department of Taxation, which issues the licenses in question, I find that it has been their practice all along to issue such licenses to partnerships and corporations as well as individuals.

Due to my answer to question (1), I do not consider it necessary to answer questions (2) and (3).

With respect to question (4), the State Tax Department only requires one bond in the amount of $2500 to be issued by the firm or corporation.

In light of my answer to the previous questions, I consider it unnecessary to answer question (5).

PUBLIC FUNDS—Advance Expenditure for Federal Programs—Only after appropriation by local governing body.

TREASURERS—Advance Expenditure for Federal Programs—Only after appropriation by local governing body.

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

September 22, 1966

This is in reply to your letter of September 20, 1966, to which you attached a letter from George W. Titus, Treasurer of Loudoun County, which reads as follows:

"During the months of July, August, and September 1966 the Loudoun County School Board has sent checks to me for my signature in payment of various bills for Operations Uplift, Headstart, Greenlight, Sunshine. Please advise me if the County is required to advance money for these federal programs with the expectation of being reimbursed at a later date."

The authority of a treasurer to make payments would depend upon whether or not the board of supervisors has made appropriations to the school board for such purposes. In this connection you are referred to § 58-839 of the Code, which contains the following sentence:

"No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body either annually, semiannually, quarterly, or monthly."
HONORABLE KERMIT L. RACEY
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of February 1, 1967, in which you request my advice in regard to the following, which I quote:

"In approximately 1932, a levy or assessment was made against the orchard owners in Shenandoah County, Virginia, under the Cedar-Rust Law. These monies were to be used to pay damages to property owners in Shenandoah County, resulting from the cutting of cedar trees in this county.

"For some reason, the sum of One Thousand ($1,000.00) Dollars accumulated in the County Treasury for this purpose, and same was deposited in a special account and has been so maintained ever since.

"This fund was never utilized for the purpose for which it was created and the County wishes to transfer this fund, from a special account into the General Fund of the County. The question they have is this, how may this be accomplished?"

The authorization for making assessments in connection with reimbursement for damages paid for trees destroyed for the purpose of controlling cedar rust is found in Article 2 of Chapter 13, Title 3.1, Code of Virginia (1950), as amended. Under this article, § 3.1-160 gives the Commissioner of Agriculture and Immigration of the State of Virginia authority to order the destruction of cedar trees found to constitute a menace to the health of apple orchards because of the possible spread of cedar rust. Section 3.1-167 authorizes the circuit court to order the treasurer of the county to pay to the owner of trees destroyed by such order of the Commissioner, out of the general fund of the county, damages, determined as therein stated. Under § 3.1-168, whenever the circuit court orders any damages paid out of the general fund of a county under § 3.1-167 or the county treasurer makes any payment out of the general fund of the county under §§ 3.1-163 or 3.1-164, the general fund shall be reimbursed by a specific levy. This levy is made on the apple orchards in the vicinity under the conditions prescribed in this section.

An examination of the statutes contained in Article 2, as previously referred to herein, indicates that the levy is made only after damages are paid out of the general fund of the county. It will be assumed, therefore, that the amount of $1,000 accumulated in the special account in the County Treasury of Shenandoah County was assessed for the purpose of reimbursing the general fund for damages therefrom previously disbursed. Accordingly, I am of the opinion that the Circuit Court may issue an order directing the County Treasurer to transfer the amount of $1,000 from the special account to the general fund.
REPORT OF THE ATTORNEY GENERAL

PUBLIC OFFICERS—Compatibility—Charter provisions of town of Appalachia control as to whether member of council may be interested in insurance contract.

CHARTERS—Appalachia—Provisions control over general law when § 15.1-73 construed.

April 11, 1967

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

This is in reply to your letter of April 8, 1967, in which you request my opinion interpreting § 15.1-73 of the Code of Virginia, as construed with the charter for the Town of Appalachia, in relation to the facts which I quote, as follows:

“A member of the Council for the Town of Appalachia, Virginia, is employed by the Appalachia Insurance Agency, Inc. The agency writes the Town’s general liability, workmens compensation, bonds and some of the Town’s fire insurance. The agency does not write the insurance on the Town’s vehicles nor is it the exclusive agency for the Town’s insurance business. The Town’s insurance is not purchased through bids.

“The member of the Council is a stockholder in the insurance agency and holds the office of Secretary in the Agency Corporation.”

The given facts show that the member of the Council is an officer and stockholder in the insurance agency corporation contracting with the town for the stated insurance services, and under such conditions the prohibitions contained in § 15.1-73 are applicable. In addition, the council member is prohibited from being interested directly or indirectly in the profits of any such contract by § 6(b) of the charter for the Town of Appalachia, as quoted in your letter, unless such prohibitions are lifted by unanimous vote of the members of such council.

The charter section cited provides that “if the council shall declare by unanimous vote of the members thereof that the best interests of the town are to be served despite a personal interest direct or indirect,” the prohibitions of this section shall not apply. Apparently, such resolution, if so adopted by the council, being a charter provision, would prevail. It is so indicated under similar circumstances in my letter of December 11, 1964, to which you draw my attention.

PUBLIC OFFICERS—Compatibility—Member of county board of zoning appeals may not serve as assessor.

TAXATION—Assessors—Member of county board of zoning appeals may not serve.

August 25, 1966

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

This will acknowledge receipt of your letter of August 24, 1966, which reads as follows:

“Section 15.1-494 of the Code of Virginia dealing with members of a Board of Zoning Appeals provides that members of the
My question is whether a member of our County Board of Zoning Appeals could also accept appointment by the Circuit Court and serve as a member of the Board appointed by the Circuit Court for the purpose of reassessing real estate as provided in §§ 58-786 through 58-789. In other words, would the members of the reassessment board be holding a public office referred to in § 15.1-494?"

The question as to whether or not an assessor appointed under § 58-787 is an officer, was considered by Honorable Abram P. Staples in an opinion furnished to the Commonwealth's Attorney of Bedford County on May 27, 1940 (Report of the Attorney General (1939-1940), at p. 168). It was subsequently considered by Attorney General Almond in an opinion to Hon. Lyon G. Tyler, dated October 18, 1954 (Report of the Attorney General (1954-1955), at p. 178). I enclose copies of these two opinions.

Although assessors are not specifically designated as officers, they perform important official duties for the county. In my judgment, the opinions enclosed herewith are sound conclusions, and I am in accord with the views expressed therein.

Therefore, in my opinion, a member of the Board of Zoning Appeals is prohibited under § 15.1-494 of the Code from serving upon the Board of Assessors appointed under the above section.

PUBLIC OFFICERS—Compatibility—Salaried employee of company selling tires to city may serve as member of city council.

CITIES—Council Member—Salaried employee of company selling tires to city may serve.

September 12, 1966

HONORABLE JOHN S. HANSEN
Member, House of Delegates

This will acknowledge receipt of your letter of September 8, 1966, which reads as follows:

"Attached is a letter I received from the City Attorney of Colonial Heights. He requests your opinion regarding the purchase by Colonial Heights of tires from the Petersburg Tire Company. The point has been raised because a member of the City Council is employed by the Petersburg Tire Company.

"I am in full agreement with the opinion of the City Attorney, i.e., that such connection by this councilman is too remote to come within the conflict of interest provisions of Section 20.6 of the city charter."

The third paragraph of the letter to you from the city attorney reads as follows:

"One of the members of the new City Council to take office on the first day of September of this year is a regular salaried employee of Petersburg Tire Company. This councilman owns no stock in this company, has no financial interest in the company, is not an officer of the company, and he receives no other compensation from this company in the form of a commission or bonus."
The city attorney refers to Sec. 20.6 of the Charter of Colonial Heights (Chapter 213, Acts of Assembly, 1960), which contains the following provision:

"No officer or employee of the city shall be interested in any contract entered into by the city with any person, firm or corporation, but this prohibition shall not apply to nonsalaried officers or nonsalaried members of boards and commissions in respect of contracts other than those in the making of which they have a part."

I concur with the opinion of the city attorney to the effect that the member of the council under consideration would not be in violation of the Charter provision.

The question presented depends upon whether or not the member of the council would be in violation of § 15.1-73 of the Code of Virginia, the first paragraph of which reads as follows:

"No member of the council, board of aldermen or member of the school board, or any other officer, or agent, or any commissioner appointed for the opening of streets, or any other member of a committee constituted or appointed for the management, regulation or control of corporate property of any city or town, or constable, policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, civil or police justice, sheriff, sergeant, superintendent of the poor or any other paid officer of any city or town, during the term for which they are elected or appointed, shall be a contractor or subcontractor, with the corporation, or its agents, or with such committee, nor shall they be interested, directly or indirectly, in any contract, subcontract, or job of work, or materials, or the profits or contract price thereof, or any services to be performed for the city, or town, for pay under any contract or subcontract; and no such councilman, officer or employee shall be interested, directly or indirectly in any contract, subcontract, or job of work, or materials or the profits or the contract price thereof, or services to be furnished or performed for the city or town for pay under any contract or subcontract; nor as agent for such contractor or subcontractor, or other person furnishing any supplies or materials. Every such contract or subcontract shall be void, and the officer, councilman, agent, or member of such committee making such contract shall forfeit to the Commonwealth the full amount stipulated for thereby."

The above section of the Code contains to a great extent the same prohibitions which are set forth in § 15.1-67 (formerly § 15-504) of the Code, relating to county officers. In this connection we furnished an opinion on May 11, 1964, to Honorable F. Paul Blanock, Commonwealth's Attorney for Mathews County, the first two paragraphs of which are applicable to the present situation. This opinion is published in Report of the Attorney General (1963-1964), at p. 241, and I enclose copy herewith. The second paragraph of this opinion to Mr. Blanock is as follows:

"Assuming that this employee does not receive any commissions or other benefits from sales made by the firm to the county school board and that he does not act as salesman or take any action whatsoever in connection with the sale by this firm to the school board of supplies for the cafeterias, in my opinion, the provisions of § 15-504 would not be a bar to his serving as a member of the school board."
If the member of the council can meet the conditions set forth in the paragraph quoted in the opinion to Mr. Blanock, in my opinion, the provisions of § 15.1-73 would not be a bar to his serving as a member of the city council.

PUBLIC OFFICERS—Contracts—Welfare board member may not contract with board.

HONORABLE V. ELMO ABBOTT, Superintendent
Page County Department of Public Welfare

October 24, 1966

This will acknowledge your letter of October 21, 1966, which reads as follows:

“For a number of years the Page County Welfare Department has been housed in quarters belonging to the county known as the County Office Building. With the expansion of various governmental agencies, it has reached the point that the space allocated to the department is no longer adequate in view of our staff. Neither is adequate expansion at the present location feasible.

“The Page County Welfare Board is anticipating moving the agency to rented quarters in Luray. Our Board Chairman, Mr. C. T. Chapman, owns quarters which appear to be adequate for our agency. It appears that these are the most suitable and the only available quarters. We would appreciate having an opinion from your office as to whether it would be legally permissible to rent these quarters from a board member.”

Section 63-59 of the Code provides for compensation for the members of the local welfare board. You do not state whether or not Page County provides compensation for the members of the board. Under § 63-65 of the Code, each member is required to take the oath of office, and, therefore, is an officer within the meaning of that term as used in § 15.1-67 of the Code.

Section 15.1-67 provides, in part, as follows:

“No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, judge of the county court, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission, or agency there-of. . . .” (Emphasis supplied.)

In the event the chairman of the board is receiving compensation under § 63-59 of the Code, the contract for the lease of property owned by him to the local board of welfare would be in violation of this section.
HONORABLE WILLIAM F. WATKINS, JR.
Commonwealth's Attorney for Prince Edward County

I am in receipt of your letter of October 5, 1966, in which you present the following situation and inquiry:

"The co-ordinator of civil defense in the County of Prince Edward has for several years been paid a salary for his services to the county in organizing civil defense. The co-ordinator of civil defense has been offered a position with the Prince Edward Community Action Group, Inc. This corporation operates from funds received from the Federal government under the office of Economic Opportunity. The co-ordinator is willing to continue his activities as co-ordinator of civil defense at a reduced salary and the board of supervisors is willing to pay this salary for his services.

"My question is whether or not under the provisions of Section 2-27 of the Code of Virginia, 1950, as amended, there is any bar against the co-ordinator of civil defense being paid compensation as suggested by the board of supervisors. There does not appear to be an exception set forth in Section 2-29 applicable here and this question has caused me some concern."

Section 2-27 of the Virginia Code, to which you refer, provides:

"No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city, or town thereof." (Italics supplied.) (Slightly reworded when recodified to § 2.1-30.)

I am of the opinion that a person who occupies a position with the Prince Edward Community Action Group, Inc.—an agency financed by the United States government through the Office of Economic Opportunity—would receive an emolument from the government of the United States and would clearly fall within the scope of the prohibitions enunciated in the above-quoted statute. In light of this view, the individual concerning whom you inquire could not legally occupy the position of co-ordinator of civil defense in Prince Edward County after accepting a position with the Prince Edward Community Action Group, Inc., unless his situation is removed from the proscriptions of § 2-27 (now § 2.1-30) by one of the exemptions specified in § 2-29 (now § 2.1-33) of the Virginia Code. The only exemption enunciated in the latter statute which might conceivably apply to the situation under consideration is that enunciated in § 2-29(11) (now § 2.1-33(11)) of the Virginia Code; however, this provision of the exemption statute was specifically declared to be unconstitutional by the Supreme Court of Appeals of Virginia in Dean v. Paolicelli, 194 Va. 219, 72 S.E. (2d) 506. I therefore concur in your
view that none of the provisions of § 2-29 (now § 2.1-33) would serve to exempt the individual in question from the prohibitions of § 2-27 (now § 2.1-30) of the Virginia Code.

PUBLIC OFFICERS—Justice of Peace—City may not contract with manufacturing company represented by justice of peace.

JUSTICE OF PEACE—City May Not Contract With Manufacturing Company Represented by Justice of Peace.

March 27, 1967

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

I have your letter of March 24, 1967, enclosing copy of a letter from the Honorable H. P. Armstrong, City Attorney for the City of Colonial Heights.

From Mr. Armstrong's letter, it appears that Mr. X, a Justice of the Peace of the City of Colonial Heights, is the local area salesman representing a manufacturing company which sells janitorial supplies; that Mr. X, a Justice of the Peace, when requested by the City Manager, submits to the City quotations and bids for janitorial supplies and if his bids are lower, such supplies will be purchased from such company. However, Mr. X owns no stock in the company, has no financial interest in the company, and is not an officer of the company.

Section 19.11 of the Charter of the City of Colonial Heights provides for the election of justices of the peace for the City of Colonial Heights and Section 20-6 of the said Charter provides that no officer or employee of the City shall be interested in any contract entered into between the City and any person, firm or corporation. A justice of the peace is an officer.

Section 15.1-73 of the Code of Virginia applies to city or town officials, and provides that no officers during the term for which they are elected shall be interested directly or indirectly in any contract with the city.

Under these circumstances, I feel that the City of Colonial Heights is prohibited from making contracts with the manufacturing company represented by Mr. X, Justice of the Peace, as local area salesman.

PUBLIC OFFICERS—Medical Examiner and Jail Physician—May not serve as member of board of supervisors.

BOARDS OF SUPERVISORS—Medical Examiner and Jail Physician—May not serve as member.

February 21, 1967

HONORABLE J. WILLARD GREER
Commonwealth's Attorney for Halifax County

This will acknowledge receipt of your letter of February 17, 1967, in which you state that Dr. N. H. Wooding is contemplating being a candidate for the board of supervisors of your county; that he is at the present time jail physician for the county and also medical examiner. You attached copy of a letter dated February 16, 1967, to Dr. Wooding in which
you advised him that in your opinion a member of the board of supervisors would not be eligible to serve as medical examiner and jail physician while holding the position of supervisor.

With respect to medical examiners, by reference to § 15.1-50 of the Code you will find that a member of the board of supervisors cannot hold another office, elective or appointive, while holding the office of supervisor, subject to certain exceptions which would not be applicable in this case. A medical examiner is a State officer appointed under the provisions of § 19.1-40 of the Code.

With respect to his continuing as jail physician appointed under § 53-184: of the Code, you are correct in your opinion that § 15.1-67 would prevent this. In this connection, you are referred to § 15.1-70 which does except from the restrictions of § 15.1-67 certain services by a physician who is a member of the board of supervisors in some counties. However, Halifax county would not come within the scope of any of these exceptions, and they do not specifically include a jail physician.

PUBLIC OFFICERS—Medical Examiner—May not serve as member of school trustee electoral board.

SCHOOLS—School Trustee Electoral Board—Medical examiner may not serve as member.

February 14, 1967

HONORABLE J. CLIFFORD HURT
Member, Board of Supervisors of Westmoreland County

This will acknowledge receipt of your letter of February 13, 1967, which reads as follows:

"Is it permissible, under State law, for one person to hold the office of County Medical Examiner and at the same time be a member of the School Trustee Electoral Board for the same county?"

Section 22-60 of the Code provides in part as follows:

"In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or State officers, to be appointed by the circuit court of each county, or the judge in vacation, within thirty days after the first day of July, nineteen hundred and fifty and every four years thereafter. . . ."

You will note that this section expressly provides that no member of the school trustee electoral board shall be a county or State officer. Medical Examiners are appointed under the provisions of § 19.1-40, which provides that they shall "take office on the first day of October after appointment and serve for a term of three years."

It is clear from this language that a Medical Examiner is an officer and hence would not be eligible to be appointed as a member of the school trustee electoral board.
PUBLIC OFFICERS—Payment for Services Not Otherwise Compensable.

JUDGES—May Authorize Payment to Officers for Services Not Otherwise Compensable.

HONORABLE LANGHORNE JONES, Judge
Circuit Court of Pittsylvania County

March 21, 1967

I have your letter of March 20, 1967, which reads as follows:

"Mrs. Ann D. Adams, a deputy clerk in this office, was employed to operate the recording machine in the trial of felonies, etc., and to transcribe the same when necessary. Now that we have so many appealed habeas corpus proceedings, as well as felonies, (all proceeding In Forma Pauperis), it is impossible, with the one transcribing machine and one transcriber, to complete the typing of the records during regular office hours. Would it be permissible for the Judge of this court, if he sees fit, to order this same employee to transcribe the evidence and incidents of trial on her own time, at night and over the weekend, and allow her a reasonable fee, same to be paid out of criminal costs set up by the state?"

It is evident from your letter that the one deputy clerk cannot perform all of the duties incident to the special work within the time that one ordinarily works at his position. Under these circumstances, the situation can only be remedied by the present deputy working beyond the normal office hours and days when she would be regularly employed, or an additional party would have to be secured either full or part time to do this work.

If the present deputy works beyond the normal hours and days of work, she would certainly be entitled to additional compensation. If, in the judgment of the Judge of the court involved, this is the best procedure to follow in order to get the work done, I am of the opinion that § 19.1-315 of the Code of Virginia is sufficiently broad to allow the payment of these extra and unusual services when so certified by the Judge of the court in the usual manner.

PUBLIC WELFARE—District Homes—Number of votes of cities and counties participating determined by population.

September 6, 1966

HONORABLE MARION G. GALLAND
Member, House of Delegates

This will acknowledge receipt of your letter of August 31, 1966, which reads as follows:

"I would appreciate having your opinion as to the correct interpretation of § 63-309 of the 1950 Code of Virginia, as amended. The section provides that each county shall have one representative, but seems to say that a county must have twenty thousand inhabitants in order for the representative to have a vote.

"The question as to which I seek your opinion is:

"Is each county entitled to one vote regardless of population, or does a county with less than twenty thousand inhabitants have no vote at all?"
"The last clause in the first paragraph reads: '... provided, that no city shall have more votes in any district than the combined votes of the counties composing the districts.' Is the word 'city' in this context to be strictly interpreted, or would the word 'city' include an urban county, such as Fairfax?"

With respect to your first question, each county participating in the project is entitled to one vote, even though its population may be less than twenty thousand.

With respect to your second question, the word "city" as used in § 63-309 of the Code means a municipal corporation as distinguished from a county. The county of Fairfax would not be considered a city within the meaning of this section.

PUBLIC WELFARE—Old Age Assistance—Recovery from estate of recipient.

ESTATES—Tenant in Common—Right of survivorship exists when testator makes plain his purpose.

HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County

In your letter of September 21, 1966, you state:

"On April 3, 1948, X and his wife, Y, purchased a parcel of real estate in Mathews County and the deed recites that the land was conveyed to them 'jointly, and to the survivor of them.' X later applied for and received Old Age Assistance. The Superintendent of Public Welfare filed and docketed a notice in the Judgment Lien Book stating that X was receiving a grant as of August 1, 1957, in accordance with said Code section.

"X died on April 16, 1961, and four days later the Superintendent then filed and docketed the final notice in the Judgment Lien Book.

"Widow Y is now in the process of selling the real estate. The Board of Public Welfare desires to know if their lien against X is valid and enforceable to recover one-half of the proceeds of the sale in accordance with their lien filed of record."

Section 63-127 of the Code of Virginia (1950), as amended, provides in part that the filing of a notice showing the grant of public assistance to a recipient "shall create a lien against all real property of the recipient lying within the county or city wherein the notice is filed in favor of the local board. . . . Upon the death of any recipient, the local board of welfare having reason to believe that such recipient died possessed of property, either real or personal, from which reimbursement may be had, shall file notice with the clerk. . . . The filing of such notice shall create a lien against the estate, both real and personal, of such recipient. . . ."

The question is whether the real estate in question, or some interest therein, was part of the estate of the recipient.

Section 55-20 of the Code provides that when a joint tenant shall die "his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts . . . as if he had been a tenant in common." However, § 55-21 provides that § 55-20 "shall not apply . . . to an estate conveyed . . . to persons in their own right when it manifestly appears from the tenor of the instrument that it was intended the part of one dying
should then belong to the others. . . ." As said in Wallace v. Wallace, 168 Va. 216, 228 (1937), in Virginia "the right of survivorship exists whenever it is manifest that a grantor or testator so desires or makes plain his purpose."

In my opinion, under § 55-21, the deed in question created a right of survivorship in the wife of the welfare recipient, and his interest in the land did not become part of his estate. This being so, I am of the opinion that the lien filed against the recipient is not enforceable against the proceeds of the sale.

REAL ESTATE—Taxation—Life tenant liable for taxes when life interest reserved.

TAXATION—Real Estate—Life tenant liable for taxes.

October 6, 1966

HONORABLE ALENE H. TUCKER
Commissioner of the Revenue of Charlotte County

This will acknowledge receipt of your letter of September 28, 1966, which reads as follows:

"We have had quite a controversy in Charlotte County regarding the transfer of land to the name of the grantee when the deed states that the grantor is reserving a life interest. Please advise me as to whether the land should be transferred to the name of the grantee at the time the deed is recorded or at the death of the grantor."

We can find no statutory provision directly in point. Upon inquiry to the real estate assessor's office in the city of Richmond, we find that assessments are made in the name of the life tenant. Upon proof of the death of the life tenant, they transfer the property to the name of the grantee. The reason for assessing the property in the name of the life tenant is because the life tenant is liable for the payment of the taxes thereon. See, Richmond v. McKenny, 194 Va. 427, 73 S. E. (2d) 414.

REAL ESTATE—Transfer Fees—Chargeable once a year.

FEES—Transfer of Real Property—Chargeable once a year.

CLERKS—Transfer Fees—Chargeable once a year.

August 3, 1966

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

In your letter of August 2, 1966, you ask:

"We respectfully request your opinion as to the following question which arises from the interpretation of Section 58-817 of the 1950 Code of Virginia:

"If during a calendar year three (3) lots from the same subdivision are conveyed to party 'X' and later in the same calendar year
party ‘X’ conveys to party ‘Y’ one of the lots, should the clerk charge the transfer fee in the second conveyance?"

Section 58-816 of the Code of Virginia (1950), as amended, provides for payment of a fee of $1.00 "for making an entry transferring to one person lands before charged to another."

Section 58-817 provides in part:

"... but in no case shall more than one fee be charged for all the transfers of the same parcel of land, made during the year terminating on the thirty-first day of December of each year, which fee shall be paid by the first vendee. . . ."

In view of this provision, I am of the opinion that no transfer fee is chargeable for the second conveyance of a lot during any calendar year.

This is in accord with a previous opinion by Attorney General Staples, published in the Report of the Attorney General (1934-1935), at pages 51-52.

RECORDATION—Chattel Deed of Trust—Recorded in miscellaneous lien book.

April 26, 1967

HONORABLE IMOGENE W. TUNSTALL, Clerk
Circuit Court of Cumberland County

This is in reply to your letter of April 24, 1967, in which you request my opinion as to whether or not a chattel deed of trust, received by your office for recordation, and a copy of which you enclosed with your letter, should be recorded in the Miscellaneous Lien Book.

Section 17-61 of the Code of Virginia, which was last amended by the Acts of Assembly of 1932, is as follows:

"All deeds, mortgages, deeds of trust, homestead deeds and leases of personal property, bills of sale, and all other contracts or liens as to personal property not mentioned in §§ 43-27 and 55-88 to 55-90, which are by law required or permitted to be recorded, all mechanics' liens, all other liens not directed to be recorded elsewhere and all other writings related to or affecting personal property which are authorized to be recorded shall, unless otherwise provided, be recorded in a book to be known as miscellaneous liens; provided, that if a deed, deed of trust, mortgage, contract or other writing conveys, relates to or affects, both real and personal property, it shall be recorded in the deed book only, but shall be indexed in the general index book and the book of miscellaneous liens."

This section is found in Article 3 of Chapter 2, Title 17, Code of Virginia (1950), as amended, and treats of records, recordation and indexing, generally. Section 43-4.1, to which you draw my attention, is found in Chapter 1 of Title 43, Code of Virginia (1950), as amended, which covers mechanic's and materialmen's liens. The latter section was enacted in Chapter 81, Acts of Assembly of 1960, and contained certain language which prompted the opinion expressed in the Report of the Attorney General (1960-1961), p. 256, that § 17-61 had been repealed by implication. The enactment of Chapter 338, Acts of Assembly of 1964, however, amended § 43-4.1 in such manner as to cause it to appear that such section has reference to the recordation of memoranda or notices of liens found in Chapter 1 of Title 43, namely, mechanic's and materialmen's liens, only.
In consideration of the foregoing, I am of the opinion that the chattel deed of trust here under consideration should be recorded in the Miscellaneous Lien Book as provided by § 17-61, hereinabove quoted.

RECORDATION—Liens—Partial marginal release—Who may present affidavit to clerk.

CLERKS—Recording of Partial Marginal Release.

September 6, 1966

HONORABLE EDITH H. PAXTON, Clerk
Circuit Court, City of Staunton

This will acknowledge your letter of September 2, 1966, which reads as follows:

"In making partial releases pursuant to § 55-66.4 of the Code of Virginia, as amended, it would appear that the marginal release of any one or more of the separate pieces of property covered by the lien or any part of the real estate covered by such lien may be accomplished by having the marginal release signed by the creditor or his duly authorized agent, attorney or attorney in fact. The question that arises in making the affidavit provided for in the 1966 amendment is—Should some significance be attached to the fact that in providing for making the affidavit it appears that only the creditor, or his duly authorized agent shall make the affidavit? It would appear that no provision has been made for an attorney or attorney in fact to make the affidavit.

"I would greatly appreciate the benefit of your opinion as to whether or not the attorney for the creditor or his attorney in fact may make a partial release under § 55-66.4 of the Code of Virginia as amended and make the affidavit as provided for therein. Also, since the amendment provides that the affidavit shall be made to the clerk, is it necessary to have a written affidavit to be filed in the clerk's office? We have been taking an oral affidavit and using a stamp on the margin of the deed book showing it was subscribed and sworn to before the clerk or deputy clerk."

Section 55-66.3 of the Code, relating to a marginal release of all the property secured by deed of trust or other lien, provides that in lieu of producing before the clerk the bond or other evidence of debt secured by the lien an affidavit shall be filed "by the creditor, or his duly authorized agent, attorney or attorney in fact, with such clerk, to the effect that the debt therein secured and intended to be released or discharged has been paid to such creditor, his agent, attorney or attorney in fact, who was, when the debt was so satisfied, entitled and authorized to receive the same, and that such note, bond or other evidence of the debt secured by the lien has been cancelled and delivered to the person by whom it was paid or has been lost or destroyed and cannot be produced as herein required. . . ."

Section 55-66.4 provides as follows:

"It shall be lawful for any such lienor to make a marginal release of any one or more of the separate pieces or parcels of property covered by such lien. It shall also be lawful for any such lienor to make a marginal release of any part of the real estate
covered by such lien if a plat of such part or a deed of such part is recorded in the clerk's office and a cross-reference is made in the release to the book and page where the plat or deed of such part is recorded. Such partial release or satisfaction may be accomplished in manner and form hereinbefore in this chapter provided for making marginal releases, except that the creditor, or his duly authorized agent, shall make an affidavit to the clerk that such creditor is at the time of making such release the legal holder of the obligation, note, bond or other evidence of debt, secured by such lien, and when made in conformity therewith and as provided herein such partial satisfaction or release shall be as valid and binding as a proper release deed duly executed for the same purpose."

This portion of § 55-66.4 formerly read as follows:

"It shall be lawful for any such lienor, upon the payment to him of a satisfactory part of the debt secured by the lien, to make a marginal release of any one or more of the separate pieces or parcels of property covered by such lien, where the instrument creating the lien includes two or more separate and sufficiently described pieces or parcels, which partial release, or satisfaction, may be accomplished in manner and form hereinbefore in this section provided for making marginal releases, and when made in conformity therewith, such partial satisfaction or release shall be as valid and binding as a proper release deed duly executed for the same purpose." (§ 6456, Code of 1942, second paragraph.)

The section was later amended so as to provide for the filing of the affidavit by the creditor or his duly authorized agent and omits the phrase "attorney or attorney in fact" as the same appears in § 55-66.3 and also in § 6456 of the Code of 1942. It would appear, therefore, that the General Assembly has authorized a partial marginal release in the manner provided for making marginal releases in § 55-66.3, subject to the exception contained in § 55-66.4. Therefore, in my opinion, the attorney for the creditor would not have authority under this section to make the affidavit, unless the attorney presents to the clerk an instrument showing that he is an agent of the creditor duly authorized to make the affidavit.

I feel that an attorney in fact could make the affidavit provided the instrument in which he was appointed attorney in fact specifically authorizes him as agent of the creditor to make such affidavit.

Section 55-66.3 requires the affidavit to be filed with the clerk and in my opinion the phrase "shall make an affidavit to the clerk" should be construed to mean that the affidavit should be filed with the clerk.

REDISTRICTING—Changes in Magisterial Districts—When commissioners' report to be filed.

BOARDS OF SUPERVISORS—Redistricting of County—Selection of member—How accomplished.

HONORABLE H. P. SCOTT, Clerk
Circuit Court of Bedford County

June 5, 1967

I am in receipt of your letter of May 17, 1967, in which you state that the redistricting commissioners appointed by the Circuit Court of Bedford County pursuant to § 15.1-577 of the Virginia Code are now in process of
Rearranging the magisterial districts of the county and are expected to file their report in the near future. In this connection, you present certain inquiries which are stated and answered seriatim.

"1. In view of the provisions of Section 15.1-579 of the Code of Virginia, can the effective date of the report be delayed until January 1, 1968, even though filed with the Clerk at an earlier date?"

Answer: No. Section 15.1-578 of the Code provides that the commissioners shall (1) make a written report within ten days after laying off the new magisterial districts and completing their surveys and (2) file such report, together with the map or diagram prescribed in § 15.1-577, in the clerk’s office of the court by which such commissioners were appointed. Section 15.1-579 of the Code then provides:

"The clerk of such court shall record the report and diagram in his deed book and shall furnish the Secretary of the Commonwealth an attested copy thereof. The magisterial districts so designated and laid off, whether by the court or the commissioners, shall thereafter be the magisterial districts of such county." (Italics supplied.)

From the language of the statute italicized above, it appears that upon the furnishing to the Secretary of the Commonwealth of an attested copy of the commissioners’ report and diagram as recorded by the clerk in his deed book, the magisterial districts specified in such report and diagram become the magisterial districts of the county. No provision is made in the applicable law for delaying or postponing the “effective date” of the report and diagram in question.

"2. If so, can candidates file for election in the November 1967 general election for the proposed new districts and be elected to the office of Supervisor for the proposed new district?"

Answer: In light of the response to your initial inquiry, no answer to your second question is necessary. However, I am of the opinion that candidates seeking election from the proposed new districts at the general election to be held in November, 1967, may file for such election in the new districts as established by the report and diagram recorded by the clerk and furnished to the Secretary of the Commonwealth pursuant to § 15.1-579 of the Virginia Code.

"3. If the report of the commission is not filed prior to July 21, 1967, the last date for a person to file as a candidate in the November 1967 general election under general law, is there any provision for a person to file as a candidate for the office of Supervisor in the new district for the term of office effective January 1, 1968?"

Answer: No. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated April 21, 1965, to the Honorable Andrew J. Ellis, Jr., Commonwealth’s Attorney of Hanover County, in which a similar question was considered and also answered in the negative. See, Report of the Attorney General (1964-1965), p. 286. As you will note, from the response to the third question stated and discussed in the enclosed opinion, there is no provision of Virginia law for holding a special election for the purpose of selecting a member of a board of supervisors.

"4. If not, what is the method of choosing a supervisor for the term becoming effective January 1, 1968?"

Answer: As indicated in the enclosed opinion, § 24-145 of the Virginia Code would be applicable to such a situation, and it would be incumbent
upon the circuit court to appoint a supervisor for any new district for which no supervisor has been elected.

"5. If the report is filed prior to the July primary, what effect does this have on persons who have already filed as candidates in the primary for district offices, including the county democratic committee, for one of the districts as they now exist?"

Answer: I am of the opinion that any person who has already filed as a candidate for nomination for a district office in the impending July primary may run in such primary as a candidate for nomination for office in the new district in which he resides. If, within the time prescribed by law, a prospective candidate for nomination for a district office had taken the proper steps to qualify as a candidate for nomination from the district as it was then constituted, I am of the opinion that he may run for office from the new district in which he resides at the time the primary is held. In this connection, § 4 of the General Provisions of the Democratic Party Plans declares:

"Any declaration of candidacy which substantially complies with the form provided in the State Primary Laws shall be sufficient for all Democratic Primary elections. Delivery of properly signed and attested declarations of candidacy and obligations (and also petitions properly executed, where required by law) to the county or city committee chairman in person within the time prescribed by law shall be a valid filing regardless of the person by whom or the method by which such delivery is accomplished. All such candidacy documents shall be open to inspection and challenge by any candidate or member of the respective county or city committee."

See, Democratic Party Plans, as amended, p. 15. The view expressed above would also apply to candidates for election to the County Democratic Committee.

"6. If the report cannot be made effective on January 1, 1968, but only on the date of filing and recording in 1967, if two or more supervisors on the existing Board fall in the same district, what is the method of choosing among the supervisors for the new district?"

Answer: The supervisors on the existing board will continue to hold office until the expiration of the term for which they were elected. In this connection, I call your attention to the first question presented in the enclosed opinion in which a similar situation was considered and a view expressed consistent with that stated in this instance. I am also forwarding to you a copy of a separate opinion, dated January 16, 1952, to the Honorable Edwin Lynch, Member of the House of Delegates, in which an analogous situation was discussed and the position taken that the tenure of existing members of a board of supervisors could not be shortened by a proposed redistricting of a county's magisterial districts. See, Report of the Attorney General (1951-1952), p. 24.

"7. If the report can be made effective January 1, 1968, what election precincts would be used in the November 1967 election, the precincts as they now exist or new precincts to be established in the proposed new districts?"

Answer: Even though the "effective date" of the report and diagram of the commissioners cannot be delayed or postponed until January 1, 1968 (see, answer to your initial question), I am of the opinion that the election districts and precincts therein as established in the new magisterial districts would be the election districts and precincts to be used in the general
election to be held in November, 1967. In this connection, I call your attention to the concluding question set forth in the enclosed opinion of April 21, 1965, for a thorough discussion of the procedure to be employed to establish election precincts within the new election districts and to adjust the registration books to reflect the changes occasioned by the redistricting in question. See, Report of the Attorney General (1964-1965), supra, at 287.

REDISTRICTING—Effect Upon Board of Supervisors.

BOARDS OF SUPERVISORS—Redistricting of County—Effect on members.

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

June 7, 1967

I am in receipt of your letter of May 24, 1967, in which you present the following situation and inquiry:

"There has been some conversation in Prince Edward County as to the redistricting of the county under the provisions of Section 15.1-571, et seq. "Section 15.1-576 provides that the court in such a proceeding may declare a vacancy in any office and provide for the filling of the same whether created by its own order or by the act of commissioners hereinafter mentioned. Reading this section, in light of Section 112 of the Constitution and in light of opinion of the Honorable J. Lindsay Almond, Jr., in report of Attorney General, 1951-52, page 24, I am concerned as to the effect that such redistricting if the same occurs after November of 1967 might prevent the redistricted board of supervisors from being elected for a period of four years."

In the opinion to which you refer, this office ruled that a member of a board of supervisors was a constitutional officer elected by the people for a term fixed by the Virginia Constitution, that it was beyond the power of the General Assembly to deprive such an officer of his office either directly or indirectly, and that a statute having the effect of shortening the tenure of a member of the board of supervisors as fixed by the Virginia Constitution would be invalid. See, Constitution of Virginia, Sections 111, 112; Report of the Attorney General (1951-1952), p. 24.

If a rearrangement of the magisterial districts of Prince Edward County takes place after November, 1967, it would appear from the above-mentioned opinion that members of the board of supervisors of Prince Edward County elected at the general election to be held in November, 1967, would enter upon the duties of their offices on January 1, 1968, and hold their offices for a term of four years as prescribed in Section 112 of the Virginia Constitution. Under the same circumstances, it would also appear from the above-mentioned opinion that the provisions of § 15.1-576 of the Virginia Code authorizing the court to "declare a vacancy in any office and provide for filling the same" would be limited in its application to non-constitutional offices, i.e., those legislative offices created or authorized by statute which the General Assembly of Virginia may alter or abolish at will. See, Foster v. Jones, 79 Va. 643; Lipscomb v. Nuckols, 161 Va. 963.
REGISTRAR—Application for Registration—Adjudged insane—Registrant has burden of proving sanity.

ELECTIONS—Registration—Adjudged insane—Registrant has burden of proving sanity.

