OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1968 to June 30, 1969

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1969
Letter of Transmittal

August 1, 1969

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

My dear Governor Godwin:

In accordance with § 2.1-128 of the Code of Virginia, I transmit to you the Annual Report of the Attorney General. This report covers the period beginning July 1, 1968, through June 30, 1969.

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

Respectfully submitted,

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

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>Robert Y. Button</td>
<td>Culpeper County</td>
<td>Attorney General</td>
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<tr>
<td>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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<td>Reno S. Harp, III</td>
<td>Richmond City</td>
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<tr>
<td>M. Harris Parker</td>
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<tr>
<td>William P. Bagwell, Jr.</td>
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<td>A. R. Woodroof</td>
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<td>Charles Shepherd Cox, Jr.</td>
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<td>Walter H. Ryland</td>
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<td>Troy G. Arnold, Jr.</td>
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<td>Wm. Luke Witt</td>
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<tr>
<td>Anthony F. Troy</td>
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<tr>
<td>Eleanor W. Tilley</td>
<td>Smyth County</td>
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<td>Agnes Reid Pickral</td>
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<td>Barbara M. Novak</td>
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<td>Marie G. Cook</td>
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<td>Olga M. Bruggeman</td>
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<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 1969

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 ....................................... 1947-1948
§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


Blum, Sara v. Tenth District Committee, etc. From Circuit Court, Arlington County. Appeal from disbarment. Affirmed.


Cardwell, Martin, Jr. v. Commonwealth. From Circuit Court, Carroll County. Appeal from conviction of a felony, to-wit: the theft of an automobile and bringing same into Virginia. Reversed and remanded.


Coffey, Billy Wayne v. Commonwealth. From Corporation Court, City of Lynchburg. Appeal from conviction for violation of terms of probation and suspended sentence. Affirmed.

Commonwealth, ex rel. etc. v. ART; Academy of Hair Fashions. Appeal for “ART” as used in connection with hair dressing services. Appeal withdrawn.

Commonwealth of Virginia, ex rel. etc. v. Colonial Natural Gas Company. Appeal from State Corporation Commission order granting additional territory in Washington County. Compromised and settled.

Commonwealth of Virginia, ex rel. etc. v. United Cities Gas Company. Appeal from State Corporation Commission order denying additional territory in Washington County. Compromised and settled.

Dean, Jarette Arlo v. Commonwealth. From Circuit Court, Rockingham County. Upon a conviction for voluntary manslaughter. Reversed and remanded.

Eastern Air Lines, Inc. v. Commissioner, Division of Motor Vehicles, etc. From Law and Equity Court, City of Richmond. Appeal from order requiring Commissioner to make special fuel tax refund pursuant to § 58-753.3. Affirmed.

Farris, Albert Wesley, Jr. v. Commonwealth. From Circuit Court, Rockbridge County. Appeal from conviction of rape. Reversed and remanded.

Fletcher, Francis Lewis v. Commonwealth. (Two cases.) From Circuit Court, Arlington County. Appeal from conviction of a felony, to-wit: malicious assault. Affirmed.

Foster, Bernard Rieves v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of statutory burglary. Affirmed.

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


Harbaugh, Charles H., Jr. v. Commonwealth. From Circuit Court, Frederick County. Appeal from conviction of assault and battery. Affirmed.


Johnson, Fred W., alias, etc. v. Commonwealth. From Corporation Court. City of Alexandria. Upon a conviction for attempted robbery. Affirmed.


Kirby, Robert Woodford v. Commonwealth. (Two cases.) From Corporation Court, City of Lynchburg. Appeal from conviction for statutory burglary; possession of burglary tools. Affirmed.


Lewis, Delbert v. Commonwealth. (Two indictments.) From Circuit Court, Tazewell County. Appeal from a conviction of oral sodomy. Affirmed.


State Board of Pharmacy v. Mrs. W. A. Ransone, Jr. and Horace G. Dodd. From Circuit Court, City of Richmond. Appeal denied; Pharmacy Board entered new punishment.

State Highway Commissioner v. S. J. Bell. From Circuit Court, Fairfax County. Appeal in condemnation proceedings. Affirmed.


CASES PENDING IN THE SUPREME COURT OF APPEALS


Barrett, Billy Joe v. Commonwealth. From Circuit Court, Tazewell County. Appeal from conviction of statutory rape of twelve-year old daughter.

Brown, Lawrence v. Commonwealth. From Corporation Court, City of Radford. Appeal from conviction of murder.

Buchanan, Ronald Lee, etc. v. Commonwealth. From Circuit Court, Fairfax County. Appeal from conviction of armed robbery.

Cannady, Alvin R. v. Commonwealth. From Hustings Court, City of Portsmouth. Appeal from conviction of breaking and entering.


Chittum, Alvin Junior v. Commonwealth. (Two cases.) From Circuit Court, Roanoke County. Upon convictions of kidnapping and rape.

Comer, Thomas James v. Commonwealth. From Hustings Court, City of Richmond. From a conviction under § 18.1-164 of the Code (robbery and grand larceny).


Commonwealth, ex rel. etc. v. Agricultural Services Association, Inc. (Two cases.) From State Corporation Commission. Involving violation of § 56-304.6:1.

Commonwealth, ex rel., etc. v. Shell Oil Company. (Two cases.) From Circuit Court, City of Richmond. Involving refund of tax on aviation fuel under Chapter 13, Title 58, Code of Virginia.

Cook, Clarence Junior v. Commonwealth. From Circuit Court, Augusta County. Appeal from conviction revoking probation.

Etheridge, Welton Walter v. Commonwealth. From Circuit Court, City of Chesapeake. Upon a conviction for malicious shooting into a dwelling.

Evans, George Bolding, Jr. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of misdemeanor.


Forester, Leo Franklin v. Commonwealth. From Circuit Court, Prince William County. Appeal from conviction of delivery of prescription drug without authority.


Hall, Alvin v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of unlawful assembly.

Harrison, Leslie N. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of robbery.

Henry, Eddie B. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of armed robbery.


House, Charles v. Commonwealth. From Corporation Court, Part II, City of Norfolk. Appeal from conviction of violating § 18.1-228 (obscenity).

Howard, John Henry, Jr. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of felony (robbery).

Hudson, Thomas Alvin v. Commonwealth. From Circuit Court, Nottoway County. Appeal from conviction of misdemeanor.

Hughes, Elbert v. Commonwealth. From Circuit Court, Amherst County. Upon a conviction for shooting into occupied building.

Jones, Ernest Thomas v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of unlawful assembly.

Jones, George Lee v. Commonwealth. (Seven cases.) From Circuit Court, City of Virginia Beach. Appeal from convictions for statutory burglary; forgery.

Joyce, Wayne Pell v. Commonwealth. From Circuit Court, Carroll County. Appeal from conviction of breaking and entering; abduction.
Land, Peter Edward v. Commonwealth. From Circuit Court, Virginia Beach. Upon convictions of rape and murder.

Lee Art Theatre, Inc. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of showing obscene motion picture.


Lewis, Carl Milam v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction of felony (statutory burglary).

Martin, David Neal v. Commonwealth. From Circuit Court, Arlington County. Upon a conviction for assault and attempted robbery.


Murray, John v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of robbery.


Plummer, Joseph v. Commonwealth. From Corporation Court, City of Norfolk. Appeal from conviction of possession of burglarious tools.

Reil, Galen Randolph v. Commonwealth. From Corporation Court, City of Danville. Upon conviction of embezzlement.

Ritter, E. Harold, Jr. v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of possession of narcotics.

Robertson, Lester, Jr. v. Commonwealth. From Circuit Court, Pittsylvania County. Appeal from a conviction for rape.


Savoy, Hosea v. Commonwealth. From Circuit Court, Prince William County. Appeal from conviction of attempted statutory burglary.


Stanley, John Plummer v. Commonwealth. From Hustings Court, City of Petersburg. Appeal from a conviction for robbery.

Staunton, City of v. Aldhizer. From Circuit Court, City of Staunton. Petition for writ of error in condemnation proceedings.

Sullivan, James Junior v. Commonwealth. From Corporation Court, City of Alexandria. Appeals from convictions of burglary.

Tharp, Richard Terry v. Commonwealth. From Corporation Court, City of Norfolk. Appeal from three convictions—uttering, forgery, petit larceny.

Thaxton, Gordon L. and Koscot Interplanetary, Inc. v. State Corporation Commission. From State Corporation Commission. Appeal from decision that Florida corporation must domesticate in order to do in Virginia that part of its business that is intrastate commerce.

Whitbeck, David E. v. Commonwealth. From Circuit Court, Hanover County. Appeal from conviction of statutory burglary.

Williamson, Jerome Dino v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of robbery.

Wilson, Larry v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction for contempt of court.


REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Ashby, George Stanley v. Commonwealth. Petition for writ of certiorari from Supreme Court of Appeals of Virginia. Petition denied.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Hirschkop, Philip J. v. Commonwealth. Appeal from judgment of Supreme Court of Appeals of Virginia dismissing appeal from conviction for contempt of court by Corporation Court of City of Lynchburg. Petition for a writ of certiorari pending.

United States of America v. State of Maine, et al. Motion of United States for leave to file complaint against Commonwealth of Virginia and other states to determine rights in subsoil, seabed and natural resources underlying the Atlantic Ocean.

CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


Avens, Howard v. B. K. Wright. Suit to enjoin appointment of member of board of supervisors. Pending.

Belvin, Ernest L. v. Walter L. McCauley. Garnishee summons to apply funds in hands of Treasurer of Virginia to claims of Virginia residents against Bankers Telephone Employees Insurance Company. Case dropped; intervened in action in Circuit Court of City of Richmond.


Ciesielksi, Dennis R. v. Lewis W. Webb, Jr., President, etc., et al. Suit seeking admission to Old Dominion College. Pending.


Haubner, William Paul, etc. v. Archie S. Rushton, etc., et al. Suit seeking reemployment of professor at Northern Virginia Community College. Pending.

Kirstein, Mrs. Jo Anne, et al. v. The Rector and Visitors of the University of Virginia, et al. Suit seeking admittance of women to College of Arts and Science, University of Virginia. Pending.
Rainey, Jay, etc., et al. v. G. Tyler Miller, etc., et al. Suit seeking admittance to Madison College. Pending.

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

Accountant's Society of Virginia, Inc., et al. v. Turner N. Burton, Director, etc. Circuit Court, City of Richmond. Motion for declaratory judgment to construe and determine validity of § 54-100 of the Code. Pending.
Baldwin Enterprises, Inc. v. Virginia ABC Board. Circuit Court, City of Richmond. Appeal from order revoking license. Pending.

Commonwealth v. A. Roy Russell and The Travelers Indemnity Company. Circuit Court, City of Richmond. Motion for judgment for failure to fill and plug wells under the mining laws. Pending.


Commonwealth, ex rel. v. Frank Howard, Jr., et al. Circuit Court, City of Richmond. Motion for judgment for damage to bridge. Settled.


Conley, Nita F. v. Chesapeake Insurance Company, et al. (Thirty-four cases.) 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.


DiBenedetto, Gildo S. v. State Board of Pharmacy. Court of Law and Chancery, City of Norfolk. Injunction denied.


Elder, L. T. v. R. H. Holland. Remanded to Circuit Court, Chesterfield County for further hearing, consistent with opinion of Supreme Court of Appeals of Virginia June 12, 1967. Pending.


Fugate v. Blue Ridge Poultry & Egg. Circuit Court, City of Richmond. Motion for judgment for damages to state vehicle. Settled.


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

Goyne, H. T., Jr., et al, Co-Executors, etc. v. County of Chesterfield, et al. Circuit Court, Chesterfield County. Proceeding for construction of a will. Pending.

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

Harris, Dorothy Mae v. Peter Rosanelli, Jr., M. D. Law and Equity Court, City of Richmond. Suit for personal injury. Judgment for the defendant.


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, Admx., 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. Judgment awarding proceeds to Commonwealth as abandoned property.


Marvin Homes, Inc. v. Commonwealth. Circuit Court, City of Virginia Beach. Petition for correction of assessment of taxes on capital not otherwise taxed. Pending.


Renee's, Inc. v. Virginia ABC Board. Circuit Court, City of Richmond. Appeal from order revoking license. Pending.


REPORT OF THE ATTORNEY GENERAL

Snyder, Bennie v. Sidney C. Day, Jr., et al. (Two cases.) Circuit Court, City of Richmond. Claim against Highway Department arising out of construction project. Pending.

State Board of Pharmacy v. Mrs. W. A. Ransone, Jr., et al. Circuit Court, City of Richmond. Appeal from action of State Board of Pharmacy. Reversed in part, affirmed in part.

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


Stephens, Fred James v. State Fire & Casualty Company, etc. and Lewis H. Vaden, State Treasurer. (Three cases.) Circuit Court, City of Richmond. Suit to apply funds in Treasurer's hands. Pending.

Stevens, Shelton Horsley v. Lewis H. Vaden, etc. (Three cases.) 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. Commissioner's report and final order entered disburse money.


Thomas, Raymond Arthur v. Lewis H. Vaden, etc. (Twelve cases.) 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.

Tucker, L. G., Committee, etc. v. Hobart G. Hansen, etc. Circuit Court, City of Richmond. Suit to enjoin transfer of hospital patient. Pending.


WASHINGTON GAS LIGHT COMPANY v. STATE HIGHWAY COMMISSIONER. Circuit Court, City of Richmond. Declaratory judgment relating to reimbursement of utility costs. Judgment for defendant.


WOODING, T. A., JR., ET AL. v. FUGATE. Circuit Court, Lunenburg County. Motion for declaratory judgment and damages for flooding. Pending.

WOODWARD, MARY V. D. B FUGATE, ET AL. Circuit Court, City of Virginia Beach. Petition for declaratory judgment. Pending.

WORLEY BROTHERS COMPANY, INC. v. SIDNEY C. DAY, JR., ET AL. Circuit Court, City of Richmond. Suit to recover interest in arbitration award. Judgment for defendant.

YATES, FITZHUGH LEE v. MARVIN M. SUTHERLAND. Circuit Court, City of Richmond. On contract of lease with Department of Conservation and Economic Development. Relief denied petitioner and judgment awarded Commonwealth on counterclaim.

ZUCKERMAN, LOUIS A., ET AL. v. COMMONWEALTH. Circuit Court, Arlington County. Two petitions for correction of assessments of taxes on capital not otherwise taxed. Pending.

CASES TRIED OR PENDING BEFORE THE STATE CORPORATION COMMISSION

AMERICAN SECURITY INSURANCE COMPANY v. COMMONWEALTH OF VIRGINIA, EX REL. STATE CORPORATION COMMISSION. Refund of taxes under retaliatory statute. Pending.

CANAL INSURANCE COMPANY, SOUTH CAROLINA INSURANCE COMPANY AND CONSOLIDATED INSURANCE COMPANY v. COMMONWEALTH OF VIRGINIA. Application for refund of taxes paid under retaliatory statute. Pending.

MALONE FREIGHT LINES, INC. ET AL. v. STATE CORPORATION COMMISSION. (STANLEY BISE ALLEGED NOT TO BE SUBJECT TO STATUTES AS CARRIER FOR COMPENSATION.) Pending.

NORFOLK & WESTERN RAILWAY COMPANY v. STATE CORPORATION COMMISSION. Application for review of tax assessment from local authorities. Pending.

CASES BEFORE FEDERAL AGENCIES

APPLICATION OF APPALACHIAN POWER COMPANY FOR CONSTRUCTION OF DAMS IN GRAYSON COUNTY FOR HYDROELECTRIC PURPOSES. PROJECT NO. 2317. COMMONWEALTH OF VIRGINIA HAS INTERVENED AS A PARTY TO PROTECT THE STATE'S INTEREST IN THE PROPOSED RECREATION AND ECONOMIC DEVELOPMENT IN THAT AREA. Pending. Before Federal Power Commission.

PIEDMONT CHICAGO ENTRY CASE. Petition to intervene filed and granted. Before Civil Aeronautics Board.

CASES TRIED OR PENDING IN THE COURTS OF RECORD OF THE STATE IN WHICH THE DIVISION OF MOTOR VEHICLES WAS INVOLVED

CHAPA, FELIX A., INDIVIDUALLY AND T/A ARLINGTON CARS v. C. H. LAMB, COMMISSIONER. LAW AND EQUITY COURT, CITY OF RICHMOND. PETITION FOR WRIT OF MANDAMUS CONCERNING TITLES FOR MOTOR VEHICLES. Pending.

COMMONWEALTH OF VIRGINIA v. JOHN BARNES CARR. CORPORATION COURT, CITY OF WINCHESTER. APPEAL FROM REVOCATION OF OPERATOR'S LICENSE PURSUANT TO § 46.1-419. APPEAL DISMISSED.

COMMONWEALTH OF VIRGINIA v. JOHN B. FOSTER STURGILL. CIRCUIT COURT, CITY OF RICHMOND. APPEAL FROM REVOCATION UNDER § 46.1-417. REVOCATION ORDER MODIFIED AND APPEAL DISMISSED.
Easter, Lewis Haynes and Charles Clifton Thomas v. Chester H. Lamb, Commissioner. Law and Equity Court, City of Richmond. Injunction order entered from enforcing suspension of driving licenses, registration certificates and plates, pending determination of suit styled Virginia Transit Company v. Lewis H. Easter and Thomas C. Clifton. Pending.


Kayhoe Construction Corporation v. Commonwealth of Virginia, Division of Motor Vehicles and Sidney C. Day, Comptroller. Circuit Court, City of Richmond. Suit for recovery of liquidated damages and additional services. Pending.

Kootner, Lewis v. Commissioner. Law and Chancery Court, City of Norfolk. Appeal from suspension of operator's license under § 46.1-430. Commissioner's action affirmed.


Sherwood, Frank M. and Helen Langan v. Commissioner, etc. Circuit Court, Fairfax County. Appeal from suspension of operators' license and privileges under §§ 46.1-442 and 46.1-446. Pending.

REPORT OF THE ATTORNEY GENERAL


Smith, John Junior v. Commissioner, et al. Court of Law and Chancery, City of Richmond. Bill of Complaint claiming a certain automobile liability insurance policy was in full force and effect at the time of complainant's automobile accident. Under advisement.


Wallingsford, Emory David v. Commissioner, etc. Circuit Court, Fairfax County. Appeal from suspension of operator's license and registration certificates and plates under § 46.1-449. Pending.


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


De Bernardes, Emilie S. v. Western Union Telegraph Co. and Virginia Employment Commission. Circuit Court, Fairfax County. Pending.


During the past fiscal year some 835 petitions for habeas corpus were filed in State and Federal courts. One hundred and sixty habeas corpus petitions and 117 petitions for mandamus were answered in the Supreme Court of Appeals. Eight responses were filed in the Supreme Court of Appeals and some 13 cases were briefed and argued in appellate courts. Appearances were made on some 750 occasions in both State and Federal courts in habeas corpus and mandamus cases.
## Report of the Attorney General

### Extradition Hearings Conducted and Reports Submitted Pursuant to Request of the Governor

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<th>Date</th>
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<td>July 22, 1968</td>
<td>Darrell Mitchell Furr</td>
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<td>August 26, 1968</td>
<td>C. E. Ashline</td>
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<td>August 26, 1968</td>
<td>Irene Lavina Lewis, alias Irene Rivers</td>
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<td>August 26, 1968</td>
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<td>Peter M. Stiltz</td>
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<td>Mary Strang</td>
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<td>William E. Finley</td>
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OPINIONS

ACKNOWLEDGMENTS—Form Required by § 55-113 of the Code.

HONORABLE T. F. TUCKER
Clerk of Corporation Court, City of Danville

September 30, 1968

I am in receipt of your letter of September 20, 1968, in which you present the following question:

"Is the following acknowledgment in substantial compliance with the requirement of Section 55-113 of the Code of Virginia as to writings, specifically deeds, to be admitted to record:

"Subscribed and sworn to before me this .......... day of

....................., 19 ................

NOTARY PUBLIC"

"My commission expires:

In response to your inquiry, I am of the opinion that the above-quoted "acknowledgment" is not substantially to the effect of those specified in § 55-113 of the Virginia Code and would not be in substantial compliance with that provision of Virginia law.

ADMINISTRATIVE PROCEDURE—Assessment of Fees for Inspection of Activities Prior to Granting Permits—Should depend upon statutory authority.

FEES—For Inspection—Should depend upon statutory authority.

HEALTH—Imposition of Fees for Inspection of Activities for Purpose of Granting Permits—Should depend upon statutory authority.

June 25, 1969

HONORABLE MACK I. SHANHOLTZ
Commissioner, State Health Department

This is in reply to your letter of June 5, 1969, in which you inquire as follows:

"The Virginia Department of Health is considering the imposition of fees for sanitation permits and inspections covered by applicable State Health Laws. These activities include the permitting and inspection of restaurants, trailer parks, summer camps, migrant labor camps and septic tank systems. However, there is no section in the State Law or State Board of Health Regulations dealing with these subjects which would specifically empower the Department to collect such fees for services.

"In the absence of enabling legislation, we would appreciate receiving your opinion as to whether the Department would be authorized to collect reasonable fees for such services through a uniform administrative policy."

Although I know of no decision in which the Supreme Court of Appeals has specifically decided whether a grant of authority by the legislature to an administrative agency to regulate and inspect confers authority on the agency to impose
a fee for the inspection, I refer you to the recent decision of *National Realty Corp. v. City of Virginia Beach*, 209 Va. 172, 175, 163 S.E.2d 154 (1968). In this decision, it was held that the power conferred upon a county by § 15.1-466 of the Code to “administer and enforce” subdivision ordinances did not include the power to impose a fee for examination and approval of subdivision plats.

While the above decision does not state that the holding is applicable to all fees imposed by administrative agencies, the situation involved therein is sufficiently analogous to that which you present that in my opinion it would be inadvisable for the Department of Health to impose the proposed fees without the approval of the General Assembly.

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**AGRICULTURE AND COMMERCE**—Control Over Production of Poultry for Sale—Includes the production of quail.

**GAME AND INLAND FISHERIES**—Production of Quail—For slaughter and sale to general public—No authority to regulate.

HONORABLE RUSSELL L. DAVIS  
Member, House of Delegates

May 8, 1969

I am in receipt of your letter of May 2, 1969, in which you inquire if it would be a violation of the Game and Inland Fisheries statutes to raise quail and slaughter them for sale to the general public.

Section 29-13 of the Code of Virginia (1950), as amended, vests in the Commission of Game and Inland Fisheries jurisdiction over all game birds and animals. However, I enclose herewith a copy of a former opinion of this office to the Honorable R. H. Pettus dated December 5, 1956, found in the Report of the Attorney General (1956-1957), page 118, wherein it was ruled that quail hatched and raised in captivity for the purpose of serving as a source of food were poultry. Thus the production of quail in the above manner would not be within the jurisdiction of the Commission of Game and Inland Fisheries. Poultry is subject to the provisions of Chapter 27, Title 3.1 of the Code of Virginia.

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**AGRICULTURE AND COMMERCE**—Filled Milk—Prohibitions against manufacture and sale.

**AGRICULTURE AND COMMERCE**—Non-dairy Products—Required to meet food standards and labeling requirements of State.

HONORABLE MAURICE B. ROWE, Commissioner  
Department of Agriculture and Commerce

June 6, 1969

This is in reply to your letter of June 4, 1969, which reads in part as follows.

“It has been brought to my attention by the Virginia Dairy Products Association that the General Assembly in Maryland passed a bill permitting the manufacture and sale of a frozen dessert using vegetable fats in lieu of animal fats. We have plants in Northern Virginia and in other parts of Virginia manufacturing frozen desserts for distribution outside the Commonwealth of Virginia. This will create a problem for some of these plants as the VirginiaFilled Milk Law could be a hindrance to their manufacturing and selling of this type of frozen dessert. In order to inform our dairy industry as to how they stand in reference to the filled milk law, I would like to request an opinion from you on the following questions:
1. Does the Filled Milk Law apply to frozen desserts in the Commonwealth of Virginia?

2. Can a product such as frozen desserts be processed in Virginia using vegetable fats in lieu of butterfat and sold outside the State of Virginia?

3. Can a product such as frozen desserts using vegetable fat in lieu of butterfat be processed in Virginia and sold in Virginia?

4. If the product is to be sold in Virginia, how does this product have to be labeled? e.g. imitation, fanciful name, mellorine, or some other name.”

I shall answer your questions seriatim.

1. The “Filled Milk Law” to which you refer is found in Title 3.1, Chapter 21, Article 8, and appears as §§ 3.1-582 through 3.1-587 of the Code of Virginia (1950).

Section 3.1-583 defines filled milk thusly:

“The term ‘filled milk’ means any milk, cream or skimmed milk, whether or not condensed, concentrated, powdered, dried, desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat.”

Section 3.1-584 prohibits the manufacture, sale or exchange, or having in possession with intent to sell or exchange, any filled milk under any name whatsoever.

In view of the broad definition of filled milk and the equally broad prohibition against its manufacture under any name whatsoever, I am of the opinion that the use of “filled milk” in any form in the manufacture of frozen desserts is prohibited in this State.

2. Whether or not a frozen dessert using vegetable fats in lieu of butterfat may be processed in Virginia for sale outside the State depends on whether the article consists in part of some form of milk or cream as defined in the “Filled Milk Law”. Should it consist of such part of some form of milk or cream as defined in the “Filled Milk Law”, I am of the opinion that it is unlawful to manufacture these products for sale either in or out of the State. In such event, I answer your question number two in the negative.

3. This question is answered in number two.

4. So called nondairy products made without milk or cream in any form using oil and fats other than milk fat and not consisting in part of some form of milk or cream are not subject to the “Filled Milk Act”. However, these products must meet provisions of the Virginia Law relating to establishing food standards, the prohibition of false or misleading representations in the labeling of foods, and the labeling of imitations. Therefore, the proper labeling of nondairy products must conform to the statutory law of Virginia.

AIR POLLUTION CONTROL—Local Ordinances—Superseded by rules and regulations of the State Air Pollution Control Board when local committee created.

ORDINANCES—Air Pollution—Local—Superseded by rules and regulations of State Air Pollution Control Board when local committee created.

August 9, 1968

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

This is in reply to your letter of July 29, 1968, in which you allude to §§ 10-17.19 and 10-17.30 of the Code of Virginia and present the hypothetical situation and related question which I quote as follows:
REPORT OF THE ATTORNEY GENERAL

"A hypothetical case involves city A, city B and county C, the governing bodies of which may have requested the State Board to establish a local air pollution control district including the three political subdivisions. City A is assumed to have an existing, effective air pollution control ordinance, but city B and county C have no such ordinance. If the State Board created the district, would the ordinance of city A immediately become invalid for the interim until the State Board, with the assistance of the local committee, could adopt appropriate rules for that specific area of the State?"

The State Air Pollution Control Board is authorized under § 10-17.19(a) of the Code to create, within any area of the State, local air pollution control districts, either on its own motion or upon request of the governing body or bodies of the area involved. A district so created may comprise 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 each district there shall be a local air pollution control committee, the members of which shall be appointed by the State Board pursuant to paragraph (b) of this section. Paragraph (c) of the same section states that "When such local committee is created, all local ordinances, rules and regulations relating to air pollution, insofar as they affect the area included within such district, shall be superseded by the rules and regulations of the State Board."

Under the quoted language, all local ordinances, rules and regulations relating to air pollution are superseded by the rules and regulations of the State Board when such local committee is created. From the moment such local committee is created the district becomes subject to the rules and regulations of the State Board, which remain in force and effect until such time as the Board may grant local variances therefrom pursuant to paragraph (c) of § 10-17.18 of the Code. In my interpretation the statute is mandatory in this respect and, therefore, I shall answer your question in the affirmative.

ALCOHOLIC BEVERAGE CONTROL LAWS—Board, With Consent of Governor, May Sell and Convey Surplus Real Estate.

HONORABLE WARREN WRIGHT, Chairman
Virginia Alcoholic Beverage Control Board

January 10, 1969

This is in response to your letter of January 3, 1969, which is as follows:

"Over the years the Alcoholic Beverage Control Board, as a Department of the Commonwealth, has acquired title to several parcels of real estate, and has occasionally sold and conveyed real estate pursuant to § 4-7 of the Code of Virginia."

"The 1968 session of the General Assembly enacted Chapter 9 of Title 2.1 which provides a method by which surplus real estate owned by agencies of the Commonwealth may be disposed of."

"It will be appreciated if you would let us have your opinion as to whether the Board may, with the consent of the Governor, lawfully negotiate a contract for the sale and conveyance of real estate owned by it, or whether it may now dispose of real estate only by following the procedures set up in Chapter 9 of Title 2.1."

In my opinion the Board may, with the consent of the Governor, negotiate a contract for the sale and conveyance of real estate owned by it, and need not follow the procedures set up in Chapter 9 of Title 2.1.

Section 4-7 of the Code of Virginia (1950), as amended, is in part as follows:

"§ 4-7. Functions, duties and powers of Board. The functions, duties and powers of the Board shall be as follows:
REPORT OF THE ATTORNEY GENERAL

* * *

(f) With the consent of the Governor, to purchase or otherwise acquire title to any land or building required for the purposes of this chapter and to sell and convey the same by proper deed . . ."

The Alcoholic Beverage Control Act was adopted in 1934. It is a comprehensive system of statutory provisions pursuant to which an administrative agency was created and charged with the responsibility of administering and controlling the sale and consumption of alcoholic beverages. The Board was invested with broad powers for the accomplishment of the legislative objectives. The language contained in the quoted portion of what is now § 4-7(f) was part of the original act, and has never been amended. (1934 Acts at p. 104)

Chapter 9 of Title 2.1 enacted by the 1968 General Assembly consists of code sections 2.1-106.1 through 2.1-106.8. Section 2.1-106.2 is as follows:

"Whenever any department, agency or institution of State Government shall possess or have under its control State-owned property which is not being used or is not required for the purposes of such department, agency or institution, it shall so notify the Director of Engineering and Buildings."

Without undertaking to set forth in detail the other provisions of the chapter, it may be sufficient to note that the Governor is authorized to transfer surplus realty to the Division of Engineering and Buildings, and thereafter the Director of the Division, "with the approval of the Governor in writing first obtained," may proceed to dispose of such real estate at public auction or by securing sealed bids.

There is no express provision in Chapter 9 for the repeal or amendment of existing statutes that may be in conflict, and in my view the power conferred upon the Alcoholic Beverage Control Board by § 4-7 (f) has not been repealed or limited by the provisions of Chapter 9 of Title 2.1.

Repeal by implication is not favored, and the Supreme Court of Appeals of Virginia has previously approved the following rule of statutory construction: Where there are two statutes, the earlier special and the latter general—the terms of the general broad enough to include the matter provided for in the special—the fact that one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be considered as repealing the special unless the provisions of the general are manifestly inconsistent with those of the special. See, South & W. R. Co. v. Commonwealth, 104 Va. 314, 320-322; Southern Railway Co. v. Commonwealth, 124 Va. 36, 56.

Additionally, as indicated above the A.B.C. Act is a comprehensive system of statutory provisions, and I find nothing in Chapter 9 of Title 2.1 indicative of a legislative intent to alter or innovate upon this system. The subject matter of the two acts are neither directly nor necessarily related. The Supreme Court of Appeals in Board of Supervisors v. Corbett, 206 Va. 167, quoted with approval from the earlier case of Smith v. Kelley, 162 Va. 645, the following language:

"In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, disregard, alter, violate, repeal or limit a general statute or system of statutory provisions, the entire subject matter of which is not directly or necessarily involved in the act." (206 Va. at 171)
ALCOHOLIC BEVERAGE CONTROL LAWS—Hours for Sale of Wine and Beer—Extent to which may be set by governing body of the county.

BOARDS OF SUPERVISORS—Authority—No authority to require referendum on hours for sale of wine and beer.

HONORABLE C. PEMBROKE PETTIT
Commonwealth's Attorney for Louisa County

This is in reply to your letter of April 22, 1969, in which you ask my opinion on the following question:

"Some years ago, our County Board of Supervisors adopted an ordinance prohibiting the sale of beer between the hours of midnight on each Saturday and 6:00 A.M. on Monday following.

"Recently the County Board has been petitioned to rescind this ordinance and so far has refused to act on it and has requested an opinion as to whether or not the Board can order a referendum on the subject.

"I have searched the statutes and also your opinions since 1957 and I am unable to find any authority under any of the titles which might be involved for the Board with our form of government to order such a referendum. I have so advised the Board and the Board has requested that I write you and obtain your opinion on the subject of the referendum in the County with our form of government which is the old County form changed only by the appointment of an Executive Secretary."

The Virginia Alcoholic Beverage Control Board is directed by § 4-36 of the Code of Virginia (1950), as amended, to prescribe between what hours and on what days beer shall not be sold. However, a limited power was conferred upon the governing body of each county by § 4-97 to adopt an ordinance "... prohibiting the sale of beer and wine, or either beer or wine, between the hours of twelve o'clock post meridian of each Saturday and six o'clock ante meridian of each Monday, or fixing hours within said period during which wine and beer, or either, may be sold..."

While the Board of Supervisors of Louisa County may pass an ordinance regulating the Sunday sale of beer to the extent authorized by § 4-97 of the Code, I am not aware of any statute pursuant to which the Board may order a referendum to be held on this subject.

ALCOHOLIC BEVERAGE CONTROL LAWS—Licenses to Sell Mixed Beverages—May be levied by town of 2500 population or less.

TOWNS—Population of 2500 or Less—May levy fees for licenses to sell mixed beverages.

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

This is in reply to a request for my opinion relative to two questions submitted on your behalf by Honorable Charles A. Ottinger, Assistant Commonwealth's Attorney of Loudoun County, in his letter of November 11, 1968.

Your first question is:

"In towns of 2500 population or less, does the town have the right to levy fees for licenses to sell mixed beverages under 4-98.19 of the Code of Virginia?"
A local option referendum as to the sale of mixed alcoholic beverages is authorized to be conducted in cities, counties, and towns having a population in excess of 2500 inhabitants, by the provisions of § 4-98.12 of the Code of Virginia (1950), as amended. Towns having a population of 2500 or less do not constitute a local option unit under the statute, but Chapter 1.1 of Title 4 of the Code pertaining to mixed beverages may become effective in such a town by virtue of a favorable referendum conducted in the county in which the town is located. Should the chapter thus become effective in the town, the town would, in my opinion, have the right to levy fees for licenses to sell mixed beverages pursuant to the authority conferred by § 4-98.19, the first paragraph of which reads, in part, as follows:

“...In addition to the foregoing State license taxes provided for in this chapter, the governing body of each city, town or county in this State may, by ordinance, adopt and impose upon persons holding Mixed Beverage Restaurant Licenses for establishments located within such city, town or county local license taxes not in excess of the following sums ...” (Emphasis added)

Your second question is:

“In towns of 2500 population or less, does the town have the right to control the closing hours of an establishment selling mixed drinks where the County has different hours?”

Subject to the exception hereafter noted, towns do not have the right to control the closing hours of an establishment selling mixed beverages.

It is provided in § 4-98.5 of the Code that mixed beverages may be sold “... only at such times as beer, wine or beverages as defined in § 4-99 may be sold ...” The power to prescribe when beer, wine and beverages may not be sold has been vested in the Alcoholic Beverage Control Board by §§ 4-36 and 4-114.1 of the Code. The Board has exercised this power and prescribed generally that wine, beer and beverages may not be sold between the hours of 11:00 p.m. and 6:00 a.m. of the prevailing time (See §§ 5 and 8 of Regulations of the Board, copies of which are enclosed). The Board can fix, and in several instances has fixed, different restricted hours for particular localities.

The Board has also prescribed that mixed beverages may not be sold prior to 8:00 a.m. (See enclosed copy of § 8.1 of Regulations of the Board).

The exception mentioned above pertains to Sunday sales. Towns may indirectly restrict or totally prohibit the Sunday sale of mixed beverages by restricting or prohibiting the Sunday sale of beer and wine. In § 4-97 of the Code the legislature conferred upon the governing bodies of counties, cities and towns the power to adopt ordinances prohibiting the sale of beer and wine, or either, between the hours of 12:00 p.m. of each Saturday and 6:00 a.m. of each Monday, or to fix hours within said period during which the same may be sold. The exercise of this power with respect to the Sunday sale of beer and wine would have the same restrictive effect upon the Sunday sale of mixed beverages by virtue of § 4-98.5.

ALCOHOLIC BEVERAGE CONTROL LAWS—Whiskey—By-the-drink—Local license fees to sell—Authority of county to levy.

TAXATION—Local Licenses—Restaurants selling mixed beverages—Extent to which county may levy.

HONORABLE CHARLES A. OTTINGER
Assistant Commonwealth's Attorney for Loudoun County

This is in response to your letter of March 7, 1969, in which you ask my opinion on the following questions:
"1. May counties levy license fees for restaurants which are licensed to sell mixed beverages in those towns in excess of 2,500 population where the Town has qualified under its own local option?

"2. May the County tax restaurants which have mixed beverage license within the County and exclude those within towns lying in the County, when the Town has imposed a license tax or would this be considered unequal taxation?

"3. May the County levy license tax on restaurants which have mixed beverage license, located in the County and in Towns of 2,500 or less population within the County and exclude those restaurants located in Towns in excess of 2,500 population which Towns are required to have their own local option?

"4. May the County enter into an agreement with the Town which has levied local license tax on restaurants having a mixed beverage license and agree with the Town to split the license fee in lieu of the County imposing its own license fees?"

Section 4-98.19 (a) of the Code of Virginia (1950), as amended, reads in part as follows:

"(a) In addition to the foregoing State license taxes provided for in this chapter, the governing body of each city, town or county in this State may, by ordinance, adopt and impose upon persons holding mixed beverage restaurant licenses for establishments located within such city, town or county local license taxes not in excess of the following sums: . . ."

In my view the foregoing language confers the power upon the governing body of the county to impose a license tax upon all persons in the county holding mixed beverage licenses. I do not think the power is affected by the size of the town, or by the fact that towns may also impose similar license taxes. See County of Loudoun v. Parker, 205 Va. 357.

Your second and third questions deal with legislative classification. I am of the opinion that the County may properly exempt from the operation of the county licensing ordinance those persons subject to a similar town license tax. Such a classification seems to have been expressly approved by the Supreme Court of Appeals in Town of Ashland v. Supervisors, 202 Va. 409, where a provision of one of the pertinent statutes provided that a county should not impose a motor vehicle license tax upon an owner resident in a town where the town imposed such tax. I am also of the opinion that the classification envisioned by your third question is proper and that this question may be answered in the affirmative.

As to your fourth question, I am not aware of any statute expressly conferring such power upon the governing bodies of counties, or of any statute from which such power is necessarily implied.

AMBULANCES—Permit to Operate Issued by State Board of Health—When required.

October 31, 1968

HONORABLE RICHARD C. GRIZZARD
Commonwealth's Attorney for Southampton County

This will reply to your letter of October 17, 1968, in which you call my attention to §§ 32-310.1 through 32-310.8 (which comprise Chapter 16.1 of Title 32) of the Virginia Code and present certain inquiries which will be stated and considered seriatim.
"1 . . . (a) Under the above statutes, is a vehicle used by a funeral director for a funeral coach primarily and also in use as an ambulance for emergency and transportation calls considered an ambulance under Section 32-310.1(b), and

"(b) Would the vehicle described in Section (a) above be exempted under Section 32-310.6(a)?"

Answer: Section 32-310.1(b) of the Virginia Code—to which you refer in Paragraph 1(a) of your communication—provides:

"As used in this chapter, 'ambulance' shall mean any privately or publicly owned vehicle that is specially designed, constructed, or modified and equipped and is intended to be used for and is maintained or operated for the transportation upon the streets or highways in this State of persons who are sick, injured, wounded or otherwise incapacitated or helpless. Vehicles designed primarily for rescue operations and which do not ordinarily transport persons upon the streets or highways are excluded."

I am of the opinion that a funeral coach which is so designed or constructed that it is capable of being used as an ambulance and which is actually "in use as an ambulance" for emergency and transportation service to persons who are sick, injured, wounded or otherwise incapacitated or helpless, would come within the scope of the above-quoted definition.

Section 32-310.6(a) of the Virginia Code—to which you refer in Paragraph 1(b) of your communication—exempts from the provisions of the statute in question

"Privately owned vehicles not ordinarily used in the business of transporting persons who are sick, injured, wounded, or otherwise incapacitated or helpless;"

Since the vehicle mentioned in your letter is used as an ambulance in the regular course of business, I do not believe it can be said that it is not ordinarily used in the business of transporting persons who are sick, etc., even though such vehicle is primarily used as a funeral coach.

"2. Are stand-by personnel and vehicles required of funeral directors who also render some ambulance service?"

Answer: I find no provision of Chapter 16.1 of Title 32 of the Virginia Code which imposes a requirement of this character.

"3. When a convalescent patient is transported by ambulance or by a funeral director as a mode of convenience to the sick person, is this classified as an emergency case?"

Although the term "emergency case" is not specifically defined in the statute under consideration, I am constrained to believe that the transportation of a convalescent patient by ambulance or by a funeral director would not constitute an emergency case within the meaning of the statute under consideration.
AMBULANCES—Volunteer—Restriction on activities by local governing bodies.

COUNTIES, CITIES, AND TOWNS—Authority—May limit operations of volunteer ambulances.

TAXATION—Sales and Use Tax—Exemptions—Volunteer rescue squads not exempt.

May 22, 1969

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This is in reply to your letter of May 14, 1969, which reads in part as follows:

"I have been requested to seek your opinion on two questions involving Volunteer Rescue Squads. First the Volunteer Rescue Squads in my area are somewhat concerned that they are required to pay sales tax on oxygen which they purchase for use in the treatment of victims whom they attend. They are requesting the ruling on whether or not oxygen used for such purpose might be brought under any of the exemptions in the act.

"The second question relates to the use of Volunteer Ambulances. Apparently some question has been raised as to whether or not the Volunteer unit is permitted to go into an area in which some ambulance company has a franchise.
"


In answer to your second question, I am of the opinion that whether or not a volunteer ambulance is permitted to go into an area in which some ambulance company already has a franchise depends upon the type of ordinance adopted by the governing body of a county, city, or town under § 32-310.8 (a) (1) of the Code of Virginia (1950) as amended. This legislation appeared as Chapter 430, Acts of Assembly of 1968. In the absence of an ordinance adopted under this section, I am of the opinion that the volunteer ambulance could go into the area. See Opinion of the Attorney General, dated January 29, 1965, to the Honorable George B. Dillard, Judge, Municipal Court of City of Roanoke, found in the Report of the Attorney General (1964-1965), p. 66.

ANIMALS—Wild Dogs—Trapping—Authority of board of supervisors to trap.

BOARDS OF SUPERVISORS—Authority—May arrange for trapping of wild dogs.

February 18, 1969

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

This is in reply to your letter of February 12, 1969, in which you inquire as follows:

"Information is requested as to whether or not the Board of Super-
visors of a County may order, and arrange for, the trapping of wild dogs in the County under any provision of law.

"If so, would the county be liable for any duly licensed dogs which might be trapped."

You have further stated by telephone that the dogs in question inhabit a particular mountain owned privately by several parties and that steel traps will be placed in the area with the consent of the landowners. You state that complaints have been received that the dogs are a nuisance and destroy livestock.

It is my opinion that §§ 15.1-510 and 29-196 of the Code provide authority for such an undertaking. This office has ruled that under the general powers of a county, as stated in § 15.1-510, a county may appropriate funds to trap rabid skunks and foxes. Report of the Attorney General (1966-1967) p. 12. The situation which you describe appears to constitute a threat to the public health and safety which differs from the above in degree only. Section 29-196 confers upon a county the authority to "regulate and control the running at large within its boundaries of vicious or destructive dogs." This office has ruled that this confers upon a county the authority to kill stray dogs. Report of the Attorney General (1946-1947) p. 19.

In response to your second inquiry, I am enclosing a copy of a previous opinion of this office which discusses in some detail the extent to which sovereign immunity of a county from suit in tort extends to its agents and employees. See, Report of the Attorney General (1966-1967) p. 311. You will note that while the county has an absolute immunity, agents and employees may be liable for negligence in certain situations. Although each case would be dependent on its facts, it is my opinion that the mere setting of the traps would not constitute actionable negligence if reasonable precautions are taken to notify dog owners of the danger in permitting their dogs to run in the area in which the trapping is conducted.

APPEAL—Costs Incident to Indigent's Appeal—Includes postage.

January 28, 1969

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

I am in receipt of your recent letter relating to postage as a part of the costs incident to the appeal of a criminal case to the Supreme Court of Appeals of Virginia, in which letter you state:

"... it is my impression that where a pauper's affidavit has been filed that all cost incident to an appeal is to be paid by the Commonwealth out of the appropriations for criminal costs, and certainly it is highly essential that a record be mailed, or otherwise it would be of no effect. Please give me your opinion as to whether the Commonwealth is to pay for postage in such cases, and if not, whose responsibility is it to pay postage?"

The Supreme Court of Appeals of Virginia has ruled that an indigent criminal defendant convicted of a felony has a right to appeal and the right to have a transcript prepared at the expense of the Commonwealth. Cabanias v. Cunningham, 206 Va. 330, 143 S.E. 2d 911 (1965).

The Rules of the Supreme Court of Appeals, authorized by § 8-1, Code of Virginia (1950) as amended, contain Rule 5:1 § 7 which reads in part as follows:

"...; and the clerk shall then transmit it with the designations of the parts to be printed to the Clerk of this Court at Richmond or Staunton or to any Justice of this Court, as requested by counsel for the appellant."
REPORT OF THE ATTORNEY GENERAL

Section 17-30.2, Code of Virginia (1950), as amended, which deals with payment of expenses of appeals of indigent defendants read as follows:

"In any felony case wherein the judge of the court of record, from the affidavit of the defendant or any other evidence certifies that the defendant is financially unable to pay his attorneys' fees, costs and expenses incident to an appeal, the Supreme Court of Appeals shall order the payment of such attorneys' fees, costs or necessary expenses of such attorneys in an amount deemed reasonable by the court, by the Commonwealth out of the appropriation for criminal charges; provided that if the conviction is upheld on appeal, the attorney's fees, costs and necessary expenses of such attorney paid by the Commonwealth under the provisions hereof shall be assessed against the defendant."

It is clear after reading the authorities cited above that an indigent defendant has the right of appeal and that the clerk of the court from which the appeal is sought is required to transmit the record to the Clerk of the Supreme Court of Appeals. It is equally clear that the Supreme Court of Appeals, upon proper certification of the lower court, shall order payment of attorney's fees, costs, and expenses incident to the appeal out of the appropriation for criminal charges under the provisions of § 17-30.2 cited above.

Inasmuch as the indigent has a right to appeal and since the clerk of the court of record is required to transmit the record, it is manifest that postage expense required to transmit the record in accordance with Rule 5:1 § 7, cited above, is an expense incident to the appeal which is to be paid out of the appropriation for criminal charges.

Therefore, in my opinion, postage expense incurred in mailing the record to the Supreme Court of Appeals should be paid by the Commonwealth out of the appropriation for criminal charges.

ATTORNEYS—Counsel Fees for Defense of Juveniles—Cannot be taxed as costs of the proceedings.

HONORABLE JOHN F. EAKIN, Judge
County Court of Botetourt County

This is in response to your recent letter in which you made reference to my opinion of July 30, 1964, to Honorable J. G. Bennett, Report of the Attorney General (1964-1965), p. 9. In the above mentioned opinion, I ruled that counsel fees paid on order of a court not of record pursuant to the provisions of §19.1-241.5 of the Code of Virginia must be taxed as costs in the manner provided by § 19.1-320 of the Code. You inquire if that opinion is applicable to cases in the Juvenile Court.

Section 19.1-241.5 of the Code provides for the compensation of court appointed counsel in a court not of record in felony cases. Section 19.1-320 of the Code provides that the Clerk in every case in which the accused is convicted shall make up a statement of the costs involved.

Section 16.1-173 of the Code of Virginia, as amended, provides for the appointment and compensation of counsel in cases coming before the Juvenile Court involving criminal offenses. Moreover, of course, a juvenile is not "convicted" if he is tried in a juvenile court, but a determination is made as to whether or not he comes within the purview of the Juvenile and Domestic Relations Court Law.

In view of the foregoing, I am of opinion that counsel fees paid pursuant to the provisions of § 16.1-173 of the Code of Virginia, as amended, cannot be taxed as costs of the proceedings.
ATTORNEYS—Employment by Board of Supervisors.

BOARD OF SUPERVISORS—Authority—May authorize expenditure of county funds for employment of local counsel.

TREASURERS—County—May expend funds where authorized by Board of Supervisors.

December 31, 1968

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

I am in receipt of your letter of December 19, 1968, in which you present the following situation and inquiry raised by a member of the Board of Supervisors of your county:

"About 4 months ago citizens of the county sought a writ of mandamus against the Circuit Judge, the County Electoral Board, and three members of the Dickenson County Board of Supervisors to place a referendum on the ballot.

"Now the lawyer who defended these officials has sent a bill to the Board of Supervisors for payment of his fee. The Board of Supervisors has never authorized the services and I would like to know whether the Board wouldn't be in violation of the law in authorizing payment of such bill and whether the Treasurer of the County wouldn't be in violation of the law, if he proceeded to pay this bill even if the Board of Supervisors authorized such payment."

I am of the opinion that the Board of Supervisors, if they are of the opinion that counsel is needed to represent the concerns of the county, could employ and pay legal counsel pursuant to the provisions of § 15.1-507 of the Code of Virginia (1950), as amended. Further, this office has previously stated in an opinion to the Honorable Elwood H. Richardson, Jr. dated October 19, 1964, found in the Report of the Attorney General (1964-1965), at p. 51, that the Electoral Board of Hampton could, with the consent of the governing body of the city, employ private counsel to represent it in litigation.

Although the Board has not authorized the employment of counsel they may by a duly adopted resolution ratify such employment and authorize payment of such fee. In this connection you are referred to the case of Campbell v. Howard, 133 Va. 19, 112 S.E. 876.

Since the Board can properly authorize the expenditure of county funds for the employment of local counsel, the Treasurer of the county may pay such fee.

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ATTORNEYS—Entitlement of Defendant When Put in a Lineup—Right to waive—How paid when court appointed.

January 14, 1969

HONORABLE CALVIN W. BERRY
Judge, Municipal Court for the City of Danville

This will acknowledge receipt of your letter of November 27, 1968, in which you state:

"(1) Assume that a person has been arrested and charged with a felony. That such person is advised by police that he has the right to have counsel while in a lineup. That such person indicates his willingness to be put in a lineup if counsel is present. That such person states that he is not able to employ counsel."
You ask:

(a) "Is the Judge of Municipal Court or of the Corporation Court required to appoint counsel?"
(b) "Would the City or the State bear the expense incident to the appointment of counsel?"

With respect to question (a), I am of the opinion that counsel should be appointed by the Judge of the Municipal Court pursuant to the provisions of § 19.1-241.1 et seq., Code of Virginia (1950) as amended.

With respect to question (b), I am of the opinion that the Commonwealth would bear the costs pursuant to the provisions of § 19.1-315 of the Code of Virginia after such costs are certified to the Clerk of the Circuit or Corporation Court pursuant to § 19.1-319, Code of Virginia (1950) as amended.

Your letter then states:

"(2) With respect to question one (1) and counsel is present, if the person refuses to walk or to utter certain words or to put on certain clothes, could the Commonwealth prove such refusal at the preliminary hearing or at the trial in the Corporation Court?"

The United States Supreme Court has held that compelling a defendant accused of crime to speak or to utter certain words, to assume certain stances at a police lineup does not violate a defendant's privilege against self-incrimination. United States v. Wade, 388 U.S. 218, 222-223 (1967). Accordingly, your second question is answered in the affirmative.

Your letter then states:

"(3) Assume that a person has been arrested and charged with a felony. That such person has been advised that he has the right to have counsel present while he is in a lineup. That such person indicates his willingness to waive his right to presence of counsel."

You ask:

(a) "Can the person charged voluntarily waive his right to counsel?"
(b) "What would constitute a sufficient waiver?"

With respect to question (a), I am of the opinion that a person accused of crime can waive his right to counsel at a police lineup.

With respect to question (b), I am of the opinion that the accused should give some indication, preferably written, that he has been advised of his right to counsel and that he does not desire the presence or appointment of counsel. Such written waiver should be witnessed.

Your letter next states:

"(4) Assume that a person has been arrested and charged with a felony. That such person is advised by police that he has the right to have counsel present during the time he is being questioned. That such person indicates his willingness to make a statement if counsel is present. That such person states that he is not able to employ counsel."

You ask:

(a) "Is the Judge of Municipal Court or of the Corporation Court required to appoint counsel?"
(b) "Would the City or the State bear the expense incident to the appointment of counsel?"

In light of my answer to question No. (1) above, the Court should appoint counsel, who would be paid in the manner provided for by law.
REPORT OF THE ATTORNEY GENERAL

ATTORNEYS—Fees for Counsel Employed by Qualified Voters to Rearrange Magisterial District—May not be paid by Board of Supervisors.

BOARDS OF SUPERVISORS—May Not Pay Counsel Fees When Counsel Hired by Qualified Voters to Seek Rearrangement of Magisterial District.

January 27, 1969

HONORABLE E. BRUCE HARVEY
Commonwealth's Attorney for Campbell County

This is in reply to your letter of January 9, 1969, in which you present the following question:

"Under Section 15.1-572 of the Code of Virginia upon a petition of fifty qualified voters of a county asking for a rearrangement of the magisterial districts of the County, the Circuit Court for good cause shown enter an order for the rearrangement of districts therein. Would the Board of Supervisors of the county be allowed to reimburse or pay any balances on counsel fees for counsel hired by said petitioners?"

I am of the opinion that your question should be answered in the negative.

Although the Board of Supervisors may itself employ counsel and petition the court for a rearrangement of magisterial districts, I am unable to discover any provision of law that would authorize the Board of Supervisors to reimburse or pay counsel fees for attorneys who represented and were hired by other petitioners.

AUDITOR OF PUBLIC ACCOUNTS—Annual Reports of Certain Political Subdivisions Required by § 2.1-164 of the Code—Filing mandatory—No authority to vary filing date.

June 3, 1969

HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

This is in reply to your letter of recent date in which you inquire whether you may advise the authorities requesting it that they may file biennial reports in lieu of the annual reports referred to in § 2.1-164 of the Code.

You point out that this section imposes no penalty for failure to file such reports, nor does it require the Auditor of Public Accounts to insist upon delivery of the reports of audit. The applicable part of § 2.1-164 provides that "Each authority, commission, district or other political subdivision the members of whose governing body are not elected by popular vote shall annually, within three months after the end of its fiscal year, file with the Auditor of Public Accounts a copy of a report of audit covering its financial transactions for such fiscal year. The Auditor of Public Accounts shall receive such reports and keep the same as public records for a period of ten years from their receipt."

The language of this section does not indicate a discretionary intent but, on the contrary, is a clear and specific declaration that such audit reports shall be filed annually. I am of the opinion, therefore, that you are not authorized to vary the requirements of the statute in this respect and your question must be answered in the negative. If, indeed, the requirement of annual audits is unnecessary, the desired changes should be sought at the legislative level.
BAIL—Admitting To—Does not include cases where an accused deposits money to cover predetermined fine.

FEES—Admitting to Bail—Deposit of money by an accused not an admission to bail—Fee not allowed.

HONORABLE D. R. TAYLOR, Judge
County Court of James City County

This is to acknowledge receipt of your letter of May 8, 1969, in which you state in part:

"The Section of the Virginia Code is 14.1-123, as amended, entitled, 'FEES FOR SERVICES PERFORMED BY JUDGES OR CLERKS OF COURTS NOT OF RECORD IN CRIMINAL CASES.' This Section of the Code in part provides, '... (5) For admitting any person to bail, including the taking of the necessary bond, three dollars, which shall, notwithstanding other provisions to the contrary, be collected, at the time of admitting the person to bail, but which shall in no case be paid out of the State treasury...'.

"The question has arisen whether a $3.00 fee should be charged by the Court when a person comes in before trial date and deposits with the clerk the amount of his fine, which has been predetermined for certain offenses, plus the required costs. The prepaid fines and costs have been treated as a 'cash forfeiture' when the case is tried. The question appears to warrant the distinction between 'bail' and 'cash forfeiture', if there is one relative to the propriety of taxing the fee."

In this connection, I am of the opinion that when an accused deposits money with the clerk of a court not of record to cover a fine which has been predetermined for certain offenses, the accused is not admitted to bail within the meaning of § 14.1-123(5) of the Virginia Code and that the fee prescribed by that statute is not chargeable.

HONORABLE RUSSELL H. QUYNN, JR.
Executive Secretary
Probation and Parole Board

This is in response to your letter of April 7, 1969, which reads in part as follows:

"We will appreciate your opinion interpreting the first half of Section 53-260 which states: 'Any parolee for whose arrest a warrant has been issued (under Section 53-258) by the Parole Board or by the Director shall, after the issuance of such warrant, be treated as an escaped prisoner...,' as it relates to the admittance to bail bond or recognizance of parolees detained under Board warrant for parole violation or probable parole violation.

"This Board has not acted as a bonding authority in such cases. The Code does not appear clear as to the authority or jurisdiction conferred upon Judges or local bail authorities as to their power to recognize or admit such cases to bail."
Section 53-258 of the Code provides that the Parole Board may issue a warrant for the arrest and return of a parolee to the institution from which he was paroled or to any other penal institution which may be designated by the Board. Each such warrant issued under this statute authorizes the officer named therein to arrest and return such parolee to actual custody in the penal institution from which he was paroled or to any other institution designated by the Parole Board. Moreover, a parolee may be arrested without a warrant, pursuant to the provisions of § 53-259 of the Code. When the arrest is accomplished without a warrant, the probation and parole officer must deliver a written statement to the officer in charge of any State or local penal institution, and this is sufficient warrant for the detention of the parolee. Section 53-261 provides that when any parolee is returned or delivered to any institution in accordance with the provisions of § 53-258, he shall be held in accordance with the rules of the Parole Board and subject to further action of the Board.

The provisions of law pertaining to the admission to bail are found in § 19.1-109, et seq., of the Code. These statutes deal with situations where the accused is charged with a crime, either a misdemeanor or a felony. A parolee, of course, is not charged with a crime, but has been convicted and sentenced.

In view of the foregoing, I find no statutory authorization for the taking of a parolee, who has been arrested pursuant to the provisions of § 53-258 or § 53-259 of the Code, before a judicial officer or any other officer to be admitted to bail. I am, therefore, of opinion that a parolee arrested in conformity with these statutes is not entitled to bail.

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BANKING AND FINANCE—Deposit of Securities to Secure Governmental Deposits—Deposits of clerk considered governmental deposits.

CLERKS—Deposits—Considered governmental deposits.

April 10, 1969

HONORABLE C. W. SMITH, Clerk
Circuit Court of Washington County

This is in reply to your letter of March 22, 1969, in which you inquire as follows:

"As Clerk of the Circuit Court of Washington County I have deposited in a local bank certain court funds in the amount of approximately $50,000.00, which may not be disbursed for several years. In addition to these funds I also deposit from time to time other funds which come into my hands as clerk. I have requested the bank to deposit securities for the purpose of securing deposits in excess of $15,000.00, which is insured by F.D.I.C. The bank is agreeable to deposit sufficient securities and their Board of Directors has adopted a resolution to do so.

"The attorney for the bank questions the bank's authority to deposit securities under the provisions of Section 6.1-79. Is the Clerk's Office an 'Agency of the Commonwealth' under the provisions of Section 6.1-79 of the Code?"

Section 6.1-79, to which you refer, provides in pertinent part as follows:

"Notwithstanding the provisions of § 6.1-78 any bank or trust company may deposit securities for the purpose of securing deposits of the United States government, and its agencies, and the Commonwealth of Virginia, its agencies, and its political subdivisions..."

While it does not appear that this office has previously had occasion to con-
sider the question you present, I am constrained to believe that a bank may de-
posit securities in accordance with § 6.1-79 of the Virginia Code to secure de-
posits which you may make as Clerk of the Circuit Court of Washington County.

BOARDS OF SUPERVISORS—Authority—Certain counties may compensate
claimants for damage caused by big game hunters whether or not incurred
during hunting season.

GAME AND INLAND FISHERIES—Stamp Fund Surplus—May not be used for
construction and improvement of camp sites.

April 21, 1969

HONORABLE ERWIN S. SOLOMON
Commonwealth’s Attorney for Bath County

This is in reply to your letter of April 14, 1969, in which inquire as follows:

"The Bath County Board of Supervisors would like to know if claims
should be allowed pursuant to paragraph 2, Chapter 527, Acts of Assem-
bly 1968, for the following damages:

"(1) Livestock shot during small game hunting season
"(2) Livestock shot when hunting seasons are closed
"(3) Livestock shot, but officials unable to determine if shot
by big game hunters

"In other words we are confronted with claims, which involved
illegal hunters, spotlighting at night and a clarification is needed in re-
lation to this type of claim.

"Also, please advise if surplus money from the Bear and Deer
Damage Fund may be used for the construction of camp sites and im-
provements to existing camp sites on either National Forests or private
land."

Chapter 527, Acts of Assembly 1968, to which you refer, provides for the issu-
ance of a special stamp as a prerequisite to the hunting of bear and deer in
certain counties, among which is Bath County. The act provides in part that,

"The money received from the sale of such special stamps shall be
paid into the county treasury . . . and the net amount thereof, or so
much as is necessary, shall be used for the payment of damages to
crops, fruit trees, livestock or farm equipment by deer, bear or big
game hunters. . . ." (Italics supplied.)

Provision is further made for the approval of such claims by the board of
supervisors or by arbitration.

Inasmuch as there is no provision in the statute which restricts payments to
satisfaction of damage incurred during the big game hunting season, it is my
opinion that whenever the damage in question was caused by big game hunters
it is proper to compensate the claimant from the damage fund. There is no
provision in the statute which permits payment for livestock shot other than by
big game hunters. Thus, while it is necessary to determine that such damage was
in fact caused by big game hunters, the procedure for making this determination
is set forth in the act with regard to the approval of claims.

Pertinent to your final inquiry, the act provides that,

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

Consistent with a number of previous opinions of this office, the propriety of a disbursement of funds under the above provision is to be tested by whether the proposed expenditure is directly related to the conservation of wildlife. It has also been ruled that the act contemplates disbursement to a program in which the Commission of Game and Inland Fisheries cooperates. See, Report of the Attorney General (1964-1965) p. 18.

In view of the foregoing principles, I am constrained to say that it is doubtful that the construction and improvement of camp sites is a project which may be financed from the surplus in the stamp fund.

BOARDS OF SUPERVISORS—Authority—Certain counties may use surplus stamp funds for stocking game.

GAME AND INLAND FISHERIES—Stocking Game—Certain counties may use surplus funds to stock.

HONORABLE RUFUS V. MCCOY, SR.
Member, House of Delegates

This is to acknowledge receipt of your letter of March 31, 1969, in which you request my opinion as to the following question:

"Does the Board of Supervisors have the authority to appropriate funds for the purpose of stocking the county with game."

According to the provisions of Chapter 420, Acts of the General Assembly of 1962, last amended by Chapters 527 and 692, Acts of 1968, the Boards of Supervisors of certain counties (Albemarle, Amherst, Bath, Bedford, Bland, Botetourt, Carroll, Clarke, Craig, Floyd, Franklin, Frederick, Giles, Grayson, Highland, Loudoun, Madison, Nelson, Page, Patrick, Rappahannock, Rockbridge, Rockingham, Roanoke, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise and Wythe) are granted the authority to adopt ordinances requiring persons who hunt deer and bear to obtain a special stamp, the fee for which shall be one dollar annually. The special fund so accumulated from the collection of this fee or tax,

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

This office has ruled that no part of such surplus can be appropriated for use by a county fire department. Annual Report of the Attorney General (1964-1965), page 18. A similar statute, Chapter 288, Acts 1956, is applicable to Charles City and New Kent Counties.

I am of the opinion that the aforesaid surplus of such funds resulting from the enactment of ordinances pursuant to the above mentioned Acts could be used (appropriated) by the board of supervisors of the aforementioned counties for the purpose of stocking such counties with game. However, in the other counties of the state there seems to be no expressed authority granted the boards of supervisors thereof to appropriate funds for the purpose of stocking game.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Authority—May contract with private agency to render ambulance service.

BOARDS OF SUPERVISORS—Ambulance Service—May contract with private agency.

HONORABLE W. CLAUDE DODSON, Clerk
Circuit Court of Bath County

September 20, 1968

I have your letter of September 18, 1968, in which you inquire if Bath County may enter into contract with a private agency for the rendering of ambulance service and contract on a yearly basis "that is to say one contract figure for total services during a given year."

Chapter 430 of the 1968 Acts of General Assembly, now codified as § 32-310.8 of the Code of Virginia, in subsection (b) provides, in part, that the governing body of a city or county may provide, or cause to be provided, ambulance services by several alternate methods. One of these provides "or to contract with any public or private agency, person, firm, corporation or association, including public and private hospitals, for the rendering of ambulance services."

The method of compensating such agency, person, firm, corporation or association is not specified. This is left to the judgment of the governing body. Certainly one possible method is "one contract figure for total services during a given year."

BOARDS OF SUPERVISORS—Authority—May employ and compensate counsel to assist the Commonwealth’s Attorney in representing the board.

ATTORNEYS—Employment by Board of Supervisors—to assist Commonwealth’s Attorney in representing board.

HONORABLE JOHN F. EWELL
Commonwealth’s Attorney for Warren County

August 26, 1968

This is in reply to your letter dated July 18, 1968, in which you asked the following question:

"Does the Board of Supervisors of Warren County have the authority to employ counsel to assist the Commonwealth's attorney for the purpose of filing and maintaining a suit to determine the status of a county road or in the event there is no duty on the Commonwealth's attorney to maintain such suit to employ counsel for such purpose."


In that letter I stated the following:

"From the information set forth in your letter, there is some question as to whether a portion of the same road was re-established as a part of the Secondary System by the action of the Board of Supervisors in 1947, or whether the public has retained a prescriptive right to use such road. However, both of these questions involve factual issues which would have to be established by proper judicial determination."

Since the above uncertainty exists, I think the problem can properly be regarded as effecting the interest of the county within the meaning of § 15.1-507, Code of Virginia (1950), as amended. That section permits the governing body of any county to hire special counsel in certain instances.
Although the Commonwealth's Attorney is the legal advisor of the Board of Supervisors and could represent the Board in the suggested judicial proceedings, I cannot say that he is required by law to do this. I have previously expressed the opinion that since it is not the mandatory duty of the Commonwealth's Attorney to represent the Board, the Board has the authority to employ and compensate other counsel if it so desires. See, Report of the Attorney General (1951-1952), pp. 38, 39.

Honorabel E. Bruce Harvey
Commonwealth's Attorney for Campbell County

This is in reply to your letter of November 26, 1968, in which you inquire as follows:

"It is becoming increasingly necessary for Members of the Board of Supervisors to serve on Commissions set up by the Board as allowed by statute among which are the Planning Commission and the Highway Safety Commission . . . My question is whether or not the Board of Supervisors of the County is allowed to compensate its member or members that [are] designated to serve on the Commission at the same rate it pays the actual members of the Commission as set up.

"Also I would like to know whether the Board of Supervisors has the discretion to pay its members for meals at its regular meetings and for meals that are required at other legitimate meetings that members are designated or obligated to attend.

"Please state how far the Board of Supervisors can go in compensating the members of the Highway Safety Commission for time and service rendered."

Sections 15.1-437 and 2.1-64.19 of the Code permit members of the board of supervisors to serve on planning commissions and local highway safety commissions. In a previous opinion of this office it was ruled that, under the then existing statute, members of the board of supervisors serving on the planning commission could not receive the compensation paid the other members of the commission for service thereon. See, Report of the Attorney General (1961-1962) p. 10. However, the statute, presently § 15.1-437, was amended by Acts of 1962, Ch. 407 at 646, to provide for "compensation to such members, or any of them, for their services." Therefore, I am of the opinion that a member of the board of supervisors may now receive compensation for service on the planning commission.

Section 2.1-64.19 specifies that one or more of the members of the local governing body are to serve on the local highway safety commission, but, unlike § 15.1-437, makes no provision for the compensation of these members. It is my opinion that the statute does not contemplate that members of the governing body are to be compensated for their service on the highway safety commission.

As stated in a previous opinion, Report of the Attorney General (1964-1965) p. 32, there is no prohibition against the county's payment of the out-of-pocket expenses of its members. This would apply to those members appointed by the
board to serve on the commissions to which you refer. This office has ruled previously that the furnishing of meals in connection with activities of the board may be a valid incidental expense payable by the board. See, Report of the Attorney General (1958-1959) p. 49. Although I am aware of no specific statutory authority for the board to compensate its members for meals, the board may properly do so upon a determination that such an expense is incurred in connection with the official duties of a board member.

BOARDS OF SUPERVISORS—Authority—May purchase an ambulance and donate it to rescue squad.

HONORABLE CATESBY GRAHAM JONES, JR.
Commonwealth’s Attorney for Gloucester County

This is in reply to your letter of September 13, 1968, in which you ask if the Board of Supervisors may purchase an ambulance and make a gift of it to a rescue squad.

I am of the opinion that § 15.1-25 of the Code of Virginia (1950), as amended, to which you refer, provides ample authority for the Board of Supervisors to purchase an ambulance and make a gift of it to a rescue squad.

BOARDS OF SUPERVISORS—Authority to Fix Salary of Clerk of Board—Limitations.

HONORABLE JENNINGS L. LOONEY, Clerk
Circuit Court of Buchanan County

This is in reply to your letter of November 22, 1968, which reads in part as follows:

“Our Board of Supervisors on January 2, 1968 entered an order fixing the salary of the Clerk of the Board of Supervisors of our County under Section 15.1-534 at $700.00 per annum until further order of the Board, payable in monthly payments.

“I desire an opinion from you as to whether or not our Board of Supervisors has the authority, if they so desire, to enter an order at this time increasing the allowance of Clerk of the Board of Supervisors for the period beginning January 1, 1968 and ending June 30, 1968 to $600.00, that being the limit under Section 15.1-534 which was repealed, and fixing his salary for July 1968 at $208.33, that being one-sixth (1/6) of $1250.00.”

By § 15.1-534 of the Code (Repealed, effective June 28, 1968), the Clerk of Buchanan County was allowed to receive a maximum yearly salary of $1,200.00 as Clerk of the Board of Supervisors.

While the Board may not at this date enter a new order fixing the salary of the Clerk of the Board under § 15.1-534 which has now been repealed, it may amend its original order of January 2, 1968, and fix the salary at $600.00 for the period beginning January 1 and ending June 30, 1968.

Section 15.1-533 of the Code, as amended by the 1968 General Assembly now reads as follows:

“Such clerk may receive as compensation for his services as clerk of the board a sum not exceeding twenty-five hundred dollars annually
except that the clerk of the board of the county of Henrico shall receive a salary in an amount determined by the board, and such salary shall be in lieu of and in satisfaction of any compensation allowable under § 33-160. Such salaries shall not be considered in determining the maximum total annual compensation of officers as set forth in §§ 14.1-136 and 14.1-143.”

Under this language, the Board may at this time enter an order fixing the salary of the clerk at $208.33 for acting as Clerk of the Board for the month of July, 1968, this being one-twelfth of the maximum annual salary of $2,500.00 allowable.

BOARDS OF SUPERVISORS—Burial of Indigents—May appropriate money to defray costs of burial.

WELFARE—Burial of Indigents—Board of Supervisors of county may appropriate money to defray costs.

May 9, 1969

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

This is in reply to your letter of April 30, 1969, which I quote as follows:

“The County of Amelia does not maintain a cemetery wherein free burial space is provided. Please advise whether or not the Board of Supervisors of the County may properly pay any portion of the burial expenses for indigent persons dying residents of Amelia County.”

The answer to your question is in the affirmative. In Chapter 6, Title 63.1 of the Code of Virginia, known as the “Virginia Public Welfare and Assistance Law,” § 63.1-91 provides that the board of supervisors, or other governing body of each county and city of the State, shall each year appropriate such sums of money as shall be sufficient to provide for the payment of public assistance under the provisions of this law. Customarily, § 63.1-106, providing for general relief, is applied when a person dies without either financial means or relatives who have the duty to support deceased.

This is separate and apart from the disposition of dead bodies pursuant to § 19.1-46 of the Code of Virginia, which controls only in case of death under the conditions stated in § 19.1-41. In the latter case, no expenses shall be paid until allowed by the court of the applicable county or city.

BOARDS OF SUPERVISORS—Contracts Creating a Debt Payable Beyond the Current Fiscal Year—Prohibited.

COUNTIES—Contracting Debts—Limited by Section 115a of the Constitution of Virginia.

June 17, 1969

HONORABLE PHILIP P. BURKS
County Treasurer of Bedford County

This is in reply to your letter of June 14, 1969, in which you inquire as follows:

“The City of Bedford has proposed that the County of Bedford enter into a contract with the city under the terms of which said contract the
city would construct a fire station and a library in the City of Bedford, the legal title to said buildings and the control and management of same being vested exclusively in the city . . . Under the terms of said contract, in the year 1972 the City of Bedford could demand that the County of Bedford pay its part of the cost of said capital outlay expenditures, the amount of which said expenditures would not be determined until the year 1972.

"Under the law of Virginia, does the Board of Supervisors of Bedford County have authority to enter into a contract with the City of Bedford under the terms of which said contract the County of Bedford would be bound to share in the cost of capital outlay facilities, such as a fire station and a library, to be used jointly by the city and the county, the amount of said expenditures for said capital outlay facilities to be determined by the City of Bedford? Does the law of Virginia authorize the present Board of Supervisors to bind a future Board of Supervisors under a contract whereby a future Board of Supervisors would be required to raise an indefinite and undetermined amount of money to pay for said capital outlay facilities mentioned above herein?"

The board of supervisors does not have the authority to make the contract of which you inquire. Section 115a of the Constitution of Virginia provides in effect no county shall contract any debt except to meet casual deficits in the revenue, or in anticipation of revenue, or to redeem a previous liability unless the debt is approved by a referendum of the people. This provision applies not only to the borrowing of money, but to the contraction of other debts payable in the future. See, *American LaFrance, etc.* v. *Arlington County*, 164 Va. 1, 178 S.E. 783 (1935).

It is my opinion that the contract which you describe creates a debt payable beyond the termination of the current fiscal year and, in the absence of a referendum, would fall within the prohibition of Section 115a of the Virginia Constitution.

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**BOARDS OF SUPERVISORS—Frederick County—Authority—May fix requirements for sewer systems.**

**SANITATION AUTHORITIES—No Authority to Supervise and Enforce County Ordinance Regulating Sewers.**

_Honorable E. Eugene Gunter_  
Commonwealth's Attorney for Frederick County

April 1, 1969

This is in reply to your letter of March 5, 1969, which reads in part as follows:

"The Board of Supervisors has seen fit to organize a Sanitation Authority for Frederick County pursuant to the Code of Virginia. The Sanitation Authority has sewer and water projects in Frederick County, Virginia.

"The Frederick County Board of Supervisors and the Sanitation Authority are now interested in standardizing all of the public sewage systems in Frederick County. The Frederick County Board of Supervisors has considered enacting an Ordinance requiring any sewage system that services a specified number of buildings to meet certain minimum standards and to have pipes not less than a certain diameter. The Board of Supervisors would like to refer the supervision and enforcement of this Ordinance, once it is enacted, to the Sanitation Authority and the Sanitation Authority is willing to accept such responsibility."
You inquire whether (1) such Ordinance would be constitutional, and (2) whether the supervision and enforcement of the Ordinance could be delegated to the Sanitation Authority which was established under the Virginia Water and Sewer Authorities Act, Title 15.1, Chapter 28 of the Code of Virginia (1950), as amended.

In our recent conversation you advised that Frederick County has no public sewer system other than that established by the Authority and your question concerns the systems being installed by various developers.

The answer to your first inquiry would be in the affirmative. Section 15.1-299, which is applicable to Frederick County gives the county authority to fix requirements as regards the installation, size and nature of sewer mains, pipes, connections, or other facilities used in connection with sewer systems. Such regulations, however, would be subject to the approval of the State Water Control Board.

Your second inquiry must be answered in the negative. The Sanitation Authority has only that power set forth in the Virginia Water and Sewer Authorities Act. I am unable to find any provision in the Act which would allow the Sanitation Authority to supervise and enforce the proposed Ordinance.

BOARDS OF SUPERVISORS—Improvement of Roads in Subdivisions—Discretionary.

September 12, 1968

HONORABLE E. EUGENE GUNTER
Commonwealth's Attorney for Frederick County

This is in response to your letters of July 29 and September 3, 1968, in which you request my opinion whether the Board of Supervisors of Frederick County may spend monies from the general funds of the County to improve roads, not a part of the Secondary System of Roads, in a subdivision of the County adjacent to the City of Winchester and if so, is it their duty to improve the roads in said subdivision?

I am attaching a copy of my letter dated May 16, 1968, to the Honorable George C. Rawlings, Jr., Member, House of Delegates, who made an inquiry similar to yours which should answer your question concerning expenditure of general funds of the County to improve roads.

With respect to your inquiry whether the Board of Supervisors can be required to pave roads in the subdivision, I am of the opinion that neither Sections 33-138 and 33-47, et seq. require a county to improve roads and that the improvement of roads lies within the sound discretion of the Board of Supervisors.

BOARDS OF SUPERVISORS—May Require Counter-signature on Checks.

TREASURERS—Authority to Select the Depositories for County or District Funds.

TREASURERS—Duty—Must ascertain validity of county warrants placed before him for signature.

March 25, 1969

HONORABLE J. K. NEWMAN
Treasurer of Lee County

This is in reply to your letter of March 8, 1969 in which you ask the following questions:

(1) Whether or not the Board of Supervisors under the County Board
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form of government has the authority to designate how much and 
where short term deposits of county funds may or shall be made?

(2) Whether or not the Board of Supervisors under the County 
Board form of government has the authority to require the Treasurer 
to have a counter signature on checks for county funds under his 
custody being transferred from one depository to another?

(3) Whether or not the County Treasurer has the right to pay war-
rants delivered to him by the Executive Secretary of the Board of Super-
visors which warrants are not supported by statements to substantiate 
their issuance?

I shall answer your questions seriatim.

(1) Section 58-943, Code of Virginia (1950), provides that the depository, or 
depositories, for the money received by a county treasurer shall be selected by 
the county treasurer and approved by the county finance board.

Section 58-940 of the Code of Virginia (1950), as amended, provides for the 
establishment of a county finance board for each county. It further provides that 
the governing body of any county which has a county finance board may by 
ordinance duly adopted, abolish the finance board, whereupon all authority, 
powers, and duties of the finance board shall vest in the governing body.

Section 58-943.2 of the Code, as amended, provides as follows:

"Notwithstanding other provisions of this article, whenever the county 
finance board shall determine that county or district funds in any given 
amount otherwise would lie idle and draw a lesser rate of interest for a 
period of time not less than sixty days, it may authorize the county 
treasurer to place such funds in such amount upon time deposit in such 
legal depository at such rate of interest and upon such conditions of 
withdrawal as the county finance board may determine."

These provisions empower the county finance board, or the board of super-
visors in counties where the finance board has been abolished, to authorize the 
county treasurer to place county or district funds in such legal depositories at 
such rate of interest and upon such conditions of withdrawal as it may deter-
mine. Therefore, I am of the opinion that while the county treasurer selects the 
depositories for the county funds, such depositories are subject to approval by 
the county finance board, or by the board of supervisors where the county finance 
board has been abolished.

(2) Section 15.1-705 of the Code which sets forth the powers and duties of the 
executive secretary provides in part:

"(a) The board of county supervisors may by resolution designate the 
executive secretary as clerk of the board of county supervisors. In such 
case and upon the qualification of the executive secretary authorized by 
this article the county clerk of such county shall be relieved of his 
duties in connection with the board of county supervisors and all of 
his duties shall be imposed upon and performed by the executive secre-
tary. If the board of county supervisors does not designate the execu-
tive secretary as clerk, the county clerk or one of his deputies shall 
attend the meetings of said board and record in a book provided for the 
purpose all of the proceedings of the board, but he shall not be 
authorized and required to sign the warrants of the board, if any, such 
authority being hereby vested in the executive secretary; provided, how-
ever, the board of county supervisors may by resolution of record re-
quire the county clerk to sign all warrants of the board of county 
supervisors."

Section 58-951 of the Code provides as follows:

"Money deposited under the provisions of this article shall be dis-


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bursed only upon checks signed by the county treasurer and drawn in payment of lawfully issued and properly drawn orders or warrants and lawfully issued and properly drawn and matured bonds, notes or other obligations of the county, for the payment of which funds are available; provided, however, that:

"(2) Any board of supervisors or other governing body desiring to do so may require the checks issued pursuant to the provisions of this section to be countersigned and appoint such person or persons as it may desire for the purpose."

In view of the foregoing, the board of supervisors may determine that all checks involving the transfer of county funds be countersigned by the executive secretary. I therefore answer your question in the affirmative.

(3) There is a duty and responsibility upon the county treasurer to ascertain the validity of county warrants placed before him for his signature or to be paid by him out of county funds. See § 58-951 of the Code. There is also a corresponding duty placed on the board of supervisors by §§ 15.1-547 through 15.1-550 of the Code to receive and audit all claims for payment by the board. Section 15.1-550 requires that all claims be authenticated by the board. If the treasurer is of the opinion that a warrant for advanced expenses is not properly authenticated in accordance with § 15.1-550, he should bring it to the attention of the Commonwealth Attorney for action in accordance with that section.

BOARDS OF SUPERVISORS—Obscenity Ordinances—No authority to adopt.

ORDINANCES—Obscenity—County has no authority to adopt.

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney for Henry County

This is in reply to your letter of August 15, 1968, in which you inquire as to the power of a county to enact an ordinance similar to § 484(h) of the New York Penal Code, making it an offense to admit minors to movies of an obscene nature. You present the following questions:

"(1) Whether the Henry County Board of Supervisors would, in your opinion, have the authority to adopt a similar ordinance to control this matter in Henry County.

"(2) If the Board would otherwise have this authority, has such authority been pre-empted by the Commonwealth of Virginia in its enactment of Title 18.1-227 to 18.1-236.3 of the Code.

"(3) Would such an ordinance fixing the age of a minor at 18 years of age be, in your opinion, constitutional."

The New York statute to which you refer is based on a theory that a State may prohibit the distribution of objectionable materials to minors, even though it might not constitutionally prohibit dissemination of the same materials to adults. However, §§ 18.1-227 through 18.1-236.3 of the Code of Virginia specify the conditions under which distribution of objectionable materials to any person violates the obscenity laws. This is a comprehensive statute dealing with obscenity and contains no authorization permitting counties to enact parallel ordinances. An express statutory authorization is required in order for a county to enact ordinances which parallel a statute. See the opinion reported in Report of the Attorney General (1955-1956) p. 40, a copy of which is enclosed.

I am furthermore of the opinion that in enacting the above legislation the General Assembly has pre-empted any power which a county may otherwise have had to pass an ordinance of the type which you describe. This office has
previously ruled that a local ordinance in conflict with a statute is invalid. See, Report of the Attorney General (1963-1964) p. 225, a copy of which is enclosed. I also enclose a copy of a previous opinion in which the subject of pre-emption is discussed at length. See, Report of the Attorney General (1956-1957) p. 61.

Since it is my opinion that the State statute has pre-empted the field, it is therefore unnecessary to comment on your first and third questions. This is, of course, not to suggest that under the present law the exhibition of certain motion pictures might not constitute a violation of the obscenity laws irrespective of the age of the audience.

HONORABLE E. BRUCE HARVY
Commonwealth's Attorney for Campbell County

This is in reply to your letter of August 28, 1968, in which you ask whether a meeting of the County Board of Supervisors which was held in the absence of the Commonwealth's Attorney was legal. You further stated this meeting was held on August 19, 1968.

I am unable to find any authority that the absence of a Commonwealth's Attorney from a meeting of the Board of Supervisors makes such meeting improperly constituted. It appears that if a regular meeting of the Board of Supervisors is held in accordance with § 15.1-536, Code of Virginia (1950), as amended, it is a legally constituted meeting.

As you are aware, § 15.1-550 formerly provided for the attendance of the Commonwealth's Attorney at meetings of boards of supervisors in the following language, "* * * the attorney for the Commonwealth shall be present at each and every meeting of the board and shall give his legal opinion when required by the board on all questions arising before the board." This office has ruled that under this statute, the attendance of the Commonwealth's Attorney depends upon the wishes of the board of supervisors. See an opinion to the Honorable Charles J. Ross, Clerk, Board of Supervisors of Madison County, dated October 12, 1959, found in the Report of the Attorney General (1959-1960), page 56. I have enclosed a copy of this opinion.

The most recent session of the General Assembly amended this section and in particular the sentence quoted above so that this sentence now reads, "* * * the attorney for the Commonwealth shall be available to the board and give his legal opinion when requested." (Italics supplied) This amendment became effective on June 28, 1968, and its provisions therefore would have governed the meeting of the Campbell County Board of Supervisors held on August 19, 1968.

It is my opinion that under the present law, § 15.1-550, the attendance of the Commonwealth's Attorney at a meeting of the Board of Supervisors is entirely discretionary with the Board and that an otherwise properly constituted regular meeting of the Board of Supervisors is not made illegal solely by the absence of the Commonwealth's Attorney.
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BOARDS OF SUPERVISORS—Wife of Member—Employed as school teacher with County School Board—Whether in violation of § 15.1-67 of the Code is not free from doubt in view of a division of authorities on the subject and the absence of a judicial determination.

June 23, 1969

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth’s Attorney for Hanover County

This is in reply to your letter of May 27, 1969, which reads, in part, as follows:

"... I would appreciate your advising me whether or not, in your opinion, it would be a violation of Section 15.1-67 of the Code of Virginia, the conflict of interest statute, for the wife of a member of the Board of Supervisors to enter into a contract of employment as a school teacher with the County School Board of the county for which her husband was a supervisor."

We are unable to find any opinion of the Supreme Court of Virginia or any former opinion of this office specifically answering your question. A review of decisions in other jurisdictions indicates that because of the relationship between husband and wife and father and children some courts have held that contracts between local governing bodies and the wife or minor child of a member of the governing body, per se constitute a conflict of interest. See, e.g. Haislip v. White, 124 W.Va. 633, 22 S.E. 361 (1942); Githens v. Butler, 165 S.W. 2d 650 (Mo. 1942); Stocker v. City of Waterbury, 226 A. 2d 514, 518 (Conn. 1967); and cases at Annot. 74 A.L.R. 792, 795 (1931). Other courts have held that a disqualifying interest arises only if an actual pecuniary interest on the part of the husband or father in the contract of the wife or child is shown and that in the absence of such financial interest, no conflict exists. See, e.g. Commonwealth v. Albert, 29 N.E.2d 817 (Mass. 1940); Panozzo v. City of Rockford, 306 Ill. App. 266, 28 N.E.2d 748 (1940); Brewer v. Howell, 299 S.W.2d 851 (Ark. 1957); J. J. Carroll, Inc. v. Waldhauer, 219 N.Y. 792, 795 (1931). Other courts have held that a disqualifying interest arises only if an actual pecuniary interest on the part of the husband or father in the contract of the wife or child is shown and that in the absence of such financial interest, no conflict exists. See, e.g. Commonwealth v. Albert, 29 N.E.2d 817 (Mass. 1940); Panozzo v. City of Rockford, 306 Ill. App. 266, 28 N.E.2d 748 (1940); Brewer v. Howell, 299 S.W.2d 851 (Ark. 1957); J. J. Carroll, Inc. v. Waldhauer, 219 N.Y. 792, 795 (1931). Other courts have held that a disqualifying interest arises only if an actual pecuniary interest on the part of the husband or father in the contract of the wife or child is shown and that in the absence of such financial interest, no conflict exists. See, e.g. Commonwealth v. Albert, 29 N.E.2d 817 (Mass. 1940); Panozzo v. City of Rockford, 306 Ill. App. 266, 28 N.E.2d 748 (1940); Brewer v. Howell, 299 S.W.2d 851 (Ark. 1957); J. J. Carroll, Inc. v. Waldhauer, 219 N.Y. 792, 795 (1931).

In light of the above mentioned division of authority and in the absence of any decision of the Supreme Court of Appeals of Virginia on the specific subject, the matter concerning which you inquire is by no means free from doubt, and I regret that no definitive answer to your inquiry can be given.

BOND—Faithful Performance—Commissioner of the Revenue—Bond given must comply with statutory requirements.

COMMISSIONERS OF REVENUE—Faithful Performance Bond—Must comply with statutory requirements.

July 25, 1968

HONORABLE WALKER R. CARTER, JR.
Clerk of Courts, City of Roanoke

This is in reply to your letter of July 18, 1968, which reads as follows:

"In view of Title 15.1, Chapter 2, Article 1, of the Code of Virginia, please advise if it would be proper for the commissioner of the revenue of the City of Roanoke to give a faithful performance bond with said city for himself and his employees in lieu of giving the required bond before the clerk of the Hustings Court of said City."

Section 15.1-41, which appears in Article 1, Chapter 2, of Title 15.1 of the
Code of Virginia which you cite, provides that the commissioner of the revenue shall give a bond to the Commonwealth of Virginia.

In view of this statutory requirement, I am of the opinion that the giving of a faithful performance bond to the city by the commissioner of the revenue would not be sufficient compliance with this section.

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**BOND—Premium—Paid by general receiver.**

February 5, 1969

_HONORABLE MARGARET B. BROWN, Clerk_  
_Circuit Court of Culpeper County_

This is in reply to your letter of February 4, 1969, which reads as follows:

"Please advise me if the premium on the bond of the General Receiver of the Court should be paid by the Board of Supervisors. Section 8-731 of the Code provides for a bond, but does not state who is to pay the premium."

Section 8-732 of the Code of Virginia (1950), as amended, provides in part that:

"A general receiver shall receive as compensation for his services such amount, as the court deems reasonable, to be apportioned among the funds under his control in such manner as the court orders; and, out of the compensation so allowed, he shall pay the premium on his bond or bonds; . . ."

Therefore the general receiver and not the Board of Supervisors should pay the premium of the bond required by § 8-731.

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**CEMETERIES—Endowment Care Fund—When required.**

January 28, 1969

_HONORABLE W. L. LEMMON_  
_Member, House of Delegates_

This is in reply to your letter of January 3, 1969, in which you request my opinion as to whether the establishment of a twenty-five thousand dollar endowment trust fund, as required by § 57-35.2 of the Code of Virginia (1950), as amended, would be applicable to the following situation:

"The Wharf Hill United Methodist Church of Sugar Grove, Virginia is in need of additional land. The land which they would like to purchase is owned by a lady whose family—prior to June 26, 1964—set up a perpetual care cemetery of small size. The lady involved is willing to sell the property to the church provided she can also sell the perpetual cemetery. While the church is not willing to do this, several members of the church are willing to bind together to purchase the cemetery, thus making the other lot available to the church."

Sections 57-35.2 and 57-35.3 are applicable to your inquiry. The former section reads as follows:

"After June twenty-sixth, nineteen hundred and sixty-four, it shall be unlawful for any person, firm, association or corporation, hereinafter referred to as 'person,' owning, operating or developing any cemetery to sell or offer for sale in this State, either as principal or otherwise,
any lot, parcel of land, burial or entombment right in such cemetery, and in connection therewith to represent to the public in any manner, express or implied, that the entire cemetery, a single lot therein, or burial or entombment right therein will be perpetually cared for, unless adequate provision has been made for the endowment care of the cemetery and all lots, burial or entombment rights therein as to which such representation has been made. Each person who shall undertake to develop any such cemetery after June twenty-sixth, nineteen hundred and sixty-four, shall deposit in a bank in this State an irrevocable endowment trust fund a minimum of twenty-five thousand dollars before the first lot, parcel of land, burial or entombment right has been sold.

And § 57-35.3 provides:

"Each person owning, operating or developing any such cemetery before or after June twenty-sixth, nineteen hundred and sixty-four shall hereafter deposit in a bank in this State, or in another State, if such person has, prior to June twenty-sixth, nineteen hundred and sixty-four, entered into a trust agreement by which he is required to make at least the minimum deposit required hereunder, a minimum of ten per centum of the selling price of each lot, interment right, and above ground crypts and niches, excluding below ground burial vaults, sold, which amount shall be paid in cash and deposited with the trustee of the care fund not later than thirty days after the close of the month in which payments on the sale are completed." (Emphasis supplied)

Any violation of these sections constitutes a misdemeanor. See § 57-35.10. Like other criminal statutes, these should be strictly construed.

Assuming the given facts to mean the present cemetery would be continued and that a new cemetery would not be developed, I am of the opinion that § 57-35.2 would not be applicable. Construing §§ 57-35.2 and 57-35.3 together it seems clear that the twenty-five thousand dollar trust fund requirement is applicable to any new cemetery commenced subsequent to June 26, 1964, and such sum must be deposited “before the first lot . . . has been sold.”

Section 57-35.3 would, of course, be applicable to any perpetual care cemetery not exempted by § 57-35.9. This latter section provides:

“The provisions of this article shall not apply to cemeteries owned and operated by a county, city or town or by a church, or by a nonstock corporation not operated for profit.”

It may be that the members of the church would desire to avail themselves of this section.

CITIES—Council Member—Owner of retail grocery store may vote on Food Stamp Program.

June 17, 1969

HONORABLE SOL GOODMAN
Commonwealth's Attorney for Hopewell

This is in reply to your letter of May 15, 1969, in which you present the following inquiry:

“Two members of the City Council of the City of Hopewell own retail grocery stores. The Council has on its agenda, for the next meeting, the adoption of a 'food stamp' program. This program, if
adopted, would be administered according to the dictates of the Department of Agriculture.

"Would it be proper for the two Councilmen to vote on the issue of 'food stamps'? If the 'food stamp' program is adopted, could they participate as owner of a retail grocery store, if the Department of Agriculture is without objection?"

It is my opinion that the conflict of interest statute does not prohibit the councilmen which you describe from participating in a food stamp program. Section 15.1-73 of the Code, the conflict of interest provision applicable to cities, precludes a councilman from being interested in a contract "with the city." In this instance, any contractual relation which may exist is not with the city but with the individual customer who uses the food stamps and is therefore not a contract within the proscription of the statute. See, Report of the Attorney General (1964-1965) p. 281. This office has ruled previously that a druggist serving on the board of supervisors is not prohibited by the present § 15.1-67 from selling drugs to county welfare recipients, despite the fact that payment is made by the county, Report of the Attorney General (1963-1964) pp. 249-250. Section 15.1-67 is the conflict of interest provision applicable to counties and is substantially similar to § 15.1-73.

Inasmuch as it is proper for the stores owned by the councilmen to participate in the food stamp program, I see no reason why the councilmen would be compelled to abstain from voting on the issue.

CIVIL PROCEDURE—Appeal to a Court of Record from Court Not of Record—Procedure established determined by the states.

This is in reply to your letter of July 19, 1968, in which you inquire whether § 16.1-106 of the Code conflicts with Amendment VII of the Constitution of the United States.

Section 16.1-106 of the Code provides for an appeal to a court of record from a judgment of a court not of record in civil cases wherein the matter in controversy exceeds $50.00 in value. The Seventh Amendment states that the right to jury trials in civil matters shall be preserved where the matter in controversy exceeds $20.00 in value.

It is my opinion that there is no conflict between these provisions. It is well established that the Seventh Amendment is applicable only to courts sitting under the authority of the United States, and states are free to determine their own procedure in this regard. See, U.S.C.A., Const. Amends, 7, 14; Pearson v. Yewdall, 95 U.S. 294 (1877); Iacaponi v. New Amsterdam Cas. Co., 258 F. Supp. 880 (W. D. Pa. 1966), aff'd 379 F. 2d 311 (3rd Cir. 1967); Constitution of the United States of America (Sen. Doc. 39, 88th Cong., 1963) at 1014.
CLERKS—Authority—May prohibit taking apart of loose leaf deed book by persons other than his staff.

DEEDS—Books—Loose leaf type—May not be taken apart by persons other than Clerk or his staff.

PUBLIC RECORDS—Deed Book—Loose leaf type—Limitations upon taking apart by persons other than Clerk or his staff.

April 17, 1969

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

I have your letter of April 15, 1969, in which you advise that certain people come into the Clerk's office and desire to take apart loose leaf deed books in order to make copies of these pages and you inquire

"... as to whether any one other than the Clerk and members of his staff have the right to take apart the loose leaf books for the purpose of making such copies."

Section 17-43 of the Code 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. The certificate of the clerk to such copies shall, if the paper copied be recorded in a bound volume, contain the name and number of the volume and the page or folio at which the recordation of the paper begins. No person shall be permitted to use the clerk's office for the purpose of making copies of records in such manner, or to such extent, as will interfere with the business of the office or with its reasonable use by the general public."

This clearly indicates that if a copy is desired, the clerk is supposed to furnish the copy thereof. However, the records and papers in the clerk's office, including deed books, are open to inspection and if the person inspecting the book desired to make a copy thereof and by so doing does not "interfere with the business of the office or with its reasonable use by the general public" would have a right to do so.

I am of the opinion that the right to make such copy does not include the right to take apart the loose leaf bound deed book. I am, therefore, of the opinion that no persons other than the clerk and members of his staff have the right to take apart the loose leaf book. If this were permitted, there would always be the danger of the loss of a page or not putting it back in its proper position which might cause serious trouble to someone later wanting to examine the records of the office.

September 5, 1968

HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

This is in reply to your letter of August 21, 1968, in which you requested my opinion whether the clerks may deduct a commission for the taxes imposed by
Chapter 778 of the Acts of Assembly of 1968 and collected for cities and counties.

Subsequent to the rendition of the opinions of this office which you enclosed, the General Assembly has undertaken to act on the subject of compensating clerks for services performed in collecting taxes for cities and counties. See §§ 58-65.1 and 58-67.1, Code of Virginia (1950), as amended.

Section 58-54, which embodies the provisions of Chapter 778 of the Acts of Assembly of 1968, contains no authority for the payment of compensation to the clerks for services performed in the collection of the recordation taxes assessed by that section. Therefore, I am of the opinion that there is no authority for the payment by cities and counties of compensation to the clerks for services performed in the collection of taxes under § 58-54.

CLERKS—Compensation for Performing as Clerk of the Board of Supervisors Under § 15.1-533 of the Code—How computed.

HONORABLE JOSEPH S. JAMES

September 11, 1968

I am in receipt of your letter of August 30, 1968, in which you call my attention to § 15.1-533 of the Code of Virginia, as amended by Chapter 328 of the Acts of Assembly of 1968, and present certain questions in connection therewith which will be stated and considered seriatim. As recently amended, § 15.1-533 of the Virginia Code provides:

"Such clerk may receive as compensation for his services as clerk of the board a sum not exceeding twenty-five hundred dollars annually except that the clerk of the board of the county of Henrico shall receive a salary in an amount determined by the board, and such salary shall be in lieu of and in satisfaction of any compensation allowable under § 33-160. Such salaries shall not be considered in determining the maximum total annual compensation of officers as set forth in §§ 14.1-136 and 14.1-143."

**Question:** "1. For practical purposes would it be proper to consider when determining excess fees that the provisions of the new Act, with respect to the maximum amounts to be excluded, would be applicable to only the last six months and that a proration of the annual maximums on an exact per day basis would be unnecessary?"

**Answer:** As you point out, Chapter 328 of the Acts of Assembly (1968) became effective on June 28, 1968. However, this statute does not purport to fix the salary of any clerk as clerk of the board of supervisors as of that date or of any date; it merely provides that such clerk "may" receive as compensation for his services as clerk of the board of supervisors a sum "not exceeding" twenty-five hundred dollars annually, with the stated exception for the clerk of the board of Henrico County. You state that the statute in question would be considered by most boards of supervisors as effective on July 1, 1968, and it would thus appear that such boards of supervisors would fix salaries under it as of that date, rather than June 28, 1968. Such salaries, so fixed as of July 1, 1968, would come within the scope of the exclusion prescribed in the terminal sentence of § 15.1-533.

**Question:** "2. Is the exclusion contained in Section 15.1-533, as amended, of the amount allowable under Section 33-160 applicable to the clerks of the boards of all counties, or does it apply only to Henrico County?"

**Answer:** The language of the exception in § 15.1-533 with respect to the clerk of the board of Henrico County formerly appeared as a com-
complete, independent provision applicable only to Henrico County in the now repealed § 15.1-534 of the Virginia Code, and I am of the opinion that the clause "and such salary shall be in lieu of and in satisfaction of any compensation allowable under § 33-160" would be applicable only to the clerk of the board of Henrico County.

Question: "3. Assuming that it is held that the clerks of all courts, except Henrico, may continue to receive compensation in road matters and that the following compensation from the county will be received by the clerk in 1968:

"$1,500 as county clerk
300 in road matters
600 as clerk of the board from January 1 through June 30
"$1,250 as clerk of the board from July 1 through December 31

"What amount of the aforementioned compensation should be disregarded for purposes of computing excess fees for 1968?"

Answer: Under the express provisions of the concluding sentence of § 15.1-533 of the Code of Virginia, as amended, the above specified compensation of $1,250 paid as clerk of the board of supervisors from July 1 through December 31, 1968, would not be considered in determining the maximum total annual compensation of such clerk. By contrast, none of the remaining amounts set out as compensation in the example you present is made excludable by the language of the statute under which it is paid—i.e., § 14.1-164, § 33-160 and § 15.1-533 prior to its recent amendment. However, it would appear that all such amounts ($1,500 as county clerk, $300 in road matters, $600 as clerk of the board from January 1 through June 30, 1968) would be disregarded under the provisions of § 14.1-143 of the Virginia Code, to which you refer in the second paragraph of your communication in the following language:

"Section 14.1-143 provides that in the computation of excess fees of clerks of courts that the compensation paid by the county be disregarded in an amount not exceeding $2,500, except for three counties a maximum exclusion of $5,000 is provided. The amount to be disregarded in the past has been construed to include the compensation paid the clerk under the provisions of Section 14.1-164 as county clerk, Sections 15.1-533 or 15.1-534 as clerk of the board, and Section 33-160 for services in road matters. This meant that, if a clerk were paid $1,000 as county clerk, $300 in road matters and $1,500 as clerk of the board, only $2,500 would be disregarded assuming that the county was not one of the counties for which the $5,000 exclusion was provided."

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CLERKS—Costs—Criminal cases—Collection not required before clerk may accept fines.

HONORABLE ROBERT C. WRENN, Clerk
Circuit Court of Greensville County

October 10, 1968

This is in response to your letter of September 23, 1968, which reads as follows:

"In light of recent court rulings regarding payment of fine and costs, would you please advise me as to whether or not a clerk can require that the costs be paid in a case before accepting any on a fine."
You make reference, of course, to the decision on September 6, 1968, by the Supreme Court of Appeals of Virginia in the case of *Wright v. Mathews*, 209 Va. ....... Nothing contained in the opinion in that case is applicable to the inquiry you present; however, I have been unable to find any statutory authority which permits a clerk to require that costs be paid in a criminal case before the clerk will accept any fine. In view of the foregoing, I am of opinion that your question must be answered in the negative.

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**CLERKS—Fees—Five dollars for issuing an interrogatory summons.**

**FEES—Clerks—Five dollars for an interrogatory summons.**

May 5, 1969

HONORABLE CECIL W. JOHNSON
Clerk of The Court of Hustings, City of Portsmouth

This is in reply to your letter of April 25, 1969, in which you present the following inquiry:

"Will you please give me an opinion as to the amount of the Clerk's fee for issuing an interrogatory summons. Section 14.1-125 provides for a fee of $3.00 for interrogatory summons in Courts not of record, however, the only authority I can find that pertains to Courts of record is Section 14.1-112 (23)."

I am aware of no specific provision for the amount of the fee to be charged by a court of record for an interrogatory summons. In such a case, the fee would be determined by § 14.1-112(23), which provides a five dollar fee for services for which no specific fee is provided by statute.

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**CLERKS—Fees—Forfeiture Proceedings.**

**COMMONWEALTH ATTORNEYS—Forfeiture Proceedings—Not entitled to fees.**

**FEES—Clerks, Commonwealth Attorneys, Sheriffs and Sergeants—Forfeiture proceedings.**

**MOTOR VEHICLES—Forfeiture Proceedings—Fees and charges taxed as costs for sheriff and clerks.**

**SHERIFFS AND SERGEANTS—Fees—Forfeiture proceedings.**

June 17, 1969

HONORABLE V. ELWOOD MASON, Clerk
Circuit Court of King George County

This is to acknowledge receipt of your letter under date of May 27, 1969, in which you relate the following:

"Under § 46.1-351.2 of the Code of Virginia, the Sheriff of King George County was ordered to sell an automobile that had been condemned and forfeited to the Commonwealth of Virginia.

"The Sheriff has sold the vehicle, paid towing and storage charges and paid the balance to me as Clerk of the Circuit Court. My question is what fees, charges, commissions, etc. may be taxed as costs for the Commonwealth's Attorney, Sheriff and Clerk of Circuit Court before paying the excess into the Literary Fund."
In my opinion letter of July 29, 1966, to the Honorable Gary T. Keyser, Sheriff of Warren County [Report of Attorney General (1966-1967), page 267], I stated the view that where the proceeds of sale of an automobile under Code § 46.1-351.2 are sufficient to pay all costs, any sheriff's commission should be computed in accordance with Code § 14.1-109, which provides 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."

As concerns the clerk's fee for services rendered in a Code § 46.1-351.2 proceeding, again assuming the proceeds of sale are sufficient to pay all costs, it is my interpretation that Code § 14.1-112, paragraph (23) is applicable. Said paragraph states that:

"For all services rendered by the clerk in any court proceeding for which no specific fee is provided by law, the clerk shall charge a fee of five dollars, to be paid by the party filing said papers at the time of filing."

A different situation obtains regarding fees for such prosecutions and the attorney for the Commonwealth. This office has previously ruled that the forfeiture of a motor vehicle which has been involved in the unlawful transportation of alcoholic beverages is a part of the normal duties of the attorney for the Commonwealth for which he is compensated by his salary as such. See, Report of the Attorney General (1956-1957), page 60. The forfeiture sections contained in Title 46.1 were patterned after the alcoholic beverages forfeiture statutes (§§ 4-55 and 4-56). I am, therefore, of the opinion that the attorney for the Commonwealth is not entitled to any fee in such prosecutions inasmuch as his annual salary provides for his entire compensation in such cases.

CLERKS—Recordation—Settlement agreement attached to and made a part of decree—Recorded in chancery order book.

December 10, 1968

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

This is to acknowledge receipt of your letter of November 21, 1968. I shall answer the questions raised therein seriatim.

"Recently I have received a divorce decree to which is attached an exhibit, which is the separation agreement signed by the parties to the marriage, and duly acknowledged.

"First: At the end of the decree the Judge has entered the order but in the body of the decree it recites that the exhibit, which is a settlement agreement, is attached to and made a part of the decree. In your opinion, should I only record the decree in the Chancery Order Book, or should the decree be recorded followed by the settlement agreement?" [Underscoring supplied]

Answer. Section 17-28 of the Code of Virginia (1950), as amended, provides, among other things, "There shall be kept in the office of the clerk . . . two order books, to be known as the common-law order book and the chancery order book, . . . and in the chancery order book, all decrees and decretal orders of such
court, . . ." This certainly means that the decree in its entirety must be recorded in the chancery order book. Inasmuch as the settlement agreement was made a part of the decree it should be recorded in the chancery order book.

"Second: The 1968 General Assembly amended Section 17-30 of the Code of Virginia by adding in the third or fourth paragraph: 'Signing of the individual orders that make up the entire day's proceedings, when such signature is shown in said order book, shall be deemed to be compliance herewith, except at the end of the term as hereinafter set forth'.

"In reading the whole of Section 17-30 with the amendment, my Judge and I have not been able to determine exactly what the amendment means. Will you please give me your interpretation of that amendment?"

Answer. The apparent purpose of this amendment is to relieve the judge of the clerical duty of signing the order book at the end of each day's proceeding and to expedite and facilitate the orderly keeping of the court records. The procedure under the amendment is not mandatory. Hence the practice heretofore pursued by the clerks in recording court orders and the signing of the order books may be continued. In order to comply with the said statute the judge must actually sign on the order book at the end of each order or a photostatic copy of the court order including the judge's signature must be spread on the order book. The authority for recording court orders by means of photostating is found in §§ 17-59 and 17-70 of the Code.

CLERKS—Recordation of Contracts in Deed Books—Contracts relating to or affecting real and personal property.

CONTRACTS—Recordation—Where relates to or affects real and personal property.

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

February 21, 1969

This is to acknowledge receipt of your letter of February 7, 1969, with which you enclose a copy of two instruments, one entitled "Dealer Sales Contract," and the other entitled "Contract." You inquire whether either or both of these documents, if properly acknowledged, may be recorded on the deed books, or can either or both of them be treated as Financing Statements. Each will be discussed separately.

(1) The Dealer Sales Contract concerns the sale and delivery of petroleum products between an oil company (distributor) and the operator of a gasoline filling station (dealer). Such products are to be delivered at the filling station, the location of which is designated in the contract. This contract provides, among other things, that the Distributor has the right to enter upon the Dealer's premises for the purpose of altering, repairing or removing advertising signs. The owner of such premises agrees to be bound by the provisions of the agreement between the distributor and the dealer respecting the painting and placing of advertising signs upon the premises and the title to and ownership of such signs, and waives the right of distraint or other lien upon such signs for rent, etc.

(2) The copy of the Contract which you enclose indicates that personal property located or installed on certain premises described therein, is leased for a specified term of years. The leased property is to be used solely for the purpose of storing fuel oil sold to lessee by a specified party.

Your attention is invited to § 17-61 of the Code of Virginia (1950), as amended, which provides in part that:
"... if a deed, ... or other writing ... 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." (Emphasis supplied)

I am of the opinion that as both of these contracts either relate to or affect real property as well as personal property, therefore they should be recorded in the deed book and indexed according to § 17-61.

Of course these instruments must be properly acknowledged before they can be recorded. See §§ 55-106 and 55-113 of the Code. The documents which you enclosed are returned herewith.

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**CLERKS—Recordation of Subdivision Plat—Clerk may decline to record until requirements of § 15.1-473 met.**

December 5, 1968

**HONORABLE JOHN ALEXANDER**
Commonwealth's Attorney for Fauquier County

This is in reply to your letter of November 27, 1968, from which I quote the following:

"Section 55-106, Code of Virginia, provides in essence, that upon presentation of a writing acknowledged by the person whose name is signed thereto or proved by two witnesses in accordance with said code section and upon payment of the necessary tax and fees, the Clerk shall record such instrument.

"Section 10-3 of the Zoning Ordinance of Fauquier County provides that the Clerk shall not record any subdivision plats until the same have been sent to the Planning Commission and approved by the governing body or its agent.

"I inquire that should one present to the Clerk a subdivision plat duly authenticated and acknowledged under Section 55-106 and appropriate accompanying statutes, may the Clerk decline to record the same because it does not bear a certificate from the local Planning Commission or Board of Supervisors in compliance with the Zoning Ordinance of Fauquier County, Virginia."

The provision of § 55-106 of the Code of Virginia that the clerk "shall admit to record any such writing as to any person whose name is signed thereto, when it shall have been acknowledged by him, or proved by two witnesses" is prefaced by the clause "except when it is otherwise provided." One such exception becomes effective after the adoption by the governing body of any county or municipality of a subdivision ordinance in accordance with Chapter 11, Title 15.1 of the Code of Virginia.

In this respect your attention is directed to paragraph (b) of § 15.1-473, which provides that no such plat of any subdivision shall be recorded unless and until it shall have been submitted to and approved by the local commission or by the governing body or its duly authorized agent. The same statute, in paragraph (e) thereof, specifically provides that no clerk of any court shall file or record any such plat of a subdivision until such plat has been approved as required therein and, further, makes the penalties provided by § 17-59 applicable to any failure to comply with the provisions of this subsection.

In view of these statutory provisions, it is my opinion that a clerk confronted with the request to record a subdivision plat under the stated conditions not only has the right but the duty to decline to record same until it has been approved as required by § 15.1-473 and, therefore, I shall answer your question in the affirmative.
CLERKS—Recordation of Writings—Duty to record does not extend to all writings.

RECORDATION—Duty of Clerk to Record Writings—Does not extend to all writings.

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

This is to acknowledge receipt of your letter of May 2, 1969, in which you state in part:

“We enclose herewith a photo copy of the constitution of the Tazewell County School Bus Drivers Association. The chairman of this group presented this document today requesting that the same be filed in this office as public notice of the existence of this group. We know of no provision in the code which permits the filing of such a document, and inquire if there is provision for the filing provided the same would be acknowledged.”

Section 55-106, Code of Virginia (1950), as amended, imposes a duty on the Clerk to record writings that are to be or may be recorded when such writings are properly acknowledged. There are a number of writings which are permitted to be recorded by statute, such as deeds, writings affecting the transfer and the encumbrance of property both real and personal, discharge records of veterans, lists of induction records, etc. However, I can find no statute which would permit the recordation of any writing and impose a duty on the Clerk to record same, simply because the holder desires it to be recorded and acknowledges it.

I am, therefore, of the opinion that the writing you describe in your letter is not recordable.

HONORABLE WALTER M. EDMONDS, Clerk
Circuit Court of the City of Portsmouth

This is in reply to your letter of June 10, 1969, in which you state that you were appointed Clerk of the Circuit Court of the City of Portsmouth on May 16, 1969, to fill the unexpired term which extends to December 31, 1975. You further state that the City Council has set your salary at the rate of $12,000.00 per annum, which is less than that paid the previous incumbent whose unexpired term you were appointed to fulfill.

In this connection, you raise the question contained in the following, which I quote:

“I would appreciate your opinion as to whether or not the action of the City Council in fixing the salary of the Clerk, a constitutional officer, and reducing it when an appointment is made to fill an unexpired term is in accordance with the law.”

Section 14.1-144 of the Code of Virginia states that in each city having a population of over 114,000 and not exceeding 150,000 inhabitants, the clerks of courts shall each be paid a salary of not less than $12,000.00, but not to exceed $14,000.00, per annum. You state that the City of Portsmouth falls within this population category. Several other Code sections, namely § 14.1-145, et sequel, increase the maximum compensation which may be allowed such clerks.

I find no constitutional provision prohibiting the decreasing of a clerk’s salary.
during a term of office. In my interpretation, the Constitution of Virginia indicates that the compensation of clerks shall be provided by general law. The salary in question meets the minimum requirements of general law as indicated by the statutes herein cited and, accordingly, I shall answer your question in the affirmative.

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COMMISSIONERS OF REVENUE—Office Hours—Control over.

November 8, 1968

HONORABLE JOHN H. ARTRIP
Commissioner of the Revenue of Dickenson County

This is in reply to your letter of October 30, 1968, in which you asked to be advised if you are required to keep your office open on Saturdays.

In an opinion of this office of November 21, 1967, to the Honorable Elsie W. Faris, Treasurer-elect of Fluvanna County, this office opined that the establishment and maintenance of the working hours of constitutional officers were the direct responsibility of the officers themselves, subject to any controlling statute dealing directly with the matter or any authority which may be vested in the appointing authority.

I am, therefore, of the opinion that the responsibility for the establishment and maintenance of the working hours of the commissioner of the revenue rest with that officer subject to the concurrence of the State Tax Commissioner as provided for by § 58-857 of the Code of Virginia (1950).

In the event of any neglect of his duties by the Commissioner of the Revenue because of improper office hours, the matter is referred to the county court for action under the provisions of §§ 58-892 and 58-893 of the Code.

Uniformity of office hours in a county is desirable and a county commissioner of the revenue would be on safe ground to conform to the prevailing office hours in his county. If other county offices are closed on Saturday this would justify the commissioner of the revenue to close his office on Saturday except during the rush period for the filing of tax returns.

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COMMONWEALTH ATTORNEYS—Disability Due to Illness—Appointment and payment of attorney to act in stead.

March 20, 1969

HONORABLE DICK B. ROUSE
Commonwealth’s Attorney for the City of Bristol

I am in receipt of your inquiry of March 18, 1969, concerning the proper method of compensating an attorney appointed by the Judge of the Corporation Court of the City of Bristol to act in your stead during your recent illness.

You direct my attention to a former opinion of this office to the Honorable Reginald H. Pettus dated May 26, 1959, found in the Report of the Attorney General (1958-1959), page 41, wherein a ruling was made in a similar situation that the Court should enter an order fixing the compensation and directing the proper State and local officials to make payment.

The question to be answered is whether the State should pay the compensation and expenses of the appointed attorney or whether the State should pay half and the City of Bristol half.

I concur in your view that § 19.1-9 of the Code of Virginia (1950), as amended, concerning absence of an attorney for the Commonwealth due to disqualification or disability is applicable. Section 19.1-11 concerns absences of an attorney for the Commonwealth for reasons other than those outlined in § 19.1-9 and is not applicable.
Section 19.1-9 being applicable, then the manner of compensation would be as outlined in § 19.1-10 which provides:

"The attorney at law so appointed shall receive such compensation as the Judge of the Circuit Court of the County or Circuit or other court of the City in which the case is tried or the service is rendered deems reasonable, in addition to his actual expenses for the time that he is actually engaged, such compensation and expenses to be paid by the state." (Emphasis mine)

You will note that the 1958-1959 opinion, to which you refer, was made when the statute (then § 19-5) provided that the State and county, or city, would pay the compensation and expenses. It would seem clear that under the statute as amended the State would pay the compensation and expenses. The Court should enter an order fixing the compensation it deems reasonable and directing the proper State officials to make payment.

COMMONWEALTH ATTORNEYS—Duties—May serve as counsel for local planning commission without additional compensation and be present with such committee at its meetings.

PLANNING COMMISSION—Local—Commonwealth Attorney may serve as counsel to.

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

This is to acknowledge receipt of your letter of May 19, 1969, in which you state:

"Should I, as Commonwealth Attorney, serve as attorney for and sit with the Nottoway County Planning Commission? It has been requested that I do so and I have some doubt about the propriety of my serving. Any advice you can give me would be greatly appreciated."

Chapter 11, Title 15.1, Code of Virginia (1950), as amended, pertaining to the establishment of local planning commissions does not contain any provision relating to the duty of the Commonwealth's Attorney in connection therewith. These local planning commissions in the counties are created by the governing body, that is, the Board of Supervisors, which appoints the members. See §§ 15.1-427 and 15.1-437. The attorney for the Commonwealth is the legal advisor or counsel for the Board of Supervisors. Section 15.1-550 of the Code, as amended in 1968, provides in part:

"The attorney for the Commonwealth shall be available to the board and give his legal opinion when requested."

Furthermore, it has been the opinion of this office for many years that it is the duty of the Commonwealth's Attorney to give legal advice and opinions to all public officials and boards of his county. See opinion expressed in letter to the Honorable Robert C. Goad, dated July 26, 1962, Report of the Attorney General (1962-1963), page 22. In an opinion set forth in a letter dated June 11, 1964, to the Honorable E. M. Jones, Report of the Attorney General (1963-1964), page 276, this office expressed the view that the Board of Supervisors can not lawfully pay the Commonwealth's Attorney or the Clerk for any services rendered to the local planning commission which come within the scope of their official duties.
REPORT OF THE ATTORNEY GENERAL

Under the circumstances, it is perfectly proper for you to serve as counsel for the local planning commission, without additional compensation, and be present with such commission at its meetings.

COMMONWEALTH ATTORNEYS—Institution of Forfeiture Proceedings on Motor Vehicles—Instituted in county in which seizure made.

MOTOR VEHICLES—Forfeiture Proceedings—Instituted in county where seizure made.

March 12, 1969

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

This will acknowledge receipt of your letter of March 1, 1969, in which you relate the following:

"A resident of Gloucester County was apprehended for driving without an operator's license in a neighboring county. After the defendant was released, the arresting officer discovered that the offender's operator's license had been revoked by the Division of Motor Vehicles.

The automobile and offender are now in this county, and the officer now has in his possession a warrant of arrest emanating from the neighboring County which will be served in Gloucester County.

My question is does 46.1-351.1 of the Code require the Commonwealth's Attorney of the neighboring county or this office to institute forfeiture proceedings."

Code § 46.1-351.1 requires the officer making a seizure thereunder to report such seizure to the attorney for the Commonwealth in the county or city in which such arrest and seizure was made. The first sentence of paragraph (a) of § 46.1-351.2 of the Code provides that within sixty days after receiving the seizure notice under § 46.1-351.1 the Commonwealth's Attorney shall file "an information against the seized property, in the Clerk's Office of the Circuit Court of the county, or of the Corporation Court, Hustings Court, or other court of record having jurisdiction in the city, wherein the seizure was made."

It appears from your statement of facts that the arrest and seizure of the motor vehicle were effectuated in Gloucester County. Applying then, the above mandate of the named statute to your fact pattern, I am of the opinion that you would be the proper official to institute the forfeiture proceeding.

COMMONWEALTH ATTORNEYS—May Represent School Boards.

January 27, 1969

HONORABLE ANDRE EVANS
Commonwealth’s Attorney for City of Virginia Beach

This will acknowledge your letter of January 22, 1969, relative to a suit believed imminent against the school board and/or superintendent. You wish my advice on whether you would be exceeding your authority in representing these officials, or if the city attorney or private counsel should represent them.

Section 22-56.1 of the Code of Virginia (1950), as amended, is applicable to your inquiry. This section provides:

"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."

Thus any of the attorneys you inquire about may, if approved by the school board, be employed to represent them. You would not exceed your authority in representing the school board and/or any school official, since the statute clearly gives you such authority.

COMMONWEALTH ATTORNEYS—Salary—Not subject to license tax on gross receipts of attorneys.

TAXATION—License Tax on Gross Receipts of Attorneys—Does not apply to salary of commonwealth attorney.

March 25, 1969

HONORABLE E. EUGENE GUNTER
Commonwealth’s Attorney for Frederick County

This is in reply to your letter of March 6, 1969, in which you request my opinion whether the salary of the Commonwealth Attorney is subject to the one percent gross receipts tax levied by the City of Winchester under § 58-266.1 of the Code of Virginia.

The Commonwealth Attorney is an employee and officer of government and his salary received for performing in that capacity is not subject to the one percent gross receipts tax. The Assistant Commonwealth Attorney and City Solicitor of the City of Winchester are also employees and officers of government and their salaries from office are likewise not subject to the tax.

I am enclosing a copy of an opinion to the Honorable W. R. Moore, Commissioner of the Revenue for the City of Norfolk, found in the Opinions of the Attorney General (1967-1968), page 286, based on similar facts which concurs with this opinion.

COMPATIBILITY OF OFFICES—Clerk of the Corporation Court—May be ex-officio clerk of the Board of Commissioners pursuant to § 24-200 of the Code of Virginia.

June 17, 1969

HONORABLE CARL E. HENNCRICH
Clerk of the Corporation Court, City of Charlottesville

In response to your inquiry of June 13, 1969, I am writing to advise that I am unable to discover any provision of Virginia law which would prevent a clerk of the corporation court, who is a candidate for election with opposition, from being ex-officio clerk to the board of commissioners pursuant to § 24-200 of the Virginia Code.
REPORT OF THE ATTORNEY GENERAL

COMPATIBILITY OF OFFICES—Commonwealth’s Attorney May Not Serve as Member of County Water and Sewer Authority.

COMPATIBILITY OF OFFICES—Judge of County Court May Not Serve as Member of County Water and Sewer Authority.

WATER AND SEWER AUTHORITIES—Members—May not include Judge of county court or Commonwealth’s Attorney.

May 6, 1969

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

This is in reply to your letter of April 17, 1969, in which you present the following questions relevant to the Rappahannock County Water and Sewer Authority:

“1. Can a Judge of the County Court be a member of the County Water and Sewer Authority and is it legal for him to serve as attorney for the Authority?
   “2. Is it legal for the Commonwealth Attorney to serve as attorney for a County Water and Sewer Authority?”

Although I have been unable to find any provision of law which would preclude a county judge from serving on a water and sewer authority, you will note that § 15.1-67 of the Code prohibits county judges and attorneys for the Commonwealth from becoming interested “in any contract, fee, commission, or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof . . . .” While the statute does provide some exceptions which permit a Commonwealth’s attorney to be employed by a county, none of these exceptions are pertinent to your inquiry. In a previous opinion of this office, it was ruled that the provisions of § 15.1-67 applied to a water and sewer authority created pursuant to the provisions of the Virginia Water and Sewer Authorities Act. See, Report of the Attorney General (1967-1968) p. 218, a copy of which is enclosed.

It is, therefore, my opinion that the statute would preclude either of the above officials from serving as the attorney for the authority.

CONCEALED WEAPONS—Permit to Carry—Validity throughout State.

March 21, 1969

HONORABLE LAWRENCE R. AMBROGI
Assistant Commonwealth’s Attorney for Frederick County

This is in reply to your letter of March 17, 1969, in which you present the following inquiry:

“In my capacity as Assistant Commonwealth Attorney for Frederick County, Virginia, I have been confronted with two questions regarding the granting of a permit to carry a concealed weapon.
   “Therefore, I respectfully request that you advise me as to whether, pursuant to Title 18.1-269 of the Code of Virginia (1950), as amended, and other law of the Commonwealth of Virginia:
   “1. An applicant for a permit to carry a concealed weapon may petition only the Circuit or Corporation Court where he resides;
   “2. A permit to carry a concealed weapon is valid statewide or only within the jurisdiction of the Court which granted it.”

Section 18.1-269 of the Code forbids the carrying of certain concealed weapons but, in its terminal paragraph, provides for the issuance of a permit as follows:
"Any circuit or corporation court, upon a written application and satisfactory proof of the good character and necessity of the applicant to carry concealed weapons, may grant permission so to do for one year. The order granting such permission shall be entered in the law order book of such court." (Italics supplied.)

As § 18.1-269 is not restricted by its terms to residents of the county in which the court sits, it is my opinion that the court would be able to issue a permit to anyone who is properly before the court and able to satisfy the requirements of the statute.

This office has ruled in a previous opinion that a permit issued under the above statute is valid throughout the State. See, Report of the Attorney General (1954-1955), p. 48.

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COSTS—Criminal Cases—Imposed where accused is convicted.

February 3, 1969

HONORABLE VIRGIL H. GOODE
Commonwealth’s Attorney for Franklin County

This is in response to your letter of January 13, 1969, which reads in part as follows:

"An indigent defendant, who was indicted for a felony, after proper inquiry, filed an affidavit of poverty in the County Court as provided by Section 19.1-241.3, at which time inquiry was made by the Judge as to his financial situation and it was found that the defendant had $50.00 in cash which the court ordered to be deposited with the Clerk to be held and applied on 'costs and attorney's fee', an order having been entered to that effect.

"When the case was tried the defendant was found not guilty.

"Pursuant to Section 14.1-184 counsel for the defendant was allowed a fee of $250.00 which was paid pursuant to Section 14.1-184 of the Code.

"My inquiry is whether or not the amount deposited with the Clerk of $50.00 can be applied on attorney's fee and remitted to the State Treasury or should it be returned to the defendant."

Section 19.1-320 of the Code of Virginia (1950), as amended, requires the Clerk to make up a statement of expenses incident to the prosecution when the accused is convicted. I have previously ruled that costs are not to be assessed in cases which result in acquittals (see my opinion to Honorable Charles R. Purdy, Clerk, Report of the Attorney General (1965-1966), p. 55).

I know of no statutory authority for the Court to require the defendant who has been acquitted to bear the cost of court-appointed counsel. In view of the foregoing, I am of opinion that the $50.00 should be returned to the defendant.

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COSTS—Felony and Misdemeanor Cases—Nonpayment by prisoner—May not be sole basis for incarceration.

October 22, 1968

HONORABLE LACY H. ANDERSON
Sheriff of Frederick County

This is in response to your letter of October 10, 1968, which reads in part as follows:
“We have been informed that prisoners can no longer be incarcerated to serve out costs on criminal cases.

“However, we have not received any official authorization concerning prisoners serving time in our County Jail for costs in misdemeanor cases. Mr. John Rice, Judge of the Winchester Municipal Court, advised that he has not yet received this authorization. Our commitment forms still include costs for subjects who have not paid them.”

Invoking the original jurisdiction of the Supreme Court of Appeals of Virginia, William Ernest Wright sought a writ of habeas corpus, directing his release from a State prison farm, where he was confined for failure to pay the costs of criminal prosecutions. At the time he filed his petition, he was detained solely for payment of the aforesaid costs. In an opinion by Mr. Justice Gordon, the Supreme Court of Appeals held in Wright v. Matthews, 209 Va. ... (Sept. 6, 1968), that Wright's imprisonment for nonpayment of costs contravened the Thirteenth Amendment to the Constitution of the United States.

In view of the foregoing decision, I am of opinion that prisoners can no longer be incarcerated to serve out costs in criminal cases either felony or misdemeanor. Such prisoners that are now detained solely for nonpayment of costs should be released from custody.

COSTS—Recording Testimony—Not paid by Commonwealth from appropriation for criminal charges.

CRIMINAL PROCEDURE—Cost for Recording Testimony—Not paid by Commonwealth from appropriation for criminal charges.

HONORABLE RICHARD L. SHELTON
Deputy Clerk, Circuit Court of Hanover County

January 15, 1969

I am in receipt of your letter of recent date, in which you present the following inquiry:

“My question is, whether pursuant to Section 17-30.1 it would be proper to bill the Commonwealth at the rate of $10.00 for each felony case and $1.00 for each misdemeanor case for the recording fee allowed by this section when it has not been paid by the defendant or the defendant is acquitted. May I bring to your attention the second paragraph of this section as follows: . . . . "and the expense of reporting or recording the trial of criminal cases shall be paid by the Commonwealth out of the appropriation for criminal charges, upon approval of the trial judge, but the Commonwealth shall be entitled to receive from the defendant, if convicted, the per diem charges of the reporter or reasonable charge attributable to the cost of operating such mechanical or electronic devices, which charges shall be taxed as a part of the costs of the case". . . . We ask this being aware of the recent ruling of your office pertaining to the non-payment of costs as this will greatly affect the amount of money which will go into our account for the maintenance and replacement of the recording equipment which we are required to maintain in our Court.”

I am of the opinion that your inquiry should be answered in the negative. In this connection “the rate of $10.00 for each felony case and $1.00 for each misdemeanor case” mentioned in your communication are not fees allowed by § 17-30.1 of the Virginia Code but are the maximum sums allowed to be taxed by clerks of courts of record pursuant to § 14.1-116 of the Virginia Code. With respect to the latter sums, I am forwarding to you a copy of a previous opinion
of this office dated October 7, 1964, to the Honorable J. Gordon Bennett, Auditor of Public Accounts, in which it was ruled that no part of these costs are to be paid by the Commonwealth. See, Report of the Attorney General (1964-1965) p. 59.

In addition, I am forwarding to you copies of two other opinions of this office dated June 18, 1964 and June 19, 1964, in which the responsibility of the Commonwealth to make payment of the expenses and charges mentioned in § 17-30.1 of the Virginia Code in criminal cases was considered and discussed at length. See, Report of the Attorney General (1963-1964) pp. 88 and 86.

COSTS—Writ Tax—One tax chargeable where original petition filed joins in more than one property owner.

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

This is in reply to your letter of September 16, 1968, which reads in part as follows:

"At times the Virginia Electric & Power Company and other utility companies will bring in what I call an omnibus suit, that is, in one suit they will bring in many parties with separate tracts or parcels of land to be condemned.

"In your opinion should this be treated as one suit and only one writ tax and Clerk's fee collected or should there be a separate Clerk's fee and writ tax for each parcel of land?"

Section 25-46.7 (f) of the Code of Virginia (1950), as amended, relating to the filing of a petition in condemnation proceedings, states:

"There may be joined in the same petition one or more separate pieces, tracts, parcels or lots of land, whether in the same or different ownership and whether or not sought for the same use, provided, however, the court, on its own motion or on motion of any party in furtherance of convenience or to avoid prejudice, may order a severance and separate trial of any claim or claims or of any issue or issues."

In view of the language of this section, I am of the opinion that the original petition filed by the company should be treated as one suit and that only one writ tax and clerk's fee should be collected. However, should subsequent individual suits be filed, then separate writ taxes and clerk's fees would be collected on each.

COUNTIES—Authority—to alleviate poverty—May not make independent appropriations of money for relief purposes.

PUBLIC WELFARE—Anti-poverty Programs—Counties—May not make independent appropriations of money for relief purposes.

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

I am in receipt of your letter of July 23, 1968, in which you present the following situation and inquiry:

"As you are no doubt aware, the County of Prince Edward, together
with certain other counties in the State of Virginia, have been designated as poverty counties by certain agencies of the federal government.

"In order to alleviate this problem it has been suggested to the Board of Supervisors that they appropriate a certain sum which would be payable to every child in Prince Edward County under the age of twenty-one years, without regard to any other standard other than they are under the age of twenty-one years. Such appropriation would be to alleviate the poverty of the county and under the provisions of Section 15.1-510 of the Code of Virginia for the promotion of the general health and welfare of the inhabitants of the county.

"I have examined the statutes and the Constitution in regard to this, however, I have not found any direct prohibition against such appropriation and would appreciate your opinion as to whether or not such appropriation is allowable under the statutes of the Constitution of the Commonwealth."

I am of the opinion that your inquiry should be answered in the negative. In this connection, I am forwarding to you a copy of an opinion of this office dated September 30, 1938, to the Honorable William H. Stauffer, Commissioner of Public Welfare, in which the then Attorney General (later Justice) Abram P. Staples ruled that the Virginia Public Assistance Act superseded any authority the board of supervisors of a county might otherwise have possessed to make direct contributions for relief so long as public welfare funds were available and that a board of supervisors might not make an independent appropriation of purely local money for relief purposes. As you are aware, the provisions of the Virginia Public Assistance Act, to which Judge Staples referred, are now contained in Title 63 of the Virginia Code, and I am of the opinion that the view expressed in the enclosed opinion would be equally applicable to the situation you present.

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COUNTIES—Board of Supervisors—Adjustments to appropriation ordinances—May be made by resolution.

APPROPRIATIONS—Counties—May adjust by resolution.

January 2, 1969

HONORABLE RAYMOND R. ROBRECHT
Commonwealth's Attorney for Roanoke County

This is in reply to your letter of December 19, 1968, in which you present the following inquiry:

"Roanoke County has an appropriation ordinance which applies to its appropriations for each fiscal year. During the course of the year as adjustments are made and new appropriations required, the Board of Supervisors will from time to time appropriate additional funds to various County agencies. Since this is in effect an amendment to the appropriation ordinance, must such amendment be treated as other amendments to ordinances with regard to notice of hearings, newspaper advertisements and publication of the ordinance or amendment for two weeks after it is adopted? The reason I am asking this question is that the County budget is only required to be summarized as far as publication goes, and I am not sure if an appropriation ordinance should be treated like other ordinances."

The answer to your inquiry is found in §§ 15.1-160, 15.1-161, 15.1-162 and 58-839 of the Code. This office has ruled on numerous occasions that the purpose of these statutes is to extend to local governing bodies firm control over the expenditures of local agencies. In this regard I am enclosing a copy of a previous
opinion of this office, Report of the Attorney General (1959-1960) p. 73, wherein it was ruled that the budget estimate prepared pursuant to the present §§ 15.1-160, et seq., is for fiscal planning purposes only and does not limit the control of the board of supervisors over the expenditures of particular agencies. While that opinion relates to control of school board expenditures it would be equally applicable to other agencies of the political subdivision. See, Report of the Attorney General (1960-1961) p. 52.

In view of the foregoing, the budget adjustments to which you refer do not require amendment of the appropriation ordinance. It is my opinion that these adjustments may be properly made by resolution of the board of supervisors.


January 9, 1969

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

This is in reply to your letter of December 21, 1968, in which you inquire as follows:

"I have at hand two deeds conveying to 'the County of Gloucester, acting for and on behalf of Gloucester Point Sanitary District.' The title to this property has not been examined and approved in writing by a competent and discreet attorney at law designated by the Judge of the Circuit Court; no approval has been made by said Court, and no place for approval by the Commonwealth's Attorney and acceptance by the persons authorized to act on behalf of the County was provided in said Deed.

"My question is do the provisions of Chapter 8, Title 15.1, regarding the conveyance of property to counties, apply in the case of counties acquiring land in behalf of a sanitary district?"

The provisions of Title 15.1, Chapter 8, to which you refer are §§ 15.1-262, 15.1-285 and 15.1-286 and impose certain requirements on conveyances of real estate to counties. A sanitary district is established under Title 21 of the Code, specifically by order of the circuit court pursuant to § 21-113, and is a separate legal entity from the county in which it is located. The governing body of the county is the governing body of the sanitary district and is given the authority to acquire land on behalf of the sanitary district by virtue of § 21-118(2). Title 21 imposes no restrictions on the transfer of property to a sanitary district.

I am therefore constrained to believe that compliance with the sections to which you refer is not essential to the validity of the transfer. However, I direct your attention to § 15.1-285 of the Code which states in part,

"Whenever it shall be necessary for any county or the public officers of the county, having authority for the purpose, to purchase real estate or acquire title thereto for public uses, the contract therefor shall be in writing and the title thereto shall be examined and approved in writing by a competent and discreet attorney at law, who shall be designated by the judge of the circuit court for the circuit wherein the real estate is located." (Italics supplied.)

In light of the wording of the italicized portion of the above statute, I am inclined to believe that the safer course would be to comply with the provisions of §§ 15.1-262, 15.1-285 and 15.1-286, even in the case of a conveyance of land to a sanitary district.
COUNTIES—Dumps—County may prescribe penalties for violation of ordinance whereby established.

PUBLIC DUMPS—Counties—May prescribe penalties for violation of ordinance whereby established.

July 31, 1968

HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney for Nansemond County

This is in reply to your letter of July 25, 1968, in which you inquire as follows:

"Section 15.1-282 of the 1950 Code of Virginia provides in part, where the governing body of a County has established a public dump, that 'no deleterious substances, which might be or become a nuisance to adjoining property shall be deposited on such dumps...'. This section makes it a misdemeanor to dump any waste materials, as described in this section, anywhere in the County except on the public dumps unless the owner of the land consents thereto. However, the section does not expressly make it a misdemeanor for anyone to dump a deleterious substance which might be or become a nuisance to the adjoining property on the public dump...

"I would appreciate your opinion as to whether or not the language of Section 15.1-282 makes it a misdemeanor to dump deleterious substances on a public dump?"

It is my opinion that § 15.1-282 does not of itself make it a misdemeanor for an individual to dump deleterious substances and industrial wastes in a dumping place established under this section. The statute specifies that counties may establish dumps, but precludes their use as a dumping place for industrial wastes and deleterious substances. However, as a general rule, acts which would be lawful absent statute do not become criminal unless there is a clear and positive intent to make them criminal. See, 22 C.J.S. Criminal Law § 24 (2) at 63; Report of the Attorney General (1960-1961) p. 87.

However, under § 15.1-505, the county could properly prescribe penalties for violation of the provisions of an ordinance establishing a county dump and could specifically make it an offense to deposit deleterious substances thereon. In this connection, see the enclosed copy of a previous opinion of this office, Report of the Attorney General (1965-1966) p. 224, wherein it was ruled that a county could prescribe penalties for violation of the terms of an ordinance establishing a county dump.

COUNTIES—Expenditure of Surplus Funds Accumulated in Preceding Year—May be expended in present year.

November 15, 1968

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

This is in reply to your letter of November 12, 1968, which reads as follows:

"In a situation where a county has developed a surplus in one fiscal year and does not include such surplus in its revenue for the next fiscal year, can that county in the next fiscal year appropriate and expend monies over and above the expenditures proposed in its budget using the funds accumulated in the prior fiscal year in the surplus.

"In answering this question please assume that the proposed expenditures are for a legal county purpose."
I am of the opinion that your question should be answered in the affirmative. Under the provisions of §§ 15.1-162 and 58-839 of the Code of Virginia (1950), as amended, a budget is tentative and for informative and fiscal planning purposes only. Therefore a failure to include as revenue for a fiscal year a surplus developed in the preceding fiscal year would not prohibit a county from appropriating and expending funds accumulated in such surplus.

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COUNTIES—Finance Board—May authorize the County Treasurer to place funds in an approved depository.