December 13, 1966

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

This will acknowledge your letter of December 6, 1966, which reads as follows:

"For my benefit and that of our County Registrar, I would appreciate your opinion as to whether a party duly committed to a Virginia State Hospital in 1944 as mentally ill and given a discharge therefrom in 1962 as 'improved' is qualified to be registered as a voter in this county where she has resided ever since her release. She has never been discharged as 'recovered.'

"Therefore, it is my opinion that she would not be entitled to registration as a voter until and unless she has received a discharge certifying that she has now recovered her sanity.

"For your information I enclose herewith a copy of my letter to the Superintendent of the State Hospital of November 8th, and his reply thereto."

The information contained in the letter to you from Central State Hospital discloses that this person was committed to that hospital on a regular mentally ill commitment. She was released as "improved" but has never been found by the hospital to be "recovered" or "restored." Therefore, insofar as the hospital record discloses, she has not been restored to sanity.

In my opinion, any person who has been committed as an insane person to a State hospital for the insane or mentally ill and has not been released by the hospital by reason of having been restored to sanity, when applying for registration for the purpose of voting, must bear the burden of producing proof that he or she is no longer insane.

SCHOOLS—Bus Driver—Age must be 16 to 65, inclusive.

August 10, 1966

HONORABLE OLIVER D. RUDY
Commonwealth’s Attorney for Chesterfield County

This will acknowledge receipt of your letter of August 9, 1966, which reads as follows:

"I would appreciate it greatly if you would construe § 22-276.1 of the Code of Virginia relating to the requirements of a person employed to drive a school bus, with specific reference to subsection (e) of that section which states that the person proposed to so operate a school bus shall: '(e) Be between the ages of sixteen and sixty-five years, both inclusive, at the time of signing such contract.'"
"Would a person who reached his 65th birthday in April of 1966 be eligible to sign a contract to drive a school bus for the school year of 1966-67?

"I am aware of your opinion dated July 12, 1962 to the Honorable E. R. Hubbard, Justice of the Peace for Wise County, but I do not think that the section in question was interpreted in that opinion."

Section 22-276.1 of the Code provides, in part, as follows:

"No school board or superintendent of schools of any county or city shall hire, employ, or enter into any agreement with any person for the purposes of operating a school bus transporting pupils after July first, nineteen hundred sixty-two, unless the person proposed to so operate such school bus shall:

* * *

"(e) Be between the ages of sixteen and sixty-five years, both inclusive, at the time of signing such contract."

In my opinion, your question must be answered in the affirmative. Paragraph (e) means that persons who have reached the age of sixteen and have not passed the age of sixty-five qualify thereunder.

In the case of *State v. Liberman*, 229 N.W. 363, the following language in an information was construed:

"... that between the 24th day of August, 1928, and the 30th day of August, 1928, inclusive, ... one Alex Liberman ... did then and there wilfully and unlawfully keep intoxicating liquor for sale. . . ."

On the trial of the case the court permitted testimony regarding transactions had on the 24th day of August. The accused claimed this was error because August 24th should not be included. The Supreme Court sustained the lower court and commented as follows:

"... Ordinarily the word 'between' excludes the termini. *Weir v. Thomas*, 44 Neb. 507, 62 N.W. 871, 48 Am. St. Rep. 741. There are times however when the word includes both dates. *McGinley v. Laycock*, 94 Wis. 205, 68 N.W. 871, 872. It depends largely upon the plain meaning and sense. As said in *Kendall v. Kingsley et al.*, 120 Mass. 94, 95, construing an assignment of rents, 'the preposition "until," like "from," or "between," generally excludes the date to which it relates' yet 'general rules of construction must yield to the intention of the parties, apparent upon the face of the whole instrument.' In the case at bar we must consider the word 'inclusive' in construing 'between,' for it is said it was between these dates 'inclusive.' Webster says 'inclusive' means: 'Comprehending the stated limit or extremes, as from Monday to Friday inclusive, that is taking in both Monday and Friday *** opposed to exclusive.' The Standard Dictionary says: 'including the things, times, places, limits, or extremes mentioned.' Had the information said 'from August 24 to August 30, inclusive,' both extremes would be included. Using the word 'between' instead of 'from,' makes no difference. It was not necessary to say 'both inclusive' to include both limits. It adds nothing to the meaning."

* * *

"... The information says: 'Between the 24th day of August and the 30th day of August inclusive,' which, under ordinary con-
The provision under consideration, in my opinion, means that persons between the ages of 16 and 65 years, including persons of those ages, are eligible for employment as school bus drivers.

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SCHOOLS—Construction Financed From Literary Fund—Accept lowest or reject all bids and ask for new bids.

LITERARY FUND—School Construction—Accept lowest or reject all bids and ask for new bids.

SCHOOLS—Construction—Board may negotiate without advertising for bids if no State funds involved.

December 14, 1966

HONORABLE HUBERT W. MONGER
Superintendent of Louisa County Public Schools

This will acknowledge your letter of December 13, 1966, which reads as follows:

"The School Board of Louisa County has received the following bids on the proposed addition at one of the elementary schools. Plans are for part of the cost to be financed by State Literary Fund money.

1. $155,950.00
2. 156,867.00
3. 157,010.00
4. 166,250.00
5. 174,990.00
6. 176,440.00

'It has asked that I secure your opinion on the following:

1. May the contract be let to anyone other than the lowest bidder as is?

2. If the answer is no, may the Board reject all bids and award the contract to anyone other than the lowest bidder without any change in bids?

3. If the answer to 1 & 2 is no, is the Board permitted to award the contract to one other than the lowest bidder who submits a lower bid than any of the others following the rejection of all bids and without the Board advertising for new bids and without any change in specifications?

4. If the answer to 1, 2 & 3 is no, may the Board reject all bids, change specifications, secure a lower bid than all original bids and award the contract without advertising again for bids?

5. May the Board reject all bids and advertise again for bids without any change in specifications?

6. In the event that you did not use state literary funds, could the Board award the contract to someone other than the lowest bidder?"
I enclose herewith copies of prior opinions of this office which relate to this matter:

- Opinion to H. Prince Burnett dated July 18, 1951 Report (1951-52), at p. 137
- Opinion to Dr. Davis Y. Paschal dated March 8, 1960 Report (1959-60), at p. 299

Sections 22-166.8 and 22-166.12 of the Code specifically require competitive bidding in connection with construction of a school by a local school board when the State funds are used in connection with the project. "State-aid project" is defined in § 22-166.8(b) of the Code, as follows:

"'State-aid project' means the construction of any building for school purposes or substantial addition to such a building for which State funds, either by appropriation, grant-in-aid or loan, are used or to be used for all or part of the cost of construction."

Therefore, if any portion of the State Literary Fund money is used in the construction of the building, the answers to questions (1), (2) and (3) are in the negative.

Question (4), under the same circumstances, is also answered in the negative because it will be necessary to advertise for bids under the provisions of Chapter 4, Title 11 of the Code of Virginia which apply when State funds are used in construction of the building.

The answer to question (5) is in the affirmative.

With respect to question (6), it will be noted from the opinions which we are enclosing that if no State funds are involved, such as grants or loans from the Literary Fund or the Supplemental Retirement System funds, the school board may negotiate a contract without asking for bids. However, in such cases, if the school board has requested bids, and it concludes that it is not in the best interest of the school board to award the contract to the lowest bidder, I doubt the propriety of awarding the contract to one of the higher bidders. Of course, the school board may reject all bids and negotiate with any contractor for the building of the property without advertising.

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SCHOOLS—Division Superintendent—Not restricted as to residence.

Honorable Hubert W. Monger
Superintendent, Louisa County Public Schools

I have your letter of June 10, 1967, which is as follows:

"If a local school board would permit, is there anything legal which would prohibit a superintendent living in a division other than the one in which he serves as superintendent. I am thinking only of those serving one division."
I know of no statute or regulation of the State Board of Education with regard to the residence of the Division Superintendent.

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SCHOOLS—School Boards—Authority to select site for vocational-technical school.

SCHOOLS—Vocational-Technical—Location selected by school board.

March 1, 1967

HONORABLE JAMES B. FUGATE
Member, House of Delegates

This will acknowledge receipt of your letter of February 28, 1967, which reads as follows:

"The State has recently made available to Scott County monies for vocational-technical school approved in February 1966 by the Board of Supervisors and the School Board. Plans are in the process of completion with 80% from Federal funds and 20% from Local funds. Now the question has been raised in regard to the choice of the site at Gate City adjacent to the Gate City High School. There is some contention now by a few members of the Board of Supervisors that the prerogative rests with the Board of Supervisors in the choice of site. In accordance with § 22-72 of Code of Virginia and Report of Attorney General 1960-61 p. 260 under this section which states 'it is the prerogative of the School Board to select the site upon which a school facility shall be erected. . . .', the school board has proceeded to select the site for the said vocational-technical school.

"The School Board had to accept the State offer of funds when offered or lose it. The School Board accepted it. Now the Board of Supervisors is seeking to cancel out the school board's plans. The next emergency meeting will be held on Tuesday, March 7th. Please will you rule in this case of emergency and let us hear, if possible, by the next mail? With whom does the choice of site of a proposed school to be erected rest?"

The question as to whether or not a school board or a board of supervisors has the authority to select the site depends upon whether or not the proposed vocational-technical school will be under the management and supervision of the county school board. We conferred with Dr. Woodrow W. Wilkerson, State Superintendent of Public Instruction, and he has advised us that this type of school becomes a part of the local school program and is under the supervision and direction of the local school board.

Under those circumstances, it is my opinion that it is the prerogative of the school board to select the site upon which such a school facility will be located.
SCHOOLS—School Boards—Bonds—Not mandatory to request board of supervisors to issue.

BOARDS OF SUPERVISORS—School Bonds—May not issue unless requested by school board.

October 13, 1966

HONORABLE GEORGE S. CUMMINS
Commonwealth’s Attorney for Nottoway County

This will acknowledge your letter of October 11, 1966, which reads as follows:

“The Board of Supervisors of Nottoway County has been requested by the Nottoway County School Board to petition the Circuit Court to order a referendum election to determine whether or not the voters wish to have the County School Board borrow $1,600,000.00 for proposed school construction. Appropriate steps are being taken to hold such election sometime during the next few weeks.

“The Board of Supervisors wishes to know if it is mandatory for it or the School Board to actually issue bonds or even further consider the proposed building program, assuming that the voters vote in favor of the program and a bond issue. In other words, would the decision of the voters create an obligation upon the Board of Supervisors or the School Board or would the opinion of the voters be merely persuasive in nature.”

Section 15.1-189 of the Code provides that if a bond issue has been approved under § 15.1-188 the board of supervisors may not issue and sell any bonds for school purposes unless the school board has by resolution requested the board of supervisors to authorize the issuance of such bonds.

In my opinion, the local school board may exercise its discretion and there is no mandatory duty upon the school board to request that the bonds be issued. This is in accordance with an opinion of this office dated August 24, 1960, to Honorable T. B. P. Davis, Commonwealth’s Attorney for Greene County, Report of the Attorney General (1960-1961), at p. 273.

SCHOOLS—School Boards—Contract bids rejected—Ten days’ notice for rebids—One bid sufficient.

January 4, 1967

HONORABLE HUBERT W. MONGER
Superintendent of Louisa County Public Schools

This will acknowledge your letter of January 2, 1967, which reads as follows:

“Just two final questions in reference to contracting:

1. After rejecting all bids and advertising the second time in the hope of getting lower bids, is there a minimum length of time which must elapse between the day the ad is run and the date of terminating and opening?

2. In the event you should receive but one bid the second time after giving all a chance to bid again, may a contract be awarded to that one bidder?”
"I should hope that the information provided to these and previous questions will be ample for our Board to reach a decision on the contractor."

I shall answer your questions in the order presented.

(1) Section 11-21 of the Code provides as follows:

"The State is authorized to reject any and all bids made under this chapter. In the event that all bids are rejected, advertisement for new bids shall be made as in the first instance."

Under this section, the bids must be advertised for the length of time required under § 11-17 of the Code. That section requires that the advertisement for bids must be made at least ten days prior to the letting of any contract. This is construed to require the advertisement to run at least ten days prior to opening the bids.

(2) This question is answered in the affirmative. There is nothing in the statute which requires that more than one bid be submitted.

SCHOOLS—School Boards—Contracts—May not contract with member of real estate board of assessors.

PUBLIC OFFICERS—Compatibility—Member of real estate board of assessors may not contract with school board.

April 17, 1967

HONORABLE JAMES W. EAVEY
Division Superintendent, Isle of Wight County Schools

I have your letter of April 14, 1967, in which you advise that the owner and operator of a motor company in your County was recently appointed to serve on the Real Estate Board of Assessors for the County for the year 1967. You further advise that a question has been raised as to the legality of purchasing vehicles, bus chassis and parts from the said motor company.

Sections 58-787, 58-788 and 58-789 of the Code of Virginia provide how assessors of real estate shall be appointed, their qualifications and compensation. It is clear that it is contemplated that the assessors so appointed will be paid by the county in which they serve.

Section 15.1-67 of the Code provides, in part,

"No . . . paid officer of the county shall become interested, directly or indirectly, in any contract, or in any profits of any contract, made by or with . . . the county school board . . . ."

It would appear, therefore, to be clear to me that the transactions referred to in your letter would be prohibited under this section of the Code.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—School Boards—County medical examiner may not be member.

PUBLIC OFFICERS—County Medical Examiner—May not be member of school board.

HONORABLE E. GARNETT MERCER, JR.
Commonwealth's Attorney for Lancaster County

October 13, 1966

This will acknowledge receipt of your letter of October 11, 1966, which reads as follows:

"Recently, we had a resident physician in the County of Lancaster appointed and he has duly qualified as a member of the School Board of Lancaster County.

"This physician has just been appointed pursuant to § 19.1-40 of the Code of Virginia of 1950 by the Chief Medical Examiner as Medical Examiner for the County of Lancaster for the term of three years beginning October 1, 1966.

"The question has arisen as to whether or not this physician can properly qualify and occupy both the office of School Board member and the office of Medical Examiner for the County of Lancaster.

"Accordingly, it would be very much appreciated if your office would furnish me with an opinion in connection with the foregoing."

In my opinion, under the provisions of § 22-69 of the Code a medical examiner for a county, appointed under the provisions of § 19.1-40, is prohibited from serving as a member of the school board. This section disqualifies a State officer, or any deputy of such officer, from holding this school position.

In our opinion, a person appointed as medical examiner under § 19.1-40 is either a State officer or a deputy of such officer.

SCHOOLS—School Boards—Dentist member may provide dental services for Head Start Program.

HONORABLE F. W. KLING, JR.
Superintendent of Public Schools, City of Buena Vista

June 5, 1967

I have your letter of June 2, 1967, which reads as follows:

"One of the members of the Buena Vista School Board is a dentist who has been requested by the Director of our Summer Head Start Program to provide dental services for a number of our Head Start children. These children are all of pre-school age, but will be enrolled in school next fall. The Head Start Program is financed entirely by the Office of Economic Opportunity, with the local School Board's share being paid only in kind. Let me add that we are short of dentists here, and really need this man's services, although I realize that this has no bearing on the case.

"Do you find any conflict of interest here, or any violation of § 22-213 of the Code of Virginia, assuming that the dentist accepts this assignment?"
As this dentist is selected by the Director of the Summer Head Start Program and not by the School Board, and, as all of the money for the payment of the services rendered will be made from Federal funds, I see no violation of § 22-213 of the Code of Virginia nor of any conflict of interest.

SCHOOLS—School Boards—Employment and payment of attorneys to examine title to real estate.

March 29, 1967

HONORABLE ROBERT E. BROWN
Commonwealth's Attorney for King George County

I have your letter of March 28, 1967, with reference to § 22-110 of the Code of Virginia.

Briefly, this section requires that where a loan is obtained from the Literary Fund, the title to the real estate involved "shall be examined and approved by the Commonwealth's Attorney of the county . . . or by other competent attorney."

Such attorney referred to in the next sentence means either the Commonwealth's Attorney or other competent attorney employed by the school board to examine the title to the real estate; and said section provides that such attorney shall be entitled to the "usual compensation for examining the title."

I do not believe that the State Bar Minimum Fee Schedule has to be followed in performance of work for the Commonwealth, its political subdivisions, or school boards, but that such attorney would be entitled to a reasonable fee for services rendered. This would apply also to such other legal work as such attorney may do for the school board of the county.

SCHOOLS—School Boards—How selected.

June 5, 1967

HONORABLE GRADY W. DALTON
Member, House of Delegates

I have your letter of June 1, 1967, in which you ask the following questions, which will be answered seriatim:

"1. Does any county or city governing body in Virginia elect school boards by popular vote? If so, please name them."

Answer: I know of no county or city in which the school board is elected by popular vote.

"2. Has any county or city been given the legal right by state legislation to have their school boards appointed by the Board of Supervisors?"

Answer: In Albemarle, Arlington, Fairfax and Henrico Counties the school boards are appointed by the boards of supervisors of the respective counties. In the cities, the school boards are selected by the governing body, which is the city council.

"3. What about the constitutionality of legislation that would remove the right of the school electoral board to appoint school board members?"
Answer: I know of no constitutional question involved. Section 133 of the Virginia Constitution provides that the school boards are composed of trustees "to be selected in the manner, for the term and to the number provided by law." Section 22-60 of the Code of Virginia provides for the trustee electoral boards who shall appoint the school board members, but the legislature may change and has changed this in some instances and provided other methods for selection of the school boards.

SCHOOLS—School Boards—Loans from Literary Fund.

February 3, 1967

HONORABLE WILLIAM R. BLANDFORD
Commonwealth's Attorney for Powhatan County

This will acknowledge receipt of your letter of February 2, 1967, which reads as follows:

"Can the School Board of Powhatan County, without the consent of the Board of Supervisors of Powhatan County, borrow money from the Literary Fund of the State under Title 22, Chapter 7, § 22-107?"

There is no statute requiring the board of supervisors to approve the application of a loan from the Literary Fund; however, the State Board of Education has adopted the policy of requiring the Board to pass a resolution approving the same and there is nothing in Chapter 7 of Title 22 of the Code which would deprive the State Board of Education from adopting and enforcing such a policy.

In this connection, I enclose copy of an opinion of this office dated April 2, 1952, to Dr. Dowell J. Howard, Report of the Attorney General (1951-1952), at p. 23.

SCHOOLS—School Boards—Loans negotiated with approval of board of supervisors.

September 6, 1966

HONORABLE R. WILLIAM ARTHUR
Acting Commonwealth's Attorney for Wythe County

This will acknowledge receipt of your letter of September 2, 1966, which reads as follows:

"We have been asked by the County School Board of Wythe County to obtain your opinion as to whether or not the School Board may make temporary loans at the first of each month for terms of approximately 15 days to obtain necessary operating money until each monthly payment under Title I, Elementary and Secondary Education Act of 1965, is received. Of course, the loans would be made pursuant to resolution of the Board of Supervisors.

"The Wythe County School Board participates in the federally financed program under Title I but the monthly payments are not received by the School Board until around the middle of each month. The School Board does not have funds of its own with which to pay the operating costs during such 15-day period and
thus temporary borrowing seems to be indicated. The necessary sum would be borrowed at the first of each month and would be paid off around the middle of the month when the Federal funds are received.

In my opinion, these temporary loans may be negotiated under the authority of § 22-120 of the Code. You will note that under this section no such loan shall be negotiated by the school board without the approval of the board of supervisors. This section states that the loans shall be repaid within not less than five years of their dates. This five-year provision is in violation of Section 115a of the Constitution and, therefore, the date of repayment is controlled by the provisions of § 15.1-546 of the Code. The provisions of § 22-120 of the Code must also be considered with § 15.1-545 which restricts the borrowing power of a county. Under this section, the board of supervisors cannot create a debt earlier than February 1 of any year, which, as provided in § 15.1-546 must be paid off not later than December 15 of the same year.

SCHOOLS—School Board—Loans to be authorized by board of supervisors.

HONORABLE WOODROW W. WILKERSON
Superintendent of Public Instruction

This will acknowledge receipt of your letter of September 21, 1966, in which you refer to our opinion dated September 6, 1966, to R. William Arthur, Acting Commonwealth's Attorney of Wythe County, with respect to temporary loans negotiated by school boards.

In the opinion to Mr. Arthur it was our conclusion that §§ 22-120 and 15.1-545 and 15.1-546 must be read together. The obligation authorized under § 22-120 is in fact an obligation of the county and cannot be negotiated without the consent of the board of supervisors.

With specific reference to the last paragraph of your letter, in my opinion the authority contained in § 22-120 is restricted by the provisions of § 15.1-545 and § 15.1-546.

SCHOOLS—School Boards—May admit and transport children residing beyond limits of the State but near thereto.

HONORABLE JAMES B. FUGATE
Member, House of Delegates

This will acknowledge receipt of your letter of February 25, 1967, in which you state that the parents of some school children who were attending a public school in Scott County have recently moved across the line into the State of Tennessee. You state that the parents of these children desire that they continue to attend the Scott County school; that in order for these children to have the benefit of school bus transportation on the school bus which goes within one-quarter mile of the new home of the parents, the School Board of Scott County wants to know whether or not it can permit the bus to extend the bus route, at local expense, the extra distance necessary to transport these children to the school. You refer to § 22-220 of the Code, which, in part, reads as follows:
“The school board of any county, city, or town operating as a separate school district, may, in its discretion, admit into its schools persons of the ages prescribed in §§ 22-218, 22-218.1 and 22-218.2 who are nonresidents of the State of Virginia, but who may be living temporarily with relatives or others within such county, city, or town operating as a separate school district and wish to attend public schools therein. The school board shall make regulations whereby such persons may attend school in such county, city or town, and shall charge tuition for the attendance of such persons in such schools. The school board of any county, city, or town operating as a separate school district bordering on another state or the District of Columbia which grants the same privileges to persons who are residents of the Commonwealth of Virginia may, in its discretion, admit into its schools, free of tuition, persons of the ages prescribed in §§ 22-218, 22-218.1 and 22-218.2 residing beyond the limits of this State, but near thereto.”

Under this provision, as you point out, the school board may admit these children to the school free of tuition, since it is stated that the State of Tennessee grants like privileges.

I find no provision in Chapter 13 of Title 22 of the Code relating to the transportation of pupils which would prohibit the school board from transporting these pupils in the manner suggested.

SCHOOLS—School Boards—May contract with independent contractor.

SCHOOLS—School Boards—May not contract with farm supply company operated by members.

SCHOOLS—School Trustee Electoral Board—Members—May not have interest in contracts.

March 20, 1967

HONORABLE JAMES W. EAVEY
Division Superintendent, Isle of Wight County Schools

I have your letter of March 10, 1967, asking three questions. I will answer them in the order mentioned.

(1) “The Board has had some dealings with a television firm located in the County whose owner is a brother to a member of the School Board. This firm engages in the selling and servicing of television sets, intercommunication systems, etc. Since he is the only firm in the County that has specialized knowledge, the Board would have to go outside the County at a considerable higher cost to obtain such services. This firm pays merchant license taxes for both the State, County of Isle of Wight, and Town of Smithfield. The Board has never entered into a written contract with him.”

I assume that the School Board member has no financial interest in the television firm owned by his brother. Section 22-213 does not prohibit contracting with an independent contractor where the independent contractor is a brother of the school board member. See Opinions of the Attorney General (1957-1958), page 237, as to a brother-in-law.

(2) “The County has been purchasing bottled gas from a member of the School Trustee Electoral Board, who is the manager of a firm which is incorporated.”
This office has held several times that § 22-213 includes members of the school trustee electoral board. See Opinions of the Attorney General (1951-1952), page 139; (1959-1960), page 306. However, the last sentence of § 22-213 provides:

"But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected and adopted by the State Board, or supplies used in the schools and by the pupils."

"Supplies used in the schools" would seem to be broad enough to cover bottled gas. If the sale is made by the merchant (the supplier of the natural gas) in the regular course of business without employing agents to solicit such business, the quoted portion of the section would cover the question asked by you.

(3) "The Board has made small purchases from a farm supply firm which is also a corporation. Two of the members of the Board of Directors of this Corporation are members of the Board of Supervisors of Isle of Wight County."

Section 15.1-67 prohibits supervisors from making contracts with the county school board. As two members of the board of directors of the farm supply company are also members of the Board of Supervisors, I am of the opinion that this section prohibits these purchases.

SCHOOLS—School Boards—May contribute additional funds to employees' retirement fund—Increase is income.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—School Boards—Additional contributions for employees—Increase is income.

January 4, 1967

HONORABLE OLIVER D. RUDY
Commonwealth's Attorney for Chesterfield County

This will acknowledge your letter of December 30, 1966, which reads as follows:

"For several years the Chesterfield County School Board has paid the employees' share of retirement benefits for the Superintendent and all other central office administrative personnel. This amounts to a highly desirable fringe benefit for these people.

"My question to you is in two parts: (1) Does the School Board have the authority to pay the employees' share of retirement; and if the answer to that question is in the affirmative, then (2) should the payment of this benefit be computed as income to the individuals receiving the benefit each time it is received?"

Section 51-111.46(a) of the Code requires each member to contribute for each pay period for which he receives compensation five and one-half per centum of his creditable compensation. Paragraph (b) of this section reads as follows:

"The Comptroller, in the case of all State employees paid by warrants on the State Treasurer, or, in the case of any other State employee, the department, institution or agency by which the salary..."
is paid, or the employer in the case of teachers and other employees shall cause to be deducted from the salary of each member for each and every payroll period subsequent to the date of establishment of the retirement system, the contribution payable by such member as provided in this chapter, but in no case shall any deduction be made from the compensation of a member after his normal retirement date if such member elects not to contribute.”

In my opinion, a school board must comply with the provisions of paragraph (b). However, if the school board wishes to increase the compensation of the employees out of the appropriations made to it for salaries, there is nothing to prevent that procedure, and, in such event, the increase in compensation will be income accruing to the employee.

The procedure being followed by the school board, if it is not in compliance with paragraph (b), should be discontinued. The payments under that procedure constitute income.

SCHOOLS—School Board—May employ special defense counsel.

October 26, 1966

Honorable John S. Hansen
Member, House of Delegates

This is in reply to your letter of October 25, 1966, which reads as follows:

"Attached is a letter I received from Mr. H. P. Armstrong, City Attorney, Colonial Heights. The City Attorney received a letter from Mr. Charles G. Smith, Jr., Superintendent of Schools, Colonial Heights Public Schools, requesting an opinion regarding the status of the legal counsel of the Colonial Heights School Board. The City Attorney gave his opinion and the Superintendent of Schools has now asked for the opinion of the Attorney General. Pertinent correspondence is included in the City Attorney's letter to me"

The letter from Mr. Armstrong, City Attorney of Colonial Heights, to you under date of October 20, 1966, requests that you obtain from the Attorney General an opinion on the following questions:

"1. Does the School Board at this moment have the services of the City Attorney on matters pertaining to the controversy between the City Council and the School Board?

2. If not, does the School Board have the right to legal counsel on this matter at this time or are they forced to be without legal counsel until some future time?

3. If the School Board is not able to have legal counsel at this time, when will the School Board be able to have legal counsel in this matter?

4. Does the action of council in adopting Resolution 66-23 and employing legal counsel for the purposes of investigation as above stated enable or authorize the School Board to employ other counsel pursuant to the provisions of § 22-56.1, of the Code, at this time to defend it, or any member thereof, with the costs and expenses being a charge against city funds?

5. In view of the action of council in adopting Resolution 66-23 and employing legal counsel for the purposes of investigation as
These questions will be answered in the order stated above:

(1) The answer to this question is in the negative. This conclusion is based upon the following statements contained in a letter dated October 14, 1966, from Mr. Armstrong to Mr. Charles G. Smith, Jr., Superintendent of Schools, Colonial Heights, which are as follows:

"The City Council, by Resolution No. 66-23, provided that upon employment of other legal counsel the City Attorney shall thereupon be relieved of any further responsibility in this matter, the same being at the request of the City Attorney for the reason that under the applicable provisions of the Colonial Heights City Charter he is charged with the duty of acting as legal representative and advisor to both the City Council and the City School Board."

"The School Board of the City of Colonial Heights, by Resolution adopted September 22, 1966, authorized the Superintendent of Schools to retain legal counsel for the School Board to take whatever action he deemed necessary to protect the interest of the School Board and individual members of the School Board and advise the School Board in all other matters which may now or later require assistance."

"On October 14, 1966, at approximately 1:30 P.M., pursuant to the aforesaid resolution of the City Council, legal counsel was retained."

(2) In light of my answer to question No. 1, no answer is required to question No. 2.

(3) In my opinion, the school board is vested with authority to employ legal counsel to represent it in matters pertaining to the controversy between the city council and the school board. Furthermore, in my opinion, the school board, out of funds appropriated to it by the city council for the administration of the school system, is authorized to pay legal fees incurred by reason of having employed special counsel. In this connection, your attention is directed to § 22-56.1 of the Code of Virginia, and Section 6.16 of the City Charter of Colonial Heights (Chapter 213, Acts of Assembly, 1960). These sections read as follows:

"§ 22-56.1.—Notwithstanding any other provision of law, the attorney for the Commonwealth or other counsel approved by the school board may be employed by the school board of any county, city or town, to defend it, or any member thereof, or any school official, in any legal proceeding, to which the school board, or any member thereof, or any school official, may be a defendant, when such proceeding is instituted against it, or against any member thereof by virtue of his actions in connection with his duties as such member.

"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."

"§ 6.16.—It shall be the duty of the school board to file its budget estimates with the city manager. The action of the council on the school budget shall relate to its total only and the school board..."
shall have authority to expend in its discretion the sum appropriated for its use, provided that if it receives an appropriation greater or less than its original request it shall forthwith revise its estimates of expenditure and adopt appropriations in accordance therewith. The school board shall have power to order during the course of the fiscal year transfers from one item of appropriation to another."

(4) The answer to this question is in the affirmative.

(5) The answer to this question is in the affirmative.

SCHOOLS—School Boards—May employ wife of brother-in-law of school board member.

October 31, 1966

HONORABLE E. ARMSTRONG SMITH
Division Superintendent,
Cumberland County Public Schools

This will acknowledge receipt of your letter of October 27, 1966, which reads as follows:

"My Board is very anxious to know your interpretation of the following question in the light of § 22-206 of Virginia School Laws:

"May the School Board appoint as teacher the wife of a brother of the wife of a member of the Board?"

Section 22-206 of the Code provides that it shall be unlawful to employ any teacher who is, among other things, "the daughter-in-law, brother-in-law, or sister-in-law of the superintendent, or any member of the school board." In this case the brother of the wife of the member of the school board would be a brother-in-law of such school board member. However, the wife of a brother-in-law would not be a sister-in-law of the member of the school board. "Sister-in-law" is defined in Webster's Dictionary as "the sister of one's husband or wife; also the wife of one's brother."

Therefore, in my opinion, the employment as a teacher in the public schools of the wife of a brother-in-law of a school board member would not be in violation of § 22-206 of the Code.

SCHOOLS—School Boards—May not lease real estate owned by board.

November 28, 1966

HONORABLE ROBERT L. POWELL
Commonwealth's Attorney for Giles County

This will acknowledge your letter of November 26, 1966, which reads as follows:

"Our Board of Supervisors has directed me to write to you for an opinion as to whether the Giles County School Board may legally lease real estate owned by the School Board."
"Section 22-161 of the Code gives the School Board the same power to sell or exchange and convey real estate as the governing body of the county has under § 15-692, (now § 15.1-262), and I would appreciate having your opinion as to whether that statute or any other statute gives the School Board authority to enter into a lease of its real estate, which is not presently being used for school purposes."

I enclose copy of an opinion of this office to Mr. William O. Fife, Commonwealth's Attorney for Albemarle County, which is dated December 29, 1947, Report of the Attorney General (1947-1948), at p. 154. In this opinion, Attorney General Apperson held that there was no authority under the statute for the school board to lease real estate owned by the school board.

It appears that there have been no changes made in the statute which would cause us to reverse or modify the opinion of Attorney General Apperson. Therefore, the answer to the question presented by you is in the negative.

SCHOOLS—School Boards—May not provide for referendum on school system to be used.

February 16, 1967

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

This is in reply to your letter of February 15, 1967, which reads, in part, as follows:

"In Bedford County question has arisen as to whether or not the School Board should depart from the presently used system of designating by geographic locations schools to be attended by pupils of the county and return to the system of freedom of choice, which at one time was used in Bedford County. There is great pressure on the Board from proponents of each system.

"I shall appreciate an expression of your opinion as to whether or not it is legal for this matter to be submitted to the voters of the county by a special referendum and whether or not the Board of Supervisors has the legal authority to pay the expenses of such a referendum from public funds."

You referred to an opinion of this office dated June 20, 1950, to the Honorable Robert C. Goad, Commonwealth's Attorney of Nelson County, Report of the Attorney General (1949-1950), at p. 12. You request my advice as to whether or not this opinion is still valid.

There have been no laws passed since that opinion was written which would justify any change. I know of no statute which would give the board of supervisors or the school board any authority to provide for such a referendum. The position taken in the opinion to Mr. Goad is affirmed at this time.
SCHOOLS—School Boards—Member representing magisterial district may be resident of town embraced therein.  

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

This will acknowledge receipt of your letter of March 2, 1967, which reads as follows:

"On the 22nd day of this month Judge Hoback entered an Order redistricting Roanoke County into five Magisterial Districts instead of four. In order to make the population approximately the same in each district, it was necessary that the Town of Salem be placed partly in Salem Magisterial District and partly in the new Richfield Magisterial District. We now, therefore, have five Magisterial Districts and two Towns. For years there has been a member of the Roanoke County School Board from each Magisterial District and from each Town.

"The question has now arisen that can a member of the Roanoke County School Board representing a Magisterial District be a resident of that portion of the Town embraced with a Magisterial District?"

In my opinion, there is no statute which would prohibit a member of a county school board who represents a magisterial district embracing a portion of a town from being a resident of that area of the town included in the magisterial district, even though the town is represented on the school board by a resident of the town.

SCHOOLS—School Board—Membership from magisterial districts and from town.  

HONORABLE TOM FROST  
Member, House of Delegates  

This will acknowledge receipt of your letter of October 12, 1966, in which you enclosed a letter to you from Mr. J. J. Foster, dated October 10, 1966, in which he states that the county of Warren has been redistricted so as to be composed of five magisterial districts and that each district contains a part of the town of Front Royal. Mr. Foster states that the membership of the county school board has been increased to six members—one from each magisterial district, and one from the town of Front Royal. Mr. Foster also states that in his opinion the six-member school board is not legal because five members—one from each magisterial district—gives the legal representation for the entire county as defined in Code of Virginia, Title 22, Chapter 5.

Under Section 133 of the Constitution, each magisterial district constitutes a separate school district. Under § 22-42 of the Code, each magisterial district shall, except where otherwise provided by law, constitute a separate school district for the purpose of representation. Section 22-43 of the Code makes provision whereby a town having a population in excess of 3500 may, by ordinance, subject to the approval of the State Board of Education, be constituted a separate school district, either for the purpose of representation on the county school board, or for the purpose of being operated as a separate school district. I am advised by the State Board of Education...
that the town of Front Royal adopted an ordinance establishing the town as a separate school district for the purpose of representation on the county school board.

Therefore, in light of the above facts, as I understand them, the school board shall consist of six members—one member from each magisterial district and one member representing the town.

SCHOOLS—School Boards—Member's son may teach in school for migrants financed wholly by Federal funds.

February 2, 1967
Honorable Philip B. Tankard
Division Superintendent of Accomack County Schools

This will acknowledge receipt of your letter of January 31, 1967, which reads, in part, as follows:

"I would like your opinion about the legality of employing the son of one of our school board members.

"The young man has applied for a teaching position in a program for migrants to be operated in buildings owned by the Accomack County School Board this summer.

"The program will be financed entirely by federal funds, and the young man will not be under any contractual arrangement to the Accomack County School Board although the selection of personnel to staff the migrant program will be made by the Accomack County School Board."

In my opinion, the employment of a son of a member of the county school board under the circumstances set forth in your letter would not result in violation of the provisions of § 22-206 of the Code of Virginia. Statutes of this nature are subject to strict interpretation. The term "public funds" as used in this section of the Code relates to funds appropriated to the school board by the governing body.

The situation presented is similar to those discussed in the following opinions of this office, to which you are referred:


SCHOOLS—School Boards—No authority to use public school buses for college students.

July 29, 1966
Miss Eliza W. Christian, Clerk
School Board of Augusta County

This will acknowledge receipt of your letter of July 20, 1966, which reads as follows:

"At the last meeting of the Augusta County School Board the question of the transporting of students enrolled in the Blue Ridge Community College—South Campus was raised, and it was the
feeling of the members of the Board that they should obtain a ruling from your office. To that end, they have instructed me to write this letter.

"In the past, this facility has been operated as the Valley Vocational-Technical School, as a part of the Augusta County Public Schools. Beginning July 1, 1966, this facility will be governed by the Community College Board. All salaries of post-high school instructors will be paid by the Augusta County School Board but will be reimbursed 100% by the Community College Board. The students will be college students.

"We would like a ruling as to the legality of transporting these college students on publicly owned school buses."

Section 22-72.1 of the Code authorizes county school boards to provide for the transportation of pupils. This office has ruled on several occasions that the authority under this section only extends to providing transportation to public schools, or in connection with the public school program.

Under the regulations of the State Board of Education and the provisions of the Appropriation Act, State funds may only be used as reimbursement for the operation of public school buses.

In my opinion, under existing statutes, a county school board does not have authority to use the public school buses for the purpose of transporting pupils to the Community College.

SCHOOLS—School Boards—Practicing medical doctor as member—Not conflict of interest.

PHYSICIANS—School Board Member—No conflict of interest.

PHYSICIANS—School Board Member—May perform services and receive fees from County Welfare Department.

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

November 22, 1966

This will acknowledge receipt of your letter of November 18, 1966, which reads as follows:

"I shall appreciate an opinion from you concerning the following:

"A practicing medical doctor is a member of the County School Board. Do the provisions of Virginia law, and particularly §§ 15.1-656, 15.1-67 and 22-213 of the Code, make illegal the following:

"(a) The treating by this doctor of patients at the Bedford County Home for which payment would be made to the doctor by the county?

"(b) The serving by this doctor on commissions of lunacy in the county for which he would be paid by the county?

"(c) The treating by this doctor of individuals in the county who are recipients of benefits under the Medical Aid to the Aged (Kerr-Mills) Program in which cases payment for his services would be made directly by the County Welfare Department to the doctor?"
"(d) There exists an arrangement whereby from the Old Age Assistance funds (made up of federal, State and local funds) the County Department of Public Welfare pays to the State certain amounts which in turn are used by the State to secure Blue Cross insurance as to individuals in the county who are receiving Old Age Assistance. Would it be legal for this doctor, who is a member of the county school board, to receive from Blue Cross in these cases pay for his treatment of individuals participating in the Old Age Assistance Program?

“(e) In certain instances where the County Department of Public Welfare is giving assistance under the Aid to Dependent Children Program to a needy mother, from time to time the Department of Public Welfare may supply funds which are used to pay this doctor member of the school board for treating the child or children who are receiving this aid under the A.D.C. Program. Is this legal?

“(f) In cases where the County Welfare Department is paying for the foster care of children, is it legal for such doctor member of the school board to be paid by the County Welfare Department for his treatment of a child who is receiving such foster care payment?”

Sections 15.1-656 and 22-213 of the Code would not apply. Section 15.1-656 applies only to counties operating under the county manager form of government. Section 22-213 would not apply because the services performed do not come within the scope of that section.

Section 15.1-67 of the Code is the applicable section. In my opinion, this section would not prevent the school board member from performing the services mentioned in paragraphs (b) and (d) of your letter. The service rendered under paragraph (b) is pursuant to a summons issued under § 37-62 of the Code, for which a statutory fee is allowed. In my opinion, this is not service performed under a contract prohibited by this Code section.

The payments made for services rendered under paragraph (d) are made by an insurance company and not by the county and, therefore, in my opinion, this service is not prohibited by § 15.1-67. The fact that the premiums paid for the insurance are with money partly contributed by the county does not, in my opinion, bring this transaction within the scope of § 15.1-67 of the Code. With respect to paragraphs (a), (c), (e) and (f) of your letter, assuming that these services are made at the request of the persons in charge of these various programs and not as a result of solicitation made by the physician, but are made in the course of the physician's usual and customary practice of responding to calls for the purpose of administering to the sick, I feel that this is not the type that is prohibited by the Code section in question. The section contains a penalty in the nature of a forfeiture of compensation for services rendered and must be strictly construed against the imposition of the penalty. Upon this principle, I am of the opinion that there is not such a conflict of interest as is prohibited under this Code section.
June 30, 1967

HONORABLE JAMES M. BEVINS
Division Superintendent,
Buchanan County Schools

This is in reply to your letter of June 21, 1967, in which I quote in part as follows:

"The Buchanan County School Board would like to contract with an insurance company on bids for accident insurance for all children, teachers, and clerical personnel employed for school year of 1967-68 while traveling to and from school and for the time at school. Teachers and other personnel would pay the Buchanan County School Board the cost of their coverage, and the County would pay from school funds that part charged for pupils' insurance.

"In your opinion can the Buchanan County School Board enter into this Insurance Program and pay with funds appropriated to the School Board by the Board of Supervisors of Buchanan County?"

Considering your question in two parts, there appears no prohibition against effecting accident insurance coverage for teachers and clerical personnel under the conditions indicated. It is my understanding that a number of school systems procure group coverage of various types for such employees, in some instances absorbing a portion of the costs.

Under Article 2, Chapter 13 of Title 22 of the Code, § 22-285 presently requires public liability and property damage insurance coverage where school pupils or personnel are transported at public expense to or from any public school supported in whole or in part by State funds. This insurance, which is mandatory under conditions stated in this article, covers traveling to and from school and, to such extent, would offset the need for additional accident coverage. Be that as it may, I find no authority for the Buchanan School Board providing the additional insurance coverage indicated for school children from school funds appropriated by the Board of Supervisors and, in this respect, I shall answer your question in the negative.

SCHOOLS—School Boards—Teachers' salaries—Payment on last working day prior to Christmas—Board determines.

TREASURERS—Teachers' Salaries—School board determines which entitled for full month's work.

January 9, 1967

HONORABLE A. C. WILLIAMSON
Treasurer of Botetourt County

This will acknowledge receipt of your letter of January 6, 1967, in which you state that it is the policy of the School Board of Botetourt County to pay the teachers on the last day of each month on a twelve-month basis. You call attention to the fact that the schools close prior to the Christmas holidays and do not reopen until after the thirty-first of December. You present the following questions:

"1. If the School Board should desire to change its payment policy, would it be legal to pay teachers who have completed their
month's work, the entire month's salary on the last working day previous to the Christmas holiday?

2. Would the Treasurer be responsible for determining that no names were included on the payroll of individuals who had not completed the month's work?

In my opinion, there is no reason why the school board may not pay the teachers for the month of December on the day before the Christmas vacation begins. The teachers at that time have earned their compensation for the month of December.

With respect to your second question, I do not think it is the obligation of the treasurer to make such a determination. It is the obligation of the school board to determine which teachers are entitled to payment for a full month's work.

SCHOOLS—School Trustee Electoral Board—Town councilman may serve as member.

March 24, 1967

HONORABLE H. SELWYN SMITH
Commonwealth's Attorney for Prince William County

I have your letter of March 22, 1967, the first sentence of which is as follows:

"A question has been raised as to whether one in this County is eligible to serve as a member of the School Trustee Electoral Board and a councilman upon a town council of one of the towns within this County."

I enclose herewith copy of a letter to the Honorable W. Carrington Thompson, dated July 9, 1951, found in the printed volume of the Report of the Attorney General (1951-1952), at page 145. From reading this letter, you will see that it refers to a special act dealing with the public schools in Pittsylvania County and two other counties.

Section 22-60 of the Code of Virginia provides, in part, as follows:

"In each county there shall be a board to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or state officials."

A councilman upon a town council is not a county or State officer and, therefore, is not disqualified by reason of the quoted language of § 22-60.

Therefore, I am of the opinion that there is no legal bar to the appointment of a councilman of a town council located in Prince William County as a member of the School Trustee Electoral Board of Prince William County.

SCHOOLS—Teachers—Mandatory retirement age established by State law.

March 20, 1967

HONORABLE KENNETH E. FULP
Division Superintendent,
Lexington City Public Schools

I have your letter of March 15, 1967, in which you asked the question:

"Would you please give us your opinion on the legality of a local school board regulation on mandatory retirement at the age of 65 for teachers."
Section 51-111.54 of the Code of Virginia provides, in part, as follows:

"Any member who is a State employee or a teacher, both as defined in § 51-111.10, and who attains seventy years of age shall be retired forthwith; provided that, upon the request of his employer in the case of a teacher, or the head of the department, institution or agency by which he is employed, in the case of a State employee, he may remain in service not longer than the last day of the fiscal year during which he attains seventy years of age. . . ."

The constitutionality of this section has not been attacked in Virginia so far as I am advised. I would consider an act of the General Assembly constitutional until declared otherwise by a court of competent jurisdiction.

Where State law establishes a mandatory retirement age for teachers but does not expressly empower local school boards to adopt a lower age for compulsory retirement, I do not believe that a local school board would be authorized to deviate from the age fixed by State law.

Therefore, I believe that your question should be answered in the negative.

SCHOOLS—Transportation for Children to Private and Parochial Schools by Public School Buses—Violative of Virginia Constitution.

June 6, 1967

Honorable Junie L. Bradshaw
Member, House of Delegates

I am in receipt of your letter of May 26, 1967, in which you present the following inquiry:

"I recently read where the Pennsylvania Supreme Court ruled a Pennsylvania law constitutional which provided transportation for children to private and parochial schools by public school buses.

"I would like to know from you before proposing same at the next session of the General Assembly if, in your opinion, a similar law could be drafted by Virginia which would not be in violation of the Virginia State Constitution."

The case to which you refer is Rhoades v. School District of Abington Township, 226 A. (2d) 53, decided January 17, 1967. In that case, the Supreme Court of Pennsylvania (two justices dissenting) sustained the validity under the Pennsylvania Constitution of a statute of that State which, inter alia, provided:

"When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit."

The phrase "nonpublic elementary and high schools not operated for profit" embraced various sectarian private schools in Pennsylvania, and the statute in question thus directed that provision be made for the free transportation of pupils to and from such schools when similar provision was made for the free transportation of pupils to and from the public schools of Pennsylvania.

Notwithstanding the decision of the Supreme Court of Pennsylvania in the Rhoades case, I am constrained to believe that a similar statute, if en-
acted by the General Assembly of Virginia, would be violative of the Virginia Constitution. In *Almond v. Day*, 197 Va. 419, the Supreme Court of Appeals of Virginia invalidated a provision of the Appropriation Act of 1954 which provided for the payment of tuition, institutional fees and other expenses of certain children attending private schools. The Court pointed out that the statute there under consideration was violative of Section 141 of the Virginia Constitution to the extent that it authorized such payments on behalf of children attending private schools and was also violative of the provisions of Sections 16, 58 and 67 of the Virginia Constitution to the extent that it authorized such payments on behalf of children attending sectarian schools. The applicable provision of Section 141 of the Virginia Constitution still forbids appropriation of public funds for the benefit of any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof, and the exception to this prohibition inserted by the 1956 amendment to Section 141 was carefully limited in scope to permit the appropriation of public funds "for educational purposes . . . in furtherance of . . . education of Virginia students in public and nonsectarian private schools and institutions of learning. . . ." (Emphasis supplied.) It thus appears that the appropriation of public funds to provide transportation for pupils attending sectarian private schools would not come within the ambit of the above-mentioned exception but would fall within the basic prohibition enunciated in the initial sentence of Section 141 of the Virginia Constitution as construed by the Supreme Court of Appeals of Virginia. Moreover, so far as sectarian private schools are concerned, it would also appear that such appropriations would be antagonistic to Sections 16 and 58 of the Virginia Constitution. See, *Almond v. Day*, *supra*, at 428-430.

SHERIFFS AND SERGEANTS—Cannot Be Trustee in Bankruptcy.

**BANKRUPTCY—Trustee—Government officers and employees may not serve.**

*Honorable M. E. Hanger*  
City Sergeant, City of Staunton

August 25, 1966

This will acknowledge receipt of your letter of August 24, 1966, which reads as follows:

"Mr. Thomas J. Wilson, III, Attorney at Harrisonburg, Virginia, and referee of bankruptcy of this District of the Commonwealth, has requested me to be named and act as Trustee in all bankruptcy cases in Staunton and Augusta County.

"My question is: Since I am City Sergeant of the City of Staunton, is it permissible and legal for me to serve in this capacity under our present Code, as an individual or as city sergeant?"

In my opinion, § 2-27 of the Code prohibits a city sergeant from serving as a trustee in bankruptcy. This Code section reads as follows:

"No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate
any office, or post of profit, trust or emolument under the govern-
ment of this Commonwealth or under any county, city, or town.
thereof."

A trustee in bankruptcy is an officer of the court and thus holds an office, or post of trust in the judicial department of the United States.

The above section is modified by certain exceptions appearing in § 2-29 of the Code, but the position of trustee in bankruptcy is not included among these exceptions.

SHERIFFS AND SERGEANTS—Fees—Criminal cases—For execution of capias pro fine and costs.

CIVIL PROCEDURE—Attachment Proceeding—When forthcoming bond required.

HONORABLE J. C. KNIGHT, JR.
Sheriff of Nansemond County

June 1, 1967

This is to acknowledge receipt of your letter of May 23, 1967, in which you request my opinion upon the following questions involving the propriety of a sheriff's collecting a "pick-up fee" in addition to the five percent capias fee when a person is arrested under a capias pro fine:

"1. If a person is picked up and brought to jail on a Capias Pro Fine and arrangement is made for his payment, are we supposed to collect the 5% Capias fee plus $5.00 pick-up fee?

"2. If a man is brought to jail and locked up and several days later payment is made, is the 5% Capias Fee and $5.00 pick-up fee due to be collected?

"3. If a man is brought in on two or more Capias Pro Fines, is the $5.00 pick-up fee due to be collected on each fine?

"4. If a man is in jail on another charge and a Capias Pro Fine is served on him, is the $5.00 pick-up fee due?"

It is assumed that by the term "pick-up fee," you refer to the fee of five dollars for serving on any person an attachment or other process, under which the body is taken, and making a return thereon as provided by § 14.1-105(3) of the Virginia Code.

This office has ruled on several occasions that § 14.1-105 of the Code of Virginia (1950), as amended—formerly § 14-116, Code of Virginia (1950) and § 3487, Code of Virginia (1919)—relates primarily to fees in civil cases (as distinguished from criminal cases) and that the execution of a capias pro fine results from criminal proceedings. Consequently, § 14.1-111 of the Virginia Code which prescribes the fees for sheriffs in criminal cases governs the applicable fees for executing a capias pro fine and costs (§§ 19.1-339 through 19.1-341) rather than § 14.1-105. As § 14.1-111 governs the situations you present, the five dollar fee prescribed under § 14.1-105(3) would not be collectible. In this connection, I am forwarding to you a copy of an opinion of this office, dated February 16, 1965, to the Honorable David G. Hanby, Clerk of the Circuit Court of Patrick County, in which a similar view was expressed. On the basis of this opinion, which is set forth in the Report of the Attorney General (1964-1965), p. 303, it will be seen that the four inquiries you present are answered in the negative.
In your communication, you also present the following concluding inquiry:

"5. When is a bond required on a levy? What is the Virginia law on this or does it depend on the individual county?"

Should the debtor wish to retain possession of his property in order to contest the validity of the levy, he must give a forthcoming bond. See, Chapter 20, Title 8 (§§ 8-450 to 8-461, inclusive) of the Code of Virginia. In an attachment proceeding, should the plaintiff desire to have the property of the debtor taken into possession by the officer to whom the attachment is directed, the plaintiff must furnish a bond in the penalty of at least double the fair value of the property levied upon with condition to pay all costs and damages which may be awarded against the plaintiff by reason of his suing out of the attachment. See, §§ 8-538 et seq., Code of Virginia.

SHERIFFS AND SERGEANTS—Sale of Forfeited Motor Vehicles—Costs and commissions.

MOTOR VEHICLES—Forfeiture Under § 46.1-351.2—Costs and commissions.

HONORABLE GARY T. KEYSER
Sheriff of Warren County

This is in reply to your letter of July 14, 1966, concerning the sale of motor vehicles forfeited to the Commonwealth pursuant to § 46.1-351.2, Code of Virginia (1950), as amended, in which relation you pose the following questions, which I quote:

"Where the proceeds of sale are sufficient to pay all costs, would same be taxed as costs in a misdemeanor case and paid out of the proceeds? Also, in what manner would the Sheriff’s commissions on the sale be computed?"

The named section provides, in paragraph (h), that “the actual expense incident to the custody of the seized property, and the expense incident to the sale thereof, including commissions, shall be taxed as costs.” Paragraph (g) thereof provides for the payment of the costs out of the proceeds of sale when the property is forfeited to the Commonwealth. In respect to your first question, therefore, where the proceeds of sale are sufficient to pay all costs, such costs should be paid out of the proceeds as provided in § 46.1-351.2, as herein indicated.

In an opinion found in Report of the Attorney General (1962-1963), p. 245, I expressed the view that the commissions of the sheriff selling personal property under an execution or under an attachment proceeding were controlled by the provisions of § 14-120, now § 14.1-109, Code of Virginia (1950), as amended, which is as follows:

"An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum of the first one hundred dollars of the money paid of proceeds from sale, five per centum on the next four hundred dollars, and two per centum on the residue; except that when such payment or sale is on execution on a forthcoming bond, his commission shall only be half what it would be if the execution were not on such bond."
In regard to your second question, I am of the opinion that in any instance in which the proceeds of sale of a motor vehicle under § 46.1-351.2 are sufficient to pay all costs, any sheriff's commissions payable should be computed in accordance with the terms of § 14.1-109, as herein quoted.

SHERIFFS AND SERGEANTS—Special Allowances to Sergeants, Etc., for Service of Criminal Process.

HONORABLE JOSEPH L. CANTWELL, JR., Judge
Corporation Court of the City of Bristol

May 10, 1967

I am in receipt of your letter of May 8, 1967, in which you present the following inquiry:

"Would you please advise whether it is proper for this Court, under the provisions of Code Section 14.1-86, to make an allowance of $600.00 per year to each of two Sergeants or Deputy Sergeants for the services therein specified."

Section 14.1-86 of the Code of Virginia (1950), as amended, to which you refer, in pertinent part provides:

"No justice of [the] peace, judge, constable, sergeant, or captain or sergeant of police who receives a salary or allowance for general service out of the treasury of his county or corporation shall receive any fees for services in a criminal case from the State, city or county, but all such fees to such officers shall be paid by the party against whom judgment is rendered. But the judge of any city or corporation court may make an allowance not exceeding six hundred dollars a year to each of two constables, sergeants or policemen of such city or corporation, to be paid in lieu of all fees for serving criminal process of any kind, which allowances shall be paid out of the treasury." (Italics supplied.)

In light of the language italicized above, I am of the opinion that it would be proper for the Corporation Court of the City of Bristol to make the allowance specified in your inquiry. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated August 30, 1943, from the Honorable Abram P. Staples, then Attorney General, to the Honorable H. G. Gilmer, then the State Comptroller, in which a similar view was expressed by Judge Staples with respect to the statute in question, which comprised at that time § 3511 of the Code of Virginia (1942).

STATE EMPLOYEES—State Corporation Commission—May not arrest for general traffic violations.

HONORABLE KENNETH B. ROLLINS, Judge
Loudoun County Court

February 3, 1967

This is in reply to your letter of January 30, 1967, in which you request my opinion on the matter presented in the question, which I quote as follows:

"Under Section 56-334 of the Code of Virginia, does an investigator of the State Corporation Commission have the au-
authority to arrest or summons the operator of a motor vehicle for a traffic violation such as driving under the influence, having no operator's license, or improper registration?"

The enforcement prescribed in § 56-334 pertains to "any person found in the act of violating any of the laws, rules and regulations governing the operation of motor vehicles which the Commission is required to administer." (Emphasis supplied.) The investigators employed by the State Corporation Commission have the authority and powers of a sheriff to enforce the statutes, rules and regulations administered by such Commission.

I am advised that the Commission has adopted regulations against the operation of "for hire" vehicles transporting flammable fuels in excess of the lawful speed limits for such vehicles. An investigator for the Commission would no doubt have the authority to arrest and summons any driver who violated such regulations. I am not of the opinion, however, that § 56-334 authorizes these investigators to arrest traffic violators in general and, accordingly, I shall answer your question in the negative.

STATE INSTITUTIONS—College of William and Mary—May construct and operate airport.

AIRPORTS—College of William and Mary—May construct and operate airport.

January 13, 1967

Mr. R. T. English, Jr.
Bursar, College of William and Mary

This will acknowledge receipt of your letter of January 11, 1967, to which is attached a copy of a letter from Mr. Curtis F. Greve, Chief, Airports Branch, Federal Aviation Agency, Washington, D.C., which reads as follows:

"We refer to your letter of October 3, 1966, transmitting information concerning eligibility of the College of William and Mary to act as a sponsor under the Federal-Aid Airports Program.

"A review of the submitted information fails to disclose whether the College of William and Mary has authority to construct and operate an airport. It is requested that an opinion from the Attorney General for the Commonwealth of Virginia be obtained regarding this matter and forwarded for consideration."

You have made a formal request for an opinion from this office regarding the matter.

It is my understanding that the College of William and Mary has been issued a permit by the State Corporation Commission to operate an airport under former § 3775(1) of the Code of Virginia, now § 5.1-8 of the Code of 1950. Under this same Code section, a permit was issued by the State Corporation Commission to the University of Virginia to operate an airport. Subsequently, in the case of Batcheller v. Commonwealth, 176 Va. 109, the authority of the State Corporation Commission to issue this permit was attacked. The Supreme Court of Virginia in that case upheld the power of the State Corporation Commission to issue such a permit and, in that opinion, made the following statement:

"The Virginia Polytechnic Institute and the College of William and Mary have been operating airports under like permits from
the State Corporation Commission. The members of the com-
mission, when those permits were granted, construed the statute
as granting to the commission the power to issue such permits,
and such departmental construction, under well-recognized rules,
is persuasive that it is the correct construction to be applied in
this case."

In light of the fact that the State Corporation Commission has granted
such a permit to the College of William and Mary and of the holding
of the Supreme Court of Virginia in the above case, I am of the opinion
that the College of William and Mary has authority under Virginia law
to construct and operate an airport upon lands owned by the college.

STATE INSTITUTIONS—Madison College—Tuition—Families of fac-
ulty—May not waive or reduce except by gifts for that purpose.

HONORABLE G. TYLER MILLER
President, Madison College

In your letter of July 28, 1966, you ask whether the Board of Visitors
of Madison College has authority “to approve a policy waiving or re-
ducing the regular tuition charges for the husband, wife, or other mem-
ers of the families of regularly employed faculty members.”

Section 23-164.6 of the Code of Virginia (1950), as amended, says the
Board “shall control and expend the funds of the College ... make all
needful rules and regulations concerning the College ... and generally
direct the affairs of the College.” Section 23-164.7 empowers the Board
to “fix the rates charged the students of the College for tuition, fees and
other necessary charges.”

This general grant of authority must be considered in connection with
§ 23-31, which empowers Madison College and other named institutions to
establish scholarships subject to the limitations set forth in that section.

Subsection (b) of § 23-31 forbids the College to “award any scholar-
ship, or remit any special fees or charges, to any student ... except as
authorized in this section.” Subsection (a), paragraph (4) provides that
such scholarships shall be awarded “on a selective basis to students of
character and ability who are in need of financial assistance.” Subsection
(e) provides that nothing in § 23-31 shall be construed to prevent the
Board “from fixing a reasonably lower tuition charge for Virginia stu-
dents than for non-Virginia students.”

Neither § 23-31, nor any other statute of which I am aware, provides
for remission of tuition or other charges based on relationship to a faculty
member.

However, subsection (d) of § 23-31 provides that nothing in that sec-
tion “shall be construed to affect or limit in any way the control” of the
Board “over any gifts or donations made” to the College “for schol-
ships or other special purposes. ...”

In view of these provisions, I am of the opinion that the Board of
Visitors may not adopt the policy outlined in your letter unless it is done
by the use of gifts or donations made to the College for that specific
purpose.
STATE INSTITUTIONS—Virginia Military Institute—May request ordinance from Lexington City Council to regulate parking.

October 6, 1966

COLONEL J. C. HANES
Business Executive Officer, Virginia Military Institute

This will acknowledge receipt of your letter of October 4, 1966, in which you request my opinion with respect to the situation existing as described in the first paragraph of your letter, which is as follows:

"The design and construction of the George C. Marshall Research Library and our administration building, Smith Hall, included parking space for our employees and visitors. This space is bounded by the buildings themselves and Virginia Route 303, the Department of Highways designation of routes owned and maintained on this State reservation by that Department. We are having an increasingly difficult problem with the students from Washington and Lee University preempting these parking spaces, not only in the occupancy of those conveniently located for our employees, but also by parking in a disorderly manner to the extent that the vehicle projects at times into the nearby traffic lane of Route 303."

I call your attention to § 15.1-516 of the Code of Virginia. Under this section, the Board of Visitors of Virginia Military Institute may make a request of the city council of Lexington to enact an ordinance under the provisions of this section. I believe that a proper ordinance would provide a method by which the Virginia Military Institute can control the parking situation.

STATE POLICE—Authority—May serve town warrants.

TOWNS—Warrants—Service by sheriff and his deputies.

June 28, 1967

HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for Botetourt County

This is in reply to your letter of June 12, 1967, in which you state that the Town of Troutville, located in Botetourt County, is in the process of setting up a Mayor's Court, but does not have a town sergeant or policeman, and inquire whether it is lawful for the Sheriff of Botetourt County and his deputies and the Virginia State Police to serve town warrants issued for violation of town ordinances.

The authority for State police officers to execute warrants of arrest for violations of ordinances of counties, cities and towns when requested so to do by the county, city or town authorities, is found in § 52-22 of the Code of Virginia. This section, however, states that the "execution of any such warrant shall rest entirely in the discretion of the Superintendent and other officers who may be requested to execute the same, and no such officer shall execute the same in any case where it will in any way interfere with, delay or hinder him in the discharge of his official duties." Further, § 46.1-182 of the Code provides that in any case of arrest by a State police officer for a violation of the motor vehicle laws of the State, the person arrested must be charged with a violation of Title 46.1 and any fine or forfeiture collected shall be credited to the Literary Fund. I am of the opinion, therefore, that the Virginia State
Police may, within their discretion, serve the town warrants issued for violations of town ordinances if it does not interfere with, delay or hinder them in the discharge of their official duties and violations of the State motor vehicle laws are not involved.

In respect to the Sheriff of Botetourt County and his deputies, I am of the opinion that it is lawful for them to serve town warrants where it does not interfere with the discharge of their official duties. Under § 15.1-90 of the Code it is lawful for a deputy sheriff of a county to serve as town sergeant of a town within such county. It may be that this or some other local arrangement could be worked out between the governing bodies of the Town and County.

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**SUBDIVISIONS—Land for Public Use—County requirements not unconstitutional.**

**CONSTITUTION—Subdivisions—Land requirements for public use not unconstitutional.**

October 4, 1966

HONORABLE R. H. L. CHICESTER
Commonwealth's Attorney for Stafford County

This is in reply to your letter of September 29, 1966, in which you enclosed a letter from the chairman of the Stafford County Planning Commission with regard to a proposed subdivision ordinance in Stafford County. You state that the constitutionality of certain sections of the subdivision ordinance have been questioned and you furnished me with copy of a letter from Carroll E. Smith, an attorney at law, with respect to the constitutional question. It appears that the main objections to the ordinance are §§ 5-32, 5-32.1 and 5-32.2, which authorize the representative of the governing body serving as agent for the board in approving subdivision plats to require subdividers of residential subdivisions to set aside land for parks, playgrounds, schools, libraries, municipal buildings and similar public and semipublic uses, subject to the regulations which are as follows:

"5-32.1. Subdividers shall not be required to dedicate land for parks or playgrounds exceeding ten (10) percent of the area of the subdivision, exclusive of street and drainage reservations, without reimbursement by the governing body. Where land is required in excess of this amount, the reimbursement by the governing body shall be based on a proportionate share of the (1) fair market value of the land immediately prior to subdivision, which shall be considered a cost item, (2) cost of improvements, including interest on investments, (3) development costs, (4) plus not more than ten (10) percent profit on the total of such cost.

"5-32.2. Subdividers shall not be required to reserve land for public purposes other than streets, drainage, parks and playgrounds, except on a reimbursement basis. They shall be reimbursed by the jurisdiction or agency requiring the land. They shall not be required to hold the land longer than eighteen (18) months following the recording of the plat for such purchase. If the land is not purchased within the said eighteen (18) months, it may be sold as lots for the same purposes for which the subdivision was platted. To facilitate such possible eventual sale of reserved land as separate lots, the subdivider shall show on his final plat, by dotted lines and dotted numbers, the area and dimensions of lots to be created within the boundaries of any such
reserved land, and may sell such lots, after the expiration date of the reservation, by lot number, without filing an amended plat."

We have not had time to make an exhaustive study of this subject, but we are of the opinion that under the provisions of Article 7, Chapter 11 of Title 15.1, and especially § 15.1-466, of the Code, the county may require compliance with these requirements as a condition precedent to approving the plat. It will be noted that all of these requirements are for public purposes. The establishment of recreational playgrounds has been established as a public use under Chapter 8 of Title 15.1. No question, insofar as we know, has ever been raised as to the constitutionality of the provisions of § 15.1-466 with respect to streets, drainage, flood control, etc., and it would seem that the requirement with respect to recreational playgrounds would come under the classification of "other public purposes."

The suggestion that this would amount to the taking of the property in violation of the provisions of Sections 11 and 58 of the State Constitution does not seem to be valid inasmuch as the county is not requiring this person to dedicate or donate any land for public use; it is merely providing that if he wishes to subdivide his land he must meet these requirements. Of course, the landowner is not being required to subdivide his property.

SUBDIVISIONS—Ordinance—Subdivision defined.

August 15, 1966

HONORABLE G. M. CORNELL
Executive Secretary of Nansemond County

In your letter of August 9, 1966, you state:

“Owner Williams subdivides a portion of his property in accordance with the Nansemond County Subdivision Ordinance and has this subdivision properly recorded in Plat Book 13, pages 64 and 65, record date being April 10, 1964. A portion of this first subdivision plat is attached hereto. The entire subdivision plat contains 27 lots.

“On June 21, 1965, Owner Williams records a second section of the subdivision consisting of 11 lots and contiguous, in part, to the section recorded on April 10, 1964.

“Owner Williams has sold more than two lots from the subdivided portion of his property. He still owns some lots in the subdivided portion of the property as well as the balance of the original parcel from which the two subdivisions were separated.

“Owner Williams now desires to sell a lot as shown in red on the attached plat, but he does not propose to submit this lot as a part of any subdivision. The lot is next to Lot No. 27 of the subdivision recorded April 10, 1964, and is a part of the original parcel of land. The lot meets all the size requirements and sanitary requirements of the subdivision ordinance. The lot faces on a street which has been improved in accordance with the subdivision ordinance.

“QUESTION: If Owner Williams sells the lot shown in red on the attached plat without having the lot recorded in accordance with the terms of Nansemond County Subdivision Ordinance, will he be in violation of said County Ordinance?”
As stated in my opinion of March 16, 1966, to which you refer, § 15.1-473 of the Code of Virginia (1950), as amended, provides a penalty for subdividing land without recording the appropriate plat when a subdivision ordinance is in effect, and "subdivision", as defined in the Nansemond County ordinance, includes division of a parcel into three or more lots for the purpose of transfer of ownership for building development or, if a new street is involved, any division of land. Since no new street is involved in the transaction outlined by you, there would be no violation unless the proposed sale resulted in division of the larger tract into three or more lots. It is arguable that this would take place because the division of the original tract of land into the two recorded subdivisions and the unplotted remainder was one "subdivision" into three or more lots or parcels, and the further creation of another lot by the proposed transfer of part of the remainder is a further "subdivision". In my opinion, this would be a strained and improper interpretation, and it is the present unplotted remainder which constitutes the parcel from which three or more lots must be created before "subdivision" occurs. Therefore, it is my view that the proposed transfer would not be a "subdivision" violating § 15.1-473.

TAXATION—Assessment of Public Utilities—Transferring from 40% statewide ratio to local true ratio.

December 9, 1966

Honorable Ernest W. Goodrich
Commonwealth's Attorney for Surry County

We wish to acknowledge receipt of your letter of December 2, 1966, requesting an opinion regarding Chapter 541 of the Acts of Assembly (1966).

The above Act is to be administered by the State Corporation Commission and the interpretation is as follows:

In assessing public utilities in the State that have been assessed on the statewide ratio of 40% in past years, including 1966, commencing January 1, 1967, the net additions during the year 1966 to their property by taxing districts will be assessed on the local ratio as determined by the most recently published findings of the Department of Taxation for the year 1967; also, 1/20th of the fair market value as of January 1, 1966, by taxing districts will be assessed on the local true ratio for 1967 and the remaining 19/20th of the January 1, 1966, fair market value will be assessed on the 40% ratio. The totaling of the above three calculations will determine the assessed value for each taxing district.

The above procedure of transferring from the 40% statewide ratio to the local true ratio will continue each year for twenty years, at which time all public utility property will be assessed on the local true ratio of the taxing district in which the property is located. All net additions during the year 1961 and subsequent years will be assessed on the local true tax ratio.

TAXATION—Assessment on Tangible Personal Property of Public Service Corporation—Formula to be used.

April 3, 1967

Honorable L. E. Turlington
Commissioner of the Revenue, City of Portsmouth

This is to acknowledge receipt of your letter of March 21, 1967, in which you request my opinion on the interpretation of § 58-514.2 of the Code
of Virginia, which was added to the Code by the enactment of Chapter 539, Acts of Assembly (1966), which said section is as follows:

"Notwithstanding the provisions of §§ 58-518, 58-522, 58-544, 58-551, 58-578, 58-596, 58-602, 58-605 and 58-851 all local taxes on the real estate and tangible personal property referred to in such sections shall be at the same rate as is applicable to other real estate in the respective locality, except that with respect to the assessed valuation of any class of property taxed as tangible personal property by any taxing district before January one, nineteen hundred sixty-six, such class of property may continue to be taxed by such taxing district at rates no higher than those levied on other tangible personal property on January one, nineteen hundred sixty-six; provided, however, that on January one, nineteen hundred sixty-seven, one-twentieth, and on each subsequent January one for nineteen years an additional one-twentieth, of the assessed valuation of such tangible personal property on January one, nineteen hundred sixty-six, shall be taxed at the real estate rate and the remainder may continue to be taxed at the tangible personal property rate as provided above. Thereafter the whole shall be taxed at the real estate rate as provided above. Notwithstanding any of the foregoing provisions, all automobiles and trucks of such corporations shall be taxed at the same rate or rates applicable to other automobiles and trucks in the respective locality."

In your letter you state:

"Enclosed herewith is a copy of a letter received from __________ Company, together with a formula for assessing Tangible Personal Property of their corporation for the next twenty years. This formula is based on their interpretation of § 58-514.2 of the Code of Virginia.

* * *

"The reduction in the 5% assessed values each year, based on the assessed valuation as of January 1, 1966, seems to be where we are not in accord. Although the section clearly states this, some are of the opinion that this was not meant to be as all assessments are based on the total assessed valuation as of January 1 of the current year."

The following is an excerpt with the appropriate insertions from the said formula for assessing tangible personal property made by the __________ Company, a copy of which was enclosed in your letter:

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From a recent conversation between your chief Deputy Commissioner of the Revenue, Mr. G. R. Hutchins, and our Mr. Tyler, I gather that the
The problem which gives you concern is how to treat property which is acquired by a public utility company after January 1, 1966.

The purpose of this statute is to tax real estate and tangible personal property (with the exception of automobiles and trucks) assessed by the State Corporation Commission at the same rate as is applicable to other real estate in the locality wherein such property is located. However, the localities may continue to tax any class of property taxed as tangible personal property at rates no higher than those levied on other tangible property as of January 1, 1966. On January first of each succeeding year after January 1, 1966, for twenty years five percent (1/20th) of the assessed valuation of such tangible personal property must be taxed as real estate and the remainder may continue to be taxed at tangible personal property rates as of January 1, 1966. Hence, for the year 1986 and thereafter all tangible personal property of public service companies, with the exception of motor vehicles, will be taxed at the same rate as real estate in the respective localities.

The State Corporation Commission will ascertain the assessed value of the various classes of property which the public utility companies own as of January 1 of each tax year. The difference between the assessed value of property classified as tangible personal property (except automobiles and trucks) by the locality and the 1966 assessed value thereof will be the value of such property to be taxed at the local real estate rate. In addition thereto, on January 1, 1967, 1/20th, and on each subsequent January 1 for nineteen years an additional 1/20th of the assessed value of property classified as tangible personal property (other than automobiles and trucks) on January 1, 1966, will be taxed at the local real estate rate.

For an illustration of how this statute would be applied, reference is made to the aforesaid formula: The assessed value of all tangible personal property as of January 1, 1966, was $1,210,051. Suppose that after January 1, 1966, and during 1966, there were additions made (exceeding retirements) which resulted in assessed value of all such property as of January 1, 1967, to be $1,510,051, then under this section (§ 58-514.2 of the Code), the difference of $300,000 in assessed value of the property would be taxed at the local real estate rate (fixed by the local authorities for 1967). Also, 5% of the $1,210,051, or $60,503, in assessed value would be taxed at local real estate rates for 1967, and 95% of $1,210,051 or $1,149,548, would be taxed on tangible personal property at a rate no higher than that levied on other tangible personal property as of January 1, 1966.

As a matter of fact, experience has shown that the value of the tangible personal property of public utilities is ever increasing. However, in the event (remotely possible) that the total assessed value of property classified as tangible personal property (by the locality) is less than the total assessed value as of January 1, 1966, then the full value base figure (1-1-66) will be reduced by the amount of the difference, thus creating a new base figure to which the percentages aforesaid would apply.

I am, therefore, of the opinion that said formula could be followed by you in imposing the tax on the tangible personal property of the public service company at a rate no higher than that levied on other personal property on January 1, 1966.
TAXATION—Assessments—Amount of levy on machinery and tools may differ from that on other property.

March 16, 1967

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

This is to acknowledge receipt of your letter of March 9, 1967, which reads as follows:

"Section 58-831 of the Code of Virginia provides for the segregation of machinery and tools for local taxation, and § 58-412 of the Code of Virginia provides for the taxing of machinery and tools used in manufacturing or mining.

"Would a formula which provides for 10% of the actual cost of machinery and tools in your opinion be a fair market value for the assessment of the property by the Commissioner of Revenue?

"Your attention is directed to the fact that the levy imposed upon machinery and tools shall not be higher than tangible personal property. If the county were using 20% of the fair market value of tangible personal property, could they at the same time, use a different formula of 10% of fair market value for machinery and tools? Would this not result in unequal taxation?"

Section 58-412 of the Code, as amended, provides, in part, as follows:

"Machinery and tools used in a manufacturing or mining business taxable on capital under § 58-418 shall not be held to be capital under the preceding section, nor shall such machinery and tools be hereafter assessed as real estate. All such machinery and tools used in a manufacturing or mining business taxable on capital under § 58-418 shall be listed for local taxation exclusively and each city, town and county may make a separate classification for all such machinery and tools and fix the rate of levy thereon, but such rate shall not be higher than the rate imposed upon tangible personal property in such city, town, county or district."

In my opinion, under the provisions of this statute, the city or county may make a separate classification for tax purposes of all machinery and tools used in a manufacturing or mining business and may fix a different rate of levy for tax purposes on such property so long as the rate shall not be higher than any levy imposed on tangible personal property in the area. If the levy should be made in an amount that conforms with this statute, I am also of the opinion that it would not result in prohibitory taxation. Therefore, the first question presented by you is answered in the affirmative, and your second question is answered in the negative.

TAXATION—Assessments—Uniformity required in rates of levy on property of like character.

March 15, 1967

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

This will acknowledge receipt of your letter of March 7, 1967, which reads as follows:

"Your opinion of May 26, 1966 at page 288 and § 58-851 of the Code of Virginia provides that the governing bodies in laying
levies on real estate tangible personal property and merchant's capital may impose one rate of levy on real estate and another on tangible personal property. In your opinion would this also authorize the counties to impose upon public service corporations which are assessed by the State Corporation Commission under Section 169 of the Constitution a different rate to that on real estate, personal property and merchant's capital?"