TREASURERS—Depository for Public Funds—Not required to place funds in such depository to bear interest in the absence of any authorization from County Finance Board.

Honorable Robert E. Gillette
Commonwealth’s Attorney for Nansemond County

May 15, 1969

This is in reply to your letter of May 7, 1969 in which you ask the following questions:

"Is the county treasurer required to place any of the public funds, which he has deposited in an approved depository, in a savings account or accounts in such depository so as to bear interest in the absence of any authorization or direction from the county finance board?"

"Does the county finance board have the absolute authority to direct the county treasurer to place all or any specified amount of public funds in a savings account or accounts in an approved depository?"

While § 58-943 of the Code of Virginia (1950) requires the county treasurer to select the depository for public funds subject to approval by the county finance board, I am unable to find any language requiring him to place these funds in a savings account or accounts in such depository so as to bear interest in the absence of any authorization from the county finance board.

Section 58-943.2 of the Code of Virginia (1950) provides as follows:

"Notwithstanding other provisions of this article, whenever the county finance board shall determine that county or district funds in any given amount otherwise would lie idle and draw a lesser rate of interest for a period of time not less than sixty days, it may authorize the county treasurer to place such funds in such amount upon time deposit in such legal depository at such rate of interest and upon such conditions of withdrawal as the county finance board may determine."

In view of the language in this Section, along with the authority in § 58-940 for the county finance board to determine the interest to be paid by a depository, I am of the opinion that the county finance board may authorize the county treasurer to place funds of the kind described in § 58-943.2 in a savings account or accounts in an approved depository.
COUNTIES—Garbage Collection Services for Town—Discretionary.

TOWNS—Garbage Collection Services by County—Within discretion of county.

January 7, 1969

HONORABLE C. W. ALLISON, JR.
Commonwealth's Attorney for Alleghany County

This is in reply to your letter of December 31, 1968, which reads as follows:

"Alleghany County operates a garbage collection service which has always been financed out of the General County Fund. We have no garbage collection tax.

"This service has never included the Town of Iron Gate, which is located within the geographical boundaries of the county. Of course, Iron Gate has its governing body, a Town Council.

"Now Iron Gate desires to have the county take over garbage collection within its corporate boundaries.

"Query: Can the county be forced to extend its services to an incorporated town within its boundaries?"

I have given your question considerable thought and while it is certainly clear that the county could, if it desired, extend its garbage collection service to include the Town of Iron Gate, I know of no law that would make it incumbent upon the county to so extend its services. Any such measures for the protection of the public health are within the discretionary power of the governing body. This would appear to be especially true in view of the fact that Chapter II, Section 1, Clause 8 of the Town Charter of Iron Gate specifically authorizes the Town to collect and dispose of garbage and other refuse.

Your inquiry is therefore answered in the negative.

COUNTIES—Gun Ordinances—No authority to enact.

ORDINANCES—County—Registration of guns—No authority to adopt.

FIREARMS—Registration of Guns—Board of Supervisors may not require.

August 1, 1968

HONORABLE LUCAS D. PHILLIPS
Member, House of Delegates

This is in reply to your letter of July 15, 1968, in which you request my opinion as to (1) whether or not the board of supervisors of a county has authority to enact an ordinance requiring the registration of guns, and (2) whether or not any such board has authority to enter into a compact with other counties requiring the registration of guns.

State law requires that, in any county having a density of population of more than one thousand a square mile, dealers in the sale of pistols and revolvers at retail shall register and obtain a permit, and, persons desiring to acquire a pistol or revolver shall first apply to the chief of police for a permit, which the chief may grant or refuse. This is embodied in Chapter 297 of the Acts of 1944, continued in effect pursuant to § 59-144 of the Code of Virginia until October 1, 1968, and thereafter pursuant to § 15.1-525 of the Code, which by Chapter 439 of the Acts of Assembly of 1968 becomes effective on that date.

Sections 15.1-523 and 15.1-524 of the Code, respectively, effective October 1, 1968 (present §§ 59-141 and 59-142) empower the governing body of any county to impose a license tax on persons engaged in selling pistols and revolvers and
to require them to furnish the clerk of the circuit court of the county certain data on the purchaser and the weapon sold.

I find no statute which would authorize the board of supervisors of a county to pass an ordinance requiring the registration of guns. Inasmuch as the legislation has dealt with the subject matter, as indicated in the statutes cited, I am of the opinion that the board of supervisors of a county has no such authority and, therefore, I shall answer both of your questions in the negative.

COUNTIES—Officers—Members of County Electoral Board, School Trustee Electoral Board, and County School Board are county officers.

COUNTIES—Offices—Residency requirements for election or appointment to County Electoral Board, School Trustee Electoral Board, and County School Board.

May 9, 1969
HONORABLE H. P. Scott, Clerk
Circuit Court of Bedford County

I am in receipt of your letter of May 2, 1969, wherein you inquire if (1) members of the county electoral board, school trustee electoral board and county school board are classified as county officers, and (2) if the members are residents of the City of Bedford if they are eligible for appointment or election to these boards.

The Bedford County Courthouse is located within the City of Bedford and the City lies wholly within the County.

Your first question is answered in the affirmative. In previous opinions of this office, found in the Reports of the Attorney General, it has been ruled that members of the county electoral board (1961-62, p. 209), the school trustee electoral board (1953-54, p. 23), and the county school board (1958-59, p. 246) are county officers.

Your second inquiry is also answered in the affirmative. Section 15.1-51 of the Code of Virginia (1950), as amended, sets forth the residency requirements for eligibility of a county officer and states in part:

"Every county officer, . . . shall, at the time of his election or appointment, have resided six months next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county, . . ." (Emphasis added)

It thus appears that residents of the City of Bedford would be eligible for election or appointment to the boards you inquire about.


September 19, 1968
HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

This is in reply to your letter of September 14, 1968, in which you inquire whether § 15.1-522 of the Code permits counties to exercise the powers conferred upon towns by § 15.1-18 of the Code to purchase land for the development of business and industry.

Section 15.1-522 confers the general powers of cities and towns upon counties. This has been interpreted to refer to those powers delegated to cities and towns
REPORT OF THE ATTORNEY GENERAL


Since § 15.1-18 is a general law, a county may therefore exercise the powers conferred on towns by § 15.1-18.

COUNTIES—Providing Hospitalization Insurance—County officers and employees that may be covered.

HONORABLE T. B. P. DAVIS
Commonwealth's Attorney for Greene County

This is in reply to your letter of December 9, 1968, in which you ask my opinion as to whether the officers and employees of Greene County as listed below would be eligible under the provisions of § 51-112 of the Code of Virginia (1950), as amended, for hospitalization insurance which the county, as authorized by the statute, contemplates providing:

"1. The Board of Supervisors
2. The Deputy Treasurer of County
3. The Superintendent of Public Welfare, Case Workers, the Clerk, and Members of Welfare Board
4. The County Agent, the Home Demonstration Agent, and the Clerks of these Agents
5. Employees of County School System including the teachers, the Superintendent, the School Board, Clerk of School Board, the Bus Drivers and Janitors
6. The Clerk of County Court
7. The Secretary of Commonwealth Attorney"

With the exception of Number 4, “The County Agent, the Home Demonstration Agent, and the Clerks of these Agents,” I find no statute that would prevent the other officers and employees from participating in the contemplated plan.

Although those listed under Number 5 are not employees of the county but of the School Board, they would under the provisions of § 15.1-522 be encompassed by the terminal paragraph of § 51-112 which provides:

“For the purpose of this section the term employees may include teachers or other employees of city and town school boards.”

Under the provisions of § 15.1-522 the counties are vested with the same power and authority as cities and towns. As this office has previously ruled, in an opinion to Honorable William J. Hassen dated June 3, 1963, found in the Report of the Attorney General (1962-1963), p. 234, the words "powers" and "authorities" relate to such as are conferred under general law to cities and towns and not under charter provisions. Since the terminal paragraph of § 51-112 is general law, then Greene County by virtue of § 15.1-522 may establish an accident and sickness plan for those people listed under Number 5.

It is my understanding from the Division of State Personnel that those listed under Number 4 are covered by the State Personnel Act and are State employees. Therefore, they would not be eligible under § 51-112 for the contemplated hospitalization plan inasmuch as the statute authorizes the plan only for the officers and employees of the county.
COUNTIES—Zoning Ordinances—Applicable to structures erected by private corporations on Federal lands comprising Dulles Airport.

ZONING—Ordinances—County building ordinance applicable to structures.

May 7, 1969

HONORABLE CARLETON PENN
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of April 22, 1969, in which you inquire as follows:

“Will you be kind enough to render your opinion as to whether or not County Zoning Ordinances are also applicable to structures erected by private corporations upon the Federal lands comprising the Dulles Airport, said structures being erected by private funds and for non-governmental purposes?”

This office has previously ruled that by virtue of the fact that the federal government has accepted concurrent jurisdiction within the area comprising Dulles International Airport, state and local governments may exercise jurisdiction therein which does not hamper or unduly interfere with the operations of the United States Government. See, Report of the Attorney General (1962-1963) p. 29, to which you refer in your letter. It is, therefore, my opinion that the zoning ordinances of the county are applicable at Dulles, subject to the conditions discussed above.

CRIMES—Breach of the Peace—Common law offense.

December 2, 1968

HONORABLE HARRISON S. DEY, JR.
Assistant Commonwealth's Attorney for Augusta County

This is in reply to your letter of November 15, 1968, which reads, in part, as follows:

“Assuming that statutory disorderly conduct, § 18.1-254, was repealed by the legislature effective April 2, 1968, and further assuming that disorderly conduct is not a common law offense, Lewis v. Commonwealth, 184 Va. 69, can persons who publicly do violence to others or cause a disturbance of public order be charged with ‘disturbing the peace’ or ‘breach of the peace’ on the theory that the latter are common law offenses?’

“Breach of the peace,” sometimes called “disturbing the peace,” is a common law offense. The answer is, therefore, in the affirmative, provided the acts alleged to have occurred are sufficient to constitute a common law breach of the peace.

It is to be noted that acts which constituted disorderly conduct under the repealed provisions of Title 18.1, to which you refer in your letter, would not necessarily constitute common law breach of the peace. The facts of each case will, of course, determine whether the acts alleged are sufficient to constitute common law breach of the peace. For example, actual or threatened violence is an essential element of breach of the peace, but this was not true in connection with the statutory charge of disorderly conduct. In other words, acts which would constitute “disorderly conduct” under the repealed statute will not necessarily constitute a common law “breach of the peace.”
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CRIMES—Concealed Weapon—Pocket knife with locking device—May fall within class of weapons described in § 18.1-269.

January 7, 1969

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

This is in reply to your letter of December 16, 1968, in which you inquire as follows:

"Is a pocket knife with about a four inch normally hinged collapsible blade to be considered under this statute a dirk or bowie knife, even though it may, when fully opened, have an automatic locking device that prevents the blade from being collapsed into the handle, or closed position, unless the locking device is released by depressing it?

"Is there any justification in law, pursuant to this statute, for considering a pocket knife a dirk or bowie knife, 'or weapon of like kind', regardless of the length of the blade, when the knife has a collapsible blade, and is being so carried in the pocket, so as to support a criminal conviction under Section 18.1-269?

"The only fact causing the question to be raised is that the contemplated knife has an unusual locking device on the opposite or back end of the handle which must be depressed to release, and will then release, the blade to close the knife. The knife is a pocket knife and is not a switch blade."

Although the question you present has not heretofore been considered by the Supreme Court of Appeals of Virginia, it has been the subject of decision in other jurisdictions. In these decisions, where the blade of a folding knife locks into place, the weapon has generally been considered to be included within the statutes prohibiting the carrying of a dagger or dirk. The terms “dirk” and “dagger” are used synonymously to refer to any straight stabbing weapon, such as a dirk, stiletto, bowie knife, etc. See, People v. Ruiz, 88 Cal. App. 502, 263 P. 836, 837 (1928); New International Dictionary (2d Ed. 1952).

In People v. Syed, 91 Cal. App. 2d 716, 205 P. 2d 1081 (1949), a spring knife with a lock was held to be a dagger before the statute was amended to specifically include switch blade knives. In People v. Forrest, 62 Cal. Rptr. 766, 432 P. 2d 374, 375 (1967), the court refused to hold that an "oversized pocket knife" was a dirk or dagger where the blade did not lock into place.

Upon consideration of the foregoing authorities, it would appear that the knife which you describe may properly fall within the class of weapons described in § 18.1-269. However, as the statute in question is criminal in character and must be strictly construed, the question is not free from doubt, and I regret that in the absence of any relevant decision of the Virginia Supreme Court, no definitive answer to your inquiry can be given.

CRIMES—Vagrancy—Authority for a city to make an offense found in charter.

WELFARE—Vagrancy—Authority of a city to deal with.

February 12, 1969

HONORABLE ANDRE EVANS
Commonwealth's Attorney for the City of Virginia Beach

This is in reply to your recent letter, which reads in part as follows:

"As you are aware, Virginia Code § 63-1 through § 63-385 was repealed by the legislature as of October 1, 1968. The question has arisen, since the Vagrancy Statute was not reenacted, as to whether or not the
Code of the City of Virginia Beach, § 23-55, could still be enforced. Section 23-55 is worded verbatim with respect to the former section under the Virginia Code 63-338. In regard to this matter, we are also under the impression that there has been some question recently with respect to the constitutionality of vagrancy statutes in general.

"In addition, your opinion is also requested as to whether or not a person could be successfully prosecuted for vagrancy under the common law, since vagrancy was a crime at common law."

Section 63-338 of the Code of Virginia of 1950, which has been repealed as of October 1, 1968, did not contain any enabling clause which allowed the localities to enact their own ordinances dealing with vagrancy. However, § 2.01 of Chapter 2 of the Charter of the City of Virginia Beach approved by the General Assembly of Virginia on February 28, 1962, (Acts of Assembly, 1962, Chapter 147, p. 204) vests in the City of Virginia Beach the powers set forth in §§ 15-77.1-15-77.70 of the Code of Virginia as in force on January 1, 1962. Section 15-77.3 of the Code of Virginia was in force on January 1, 1962, but was later reenacted as § 15.1-839 of the Code of Virginia which reads, in part, as follows:

"A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth . . . and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof. . . ."

It is manifest that the City of Virginia Beach derives its power to enact an ordinance dealing with vagrancy from its Charter and the code section mentioned above, and not from any enabling clause contained in the repealed state statute. Therefore, the repeal of § 63-338 of the Code of Virginia does not affect the validity of § 23-55 of the Code of Virginia Beach.

Further, the Supreme Court of Appeals of Virginia in *Morgan v. Commonwealth*, 168 Va. 731, 191 S.E. 791 (1937) ruled that the enactment of a state statute making vagrancy an offense is a valid exercise of the police power and is, therefore, constitutional. The same reasoning applies to § 23-55 of the Code of Virginia Beach.

Therefore, in my opinion § 23-55 of the Code of Virginia Beach is still enforceable.

In my opinion, having found the local ordinance in question to be enforceable, it is not necessary to reach the question relating to the prosecution of vagrancy as a common law crime.

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**CRIMINAL LAW—Lotteries—Sales promotional program does not constitute.**

**HONORABLE T. C. ELDER**  
Commonwealth's Attorney for the City of Staunton  
March 11, 1969

This is in reply to your letter of March 10, 1969, in which you inquire whether or not a certain sales promotional program constitutes a lottery in violation of Virginia law.

From your letter and information you enclosed, it appears that the promotional program is operated as follows:

An individual is sent a letter on the basis of his motor vehicle license number which is selected for a particular week. He then has seven days to present the letter to the store manager which entitles him to a Hi-Fi Stereo Console if he also agrees to purchase a record album per week for fifty-two weeks, at an overall cost of approximately $240.00.
REPORT OF THE ATTORNEY GENERAL

In conformity with the opinion of the Supreme Court of Appeals of Virginia in *Maughs v. Porter*, 157 Va. 415, this office has stated that a particular activity constitutes a lottery when the elements of prize, chance, and consideration for the chance, combine.

In the present plan the consideration is paid for the prize. Since return for the consideration is not determined by chance, I am of the opinion that the plan does not constitute a lottery in violation of Virginia Law.

CRIMINAL LAW—Stealing From or Tampering With Parking Meter, Vending Machine, Pay Telephone, Etc.—Section 18.1-125.1 of the Code providing for punishment does not constitute an ex post facto law.

CRIMINAL LAW—Ex Post Facto—Section 18.1-125.1 providing for punishment for tampering with parking meters, etc., does not constitute.

September 6, 1968

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

This is in response to your recent letter which reads in part as follows:

"A question has arisen in regard to Section 18.1-125.1 which provides that a second or subsequent conviction of the tampering with a vending machine, pay telephone, etc., shall be punished as a felony and by confinement in the penitentiary or on the state convict road force."

"The question which has arisen is whether or not a conviction which occurs prior to the effective date of the act, which I believe was June 28, 1968, and a conviction occurring after June 28, 1968, would be a subsequent conviction. The question occurs in my mind that this changing of punishment might be an ex post facto law which would be prohibited by the Constitution of Virginia."

In *Rand v. Commonwealth*, 9 Gratt. (50 Va.) 738, the Supreme Court of Appeals had before it a similar question and the opinion reads in part as follows:

"The Constitution withholds from the legislature the power to convert, by statute, into a crime, an act, which, at the time it was done, offended against no law; or to visit a criminal act even with penalties more severe than those which were attached to it by the law, when it was committed. No constitutional or other obstacle however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offences committed after the passage of the act, may, if shown to have committed like offences before, be subjected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity. One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him."

In *Surratt v. Commonwealth*, 187 Va. 940, 943, 48 S.E. 2d 362. The Supreme Court of Appeals reaffirmed its holding that the enactment of such a statute did not constitute an ex post facto law.

In view of the foregoing, I am of opinion that the enactment of § 18.1-125.1 by the 1968 General Assembly does not constitute an ex post facto law.
November 8, 1968

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

This is in reply to your letter of October 10, 1968, which reads in part as follows:

"(1) Section 18.1-254.1—Unlawful Assembly: Under the above stated section I would appreciate your advice as to whether or not participants at a gathering to watch an unlawful act known as 'drag racing' on the public highway during which time the participants were shouting, cursing and making disturbing noises throughout the neighborhood, would be properly charged under the above stated Section with 'unlawful Assembly.'

* * *

"I would also appreciate your advice as to whether or not under the aforementioned Section 18.1-254.1 et seq., it would be required that a state policeman or other law enforcement officer go among the persons so assembled and order them to disburse before they could lawfully be charged with unlawful assembly?

"I would further appreciate your advice as to whether or not a gathering of youths in a public street or parking lot at which time loud and boisterous and disturbing noises were made would constitute an 'unlawful assembly' and whether or not it would be necessary for the officers to inform the participants at such gathering to disburse before charging participants with unlawful assembly."

Section 18.1-254.1, paragraph (c), reads as follows:

"(c) Whenever three or more persons assemble with the common intent or with means and preparations to do an unlawful act which would be riot if actually committed, but do not act toward the commission thereof, or whenever three or more persons assemble without authority of law and for the purpose of disturbing the peace or exciting public alarm or disorder, such assembly is an unlawful assembly."

Section 18.1-254.3 provides that every person who participates in an unlawful assembly shall be guilty of a misdemeanor.

In my opinion, the answer to your first question is in the negative, unless it can be proved that three or more persons assembled without authority of law "and for the purpose of disturbing the peace or exciting public alarm or disorder." The important element of proof is the intent or purpose of the assembly. That purpose or intent must be to disturb the peace or excite public alarm or disorder and must be shown to exist in connection with the assembly in question.

In my opinion, the answer to your second question is in the negative. It is not necessary for an officer to go among the persons assembled and order them to be disbursed before they can be charged with unlawful assembly.

The answer to your third question is found in the answer to your first question. As indicated, it would be necessary to prove that the gathering of persons in the public street or parking lot was "for the purpose of disturbing the peace or exciting public alarm or disorder." An assembly such as you describe would be an "unlawful assembly" only if this intent or purpose could be proved.
CRIMINAL LAW—Uttering Check With Insufficient Funds on Deposit—Venue of crime.

CRIMINAL LAW—Venue of Crime of Uttering Check With Insufficient Funds—Where drawer utters the check.

HONORABLE R. TURNER JONES
Commonwealth's Attorney for Highland County

June 17, 1969

This is in reply to your letter of May 27, 1969, in which you direct attention to § 6.1-115 of the Code which provides that a person is guilty of larceny who, with the requisite intent, draws a check without sufficient funds or credit in the drawee bank. Your inquiry is as follows:

"Highland County is bounded by West Virginia on several sides and frequently our citizens go into West Virginia and in payment for articles purchased there give a check on a Highland County bank. The check is not paid by the bank on which it is drawn because of either insufficient funds or no account.

"My question is, is the crime or offense committed at the time of the giving of the check in West Virginia or at the time the check is refused by the Highland County bank because of no funds or insufficient funds? In other words, is the crime of larceny committed in West Virginia or Highland County?"

Under applicable rulings of the Supreme Court of Appeals, the crime defined in § 6.1-115 is committed when the drawer utters the check. See, Rosser v. Commonwealth, 192 Va. 813, 66 S.E. 2d 851 (1951); Cook v. Commonwealth, 178 Va. 251, 258, 16 S.E. 2d 635 (1941). Therefore, on the facts which you describe, the crime would thus be committed in West Virginia.

While in a criminal prosecution venue normally lies only where the crime was committed, the General Assembly may provide a different venue. See, Howell v. Commonwealth, 187 Va. 34, 46 S.E. 2d 37 (1948). One such instance in which a different venue has been provided is found in § 19.1-220 of the Code, which deals with offenses committed outside the State and provides in part:

"if any person shall commit larceny, embezzlement or robbery beyond the jurisdiction of this State and bring the stolen property into the same he shall be liable to prosecution and punishment for his offense in any county or corporation in which he may be found as if the same had been wholly committed therein... ."

The offense which you describe constitutes larceny in West Virginia by virtue of § 61-3-24 of the Code of West Virginia. In Virginia, the Supreme Court of Appeals has ruled that under § 19.1-220 a person who commits larceny in another State may be prosecuted for larceny in Virginia upon bringing the stolen property into this State. Lovelace v. Commonwealth, 205 Va. 541, 138 S.E. 2d 253 (1964).

It is therefore my opinion that, because the offense to which you refer is committed in West Virginia, the venue for that offense lies in West Virginia. However, you are referred to § 19.1-220 and the cases above cited as authority for laying venue for a larceny prosecution in Highland County when the stolen property is brought into this State.
CRIMINAL PROCEDURE—Appeal to Circuit Court of Convictions of Town Ordinance for Driving Under Influence—Costs for recording not payable out of State Criminal Fund.

CRIMINAL PROCEDURE—Cost for Recording Trial on Appeal From Conviction of Town Ordinance for Driving Under Influence—Not payable from State Criminal Fund.

October 10, 1968

HONORABLE ALDAH B. GORDON, Clerk
Circuit Court of Appomattox County

This is in response to your letter of September 23, 1968, in which you advise that in recent days two cases involving charges of driving under the influence of alcohol in violation of town ordinances have been appealed to the Circuit Court. These cases are misdemeanor cases, involving violations of town ordinances and presented questions of law and fact. You inquire whether or not in such cases the Court's recording machine may be used, and if the person designated to operate the same may be paid from the State Criminal Fund.

The ordinances in question were enacted pursuant to the provisions of § 15.1-132 of the Code of Virginia (1950), as amended. You will note that this section specifies that the Commonwealth shall not be chargeable with any costs in connection with the prosecution of a violation of a town ordinance, nor shall any such cost be paid out of the State treasury.

I find no statute which prohibits the use of the Court's recording equipment in such circumstances. The costs incurred, however, would have to be paid by the parties.

I have carefully reviewed the amendments to § 17-30.1, et seq., of the Code of Virginia, and I find no authority contained therein for the payment of the person who operates the recording equipment out of the Criminal Fund.

I am, therefore, of the opinion that, although the recording equipment may be used, the costs incurred in connection therewith may not under any circumstances be paid out of the Criminal Fund.

CRIMINAL PROCEDURE—Arrest and Charging of Escapee—With or without bail—Procedure followed.

CRIMINAL PROCEDURE—Bail—Escapee charged with felony.

CRIMINAL PROCEDURE—Warrants—When issued in case of escapee.

April 9, 1969

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

This is in reply to your letter of recent date in which you request my opinion on four groups of questions regarding the law of arrest in the cases of escape and close pursuit into other jurisdictions of the State and warrants received from other Virginia areas for arrest elsewhere in the State. For the sake of clarity, I shall quote the narrative and related questions in each of the four groups in the order you present them and reply to the questions in each group separately, as follows:

“Section 19.1-100 provides in part for the arrest of persons duly charged with crime in another jurisdiction upon receipt of a telegram, a radio, or teletype message.

1. Assuming that the statute has been complied with in regard to description, etc., and the person is arrested, when he is brought before a justice of the peace, what type warrant is
issued? A fugitive warrant or a warrant charging the actual crime in the other jurisdiction?

2. Secondly, after the warrant is issued, can the subject be turned over to the jurisdiction which desires him, must he be committed to the local jail, or must he appear before the local city or county court?"

This part of § 19.1-100 has reference to an arrest, without a warrant, of persons duly charged with crime in another jurisdiction. In regard to your first question, when an accused is brought before a justice of the peace under such circumstances and a warrant is issued, in my opinion, the warrant should charge the actual crime alleged in the other jurisdiction.

In regard to question numbered 2, in my opinion, if the offense charged is a misdemeanor the action to be taken by the justice of the peace who issues the warrant is subject to the requirements of §§ 19.1-110(a) and 19.1-119. If the person charged is admitted to bail, the justice of the peace shall take a recognizance for his appearance before the applicable court, that is, the court having cognizance of the case, on the day specified. The fact of taking such recognizance shall be certified by the justice of the peace taking it upon the warrant and the warrant and recognizance shall be returned forthwith to the clerk of the court or to the trial justice before whom the accused is to appear.

If the offense charged is a felony, the situation is controlled by § 19.1-110 (b) which provides that a justice of the peace may admit such person to bail if authorized to do so by the examining judge of the court not of record, the judge of the court of record, or the Commonwealth’s Attorney of the city or county wherein the justice of the peace has jurisdiction. Otherwise, the person charged shall be committed to jail by written order for further examination by the judge of the applicable court not of record.

Regardless of whether the crime charged is misdemeanor or felony, if the person charged is not admitted to bail, the court before whom the accused is brought shall, by warrant, commit him to an officer who shall carry him to the county or corporation in which the trial shall be, as prescribed in § 19.1-99.

"Section 19.1-94 provides for the arrest of a subject by an officer to whom the warrant is issued outside of the officer’s jurisdiction.

1. Assuming an arrest by an officer, must this officer take the subject before a justice of the peace in the jurisdiction in which he is arrested?

2. If so, what action does the justice of the peace take? Does he commit the subject to the local jail? May he permit the officer to return the subject to his own jurisdiction? If so, how?"

Here you present a situation in which a person charged with an offense, after or at the time the warrant is issued for his arrest, escapes from or out of the county or corporation in which the offense is alleged to have been committed, which is the “officer’s jurisdiction.” The first paragraph of § 19.1-94, which presents the basis for your question, provides that the officer to whom the warrant is directed may pursue and arrest him anywhere in the State. In regard to your question numbered 1, the officer is not required to take the person before a justice of the peace in the jurisdiction in which he is arrested, unless the person so arrested requests it. If the person does request it, the procedure is as set forth in §§ 19.1-110 and 19.1-119 as previously herein outlined.

"Section 19.1-94 provides for the arrest of misdemeanants in an adjoining government and the arrest of felons throughout the State, both while in close pursuit and without a warrant.

1. Assuming a subject is arrested by a pursuing officer in another jurisdiction, must he take him before a justice of the peace in the jurisdiction wherein the subject was arrested?"
Section 19.1-100.1 requires that a person arrested without a warrant shall be brought forthwith before an officer authorized to issue criminal warrants in the county or city where the arrest is made, unless such person is released on summons as provided by law. In my opinion, therefore, a person arrested by a pursuing officer under the stated conditions in another jurisdiction must be taken before a justice of the peace or some other officer authorized to issue criminal warrants in the jurisdiction wherein the arrest is made. In answer to your second question, the police officer should secure a warrant for the crime committed. In response to your third question, what happens then depends upon whether or not the person charged with the offense is admitted to bail. If he is admitted to bail, the procedure as previously herein outlined is as prescribed in §§ 19.1-110 and 19.1-119. If he is not admitted to bail, then the court before whom the accused is brought shall, by warrant, commit him to an officer and such officer shall carry him to the county or corporation in which the trial should be, in accordance with § 19.1-99.

"Section 19.1-94 also provides for the arrest of a subject by a warrant issued from another jurisdiction provided the warrant is endorsed by a person authorized to issue warrants under 19.1-90. Section 19.1-119 provides for bail under these circumstances if the charge is a misdemeanor. There is no corresponding section if the charge is a felony.

1. Under these circumstances, can a person charged with a felony be admitted bail?

2. Assuming the subject is not able to secure bail, what happens to the subject? Is he committed to the local jail? Must he appear before the local court? Can the desiring jurisdiction immediately secure his person for transporting to the jurisdiction where he is to be tried without going through the local court?"

This part of § 19.1-94 refers to a situation in which a warrant issued in one jurisdiction is delivered to an officer in another jurisdiction. In such instances any person authorized to issue process under § 19.1-90 in the latter jurisdiction, on being satisfied of the genuineness of the warrant, may endorse it and such endorsement shall operate to direct the warrant to an officer of the endorser's jurisdiction.

In answer to your question numbered 1, in my opinion, the same law governs as to admitting a person charged with a felony to bail as previously herein stated. Section 19.1-110 (b) prescribes that such person shall be committed to jail for further examination by the judge of the applicable court not of record; provided he may be admitted to bail if authorized by the examining judge of the court not of record, the judge of the court of record, or the Commonwealth's attorney.

If he is not admitted to bail, I am of the opinion he must appear before the local court before being released to the jurisdiction where he is to be tried.
tentiary by one or more courts in Virginia and the papers are received at
the penitentiary on such sentence when at the same time this man is
wanted for trial in one or more counties or cities of Virginia. I am
attaching hereto copy of Mr. Cunningham's memorandum of June 19
and Mr. Peyton's letter of June 17. I would appreciate it if you would
give me your opinion as to the procedure that should be followed in
cases such as that outlined above."

Pursuant to the provisions of § 19.1-296 of the Code of Virginia, the Superin-
tendent is required, upon receiving a copy of the judgment sentencing the person
to the penitentiary, to dispatch a guard to the county or city with a warrant au-
thorizing the prisoner's custodian to deliver to the guard the person so sentenced.
The problem which you present apparently arises when an individual is charged
with several crimes in adjacent jurisdictions. If a court of competent jurisdiction
issues a writ of habeas corpus ad prosequendum addressed to the custodian of such
person who is lodged in jail awaiting transportation to the penitentiary, having been
sentenced thereto, I am of opinion that the Sheriff must honor such writ. I am
further of opinion that the power of the courts to issue such writs would take
precedence over the provisions of this section.

CRIMINAL PROCEDURE—Evidence—Real—Disposition of where not used in
trial.

March 4, 1969

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

I am in receipt of your letter of February 25, 1969, relative to the seizure, by
law enforcement officers of the Marine Resources Commission, of an unlicensed gill
net found in the York River. You state that the net has remained unclaimed and
you desire to know if there is any provision of the law permitting the disposal
of unclaimed tangible personal property by law enforcement agencies of the
Commonwealth.

I know of no specific provision of Virginia law governing the situation you de-
scribe. However, the net was seized pursuant to § 28.1-74 of the Code of Virginia
(1950), as amended, for the purpose of charging the owner with a criminal offense.
This section provides for the licensing and display of licenses on gill nets and pro-
vides further that any net not properly displaying a metal license "may be seized
by a duly authorized inspector to be held for any forthcoming legal proceeding."
Any violation of this section constitutes a misdemeanor. Section 28.1-76.

I thus feel that the net in question is properly under the control of the court
having jurisdiction of the place where the statutory violation occurred and that
such court would have the authority to enter an order directing the disposition of
such net after the lapse of a reasonable period of time.

CRIMINAL PROCEDURE—Evidence—Results of polygraph test—When ad-
missible.

September 10, 1968

HONORABLE RICHARD C. GRIZZARD
Commonwealth's Attorney for Southampton County

This is in response to your recent letter which reads in part as follows:

"In the light of past decisions of the Virginia Supreme Court of Ap-
peals concerning the use of lie detector tests in evidence I would like your
REPORT OF THE ATTORNEY GENERAL

opinion as to the admissibility of such evidence in the following factual situation:

"The accused is charged with a felony in Southampton County, Virginia, and has employed his own counsel. The accused desired to take the lie detector test and after full discussion with his attorney as to the nature of the lie detector test and that the results of such tests were inadmissible in evidence requested to be given a lie detector test by the Virginia State Police Department. The accused signed a statement in which he agreed to allow the results of such a test into evidence regardless of the results and waived his rights against self-incrimination.

"Under this set of facts I would like your opinion as to whether or not this waiver signed by the defendant is sufficient to allow the results to be placed into evidence even though the results were detrimental to the accused."

It is quite clear that under ordinary circumstances, the results of a polygraph examination are not admissible in a criminal proceeding in Virginia. Lee v. Commonwealth, 200 Va. 233, 105 S.E. 2d 152. In circumstances similar to those set forth in your letter, other courts have upheld the admissibility of the results of a polygraph test in evidence when the same had been agreed to by the accused, his attorney, and the prosecutor prior to trial. State v. McNamara, 252 Iowa 19, 104 N.W. 2d 568; People v. Houser, 85 Cal. App. 2d 683, 193 P. 2d 937.

In Orange v. Commonwealth, 191 Va. 423, 61 S.E. 2d 267, the defendant sought to introduce into evidence the results of a certain "truth serum" test, said test having been made on motion of the defendant and agreed to by the Commonwealth, but no agreement was made that the results could be given in evidence. The court upheld the inadmissibility of the results of the test as a matter of law but did not indicate what its ruling would be if an agreement had been made that the results would be admissible in evidence.

In view of the foregoing, although the question is not entirely free from doubt, I am of opinion that where the accused and the Commonwealth have agreed in advance of trial that the results of a polygraph examination may be admitted into evidence, such results are properly admissible.

You also inquire as follows:

"I would also like your opinion in the case where an accused is charged with a felony and the Court appoints a lawyer for the defense and at the preliminary hearing the charge is reduced to a misdemeanor and part of the punishment is to pay fine and costs. Can the attorney fee allotted by the Court be considered a part of the costs? In the past our lower courts have made the attorney fees part of the costs."

I enclose for your information a copy of an opinion to Honorable Charles R. Purdy of August 26, 1965, Report of the Attorney General (1965-1966), p. 55, wherein it was ruled under similar circumstances that the fees of court appointed counsel in a court not of record should be assessed as part of the costs.

CRIMINAL PROCEDURE—Evidence as to Sunrise and Sunset—Proper method of introduction.

October 8, 1968

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

This is in reply to your letter of October 1, 1968, with which you enclosed
a copy of the time table for sunrise and sunset at Cape Henry, Virginia, and asked the following:

"Heretofore I have prosecuted cases involving the game and fisheries laws where the time of sunrise and sunset were material to the proof of the offense.

"In view of 8-272 of the Code of Virginia, I am wondering what would constitute sufficient proof of this fact in a criminal trial. I enclose herewith a printed facsimile of table numbered 1300, which is not actually under seal, signed by the Superintendent of the U. S. Naval Observatory, entitled 'Sunrise and Sunset at Cape Henry, Virginia'. My questions are:

"1) Would the submission of this publication numbered 1300 suffice as proof?

"2) Would the weather report in a daily newspaper be sufficient?

"3) If these sources of information would not constitute sufficient proof, would you suggest the proper procedure and where this information could be obtained?"

Section 8-272(a), Code of Virginia (1950), as amended, states in part that "An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof ...." Inasmuch as the table you refer to is clearly an official publication it is admissible pursuant to § 8-272. The certification of accuracy would in my opinion be sufficient proof of sunrise and sunset.

In response to your concluding two questions I call your attention to § 8-272(e). A weather report in a daily newspaper would merely show that such information had been published, but would not be any indication of the accuracy of such information.

Section 8-272(e) which states:

"Copies of official weather records in any office of the United States Weather Bureau, when duly attested by the Weather Bureau official having custody thereof and accompanied by a certificate that such officer has such custody shall be received as evidence in any court or other proceeding for any purpose for which the original could be received without any further proof of their official character or of the person whose name is signed thereto."

provides the proper method for introducing weather reports.

CRIMINAL PROCEDURE—Fine and Costs—Court may not order incarceration solely for nonpayment.

October 2, 1968

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

This is in response to your letter of September 9, 1968, in which you make reference to the decision of the Supreme Court of Appeals of Virginia of September 6, 1968, in the case of Wright v. Matthews, 209 Va. ......... Your letter reads in part as follows:

"1. If the Court in fixing its punishment for a crime makes the payment of the costs incurred a part of its judgment in this way, 'the Court finds you guilty as charged and fixes your punishment at a fine of fifty dollars plus the costs of prosecution, and if the said fine and costs be not paid, at a term of confinement in jail not to exceed sixty days' would
this judgment come under the rule of the recent decision, or would it be enforceable as pronounced?

"2. Can the Court impose jail or fine and suspend execution of the whole or any part on the express condition that the costs of prosecution be paid by the defendant?

"3. If a convicted defendant tenders me, as Clerk, the fine only and none of the costs, what are my duties in regard to it?"

In *Wright v. Matthews*, supra, the prisoner had served consecutive sentences for statutory burglary and attempted statutory burglary and was thereafter incarcerated for nonpayment of costs. This was the sole reason for his detention. The Court pointed out that in view of the Thirteenth Amendment to the Constitution of the United States, Wright's confinement, for this reason, constituted involuntary servitude. The holding was limited to this narrow point.

I am, therefore, of opinion that the procedure suggested in your first question is prohibited by the Court's opinion in the *Wright* case.

Your second question presents two separate problems. You inquire first if the Court can impose a jail sentence and suspend execution of the same on the express condition that the costs of the prosecution be paid by the defendant. Under these facts, it can be argued that the prisoner is not confined for nonpayment of costs but is confined pursuant to a valid sentence. Although the question is not entirely free from doubt, I am inclined to believe that this procedure, while not specifically prohibited by the *Wright* case, is of doubtful validity.

You inquire also if the Court can impose a fine and suspend the same, conditioned upon the payment of the costs of the prosecution. I find nothing in the *Wright* case which would prohibit this practice.

With regard to your third question, your duties have not changed relative to the collection of fines and costs. If the fine is tendered to you and the costs are not, you would, of course, include this information on your report to the Attorney for the Commonwealth, as prescribed by § 19.1-341.2 of the Code of Virginia.

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**CRIMINAL PROCEDURE—Habeas Corpus Petition—Jurisdiction to entertain.**

**COURTS—Jurisdiction—Habeas corpus proceedings.**

October 30, 1968

HONORABLE B. A. WILLIAMS, JR., Clerk
Circuit Court of Southampton County

This is in response to your recent letter, which reads in part as follows:

"We have a petition for a writ of habeas corpus from an inmate who was committed from the Municipal Court, City of Franklin as a Chronic Alcoholic.

"Does this Court have jurisdiction to rule on the petition or should this petition be to the Municipal Court of the City of Franklin."

I have reviewed the record in this case and find that the petitioner was acquitted in the Municipal Court of the City of Franklin on two charges of being drunk in public and was committed to the Department of Welfare and Institutions pursuant to the provisions of § 18.1-200.1 of the Code of Virginia (1950), as amended, in conformity with the provisions of § 18.1-200 of the Code of Virginia (1950), as amended.

Your attention is directed to the provisions of § 8-596(a) of the Code of Virginia (1950), as amended, which reads as follows:

"The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court or corporation court, or any judge of either in vacation, to any person who shall apply for the same by petition, show-
In view of the foregoing statute, I am of the opinion that inasmuch as the Municipal Court of the City of Franklin lies within the jurisdiction and is under the supervision of the Circuit Court of Southampton County, the petition should be entertained and acted upon in the usual manner.

CRIMINAL PROCEDURE—Issuance of Warrants—Proper person to Issue.

JUSTICE OF PEACE—Issuance of Warrants—Authority.

January 22, 1969

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County and for City of Harrisonburg

This is in reply to your letter of January 13, 1969, from which I quote the following:

"Harrisonburg is a second class city presently served by two elected Justices of the Peace. Rockingham County has some fifteen duly elected Justices. The City of Harrisonburg and Rockingham County share the Circuit Court Judge, Clerk, Sheriff and Commonwealth's Attorney. The City of Harrisonburg and Rockingham County also share the same County Court and County Court Judge, which is located within the corporate limits of the City of Harrisonburg, and which has jurisdiction and tries criminal cases committed both in the City and County. The City of Harrisonburg does have a Municipal Court with jurisdiction limited to misdemeanors occurring in the City in violation of the City Ordinances.

"Our questions are these concerning who may issue a warrant in the following situations:

"(1) An arrest by the State Police or Sheriff's Department of a motorist while in the County of Rockingham for a violation of the State Highway traffic laws—may such motorist be brought before a City Justice of the Peace for the purpose of issuing a warrant and bonding, or must a County Justice handle it?

"(2) A violation of the felony or misdemeanor statute committed within the County and the suspect is arrested, with or without a warrant, in the County. Must a County Justice issue the warrant and subsequent bond, if any?

"(3) A violation of one of the felony statutes committed within the County, but the suspect is later located within the City, must a County Justice issue the warrant, and handle the subsequent bonding?"

In regard to jurisdiction accorded justices of the peace, § 39.1-14 of the Code of Virginia prescribes that: "A justice of the peace shall exercise the powers conferred by this title only in that area which is coterminous with the boundaries of the city, county or town for which he is appointed." Further, in regard to the power of a justice of the peace to issue a process of arrest, § 39.1-15 provides: "A justice of the peace shall have the following powers only: (1) To issue process of arrest in accord with the provisions of §§ 19.1-90 to 19.1-100.1 of the Code." Section 19.1-100.1 is as follows:

"A person arrested without a warrant shall be brought forthwith before an officer authorized to issue criminal warrants in the county or city where the arrest is made, unless such person is released on summons as provided by law. The officer before whom such person is brought
shall proceed to examine the officer making the arrest. If the officer before whom such person is brought has reasonable grounds upon which to believe that a criminal offense has been committed, and that the person arrested has committed such offense, he shall issue such a warrant as might have been issued prior to the arrest of such person under the provisions of § 19.1-91. If such a warrant is issued the case shall thereafter be disposed of under the provisions of §§ 19.1-101 to 19.1-108, if the issuing officer is a judge; under the provision of § 19.1-110, if the issuing officer is a justice of the peace; and under the provision of § 19.1-111 if the issuing officer is a clerk. If such a warrant be not issued the person so arrested shall be released; however, provided, that this section shall not bar a judge of a court not of record from proceeding in accord with the provisions of § 16.1-129.1."

This section was enacted under Chapter 639, Acts of Assembly of 1968 which also enacted Title 39.1 of the Code. It provides that a person arrested without a warrant, unless released on summons as provided by law, shall be brought forthwith before an officer authorized to issue criminal warrants in the county or city where the arrest is made. This section further provides that if a warrant is issued the case shall thereafter be disposed of under the provisions of § 19.1-110, if the issuing officer is a justice of the peace. Section 19.1-110 provides, among other things, that a justice of the peace before whom a person is brought charged with the commission of a misdemeanor, if an arrest warrant is issued, shall set bail in a reasonable amount. Referring to the situation outlined in your question numbered (1), therefore, in my opinion the person so arrested in the County of Rockingham should be brought before a county justice of the peace for the purpose of issuing a warrant and bonding.

In regard to your question numbered (2), the same law applies as to which justice of the peace shall issue the warrant and subsequent bond, if any. This is the officer authorized to issue criminal warrants in the county or city where the arrest is made. In the case of an offense charged as a felony, however, under paragraph (b) of § 19.1-110, the justice of the peace does not issue a bond but commits such person to jail to await further questioning by the applicable court not of record, unless authorized to admit such person to bail by "the examining judge of the court not of record, the judge of the court of record or the Commonwealth's Attorney of the city or county wherein the justice of the peace has jurisdiction." With this exception as to bonding a person charged with a felony, your question numbered (2) is answered in the affirmative.

Your question numbered (3) is answered in the negative. Under the statutes cited herein a person arrested for a criminal violation should be brought before a justice of the peace in the county or city where the arrest is made. Since the arrest in this case is made in the City of Harrisonburg, the person arrested should be taken before a justice of the peace in the City. If such justice of the peace issues a warrant, the matter should be handled as provided in § 19.1-99 of the Code.

CRIMINAL PROCEDURE—Jurisdiction—County court—to try charge of assault and battery between two sisters, over 21, living separately.

September 3, 1968

HONORABLE W. GLENN MARTIN
Justice of the Peace for Patrick County

This is in reply to your letter of August 19, 1968, in which you ask whether a criminal charge of assault and battery against a woman by her sister should be sent to the County Court or to the Juvenile and Domestic Relations Court where both women are over the age of twenty-one, married and living in separate houses.
Section 16.1-158, Code of Virginia (1950), as amended, establishes the jurisdiction for Juvenile and Domestic Relations Courts. Section 16.1-158 (8), the only section under which the fact situation you present could fall, provides:

“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. The word “family” as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild; * * *" (Italics supplied)

“The family” as used in this section refers not to those adult relatives who are married and living under separate roofs, but to those relatives mentioned who are still within the family circle living together in the same house. It is my opinion therefore, that the Juvenile and Domestic Relations Court would not have jurisdiction in the case you describe and you should send it to the County Court.

CRIMINAL PROCEDURE—Larceny—Application of § 18.1-109 to charges of larceny as well as embezzlement.

CRIMINAL PROCEDURE—Indictment for Larceny—Includes lesser offense of receiving stolen goods.

February 28, 1969

HONORABLE LEROY MORAN
Commonwealth’s Attorney for City of Roanoke

This is in reply to your letter of February 13, 1969, in which you present the following situation:

“FACT SITUATION: The accused is apprehended in possession of recently stolen goods. He is charged and indicted for Grand Larceny. Through his attorney the accused moves the Attorney for the Commonwealth to elect under what section he chooses to prosecute as set out in Section 18.1-109 (‘... On the trial of every indictment for larceny, however, the defendant, if he demands it, shall be entitled to a statement in writing from the attorney for the Commonwealth of what statute he intends to rely upon to ask for a conviction.’). The Commonwealth’s Attorney, based upon evidence before him at that time, chooses to stay with the charge of simple larceny. The evidence introduced at the trial convinces the jury that someone else stole the property in question; therefore, the jury finds the defendant not guilty. However, if so instructed, they would have found the defendant guilty of Receiving Stolen Goods, since the evidence showed that he was clearly guilty of that offense. This line of evidence came out only after the trial was under way and was unavailable to the Commonwealth’s Attorney when he made his election.”

The questions raised will be answered seriatim:

“QUERY ONE: Does the appropriate portion of 18.1-109 quoted above apply only to cases of Embezzlement, since it is found under that heading, or to all larceny; e.g., Receiving Stolen Goods?”

ANSWER: The language of the statute makes it clearly applicable to all cases of larceny, not just cases of embezzlement.
“QUERY TWO: After the evidence was in, but before the case went to the jury, could the Commonwealth's Attorney, under Section 19.1-177 of the Code of Virginia, have asked that the indictment be amended to comply with Section 18.1-107, Receiving Stolen Goods?”

ANSWER: By statute, (§ 18.1-107 of the Code of Virginia (1950), as amended), larceny embraces the criminal receiving of stolen property. Under a larceny indictment an accused may be tried for receiving stolen goods, as this latter crime is a lesser offense includable in the major one of larceny. Branch v. Commonwealth, 184 Va. 394 (1945). The announcement by the Commonwealth's Attorney in no way modifies the offenses charged in the indictment. The statement merely specifies the extent of participation he will endeavor to prove on the part of the accused. Dove v. Peyton, 343 F. 2d 210 (1965). Therefore, one indicted for larceny is apprised of his liability to conviction as a criminal receiver. Since the proof of receiving stolen goods will sustain a charge of larceny it seems that it would not be necessary to amend the indictment under the provisions of § 19.1-177. An instruction requesting that defendant be found guilty of receiving stolen goods could be requested.

“QUERY THREE: Could the defendant have been reindicted for Receiving Stolen Goods?”

ANSWER: Though the matter is not entirely free from doubt, I am of the opinion, in view of my above answer, that the defendant could not be reindicted, since an acquittal of the higher offense bars prosecution for the lower includable offense.

CRIMINAL PROCEDURE—Order Issued by Justice of Peace to Commit Misdemeanants and Felons—Form suggested.

HONORABLE W. R. LUMPKIN
Justice of the Peace, Ashland

July 12, 1968

This is in response to your request that I prepare a form to be used by a Justice of the Peace when it is necessary to commit an individual, charged with a crime, to jail, as provided for by § 19.1-110(a) of the Code of Virginia. The following form I believe would comply with the statute:

To
The Sheriff of ........................................ County, Virginia
You are directed to take into custody and place in jail ........................................, who is charged with the crime of ........................................, and to take him before the Judge of the County Court of ........................................ County on the .......... day of ........................................, 19.........
Amount of bond ........................................, 19.........

........................................
Justice of the Peace

I am of opinion that the foregoing form complies with the statute and may be used in both misdemeanor and felony cases. Of course, certain changes will have to be made when this form is used in cities.
CRIMINAL PROCEDURE—Search of Motor Vehicle—Consent of owner is waiver of rights protected by Constitution of the United States or the Constitution of Virginia.

MOTOR VEHICLES—Search—Consent of owner is waiver of rights protected by Constitution of the United States or the Constitution of Virginia.

April 21, 1969

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

This is in reply to your letter of April 15, 1969, in which you inquire as follows:

"Authorities at Southwestern State Hospital, Marion, Virginia, are requiring hospital employees to sign an automobile registration form designated as 'S.S.H. Form 1810 (1-69)' which contains the following: 'In accepting parking assignment on the grounds of Southwestern State Hospital, I acknowledge that I park my vehicle at my own risk. I will also allow this vehicle to be searched on hospital grounds by authorized persons at any time when deemed necessary.'

"I have been contacted by a number of employees who questioned whether or not the requirement that their vehicle may be searched violates their constitutional rights as provided by Amendment IV of the Constitution of the United States.

"May I have your opinion as to whether or not this requirement allowing the search of the vehicle violates the constitutional rights of the hospital employee?"

It is settled law that a search to which an individual consents meets fourth amendment standards. In this regard, the leading case of Zap v. United States, 328 U.S. 624 (1946), is dispositive of your inquiry. At issue therein was a Navy requirement that a businessman consent to the inspection of his records as a prerequisite to holding a government contract. It was ruled that such consent was a voluntary waiver of the businessman's fourth amendment rights.

By analogous reasoning, a state hospital may require that its employees consent to the inspection of their automobiles as a prerequisite to parking on the hospital's grounds. Such a requirement would not infringe any right protected by either the Constitution of the United States or the Constitution of Virginia.

CRIMINAL PROCEDURE—Search Warrant Defective—Effect of.

ALCOHOLIC BEVERAGE CONTROL LAWS—Search Warrant—Defective effect of.

September 11, 1968

HONORABLE W. FRANCIS BINFORD, Judge
Prince George County Court

This is in reply to your letter of September 6, 1968, which is as follows:

"On May 2, 1968, an undercover agent for the Alcoholic Beverage Control Board working in a County made a purchase of legal whisky at what is commonly called a 'nip joint.' He continued his work for several weeks. On July 15th he went before a Justice of the Peace and requested a warrant of arrest for the person selling him this pint of whiskey. The criminal warrant was issued. He then requested a search warrant which was issued. The affidavit on the search warrant was signed by a Justice of the Peace. A search was made of the premises and a quantity of legal whiskey and beer was found. In light of the search
warrant being defective, can he be convicted of selling this pint of whiskey to the agent?"

Under § 4-58 of the Code of Virginia (1950), as amended, the illegal sale of whiskey is a misdemeanor. I see no objection to the admissibility of the evidence of the undercover agent to the effect that a particular person sold him a pint of whiskey on May 2, 1968. If this evidence is accepted as true by the trier of facts, it is sufficient to support a verdict of guilty.

I am unable to say from the facts contained in your letter whether or not the evidence obtained as a result of the search would be admissible—the answer would depend upon whether the search was reasonable or unreasonable. The Fourth Amendment to the United States Constitution affords protection against unreasonable searches. See, One 1963 Chevrolet Truck v. Commonwealth, 208 Va. 506, where the Court indicated several situations where searches may be lawful without a search warrant. Evidence obtained by an unlawful search and seizure is, of course, inadmissible. Mapp v. Ohio, 367 U.S. 643 (1961). This is not to say, however, that evidence obtained prior to any such search is inadmissible.

CRIMINAL PROCEDURE—Transcript of Trial—Indigent defendant not entitled to in preparing petition for writ of habeas corpus.

October 10, 1968

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

This is in response to your letter of October 1, 1968, which reads in part as follows:

"From time to time I have had requests from prisoners in the State Penitentiary for copies of the transcript and/or record of their trial in the Circuit Court of this County. I am in receipt of a letter from one Tony McCoy who was convicted in September, 1968, a copy of which letter is enclosed for your information.

"The purpose of this letter is requesting an opinion as to whether or not I am required to furnish McCoy and other prisoners such information."

At the 1968 Session of the General Assembly, § 8-596.1 of the Code of Virginia was enacted, which section prescribes the form on which a petition for a writ of habeas corpus is to be filed by a prisoner. The form does not require that the court records or transcript be appended to the same. Moreover, if the prisoner desires to file his petition in a court of record, he must file it in the court wherein the judgment was entered against him. All of the records pertaining to his conviction, of course, will be available to that court. The United States Court of Appeals for the Fourth Circuit has had occasion to consider the question of whether or not the transcript of a prisoner's trial must be made available to him prior to the filing of a petition for a writ of habeas corpus. In United States v. Glass, 317 F. 2d 200 (4th Cir., 1963) and United States v. Shoaf, 341 F. 2d 832 (1964), the court held that the prisoner was not entitled to the transcript of his trial, in order that he might prepare a petition for a writ of habeas corpus.

In view of the foregoing, I am of opinion that the Clerk is not required to furnish a copy of the record or the transcript of an indigent prisoner's trial, in order that he may prepare a petition for a writ of habeas corpus. In view of the enactment of § 8-596.1 by the 1968 Legislature, which obviates the necessity of furnishing indigent prisoners with any court records, I overrule my opinion of May 25, 1964, to Honorable John Wingo Knowles, Report of Attorney General (1963-1964), p. 91.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Trial—Must be held within three terms of court after indictment.

CRIMINAL PROCEDURE—Indictment—Defendant must be tried within three terms of court after indictment.

HONORABLE JAMES P. BABER
Commonwealth’s Attorney for Cumberland County

July 23, 1968

This is in response to your letter of June 28, 1968, which reads in part as follows:

“A defendant was indicted upon three indictments at a term of court, the September term, and on one of the indictments, plead guilty and was sentenced, on the second indictment entered a plea of not guilty, and the Commonwealth requested a continuance, which was granted by the Court, and which was agreed to by the defense counsel. No order was entered in the order books continuing the case.

“No action of any kind was taken at the January, April, and June terms of court.

“The question which arises is whether the Commonwealth is precluded by § 19.1-191 of the Code from trying the case at the next term, the September term of court, or does the fact that defense counsel at the first September term agreed that the case be continued from that day allow the Commonwealth to try the case after passage of the three intervening terms.

Under the factual situation set forth in your letter, no order was entered continuing the matter, nor is there any evidence of record that the attorney for the defendant concurred in the continuance. If the defense attorney raised the question at the September term of court following the third term subsequent to the indictment, I am of opinion, in view of the decision of the Supreme Court of Appeals of Virginia in Flanary v. Commonwealth, 184 Va. 204, 35 S.E. 2d 135 (1945), that the Court would quash the indictment. It is clear that the defendant was not tried within three terms of court after indictment and that he did not consent to the continuance.

CRIMINAL PROCEDURE—Warrants—Issuance not necessary in misdemeanor case.

December 18, 1968

HONORABLE LEROY MORAN
Commonwealth’s Attorney for the City of Roanoke

This is in reply to your letter of December 13, 1968, which reads as follows:

“This is a request for an opinion with reference to Section 19.1-100.1 of the Code of Virginia, which reads in pertinent part:

‘... If such a warrant be not issued the person so arrested shall be released; however, provided, that this section shall not bar a judge of a court not of record from proceeding in accord with the provisions of Sec. 16.1-129.1. (1968, c. 639.)’

“Section 16.1-129.1 of the Code of Virginia reads as follows:

‘In any case in which a person has been arrested for a misdemeanor by an officer in the discharge of his duty, it shall not
be necessary that a warrant be issued for such person, who may be tried without a warrant unless he shall, in person or by counsel, demand that the charges against him be reduced to writing in the form of a warrant. (1956, c. 555.)

"I have interpreted the above Code provision to mean that while the arresting officer has a duty to take his prisoner before a magistrate in order to have a warrant issued in those cases in which an arrest, including arrest for a misdemeanor committed in his presence, was made by him without a warrant, the court trying the case may render judgment even if the officer failed to obtain the required warrant, so long as the defendant does not request the issuance of a warrant. Another view, however, is that in cases of misdemeanor arrests for misdemeanors committed in the officer's presence there is no requirement that the officer take the prisoner before a magistrate. In effect, Section 19.1-100.1 would thus be construed to apply only in felony cases, which distinction certainly does not appear on the face of the statute.

"Please advise me whether it is your opinion that Section 19.1-100.1 does or does not require the arresting officer to take before a magistrate any person whom he has arrested without a warrant, including one arrested for a misdemeanor committed in the officer's presence."

The Supreme Court of Appeals of Virginia and also this office have previously said that undoubtedly the better practice is to always obtain a warrant. See Gooch v. City of Lynchburg, 201 Va. 172, 175 (1959), and also opinion of the Attorney General to the Honorable Charles T. Turner, dated June 13, 1962, found in the Report of the Attorney General (1961-1962), p. 77.

Now, § 19.1-100.1, enacted by the 1968 General Assembly, requires an arresting officer to bring a person arrested without a warrant "forthwith before an officer authorized to issue criminal warrants." It is clear, however, that the failure of the officer to fulfill this requirement is not a bar to a judge of a court not of record from proceeding, in accordance with § 16.1-129.1, to try such person.

I am therefore of the opinion that yours is the proper interpretation applicable to § 19.1-100.1.

CRIMINAL PROCEDURE—Warrants—Issued on probable cause.

WARRANTS—Arrest—Issued on probable cause.

June 16, 1969

HONORABLE G. L. FORRESTER
Sheriff of Lancaster County

This will acknowledge your letter of May 29, 1969, which states, in part, as follows:

"A case was tried in County Court in our county where a misdemeanor warrant was sworn out by me on information I received from the complaining witness. The County Court Judge dismissed the case on the grounds that I did not have probable cause to swear out a warrant on a misdemeanor charge. As this has been our practice for the 10 years that I have been in the Sheriff's Department, I would like to have your opinion as to the legality of this."

Section 19.1-90 of the Code of Virginia enumerates those persons authorized to issue warrants for the arrest of persons charged with criminal offenses. Section 19.1-91 of the Code of Virginia states that upon complaint of a criminal offense, a person authorized to issue warrants of arrest.
“shall examine on oath the complainant and any other witnesses. . . . If such officer sees good reason to believe that an offense has been committed, he shall issue his warrant reciting the offense and requiring the person accused to be arrested and brought before a court of appropriate jurisdiction of the county or corporation, and in the same warrant require the officer to whom it is directed to summon such witnesses as shall be therein named to appear and give evidence on the examination. . . .”

I find no authority for the proposition that the complainant, to which § 19.1-91 refers, must be the victim of a criminal offense. The validity of an arrest warrant is tested not by who makes the complaint but whether there is good reason to believe that an offense has been committed by the accused. Virginia Constitution, Sections 8, 10, § 19.1-91 of the Code of Virginia (1950).

CRIMINAL PROCEDURE—Warrants—Justice of peace may act as notary public in issuing.

JUSTICE OF PEACE—Acting as a Notary Public—in issuance of warrant.

October 30, 1968

HONORABLE GEORGE RIFE
Justice of the Peace for Buchanan County

This is in reply to your letter of October 24, 1968, in which you present the following question:

“The question that I wish to ask you is, I am a Notary Public and a Justice of Peace also. If I notarize the affidavit for the search warrant, and then as a Justice of Peace I issue the search warrant on the said affidavit, would the search warrant be a legal warrant?”

I find no statute prohibiting a justice of the peace from being a notary public. Neither do I find any such prohibition in the Constitution of Virginia.

Any affidavit required by law, which is not of such nature as it must be made in court, may be made before a notary pursuant to § 49-4 of the Code of Virginia. Thus, the affidavit required by § 19.1-85 of the Code, as a prerequisite for issuing a search warrant, may be made before a notary. Section 19.1-84 of the Code authorizes a justice of the peace, under the conditions therein stated, to issue a search warrant.

In view of the foregoing, it follows that a justice of the peace who is also a notary public is authorized to take the affidavit required by § 19.1-85 in his capacity as notary and thereafter issue the search warrant in his capacity as justice of the peace. In my opinion, therefore, the search warrant issued under the conditions stated would be legal.

DEEDS—Partial Marginal Release—May be allowed if a plat of the part or a deed of such part is recorded in the clerk's office.

RECORDATION—Liens—Partial Marginal release—May be allowed if a plat of the part or a deed of such part is recorded in the clerk's office.

June 19, 1969

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

I am in receipt of your letter of May 19, 1969, in which you set forth the following situation relative to the provisions of § 55-66.4 of the Code of Virginia (1950), as amended:
"In 1953 a deed of trust was given on certain lots in a subdivision joining the Town of Farmville to secure a note thereon. The present owners of these lots have conveyed a portion of two lots (not independently described in the deed of trust). Said lots are described in said deed as a portion of the numbered lots and by frontage on a principal street, running back between parallel lines a designated distance to a twenty foot alley. No plat is recorded with the deed.

The Clerk of the Circuit Court is concerned with the fact that a plat is not recorded and would like your opinion as to whether under provisions of Section 55-66.4 he may allow a lien holder to make a partial release of the deed of trust, without the recordation of the plat."

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." (Emphasis added)

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.) (Emphasis added)

It readily appears from the amendment to § 55-66.4 that a partial marginal release may be allowed if the property is sufficiently described in either one of two ways: "a plat of such part or a deed of such part is recorded in the clerk's office." In the situation you present, a partial release under the provisions of § 55-66.4 may still be allowed if there is on record a deed of the part of the property to be released. Of course, a cross reference must be made to the book and page where such deed is recorded.

DOG LAWS—Compensation for Livestock and Poultry Killed by Dogs—County of Roanoke may not adopt an ordinance requiring procedures not authorized by statute.

HONORABLE RAYMOND R. ROBRECHT
Commonwealth's Attorney for Roanoke County

This is in reply to your letter of August 20, 1968, in which you direct attention to the fact that § 29-202 of the Code of Virginia, entitled "Compensation for
Livestock and Poultry Killed by Dogs," contains exceptions which permit certain named counties to vary the prescribed method of handling claims under the statute. You present the following inquiry:

"From the fact of the aforementioned Code Section it would appear that Roanoke County could not pass an ordinance setting forth standards for required proof of such claims . . . Would you please render an opinion on 1) whether Code Section 29-202 is valid (constitutional) and 2) whether Roanoke County might pass an ordinance requiring reasonable standards of proof of claims for killed or injured livestock."

Section 63 of the Constitution of Virginia specifies the subjects upon which the General Assembly is precluded from enacting special or local legislation; however, I am unable to find any prohibition in Section 63 which pertains to the exceptions in § 29-202.

A different question is presented by Section 64 of the Constitution which requires the General Assembly to enact general laws as to subjects not included in Section 63 "which, in its judgment, may be provided for by general laws." This determination is made solely by the General Assembly. See, 4 M.J. Constitutional Law, § 39 at 122. Moreover, the Supreme Court of Appeals of Virginia has held that if a general statute contains special exceptions in violation of the Constitution, only the exceptions themselves are rendered inoperative. See, Martin v. Commonwealth, 126 Va. 603, 102 S.E. 724 (1920).

I am enclosing a copy of a previous opinion of this office, Report of the Attorney General (1950-1951) p. 94, in which it was ruled that Northumberland County could not require a claimant under § 29-202 to exhaust his legal remedies against the dog owner before making a statutory claim, in spite of the fact that the statute then contained a specific exception permitting Surry County to do so. In accordance with the foregoing, it is my opinion that Roanoke County may not enact an ordinance adopting procedures which the statute grants only to certain named counties.

DOG LAWS—Licenses—Ordinance changing rate—Effect of language. September 23, 1968

HONORABLE ELRIDGE C. HUFFMAN
Commonwealth's Attorney for Craig County

This is in reply to your letter of September 12, 1968, which I quote as follows:

"The Board of Supervisors is raising the dog license to $3.00 per dog regardless of sex.

"Can they have this new rate take effect the first of November or must they wait until the first of January for it to go into effect?

"Also they have some tags on hand marked male and female. Can they sell these tags under the new ordinance?"

Section 29-184.4 of the Code of Virginia authorizes the governing body of any county or city to which the provisions of §§ 29-184.2, 29-184.3 and 29-184.5 are applicable to enact local ordinances corresponding in nature and scope, and not in conflict with, the provisions of Chapter 9, Title 29 of the Code. It is provided in § 29-184 of the Code that the governing body of any city or county, which has assumed responsibility for enforcement of the dog laws under § 29-184.2 or § 29-184.5, may prescribe by ordinance a single tax for all dogs regardless of sex, the amount of which shall not exceed five dollars. Another provision of this section is that "dog licenses shall run by the calendar year, namely, from January first to December thirty-first, inclusive."

Section 29-185 prescribes that if a dog becomes six months of age or comes
into possession of any person between January first and November first, the license tax for the current year shall be paid forthwith by the owner. This section further states that if a dog shall become six months of age or come within possession of any person between October thirty-first and December thirty-first of any year, the license tax for the succeeding calendar year shall be paid forthwith and shall protect such dog from the date of purchase.

These statutes seem to indicate that there shall be uniformity between the State and local license laws as to period of license applicability and that the license period shall be on a calendar year basis except for licenses issued on and after November first of any year, which apply to the succeeding year. In regard to the first question, therefore, it is suggested that the amendment raising the license tax to $3.00 be made effective January 1, 1969. If the amendment is enacted prior to November 1, 1968, however, all license fees becoming due on and after November first should be based on the new rate, since, as indicated by the emphasized language of § 29-185, supra, the license tax for the succeeding year shall be paid by the owner of a dog which becomes subject to the license tax on and after November first of the current year.

In regard to your latter question my answer would be dependent upon the wording of the new ordinance. Section 29-208.1 of the Code states that any county having assumed responsibility for enforcement of the dog laws under § 29-184.2 may, by ordinance, provide a method of obtaining licenses and tags of a type which shall be described by the ordinance. If the use of such tags is authorized by the ordinance or is not in conflict with the terms thereof I find no statute preventing their sale under the new ordinance. As a practical matter, however, the use of the same type tag for successive licensing periods may present other problems.

________________________

ELECTIONS—Ballot—Absentee—May not be sent as a portion of official ballot.

ELECTIONS—Ballot—Different form of ballot may be used for special bond issue.

HONORABLE L. STANLEY HARDAWAY
Executive Secretary, State Board of Elections

October 4, 1968

I am in receipt of your letter of September 16, 1968, in which you forwarded to me a copy of a letter you received from Mrs. Cornella T. Martin, Secretary of the Electoral Board of the City of Falls Church, presenting several questions involving the handling of absentee ballots in that city at the elections to be held on November 5, 1968. From Mrs. Martin's communication, it appears that a special election may be held on that date in Falls Church upon the question of the issuance of general obligation bonds to finance the city's portion of the cost of construction of certain proposed transportation facilities. You point out in your communication that:

"Mrs. Martin states that the decision will be made on September 25, 1968, by the City Council as to whether to place this question on the November 5 ballot as a special election item, and she adds that the date of serving the official copy of the proposed ordinance to her electoral board is estimated to be October 12, and would therefore delay the printing of the complete ballot and impose a tight schedule for implementation of the election. She therefore asks the question as to whether the general election ballots may be sent to absentee applicants when available and a separate mailing of the special election ballot be made when that is ready, . . . ."

In this connection I am writing to advise that I have been unable to discover any provision of the applicable Virginia law which authorizes the procedures
suggested in Mrs. Martin's communication. In my opinion, the Virginia law governing absent voters—§ 24-319, et seq., Code of Virginia (1950) as amended—does not contemplate distribution to a prospective absent voter of a portion of the official ballots at one time and a further, separate distribution of the remaining official ballots at another time. Moreover, as you observe, there is "no provision in the War Voters Act authorizing the mailing of a second ballot except in the case of a second primary election." I am, therefore, of the opinion that the State Board of Elections cannot approve the absent voter procedure under consideration.

The above-stated conclusion obviates independent consideration of the related questions presented in Mrs. Martin's communication. There remains the following separate inquiry:

"If this issue is ordered as a Special Election to be held on November 5 it will necessitate the preparation and use of a 'Freeholders List.' Could paper ballots be used for THIS SPECIAL BOND ISSUE ONLY and the voting machines used strictly for the General Election?"

I am of the opinion that this question should be answered in the affirmative. In this connection, I call your attention to § 24-315 of the Virginia Code—a provision of Chapter 12 of Title 24 regulating the adoption and utilization of voting machines—which prescribes:

"All of the election laws now in force, and not inconsistent with the provisions of this chapter, shall apply with full force and effect to elections in cities, towns and counties adopting and using voting machines. Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures."

(Italics supplied.)

ELECTIONS—Ballot—Presidential—Name deleted upon timely request of candidate.

August 9, 1968

HONORABLE L. STANLEY HARDAY
Executive Secretary, State Board of Elections

I am in receipt of your letter of August 2, 1968, in which you present the following situation and inquiry:

"A letter was received in this office on October 20, 1967 from Mr. Lyn Nofziger, Communications Director for Governor Ronald Reagan of California, stating it had come to their attention that a group identifying itself as the Conservative Party of Virginia intends to enter a presidential slate in Virginia composed of George Wallace for President and Governor Ronald Reagan for Vice President and that this slate does not have Governor Reagan's sanction nor approval. He further asked to be notified as to what steps are needed to assure that Governor Reagan's name does not appear on a presidential ballot in Virginia.

"A letter dated July 11, 1968 has been received by this Board from George C. Wallace stating his official political organization in Virginia is the American Independent Party and this group will file the necessary petitions with us to qualify him as a candidate for President of the United States some time in August. He stated he has not approved the use of his name as a Presidential candidate on a Wallace-Reagan ticket and requested the Board not to permit his name to be used as a candidate of the Virginia Conservative Party. He said any other papers filed in this office, purporting to place his name on the November election ballot, are entirely without his approval or consent and requested that we be filed."
"Since Governor Reagan has requested that his name not appear on a presidential ballot in Virginia and Mr. Wallace has expressed his desire to have his name appear on the ballot in Virginia only as a candidate for President for the American Independent Party, it will be appreciated if you will advise us the procedure to follow with respect to their requests."

The special provisions of Virginia law concerning presidential elections are embodied in §§ 24-290.1 through 24-290.6, which comprise Chapter 11.1 of Title 24 of the Virginia Code. Section 24-290.1 provides that in such an election the electors selected by a political party, together with the name of the political party and the names of the candidates for President and Vice President for which such electors are expected to vote in the Electoral College, shall be furnished the State Board of Elections at least sixty days before the election. A “political party” is defined in § 24-290.2 as an organization or affiliation of citizens of Virginia which at the last preceding Statewide general election polled at least five per cent of the total vote cast for an office filled in that election by the voters of the State at large and which has a State central committee which has been continually in existence since the last preceding Statewide election.

In addition, § 24-290.3 empowers any group containing not less than one thousand qualified voters and not constituting a political party as above defined to have printed on the ballot to be used at such election the names of electors selected by them by filing with the State Board of Elections a petition signed by such voters. Such petition must set forth the names of the electors, the party name under which they desire such electors to be listed on the ballot and the names of the candidates for President and Vice President for whom such electors are expected to vote in the Electoral College. Section 24-290.3 further prescribes that the party name selected by such group of voters shall not be identical with the name of any political party as defined in § 24-290.2.

In the preparation of the uniform ballot for use in such an election, the State Board of Elections is directed by § 24-290.4 to certify to the secretary of each local electoral board the form of the ballot which shall contain (1) the name of the political party or the party name specified by those filing a petition (2) the names of the candidates for President and Vice President for whom the electors are expected to vote (3) the names of the individual electors and (4) a square preceding the name of each political party or party designation. When the election is held, qualified voters designate their preference for candidates for electors of President and Vice President by marking the square preceding the name of the political party or party name of his choice, which action is, by § 24-290.5 of the Virginia Code, made tantamount to a vote for each of the individual electors nominated or selected by such political parties or group of petitioners.

In light of the above canvassed statutes, it is clear (1) that those voting in a presidential election vote for electors nominated or selected by political parties or party groups, which electors are in turn expected to vote for the candidates for President and Vice President of that political party or party group (2) that such electors are not voted upon individually, but as a unit previously nominated or selected by a political party or party group (3) that a voter’s choice of electors is indicated by his marking the ballot for a political party or party group and (4) that the names of each party group must be distinguishable from that of each other political party as defined by statute.

While I have been unable to discover any decision of the Supreme Court of Appeals of Virginia or any prior opinion of this office in which the question you present has been passed upon, it appears that the substantially identical issue was recently considered by the Supreme Court of South Carolina in Wallace v. Thornton, decided July 8, 1968. In that case, the South Carolina Independent Party had nominated and filed with the Secretary of State of South Carolina the names of its candidates for presidential electors and requested the Secretary of State to add the name of George C. Wallace to the ballot as the candidate for whom such electors were pledged to vote. Thereafter, Wallace instituted suit for an injunction.
to restrain the Secretary of State from placing his name on the ballot of electors nominated by that party. The Supreme Court of South Carolina granted the requested relief and, during the course of its accompanying opinion, observed:

"Ordinarily the listing of a candidate's name on the ballot would cause no problem because in the usual election, votes are cast for the candidate himself and all votes in favor of the candidate are totaled to his benefit. In an election for President, however, a unique situation is presented because of the electoral college system established by article II of the Constitution of the United States. Under this system of election the citizen votes, not directly for the candidate himself, but for electors who attend the electoral college and bring about the actual election. The electors who receive the largest popular vote in each State attend the electoral college and elect the President. Separate sets of electors pledged to the same presidential candidate may not consolidate their vote.

"In the election of electors where a plurality prevails, two sets of electors committed to the same candidate may serve as a trap for the presidential aspirant. Of more importance, such may effectively create a device which thwarts the will of the majority.

"It is the argument of the petitioners that he should not be required to lend his name to The South Carolina Independent Party, when such might so strengthen its electors' candidacy as to split his voting support and bring about defeat of electors selected by those in charge of his campaign. * * *

"We agree with the petitioner that the use of his name above the slate of electors of The South Carolina Independent Party will tend to prevent, rather than enhance, the possibility of the voters making their voice heard in the electoral college. * * *

"It is therefore the order of this court that the relief prayed in the petition of George C. Wallace be granted and that the respondent, O. Frank Thornton, as Secretary of State of South Carolina, be and he is hereby enjoined from placing the name of George C. Wallace on the November 1968 general election ballot in connection with the presidential electors nominated by The South Carolina Independent Party." (Italics supplied.)

The Supreme Court of South Carolina also made reference to the decision of the Supreme Court of Florida in Battaglia v. Adams, 164 So. 2d 195, in which case the right of Richard M. Nixon to have his name removed from the Florida presidential primary ballot was sustained. In its opinion in that case, the Florida Supreme Court declared (164 So. 2d, at 197, 198):

"And we agree that Mr. Nixon . . . has an absolute right to say whether or not his name shall be advanced as a candidate for president or any other office by the relators or any other group." * * *

"It might be noted that in this area—the political arena—a person's right to manage his own political campaign and to say when and where he shall stand for office has been recognized as a personal right in many other jurisdictions; and it appears to be generally held that, in the absence of statutory inhibition, a candidate has a natural or inherent right to resign at any time and to have his name deleted from the ballot." (Italics supplied.)

The general rule stated in the language of the Supreme Court of Florida italicized immediately above is well supported by decisional authority. See, Black v. Board of Supervisors of Elections, 191 A.2d 580; State v. Burch, 125 So. 2d 876; State v. Hunt, 81 P.2d 883; State v. Hinkle, 229 P. 317; Bordwell v. Williams, 159 P. 869; 27 Am. Jur. 260, Elections: § 127.

Considering the applicable Virginia statutes in light of the above cited cases, I am of the opinion that the requests of Governor Reagan and Mr. Wallace should
both be honored and that their names should not be placed on the ballot in connection with the presidential electors of the Conservative Party. In this regard, it is significant that the Virginia law contains no statutory prohibition against the resignation of a candidate in situations such as that under discussion, much less any prohibition against withdrawal by one who is not even a candidate for the office for which his name is put forward by others without his sanction. On the contrary, § 24-234 of the Virginia Code makes express provision for placing additional names on the ballot when any candidate of a political party “dies or withdraws as a candidate” when it is too late for any other candidate for the office to qualify under general law. While § 24-234 is not applicable in its terms to presidential elections, the right of a citizen to withdraw as a candidate for public office and have his name stricken from the ballot has been uniformly recognized by this office over the years. See, Reports of the Attorney General (1930-1931) p. 56; (1946-1947) p. 56; (1955-1956) pp. 56, 61; (1963-1964) p. 115.

In view of the foregoing, I am of the opinion that Virginia law does not contemplate that anyone can be required to permit his name to be placed on the ballot as a candidate for office against his will, or as a candidate for public office in connection with a political party or party group whose affiliation he specifically disavows. Neither expressly nor by implication does it appear to be the design of the Virginia statutes to infringe the right of an individual “to say whether or not his name shall be advanced as a candidate for president or any other office by . . . any . . . group” or his right, upon timely request being made therefor, “to have his name deleted from the ballot.” Battaglia v. Adams, supra at 197, 198.

As the State Board of Elections will not certify the form of official ballot to the secretaries of the local electoral boards until sometime after September 6, 1968 (sixty days before the general election) there can be no doubt of the timeliness of the requests concerning which you inquire. I believe, therefore, that the State Board of Elections should advise Governor Reagan and Mr. Wallace that it will delete their names from the ballot as candidates of the Conservative Party in accordance with their request. In addition, I would suggest that you advise the appropriate representative of the Conservative Party of the action which the State Board of Elections intends to take with respect to the requests under consideration.

ELECTIONS—Ballots—Secretary of Election Board legal custodian of.
ELECTIONS—Absent Voters—How voucher and coupon executed.
ELECTIONS—Absentee Voter—Certificate of Registration—No specific method required for applicant to follow in delivery to the secretary of the Electoral Board.
ELECTIONS—Absentee Voter—Electoral Board—Duties—Required to determine that applicant is a registered voter.
ELECTIONS—Absentee Voter—Registrar—Duties—Required to see that application for absentee ballot complies with the requirements of § 24-324 of the Code.
ELECTIONS—Absentee Voter—Judges of elections—Duties—Required to determine the eligibility of voter.
ELECTIONS—Absentee Voter—Secretary of Electoral Board—Duties—Required to send the applicant the documents specified in § 24-327 of the Code.
ELECTIONS—Voter Residence—Controlled by intent of voter.
ELECTIONS—Local Electoral Board—Quorum of two members—Cannot be altered or changed except by legislature.
I am in receipt of a copy of your letter of April 1, 1969, to the Honorable Kenneth P. Asbury, Commonwealth's Attorney of Wise County, in which you request his opinion, and that of this office, upon certain questions involving the election laws of Virginia. Your questions will be stated and considered seriatim.

Question (1)
Can the local board, by resolution give exclusive possession of the ballots prepared for the State Board until they are sent by registered mail to the State Board, and also the ballots to be used locally by absent voters?

Answer: The secretary of the electoral board is the legal custodian of the ballots. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated October 7, 1948, in which this question was considered and discussed at length. See, Report of the Attorney General (1948-1949) p. 68.

Question (2)
Can any capable person who is requested to do so by the applicant complete the blank spaces appearing on the "Application for absentee ballot," above the line provided for "Signature of Applicant?"

Answer: I find nothing in § 24-327 of the Virginia Code which prohibits a person "who is requested to do so by the applicant" from filling out that part of the application for an absentee ballot which appears above the signature of the applicant. Cf. Reports of the Attorney General (1943-1944) p. 47; (1959-1960) p. 144. Section 24-324 does provide in part, however, that

"The statement shall also declare under penalty of perjury that the facts in such application have been examined by the applicant and are true and correct. Any applicant signing an application which is not true and correct shall be guilty of perjury and punished as provided by law."

Moreover, § 24-322 prescribes that the application "may be handed by the applicant himself to the registrar in person, or forwarded to him by mail." (Emphasis supplied.)

Question (3)
After the Registrar has completed the Certificate of Registration and returned it to the applicant, can the applicant deliver the application to the secretary of the Electoral Board in any way that he/she (the applicant) chooses?

Answer: Yes. The applicable statute (§ 24-327) does not prescribe any specific method by which an applicant may deliver the approved application to the secretary of the electoral board.

Question (4)
Is there any further obligation on the Electoral Board than that required in the last sentence of this section? Which reads, "If it then appear to the electoral board that the applicant is a registered voter of the precinct in which he offers to vote the electoral board SHALL SEND to the applicant by registered or certified mail with return receipt requested or deliver in person to him the following: (a) (b) (c) (d) (e) of Section 24-327."

Answer: No. In this connection, I am forwarding to you a previous opinion of this office, dated September 23, 1947, in which the then Attorney General (later Justice) Abram P. Staples expressed the view that:

dismiss from our records any and all such papers, if and when they may
"The statute then requires the electoral board, if it determines that the applicant is a registered voter of the precinct in which he offers to vote, to send the ballot and related papers to the applicant by registered mail."
(Emphasis supplied.)


Question (5)
Is it the duty of the registrar to make certain that the application is properly completed?

Answer: I am of the opinion that it is the duty of the registrar to see that the application for an absentee ballot complies with the requirements of § 24-324 of the Virginia Code. This view is consistent with that previously expressed by this office in an opinion to the Honorable Philip P. Burks, Treasurer of Bedford County, dated June 2, 1944. See, Report of the Attorney General (1943-1944) p. 45.

Question (6)
Is it the duty of the judges of the election to check application, voucher, and coupon?

Answer: I am of the opinion that the judges of election should check the documents you mention. In this connection, this office has previously ruled that:

"... any absentee vote cast by a person whose application was not filed within the time prescribed by the statute is an illegal vote and the judges of election should refuse to deposit the vote in the ballot box."

See, Report of the Attorney General (1959-1960) p. 143. Moreover, in an opinion dated July 7, 1961, we expressed the view that:

"By virtue of § 24-341 of the Code, the judges of election are required to determine the eligibility of the voter to cast his vote before the ballot is deposited in the ballot box. Should they, or any elector, have reason to believe any such absentee voter is not qualified to cast his vote in the primary election, it is the duty of the judges to withhold that ballot until the question of eligibility is determined."


Question (7)
Is it the duty of secretary of the electoral board to send to the applicant, an instruction sheet, a ballot or ballots, a voucher envelope, a coupon and an envelope properly addressed for return of marked ballot and coupon by registered mail, when the Registrar has certified to the electoral board, that the applicant is a registered voter in his precinct?

Answer: It is the duty of the secretary of the electoral board to send to the applicant the documents specified in § 24-327 once the board has determined that the applicant is a registered voter of the precinct in which he offers to vote. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated October 14, 1954, in which the duties of the electoral board (and the rights of the individual members thereof), upon receipt of an application for an absentee ballot, were considered and discussed at length. See, Report of the Attorney General (1954-1955) p. 79.

Question (8)
When a voter has established a voting place in an incorporated town, and has moved his physical being to another location, but never voted anywhere else, can he still exercise his right of franchise at the place he has legally chosen for voting? Who has authority to make a person change his franchise from one location to another?
Answer: This office has repeatedly ruled that residence for the purpose of voting is controlled by the intent of the voter. See, Report of the Attorney General (1935-1936) p. 55; (1966-1967) p. 144. Specifically, in the most recent of the above cited opinions, this office re-affirmed:

"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."

Question (9)

Section 24-34 provides that any two members of the Local Electoral Board constitutes a Quorum in regular and special meetings. Does any person have authority to change this section of the Virginia Election laws and order that the Quorum present cannot act on all matters that the Quorum present deems urgent and necessary to be acted upon?

Answer: I am of the opinion that no individual has the authority to alter the terms of this provision of the election laws of Virginia.

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ELECTIONS—Circulation of Writing Concerning Candidate—When statute prohibiting violated.

HONORABLE JOHN S. HANSEN
Member, House of Delegates

This is in reply to your letter of October 5, 1968 in which you request my opinion as to whether or not the distribution of certain papers in a recent political campaign constitutes a violation under paragraph (2) of § 24-456 of the Code of Virginia.

The named Code section is as follows:

"It shall be unlawful for any person to cause other persons to print or distribute or himself to print or distribute any writing concerning any candidate for office unless such writing plainly identifies the person responsible therefor."

One of the papers submitted for my consideration is a clipping from the Colonial Heights Herald Tribune. By definition of the term "writing," found in paragraph (1) of § 24-456, an item printed in the newspapers is excluded and hence, this item is not in violation of the section. Two other writings fail to name any candidate and, therefore, do not qualify as a "writing concerning any candidate." The remaining two writings submitted name certain candidates and state what they believe. These fall in the same category as a writing discussed in an opinion issued May 31, 1957 by then Attorney General J. Lindsay Almond, Jr., to Honorable A. D. Johnson, Commonwealth’s Attorney for Isle of Wight County, now found in Report of Attorney General (1956-1957) p. 97.

For the reasons set forth in the cited opinion, a copy of which I enclose, it is doubtful whether the statute under consideration has been violated in the present instance.

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ELECTIONS—County Magisterial Districts—Requirements as to population and size.

HONORABLE JOHN PAUL CAUSEY
Commonwealth’s Attorney for King William County

This is in reply to your letter of July 2, 1968, in which you present two questions which will be answered seriatim.
"1. Does the ruling of the United States Supreme Court in Avery v. Midland County require that in the redistricting of a county the magisterial districts be substantially equal in population, without regard to geographic size?"

Yes. The Avery decision prohibits the election of members of governmental bodies from single member districts of "substantially unequal population." See, 88 S. Ct. at 1116. The Court also held it improper to consider factors other than population in working out an apportionment plan. 88 S. Ct. at 1120.

"2. Provided that in the redistricting of a county magisterial districts are substantially equal in population, may a magisterial district lawfully be created less than thirty square miles in area?"

No. In this connection, I am enclosing a copy of a previous opinion of this office, in which it was ruled that Section 111 of the Constitution of Virginia requires that magisterial districts be at least thirty square miles in area. See, Report of the Attorney General (1965-1966) p. 59. I do not believe that this provision of the organic law in Virginia is necessarily inconsistent with Federal apportionment standards or that its requirements may be disregarded when new or additional magisterial districts are created.

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ELECTIONS—Electoral Boards—Subject to "The Virginia Freedom of Information Act."

HONORABLE JAMES M. WOLCOTT, Chairman
Electoral Board, City of Norfolk

July 8, 1968

This is in reply to your letter of June 26, 1968, in which you inquire if "The Virginia Freedom of Information Act," Acts of Assembly, Ch. 479, p. 691 (1968), is applicable to local electoral boards. Sections 2(a) and 4 of the Act make it applicable to "any authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State," when sitting as a body, unless otherwise specifically provided by law. None of the exceptions contained in § 6 of the Act is applicable to electoral boards, although under § 5 provision is made for the holding of executive sessions. In view of the foregoing, I am, therefore, of the opinion that electoral boards would be within the coverage of the Act.

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ELECTIONS—Local Option—Costs which county may pay.

HONORABLE GEORGE S. ALDHIZER, II
Member, Senate of Virginia

December 9, 1968

This is in response to your letter of December 3, 1968, in which you ask my opinion on the following question:

"Does the Town Council of a town have legal authority to authorize payment, from town funds, of attorneys fees and court costs involved in preparing and submitting to the Court the necessary exhibits, notices and orders for the holding of a referendum on the sale of alcoholic beverages within the town, as set out in Section 4-45 et seq, Code of Virginia, 1950, as amended?"

The local option election provided for in § 4-45 of the Code of Virginia (1950), as amended, is initiated by the filing of a petition in the proper circuit or corpora-
tion court. There is no provision in the statute authorizing the governing body of a town to initiate such a proceeding.

Sections 4-45 et seq. do not specifically prescribe how the costs of such an election shall be paid. It is noted that provision is made in §§ 4-45.2 and 4-45.3 for reference to a master in chancery in some situations, and the expenses of the reference are part of the “costs of election.” The answer to the question as to how the costs of such an election are to be borne is determinable under Title 24 of the Code, which title pertains to the conduct of elections.

Section 24-177 of the Code is as follows:

“The costs of conducting elections under this chapter shall be paid by the counties and cities respectively.”

This office has heretofore ruled that the costs of an election held in a town pursuant to § 4-45 should be paid by the county, in view of the provisions of § 24-177. See, Report of the Attorney General (1961-1962) p. 102, at 104.

There are other sections in Title 24, however, that direct that certain specific costs in a town election be paid by the town, and that authorize a town to supplement in some cases the compensation paid certain officials. See, §§ 24-204, 24-206 to 24-209 inclusive.

An attorney's fee, in my view, is not a part of the costs of such an election, and I find no provision for the payment of such fees in the applicable statutes. I conclude that such fees may not properly be paid by the Town. The filing fees accruing to the clerk of the circuit court in connection with the election appear to be costs payable by the county.

ELECTIONS—Local Option—Qualified voters in a town constituting separate local option units may not vote in county election.

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

This is in reply to your letter of October 16, 1968, which is as follows:

“Residents of Loudoun County and the Town of Leesburg in Loudoun County, the latter with a population in excess of 2500, expect to cast their votes in the upcoming local option elections pursuant to Section 4-98.12 of the Virginia Code. A question has arisen as follows:

“Are the residents of the Town of Leesburg, who are also qualified to vote in county elections, permitted to cast a vote on both the county ballot and town ballot on the particular question?”

Section 4-98.12 is the section of the Code that provides for local option elections on the question of the sale of mixed alcoholic beverages. The last paragraph of this section is as follows:

“The provisions of this section shall be applicable to towns having a population in excess of two thousand five hundred inhabitants according to the last preceding United States census to the same extent and subject to the same conditions and limitations are otherwise applicable to cities and counties under this section.”

In my opinion towns having a population in excess of two thousand five hundred inhabitants constitute separate local option units. This being so, the qualified voters of a town constituting such a unit are not eligible to vote in a county election on this question.
ELECTIONS—Poll Books—Court order required before chairman of a committee entitled to inspect sealed books.

June 2, 1969

HONORABLE KATHERINE V. RESPRESS
Clerk of Courts, City of Norfolk

I am in receipt of your letter of May 28, 1969, in which you call my attention to § 24-378 of the Virginia Code and make inquiry concerning the propriety of your "surrendering to the new City Democratic Chairman, for the purpose of copying same, the poll books which were used in the July Primary in 1968."

Your present inquiry supplements that of April 30, 1969, to which I replied on May 6, 1969, reaffirming the view previously expressed by this office that "a court order would be required in order for the Chairman of a committee to be entitled to inspect the sealed poll books." See, Report of the Attorney General (1953-1954) p. 70.

In view of the substantial identity between the language contained in §§ 24-378 and 24-380 of the Virginia Code, relating to primary elections, and the language contained in §§ 24-267 and 24-268 of the Virginia Code, relating to elections generally, I am of the opinion that the view expressed on the previous occasion would be equally applicable to the situation you now present and that a court order would be required before the individual in question may have access to the sealed poll books.

ELECTIONS—Primary—Where political party selects primary as method for nomination of candidate—Must follow statutory provisions relating to primary.

December 16, 1968

HONORABLE ROBERT A. MALONEY
Member, House of Delegates

I am in receipt of your letter of November 26, 1968, in which you call my attention to § 24-364 of the Virginia Code and request my opinion upon the following matter:

"It would appear to me that the Republican Party could provide a method of slot voting in a primary election for nomination of candidates for the House of Delegates in a jurisdiction such as Fairfax County. For example, there are six at large seats in Fairfax County as well as a floater delegate seat. Each seat could be designated by letter and prospective candidates could designate the seat they seek. While it is recognized that Section 24-356 brings general election provisions into play respecting primary elections, the succeeding section, 24-364, appears to authorize a party to adopt a slot method of selection of candidates."

Section 24-364 of the Virginia Code provides:

"Each party shall have the power to provide in any way it sees fit for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committees."

While the above-quoted statute empowers a political party to prescribe the method by which its candidates shall be nominated, I am of the opinion that the authorization contained therein does not permit a political party to alter the provisions of Virginia law governing primary elections. Section 24-364 is embodied in Chapter 14 of Title 24 of the Virginia Code (§§ 24-346 through 24-348) entitled Primary Elections, and §§ 24-347 and 24-348 provide:

"A primary when held shall be conducted in all respects under the provisions of this chapter." (Italics supplied.)
"This chapter shall apply to the nomination of candidates for such offices as shall be nominated by a direct primary and to no other nominations. The right to provide that a party nomination shall be made by a direct primary or by some other method shall be determined as follows: For a member of the Senate in the Congress of the United States, or for any State office, by the duly constituted authorities of any political party for the State at large; for any district office or member of the House of Representatives of the United States, or for State senator, member of the House of Delegates, or for any city, town, or county office, by the duly constituted authorities of any political party of the district, county, city, town, or other political subdivision of the State in which such office is to be filled. All nominations made by a direct primary shall be made in accordance with the provisions of this chapter." (Italics supplied.)

While § 24-364 clearly confers upon a political party the power to provide for the nomination of its candidates by some method other than a direct primary, if the direct primary is selected by the duly constituted authorities of the party as the method of party nomination, such primary must be conducted in accordance with the provisions of Chapter 14. Since none of the statutory provisions comprising Chapter 14 purports to authorize a method of "slot voting" for the nomination of candidates, I am of the opinion that this type of voting may not be utilized if party nominations are to be determined by a direct primary.

ELECTIONS—Referendum on Sale of Mixed Alcoholic Beverages—Procedures available to political subdivisions for termination of sale of beverages after voted on affirmatively—Discussion of.

ALCOHOLIC BEVERAGES—Procedures Open to Political Subdivisions for Repeal after Voted On.

HONORABLE CHARLES R. FENWICK
Member, Senate of Virginia
October 23, 1968

This is in response to your letter of October 21, 1968, which is as follows:

"In connection with the referendum to be on the Arlington County ballot November 5, relative to the sale of 'mixed alcoholic beverages' the question has arisen as to what provision, if any, is provided for the termination of such sales if the referendum passes.

"Section 4-98.13 specifies that 47 months must elapse before the question can be raised again after the voters in a given jurisdiction reject the proposal in a referendum as provided in Section 4-98.12. Section 4-98.12 establishes the procedure for making Chapter 1.1 effective in a city or county, but the alternative situation of ending the sale of mixed alcoholic beverages in a jurisdiction appears not to be dealt with in this or any other section of Chapter 1.1.

"I would appreciate your opinion as to what procedure, if any, is available to a political subdivision by referendum or otherwise for terminating the sale of 'mixed alcoholic beverages' after it has once been favorably adopted by referendum and is being practiced. In view of the time element, I would greatly appreciate your giving me an opinion as promptly as possible."

In my opinion, the question as to whether a local option unit may hold a subsequent referendum after having voted affirmatively in one such referendum upon the question "May mixed alcoholic beverages be sold in (name of local option unit) by restaurants licensed under Chapter 1.1 of Title 4 of the Code of Virginia" is not free from doubt.

The applicable statutes are §§ 4-98.12 and 4-98.13 of the Code of Virginia.
(1950), as amended. Section 4-98.12 prescribes in detail the procedure for conducting such a referendum. As the statute is rather lengthy, I shall not set it forth in full. It is noted that the statute contains this language "The provisions of this chapter shall not become effective in any city or county until . . . a majority of the voters voting in such election shall vote 'Yes' . . ." Further on in this section provision is made for the entry of a court order proclaiming the results of the election, and then this sentence: "This chapter shall become effective in such city or county 30 days following the entry of such order."

Section 4-98.13 contains this language: "After an election is held in a city, town or county under § 4-98.12, no further such election may be held in such city, town or county for a period of forty-seven months . . ."

There is no language in Chapter 1.1 making specific reference to the effect of a negative referendum held after the chapter becomes effective, to the effect thereof upon any previous court order, or to the effect thereof upon unexpired licenses that may have been issued pursuant to the chapter.

The language of § 4-98.13, "no further such election," seems indicative of legislative intent that more than one election may be held, and this section makes no reference as to whether the result of a previous election was affirmative or negative.

While I have found no Virginia case that appears to be applicable, research has disclosed a decision of the Supreme Court of Georgia which may be somewhat pertinent to the question you present. In Wharton v. State, (Ga.), 21 S.E. 2d. 258 (1942), a county that voted "wet" in a local option election in 1938 voted "dry" in another such election held in 1940, though the Georgia statutes effective at that time did not specifically provide for that contingency, nor does it appear that the relevant Georgia law made provision for the entry of a court order. The Georgia Supreme Court found that the legislative intent was to allow such subsequent election; however, in the absence of any applicable decision of the Supreme Court of Appeals of Virginia, no definitive response to your inquiry can be made.

ELECTIONS—Registration—Application for transfer may not be processed after registration books closed. October 9, 1968

MRS. LESLIE C. CURDTS
General Registrar, City of Norfolk

I have your letter of October 8, 1968, which reads as follows:

"We have received through the mail several transfers of registration from other cities and counties in Virginia since the Registration Books closed on October 5, 1968. "May we enter the names on the Books of those transfers received with a postmark dated on or before October 5, 1968?"

The answer to your question is governed by § 24-86 of the Code of Virginia, which provides, in part, as follows:

"Whenever a registered voter changes his place of residence from one county or city to another county or city, it shall be lawful for him to apply to the registrar of his former election district, at any time up to and including the regular days of registration, in person or in writing to furnish a certificate that he was duly registered . . . and the name of every such person shall be entered at any time, up to and including the regular days of registration, by the registrar, on the registration books of the election district in which such person resides." (Emphasis supplied)

From this, it appears clear that such a transfer has to be made during the regular days of registration and after the registration books are closed it would be too late to make such transfer.
ELECTIONS—Registration Requirements—Registrar cannot require applicant to remove name from voting rolls of another state.

October 29, 1968

HONORABLE JARED A. CLOSE, Chairman
Rockbridge County Electoral Board

I am in receipt of your letter of October 24, 1968, in which you present the following situation and inquiry:

"Subject A appears before the Registrar and requests to register, stating he has lived in Virginia, the required time, but is registered in the State of New Jersey wherein he voted. My question is this: Does the Registrar have the right to request of subject A to have his name removed from the voting Rolls of New Jersey, prior to his registering in Virginia?"

I am of the opinion that your inquiry should be answered in the negative. If a prospective registrant complies with all the requirements prescribed by Virginia law for registration to vote, he is entitled to be registered, and I am not aware of any provision of Virginia law which empowers a registrar to condition such registration upon the prospective registrant's having his name removed from the voting rolls of another State.

ELECTIONS—Voting—Physically handicapped voters—Upon request, may be assisted by judges of election.

September 23, 1968

HONORABLE GRIER L. CARSON
Secretary, Augusta County Electoral Board

I am in receipt of your letter of September 13, 1968, in which you forwarded to me a copy of a letter you recently received from Curtis Iddings, Assistant Director of the Woodrow Wilson Rehabilitation Center, concerning the propriety of a limited number of separate paper ballots being used by handicapped voters in those precincts in which voting machines have been installed. You request to be advised of the appropriate method of accommodating handicapped voters in such precincts.

With respect to the propriety of utilizing separate paper ballots under such circumstances, I am forwarding to you copies of two previous opinions of this office, dated October 24, 1955, and October 21, 1964, in which it was ruled that it would not be permissible to allow voting by separate paper ballots in electing candidates for public office. See, Reports of the Attorney General (1955-1956) p. 78; (1964-1965) p. 112.

However, I call your attention to § 24-310 of the Virginia Code, which prescribes that the provisions of the existing election laws relating to the assistance to be given voters shall apply where voting machines are used. With regard to the rendering of assistance to voters, § 24-251 of the Virginia Code provides:

"Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of
this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months."

As you are aware, the above-quoted provisions of § 24-251 of the Virginia Code have been made applicable by the State Board of Elections to educationally handicapped as well as physically handicapped voters.

ELECTIONS—Voting Machines—Provisions for voter to vote for individual electors or for write-in votes not required.

HONORABLE JAMES M. YOUNG, Chairman
City of Salem Electoral Board

I am in receipt of your letter of October 18, 1968, in which you state that the City of Salem will utilize voting machines for the general election to be held on November 5, 1968. In this connection, you call my attention to the concluding proviso of § 24-294 of the Virginia Code and present the following inquiries:

"1. Must we make the provision on our voting machines for a voter to vote for individual Electors?
"2. Must we provide a place for one or more write-in votes on the Presidential ballot?"

I am of the opinion that both of your inquiries should be answered in the negative. The special provisions of Virginia law concerning presidential elections are embodied in §§ 24-290.1 through 24-290.6, which comprise Chapter 11.1 of Title 24 of the Virginia Code, entitled Special Provisions for Presidential Elections. This segment of the Virginia election law was enacted subsequent to § 24-294, to which you refer, and governs the conduct of presidential elections. With regard to the preparation of the ballot in such elections and the method of marking such ballots, §§ 24-290.4 and 24-290.5 of the Virginia Code are determinative. In the preparation of the uniform ballot for use in such an election, the State Board of Elections is directed by § 24-290.4 to certify to the secretary of each local electoral board the form of the ballot which shall contain (1) the name of the political party or the party name specified by those filing a petition (2) the names of the candidates for President and Vice President for whom the electors are expected to vote (3) the names of the individual electors and (4) a square preceding the name of each political party or party designation. When the election is held, qualified voters designate their preference for candidates for electors of President and Vice President by marking the square preceding the name of the political party or party name of his choice, which action is, by § 24-290.5 of the Virginia Code, made tantamount to a vote for each of the individual electors nominated or selected by such political parties or group of petitioners.

In light of the above canvassed statutes, it is clear that presidential electors are not voted upon individually, but as a unit previously nominated or selected by a political party or party group, and that a voter’s choice of electors is indicated by his marking the ballot for a political party or party group. I am, therefore, of the opinion that the Electoral Board of the City of Salem is not authorized by Virginia law to make provision for voters to vote for individual presidential electors or to cast a write-in vote in the impending presidential election.

EMINENT DOMAIN—Easements for Stream Channel Improvements—City of Culpeper may condemn.

HONORABLE JOHN L. JEFFRIES, III
Commonwealth’s Attorney for Culpeper County

This is in reply to your letter of February 7, 1969, from which I quote the following:
"The Town Attorney and the Town Manager of Culpeper, Virginia, have asked my opinion in regard to the question of the right of the Town of Culpeper to condemn in order to secure an easement of 3.45 miles for stream channel improvements as set forth as increment # 3 in paragraph # 4 of the attached letter, as much of this land is located in the County of Culpeper outside of the Town.

"The letter from the Town addressed to the Town Attorney, a copy of which is hereby attached together with the pertinent sections of the Ordinances of the Town of Culpeper, will explain to you the problem in detail. The question seems to be involved in section 2.3 (paragraph b), the last clause. The specific questions are as follows.

"1. Does the Town of Culpeper have any right of condemnation to secure the easements for stream channel improvements?

"2. Does the Town (or other parties involved) have condemnation rights for flood easements on the floodwater retarding structure?"

In setting forth the powers of eminent domain, § 2.3 of the charter for the town of Culpeper, as embodied in Chapter 247, Acts of Assembly of 1968, states, in part, as follows:

"The powers of eminent domain set forth in Title 15.1, Title 25, Chapter 1.1 and Title 33, Chapter 1, of the Code of Virginia, as amended, and all acts amendatory thereof and supplemental thereto, mutatis mutandis, are hereby conferred upon the town of Culpeper."

Condemnation proceedings by counties, cities and towns are prescribed in Article 1, Chapter 7, Title 15.1 of the Code of Virginia, wherein § 15.1-236 provides that the procedure in cases in which the right of eminent domain may be instituted shall be mutatis mutandis the same as prescribed in §§ 33-59 to 33-67 for condemnation proceedings by the State Highway Commission, or the same as prescribed in Chapter 1.1 (§§ 25-46.1, et seq.) of Title 25 of the Code of Virginia. The latter refers to the "Virginia General Condemnation Act."

In regard to the construction of dams, levees, etc., the following passage from § 15.1-31 of the Code is pertinent to the questions raised:

"Any county, city or town may construct a dam, levee, seawall or other structure or device, or perform dredging operations hereinafter referred to as 'works,' the purpose of which is to prevent the flooding or inundation of such county, city or town, or part thereof. The design, construction, performance, maintenance and operation of any of such works is hereby declared to be a proper governmental function for a public purpose."

This statute should be considered in conjunction with the town charter, which, as indicated from the portion of § 2.3 quoted herein, clothes the town with the powers of eminent domain. Paragraph (a) of the same charter section authorizes condemnation of any property, within or without the town, for the public purposes of the town. Further in this regard, § 2.1 of the charter grants the town of Culpeper all powers conferred or delegated to towns under the Constitution and laws of the Commonwealth of Virginia, as fully and completely as though such powers were specifically enumerated therein. The powers set forth in §§ 15.1-837 through 15.1-915, both inclusive, Chapter 18, Title 15.1 of the Code of Virginia, as in force on January one, nineteen hundred sixty-eight, are conferred on and vested in the town of Culpeper under § 2.2 of its charter. In Article 7 of this chapter, §§ 15.1-897 through 15.1-900 of the Code of Virginia, provision is made for the acquisition of property for public use and ownership, within and without the municipal corporation, and the exercise of the power of eminent domain is authorized whenever a public necessity exists therefor.

The limiting provision contained in the terminal clause of paragraph (b), § 2.3 of the charter prohibits the application of §§ 33-70.1 through 33-70.11 of the Code
of Virginia “except for the acquisition of lands or easements necessary for streets, water, sewer or utility pipes or lines or related facilities.” The named sections authorize the State Highway Commissioner to take possession and title to property before or during condemnation proceedings. The effect of this limiting clause, therefore, is to deny the town of Culpeper the right to “quick takeover” prior to or during condemnation, except in the stated instances. It does not deny the town the right of eminent domain, however, under the procedure presented in the statutes previously herein indicated.

In consideration of the foregoing, I shall answer both of your questions in the affirmative.

ESCHEATS—Escheator's Bond—When premium on bond may be paid.

February 24, 1969

HONORABLE RANDOLPH W. CHURCH
State Librarian

This is in reply to your letter of February 12, 1969, with which you enclosed a list of escheated properties recently sold in the city of Roanoke and request verification as to whether the descriptions are in proper order for the grants to be issued. You also inquire whether it is correct procedure for the escheator to deduct the cost of the premium on his escheator's bond from the proceeds of sale.

In regard to issuing the grants, the plat information and official tax number shown on the list furnished should be coupled with recordation data, date, book, page, etc., previously received, as outlined in my letter of February 15, 1968. As you know, § 55-186 of the Code provides for payment of the proceeds of sale, deducting the expenses, into the State treasury and likewise provides for payment to the escheator the expenses of the inquest and sale. In my opinion, the statute is sufficiently broad to include the costs of premium on the escheator’s bond required by § 55-169 of the Code and if the escheator has not been otherwise reimbursed for same, it may be deducted from the proceeds before they are deposited with the State treasurer.

ESCHEATS—Payments by Comptroller to Cities, Towns and County Treasurers Under § 55-200 of the Code—Subject to deductions for escheator’s commis-

ESCHEATS—Inquest Costs—Deductible prior to comptroller’s payments to cities, towns, and counties under § 55-200 of the Code.

June 6, 1969

HONORABLE SIDNEY C. DAY, JR.
Comptroller

This is in reply to your letter of May 19, 1969, from which I quote the following:

“Section 55-200, amended at the 1968 session of the General Assembly, provides that under certain circumstances the comptroller shall pay to a city, town or county treasurer, out of the net proceeds, unpaid real estate taxes, etc., assessed against said real estate.

“The commissions and costs in connection with the sale of real estate are deducted by the Escheater when remitting to the Treasurer, but the $10.00 fee for the inquest above mentioned has been previously paid to him.

“Am I correct in assuming that this $10.00 fee should be deducted from the amount due the city, town or county?”
The amendment to § 55-200 of the Code of Virginia, to which you refer, was enacted in Chapter 626, Acts of Assembly of 1968. The Act inserted in the existing statute the right of a city, town or county, under certain conditions, claiming unpaid real estate taxes or other local assessments constituting liens on escheated lands sold, to recover the net proceeds paid into the State treasury, or so much thereof as may be sufficient to pay such real estate taxes or local assessments. The same Act added the second paragraph of this section, which is as follows:

"Upon the sale of any escheated lands and upon certification to the escheator making such sale, verified by oath of the city, town or county treasurer or other officer charged with the collection of local real estate taxes or other assessments, that the lands so sold were, at the time of escheat to the Commonwealth, subject to the lien of unpaid local real estate taxes or other assessments validly assessed, levied or imposed by said city, town or county on said lands within twenty years preceding the date of such escheat, the escheator shall certify such facts to the State Comptroller, who shall, upon receipt of the proceeds of sale and after deducting therefrom the escheator's commission and costs of the inquest and sale, pay to said city, town or county treasurer out of the net proceeds of such sale, if any, the amount of said local real estate taxes and/or assessments, including accrued penalties and interest, up to but not exceeding the amount of the funds remaining in the hands of the State Treasurer from the proceeds of said sale; and such unpaid real estate taxes and assessments shall constitute preferred claims against the net proceeds of such sale coming into the hands of the State Treasurer."

As will be noted from the quoted passage, the State Comptroller makes such payment to a city, town or county under the stated conditions from the proceeds of sale after deducting therefrom the escheator's commission and costs of the inquest and sale. Your question, therefore, is answered in the affirmative.

ESTATES—Decedent—Appraisement—When required.

October 24, 1968

HONORABLE ALDAH B. GORDON, Clerk
Circuit Court of Appomattox County

This is in answer to your letter of October 17, 1968, which reads as follows:

"The Commissioner of Accounts and I are having some difference of opinion as to whether or not the real estate of a deceased person should be appraised when the decedent dies intestate or testate leaving his real estate outright to an individual. The language on the inventory and appraisal form is as follows: . . . 'All the property, both real and personal, of the estate of ____________________, deceased, under the authority, supervision and control of the personal representative and such other property of said estate as they may be requested to appraise by said personal representative. . . .'"

"Section 26-12 of the Code as amended in 1966 states that the personal representative shall return to the Commissioner of Accounts 'an inventory of all the personal and real estate which is under his supervision and control, and all other property of the estate of which he has knowledge. . . .'"

"We would like your opinion as to whether or not the personal representative should request that the appraisers appraise the real estate of a person who dies intestate and a person who dies testate devising real estate outright to an individual."
In this connection, I call to your attention § 64-126 of the Code, which was extensively amended by the 1966 General Assembly, and which provides in part:

"Every court or clerk by whose order any person is authorized to act as a personal representative shall, if requested by the personal representative or if the court or clerk deem it proper appoint three or more disinterested and competent appraisers who after taking an oath for the purpose shall appraise all property, both real and personal, which is under the supervision and control of the personal representative, and such other property as the personal representative may request. . . ."

Under this section, in my opinion, the appraisement in either of the situations posed by you is required to be made if requested by the personal representative or if the court or clerk deem it proper.

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EXTRADITION—Issuing of Bad Checks is Felony—Felon may be extradited.

CRIMINAL PROCEDURE—Extradition of Felon Issuing Bad Checks.

February 17, 1969

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

This is in response to your letter of January 28, 1969, which reads in part as follows:

"An individual will be convicted three, four, or five times of issuing bad checks pursuant to Section 6.1-115 and 6.1-117. They will then write a number of checks and leave the State.

"My question is: Can they be extradited and tried as a felon pursuant to the provisions of Section 19.1-293 of the Code?"

Section 19.1-293 provides that when the accused is indicted for a third or subsequent offense of petit larceny, he shall be confined in the penitentiary not less than one nor more than two years. The General Assembly has defined in § 18.1-6 of the Code, a felony, as an offense that is punishable with death or confinement in the penitentiary. The Supreme Court of Appeals held in Toler v. Commonwealth, 188 Va. 774, 783, 51 S.E. 2d 210 (1949), that an indictment drawn pursuant to § 19.1-293 alleging a third offense of petit larceny charged the accused with a felony. In view of the foregoing, I am of opinion that the accused would be tried as a felon under the facts set forth in your letter.

He could, of course, be extradited pursuant to the provisions of the Uniform Extradition Act.

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FEES—CLERKS—For filing warrants and summonses for violation of local ordinances.

January 28, 1969

HONORABLE GEORGE M. ROGERS, III
First Assistant Commonwealth's Attorney for the City of Newport News

This is in reply to your letter of January 14, 1969, which I quote as follows:

"At the request of an incoming Judge of a court not of record, I am writing you concerning taxation and payment of costs. Reference is made to Section 19.1-337 of the 1950 Code of Virginia, as amended. Therein it states "The clerk's fee for filing warrants and summonses for violations of local ordinances shall be taxed as a part of the costs and paid in
conformity with Section 14-132 of this Code.' Section 14-132 was repealed by the Acts of Assembly 1964, c. 386.

"The question thus remains, does the Clerk for the Municipal Court for the City of Newport News have authority to assess and collect his fees in such cases?"

In regard to the fees for services performed by the judges or clerks of the courts not of record in criminal actions and proceedings § 14.1-123 replaced former § 14-132 by Chapter 386, Acts of Assembly of 1964, which repealed Title 14 and enacted Title 14.1 of the Code of Virginia. With specific reference to the fees for filing and indexing papers connected with any criminal action in a county or municipal court, paragraph (6) of former § 14-132 was identical to paragraph (6) of § 14.1-123 of the Code of Virginia, which is as follows:

"(6) For filing and indexing all papers connected with any criminal action in a county or municipal court, one dollar and twenty-five cents, which when collected shall be transmitted to the clerk of the circuit or corporation court with such papers in the manner prescribed by § 19.1-335, when such papers are required by law to be transmitted to a court of record."

The language which you quote from § 19.1-337 states that the clerk's fee for filing warrants and summonses for violations of local ordinances shall be taxed as a part of the costs and "paid in conformity with § 14-132 of this Code." When former Title 14 of the Code was repealed and replaced by Title 14.1 resulting in the replacement of former § 14-132 by § 14.1-123, as I have previously indicated herein, no corresponding change was made in § 19.1-337, which has remained unchanged since 1962. In my opinion, however, it is clearly the legislative intent of the final sentence in § 19.1-337 that the fees therein specified be taxed as part of the costs and paid in conformity with § 14.1-123 (former § 14-132) of the Code of Virginia. Accordingly, your question is answered in the affirmative.

FEES—CLERKS—Proceedings for judgment by confession. November 18, 1968

HONORABLE S. W. SWANSON, Clerk
Circuit Court of Pittsylvania County

This is in reply to your letter of October 31, 1968, which reads as follows:

"The Treasurer of Pittsylvania County obtained a confessed judgment for tangible property taxes for 1963, 1964, 1965, 1966 and 1967 against a property owner and the clerk's fees amounted to $12.50. Is it proper for me to charge the county for the $12.50 clerk's fees?"

Subsequent to your letter, you indicated that the fees were for the following services:

Clerk ............................................................................................................ $10.00
Docketing fee .......................................................................................... 1.00
Issuing Execution .................................................................................... 1.50
Total .......................................................................................................... $12.50

Since the fees which you listed are those allowed under § 8-365, I am of the opinion that they are properly chargeable to the county.

FEES—Collected by Juvenile and Domestic Relations Courts of Cities—Disposition of.

JUVENILE AND DOMESTIC RELATIONS COURTS—Cities—Fees collected should be paid into treasury of the city.

HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

I am in receipt of your letter of July 2, 1968, in which you present the following situation and inquiry:

"The question has been raised as to the disposition of fees collected by a city juvenile and domestic relations court, which is one of the courts combined as a part of a regional juvenile and domestic relations court. * * *

"Section 16.1-143.2 provides that regional juvenile and domestic relations courts shall be described numerically in the order of establishment, and that the court shall be known in each county or city it serves as the juvenile and domestic relations court for such county or city. The salaries of the judges and other personnel of the regional courts are fixed by the Committee of Judges and are paid by the State out of the appropriation for criminal charges.

"The fees collected by county courts under the provisions of Sections 14.1-44 and 16.1-51 are payable into the State treasury, while Section 16.1-151 provides that fees collected by juvenile courts of cities, which by the definition contained in Section 16.1-141 means the juvenile and domestic relations court of the city, shall be paid into the city treasury. While it seems to be clear that such fees should be paid into the treasury of the city, the practice has not been entirely uniform in the operations of the regional courts. For that reason, I would appreciate your opinion as to whether the fees collected by juvenile and domestic relations courts of cities, which are a part of the combination of a regional court, should be paid into the city treasury.

"Your opinion will be very helpful to me in suggesting to the judges of the several regional courts uniform practices as to the disposition of these fees."

In this connection, I am writing to advise that I concur in your view that the disposition of the fees concerning which you inquire would be governed by the provisions of § 16.1-151 of the Virginia Code, which provide:

"All fees collected by the judge, associate judge, substitute judge, referee, clerk, deputy clerks and other employees of a juvenile court of a city or of a county having a density of population in excess of five thousand per square mile shall be paid into the treasury of the city or county respectively. All fees collected by such officers and employees of a juvenile court of any other county shall be accounted for and paid as provided in article 5 (§ 14-50 et seq.) of chapter 1 of Title 14 with respect to fees collected by officers and employees of trial justices." (Italics supplied.)

As you point out, a regional juvenile and domestic relations court is denominated in each city it serves as the juvenile and domestic relations court for such city. Sec. § 16.1-143.2, Code of Virginia (1950), as amended. I am, therefore, of the opinion that the fees collected by such city juvenile and domestic relations court should be paid into the treasury of the city.
REPORT OF THE ATTORNEY GENERAL

FEES—Expert Witnesses—Appointed by the court—Paid out of appropriation for criminal charges.

WITNESSES—Expert—When appointed by the Court—May be paid out of appropriation for criminal charges.

April 4, 1969

HONORABLE EDWARD P. SIMPKINS, JR.
Judge, Circuit Court of Hanover County

This is in response to your letter of March 28, 1969, which reads in part as follows:

"Certain questions have arisen as to the power of the Court in criminal cases to order payment of fees of experts by the Commonwealth of Virginia.

"I naturally do not want to have an expert chosen, do the work and testify and then not be able to properly order that he be paid by the Commonwealth.

"I should therefore appreciate an answer to the following questions:

"1. Does a Court of Record, in a criminal case, on motion of the Commonwealth, the accused or on its own motion have the right to appoint an expert and direct payment of said expert by the Commonwealth of Virginia?

"It is assumed that the expert could be called as a witness by the Court, the prosecution or the accused.

"2. Does a Court of Record, in a criminal case, have the right to authorize counsel for an indigent defendant to employ an expert and direct the Commonwealth of Virginia to pay the compensation of said expert?"

I shall answer your questions seriatim.

It is quite clear that on motion of the Commonwealth an expert witness may be appointed by the Court and paid out of the Criminal Fund pursuant to the provisions of § 19.1-315. This office has previously held that this provision of law is broad enough to permit such employment and payment out of the State treasury (Report of the Attorney General (1949-1950), p. 80).

I find no authority contained in the Code for the Court on motion of a non-indigent accused to appoint an expert and direct payment of his fee.

If the expert is appointed by the Court on its own motion, I am of opinion that his fee may be paid out of the Criminal Fund pursuant to the provisions of § 19.1-315.

Section 14.1-184 of the Code of Virginia (1950), as amended, provides in part:

"The court shall direct the payment of such reasonable expenses incurred by such court appointed attorney as it deems appropriate under the circumstances of the case. When such direction is entered upon the order book of the court, the Commonwealth shall provide for the payment out of its treasury of the sum of money so specified."

In view of the provisions of the foregoing statute, I am of the opinion that your second question should be answered in the affirmative.

With respect to the payment of physicians or psychiatrists under various circumstances, I am enclosing a copy of an opinion this day rendered to Mr. Sydney C. Day, Jr., State Comptroller, in which this subject is discussed at length.
REPORT OF THE ATTORNEY GENERAL

FEES—For Issuing Warrants and Subpoenas—Amounts allowed under §§ 14.1-123 and 14.1-128.

HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

This is in reply to your letter of August 19, 1968, in which you refer to the 1968 amendments to §§ 14.1-123 and 14.1-128 of the Code of Virginia and pose the questions which I quote as follows:

"Does the $3.00 allowed to the Justice of the Peace for issuing a warrant of arrest include the issuing of subpoenas and if not, how or by whom is the cost for said subpoenas collected? Are the above cited sections in conflict?"

In amending § 14.1-128 of the Code by Chapter 639, Acts of Assembly of 1968, subsection (la) was added, so that the section now reads, in part, as follows:

"A justice of the peace shall charge for services rendered by him in criminal actions and proceedings the following fees only:

"(1) For issuing a warrant of arrest, or a warrant for violation of any ordinance, three dollars.

"(la) For issuing all subpoenas, three dollars."

In view of this change I am of the opinion that in instances in which a justice of the peace issues the subpoenas, as well as the warrant, he receives a fee of three dollars for issuing all subpoenas in addition to the three dollar fee for issuing the warrant. If he issues both the warrant and the subpoenas he receives total fees of six dollars. Such fees should be collected from the defendant in cases of conviction, but in cases of acquittal or cases in which the defendant is convicted and unable to pay the costs, if not paid by the prosecution, these shall be paid out of the State treasury in accordance with § 14.1-85 of the Code.

Section 14.1-123, which specifies the fees for services performed by judges or clerks of courts not of record in criminal cases, however, provides for a fee of three dollars for issuing a warrant of arrest, or a warrant for violation of an ordinance, including the issuing of all subpoenas. Thus, a clerk or judge of a court not of record would receive only one fee of three dollars for performing the stated services. The fee, of course, would be collected as provided in § 14.1-85 of the Code, as I have previously herein indicated. Assuming that your first question refers to a situation in which a justice of the peace issues the warrant for which he receives a fee of three dollars under § 14.1-128 and the clerk issues the subpoenas, there would be no fee for the latter. I enclose a copy of my letter of June 21, 1968, to Honorable Fletcher B. Watson, Judge, Second Regional Juvenile and Domestic Relations Court for the Counties of Halifax, Mecklenburg and Pittsylvania, which expresses a similar view.

In respect to your other question, I have already indicated the difference between § 14.1-123 and § 14.1-128 as to what the fees shall be. Since the former relates to fees for clerks and judges of courts not of record while the latter relates to fees for justices of the peace, however, in my opinion the sections are not in conflict.

FEES—Issuance of Warrant—Defendant chargeable.

HONORABLE W. J. BREEDLOVE
Justice of Peace for City of Chesapeake

This is in reply to your letter of October 16, 1968, in which you present two questions, which I quote as follows:
"1. In criminal matters (City and State) to whom should the Justice of Peace look to for payment of the $3.00 for issuing a warrant or a subpoena?

"2. Is it permissible to charge the person requesting the issuance of a criminal warrant or subpoena the $3.00 fee?"

In regard to your first question, except as hereinafter stated to the contrary, such fees should be collected from the defendant in cases of conviction. In cases of acquittal or cases in which the defendant is convicted and unable to pay the costs, if not paid by the prosecutor, the fee shall be paid out of the State treasury in accordance with § 14.1-85 of the Code. In the latter instance, however, if the crime alleged is the violation of a city ordinance, the city, rather than the State, pays the fees for issuing the criminal warrants.

In regard to your second question, § 14.1-97 of the Code states, in part: "Unless otherwise provided, the fees mentioned in this chapter shall be chargeable to the party at whose instance the service is performed." Although the fees are, by statute, chargeable to the party at whose instance the service is performed, they are ultimately collected as stated in my answer to your first question and disbursed by the clerk to the several parties entitled thereto as stated in § 14.1-100 of the Code. An exception to this procedure occurs when the judge before whom the proceeding is gives judgment for the costs against the prosecutor, other than a public officer charged with the enforcement of the laws, under the conditions set forth in § 14.1-131 of the Code. Otherwise, a private prosecutor cannot be required to pay such fees.

FEES—Justice of Peace—For issuing all subpoenas in a criminal case, the fee is three dollars.

JUSTICE OF PEACE—Fees—For issuing all subpoenas in a criminal case, the fee is three dollars.

JUSTICE OF PEACE—May sign affidavit on search warrant as Notary Public and sign the search warrant as Justice of Peace.

NOTARIES PUBLIC—Signing of Affidavit on Search Warrant—May be done by Notary Public who is also a Justice of Peace.

May 9, 1969

MR. FRANK E. SWAIN
Justice of the Peace

This is in reply to your letter of May 2, 1969, which I quote as follows:

"In order that I might be more capable of dispensing with the position which I hold in Pulaski County, I have two questions that I must ask you.

"1. If a complainant swears to a warrant and the Justice of the Peace finds it necessary to issue a subpoena for the complainant's appearance in the courts on a pre-set date in which the accused is to be tried, is the $3.00 issuance fee collectable? In other words is the complainant to a warrant considered the same as a witness?

"If the complainant has a witness or more than one witness and a subpoena is issued by the Justice of the Peace and he includes the complainant's name and the names of the other witness or witnesses on the same subpoena, then the $3.00 fee applies, but if a subpoena is issued to only the complainant, is the $3.00 fee still applicable?

"2. I have received information from the Virginia Association of Justices of the Peace that it is now unlawful to sign the affidavit as a Justice of the Peace and sign the search warrant, but if the Justice of the Peace is a Notary Public, he can sign the affidavit as a Notary Public, but not as a Justice of the Peace."
"I also am a Notary Public for Pulaski County and heretofore, when it was necessary to issue a Search Warrant, I have been governed by what information the Justices of the Peace Association forwarded me in that I have been signing the original and copy of the Search Warrant as a Justice of the Peace and signing the Affidavit as a Notary Public. I wish to know if this is proper and correct to do this?"

Section 14.1-128 of the Code of Virginia controls as to the fees which a justice of the peace shall charge in criminal actions. The prescribed fee for issuing all subpoenas is three dollars. In regard to your question in Number 1, in my opinion, the complainant to a warrant is considered the same as a witness under the stated conditions and the three dollar fee should be charged. The same fee is charged whether one or more than one subpoena is issued, since the statute prescribes: "For issuing all subpoenas, three dollars."

In regard to your question in Number 2, I am of the opinion that you may sign the affidavit required in support of a search warrant in your capacity as Notary Public and sign the search warrant as Justice of the Peace under the stated conditions.

FEES—Justices of Peace—Not paid for issuing warrant when case never docketed.

JUSTICE OF PEACE—Fees—Not paid for issuing warrant when case never docketed.

HONORABLE LEROY T. CHESHIRE
President, Association of Justices of the Peace

This is in reply to your letter of October 16, 1968, in which you inquire whether or not a justice of the peace is entitled to receive a fee out of the treasury of Virginia for issuing a warrant when the case never appears on the court docket?

My letter of June 21, 1968, to Honorable David A. Lyon, III, to which you refer, was in response to the question of whether a justice of the peace may bill the Commonwealth for the full $3.00 for issuing a warrant "if the defendant is dismissed or if he is convicted but does not pay the fine and costs."

The authority for paying out of the State treasury the fees prescribed by law for the services of justices of the peace is found in § 14.1-85 of the Code. This section authorizes the payment of such fees out of the State treasury, if not paid by the prosecutor, in cases in which the defendant shall be acquitted, or convicted and unable to pay the costs, when certified as prescribed by § 19.1-317. The statute makes no provision for payment where the defendant is neither acquitted nor convicted. Thus, in my opinion, there is no authority for payment out of the State treasury the fee for issuing a warrant where the case never appears on the court docket.

FEES—Sheriffs and Sergeants—For serving affidavit attached to a search warrant—Limited by § 14.1-105 of the Code to one fee.

MR. BERKLEY T. GRILES
Deputy Sheriff for Charlotte County

This is in reply to your letter of recent date, which I quote as follows:

"A question concerning our department on civil warrants is the words 'Attached Papers' on the return. Does this mean that an affidavit or sworn statement can be attached and served without any additional charge or should there be a charge made for this service?"
The law in regard to the fees of sheriffs, sergeants and criers generally, as found in § 14.1-105 of the Code of Virginia, is as follows:

"The fees of sheriffs, sergeants and criers shall be as follows:

(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm or corporation any process when the body is not taken and making a return thereof, the sum of one dollar twenty-five cents.

(2) For summoning a witness or garnishee on an attachment, one dollar.

(3) For serving on any person an attachment or other process under which the body is taken and making a return thereon, five dollars.

(4) For receiving and discharging a person in jail, one dollar.

(5) For carrying a prisoner to or from jail and every mile of necessary travel, an amount equivalent to the necessary toll and ferry charges incurred by the officer, if any, and eight cents per mile, which shall be charged and taxed as a part of the court cost.

(6) For serving any order of court not otherwise provided for, one dollar.

(7) For serving a writ of possession, two dollars.

(8) For levying an execution or distress warrant or an attachment, three dollars.

(9) For serving any papers returnable out of State, six dollars."

This section establishes the fee for serving any civil process and making a return thereof. It contains no provision for an additional fee for service and making a return thereof when an affidavit or other such paper is attached for delivery along with a civil warrant. Neither do I find any other statute supporting an additional charge in any such instance. It is my opinion, therefore, that an affidavit may be attached to the civil warrant and served without any additional charge.

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FEES—Sheriffs and Sergeants—Service in garnishment proceedings.
SHERIFFS AND SERGEANTS—Fees and Commissions for Service in Garnishment Proceedings.

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

March 21, 1969

This is to acknowledge receipt of your letter of March 13, 1969, in which you state in part:

"A question has arisen relative to the proper commission to be deducted by a Sheriff upon collections in garnishments. This situation has arisen because of instructions given at the Judicial Conference for Courts Not Of Record, a copy of which is enclosed herewith. In reading the statutes, we have interpreted Section 8-429 as having to do with Sheriff's sales while Section 14.1-109 has to do with collections of garnishments and so forth. The enclosed instruction sheet states just the opposite."

Three situations may arise in the collection of money from a garnishee:

(1) The garnishee may pay the amount owing the judgment debtor to the officer serving the summons in garnishment upon him pursuant to § 8-448 of the Code of Virginia (1950), as amended, which reads as follows:

"Any person, summoned under § 8-441, may, before the return day of the summons, deliver and pay to the officer serving it, what he is
liable for; and the officer shall give a receipt for, and make return of, what is so paid and delivered."

This section is a part of Chapter 19, Title 8, Code of Virginia, and deals expressly with summons in garnishment.

(2) The garnishee may pay the amount owing the judgment debtor into Court after he has been served with a summons in garnishment by an officer.

(3) Where a judgment is rendered against the garnishee and he fails and refuses to pay the amount of the judgment, then an execution may be issued against him (the garnishee) and collection is thereafter made by the officer under said judgment.

In a situation arising as described in No. 1, the officer (sheriff) is entitled to the fees prescribed under § 8-429 of the Code. This section provides for fees to officers receiving money under Chapter 19, Title 8 of the Code. See opinion of the Attorney General expressed in a letter to the Honorable Mervin A. Gage dated September 5, 1962, Annual Report of the Attorney General (1962-1963), page 101, a copy of which is enclosed herewith.

In a situation arising as described in No. 2, the officer is entitled to no commission. His compensation is limited to the fee allowed for the service of the process. This is in accord with the said opinion heretofore cited.

In a situation arising as described in No. 3, the officer is entitled to commissions prescribed under § 14.1-109 of the Code (formerly designated as § 14-120 [1950] and § 3487 of the Code of 1919). That section reads in part:

"An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum..."

This section is not limited to only those cases where goods are sold by the officer to satisfy a judgment but applies also when the officer receives money under an execution without a sale. This of course would apply to an execution against a garnishee. This office has so ruled in an opinion expressed in a letter dated March 11, 1943, to Mr. John A. Rife, Sheriff of Buchanan County. Annual Report of the Attorney General (1942-1943), page 247, a copy of which is enclosed.

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**FEES—Uncollected—Payment by State Treasurer under § 14.1-85—Restricted to violations of State law.**

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

August 22, 1968

This is in reply to your letter of August 15, 1968, which I quote as follows:

"Please advise whether uncollected fees for services rendered by a Justice of the Peace on issuing a warrant for violation of any ordinance of the City of Waynesboro are paid by the State Treasurer under the provisions of Section 14.1-85.

"Assuming that your answer would be that fees uncollected would be paid by the State Treasurer under the provisions of Section 14.1-85, how far back could the Justice of the Peace go in submitting his account in light of the provisions of Section 14.1-137, Annual Reports of Fees, Etc., Collected, 'also charged and not collected ...'"

In my opinion, § 14.1-85 of the Code of Virginia is confined to the payment of fees for services of the officers therein enumerated, in connection with violations of State Law. Consistent with this view, although addressing itself to no particular statute, is an opinion rendered March 22, 1932, by then Attorney General John R. Saunders, Report of the Attorney General (1931-1932), p. 130, which states that in those cases where the crime alleged is the violation of a city ordi-
nance, the city, rather than the State, should pay the fees for issuing the criminal warrants. I enclose a copy of that opinion for your convenience. That § 14.1-85 applies only to violations of State law, to the exclusion of city ordinances, has been the rule followed by the State in approving the payment of fees out of the State treasury. Accordingly, I shall answer your first question in the negative.

No further consideration of your second question appears necessary since it is predicated upon an affirmative reply to your first, which I have answered in the negative.

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FEES—WITNESSES—Physicians and psychiatrists regularly employed by State—
When called upon to examine accused defendants and testify in court.

WITNESSES—Fees—Physicians and psychiatrists regularly employed by State—
When called upon to examine accused defendants and testify in court.

April 4, 1969

MR. SIDNEY C. DAY, JR.
Comptroller

This is in reply to your letter of March 13, 1969, in which you ask a series of questions concerning the payment of fees of physicians or psychiatrists regularly employed by the State and called upon to examine accused defendants and to testify in court concerning their findings.

The provisions of § 19.1-233 specify the fees to be paid and the conditions under which the fees are to be paid where the "expert or physician or clinical psychologist skilled in the diagnosis of insanity or feeblemindedness or other physician" is appointed by the court to render professional services "pursuant to § 19.1-288 or to subparagraphs (1) and (2) of § 19.1-239."

Where the physicians and psychiatrists about which you inquire conduct examinations and testify in situations other than those provided for in § 19.1-228 or subparagraphs (1) and (2) of § 19.1-239, the provisions of § 19.1-315 would be applicable. (See, Report of the Attorney General (1959-1960), p. 383 and letter of June 8, 1966, to Honorable Catesby G. Jones, Jr., a copy of which is enclosed.)

In connection with § 19.1-315 you direct my attention to the last paragraph, which reads as follows:

"This section shall not be construed to authorize the payment of any additional compensation to a sheriff or other officer who is compensated for his services by a salary exclusively."

In my opinion, physicians, clinical psychologists, psychiatrists or other professional persons employed by the Commonwealth in the various mental hospitals operated by the Department of Mental Hygiene and Hospitals are not "officers" as the term "other officer" is used in the quoted paragraph. Therefore, in my opinion the compensatory provisions of § 19.1-315 are applicable to them.

You also ask about the provisions of § 19.1-233 pertaining to "authorized leave." Section 19.1-233 provides than an "expert or physician or clinical psychologist... appointed by the court to render professional service pursuant to § 19.1-228 or to subparagraphs (1) and (2) of § 19.1-239... if regularly employed by the State of Virginia but on authorized leave therefrom" shall receive the designated fee. In my opinion, a person is "on authorized leave therefrom" when the appropriate official of the institution has authorized his leave. The amount of leave with which he is charged would be a matter for administrative determination in each case. It is clear, however, that in order to receive the fee provided in § 19.1-233, he must be "on authorized leave" from his duties at the institution.
FEES—Witnesses—Physicians or clinical psychologists appearing in proceedings for admission to state hospitals—Limited to fifty dollars for each day of service.

INSANE AND MENTALLY ILL—Finding by Justice That Person is Mentally Ill—Not dependent upon testimony of physician.

INSANE AND MENTALLY ILL—Records of Proceeding for Commitment of Mentally Ill—Not required to be filed in clerk's office.

WITNESSES—Fees—Physicians or clinical psychologists appearing in proceedings for admission to state hospitals—Limited to fifty dollars for each day of service.

April 22, 1969

HONORABLE N. G. HUTCHENSON, Clerk
Circuit Court of Mecklenburg County

This is in reply to your letter of April 11, 1969, which reads as follows:

"There seems to be some confusion as to the fees to be paid physicians under Title 37.1 of the Code. We are receiving bills for physicians from other jurisdictions for patients residing here in varying amounts. It would appear from Section 37.1-89 that the fee in all cases is $50.00 per day for each physician appearing in the proceedings. I would like to have your opinion.

"The prevailing procedure seems to be the Medical Certification under Section 37.1-66 which requires the services of two physicians. However, it appears that in proceedings by Judicial Certification under Section 37.1-67, the services of physicians can be dispensed with if the Justice is otherwise satisfied as to the condition of the patient. Am I correct in this interpretation?

"Also, are any records to be filed in the Clerk's Office under Title 37.1?"

The answer to your first question is found in § 37.1-89, the applicable portion of which reads as follows:

"Every physician or clinical psychologist not regularly employed by the State of Virginia, or if regularly employed by the State of Virginia but on authorized leave therefrom, who is required to serve as a witness for the State in any proceeding under this chapter or who executes a medical certificate pursuant to § 37.1-66 shall receive a fee of fifty dollars for each day during which he serves."

It is to be noted that the fee of $50.00 is "for each day during which he serves." (Emphasis added.) I am enclosing a copy of an opinion to the Honorable Jack F. DePoy, Commonwealth's Attorney for Rockingham County, dated October 16, 1968, on the same question.

With reference to your second question, your interpretation of § 37.1-67 is correct. The Justice is required to find "that there is sufficient cause to believe that such person is or may be mentally ill." In my opinion, he may make such finding without the testimony of physicians.

The answer to your last question is in the negative. Title 37.1 contains no provision similar to the provisions of § 37-69 insofar as that section required recordation by the clerk.

FINES AND COSTS—Docketing—Recorded in judgment docket.

HONORABLE WALKER R. CARTER, JR., Clerk
Hustings Court of the City of Roanoke

I am in receipt of your letter of February 25, 1969, in which you request my
opinion on whether fines and costs imposed by the Hustings Court of the City of Roanoke should be docketed in the judgment docket book rather than entered in your "Fine Book".

Section 17-64 of the Code of Virginia (1950), as amended, reads in part as follows:

"Abstracts of all judgments authorized or required by law to be docketed or recorded and abstracts of all executions issued on any judgment shall be recorded in a book to be known as the judgment docket; . . ."

Fines and costs are in reality judgments in favor of the Commonwealth against the accused. Since such judgments are recorded and executions issued thereon the same should be recorded in the judgment docket in accordance with the above statute. I am unable to find any statute authorizing the recordation of such judgments in a fine book.

FISHERIES—Crabbing License—Revocation precludes reissuance until after one year following date of second conviction.

March 5, 1969

HONORABLE WILLIAM E. FEARS
Member of the Senate

This is in reply to your letter of March 4, 1969, concerning crabbing licenses revoked pursuant to § 28.1-167 of the Code of Virginia (1950), as amended. You raise the following questions:

"(1) Does the Governor have Executive Authority to issue a clemancy order reissuing these revoked licenses?