In answer to my inquiry, you have stated under date of March 14, that you specifically wish to know whether a different rate of levy can be imposed on assessments made by the State Corporation Commission than upon assessments made by the local commissioner of the revenue.

In my opinion, this cannot be done. The rate of tax upon all properties of like character must be uniform, regardless of whether the assessment has been made by the State Corporation Commission or by the local authorities. See, Section 168 of the Constitution.

Your attention is also directed to § 58-514.2 of the Code, relating to assessment and taxation of property of certain public service corporations.

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TAXATION—Capitation Tax—Valid and enforceable, but nonpayment does not take any rights from the individual.

October 10, 1966

HONORABLE ROBERT S. BURRUSS, JR.
Member, Virginia State Senate

This will acknowledge receipt of your letter of October 4, 1966, which reads as follows:

"I have had a number of inquiries regarding the payment of the state poll tax or capitation tax. People have inquired of me whether they should pay this tax since this has been voided as a pre-requisite for voting by the U. S. Supreme Court. This raises several questions and I would appreciate it if you would give me answers to the questions I am listing below.

"1. It is my understanding that the poll tax, or State capitation tax is not collectible locally but is collectible after the end of a 3-year period by the Department of Taxation in Richmond. Is this assumption correct?

"2. It is my understanding that the poll tax has not been collected by the Department of Taxation in the past and does the authority exist now to collect this tax?

"3. Would you advise my friends and constituents to pay this tax at this time?

"4. Would the non-payment of the State capitation tax cause an elected state official or a local official to be ineligible as a candidate for office in the future?

"5. Does the non-payment of a State capitation tax have any bearing on an individual's rights other than a debt to the state for an unpaid bill?"

Your questions will be answered in the order presented by you.

1. Under Section 173 of the Virginia Constitution, the levying of a State capitation tax is mandatory, and it is the duty of the treasurers to collect
this tax, subject to the provisions of Section 22 of the Virginia Constitution. It is also the duty of the treasurers to collect the delinquent State capitation taxes so long as they may remain in his hands for collection. See, § 58-989 of the Code.

2. The State Department of Taxation is probably authorized to collect the delinquent capitation taxes. Section 58-44 of the Code. However, the collection of this tax by actions at law has not been deemed by the State Tax Commissioner to be practical. The enforcement of the payment of these taxes is prohibited under Section 22 of the Virginia Constitution until the taxes have become three years past due.

3. This is a valid obligation, enforceable after three years past due. The decision of the Supreme Court of the United States holding that the constitutional requirement that this tax had to be paid as a prerequisite to being qualified to register and vote violates the federal constitution did not purport to hold that the imposition and collection of the tax is an invalid exercise of State power. I would not advise anyone to refuse to pay a valid tax obligation.

4. The answer is in the negative.

5. The answer to this question is in the negative.

TAXATION—Churches—Revenue from non-church activities taxable.

HONORABLE E. A. CHRISTIAN, Vice Chairman
Louisa County Board of Supervisors

September 27, 1966

This will acknowledge receipt of your letter of September 23, 1966, which reads as follows:

"The Board of Supervisors of Louisa County is at the present time renting an office for the County Coordinator from the Louisa Methodist Church for which is paid $50.00 per month from County funds.

"Some church people are concerned about whether or not this would cause the church building liable for taxation since it is no longer a non-profit organization and I would like to have your opinion on this matter very soon."

Property owned by a church and used for church purposes is exempt from taxation under Section 183 of the Constitution and § 58-12 of the Code of Virginia; however, this exemption does not apply when such property is a source of revenue. In this connection, you are referred to § 58-14 of the Code of Virginia, which reads as follows:

"Whenever any building or land, or part thereof, mentioned in § 58-12, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town, except as is now or may hereafter be provided by law; provided, that when a part but not all of any such building or land shall be leased or otherwise be a source of revenue or profit, and the remainder of such building or land shall be used by any organization specified in § 58-12 for its purposes, only such portion thereof shall be liable to taxation as is so leased or is otherwise a source of profit or revenue."
I also call attention to § 58-16 which relates to the assessment of property owned by a church or other exempt organization but all of which is not used exclusively for its purposes. This section reads as follows:

"In assessing any building and the land it occupies which may be owned exclusively by any organization or association mentioned in § 58-12 but all of which is not used exclusively for its purposes, the assessing officers shall only assess for taxation that portion of said property subject to any such lease or otherwise a source of profit or revenue and the tax shall be computed on the basis of the ratio of the space subject to any such lease or otherwise a source of profit or revenue to the entire property; provided that when any such property is leased for portions of a year the tax shall be computed on the basis of the average use of such property for the preceding year."

TAXATION—Delinquent Taxes—Refund of penalty paid—Taxpayer must prove actual prejudice.

TREASURERS—Refund of Penalty on Delinquent Taxes—No authority to refund unless taxpayer shows actual prejudice.

May 29, 1967

HONORABLE OLIVER D. RUDY
Commonwealth's Attorney for Chesterfield County

This is in answer to your letter of May 9, 1967, which reads as follows:


"(1) Taxpayer owns several pieces of property within the county, receives tax bills on all but one, which bill is in the wrong name at another address and is discovered subsequent to the date penalty accrues on the delinquent tax bill. Is the above cited case authority for the Treasurer to make a refund of penalty paid, or collect the tax without the penalty on the basis that there was an error made not chargeable to the taxpayer, and since the tax has never been properly levied, he is not in default.

"(2) What is the extent of the Treasurer's duty insofar as ascertaining the correct address of all land owners within his county, and does the above cited case extend or reduce that duty?

"(3) In your opinion to Mr. Titus you indicate that a subsequent re-assessment creates a hardship for which no substantiary relief seems to be available. Does the language of the Norfolk County case afford any relief to the situation as posed by Mr. Titus in his letter to you?

"(4) Under the language of the Norfolk County case, what would be an example of 'An error so obvious as to charge the owner with notice of same?'"
REPORT OF THE ATTORNEY GENERAL

In answer to your Question (1), I am of the opinion that the above cited case is not authority for the treasurer to make a refund of the penalty paid.

Section 58-815 of the Code provides that "No assessment of any real estate . . . shall be held to be invalid because of any error, omission or irregularity by the commissioner of the revenue . . . in charging such real estate on the land book unless it be shown by the person or persons contesting any such assessment that such error . . . has operated to the prejudice of his or their rights." (Emphasis supplied.)

This statute places the burden upon the contestants to show prejudice. They must allege and prove actual prejudice, not some theoretical prejudice that might be supposed to exist. City of Richmond v. McKenny, 194 Va. 435, 73 S.E. 2d 414 (1952). In Board of Supervisors of Norfolk County v. Stanley Bender and Associates, Inc., 201 F. Supp. 839 (1961), which you cite, the evidence which is not set forth in detail was apparently deemed by the court sufficient to show the error operated to the prejudice of the defendant. In the factual situation posed by you there is no such showing.

Furthermore, in the factual situation presented by you, the error appears to be so obvious as to charge the owner with notice of same. The taxpayer knew he owned the property and had not received a tax bill on the same. He knew it was taxable and the duty was on him to investigate the amount of the tax and to pay the same.

It is the duty of every taxpayer to pay the tax assessed upon his property by December 5th following the assessment in order to escape the prescribed penalties. The statute (§ 58-963 of the Code of Virginia (1950), as amended) imposes the penalty, and the Supreme Court of Appeals has no power to relieve a delinquent taxpayer therefrom. The same principles apply as to the interest which the officers, by mandate of the statutes, are required to collect. See, Rixey's Ex'r's v. Commonwealth, 125 Va. 337, 355, 99 S.E. 573 (1919).

In reference to your Question (2), in the case cited by you, while it is not clear, it seems that an assessment was correctly made by the commissioner of the revenue, but the bill for the taxes was incorrectly addressed to the taxpayer by the treasurer. Section 58-900 requires the treasurer to mail the tax bills to the person upon whom the assessment was made. This statute places a responsibility on the treasurer to mail the bills to the correct owner of the real estate. In my opinion, the case of Board of Supervisors of Norfolk County v. Stanley Bender and Associates, Inc., supra, does not enlarge or alter this responsibility.

The answer to your Question (3) is in the negative.

In answer to your Question (4), the failure to receive a timely tax bill within itself is, in my opinion, an error so obvious as to charge the owner with notice of the same.

TAXATION—Exemptions—Nonprofit airport.
AIRPORTS—Taxation—Exempt if nonprofit.

HONORABLE CATESBY GRAHAM JONES, JR.
Commonwealth's Attorney for Gloucester County

September 29, 1966

In your letter of September 22, 1966, you ask whether it is possible for the Board of Supervisors of Gloucester County to exempt property of an airport from local taxation pursuant to § 5-9.1 of the Code of Virginia (1950),
as amended. You state that the airport corporation is licensed by the State Corporation Commission, Division of Aeronautics, and is open to the public.

Section 189 of the Constitution provides: “The General Assembly may, by general law, authorize the governing bodies of cities, towns and counties to exempt manufacturing establishments and works of internal improvement from local taxation for a period not exceeding five years, as an inducement to their location.” (Emphasis added.)

Section 5-9.1 of the Code declares to be “a work of internal improvement” any “nonprofit public use privately owned airport in this State, or any improvements made thereto, which is open to the public and which has been licensed by the Division of Aeronautics.” This section also empowers any local governing body to exempt from taxation, for not more than five years, “as an inducement to their location, the runways and taxiways of any privately owned, nonprofit public use airport.”

Since the tax exemption of airports and improvements thereto is permitted by Constitution and statute only "as an inducement to their location," it seems clear that no tax exemption may be granted for an existing, already located, airport.

In addition, I am of the opinion that the corporation operating the airport in question may not be exempted from taxation, because it is not a nonprofit corporation as specified in § 5-9.1, but is rather a stock corporation organized under Chapter 1 of Title 13.1 of the Code.

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TAXATION—Exemptions—Real estate of Bedford County Industrial Development Corporation and of Hines Memorial Pythian Home not exempt.

February 2, 1967

HONORABLE GARRETT G. BALLARD
Commissioner of the Revenue of Bedford County

I am in receipt of your letter of January 27, 1967, in which you inquire whether or not land and buildings owned by the Bedford County Industrial Development Corporation and Hines Memorial Pythian Home would be exempt from taxation under Virginia law.

In this connection, Section 183 of the Virginia Constitution provides that certain specific property, and no other, shall be exempt from taxation. From the facts set forth in your communication, it does not appear that the real property of either of the above-mentioned entities falls within the ambit of any of the exemptions specified in the constitutional provision to which I have referred. It would therefore appear that neither the real property of the Bedford County Industrial Development Corporation nor the real property of the Hines Memorial Pythian Home would be exempt from taxation under Virginia law.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Exemptions—Real estate owned by community clubs not exempt.

February 13, 1967

HONORABLE G. DUANE HOLLOWAY
Commonwealth's Attorney for York County

This will acknowledge your letter of February 8, 1967, relating to § 58-12 of the Code of Virginia, in which you refer to that portion thereof which is as follows:

"...and also property whether real or personal, owned by any community club or association or its trustees, when said property is used or operated exclusively for general and community purposes and not for profit."

You further state as follows:

"There are three clubs in York County which have questioned the duty of the county to assess their property for taxation purposes. These clubs are each located within the boundaries of a residential subdivision. In each case, land was donated by the subdivider, and the citizens of the subdivision organized and now perpetuate the clubs. Membership is limited first to residents of the subdivision. These members, however, must be approved by the Board of Trustees or directors before they may be admitted to membership. Non-resident membership also exists and these members must also be approved by a Board of Directors, committee or trustee. In each case, the number of non-resident members is limited to a specific number. Members of the clubs may invite guests which are usually required to pay a small fee for the use of club facilities.

"It is a general policy for at least one of these clubs to permit the American Red Cross to use its facilities, building and swimming pool for a program sponsored by the American Red Cross. Also certain civic organizations have been permitted to use the building for meetings and on occasions, these meetings have been opened to the general public. Whether or not the American Red Cross, civic organizations or the general public may use any of the facilities is exclusively in control of some committee, Board of Directors or Trustee. I think, however, that we could assume that the membership of either club, by a majority vote, could permit civic clubs, etc. to use the club's facilities.

"The general public, however, is not permitted to use the swimming pool and other facilities and only members and their guests may generally avail themselves of club facilities.

"Would you please advise me as to whether or not the clubs described herein are exempt from taxation pursuant to § 58-12, Code of Virginia."

The exemptions from taxation are set forth in Section 183 of the Constitution. In paragraph (g) of this section, it is provided as follows:

"Except as to class (a) above, general laws may be enacted restricting but not extending the above exemptions."

It is doubtful whether the property under consideration would qualify under the provision in § 58-12 of the Code cited by you. However, in my opinion, there is nothing contained in Section 183 of the Constitution that would authorize exemption of property within the scope of the provision in
§ 58-12 under consideration; it is an extension of the exemptions appearing in the Constitution and, therefore, in my opinion, the provision is not enforceable.

TAXATION—Inheritance Tax Return—Not public record.

September 12, 1966

HONORABLE FRED W. BATEMAN
Member, Senate of Virginia

In your letter of September 6, 1966, you ask whether a statutory beneficiary, legatee or devisee is precluded from obtaining a copy of an inheritance tax return by § 58-46 of the Code of Virginia (1950), as amended.

Section 58-46 makes it unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the property of any person while in the performance of his public duties, unless the Governor directs that this information "be made public or laid before any court," or unless the information is "required by law to be entered on any public assessment roll or book."

Section 58-166 requires each personal representative of a decedent whose gross estate exceeds $1,000 to report the property of the estate to the State Department of Taxation on prescribed forms. There is no requirement that such inheritance tax returns be entered on any public assessment roll or book. Therefore, in my opinion, it would be unlawful under § 58-46 for any official or employee of the Department of Taxation to give a copy of an inheritance tax return to any person, including a beneficiary, legatee or devisee, unless the Governor orders it done. However, L. C. Haake, Director of the Division of Inheritance and Gift Taxes of the State Department of Taxation, advises that a beneficiary, legatee, or devisee, upon making a request by letter, will be advised of the value of the property reported as left to such beneficiary, legatee or devisee. Such information may also be obtained, by subpoena duces tecum or otherwise, in any suit for tax correction filed pursuant to § 58-182 of the Code.

TAXATION—Land Books—Assessments made as of first day of each year.

January 26, 1967

HONORABLE PHILLIP P. BURKS
Treasurer of Bedford County

This will acknowledge your letter of January 25, 1967, in which you state that there is a possibility that the magisterial districts of the county will be reapportioned during the year 1967. You call attention to § 58-804(c) of the Code of Virginia, which provides that tracts of land in counties shall be entered on the land books by magisterial or school districts. You present the following question:

"If the commissioners appointed to redistrict Bedford County complete their work in April or May of this year, does the law of Virginia require that the 1967 land book for Bedford County be prepared by magisterial districts as they existed on January 1, 1967, or will the land book have to be prepared according to the magisterial districts as fixed by the commissioners appointed to redistrict Bedford County?"
As pointed out in your letter, § 58-4 of the Code provides that all assessments shall be made as of the first day of January in each year. In my opinion, the land books for the year 1967 should be made with respect to the location of the land as of January 1, 1967. I am not familiar with any statute which would require the commissioner of the revenue to change the land books to conform with the magisterial districts established subsequent to January 1 of the year in which the land books are prepared.

TAXATION—License Taxes—On landlords for separate types of rental properties.

February 21, 1967

Honorable Walther B. Fidler
Member, House of Delegates

This will acknowledge receipt of your letter of February 20, 1967, relating to the opinion furnished to you under date of February 9, 1967, with respect to the authority of the town of Kilmarnock regarding the following question:

“The Council is interested in knowing whether they would have the right to impose a license tax on the privilege of renting property within the Town of Kilmarnock. They propose a license tax on any landlord who rents two or more parcels of property with a given charge for vacant lots rented, another charge for business property rented and a third charge for residential property rented. The question is, does the Town have authority to impose such a license tax under its Charter or under the provisions of State law?”

In our previous opinion, we referred to the case of Young v. Town of Vienna, 203 Va. 265, and made the following statement:

“You will note that in that case the court held that the ordinance enacted by the council of the town of Vienna was not sufficiently broad to authorize the collection of a license tax based upon gross receipts. Whether or not a town can adopt an ordinance such as suggested in your letter that would be enforceable, this case does not specifically rule upon.”

You now request my advice with respect to the following question:

“The purpose of this letter is to get an opinion from your office as to whether your office feels that the whole broad proposition is permissible or not if the ordinance is properly drafted.”

We have not examined the charter of the town of Kilmarnock and, unless there is authority in the charter for the imposition of a license tax of this nature, the only applicable statute would appear to be § 58-266.1 of the Code of Virginia which authorizes towns to provide for the assessment and collection of license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within such towns regardless of whether any such license tax be imposed thereon by the State or not, subject to certain limitations.

I am unable to find any provision in Title 58 of the Code, or any other statute, which would prohibit the levying of a local license tax for this purpose, provided the first paragraph of this section (§ 58-266.1) is sufficiently broad to include the type of license tax being contemplated by your town council.
As we pointed out in our previous opinion, the case therein cited did not specifically rule upon this question. In that case the court said:

"The term 'engage in the business,' as expressed in statutes and ordinances, has a well defined meaning in law. It means a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit. . . . It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction, in the absence of a statute specifically providing otherwise. . . ."

I have omitted the authorities cited in that paragraph of the opinion. The case fails to cite statutory or charter authority empowering the council to enact the ordinance.

The court in this case seems to have expressly held that the collection of monthly rents under a lease does not constitute more than one act of engaging in business.

The case does imply that if the ordinance had been so drafted as to specifically state that one act of renting property would constitute engaging in business that the ordinance would have been valid.

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TAXATION—Licenses—Coin-operated pool tables.

JUVENILES—Crimes—Frequenting, playing in or loitering in public poolroom by minors.

CRIMES—Frequenting, Playing in or Loitering in Public Poolroom by Minors—What constitutes.

May 16, 1967

HONORABLE H. SELWYN SMITH
Commonwealth's Attorney for Prince William County

I am in receipt of your letter of May 4, 1967, in which you state that your office "has been asked to rule as to whether a device constitutes a pool table and is therefore to be regulated by Title 58, Section 396, and further, whether a person under the age of eighteen may frequent such an establishment operating the same." From your communication and our collateral discussions of this matter, it appears that the tables in question are somewhat smaller than the standard pool table and that they are operated by coin device, i.e., "by insertion of a coin, the balls are released for play—and once pocketed, are not available for re-play until a coin is again inserted." You further advise that all types of pool which may be played on a table of standard size may also be played on the tables in question and that such tables are operated at a public place where the principal undertaking is playing pool and the major source of revenue is derived from the rental of the tables under consideration.

In light of the above-stated circumstances, I am of the opinion that the tables concerning which you inquire would fall within the provisions of the initial paragraph of § 58-355 of the Virginia Code and be subject to a license tax of twenty-five dollars per year as therein prescribed. In this connection, the tables in question do not appear to qualify as "miniature" coin-operated pool tables which are subject to a special license tax of ten dollars per year as prescribed in § 58-355(7) of the Virginia Code.
Moreover, I am of the opinion that the payment of the tax on the tables in question pursuant to the initial paragraph of § 58-355 would not exempt the person operating such tables from the provisions of § 58-396 of the Virginia Code which requires a license for the privilege of operating a poolroom. Thus, a person keeping a poolroom containing coin-operated pool tables which do not qualify as "miniature" pool tables would be subject to the licensing provisions of both §§ 58-355 and 58-396 of the Virginia Code. This view is consistent with that which has been uniformly enunciated by the State Tax Department.

With respect to the second aspect of your inquiry, I concur in your view that the premises in question would also come within the ambit of § 18.1-349 of the Virginia Code which, in pertinent part, provides:

"No minor shall frequent, play in or loiter in any public poolroom or billiard room operated in conjunction with any establishment licensed under the Alcoholic Beverage Control Act; nor shall any minor under eighteen years of age frequent, play in or loiter in any other public poolroom or billiard room; nor shall the proprietor of any public poolroom or billiard room or his agent permit any minor to frequent, play in or loiter in any such place in violation of the foregoing provisions of this section.

"Any such minor or any such proprietor or agent violating the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than five dollars or by imprisonment in jail not more than six months or by both such fine and imprisonment."

In this connection, I am forwarding to you a copy of a previous opinion of this office, dated May 27, 1964, in which the view was expressed that the provisions of § 18.1-349 would apply to an establishment subject to a license under § 58-396 of the Virginia Code. See, Report of the Attorney General (1963-1964), p. 74.

TAXATION—Local Property Tax—Industrial Development Authority—Responsibility for payment when authority and lessee covered under Bond Act. April 25, 1967

HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

I am in receipt of your letter of April 13, 1967, in which you present for consideration and opinion the following situation and inquiry:

"The City of Chesapeake has created an industrial development authority under the Virginia Industrial Development and Revenue Bond Act (Sections 15.1-1373 to 15.1-1390 of the Code of Virginia, as amended). Section 15.1-1382 provides that the authority shall fix rent to be paid by the lessee at an amount sufficient to cover all expenses incident to the project and debt service on the bonds. This section also provides for the lessee to include as rent an amount in lieu of property taxes, as follows:

"Included in the rental payments to be made by any lessee to the authority shall be an amount in lieu of and equal to local property taxes and assessments upon property of the authority so leased; provided, however, that all such taxes and assessments shall be remitted by the authority to the political subdivision to which such taxes would normally be remitted if the
property were owned by private persons and not by the authority and shall be remitted by the authority to the political subdivision at the same time and into the same fund or funds as are local property taxes.

"A question has arisen in connection with the financing and construction of an industrial facility on which your opinion will be most helpful. If for any reason the lessee does not make the required payment in lieu of taxes, does the authority have any liability to the city for the payment of this amount or is the authority merely a conduit for the transmission to the city of such amounts as it may receive from the lessee in lieu of taxes?"

It is manifest from the provisions of § 15.1-1382 of the Virginia Code set forth in your communication that the amounts to be included in the rental payments made by a lessee to the authority are "in lieu of" local property taxes and that the authority is required to remit such amounts to the political subdivision to which local property taxes would have been paid if the property in question were owned by private persons and still subject to taxation. This view is supported, I believe, by the language of the provision under consideration directing that the amounts in question "shall be remitted" to the appropriate political subdivision by the authority. I find no language in § 15.1-1382 or any other provision of the Industrial Development and Revenue Bond Act which purports to impose any liability upon the authority for the payment of such amounts to a political subdivision other than by remission of the amounts received from a lessee, and I am therefore of the opinion that the authority is merely required to remit to the appropriate political subdivision such amounts as it may receive from a lessee in lieu of taxes.

TAXATION—Lodging House—License tax required through lodging irregularly furnished.

September 14, 1966

HONORABLE WILLIAM J. GILLS, JR.
Commissioner of the Revenue, Prince Edward County

In your letter of September 9, 1966, you ask whether a license tax is payable under § 58-387 of the Code of Virginia, (1950), as amended, by certain persons who occasionally provide lodging in their homes for compensation.

Section 58-387 provides:

"Any person who shall furnish, for compensation, lodging or diet to travelers or sojourners in any house of ten bedrooms or less shall be deemed to keep a lodging house. Every person who keeps a lodging house shall pay an annual license tax of five dollars."

You ask whether application of this section should be limited to "permanently established lodging houses having continuous occupancy or availability of rooms, and readily identified by signs and/or other forms of advertising."

No such limitation is expressed in § 58-387. The statute specifically states that anyone who furnishes lodging for compensation is deemed to keep a lodging house. Where such lodging is furnished, even though irregularly, in my opinion, the license tax is payable.
TAXATION—Motor Vehicles—Presumption of ownership may be overcome if proved to Commissioner of Revenue.

COMMISSIONERS OF REVENUE—Taxation of Motor Vehicles—Ownership can be determined by commissioner.

August 4, 1966

HONORABLE A. BURKE HERTZ
Commissioner of the Revenue, City of Falls Church

This will acknowledge receipt of your letter of August 3, 1966, in which you refer to my opinion of January 11, 1966, to Mr. James E. Durant, Treasurer, in which he expressed the view that the automobile mentioned in his letter was subject to taxation for the year 1966. In that letter, Mr. Durant stated:

"An automobile was purchased with bill of sale dated December 1965 but not titled with the Division of Motor Vehicles until January 4, 1966."

My opinion was based upon the theory that when the person involved purchased the automobile on December 20, he became the owner thereof by virtue of the fact that title to the car passed when the bill of sale was executed. The title certificate issued by the Division of Motor Vehicles is a mere registration of the title showing who is the owner of the car.

In your letter of August 3, you state:

"In the case cited by Mr. Durant, the vehicle was ordered on December 2, 1965 with delivery specified on the order to be January 2, 1966. The Dealer's Invoice was dated December 20, 1965 and the taxpayer made payment for the vehicle on January 4, 1966. The vehicle, I am advised by the Dealer, was carried on his Inventory as of January 1, 1966 and the Title was not transferred to the taxpayer until the date of payment on January 4, 1966. I am further advised that the Dealer allowed the taxpayer to use the vehicle on a conditional basis on December 24, 1965; however, the use was conditional on payment by the taxpayer for the vehicle and neither the Dealer nor the taxpayer considered the sale consummated until after January 1, 1966. I am further advised by the Dealer that in a great many cases when the Invoices are prepared the sales of such vehicles are not consummated and that it is customary to allow prospective purchasers to use and otherwise try out a vehicle prior to the consummation of a sale.

"This office has previously advised both taxpayers and Dealers that the ordering of a car prior to January 1st did not make the vehicle subject to tangible personal property taxes nor would the typing of an Invoice make such property liable to taxation."

The statement made by you contains information that was not furnished in the letter which was the basis of my opinion of January 11, 1966. Under the facts stated by you it would seem that the commissioner of the revenue would be justified in concluding that the person who bought this particular automobile was not the actual owner of the car on January 1, 1966—that is, that the negotiations had not reached the point where ownership had passed from the dealer. In this case a person had possession of the car on January 1, which established a presumption that he was the owner. In such cases, that presumption may be overcome by a showing to the satisfaction of the commissioner of the revenue that the car, in fact, was not owned by him until a later date.
TAXATION—Personal Property—Authority to assess depends on situs as of January first of taxable year.

Honorable G. Hugh Turner
Treasurer of Franklin County

This is in reply to your letter of May 19, 1967, which reads, in part, as follows:

"(1) A person bought a county car strip for 1965. The Commissioner of Revenue picked up this tax assessment from the sale of the car license. He did not buy a county car license for the year of 1966 nor did he turn in a list of his personal property to the Commissioner of Revenue. Should the Commissioner of Revenue copy the assessment that he made against this person in 1965 for the year of 1966 and 1967, when the assessment forms that were mailed to this one person were returned to the Commissioner of Revenue marked 'Unknown'?

"(2) Is it the responsibility of a person moving from a county to notify the Commissioner of Revenue of that county that he is leaving?

"(3) Do I have the authority to force collection of these tax assessments even though the person moved from the county in the fall of 1965?"

I shall treat your questions (1) and (3) together.

According to § 58-834, Code of Virginia (1950), as amended, the situs for the assessment and taxation of tangible personal property is the county or city in which such property may be physically located on the first day of the tax year. By virtue of § 58-835, tangible personal property shall be returned for taxation as of January first of each year, and the value of the property shall be taken as of such date.

Assuming that the personal property of the taxpayer was located in your county on January 1 of 1965, the property was assessable and taxable for the year 1965 on that date. The later removal of the taxpayer from the county does not alter this conclusion.

Also, assuming that the taxpayer moved from the county in the fall of 1965, taking his personal property with him, no legal assessment could be made on his property on January 1, 1966, under § 58-834.

The answer to your question (2) is in the negative.

There is no statutory duty on the taxpayer to notify the Commissioner of Revenue that he is moving from the county; however, as a practical matter, it would be advisable for him to do so.

TAXATION—Personal Property—County may exempt items in § 58-829.1.

COUNTIES—Taxation—Items in § 58-829.1 may be exempted.

Honorable S. Page Higginbotham
Commonwealth's Attorney for Orange County

This is in reply to your letter of May 12, 1967, which reads as follows:

"The Board of Supervisors of Orange County is considering the tax levy for the next ensuing fiscal year and questions have arisen
as to the different rates of levy that may be placed on different classes of property.

"According to Section 58-851 of the Code and 58-829.1 of the Code, a different rate of levy may be imposed upon farm machinery, farm tools, farm livestock, or tangible and personal property used or employed in a research or development business and also a different rate on certain household goods and personal effects and also a different rate on certain boats and water crafts under Section 58-828.2 of the Code and certain vehicles used as mobile homes under Section 58-829.3 of the Code.

"Would the power to levy a different rate mean that these items could be completely exempted with no rate imposed thereon? In our opinion this may be done.

"I have further advised the Board that in my opinion the classes of property listed under Section 58-829.1 must all have the same rate of levy except as to the exemptions listed above."

In my opinion the Board of Supervisors may, by proper ordinance, exempt from taxation in whole or in part the items of household goods and personal effects set forth in § 58-829.1 of the Code. I am attaching a copy of an opinion to the Honorable E. A. Christian, Vice-chairman of the Louisa County Board of Supervisors, under date of March 18, 1966, Report of the Attorney General (1965-1966), p. 287, to the same effect.

Since all of the household goods and personal effects included in the language of § 58-829.1 are placed in the same class for tax purposes, I am of the opinion that it would be violative of Section 168 of the Constitution of Virginia to place a different levy on any of these items.
compliance with military or naval orders. Compensation for military or naval service should not be deemed income for services performed within such other State, or political subdivision thereof, and personal property shall not be deemed to be located or present in or to have acquired a situs for taxation in such other State or political subdivision. This does not apply to personal property used in or arising from a trade or business, if the State in which it is performed otherwise has jurisdiction. If such serviceman accepts employment for compensation in a civilian undertaking, the State income tax is collected on this portion of his income.

While there is no exemption from real estate taxes, the fact that a non-domiciliary serviceman purchases real estate or obtains Virginia licenses for his automobile would not subject him to assessment of the local personal property taxes. Neither do I find reason in any of the other facts given for denying the immunity granted under the named Act to non-domiciliary servicemen in Virginia solely because of military or naval orders. Accordingly, I am of the opinion that these two servicemen are exempt from local personal property taxes and State income taxes and I shall answer your question in the affirmative.

TAXATION—Property Owned Directly or Indirectly by Commonwealth—Exempt.

Honorable L. W. Webb, Jr.
President, Old Dominion College

This is in reply to your letter of April 24, 1967, in which you asked to be advised if the city of Norfolk may charge Old Dominion College building permit fees in connection with buildings which will be constructed on State property.

While the provisions of the ordinance which you enclosed denominate the taxes as permit fees, the amounts charged indicate that they are taxes exacted for revenue purposes rather than fees imposed for the purpose of regulation.

The provisions of Section 183(a) of the Constitution of Virginia and of § 58-12(1) of the Code of Virginia (1950), as amended, exempt from taxation property owned directly or indirectly by the Commonwealth. Since the Old Dominion College is owned by the Commonwealth, it is exempt from this taxation.

It follows, therefore, that the College should be able to obtain the building permits directly from the city.

TAXATION—Real Estate—Assessment notice to last known address of owner.

Honorable J. T. Luckett, Jr.
Treasurer, City of Alexandria

This is in reply to your letter of August 11, 1966, in which the following state of facts are presented:

"Taxpayer notified City Collector to send all tax bills on certain property owned by him to an address different from that of the
property itself because he intended to rent the house rather than to occupy it. A receipt for taxes paid was so sent and received, leading taxpayer to believe that City Collector had corrected his records.

"The first half of the 1966 tax bill was mailed to the address of the owned property where it was personally received by the tenants but never forwarded to taxpayer.

"Taxpayer then learned that a penalty would be imposed as to this first half, and paid the entire amount of the 1966 tax promptly, but not the penalty. His position is that the penalty would not have been imposed except for the error of the City Collector and that his rights have been prejudiced by this error.

"Virginia Code § 58-960 requires treasurers to mail tax bills to taxpayers; in Board of Supervisors of Norfolk County v. Stanley Bender and Associates, 201 F Supp 839, it was held that compliance with § 58-960 is a prerequisite to the attachment of penalties and interest. There, as here, taxpayer paid the tax in full once the error was discovered."

You request my advice as to whether the penalty for late payment attached.

Section 58-960 of the Code provides as follows:

"The treasurer of every city and county shall, as soon as may be in each year, not later than December first, send by United States mail to each taxpayer assessed with taxes and levies for that year, a bill or bills in the form prescribed by the Department of Taxation. The failure of any such treasurer to comply with this section shall be a misdemeanor, punishable by a fine not exceeding five dollars; provided, that such treasurer shall be deemed in compliance with this section as to any taxes due on real estate if, upon the request in writing of the obligor upon any note or other evidence of debt secured by a mortgage or deed of trust on such real estate, he mails the bill for such taxes to the obligee thereof."

In my opinion, under the state of facts presented, the taxpayer is not subject to the penalty. The statute should be construed to mean that the treasurer or the city collector, as the case may be, is required to mail the statement to the last known address of the taxpayer, which in this instance, under the facts presented by the city attorney, was not done.

TAXATION—Real Estate—Lien on property until paid.

TREASURERS—Collection of Delinquent Taxes—Not held personally liable.

October 20, 1966

HONORABLE CLIFTON C. SIMMS
Treasurer of Grayson County

This is in reply to your letter of October 13, 1966, which reads as follows:

"I am writing you in regard to accepting a check from a taxpayer for real estate tax and have not been able to collect the money on the check. The real estate has been sold and the tax-
payers have left the State. Is there anything in the Tax Code that protects the treasurer from losing this money? Though the taxpayer has the tax ticket and the check given has not cleared the bank on which it was given."

Subsequently, you have advised this office that the real estate tax involved is for the year 1965; that you gave the taxpayer a receipt for the taxes on June 7, 1966; that the property against which the tax was assessed was sold by the owner and that you did not advise the purchaser or his attorney that the tax in question had been paid.

On September 21, 1950, in response to a question of a similar nature, this office ruled that a county treasurer would not be held personally responsible in the event a check given for the payment of real estate tax should be returned by the bank because of lack of sufficient funds. I enclose copy of that opinion, which was directed to Charles A. Reid, Treasurer of Greensville County, and which is found in the Report of the Attorney General (1950-1951), at p. 300.

There may be a difference between the facts in your case and the one considered in the opinion to Mr. Reid, as in that opinion the inference is that the property had not been sold.

Section 58-762 of the Code of Virginia, reads, in part, as follows:

"There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance thereon. The lien shall continue to be such prior lien until actual payment shall have been made to the proper officer of the taxing authority. . . ."

Inasmuch as the tax in question has not been actually paid, it is a lien against the real estate upon which the assessment was made. In my opinion, the lien was not extinguished by the giving of a receipt for the tax upon the tender to the treasurer of a worthless check, and will continue to be a lien on the property until the tax is actually paid.

If you did not include this tax in the list of delinquent taxes as required by §58-978(2) of the Code, and recorded in the clerk's office pursuant to §58-984 of the Code, you should file an amendment to this list as soon as possible.

There is no statute pertaining to the liability of a treasurer under the circumstances in this instance. If you reported this tax in the delinquent list prepared under § 58-978 of the Code, it would seem that under the provisions of § 58-999 of the Code there would be no liability. Whether the filing of an amendment to this list now would bring a treasurer within the protection of § 58-999, I cannot express a positive opinion.

TAXATION—Real Estate—Order dismissing old delinquent tax suit.
CIVIL PROCEDURE—Order Dismissing Old Delinquent Tax Suits.

December 2, 1966

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

This will acknowledge receipt of your letter of November 22, 1966, in which you state that there are approximately three hundred tax suits pending in your court which could be striken from the docket under the
provisions of § 8-154 of the Code. These suits are, I assume, in the name of Nansemond County versus the several defendants, and are carried separately from your Active Chancery Docket, but in separate files.

You request my advice as to whether an order in the following words would be sufficient:

"It appearing to the Court that there are many old delinquent tax suits on real estate, pending in the Circuit Court of Nansemond County, in which there have been no orders or proceedings for more than five (5) years, it is ORDERED that all such tax suits pending on the date of this order, except the suit of Commonwealth of Virginia and County of Nansemond v. Louisa Gregory and all parties unknown, etc., be and they hereby are dismissed and stricken from the docket of this Court, pursuant to § 8-154 of the 1950 Code of Virginia."

Frankly, I am not sure whether such an order would suffice. I believe, however, a single order showing Nansemond County as plaintiff and listing the various defendants in the order would be sufficient. By this method the members of the Bar could more readily ascertain what defendants were affected by the order.

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TAXATION—Real Estate—Political subdivisions not authorized to classify.

February 9, 1967

HONORABLE WALther B. FIDLER
Member, House of Delegates

This will acknowledge your letter of February 7, 1967, which reads as follows:

"The Mayor and Town Council of the Town of Kilmarnock have requested me to obtain an opinion from your office on two questions related to taxation."

"The Council is interested in knowing whether they would have the right to impose a license tax on the privilege of renting property within the Town of Kilmarnock. They propose a license tax on any landlord who rents two or more parcels of property with a given charge for vacant lots rented, another charge for business property rented and a third charge for residential property rented. The question is, does the Town have authority to impose such a license tax under its Charter or under provisions of State law?"

"The second question involves the right to impose separate rates of real estate taxes on business and residential property. The Town of Kilmarnock is zoned into two classifications of property, namely, commercial or business and residential. The question is, whether the Town has the right to impose different rates of real estate taxation on these two types of properties?"

With respect to your first question, you are referred to the case of Young v. Town of Vienna, 203 Va. 265, 123 S.E. (2d) 388, 93 A.L.R. (2d) 86. You will note that in that case the court held that the ordinance enacted by the council of the town of Vienna was not sufficiently broad to authorize the collection of a license tax based upon gross receipts. Whether or not a town can adopt an ordinance such as suggested in your letter that would be enforceable, this case does not specifically rule upon. You will find this case analyzed in the above volume of A.L.R., at page 135.
With respect to your second question, I am unable to find where the General Assembly of Virginia has given a different classification to business and residential property. Real estate is classified as one subject in § 58-851 of the Code of Virginia. This section is based upon the provisions of Section 168 of the Constitution which authorizes the General Assembly to define and classify taxable subjects. This constitutional provision does not authorize the political subdivisions of the State to make such classification. Therefore, the answer to this question is in the negative.