"(2) Under the Act, can the Commission exercise direct authority, and reissue these revoked licenses?"

I will first respond to your second question.

Section 28.1-167 places limitations on the size of crabs to be taken. Any violation of this statute constitutes a misdemeanor. Section 28.1-187. The last paragraph of § 28.1-167 states:

"Any person when convicted of the second violation within one year of any provisions of this section, the Commission shall upon the second conviction, immediately, . . . revoke all the existing licenses which have been issued to such person to take or catch crabs, and the Commission shall not issue a new license or licenses to such person to take or catch crabs for a period of one year from the date of the second conviction."

(Emphasis added.)

In view of the mandatory language of the statute, I am of the opinion that the Marine Resources Commission, which enforces such provision, may not reissue a revoked license prior to the statutory period.

In response to your other inquiry I am forwarding a copy of a previous opinion of this office dated June 10, 1948, to the Honorable William M. Tuck, Governor of Virginia, in which an inquiry substantially similar to that which you present was considered and discussed at length. See Report of the Attorney General (1947-1948), page 128.

Section 2569 of the Code mentioned in the ruling is now § 19.1-352. Since there have been no substantive changes to this section nor to Section 73 of the Constitution, the views expressed in the enclosed ruling are thus still valid and controlling. In the light of this ruling I am of the opinion that your inquiry should be answered in the negative.
HONORABLE W. CARY CRISMOND, Clerk
Circuit Court of Spotsylvania County

This is in response to your recent inquiry, in which you propound two questions, which are set forth below:

"May I exercise my dog on property which I have permission to do so, when not carrying a gun? This would be done prior and subsequent to hunting season.

"Would the possession of a hunting license have any bearing on the question?"

Section 29-51 of the Code of Virginia (1950), as amended, requires that a person must have a license in order to hunt wild animals. Hunting is defined by § 29-131 of the Code, which reads in part as follows:

"Hunting and trapping wild birds and wild animals includes taking, hunting, trapping, pursuing, chasing, shooting, snaring and/or netting such birds or animals, and lesser acts, such as attempting to take, hunt, trap, pursue, chase, shoot, snare and/or net wild birds or wild animals. . . ."

The Supreme Court of Appeals of Virginia in Commonwealth v. Bailey, 124 Va. 800, 97 S.E. 774 (1919), had occasion to consider the definition of "hunting". Hunting would include "to follow with dogs or guns for sport or exercise." (124 Va. 802).

You do not state in your question whether or not in the course of "exercising" your dog the dog will be engaged in chasing wild animals. If this be so, then I am of opinion that the chasing of wild animals by dogs, regardless of the fact that you are not carrying a gun, constitutes hunting under Virginia law and could only be done during hunting season and by a person carrying a hunting license. Of course, in situations where the dog does not chase wild animals but is merely running loose, this would not constitute hunting and could be done out of hunting season and without the necessity of carrying a hunting license.

HONORABLE WILLIAM J. WALKER, JR., Clerk
Circuit Court of Franklin County

This is in response to your letter of July 17, 1968, in which you ask the following questions:

"(a) In the sentence: 'If the clerk of any court desires to be relieved of this duty, or gives his consent thereto in writing, the Commission shall have authority to require its agents also to sell hunting, trapping and fishing licenses in the place of or in addition to the clerk; provided, however, that in the counties of Caroline, Franklin and Scott the Commission may appoint not exceeding five agents, and in the county of Pittsylvania not exceeding ten agents, and in the city of Lynchburg not exceeding three agents, for the sale of such permits and licenses who shall be in addition to the clerk of the circuit or corporation court of such county or city.' to what does the following portion of this sentence relate, 'or give his consent thereto in writing'?"
“(b) Does the Commission of Game and Inland Fisheries have the authority to appoint an agent to sell hunting and fishing licenses in Franklin County, Virginia without the consent in writing of the Clerk of the Circuit Court?”

I am of opinion after a review of § 29-65 in its entirety that the Commission of Game and Inland Fisheries may appoint as many as five agents in Franklin County, Virginia, for the issuance and sale of the licenses in question without the consent of the Clerk of the Circuit Court of Franklin County.

GAME AND INLAND FISHERIES—Hunting Licenses—Member of Armed Services stationed out of State.

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

August 14, 1968

This is to acknowledge receipt of your letter of August 10, 1968, in which you state as follows:

"Is a service man that originally lived in this county who by the very nature of his work has lived on many bases not only in this county but in foreign lands and is currently stationed in Massachusetts, eligible to have issued to him a Virginia resident hunting and fishing license? This man is not a legal voter in this county or state. He spends his leaves with his mother in this county and in many respects considers this county his home."

I am of the opinion that your inquiry should be answered in the negative. Section 29-57 of the Virginia Code enumerates the various classes of individuals entitled to a county license to hunt, trap or fish in the county, while § 29-58 prescribes the requirements for a State resident license to hunt, trap or fish. It does not appear from your communication that the individual concerning whom you inquire would fall within the scope of either provision of Virginia law.

GAME AND INLAND FISHERIES—License Revocation—Construction of words “within two years of a previous conviction.”

HONORABLE W. CARRINGTON THOMPSON
Member, Virginia State Senate

February 21, 1969

This is in reply to your inquiry of February 18, 1969, which I quote as follows:

"Your official opinion is respectfully requested as to the proper interpretation of a portion of § 29-77 of the Code which is as follows:

"‘If any person be found guilty of violating any of the provisions of the hunting, trapping, and/or inland fish laws, and/or § 33-287 of the Code of Virginia and/or regulations adopted by the Commission pursuant thereto, a second time within two years of a previous conviction of violating any such law or regulation, the license issued to such person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction. If found hunting, trapping or fishing during such prohibited period, such person shall pay a fine of not less than fifty dollars nor more than one hundred dollars. Licenses revoked shall be sent to the Commission.’"
REPORT OF THE ATTORNEY GENERAL

"The language which gives me concern is:

*a second time within two years of a previous conviction*

The literal wording of this would indicate that the power to revoke comes into existence upon the third conviction within two years. There is the original conviction and then a second conviction within two years thereafter. This may not have been the legislative intent but appears to be the meaning of the language used.

"I would appreciate your official opinion on this matter."

It is my opinion that the language in question should be interpreted to require that the license shall be revoked when a person is convicted two times within a period of two years or when a subsequent conviction occurs within two years of the first conviction. In this connection, I am enclosing a copy of a previous opinion of this office in which § 29-77 was heretofore interpreted in this manner. See, Report of the Attorney General (1962-1963) p. 98.

GAME AND INLAND FISHERIES—Natural Oyster Beds, Rocks, and Shoals—Changes in—May be made by General Assembly.

OYSTERS—Natural Beds, Rocks, and Shoals—Changes in—May be made by General Assembly.

June 6, 1969

HONORABLE B. T. GUNTER, JR.
Attorney for the Marine Resources Commission

This is in reply to your inquiry of May 19, 1969, as to the power of the General Assembly to change the boundaries of the natural oyster beds, or oyster rock, which are defined by virtue of § 28.1-100 of the Code to correspond to a survey known as the Baylor Survey which was undertaken to specify the area which would be deemed natural oyster rock. You present the following inquiry:

"I. Does the Legislature have authority to provide for re-defining the boundaries of the natural rocks so that the ground which is not natural rock could be taken out of the Baylor Survey and made available, by lease, to the public for the cultivation and propagation of oysters.

"2 a. If the Legislature has this authority, can it specify a certain percentage of the area, now within the Baylor Survey, to be withdrawn and made available to the public.

"b. Or would there have to be an actual survey and the boundaries of the natural rocks reestablished so as to eliminate the mud or sand bottoms which are not natural rocks."

It is my opinion that Question 1 should be answered in the affirmative. In this regard, I refer you to the case of Blake v. Marshall, 152 Va. 616, 632, 148 S.E. 789 (1929), wherein it was ruled that Section 175 of the Constitution of Virginia requires the natural oyster rock to be held in trust for the public, subject to the General Assembly's "unqualified" power to prescribe regulations and restrictions. It was in the exercise of this power that the Baylor Survey was undertaken Accordingly, the legislature retains the power to re-define the boundaries of the natural rock, as established by the survey and § 28.1-100, for the purposes which you describe.

With regard to Question 2, it is my opinion that the legislature is empowered to determine what specific portions of the bottom area included in the Baylor Survey are in fact not natural oyster rock and designate them accordingly. The legislature would have complete discretion to select the method of making the
determination of what areas are to be released, including a resurvey of such areas as it may wish. This authority may be delegated to the Marine Resources Commission. However, since Section 175 of the Constitution prohibits the sale or lease of the natural rock, use of a percentage formula for the release of portions of the area within the Baylor Survey would be improper if it was to effect a sale or lease of portions of the natural rock.

GAME AND INLAND FISHERIES—Revocation of Hunting License—Upon second conviction within two years of previous conviction revocation must be for one year.

March 21, 1969

HONORABLE W. BYRON KEELING
Commonwealth’s Attorney of Charlotte County

This is in reply to your letter of March 18, 1969, in which you inquire as follows:

“With reference to Virginia Code, Section 29-77, and to the imposition of the penalty prescribed therein for the second offense of violating provisions of the game laws, I would appreciate it if you would advise if the Judge of the Circuit Court has it within his discretion to revoke the privilege to hunt for a shorter period of time than the one-year period prescribed or to suspend part of the one-year period in the event the full penalty is imposed.”

Section 29-77 of the Code, to which you refer, reads as follows:

“If any person be found guilty of violating any of the provisions of the hunting, trapping, and/or inland fish laws, and/or § 33-287 of the Code of Virginia and/or regulations adopted by the Commission pursuant thereto, a second time within two years of a previous conviction of violating any such law or regulation, the license issued to such person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction. If found hunting, trapping or fishing during such prohibited period, such person shall pay a fine of not less than fifty dollars nor more than one hundred dollars. Licenses revoked shall be sent to the Commission.”

I am of the opinion that your inquiry should be answered in the negative. The statute directs the court to revoke the license of a second offender and submit it to the Commission. The offender is also prohibited from applying for another license for a period of twelve months. Therefore, there would be no way in which a court could revoke or suspend the license for a lesser period and still be in compliance with the statute.

Furthermore, while it is true that, pursuant to § 53-272 of the Code, a court has the power to suspend a sentence, revocation of a license in the above circumstances would not constitute a sentence within the meaning of § 53-272. In this regard, I refer you to the case of Prichard v. Battle, 178 Va. 455, 462, 17 S.E. 2d 393 (1941), in which this question arose regarding the effect of revocation of a driver's license. Therein it was held that revocation of the license is not an added punishment, but is a finding, civil in nature, that the licensee is no longer entitled to hold and enjoy a privilege which the State had theretofore granted to him under its police power.
GENERAL ASSEMBLY—Members—Service as honorary consul for foreign nation.

July 10, 1968

HONORABLE EDWARD T. CATON, III
Member, Senate of Virginia

This is in reply to your letter of June 26, 1968, regarding service by a member of the General Assembly of Virginia as an honorary consul for a foreign nation.

I know of no provision of the Constitution of Virginia or of the Code of Virginia which prohibits or permits a member of the General Assembly to serve in this particular capacity. However, Section 44 of the Constitution seems to be indicative of the public policy of the Commonwealth. In specifying the qualifications and eligibility of members of the General Assembly, it reads in part as follows:

"...; and no person holding any office or post of profit or emolument under the United States government or who is in the employment of such government, shall be eligible to either house. . . ."

GOVERNOR—Removal of Political Disabilities—Operates as of time Governor acts.

PARDON, PROBATION AND PAROLE—Removal of Political Disabilities by Governor—Operates as of time Governor acts.

May 6, 1969

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This is in reply to your letter of April 24, 1969, inquiring whether the Governor may remove the political disabilities of a convicted felon and make the removal retroactive to the year 1944.

The power of the Governor to grant various types of executive clemency, including pardons and the removal of political disabilities, imposed as an incident to the conviction of certain offenses, is contained in the following language from Section 73 of the Constitution of Virginia:

"He shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; and, except when the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment."

The removal of political disabilities as a separate act of clemency by the chief executive of a state has not been the subject of extensive discussion by the authorities. The precise question which you present is apparently without precedent. However, the stated rule as to the effect of a pardon is that a pardon relieves an individual of the punishment for the offense for which he has been convicted "and of all penalties and consequences, except political disabilities, growing out of his conviction and sentence." Edwards v. Commonwealth, 78 Va. 39, 44, 49 Am. Rep. 377 (1883). But even a pardon does not operate retroactively to wipe out the conviction and render the party innocent dating back to the time he was convicted. State v. Sims, 133 W. Va. 619, 58 S.E. 2d 784, 790 (1950).

By analogy to the foregoing, it is my opinion that the removal of disabilities should operate as of the time at which the Governor acts.
HEALTH—Ambulances—Privately owned and not operated for profit—Exempt from requirements of Title 32, Chapter 16.1.

August 13, 1968

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

This is in reply to your letter of August 2, 1968, from which I quote:

"Section 32-310.6, dealing with the exemption from the operation of Chapter 16.1 of the Code, provides in part as follows:

'(a) Privately owned vehicles not ordinarily used in the business of transporting persons who are sick, injured, wounded, or otherwise incapacitated or helpless;'

"Will you please advise me whether an ambulance, which is owned by a private industry and used only for transporting its employees who may become sick, injured, wounded, or otherwise incapacitated or helpless, while on the job for their employer, will be exempt from the operation of Chapter 16.1 under Title 32."

It is my understanding from your letter that the industrial owner of the ambulance in question does not make its profit from transporting the class of people described in § 32-310.6 (a). If this is the case they are not in "... the business of transporting persons who are sick, injured, wounded, or otherwise incapacitated or helpless." (Italics supplied.) It is my opinion, therefore, that the vehicle you describe will be exempt from the provisions of Chapter 16.1 of Title 32 of the Code.


October 16, 1968

HONORABLE DOUGLAS B. FUGATE
State Highway Commissioner

This is in reply to your request for an opinion from this office regarding the legal ability of the Virginia Department of Highways to comply with the provisions of the interim operating procedures for relocation assistance and payment which were issued by the Federal Highway Administrator under date of September 5, 1968.

Since receipt of these provisions this matter has been thoroughly considered and I am of the opinion that major portions of the Directive cannot be legally complied with by your Department under existing Virginia law.

It is well settled under the Federal and State Constitutions as well as the eminent domain laws of the Commonwealth that the State Highway Commissioner is authorized and in fact is required to pay just compensation for the property which is acquired for highways. Anderson v. Chesapeake Ferry Company, 186 Va. 481. Just compensation is considered as the full and perfect equivalent for the property taken, but does not entitle the landowner to compensation for any element resulting subsequent to or because of the taking. Anderson v. Chesapeake Ferry Company, supra; Pruner v. State Highway Commissioner, 173 Va. 307.

The Virginia Supreme Court has interpreted a full and perfect equivalent to mean the market value of the property and has held that where property has a present market value at the time of the acquisition, that value is the just compensation to which the owner is entitled. State Highway Commissioner v. Crockett, 203 Va. 796; Chairman of the Highway Commission v. Fletcher, 153 Va. 43; Duncan v. State Highway Commission, 142 Va. 135.
In considering the question of damages as a result of acquisition of land by the Highway Department, the Virginia Supreme Court has stated the general rule to be that damages are determined on the basis of the difference in value of the residue immediately before and immediately after the taking, considering every circumstance which affects the value and offsetting any enhancement in value to the remaining property by reason of the construction or improvement. *Ryan v. Davis*, 201 Va. 79. At the same time the Court has held that remote and speculative damages are not to be considered and has included in this category damages to a business as well as profits and losses from a business. *Ryan v. Davis*, supra; *Chairman of the Highway Commission v. Parker*, 147 Va. 25.

In the *Ryan* case, supra, the Court, at page 82 of the opinion, stated in part:

"** * * * Damages cannot be allowed for injuries to the business. The obvious reason for this is that the owner is entitled only to the value of the property taken and damages to the remainder if any. *Fonticello Co. v. Richmond*, 147 Va. 355, 368, 137 S.E. 458; *Stanpark Realty Corp. v. City of Norfolk, supra*, 199 Va., at p. 723, 101 S.E. 2d, at p. 533."

All of the above citations support the position that the Highway Commissioner, in acquiring property, must pay just compensation for such property and this is to be determined by the market value of the property acquired and the difference in market value of the residue before and after the acquisition.

It is clear that the decisions of the Virginia Supreme Court are in accord with the general rule throughout this country as to the payment of just compensation, and I am of the opinion that no further payment is required or authorized unless the General Assembly of Virginia has expressly authorized such additional payment.

A review of the Federal-aid Highway Act of 1968 reveals in § 32 of the Act that Congress considered the payments authorized by the Act to be beyond any payment required under the eminent domain laws in existence at the time of the enactment. Section 32 reads as follows:

"Nothing contained in chapter 5 of title 23, United States Code, shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages not in existence on the date of enactment of such chapter 5."

In view of the express provision that relocation payments are not part of the compensation required under the eminent domain laws and the previous opinions of the Virginia Supreme Court, it is necessary to look to other statutory authority to determine whether the Highway Department has the ability to make the payments in question.

The only specific legislative authority for payments by the Highway Department beyond the just compensation payments discussed above is found in § 33-67.3 of the Code of Virginia (1950), as amended. This section authorizes the Highway Department to make certain payments to persons displaced by highway construction to cover the cost of moving personal property, but such payments are limited to the cost of moving fifteen (15) miles or the sum of $200.00, whichever is less, for any individual or family and the cost of moving thirty (30) miles or the sum of $3,000.00, whichever is less, in the case of a business concern or non-profit organization.

Therefore, to the extent that the interim procedures direct the payment of moving expenses for individuals in excess of those provided in § 33-67.3, they are not only unauthorized, but would be in direct conflict with this statute. For any moving expense to be paid in excess of that authorized by § 33-67.3 would require action by the General Assembly of Virginia to amend this section.

While there is no other express statute which would authorize the Highway Department to make any of the other payments required under the Federal Highway Administrator's directive, some question may be raised as to the authority to make such payments by virtue of the fact that the legislature from time to time has
passed certain legislation authorizing cooperation with the Federal Government and empowering the State Highway Commission to do certain things in order to obtain Federal-aid funds. Specifically, the statutes in question are §§ 33-36.2, 33-130 and 33-131 of the Code.

Section 33-130 is the oldest of the three sections cited and was adopted in 1918 by the General Assembly of Virginia. This legislation was passed after the Federal Government had adopted the first Federal-aid Highway Act in 1916 and was for the express purpose of granting authority to the Highway Commissioner to carry out the necessary administrative acts in order to obtain Federal-aid funds pursuant to such Act.

Section 33-131 was adopted in 1944 and the purpose of this legislation was to extend to the localities the authority to cooperate with the Federal Government and to carry out the necessary administrative details in order for such localities to obtain Federal-aid funds for highways under their jurisdiction and control.

The last of the three acts, § 33-36.2, was adopted by the General Assembly in 1958, along with the other legislation specifically authorizing the Interstate System in the State of Virginia.

It might be argued that since the legislature has provided in the statutes mentioned that the Highway Commissioner is authorized to do all things necessary to comply with the Federal-aid highway legislation, that he is empowered to pay these costs and thereby receive Federal reimbursement. The fallacy in such reasoning appears obvious, i.e., if this position were sound and in the intent of the General Assembly, there would be no need for many of the other statutes which the legislature has enacted regarding highways and agreements with the Federal Government relating to the same. A prime example is the legislation set forth in Article 2.1 of Chapter 1 of Title 33, Code of Virginia (1950), as amended. This entire article was adopted by the General Assembly in order to authorize the Interstate System in the State of Virginia, but it would have been unnecessary if § 33-130 had been considered sufficient to authorize the Highway Commissioner to do all things necessary to obtain the ninety per cent (90%) Federal reimbursement for the Interstate System.

Further evidence which refutes any such broad application of the statutes for Federal-aid cooperation is found within the provisions of Article 2.1 of the above mentioned chapter and title of the Code. Section 33-36.2 provided the Highway Commission with broad authority to comply with the provisions of the Federal-aid Highway Act of 1956, but the legislature at the same time enacted § 33-36.9 in the same article which specifically empowered the Commissioner to pay certain utility relocation costs, and in 1964 added § 33-36.10 authorizing further utility cost payments. If § 33-36.2 had been intended to be broad enough to allow any payments in which the Federal Government would participate, the legislature would not have found it necessary to enact §§ 33-36.9 and 33-36.10.

Other examples where the General Assembly has specifically authorized the Highway Commissioner to do certain acts in order to obtain Federal funds, or in order not to lose Federal funds, are found in §§ 33-317.1 and 33-317.2 relating to outdoor advertising, § 33-279.3 relating to junkyards and § 33-67.3 relating to payment of costs to persons displaced by highway construction. It is to be noted that in both the legislation relating to outdoor advertising and the legislation relating to junkyards, the legislature found it necessary to specifically authorize the State Highway Commissioner to enter into agreements with the Federal Government relating to such subject notwithstanding the fact that § 33-130 was in effect.

The only valid conclusion which can be drawn from the sections which have been cited above is that the legislature in enacting §§ 33-36.2, 33-130 and 33-131 intended to authorize the State Highway Commissioner to do the necessary administrative acts in order to obtain Federal-aid highway funds but did not in any manner empower the Highway Commissioner to spend funds contrary to the substantive law in effect within the Commonwealth.

In addition to the absence of any express legislative authority to make the payments contemplated, there are certain limitations which the General Assembly has placed on the expenditure of funds for highway purposes.
Revenue for highways in Virginia has been obtained primarily from motor vehicle licenses, motor vehicle sales and use tax and motor vehicle and special fuel taxes. All of the legislative enactments relating to the imposition of these taxes have provisions relating to the disposition and use of such funds.

Section 46.1-167 of the Code sets forth in general how license fees will be expended and provides in general that such funds will be available only for the construction, reconstruction and maintenance of roads and bridges in the State highway systems.

Section 58-685.23 governs the disposition of motor vehicle sales and use taxes and provides for their use for the construction, reconstruction and maintenance of highways and the regulation of traffic thereon and "for no other purpose".

Section 58-730 regulates the disposition of motor fuel tax and provides in general for the same disposition as the license and motor vehicle sales and use tax revenue.

Likewise, § 58-757 provides the same disposition for revenue derived from the special fuels tax.

In addition to the above statutes limiting the disposition of revenue raised for highway purposes, the General Assembly in 1954 enacted § 58-730.1 of the Code. This section further spells out the restrictions on the expenditure of road user and motor fuel taxes and provides that no revenue so derived shall be expended for any purpose other than the following:

(a) The construction and reconstruction of highways, streets, bridges, tunnels and ferries and the maintenance thereof;
(b) The acquisition of land, bridges, tunnels and ferries required therefor;
(c) The purchase of equipment required therefor;
(d) The employment of such personnel as may be required therefor;
(e) Structures required in connection with the foregoing;
(f) Expenditures directly and necessarily required for the foregoing purposes including retirement of revenue bonds and no other reason.

In reviewing the above purposes for which revenue so derived may be expended, it would appear that the only authorization for expenditure of funds relating to the acquisition of right of way and purposes incidental thereto would be found in (b) and (f). After considering these purposes, I am of the opinion that the proposed expenditures required for relocation payments under the interim procedures established by the Federal Government do not come within the language of this section and consequently, the revenue derived from these sources may not be used for these purposes.

The expenditure for relocation costs under the existing § 33-67.3 would come within those expenditures which are "directly and necessarily required" for the acquisition of land since the Legislature has seen fit to specifically authorize such payments. However, in view of the express legislation, I am of the opinion that any further expenditure would be unauthorized.

Considering the foregoing information, I am of the opinion that the Highway Department would not be authorized to expend any funds for the employment of additional personnel to implement the proposed interim procedures in view of the limitation set forth in § 58-730.1(d) of the Code.

In summary, I am of the opinion that the Highway Department has the authority to comply only with those provisions of the proposed interim procedures which can be implemented with the present highway personnel and which do not require the expenditure of any funds beyond the payment of just compensation as determined by the Virginia Supreme Court and relocation costs as set forth in § 33-67.3 of the Code.

I am further of the opinion that there is no authority for the Highway Department to act as an agent for the Federal Government in making such payments since this would require the use of highway personnel and highway revenue which I have previously stated the Highway Department has no authority to use for such purpose.
HIGHWAYS—Private Streets—Streets and alleys clearly marked on subdivision plat as not intended for public use do not pass to the county or municipality in which land lies upon recordation of plat.

SUBDIVISIONS—Plats—Land marked for private use on—Does not pass to county or municipality in which land lies upon recordation of plat.

April 17, 1969

HONORABLE T. EDWARD TEMPLE, Director
Division of State Planning and Community Affairs

I am in receipt of your letter of March 21, 1969, in which you raise several questions concerning "Land Subdivision and Development" and "Zoning" as contained in Chapter 11, Title 15.1, Articles 7 and 8, of the Code of Virginia (1950), as amended.

Your questions are set forth below.

(1) "Is it permissible for the governing body to amend its subdivision ordinance allowing for the creation of subdivisions with only private streets, the maintenance of which would be the responsibility of the developer or a home owners association, in perpetuity?"

(2) "Is it proper, under the zoning ordinance, to create a district with the sole purpose of establishing a private enclave to the exclusion of the general public?"

As I construe your letter, the main issue is the applicability of § 15.1-478 to your questions.

Section 15.1-478 concerns the recordation of a subdivision plat and states:

"The recordation of such plat shall operate to transfer, in fee simple, to the respective counties and municipalities in which the land lies such portion of the premises platted as is on such plat set apart for streets, alleys, or other public use and to transfer to such county or municipality any easement indicated on such plat to create a public right of passage over the same; ..." (Emphasis added.)

I am of the opinion that such streets and alleys that are set forth on a subdivision plat and clearly marked as not being intended for a public use would not pass pursuant to the statute to the respective county or municipality in which the land lies.

Whether a subdivision may be created with only private streets would depend on whether the Board of Supervisors approve such a subdivision plat when it is presented. In view of the above, I see no necessity for amending any county ordinances.

The prior decision of this office found in the Report of the Attorney General (1960-1961), pages 161-162, to the extent that it is in conflict with this opinion is hereby overruled.

HIGHWAYS—Regulation of Traffic Over—Where road not in State Secondary Road System.

COUNTIES—Highways Not in State Secondary Road System—May control traffic over.

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of July 20, 1968, a portion of which is quoted as follows:
"A subdivision wherein is included a road which meets the Department of Highways specifications as to Secondary Roads, but which has not been included in our highway system, has a large amount of commercial traffic passing through. The plat of the subdivision showing the road has been duly recorded and dedicated. This subdivision is in Pittsylvania County but not in the limits of any town."

You requested my opinion as to whether the Board of Supervisors of Pittsylvania County can, by ordinance, regulate the commercial traffic through the subdivision:

(1) Where the road has been taken into the State Secondary System?
(2) Where the road is not in the State Secondary System?

Section 46.1-181, Code of Virginia (1950), as amended, permits the governing bodies of counties, cities and towns to regulate, in certain instances, the movement of trucks and carriers over the streets under their jurisdiction. Therefore, the Board of Supervisors cannot regulate the movement of trucks and carriers over roads which have been made a part of the State Secondary System of Highways since those roads are not under the Board's jurisdiction. See: § 33-46, Code of Virginia (1950), as amended.

However, § 46.1-181, clearly permits localities to regulate commercial traffic over roads which are not a part of the Secondary System of State Highways and which are thus under the Board of Supervisors' jurisdiction.

HONORABLE C. W. ALLISON, JR.
Commonwealth's Attorney for Alleghany County

This is in reply to your letter of May 22, 1969, which I quote in part as follows:

"Under the present subdivision law, which is Title 15.1, Article 7 and in particular Section 15.1-478 of the Code of Virginia, 1950, the recordation of a plat operates to transfer in fee simple to the respective counties and municipalities streets and alleys which are shown on the plat.

"Under an Act of the Assembly passed at the 1889-90 session, page 35, and enacted into the Code of 1942, as Section 5219, and annotation thereunder, fee simple title to the streets on recorded plats remain in the dedicator with the right of passage in favor of the public. My query is this:

"Should the Board of Supervisors of any county guarantee to the State Highway Department the free right of passage over streets in old subdivisions which were plated prior to the enactment of the present subdivision law for the purpose of taking these streets into the State Highway Secondary System, or should the guaranty of free right of passage come from the dedicator?"

In answer to your question, it is my opinion that since under Chapter 45 of the Virginia Acts of Assembly 1889-1890 and § 5219 of the Code of Virginia, 1942, a dedication is made to the public, there is no need to go back to the dedi-
cator to acquire a right of passage. Transferring a road to the Secondary System does not change the character of the original dedication.

HIGHPWAYS—Streets in Subdivision Included in State Secondary Road System—County not liable for damages to abutting property owner resulting from construction of street.

June 13, 1969

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

This will acknowledge your letter of May 20, 1969, in which you state that Spotsylvania County designated a certain street in a subdivision of the county for inclusion in the State Secondary Road System and agreed to contribute one-half the cost to bring said street up to the necessary standards as provided by § 33-47.2 of the Code of Virginia. You further state that the Department of Highways made the improvements necessary to bring the said street up to acceptable standards; however, in so doing, it lowered the grade on a section of the street with resulting damage to the property of an abutting landowner, whereby he is deprived of lateral support and convenient access to the street.

Your question is, "What, if any, liability is the county under to said property owner in the premises?"

It is my opinion that the county of Spotsylvania is under no liability to the property owner.

HIGHPWAYS—Subdivision Street Ordinances—Whereby county agrees to pay 50% of cost of road improvement—Conditions under which valid.

ORDINANCES—Subdivision—Conditions under which county can agree to pay 50% of construction of road improvement.

SUBDIVISIONS—Ordinance Pertaining to Cost of Street Improvement—When county may agree to pay 50% of cost.

September 12, 1968

HONORABLE E. EUGENE GUNTER
Commonwealth's Attorney for Frederick County

This is in reply to your letter of September 4, 1968, in which you request my opinion concerning the constitutionality of a proposed ordinance in which the County agrees to pay 50 percent of the cost of road improvements in subdivisions provided owners on both sides of the street agree to pay 50 percent of the cost of the improvement.

I know of no provision of the Constitution of Virginia which would prohibit such an ordinance.

Your proposed ordinance would not be in violation of any State statute so long as the subdivision to which the ordinance is to be applied falls within the provisions of §§ 33-138 and 33-47, et seq. of the Code.

HOUSING AUTHORITIES—Members—Conflict of interest—Mere kinship not determinative.

October 21, 1968

HONORABLE ROBERT E. GIBSON
Member, House of Delegates

This is in reply to your letter of September 23, 1968, in which you inquire whether a conflict of interest arises where the vice-chairman of the board of a
housing authority is related to the director of the authority and votes on the
director's salary and countersigns various documents with the director.

Section 36-16 of the Code, the conflict of interest statute applicable to housing
authorities, provides that no member of the authority shall have an interest,
direct or indirect, in any contract with the authority. However, except as to
spouses and dependent children, the general rule is that a mere showing of
kinship does not constitute a conflict of interest under statutes similar to § 36-16.
See, 63 C.J.S Municipal Corporations § 991, at 557.

It is, therefore, my opinion that as long as the vice-chairman receives no
benefit from the salary paid the director, there is no conflict of interest within
the meaning of § 36-16.


INTEREST—Contracts in Excess of Legal Rate of Six Percent Per Annum—
Application of § 6.1-319 of the Code, as amended.

HONORABLE STANLEY E. SACKS
Member, House of Delegates

January 9, 1969

This is in reply to your letter of December 20, 1968, in which you request my
opinion as to whether or not the charge of a "5% placement fee," in addition to
the interest rate of 6 3/4% on a thirty-year first mortgage loan is in violation of

The named Code section, which was rewritten by Chapter 92, Acts of Assembly
of 1968, is as follows:

"Except as otherwise permitted by law, no contract shall be made,
for the loan or forbearance of money at a greater rate of interest than
eight percent per annum, including points expressed as a percentage of
the loan divided by the number of years of the loan contract. For the
purpose of this section the term points is defined as the amount of
money, or other consideration, received by the lender, from whatever
source, as a consideration for making the loan and not otherwise ex-
pressly permitted by statute."

This section places a limitation of eight percent per annum on a contract for
the loan or forbearance of money, except as otherwise permitted by law, including
points expressed as a percentage of the loan divided by the number of years of
the loan contract. As I interpret the statutory definition of points, included therein,
the "5% placement fee" referred to falls within such definition.

In determining the legality of the situation here under consideration, it must
be determined whether the aggregate of the stated interest rate and points reduced
to an annual basis equal a percentage in excess of eight percent per annum. If so,
the contract is illegal because it violates § 6.1-319. If not, there is no violation
of this section. In making this analysis of a contractual situation in relation to the
quoted statute we must take into consideration the points expressed as a percentage
of the loan divided by the number of years of the loan contract.

Applying the law to the given facts by dividing the five percent placement fee
by thirty, the number of years of the loan contract, the resulting percentage fraction
added to the 6 3/4% interest aggregates less than the maximum eight percent
permitted under the statute. Accordingly, in my opinion, there is no violation of
§ 6.1-319 and your question is answered in the negative.
INTEREST—Legal Rate Permitted Under § 6.1-319.

BANKING AND FINANCE—Interest—Legal rate permitted under § 6.1-319.

HONORABLE ROBERT C. FITZGERALD
Member, Senate of Virginia

July 19, 1968

I am in receipt of your letter of July 10, 1968, in which you present the following situation and inquiry:

"There seems to be considerable question about the effect of the legislation passed by the General Assembly at the last session raising the interest rate to an 8 per cent maximum as it affects second trust loans made both by the lender and then taken back by the seller as part of the purchase price. The question apparently arises in the wording of Section 6.1-330 as it relates to Section 6.1-234 which refers to 'the legal rate of interest.'

"It would seem to me that prohibiting a second trust loan in 'an amount in excess of that permitted by Section 6.1-234' would not prohibit an 8 per cent amortized second trust loan, since the lender would not be receiving 'an amount' in excess of a 6 per cent add-on interest, which is permitted by Section 6.1-234.

"Inasmuch as there are conflicting opinions and many buyers and lenders are confused by the situation, your opinion is respectfully requested."

In this connection, § 6.1-330 of the Code of Virginia (1950) as amended, in pertinent part, provides:

"(a) No person, copartnership, association, trust, corporation or other similar legal entity shall directly or indirectly charge, take or receive for a loan secured in whole or in part by a mortgage or deed of trust other than a first mortgage or deed of trust, on residential real estate improved by the construction thereon of housing consisting of four or less family dwelling units, an amount in excess of that permitted by § 6.1-234, whether payable directly to the lender or to a third party in connection with such loan. . . .

"(b) In addition to the investigation fees and interest permitted by § 6.1-234, any such lender may also require the borrower to pay the actual cost of title examination, title insurance, recording fees, surveys, attorneys' fees, and appraisal fees. No other charges of any kind shall be made by the lender or any other party in connection with such loan." (Italics supplied.)

Section 6.1-234 of the Virginia Code—to which reference is made in the above-quoted provision—relates to industrial loan associations and, in pertinent part, prescribes:

"An industrial loan association may charge in advance the legal rate of interest upon the entire amount of the loan, and such loans may be repaid in weekly, monthly or other periodical installments, with the privilege to the association to declare the entire unpaid balance due and payable in the event of default in the payment of any installment for a period of thirty days; and such associations may also charge an investigation fee not exceeding two per centum of the amount of the loan. In the event the combined charges for interest and investigation fee would not amount to one dollar, such industrial loan association shall be entitled to a minimum charge of one dollar in lieu thereof. It may fix in its by-laws such fines as it will charge for the nonpayment of any installments of any loan; but such fines shall not be more than ten percent of the
amount of the payment in which default is made, and shall not be cumulative.

"As used in this section the phrase 'charge in advance' when applied to installment loans means that the interest may be added to the principal amount of the note but may not be deducted from it." (Italics supplied.)

From the language of the statutes italicized above, it appears that a lender in a second trust loan situation may not charge or receive for such loan an amount in excess of that which industrial loan associations are permitted to charge under § 6.1-234 of the Virginia Code. The latter statute permits an industrial loan association to "charge in advance the legal rate of interest" upon the entire amount of the loan. The legal rate of interest which such association may charge in advance is that established by § 6.1-318 of the Virginia Code, as recently amended, which prescribes that legal interest shall be at the rate of six percent per annum, and I am of the opinion that this is the maximum rate of interest which may be charged in advance in the situation you present.

However, as you point out, § 6.1-319 of the Virginia Code was also amended at the recent regular session of the General Assembly of Virginia to provide:

"Except as otherwise permitted by law, no contract shall be made, for the loan or forbearance of money at a greater rate of interest than eight percent per annum, including points expressed as a percentage of the loan divided by the number of years of the loan contract. For the purpose of this section the term points is defined as the amount of money, or other consideration, received by the lender, from whatever source, as a consideration for making the loan and not otherwise expressly permitted by statute." (Italics supplied.)

In light of the above-quoted statute, I am of the opinion that so long as the rate of interest on a second trust loan does not exceed that prescribed in § 6.1-319, and so long as the amount which is charged or received by a lender on such second trust loan is not in excess of that permitted by § 6.1-234, no violation of § 6.1-330 of the Virginia Code would occur.

JUDGES—Courts Not of Record—Salary—May be diminished during term of office.

HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

This is in reply to your letter of June 6, 1969, in which you inquire whether the opinion expressed in my letter of May 16, 1961, to Honorable Fred W. Bateman, Report of the Attorney General (1960-1961), p. 169, applies to courts not of record.

The opinion cited was in reference to a judge of the Corporation Court for the City of Newport News. A review of the sections of the Constitution of Virginia, cited therein, indicates that such sections only pertain to courts of record. I fail to find any similar constitutional provisions applicable to courts not of record. My conclusion is, therefore, that the matter of reduction in salary of a court not of record was not covered by the opinion since the restrictions indicated have application only to courts of record.

JUDGES—Municipal Court of the City of Staunton—Vacancy filled by general election.

HONORABLE EDITH H. PAXTON, Clerk
Circuit Court of the City of Staunton

This is in reply to your letter of February 27, 1969, from which I quote the following:
"I have been requested to seek your opinion in the matter of the election or appointment of Judge of the Municipal Court of the City of Staunton. The term of the present Judge will expire December 31, 1969 and the question at hand is 'Should the office of Judge of the Municipal Court for the City of Staunton be filled in the General Election or by appointment made by the Court?'

"For your information I am enclosing copies of pertinent sections from the Charter of the City and the Staunton City Code relating to this matter. May I also refer you to Section 16.1-52 of the 1950 Code of Virginia and to Section 16-84 of the 1919 Code of Virginia."

Section 16.1-52 of the Code of Virginia, to which you refer me, provides for a municipal court which may be called the civil and police court and a judge for such court in each city having a population of ten thousand or more but less than forty-five thousand. The key to the proper manner of appointment or election of any such judge, however, is found in § 16.1-7 of the Code of Virginia, the relevant part of which is as follows:

"(2) In cities and towns each such judge, associate judge, assistant or substitute judge shall be appointed or elected for such term and in such manner as is prescribed by the charter of the city or town in which he serves; but, in the event such charter does not prescribe the term and manner of appointment or election, then for such term and in such manner as was prescribed by general law immediately prior to the effective date of this title."

In my interpretation, Section 13, Chapter III of the charter for the city of Staunton, a copy of which you furnished me, relates to the procedure for filling vacancies in the office of civil and police justice pending a general election in the city. In other words, it applies only to vacancies which may occur during a regular term of office.

Since the charter does not prescribe the term and manner of appointment or election, under the quoted portion of § 16.1-7 such term and manner shall be as prescribed by general law in effect immediately prior to the effective date of Title 16.1. This title was enacted by Chapter 555, Acts of Assembly of 1956, which repealed Title 16, and the law immediately prior thereto in respect to the subject matter is found in former § 16-84 of the Code of 1950. That section prescribes that in each city containing at least ten thousand but less than forty-five thousand inhabitants the civil and police justice shall be elected by the qualified voters of such city on the Tuesday after the first Monday in November, nineteen hundred and forty-nine, and every four years thereafter. The term of office shall begin on the first day of January succeeding his election and such justice shall hold office for a term of four years.

In consideration of the foregoing, it is my opinion that the office of Judge of the Municipal Court of the City of Staunton should be filled in the general election.

JUDGMENTS—Issuance of Execution Upon—No authorities for clerk of one county to issue execution upon abstract of judgment obtained in another county.

May 23, 1969

HONORABLE LEDA S. THOMAS, Clerk
Circuit Court of Prince William County

This is to acknowledge receipt of your letter of May 15, 1969, in which you state in part:

"There has been docketed in our Court an abstract of a Judgment from the Civil Justice Court of the City of Norfolk."
"Now, we have filed in our office a Suggestion for Garnishment on this same judgment. * * *

"Under the law can we issue a fieri facias on this judgment and then issue Garnishee summons on the same?"

According to § 8-441 of the Code of Virginia (1950), as amended (1966), after the issuance of a writ of fieri facias a summons in garnishment may be sued out: (1) in the clerk's office of the court in which the judgment is, or (2) if rendered by a trial justice, may be issued by a trial justice, or (3) in cities of a certain population by a justice of the peace, or (4) in the clerk's office to which an execution issued thereon has been returned as provided in § 16.1-99 of the Code. Said § 16.1-99 provides that where the papers in a case have been returned to a court of record, then the writ and other papers in connection with such proceedings (including garnishment) shall likewise be returned to the court of record. A fieri facias or summons in garnishment based on a judgment of a court not of record can be issued by the court in which the judgment was rendered and by the clerk of a court of record in whose office the papers of the proceeding are filed. See §§ 16.1-100, 16.1-115, 16.1-116 of the Code. I know of no statute which authorizes the clerk of a court of record to issue a summons in garnishment of fieri facias on an abstract of judgment rendered by a court not of record in another jurisdiction.


Your question is therefore answered in the negative.


JUSTICE OF PEACE—Incompatibility—May not be a law enforcement officer.

HONORABLE MOODY E. STALLINGS
Commonwealth's Attorney for City of Suffolk

October 21, 1968

This is in reply to your letter of October 9, 1968, in which you quote Section 29.08 of the charter of the City of Suffolk, pertaining to justices of the peace and the issuance of warrants and inquire as to the effect of § 39.1-1 of the Code of Virginia on this charter section. In this connection, I quote from your letter the applicable paragraph of the charter and the questions presented for my consideration, as follows:

"Section 29.08 of the charter of the City of Suffolk reads as follows:

"Issuance of warrants.—The council shall elect one or more special justices of the peace to be known as warrant justices, who shall hold office during the pleasure of the council and shall have such powers as are hereby conferred, and no other. No person shall be ineligible to such office by reason of the fact that at the time of his election or while holding such office he is an officer or employee of the State or City.’

"1. I would like to know if section 39.1-1 of the Code of Virginia has the effect of repealing section 29.08 of the charter of the City of Suffolk in its entirety.

"2. If your answer to inquiry number one is in the negative, I would like to know if the warrant justice, who is a police officer, could remain in office under the provisions of the last sentence of 39.1-10 of the Code of Virginia after January 1, 1969.

"3. If your answer to inquiry number one is negative, I would like to
know if the Council of the City of Suffolk will have the authority to appoint Justices of the Peace on or after January 1, 1969.

"4. If the City Council of the City of Suffolk does not have the authority to appoint Justices of the Peace and that authority is vested in the Judge of the Circuit Court, I would like to know if the Judge of the Circuit Court could appoint a police officer as Justice of the Peace, who is now serving as a Warrant Justice for the City of Suffolk."

Title 39.1 of the Code of Virginia becomes effective January 1, 1969, replacing Title 39 on that date. Section 39.1-1 thereof prescribes that all provisions of municipal charters inconsistent with the provisions of this title are, except as herein otherwise provided, repealed to the extent of such inconsistency. Under Article 3 of this title, however, § 39.1-6 contains a provision that if the charter of any city provides for the appointment or election of justices of the peace by the city council, such justices of the peace shall continue to be appointed in the same manner as they were prior to the enactment of this article. Your first question, therefore, is answered in the negative.

Section 39.1-10 provides that no person who is a law enforcement officer may be elected or appointed to the office of justice of the peace under the provisions of this title and that no employee of a police department of a county, city or town shall be eligible for election or appointment to the office of justice of the peace of such county, city or town. The last sentence of the section states:

"This section shall not apply to incumbents of such office who are in office when this section becomes effective."

In view of this provision, assuming you have reference to incumbent justices of the peace who are in office when this section becomes effective on January 1, 1969, I shall answer your second question in the affirmative.

For the reasons previously herein stated, your third question is answered in the affirmative. Having so answered your third question, no further consideration of your fourth question is necessary.

JUSTICE OF PEACE—Appointment—Inconsistent charter provisions of city affecting appointment repealed.

HONORABLE T. TAYLOR CRAILLE, Judge
Municipal Court, City of Petersburg

This is in reply to your letter of November 25, 1968, in which you request to be advised (1) if § 39.1-1 of the Code repeals Section 3-9 of the Charter of the City of Petersburg which provides for the election of justices of the peace by the qualified voters of the city and, if so, (2) does the present term of office of a justice of the peace continue to its expiration or expire January 1, 1969.

Title 39.1 of the Code of Virginia becomes effective January 1, 1969, and § 39.1-1 thereof provides, among other things, that "all provisions of municipal charters, inconsistent with the provisions of this title, are, except as herein otherwise provided, repealed to the extent of such inconsistency." In regard to the appointment of justices of the peace, § 39.1-6 prescribes the appointment of justices of the peace in every county and every city by the "appointing court," as defined in § 39.1-5, with certain exceptions not applicable to the situation presently under consideration. Since Section 3-9 of the Charter requires election by the qualified voters, it is in conflict with the provisions of Title 39.1 of the Code of Virginia, specifically, § 39.1-6 prescribing the manner of appointment. In respect to your first question, therefore, I am of the opinion that the charter provision is repealed effective January 1, 1969, to the extent of such inconsistency.

It follows that the justices of the peace for the City of Petersburg must be appointed under the provisions of Article 3, Chapter 1, of Title 39.1, wherein
§ 39.1-8 provides that persons appointed under the provisions of this Article shall serve for a term of four years and "such term shall commence January 1, 1969." Accordingly, in answer to your second question, it is my opinion that the present term of office of a justice of the peace for the City of Petersburg will expire January 1, 1969.

JUSTICE OF PEACE—Authority—May exercise the powers conferred upon him only in city, county or town for which appointed.

JUSTICE OF PEACE—Authority—May issue warrants or admit to bail persons arrested in his jurisdiction but charged with committing crimes elsewhere.

April 11, 1969

MR. WALTER F. ANDREWS
Justice of the Peace for City of Emporia

This is in reply to your letter of recent date in which you request that I answer the following questions:

"Can a City Justice of the Peace write a warrant or a bond for a county offense, and also if a County Justice of the Peace can write a warrant or a bond for a city offense?"

"Can a County Justice of the Peace write a criminal or civil warrant for someone in the City of Emporia?"

"Can a City Justice of the Peace bond anyone for an offense committed in the City?"

In regard to the jurisdiction of justices of the peace, § 39.1-14 of the Code of Virginia states: "A justice of the peace shall exercise the powers conferred by this title only in that area which is coterminous with the boundaries of the city, county or town for which he is appointed." Section 39.1-15 of the Code is as follows:

"A justice of the peace shall have the following powers only:

"(1) To issue process of arrest in accord with the provisions of §§ 19.1-90 to 19.1-100.1 of the Code;

"(2) To issue search warrants in accord with the provisions of §§ 19.1-83 to 19.1-89 of the Code;

"(3) To admit to bail or commit to jail all persons charged with offenses subject to the limitations of § 19.1-110 and in accord with general laws on bail;

"(4) The same power to issue attachments, warrants, and subpoenas within such city as is conferred upon courts not of record. Such attachments, warrants, and subpoenas shall be returnable before a court not of record;

"(5) To issue civil warrants directed to the sheriff, sergeant or constable of the county or city wherein the defendant resides, together with a copy thereof, requiring him to summon the person against whom the claim is, to appear before a court not of record on a certain day, not exceeding thirty days from the date thereof to answer such claim. If there be two or more defendants and any defendant resides outside the jurisdiction in which the warrant is issued, the summons for such defendant residing outside the jurisdiction may be directed to the sheriff or sergeant of the county or city of his residence, and such warrant may be served and returned as provided in § 16.1-80."

As indicated in § 39.1-14, quoted above, a justice of the peace may exercise the powers conferred on him only in the city, county or town for which he is appointed. Thus, a justice of the peace for a city is not empowered to go outside
of the city for which appointed and write a warrant or admit a person to bail for a county offense. Neither may a justice of the peace for a county exercise his powers outside the county for which appointed.

It is a different matter, however, for a justice of the peace acting within the boundaries of his jurisdiction to issue warrants or admit to bail persons charged with committing crimes elsewhere. This may occur when an arrest is made in a jurisdiction other than that in which the crime is committed, as contemplated in §§ 19.1-94 and 19.1-100 of the Code. For example, a person commits a crime in Greensville County and, before a warrant has been issued, escapes into the City of Emporia where he is arrested for the crime. Upon his arrest in Emporia the officer making the arrest takes the person before a justice of the peace or other officer authorized to issue criminal warrants in Emporia, who, if he finds reasonable grounds, shall issue a warrant. This is prescribed by § 19.1-100.1 of the Code, which states: "A person arrested without a warrant shall be brought forthwith before an officer authorized to issue criminal warrants in the county or city where the arrest is made, unless such person is released on summons as provided by law." (Emphasis supplied.)

Sections 19.1-110 and 19.1-119 of the Code are instructive in regard to whether the person charged shall be admitted to bail. Also, where the warrant for arrest is issued in the jurisdiction in which the offense occurred and after or at the time the warrant is issued for his arrest, the accused escapes to another jurisdiction in which he is later arrested, a justice of the peace before whom he is brought in the latter jurisdiction is authorized to admit him to bail under the provisions set forth in §§ 19.1-110 and 19.1-119 of the Code. The same law applies when a person charged with crime in Greensville County escapes to and is brought before a justice of the peace in Emporia as when a person charged with crime in Emporia escapes to and is brought before a justice of the peace in Greensville County.

JUSTICE OF PEACE—Authority—May not take affidavits.

September 3, 1968

HONORABLE DAVID A. LYON, III
Secretary & Treasurer
Association of Justices of the Peace of Virginia

This is in reply to your letter of August 23, 1968, from which I quote the following:

"The authority of the Justice of the Peace to take an affidavit or acknowledgement was taken from them by the 1968 Legislature. The question is: "Can a Justice of the Peace now take the affidavit (and sign same as a Justice of the Peace and not as a Notary Public) as required on a Search Warrant?"

When the general laws of Virginia relating to justices of the peace were revised and amended by Chapter 639, Acts of Assembly of 1968, the reference to justices of the peace was deleted from § 55-113 of the Code, which relates to taking and certifying acknowledgments. At the same time § 49-4 of the Code was amended so that it no longer includes justices of the peace among those officers authorized to administer oaths and take affidavits. Accordingly, your question is answered in the negative.
JUSTICE OF PEACE—County—Authorized to issue warrants for violation of State law anywhere in county, including a town located therein.

JUSTICÉ OF PEACE—County—No authority to issue warrants for violations of town ordinances unless justice of peace for magisterial district in which town is situated.

JUSTICE OF PEACE—County—May not be appointed substitute justice of peace for a town.

June 17, 1969

HONORABLE H. HAMPTON OLIFF
Justice of the Peace for Westmoreland County

This is in reply to your letter of June 2, 1969, which I quote as follows:

"I have two questions concerning my duties as a justice of the peace for Westmoreland County, Virginia.

"(A) If the justice of the peace of a town who has been appointed by members of council and the mayor of the town is sick, out of town and cannot be reached, does a county justice of the peace have the authority if called to the town to issue arrest warrants, summons for violations that have occurred within that town for its police officers and private citizens?

"(B) Can the mayor of a town and the town council appoint a county justice of the peace as a substitute justice of the peace for a town to fill in if the regular appointed town justice of the peace is not available to serve the police officer and the citizens of the town?"

In regard to your first question, designated (A), I am of the opinion that a county justice of the peace is authorized to issue warrants for violations of State law anywhere in the county, including a town located in such county, but is not authorized to issue warrants for violations of town ordinances unless he is justice of the peace for a magisterial district in which the town is situated. I expressed similar views in Report of the Attorney General (1962-1963), p. 45 and Report of the Attorney General (1964-1965), p. 150.

In regard to your question (B), § 39.1-20 of the Code of Virginia states that the council of any town may elect one or more special justices of the peace. I find no provision of law, however, under which a county justice of the peace may be appointed substitute justice of the peace for a town and, therefore, this question is answered in the negative.

JUSTICE OF PEACE—Elected and Qualified Prior to Adoption of § 39.1-9 of the Code—Not affected by the provisions of that section.

October 22, 1968

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

This is in reply to your letter of October 10, 1968, in which you present the following questions:

"Does § 39.1-9 affect the Justices of the Peace who were elected and qualified for a new term beginning 1968, or will that section be effective only upon a new appointment or after the next election of the Justices of the Peace?

"Is it your opinion that the Justices who were elected and took office on January 1, 1968 and posted the $500.00 bond in order that they could take cash bonds will continue under this bond until the end of their
present term, or does §39.1-9 make it mandatory that they post a $2,500.00 bond on January 1, 1969, as required by Section 39.1-8?"

Section 39.1-9 of the Code of Virginia, to which you refer, is as follows:

"Every justice of the peace elected or appointed under the provisions of this article shall enter into bond in the sum of two thousand five hundred dollars, before the clerk of the circuit or corporation court which exercises jurisdiction over the political subdivision wherein he shall serve, for the faithful performance of his duties."

A justice of the peace who was elected and qualified for a term beginning in 1968 and continues in office under such term would not be a "justice of the peace elected or appointed under the provisions of this article" within the purview of §39.1-9, since Title 39.1, which includes this article, does not become effective until January 1, 1969. In my opinion, therefore, §39.1-9 does not affect the justices of the peace who were elected and qualified for a new term beginning 1968. Accordingly, justices of the peace who were elected and took office on January 1, 1968, and posted the $500.00 bond in order that they could take cash bonds, will continue under such bond until the end of their present term or until their service is otherwise terminated prior to the end of their present term.

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**JUSTICE OF PEACE—Issuance of Warrant by Justice of Locality Other Than That Where Defendant to be Tried.**

**CRIMINAL PROCEDURE—Warrants—Issuance by justice of locality other than that where defendant to be tried.**

October 14, 1968

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

This is in reply to your letter of October 4, 1968, which I quote as follows:

"I would appreciate a clarification of an opinion given to J. T. Rodgers on August 21, 1952 concerning the jurisdiction of Justices of the Peace. (Opinions of the Attorney General 1952-53, page 133)

"My specific question is: Can a suspect arrested in the County for an offense committed in the County be brought before a City Justice of the Peace by the arresting officer, or must the suspect be arrested within the City before he can be brought before a City Justice?"

A question similar to the one you present was answered in the affirmative in an opinion found in Report of the Attorney General (1945-1946), p. 7, which quoted from §4827 of Michie's Code language later included in §19-78 of the Code of Virginia. The opinion found in Report of the Attorney General (1952-1953), p. 133, to which you refer, cited that prior opinion and stated that a justice of the peace for the City of Harrisonburg could issue warrants under §39-1 for crimes committed within the corporate limits or, if the person accused was within the corporate limits of Harrisonburg and brought before him, in accordance with §19-78.

In the latter situation, §19.1-99 (former §19-78) prescribes the procedure to be followed when a warrant is issued in a county or corporation other than that in which the charges ought to be tried. In any such instance, the statute requires that the court before whom the accused is brought shall, by warrant, commit him to an officer who shall take him before, and return such warrant to, a court of appropriate jurisdiction in the county or corporation in which the trial should be.

It is obvious from the foregoing that a warrant may be issued in a county or
corporation other than that in which the charge ought to be tried. The procedure necessary to comply with such statute, however, leads me to the conclusion that in the situation set forth in your question, the suspect should be taken before a justice of the peace in the county, since he is present in the county and that is where the charge ought to be tried.

JUSTICE OF PEACE—No Longer Authorized to Take Affidavits—May administer oaths, issue warrants and search warrants.

September 24, 1968

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

This is in reply to your letter of September 13, 1968, in which you refer to the 1968 amendment to § 49-4 of the Code of Virginia and present the questions which I quote as follows:

1. Does 49-4 of the Code as amended affect the laws of search and seizure (19.1-83 et seq, 4-54, and related statutes) in regard to (a) the taking of the affidavit; or (b) administering the oath?

2. If the Justice of the Peace cannot take either the oath or affidavit, how does he as a judicial officer determine the question of probable cause in light of the decisions of the Supreme Court of the United States?

3. Does 49-4 affect the power of a Justice of the Peace to issue process of arrest and examine complaining witnesses under oath as provided by 19.1-90 et seq. of the code and 19.1-101 et seq.?

4. Does the amendment to 19.1-101 preclude Justices of the Peace from issuing criminal warrants?

In regard to your question numbered 1(a) respecting the taking of the affidavit required prior to the issuance of a search warrant, I have previously expressed the opinion that a justice of the peace is no longer authorized to take the affidavit. In this connection a copy of my letter of September 3, 1968, to Honorable David A. Lyon, III, Secretary & Treasurer, Association of Justices of the Peace of Virginia, is enclosed.

Your next three questions enumerated 1(b), 2 and 3 will be considered together because of their relationship. The amendments to the general laws of Virginia relating to justices of the peace, as reflected by Chapter 639, Acts of Assembly of 1968, deleted from § 49-4 of the Code the provision that any oath or affidavit required by law, except those that must be made in court, may be administered by or made before a justice of the peace. I find no other statute granting a justice of the peace authority to take an affidavit.

The authority of a justice of the peace for administering an oath, however, seems to be on different footing. In the first place, §§ 19.1-83 and 19.1-84 of the Code provide that if there be complaint on oath, supported by the affidavit required by § 19.1-85, a justice of the peace, if satisfied there is reasonable cause, shall issue a search warrant. Likewise §§ 19.1-90 and 19.1-91 authorize a justice of the peace to issue a warrant of arrest if he sees good reason to believe that an offense has been committed, after examining on oath the complainant and any other witnesses. Further, § 14.1-128 of the Code, as amended by Chapter 639, Acts of Assembly of 1968, prescribes the present fees for the services of a justice of the peace for issuing warrants and search warrants.

The foregoing statutes undoubtedly authorize a justice of the peace to issue warrants of arrest and search warrants. As previously indicated, § 19.1-91 plainly includes a justice of the peace among those who shall examine on oath the complainant and other witnesses before issuing a warrant of arrest. Also, the language of § 19.1-84 is obviously to the same intent with respect to search warrants.
Section 8-294 of the Code states that any person before whom a witness is to be examined may administer an oath to such witness. In reference to witnesses in general, § 19.1-262 prescribes that § 8-294 shall apply to a criminal as well as to a civil case. On the basis of these statutes, I conclude that a justice of the peace is authorized to administer the oath preparatory to examining a witness in connection with his determining whether there is reasonable cause for issuing a warrant or a search warrant and your questions 1(b) and 3 are answered in the negative. This conclusion also answers question numbered 2 and makes further consideration thereof unnecessary.

In accordance with the foregoing your question numbered 4 is answered in the negative.


November 4, 1968

HONORABLE MOODY E. STALLINGS
Commonwealth's Attorney for the City of Suffolk

This is in reply to your letter of October 29, 1968 in which you make inquiry as follows:

"Can a justice of the peace who is appointed under the authority of Section 29.8 of the Charter of the City of Suffolk to hold office during the pleasure of the Council, remain in office at the pleasure of the Council, or does he have to be reappointed for a four year term under the provisions of Section 39.1-8 of the Code of Virginia?"

Section 39.1-8, to which you refer, provides that persons appointed as justices of the peace under the provisions of Article 3, Chapter 1, Title 39.1 of the Code of Virginia, shall serve for a term of four years. A person elected by the city council prior to the effective date of this article to hold office during the pleasure of the council under the provisions of a city charter, as authorized in § 39.1-6, would not be a person appointed under the provisions of this article. In my opinion, therefore, such person can remain in office at the pleasure of the council and does not have to be reappointed for a four year term under the provisions of § 39.1-8 of the Code.

JUSTICE OF PEACE—Status—Period of service, election, appointment.

January 9, 1969

HONORABLE RAYNER V. SNEAD, Judge
Twenty-Sixth Judicial Circuit of Virginia

This is in reply to your letter of December 30, 1968, in which you request my interpretation of §§ 24-157 and 39.1-6 of the Code of Virginia and specifically raise three questions, which I quote as follows:

"1. Do justices of the peace elected pursuant to section 24-157 continue to serve until the expiration of their four year terms?
2. Assuming the answer to question #1 is yes and there is no repeal of this section, would justices of the peace be elected again under the terms of it in 1971?
3. Does section 39.1-6 mean that the appointing court shall appoint in addition to those elected under section 24-157 justices of the peace as are necessary for the effective administration of justice?"

Title 39.1 of the Code of Virginia which became effective January 1, 1969, prescribes, under § 39.1-1 thereof, as follows:
REPORT OF THE ATTORNEY GENERAL

"§ 39.1-1. All acts and parts of acts, all sections of this Code, and all provisions of municipal charters, inconsistent with the provisions of this title, are, except as herein otherwise provided, repealed to the extent of such inconsistency."

In regard to this section, I have previously expressed the opinion that a city charter found to be inconsistent with the appointing requirements prescribed by § 39.1-6 is thereby repealed to the extent of such inconsistency. See my letter of December 3, 1968, to Honorable T. Taylor Cralle, Judge, Municipal Court, City of Petersburg, a copy of which is enclosed for your convenience.

As you will note, the named opinion is concerned only with the narrow question of a conflicting city charter and does not involve § 24-157 relating to justices of the peace in counties or the questions which you now raise for the first time. Section 24-157 is as follows:

"§ 24-157. District supervisors and Justices of the Peace.—In each magisterial district there shall be chosen by the qualified voters thereof at the general election to be held on the Tuesday after the first Monday in November, in the year nineteen hundred and fifty-one, and every four years thereafter, one supervisor and three justices of the peace who shall hold office for the term of four years."

This is one of several statutes which were amended and reenacted by Chapter 639, Acts of Assembly of 1968, the same act which repealed Title 39 and enacted Title 39.1. Notwithstanding the repealing clause embodied in § 39.1-1, quoted herein, certain incidents of the legislative history of the enactment indicate a definite intent with respect to § 24-157. Paramount is the fact that Senate Bill No. 1, under which these changes were introduced, shows deletions of all references to justices of the peace. Before adoption of the bill, however, these references to justices of the peace were restored to § 24-157, with the result that this section was reenacted in virtually the same language as it previously contained.

Considering the foregoing, I am of the opinion that the obvious legislative intent was to leave § 24-157 in full force and effect. This interpretation is supported by the rule of statutory construction that all parts of the same act be given effective application insofar as this may be reasonably done. Accordingly, your three questions are answered in the affirmative.

JUVENILE AND DOMESTIC RELATIONS COURTS—Authority—No authority to commit mentally ill adult.

December 2, 1968

HONORABLE HAROLD B. SINGLETON
Judge, Fifth Regional Juvenile and Domestic Relations Court for Amherst County

This is in reply to your letter of November 21, 1968, which reads in part as follows:

"Would you please advise me as to whether or not I may commit an adult who appears in my Court charged with child neglect and who is found by a psychiatrist to be mentally ill to the proper institution for treatment."

The answer is in the negative. Section 16.1-158(2) of the Code specifies the jurisdiction of Juvenile and Domestic Relations Courts with reference to admissions of the mentally ill and defective to hospitals. Title 37.1 does not expand that jurisdiction, nor did Title 37.

With respect to the subject matter of your question, the provisions of Title 37.1 contain no essential changes from the provisions of Title 37. The definition of "justice" in § 37.1-1(11) is almost identical to the definition in § 37.1-1(7), and its use in § 37.1-67 is very similar to its use in § 37-61. Title 37.1 does not expand the jurisdiction of Juvenile and Domestic Relations Courts beyond that which existed while Title 37 was in effect.
July 25, 1968

HONORABLE RICHARD W. DAVIS, Judge
Radford Municipal Court

This is in reply to your letter of July 2, 1968, in which you requested my opinion concerning jurisdiction under § 16.1-158, subsections (8) and (9), Code of Virginia (1950), as amended, in the following situations:

1. Which court has the jurisdiction over a fight between a mother-in-law and daughter-in-law where the parties do not reside in the same household.

2. Which court has the jurisdiction to try an assault and battery between a wife and a husband's alleged mistress where the wife catches the parties together resulting in the fracas.

Because a mother-in-law and daughter-in-law are not within the scope of the definition of "family" included in § 16.1-158, subsection (8), I am of the opinion the Juvenile and Domestic Relations Court would not obtain jurisdiction with respect to your question No. 1 under this subsection.

For the same reason, I am of the opinion that the Juvenile and Domestic Relations Court would not have jurisdiction under this subsection with respect to the situation you posed in question No. 2 quoted above.

It seems, however, that in both these situations the violation of law described would tend in some way to disrupt marital relations. It is my opinion, therefore, that in both these instances the Juvenile and Domestic Relations Court would have exclusive original jurisdiction under the provisions of § 16.1-158, subsection (9). I have been unable to find either statutory or common law authority for qualification of subsection (9) making it applicable only in those cases "where an infant is involved."

You further stated in the last paragraph of your letter:

"We would also like to know which court has jurisdiction to hear commitment proceedings for inebriation where the wife, or other members of the family, files a petition against the husband."

As you know, § 37-61 of the Code now covers this situation. It provides:

"Any circuit or corporation judge, or any justice, as defined in § 37-1.1, when any person in his county or city is alleged to be mentally ill, epileptic, mentally deficient or inebriate, upon the written complaint and information of any responsible person, shall issue his warrant, ordering such person to be brought before him. The judge or justice may issue the warrant on his own motion." [Italics added]

Under the provisions of § 37-1.1 of the Code "justice" or "trial justice" includes both municipal court judges and judges of Juvenile and Domestic Relations Courts. It is clear, therefore, that in the situation you posed both you and the judge of the Regional Juvenile and Domestic Relations Court could have jurisdiction.

On October 1, 1968, the sections I have hereinbefore cited will be found at § 37.1-67 and § 37.1-1, respectively. My opinion on this point will not be affected at that time by these sections.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURTS—Juvenile Detention Commission—Appropriation of funds to Commission by county not mandatory.

COUNTIES—Appropriation of Funds for Juvenile Detention Commission Not Mandatory.

October 21, 1968

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

This is in reply to your inquiry of October 3, 1968, concerning the Juvenile Detention Facilities Act—Chapter 8, Article 4.1, Title 16.1, §§ 16.1-202.1 through 16.1-202.9 of the Code of Virginia. You state that the counties of Spotsylvania and Stafford and the city of Fredericksburg have established a Commission pursuant to the Act and that the Commission has selected a site for a detention home, which site is not acceptable to Spotsylvania County. You then raise the following four questions which will be answered seriatim:

"(1) Can the Spotsylvania Board of Supervisors refuse to appropriate any further funds for the Commission?"

Answer: Section 16.1-202.8 states that the political subdivisions are "authorized" to make appropriations to the Commission. This is clearly differentiated from the charge placed upon a county in Article 4, § 16.1-201 to maintain and operate a detention home established by the county. It is therefore my opinion that § 16.1-202.8 is permissive, not mandatory, and does not compel appropriations by the Board of Supervisors of Spotsylvania County.

"(2) Can a regional juvenile detention commission sell the land which it has purchased and received title thereto?"

Answer: The Commission established under Article 4.1 is a public body corporate. Generally such a public body may exercise only such powers as are expressly conferred or necessarily implied. Though the Commission has only the express power of acquiring property, it may alienate the same just as other corporations or individuals might do, unless such property has been appropriated for public use. See City of Williamsburg v. Lyell, 132 Va. 455, 460.

"(3) Does the site of the juvenile detention home require approval of the Spotsylvania Board of Supervisors?"

Answer: The site of the juvenile detention home would require the approval of the Spotsylvania Board of Supervisors pursuant to § 16.1-202.5(3) if the site were outside the territorial limits of the political subdivisions forming the Commission or if the site is to be acquired in Spotsylvania County by eminent domain proceedings, pursuant to § 16.1-202.6. If the land in question is not being acquired by eminent domain, the Commission does not need approval of the site by the Board of Supervisors of Spotsylvania County.

"(4) Under what circumstances could the Spotsylvania Board of Supervisors purchase the land now owned by the regional Juvenile Detention Commission so that the Commission can purchase a new location?"

Answer: The Spotsylvania Board of Supervisors can purchase property only for purposes authorized by law. While I know of no statute which would allow the Board of Supervisors to purchase the land in question solely for the purpose of enabling the Commission to purchase a new location, it could do so if the land may appropriately be utilized for any other legitimate county purpose.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional—Procedures for establishment.

October 24, 1968

HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

This is in reply to your letter of October 11, 1968, in which you inquire as follows:

"The Fifth Regional Juvenile and Domestic Relations Court is now composed of Amherst and Campbell Counties. Charlotte and Nelson Counties desire to become members of this court.
"May these counties become members of the court without having the Board of Supervisors of Amherst and Campbell Counties pass resolutions admitting them to do so?

* * *

"Would you please let me know as soon as you can whether the Counties of Amherst and Campbell will have to pass resolutions setting up a new court composed of Amherst, Campbell, Charlotte and Nelson Counties, or whether the Judges who preside over the Circuit Court in these counties, namely Judge George F. Abbitt, Jr., Judge William W. Sweeney and Judge C. G. Quesenberry may prepare the proper order and thus set up the court without the concurrence of Amherst and Campbell County."

Sections 16.1-143.1 through 16.1-143.7 of the Code provide for the establishment of regional juvenile and domestic relations courts, but make no express provision for the inclusion of additional governmental units into an existing regional court. Although I do not have before me a text of the original resolution passed by Amherst and Campbell Counties, I assume that it failed to anticipate the proposed participation of additional counties in the court thereby established. Therefore, I feel that it would not be appropriate to change the composition of the participating bodies without the concurrence of Amherst and Campbell Counties.

It is my opinion that the governing bodies of Amherst and Campbell Counties should pass resolutions authorizing the inclusion of Charlotte and Nelson Counties into the existing regional court, which resolutions should be approved by the judge of the circuit court of the respective counties. Thereafter, appropriate resolutions should be passed by the governing bodies of Charlotte and Nelson Counties which, with the approval of the judge of the circuit court of such counties, would operate to include these counties in the Fifth Regional Juvenile and Domestic Relations Court.

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional Juvenile Detention Commission—Judge may vote as ex officio member.

November 15, 1968

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

This is in reply to your letter of November 12, 1968, in which you ask the following question concerning a regional juvenile detention commission established pursuant to §§ 16.1-202.1, et seq., Code of Virginia (1950), as amended:

"Will you please advise me whether or not the juvenile judge acting as ex officio member may vote on matters coming before the commission and whether he can be counted as a part of the members constituting a quorum."
The distinction between the appointive members of the commission and the juvenile judges who are ex officio members is that the latter are members by virtue of their office, whereas the former are members because they have been appointed in a manner provided by law. I know of no reason why an ex officio member should not have the same authority as other members, unless such authority is limited by statute, and I find nothing in the statute that limits the authority of an ex officio member to vote on matters coming before the Commission.

Furthermore, it seems clear from § 16.1-201.4 which states in part that "a majority of the members in office shall constitute a quorum" that the ex officio members should be counted in determining the presence of a quorum.

JUVENILES—Confessions in Absence of Parents—Admissible.

CRIMINAL PROCEDURE—Evidence—Juveniles—Confession in absence of parents admissible.

HONORABLE LAWRENCE L. KOONTZ, JR.
Judge, Juvenile and Domestic Relations Court

October 4, 1968

This is in reply to your letter of September 11, 1968, which reads in part as follows:

"I am repeatedly presented with a defense attorney's motion to suppress the entry into the evidence of a juvenile's confession, which is obtained by the Police Department without the juvenile's parents being present. These cases do not involve any question of the proper advice and warning being given to the juvenile by the police of his constitutional rights under the appropriate cases, but involve only the question of whether or not a confession taken outside the presence of a juvenile's parents is admissible."

In my opinion the fact that a juvenile makes a voluntary extra-judicial confession in the absence of his parents does not of itself make the confession inadmissible.

The most recent case in point is People v. Lara, 62 Cal. Rptr. 586, 432 P. 2d 202 (1967), cert. den., 88 S. Ct. 2303 (June 17, 1968). There the Supreme Court of California held that the opinion of the Supreme Court of the United States in In re Gault, 387 U.S. 1, 18 L.Ed. 2d 527, did not require it to adopt the view that minors must now be deemed incompetent to waive per se the constitutional rights afforded them during custodial interrogation. At 62 Cal. Rptr. 599, the California Supreme Court stated:

"This, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement."

The Court went on to say that it could not accept the suggestion of some commentators [see 7 Santa Clara Lawyer 114, 127 (1966); 40 Wash. L. Rev. 189, 200-201 (1965)] that every juvenile is incompetent as a matter of law to waive his constitutional rights to remain silent unless the waiver is consented to by an attorney or by a parent or guardian who has himself been advised of the juvenile's rights. The Court indicated that such adult consent and presence is of course to be desired and should be obtained whenever feasible but that whether the juvenile
knowingly and intelligently waived these rights and then made a statement is a question of fact to be determined in each case. The mere failure of the authorities to seek the consent or presence of an adult could not be held to outweigh, in any given instance, an evidentially-supported finding that such a waiver was actually made.

*People v. Rodriguez*, 64 Cal. Rptr. 253, 257 (1967) followed *Lara*. There the Court of Appeal of California held that the fact that a defendant juvenile was interrogated and made a confession in the absence of his parents or an attorney does not, *of itself*, require a finding that the defendant did not waive his right to remain silent. The Court emphasized that the admissibility of such a confession depends not on the presence or absence of the juvenile's parents as a single factor, but on a combination of that factor with such other circumstances as his intelligence, education, experience and ability to comprehend the meaning and effect of the statement which he makes.

I am sure that you will find it helpful if you will read both of these opinions. The portion of the *Gault* opinion which discusses self-incrimination, and which is therefore related to your question, may be found at 18 L. Ed. 2d 527, 554-563, particularly page 561.

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**JUVENILES—Escaping From Institution to Which Committed Pursuant to Laws of Virginia—Recovery of.**

November 14, 1968

HONORABLE W. A. ALEXANDER, Judge
County Court of Franklin County

This is in reply to your letter of October 28, 1968, which reads in part as follows:

"I have a question that is giving me some trouble. We have a boy's institution known as Edgemeade of Virginia. It is a branch of the institution located in Maryland and supervised by Dr. Dinwiddie, who is a Franklin County man.

"The question presented is how to handle boys who escape from this institution since it is an institution for boys. Most of them have been committed by courts from this State and other states. When they escape, the officers have been hesitant to pick them up, and Dr. Dinwiddie has contacted the Commonwealth Attorney and myself in regard to this. I am not sure of the status of this institution and as to whether we should issue warrants for these boys or what the proper procedure is. It is my understanding this institution is under the same status as other mental institutions and similar institutions in this State.

"Section 37.1-76 states 'that the Superintendent shall forthwith issue warrants directed to an officer authorized to make an arrest.' The question is should this be issued by a Justice of the Peace or the County Court Clerk or who would be the proper person to issue it. This statute reads as though it intends to give the power to the Superintendent to issue the warrant."

Section 37.1-76 of the Code, to which you refer, applies only to escapes from "hospitals" as defined in § 37.1-1 of the Code. Pursuant to § 37.1-1, a private institution must be duly licensed in order to qualify as a "hospital." I am informed that "Edgemeade of Virginia" is not so licensed. Therefore, § 37.1-76 is not applicable.

I am also informed that this institution has not yet been licensed by the State Department of Welfare and Institutions and that juveniles are not normally placed in such an institution, pursuant to laws governing juveniles, unless it is so licensed.

In any event, the answer to your question is found in §§ 16.1-194 and 16.1-195 of the Code. Section 16.1-194 reads in part as follows:
"No child may be taken into immediate custody except:
"(1) With a summons endorsed by the judge of the juvenile court in accordance with the provisions of this law or with a warrant; or
"* * * *
"(5) When a child who has been committed to the State Board or some other agency escapes from the custody of the agency to which he was committed and the officer has knowledge of such fact; in which case no process is needed."

Section 16.1-195 prohibits the issuance of a warrant of arrest for any child known or alleged to be under the age of fourteen years, except when authorized by the judge or clerk of a juvenile court or a judge or clerk of a court of record, and when a child is known or alleged to be between the ages of fourteen and eighteen years, the issuance of such a warrant is prohibited except when its use is "imperative."

In my opinion, the provisions of §§ 16.1-194 and 16.1-195 prescribe the means by which juveniles committed to this institution pursuant to the laws of Virginia should be recovered when they escape.

Reference should also be made to §§ 16.1-146 and 19.1-90 of the Code.

LABOR LAWS—Right to Work Law—Effect upon of irrevocable voluntary check-off authorization.

HONORABLE JAMES C. TURK
Member, Senate of Virginia

This is in response to your inquiry of June 26, 1968, as to whether an employee’s voluntary check-off authorization made under a collective bargaining agreement is in violation of Virginia’s so-called “right to work” statute, where the authorization is irrevocable for a period of one year and may be revoked only during a period fifteen (15) days immediately preceding the termination of the collective bargaining agreement or fifteen (15) days preceding the annual anniversary date of the authorization.

Please excuse my delay in responding to you, but this was due to the necessity of obtaining materials from sources out of state.

While the answer to your question is not free from doubt, I do not feel that a one-year irrevocability clause with a fifteen-day escape clause violates the “right to work” statute per se, since the arrangement is voluntarily assumed by parties. A number of state decisions do hold that where the duration of an irrevocability clause is prescribed by statute, agreements for a longer irrevocability period are unenforceable. But I am not aware that Virginia has legislated to that effect.

This is not to declare that the agreement is necessarily enforceable under Virginia law. That is a question to be determined in light of all the facts of a particular case as may be developed in litigation.

LICENSES—Auctioneer—Auctioneer not required to obtain a real estate broker’s license to cry real estate at public auctions.

LICENSES—Auctioneer—Not transferrable.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Broker’s License—Not required for auctioneer crying real estate at public auction.

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in reply to your letter of April 9, 1969, from which I quote the following:
"Chapter 20 of Title 54 of the Code; specifically, §§ 54-792 through 54-808 of the Code, provides for the licensing of auctioneers. The General Assembly of Virginia, session 1960, repealed §§ 54-793 and 54-794 of the Code. Section 54-794 set forth that an auctioneer may conclude a sale of anything he is authorized to sell, grant a certificate or other evidence of the sale and receive the money. But no auctioneer shall authorize or permit any person to sell any property under and by virtue of his license, unless the person so authorized or permitted is actually and bona fide in the employment of such auctioneer and is actually and bona fide a resident of the county or city where such auctioneer is licensed to do business, and the commissions on such sale are actually and bona fide for the benefit of such auctioneer.

"In view of the foregoing language of § 54-794, the Virginia Real Estate Commission ruled that a duly licensed auctioneer could cry at public auction real property without first obtaining a license as a real estate broker, however, in view of the fact that the General Assembly of Virginia repealed § 54-794 of the Code in its entirety, in your opinion, can an auctioneer cry real property at a public auction without first obtaining a real estate broker license as required in § 54-749 of the Code, taking into consideration the definitions contained in §§ 54-730 and 54-732 of the Code.

"In the event you are of the opinion that an auctioneer may cry real property at public auction and receive a fee for services rendered, is the auctioneer prohibited by any of the provisions of Chapter 20 of Title 54 of the Code of Virginia from employing persons to assist him in such auctions."

In regard to licenses generally, under Chapter 7, Title 58 of the Code of Virginia, § 58-286 provides that any person licensed as an auctioneer may sell by auction any property not prohibited by law. It is doubtful that Chapter 18, Title 54 of the Code, concerning real estate brokers and salesmen, was intended to embrace an auctioneer. In any event, the rule promulgated by the Virginia Real Estate Commission that a duly licensed auctioneer may cry real estate at public auction without first securing a license as a real estate broker has obtained over a period of many years, including the eight years since repeal of former § 54-794, to which you refer, effective January 1, 1961. In view of the duration of the Commission's rule and the fact there has been no recent change in the law in respect to this specific subject matter, I shall answer your first question in the affirmative.

In regard to your question of whether an auctioneer is prohibited by any of the provisions of Chapter 20, Title 54, from employing persons to assist him in such auctions, I assume you have reference to unlicensed persons. Section 54-792 of this title states that no person shall sell at auction or public outcry, for compensation, without a license, except in the cases therein enumerated. Further, it is provided in § 58-286 that an auctioneer's license issued thereunder shall not authorize anyone to sell by auction except the individual to whom it is issued. Under § 58-289, however, a person licensed as a common crier may, except in cities of over fifteen thousand inhabitants, cry for sale at any place in the county or city in which his license issued any property, real or personal, for an auctioneer.
REPORT OF THE ATTORNEY GENERAL

LICENSES—Marriage—Party under age but pregnant—Female must be resident of county or city where license sought.

MARRIAGE—Licenses—Party under age but pregnant—Female must be resident of county or city where license sought.

May 12, 1969

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

I am in receipt of your letter of May 9, 1969, concerning the applicability of § 20-48 of the Code of Virginia (1950), as amended, to the following situation:

"Recently, I had a couple from out of the State to apply for a marriage license. The male was eighteen, the female was fifteen, and they had the doctor's certificate stating she was pregnant, plus the consent of the parents.

"I refused to issue the license on the basis that this Code Section states the clerk is authorized to issue the license in the county or city wherein the female resides. Since she was a non-resident, I did not feel that this particular Section would apply.

"Was I correct in my decision in this matter or is there another Code Section that covers a situation of this nature?"

In pertinent part, § 20-48 provides:

"The minimum age at which minors may marry, with consent of the parent or guardian, shall be eighteen for the male and sixteen for the female.

"In case of pregnancy when either the female is under sixteen or the male under eighteen, the clerk authorized to issue marriage licenses in the county or city wherein the female resides shall issue proper marriage license with the consent of the parent or guardian of the person or persons under the ages aforesaid only upon presentation of a doctor's certificate showing he has examined the female and that she is pregnant, . . ."

A similar situation was previously considered and approved by this office in an opinion to the Honorable John R. Porter, Jr., dated November 20, 1959, found in the Report of the Attorney General (1959-1960), p. 224, wherein the female was not only a non-resident but did not have the required doctor's certificate showing pregnancy.

In view of the above opinion, copy of which I enclose, and the clear language of the statute in question, I am of the opinion that your decision in the situation outlined was correct. I know of no other statute that would be applicable to your inquiry.

LOTTERIES—Payment of Money to Holder of Credit Card by Bank Constitutes Lottery.

December 10, 1968

HONORABLE ROYSTON JESTER, III
Commonwealth's Attorney for the City of Lynchburg

This is in reply to your letter of November 26, 1968, and the enclosure dated November 25, 1968, which presents the following situation:

"... a banking institution in this State ... proposes to issue bank credit cards. Incidental thereto the bank proposes at one or more intervals to pay a sum certain to the holder of a credit card which has been issued by the bank and bearing a certain number to be selected at random by the bank, regardless of whether the card has been actually
used. If the selected card has been used, then the bank will pay double the above amount.”

You point out that if the credit card has been used the award is doubled and inquire whether the same would violate the lottery laws of Virginia, §§ 18.1-340 and 18.1-340.1 of the Code of Virginia (1950), as amended. In accordance with § 18.1-314 these sections are remedial and thus should be liberally construed.

As this office has frequently ruled, an activity constitutes a lottery when the elements of prize, chance and consideration combine. With respect to consideration, § 18.1-340.1 provides:

“In any prosecution under § 18.1-340, no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith.”

Unquestionably the elements of prize and chance are existent. Further, I am of the opinion that since eligibility for the greater prize is dependent upon the requirement of a purchase, that consideration also exists. Therefore, such plan would constitute a lottery under the existing anti-lottery laws of Virginia.


HONORABLE LESLIE D. CAMPBELL, JR.
Member, Senate of Virginia

February 5, 1969

This is in reply to your letter of January 29, 1969, which I quote as follows:

"Some of my constituents have called to my attention the circulation of the enclosed contract of Continental Marketing Associates, Inc., of Birmingham, Alabama, and have indicated that the mechanics of this contract have a striking similarity to that of the old 'pyramid' game, or gimmick, that was ruled illegal some years ago in the Richmond area.

"I must admit that I have not analyzed the contract, nor am I familiar with the manner in which it is circulated or handled. It is my general understanding that the promoters indicate an intention to build a discount marketing store in the Richmond area, and the proceeds from the circulation of this contract are to be used for this purpose. I was asked the question 'What would happen if the store is never built, furnished and operated?' Is there any insurance that the funds would be returned to the investors?

"I am not sufficiently familiar with the facts of this undertaking, nor of the law that might be applicable, but I thought it wise that I forward the contract to you for your consideration and any action that might be taken in the event it is in any way in violation of Virginia's law.'"

The contract here under consideration has been examined and I believe several observations in connection with the questions presented in your letter and in later telephone communications with this office are in order.

The first item under the agreement terms and conditions, appearing on the reverse of the contract, states that "all applicants for enrollment as a Founder shall be subject to approval and acceptance of Continental Marketing Associates, Inc." There is no showing on the contract as to how or when this acceptance by the company is communicated to the "Founder" since there appears no place on
the contract for a signature of the company or its duly designated representative. There is a space only for the signature of a "Founder," this being the person who puts up the money and agrees to perform as required under the contract with the company.

The contract states under the heading Supervisor Earnings: "You distribute fifty (50) Purchase Authority Cards and earn a 5% commission each time one of your Purchase Authority Cards is used to make a purchase." However, I find no specific language expressing any promise by the company that a store will be constructed in this State. If such a store is never built, of course, the purchase authority cards could not be used and there could be no collection of commissions by the founder. The contract contains no reference to such contingency and offers no insurance or indication that the funds will be returned to the investor in the event no store is constructed or operated by the company.

Finally, you ask if this contract evidences the operation of a so called "pyramid game," which was held to be in violation of the State lottery laws, as outlined in a letter dated April 7, 1949, of then Attorney General J. Lindsay Almond, Jr., addressed to Honorable T. Gray Haddon, Commonwealth's Attorney for the City of Richmond and found in Report of the Attorney General (1948-1949), p. 137. This question has been considered previously and answered in the negative in my letter of December 26, 1968, to Mr. John E. Dodson, Assistant Commonwealth's Attorney for Chesterfield County, a copy of which is enclosed.
MARRIAGE—Issuance of License by Clerk—Physician issuing blood test certificate may be out-of-state physician.

JUDGMENTS—Paid by Surety—Surety is assignee of all rights of creditor.

HONORABLE MARGARET H. HARMAN
Clerk, Circuit Court of Floyd County

This is to acknowledge receipt of your letter of January 24, 1969, requesting my opinion on two questions which are answered seriatim.

(1) “Can a Clerk issue a marriage license to persons living outside Virginia when the blood test was made in another state and not reported on Form V.D. 32?”

Section 20-1 of the Code requires that no marriage license be issued except upon presentation of a “statement signed by a physician” that a standard seriological test has been made for each party. Pursuant to § 20-12, the word “physician” includes persons licensed to practice medicine in other States as well as Virginia. Accordingly, this office has previously ruled that a marriage license may be issued upon presentation of a blood test certificate signed by an out-of-State physician as long as the certificate meets the requirements of Virginia law as evidenced by the form V.D. 32 to which you refer; however, it is not necessary, as a matter of law, for the form V.D. 32 to be used. See, Report of the Attorney General (1940-1941) p. 103, a copy of which is enclosed. These requirements include the transmission of copies of the certificate to the State Board of Health (§ 20-3) and the making of the test in an approved laboratory (§ 20-6). At the present time, the State Board of Health approves laboratories approved by the health departments of other States.

(2) “Does the Clerk have authority to assign a judgment to the surety of a forfeited bond when the surety has paid the judgment and same has been marked satisfied.”

The answer to this question is found in § 49-27 of the Code, which provides a surety with a twofold remedy against his principal debtor for whom he has assumed an obligation. The surety (1) may proceed by motion to obtain a judgment against the principal debtor and (2) he is deemed an assignee of all rights of the creditor for collection of the amount paid. Therefore, while in a literal sense the clerk does not actually make the assignment, it is deemed to occur when the surety pays the obligation, and the judgment lien would then run in his favor. In this connection, this office has previously ruled that it is proper for the clerk to note in the judgment lien docket, where the judgment is recorded, that the surety has satisfied the obligation. See, Report of the Attorney General (1955-1956) p. 110.

MENTALLY ILL—Jurisdiction Over Proceedings to Commit—Justice having jurisdiction in political subdivision in which person alleged to be mentally ill is physically present.

HONORABLE W. E. EDWARDS
Judge of Frederick County Court

This is in reply to your letter of January 29, 1969, which reads, in part, as follows:

“A resident of Frederick County or one of the other nearby counties, e. g., Clarke, Warren or Shenandoah, is a patient in the Winchester
Memorial Hospital. It becomes necessary to procure the admission of this patient to one of the State Hospitals, either by Medical Certification under Section 37.1-66 or Judicial Certification under Section 37.1-67. Our problem is to determine who has jurisdiction of the proceedings. Under the old law, confirmed by an opinion of the Attorney General, it appeared that the proceedings must be conducted in the county or city wherein the patient is physically present. We are unable to find anything in the new law prescribing who shall conduct the proceedings. We feel that this question is of considerable importance, not only as it may affect the validity of the commitment, but also as it relates to the Sheriff or Sergeant who is charged with the duty of delivering the patient.”

The “justice” referred to in §§ 37.1-66 and 37.1-67 of the Code and defined in § 37.1-1 is the justice having jurisdiction in the political subdivision where the person alleged to be mentally ill is physically present at the time admission is sought by medical or judicial certification. (See also § 16.1-30 and Report of the Attorney General (1961-1962), p. 157.)

MOTOR VEHICLES—Abandoned Vehicles—Detention by police.

HONORABLE DONALD H. SANDIE, Judge
Municipal Court, City of Portsmouth

January 29, 1969

This is to acknowledge receipt of your recent letter which reads, in part, as follows:

“Your opinion is requested as to the legality of our Police Department detaining vehicles involved in hit and run cases where the vehicle has been abandoned at the scene, and the driver is unknown.

“(1) In such cases can the police have the vehicle driven or towed to the Police Compound to be detained until ownership can be determined?

“(2) Can the vehicle be held as evidence for further investigation while the police attempt to locate and charge the driver of the vehicle?

“(3) If the registered owner appears and demands the release of the vehicle, can the police properly refuse delivery on the ground that the vehicle is being held as ‘evidence’ while they complete their investigation? If so, how long can it be held against the wishes of the registered owner?”

Your questions will be answered seriatim.

(1) In cases such as you describe where a vehicle has been involved in a hit and run accident and then has been abandoned at the scene, in my opinion the police may have the vehicle either driven or towed to the police compound to be detained until ownership can be determined. The police are authorized by § 46.1-248 (a) of the Code of Virginia (1950), as amended, to take such action. The Code section reads in part as follows,

“...; and, if said vehicle is not promptly removed, such removal may also be ordered by a police officer at expense of the owner if the disabled vehicle creates a traffic hazard.”

The above quoted statute clearly gives the police authority to remove the vehicle if it is a traffic hazard.

Section 15.1-138 of the Code of Virginia (1950), as amended, which reads, in part, as follows:

“... and each and everyone of such policemen shall use his best endeavors to prevent commission within the city or town of offenses
against the law of the Commonwealth and against the ordinances and regulations of the city or town; shall observe and enforce all such laws, ordinances, and regulations; shall detect and arrest offenders against the same; shall preserve the good order of the city or town; and shall secure the inhabitants thereof from violence and the property therein from injury."

Since the police, as is shown by the above quoted statute, have the duty to investigate crime, then it seems obvious that they have the right inherently to detain the vehicle in such circumstances as you describe above until ownership can be determined. Therefore, in my opinion, the answer to the first question is in the affirmative.


"Schmerber settled the proposition that it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals."

Since the seizure of this vehicle under the circumstances as you described them is permissible under § 46.1-248 (a), supra, then under the doctrine of Warden v. Hayden, supra, the automobile may be retained for further investigation. Therefore, in my opinion the answer to your second question is in the affirmative.

(3) In Warden v. Hayden, supra, p. 1650, the Supreme Court of the United States also said:

"The remedy of suppression, moreover, which made possible protection of privacy from unreasonable searches without regard to proof of a superior property interest likewise provides the procedural device necessary for allowing otherwise permissible searches and seizures conducted solely to obtain evidence of crime."

The seizure was permissible under the statute cited above, § 46.1-248 (a). Moreover, the automobile is an instrumentality of the crime. The fact that the registered owner asserts his property interest does not operate to remove the authority from the police to continue their investigation. In my opinion, the answer to the first part of question three is in the affirmative.

The cases and statutes cited above give the police the authority to seize the vehicle and to hold it for further investigation. The right to investigate obviously includes the right to conclude the investigation.

Therefore, in my opinion, the police may detain the vehicle, for a reasonable length of time, until the investigation is concluded.

MOTOR VEHICLES—Accident Report—Not required where accident occurs wholly on private property.

HONORABLE C. PEMBROKE PETTIT
Commonwealth's Attorney for Louisa County

This will acknowledge receipt of your letter of July 25, 1968, in which you ask whether or not a motor vehicle accident on private property (to wit: a privately maintained parking lot) must be reported to the Division of Motor Vehicles in accordance with § 46.1-400, Code of Virginia (1950), as amended, which reads as follows:

"(a) The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent
of one hundred dollars, or more, shall, within five days after the accident, make a written report of it to the Division.

“(b) The Commissioner may require any driver of a vehicle involved in any accident of which report must be made to file a supplemental report whenever any report is insufficient in his opinion and he may require witnesses of accidents to render reports to the Division. A wilful failure to file the report required in this section shall constitute a misdemeanor and be punishable under § 46.1-16.”

Please be advised that this office has previously ruled that though it contains no mention as to location of the motor vehicle accident, § 46.1-400 has reference to “accidents which arise from or are related to operation upon a highway or way open to the public for vehicular travel.” See, enclosed copy of opinion letter to the Honorable Marvin M. Murchison, Commonwealth’s Attorney of the City of Newport News, under date of December 6, 1962 (Report of the Attorney General (1962-1963) p. 132). “Highway” is defined in § 46.1-1 (10) as “The entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns.”

Because privately maintained parking lots, and private property moreover, are not included in the above definition of highway, it is, therefore, my opinion that vehicular accident involvement wholly on a privately maintained parking lot or other private property is not required to be reported to the Division of Motor Vehicles in accordance with § 46.1-400. This view is consistent with the one contained in the aforementioned enclosed opinion previously identified herein.

MOTOR VEHICLES—Blood Analysis—Implied consent—Juvenile may consent to test.

JUVENILES—Driving Under the Influence—May consent to blood analysis.

HONORABLE W. W. MOORE, JR.
Judge, Juvenile and Domestic Relations Court

I am in receipt of your letter of January 15, 1969, in which you present the following inquiry:

“Is it lawful to take a blood test of a juvenile charged with driving under the influence, where he gives his consent without the presence of his parents, their consent or an attorney?”

In response thereto, I am writing to advise that I am of the opinion that it is lawful to take a blood sample of a juvenile charged with operating a motor vehicle while under the influence of intoxicants if the juvenile in question gives his consent, and that “the presence of his parents, their consent or an attorney” is not required.

MOTOR VEHICLES—Blood Analysis—Implied consent—Refused to submit applies only to persons who operate a vehicle on a public highway—Blood analysis taken with consent may be used in evidence for driving under influence on private property.

HONORABLE CARTER R. ALLEN
Commonwealth’s Attorney, City of Waynesboro

I am in receipt of your letter of September 20, 1968, in which you present the following inquiry:
“Under the provisions of Section 18.1-54 the operation of a motor vehicle is prohibited while under the influence whether on private property or a public highway.

“Section 18.1-55.1, implied consent law, states '(b) . . ., who operates a motor vehicle upon a public highway in this state, . . . shall be deemed thereby as the condition of such operation, to have consented . . .'.

“Is the use of a blood analysis precluded in the prosecution for driving under the influence on private property, private parking lot or roadway?"

Your statement concerning the applicability of the provision of § 18.1-54 of the Virginia Code to the operation of motor vehicle while under the influence of intoxicants on private as well as public property is consistent with the position previously taken by this office. See, Reports of the Attorney General (1959-1960) p. 249; (1950-1951) p. 198; cf. Valentine v. Brunswick County, 202 Va. 696. However, as you point out in your communication, § 18.1-55.1 (b) of the Virginia Code—a provision of the amended Virginia "implied consent" law—prescribes:

“(b) Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-four, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if such person is arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense." (Italics supplied.)

In light of the language italicized above and the substantially identical language which appears in § 18.1-55.1 (c) of the Virginia Code, I am of the opinion that only those persons who operate a motor vehicle "upon a public highway" in Virginia are deemed to have consented to submit to a blood alcohol test if arrested for a violation of § 18.1-54 of the Virginia Code or a similar ordinance of any county, city or town. In this connection, this office has previously ruled that the refusal to submit to a blood test in violation of the amended Virginia "implied consent" law constitutes an offense which is separate and distinct from that of operating a motor vehicle while under the influence of intoxicants. See, Reports of the Attorney General (1963-1964) p. 189; (1962-1963) pp. 151, 154. I am of the opinion that only those persons who operate a motor vehicle on a public highway in Virginia may be charged with a violation of § 18.1-55.1 of the Virginia Code for refusing to submit to a blood alcohol test.

It does not follow, however, that use of the results of a blood alcohol test taken in accordance with § 18.1-55.1 of the Virginia Code is precluded in a prosecution "for driving under the influence on private property, private parking lot or roadway." If a person charged with a violation of § 18.1-54 for operating a motor vehicle while under the influence of intoxicants on private property submits to a blood test (although not required to do so), which is taken in accordance with the provisions of § 18.1-55.1 of the Virginia Code, I am of the opinion that the results of such test would be admissible in evidence pursuant to §§ 18.1-55.1(f) and 18.1-55.1(i) of the Virginia Code.

MOTOR VEHICLES—Blood Analysis—Reasonable ground for refusal to permit test.

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

July 3, 1968

I am in receipt of your letter of June 27, 1968, in which you submit the following inquiry:

"I would like an opinion as to whether or not the following fact situa-
tion would constitute reasonable ground for refusing to take the blood alcohol test within the meaning of our statute.

"Subject, when apprehended, expresses a willingness to take the test, but later refuses to do so on the advice of his counsel."

In this connection, I am of the opinion that an individual who declines, upon the advice of his legal counsel, to submit to the blood alcohol test prescribed in § 18.1-55.1 of the Virginia Code would have reasonable ground for refusing to submit to such test within the meaning of the statute in question.

MOTOR VEHICLES—Chauffeur’s License—Milk truck driver salesman not required to obtain.

February 11, 1969

HONORABLE DONALD H. SANDIE, Judge
Municipal Court of the City of Portsmouth

This will acknowledge receipt of your letter under date of February 6, 1969, in which you ask for an interpretation of § 46.1-1 (2), Code of Virginia (1950), as amended. Specifically, you relate the following:

“A local milk company employs milk salesmen who work on commission. They drive trucks owned by the milk company as they sell and deliver company milk to their customers.

“Are these driver-salesmen to be considered as being employed for the principal purpose of operating a motor vehicle and thus needing a chauffeur’s license or are they to be considered as being employed for the principal purpose of being salesmen and thus needing only an operator’s license?”

Code § 46.1-1 (2), defines “chauffeur” 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.”

It is apparent from your letter that the milk salesman is employed principally for the purpose of selling milk. The operation of a motor vehicle is only incidental to the prime purpose of such employment. In light of this consideration, coupled together with the statutory definition of “chauffeur,” supra, it is my opinion that a milk salesman need not have a chauffeur’s license so long as he has a valid operator’s permit. I am advised that this is consistent with the administrative policy of the Division of Motor Vehicles.

MOTOR VEHICLES—Chauffeur’s License—Primary purpose of person’s employment determines necessity for license.

April 3, 1969

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

This will acknowledge receipt of your letter of March 18, 1969, in which you relate the following:

“Code Section 46.1-1 (2) defines ‘chauffeur’ as follows: ‘Every person employed for the principle 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.’"
"Would you please express your opinion as to the necessity of the following persons to be licensed as a chauffeur.

(1) A person employed principally as a service man for a LP gas distributor who customarily drives a truck from one location to another about his occupation in installing and serving LP gas tanks and equipment and occasionally transports replacement parts necessary for such repairs and servicing and owned by his employer.

(2) A person employed principally as a salesman and customarily engaged in the delivery of liquefied petroleum products owned by his employer for the purpose of servicing minor repairs in connection with the employers installations."

As you will note from the above named statute, it is the primary purpose of the person's employment or the use of the motor vehicle in question which is the determining consideration as to whether or not an individual qualifies as a chauffeur. In both of the situations referred to in your letter, the operation of a motor vehicle is secondary to the prime purpose of the employment. Nor are the motor vehicles used as "for hire" common carriers of property. It is, therefore, my opinion that the individuals contemplated by your inquiry do not have to be licensed as chauffeurs, provided that they have valid operator's permits.

MOTOR VEHICLES—Dealer's License—Subject to suspension or revocation by Commissioner of the Division of Motor Vehicles.

December 9, 1968

HONORABLE C. WILLIAM CLEATON
Member, House of Delegates

This will acknowledge receipt of your December 2, 1968 letter requesting an opinion relating to an automobile dealer tampering with the mileage reading on a speedometer or odometer on a used automobile. You relate the following:

"I wish you would give me a ruling on the Code relating to turning back speedometers on automobiles. If a used car speedometer was turned back to zero, would this be ruled as fraud on the selling dealer and if it was turned back by the selling dealer to a lesser mileage than the speedometer originally had, what is the penalty, if there is one. It is possible that a speedometer can go round what is termed the clock and still be at zero."

Please be advised that there is no Virginia Code section as such which prohibits altering or tampering with the speedometer or odometer reading of a new or used automobile. This is not to say, however, that there are no legal sanctions which may be used to control or police such practices.

Under the Virginia Motor Vehicle Dealer Licensing Act, the Commissioner of the Division of Motor Vehicles shall promote the interest of the motor vehicle purchasers and may prevent unfair methods of competition and unfair or deceptive acts or practices. See, § 46.1-517, Code of Virginia (1950), as amended. Moreover, various grounds are set forth therein warranting the suspension or revocation of a motor vehicle dealer's license. Section 46.1-535 provides that, inter alia, if the dealer has willfully defrauded any retail buyer to the buyer's damage or has used unfair deceptive acts or practices, his license may be revoked or suspended by the Division of Motor Vehicles. Before such action may be taken against the licensee, however, he must be furnished with a written copy of the complaint made against him and a public hearing thereon after proper written notice is given. Thereafter, the Commissioner of the Division of Motor Vehicles shall have the power to suspend or revoke the license in question. See, § 46.1-537.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Definition of Those Used for the Purpose of Fighting Fire—Privately owned automobiles of volunteer firemen not included.

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

July 29, 1968

This will acknowledge receipt of your letter dated July 24, 1968, in which you ask for my opinion with reference to §§ 46.1-226 and 46.1-285, Code of Virginia (1950), as amended, and in this connection, you relate as follows:

"I have had called to my attention the fact that §§ 46.1-285 and 46.1-226 of the Code, as amended, include a provision relating to 'every vehicle used for the purpose of fighting fire.' I have been asked to ascertain whether this provision relates to the automobiles of volunteer firemen who use their vehicles in going to the fire station, whether it applies to their vehicles if they are used to go directly to the fire or whether the language relates only to vehicles which are designed specifically as fire-fighting equipment."

Code § 46.1-285 requires that every police vehicle, vehicle used for the purpose of fighting fire and ambulance or rescue vehicle used for emergency calls shall be equipped with a siren, exhaust whistle or air horn designed to emit automatically intermittent signals of a type not prohibited by the Superintendent of the Department of State Police. Code § 46.1-284 makes it unlawful for any vehicle to be so equipped or for any person to use such equipment upon any vehicle except as may be authorized in Title 46.1. Code § 46.1-226 exempts the operator of any vehicle used for the purpose of fighting fire when traveling in response to a fire alarm or an emergency call (and other designated vehicles therein) from certain specified traffic regulations and criminal prosecutions for violations thereof.

As used in the above Code sections, I interpret the language "vehicle used for purpose of fighting fire" to apply to those privately or publicly owned vehicles furnished with fire fighting equipment and which are used for such purpose. Privately owned vehicles which are not furnished with fire fighting equipment but which are used by the individual members of the volunteer fire department or association in going either to the fire station or the fire itself are not required by § 46.1-285 to be equipped with sirens nor can they legally be so equipped.

REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Driving Under the Influence Charged—Procedure on appeal where found not guilty of charge but guilty of impaired driving.

CRIMINAL PROCEDURE—Appeal—When convicted of impaired driving on original charge of driving under the influence.

February 27, 1969

HONORABLE J. PEYTON FARMER
Commonwealth's Attorney for Caroline County

This is in reply to your letter of February 13, 1969, in which you request my opinion on the following:

"Facts: Defendant is charged with driving under the influence in violation of 18.1-54 of the Code of Virginia of 1950, as amended and is convicted in the County Court of impaired driving. Defendant notes an appeal to the Circuit Court.
"Query: On appeal can the defendant be tried for the original charge of driving under the influence?"

The offense of impaired driving is, by § 18.1-56.1 of the Code of Virginia, a lesser included offense in a prosecution for driving a motor vehicle while under the influence of alcohol, narcotic drug or other self-administered intoxicant or drug. This section states that no person shall be arrested, prosecuted or convicted for a violation thereunder "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."

The case on appeal from the county court is tried de novo as specified in § 16.1-136 of the Code. The appeal annuls the judgment of the inferior tribunal as completely as if there had been no previous trial. In my opinion it is proper for the appeal court to consider the charges just as though they had not been previously heard. Your question, therefore, is answered in the affirmative.

I expressed a similar view in an opinion found in Report of the Attorney General (1967-1968), p. 174, relative to a person charged with reckless driving but convicted of speeding who appealed to the circuit court. A copy of that opinion is enclosed.

MOTOR VEHICLES—Equipment With Flashing or Steady Burning Red Lights—Limited to vehicle owned by member of organization authorized to use.

July 9, 1968

HONORABLE SOL GOODMAN
Commonwealth's Attorney for Hopewell

This will acknowledge receipt of your letter, under date of July 2, 1968, which I shall quote as follows:

"Re: Section 46.1-267 of the Code of Virginia as amended.
"In the above cited Section the wording 'owned by him' is giving me some difficulty in interpreting the Statute. Many members of an emergency crew or rescue squad have their automobile in their wife's name for various and sundry reasons. If a member of an emergency crew is using his wife's automobile, will the automobile qualify for the installation of a red light? Also the same problem arises when a member of an emergency crew uses his parents' automobile.
"Your interpretation will be greatly appreciated."

Code § 46.1-267, to which you make reference in your letter, was amended by Chapter 89, Acts of Assembly of 1968, and reads as follows, the emphasized language below indicating the 1968 change.
REPORT OF THE ATTORNEY GENERAL

"Any motor vehicle may be equipped with not to exceed two fog lamps, one passing lamp, one driving lamp, two side lamps of not more than six candle power; interior light of not more than fifteen candle power; vacant or destination signs on vehicles operated as public carriers, and signal lamps.

"Only those vehicles listed in paragraph (a) of § 46.1-226 and paragraph (a) of § 46.1-267 and school buses may be equipped with flashing, blinking or alternating red emergency lights of a type approved by the Superintendent.

"Vehicles used for the principal purpose of towing disabled vehicles or in constructing, maintaining and repairing highways or utilities on or along public highways may be equipped with flashing, blinking or alternating amber warning lights of a type approved by the Superintendent. (a) A member of any fire department, volunteer fire company or volunteer rescue squad may equip one vehicle owned by him with a flashing or steady-burning red light of a type approved by the Superintendent, for use by him only in answering emergency calls. Any person violating the provision of this section shall be guilty of a misdemeanor.

"(b) Blue lights, steady or flashing, of a type approved by the Superintendent shall be reserved for civil defense vehicles, publicly or privately owned.

"No motor vehicle shall be operated on any highway which is equipped with any lighting device other than lamps required or permitted in this article or approved by the Superintendent.

The language of paragraph (a) of the above quoted statute is clear and certain, admitting of no doubt as to which vehicles may be equipped with a flashing or steady-burning red light. Each member of any fire department, volunteer fire company or volunteer rescue squad may equip one private motor vehicle owned by him with such a red light. There is no mention of a motor vehicle belonging to the member's spouse or parent. Because there is none, I shall answer both of your questions in the negative. I am advised that this view is consistent with the enforcement policy of the Department of State Police.

MOTOR VEHICLES—Farm Vehicles—Owned by members of a non-profit apple co-operative within the exemption contained in § 46.1-45 of the Code.

April 15, 1969

HONORABLE MARTIN F. CLARK
Commonwealth's Attorney for Patrick County

This will acknowledge receipt of your inquiry letter, under date of April 9, 1969, in which you relate the following:

"Pursuant to our telephone conversation, I would like the opinion of your office on the problem which has arisen concerning persons who are members of a non-profit apple co-operative using their farm vehicles to transport the apples from the farm to the co-op.

"Of course, as members of the co-op, they are owners of the co-operative, and the only question is whether or not they come in the exemption for farm vehicles."

Section 46.1-45 of the Code of Virginia (1950), as amended, states, in applicable part, that:

"(a) No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, for any backhoe operated on any highway a distance not in excess of ten miles from the operating base.
of such backhoe, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for any motor vehicle, trailer or semi-trailer, which is used exclusively for agricultural or horticultural purposes on land owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin, provided that the distance between the points shall not exceed ten miles, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. The foregoing exemption from registration and license requirements shall also apply to any vehicle hereinbefore described or to any farm trailer owned by the owner or lessee of the farm on which such trailer is used, when such trailer is used by the owner thereof for the purpose of moving farm produce and livestock from such farm along a public highway for a distance not to exceed ten miles to a storage house or packing plant, when such use is a seasonal operation."

Like any other tax exemption statute, the above named Code section must be strictly construed against the taxpayer inasmuch as exemption is the exception rather than the rule. Only when the conditions contained therein are met will the exemption from registration and licensing obtain. Any deviation in any particular prevents its application.

Your letter is silent as concerns the farm vehicle's description. Assuming, however, that it is a farm trailer, it is my opinion that the above emphasized statutory language would embrace same, subject, of course, to the conditions and limitations contained therein. Accordingly, if the apple farmer uses his farm trailer to transport farm produce (apples) from the farm on a public highway for a distance not to exceed ten miles to a facility of the non-profit apple co-operative which constitutes a storage house or packing plant, such vehicle is exempt from registration and licensing.

MOTOR VEHICLES—Forfeiture Proceedings—Filing of information necessary.

August 28, 1968

HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

This is to acknowledge receipt of your letter under date of August 14, 1968, in which you pose certain inquiries relative to forfeiture proceedings in accordance with § 46.1-351.2, Code of Virginia (1950), as amended. I shall set forth your questions and consider same seriatim.

"On April 10, 1968, the Sheriff of this County seized one 1958 Ford with temporary 1967 Maryland tags. I notified the Commissioner of Motor Vehicles of Annapolis, Maryland of this seizure and was notified as to the registered owner of this vehicle. Subsequent to seizure, the registered owner applied for possession of this vehicle and the value of the same was determined to $25.00 and upon payment of this sum into the hands of the Clerk of this Court, the vehicle was released to him. Somehow, the further forfeiture provisions of the law have not been carried forward and more than sixty days having elapsed, I understand that further forfeiture proceedings must be done by your office. Please advise as to the disposition of the posted bond. There has been no application for the same by the owner."

I assume from the above related facts that the information against the motor vehicle seized has not yet been filed. As you know, the statutory procedure for the
filing of such information is found in paragraph (a) of Code § 46.1-351.2. That Code section provides that should the attorney for the Commonwealth, for any reason, fail to file the information within sixty days after receiving notice of the seizure, the information may, at any time within twelve months thereafter, be filed by the Attorney General, in which event the proceedings thereon are to be the same as if the information had been filed by the attorney for the Commonwealth. If you will please be so kind as to forward to this office the papers that you possess concerning the above seizure, we shall be glad to prepare an information for filing in the court of record having jurisdiction wherein the seizure was made. Please find enclosed forms to be submitted to the Division of Motor Vehicles respecting this seizure and any in the future in accordance with Code § 46.1-351.1.

As concerns the posting of bond and disposition of same paragraph (b) of Code § 46.1-351.2 is instructive. It provides that the owner or lienor of the seized vehicle may obtain possession thereof before the hearing on the information by giving a proper bond in a penalty of an amount equal to the vehicle's appraised value plus court costs, and conditioned further that: "if upon the hearing on information, the judgment of the court be that such property, or any part thereof, or such interest and equity as the owner or lienor may have therein, be forfeited, judgment may thereupon be entered against the obligors on such bond for the penalty thereof, without further or other proceedings against them thereon, to be discharged by the payment of the appraised value of the property so seized and forfeited and costs, upon which judgment, execution may issue, on which the clerk shall endorse, 'no security to be taken.'" (Emphasis supplied.) It is patently clear from the foregoing that any judgment for forfeiture, resulting from a trial on the information, may be discharged by payment of the amount of such bond. As an alternative, the court may, in its discretion, demand return of the vehicle for sale and release the obligation of the bond. This is in accord with the view I expressed in an opinion letter sent to the Honorable Joseph Motley Whitehead, Commonwealth's Attorney for Pittsylvania County on August 27, 1964. (Report of the Attorney General (1964-1965), p. 195).

"The other problem deals with a 1957 Plymouth with 1966 Virginia tags, which was seized by the Virginia State Police on December 31, 1966. Upon application from the registered owner, possession of this vehicle was delivered to him upon the payment of the bond of $50.00, having been determined to be the value of the vehicle. This $50.00 is still carried in the Clerk's records and, apparently, no forfeiture proceedings were ever had against this vehicle or the bond posted therefor. The officer and the Clerk are interested in final disposition of the matter and I would like to know what action to take in this regard."

Again, I assume from the above given facts that an information has not been filed by your office. In an opinion letter of March 9, 1965, to the Honorable Curtis A. Sumpter, Commonwealth's Attorney for Floyd County, I expressed the view that an information filed by the attorney for the Commonwealth after the expiration of the statutory period is a nullity. (Report of the Attorney General (1964-1965), p. 198.) For the reasons therein given, it is my opinion that, similarly, there is no statutory authority which permits an untimely filing of an information by this Office. For this reason, then, it is my belief that the liabilities of the obligors on the posted $50.00 bond should be terminated and discharged.

MOTOR VEHICLES—Forfeiture Proceedings—Payment of towing and storage expenses paid by Commonwealth where vehicle returned to innocent owner.

HONORABLE R. H. L. CHICHESTER
Commonwealth's Attorney for Stafford County

March 31, 1969

This is to acknowledge receipt of your March 18, 1969 letter, in which you pose the following inquiry:
"I would like to have your opinion on certain matters pertaining to Section 46.1-350 of the Code of Virginia.

"As you know, this section permits the confiscation of the motor vehicle if being operated by a driver who has had his license revoked or is operating without a license. The question which arises is, in the event that the accused or operator of this vehicle is acquitted of the charge of operating without a license and in the interim the automobile has been towed from the highway at certain expense and been stored by the sheriff of the county, how are the costs for this towing and storage paid? It would certainly seem that the driver if acquitted should not be charged with this cost, but that the Commonwealth should bear this expense."

It is apparent from your letter that you are concerned about the application of § 46.1-351.2, Code of Virginia (1950), as amended, particularly as it relates to the payment of towing and storage charges when the driver has been acquitted of the § 46.1-350 offense. Though your inquiry is silent on the point, I assume from your fact pattern that an information had already been filed against the motor vehicle, pursuant to the above named statute, prior to the disposition of the § 46.1-350 charge.

From your stated facts it appears that the operator of the vehicle in question was acquitted of the § 46.1-350 crime. This being the case, I direct your attention to paragraph (d) of § 46.1-351.2, which provides that: "If such claimant shall deny that he was, or should be, convicted as provided in §§ 46.1-350 or 46.1-351, and * * * if the court, trying such issue without a jury, shall so find, the judgment of the court shall be to entirely relieve the property from forfeiture, and no costs shall be taxed against such claimant." By the terms of paragraph (h) of the said statute, such costs include, inter alia, "the actual expense incident to the custody of the seized property."

In consideration of the foregoing, I am of the opinion that the above described cost may not be assessed against the operator or the motor vehicle owner. There is no obligation on either the owner or operator to the garage owner who towed and stored the motor vehicle at the request of the Commonwealth. In my view, therefore, the towing and storage expenses should be defrayed by the Commonwealth. For a similar opinion, see Report of the Attorney General (1965-1966), p. 183.

MOTOR VEHICLES—Fuel Tax Refunds Due to Shrinkage and Evaporation in Overhead Storage Tanks—Not applicable to underground storage tanks located at service stations.

TAXATION—Motor Fuel Tax Refunds—Made for shrinkage and evaporation in overhead storage tanks.

June 10, 1969

HONORABLE DON E. EARMAN
Member, House of Delegates

This will acknowledge receipt of your letter, under date of May 5, 1969, in which you relate the following:

"A licensed dealer in motor fuels (pursuant to Chapter XII.1 of Title 58, Code of Virginia, 1950, as amended) applies for refund of the motor fuel taxes, pursuant to Section 58-717.

"It appears that the dealer has more than one ‘above-ground’ bulk storage tanks and in addition thereto has more than one storage tank located underground on service station premises which he also owns, yet leases to a tenant who ‘meters’ the gasoline from these underground storage tanks. In turn the tenant is charged by the dealer for the amount
of gasoline (and consequently the tax) which is metered from these underground storage tanks. All risk of loss from these underground tanks, including fire, explosion, shrinkage, evaporation, etc., is absolutely upon the dealer and on occasion the dealer will remove gasoline therefrom and transfer it to other bulk tanks.

"I would like to inquire whether or not in your opinion the refund due the dealer pursuant to Section 58-717 is limited to the gasoline placed in the overhead storage tanks or whether it would include that placed in the underground storage tanks, as outlined above."

Section 58-717, Code of Virginia (1950), as amended, to which you refer in your letter, states that:

"Any dealer duly licensed under this chapter, to whom motor fuel is transferred in this State by tank car, barge or pipe line from a point within the State from another duly licensed dealer who has paid or assumed the payment of the tax levied hereunder and any dealer duly licensed under this chapter to whom motor fuel is transferred by transport truck from a water terminal in this State to a bulk storage tank from another duly licensed dealer who has paid or assumed the payment of the tax levied hereunder shall receive a refund equivalent to one per cent of the tax passed on to him on the gross gallonage of motor fuel so transferred, in consideration of shrinkage and evaporation; provided, however, that no dealer shall receive more than one such refund and not more than one such refund shall be paid on the transfer of the same motor fuel. Claim for such refund shall be filed with the Commissioner within sixty days from the date of the receipt of such motor fuel. The claim for refund shall be allowed and paid in the same manner and from the same funds as provided under § 58-716."

In my view, the use of the term "bulk storage tank," supra, does not contemplate the inclusion of underground storage tanks located at service stations. In answer to your question, then, the above named statute is limited in its application to refunds due to shrinkage and evaporation of motor fuels in overhead storage tanks. This view is consistent with the administrative and enforcement policy of the Division of Motor Vehicles. See, Report of the Virginia Advisory Legislative Council to the Governor and the General Assembly of Virginia, Refunds to Service Stations for Gasoline, (1961), a copy of which I am taking the liberty of enclosing herewith for your information.

MOTOR VEHICLES—Habitual Offenders—Conviction records—Certified to county in which offender actually resides for prosecution purposes.

HONORABLE W. BYRON KEEING
Commonwealth’s Attorney for Charlotte County

This is to acknowledge receipt of your letter, under date of May 16, 1969, in which you relate the following:

"Under the Habitual Offenders Act, Section 46.1-387.3 provides that the Commissioner of the Division of Motor Vehicles shall certify, * * * the conviction record * * * of any person * * * to the attorney for the Commonwealth of the political subdivision in which such person resides according to the records of the Division * * *.

"Section 46.1-387.4 provides: 'The attorney for the Commonwealth, upon receiving the aforesaid transcripts * * * shall forthwith file information against the person named therein in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides.'

"I would appreciate it if you would furnish an opinion as to where the information is to be filed in the situation where the Commissioner..."
certifies the record to the Commonwealth Attorney for county ‘A’ when the offender has been an actual bona fide resident of county ‘B’, for instance, for a period of two years prior to the issuance of the certificate. In other words, does subsection 4 mean that political subdivision in which such person resides ‘according to the records of the Division’, or does it mean the political subdivision in which the person actually resides.

"Under the present wording it would seem possible that the circuit court of county ‘A’ might rule that the hearing on the information should be in county ‘B’, but at the same time the circuit court of county ‘B’ might rule that county ‘A’ has jurisdiction. A ruling from your office should assist in bringing about a uniform application of these two sections."

In my opinion, the clear mandate of §46.1-387.4, Code of Virginia (1950), as amended, requires that the habitual offender proceeding be brought by the attorney for the Commonwealth in the court of record having jurisdiction of criminal offenses in the political subdivision in which the suspected habitual offender actually resides. As concerns the particular fact pattern presented in your letter, the Commonwealth's Attorney for county “A,” upon receipt of the certified habitual offender transcript, should forward same to the Commonwealth's Attorney for county “B” for prosecution purposes.

MOTOR VEHICLES—Licenses—Exemption—Vehicles used exclusively for agricultural purposes—Limitation on. September 12, 1968

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

This will acknowledge receipt of your letter under date of August 31, 1968, in which you ask for an opinion with reference to three questions posed therein as relates to an interpretation and application of §46.1-45, Code of Virginia (1950), as amended. For the sake of clarity, I shall quote hereinafter the questions in the order set forth in your letter and discuss each separately.

"1. May a motor vehicle which is used exclusively for agricultural or horticultural purposes (hereinafter referred to as a farm truck) be used to transport fertilizer from a business establishment to the farm not exceeding ten miles as part of a seasonal operation?"

Code §46.1-45 provides that motor vehicles under certain circumstances are exempt from the registration and licensing statutes of Virginia. It is well settled that such an exemption statute must be construed strictly against the taxpayer, exemption being the exception rather than the rule. In order for a particular vehicle to be exempt from the registration and licensing statutes aforesaid, it must come squarely within the terms and limitations of the exempting statute. I find no language contained in §46.1-45 exempting the particular vehicle in your first question. Accordingly, before any such vehicle may be used in the manner which you describe and operated on the highways of Virginia it must be properly registered and licensed.

"2. May a motor vehicle used exclusively for agricultural or horticultural purposes be used to transport peanuts (farm produce) from such farm along a public highway for a distance not to exceed ten miles as part of a seasonal operation to a place of business where the peanuts (farm produce) are then sold, stored or processed?"

I assume from this inquiry that the motor vehicle to which you refer is, again, a farm truck. This office has previously ruled that the truck used in the manner which you describe is not included in the exemption set forth in §46.1-45. See,
Paragraph (a) of this Code section exempts farm trailers, but not farm trucks, which are used for the purpose of moving farm produce or livestock along a public highway for a distance not exceeding ten miles to a storage house or packing plant. Again, paragraph (h) exempts any trailer or semitrailer, but not farm trucks, drawn by a farm tractor or properly licensed motor vehicle and used for the purpose of transporting peanuts to market or the dryer. Accordingly, the answer to your second question is in the negative.

"3. May a vehicle exempt under subsection (h) of Section 46.1-45 and used in accordance therewith transport such produce for a distance exceeding ten miles?"

It is true that paragraph (h) contains no mileage limitation with reference to the permitted use of the exempted trailers and semitrailers therein. However, when this paragraph is considered together with paragraphs (a) and (c), it seems apparent that the intent was to exempt trailers and semitrailers therein, used for similar purposes as specified in paragraphs (a) and (c). To interpret the paragraph (h) exemption otherwise would be to erroneously disassociate it from the context of § 46.1-45. In my judgment, the ten-mile limitation of paragraphs (a) and (c) limits the permitted use found in paragraph (h).

In consideration of the foregoing, I am of the opinion that a trailer or semitrailer exempted under paragraph (h) and used in accordance therewith may not be drawn along a public highway for a distance exceeding ten miles. For a similar holding, see opinion letter to the Honorable John Paul Causey, Commonwealth's Attorney for King William County, under date of September 4, 1952. Report of Attorney General (1952-1953), pp. 152-153.

MOTOR VEHICLES—Licenses—Refund—Owner of vehicle not entitled to unless vehicle disposed of.

October 10, 1968

HONORABLE R. TURNER JONES
Commonwealth's Attorney for Highland County

This is to acknowledge receipt of your letter under date of October 9, 1968, in which you relate the following:

"Section 46.1-97 of the Code provides as follows: '(a) Any person holding a current registration certificate and license plate who disposes of the vehicle for which it was issued and does not purchase another vehicle may surrender the license plates and registration certificate to the commissioner with a statement that the vehicle for which the license plates were issued has been sold and request a refund for the unused portion of the fee paid.'

"A resident of Highland County, Virginia, with a vehicle registered in Virginia, moved to Pendleton County, West Virginia, in the summer of 1968, and after being at his new place of residence a short time was required to register his vehicle in West Virginia and purchase West Virginia license plates. After October 1 he applied to the local licensing agent in Monterey, Virginia, for a refund as is provided in the same Section under paragraph (b), and the agent advised him that he was not entitled to a refund since he had not sold his vehicle.

"I would like to have your interpretation of this Section as to its application to the now nonresident of the State of Virginia. He has not sold his vehicle, but is that term broad enough to include his present situation?"

You will notice from the language of § 46.1-97 (a), Code of Virginia (1950), as amended, that the motor vehicle owner must dispose of the vehicle before his
application for license refund can be acted upon. There appears no distinction in that Code section between resident and nonresident as relates to the coverage of same. Because of this fact, I am constrained to believe that none was intended by the Legislature. Accordingly, it is my opinion that the nonresident described in your inquiry, not having disposed of his vehicle, is not entitled to a license refund in Virginia.

**MOTOR VEHICLES—Local Licenses—Authority of town to tax.**

**TAXATION—Local Licenses—Authority of town to require.**

November 19, 1968

**HONORABLE DONALD G. PENDLETON**

Member, House of Delegates

This will acknowledge receipt of your letter under date of November 15, 1968, in which you relate the following:

"I have an inquiry as to whether the Town of Amherst can compel a non-resident to obtain the Town tag on his personal automobile which he uses to drive to and from work and for other personal pleasures." According to my interpretation of § 46.1-65 and § 46.1-66, the Town has no authority to tax a motor vehicle unless it is registered in the name of the business which is situated within the corporate limits of the town and is used for strictly business purposes."

This office has previously ruled that the residence of the owner of the motor vehicle, rather than the place of business, is determinative as to which taxing authority may issue local license plates. See, Report of the Attorney General (1963-1964), p. 197; (1964-1965), pp. 205, 238. I am unable to ascertain from your letter the residency of the owner of the vehicle in question. Assuming that the owner resides in a local jurisdiction which does impose a similar tax or license fee, it is my judgment that the Town of Amherst may not collect one. See, § 46.1-66, subsection (a)(1), Code of Virginia (1950), as amended. In any event, the motor vehicle in question would not be required to have Amherst Town tags for the reason that it qualifies under Section 46.1-66, subsection (a)(2), as a motor vehicle owned by a nonresident, and which is "used exclusively for pleasure or personal transportation and not for hire or for the conduct of any business." Accordingly, I shall answer your question in the negative.

**MOTOR VEHICLES—Local Licenses—Locality may collect full county license tax during proration period.**

October 7, 1968

**HONORABLE I. CLINTON MILLER**

Commonwealth's Attorney for Shenandoah County

This is to acknowledge receipt of your letter under date of October 1, 1968 in which you relate, in part, as follows:

"Shenandoah County charges $10.00 for the county tag. The tags went on sale on the 15th of August and all were required to have purchased same by midnight the 30th of September, 1968. On October 1, 1968, the pro-ration period as required by state law begins. My question is as follows: May the County of Shenandoah require those persons purchasing county tags in Shenandoah County to pay the full $10.00 fee for the county tag after October 1, if such party would have been liable
to pay the full $10.00 amount had he purchased his license within the
time required by the county ordinance?

"The problem here is that some people may have waited purposely
until after the 30th of September, 1968, to purchase their county tags
in order to take advantage of the pro-ration period, however, our
ordinance required the purchase of the tags between the 15th of August,
1968, and the 30th of September, 1968, and their proper display there-
after.

"The county would honor the pro-ration period set by the State statute
for those who newly purchased an automobile and/or are new residents
moving into Shenandoah County from elsewhere. The purpose for
charging the full $10.00 amount after October 1 for those citizens of
Shenandoah County who would not fit this category is so that they could
not take advantage of failing to procure a license at the time required."

Your inquiry specifically relates to the propriety of collecting the full county
license tax and fee during the pro-ration periods as set forth in § 46.1-165, Code
of Virginia (1950), as amended, when the motor vehicle owner, seeking to evade
payment of the larger license fee, has waited to make application for his county
license plate during such proration period. I find no prohibition in the statutes
obtaining which prevent the collection of the larger license fee in the above related
circumstances. Accordingly, I shall answer your question in the affirmative. I am
advised that this view is in accord with the administrative policy of the Division
of Motor Vehicles concerning the collection of fees for State license plates issued
during the proration periods aforesaid.

MOTOR VEHICLES—Local Licenses—Vehicles owned by students subject to.

December 18, 1968

HONORABLE G. M. WEEMS
Treasurer of Hanover County

This is in reference to your letter under date of December 7, 1968, in which
you ask for an opinion regarding the applicability of the Town of Ashland and
Hanover County local license plate ordinances to automobiles belonging to
Randolph-Macon College students.

At the outset, it must be borne in mind that there is no exception in the Code
of Virginia for the local registration of motor vehicles owned by students. Such
vehicles are subject to the same requirements as any other motor vehicle. For
the sake of clarity, I shall quote hereinafter the problems set forth in your letter,
dealing with each separately.

"1. Students who bring their automobiles from localities in Virginia
with local license plates displayed."

Assuming that the student has purchased local automobile tags in his home
county, city or town, he is entitled to display same during the then current license
year. This applies even though during this period he may relocate in another
Virginia county, city or town. Accordingly, when the student moves to Hanover
County or the Town of Ashland, he may not be required to purchase Hanover
County or Ashland Town tags during the then current license year. I base this
view upon paragraph (f) of Code § 46.1-65, which provides that, except for the
imposition of license fees and taxes by a county and town located therein, no
vehicle shall be subject to local license taxation in more than one jurisdiction.
This conclusion is in accord with a previous opinion rendered by this office to
the Honorable G. Hugh Turner, Treasurer of Franklin County on April 29, 1965,
a copy of which I enclose herewith. (Report of the Attorney General (1964-1965),
p. 203.)
REPORT OF THE ATTORNEY GENERAL

“2. Students from outside of Virginia who bring their automobiles with their out-of-state licenses but no local license plates.”

Although your letter does not indicate, I assume that while the out-of-State students are attending Randolph-Macon College, they reside in either the Town of Ashland or Hanover County for nine months of the year. In this case, it is my opinion that they qualify as residents, by the terms of Code § 46.1-1 (16)(c), which states that, “A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle, listing an address within this State in the application for registration shall be deemed a resident for the purposes of this title.” The result obtains, then, that the Town or County may impose license taxes upon the operation of vehicles belonging to such students. This view is in accord with the one expressed in an opinion letter, under date of December 30, 1953, to the Honorable Porter R. Graves, Trial Justice for Rockingham County, a copy of which I enclose herewith. (Report of Attorney General (1953-1954), p. 132.)

“3. Students who purchase automobiles in the State of Virginia and purchase Virginia State license plates, either after purchasing automobiles locally or after acquiring a Virginia title on the basis of their out-of-state plates and title. Some of these students give their home state addresses, others give their local addresses at the college.”

For the reasons set forth in my answer to your problem numbered 2, the out-of-State student qualifies as a resident by virtue of his residing in the Town or County for the duration of the academic year, and, therefore, his automobile is subject to the local license plate requirements of the Town of Ashland or Hanover County. It makes no difference, then, what address the student gives in his application for Virginia registration.

“4. Students who live in the dormitories or college facilities within the Town of Ashland as contrasted to those who live in dormitories or college facilities in the County of Hanover outside of the corporate limits of the town.”

As concerns which local license plate the student’s automobile must display, this will depend on where he is actually residing. Accordingly, it is my interpretation that if the student resides at a dormitory or other college facility in the Town of Ashland, his car should display Ashland Town tags. If, however, he lives at a college facility in Hanover County, his automobile should have County tags.

MOTOR VEHICLES—Local Ordinances Regulating Traffic—May incorporate provisions of Title 46.1.

October 14, 1968

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth’s Attorney for Hanover County

This will acknowledge receipt of your letter under date of October 9, 1968, in which you relate the following:

“The 1968 Legislature amended Section 46.1-188 of the 1950 Code of Virginia, as amended, to read as follows:

‘Ordinances enacted on and after July one, nineteen hundred sixty-eight, by local authorities pursuant to this article may incorporate appropriate provisions of this title into such ordinance by reference. Nothing contained in this title shall be construed to require the reenactment of ordinances heretofore validly adopted.’
"I will appreciate your advising me whether or not in your opinion the County may now enact an ordinance embodying an appropriate section of title 46.1 simply by referring to the State Code Section. "If your answer is in the affirmative, how would the requirements concerning publication be affected by the foregoing statute?"

It is apparent from the above quoted statute that if local authorities intend to incorporate the provisions of an appropriate Virginia Code section into an ordinance to be enacted pursuant to Article 2 of Chapter 4, Title 46.1, they may do so without setting forth in full the language of said Code section. It is enough, in my judgment, if such Code section is incorporated by reference to its number. Accordingly, I shall answer your first question in the affirmative.

With respect to your second question, Code § 46.1-188, as amended, has no effect on the publication requirements set forth in Code § 15.1-504. Before a proposed ordinance, pursuant to Article 2 of Chapter 4, Title 46.1, may be enacted, the methodology outlined in § 15.1-504 must be followed.

MOTOR VEHICLES—Motorcycles—Operator's license—Special endorsement required.

MOTOR VEHICLES—Farm Vehicle—No operator's license required.

MOTOR VEHICLES—Stoppage by Police Officer—Conditions upon which vehicle may be stopped.

MOTOR VEHICLES—Arrest of Driver—Authority of police officer.

June 20, 1969

HONORABLE E. R. HUBBARD
Justice of the Peace

This is in response to your letter of May 17, 1969. I shall answer your questions seriatim:

(1) "Does a person who has an operator or chauffeur license have a right to drive a motorcycle on such license, or do they have to have a special permit or license for a motor vehicle such (motorcycle) and (scooter) or other vehicle?"

Section 46.1-373 of the Code of Virginia (1950), as amended, requires that before any person operates a motorcycle on the highways of Virginia, he must first have his operator's or chauffeur's license endorsed authorizing such operation. Said Code section further provides that every person who operates a motorcycle without having the appropriate motorcycle endorsement on his or her operator's or chauffeur's license shall be guilty of a misdemeanor.

The other vehicles which are also subject to the above endorsement requirement are: (1) passenger carrying buses equipped with more than 32 passenger seats, and (2) any vehicle or combination of vehicles having three or more axles with an actual gross weight in excess of 40,000 pounds.

(2) "Does a person who operates a farm vehicle have to have an operator license for such?"

Code § 46.1-352 provides that no person shall be required to obtain an operator's or chauffeur's license for the purpose of operating, inter alia, any farm tractor or farm machinery or vehicle defined in § 46.1-45, temporarily drawn, moved or propelled on the highways. In answer to your question, then, so long as the farm vehicles as defined in § 46.1-45 are operated in accordance with the statutory limitations contained in § 46.1-45, the operator's or chauffeur's license requirement does not obtain.
REPORT OF THE ATTORNEY GENERAL

(3) "Can a police officer pull you over on the highway just because he wants to do so, or must he have a legal excuse (No permit or something else)?"

Section 46.1-8 of the Code of Virginia authorizes any peace officer who shall be in uniform or who shall exhibit his badge or other sign of authority to stop any motor vehicle for the purpose of inspecting the motor vehicle as to its equipment and operations. If the purpose of stopping the automobile is related to an arrest of its operator or another occupant, then the officer's action must be grounded upon good reason to believe that an offense has been committed. Va. Const. § 10; § 19.1-91, Code of Virginia (1950).

(4) "Does an officer of the law lose all of his authority as such when he takes off his gun and tries to fight a person he has arrested?"

I find no authority for the proposition that an officer who, in encountering resistance to an arrest, removes his gun thereby relinquishes his authority to complete the arrest. "Officers, within reasonable limits, are the judges of the force necessary to enable them to make arrests." Davidson v. Allam, 143 Va. 367, 373, 130 S.E.2d 245, 246 (1952).

MOTOR VEHICLES—Motorcycles—Riding upon and operating—Safety glasses required.

HONORABLE D. R. TAYLOR, Judge
James City County Court

March 14, 1969

This will acknowledge receipt of your letter of March 10, 1969, in which you relate the following:

"I am writing to you in my capacity as County Judge of James City County to ask your assistance relative to an interpretation of one of the sections of the 1950 Code of Virginia as amended. The section in question is 46.1-172 entitled 'Riding Upon or Operating Motorcycles.' This section of the Code provides in part that 'A person operating a motorcycle shall wear safety glasses or goggles or have his motorcycle equipped with safety glass or a windshield at all times while operating said vehicle. The Superintendent of State Police shall, within one year from the enactment of this bill, establish standards for windshields and glasses or goggles set forth herein. Failure to wear safety glasses or goggles shall not constitute negligence per se in any civil proceeding. Any person who violates this section shall be guilty of a misdemeanor and shall be punished as provided in § 18.1-9.'"

"The question has arisen whether or not the use of sun glasses with safety glass inserted therein or the use of regular reading or standard eye glasses equipped with safety glass is a substantial compliance with this section of the Code. It would be appreciated if your office could give me the benefit of your opinion in this matter."

Enclosed herewith you will find a copy of the standards, referred to in the above named statute, recently promulgated by the Department of State Police and which, I understand, will not go into effect until around July 1, 1969. At that time, it is my opinion that the glasses described in your letter will not comply with standard No. 2.2, which reads as follows:

"Safety glasses require special frames. Therefore, combinations of street-wear frames with safety lenses meeting this standard are definitely not in compliance. Safety glasses shall consist of two lenses in a frame which supports the lenses around their entire periphery, of suitable size
and shape for the purpose intended, connected by a nose bridge, and retained on the face by temples or other suitable means. The safety glasses may be furnished with or without sideshields. The frames, temples, and sideshields can be of metal or plastic construction and when made of plastic shall be of the slow-burning type."

Until the effective date of the enclosed requirements, however, it is my view that the above described use of such glasses would constitute substantial compliance with the provisions of § 46.1-172. I am advised that this view is consistent with the present Department of State Police enforcement policy.

MOTOR VEHICLES—Operating Under Influence—Suspension of fine imposed under § 18.1-58.


HONORABLE SAMUEL A. GARRISON, III
Assistant Commonwealth's Attorney for City of Roanoke

February 11, 1969

This is in reply to your letter of February 7, 1969, in which you present the following inquiry:

"This is a request for an opinion with reference to Section 18.1-59 of the Code of Virginia which, after referring to the penalties imposed under Section 18.1-58, provides:

"... and the court may, in its discretion, suspend the sentence during the good behavior of the person convicted or found not innocent.

"Section 53-272 of the Code of Virginia in pertinent part provides:

"After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged,... the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment....