TAXATION—Reassessment—Part of county annexed by city.
CITIES—Taxation—Annexed part of county—No reassessment until official.

January 10, 1967

HONORABLE JAMES H. BROWN, JR.
Attorney for the City of Galax

This will acknowledge your letter of December 28, 1966, in which you state that certain territories in the counties of Grayson and Carroll have annexed to the city of Galax, effective January 1, 1967. I quote from your letter as follows:

“Our (city) problem is this: Carroll County is having a county-wide reassessment this year but is not considering any of the property in the newly annexed territory, since it will soon be in the city. I advised the city Council and Manager that I did not feel that the city had any grounds to commence reassessing this new property until the annexation order became effective as of January 1, 1967.

“Tentatively checking by city officials I understand that the appraised value of the houses, etc., in the new portion seems to be pretty much in line with the value of similar property in the old portion of Galax. However, the tax rate in the city is somewhat higher than the tax rate in the county.

“I will appreciate your opinion as to the equitable and legal procedure to follow in reassessing and taxing the property in the new section, and which Code Section or case might govern this situation. The City Council felt like they could then proceed with a direct opinion from your office and so do I.”

I concur with your conclusion that the city could not take steps to reassess the annexed property until after it has become part of the city.

The assessed value of the property annexed cannot be changed for the purpose of taxation during the year 1967. See, § 58-759 of the Code. Therefore, any reassessment cannot be effective until January 1, 1968. Under § 58-776.1 of the Code, the council of the city of Galax may by ordinance provide for the annual assessment and reassessment and equalization of assessments of the property located in the city. Under this provision, if the council wishes, it may adopt such an ordinance and direct that the reassessment be made and completed during the calendar year 1967, effective January 1, 1968. Of course, any such reassessment could not be confined to the annexed property but would have to be a general reassessment throughout the city.
This opinion is based upon the provisions of general law and we have not examined the charter of the city of Galax to determine whether or not it contains any provisions with respect to reassessments.

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**TAXATION—Recordation—Assignment of lease subject to tax.**

**RECORDATION—Assignment of Lease—Subject to tax.**

October 6, 1966

**Honorable W. Cary Crismond, Clerk**

Circuit Court of Spotsylvania County

This is in reply to your letter of October 3, 1966, which reads as follows:

"I am enclosing a copy of a lease dated 14 May 1965, which was recorded in this office in 1965 and the proper tax placed thereon. I am also enclosing a copy of a lease amendment which amends the aforementioned lease.

"Will you please advise whether the state tax on the Lease Amendment should be the difference between the original $100.00 per month and $150.00 per month in the amended lease from 1 August 1966 or for twenty years or for fifty years less the months the original lease has run or whether it should be considered an entirely new lease and the proper tax placed thereon.

"I am also enclosing an Assignment of Lease dated 2 September 1966 and wish you would advise whether only the recording charge is to be placed thereon or whether the recording charge and state tax be charged."

In my opinion, the tax on the amended lease should be based on the difference in the amount of the monthly rent, which is $50.00 per month. The tax is determined under the provisions of § 58-58 of the Code. If the annual rental multiplied by the first fifty years equals or exceeds the actual value of the property leased, then the tax should be based on the actual value of the property leased.


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**TAXATION—Recordation—Deed—No additional tax where contract for purchase of real estate recorded and tax paid unless consideration more.**

February 16, 1967

**Honorable R. H. L. Chichester**

Commonwealth's Attorney for Stafford County

This will acknowledge receipt of your letter of February 15, 1967, which reads as follows:

"I would like your opinion on the following situation:

"Property is sold under a contract of sale, at the time of the recording of the contract state and local taxes are paid on the
amount of consideration for the property by the purchaser. Then at a later date when the property is paid for under the terms of the contract, the purchaser presents his deed to the clerk for recordation. Should or should not the clerk require that state and local taxes be again paid on the deed, which has formerly been paid on the contract of sale?"

The answer to the question you have presented is found in § 58-61 of the Code. Under an amendment to that section by Chapter 361 of the Acts of Assembly (1964), there is no recordation tax for recording the deed in those cases where the contract for the purchase of the real estate has been recorded and the recordation tax upon the consideration was paid at that time.

Of course, where the consideration in the contract to purchase property is less than the consideration stated in the deed, an additional recordation tax shall be charged based on the difference.

TAXATION—Recordation—Fees—Land trust deed and final deed of conveyance to beneficiaries.

CLERKS—Fees—Recording land trust deed and final deed of conveyance to beneficiaries.

RECORDATION—Fees—Land trust deed.

November 14, 1966

HONORABLE EVA W. MAUPIN, Clerk
Circuit Court of Albemarle County

This will acknowledge your letter of November 10, 1966, in which you enclosed a deed from the office of McGuire, Woods & Battle, on which you have charged the usual recordation tax imposed under § 58-54 of the Code. You state that McGuire, Woods & Battle take the position that no recordation tax applies to a deed of this nature. This law firm has written you a letter under date of November 10 setting forth their reasons for the position taken, which letter reads as follows:

"This letter is written with reference to a Deed in Trust which we desire to present to your office for recordation. You have advised us that the Deed would be subject to the usual recordation tax imposed by § 58-54 of the Code of Virginia.

"The instrument in question (a copy of which is attached to this letter) was entered into pursuant to the recent Virginia Statute specifically authorizing land trusts, as set forth in § 55-17.1 of the Code of Virginia. As you will note, the interest of each beneficiary under the trust is identical to his respective interest in the land prior to the conveyance.

"Because of the large number of persons involved in the ownership of the land, we desire to use the land trust purely for the convenience it affords in permitting one person—the trustee—to deal with various title matters that might arise.

"As much as the document is neither a conveyance of property in the usual sense, nor a form of security instrument, we respectfully request you to obtain a ruling from the Attorney General regarding the imposition of the recordation tax on recording the document
attached, on subsequent conveyances by the trustee, and on the final deed terminating the trust and conveying its assets to the beneficiaries."

Attached to the above letter is copy of the deed which is designated as a "Deed in Trust."

It appears from the recitals in this deed that the property was conveyed to the grantors therein who were former stockholders of Cushman Virginia Corporation by that Corporation in connection with its liquidation.

The deed now offered for recordation is a conveyance with general warranty of title from the former stockholders of Cushman Virginia Corporation to Citizens Bank and Trust Company, Trustee, of all the land which they acquired from Cushman Virginia Corporation. The conveyance is in fee simple with full power and authority being granted to the trustee to manage and sell the property. There are various other provisions in the deed which I do not deem necessary to review in this opinion.

In my opinion the deed is subject to the recordation tax provided for in § 58-54 of the Code. The exceptions set forth in §§ 58-61 and 58-64 of the Code, in my opinion, do not apply.

In my opinion, as the statutes relating to recordation taxes now exist, deeds executed by the Citizens Bank and Trust Company to purchasers of the property involved in the deed in question would be subject to the recordation tax under § 58-54 of the Code.

I am also of the opinion that a final deed terminating the trust and conveying its assets to the beneficiaries would be subject to the provisions of § 58-54 of the Code.

TAXATION—Recordation Tax Separate from Gift Tax—Deed reserving life right.

CLERKS—Fees—Recordation of deed reserving life right—Based on appraisal.

November 4, 1966

HONORABLE KENNETH L. Figg, Jr., Clerk
Circuit Court of Prince George County

This will acknowledge your letter of November 3, 1966, which reads as follows:

"I have recently had presented to me a deed of gift conveying property from a man to his wife and children. The said deed reserves unto the grantor a right, during his natural life, to sell and convey timber growing on the land being conveyed. The grantor had an appraisal made of the property for the purpose of computing the gift tax due by this conveyance.

"The grantor was of the opinion that since there will be a gift tax paid by reason of this conveyance, there should be no recordation tax charged for the recordation thereof. He further questioned the propriety of the recordation tax being based on the consideration as fixed by the appraisal of the property rather than some lesser value, such as cost of the property which was purchased many years ago."
"The property, prior to this conveyance, was owned solely by the grantor therein.

"I am of the opinion that the gift tax and recordation tax are not related, and further that this office was proper in charging the recordation tax based on the current appraised value, however, to clarify this matter I would appreciate your opinion regarding the two questions the grantor raised in this matter as set out above."

The position taken by you, as expressed in the terminal paragraph of your letter, in my opinion, is correct. The provisions of § 58-54 of the Code apply and the recordation tax should be determined in accordance with that section. The gift tax is imposed under another section of the Code and does not in any way relieve the clerk from requiring payment of the recordation tax.

TAXATION—Sales and Use Tax—Agricultural exemption—Fences if not attached permanently to land.

October 10, 1966

HONORABLE MATT G. ANDERSON
Member, House of Delegates

This will acknowledge your letter of October 6, 1966, which reads as follows:

"As you are aware, § 58-441.6(c) of the Virginia Retail Sales and Use Tax act provides an exemption from the sales and use tax for, among other things, 'farm machinery, and all other agricultural supplies provided the same are sold to and purchased by farmers for use in agricultural production for market.'

"I understand that there has been considerable confusion among farmers as to the proper treatment of materials used for fencing farm animals, fields and pastures. It seems clear to me that such materials are essential to agricultural production (as a matter of fact, § 8-86 makes it unlawful for farmers not to have such fences). Further, it was certainly the intention of the General Assembly to be liberal in extending the exemption from sales taxes to our farm industry, as shown by the failure of the farming exemption to include language similar to that used in the manufacturing exemption which requires 'direct use' in the manufacturing process."

As you pointed out, the Act exempts agricultural supplies provided the same were sold to and purchased by farmers for use in agricultural production and market. The Act does not mention fences in any way.

Upon conferring with the State Tax Commissioner, we find that he takes the position, which he states is similar to that taken by other States having a comparable provision in their sales tax laws, that fences attached permanently to the land become an improvement to the land and are not exempt. However, temporary fences not permanently attached to the land are deemed to be exempt.
REPORT OF THE ATTORNEY GENERAL 301

TAXATION—Sales and Use Tax—Appropriation of Funds—At discretion of board of supervisors subject to § 58-441.49(g) and (h).

BOARDS OF SUPERVISORS—Sales and Use Tax—May apportion funds to school districts at board’s discretion.

SCHOOLS—School Boards—Have authority for capital outlay expenditures.

December 1, 1966

HONORABLE ERWIN S. SOLOMON
Commonwealth’s Attorney for Bath County

This will acknowledge your letter of November 29, 1966, which reads as follows:

“It would be appreciated if you would give your opinion on the following problem:

“The Board of Supervisors and the School Board of Bath County, Virginia, desire to know whether the sales tax remitted to the County under § 58-441.48 and § 58-441.49 of the Code of Virginia as amended may be distributed on a school district basis for capital outlay for school construction.

“It appears that the said § 58-441.48 in paragraph D of the said section will permit the funds to be used for capital outlay but does not state whether this may be used on a school district basis. Section 58-441.49 is silent on the use of the tax and whether it may be used on a school district basis.

“It would be appreciated if you would let us have your opinion on this matter.

“If the above funds may be distributed on a school district basis, does the board of supervisors have the authority to apportion the distribution of the funds to the school districts as they in their discretion see fit?”

All of the funds paid into the county treasury under the provisions of §§ 58-441.48 and 58-441.49 of the Code of Virginia are subject to the appropriation power of the board of supervisors. I know of no statute which would prevent the board of supervisors from appropriating these funds, or so much thereof as they deem advisable, for the purposes set forth in paragraphs two and three of your letter and in the same manner suggested therein.

With respect to the fourth paragraph of your letter, in my opinion, the board of supervisors may apportion these funds to the various school districts in accordance with their discretion.

Of course, capital outlay expenditures for public school purposes are subject to the discretion of the county school board, since the board of supervisors is not authorized to require the school board to construct school buildings, nor can the board of supervisors select the location of a school building—this being the prerogative of the school board.

This conclusion with respect to the distribution of these funds is subject to the provisions of paragraphs (g) and (h) of § 58-441.49, relating to incorporated towns.

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REPORT OF THE ATTORNEY GENERAL

TAXATION—Sales and Use Tax—Banks—Purchase or sale of property and services within or outside the State.

August 9, 1966

HONORABLE GRADY W. DALTON
Member, House of Delegates

This will acknowledge receipt of your letter of August 5, 1966, enclosing copy of an opinion of the Supreme Court, Appellate Division (New York), holding that national banks are not subject to the sales and use tax imposed under a law of that State. You also enclosed a letter from the Comptroller of the Currency to the same effect.

You present the following questions:

"In light of this decision and the position of the Comptroller's office, I should like to request the opinion of your office as to whether national banks doing business in Virginia are exempt from the taxes imposed by the Virginia Retail Sales and Use Tax Act under the following situations:

1. On purchases of property or services taxable under the Act, made within the state.

2. On purchases of property or services taxable under the Act, made outside the state.

3. On the sale to the public of items such as piggy banks, flags, etc. on which no profit is made."

Section 1-12 of the Regulations of the State Tax Commissioner is as follows:

"§ 1-12. Banks.—The tax applies to purchases of tangible personal property by banks for use or consumption by them.

"When any bank engages in selling, leasing or renting tangible personal property to consumers, it must register as a dealer, and collect and remit the tax due thereon to the State Tax Commissioner.

"Taxable sales by banks include, but are not necessarily limited to, sales of checks, check books, silverware, savings or piggy banks, repossessed merchandise, and gross charges for the lease or rental of tangible personal property.

"The rental of safe deposit boxes is not subject to the tax."

Section 58-441.46 of the Code is as follows:

"If any provision of this chapter be held unconstitutional or invalid by a court of competent jurisdiction the same shall not affect the remaining provisions of this chapter but all such provisions not held unconstitutional or invalid shall remain in full force and effect. If, however, a court of competent jurisdiction should hold that the sales tax or the use tax levied by this chapter is for any reason invalid in its relationship to national banks, it is hereby provided that State banks shall thenceforth enjoy immunity from such tax or taxes to the same extent as national banks."

The New York court is not a "court of competent jurisdiction" within the meaning of the above section. Therefore, until and unless such a court holds that the tax imposed is invalid in its relationship to national
banks, such banks are subject to the provisions of the act. None of the transactions mentioned in your questions is exempt. I doubt that any of the "exclusions and exemptions" set out in § 58-441.6 would apply.

TAXATION—Sales and Use Tax—Bottled gas not exempt.

August 18, 1966

HONORABLE J. P. BEALE
Commissioner of the Revenue of Westmoreland County

This is in reply to your letter of August 16, 1966, in which you refer to subsection (g) of § 58-441.6 of the Code which exempts from the sales tax "gas, electricity, or water when delivered to consumers through mains, lines or pipes." You raise the question as to whether or not this is a valid exclusion, due to the fact that bottled gas is not exempted.

The State Department of Taxation has issued rules and regulations relating to the Virginia Retail Sales and Use Tax and Regulation No. 1-43 reads as follows:

"The tax does not apply to gas, electricity, or water when delivered to consumers through mains, lines, or pipes."

"The tax applies to sales of oxygen, acetylene, hydrogen and liquefied petroleum gases to consumers or users, unless such sales are exempt under § 1-63, relating to manufacturers, processors, etc., or § 1-4, relating to agricultural products for market, or on some other specific ground. The tax does not apply to sales of such gases for resale."

"Retail sales of bottled water are taxable."

It is contended that the person using gas that is stored in bottled containers is discriminated against on the ground that a person using gas or electricity for the same purpose when delivered to a consumer through mains, lines or pipes is not subject to the tax.

The constitutionality of the Virginia Retail Sales and Use Tax Act must be presumed. The State Tax Commissioner is authorized under § 58-441.41 to promulgate Rules and Regulations for the enforcement of the Act. Since he has so acted in regard to the provisions of the statute in question, I would be reluctant to issue an opinion to the contrary without the citation of Virginia court decisions holding such a classification to be invalid. Both the statute and the regulations are free from ambiguity.

TAXATION—Sales and Use Tax—Certain church activities exempt.

August 31, 1966

HONORABLE EDWARD E. LANIER
Member, House of Delegates

This will acknowledge receipt of your letter of June 20, 1966, which reads as follows:

"I am writing to request an official opinion with regard to the applicability of any state sales tax in the following situations:

1. Churches of the Episcopal Diocese of Virginia have in the past, from time to time, sponsored fairs, bazaars, or sales, open to
the public, at which various items of an edible nature, prepared foods, flowers, animals, clothing, both new and used, and other merchandise, are offered for sale. The items so offered may have been donated, made by members of the congregation, purchased for resale, or on consignment from a dealer.

"2. In addition to the type sale mentioned in No. 1 above, items such as pecans, candies, fruit cakes, Christmas cards, etc., are frequently offered for sale privately to members of the congregation and their friends. In such instances, the items offered for sale are frequently on consignment.

"3. The churches also, at times, serve meals for which a charge is made. Some of these are in connection with activities involving the fairs, bazaars or sales above referred to, and others are directly in connection with meetings or other related activities of the congregation and the church. When meals are served, the charge made is usually barely sufficient to pay for the food and utilities, without regard to the labor involved, which is furnished by the ladies of the congregation as a normal thing, however, at times a charge may be made exceeding actual cost of ingredients and utilities.

"4. Some of the activities referred to above are carried on by the church itself, but most of them are carried on usually by church connected organizations such as Bible Classes, Sunday School Classes, Ladies Auxiliaries, Youth Groups, or the like. The proceeds of the sale of such merchandise and any profits made are used to support the activities of the church, or of the church organization in question, and thus are believed to benefit directly the religious activities of the congregation.

"My inquiry relates to the following:

"A. Is any state sales tax applicable to sales made in any of the above situations?

"B. If the tax is applicable to any such, please specify which types of situations result in tax liability.

"C. In case any of the activities in question are subject to sales tax, may the church designate one person as its representative to file the necessary forms and to act for the church and for all of the church connected organizations?

"D. Will you also outline the steps and procedures required by law to qualify such person or such organization to collect the tax in question and to file the necessary tax returns."

The State Tax Commissioner has issued rules and regulations pertaining to the Virginia Retail Sales and Use Tax Act. Regulation No. 1-74 is as follows:

"No exemption is granted to churches, religious, charitable, civic and other non-profit organizations, except as hereafter in this section stated. They are required to pay the tax on all purchases of tangible personal property.

"The Act exempts: (a) Sales of tangible personal property for use or consumption by a college or other institution of learning at any level, provided it is not conducted for profit; and,

"(b) Sales of tangible personal property for use or consumption by a hospital, provided it is not conducted for profit."
REPORT OF THE ATTORNEY GENERAL

"When any non-profit organization engages in selling tangible personal property at retail, it is required to comply with the provisions of the Act relating to collection and remittance of the tax. But as to the sale of medicines and drugs and certain other enumerated items of tangible personal property by hospitals, see § 1-47; and as to the sale of school textbooks by non-profit schools at any level, see § 1-96."

These regulations were promulgated under the authority contained in § 58-441.41 of the Code.

In my opinion, the transactions, including the serving of meals (Levy v. Paul, 207 Va. 100), which you have mentioned in paragraphs (1), (2) and (3), constitute sales and are subject to the taxing provisions of § 58-441.4 of the Code. None of these transactions would ordinarily be excluded or exempted under the provisions of § 58-441.6. This answers your questions A and B.

With respect to your question C, it would seem that the procedure therein suggested would be appropriate. I suggest that each separate church should make application to the Department of Taxation for a certificate of registration as provided for in Regulation 1-21. I also suggest that question C be directed to the State Tax Commissioner, because the procedure for reporting in such manner is a matter for administrative determination.

With respect to question D, this same section—1-21 of the regulations—should be followed.

TAXATION—Sales and Use Tax—Churches and religious societies.

November 25, 1966

HONORABLE HENRY E. HOWELL, JR.
Member, Senate of Virginia

This will reply to your letter of November 1, 1966, in which you present several questions involving application of the Virginia Retail Sales and Use Tax Act—§§ 58-441.1 et seq., Code of Virginia (1950), as amended—to churches and religious societies. Your inquiries will be stated and considered in the order set forth in your communication.

(Q) "Is a church or a religious body a 'person' within the meaning of § 58-441.2(a)?"

Answer: Yes. As you are aware, § 58-441.2(a) of the Virginia Code is a comprehensive provision which specifies that the term "person" shall include:"

"... any individual, firm, copartnership, cooperative, non-profit membership corporation, joint venture, association, corporation, estate, trust, business trust, trustee in bankruptcy, receiver, auctioneer, syndicate, assignee, club, society, or other group or combination acting as a unit, body politic or political subdivision, whether public or private, or quasi-public, and the plural as well as the singular number." (Italics supplied.)

I am of the opinion that the above-quoted definition is sufficiently broad to include churches and religious societies within its terms. This view is consonant with the legislative history of the statute in question, since several attempts were made in the General Assembly during the course of passage of the statute—but without success—to exempt churches and religious bodies specifically from the scope of the sales tax enactment. Con-
sistent with this view also is § 1-74 of the Rules and Regulations applicable to the Virginia Retail Sales and Use Tax issued by the Department of Taxation on August 1, 1966. In pertinent part, § 1-74 of the Rules and Regulations prescribes:

"No exemption is granted to churches, religious, charitable, civic and other non-profit organizations, except as hereafter in this section stated. They are required to pay the tax on all purchases of tangible personal property.

"The Act exempts: (a) Sales of tangible personal property for use or consumption by a college or other institution of learning at any level, provided it is not conducted for profit; and,

"(b) Sales of tangible personal property for use or consumption by a hospital, provided it is not conducted for profit.

"When any non-profit organization engages in selling tangible personal property at retail, it is required to comply with the provisions of the Act relating to collection and remittance of the tax."

(Q) "Do not the provisions of Section 183 of the Constitution of Virginia prohibit any tax, including sales tax, from being imposed upon any of the furniture and furnishings of churches or religious bodies?"

Answer: No. Section 183 of the Virginia Constitution specifies what property shall be exempt from taxation. The sales tax imposed by the Virginia Retail Sales and Use Tax Act is not a tax on property but is specifically denominated by § 58-441.4 of the Virginia Code as a license or privilege tax upon persons engaged in the business of selling at retail or distributing tangible personal property in this State. As such, I am of the opinion that the sales tax in question does not come within the ambit of Section 183 of the Virginia Constitution.

(Q) "The third and somewhat related question is 'Does the imposition of a sales tax on churches and religious bodies violate the guarantees of our state and federal laws that provide for a separation of church and state?"

Answer: No. The sales tax imposed by the statute in question is ordinary and general in its nature and operation and is imposed for the support of government. Such tax is not imposed with the design—not does it have the effect—of advancing or inhibiting religion or religious bodies. While a different question would be presented if the tax under consideration was special or single in kind and directed solely or predominantly against churches or religious societies, I am of the opinion that the imposition of a general retail sales tax does not violate any guarantee of the "separation of church and state" principle embodied in any of our State or Federal laws.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Sales and Use Tax—Distribution after part of county annexed by town.

TOWNS—Sales and Use Tax—Distribution after part of county annexed.

October 31, 1966

HONORABLE OTIS B. CROWDER
Treasurer of Mecklenburg County

This will acknowledge your letter of October 29, 1966, which reads as follows:

"The Town of South Hill recently annexed some land from Mecklenburg effective as of January 1, 1967.

"I understand that the 1½ sales tax (local) that is collected during the months of November and December, 1966, will be paid into our county treasury in January and February, respectively.

"I would like for you to advise me if the town should share in the above mentioned sales tax that may be collected before the annexation although to be received by the county after the annexation."

I assume you have reference to distribution to incorporated towns under § 58-441.49 of the Code. In my opinion, distribution by the county treasurer to the town under the provisions of either subsection (g) or (h) of the above Code section shall be governed by the ratio that the school age population of the town bears to the school age population of the entire county at the time distribution is made. This would require an adjustment of such population as shown by the last State-wide school census so as to reflect the increase on account of the annexation.

TAXATION—Sales and Use Tax—Distribution to Town Not Separate School District—Not authorized unless charter election requirements met.

TREASURERS—Sales and Use Tax—Distribution to Incorporated Town Not Separate School District—Not authorized unless charter election requirements met.

December 12, 1966

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney for Henry County

This will acknowledge your letter of December 7, 1966, which reads as follows:

"I have been requested by the Treasurer of Henry County to seek your opinion concerning the distribution of the local sales tax levied pursuant to the enactment of Chapter 8.1 of the Code of Virginia, more particularly the provisions of paragraph (h) of Title 58-441.49, wherein it is provided that, 'In any county wherein is situated any incorporated town not constituting a separate school district which has complied with its charter provisions providing for the election of its council and mayor for a period of at least four years immediately prior to the adoption of the sales tax ordinance, the county treasurer shall pay into the town treasury of each such town for general governmental purposes the proper
proportionate amount received by him in the ratio that the school age population of each such town bears to the school age population of the entire county, based on the latest state-wide school census.'

"The incorporated Town of Ridgeway, incorporated in 1890, is located in Henry County and does not constitute a separate school district. The town has not held an election of council and mayor during the period of four years immediately prior to the adoption of the sales tax ordinance, although, so far as I can determine, the town charter provides for election of these officials every two years. However, previously duly elected council and mayor are holding these offices. It is provided in the charter, as amended in 1900, that they shall hold office after their election until their successors shall qualify. I am advised further that the Attorney General of Virginia has previously rendered an opinion that these officers can legally continue to hold office beyond the two year period for which they were elected. No election has been held within the four years immediately prior to the adoption of the sales tax ordinance because no candidate has filed for either of these offices during that time and it is the practice that unless such a candidate files, then no election is held.

"The Town of Ridgeway is an active, functioning corporation and renders governmental service to its residents. The council holds regular meetings and transacts the ordinary business that comes before it.

"In view of the foregoing facts and inasmuch as the Town does provide a governmental service and functions, and in view of the fact that the duly elected officials can apparently hold office until a successor or successors qualify, I would like your opinion as to whether the treasurer of Henry County can legally make the apportionment of the tax as provided by paragraph (h) of Title 58-441.49, even though no election has been held within the four years immediately before passage of the sales tax ordinance."

In my opinion, the town does not qualify for participation in the fund collected under the county sales tax. As you have pointed out, subsection (h) of § 58-441.49 of the Code provides that in order for any town that does not constitute a separate special school district to be eligible to participate in the distribution of the fund, it must have complied with its charter provisions providing for the election of its council and mayor for a period of at least four years immediately prior to the adoption by the county of the sales tax ordinance. The town of Ridgeway fails to meet this statutory condition. Therefore, the treasurer of the county has no authority to pay any part of the local county sales tax into the treasury of the town in question.

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TAXATION—Sales and Use Tax—Local tax—When applicable.

September 29, 1966

HONORABLE GEORGE P. SMITH, JR.
Commonwealth's Attorney for Fluvanna County

This will acknowledge receipt of your letter of September 27, 1966, which reads as follows:

"Fluvanna County has adopted a general retail sales tax of one per cent under the provisions of § 58-441.49 of the Code of Virginia."
The adjoining County of Cumberland has not adopted such local sales tax.

"We have a fuel oil distributor who has an office and place of business in Fluvanna County who sells fuel oil to persons residing in Cumberland County. Sometimes orders are phoned in to his office here in Fluvanna County and sometimes the tanks of customers are filled when required as a routine matter. The fuel oil is delivered to the tanks of the customers in Cumberland County and the sales tickets are made out at that time and place.

"My question is whether the fuel oil distributor should collect the local sales tax imposed by Fluvanna on the sales made in Cumberland County, and report and remit the same as required by law? Conversely, is a fuel oil distributor located in Cumberland County, or any other locality not imposing a local sales tax, required to collect the tax on fuel oil sold and delivered to persons residing in Fluvanna County, and report and remit the same for the benefit of Fluvanna County?"

The answer to your first question is in the affirmative. Under § 58-441.49(e) of the Code, the imposition of the sales tax in the cities and counties is controlled by the place of sale.

The answer to your second question is in the negative because there is no tax being imposed by the county in which the sale is being made.

TAXATION—Sales and Use Tax—Occasional sale by auctioneer or common crier.

October 6, 1966

HONORABLE R. TURNER JONES
Commonwealth's Attorney for Highland County

This is in reply to your letter of September 30, 1966, which reads as follows:

"Section 1-9 of the Virginia Retail Sales and Use Tax regulations provides, 'Auctioneers, agents or factors selling tangible personal property are liable for collection and payment of the sales tax. The tax applies to the gross sales price of each single sale without deduction for commissions, service charges or any other expenses.'

"Section 1-75 of the same regulations provides, 'The tax does not apply to an occasional sale, which means a sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a certificate of registration...'

"We have several auctioneers or common cribers in our community who are called by individuals to conduct household and general sales for the owners. The service of the auctioneer or common crier is engaged for a flat fee, the auctioneer not owning the property nor receiving any commission of percentage from the sale of same, he acting only as agent for the owner. It is my opinion that Section 1-9 does not apply to sales of this kind, and that Section 1-75 would apply in that we would call it an occasional sale of tangible personal property in which the auctioneer or crier had no
interest in the activity whatever except his employment for a stated fee to sell the property. I would like to have your opinion on this matter."

In my opinion, the provisions of Section 1-75 of the Regulations issued by the Department of Taxation would not apply in this case. I do not believe that sales of this nature by a licensed auctioneer come within the definition of "an occasional sale" contained in § 58-441.6(m) of the Code. In my opinion, Section 1-9 of the Regulations applies.

I am sending a copy of this to Honorable C. H. Morrissett, State Tax Commissioner, so that if I am in error he may advise you to that effect.

TAXATION—Sales and Use Tax—Religious organizations not exempt.

October 21, 1966

HONORABLE TESS HARLESS SAUM
Commissioner of the Revenue, City of Clifton Forge

This will acknowledge receipt of your letter of October 12, 1966, which reads as follows:

"I have been asked by a member of the Clifton Forge Christian Church to request your opinion concerning the sales tax on the purchase of a furnace for the church and the parsonage.

"I am familiar with section No. 1-74 concerning nonprofit organizations, but I thought perhaps there would be some exemption possibility in the State constitution."

The Virginia Retail Sales and Use Tax Act does not exempt from the sales tax purchases made by religious organizations. The tax is imposed on the seller who must account for the tax to the State Tax Commissioner.

There is no constitutional provision that would compel an exemption to the church. Section 183 of the Constitution would not apply.

TAXATION—Trailer Lots Within Trailer Camping Ground—Tax must be uniform in application.

ORDINANCES—Taxation—Trailer lots—Must be uniform in application.

April 25, 1967

HONORABLE DONALD R. HOWREN
Commonwealth’s Attorney for Henrico County

This will acknowledge receipt of your letter of April 18, 1967. You requested my opinion as to whether or not the county can legally apply a lesser tax to those trailer lots within a trailer camping ground or park devoted entirely to those persons who stay but a short period of time (e.g., one day or so up to two weeks) as opposed to other trailer facilities where they stay for other periods of time.
In my opinion, the provisions of § 35-64.5 of the Code of Virginia (1950), as amended, prohibit the county from requiring a lesser tax on those trailer lots within a trailer camping ground or park used for shorter periods of time than on those trailer lots which are used for longer periods of time.

This section provides, in part:

"... the license so imposed by the governing body on such trailer park or trailer park operators or person parking a trailer in an individual lot not in a trailer camp or park to be uniform in its application, and the amount thereof to be fixed by an ordinance duly adopted by said governing body..."

It is clear from the language of this section that the legislature intended that any tax on trailer lots be uniform in application. This, therefore, precludes the county from establishing different classifications for tax purposes of trailer lots based solely on the period of time during which the lots are used.

TORTS–Immunity–County dog warden–Not liable where acting legally within scope of authority, but liable for negligence in performance of ministerial duty.

DOG LAWS–Special Dog Warden–Immune to civil action if acting legally within scope of authority, but liable for negligence in performance of ministerial duty.

July 11, 1966

HONORABLE HARRY G. LAWSON
Commonwealth's Attorney for Appomattox County

In your letter of July 6, 1966, you ask whether a county dog warden, attempting to capture an unlicensed dog which has been injuring property, would be personally liable for injuring or killing the dog without negligence on the part of the warden. You ask if the warden would enjoy the same immunity from suit which is enjoyed by the county or the State.

It seems clear that the dog warden is a county, rather than a State, employee. See, § 29-184.2 of the Code of Virginia (1950), as amended, authorizing the governing body of a county to provide that a dog warden may be hired to enforce the dog laws and ordinances, and providing that such dog wardens have all the powers of game wardens in the enforcement of such laws and ordinances. Among the laws such a warden must enforce is § 29-199 of the Code, which imposes on game wardens the duty of killing dogs of unknown ownership on which no license has been paid.

The county, like the State, enjoys an absolute immunity from suit for torts committed by its agents and employees. Mann v. Arlington County, 199 Va. 169, 98 S. E. 2d 515 (1957).

In some cases, it has been held that an agent or employee of the State is immune from suit in tort. For example, in Sayers v. Bullar, 180 Va. 222, 22 S. E. 2d 9 (1942), the court said at page 230: "Our conclusion is that the immunity of the State from actions for tort extends to State agents and employees where they are acting legally and within the scope of their employment, but if 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 when they are sued by a party who has suffered injury by their negligence."

However, in Berry v. Hamman, 203 Va. 596, 125 S.E. 2d 851 (1962), although finding a state trooper not negligent in wounding a special police-
man, the court said at page 598: "Generally, a public officer may be held personally liable for damage resulting from negligent acts in the performance of a ministerial duty."

While the court said in the Mann case, 199 Va. at 175, that a county's freedom from liability in tort "may be likened to the immunity that is inherent in the State," I know of no Virginia case stating that a county employee is immune from suit in tort. The contrary is indicated by Wynn v. Gandy, 170 Va. 590, 197 S.E. 527 (1938), affirming a judgment against a school bus driver. The court said at page 595: "It seems to be well settled that public officers are liable for injury which is the result of their negligence in the performance of duties which do not involve judgment or discretion in their performance, but which are purely ministerial."

The act of a county dog warden in capturing a dog probably would be held to be performance of a ministerial, rather than a discretionary, duty. This being so, probably such a warden would be held personally liable for negligent or intentional infliction of injury while capturing a dog, or for killing a dog which he is not authorized to kill by § 29-199. Like any person, he would not be liable for injury caused by unavoidable accident while performing his duties with reasonable care.

TOWNS—Council—May hold closed or executive meetings unless prohibited by charter.

September 12, 1966

HONORABLE DONALD K. FUNKHOUSER
Member, House of Delegates

This will acknowledge receipt of your letter of September 8, 1966, which reads as follows:

"I am writing concerning a matter of press coverage of town council meetings and request a ruling from your office on this matter.

"The town of Strasburg's Town Council met in regular session for the purpose of organizing the Council for the coming year. The local newspaper (Northern Virginia Daily) has always covered these Council meetings, however this time they were barred from having a reporter there by the Mayor's calling this meeting an Executive Session. My question is this: Can a regular meeting of a Town Council be termed an Executive Session or does it have to be a special meeting? In broadening this question: Under what conditions can a meeting of a Town Council be termed an Executive Session?

"I feel if these regular meetings can be termed an Executive Session and the press barred we are making a step in the wrong direction toward an informed populace."

Section 15.1-539 of the Code requires the board of supervisors of counties to hold open meetings and § 15.1-810 requires city councils to hold open meetings subject to an exception set forth therein. I can find no comparable Code section requiring the council of a town to hold open meetings. Section 15.1-826 of the Code provides that the "council of a town may adopt rules for the regulation of its proceedings. . . ."

In my opinion, unless there is a provision in the town charter requiring the council to hold open meetings, it would seem that they may hold closed or executive meetings.
REPORT OF THE ATTORNEY GENERAL

TOWNS—How Vacancies on Council Filled When Elected Councilmen Fail to Qualify.


September 16, 1966

HONORABLE H. VICTOR MILLNER, JR.
Town Attorney of Chatham

This will acknowledge receipt of your letter of September 12, 1966, in which you state, in part, as follows:

"On Tuesday, June 14, 1966, an election was held in the Town of Chatham to elect a Mayor and six Councilmen. The positions of the entire Council membership as well as that of the Mayor were up for election and ten persons filed notice of candidacy for the six available seats. Of those seeking election four were incumbents in that two of the existing Council did not stand for reelection. The Mayor was unopposed and was reelected.

"All four of the incumbent Councilmen were returned to office along with the Mayor and two new members were elected.

"Section 4(3) of the Charter of the Town of Chatham provides as follows:

"On the second Tuesday in June, nineteen hundred and forty-two, and every two years thereafter, there shall be elected by the qualified voters of the Town of Chatham, one elector of the town, who shall be denominated mayor, and six other electors who shall be denominated the councilmen of the town, and said mayor and councilmen shall constitute the town council. They shall enter upon the discharge of the duties of their offices on the first day of September next succeeding their election, and shall continue in office until their successors are duly elected and qualified. Every person elected shall take an oath faithfully to execute and discharge the duties of his office to the best of his judgment, and the mayor shall take the oath prescribed by law for State officers. The failure of any person elected or appointed under the provisions of this act to qualify or to take the oath required, within the time prescribed for entering upon the discharge of the duties of the office to which he is elected or appointed, shall vacate the said office, and the council shall proceed and are hereby vested with power to fill such vacancy in the manner herein prescribed.'

"Section 4(5) of the Charter provides as follows:

"The council of the town shall judge the election, qualification and return of its members; may fine them for disorderly conduct, and with concurrence of two-thirds vote of the council, expel a member. If any person returned, be adjudged disqualified, or be expelled, a new election to fill the vacancy shall be ordered by the council and held on such day as it may designate by ordinance. Any other vacancy occurring during the term of any member of the council shall be filled by the council by the appointment of any one eligible to such office. A vacancy in the office of mayor shall be filled by the council from the electors of the town, and any member of the council may be eligible to such office.

"Neither the Mayor nor any of the elected Councilmen presented themselves to qualify or take oath as required by the Charter within the time prescribed.
"Assuming that the old Council, including the two members who did not seek reelection, would remain in office pursuant to Section 4(3) of the Charter, is it necessary under the Charter as quoted above that a new election to fill the vacancies be held, or may the old Council appoint a new one (presumably itself and the two newly elected members)? In the alternative, would Section 15.1-830 of the Code of Virginia apply under the proviso therein concerning vacancies in the majority of the Council where the Circuit Court is empowered to appoint to fill the vacancies?

"Assuming that a new election should be held or that the vacancies may be filled under the Charter or the Statute, would any action of the Council taken prior to qualification of the new Council be valid with respect to new legislation or commitments other than in the regular course of day to day business?"