"However, Section 19.1-351 of the Code of Virginia provides:

"No court shall remit any fine, except for a contempt, which the court during the same term may remit either wholly or in part. This section shall not impair the judicial power of the court to set aside a verdict or judgment, or to grant a new trial.

"QUERY: May a court impose a fine of $200 or more for a conviction of Driving Under the Influence and suspend the payment of the fine if the court deems such suspension advisable?"

This office has previously ruled that the power to suspend a sentence under § 53-272 includes the power to suspend a fine. Report of the Attorney General (1950-1951) pp. 157-58. However, no court has the power to excuse a prisoner from the penalties for his crime. See, Richardson v. Commonwealth, 131 Va. 802, 109 S.E. 460 (1921). In an opinion reported in Report of the Attorney General (1937-1938) p. 176, the Honorable Abram P. Staples (then Attorney General) recognized the following distinction between remittance and suspension of a fine:

"A remittance releases the prisoner forever from further liability to
pay the fine; a suspension defers the time of payment in accordance with
the terms of the suspension order.”

In light of the foregoing, it is my opinion that a court may suspend a fine
imposed under § 18.1-58 of the Code.

MOTOR VEHICLES—Operator's License—Driver required to file proof of
financial responsibility following termination of drunk driving revocation—
Both resident and nonresident subject to conviction under § 41.1-351 if proof
not filed.

MOTOR VEHICLES—Financial Responsibility—Failure to file proof following
termination of drunk driving conviction—Driver guilty of violation of
§ 46.1-351 regardless of residency.

HONORABLE PAUL X BOLT
Commonwealth's Attorney for Grayson County

This is to acknowledge receipt of your letter, under date of April 22, 1969,
in which you request an opinion on the following factual situations:

“(1) A Virginia resident was convicted of violating Section 18.1-54 of
the Code of Virginia of 1950, as amended, and his license to operate
a motor vehicle was revoked for a period of one year. During the period
of revocation, that person moved to the State of North Carolina and after
the period of revocation expired he obtained a North Carolina operator's
license and a policy of liability insurance with coverage equal to the
minimum requirements for the State of Virginia; however, no proof
of financial responsibility was filed in this State. According to the records
of the Division of Motor Vehicles, his privileges to operate a motor
vehicle in the State of Virginia was suspended contingent upon the
person filing a proof of financial responsibility. If he is later found
to be operating a motor vehicle in the State of Virginia covered by
the above mentioned insurance policy, I would like your opinion as to
whether or not he could be convicted under Section 46.1-351 of the
Code of Virginia.

“(2) A Virginia resident was convicted under Section 18.1-54 of the
Code of Virginia and his license to operate a motor vehicle was also
revoked for a period of one year. After the period of revocation, this
person moved to Maryland and there obtained an Instruction Permit;
however, he did not obtain liability insurance and has given no proof
of financial responsibility in this State. If the person is found to be
operating a motor vehicle, not his own, in the State of Virginia accom-
panied by a licensed driver, I would like your opinion as to whether
or not he could be convicted in violation of Section 46.1-351 of the
Code of Virginia.”

Code § 46.1-417 requires the Commissioner of the Division of Motor Vehicles
to revoke for one year the license of any person upon receiving a record of his
having been convicted of a § 18.1-54 offense. Section 46.1-438 requires that before
restoring a license to any such person whose license or privilege to drive has been
revoked pursuant to § 46.1-417, the Commissioner shall require the filing of proof
of financial responsibility for the future. By the terms of § 46.1-439, when three
years shall have elapsed from the termination of the § 46.1-417 revocation, such
person shall be relieved from the proof of financial responsibility requirement.

Code § 46.1-351, in pertinent part, provides that:

“(a) No person resident or nonresident whose operator's or chauffeur's
license or instruction permit has been suspended or revoked by any court
or by the Commissioner or by operation of law pursuant to the provisions of this title or of § 18.1-59 or who has been forbidden as prescribed by law by the Commissioner, the State Corporation Commission, the State Highway Commissioner, or the Superintendent of State Police, to operate a motor vehicle in this State shall drive any motor vehicle in this State during any period wherein the restoration of license or privilege is contingent upon the furnishing of proof of financial responsibility, unless he has given proof of financial responsibility in the manner provided in article 6 (§ 46.1-467 et seq.) of chapter 6 of this title.” (Emphasis supplied.)

It is clear from reading the emphasized statutory language, supra, that no person, resident or nonresident, shall drive any motor vehicle in Virginia during a period wherein the restoration of the driver's license or privilege is predicated on the furnishing of proof of financial responsibility unless he or she has complied with such proof requirement in the manner provided in Code § 46.1-467 et seq. It makes no difference, then, that the Virginia driver moves out of State and acquires a foreign driver's license or instruction permit and a liability insurance policy upon the termination of the Virginia revocation period. His or her privilege to operate in Virginia would still be subject to the said proof requirement during the three year period immediately following the termination of the § 46.1-417 revocation. The methods of proving financial responsibility and the requirements for certificate of insurance carrier are set forth in §§ 46.1-468 and 46.1-471 of the Code.

Your questions do not indicate the time of the alleged offenses. Assuming, however, that they occurred within the aforementioned three year period, my answer to both of your questions would be in the affirmative. On the other hand, if they occurred after the expiration of said three-year period, they would not constitute § 46.1-351 offenses, the driver having been relieved of the aforesaid proof requirement, in which case my answer to both questions would be in the negative. For a similar view, see my letter to the Honorable Reginald H. Pettus, Commonwealth's Attorney for Charlotte County [Report of the Attorney General (1961-1962), page 178].

MOTOR VEHICLES—Operator's License—Operation of vehicle after suspension —Basis for confiscation of vehicle.

HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

This is in reference to your letter, under date of December 7, 1968, in which you relate the following:

"Recently the Virginia’s operator's license of a resident of this city was suspended. The individual returned to West Virginia where he obtained a West Virginia's driver's permit and purchased a car in that State which remains registered in West Virginia. The former resident of Virginia returned to this city and was involved in an accident. The police, upon investigation, impounded the automobile.

"If I interpret the law correctly, he was driving in Virginia under a revoked or suspended driver's license and I can confiscate the automobile under the proper Code section. Am I correct?"

While it is the policy of this office not to render opinions touching upon cases pending trial, yet it is unclear from a reading of the above quoted facts that same relate to an abeyant prosecution. For purposes of this letter, however, I shall assume that they do not.
Section 46.1-350, Code of Virginia (1950), as amended, in applicable part, spells out the driving under revocation or suspension offense as follows:

“(a) Except as otherwise provided in § 46.1-352.1, no person resident or nonresident whose operator's or chauffeur's license or instruction permit or privilege to drive a motor vehicle has been suspended or revoked or who has been directed not to drive by any court or by the Commissioner or by operation of law pursuant to the provisions of this title or of § 18.1-59 or who has been forbidden as prescribed by law by the Commissioner, the State Corporation Commission, the State Highway Commissioner, any court, or the Superintendent of State Police, to operate a motor vehicle in this State shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in this State unless and until the period of such suspension or revocation shall have terminated.” (Emphasis added.)

It is manifest that the above emphasized statutory language encompasses the factual situation outlined in your letter. It makes no difference that the nonresident had a valid West Virginia license. It must be borne in mind that the granting and suspension of a privilege to drive upon the highways of this State is subject to the statutory authority of this State. Consequently, the nonresident's privilege to drive having been suspended and the period of suspension not having terminated, his operation of a motor vehicle on a highway in Virginia during the period of such disability was violative of § 46.1-350, and furthermore, seizure of the motor vehicle in question pursuant to § 46.1-351.1 was both proper and correct. Accordingly, I shall answer your question in the affirmative.

MOTOR VEHICLES—Operator's License—Suspension under § 46.1-442 not terminated by statute of limitations.

Honorable Thomas W. Moss, Jr.
Member, House of Delegates

This is to acknowledge receipt of your letter of June 16, 1969, in which you request an opinion as to whether or not the running of the twenty-year statute of limitations satisfies or discharges a judgment as concerns any outstanding administrative suspension ordered by the Division of Motor Vehicles in accordance with § 46.1-442, Code of Virginia (1950), as amended.


You will note therein that I state that:

“There is no indication anywhere in this chapter (Chapter 6 of Title 46.1) that the limitations imposed 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.”

In answer to your inquiry, then, the running of the statute of limitations per se does not terminate an order of suspension entered by the Division of Motor Vehicles in accordance with Code § 46.1-442. According to § 46.1-459 (b), such
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suspension shall continue until the person satisfies the judgment as prescribed in § 46.1-444 and gives proof of financial responsibility in the future.

MOTOR VEHICLES—Operator’s License Renewal—Persons subject to reexamination requirement.

June 19, 1969

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This will acknowledge receipt of your letter of June 18, 1969, in which you request an opinion whether the following schedule of persons who will or will not be subject to reexamination upon operator’s license renewal in the calendar year of 1970 is in accordance with § 46.1-380.1, Code of Virginia (1950), as amended:

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<td>1970</td>
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Code § 46.1-380.1, in pertinent part, provides that:

“(a) Any operator’s license issued in accordance with the provisions of this chapter on and after January one, nineteen hundred seventy, shall be issued to expire four years from the birthday month of the applicant nearest to the month in which the license is issued. Thereafter any such operator’s license shall be renewed in the birthday month of the licensee and shall be valid for four years.

“(b) . . . Any operator’s license issued in accordance with the provisions of this chapter may thereafter be renewed only upon proper application and, in the cases enumerated below, upon the applicant’s having taken and successfully completed those parts of the examination provided for in §§ 46.1-357.2 and 46.1-369, including visual and written tests, other than the parts of such examination requiring the applicant to operate a motor vehicle. All operators applying for renewal of a license shall be required to take and successfully complete such examination in the following cases: (i) in the renewal year most immediately prior to the year of his thirtieth birthday; (ii) in the renewal year most immediately prior to the year of his thirty-eighth birthday; (iii) in the renewal year most immediately prior to his forty-second birthday; and (iv) each renewal year thereafter.”
In my interpretation, the above schedule is correct, except that persons who are twenty-six, thirty-four and thirty-eight years old during the calendar year of 1970 and subject to license renewal are also subject to the reexamination requirement. Insofar as their license renewals come up during 1970, they would constitute renewals most immediately prior to the years of their thirtieth, thirty-eighth and forty-second birthdays, respectively, and, therefore, subject to the aforesaid reexamination requirement.

In this connection, paragraph (e) of § 46.1-380.1 provides that the aforementioned reexamination may be waived, excepting the visual test, as follows:

"(e) Notwithstanding any other provision of this section, the Commissioner in his discretion may require any applicant for renewal be fully examined as provided in §§ 46.1-357.2 and 46.1-369. Furthermore, the Commissioner shall waive the requirement or the taking of the written test as provided in subsections (b) and (c) hereof and § 46.1-369 for any applicant for renewal if the applicant's operator's or chauffeur's license record on file at the Division contains, for the four years prior to the expiration date of the license being renewed, a record of no more than one conviction for any offense reportable under §§ 46.1-412 and 46.1-413; provided, that in no case shall there be any waiver of the visual examination required by said subsections or § 46.1-357.2."

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MOTOR VEHICLES—Parking Violation—Certified mailing of notice is compliance with § 46.1-179.01 of the Code.

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

This will acknowledge receipt of your letter under date of August 21, 1968, in which you ask whether a certified mailing of the notice specified in § 46.1-179.01, Code of Virginia (1950), as amended, constitutes compliance therewith. That Code section reads as follows:

"Before any warrant shall issue for the prosecution of a violation of an ordinance of any county, city or town regulating parking, the violator shall have been first notified by registered mail at his last known address or at the address shown for such violator on the records of the Division of Motor Vehicles, that he may pay the fine, provided by law for such violation, within five days of receipt of such notice, and the officer issuing such warrant shall be notified that the violator has failed to pay such fine within such time."

The above-quoted Code section must be considered together with Code § 1-15.1, which provides that a certified mailing shall constitute compliance with any Code section requiring any mail or notice to be sent by registered mail. Therefore, it is my opinion that a certified mailing of such notice does comply with § 46.1-179.01, and accordingly, I shall answer your question in the affirmative.

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MOTOR VEHICLES—Parking Violation—Summons may be issued without first giving notice by registered mail.

HONORABLE HERMAN A. COOPER, Judge
Traffic Court of the City of Richmond

This will acknowledge receipt of your letter of August 20, 1968, in which you relate the following:
"The Traffic Court of the City of Richmond, issues summonses on delinquent parking citations, and a copy is left with the owner by the officer who writes his return on the original and returns it to the Traffic Court.

"In view of the definition of a 'warrant' as shown in Black's Law Dictionary, is the Traffic Court required to send a notice by registered mail prior to the issuance and service of the summons."

Section 46.1-179.01, Code of Virginia (1950), as amended, to which you make reference, reads as follows:

"Before any warrant shall issue for the prosecution of a violation of an ordinance of any county, city or town regulating parking, the violator shall have been first notified by registered mail at his last known address or at the address shown for such violator on the records of the Division of Motor Vehicles, that he may pay the fine, provided by law for such violation, within five days of receipt of such notice, and the officer issuing such warrant shall be notified that the violator has failed to pay such fine within such time."

I fail to see any inclusion of the term "summons" contemplated by the above quoted Code section. The difference between a warrant and a summons is universally recognized. See, Black's Law Dictionary. The implementation of a warrant, on the one hand, serves to arrest the defendant and bring him before the court; the use of a summons, on the other hand, requires the defendant to appear in court on a specified date in the future to answer the complaint or charges against him. I am, therefore, inclined to believe that given the distinction between warrant and summons, (a) Code § 46.1-179.01 only envisages compliance with the conditions precedent therein before an arrest warrant shall be issued for the prosecution of a delinquent parking violation and (b) with reference to the issuance of a summons, the § 46.1-179.01 requirement of notice by registered mail does not obtain. Accordingly, I shall answer your question in the negative.

MOTOR VEHICLES—Personal Property Taxes—May be collected by local taxing authorities on dealer owned motor home.

MOTOR VEHICLES—Dealer Owned Motor Home—License—May not be required if motor home used for sale or for sales demonstration.

June 19, 1969

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

This will acknowledge receipt of your letter of June 17, 1969 in which you relate the following:

"This office would greatly appreciate your ruling on the following situation:

"An automobile dealer in this area owns a motor home and has dealer tags on it. The motor home has a permanent shed at his place of residence which was built strictly for shelter of this vehicle and the vehicle is used by him and his wife to go on trips ranging up to 3 and 4 weeks at a time.

"Realizing Article 46.1-115 of the Code of Virginia authorizes the permissible use of dealer's license plates, this in my opinion does not make him immune from paying personal property tax on the reference vehicle. Article 46.1-66 (5) of the Code of Virginia appears to give the local taxing authorities the power to tax such vehicles when they are
used in such methods as set out above. Please confirm if you agree with my opinion.”

Your letter raises a twofold inquiry: the applicability of, first, local personal property taxes and, secondly, local license taxes and fees to the motor home which is owned by a duly authorized automobile dealer and which displays dealer’s tags thereon.

From your stated facts, the dealer owns the motor home, in which case he has obtained a certificate of title therefor. Paragraph (a) of § 46.1-115, Code of Virginia (1950), as amended, in pertinent part, states that “dealer’s license plates may be used on motor vehicles, trailers and semitrailers owned by . . . duly licensed motor vehicle dealers of this State when operated on the highways of this State by such dealers or their authorized representatives.” It is significant to note that in 1964 the General Assembly deleted the language “for demonstratoin or sale” which formerly appeared at the end of the first sentence of paragraph (a).

The display of dealer’s plates, then, on the dealer owned motor home, used in the manner described in your letter, is deemed proper. To be sure, I can see no problem as concerns the applicability of local personal property taxes to the dealer as long as he owns the vehicle in question. Therefore, in answer to the first part of your inquiry, I agree with you that the use of dealer’s plates on a motor home owned by the dealer does not exempt the dealer from payment of such taxes.

As concerns the applicability of local license fees or taxes, your letter is not clear as to the purpose for which the dealer is keeping the vehicle. Section 46.1-66 (5) of the Code prohibits the imposition of such taxes or fees if the motor vehicle is kept by a dealer “for sale or for sales demonstration.” Accordingly, if the vehicle is being kept by the dealer for such purposes, the locality may not impose license fees and taxes thereon, regardless of how the vehicle may be titled. Conversely, the prohibition contained in § 46.1-66 (5) does not extend to such vehicle owned by the dealer but not kept for “sale or for sales demonstration” purposes, in which case collection of the tax would be proper. For similar opinions, see Report of the Attorney General (1955-1956), page 130; (1962-1963), page 178.

MOTOR VEHICLES—Registration—Exemptions—Liquid fertilizer applicator trailer not exempt.

HONORABLE HARRY W. GARRETT, JR.
Commonwealth’s Attorney for Bedford County

August 19, 1968

This is in reply to your letter of August 8, 1968, in which you request my opinion as to whether or not § 46.1-45 of the Code of Virginia exempts a liquid fertilizer applicator trailer, owned by a dealer in liquid fertilizers who pulls it from farm to farm of his respective customers behind an automobile or truck belonging to such dealer or one of his salesmen.

Section 46.1-45 of the Code exempts from registration motor vehicles, trailers or semi-trailers operated under certain specific conditions and within enumerated limitations. Like any exemption from taxation this statute must be strictly construed against the exemption. In order to be exempt from the registration and license requirements of this State, a vehicle must fall squarely within the terms and limitations of the exempting statute. In my opinion the vehicle under consideration does not come within any of the exemptions set forth in this section and, therefore, your question is answered in the negative.
MOTOR VEHICLES—Registration and Licensing—For hire—When required where delivery of materials to another for compensation involved.

August 7, 1968

HONORABLE T. CARLYLE LEA, JR., Judge
Rappahannock County Court

This will acknowledge receipt of your letter of July 24, 1968, in which you relate the following:

“$A$ has a bulldozer and excavating company and in that operation uses several dump trucks. These dump trucks are used to haul materials for the various jobs. This contractor, $A$, has ‘T’ tags on his vehicles. Considering Sec. 46.1-1 (35) and Sec. 56-275.1 of the 1950 Code of Virginia, as amended, I have the following questions:

1. Can $A$ deliver other materials to a customer on whose property he is working which materials are not a part of $A$'s particular construction? $A$ receives compensation over and above the cost of the materials.

2. Can $A$ deliver sand or gravel for which he receives compensation for the transportation of the same to any customer? In this particular instance, $A$ would not be doing work on this property, he would only be delivering materials. The materials he delivers are exactly the same materials that are used in his business.”

By the very language of § 46.1-1 (35), Code of Virginia (1950), as amended, to which you make reference in your letter, the terms operation or use for rent or for hire, property carried for compensation, and business of transporting property, whenever used in Title 46.1 of the Code, contemplate any owner or operator of any motor vehicle, trailer or semitrailer operating over Virginia highways who accepts or receives compensation for such service, directly or indirectly. Similarly, Code § 56-275.1 provides that any person who purchases articles, merchandise, commodities or things at one place and transports them in a motor vehicle, trailer or semitrailer to another place for sale, in the sale price of which a transportation charge is reflected, shall be deemed operating for compensation. Excepted from coverage of this latter statute by express mention are: merchants maintaining a bona fide and regular place of business who transport to and deliver from such place of business by motor vehicle, trailer or semitrailer things sold by them; peddlers, commission merchants and brokers holding proper authority who have paid the State occupational license tax; authorized commissioned agents who distribute goods, wares or merchandise; and persons who transport forest products, farm produce and products, livestock or farm supplies in motor vehicles, trailers and semitrailers licensed for no more than 18,000 pounds.

In regard to your first question, I am of the opinion that $A$'s transporting of material for compensation under the above quoted conditions does come within the requirements of Code § 46.1-1 (35). I fail to see any real connection between $A$'s excavation business and his buying and selling of materials not associated with that business. The aforementioned exceptions of Code § 56-275.1 would seem to have no application. Therefore, I shall answer your question numbered 1 in the negative. This is in accord with the views found in Reports of the Attorney General (1963-1964), p. 193 and (1966-1967), p. 197.

The answer to your second question depends on the supply source of the sand and gravel. Assuming that, in connection with his excavation business, $A$ produces the sand and gravel and transports same in his own trucks, I would conclude that such operation is that of a private carrier and, therefore, the answer to your question numbered 2 would be in the affirmative. This view is consistent with the earlier view of this office that a person engaged in the business of producing a product and delivering it upon his own vehicle operates as a private carrier. See, Reports of the Attorney General (1961-1962), pp. 164-165 and (1962-1963), p. 171. If, however, $A$ has to rely on another supply source for the
sand and gravel, it is obvious that he will receive compensation for the service of hauling these materials. In this situation, I would conclude that such operation would be that of a "for hire" carrier and, therefore, the answer to your question numbered 2 would be in the negative.

_**MOTOR VEHICLES—Revocation of License—May not be revoked from conviction of improper driving.**_

_**MOTOR VEHICLES—Improper Driving—Not basis for revocation of license.**_

**June 11, 1969**

**HONORABLE RICHARD W. DAVIS**
Municipal Judge, Radford Municipal Court

This is to acknowledge receipt of your letter of June 2, 1969, in which you pose the following inquiry:

"Would you please advise me as to whether an accused charged with reckless driving, and convicted under Virginia Code Section 46.1-192.2 of 'improper driving' may, in addition to a fine not to exceed $100.00, have his license revoked by the court."

Inasmuch as § 46.1-192.2 of the Code of Virginia (1950), as amended, is penal in nature, a presumption obtains favoring strict construction thereof. Since there is no provision regarding license revocation or suspension appearing in § 46.1-192.2 or any other Code section applicable thereto, I am of the opinion that the trial court may not revoke the driver's license of any person convicted of improper driving.

_**MOTOR VEHICLES—School Bus—Speed limit 35 miles per hour when carrying children.**_

_**SCHOOLS—School Bus—Speed limited to 35 miles per hour when carrying children.**_

**March 17, 1969**

**HONORABLE W. L. PERSON, JR.**
Commonwealth's Attorney for James City County

This will acknowledge receipt of your letter of March 11, 1969, in which you relate the following:

"I would appreciate your opinion as to the maximum speed limits under Section 46.1-193 of the Code of Virginia, (1950), as amended, in regard to a school bus carrying children. The specific question is whether a school bus carrying children to athletic events, school events, and/or historical sights some distance from the school, when the words on the bus referring to school bus, etc. are covered, is governed by the speed limits as set forth in the aforesaid section."

Paragraph (d) of § 46.1-193, Code of Virginia (1950), as amended, to which you make reference, provides the following maximum speed limits for school buses: "Thirty-five miles per hour on any highway other than an interstate highway, if the vehicle is being used as a school bus carrying children, and forty-five miles per hour on interstate highways." The determining consideration as to whether this provision is applicable at any given time is the vehicle's use. If the vehicle is actually being used to transport school children, then I am of the opinion that, during such operations, the limits contained in § 46.1-193 (d) would apply. See, Report of the Attorney General (1952-1953), p. 211; (1967-1968), p. 182.
I know of no provision of law which would authorize covering the required lettering or warning signals on a school bus being used to transport children.

MOTOR VEHICLES—Unauthorized Use—When owner guilty of permitting.

November 25, 1968

HONORABLE RICHARD W. DAVIS
Municipal Judge, Radford Municipal Court

This will acknowledge receipt of your November 21, 1968, letter, in which you relate the following:

"46.1-386 states as follows, 'No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this chapter.'"

"If the evidence presented by the accused, charged under the above code section, is that the individual who was operating the automobile has been operating other vehicles for sometime prior to the offense, and that the accused had every reason to believe that the operator possessed a valid driver's license, is he guilty of 'authorizing or knowingly' permitting his vehicle to be operated by a person who has no legal right to do so?"

In your statement of facts, the accused had no cause to suspect that the driver of the motor vehicle did not have a valid operator's or chauffeur's license. In consideration of this circumstance, it is my view that the accused has not knowingly authorized or permitted the use of his vehicle by a person who has no legal right to do so. Accordingly, I shall answer your inquiry in the negative.

MOTOR VEHICLES—Uniform Summons—Must be used for reportable law violations.

January 15, 1969

HONORABLE LACY H. ANDERSON
Sheriff of Frederick County

This is in reply to your letter of January 7, 1969, in which you refer to § 46.1-416.1 of the Code of Virginia and the fact that your department has quite a large supply of summons books similar to those used by the Department of State Police in 1968 and a quantity of forms printed for record requests from the Division of Motor Vehicles. You ask my opinion on the suitability of continuing to use these forms.

Section 46.1-416.1 provides for a uniform summons to be used in cases of motor vehicle law violations reportable to the Division of Motor Vehicles under the provisions of §§ 46.1-412 and 46.1-413 and states that "such form shall be used on and after January one, nineteen hundred and sixty-nine by all enforcement officers throughout the Commonwealth." (Emphasis supplied.) There is no provision in the statute for the use of any other type summons or for the utilization of old summons books until the supply is exhausted. On the contrary, the emphasized language is mandatory and clearly requires the use of the uniform summons by all enforcement officers on and after January 1, 1969. While I find nothing in the law to prevent your use of the old summons books for other violations of law, in my opinion it would not be suitable to continue using them for motor vehicle law violations which are required by law to be reported to the Division of Motor Vehicles. In reference to the forms which you state you had printed for record requests from the Division of Motor Vehicles, I know of no
statutory obstacle to the use of such forms for record requests provided they comply with the requirements of the Division of Motor Vehicles.

MOTOR VEHICLES—Violation of Weight Limits—Assessments of liquidated damages in accordance with statutory formula mandatory.

November 8, 1968

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

This will acknowledge receipt of your letter under date of November 4, 1968, in which you relate the following:

"Section 46.1-342 provides for the assessment of liquidated damages for violation of weight limits against the owner, operator or other person causing the operation of an overweight vehicle. I am advised that the practice has arisen in some jurisdictions for the Court to assess less damages than the statute provides. Would you kindly advise and render your opinion as to whether it is discretionary for the court so to do? Is the word in the statute 'shall' mandatory or discretionary?"

Section 46.1-342, Code of Virginia (1950), as amended, to which you make reference in your letter provides that, upon conviction of any person for a violation of any weight limit specified in Chapter 4 of Title 46.1 or in any permit issued by the State Highway Commission or local authority in accordance with § 46.1-343 or § 46.1-343.1 of said Code, the court shall assess liquidated damages, calculated by the graduated amounts prescribed therein, against the owner, operator or other person causing the operation of the overweight vehicle. Code § 46.1-342 further provides that:

"Such assessment shall be entered by the court as a judgment for the Commonwealth, the entry of which shall constitute a lien upon the overweight vehicle. Such sums shall be paid into court or collected by the attorney for the Commonwealth and forwarded to the State Treasurer and allocated to the fund appropriated for the construction and maintenance of State highways."

In answer to your inquiry, it is my opinion that the liquidated damages provision of § 46.1-342 is mandatory, admitting of no judicial discretion in the matter of assessing liquidated damages at a lesser rate than is provided for therein. Accordingly, whenever a person has been convicted of said overweight violation, the court must assess liquidated damages, in accordance with the statutory formula of § 46.1-342, against the owner, operator or other person causing the operation of the overweight vehicle.

MOTOR VEHICLES—Virginia Habitual Offender Act—Non-resident under the Act construed.

March 13, 1969

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This will acknowledge receipt of your letter of March 6, 1969, in which you relate the following:

"I will appreciate your opinion on the following question which has arisen under Article 7, of Chapter 5, of Title 46.1 of the Code of Virginia, which is the Virginia Habitual Offender Act."
In this particular case, the alleged habitual offender is now serving in the United States Army in Germany, and even though he was born and raised and owned property at one time in Nelson County, Virginia, a short time before he went in the Army he sold his property in Nelson County, and he and his wife then lived and resided in an apartment in the City of Lynchburg, Virginia, until he went into the Army.

"Under these general facts, is this alleged habitual offender now a non-resident of the State, or a resident of Nelson County, Virginia, or a resident of the City of Lynchburg, Virginia, within the meaning of the above Act?"

Under normal circumstances, the fact that a Virginia service man is serving overseas by itself does not strip him of his Virginia residence. However, inasmuch as the provision of §§ 8-67.1 and 8-67.2, Code of Virginia (1950), as amended, are made applicable mutatis mutandis to habitual offender proceedings by the very terms of § 46.1-387.5, I am of the opinion that, for purposes of venue and process under the Act, the Virginia serviceman should be treated as a nonresident provided he has been absent from the State for at least sixty days. In this connection, § 8-67.1 provides, in pertinent part, as follows:

"The term 'nonresident' includes any person who though resident when the motor vehicle accident or collision occurred, has been continuously outside the State for at least sixty days next preceding the day on which notice or process is left with the Commissioner, and includes any person against whom an order of publication may be issued under the provisions of § 8-71."

In consideration of the foregoing, if the serviceman described in your stated facts has been continuously outside Virginia for at least sixty days thereby qualifying as a nonresident, this would mean that any habitual offender proceeding should be brought against him in the City of Richmond. See, § 46.1-387.4 of the Code of Virginia. By way of further information, I call your attention to the Soldiers’ and Sailors’ Civil Relief Act, 50 U.S.C.A., § 521, which provides as follows:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501-548 and 560-590 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

MOTOR VEHICLES—Virginia Habitual Offender Act—Procedure followed to reach nonresident.

March 11, 1969

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This will acknowledge receipt of your letter of March 3, 1969, in which you pose two questions relative to the Virginia Habitual Offender Act. For the sake of clarity, I shall consider your questions separately and in the order set forth in your letter.

"In the event an offender has been convicted of one of the offenses enumerated in Section 46.1-387.2 (a) (1) through (9) and is subsequently
REPORT OF THE ATTORNEY GENERAL

convicted within ten years of two offenses occurring on or after June 28, 1968, enumerated in Section 46.1-387.2 (a) (1) through (9), and the last two offenses are committed within a six-hour period, are the last offenses treated as one offense or two offenses in relation to the one prior offense?"

Section 46.1-387.2, in applicable part, reads as follows:

"An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subsections (a), (b) and (c), of this section, committed within a ten-year period, provided that where more than one included offense shall be committed within a six-hour period such multiple offenses shall, on the first such occasion, be treated for the purposes of this article as one offense provided the person charged has no record of prior offenses chargeable under this article, and provided further the date of the offense most recently committed occurs on or after June twenty-eight, nineteen hundred sixty-eight and within ten years of the date of all other offenses the conviction for which is included in subsections (a), (b) or (c) as follows. . . ."

By the terms of the above quoted statute, multiple offenses committed within a six-hour period and chargeable under the Act on the first such occasion, are to be counted as one offense for purposes of qualifying as an habitual offender only if the driver has no record of a previous offense chargeable under the Act. It is clear from your statement of facts that the pre-June 28, 1968, conviction is chargeable under the Act. Because it is, the latter two convictions of multiple offenses, although committed within six hours of each other, would count as two convictions for the purposes of the Act.

"We are running into quite a few situations where former residents of Virginia falling within the provisions of the Act have removed to unknown residence addresses in other jurisdictions. The Division of Motor Vehicles in these cases is unable to supply the Commonwealth's Attorney for the City of Richmond with definite out of State addresses. "Section 8-67.2 of the Code provides that service of a notice or process should be valid without the mailing otherwise required by the Section if there is left with the Commissioner along with the notice of process, an affidavit of the plaintiff that he does not know and is unable to obtain any post office address of the defendant. "In the case of the show cause orders related to in the Virginia Habitual Offender Act, do the provisions of the last paragraph of Section 8-67.2 apply; and, if so, is the burden on the Commonwealth's Attorney for the City of Richmond to furnish the Commissioner the affidavit referred to?"

Section 46.1-387.4 provides that if the suspected habitual offender is a nonresident of Virginia, the Commonwealth's Attorney of the City of Richmond shall file an information against the accused party in the Circuit Court of the City of Richmond. As concerns service of process against the nonresident, § 46.1-387.5 provides, in pertinent part, as follows:

"A copy of the show cause order and such transcript or abstract shall be served on the person named therein in the manner prescribed by law for the service of notices. Service thereof on any nonresident of the State may be made by the Commissioner of the Division of Motor Vehicles in the same manner as in any action of proceeding arising out of a collision on the highways of this State in the manner provided in §§ 8-67.1 and 8-67.2, which are hereby made applicable mutatis mutandis to these
proceedings, and the Commonwealth shall pay a fee of five dollars to
the Commissioner for making such service and such fee shall be taxed
against the defendant as a part of the cost of such proceeding."

Inasmuch as the provisions of §§ 8-67.1 and 8-67.2 are made applicable
mutatis mutandis to habitual offender proceedings by the very language of
§ 46.1-387.5, I am of the opinion that the saving condition of the mailing require-
ment contained in § 8-67.2 is, therefore, applicable to the service of habitual
offender show cause orders cause orders on nonresidents. Accordingly, it is my view that if the
§ 8-67.2 mailing requirement is to be excused in the case of habitual offender show
cause order against nonresidents, then the Commonwealth's Attorney for the City of Richmond must file with the Division of Motor Vehicles an affidavit that he
does not know and is unable to ascertain any post office address of the defendant.

ORDINANCES—County—Regulation of trailers—Must relate to trailer camps or
trailer parks.

PURCHASING—County—Role of executive secretary.

ORDINANCES—County—Repeal—Procedure to be followed.

HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney for Westmoreland County

This is in reply to your letter of July 12, 1968, in which you present three
questions which will be answered seriatim.

"1. I am enclosing herein a copy of a trailer ordinance which has been
proposed for passage by the Board of Supervisors of Westmoreland
County. So far as I am able to determine the only authority which a
county has to regulate trailers is Section 35-64.1 of the Code of Virginia.
Could you please advise whether in your opinion the proposed ordinance
would be constitutional in accordance with this Section or whether or not
there is any other authority whereby this ordinance, as presently written,
could be adopted.

Answer. I am of the opinion that the ordinance you enclosed is not in the
proper language required by §§ 35-64.1 through 35-64.5 of the Code, since it
does not relate to trailer camps or trailer parks, and, therefore, is unenforceable.
I am aware of no other authority whereby this ordinance, as presently written,
could be adopted.

However, this is not to say that the county may not levy a tax on trailers. The
types of taxes which may be levied and the procedures to be followed are discussed
in an opinion of this office to the Honorable William R. Bland, Commonwealth's
Attorney for Powhatan County, dated December 8, 1961, a copy of which is

"2. Westmoreland County appointed in 1967 an executive secretary pursuant to Section 15.1-115 of the Code of Virginia and continues
under this form of government. However, the executive secretary has
never been officially designated by resolution or otherwise as purchasing
agent for the County. In advertising for fuel oil bids for county proper-
ties the executive secretary sent a form letter to a list of dealers which
list was thought to be comprehensive and inclusive of the existing dealers
in our area. Bids were received and opened at the June meeting and on
the basis of these bids a contract was awarded to the low bidder on
June 17, 1968. No notice of any type requesting bids was published
in any newspaper. At the July meeting of the Board of Supervisors three
local fuel oil dealers appeared and complained that they had received
no notice of the bids and it was determined that this was in fact true.
I would like your opinion as to whether or not the Board of Supervisors
could re-offer the bidding for the fuel oil contracts by publication in a local newspaper without the possibility of litigation from the prior low bidder and also if the procedure followed by the executive secretary was in accordance with the laws and statutes of the State of Virginia."

Answer. Section 15.1-115 of the Code provides for the appointment of a county executive secretary, and § 15.117(12) provides as one of his general duties that he shall act as purchasing agent for the county and that:

"... All purchases and sales shall be made under such rules and regulations as the governing body may by ordinance or resolution establish. Subject to such exception as the governing body may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the governing body may by ordinance or resolution establish. ..."

In order to determine if the bid may be relet and whether the procedure followed by the executive secretary was in accordance with the laws of Virginia, it will be necessary to know what rules and regulations on this subject have been adopted by the county.

"3. Some years ago Westmoreland County passed an ordinance pursuant to Section 4-97 of the Code of Virginia regulating the Sunday sale of beer and wine. At the July meeting it was the desire of the Board of Supervisors to repeal this ordinance and they attempted to do so by simple resolution. At that time I advised them that I did not know what action or procedure was necessary for the repeal of this ordinance. Referring to Section 15.1-504 of the Code of Virginia I find nothing mentioned concerning the repeal of this ordinance and I would appreciate your opinion as to what procedure should be followed by the Board of Supervisors and what action is necessary on their part for the repeal of this ordinance."


ORDINANCES—Local—Pool rooms—Prohibiting minors under eighteen from frequenting.

September 13, 1968

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of September 4, 1968, in which you present the questions which I quote as follows:

"In your opinion do the provisions of 18.1-349.1 of the Code of Virginia permit a town to enact an ordinance providing that minors under the age of 18 years may be permitted to frequent pool rooms within a town? Further, in the event that the pool room is an establishment licensed under the Alcoholic Beverage Control Act, may a town enact an ordinance permitting minors to play in such pool rooms?"

The law prohibiting any minor from frequenting any public poolroom operated in conjunction with any establishment licensed under the Alcoholic Beverage Con-
trol Act and prohibiting any minor under eighteen years of age from frequenting any other public poolroom is contained in § 18.1-349 of the Code of Virginia. Since its amendment, that portion of the section pertinent to your question may be stated as follows:

"But nothing in this section shall apply to any poolroom or billiard room located . . . within any county, city or town which has adopted an ordinance regulating the frequenting, playing in or loitering in public poolrooms or billiard rooms by minors."

Further, § 18.1-349.1 of the Code, enacted in 1968, authorizes the governing body of any county, city or town to regulate by ordinance the frequenting of public poolrooms by minors, in lieu of the provisions of § 18.1-349, provided that the punishment for a violation of any such ordinance shall not exceed that set out in § 18.1-349.

Under the quoted language, the State law contained in the same section shall not apply to any poolroom located within any county, city or town which has adopted a regulatory ordinance in regard to the frequenting of poolrooms by minors. This does not authorize any such political subdivision to nullify the State law without more. There must be a local regulation to replace the statute, because only in such event does this section relinquish control to the locality.

Considering the foregoing, if your first question be taken literally, my answer would be in the negative since both § 18.1-349 and § 18.1-349.1 are predicated upon the adoption of a regulatory ordinance by the locality. Assuming this question to relate to whether or not a town may adopt an ordinance which regulates the frequenting of poolrooms by minors but which adopts a lower age limit than that set by State law, my answer would be in the affirmative.

In response to your second question, in my opinion, the statutes cited herein apply to any public poolroom, whether or not it may be within an establishment licensed under the Alcoholic Beverage Control Act. This is not to be construed, however, as affecting lawful regulations of the ABC Board or other existing statutes, such as § 4-62, which makes it a misdemeanor to sell any alcoholic beverage to a minor or § 4-98.10 prohibiting a licensee for the sale of mixed beverages from employing a minor or allowing a minor to loiter in the licensed establishment.

ORDINANCES—Local—When republication required of entire ordinance.

October 29, 1968

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

This is in reply to your letter of October 25, 1968, which reads as follows:

"The Board of Supervisors of Gloucester County proposes to pass a license tax ordinance pursuant to the authority conferred by 58-266.1 of the 1950 Code of Virginia as amended. Many professions are covered. I have been informed that the tax on one particular business exceeds the amount they intended. Advertisement for this ordinance has appeared twice in our weekly newspaper.

"In light of 15.1-504 (a), (b), and (c) of the Code, is the Board permitted to make minor amendments to such ordinance after the public hearing and before adoption without publishing the entire ordinance again in the newspaper?"

Since the Board of Supervisors has not adopted the license tax ordinance described by you, the change now desired to be made therein is not in the nature of an amendment to an existing ordinance. Therefore, I am of the opinion that
the entire ordinance, including the desired change, can only be adopted in accordance with the provisions of § 15.1-504 (a), (b), and (c) of the Code which require, among other things, republication of the entire proposed ordinance.

ORDINANCES—Town Zoning—Alteration after public hearing.

November 13, 1968

HONORABLE HOWARD P. ANDERSON
Member, House of Delegates

This is in reply to your letter of October 17, 1968, in which you state that the Town of Halifax is considering a proposed zoning ordinance and has held the public hearing required by § 15.1-431 of the Code. You present the following inquiry as to the authority of the town council to make changes in the ordinance after the hearing, pursuant to § 15.1-493:

"Immediately following the public hearing, the local planning commission went into session and reached the conclusion that it desired to recommend the adoption of the zoning ordinance exactly as published except that it recommended that a small portion of one business district be removed from the business district and be made a part of the adjoining residential district. This part that it wished to place in the residential district has in the past been classified as residential, so the over-all effect of the commission's action with reference to this particular parcel will be to leave it as it originally was. The local planning commission is preparing a report making such recommendation.

"Both the planning commission and the town council have asked whether or not such an alteration can be made in the proposed zoning ordinance without having another public hearing. The language of Section 15.1-493 is not altogether free from ambiguity and obscurity, and I am not certain on this question. Therefore, I will greatly appreciate an opinion from your office of this question which involves specifically the construction of the clause 'provided, however, that no additional land may be zoned to a different classification than was contained in the published notice without an additional public hearing.'"

The pertinent portion of § 15.1-493 to which you refer reads as follows:

"Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.1-431, after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment; provided, however, that no additional land may be zoned to a different classification than was contained in the public notice without an additional public hearing after notice required by § 15.1-431. Such ordinances shall be enacted in the same manner as all other ordinances.

It is clear that the governing body may make the change which you describe, provided that to do so does not constitute zoning additional land to a different classification, within the meaning of the above quoted portion of § 15.1-493. This language has been construed by the Supreme Court of Appeals in the case of Wilhelm v. Morgan, 208 Va. 398, 400, 157 S. E. 2d 920 (1967), to refer only to land which was not included in the ordinance as originally published:

"But Code § 15.1-493, which expressly empowers the Board of Supervisors to make changes in a proposed amendment to a zoning ordinance, imposes only one qualification: that the Board shall not pass an amendment that rezones more land than that described in the original public
notice, without first giving the statutory notice of the proposal to rezone the larger tract and holding an additional public hearing. . . ."

In view of the foregoing it is my opinion that the proposed change may be approved without holding an additional public hearing.

ORDINANCES—Zoning—County may require set back line from right of way of highway.

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

October 7, 1968

This is in reply to your letter of September 30, 1968, which is set out in part as follows:

"The zoning ordinance adopted by Orange County and now in effect provides on page 8 section 9-6-5 for a set back line on the eastern side of Virginia Route #3 of 150 feet from the right of way line of the existing two lane road.

"Assuming that the ordinance was properly adopted, would you please advise me as to whether the county is authorized under the Virginia statutes to enact and enforce such a set back regulation along a public highway in a rural area."

In my opinion, the county does have the authority to require a set back line a reasonable distance from the right of way line by virtue of § 15.1-486, Code of Virginia (1950), as amended. The General Assembly of Virginia has also provided for the enforcement of such a set back regulation by the enactment of § 15.1-499 of the Code.

PARK AUTHORITIES—Authority to Acquire and Convey Land.

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

November 7, 1968

This will acknowledge receipt of your letter of October 17, 1968, which reads as follows:

"The Virginia Commission of Game and Inland Fisheries has expressed an interest in establishing a fishing lake in Essex County, if the required land can be made available. A land acquisition committee has been appointed by the Essex County Board of Supervisors, and through the efforts of this commission, options on a number of tracts of land have been acquired. The owners of several of the properties which would of necessity be included in the lake project have refused to sign options, however.

"In anticipation of this, the Essex County Board of Supervisors, acting pursuant to § 15.1-1228 of the Code, established the Essex County Park Authority. As you know, the Authority has the power of eminent domain, and we plan to institute condemnation proceedings to acquire the balance of the land needed for the lake project.

"Once the land has been acquired by the Essex County Park Authority, it may become necessary to convey the property to the Virginia Commission of Game and Inland Fisheries which will finance the project, possibly in conjunction with the Virginia Outdoor Recreation Commission."
"My question is this: do you consider that there would be any impropriety in a conveyance by the Essex County Park Authority of land acquired by the Authority through eminent domain proceedings to the Virginia Commission of Game and Inland Fisheries. The Park Authority will, once the lake site has been established, operate certain recreation areas around the lake and the overall objective which we are seeking to accomplish is a fishing lake and recreation area in Essex County."

Section 15.1-1232(f) of the Code of Virginia (1950), as amended, authorizes a park authority "... to sell, lease as lessor, transfer or dispose of any property or interest therein acquired by it, at any time."

Section 29-11 of the Code authorizes the Virginia Commission of Game and Inland Fisheries "... to acquire by purchase, lease, exchange, gift or otherwise, such lands and waters anywhere in this State as it may deem expedient and proper, ..."

It is therefore evident, from the above statutes, that any land acquired by the Essex County Park Authority may be conveyed to the Virginia Commission of Game and Inland Fisheries, which has the power to accept the same. Any question as to propriety would be covered by an opinion previously rendered by this office on January 28, 1966, to the Honorable Edward E. Lane, Member of the House of Delegates, found in the Report of the Attorney General (1965-1966) on page 70, a copy of which is herewith enclosed.

PLANNING COMMISSION—Members—Payment of travel expenses in connection with official duties—Does not involve conflict of interest under § 15.1-67.


HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney for Nansemond County

This is in reply to your letter of August 1, 1968, in which you inquire whether the payment of travel expenses to a member of the planning commission is sufficient to make him a paid officer subject to the conflict of interest provisions of § 15.1-67 of the Code.

The payment of actual travel expenses of persons travelling on county business is authorized by § 14.1-7 of the Code. It is my opinion that § 15.1-67 refers only to officers who receive payment for their services, and not to payments made pursuant to § 14.1-7. In this connection, I enclose a copy of a previous opinion, Report of the Attorney General (1964-1965) p. 32, in which this distinction was recognized.

POLICE OFFICERS—Town Police Officers—Not subjected to greater civil liability when rendering assistance outside of town.

SHERIFFS AND SERGEANTS—Town Police Officers—May assist in law enforcement outside town.

HONORABLE T. J. CUNDIFF
Sheriff of Bedford County

This is in response to your recent letter, which reads in part as follows:

"Recently while trying to apprehend an individual operating a motor vehicle in a reckless manner, a Bedford County Deputy Sheriff became involved in a high-speed automobile chase."
"The chase took place on Route 122 some miles south of the Town of Bedford with the subject vehicles traveling north toward the Town. The Deputy Sheriff radioed the Police Department of the Town of Bedford, Virginia, and requested assistance. Town Officers responded immediately and set up a road block on a long straight stretch of Route 122, some several miles outside the corporate limits and there apprehended the offender.

"I would very much appreciate your advice concerning the foregoing situation. Does Section 18.1-301 of the Code of Virginia of 1950, as amended, give the Bedford County Deputy Sheriff authority to request the assistance of a police officer of the Town of Bedford outside of what would be the normal limits of jurisdiction for a town officer?

"In the event the town officer renders such assistance outside the limits of his jurisdiction, is he subjecting himself to potential civil liability?"

I shall answer your question seriatim.

The Supreme Court of Appeals of Virginia in Randolph v. Commonwealth, 145 Va. 883, 134 S.E. 544, 47 A.L.R. 1084, recognized the right of a law enforcement officer to call upon others to assist him in making an arrest. Cf. § 18.1-301, Code of Virginia (1950) as amended. When a person is called upon by a law enforcement officer to assist in making an arrest, he is justified in doing whatever the officer himself might lawfully do. Byrd v. Commonwealth, 158 Va. 897, 164 S.E. 400. In Bowman v. Commonwealth, 201 Va. 656, 112 S.E. 2d 887, a state trooper arrived at the scene of an accident as Bowman was being placed in an ambulance. Shortly thereafter, having observed the odor of alcohol about Bowman, the trooper investigating the accident found an empty Vodka bottle in the wrecked automobile. By means of his radio, he requested that a town police officer of the Town of Wytheville go to the hospital and inform Bowman that he was to be charged with driving under the influence of intoxicants and of his right to submit to a blood test. The Supreme Court of Appeals held that the town police officer who advised Bowman of his rights was an arresting officer, citing Byrd v. Commonwealth, supra.

In view of the foregoing authorities, I am of opinion that under the factual situation set forth in your letter, the Town Officers were authorized upon receipt of a call for assistance from the Deputy Sheriff of Bedford County to set up the roadblock outside the corporate limits of the town and take the offender into custody.

With regard to your second question, I am of opinion that the Town Officers in rendering such assistance would be subjecting themselves to no greater potential civil liability than that to which they would be subject in making any other lawful arrest.

PRISONERS—Handling of Suits and Actions While Incarcerated—By committee where appointed.

HONORABLE EDWIN H. HOY, Clerk
Circuit Court of Charlotte County

I am in receipt of your recent letter which reads in part as follows:

"I have received from the inmate of Virginia State Penitentiary a notice of motion for judgment for $500.00 which he claims is due him by the defendants for work performed while he was on parole. He did not enclose a pauper's affidavit, but only the notice of motion and copies of same to be served.

"I am writing to ask whether or not I should collect the writ tax and Clerk's fees on this notice of motion just as if the plaintiff was not incarcerated."
Section 53-307 of the Code of Virginia (1950), as amended, reads in part as follows:

"... No action or suit on any such claim or demand shall be instituted by or against such convict after judgment of conviction, and while he is incarcerated. All actions or suits to which he is a party at the time of his conviction shall be prosecuted or defended, as the case may be, by such committee after ten days' notice of the pendency thereof, which notice shall be given by the clerk of the court in which the same are pending."

Inasmuch as a committee has not been appointed in this case, it is my opinion that the answer to your question is in the negative. The papers should be returned to the inmate, and he should be informed as to the status of the suit.

PRISONERS—Per Diem Costs to Incarcerate—Town may not charge county as part of costs in criminal proceedings. September 23, 1968

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

This will acknowledge receipt of your letter of September 5, 1968, in which you point out that prisoners convicted in the Town of Strasburg are incarcerated in the Shenandoah County Jail. You ask the following question:

"Can the Town of Strasburg, an incorporated town, within the boundaries of Shenandoah County, Virginia, charge as a part of the costs in a criminal proceeding the per diem expenditures for the prisoner expended by the town to the county for the board of the prisoner?"

The Sheriff of Shenandoah County should collect from the Town of Strasburg the reasonable costs of detaining Town prisoners, in conformity with the provisions of § 53-182 of the Code of Virginia (1950).

I find no provision of law which provides that the cost of incarceration may be taxed against a prisoner. In the absence of any specific statutory authorization, I am of the opinion that the Town of Strasburg may not charge as part of the costs in the criminal proceedings the amount the Town must pay the County of Shenandoah to incarcerate the prisoner.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Commercial Driver Training Schools—"Instructor" construed. March 6, 1969

MR. TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in reply to your letter of February 25, 1969, which I quote as follows:

"The Board for Commercial Driver Training Schools has requested that I obtain from you an opinion in the following matter.

"Section 54-145.11 defines a 'commercial driver training school' and states in part that the words mean 'a business enterprise conducted by an individual, association, partnership, or corporation, for the education and training of persons . . . to operate or drive motor vehicles. . . .' Subparagraph (b) of this Section defines 'instructor' as being 'any person . . . acting for such school for compensation. . . .' Section 54-145.13 further states that no school shall operate without a license. The fee for such license is set forth in § 54-145.15.

"In processing questionnaires gleaned by the Board from the schools,
it was noted that one school advised that it had a certain number of instructors, approximately eleven. It was also noted in reviewing these questionnaires that the aforementioned instructors received no compensation from the licensed school, rather they are allowed by the school to use the school name and cars owned by the school. Each individual instructor charges a fixed fee, remits a predetermined portion to the school and retains a fixed amount. The actual bookkeeping may be handled centrally by the school. The key point, however, is that as to the individual '_instructor,' no social security or tax is withheld from the instructor's compensation.

"If the facts are as stated, are the so-called 'instructors' actually independent contractors rather than instructors as defined by the Code. If such instructors are independent contractors, are they required to obtain a separate and distinct license from that issued to the parent school as required under § 54-145.13 of the Code."

In defining the word "Instructor" under the general provisions of Article 1, Chapter 7.1, Title 54 of the Code of Virginia, § 54-145.11, paragraph (b), is as follows:

"'Instructor' means any person, whether acting for himself as operator of a commercial driver training school or for such school for compensation, who teaches, conducts classes of, gives demonstrations to, or supervises practice of, persons learning to operate or drive a motor vehicle."

In my interpretation, a person may act for any such driver training school for compensation without being on a straight salary. In the situation under consideration the instructor's compensation is comprised of that portion of the fee which he retains. This is arrived at by predetermined agreement with the school. The operation is conducted under the school name, through the use of school equipment and apparently the books are maintained centrally by the school. In my opinion such person qualifies as an "Instructor" acting for the school for compensation under the quoted section and your first question, therefore, is answered in the negative. Having so answered, no further consideration need be given your remaining question since it is based on an affirmative answer to the first.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Hairdressers—License required—School which may be attended for training—Separation of beauty school and beauty salon.

Mr. Fredric Schwenk, Chairman
Virginia State Board of Registered Professional Hairdressers
January 10, 1969

This is in reply to your letter of recent date which I quote as follows:

"Your opinion is requested as to whether or not under §§ 54-112.26 and 54-112.27 it shall be unlawful for any person, firm or corporation to operate any place or establishment which renders as part of its service to the general public cosmetic treatments of any kind or nature, cutting, curling, treating or dressing human hair for compensation, unless such place or establishment has a current license issued by the Board.

"Your interpretation is also requested of subsection (5) of § 54-112.12 of the Code, specifically with reference to paragraphs A and B. You will note that those persons desiring to be examined have two avenues by which to qualify to sit for the examination (A and B) so far as formal education is concerned. The Board desires to know if the regulations of the Board apply to persons in paragraph A who seek to be an approved school such as schools under paragraph B."
Your opinion is also requested relative to an interpretation of 3(e) of Section C of the enclosed copy of the Board's Rules and Regulations. You will note in reviewing this Section of the Rules that each school is required to be identified as either a school of cosmetology, beauty school, beauty academy, beauty center or any designation whereby the public may be able to distinguish it from a beauty salon. Is it contrary to the foregoing for a beauty school and beauty salon to be housed in the same building with a common entrance and to be identified in the following manner: 'XYZ Beauty School and Salon,' which is painted on the door in lettering which meets the requirements of the second paragraph of this Section. On the inside of the building the school is identified by the following lettering on the door leading to the school, 'Beauty School.'

Your opinion is also requested relative to an interpretation of 3(i) of Section C of the enclosed Rules and Regulations. You will note this subsection reads as follows:

"On or after January 1, 1965, every approved school shall operate independently from a beauty salon. Each school shall be located in quarters which shall be separate and apart from any beauty salon and shall be under separate management."

"Does the foregoing, in your opinion, prohibit a school and salon from having a common entrance, common reception area, common toilet facilities, common telephone, etc. Shall the school and salon, if located in the same building, be physically separated by a ceiling-high wall, or may they be separated by a barrier; i.e., waist-high partition, which can be deemed by the public to be a barrier separating the salon from the school."

First, you request my opinion as to whether or not under §§ 54-112.26 and 54-112.27 of the Code of Virginia it shall be unlawful for any person, firm or corporation to operate any place or establishment which renders the named services to the general public, unless such place or establishment has a current license issued by the Board. The language used in your question is taken from § 54-112.27, verbatim, which clearly states that such operation without a current license issued by the Board shall be unlawful. In my opinion, however, these statutes do not apply to public tax-supported schools which are teaching cosmetology even though a fee may be charged in connection with a service rendered.

In regard to your request for interpretation of subsection (5) of § 54-112.12 of the Code, with specific reference to paragraphs A and B, paragraph A has reference to a tax-supported school while paragraph B refers to "a school approved by the Board," which is shown by § 54-112.4 of the Code to mean the "Virginia State Board of Registered Professional Hairdressers." In my interpretation, paragraph B requiring that the school be approved by the Board, has reference to schools other than tax-supported schools, whereas, no such approval is authorized for a tax-supported school under paragraph A.

Next, you request interpretation of subsection 3.e., Section C of the Virginia State Board of Registered Professional Hairdressers' Rules and Regulations, in relation to the identification "XYZ Beauty School and Salon" posted at the common entrance to a building, with the lettering "Beauty School" on the door within the building identifying the Beauty School, all other requirements as to lettering being in accordance with the regulations of the Board. The named section of the Rules and Regulations prescribe that each approved school be identified as a Beauty School so that the public may be able to distinguish it from a beauty salon. It is not unusual for a number of establishments to be located within a building with a common entrance. In my opinion, a listing such as that given on the exterior of the building in the instant case does not violate the intent of the enumerated rule of the Board, since the actual entrance to the beauty school
within the building is properly identified to distinguish it from the beauty salon also located within the same building.

In regard to the factual situation outlined in connection with your last question, it is my understanding that you further stated, during your recent visit to this office, that the beauty salon and the beauty school in question are located adjacent to each other in the same building but are under separate management. It is further understood that by the term "common entrance" you have reference to the building entrance rather than actual entrance to the school and salon, which have separate entrances within the building. While each factual situation must be considered individually, I am not inclined to believe the given facts show a violation of Section C, 3.i., of the Board's Rules and Regulations. I am not of the opinion that the separating wall must be of ceiling height in each instance.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Polygraph Examiners—Licenses—Examiners in employment of State Police Exempt.

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

December 23, 1968

This is in reply to your letter of December 9, 1968, in which you inquire as follows:

"Section 54-729.03 of the Code exempts polygraph examiners in the full-time employ of any State or local police or sheriff's office of a political subdivision of the State from paying the license fee required in this Section.

"Section 54-729.018 exempts polygraph examiners in the full-time employ of the Department of State Police from the entire provisions of Chapter 17.01 of Title 54 of the Code of Virginia.

"This Department has received approximately eight applications from polygraph examiners in the full-time employ of the Department of State Police requesting a license to act as polygraph examiner. These applications were not accompanied by a fee of $50.00. The question is that inasmuch as § 54-729.018 exempts this group from the provisions of Chapter 17.01 of Title 54, is it mandatory for this Department to honor these applications as there is an expense to the State, although small, connected with the issuance of the certificates and licenses involved.

"Do the full-time employees of the Department of State Police who are polygraph examiners come within the purview of § 54-729.03 in the same manner as the full-time employees of the local police departments or sheriff's offices of a political subdivision of the State?"

Chapter 17.01 of Title 54, to which you refer, imposes licensing requirements for polygraph examiners. Section 54-729.03 provides that, "Each application for an examiner's license shall be accompanied by a fee of fifty dollars, which is nonrefundable, provided, however, no such fee shall be charged to any examiner in the full-time employ of any State or local police department or sheriff's office ..." Full time examiners employed by the Department of State Police as well as those employed by local enforcement agencies are thereby exempt from payment of the required fee for the license imposed by this chapter.

In addition, § 54-729.18 exempts examiners in the employ of the Department of State Police from the provisions of this entire chapter, and they are therefore not required to be licensed pursuant to this chapter.

Although employees of the Department of State Police are not required to obtain licenses, there is no provision which prevents them from doing so, and in such event they would not be required to pay the specified fee. However, I direct your attention to § 54-729.04 which imposes an annual fee for renewal of a
license obtained pursuant to this chapter. There is no provision which exempts any licensee from payment of this renewal fee.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Authority—May determine whether licensee guilty of violation of acts enumerated in § 54-762 (1) through (14) and suspend or revoke license.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Authority—Authorized to determine the validity and interpret the provisions of contract for sale of real property.

April 15, 1969

Honorable Turner N. Burton, Director
Department of Professional and Occupational Registration

This is in reply to your letter of April 9, 1969, from which I quote the following:

"The Virginia Real Estate Commission receives numerous complaints from the public accusing its licensees of failing within a reasonable time to account for or to remit any monies coming into their possession which belongs to others. The bases of these complaints are:

"A person will enter into a contract to purchase real property and deposit with the real estate broker a certain amount of money to show good faith. The contract is signed by the seller. For one reason or another, the prospective purchaser changes his mind and does not consummate the contract entered into. The prospective purchaser immediately demands the return of his deposit. The licensed real estate broker refuses to return the earnest money deposited by the purchaser. The purchaser files a complaint with the Real Estate Commission accusing the broker of withholding monies coming into his possession which rightfully belongs to the purchaser.

"The foregoing action on the behalf of the purchaser places the Real Estate Commission in the following positions:

"(a) determining whether or not a valid contract of sale exists;

"(b) determining whether or not the broker is withholding beyond a reasonable time monies coming into his possession belonging to others.

"Many other complaints received by the Commission are of the following nature. A broker will negotiate a lease for his principal renting real estate. In negotiating the lease for real property, the broker will require a security deposit from the tenant. At the termination of the lease, the tenant will vacate the property and demand the return of the security deposit from the broker. The broker, in many instances, will refuse to return the security deposit claiming that the tenant failed to leave the premises in as good condition as when rented, allowing for normal wear and tear. The tenant, after receiving the letter from the broker refusing to refund his security deposit, files a complaint with the Real Estate Commission accusing the broker of failing within a reasonable time to remit monies coming into his possession which rightfully belongs to the tenant.

"The foregoing type of complaints places the Commission in the position of interpreting the terms of a legal contract and, secondly, places the Commission in the position of determining whether or not the broker has failed to remit monies coming into his possession which rightfully belongs to others.

"Section 54-762 provides that the Real Estate Commission has the
authority to suspend or revoke any license under Chapter 18 of Title 54, at any time when the licensee in performing or attempting to perform any of the acts mentioned in this Chapter is deemed guilty of: . . .

“(7) Failing, within a reasonable time, to account for or to remit any monies coming into his possession which belong to others; . . .

“The Virginia Real Estate Commission requests that you advise if it has the authority in accordance with the provisions of Chapter 18 of Title 54

“1. To determine the validity of a contract of sale of real property and to interpret the provisions of said contract.

“2. Whether or not it may determine if earnest money deposited with the broker to bind a contract should be disbursed to either the buyer or seller without a court of proper jurisdiction first determining whether or not a valid contract exists or which party to the contract violated the provisions thereof.”

The Virginia Real Estate Commission, pursuant to § 54-762 of the Code of Virginia, shall, upon the verified complaint in writing of any person, provided such complaint together with evidence, documentary or otherwise, presented therewith, makes out a prima facie case, investigate the actions of any real estate broker or real estate salesman. The Commission shall have the power to suspend or revoke any license issued under the provisions of Chapter 18, Title 54 of the Code when the licensee, in performing or attempting to perform any of the acts mentioned therein, is deemed to be guilty of any of the fourteen acts enumerated (1) through (14) in § 54-762, one of which is:

“(7) Failing, within a reasonable time, to account for or to remit any monies coming into his possession which belongs to others.”

The language of this section makes it mandatory that the Commission make an investigation when the complainant makes out a prima facie case. If, after any such investigation and a hearing as required by § 54-763, the licensee is deemed to be guilty, the Commission has the power to suspend or revoke any license issued under this chapter. Clearly, the words “deemed to be guilty” have reference to a finding by the Commission after a hearing is conducted by it. It would be an idle gesture to impose upon the Commission the duty to investigate the actions of a licensee and the power to suspend or revoke his license without the authority to make the necessary determinations incident thereto.

It is obvious that this section does not contemplate the necessity of a prior court decision or a conviction before the Commission takes action. Otherwise, the statute would use some such language as found in paragraph (15) thereof, which authorizes the Commission to take action against a licensee “having been convicted” under the stated conditions. Both of your questions, therefore, are answered in the affirmative.

PUBLIC OFFICERS—Compatibility—ABC Board employee not a public officer—May serve as member of city school board.

SCHOOLS—School Boards—Employee of ABC Board may serve as member.

HONORABLE MOODY E. STALLINGS
Commonwealth’s Attorney of the City of Suffolk

July 22, 1968

This is in answer to your letter of July 16, 1968, in which you present the following inquiry:

“I would like to know if in your opinion there is any conflict of interest because an employee of the Virginia Alcoholic Beverage Control Board is a member of the school board.”
As you know, § 22-92, Code of Virginia (1950), as amended, prohibits certain officers from serving on a city school board. This section provides:

"No State officer, except a notary public, no city officer, no member of council, or any officer thereof, shall during his term of office be chosen or allowed to act as a school trustee; but this provision shall not have the effect of prohibiting a referee in chancery or commissioner in bankruptcy, or member of the board of health, from holding such office."

In construing a similar statute this office ruled that a clerk in an Alcoholic Beverage Control Store is an employee and not an officer, thereby permitting him to serve as a member of The Board of Supervisors. See an opinion to the Honorable T. Moore Butler, Commonwealth's Attorney for Alleghany County, on August 1, 1951, Report of the Attorney General (1951-1952), p. 35, copy of which is enclosed.

In view of this earlier ruling, it is my opinion that an employee of the Alcoholic Beverage Control Board may serve as a member of a city school board.

PUBLIC OFFICERS—Compatibility—Employee of company contracting with city may serve as member of Planning Commission. November 22, 1968

HONORABLE LLOYD C. BIRD
Member, Virginia State Senate

This is in reply to your letter of November 15, 1968, in which you inquire whether the service of Mr. Russell Garrison on the Planning Commission of Colonial Heights involves a conflict of interest. You present the following information pertinent to your inquiry:

"Mr. Garrison is employed solely by Burton P. Short & Son, Inc., a distinct and separate corporation from that of Short Paving Co., Inc. Short Paving Co., Inc., is engaged solely in the asphalt paving business, and, in recent years, because of its proximity to the Petersburg area, has participated in much of the asphalt paving business in the surrounding counties and cities, which include the Cities of Colonial Heights, Petersburg, Hopewell, Franklin, the State Highway Department, and others. In Colonial Heights, for example, annual bids are obtained on a per-ton basis as ordered by the city from time to time during the year. No solicitation of this business is made, nor are any commissions paid to any salesman, factors or employees of Short Paving Co., Inc., including Mr. Garrison, who has no connection with the company or its contracts. Mr. Garrison receives no compensation, either directly or indirectly, from Short Paving Co., Inc., as a result of any contract of the company, nor does he own any interest in the company.

"Mr. Garrison is a regular salaried employee of Burton P. Short & Son, Inc., and receives no commissions or bonus based upon any contract entered into by the company, nor does he have any interest in the company. It has been the custom of the employees of Burton P. Short & Son, Inc., to receive a Christmas bonus according to the proficiency of each employee in his particular job, as determined by the president of the company. This Christmas bonus has no relation to the profits or contracts of the company. Merit Christmas bonuses are the custom of the trade in the construction business and are awarded solely for professional efficiency.

"Burton P. Short & Son, Inc., has not entered into any bid contracts with the City of Colonial Heights for several years, although from time to time it leases equipment and equipment operators to the City, at the City's request. Burton P. Short & Son, Inc., does no paving work for the City of Colonial Heights.
"Based upon the foregoing state of facts, Mr. Garrison would appreciate knowing if there is any valid objection to serving on the City Planning Commission under Section 15.1-73 of the Code of Virginia, and/or Section 20.6 of the Colonial Heights Charter of 1960."

Section 15.1-73, the applicable conflict of interest provision of the Code, provides in effect that no city officer shall be interested, "directly or indirectly," in the proceeds of any contract with the city. Since the individual to whom you refer is not employed by the Short Paving Company, and receives no compensation from the company, it cannot be said that he is interested within the meaning of the statute in the proceeds of contracts made by that company.

It does appear that Mr. Garrison's employer, Burton P. Short & Son, Inc., occasionally contracts with the city for equipment rentals. However, this office has previously ruled that where an officer is employed by a company contracting with the political subdivision for which he serves, there is no conflict of interest as long as the official is a salaried employee who receives no commission, bonus or other benefit from the contracts. See, Report of the Attorney General (1966-1967) p. 226; (1963-1964) p. 241; (1962-1963) p. 219. Based upon the above statement of facts, the bonus received by Mr. Garrison does not depend on the profits of the company, nor is it related to the proceeds of contracts with the city. I am therefore of the opinion that no conflict of interest arises from Mr. Garrison's service as a member of the planning commission.

I am enclosing a copy of a previous opinion of this office which appears to refer to the same individual. Both that opinion and this are based on the particular statement of facts which accompanied each request.

PUBLIC OFFICERS—Compatibility—Justice of peace may not hold office as deputy treasurer.

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

This is in reply to your letter of September 4, 1968, in which you inquire whether a justice of the peace may also serve as deputy treasurer.

Section 15.1-50 of the Code prohibits certain officers, including a treasurer, from holding any other office. This office has previously ruled that the statute extends to the deputies of the officers named therein, Report of the Attorney General (1950-1951) p. 262. I am, therefore, of the opinion that a justice of the peace is precluded from serving as a deputy treasurer. This view is consistent with that expressed in Report of the Attorney General (1963-1964) p. 242, in which it was ruled that a justice of the peace could not serve as a deputy clerk of the circuit court.

PUBLIC OFFICERS—Compatibility—Justice of peace may serve as surplus food distribution clerk.

JUSTICE OF PEACE—Compatibility of Office—May serve as food distribution clerk for the county.

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

I am in receipt of your letter of June 24, 1968, in which you state:

"Information is requested as to whether or not a justice of the peace in Virginia may also be employed by the County Local Welfare Board and serve as Surplus Food Distribution Clerk for such Board."
I am unable to find any provision of Virginia Law which prohibits a justice of the peace from serving as an employee of the county in the capacity of a Surplus Food Distribution Clerk.

We have previously ruled that a justice of the peace may be employed as a city fireman (Report of the Attorney General (1963-1964), p. 245); that a county justice of the peace may be employed as a city policeman (Report of the Attorney General (1965-1966), p. 158); and that a justice of the peace may be employed as treasurer of an incorporated town (Report of the Attorney General (1966-1967), p. 166).

In my opinion the duties of a food distribution clerk for the county are not incompatible with those of a justice of the peace and he may serve in both capacities.

PUBLIC OFFICERS—Compatibility—Member of board of supervisors may not act as a subcontractor on contracts entered into by the school board or board of supervisors.

Honorable Raymond R. Robrecht
Commonwealth's Attorney for Roanoke County

March 31, 1969

This is in reply to your letter of March 18, 1969, in which you present the following questions:

"Under Section 15.1-67 of the Code of Virginia, as amended, may a consulting engineering firm (one of whose members is a member of the County Board of Supervisors) contract with an architectural firm for the purpose of providing professional engineering services in connection with the design of a public building project for which the architectural firm has previously contracted with the said Board of Supervisors?"