Under the state of facts presented by you, and under the provisions of Section 4(3) of the Charter, there is a vacancy in all of the council seats and the office of mayor. The Charter provision is similar to §§ 15.1-38 and 15.1-40 of the Code. Section 4(5) of the Charter, which you cited in your letter, prescribes two methods of filling the vacancy. In my opinion, the first method—that is, by calling an election—would not apply. The second sentence of Section 4(5) of the Charter provides that any other vacancy occurring during the term of any member of council shall be filled by the council. Since all of the councilmen have failed to qualify, thus creating a vacancy as to the whole council, the question arises as to whether or not these vacancies have occurred during the term of any of the councilmen. Section 33 of the Constitution is 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."

Although the council members whose terms expired on September 1, 1966, hold over until their successors are duly elected and qualified, nevertheless, their terms of office are not extended either under the statutory and Charter provisions or the Constitutional provision cited above.

In construing a similar Constitutional provision, the Supreme Court of Appeals of Virginia has held that such a clause does not extend the term but simply enables the incumbent to hold over until his successor, whether elected or appointed, is chosen and qualifies in the manner prescribed by law. See, Burnett v. Brown, 194 Va. 103. In my opinion, this is not a situation that is contemplated by the terms of Section 4(5) of the Charter. In other words, I do not feel that provision is made in the Charter for the filling of a vacancy where all of the seats on the council are vacant. Since, in my opinion, this is the type of vacancy as to the filling of which there is no provision in the Charter of the town, I feel that the proper method of filling this vacancy is under the provisions of general law. Section 15.1-830 of the Code, to which you referred in your letter, expressly provides that when there shall be vacancies in the majority of the council the circuit court or the judge thereof in vacation shall fill such vacancies. Also, § 24-145 provides that if a vacancy occurs in any office of the town as to the filling of which there is no provision in the Charter or ordinances of such town, that the same shall be filled by the circuit court of the county in which the town is situated or by the judge thereof in vacation.
REPORT OF THE ATTORNEY GENERAL

After the council has been appointed by the judge and has qualified by taking the oath of office, the council may then elect a mayor to fill the vacancy created by the failure of the mayor-elect to take the oath of office as prescribed by law.

With respect to your second question relating to the validity of actions taken by the council prior to the qualification, you are referred to § 2-33 of the Code and the cases annotated thereunder. Under this section and the cases cited in the annotation, the official actions of the council would be valid.

TOWNS—Incorporation—Election not needed for initial incorporation.

HONORABLE TOM FROST
Member, House of Delegates

This is in reply to your letter of September 26, 1966, which reads as follows:

"I have received a request from the residents of Marshall, Virginia for information on how to call an election pursuant to § 15.1-834, under the circumstances described.

"Marshall, Virginia is an unincorporated community situated in Fauquier County and having approximately 900 residents. The Chamber of Commerce of Marshall has sponsored extensive investigation of the advantages and disadvantages of incorporating the community as a town under Title 15.1 of the Code of Virginia and now believes that a majority of the community's residents favor requesting the Virginia General Assembly to grant a charter incorporating Marshall, Virginia as a town.

"Prior to making such request to the General Assembly, the Chamber of Commerce desires, and apparently is required by Code §§ 15.1-833 and 15.1-834, to have an election conducted among the qualified voters of the community as provided in § 24-141 of the Code. The alternative public meeting set forth in § 15.1-835 is undesirable because of the difficulties of measuring the sense of the community's residents.

"In particular, information is desired on the following questions:

"(1) Whether the Judge of the Circuit Court of Fauquier County is authorized to call the election described in § 15.1-834 upon petition by the Chamber of Commerce of Marshall, Virginia.

"(2) If the answer to question (1) is negative, whether the governing body of the county or a resident of the unincorporated town of Marshall can call the election described in Code § 15.1-834.

"(3) Whether voters qualified to vote in such an election must reside within the proposed boundaries of the town to be incorporated.

"(4) Whether the order, resolution, or petition calling the election, as the case may be, must recite the proposed boundaries of the town in terms of metes and bounds.
"If it is possible to hold the election described above, it will be convenient and economical to hold it as part of the regular election scheduled for November 8, 1966."

Chapter 17 of Title 15.1 of the Code, consisting of §§ 15.1-833 through 15.1-836, does not provide for the incorporation of communities into municipal corporations. This chapter relates to the obtaining of a new charter or an amendment to a charter of an existing municipal corporation. The questions presented by you are obviously based upon the theory that the procedure set forth in the foregoing Code sections are applicable to the situation confronting an unincorporated community.

In lieu of incorporating a community into a town by an act of the legislature, the General Assembly has provided in Chapter 21 of Title 15.1—§§ 15.1-966 through 15.1-977—the procedure for incorporating a town by an order of court. Under § 15.1-967(4) the court is without authority to incorporate a community into a municipal corporation unless the inhabitants of the proposed town exceed 1,000.

At the next session of the General Assembly the community may be incorporated into a town by the enactment of a charter for the town, pursuant to the provisions of Section 117 of the Constitution. Any bill passed by the General Assembly under the provisions of Section 117 of the Constitution providing an original charter for the community will accomplish the end desired by the Chamber of Commerce. None of the procedures set forth in Chapter 17 of Title 15.1 of the Code is required in connection with legislation incorporating a community for the first time.

TOWNS—Mayor—Ineligible for period of one year after resignation to fill vacancy on council.

TOWNS—Council—Mayor ineligible for one year after resignation to fill vacancy.

May 8, 1967

HONORABLE PAUL B. EBERT
Assistant Commonwealth's Attorney,
County of Prince William

I am in receipt of your letter of April 28, 1967, in which you present the following situation and inquiry:

"The elected Mayor of the Town of Manassas Park resigned sometime ago and several months later, was reappointed by the Town Council pursuant to 15.1-799 of the Code of Virginia as Amended. The Mayor in the Town of Manassas Park, according to the Charter, is not only a Mayor but is, also, a member of the Town Council itself. Like the Statute, the Charter for the Town of Manassas Park provides that vacancies can be filled by the Town Council.

"Does Section 15.1-800 of the 1950 Code of Virginia as Amended affect this appointment?"

Pertinent to the resolution of your inquiry is the initial sentence of Section 4 of the charter of the Town of Manassas Park (Chapter 216, Acts of Assembly, 1962) which declares that:

"The government of said town shall be vested in a town council, which shall be composed of a mayor and six councilmen."
In light of the above-quoted language, it is clear—as you point out—that the mayor of the Town of Manassas Park is also a member of the town council. This view is consistent with that previously expressed by this office in a substantially identical situation involving the composition of the council of the town of Pennington Gap. See, Report of the Attorney General (1958-1959), p. 238.

Moreover, Section 4(b) of the town charter provides that the council "may fill any vacancy that may occur in the membership of the town council for any unexpired term from the rolls of those qualified." (Emphasis supplied.) Thus, it follows that the town council is authorized to fill a vacancy occasioned by the resignation of the mayor, who—as previously pointed out—is a member of the town council.

I have been unable to discover any provision of the town charter which purports to establish any criteria for determining the identity of "those qualified" to be members of the town council. In such a situation, it is clear from the above-cited opinion that what is now § 15.1-800 (then 15-393) of the Virginia Code is applicable. This provision of the Virginia Code prescribes:

"No member of any council shall be eligible during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council, by election or by appointment." (Emphasis supplied.)

It would therefore appear that the mayor of the Town of Manassas Park, as a member of the town council, would be ineligible for appointment by the council to the position of mayor if that position is an office within the meaning of § 15.1-800 of the Virginia Code. Although the Supreme Court of Appeals of Virginia held, in Lambert v. Barrett, 115 Va. 136, 78 S.E. 586, that a member of a city council was not a municipal officer within the meaning of § 15.1-799 of the Virginia Code, I have been unable to discover any similar ruling of the Virginia Supreme Court with respect to the provisions of § 15.1-800 of the Virginia Code. It would appear, however, from the language of Section 4(b) of the charter of the Town of Manassas Park that the position of mayor is an office. In this connection, Section 4(b) provides that the mayor shall be elected by the qualified voters, that his "term of office" shall begin on the first day of September following the date of his election and shall continue for a term of four years thereafter and until his duly elected successor shall have qualified. I am therefore of the opinion—although the matter is not entirely free from doubt—that a mayor (who is a member of the town council of the Town of Manassas Park) may not, within one year of his resignation, be again appointed mayor by the town council.

TREASURERS—Responsibility for Collection of Real Estate Tax.

TAXATION—Real Estate—Treasurer's responsibility for collection of delinquent taxes.

February 3, 1967

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of February 2, 1967, relating to the question of liability of a county treasurer who accepts a check for the payment of taxes. You present the following questions:

"(1) If a Treasurer receives a check in payment of taxes and is unable to effect collection of the check, and fails to include on the
delinquent list the tax item for which the check was given, is he personally liable?

"(2) Does the failure to include such an item on the delinquent list constitute a violation of § 58-1000?"

I enclose copy of an opinion of October 20, 1966, to Honorable Clifton C. Simms, Treasurer of Grayson County, which pertains to real estate taxes. In that case the property had been conveyed to a person who, I assume, was a purchaser who did not know that payment of the taxes for 1965 had not actually been paid. Under § 58-762 of the Code, the tax in such cases remains a lien on the property so long as the owner at the time of the assessment continues to own the property. Therefore, in my opinion, there is no personal liability on the treasurer unless the property has passed to a bona fide purchaser for value, who had no actual or constructive notice by reason of timely filing of the delinquent list as required by § 58-978 of the Code. However, in the event a bona fide purchaser had no actual notice of the nonpayment of the tax and the list required by § 58-978 had not been filed, it would seem that the treasurer would have to account for the tax for which the bad check was given. Of course, the treasurer would have a claim against the person who gave the check, and the receipt issued by the treasurer would not be a defense in any action against such person for collection of the tax.

Your question (2) relates to a statute enacted for the purpose of preventing a treasurer from excluding from the delinquent list any taxes that have not been paid within the time required by law, without being subject to the penalties therein prescribed. If the treasurer, at the time of making the delinquent list, fails to include in the list a tax item that has not been paid, § 58-1000 applies.

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UNEMPLOYMENT COMPENSATION—Taxation—Contribution rate.

TAXATION—Unemployment—How contribution rate figured.

HONORABLE JAMES C. TURK
Member, Senate of Virginia

July 19, 1966

This is in reply to your letter of July 5, 1966, in which you inquire whether the 1966 contribution rate of 2.7% set by the Virginia Employment Commission for the employer, Credit Bureau of New River Valley, is correct.

Section 60-67, Code of Virginia (1950), as amended, reads as follows:

“For each calendar year commencing after December thirty-first, nineteen hundred sixty, the contribution rate of each employer, whose experience rating account has been chargeable with benefit wages throughout the most recent twelve completed calendar month period ending on the thirtieth day of June of the calendar year immediately preceding the calendar year for which a contribution rate is being determined, shall be computed as hereinafter provided. The Commission shall notify each such employer of his contribution rate for such calendar year not later than the thirty-first day of December immediately preceding such year, but failure of any such employer to receive such notice shall not relieve him from liability for such contribution.”

I am advised that this employer’s account was established on February 12, 1965, and its liability established as of January 1, 1963.
Contribution rates which are effective on a calendar year basis are computed on July 1st of the preceding year. Under § 60-67 the Commission cannot consider an employer for an experience rate until he has an account established with the Commission “chargeable with benefit wages throughout the most recent twelve completed calendar month period” prior to the 1st of July of any given year. Thus, since July 1, 1966, was the first time that this employer could be considered for an experience tax rate, it is my opinion that regardless of § 60-76.2 to which you refer, this employer was not eligible for a reduced tax rate for the year 1966 and was thus rightly charged with a 2.7%.


CLERKS—Charges—Furnishing copies of papers and reports issued pursuant to Uniform Commercial Code.

April 18, 1967

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

This is in reply to your letter of April 12, 1967, which reads in part as follows:

“This morning I received from a firm in Ohio a ‘Uniform Commercial Code—Request for Information or Copies’ on Culpeper Appliance, Inc.

“We have a booklet ‘Uniform Commercial Code Secured Transactions Part 4 Filing’ issued by the State Corporation Commission, on page 9 of which is stated—‘Certified copies will be furnished only when the document is described by its index number. Members of the staff will not make title searches, will not express legal opinions, and will not give information as to the contents of document over the telephone.’

“It is also stated in the Commercial Code that § 8.9-407 is omitted, and then offers 9-407 as an optional section, at the bottom of which is stated, ‘In light of Virginia practice, this section was deemed unnecessary.’

“Please advise just what information this office can give out in writing, and if any, what charge should be made.”

The paragraph which you quote from page 9 of the booklet issued by the State Corporation Commission establishes S.C.C. office procedure and is not necessarily applicable to clerks of court.

Section 8.9-407 of the Uniform Commercial Code was omitted because the Code of Virginia already provides for the furnishing of copies of the records and papers of courts of record to any person. Section 17-43 provides:

“The records and papers of every court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided. . . .”

As indicated, there is nothing in the Uniform Commercial Code “otherwise specially provided.” Section 17-43 is applicable. Thus, copies of papers
and records, maintained pursuant to the Uniform Commercial Code, should be made available pursuant to that section.

Charges for such copies should be made in accordance with the provisions of § 14.1-112(10). Other paragraphs in § 14.1-112 may also be applicable in particular situations.

VIRGINIA COMMISSION FOR THE BLIND—Operation of Vending Stands in Public Buildings.

STATE BUILDINGS—Operation of Vending Stands, Etc., by the Blind.

HONORABLE WILLIAM T. COPPAGE, Director
Virginia Commission for the Visually Handicapped

July 8, 1966

This is in answer to your letter of July 1, 1966, which reads as follows:

"We are writing to request that you render a formal opinion with respect to Sections 63-204.2 and 63-204.14, Code of Virginia.

"Specifically, we would like to know to what extent, if any, this Act applies to new buildings constructed by the State. Also, when does a public building 'Become Vacant'? Would the Hotel Richmond, for example, be considered an instance in which 'a public building becomes vacant' prior to its occupancy by the State?

"This Act has been on the books for a number of years and has provided only two or three employment opportunities for the blind persons to date. While many agencies, employee welfare or similar types of employee associations have been permitted to operate vending stands or other types of business enterprise concessions, the Virginia Commission for the Visually Handicapped has, in ninety-five per cent of the cases, not been given an opportunity to provide the service."

Section 63-204.14 of the Code, which you purport to paraphrase in your second paragraph, reads as follows:

"When any vending stand and other business enterprise operated in a public building becomes vacant for any reason whatsoever such vacancy shall be filled by employment of the blind, provided this shall not apply to the lunch counter in the State Capital which counter shall be subject to the control of the Clerk of the House of Delegates."

As a matter of interest, I am enclosing a copy of an opinion rendered by the Honorable J. Lindsay Almond, Jr., to the Honorable J. H. Bradford, Director of the Budget, dated July 12, 1956, and found in the Report of the Attorney General (1956-1957), at p. 243, in which it is stated that § 63-204.14 was not applicable to a proposed business operation for cooking and preparing food in the then new Blanton Building, because the installation of the proposed operation would cost in excess of $10,000.00. The specific question which you now ask, however, was not answered in that opinion.

In my opinion, whenever a "vending stand" or "business enterprise" in a "public building," as those terms are defined by § 63-204.1 of the Code, is to be operated for the first time or has been in existence previously and has become vacant, § 63-204.14 requires that such "vending stand" or "busi-
ness enterprise" shall employ the blind. The vacancy of the public building is not material. It is a vacancy in the "vending stand" or "business enterprise" within the "public building" which is determinative. Thus, if the State acquires or builds a new office building, such as it has done in acquiring the so-called "Hotel Richmond" and a "vending stand" or "business enterprise" is to be operated therein, in my opinion if such "stand" or "enterprise" is to be operated for the first time or has been operating and becomes vacant, it must thereafter employ the blind.

VIRGINIA EMPLOYMENT COMMISSION—Unemployment Compensation—Federal employees.

HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

This is in reply to your letter of November 28, 1966, in which you requested my opinion as to the effect of the 1966 amendment to § 60-46(h), Code of Virginia (1950), as amended, upon the eligibility for unemployment compensation of Federal Civil Service employees under the following facts submitted by you:

"Federal Civil Service employee retired at the end of 1965 after 38 years of service with the Federal Government and under the provisions of the Federal Government Retirement Program where the employee has contributed over a period of years of his salary to the retirement program and where the retirement program provides for the first two years of the retirement to constitute a repayment of the sums contributed to by the employee, and not the sums contributed by the Federal Government."

Section 60-46 of the Code of Virginia provides that an unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that:

"(h) He does not have payable to him remuneration equal to or in excess of his weekly benefit amount in the form of a retirement pension, annuity, or other retirement payment under any plan contributed to by the most recent employer for whom he performed services during thirty days, whether or not such days are consecutive; provided, if such remuneration is less than his weekly benefit amount, such remuneration shall be treated as if it were wages in accordance with § 60-43; provided further, that this section shall not apply to the receipt of any amount under Title II of the Social Security Act."

The 1966 amendment to this section involved the striking out of the word "private" after the word "any" in line 3. This brought all plans contributed to by employers, both private and public, within the purview of the section. Prior to this change (Federal) plans contributed to were not included.

In view of the present wording of the statute, I am of the opinion that the amounts received by a Federal employee under any plan contributed to by the Federal Government, except under Title II of the Social Security Act, are deductible from any unemployment compensation benefits which he may receive, whether or not the employee for the first two years is being repaid for the sum contributed by him.
REPORT OF THE ATTORNEY GENERAL

VOCATIONAL REHABILITATION—Board—Authority—With consent of Governor, may convey easements and enter into lease with county for operation of sewage treatment plant.

VOCATIONAL REHABILITATION—Board—May accept gifts for construction of chapel.

May 8, 1967

HONORABLE DON W. RUSSELL, Commissioner
Department of Vocational Rehabilitation

This is in reply to your letter of May 1, 1967, in which you make several inquiries.

Your first inquiry reads as follows:

"Landover Gardens, Inc., proposes to develop a subdivision on property adjacent to the Woodrow Wilson Rehabilitation Center, Fishersville. The corporation has agreed to construct a sewage disposal plant and sewage drainage line on their property and deed the plant and line to the County of Augusta for operation. It is necessary to extend the sewage and drainage line across property of the Center. The Board of Supervisors of Augusta County desires a drainage and sewage easement over property occupied by the Center.

"Question: Does the Virginia Board of Vocational Rehabilitation have the authority, with the approval of the Governor, to execute an easement over Center property to the Augusta County Board of Supervisors under the circumstances listed above?"

The answer to this question is in the affirmative. In my opinion, the Board may, with the approval of the Governor, convey to Augusta County a right-of-way easement over property owned by the Board. See Code § 2.1-6.

Your second inquiry reads as follows:

"The Center operates a sewage treatment plant which is located on its property. The Center, through a cooperative arrangement, also services the Augusta County Public School facilities which are adjacent to Center property. Less than one-third of the capacity of the plant is being used at the present and no more than one-third of the capacity of the plant will be needed for our future operations. Augusta County, in meeting its additional needs for sewage treatment facilities, is interested in working out some type of arrangement for joint use of the plant. Attached are proposals made by the Augusta County Board of Supervisors and an evaluation of these proposals by Mr. J. S. Barret of the Division of Engineering and Buildings. Our department desires to cooperate to the fullest extent with Augusta County, but we see no need to become involved in major remodeling or expansion of the sewage treatment facility when the present facilities are more than sufficient to meet our demands. Neither do we desire to get in the business of selling sewage treatment services.

"Question: In the event that an agreement can be worked out with the Augusta County Board of Supervisors which would not be detrimental to the best interest of our agency does the Virginia Board of Vocational Rehabilitation have the authority, with the approval of the Governor, to enter into a long-term lease with Augusta County for the operation of the sewage treatment plant..."
by the County, with the Department paying its proportionate share of the annual operating cost?"

The answer to this question is in the affirmative. In my opinion, the Board may enter into the agreement described, provided the approval of the Governor is obtained.

Your third inquiry reads as follows:

"The Department is in the process of replacing all of the existing buildings at the Center, but no plans are included for the use of State or Federal funds in the construction of a chapel. Individuals and organizations in the Waynesboro-Staunton area have indicated an interest in raising private funds for use in the construction of a chapel.

"Question: Does the Board of Vocational Rehabilitation have the authority, with the approval of the Governor, to accept funds donated for the purpose of construction of a chapel and to use such funds for that purpose?"

The answer to this question is in the affirmative. Section 22-330.11 provides that the Board is empowered to receive gifts from public or private sources, made unconditionally or under such conditions related to the vocational rehabilitation of disabled persons as in the judgment of the Board are proper and consistent with Chapter 15.1 of Title 22. That section further provides that such donated moneys may be used by the Board to construct, equip and operate "necessary rehabilitation facilities." If the Board concludes that a chapel is a "necessary rehabilitation" facility, then, in my opinion, the gifts may be made and used for the construction of the chapel.

WARRANTS—John Doe Warrant—Nullity in this State.

WARRANTS—Name Not Given—Sufficient if adequate description identifies with reasonable certainty.

December 13, 1966

HONORABLE FRED W. BATEMAN
Member, Senate of Virginia

This is to acknowledge receipt of your letter of December 7, 1966, in which you request my opinion on the validity of the so-called "John Doe warrant." I quote from your letter:

"A Justice of the Peace issued a state criminal warrant for 'A' against 'John Doe' complaining that John Doe committed a misdemeanor. A police officer appears at the residence of X, whose name is not John Doe nor has he ever been known by an alias similar to such name, and serves the warrant on X. arrests him and takes him before a magistrate to be bonded. The alleged offense was not committed in the presence of the police officer."

A warrant with no other description of the defendant than that of John Doe would, in effect, be a general warrant, the issuance of which would be in violation of Section 10 of the Constitution of Virginia. Wells v. Jackson, 3 Munif. (17 Va.) 438; Winters v. Campbell, 248 W. Va. 710, 137 S.E. (2d) 188 (1964). It is essential to the validity of a warrant that the person to be arrested be identified by the terms of the warrant. 5 Am. Jur. (2d), Arrests, Section 9; 19 M.J., Warrants, Section 3.
I am therefore of the opinion that the warrant you describe above is a nullity.

I quote further from your letter:

"In the event that your answer to the foregoing is that the warrant, in effect, is a nullity, then would your answer be the same if the warrant had alleged 'John Doe, white, male, estimated age 50, residing at (or employed at) whose given or surname is not known.'"

We do not have a statute in Virginia covering the so-called "John Doe warrant." All that § 19.1-91, Code of Virginia (1950), as amended, requires is that the offense be recited therein and the person accused to be arrested. The common law rule does not prevent the issuance of a warrant on a person whose name is unknown but the warrant must describe the person sufficiently to identify him. 5 Am. Jur. (2d), Arrests, Section 9. It has been held that a description of a person by occupation, residence, appearance, peculiarities and the like is sufficient. Commonwealth v. Crotty, 10 Allen (Mass.) 403. Rule 4(b) of the Federal Rules of Criminal Procedure provides in part:

"The warrant . . . shall contain the name of the defendant, or if his name is unknown, any name or description by which he can be identified with reasonable certainty."

Whether the description of the person in a "John Doe warrant" is sufficient to "indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances, by which he can be identified" (Winters v. Campbell, supra, at page 193) is a question of fact.

I do not believe that a definitive answer can be given to the hypothetical question you have presented, but the language used in your question seems to fall short of the rule stated in the Winters case.

WELFARE AND INSTITUTIONS—Child Separated from Custody of Parents—Authority to consent to surgical or medical treatment.

CHILDREN—Committed to Institutions—Arrangement for hospitalization.

February 1, 1967

HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This will acknowledge receipt of your letter of January 31, 1967, enclosing a memorandum from the Director, Division of General Welfare, requesting the opinion of the Attorney General as follows:

"Does the local superintendent (the executive officer of one of the agencies referred to in subsection (4) of § 32-137) have the authority to sign a general statement authorizing the executive of an institution in which the child is to be placed to arrange any necessary hospitalization, medical care, and/or surgery for a ward who is placed by the agency in the institution so long as the child remains in the care of the institution? If so, in which
of the following situations would the local superintendent have authority to sign such a statement?

"1. The child was committed to the local board under the provisions of § 16.1-178(3) and the order of commitment did not provide for permanent separation of the child from his parent, parents, or guardian.

"2. The child was committed to the local board under the provisions of § 16.1-178(3) of the Code and the order of commitment provided for permanent separation of the child from his parent, parents, or guardian.

"3. The child was entrusted to the local board under the provisions of § 63-73 of the Code and the entrustment agreement did not provide for the permanent separation from his parent or parents.

"4. The child was entrusted to the local board under the provisions of § 63-73 of the Code and the entrustment agreement provided for the permanent separation from his parent or parents."

Section 32-137 of the Code provides as follows:

"Whenever any person who is under twenty-one years of age and who has been separated from the custody of his parent or guardian is in need of surgical or medical treatment, authority, commensurate with that of a parent in like cases, is conferred, for the purpose of giving consent to such surgical or medical treatment, as follows:

"(1) Upon judges and trial justices with respect to children whose custody is within the control of their respective courts,

"(2) Upon the Commissioner of Public Welfare with respect to any ward of the Board of Welfare and Institutions,

"(3) Upon the principal executive officers of State institutions with respect to the wards of such institutions, and

"(4) Upon the principal executive officer of any other institution or agency legally qualified to receive children for care and maintenance separated from their parents or guardians, with respect to any child whose custody is within the control of such institution or agency."

A local board of welfare is a qualified agency within the scope of paragraph (4) of the above section of the Code.

I understand that "Institution" as used in the memorandum relates to private facilities established for the care of indigent and afflicted persons, and that the placement by a local board of welfare in such a facility does not have the effect of discharging a child from the custody of the local board.

The statute provides that "authority, commensurate with that of a parent in like cases, is conferred." (Emphasis supplied.) In my opinion, a general authorization given by the principal executive officer of the local board for hospital and other medical services that may arise while the child is in the institution would be within the scope of the authority that under the same circumstances the natural parents could have exercised. Whether or not the placement of the child in the custody of the local board is permanent or for a shorter duration, in my opinion, during the time the custody continues in effect, the provisions of § 32-137(4) apply.
WELFARE AND INSTITUTIONS—Hospitalization and Treatment of Indigents—Collection of expense—Promissory note cannot be required of indigent.

December 9, 1966

Honorabele Joseph M. Whitehead
Commonwealth's Attorney for Pittsylvania County

This will acknowledge your letter of December 7, 1966, which reads as follows:

"Title 32-291 to Title 32-296, inclusive, Code of Virginia, 1950, as amended, sets forth provisions relating to the hospitalization and treatment of indigent persons. Title 32-293.2, Supra, states that the counties and cities are liable for a portion of the costs thereof. Title 32-295, Supra, provides for the collection of such expenses and the distribution thereof."

"The Department of Public Welfare of Pittsylvania County desires to collect such expenses whenever possible, however, we would like to do this, with the least amount of costs and effort. Title 63-127 and Title 63-191, Code of Virginia, as amended, sets forth a procedure for filing a notice of lien against real estate. No such provision is made when hospitalization and treatment of indigent persons is concerned. My query is simply this: Would it be possible for us to have the person receiving such aid to sign a promissory self-confessing judgment note, etc. or would it be possible for us to follow the procedure in Title 63-127 and Title 63-191, or what would be the best procedure, in your opinion, for us to follow in the collection of these expenses?"

Sections 63-127 and 63-191 of the Code, to which you refer, relate to procedures incident to the recovery of payments made for old age assistance and aid to the blind and, in my opinion, these sections would not apply in the situation presented by you.

With respect to the taking of a promissory self-confessing judgment note, in my opinion, this could not be required of the indigent person as a condition precedent to the hospital treatment provided for in Chapter 15 of Title 32 of the Code.

WILLS—Probate—in county wherein real estate lies.

February 3, 1967

Honorable John H. Powell, Clerk
Circuit Court of Nansemond County

This will acknowledge receipt of your letter of February 2, 1967, which reads as follows:

"I would appreciate an immediate opinion on the following question:

"There has been presented to me a will which states on the face of it 'Jesse Clark, of 5790 Race Road, Elkridge, Maryland.' From the best information that I have been able to get, Jesse Clark lived in Maryland in a home owned by his wife and daughter and died in a Veterans' Hospital in Maryland. Jesse Clark owns real estate in Nansemond County and also personal property. He occupied the premises in Nansemond County in 1964 and possibly for a while in 1965, and then returned to Maryland."
"In your opinion, can this will be probated in Nansemond County or will it have to be probated in the State of Maryland?"

Section 64-72 of the Code is the applicable statutory provision and you will note that under this section a will may be probated in the county wherein any real estate lies that is devised or owned by the decedent. This section makes no distinction between the probate of wills of persons domiciled in Virginia and the probate of wills of persons domiciled outside of Virginia. See, French v. Short, 207 Va. 548, at p. 551, in which this section is construed with respect to the will of Mr. French, a resident of Florida who owned real estate in Virginia. I quote from this decision as follows:

"However, Code § 64-72, which confers jurisdiction upon Virginia courts and clerks of courts to admit wills to probate, makes no distinction between the probate of wills of persons domiciled in Virginia and the probate of wills of persons domiciled outside Virginia. Since French owned property in Virginia at his death, Code § 64-72 conferred potential jurisdiction upon circuit courts of counties and certain other Virginia courts to probate French's will, whether he was domiciled in or domiciled outside Virginia.

"The Circuit Court of Dickenson County could properly have proceeded, therefore, to probate the will without any inquiry or adjudication as to French's domicile..."

Therefore, you should proceed to probate the will.

WITNESSES—Allowance—Employees of Commonwealth.

STATE EMPLOYEES—Witness Fees—Allowance on behalf of Commonwealth.

Honorable Rhea F. Moore, Jr., Clerk
Circuit Court of Tazewell County

This is in reply to your letter of March 1, 1967, which reads as follows:

"Messrs. Whitman and Coe, members of a Virginia Department of Highways Truck Weighing Crew, appeared in Circuit Court as Commonwealth witnesses. At the conclusion of the trial, these gentlemen requested payment as witnesses. Heretofore this court has taxed attendance of Troopers and other full time Commonwealth witnesses who testify as Commonwealth witnesses, but have not paid them as such witnesses. It has been our understanding that they were not entitled to receive such allowances inasmuch as their testifying in court was a part of their official duties. These members of the weighing crew report that they have been paid in other courts; the judge of our court directed that their attendance and mileage be taxed against the defendant but that no payment be made to them as witnesses until such time as your office has ruled in this matter.

"Please advise if these and any other full-time Commonwealth employees are entitled to witness attendance."

I know of no provision of Virginia law prohibiting full-time employees of the Commonwealth from being paid the customary allowances and fees provided by law for witnesses, when they testify on behalf of the Commonwealth. Several previous opinions of Attorneys General have dealt with this problem. See Reports of the Attorney General (1962-1963), p. 304; (1959-1960), pp. 229-30, and (1937-1938), p. 178.

Where Commonwealth employees refuse to accept these attendance fees and payments, there is usually a policy or regulation of the State department in which they are employed prohibiting acceptance. This is true, for example, of the Department of State Police and explains why payments are not made to Troopers. I do not know the policy of the Department of Highways. Some departments permit the witnesses to receive the fees, but require, by regulation, that the fees be turned over to the department.

Again, it is entirely a matter of departmental policy and regulation. There is no provision of law prohibiting payment of witness fees and allowances to Commonwealth employees who testify on behalf of the Commonwealth.

WITNESSES—Fees—Appearance before regulatory board.

July 12, 1966

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

In your letter of July 8, 1966, you ask:

"Will you please advise the correct fee which may be paid a witness when such a witness is subpoenaed to appear before a regulatory board. Is the witness entitled to mileage reimbursement from home to the place of hearing and return? If so, what rate per mile is allowed?

"Further, if a witness is subpoenaed and resides in Prince William County, Virginia, and the hearing is held in the City of Falls Church, Virginia, is the witness fee greater in this instance than it would be if the witness resided in the City of Falls Church?"

Section 9-6.10(d) of the Code of Virginia (1950), as amended, provides that any State regulatory agency "shall have power to issue subpoenas and subpoenas duces tecum, and at the request of any party shall issue such subpoenas."

Section 14.1-190 states that a person attending as a witness under a summons not covered by §14.1-189 (dealing with witnesses summoned by the Commonwealth in criminal cases) "shall have one dollar for each day's attendance and seven cents per mile for each mile beyond ten miles necessarily travelled to the place of attendance and the same for returning, besides the tolls at the bridges and ferries which he crosses or turnpike gates he may pass. On his oath an entry of the sum he is entitled to and for what and by what party it is to be paid shall be made: (1) When the attendance is before either house or a committee of the General Assembly by the clerk of such house or committee and (2) in other cases by the clerk of the court in which the case is or the person before whom the witness attended. . . ."

While §14.1-190 does not specifically refer to proceedings before an administrative agency, it is not restricted to attendance in courts. In my opinion, the clause "person before whom the witness attended" in §14.1-
190 is broad enough to include a regulatory board, and therefore witness fees and mileage charges are payable to witnesses summoned to appear before such boards.

The witness fee is the same, one dollar per day, regardless of how far the witness must travel to attend. It is only the mileage fee which varies with the distance traveled.

WITNESS—Medical Examiner—Allowance for testifying as expert.

CRIMINAL PROCEDURE—Costs—Medical Examiner—Testifying as expert witness.

November 17, 1966

HONORABLE EMORY H. CROCKETT
Commonwealth's Attorney for Lee County

I am in receipt of your letter of November 4, 1966, in which you outline the circumstances surrounding the appearance of a medical examiner at the preliminary hearing in a criminal case to testify concerning the cause of death of a deceased. In this connection, you state:

"I would appreciate your advice as to whether or not the Attorney General has heretofore ruled that medical examiners appearing as witnesses are entitled to an expert witness fee and whether or not a medical examiner testifying as to the facts revealed in his official investigation of a death in accordance with his official capacity, would be construed as being a special service beyond a service rendered by them in their official capacity that would entitle said medical examiner to compensation under Section 19.1-315 as an expert witness."

While I have been unable to discover any official opinion of this office in which it was specifically ruled that a medical examiner who testifies in a criminal case is entitled to an expert witness fee, the opinion of this office to which you refer in your communication is sufficiently comprehensive to permit the allowance of such a fee by the court pursuant to § 19.1-315 of the Virginia Code. See, Report of the Attorney General (1962-1963), p. 304. In addition, I am forwarding to you a copy of a letter, dated June 24, 1948, from the Honorable J. Lindsay Almond, Jr., then Attorney General, to Dr. Herbert S. Breyfogle, then Chief Medical Examiner, in which Judge Almond expressed the view that § 4960 (now 19.1-315) of the Virginia Code was "broad enough to permit the employment of a person to give expert testimony in a criminal case."

With respect to the concluding portion of your inquiry, it would seem that, in almost all instances, any testimony given by a medical examiner in a criminal case—beyond a mere recitation of the information contained in the report prescribed by § 19.1-42 of the Virginia Code—would constitute expert testimony for which the court may allow such amount as it deems reasonable to be paid out of the State treasury from the appropriation for criminal charges pursuant to § 19.1-315 of the Virginia Code.
# INDEX

**OPINIONS**

**ATTORNEY GENERAL OF VIRGINIA**

**1966-1967**

<table>
<thead>
<tr>
<th>ADVERTISING</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment Agencies—Prohibited from advertising services as free if fee charged.</td>
<td>148</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>AGRICULTURE AND COMMERCE</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration of Economic Poisons—Required for mildew resistant paint</td>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>AIR POLLUTION CONTROL</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local Ordinances—Compatibility with rules, regulations, orders or requirements of State Air Pollution Control Board</td>
<td>2</td>
</tr>
<tr>
<td>Proposed Ordinance of City of Falls Church and Model Air Pollution Control Ordinance—Constitutionality of</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>AIRPORTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>College of William and Mary—May construct and operate airport</td>
<td>269</td>
</tr>
<tr>
<td>Taxation—Exempt if nonprofit</td>
<td>281</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ALCOHOLIC BEVERAGE CONTROL LAWS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Towns—May require license to manufacture, bottle or sell alcoholic beverages—May impose local merchants' license tax measured by sales</td>
<td>5</td>
</tr>
<tr>
<td>Transportation of Beverages—Limitation in § 4-118.2 on quantity</td>
<td>6</td>
</tr>
<tr>
<td>Unlicensed Restaurants—Not to have alcoholic beverages on premises</td>
<td>7</td>
</tr>
<tr>
<td>Whiskey by the Drink—Restaurants, hotels and clubs</td>
<td>8</td>
</tr>
<tr>
<td>Wholesaler and Retailer—Prohibited from acting in same capacity</td>
<td>10</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ANIMALS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rabid—Hunting and Trapping—Authority of board of supervisors to expend funds to control</td>
<td>11</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>APPEAL</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Cases—Indigents—Not entitled to at expense of Commonwealth</td>
<td>12</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARREST</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>After Arrest Misdemeanant Must be Taken to Nearest Available Justice of Peace</td>
<td>13</td>
</tr>
<tr>
<td>Motor Vehicle Violations—Issuance of summons in lieu of warrant</td>
<td>207</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ASSESSORS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>County Real Estate—May compute corrected assessment, but not make entries in land books</td>
<td>14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ATTORNEYS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney-client Relationship—Censoring written communications to prisoner</td>
<td>159</td>
</tr>
<tr>
<td>City—Must be resident of city when appointed or elected</td>
<td>15</td>
</tr>
<tr>
<td>Entitlement—Civil Cases—Appeal—Indigent not entitled to at expense of Commonwealth</td>
<td>12</td>
</tr>
<tr>
<td>Entitlement—Indigent entitled to in appeal on adverse judgment in habeas corpus proceeding</td>
<td>15</td>
</tr>
<tr>
<td>Entitlement—Indigent not entitled to in bringing petition for writ of <em>coram vobis</em></td>
<td>15</td>
</tr>
<tr>
<td>Fees—Maximum under § 14.1-184</td>
<td>16</td>
</tr>
</tbody>
</table>
BAIL AND RECOGNIZANCE
Forfeiture of Cash Security—Procedure in form of *scire facias* and *in rem*..  17
Forfeiture of Cash Security—Sufficiency of constructive service.............  17

BAIL
Justice of Peace May Take Cash Deposit in Lieu of Recognizance with Surety..............................................  164
Misdemeanant Taken Before Nearest Justice of Peace...........................  13

BANKRUPTCY
Trustee—Government officers and employees may not serve.................  265

BANKS
Advertising—May advertise in newspaper in this State and not be doing business in the State..............................  72

BOARDS OF SUPERVISORS
Adoption of Local Sales Tax—Must be by ordinance............................  19
Adoption of Ordinance—Public hearing necessary if required by statute...  19
Appropriations—Cannot construct road.........................................  154
Appropriations—County not authorized to compensate State employees...  20
Appropriations—May not pay office rent for federal agency.................  21
Appropriations—To incorporated town...........................................  22
Authority—May adopt ordinance containing exemptions from personal property tax..........................  19
Authority—May allow volunteer rescue squad to build on county property.................................................  23
Authority—May compensate tie-breaker for performance of duty...........  144
Authority—May contribute funds to towns within boundaries of county for development of airport.................................  23
Authority—May not operate railroad.............................................  24
Authority—May not pay counsel fees for defense of dog warden............  25
Authority—May participate in cost of changing channel of river in promoting industrial development.................................  26
Authority—No authority to loan money to private corporation for water system..........................................................  26
Authority—Not authorized to defend civil actions against employees...  27
Authority—to authorize expenditure of funds to hunt and trap rabid foxes and skunks.................................................  11
Authority—to compel removal of nuisance—Abandoned wells.................  29
Clerk—Cannot be relieved of duties unless deputy appointed..............  30
Compensation to Registrar—Copying registration books in absence of purge..............................................................  30
Contracts—Under § 15.1-67 member may complete teaching contract entered into prior to taking office.................................  31
Conveyance of Property to School Board—May be done without consider-ation.................................................................  32
Counties Adopting Urban County Executive Form of Government—Authority to fix salary of chairman......................  33
Eligibility for Office—Constitutional and statutory requirements must be met..........................................................  33
Eligibility for Re-election Where Territory in Which Serving is Annexed...  34
Employment of County Attorney—Referendum not needed if allowed by other statutes.........................................................  34
Limitations on Authority to Borrow Money........................................  35
Local Planning Commission—Membership may be increased to statutory limit by resolution.............................................  36
Medical Examiner and Jail Physician—May not serve as member............  230
REPORT OF THE ATTORNEY GENERAL

Method of Electing—To be decided by the voters.......................................................... 37
Ordinance Affecting Unincorporated Towns—Notice of public hearing necessary.................. 38
Ordinances—Limitations on regulation of peddling and parking...................................... 40
Ordinances—Not to set forth type of provisions real estate contracts must contain.............. 41
Provision of Office Space for Treasurer or Deputy.......................................................... 42
Redistricting of County—Effect on members.................................................................. 240
Redistricting of County—Selection of member—How accomplished................................... 237
Referendum—Cannot be rescinded after filing with court.................................................. 42
Required to Appropriate Funds for Public Assistance...................................................... 44
Sales and Use Tax—May apportion funds to school districts at board's discretion.............. 301
School Bonds—May not issue unless requested by school board...................................... 246
Sewer Connection Fees—Authority to establish different amounts if reasonable................ 45
Special Levy on Town for Schools—Not to assess town that is part of county school system for use of schools................................................................. 85
Subdivision Ordinances—Deposit of funds for road construction by developer.................. 91
Tie Breaker—May not be commissioner in chancery....................................................... 23
Travel Expense—Optional as to substantiating with receipts........................................... 46
Zoning—Trailer Courts—Reconsideration of action in denial of application........................ 46

BOND ISSUES
Counties—May finance any project defined in § 15.1-172(h), which includes hospitals........ 77

BOUNDARY
Line Between Virginia and Maryland—Not affected by artificial change in low-water mark by property owner............................................................. 48

CEDAR RUST LAW
Assessments—Disposition............................................................................................... 224

CENTRAL CRIMINAL RECORDS EXCHANGE
Persons Having Authority to Arrest for Felony—Required to make report of each arrest......... 49

CHARTERS
Appalachia—Provisions control over general law when § 15.1-73 construed........................ 225

CHILDREN
Committed to Institutions—Arrangement for hospitalization........................................... 324
Support of Parents........................................................................................................... 215

CITIES
 Appropriations—Not authorized to compensate State employees..................................... 20
City Attorney—Must be resident when appointed or elected............................................. 15
City of Covington—May not pledge credit to secure loan to hospital................................ 79
Council Member—Public school teacher may not serve.................................................. 52
Council Member—Salaried employee of company selling tires to city may serve................ 226
Planning Commission—Change in number of members requires amendment of ordinance pursuant to § 15.1-431................................................................. 53
School Funds—City treasurer's responsibility.................................................................. 54
Taxation—Annexed part of county—No reassessment until official................................... 296
# CIVIL PROCEDURE

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attachment proceeding—When forthcoming bond required</td>
<td>266</td>
</tr>
<tr>
<td>Eminent Domain—Municipalities—Writ tax not applicable</td>
<td>146</td>
</tr>
<tr>
<td>Interrogatories Under Rule 4:8 of Rules of Court—Service</td>
<td>55</td>
</tr>
<tr>
<td>Judgments—When executions to be issued</td>
<td>135</td>
</tr>
<tr>
<td>Order Dismissing Old Delinquent Tax Suits</td>
<td>294</td>
</tr>
</tbody>
</table>

# CLERKS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bonds for Guardians or Committees—May not alter penalty unless original bond set by clerk</td>
<td>92</td>
</tr>
<tr>
<td>Charges—Furnishing copies of papers and reports issued pursuant to Uniform Commercial Code</td>
<td>319</td>
</tr>
<tr>
<td>Compensation—Minimum and maximum</td>
<td>56</td>
</tr>
<tr>
<td>Compulsory School Attendance Ordinance—Fine paid into State treasury</td>
<td>57</td>
</tr>
<tr>
<td>Confession of Judgment—Acts in ministerial capacity only</td>
<td>57</td>
</tr>
<tr>
<td>Confession of Judgment—No obligation to see if it is or is not a demand note</td>
<td>57</td>
</tr>
<tr>
<td>County—Must serve as clerk to board of supervisors unless duty delegated to deputy</td>
<td>30</td>
</tr>
<tr>
<td>Fees—Recordation of deed reserving life right—Based on appraisal</td>
<td>299</td>
</tr>
<tr>
<td>Fees—Recordation of typewritten single-spaced instrument</td>
<td>58</td>
</tr>
<tr>
<td>Fees—Recording and indexing will when no qualification</td>
<td>59</td>
</tr>
<tr>
<td>Fees—Recording land trust deed and final deed of conveyance to beneficiaries</td>
<td>298</td>
</tr>
<tr>
<td>Fees—Transfers of separate tracts of real estate under will</td>
<td>59</td>
</tr>
<tr>
<td>Marking Judgments Satisfied or Discharged—Determines from direction of judgment creditor</td>
<td>163</td>
</tr>
<tr>
<td>Recordation—County’s deed of trust—Non-taxable, but fee owed clerk</td>
<td>60</td>
</tr>
<tr>
<td>Recordation—Personal property lease recorded in miscellaneous lien book</td>
<td>60</td>
</tr>
<tr>
<td>Recordation of Liens—Not authorized to docket notices from other state</td>
<td>62</td>
</tr>
<tr>
<td>Recording of Partial Marginal Release</td>
<td>236</td>
</tr>
<tr>
<td>Town—May serve as justice of peace unless prohibited by charter</td>
<td>62</td>
</tr>
<tr>
<td>Transfer Fees—Chargeable once a year</td>
<td>234</td>
</tr>
<tr>
<td>Transmission of Orders to Superintendent of State Penitentiary</td>
<td>63</td>
</tr>
</tbody>
</table>

# COMMISSIONERS IN CHANCERY

May Not Be Tie-breaker

# COMMISSIONERS OF REVENUE

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessments—Cannot change</td>
<td>63</td>
</tr>
<tr>
<td>Assessments—Standing timber—May be made separately if deed recorded</td>
<td>64</td>
</tr>
<tr>
<td>Authority Over Employees</td>
<td>65</td>
</tr>
<tr>
<td>Deed to Real Estate—Recorded in name of grantee not “Unknown Owner”</td>
<td>66</td>
</tr>
<tr>
<td>Duties Set Out in Title 58 of the Code</td>
<td>67</td>
</tr>
<tr>
<td>Have Sole Responsibility for Land Books</td>
<td>14</td>
</tr>
<tr>
<td>Not to Divulge Information—See § 58-46 of the Code</td>
<td>67</td>
</tr>
<tr>
<td>Taxation of Motor Vehicles—Ownership can be determined by commissioner</td>
<td>289</td>
</tr>
</tbody>
</table>

# COMMONWEALTH ATTORNEYS

Candidate for Election—Residency requirements

# COMPENSATION BOARD

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salaries of Treasurers—Construing §§ 14.1-55 and 14.1-62.1</td>
<td>69</td>
</tr>
</tbody>
</table>
REPORT OF THE ATTORNEY GENERAL

Page

CONFLICT OF LAWS
Comity—Usurious contract performed in another state.............................. 70

CONSERVATION AND ECONOMIC DEVELOPMENT
Forestry—Reseeding—Liability on both cutter and owner even with contract requiring one to do so................................. 71

CONSTITUTION
Subdivisions—Land requirements for public use not unconstitutional........ 272

CONTRACTORS
Supplier and Installer of Crane—Classified as general contractor under § 54-113 ........................................................ 72

CORPORATIONS
Doing Business—Foreign corporation may advertise in newspaper in this State and deemed to be not doing business in the State ......................... 72

COUNTRIES
Appropriations—May not be made for consultants and promotional expenses of development corporation .................................................. 73
Appropriations—Public schools—Control by governing body ..................... 74
Automobile Graveyards—Regulation—State preempted field except for licensing and regulation of maintenance and operation ....................... 75
Bond Issues—May finance any project defined in § 15.1-172(h), which includes hospitals .................................................. 77
Building Permits—§ 58-766.1 applies solely to obtaining a permit ............... 82
Employment of County Attorney .................................................. 34
Executive Secretary—May issue licenses but not collect fees ....................... 77
Immune from Tort Liability .......................................................... 78
Imposition of General Admissions or License Tax .................................. 79
May Not Pledge Credit to Secure Loan to Hospital ................................ 79
Motor Vehicle License Fees—Refunds to non-domiciliary servicemen ............ 179
Open-space Land Act—Assessment of easement—At market value for tax purposes ................................................................. 81
Ordinances—May not require provisions of real estate sales contracts .. 41
Ordinances—Regulating construction of buildings, installation of plumbing, electrical and heating equipment ............................... 82
Ordinances—Regulation of trailer camps .......................................... 82
Requirement of Scenic and Development Easements—Unconstitutional ....... 83
Sanitary Districts—Bonds valid obligation of county ................................ 84
Taxation—Items in § 58-829.1 may be exempted .................................. 290
Taxation—Not to make special assessment on town that is part of county school system for use of schools ........................................... 85
Training Facilities for Police—Joint establishment and maintenance .......... 86
Urban County Executive Form—Magisterial Districts—Not abolished under this form of government ............................................. 87

COUNTRIES, CITIES AND TOWNS
Acquisition of Property for Public Medical Center—Joint venture authorized ................................................................. 87
City of Covington and County of Alleghany—May not subsidize ambulance service of hospital ........................................... 89
Contiguous—Construing ................................................................. 90
Enforcement of Dog Laws .............................................................. 124
Motor Vehicles—Local licenses—Limitation on charging of license fees ...... 186
REPORT OF THE ATTORNEY GENERAL

Page

Post Mortem Fee—How payment made ................................................................. 90
Subdivision Ordinances—Relating to deposit of funds for road construction .......... 91

COURTS
Authority—May alter penalty of bonds of guardians or committees for incapacitated persons ................................................................. 92
Circuit—Terms—Change in number by order of judge ........................................... 95
Circuit Court of Nansemond—Each term of court is a regular term ..................... 94
Not of Record—Saturday closing at discretion of judge ........................................ 96
Regular Grand Jury Impaned—One of statutory terms to be designated by judge for such ................................................................. 94

COURTS NOT OF RECORD
Cash Deposits—Justice of peace may take in lieu of recognizances with surety ................. 164
Preliminary Hearing—Jurisdiction in adult family situation involving murder and manslaughter ................................................................. 168
Recording Preliminary Hearing—§ 17-30.1 not applicable ..................................... 96

COURTS OF RECORD
Authority—May order pre-trial investigation of adults and minors ....................... 115

CRIMES
Abduction—Parent may be guilty ................................................................. 97
Being Drunk in Public—Person drunk inside motor vehicle parked on service station yard ................................................................. 102
Failure to Appear on Date to Which Case Continued—Not punishable as misdemeanor under § 46.1-178 ................................................................. 98
Frequenting, Playing in or Loitering in Public Poolroom by Minors—What constitutes ................................................................. 286
Grand Larceny by False Pretenses Not From the Person—Must be of the value of $100.00 ................................................................. 99
Larceny—Intrusted property—Not taken unless demand made and property not produced ................................................................. 100
Larceny—Property in trust fraudulently moved without consent—Within or from State ................................................................. 100
Malicious Burning—Proper charge is under § 18.1-80 when persons are within the building ................................................................. 101
Perjury—Swearing falsely to oath ................................................................. 101

CRIMINAL PROCEDURE
Arrest—Person drunk inside motor vehicle parked on service station yard ............... 102
Arrest and Confinement—Deserter from armed forces—Authority of State officer ........ 103
Blood Analysis—Refusal of accused to test—Does not prevent conviction .......... 177
Blood Analysis—Steps set forth in § 18.1-55.1, relating to taking, handling, etc., of blood samples, procedural not substantive ................................................................. 104
Conviction for Speeding—Bars subsequent conviction for reckless driving ............... 178
Costs—Medical Examiner—Testifying as expert witness ..................................... 329
Definitions of “Abstract of Judgment,” “Order of Trial,” and “Complete Final Order” in § 19.1-296 ................................................................. 105
Driving Without License or While License Revoked—Conviction of one bars prosecution under other ................................................................. 106
Drunk Driving Conviction—Date license restriction begins and period of revocation ................................................................. 180
REPORT OF THE ATTORNEY GENERAL

Drunk Driving Conviction—Dismisses any reckless driving charge........ 182
Extradition Hearing—Indigent felon has right to court appointed counsel.

Fees for Summonsing Witnesses—Paid by defendants................... 108
Fines—Paid into State treasury where offenses committed against State—

Into county treasury where violation of county ordinances................. 109
Grand Jury—Cannot commit witness to secrecy.......................... 110
Implied Consent Law—Applicable in all drunk driving prosecutions..... 176
Indictments—Charging third and fourth time offenses.................. 110
Insanity Hearing—Physicians paid per § 19.1-233.......................... 111
Juror—Intimidation—Threats or force necessary........................ 112
Preliminary Hearing—Not required when person not arrested until after
indictment returned.......................................................... 113
Preliminary Hearing—Recorded if requested................................ 96
Preliminary Hearing—When not required.................................... 114
Pre-trial Investigation—Court of record may order for minors and adults

Prior Traffic Offenses—Record may be used before sentencing........... 206
Prior Traffic Record—Includes operation of motor vehicle on highway
without valid operator's license........................................... 115
Search Warrants—Length of time valid...................................... 118
Search Warrants—Name of informant....................................... 119
Sentences—Credit for time served.......................................... 119
Subdivision Ordinance Violation—Effect of sale made outside county
limits—One year statute of limitation on this violation................ 121

DEEDS OF TRUST
Farmers Home Administration—Employee may release...................... 122

DOG LAWS
County Dog Warden—Enforcement of game laws............................ 123
County Ordinance—Does not have to parallel State law in every respect

Enforcement by Counties, Cities and Towns................................ 124
Fox Hounds—Permits to run at large...................................... 152
Rabies in Livestock—Payment from dog fund only if caused by dog not
personally owned............................................................ 125
Running at Large—Henrico County—Confinement and disposition of
stray dogs—No authority while dogs properly licensed................ 126
Running at Large—Under § 29-194 notice required before there is violation
of local ordinance.......................................................... 127
Sheep Killed by Dogs—Reimbursement for—Owner may not recover where
his dog participated in killing............................................ 128
Special Dog Warden—Immune to civil action if acting legally within scope
of authority, but liable for negligence in performance of ministerial
duty.................................................................................. 311
Vaccinations—Licensed non-graduate veterinarian may perform........... 129

ELECTIONS
Absentee Ballots—Educationally handicapped person—May be helped
by person of his choice to execute ballot.................................. 129
Assistant Registrars—Appointed only when registrar physically or men-
tally impaired....................................................................... 130
Assistant Registrars—May not be appointed except upon disability of
registrar.................................................................................. 130
Candidate for Commonwealth’s Attorney—Resident requirements.... 68
Candidates—Must be qualified to vote in precinct for which candidacy
filed....................................................................................... 131
| Candidates-Procedures required for qualification where town becomes city of second class | 132 |
| Central Registrar Appointed-No one else may register voters | 102 |
| Challenger-Must be qualified voter | 133 |
| Democratic Party Plan-Party committee may determine contested re-organization | 133 |
| Democratic Primary-Last date for filing | 135 |
| Election Judge or Clerk-School teacher may act | 133 |
| Judge, Clerk, or Precinct Committeeman-Employee of redevelopment and housing authority may serve | 136 |
| Judge or Clerk-Justice of peace may not serve | 136 |
| Judge or Clerk-Member of board of supervisors may not serve | 136 |
| List of Registered Voters-Preparation not mandatory | 137 |
| Primary-Candidate must file before midnight ninety days prior to primary | 138 |
| Primary-Candidate must file with party chairman | 139 |
| Primary-Time for calling by Democratic chairman directory not mandatory | 139 |
| Purge of Registration Books-Whenever electoral board deems proper-Procedure under §§ 24-106, et seq | 141 |
| Registrars-Disability defined | 130 |
| Registrars-Justice of peace ineligible to serve | 130 |
| Registration-Adjudged insane-Registrant has burden of proving sanity | 241 |
| Registration and Voting-Residence requirements must be met | 141 |
| Registration Books-May be inspected at reasonable times | 142 |
| Registration Books-Remain in custody of registrar except in use on election day | 143 |
| Sample Ballot-May be taken into voting booth | 142 |
| Tie-breakers-May be compensated for performance of duty | 144 |
| Voting Residence-Controlled by intent of voter | 144 |

**EMINENT DOMAIN**

| Commission of Outdoor Recreation-Lacks power | 145 |
| Municipalities-Writ tax not applicable | 146 |
| State Institution-Applicable to Longwood College | 147 |

**EMPLOYMENT AGENCIES**

Prohibited from Advertising Services as Free if Fee Charged | 148

**ESCHEATS**

| Delinquent Real Estate Taxes-Treasurers may accept | 148 |
| Recovery of Property-Claimants must file pursuant to §§ 55-176 through 55-181 | 148 |

**ESTATES**

| Tenant in Common-Right of survivorship exists when testator makes plain his purpose | 233 |

**FEES**

| City Sergeant-Allowed on fieri facias upon return of “no effects” | 149 |
| Justice of Peace-Warrant of arrest | 165 |
| Transfer of Real Property-Chargeable once a year | 234 |

**FIREWORKS**

Prohibited Use-Roman candles | 150
### GAME AND INLAND FISHERIES
- Bee Hives Destroyed by Bears—No compensation ........................................ 151
- Dog Warden—Has same duties and powers as game warden ............................... 124
- Motorboat Equipment—Life preservers, etc., must comply with Commission regulations .................................................. 152
- Permits Allowing Fox Hounds to Run at Large—Authority to issue in commissioner .................................................. 152

### GARNISHMENT
- Wages—Amount exempt from attachment under § 34-29 ........................................ 156

### GENERAL ASSEMBLY
- Members—Cannot serve as judge of any court .................................................. 153

### HEALTH
- Public Medical Centers—Established by joint political subdivisions—Board of Health sole State agency to administer Federal construction funds ........................................................................................................................................ 87

### HIGHWAYS
- Boards of Supervisors—Construction of road not within primary or secondary system .................................................. 154
- Boundary Lines—Establishment—Between roadways and adjacent property owners .................................................. 155
- Rights of Way—Pine seedlings furnished for planting thereon .......................... 216

### HOMESTEAD EXEMPTIONS
- Wages Exempt—How computed .................................................. 156

### HOSPITALS
- Alleghany Memorial Hospital—Ambulance service may not be subsidized by City of Covington and County of Alleghany .................................................. 89

### HOUSING
- Fairfax County Redevelopment and Housing Authority—Purchases or leases of completed buildings assumed done according to law .................................................. 158

### HOUSING AUTHORITIES
- Charlottesville—Referendum necessary on each construction site .................................................. 157

### INDUSTRIAL DEVELOPMENT
- Boards of Supervisors—May participate in cost to change channel of river to promote ........................................................................................................................................ 26
- Counties—Appropriation may not be made for organization of development corporation ........................................................................................................................................ 73

### JAILS AND PRISONERS
- Attorney-client Relationship—Censoring of written communications .................................................. 159
- Confinement in State Penitentiary Under § 53-8—How accomplished .................................................. 159
- Cost of Prosecution—Jail sentence for failure to pay—Determined by court ........................................................................................................................................ 160
- Escape—From county jail before trial by person held without bond .................................................. 161

### JUDGES
- Cannot Serve as Member of General Assembly .................................................. 153
- May Authorize Payment to Officers for Services Not Otherwise Compensable ........................................................................................................................................ 232
- Referendum—Once called by court cannot be set aside .................................................. 42
JUDGMENTS
Marking Satisfied or Discharged—Clerk determines from direction of judgment creditor ................................................ 163

JURIES
Composition—Second class city—Selection from city or county ................. 163

JUSTICE OF PEACE
Bail—Cash deposits—May take in lieu of recognizances with surety ...... 164
City May Not Contract With Manufacturing Company Represented by Justice of Peace .................................................. 230
Fees—Warrant of arrest .................................................................. 165
Issuance of Warrant—One spouse against the other when charges properly founded .................................................... 165
May Be Treasurer of Incorporated Town ........................................ 166
Spouse of State Employee—May serve unless spouse is law enforcement officer ......................................................... 62
Status—Upon rearrangement of magisterial districts ....................... 167
Town Clerk May Serve Unless Prohibited by Charter ....................... 62
Urban County Executive Form of Government—Magisterial districts not abolished ..................................................... 87

JUVENILE AND DOMESTIC RELATIONS COURTS
Fines Assessed and Collected for City Violations—Must be paid to city treasurer ................................................................. 168
Jurisdiction—Adult family situation involving felony except murder and manslaughter ....................................................... 168
Juvenile Detention Commission—Judge may not be member ............ 169
Juvenile Detention Commission—Membership of joint or regional commission ................................................................. 169
Regional—City of Staunton and Augusta County may use same court- room ................................................................. 170

JUVENILES
Crimes—Frequenting, playing in or loitering in public poolroom by minors ............................................................................ 286
Recognizance—Satisfaction and discharge—§ 19.1-18 not applicable .......... 116

LABOR LAWS
Railroad Labor Law—Controlling as to railroad employees .................... 171

LAND REGISTRATION ACT
Referendum Requirements—Exception of Warwick County no longer enforceable ................................................................. 171

LITERARY FUND
School Construction—Accept lowest or reject all bids and ask for new bids ................................................................. 243

LOTTERIES
What Constitutes—Element of consideration includes donations .......... 172

MENTAL HYGIENE AND HOSPITALS
Physicians on Staff of Hospital Paid for Sitting on Commissions ............ 111

MINES
Board of Examiners—Authority over examinations and qualifications of candidates ................................................................. 173
MOTORBOATS
Life Preservers, Etc.—Must comply with regulations.......................... 152

MOTOR VEHICLES

Accidents on Private Property—Investigation ....................................... 174
Arrest—Person drunk inside motor vehicle parked on service station yard ...... 102
Blood Analysis—Impaired driving instruction given when blood sample exceeds .15% by weight of alcohol .................................................. 175
Blood Analysis—Implied consent—Accused must be arrested within two hours of alleged offense .................................................. 176
Blood Analysis—Implied consent—Applicable in all drunk driving prosecutions .......................................................... 176
Blood Analysis—Refusal of accused to test—Does not prevent conviction .... 177
Blood Analysis—Steps set forth in § 18.1-55.1, relating to taking, handling, etc., of blood samples, procedural not substantive ...................... 104
Chauffeur’s License—Not required if duty only occasional ........................ 97
Conviction for Speeding—Bars subsequent conviction for reckless driving .. 178
County License Fees—Refunds to non-domiciliary servicemen .................. 179
County Licenses—Vehicles operated by common carrier exempt under certain conditions .......................................................... 179
Driving Without License or While License Revoked—Conviction of one bars prosecution under other .............................................. 106
Drunk Driving Conviction—Date license restriction begins and period of revocation .......................................................... 180
Drunk Driving Conviction—Dismisses any reckless driving charge .......... 182
Electronic Devices for Measuring Speed—Placing of signs—Presumption that signs erected .......................................................... 183
Exemption from Fuel Tax—Does not extend to private corporations ............ 198
Forfeiture Under § 46.1-351.2—Costs and commissions .......................... 267
License Plates—For Hire—Not needed for escort car of overweight vehicle .... 184
License Plates—When “T” plates required ........................................... 185
Local Licenses—Amendment of ordinances must follow provisions of § 15.1-504 (a), (b) and (c) .................................................. 213
Local Licenses—Authority of towns and counties to impose—Limited to one license tag in addition to that of the State .................. 186
Local Licenses—Exemption to non-domiciliary member of armed forces not affected by purchase of Virginia license plates .......... 186
Local Licenses—Refunds—Fee not to be imposed on non-domiciliary member of armed forces .................................................. 187
Local Licenses—Refund of portion of purchase price upon surrender of license plates .......................................................... 188
Operator’s License—Age limit set by statute .......................................... 189
Operator’s License Revocation—Duty upon commissioner on two convictions within year for speeding ............................................. 190
Operator’s License—Revocation for two or more convictions of speeding .... 190
Operator’s License—Suspension under § 46.1-442 not terminated by statute of limitations .................................................. 191
Operator’s License—When required for nonresident servicemen—When not .......................................................... 194
Pedestrian Crosswalk—May be at intersection or elsewhere ...................... 195
Prior Traffic Record—Includes operation of motor vehicle on highway without operator’s license .................................................. 115
Reciprocal Provisions Revocation Nonresident’s Operator’s License—Construing §§ 46.1-179.1, 46.1-179.2 and 46.1-179.3 ................. 196
Registration and Licensing—For hire—Required when transporting water for sale .................................................. 197
Registration and Licensing—Not necessary for machine defined as “backhoe” .................................................. 198
Registration Fee—Required where vehicle used for private rather than purely for State, county and municipal purposes ........................................ 198
Sales and Use Tax .................................................................................. 199
Speeding—Convictions under § 46.1-198 .............................................. 183
Taxation—Personal Property—Student residing nine months in Virginia .. 205
Traffic Offenses—Record may be used before sentencing .................... 206
Traffic Violations—Issuance of summons in lieu of warrant ................ 207
Virginia Motor Vehicle Sales and Use Tax—Levy of tax where sale is related transaction ................................................................. 208

NEWSPAPERS
 Legal Advertisements—Newspaper must meet requirements of § 8-81 .... 209

NONSUPPORT
 Payments to Wife and Children—County or city must pay to court originally sentencing prisoner for nonsupport .......................... 210

NOTARIES PUBLIC
 Residence—Commission not forfeited by living temporarily out of State .. 211

OPTICIANS
 Advertising—What constitutes illegal advertising ................................. 219

ORDINANCES
 Amendment or Repeal—Action required to accomplish ...................... 212
 Automobile Graveyards—Licensing—May regulate maintenance and operation if established after April 4, 1966 .............................. 75
 Counties—Establishing building, plumbing, electrical and heating equip- ment codes .............................................................................. 82
 County—Affecting unincorporated towns—Notice of public hearing necessary ................................................................. 38
 County—Limitations on regulation of peddling and parking .................. 40
 County—Public hearings necessary if required by statute .................. 19
 Exemptions from Personal Property Tax—Boards of supervisors may adopt ................................................................. 19
 Local—Air Pollution—Compatibility with rules, regulations, orders or requirements of State Air Pollution Control Board .................. 2
 May Not Require Provisions of Real Estate Sales Contracts ............... 41
 Motor Vehicle License Tax—Amendment—Must follow provisions of § 15.1-504 (a), (b) and (c) ..................................................... 213
 Subdivision—Application of county subdivision regulations in area subject to municipal jurisdiction ............................................... 213
 Taxation—Trailer lots—Must be uniform in application .................... 310
 Violation of Compulsory School Attendance Ordinance—Fine paid into State treasury ......................................................... 57

PARENTS
 Support by Children ............................................................................. 215

PARK AUTHORITIES
 Authority to Borrow Money—Limited to issuance of revenue bonds ...... 215

PERJURY
 Swearing Falsely to Oath or Affidavit .................................................. 101
PHYSICIANS
Mental Hospitals—Payment for sitting on commissions .................. 111
School Board Member—May perform services and receive fees from
County Welfare Department ............................................. 260
School Board Member—No conflict of interest .......................... 260

PINE TREE SEED LAW
Pine Seedlings—Furnished Highway Department for use on highway
rights of way ................................................................. 216

PLANNING COMMISSION
Change in Number of Members—Effected by ordinance amendment
pursuant to § 15.1-431 ...................................................... 53

POLICE OFFICERS
Off-duty Police—No indemnification provided by State .................. 217
Off-duty Police—No obligation on State to defend in case of suit ...... 217

POST MORTEM EXAMINATION
Fee—How payment made .................................................. 90

PRACTICE OF LAW
Licensed Bill Collector—May not represent his principal in court ........ 218

PRISONERS
Costs for Medical Expenses for Injuries—May be paid out of appropriation
for criminal charges ................................................................ 218

PROFESSIONAL AND OCCUPATIONAL REGISTRATION
Board of Opticians—What constitutes illegal advertising .................. 219
Clinical Psychologists—Examination not waived .......................... 220
Licensed Registered Professional Hairdresser—May operate barber shop.. 221

PROFESSIONS AND OCCUPATIONS
Pawnbrokers—Licensing of partnerships and corporations—One bond
required .............................................................................. 222

PUBLIC FUNDS
Advance Expenditure for Federal Programs—Only after appropriation
by local governing body ...................................................... 223
Assessments under Cedar Rust Law—Disposition .......................... 224

PUBLIC NOTICES
Legal Advertisements—Newspaper must meet requirements of § 8-81 ...... 209

PUBLIC OFFICERS
Compatibility—Charter provisions of town of Appalachia control as to
whether member of council may be interested in insurance contract .... 225
Compatibility—Justice of peace may not serve as registrar ............... 130
Compatibility—Member of county board of zoning appeals may not serve
as assessor ........................................................................... 225
Compatibility—Member of real estate board of assessors may not contract
with school board .................................................................. 247
Compatibility—Salaried employee of company selling tires to city may
serve as member of city council ............................................. 226
| **Contracts** | Welfare board member may not contract with board | 228 |
| Co-ordinator of County Civil Defense | Not to be employee of federal government | 229 |
| County Medical Examiner | May not be member of school board | 248 |
| Justice of Peace | City may not contract with manufacturing company represented by justice of peace | 230 |
| Medical Examiner | May not serve as member of school trustee electoral board | 231 |
| Medical Examiner and Jail Physician | May not serve as member of board of supervisors | 230 |
| Member of Board of Supervisors | May complete teaching contract, under § 15.1-67, entered into prior to taking office | 31 |
| Payment for Services Not Otherwise Compensable | | 232 |

**PUBLIC WELFARE**

| Boards of Supervisors | Required to appropriate funds for payment of public assistance | 43 |
| District Homes | Number of votes of cities and counties participating determined by population | 232 |
| Old Age Assistance | Recovery from estate of recipient | 233 |

**REAL ESTATE**

| Contracts | County ordinance not to set forth type of provisions contract must contain | 41 |
| Deeds | Recorded in name of grantee not unknown owner | 66 |
| Taxation | Life tenant liable for taxes when life interest reserved | 234 |
| Transfer Fees | Chargeable once a year | 234 |

**RECORDATION**

| Assignment of Lease | Subject to tax | 297 |
| Chattel Deed of Trust | Recorded in miscellaneous lien book | 235 |
| County's Deed of Trust | Nontaxable, but fee owed clerk | 60 |
| Deeds | Recorded in name of grantee not unknown owner | 66 |
| Fees | Land trust deed | 298 |
| Fees | Typewritten single-spaced instrument | 58 |
| Lease of Personal Property | Recorded in miscellaneous lien book | 60 |
| Liens | Clerk not authorized to docket notices from other state | 62 |
| Liens | Partial marginal release—Who may present affidavit to clerk | 236 |
| Wills | Fees when no qualification | 59 |

**REDISTRICTING**

| Changes in Magisterial Districts | When commissioners' report to be filed | 237 |
| Effect Upon Board of Supervisors | | 240 |

**REGISTRAR**

| Application for Registration | Adjudged insane—Registrant has burden of proving sanity | 241 |
| Books | In custody of registrar except when in use on election day | 143 |
| Central Registrar Appointed | No one else may register voters | 102 |
| Copying Registration Books | Compensation in absence of purge | 30 |

**SANITARY DISTRICTS**

| Bonds | Valid obligation of county | 84 |

**SCHOOLS**

<p>| Bus Driver | Age must be 16 to 65, inclusive | 241 |
| Construction | Board may negotiate without advertising for bids if no State funds involved | 243 |</p>
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction Financed From Literary Fund-Accept lowest or reject all bids and ask for new bids</td>
<td>243</td>
</tr>
<tr>
<td>Division Superintendent—Not restricted as to residence</td>
<td>244</td>
</tr>
<tr>
<td>School Boards—Appropriations—Extent of control of expenditures</td>
<td>74</td>
</tr>
<tr>
<td>School Boards—Authority to select site for vocational-technical school</td>
<td>245</td>
</tr>
<tr>
<td>School Boards—Bonds—Not mandatory to request board of supervisors to issue</td>
<td>246</td>
</tr>
<tr>
<td>School Boards—Contract bids rejected—Ten days' notice for rebids—One bid sufficient</td>
<td>246</td>
</tr>
<tr>
<td>School Boards—Contracts—May not contract with member of real estate board of assessors</td>
<td>247</td>
</tr>
<tr>
<td>School Boards—Conveyance of property from board of supervisors without consideration</td>
<td>32</td>
</tr>
<tr>
<td>School Boards—County medical examiner may not be member</td>
<td>248</td>
</tr>
<tr>
<td>School Boards—Dentist member may provide dental services for Head Start Program</td>
<td>248</td>
</tr>
<tr>
<td>School Boards—Employment and payment of attorneys to examine title to real estate</td>
<td>249</td>
</tr>
<tr>
<td>School Boards—Have authority for capital outlay expenditures</td>
<td>301</td>
</tr>
<tr>
<td>School Boards—How selected</td>
<td>249</td>
</tr>
<tr>
<td>School Boards—Loans from Literary Fund</td>
<td>250</td>
</tr>
<tr>
<td>School Boards—Loans negotiated with approval of board of supervisors</td>
<td>250</td>
</tr>
<tr>
<td>School Boards—Loans to be authorized by board of supervisors</td>
<td>251</td>
</tr>
<tr>
<td>School Boards—May admit and transport children residing beyond limits of the State but near thereto</td>
<td>251</td>
</tr>
<tr>
<td>School Boards—May contract with independent contractor</td>
<td>252</td>
</tr>
<tr>
<td>School Boards—May contribute additional funds to employees' retirement fund—Increase is income</td>
<td>253</td>
</tr>
<tr>
<td>School Boards—May employ special defense counsel</td>
<td>254</td>
</tr>
<tr>
<td>School Boards—May employ wife of brother-in-law of school board member</td>
<td>256</td>
</tr>
<tr>
<td>School Boards—May not contract with farm supply company operated by members</td>
<td>252</td>
</tr>
<tr>
<td>School Boards—May not lease real estate owned by board</td>
<td>256</td>
</tr>
<tr>
<td>School Boards—May not provide for referendum on school system to be used</td>
<td>257</td>
</tr>
<tr>
<td>School Boards—Member representing magisterial district may be resident of town embraced therein</td>
<td>258</td>
</tr>
<tr>
<td>School Boards—Members—Filling of vacancies upon rearrangement of magisterial districts</td>
<td>167</td>
</tr>
<tr>
<td>School Boards—Membership from magisterial districts and from town</td>
<td>258</td>
</tr>
<tr>
<td>School Boards—Member's son may teach in school for migrants financed wholly by Federal funds</td>
<td>259</td>
</tr>
<tr>
<td>School Boards—No authority to use public school buses for college students</td>
<td>259</td>
</tr>
<tr>
<td>School Boards—Practicing medical doctor as member—Not conflict of interest</td>
<td>260</td>
</tr>
<tr>
<td>School Boards—Providing insurance coverage for children, teachers and clerical personnel to and from school—Limitations on</td>
<td>262</td>
</tr>
<tr>
<td>School Boards—Teachers' salaries—Payment on last working day prior to Christmas—Board determines</td>
<td>262</td>
</tr>
<tr>
<td>School Funds—Responsibility of city treasurer</td>
<td>54</td>
</tr>
<tr>
<td>School Trustee Electoral Board—Medical examiner may not serve as member</td>
<td>231</td>
</tr>
<tr>
<td>School Trustee Electoral Board—Members—May not have interest in contracts</td>
<td>252</td>
</tr>
<tr>
<td>School Trustee Electoral Board—Town councilman may serve as member</td>
<td>263</td>
</tr>
</tbody>
</table>
### Teachers
Mandatory retirement age established by State law .......... 263

### Town
Cannot be Required to Contribute to County School Fund .... 85

### Transportation
for Children to Private and Parochial Schools by Public School Buses—Violative of Virginia Constitution .......... 264

### Vocational-Technical
Location selected by school board .......................... 245

### SEVERAGE
County Sewer System—Connection fees—Authority to establish different amounts if reasonable ........................ 45

### SHERIFFS AND SERGEANTS
Cannot be Trustee in Bankruptcy ............................... 265
City Sergeant—Fee allowed on fieri facias upon return of "no effects" .... 149
Fees—Criminal cases—For execution of capias pro fine and costs ..... 266
Sale of Forfeited Motor Vehicles—Costs and commissions ... 267
Special Allowances to Sergeants, Etc., for Service of Criminal Process ... 268

### STATE BUILDINGS
Operation of Vending Stands, Etc., by the Blind .......... 320

### STATE CORPORATION COMMISSION
Registration of Motor Vehicles Under § 56-304.2—Not required unless has in excess of two axles ........ 185

### STATE EMPLOYEES
State Corporation Commission—May not arrest for general traffic violations .......... 268
Witness Fees—Allowance on behalf of Commonwealth .......... 327

### STATE INSTITUTIONS
College of William and Mary—May construct and operate airport .... 269
Longwood College—Eminent domain may be exercised ........ 147
Madison College—Tuition—Families of faculty—May not waive or reduce except by gifts for that purpose ........ 270
Virginia Military Institute—May request ordinance from Lexington City Council to regulate parking .......... 271

### STATE POLICE
Authority—May serve town warrants .......................... 271

### SUBDIVISIONS
Land for Public Use—County requirements not unconstitutional .... 272
Ordinances—Application of county subdivision regulations in area subject to municipal jurisdiction .......... 213
Ordinances—Deposit of funds for road construction by developer .... 91
Ordinances—Subdivision defined ............................... 273

### TAXATION
Assessment—Amount of levy on machinery and tools may differ from that on other property .... 277
Assessment—Commissioner of revenue cannot change ........ 63
Assessment—Uniformity required in rates of levy on property of like character .......... 277
Assessment of Public Utilities—Transferring from 40% state-wide ratio to local true ratio ................................................ 274
Assessment on Tangible Personal Property of Public Service Corporation—Formula to be used ........................................... 274
Assessors—Member of county board of zoning appeals may not serve .............................................................. 225
Capitation Tax—Valid and enforceable, but non-payment does not take any rights from the individual .......... 278
Churches—Revenue from non-church activities taxable .............................................................. 279
Delinquent Real Estate Taxes—Property escheated to State not subject to sale .............................................................. 148
Delinquent Taxes—Refund of penalty paid—Taxpayer must prove actual prejudice .............................................................. 280
Easements on Open-space Land—Assessment to reflect change in market value .............................................................. 81
Exemptions—Nonprofit airport .............................................................. 281
Exemptions—Real estate of Bedford County Industrial Development Corporation and Hines Memorial Pythian Home not exempt .............................................................. 282
Exemptions—Real estate owned by community clubs not exempt .............................................................. 283
General Admissions or License Tax—Imposition by county .............................................................. 79
Income—Member of armed forces—Residence determines liability .............................................................. 291
Inheritance Tax Return—Not public record .............................................................. 284
Land Books—Assessment made as of first day of each year .............................................................. 284
Land Use Tax—Unconstitutional .............................................................. 83
License for Trailer Camps—County executive secretary may issue but not collect fees .............................................................. 77
Licenses—Coin-operated pool tables .............................................................. 286
License Taxes—On landlords for separate types of rental properties .............................................................. 285
Local Property Tax—Industrial Development Authority—Responsibility for payment when authority and lessee covered under Bond Act. .............................................................. 287
Local Sales Tax—County must adopt by ordinance .............................................................. 19
Lodging House—License tax required though lodging irregularly furnished .............................................................. 288
Motor Vehicles—Member of armed forces—Assessable in locality where owner is resident .............................................................. 186
Motor Vehicles—Personal Property—Student residing nine months in Virginia .............................................................. 205
Motor Vehicles—Presumption of ownership may be overcome if proved to Commissioner of Revenue .............................................................. 289
Motor Vehicles—Sales and Use Tax .............................................................. 199
Personal Property—Authority to assess depends on situs as of January first of taxable year .............................................................. 290
Personal Property—County may exempt items in § 58-829.1 .............................................................. 290
Personal Property—Non-domiciliary member of armed forces exempt .............................................................. 291
Property Owned Directly or Indirectly by Commonwealth—Exempt .............................................................. 292
Real Estate—Assessment notice to last known address of owner .............................................................. 292
Real Estate—Life tenant liable for taxes .............................................................. 234
Real Estate—Lien on property until paid .............................................................. 293
Real Estate—Order dismissing old delinquent tax suit .............................................................. 294
Real Estate—Political subdivisions not authorized to classify .............................................................. 295
Real Estate—Treasurer's responsibility for collection of delinquent taxes .............................................................. 317
Reassessment—Part of county annexed by city .............................................................. 296
Recordation—Assignment of lease subject to tax .............................................................. 297
Recordation—Deed—No additional tax where contract for purchase of real estate recorded and tax paid unless consideration more .............................................................. 297
Recordation—Fees—Land trust deed and final deed of conveyance to beneficiaries .............................................................. 298
Recordation Tax Separate from Gift Tax—Deed reserving life right .............................................................. 299
Sales and Use Tax—Agricultural exemption—Fences if not attached permanently to land .............................................. 300
Sales and Use Tax—Appropriation of Funds—At discretion of board of supervisors subject to § 58-441.49 (g) and (h) ........................................ 301
Sales and Use Tax—Banks—Purchase or sale of property and services within or outside the State ........................................ 302
Sales and Use Tax—Bottled gas not exempt ........................................................................................................ 303
Sales and Use Tax—Certain church activities exempt .................................................................................. 303
Sales and Use Tax—Churches and religious societies .................................................................................. 305
Sales and Use Tax—Distribution after part of county annexed by town .................................................. 307
Sales and Use Tax—Distribution to Town Not Separate School District—Not authorized unless charter election requirements met ........................................ 307
Sales and Use Tax—Local tax—When applicable ...................................................................................... 308
Sales and Use Tax—Occasional sale by auctioneer or common crier ................................................................ 309
Sales and Use Tax—Religious organizations not exempt ........................................................................ 310
Standing Timber—Assess separately where deed of conveyance recorded .................................................................................. 64
Trailer Lots Within Trailer Camping Ground—Tax must be uniform in application .................................................. 310
Unemployment—How contribution rate figured .......................................................................................... 318
Virginia Motor Vehicle Sales and Use Tax—Levy of tax where sale is related transaction .............................. 208

TORTS

Counties—Immune from liability .............................................................................................................. 78
Immunity—County dog warden—Not liable where acting legally within scope of authority, but liable for negligence in performance of ministerial duty .............................................................................. 311

TOWNS

Acts of Councilmen Before Qualification—Validity of ........................................................................ 313
Appropriation from County .................................................................................................................. 22
Authority—Alcoholic beverages—May require license to manufacture, bottle or sell alcoholic beverages—May impose local merchants’ license tax measured by sales .................................................................................. 5
Council—May hold closed or executive meetings unless prohibited by charter ...................................................................................... 312
Council—Mayor ineligible for one year after resignation to fill vacancy .................................................. 316
How Vacancies on Council Filled When Elected Councilmen Fail to Qualify .................................................. 313
Incorporation—Election not needed for initial incorporation ................................................................. 315
Mayor—Ineligible for period of one year after resignation to fill vacancy on council ...................................... 316
Sales and Use Tax—Distribution after part of county annexed .............................................................. 307
Warrants—Service by sheriff and his deputies ......................................................................................... 271

TRAILER CAMPS

Regulation and Inspection .................................................................................................................. 82

TRAILER COURTS

Zoning—When board of supervisors may reconsider applications ...................................................... 46

TREASURERS

Advance Expenditure for Federal Programs—Only after appropriation by local governing body .................................................................................. 223
City—May receive fines collected by juvenile and domestic relations courts for city violations .................................................................................. 168
Collection of Delinquent Taxes—Not held personally liable ........................................................................ 293
Compensation—Maximum amount ....................................... 69
Liability for Illegal Expenditure ........................................ 27
Negotiating for Loan of Money—May negotiate for but not conclude loan
to county ........................................................................ 35
Refund of Penalty on Delinquent Taxes—No authority to refund unless
taxpayer shows actual prejudice ...................................... 280
Responsibility for Collection of Real Estate Tax ...................... 317
Responsibility for School Funds ............................................ 54
Sales and Use Tax—Distribution to Incorporated Town Not Separate
School District—Not Authorized unless charter election requirements
met .................................................................................. 307
Teachers’ Salaries—School board determines which entitled for full
month’s work ................................................................. 262

UNEMPLOYMENT COMPENSATION
Taxation—Contribution rate .................................................. 318

UNIFORM COMMERCIAL CODE
Charges for Furnishing Copies of Papers and Records Issued Pursuant
Thereto—Controlled by § 14.1-112 of the Code ...................... 319

VIRGINIA COMMISSION FOR THE BLIND
Operation of Vending Stands in Public Buildings ......................... 320

VIRGINIA EMPLOYMENT COMMISSION
Unemployment Compensation—Federal employees ....................... 321

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM
School Boards—Additional contributions for employees—Increase is
income .............................................................................. 253

VOCATIONAL REHABILITATION
Board—Authority—with consent of Governor, may convey easements and
enter into lease with county for operation of sewage treatment plant.... 322
Board—May accept gifts for construction of chapel ......................... 322

WARRANTS
John Doe Warrant—Nullity in this State ................................... 323
Name Not Given—Sufficient if adequate description identifies with
reasonable certainty .......................................................... 323
One Spouse Against the Other—Justice of peace may issue when charges
properly founded ................................................................ 165
Search—Length of time valid .................................................. 118

WELFARE AND INSTITUTIONS
Child Separated from Custody of Parents—Authority to consent to
surgical or medical treatment .............................................. 324
Hospitalization and Treatment of Indigents—Collection of expense—
Promissary note cannot be required of indigent ......................... 326
Prisoner Sentences—Credit for time served ................................. 119

WILLS
Probate—in county wherein real estate lies .................................. 326

WITNESSES
Allowance—Employees of Commonwealth .................................. 327
Fees—Appearance before regulatory board .................................. 328
Fees for Summonsing—Paid by defendants .................................. 108
Medical Examiner—Allowance for testifying as expert ................... 329
## STATUTES AND CONSTITUTIONAL PROVISIONS REFERRED TO IN OPINIONS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ACTS OF ASSEMBLY</strong></td>
<td></td>
</tr>
<tr>
<td>Acts of 1916</td>
<td></td>
</tr>
<tr>
<td>62</td>
<td>171</td>
</tr>
<tr>
<td>Acts of 1932</td>
<td></td>
</tr>
<tr>
<td>393</td>
<td>54</td>
</tr>
<tr>
<td>Acts of 1942</td>
<td></td>
</tr>
<tr>
<td>345</td>
<td>14</td>
</tr>
<tr>
<td>Acts of 1946</td>
<td></td>
</tr>
<tr>
<td>160</td>
<td>86</td>
</tr>
<tr>
<td>344</td>
<td>89</td>
</tr>
<tr>
<td>Acts of 1950</td>
<td></td>
</tr>
<tr>
<td>174</td>
<td>89</td>
</tr>
<tr>
<td>Acts of 1952</td>
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<td>Acts of 1956</td>
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<td>54</td>
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<td>Acts of 1958</td>
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<td>141</td>
<td>172</td>
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<tr>
<td>Acts of 1960</td>
<td></td>
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<tr>
<td>81</td>
<td>61, 235</td>
</tr>
<tr>
<td>213</td>
<td>15, 227, 255</td>
</tr>
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<td>389</td>
<td>114</td>
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<tr>
<td>Acts of 1962</td>
<td></td>
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<td>332</td>
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<td>Acts of 1964</td>
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<td>159</td>
<td>147</td>
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<td>116</td>
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<tr>
<td>338</td>
<td>61, 235</td>
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<td>298</td>
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<td>489</td>
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<td>Acts of 1966</td>
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<td>189</td>
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<td>97</td>
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<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
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<tbody>
<tr>
<td>151</td>
<td>202</td>
</tr>
<tr>
<td>176</td>
<td>145</td>
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<td>38</td>
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<td>12</td>
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<td>29, 29</td>
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<td>204</td>
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## CODE OF VIRGINIA

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Code of 1919</td>
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<tr>
<td>2154(a24)</td>
<td>192</td>
</tr>
<tr>
<td>3487</td>
<td>266</td>
</tr>
<tr>
<td>4960</td>
<td>219</td>
</tr>
<tr>
<td>5893(i)</td>
<td>95</td>
</tr>
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<td>Code of 1942</td>
<td></td>
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<tr>
<td>3511</td>
<td>268</td>
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<td>237</td>
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<td>Code of 1950</td>
<td></td>
</tr>
<tr>
<td>2-27</td>
<td>229, 265</td>
</tr>
<tr>
<td>2-29</td>
<td>229, 265</td>
</tr>
<tr>
<td>2-29(11)</td>
<td>229</td>
</tr>
<tr>
<td>2-33</td>
<td>315</td>
</tr>
<tr>
<td>2-37</td>
<td>322</td>
</tr>
<tr>
<td>2-36</td>
<td>229</td>
</tr>
<tr>
<td>2-33(11)</td>
<td>229</td>
</tr>
<tr>
<td>2-114(3)</td>
<td>21</td>
</tr>
<tr>
<td>Title 2.1, Ch. 10</td>
<td>21</td>
</tr>
<tr>
<td>Title 3.1, Ch. 13, Art. 2</td>
<td>224</td>
</tr>
</tbody>
</table>
Section | Page | Section | Page
---|---|---|---
4-2(20) | 9 | 10-79 | 71
4-25 | 9 | 10-81 | 71
4-28 | 8 | 10-82 | 71
4-32 | 11 | 10-83 | 71
4-38 | 5 | 10-152 | 81
4-38(e) | 6 | 10-155 | 81
4-60 | 9 | Title 10, Ch. 1.2 | 2
4-61 | 7, 8, 9 | 4-2(20) | 9
4-79 | 10 | 11-17 | 247
4-89 | 9 | 11-21 | 247
4-96 | 5 | Title 11, Ch. 4 | 244
4-99 | 6, 10 | 14-8.1 | 69
4-115 | 10 | 14-68 | 69
4-116 | 7 | 14-68.1 | 69
4-118.2 | 6 | 14-68.2 | 69
Title 4, Ch. 2 | 7 | 14-68.3 | 69
5-9.1 | 281 | 14-75 | 69
5.1-8 | 269 | 14-116 | 266
5.1-31 | 24 | 14-122 | 108
5.1-36.1 | 24 | 14-166 | 108
Title 5.1, Ch. 3 | 25 | 14-180 | 108
7.1-7 | 48 | Title 14, Art. 8 | 69
8-81 | 210 | 14.1-5 | 46
8-86 | 300 | 14.1-7 | 46
8-134 | 295 | 14.1-10 | 46
8-357 | 58 | 14.1-44 | 110, 168
8-362 | 58 | 14.1-46 | 33
8-380 | 163 | 14.1-50 | 66
8-396 | 193 | 14.1-51 | 66
8-397 | 193 | 14.1-52 | 70
8-399 | 135 | 14.1-55 | 69, 70
8-443 | 157 | 14.1-55 through 14.1-58 | 70
8-450 through 8-461 | 267 | 14.1-62 | 70
8-485 | 16 | 14.1-62.1 | 69, 70
8-538, et seq | 267 | 14.1-86 | 268
Title 8, Ch. 20 | 267 | 14.1-87 | 108
Title 8, Ch. 20 | 267 | 14.1-93 | 150
8.9-407 | 319 | 14.1-105 | 266
9-6.10(d) | 328 | 14.1-105(3) | 266
10-17.10 through 10-17.30 | 2 | 14.1-109 | 267
10-17.10(c) | 4 | 14.1-111 | 108, 266
10-17.18(e) | 4 | 14.1-112 | 58, 319
10-17.19 | 2, 3, 4 | 14.1-112(2) | 59
10-17.29 | 4 | 14.1-112(4) | 59
10-17.30 | 3 | 14.1-112(10) | 320
10-17.30(a) | 2 | 14.1-128 | 165
10-17.30(b) | 2 | 14.1-143 | 56
10-36 | 216 | 14.1-145 | 56
10-76 | 71 | 14.1-148 | 56
10-76.1 | 71 |
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.1-152</td>
<td>56</td>
</tr>
<tr>
<td>14.1-155</td>
<td>56</td>
</tr>
<tr>
<td>14.1-155.1</td>
<td>56</td>
</tr>
<tr>
<td>14.1-164</td>
<td>108</td>
</tr>
<tr>
<td>14.1-169</td>
<td>12, 16</td>
</tr>
<tr>
<td>14.1-183</td>
<td>16, 96</td>
</tr>
<tr>
<td>14.1-184</td>
<td>327, 328</td>
</tr>
<tr>
<td>14.1-189</td>
<td>327</td>
</tr>
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<td>14.1-190</td>
<td>327</td>
</tr>
<tr>
<td>14.1-191</td>
<td>150</td>
</tr>
<tr>
<td>Title 14.1</td>
<td>60</td>
</tr>
<tr>
<td>Title 14.1, Ch. 1, Art. 8</td>
<td>68</td>
</tr>
<tr>
<td>15-12</td>
<td>74</td>
</tr>
<tr>
<td>15-575</td>
<td>75</td>
</tr>
<tr>
<td>15-577</td>
<td>75</td>
</tr>
<tr>
<td>15-899 through 15-914</td>
<td>54</td>
</tr>
<tr>
<td>15-901</td>
<td>54</td>
</tr>
<tr>
<td>15.1-10</td>
<td>26</td>
</tr>
<tr>
<td>15.1-10.1</td>
<td>26, 74</td>
</tr>
<tr>
<td>15.1-13</td>
<td>29</td>
</tr>
<tr>
<td>15.1-21</td>
<td>86, 88</td>
</tr>
<tr>
<td>15.1-24</td>
<td>22</td>
</tr>
<tr>
<td>15.1-25</td>
<td>22, 23, 77, 89</td>
</tr>
<tr>
<td>15.1-38</td>
<td>314</td>
</tr>
<tr>
<td>15.1-40</td>
<td>314</td>
</tr>
<tr>
<td>15.1-48</td>
<td>30</td>
</tr>
<tr>
<td>15.1-50</td>
<td>24, 231, 272</td>
</tr>
<tr>
<td>15.1-51</td>
<td>15, 34, 69</td>
</tr>
<tr>
<td>15.1-67</td>
<td>31, 53, 227, 231, 247</td>
</tr>
<tr>
<td>15.1-70</td>
<td>231</td>
</tr>
<tr>
<td>15.1-73</td>
<td>53, 225, 227, 230</td>
</tr>
<tr>
<td>15.1-116</td>
<td>78</td>
</tr>
<tr>
<td>15.1-122</td>
<td>30</td>
</tr>
<tr>
<td>15.1-160</td>
<td>75</td>
</tr>
<tr>
<td>15.1-162</td>
<td>75</td>
</tr>
<tr>
<td>15.1-172(h)</td>
<td>77</td>
</tr>
<tr>
<td>15.1-185, et seq.</td>
<td>77</td>
</tr>
<tr>
<td>15.1-188</td>
<td>246</td>
</tr>
<tr>
<td>15.1-189</td>
<td>246</td>
</tr>
<tr>
<td>15.1-237</td>
<td>23</td>
</tr>
<tr>
<td>15.1-258</td>
<td>42</td>
</tr>
<tr>
<td>15.1-262</td>
<td>32, 257</td>
</tr>
<tr>
<td>15.1-292</td>
<td>25</td>
</tr>
<tr>
<td>15.1-304</td>
<td>25</td>
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<td>15.1-427</td>
<td>37</td>
</tr>
<tr>
<td>15.1-429</td>
<td>54</td>
</tr>
<tr>
<td>15.1-431</td>
<td>20, 39, 53</td>
</tr>
<tr>
<td>15.1-437</td>
<td>36, 54</td>
</tr>
<tr>
<td>15.1-456</td>
<td>158</td>
</tr>
<tr>
<td>15.1-459</td>
<td>20</td>
</tr>
<tr>
<td>15.1-465, et seq.</td>
<td>38</td>
</tr>
<tr>
<td>15.1-466</td>
<td>90, 273</td>
</tr>
<tr>
<td>15.1-466(f)</td>
<td>92</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>15.1-467</td>
<td>214</td>
</tr>
<tr>
<td>15.1-468</td>
<td>38, 214</td>
</tr>
<tr>
<td>15.1-469</td>
<td>214</td>
</tr>
<tr>
<td>15.1-473</td>
<td>121, 274</td>
</tr>
<tr>
<td>15.1-473(c)</td>
<td>121</td>
</tr>
<tr>
<td>15.1-473(d)</td>
<td>121</td>
</tr>
<tr>
<td>15.1-493</td>
<td>20, 54</td>
</tr>
<tr>
<td>15.1-494</td>
<td>225</td>
</tr>
<tr>
<td>15.1-504</td>
<td>19, 37, 212</td>
</tr>
<tr>
<td>15.1-504(a)</td>
<td>213</td>
</tr>
<tr>
<td>15.1-504(b)</td>
<td>213</td>
</tr>
<tr>
<td>15.1-504(c)</td>
<td>213</td>
</tr>
<tr>
<td>15.1-510</td>
<td>12, 88</td>
</tr>
<tr>
<td>15.1-510 through 15.1-510.5</td>
<td>82</td>
</tr>
<tr>
<td>15.1-516</td>
<td>271</td>
</tr>
<tr>
<td>15.1-522</td>
<td>22, 27, 29, 82</td>
</tr>
<tr>
<td>15.1-532</td>
<td>30</td>
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<tr>
<td>15.1-533</td>
<td>30</td>
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<td>30</td>
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<td>15.1-535</td>
<td>24, 144</td>
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<td>15.1-537</td>
<td>39</td>
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<td>15.1-539</td>
<td>312</td>
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<td>15.1-542</td>
<td>39</td>
</tr>
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<td>15.1-544</td>
<td>22, 24</td>
</tr>
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<td>15.1-545</td>
<td>36, 80, 89, 251</td>
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<td>46</td>
</tr>
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<td>15.1-571, et seq.</td>
<td>240</td>
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<td>37</td>
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<td>31</td>
</tr>
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<td>21</td>
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<td>21</td>
</tr>
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<td>15.1-656</td>
<td>31, 260, 261</td>
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<tr>
<td>15.1-698</td>
<td>42</td>
</tr>
<tr>
<td>15.1-717</td>
<td>31</td>
</tr>
<tr>
<td>15.1-729</td>
<td>33</td>
</tr>
<tr>
<td>15.1-769</td>
<td>35</td>
</tr>
<tr>
<td>15.1-779</td>
<td>33</td>
</tr>
<tr>
<td>15.1-787</td>
<td>87, 167</td>
</tr>
<tr>
<td>15.1-799</td>
<td>317</td>
</tr>
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<td>15.1-800</td>
<td>316</td>
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<td>15.1-826</td>
<td>312</td>
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<td>15.1-830</td>
<td>314</td>
</tr>
<tr>
<td>15.1-833 through 15.1-836</td>
<td>316</td>
</tr>
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<td>15.1-834</td>
<td>315</td>
</tr>
<tr>
<td>15.1-835</td>
<td>315</td>
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<td>15.1-852</td>
<td>29</td>
</tr>
<tr>
<td>15.1-864</td>
<td>82</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
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<tr>
<td>15.1-867</td>
<td>29</td>
</tr>
<tr>
<td>15.1-916</td>
<td>42</td>
</tr>
<tr>
<td>15.1-966 through 15.1-977</td>
<td>316</td>
</tr>
<tr>
<td>15.1-967(4)</td>
<td>316</td>
</tr>
<tr>
<td>15.1-978 through 15.1-998</td>
<td>163</td>
</tr>
<tr>
<td>15.1-994</td>
<td>132</td>
</tr>
<tr>
<td>15.1-995</td>
<td>34</td>
</tr>
<tr>
<td>15.1-997</td>
<td>163</td>
</tr>
<tr>
<td>15.1-1053</td>
<td>34</td>
</tr>
<tr>
<td>15.1-1144</td>
<td>163</td>
</tr>
<tr>
<td>15.1-1237</td>
<td>216</td>
</tr>
<tr>
<td>15.1-1250(i)</td>
<td>45</td>
</tr>
<tr>
<td>15.1-1261</td>
<td>45</td>
</tr>
<tr>
<td>15.1-1373 through 15.1-1390</td>
<td>287</td>
</tr>
<tr>
<td>15.1-1382</td>
<td>287</td>
</tr>
<tr>
<td>Title 15.1, Ch. 5, Art. 3</td>
<td>77</td>
</tr>
<tr>
<td>Title 15.1, Ch. 8</td>
<td>273</td>
</tr>
<tr>
<td>Title 15.1, Ch. 9, Art. 1</td>
<td>25</td>
</tr>
<tr>
<td>Title 15.1, Ch. 11</td>
<td>20, 158</td>
</tr>
<tr>
<td>Title 15.1, Ch. 11, Art. 7</td>
<td>121, 273</td>
</tr>
<tr>
<td>Title 15.1, Ch. 13</td>
<td>21, 32</td>
</tr>
<tr>
<td>Title 15.1, Ch. 13, Art. 2</td>
<td>35</td>
</tr>
<tr>
<td>Title 15.1, Ch. 13, Art. 3</td>
<td>21</td>
</tr>
<tr>
<td>Title 15.1, Ch. 14</td>
<td>32</td>
</tr>
<tr>
<td>Title 15.1, Ch. 14, Art. 2</td>
<td>87</td>
</tr>
<tr>
<td>Title 15.1, Ch. 14, Art. 3</td>
<td>87</td>
</tr>
<tr>
<td>Title 15.1, Ch. 15, Art. 1</td>
<td>87</td>
</tr>
<tr>
<td>Title 15.1, Ch. 15, Art. 2</td>
<td>35, 87, 167</td>
</tr>
<tr>
<td>Title 15.1, Ch. 15, Art. 3</td>
<td>35</td>
</tr>
<tr>
<td>Title 15.1, Ch. 15, Art. 4</td>
<td>35</td>
</tr>
<tr>
<td>Title 15.1, Ch. 18, Art. 1</td>
<td>29</td>
</tr>
<tr>
<td>Title 15.1, Ch. 18, Art. 4</td>
<td>29</td>
</tr>
<tr>
<td>Title 15.1, Ch. 17</td>
<td>316</td>
</tr>
<tr>
<td>Title 15.1, Ch. 21</td>
<td>316</td>
</tr>
<tr>
<td>Title 15.1, Ch. 22</td>
<td>34, 164, 323</td>
</tr>
<tr>
<td>Title 15.1, Ch. 27</td>
<td>216</td>
</tr>
<tr>
<td>Title 15.1-31</td>
<td>96</td>
</tr>
<tr>
<td>Title 15.1-98</td>
<td>150</td>
</tr>
<tr>
<td>Title 15.1-99</td>
<td>150</td>
</tr>
<tr>
<td>Title 15.1-143</td>
<td>170</td>
</tr>
<tr>
<td>Title 15.1-158 through 16.1-217</td>
<td>117</td>
</tr>
<tr>
<td>Title 16.1-158 (6)</td>
<td>168</td>
</tr>
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<td>Title 16.1-176</td>
<td>115</td>
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<tr>
<td>Title 16.1-176(b)</td>
<td>115</td>
</tr>
<tr>
<td>Title 16.1-177</td>
<td>117</td>
</tr>
<tr>
<td>Title 16.1-178 (3)</td>
<td>325</td>
</tr>
<tr>
<td>Title 16.1-202.2</td>
<td>169</td>
</tr>
<tr>
<td>Title 16.1-202.3</td>
<td>169</td>
</tr>
<tr>
<td>Title 16.1-202.4</td>
<td>169</td>
</tr>
<tr>
<td>Title 16.1, Ch. 6, Art. 3</td>
<td>150</td>
</tr>
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<td>Title 16.1-28</td>
<td>146</td>
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<td>Title 17-30.1</td>
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<td>Title 17-41</td>
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<td>Title 17-43</td>
<td>319</td>
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<td>Title 17-61</td>
<td>61, 235</td>
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<td>Title 17-127</td>
<td>95</td>
</tr>
<tr>
<td>Title 17-127(s)</td>
<td>94</td>
</tr>
<tr>
<td>Title 17, Ch. 2, Art. 3</td>
<td>235</td>
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<tr>
<td>Title 18-47</td>
<td>97</td>
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<tr>
<td>Title 18.1-36</td>
<td>97</td>
</tr>
<tr>
<td>Title 18.1-54</td>
<td>105, 175, 177, 181, 182</td>
</tr>
<tr>
<td>Title 18.1-55.1</td>
<td>104, 176</td>
</tr>
<tr>
<td>Title 18.1-55.1, et seq</td>
<td>104</td>
</tr>
<tr>
<td>Title 18.1-55.1(b)</td>
<td>176</td>
</tr>
<tr>
<td>Title 18.1-55.1(c)</td>
<td>176</td>
</tr>
<tr>
<td>Title 18.1-55.1(d)</td>
<td>104</td>
</tr>
<tr>
<td>Title 18.1-55.1(i)</td>
<td>177</td>
</tr>
<tr>
<td>Title 18.1-55.1(s)</td>
<td>105</td>
</tr>
<tr>
<td>Title 18.1-56.1</td>
<td>175, 176, 177, 182</td>
</tr>
<tr>
<td>Title 18.1-57</td>
<td>175</td>
</tr>
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<td>Title 18.1-59</td>
<td>181</td>
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<td>Title 18.1-79</td>
<td>101</td>
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<td>Title 18.1-80</td>
<td>101</td>
</tr>
<tr>
<td>Title 18.1-100</td>
<td>99</td>
</tr>
<tr>
<td>Title 18.1-101</td>
<td>99, 181</td>
</tr>
<tr>
<td>Title 18.1-116</td>
<td>100</td>
</tr>
<tr>
<td>Title 18.1-118</td>
<td>99</td>
</tr>
<tr>
<td>Title 18.1-237</td>
<td>102</td>
</tr>
<tr>
<td>Title 18.1-255</td>
<td>166, 172</td>
</tr>
<tr>
<td>Title 18.1-273</td>
<td>102</td>
</tr>
<tr>
<td>Title 18.1-288, et seq</td>
<td>161</td>
</tr>
<tr>
<td>Title 18.1-289</td>
<td>161</td>
</tr>
<tr>
<td>Title 18.1-290</td>
<td>161</td>
</tr>
<tr>
<td>Title 18.1-301</td>
<td>217</td>
</tr>
<tr>
<td>Title 18.1-310</td>
<td>113</td>
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<td>Title 18.1-340</td>
<td>172</td>
</tr>
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<td>Title 18.1-340.1</td>
<td>173</td>
</tr>
<tr>
<td>Title 18.1-349</td>
<td>287</td>
</tr>
<tr>
<td>Title 18.1-397</td>
<td>102</td>
</tr>
<tr>
<td>Title 19-303</td>
<td>161</td>
</tr>
<tr>
<td>Title 19-309</td>
<td>161</td>
</tr>
<tr>
<td>Title 19.1-4.8</td>
<td>122</td>
</tr>
<tr>
<td>Title 19.1-18</td>
<td>116, 118</td>
</tr>
<tr>
<td>Title 19.1-19.3</td>
<td>49</td>
</tr>
<tr>
<td>Title 19.1-19.3(a)</td>
<td>49</td>
</tr>
<tr>
<td>Title 19.1-19.3(b)</td>
<td>51</td>
</tr>
<tr>
<td>Title 19.1-19.3(c)</td>
<td>51</td>
</tr>
<tr>
<td>Title 19.1-20</td>
<td>104</td>
</tr>
<tr>
<td>Title 19.1-40</td>
<td>231, 248</td>
</tr>
<tr>
<td>Title 19-42</td>
<td>90, 329</td>
</tr>
<tr>
<td>Title 19.1-85</td>
<td>119</td>
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<td>Title 19.1-90</td>
<td>104</td>
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<td>Title 19.1-115</td>
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<td>Title 19.1-116</td>
<td>164</td>
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<td>Title 19.1-127</td>
<td>164</td>
</tr>
<tr>
<td>Title 19.1-130</td>
<td>17, 164</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
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<td>19.1-131</td>
<td>164</td>
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<td>19.1-132</td>
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<td>19.1-137</td>
<td>17</td>
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<td>19.1-147</td>
<td>94</td>
</tr>
<tr>
<td>19.1-163.1</td>
<td>113, 114</td>
</tr>
<tr>
<td>19.1-186.1</td>
<td>116, 206</td>
</tr>
<tr>
<td>19.1-186.2</td>
<td>116, 206</td>
</tr>
<tr>
<td>19.1-228</td>
<td>111</td>
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<tr>
<td>19.1-233</td>
<td>111</td>
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<td>19.1-241.1</td>
<td>107</td>
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<td>19.1-241.3</td>
<td>107</td>
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<tr>
<td>19.1-241.5</td>
<td>107</td>
</tr>
<tr>
<td>19.1-259</td>
<td>106, 178</td>
</tr>
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<td>19.1-259.1</td>
<td>182</td>
</tr>
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<td>19.1-293</td>
<td>111</td>
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<td>19.1-296</td>
<td>63, 105</td>
</tr>
<tr>
<td>19.1-308, et seq.</td>
<td>327</td>
</tr>
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<td>19.1-315</td>
<td>96, 219, 232, 329</td>
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<td>19.1-328</td>
<td>161</td>
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<tr>
<td>19.1-334</td>
<td>161</td>
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<tr>
<td>19.1-339 through 19.1-341</td>
<td>266</td>
</tr>
<tr>
<td>19.1-346</td>
<td>110</td>
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<td>Title 19.1, Ch. 1.1</td>
<td>49</td>
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<td>20-88</td>
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<td>Title 20, Ch. 5</td>
<td>210</td>
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<td>21-130</td>
<td>84</td>
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<td>Title 21, Ch. 2</td>
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<td>Title 29, Ch. 9</td>
<td>124</td>
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<td>32-137</td>
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<td>32-276, et seq</td>
<td>88</td>
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<td>32-281</td>
<td>89</td>
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<td>32-290</td>
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<tr>
<td>32-291 through 32-296</td>
<td>326</td>
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<tr>
<td>32-295</td>
<td></td>
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<tr>
<td></td>
<td>60, 326</td>
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<tr>
<td>Title 32, Ch. 14</td>
<td>88</td>
</tr>
<tr>
<td>Title 32, Ch. 15</td>
<td>60, 326</td>
</tr>
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<td>33-46</td>
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<td>33-279.3</td>
<td>76</td>
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<tr>
<td>33-279.3(b)(2)</td>
<td>76</td>
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<tr>
<td>33-279.3(b)(3)</td>
<td>76</td>
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<td>33-279.3(f)</td>
<td>76</td>
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<tr>
<td>Title 35, Ch. 6, Art. 1.1</td>
<td>77</td>
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<td>Title 36, Ch. 1</td>
<td>158</td>
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</table>

**REPORT OF THE ATTORNEY GENERAL**
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
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</thead>
<tbody>
<tr>
<td>46.1-198</td>
<td>183</td>
<td>54-83.5</td>
<td>221</td>
</tr>
<tr>
<td>46.1-198(d)</td>
<td>183</td>
<td>54-102.5(b)</td>
<td>220</td>
</tr>
<tr>
<td>46.1-252</td>
<td>41</td>
<td>54-102.6(a)(4)</td>
<td>220</td>
</tr>
<tr>
<td>46.1-252.1</td>
<td>40</td>
<td>54-102.6(b)</td>
<td>220</td>
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<td>46.1-254</td>
<td>40</td>
<td>54-102.6(c)</td>
<td>220</td>
</tr>
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<td>46.1-349</td>
<td>107, 116</td>
<td>54-112.1</td>
<td>221</td>
</tr>
<tr>
<td>46.1-350</td>
<td>107, 181</td>
<td>54-112.26</td>
<td>222</td>
</tr>
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<td>46.1-351.2</td>
<td>267</td>
<td>54-113</td>
<td>72</td>
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<tr>
<td>46.1-355</td>
<td>194</td>
<td>54-273(10)</td>
<td>220</td>
</tr>
<tr>
<td>46.1-357</td>
<td>189</td>
<td>54-309.1</td>
<td>220</td>
</tr>
<tr>
<td>46.1-389(c)</td>
<td>192</td>
<td>54-398.23(5)</td>
<td>219</td>
</tr>
<tr>
<td>46.1-390</td>
<td>193</td>
<td>54-840</td>
<td>222</td>
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<tr>
<td>46.1-394</td>
<td>193</td>
<td>54-841</td>
<td>222</td>
</tr>
<tr>
<td>46.1-412</td>
<td>116, 191, 207</td>
<td>54-844</td>
<td>222</td>
</tr>
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<td>46.1-412(a)</td>
<td>116, 207</td>
<td>54-851</td>
<td>223</td>
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<td>46.1-412(b)</td>
<td>207</td>
<td>54-853</td>
<td>223</td>
</tr>
<tr>
<td>46.1-413</td>
<td>191</td>
<td>Title 54, Ch. 4.1</td>
<td>221</td>
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<td>46.1-415</td>
<td>181</td>
<td>Title 54, Ch. 6.1</td>
<td>221</td>
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<td>46.1-419</td>
<td>190</td>
<td>Title 54, Ch. 7</td>
<td>72</td>
</tr>
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<td>46.1-422</td>
<td>178</td>
<td>55-17.1</td>
<td>298</td>
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<td>46.1-425</td>
<td>182</td>
<td>55-20</td>
<td>233</td>
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<td>46.1-441</td>
<td>181, 190</td>
<td>55-21</td>
<td>233</td>
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<td>46.1-442</td>
<td>192</td>
<td>55-66.3</td>
<td>236</td>
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<td>46.1-443</td>
<td>192</td>
<td>55-66.4</td>
<td>236</td>
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<td>46.1-444</td>
<td>192</td>
<td>55-106</td>
<td>61</td>
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<td>46.1-446</td>
<td>193</td>
<td>55-113</td>
<td>61</td>
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<td>193</td>
<td>55-175</td>
<td>149</td>
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<td>46.1-449</td>
<td>193</td>
<td>55-176 through 55-181</td>
<td>148</td>
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<tr>
<td>46.1-459(b)</td>
<td>192</td>
<td>55-176</td>
<td>298</td>
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<tr>
<td>Title 46.1</td>
<td>98</td>
<td>55-181</td>
<td>298</td>
</tr>
<tr>
<td>Title 46.1, Ch. 6</td>
<td>192</td>
<td>Title 54, Ch. 4.1</td>
<td>221</td>
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<td>47-1</td>
<td>90, 211</td>
<td>Title 54, Ch. 6.1</td>
<td>221</td>
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<tr>
<td>48-1</td>
<td>75</td>
<td>Title 54, Ch. 7</td>
<td>72</td>
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<td>48-1, et seq.</td>
<td>76</td>
<td>55-17.1</td>
<td>298</td>
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