"Secondly, may the same consulting engineering firm contract with an architectural firm to provide professional engineering services in connection with the design of a public building project for which the architectural firm has previously contracted with the Roanoke County School Board?"

Both of your questions should be answered in the negative. In this regard, I refer you to § 15.1-67 of the Virginia Code, the conflict of interest statute applicable to counties, which states in pertinent part as follows:

"No supervisor including the chairman of a board of supervisors, 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 thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

As indicated in the quoted portion of the above statute, a member of a board of supervisors is prohibited from being interested in contracts made by the board of supervisors or the school board. In a previous opinion, which is reported in Report of the Attorney General (1953-1954) p. 185, this office has ruled that
a subcontract is a contract within the meaning of the above statute (then § 15-504).

In view of the foregoing, it is my opinion that a member of the board of supervisors may not act as a subcontractor on contractors entered by the school board or the board of supervisors.

PUBLIC OFFICERS—Compatibility—Member of board of zoning appeals may not serve as member of local electoral board.  

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

This is in answer to your letter of July 8, 1968, in which you state:

"Please give me your opinion as to whether a person can hold the office as a member of the Electoral Board and at the same time be a member of the Board of Zoning Appeals."

This office has previously ruled that members of local electoral boards are officials of the political subdivisions in which they serve. See, Reports of the Attorney General (1958-1959) p. 236; (1957-1958) p. 111; see also, Reports of the Attorney General (1948-1949) p. 202; (1943-1944) p. 139. Copies of these opinions are enclosed.

Section 15.1-494, Code of Virginia (1950), as amended, concerning members of the Board of Zoning Appeals, provides in part:

"* * * Members of the board [Board of Zoning Appeals] shall hold no other public office in the county or municipality except that one may be a member of the local planning or zoning commission. * * *

A member of the Board of Zoning Appeals is, therefore, prohibited from serving at the same time as a member of a Local Electoral Board.

PUBLIC OFFICERS—Compatibility—Member of city council may not have interest in contracts of husband with city.  

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This is in reply to your letter of October 4, 1968, in which you inquire whether there is a prohibited conflict of interest in the following situation:

"For several years the City and the School Board have, from time to time, purchased office supplies and equipment from Williams Business Machines, a local company, owned and operated by Mr. W. W. Williams, as sole proprietor.

"One of the members of the new City Council who took office on the first day of September of this year is the wife of the owner of the above company. She has no financial interest in the company owned by her husband, she is not an officer of the company, she owns no stock in the company, and she receives no compensation from the company."

Section 15.1-73 of the Code, to which you refer, prohibits city officers from being interested directly or indirectly in contracts made with the city. It is my opinion that a councilman would of necessity be interested in a contract made with the city by his spouse and that such an interest would be prohibited by § 15.1-73. See, Report of the Attorney General (1939-1940) p. 161. I am enclosing
a copy of a recent opinion of this office to Mr. Warren K. Newcomb, a member of the Pulaski County Board of Supervisors, dated August 31, 1967, in which a similar ruling was made. See also, 63 C.J.S. Municipal Corporations § 991.

PUBLIC OFFICERS—Compatibility—Member of city council not to take orders for supplies for company contracting with city.

November 22, 1968

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This is in reply to your letter of October 30, 1968, in which you request an opinion based on the following inquiry:

"I am writing you in connection with the request of our City Manager, Mr. Paul H. Bock, to be advised by the Attorney General of his opinion as to whether or not the City of Colonial Heights, in view of the prohibitive provisions of Section 15.1-73 of the Code of Virginia, 1950, and Section 20.6 of the Colonial Heights Charter of 1960, may contract for supplies and maintenance of equipment with the hereinafter mentioned company who employs a member of City Council.

"The Honorable J. C. Kollman, Jr., is a member of our city council and is employed by Burroughs Corporation as a service repairman and field engineer. While Mr. Kollman is not an officer or director of the company he does own stock in the Burroughs Corporation. Mr. Kollman personally does service work on Burroughs Corporation equipment owned by the City which are under maintenance contract with said company and on occasions takes and receives orders for supplies. Mr. Kollman's compensation is from salary only."

In this regard, I am enclosing a copy of a previous opinion of this office, Report of the Attorney General (1966-1967), p. 226, in which it was ruled that a salaried employee of a company contracting with the city could serve on the City Council of Colonial Heights. Since Mr. Kollman does not receive any commission or other benefits from the proceeds of the contract between the company and the city, this opinion is applicable to the situation you present. The fact that the individual in questions owns stock in the Burroughs Corporation does not alter this conclusion, since—in view of the identity of the company—his stock interest is in all probability de minimus. See, Report of the Attorney General (1950-1951), p. 244.

As you will note, however, the enclosed ruling was predicated upon a previous opinion of this office, in which it was stated, Report of the Attorney General (1963-1964), p. 241:

"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." (Italics supplied.)

In light of the above-quoted language, I am of the opinion that the councilman in question should refrain from acting as an agent for the company in the taking of orders for supplies.
PUBLIC OFFICERS—Compatibility—Nonsalaried city officers—May not contract with city unless city charter provides to the contrary.

HONORABLE VON L. PIERSALL, JR.
Commonwealth's Attorney for the City of Portsmouth

This is in reply to your letter of July 29, 1968, in which you inquire whether § 15.1-73 of the Code, relating to conflict of interest, applies to city officers who receive no compensation for their services.

I am enclosing a copy of an opinion in which it was ruled that a nonsalaried member of a city board would not be exempt from the prohibitions of § 15-508 (presently § 15.1-73) and could not contract with the city. See, Report of the Attorney General (1957-1958) p. 244.

Section 15.1-73 of the Virginia Code expressly states that "No member of the council, board of aldermen or member of the school board, or any other officer..." shall contract with the city. The subsequent reference to "any other paid officer" follows a list of specifically denominated paid officers, and should not be interpreted as qualifying the above quoted language or as making the section applicable only to paid officers.

Previous opinions of this office exempting nonsalaried city officers have done so in instances where the applicable city charter contained a specific exemption to that effect. See, Reports of the Attorney General (1961-1962) p. 16; (1966-1967) p. 225. However, absent such a provision in the charter of the city of Portsmouth, § 15.1-73 would be applicable to nonsalaried city officers.

PUBLIC OFFICERS—Compatibility—Parole officer may not serve as member of school trustee electoral board.

PARDON, PROBATION AND PAROLE—Probation and Parole Officer—May not serve as member of school trustee electoral board.

SCHOOLS—Trustee Electoral Board—Members may not serve as probation and parole officers.

HONORABLE R. WILLARD PHILLIPS
Parole & Probation Officer, District 4

This is in reply to your letter of August 5, 1968, in which you inquire whether a probation and parole officer may also serve as a member of the school trustee electoral board.

In this regard, I call your attention to § 22-60 of the Code of Virginia, which states that members of the school trustee electoral board may not hold any other county or State office and that "no person employed by, or paid from, public funds in whole or in part shall be eligible to serve on such trustee electoral board." Sections 53-243 through 53-250 prescribe the tenure, method of appointment, duties and compensation from State funds, of probation and parole officers.

In view of the foregoing, it is my opinion that § 22-60 precludes a probation and parole officer from serving on a school trustee electoral board, both by virtue of the fact that he holds office within the meaning of the statute, and because he is compensated from public funds.
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PUBLIC OFFICERS—Compatibility—Trustee of regional library may contract with city.

PUBLIC OFFICERS—Compatibility—School board member's wife teaching in public school—Depends on her status at time member is appointed.

SCHOOLS—Board Member's Wife Teaching in Public School—Depends on her status at time member is appointed.

PUBLIC OFFICERS—Compatibility—Member of board of zoning appeals should not serve on city's community action group committee.

July 30, 1968

HONORABLE RICHARD C. GRIZZARD
Commonwealth's Attorney for Southampton County

This is in reply to your July 15, 1968, letter in which you ask several questions dealing with conflict of interest. These questions will be stated and answered seriatim.

(1) "... the City Council of the City of Franklin, Virginia desires to know if section 15.1-73, or any other section of the Code, would preclude and prohibit the insurance agent who writes the City of Franklin's insurance, from being appointed as a member of the Walter Cecil Rawls Library Board. This is a regional library, made up of several counties and the City of Franklin, and the agent would be one of two representatives appointed by the City to the Board of Trustees administering this library. He doubtless would not insure any of the library property, the same being located in Southampton County. However, upon dissolution of the library, if the same ever took place, each of the governmental entities making up the library might be entitled to receive some of the assets in liquidation."

I assume the library board to which you refer is established under the provisions of § 42-9, Code of Virginia (1950), as amended. This section provides for the appointment of the board members by the Circuit Court(s) serving such region, refers to service on this board as an office, and establishes that member will serve for a term of years. The statute goes on to provide that these members may be removed for misconduct or neglect of duty. In view of the foregoing, it is my opinion that the trustees of regional library boards established under the provisions of § 42-9 are public officers of the area served by the regional library.

The conflict of interest statute applicable to cities and towns is § 15.1-73. It prohibits town and city officers from contracting with either the city or town in which he serves as an officer. Section 15.1-67 similarly is a bar to a county officer contracting with the county he serves.

Trustees of public trusts or funds are prohibited under § 18.1-411 from contracting with such fund. This office has previously ruled with respect to the latter in a September 12, 1945, opinion to the Honorable John Warren Cooke, Member of the House of Delegates, which may be found in the Report of the Attorney General (1945-1946), p. 113. I have been unable to find any provision of the law which prohibits a regional officer from contracting with a city located within the region he serves.

(2) "... , the City Council desires to know whether it can appoint as a member to the City School Board a man whose wife is currently employed as a teacher by the School Board. It would appear to the Council that Section 22-206 would permit this appointment. . . ."

In answer to this question I have enclosed copies of two opinions rendered by this office which consider your question and discuss it at length. The first of these opinions was to Dr. Davis Y. Paschall, Superintendent of Public Instruction, on July 8, 1957, and may be found in the Report of the Attorney General (1957-
The second opinion, in which this question is discussed in the last full paragraph, was to the Honorable Reginald H. Pettus, Commissioner of Accounts of Charlotte County on March 18, 1966, and it may be found in the Report of the Attorney General (1965-1966), p. 44. In view of these opinions the answer to your question depends upon whether she is a regular employee at the time her husband is appointed.

(3) "...do the conflict of interests or other provisions of our State Code prohibit members of the City Planning Commission and the City Redevelopment and Housing Authority from serving on the Citizens Advisory Committee of the City, which committee is required under the City Workable Program for the Redevelopment and Housing Authority."

I believe this question presents a problem of incompatibility rather than a conflict of interests in that no contractual relationship is anticipated. I cannot determine from your letter, the Virginia Code or your city charter, the function or status of members of your Citizens Advisory Committee and am therefore unable to give you my opinion as to whether membership on it by members of either the City Planning Commission or the City Redevelopment and Housing Authority would be incompatible. Following is some information which may help you in making such a determination.

Commissioners of the City Redevelopment and Housing Authority established in accordance with Virginia's "Housing Authorities Law," Chapter 1, Article 2, Title 36, Code of Virginia, are limited in that "...No commissioner of an authority may be an officer or employee of the city or county for which the authority is created." § 36-11, Code of Virginia.

This office has previously ruled that members of Planning Commissions are also public officers. Such a ruling specifically concerning a county planning commission may be found in the Report of the Attorney General (1959-1960), p. 279. I am of the opinion it is equally applicable in the case of a City Planning Commission.

(4) "The City Council likewise desires to know whether a member of the Board of Zoning Appeals of the City may serve also on the Southeastern Tidewater Opportunity Project Local Committee (the City's Community Action Agency)."

It is my understanding that the Southeastern Tidewater Opportunity Project is one of those local agencies funded and supervised by the Federal Economic Opportunity Act. Section 2.1-30, Code of Virginia, provides:

"No person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia, 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.]

This statute was applied in an opinion to the Honorable William F. Watkins, Jr., Commonwealth's Attorney for Prince Edward County on October 7, 1966. This opinion, a copy of which is enclosed, may be found in the Report of the Attorney General (1965-1967), p. 229. While I am not certain the relationship contemplated is one of profit, I am constrained to believe from the language of the aforementioned statute, it would be better for a member of the Board of Zoning Appeals not to serve on the Southeastern Tidewater Opportunity Project Local Committee.

You should also note the specific prohibition against dual office holding applicable to members of Boards of Zoning Appeals in § 15.1-494, "... Members
of the board [Board of Zoning Appeals] shall hold no other office in the county or municipality except that one may be a member of the local planning or zoning commission. . . ."

PUBLIC OFFICERS—Compatibility—When officer, director or stockholder of a bank may serve as member of county board of supervisors or school board. August 14, 1968

HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney for Nansemond County

This is in reply to your letter of August 1, 1968, in which you present the following inquiry:

"Section 15.1-67 of the 1950 Code of Virginia provides in part that 'this section shall not be construed to prevent any officer, director or stockholder of a bank, which has a contract with a County, from serving as a member of the Board of Supervisors or as a member of the school board of such county, nor shall it invalidate such contract.'

"I would appreciate your opinion as to whether or not this section would prevent any officer, director, or stockholder of a bank which has a contract with a County from serving as a County official other than as a member of the Board of Supervisors or a member of the school board?"

The portion of the statute which you quote specifically permits bank officers, directors and stockholders to serve on the board of supervisors and school board. Also pertinent to your inquiry is the following language from § 15.1-67:

"The term 'contract,' as herein used, shall not be held to include the depositing of county or town funds in, or the borrowing of funds from, local banks in which members of the board of supervisors, members of the school board, or other county officers herein named may be a director or officer or have a stock interest. . .." (Italics supplied.)

In view of the foregoing exemption, I am of the opinion that any county officer to which § 15.1-67 is applicable may also be a stockholder, officer or director of a bank in which county or town funds are deposited or from which funds are borrowed. However, an officer, director or stockholder of a bank which has with the county a contract not within the above-quoted exemption could only serve as a member of the county board of supervisors or the county school board.

PUBLIC OFFICERS—Determination as to whether a person within definition—Member of a housing authority not a public officer of the city.

PUBLIC OFFICERS—Definition of—Does not include mere employees.

CITIES—Member of City Council—May not contract with city agency. September 9, 1968

HONORABLE VON L. PIERSALL, JR.
Commonwealth's Attorney, City of Portsmouth

This is in reply to your letter of August 14, 1968, in which you inquire as follows:

"1. Can a private attorney, one who represents the City in real estate title examinations, condemnation suits, or otherwise, serve on the City of Portsmouth's Civil Service Commission and continue to so represent the City."
2(J2

REPORT OF THE ATTORNEY GENERAL

"2. Are the commissioners and employees of the Portsmouth Redevelopment and Housing Authority and the Portsmouth Port and Industrial Commission officers or agents of the City of Portsmouth so as to make them come within the provisions of Sec. 15.1-73. Specifically, can such commissioners and employees contract with the City of Portsmouth for materials or services and can members of the City Council contract to provide services and materials for either of these Authorities or Commissions."

The answer to your first question turns on whether a member of a city civil service commission is a city officer within the meaning of § 15.1-73 of the Code. This determination would have to be made after consideration of the particular facts involved, as affected by the city charter and applicable rules of law.

Generally speaking, a public office is a position created by law with specified duties which involve an exercise of a portion of the sovereign power. See, Am. Jur. Public Officers § 3; 15 M.J. Public Officers § 2; Report of the Attorney General (1962-1963) p. 213. Important indicia that the creation of an office was intended are the requirement of an oath, the fixing of a term of office, and a grant of authority conferred by law.

As to your second question, this office has previously ruled that mere "employees" are not officers within the meaning of the conflict of interest statutes. Report of the Attorney General (1963-1964) p. 109. Thus, the employees of the Redevelopment and Housing Authority and the Port and Industrial Commission would not be officers or agents of the city within the meaning of § 15.1-73. In addition, this office has previously ruled that § 15.1-73 does not prevent a councilman from contracting with a housing authority established pursuant to the provisions of Title 36 of the Virginia Code unless the project involves funds under the control of the city. See, Report of the Attorney General (1960-1961) p. 250, a copy of which is enclosed. See also, Report of the Attorney General (1965-1966) p. 240. In accordance with these opinions, I am constrained to believe that a member of a housing authority is not an officer of the city within the meaning of § 15.1-73.

However, as to members of the Port and Industrial Commission, it will be necessary to determine whether they are officers within the meaning of the statute as discussed in reply to your first question. If they are found to be officers, then they may not contract with the city. Of course, a member of the city council may not contract with a city agency, regardless of whether any of the members thereof are city officers.

PUBLIC OFFICERS—Member of Planning Commission may not be interested in contract with city.

HONORABLE JOHN S. HANSEN
Member, House of Delegates

October 28, 1968

This is in reply to your letter of October 5, 1968, in which you present the following inquiry:

"Mr. Russell Garrison was appointed to the Planning Commission of the City of Colonial Heights on September 17, 1968 by the City Council. He had been on the Commission previously but had resigned when charges were made that a conflict of interest existed.

"Please give me your opinion whether you believe his serving on the Planning Commission is a conflict of interest which would be illegal by local or state statute or law."

"The following information will hopefully be of use to you.

"1. Mr. Russell Garrison is employed by Short Paving Company of Petersburg, Virginia as a foreman of a paving crew."
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"2. Mr. Garrison to the best of my knowledge works on a salary but does receive at the end of each year a merit bonus.

"3. Short Paving Company has over the past several years received on a bid basis 100% of all the street paving work done in Colonial Heights.

"4. Mr. Garrison has informed the Planning Commission and the City Council that he will not serve on the Commission until a ruling on this matter is made. At present, therefore, there is a vacancy on this Commission."

This office has previously ruled that planning commission members are officers, Report of the Attorney General (1959-1960) p. 279, and they would therefore be subject to the conflict of interest provisions of § 15.1-73 of the Code. In previous situations involving the employment of an officer of a city, county, or town by a company contracting with such city, county or town, this office has ruled that no conflict of interest exists so long as the official is a salaried employee only and receives no compensation, bonus or other benefit from the contracts. See, Reports of the Attorney General (1963-1964) p. 241; (1966-1967) p. 266; (1962-1963) p. 219.

However, it is apparent from your communication that the individual concerning whom you inquire is not merely a salaried employee of the company in question but receives, in addition to his salary, a merit bonus at the end of each year. Thus, he would not come within the scope of the above-cited rulings, but would appear to be at least indirectly interested in the paving contracts mentioned in your letter. I am, therefore, of the opinion that the situation you present would fall within the prohibitions of § 15.1-73 of the Virginia Code if such person became a member of the planning commission and the city continued to contract with the paving company by which he is employed.

PUBLIC SERVICE CORPORATIONS—Power Rates—Setting of—Legislative grant of authority to State Corporation Commission.

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

November 18, 1968

This is in reply to your letter of October 29, 1968, from which I quote the following:

"Section 56-235 of the Virginia Code delegates the determination of proper electric power rates to the State Corporation Commission pursuant to Section 156(c) of the Virginia Constitution. The General Assembly has, by the former provision, delegated a legislative function to the Commission. Board of Supervisors v. VEPCO, 196 Va. 1102.

"I would appreciate your opinion as to the General Assembly’s power to establish criteria by which the Commission should discharge this function; e.g., specifying the elements that must be included in or excluded from the rate base."

Section 156(a) of the Constitution of Virginia provides that, subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be a department of government through which shall be carried out the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, the State. In relation to your question, I quote from Section 156(c) of the Constitution of Virginia to which you refer:

"The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution)
as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchise, for taxation, or with the investigation of the subject of taxation generally."

This section provides that the Commission may be vested with additional power and charged with other duties, as may be prescribed by law. Among these are the powers and duties of prescribing and enforcing rates and charges. The legislature has activated this section by granting the Commission the power of rate making under the conditions set forth in § 56-235 of the Code. In *Holding Corp. v. Utilities Corp.*, 207 Va. 729, at page 734, the Court said:

"Under the authority vested in it by § 156(c) of the Constitution of Virginia, the General Assembly has enacted statutes which confer jurisdiction on the State Corporation Commission to fix rates and charges of public utilities operating in this State. Code, § 56-235 provides:

"'If upon investigation the rates, tolls, charges, schedules, or joint rates of any public utility operating in this State shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of law, the State Corporation Commission shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable.'"

From the foregoing, it seems clear that the Commission derives its rate making jurisdiction from the legislature. Since the legislature has the power pursuant to Section 156(c) of the Constitution to place rate making under the jurisdiction of the Commission and has done so in § 56-235 of the Code, I am of the opinion the legislature does have the power to establish criteria by which the Commission should discharge this function. Your question, therefore, is answered in the affirmative.

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**RECORDATION—Deed of Assignment—Tax where assigned for less than original face amount.**

**TAXATION—Recordation—Deed of assignment for less than original face amount.**

**HONORABLE D. L. PARRISH, JR., Clerk**

**Circuit Court of Goochland County**

July 19, 1968

This is in reply to your letter of July 11, 1968, which reads as follows:

"I am enclosing a copy of a Deed of Assignment and desire to have a ruling from your office on whether or not I should charge a tax on such deeds where the mortgage holder has assigned the indebtedness to a purchaser of the note for less than the original face amount."

In my opinion, this assignment comes within the definition of a contract as contemplated by § 58-58 of the Code, and, therefore, would be subject to the recordation tax of fifteen cents on every one hundred dollars or fraction thereof.
REPORT OF THE ATTORNEY GENERAL

RECORDATION—Tax—Deed conveying same property received by will based on the consideration or value of property contracted for.

RECORDATION—Tax—Imposed on deed conveying same property which was received by will.

TAXATION—Recordation—Deed conveying same property conveyed by will and subjected to probate tax is subject to recordation tax.

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

This is in reply to your letter of April 26, 1969, which reads in part as follows:

"A certain individual in this county died testate; however, his widow subsequently renounced the will, taking ½ of the personal property and ½ of the realty for life as prescribed by the law relating to intestate succession.

"Before the widow renounced this will, it was agreed between her and the testator's four children that she should share ½ of the net estate, including real estate and personalty.

"This written agreement was submitted to our Clerk for recordation in the Clerk's Office and we are wondering what recordation taxes, if any, are due thereon. Inasmuch as this matter is of a testamentary nature upon which a probate tax has been paid, is there any additional tax under Title 58, Chapter 3, Article 3 (58-54 et seq) or any other section of the Code?

"If the answer is in the affirmative, upon what value would the tax be based and what Code sections govern."

In my opinion this agreement is a contract relating to real and personal property and subject to the recordation tax imposed by § 58-58 of the Code of Virginia (1950). The tax is based on the consideration or value of the property contracted for.

The fact that this matter is of a testamentary nature upon which a probate tax has been paid does not alter this conclusion. See opinion to the Honorable John H. Powell, Clerk, Circuit Court of Nansemond County, found in Report of the Attorney General (1950-1951), page 291.

REDISTRICTING—Commissioners' Report—No appeal after statutory requirements met.

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of September 13, 1968, in which you present the following questions regarding the redistricting of magisterial districts, which will be answered seriatim:

"(1) Upon completion of the Commissioners' report as required in Section 15.1-578, and the recordation of the said report as required by Section 15.1-579, is this report final or would the County Circuit Court have to approve the Commissioners' report?"

Section 15.1-577 of the Code provides for the appointment of commissioners to act on a petition to rearrange or change the number or name of magisterial districts. Section 15.1-578 provides that when the commissioners have executed the order of the court, their report is returned to the clerk's office. Section 15.1-579 states that the clerk then records it and the "magisterial districts so designated and
laid off . . . shall thereafter be the magisterial districts of such county." Therefore, it is my opinion that these sections provide for the change of magisterial districts without further action by the court on the commissioners' report. I am advised, however, that in a number of cases the report is filed with the clerk and formally approved by order of the court.

"(2) Is there any method or means by which an appeal can be made or taken from the said report?"

I am unaware of any provision for an appeal from the commissioners' report. Section 15.1-575 provides for a contest of the petition to redistrict, but no provision is made for an appeal from the report of the commissioners.

"(3) What course should be followed, if any, if there are exceptions by any one or more of the Commissioners, which might result in a minority report?"

Similarly, no provision is made for the filing of a minority report by dissenting commissioners. However, it does not appear that the inclusion of a minority report would render the commissioners' report defective so long as the prescribed statutory requirements are met.

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SANITARY DISTRICTS—Bond Issue Election—Not required for loan where repayment to be made only from reserves collected by District.

October 1, 1968

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This is in reply to your letter of September 18, 1968, which I quote as follows:

"The Lovingston Sanitary District has been properly established under the provisions of Chapter 2 of Title 21 of the Code of Virginia, and the voters of the sanitary district earlier this year approved by a big majority a bond issue in the amount of $115,000.00 for the purpose of providing funds to construct a sewage system in the district.

"The total low bid on this project was about $25,000.00 in excess of the funds available, including the above approved bond issue, and it will be necessary for the sanitary district to borrow an additional sum of $25,000.00, before construction can begin on this project.

"The Farmers Home Administration is lending to the sanitary district the above $115,000.00, plus the above $25,000.00 additional money needed, but a question has arisen concerning the legality of the additional $25,000.00 loan, which has not been approved by the voters of the sanitary district.

"It is my opinion that the sanitary district can legally borrow the additional sum of $25,000.00 from the Farmers Home Administration, without having another bond issue election to cover the same, under the rules laid down in the case of Farquhar v. Board of Supervisors, 196 Va. 54, and/or under the opinion of the Attorney General dated August 12, 1959, to the Commonwealth's Attorney of Amherst County, page 291. It is my opinion that the bond for $115,000.00, as approved by the voters, will be issued under the above sanitary district laws, and an additional bond for $25,000.00 can be issued, payable solely from the revenues received by the sanitary district from the users of the district sewage system, under an agreement by the district that it will fix and collect from the users of the district sewage system rates of charge sufficient to pay off said $25,000.00 bond when due.

"The loan agreement of the Sanitary District with the Farmers Home
Administration requires the borrowed money to be paid off in installments over a period of thirty four years.

"I will certainly appreciate your opinion at your earliest convenience on the question of whether or not it will be legal for the sanitary district to borrow the additional $25,000.00, without another bond issue election covering the same, as set forth above, and if so, can the additional $25,000.00 be paid off over the period of thirty four years, or should it be paid off over a shorter period of years."

Section 115-a of the Constitution of Virginia prescribes that no debt shall be contracted by any county except in pursuance of authority conferred by the General Assembly by general law and that the General Assembly shall not authorize any county or district thereof to contract any debt, with the exceptions there noted, unless in the general law authorizing same provision be made for submission to the qualified voters of the county or district for approval or rejection. Both, the case of Farquhar v. Board of Supervisors, 196 Va. 54, and the opinion expressed in Report of the Attorney General (1959-1960), p. 291, which you cite, were based in substantial part on principles which excluded them from the limitations of this constitutional restriction.

The Farquhar case followed the special fund doctrine, which is that obligations payable solely from a special fund derived from the revenue of the enterprise for which such obligations are issued do not constitute a bond or a debt within the meaning of Section 115-a of the Constitution of Virginia. In the opinion cited, a loan under a contract whereby the lender could collect only from the revenues of the facilities being operated by the sanitary district, and which was under no circumstances capable of subjecting the revenues of the county from any source, except from the revenues collected from the users of the facility, to the repayment thereof, was held not violative of the named Constitutional clause.

Your questions involve the propriety of issuing an additional bond for $25,000.00 "payable solely from the revenues received by the sanitary district from the users of the district sewage system, under an agreement by the district that it will fix and collect from the users of the district sewage system rates of charge sufficient to pay off said $25,000.00 bond when due." I agree with your opinion that the sanitary district may borrow this additional sum of $25,000.00 without having another bond issue election to cover the same, under the tenets of the Farquhar case and the Attorney General's opinion cited. So long as repayment is to be made only from the revenues collected by the sanitary district from the users of the facility, and there is no obligation on the county or its revenues, if all other requirements of law be met, it is my opinion that the additional $25,000.00 may be borrowed and paid off over a period of years, as indicated in your letter.

SCHOOLS—School Boards—Appointee from special town school district—Rights and privileges same as other members of county board.

SCHOOLS—Special Town Districts—Appointment of representative from town to county school board—Rights and privileges same as other members.

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

August 9, 1968

This is in reply to your letter of July 23, 1968, in which you relate certain information and pose two questions, which I quote as follows:

"1. Is the representative from the Town of Onancock entitled to the same rights and privileges as the other members of the Accomack County School Board?

"2. If the answer to the above question is affirmative, how should the representative from the Town of Onancock be appointed? There are no
references whatsoever to schools or school boards, in the Onancock Town Charter.”

In abolishing special school districts, § 22-43 of the Code of Virginia makes an exception for those special town school districts which heretofore have been established by and with the approval of the State Board of Education and thereby expressly continues these for the purpose for which established. It is apparent from the related correspondence, copies of which you furnished this office, that the State Board of Education has approved the Town of Onancock for representation on the County School Board. In regard to your first question, therefore, assuming that the representative from the Town of Onancock is legally appointed, I am of the opinion that he has the same rights and privileges as the other members of the Accomack County School Board.

From the given facts the Town of Onancock does not fall within the class of towns of at least 3500 population which are authorized by § 22-43 to have their town council appoint a member to the county school board. Otherwise, I find no authority for the appointment of the representative of a town to a county school board other than that given in the first clause of § 22-61 of the Code of Virginia. This states that the “county school board shall consist of one member appointed from each school district in the county by the school trustee electoral board.” The town of Onancock has been approved by the State Board as a special school district for the sole purpose of representation on the county school board. Consequently, I am of the opinion that the representative from Onancock should be appointed by the school trustee electoral board pursuant to this section.

SCHOOLS—School Boards—Contracts with members of School Trustee Electoral Board prohibited.

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

This is in reply to your letter of June 6, 1969, in which you inquire as follows:

“For some time several of the schools in Carroll County have obtained insurance coverage to insure the pupils against physical injury, etc., while attending school and while in route to and from school. For the past few years this insurance, the premiums which are collected by the individual school itself have been placed by the school administrative authorities with a local insurance agency operated by Mr. H. K. Neff of Hillsville. Some months ago Mr. Neff was appointed to the School Trustee Electoral Board of Carroll County and now the question has arisen whether the insurance can or should be again purchased through Mr. Neff’s agency.

“I find that you have heretofore ruled that members of the School Trustee Electoral Board are ‘school officers’ within the meaning of Section 22-213 of the Code of Virginia, but the only reference to insurance which I see in that section deals with the writing of insurance on ‘any school building.’

“Section 15.1-67 prohibits ‘any paid officer of the county’ from having any interest, directly or indirectly, in any contract with the county or the county school system. I understand that members of the School Electoral Board do receive an annual stipend of $10.00, but although I find you have ruled this applies to members of the School Board, I cannot find any ruling in respect to members of the School Trustee Electoral Board.

“I, on behalf of the School Board of Carroll County, would appreciate very much your advising as to whether the sections quoted or indeed any other provision of the law limits or prohibits the placing of the liability insurance with Mr. Neff’s agency.”
This office has ruled that a member of the school trustee electoral board is a paid county officer within the meaning of what is now § 15.1-67. See, Report of the Attorney General (1961-1962) p. 231. It is therefore my opinion that the contract to which you refer would be within the proscription of the statute.

This conclusion is not altered by the fact that § 22-213 of the Code specifically states only that except by permission of the State Board school officers are forbidden to “sell or write or solicit insurance on any school building; . . .” While § 22-213 may permit a member of the school trustee electoral board to write insurance on school buildings, upon the approval of the State Board of Education, this is not to say that he may enter into other contractual relationships which are not specifically permitted under § 22-213. This office has previously ruled in a similar situation that a county officer is prohibited by § 15.1-67 from entering any contract not permitted by § 22-213. See, Report of the Attorney General (1967-1968) pp. 223-224.

SCHOOLS—School Boards—Control over property devoted to school purposes.

HONORABLE GEORGE M. WARREN, JR.
Member, Virginia State Senate

November 7, 1968

This will reply to your letter of October 21, 1968, in which you present the following situation and inquiries:

“With the approval of the School Board the City of Bristol, Virginia has purchased a new school site and erected thereon an elementary school known as the Washington-Lee School. This school replaces the two old school properties referred to above, known as the Robert E. Lee School and the George Washington School, which are no longer used for school purposes.

“Section 54(d) of the City’s charter (Acts 1920, ch. 309) provides ‘the title to all real estate acquired for public school purposes shall be taken and held in the name of the City of Bristol.’

“Your attention is directed to Sections 22-161 and 22-166 of the Code of Virginia 1950, and to the opinion of the Supreme Court of Appeals of Virginia in the case of Howard v. County School Board, 203 Va. 55, 122 SE (2d) 891.

“The City would like to dispose of the old school properties and apply the proceeds toward the cost of the new school. The City School Board would like to retain the old buildings for storage and office purposes.

“Bearing in mind the fact that the two old school properties are no longer used for school purposes, I would like your opinion on the following questions:

1. Is the judgment of the School Board controlling under Section 133 of the Constitution?

2. Must the School Board and the City Council concur in order to dispose of the property?

3. Must approval of the Corporation Court of the City of Bristol, under Code Section 15.1-262 of the Code of Virginia 1950 be obtained?”

Initially, I am of the opinion that the authority to determine whether or not the property in question should be sold or retained is vested in the local school board. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated February 2, 1962, to the Honorable E. B. Stanley, Division Superintendent of Washington County Schools, in which an analogous situation was considered and discussed. See, Report of the Attorney General (1961-1962) p. 222. During the course of this opinion, we referred to the case of Howard v. County School Board, 203 Va. 55, and made the following declaration:
"The Court there made it quite manifest that the school board is charged with the supervision of public schools by virtue of Section 133 of the Constitution of Virginia, and that such supervision extends to the control of property devoted to school purposes."

Supportive of the above-quoted observation is the following language from the decision of the Supreme Court of Appeals of Virginia in the Howard case, supra, at 58:

"In plain language § 133 vests in the local school board, as the agency of the State, the 'supervision of schools.' Harrison v. Day, 200 Va. 439, 452, 106 S.E. 2d 636, 646; Kellam v. School Board of City of Norfolk, 202 Va. 252, 254, 117 S.E. 2d 96, 97, 98. In such supervision it is an essential function of the local board to determine whether a particular property is needed for school purposes and the manner in which it shall be used." (Italics supplied.)

In light of the foregoing, I am of the opinion that your first question should be answered in the affirmative and your second question in the negative. Moreover, I do not believe that the validity of these conclusions would be affected by the language of Section 54(d) of the Charter of the City of Bristol to which you refer.

With respect to your concluding inquiry, I am also forwarding to you a copy of a previous opinion of this office, dated January 20, 1965, to the Honorable A. Dunston Johnson, Commonwealth's Attorney for Isle of Wight County, in which the question you present was considered and answered in the affirmative. See, Report of the Attorney General (1964-1965) p. 290.

SCHOOLS—School Trustee Electoral Board—No authority to elect members to school board to serve at large.

HONORABLE W. BYRON KEELING
Commonwealth's Attorney for Charlotte County

September 10, 1968

This is in reply to your September 6, 1968 letter in which you ask me to furnish "an opinion as to whether or not the School Trustee Electoral Board can legally appoint a person as a member-at-large to serve on the School Board in addition to one member from each of the six magisterial districts in the county."

I am unable to find a previous ruling from this office which would answer your question. In this regard, however, I direct your attention to the provisions of §§ 22-42, 22-61 and 22-68, Code of Virginia (1950), as amended. The first of these sections, § 22-42, provides in pertinent part:

"Each magisterial district shall, except where otherwise provided by law, constitute a separate school district for the purpose of representation. * * *"

Section 22-61 states in pertinent part:

"The county school board shall consist of one member appointed from each school district in the county by the school trustee electoral board, provided that in towns constituting separate school districts and operated by a school board of three members, one of the members shall be designated annually by the town board as a member of the county school board."

Finally it is provided in § 22-68 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."

I am of the opinion that individual members of a school board for a given county wherein the magisterial districts are still in existence can represent but one magisterial district. Therefore, for the school trustee electoral board to elect as a member of the school board a person to serve at large in addition to a representative from each of the magisterial districts would be unauthorized by Virginia law.

SCHOOLS—Tax Levy—Levied only in districts voting on consolidation of school.  

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

February 19, 1969

This is in reply to your letter of February 11, 1969, in which you inquire as follows:

"In Accomack County, there are five magisterial districts, Islands, Atlantic, Metompkin, Lee and Pungoteague.  

* * *

"In Islands Magisterial District, there is a relatively new modern high school. The citizens of Island District have been paying for this school through a school levy that is not made in the other districts.  

"An Advisory Committee for the Superintendent of Schools has recommended that a consolidated high school be built to serve all of the districts except Islands District which has adequate facilities, and is isolated from the main body of the County as described above. Of course, a County wide referendum will be necessary in order to issue bonds to finance the construction, since the credit of the County as a whole would be pledged.  

"My question is, ‘Would it be proper for the Board of Supervisors to levy a school tax in the four magisterial districts that would be served by the proposed consolidated high school and not in Islands District, even though Islands District voted in the referendum?’"

It is my opinion that your question should be answered in the negative. Sections 15.1-185 and 15.1-190 of the Code provide alternative procedures for the issuance of the bonds which you describe, so that Accomack County would not be required to hold a county-wide referendum. Section 15.1-185 provides for issuance of general obligation bonds by a county upon a majority vote of the qualified voters thereof. If such a referendum is held, the governing body of the county is required by § 15.1-210 to meet the obligation created by the bonds by levying a tax on property in the unit voting on the question. In this case the “unit” would be the county as a whole.

Section 15.1-190 provides for the issuance of bonds by one or more “school districts” upon a vote of the qualified voters of the districts involved. The terms “school district” and “magisterial district” are used synonymously in this section. Since only four of the five magisterial districts of Accomack are to be taxed, the bonds should be issued pursuant to this section upon a vote of the voters of the affected districts.

As indicated in §§ 15.1-199(b) and 15.1-210, the school tax to which you refer would then be levied only in those districts voting on the measure.
SCHOOLS—Teachers—Continuing contracts of employment.

HONORABLE JAMES E. DURANT
Treasurer for the City of Falls Church

February 11, 1969

I am in receipt of your letter of January 22, 1969, in which you forwarded to this office a copy of a letter dated January 16, 1969, to Mr. LaRue Van Meter, City Attorney for the City of Falls Church, from Mr. J. Roger Wollenberg, Chairman of the Falls Church School Board, in which certain inquiries involving "continuing contracts" with public school teachers were presented. In this connection, you call my attention to the recently enacted provisions of §§ 22-217.1 et seq., of the Virginia Code and invite my consideration of the questions posed by Mr. Wollenberg, which questions will subsequently be stated and considered seriatim.


Section 22-207 formerly provided for written contracts between school boards and public school teachers in a form prescribed by the Superintendent of Public Instruction, and these provisions are now embodied in § 22-217.2 of the Virginia Code. Section 22-208 of the Virginia Code—which remains in force until the effective date of its repeal on July 1, 1969—prescribes:

"The State Board of Education shall prescribe rules and regulations to enable local school board, in employing teachers, to make contracts with any of such teachers as to it may appear advisable, to continue in effect for more than one year, the provisions of such contracts as to the expiration and termination thereof to be prescribed by said rules and regulations."

In compliance with the mandate of the above-quoted statute, the State Board of Education prescribed the following rules and regulations on April 24, 1952, which are still in force:

"1. Local school boards may, with the consent and approval of the State Board of Education, make contracts with teachers providing for continued employment. The contracts shall provide that written notice of intention to terminate said employment shall be given by either party prior to April 15th of each year. Failure of either party to give such notice automatically obligates them to continue the contract for the next succeeding year.

"2. Local school boards operating under this regulation shall furnish each teacher a written statement confirming the continuation of employment as soon after April 15th as the school budget has been approved by the appropriating body.

"3. Nothing in these regulations shall be construed to authorize the school board to contract for any financial obligation beyond the period for which funds have been made available with which to meet such obligation." (Italics supplied.)

See, Minutes of the State Board of Education, Vol. 23, p. 41. Subsequently, on March 26, 1953, the Falls Church School Board—acting under the authority of § 22-208 and the above-quoted regulations of the State Board of Education—made provision for the issuance of "continuing contracts" to all teachers who have taught successfully for one or more consecutive years and who hold regular, renewable teacher's certificates. Consistent with the initial provision of the rules and regulations of the State Board of Education is the following provision of the
Falls Church School Board’s proposal, which was approved by the State Board of Education:

“An intent by either party to terminate the contract at the end of the school term shall be communicated in writing prior to April 15 of each school year. Failure of either party to give such notice automatically continues the contract for the next school year. Termination of contract at any other time shall be by mutual consent of the contracting parties.”

In this setting, § 22-217.1 through § 22-217.8 of the Virginia Code were enacted at the last regular session of the General Assembly of Virginia. Section 22-217.1 declares the purpose of the statute is to prescribe certain contractual procedures for the employment of public school teachers, to provide probationary periods of their employment and to establish a basis and procedure of dismissal of such teachers. Section 22-217.2, as previously noted, embodies the provisions which were formerly found in repealed § 22-207, while § 22-217.5 through § 22-217.8 prescribes the grounds for dismissal of teachers, the notice of such dismissal, hearing thereon by the school board and decision by the school board within five days after the hearing. Particularly pertinent to the inquiries you present are the following provisions of §§ 22-217.3 and 22-217.4 of the statute:

§ 22-217.3. “A probationary term of service for three years in the same county or city school division shall be required before a teacher is issued a continuing contract; provided, service prior to July one, nineteen hundred sixty-nine shall not be considered as a portion of such probationary term . . .” (Italics supplied.)

§ 22-217.4. “Teachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service and prior to the age at which they are eligible or required to retire except as hereinafter provided. Written notice of noncontinuation of the contract by either party must be given by April fifteenth of each year; otherwise the contract continues in effect for the ensuing year in conformity with local salary stipulations including increments . . .” (Italics supplied.)

Manifestly the statutes canvassed above effect a fundamental change in the law governing continuing contracts from that arising under § 22-208 and the implementing regulations of the State Board of Education. While no probationary term of service was required of teachers before issuance of a continuing contract under the regulations of the State Board of Education, a probationary period of three years in the same county or city school division is now prescribed by § 22-217.3 of the Virginia Code. Moreover, service prior to July 1, 1969, may not be considered as a portion of such probationary term. On the other hand, no teacher was entitled to a continuing contract during good behavior and competent service after completion of a probationary period under the regulations of the State Board of Education—written notice of intention to terminate a teacher’s employment prior to April 15 of each year being the only obligation placed by such regulations upon a local school board, subject to a confirming statement as soon after April 15 as the school budget was approved by the appropriating body. By contrast, under § 22-217.4 of the Virginia Code a teacher employed after completing the statutorily prescribed probationary period is entitled to continuing contracts during good behavior and competent service. This entitlement is, of course, subject to the limitations specified in the concluding paragraphs of § 22-217.4 in the following language:

“Nothing in the continuing contract shall be construed to authorize the school board to contract for any financial obligation beyond the period for which funds have been made available with which to meet such obligation.

“A board may reduce the number of teachers, whether or not such
teachers have reached continuing contract status, because of decrease in enrollment or abolition of particular subjects."

In light of the foregoing summary, we turn to a consideration of the specific questions you present:

"1. Will valid continuing contracts in existence prior to July 1, 1968 remain in force automatically after July 1, 1969; or, if they will not continue automatically, may they validly be continued by action of a school board?"

Answer: No. A valid continuing contract in existence prior to July 1, 1968, would only obligate the parties to continue the contract "for the next succeeding year" which would end July 1, 1969. Under the provisions of § 22-217.3 completion of the prescribed probationary period is now required before a teacher is issued a continuing contract.

"2. May a School Board validly issue a continuing contract to a teacher in April 1969, to become effective on July 1, 1969, based upon satisfaction of the criteria for issuance of such contracts in force prior to the promulgation of the new law? If the initial issuance of such a contract prior to July 1, 1969 is valid, may the contract validly be maintained in existence indefinitely after July 1, 1969?"

Answer: No. As indicated in the answer to the immediate previous question, the probationary period prescribed by § 22-217.3 must now be served before a teacher is issued a continuing contract.

"3. May a school board validly issue a continuing contract to a teacher in April 1970, to become effective July 1, 1970, if the teacher will by that time have completed a three year probationary period, but only one year of the probationary period will have been completed subsequent to July 1, 1969?"

Answer: No. In this connection, § 22-217.3 specifically states that service prior to July 1, 1969, shall not be considered a portion of the probationary term which is now required by law as a condition precedent to the issuance of a continuing contract.

SCHOOLS—Teachers Under Contract With County School Board—May accept compensation for extra or special employment by county.

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

February 11, 1969

This is in reply to your letter of February 6, 1969, in which you inquire as follows:

"The Loudoun County Department of Parks and Recreation is hiring employees who are under contract to the Loudoun County School Board, to carry out the programs of the Parks and Recreation. These employees work hours that do not conflict with regular school hours and receive compensation from the Loudoun County Board of Supervisors on a per job basis or per class basis.

"In your opinion dated April 10, 1962 given to J. T. Martz, Clerk of Loudoun County you stated that no paid officers of the county shall become interested, directly or indirectly, in any contract made by or with any officer or person acting on behalf of the Board of Supervisors. Please advise me if employees of the Loudoun County School Board can be employees of the Loudoun County Parks and Recreation."

"
Your question is answered in the affirmative. The opinion to which you refer ruled that the conflict of interest provision applicable to counties, presently § 15.1-67, precluded certain county officers from accepting compensation for extra or special employment by the county. See, Report of the Attorney General (1961-1962) p. 37. However, this office has previously ruled that teachers are not county officers within the meaning of the statute, Report of the Attorney General (1964-1965) p. 296. The statutory prohibition is therefore inapplicable, and teachers are thus free to contract with the county to perform additional services. By similar reasoning, the other employees of the county to which you refer are also exempt from § 15.1-67. While § 22-213 of the Code makes it unlawful for a teacher to enter certain contracts without the approval of the State Board of Education, the situation which you present does not appear to be such a contract.

SCHOOLS—Transportation of Kindergarten Pupils at Public Expense—Motor vehicle of less than ten capacity may be used in lieu of school bus.

SCHOOLS—Driver of Vehicle Not a School Bus But Used to Transport Children —Not required to procure school bus driver's license.

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

This is to acknowledge receipt of your letter of July 11, 1968, in which you state that certain problems have arisen concerning transport of pupils in the operation of the summer kindergarten program of the county school system under Title I of P. L. 89-10. The entire cost is borne by the United States Government. Your questions will be answered seriatim:

"Question (1) Would it be legal to use an automobile owned by the School Board and driven by a regularly licensed school bus driver to transport kindergarten pupils to and from school, provided the car makes no stops on a public road to load or unload? (The car could pull into the private driveways of each house for this purpose.)"

The motor vehicle used as above described is not a school bus and does not have to be painted yellow as required of school buses by § 46.1-286.1, Code of Virginia (1950), as amended by Chapter 653, Acts of Assembly, 1968. Every vehicle transporting pupils to public or private schools is not required to meet the requirements under the section as the same provides: "All motor vehicles except commercial buses, station wagons, automobiles or trucks, transporting pupils to and from public, private or parochial schools shall be painted * * *." Clearly this section applies to school buses as defined in § 46.1-1 (37) as amended by Chapter 653, Acts of Assembly, 1968.

Article 2, Chapter 13, Title 22 of the Code, requires motor vehicles used in the transportation of pupils at public expense be covered by insurance. Section 22-286 requires certain insurance coverage of motor vehicles where less than ten school pupils are transported. Hence the legislature recognized that motor vehicles of a capacity of less than ten persons could be used to transport school pupils at public expense. Obviously these small vehicles are not school buses within the meaning of the statute. However, any such motor vehicle should be covered with insurance as prescribed by § 22-288, covering the pupils riding as passengers.

Therefore, this question is answered in the affirmative, provided that the insurance coverage under Article 2, Chapter 13, Title 22, Code of Virginia, is maintained.

"Question (2) If it is legal to use a car as outlined in question #1, would it also be permissible to use a driver with a regular driver's license instead of one with a school bus driver's license?"
This question is answered in the affirmative. While drivers of school buses must meet the requirements of § 22-276.1 of the Virginia Code (which provides that persons who drive school buses must obtain a special driving license), as indicated in the answer to question (1) above, this motor vehicle is not a school bus and would not fall within the scope of the cited statute. The driver of such a vehicle, however, should furnish the certificate mentioned in § 22-249 of the Virginia Code.

SHERIFFS AND SERGEANTS—City Sergeant—Filling of vacancy upon death of incumbent.

HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

August 13, 1968

This is in reply to your letter of August 8, 1968, which I quote:

"The Town of Clinchport, Scott County, Virginia, was incorporated by approved general assembly March 16, 1940—Acts of Assembly, Page 313. Paragraph 3 of said Charter provides what officers shall compose the elective offices of said town. Said charter makes no reference as to how said offices shall be filled in case an office becomes vacant during his elective term. Virginia Code, Volume 3, Section 15.1-799 provides a procedure in which said office can be filled upon said vacancy.

"My question is: How is the Office of City Sergeant of the Town of Clinchport to be filled?. The duly elected City Sergeant died during his tenure in office."

Section 15.1-799 of the Code of Virginia (1950), as amended, provides:

"In case of vacancies occurring in any municipal position so authorized to be filled, a qualified person may be appointed to fill such position for the unexpired term by the proper appointing power. In case of vacancy in any municipal office which is elective by the people, if there be no general election during the unexpired term at which such vacancy can be legally filled, the city or town council may elect a qualified person to fill such vacancy until a qualified person can be elected by the people and shall have qualified for the next succeeding term; or when such general election does occur during the unexpired term at which such vacancy can be filled, such city or town council shall elect a qualified person to fill such vacancy until a qualified person is elected to fill such vacancy at such general election and shall have qualified." (Italics supplied.)

It is my opinion that in the absence of a town charter provision to the contrary, the office of City Sergeant for the Town of Clinchport should be filled in accordance with the above quoted statute.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS AND SERGEANTS—Deputy City Sergeant—May not act as deputy clerk of municipal court.

CLERKS—Deputy Municipal Clerk—No authority to commit or release from jail—Designated as official to collect all fines and costs.

SHERIFFS AND SERGEANTS—City Sergeant of Roanoke and His Deputies—Authorized to grant bail.

August 19, 1968

HONORABLE KERMIT E. ALLMAN
City Sergeant, City of Roanoke

I am in receipt of your letters of July 9 and August 1, 1968, in which you present certain questions concerning the powers and duties of deputy clerks of municipal courts and deputy city sergeants. Your inquiries will be stated and considered seriatim.

"1. Does State law permit Deputy City Sergeants (Jailors) employed in a Constitutional Office to be appointed by Judge of Municipal Court to act as Deputy Clerks of Municipal Court?"

I have been unable to discover any provision of Virginia law or the Charter of the City of Roanoke which authorizes the judge of the Municipal Court to appoint deputy city sergeants as deputy clerks of the Municipal Court. A deputy to the Municipal Court clerk is authorized by Section 28 of the Charter of the City of Roanoke to collect all fines and costs imposed by a municipal judge or arising in the administration of the Municipal Court, while a deputy city sergeant is authorized and required by Section 30 of the city charter "to admit to bail in proper cases" persons arrested and brought to the police station, with the exception of those persons charged with certain specified offenses. While the question is not entirely free from doubt, I am constrained to believe that there is sufficient inconsistency between the powers and duties imposed upon deputy Municipal Court clerks and deputy city sergeants to militate against one person's holding both of these offices in the absence of express statutory authority to that effect.

"2. Does State law permit Deputy Clerks of Municipal Court to commit persons to jail and/or release persons from jail by signing their names to committals and releases as deputies of said Court?"

The powers and authority of deputy clerks of the Municipal Court of the City of Roanoke are set out in Section 28 of the city charter. Prior to its amendment in 1966, Section 28 of the city charter—Acts of Assembly (1952), Chapter 216, p. 282, as amended by Acts of Assembly (1956), Chapter 393, p. 447, provided:

"In addition, the chief municipal judge may appoint such number of deputy clerks of the Municipal Court as may from time to time be authorized by ordinance of the council, who shall serve at the pleasure of the chief municipal judge, and who may be members of the police force or other city employees but who shall not be entitled to special compensation as such deputy clerk unless otherwise provided by the council. Such deputy clerks shall have the power and authority to take affidavits, administer oaths and affirmations, issue civil warrants, abstracts of judgment and subpoenas for witnesses only, except that members of the police force appointed as deputy clerks hereunder shall have the additional power and authority to issue criminal warrants and processes within the jurisdiction, territorial and otherwise, of the Municipal Court, at such times as may be expressly designated by the chief municipal judge. Said papers shall be signed in the name of the Municipal Court by the deputy clerk as such deputy." (Italics supplied.)

As amended in 1966, Acts of Assembly (1966), Chapter 73, p. 139—Section 28 of the city charter now provides:
"In addition, the chief municipal judge may appoint such number of deputy clerks of the Municipal Court as may from time to time be authorized by ordinance of the council, who shall serve at the pleasure of the chief municipal judge. Such deputy clerks shall have the power and authority to take affidavits, administer oaths and affirmations, issue civil warrants, abstracts of judgment and subpoenas for witnesses. Such warrants, abstracts of judgment and subpoenas shall be signed in the name of the municipal court by the deputy clerk as such deputy." (Italics supplied.)

When the language of the present city charter is viewed in light of that which existed prior to the 1966 amendment, it does not appear that deputy clerks of the Municipal Court of the City of Roanoke are authorized to order persons to be committed to jail or released from jail.

"3. Does State law provide that Jailors accept fines and costs from prisoners before or after trial?"

I have been unable to find any provision of Virginia law or the Charter of the City of Roanoke which authorizes jailors to accept fines and costs. On the contrary, Section 28 of the city charter expressly provides for the collection of fines and costs by the clerk of the Municipal Court in the following language:

"Such clerk shall keep the docket and accounts for the Municipal Court and shall collect all fines, fees, forfeitures and costs imposed by a municipal judge or arising in the administration of the Municipal Court." (Italics supplied.)

It would thus appear that the clerk of the Municipal Court is expressly designated as the official who shall collect all fines and costs imposed by a municipal judge or arising in the administration of the Municipal Court.

"4. Does State law provide that Jailors take cash bonds from prisoners and/or write property bonds in criminal cases?"

Pertinent to the resolution of this inquiry is the following provision of Section 30 of the city charter:

"In order that there shall be at all times some officer at the municipal building empowered to grant bail in misdemeanor cases, the chief of police or the ranking officer on duty and present at the police station shall, at all times in the absence of a municipal judge have the same power to admit to bail persons arrested on charges of misdemeanor and brought to the police station as a justice of the peace. The sergeant of the city of Roanoke, Virginia, and any and all of his regularly employed deputies shall at all times have the same power to admit to bail persons arrested and brought to the police station, as bail commissioners except as to persons charged with murder, manslaughter, malicious shooting, burglary, robbery from the person by violence, arson, rape or attempted rape. It shall be the duty of the officers empowered by this section so to do to admit to bail in proper cases all persons applying therefor and offering adequate security." (Italics supplied.)

In light of the language of the city charter italicized above, it would appear that the city sergeant and all regularly employed deputy city sergeants are expressly authorized to grant bail except in those instances in which an individual is charged with one or more of the offenses specified in Section 30 of the city charter.

"5. Status of Civil liability of Jailor and City Sergeant when Jailors are acting as Deputy Clerks of Municipal Court and as Jailors."

The answer given to the first question presented in your communication obviates consideration of this inquiry.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS AND SERGEANTS—Expenses Incurred in Taking Person to State Mental Hospital—Extent of payment.

HONORABLE E. EUGENE GUNTER
Commonwealth's Attorney for Frederick County

This is in reply to your letter of March 6, 1969, in which you state that pursuant to a court order the sheriff and a guard, the Town Sergeant of Stephens City, took an accused to Southwestern State Mental Hospital for examination. You present the following inquiries as to payment of the expenses of the officers:

"Is the Sheriff or one of his deputies entitled to a fee out of the Criminal Expense Fund in the State Treasury? Is the guard entitled to a fee out of the Criminal Expense Fund in the State Treasury? Is the mileage to be paid out of the Criminal Expense Fund in the State Treasury?"

I am aware of no authority for paying the above per diem to the sheriff and town sergeant. Section 19.1-315 of the Code, which authorizes compensation to persons rendering services for which no specific compensation is provided elsewhere in the Code, is inapplicable in the present case. This section provides that it shall not be construed to authorize payment of additional compensation to "a sheriff or other officer" who is compensated for his services exclusively by salary.

Pursuant to Chapter 1, Article 9 of Title 14.1 of the Code, two-thirds of the mileage submitted by the sheriff would be payable by the Compensation Board as part of the sheriff's expense allowance. If the car was a county car, the mileage reimbursement would be paid to the county. Pursuant to § 14.1-79 of the Code, the Board will also pay two-thirds of the actual expense of transporting the prisoner but is not authorized to pay a per diem.

SHERIFFS AND SERGEANTS—Fees—Transportation of prisoners—Reimbursement limited to eight cents per mile.

HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

This is to acknowledge receipt of your letter of December 4, 1968, in which you state in part:

"A Deputy City Sergeant, City of Portsmouth, has requested that I obtain your opinion as to whether or not he would be entitled to reimbursement at the rate of nine cents per mile for mileage traveled under an order of the Court of Hustings for the City of Portsmouth to return to that City from the State Penitentiary in Richmond an inmate to testify as a witness on behalf of the Commonwealth. A voucher was submitted requesting reimbursement at the aforesaid rate and was reduced to eight cents per mile."

The Court from which the process is issued (such as you describe above) has the authority under § 19.1-315, Code of Virginia (1950), as amended, to allow compensation to the sergeant for performing the duty of procuring the presence of this inmate of the penitentiary by transporting him to and from the Court. However, that section limits the mileage allowance to eight cents a mile, as we find this language in said section:

"Not more than eight cents per mile shall be allowed for officers using automobiles for travel, irrespective of the number of guards or prisoners conveyed in such automobiles."
Furthermore, § 19.1-315 also provides:

“But the amount of compensation to officers for execution of process outside of the respective counties of such officers shall not exceed the fees or allowances now provided by law for the execution of process within the county including the provision for the allowance of mileage for officers and prisoners within a county.” [Underscoring supplied]

The fees of sheriffs and sergeants in performing certain duties (in their localities) are prescribed in § 14.1-105 of the Code as amended. These fees are taxed as costs. This section provides, among other things, that for every mile of necessary travel a fee of eight cents per mile be charged and taxed as costs.

Section 14.1-5 of the Code as last amended by Chapter 711, Acts of 1964, increased the reimbursement to any person traveling on State business by private transportation from seven cents to nine cents per mile. However, I do not believe that it was the intention of the legislature that the 1968 amendment to § 14.1-5 of the Code amend § 19.1-315 of the Code by implication.

I am therefore of the opinion that the reimbursement at the rate of eight cents per mile for the transportation of this prisoner to and from the State Penitentiary is correct.

SHERIFFS AND SERGEANTS—Guarding of Prisoner While in Hospital—Responsibility shifts to city police after warrant executed on prisoner.

PRISONERS—Responsibility for Custody While in Hospital.

HONORABLE T. FRANK FINES
City Sergeant, City of Fredericksburg

January 14, 1969

This is in response to your recent inquiry, in which you set forth a factual situation which I have summarized below:

The Sheriff of a nearby county received a felony warrant for a man wanted in another county. The fugitive was also wanted in the Sheriff’s county for jumping bond. The fugitive was admitted to a Fredericksburg hospital. The Sheriff then delivered the warrant to the Police Department of the City of Fredericksburg and requested the Fredericksburg police to serve the warrant and to guard the prisoner while he remained in the hospital.

You inquire if the City Police are required to guard the prisoner after the warrant has been executed, under the above circumstances.

The Fredericksburg police officer, of course would have the warrant endorsed as required by § 19.1-94 of the Code of Virginia and then serve the fugitive confined in the hospital. Under ordinary circumstances, he would then take him before the appropriate court pursuant to the provisions of § 19.1-98 of the Code of Virginia. However, under the factual situation as set forth above, the prisoner cannot be taken before court. Under these circumstances, I am of opinion that it is the duty of the police department to place an appropriate guard on the prisoner until such time as he can be taken before a judicial officer.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS AND SERGEANTS—Use of Automobile—Mileage allowance for transporting prisoners—Limited to eight cents a mile.

ALLOWANCES FOR ACTUAL EXPENSES—Other Than Transportation of Prisoners—Approved by court in which case is pending.

HONORABLE T. F. TUCKER, Clerk
Corporation Court, City of Danville

This is to acknowledge receipt of your letter of December 13, 1968. I shall answer the questions you raise seriatim.

(1) "Under which of these Sections of the Code—14.1-5; 14.1-105; 14.1-111; 8-300—is the authority for payment of mileage to a City Sergeant who goes to a Penitentiary, State Farm or a State Convict Road Camp to carry a prisoner to Court to testify as a witness and return him after he has testified?"

Answer. Under the provisions of § 8-300 of the Code a court of record in a criminal prosecution has the authority to grant reasonable compensation for carrying prisoners ordered to attend court as witnesses. However, the General Assembly, by § 19.1-315 of the Code as amended, has limited the allowance for mileage in such instances to eight cents per mile. I quote from that section (§ 19.1-315):

"But the amount of compensation to officers for execution of process outside of the respective counties of such officers shall not exceed the fees or allowances now provided by law for the execution of process within the county including the provision for the allowance of mileage for officers and prisoners within a county. Not more than eight cents per mile shall be allowed for officers using automobiles for travel, irrespective of the number of guards or prisoners conveyed in such automobiles." (Emphasis supplied.)

Further in this connection, I am forwarding to you a copy of a recent opinion of this office, dated December 11, 1968, to the Honorable William H. Hodges, Member of the Senate of Virginia, in which the above stated view with respect to the allowance for mileage in situations of the type you present was considered and stated at length.

(2) "Does the following language of Section 8-300 'for all of which service such officers shall be paid out of the criminal expense funds in the State treasury such compensation as the court in which the case is pending, may certify to be reasonable', especially the word 'compensation', authorize a court to pay mileage and expenses, such as meals, etc. If this language does not mean mileage and expenses, would you please clarify the word compensation."

Answer. I am of the opinion that a court under §§ 8-300 and 19.1-315 of the Code has the authority to allow a reasonable amount to reimburse the officers for actual expenses incurred outside of the officer's bailiwick, including the cost of meals, in performing the services of transporting prisoners to and from places of incarcerations for the purpose of testifying in criminal prosecutions.

(3) "Does Section 14.1-5 apply to City Sergeants?"

Answer. No. See the enclosed opinion to Senator William M. Hodges to which reference has been made.
SUBDIVISIONS—Plats—Disposition after recordation.

January 27, 1969

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

This is in reply to your letter of January 14, 1969, in which you inquire as follows:

"1. After a subdivision plat is recorded under the Subdivision Act and pursuant to a County Subdivision Ordinance, should the plat be retained in the Clerk's Office or can it be released to the person admitting the plat to record?
"2. Whatever your opinion is with regard to the first question, will the same opinion apply to an ordinary plat that is admitted to record?"

Section 15.1-477 of the Code contains the following reference to recordation of subdivision plats:

"When thus executed and acknowledged, the plat, subject to the provisions herein, shall be filed and recorded in the office of the clerk of court where deeds are admitted to record for the lands contained in the plat, and indexed in the general index to deeds under the names of the owners of lands signing such statement, and under the name of the subdivision."

I also direct your attention to § 17-59 which provides for the method by which certain writings, including plats, are recorded and states that, "[a]fter being so recorded such writings may be delivered to the party entitled to claim under the same."

When the above sections are read together, it is my opinion that § 15.1-477 should not be construed to require the permanent deposit of subdivision plats in the clerk's office. Once the plats referred to in your question have been spread upon the record, there is no prohibition against the subsequent return of the plats to the proper person.

SUBDIVISIONS OF LAND—Subdivision Ordinance—Applicability to lease—Hold interests.

February 20, 1969

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of February 11, 1969, in which you set forth the following situation:

"A resort area of Shenandoah County, . . . is considering a plan to subdivide a great number of acres of mountain land into approximately 600 separate lots, all of said lots to be of less than three acres. Upon subdividing this land, the resort, a corporation, would then lease these lots under lease-hold agreements, with the right vested in the lessee to construct any improvements they desired on the real estate, etc."

You inquire whether the Shenandoah County Subdivision Ordinance would be applicable to this arrangement of lease-hold interests.


Article II, Number 8, of the ordinance defines subdivision and reads in part:

"The word subdivision shall mean the dividing of any piece of land
REPORT OF THE ATTORNEY GENERAL

into three or more parcels of land of not more than three acres, each, within any period of eighteen months; . . ."

Article II, Number 3, states:

"No lots in proposed subdivisions not approved by the Board of Supervisors are to be sold by the owners and proprietors thereof until said plats are approved by the Board of Supervisors and recorded in the Clerk's Office of the Circuit Court of Shenandoah County, Virginia."

I note that the lots are leased for a term of ninety-nine years with an option to renew for an additional like term. Further, the lessor has the option, after execution of the lease, to convey the property in fee simple, by a general warranty deed.

It is the interpretation of the word "sold" in Article II, Number 3, which precipitates your inquiry, inasmuch as the proposed plan is definitely encompassed by the definition in Article II, Number 8.

In this connection I enclose herewith a copy of an opinion of this office to the Honorable Earl F. Wagner dated April 26, 1956, found in the Report of the Attorney General (1955-1956) at page 184, wherein it was ruled that a proposed ninety-nine year lease could be in the nature of a sale or conveyance of property, thus necessitating that the procedure for sale or exchange of property in § 15.1-262 (formerly § 15-692) be followed. Also enclosed is a similar opinion to the Honorable R. Turner Jones dated June 3, 1958, found in the Report of the Attorney General (1957-1958) at page 70.

However, the determination of whether the lease-hold arrangement you inquire about would constitute a sale within the meaning of Article II, Number 3, lies within the discretion of the county which must interpret and administer the local ordinance.

This was clearly borne out by the case of Board of Supervisors v. Land Company, 204 Va. 380, 383, wherein the Supreme Court of Appeals of Virginia stated that:

"The legislature, in enacting the Virginia Land Subdivision Act, delegated to each locality a portion of the police power of the state, to be exercised by it in determining what subdivisions would be controlled and how they should be regulated. The legislature left much to the discretion of the locality in making such determination, relying upon the local governing body's knowledge of local conditions and the needs of its individual community."

As a practical matter the interpretation of the word "sold" would seem not to be necessary since under Article II, Number 10, building permits cannot be issued until a subdivision plat receives final approval from the Board of Supervisors.

SUPPORT LAWS—Uniform Reciprocal Enforcement—Virginia court makes own determination as to duty to support.

HONORABLE R. PAGE MORTON
Judge, Charlotte County Court

August 30, 1968

This is in reply to your letter of August 13, 1968, which states:

"This letter concerns the "Uniform Reciprocal Enforcement of Support Act". It pertains particularly to the Civil Enforcement, Section Title 20-88.18 et seq. of the Virginia Code.

"My specific question is this: Is a Juvenile and Domestic Relations Court in Virginia required to give full faith and credit to a decree or order entered by a Court of another State? If there has been a divorce
granted, custody of the children determined, and an award entered requiring the husband to pay his former wife, or to the Court, a certain amount each week for the support of his children, all in another State, and the husband and father later moves to Virginia and establishes residence, and the initiating State sends the required papers to Virginia showing valid proceedings in a competent Court, in the initiating State, properly attested, is the local Juvenile and Domestic Relations Court in the responding State, required to adopt the former order or decree rendered by the initiating State, or can it modify or alter such order or decree."

The law to which you refer was enacted to provide a means by which support could be compelled from one who owed it even though the one to whom it was owed was living in a different state. The proceeding in the responding state is conducted at the request of a competent court in what has been called the initiating state. If the responding state were required to give "full faith and credit" to the decree or order entered in the initiating state it seems there would be no need for any but summary proceedings in the responding state. This is not the case, however, for the responding state, in your example Virginia, through its courts has a very specific procedure and task as can be seen from the wording of § 20-88.24. The situation might occur where the Virginia court would not find a duty of support and therefore would not order the defendant to make any payments of this kind.

"§ 20-88.24. Order of support.—If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order." (Italics added.)

Virginia law in the form of cases interpreting the Uniform Reciprocal Enforcement of Support Act is virtually non-existent, as I am sure you are aware. Virginia's law is substantially in the form of the model act and therefore you may find the annotations of the Uniform Act, Uniform Laws Annotated, Vol. 9-C, pages 12 through 71, helpful. I also direct your attention to the annotation found at 42 A.L.R.2d 782, at 783 (1955). Here it is said, "* * * It was to be presumed that the trial court in California would properly evaluate the proof as to the child's necessities and the ability of the father to pay, and with a judicial discretion that would not penalize the father for not having been able to cross-examine the mother. * * *" California in this case was the responding state. "... support may be ordered in responding state without regard to orders or judgments of another state. ..." Moore v. Moore, 252 Iowa 404, 107 N.W.2d 97 (1961).

In direct answer to your questions, it is my opinion that Virginia as a responding state under the Uniform Reciprocal Enforcement of Support Act holds an independent hearing utilizing the information furnished to it by the initiating state, and the defendant over whom it has jurisdiction, making its own determination with regard to the duty to support and the amount of payments, if any, and is not bound by another court's findings in this regard.

TAXATION—Assessment—Improvements to land assessed to owner of realty.
December 5, 1968

HONORABLE VICTOR J. SMITH
Commissioner of the Revenue, City of Harrisonburg

This is in reply to your letter of November 21, 1968, which reads in part as follows:

"Recently the operator of a car washing establishment erected a coin operated car wash station on land leased from the owner of the land."
"I have assessed the value of the car wash station to the owner of the land rather than to the lessee. The owner of the land has protested this action claiming that the car wash station should be assessed in the name of the operator of the car wash station.

"It has always been my impression that any structure built on a parcel of land must be assessed to the land owner under the general statutes except for the provisions outlined in § 58-773.1 of the Code of Virginia. The question is whether the Commissioner of the Revenue is correct in assessing improvements of a lessee to the owner of the land, or must the improvements built by a lessee be assessed separately in the name of the lessee?"

Property is taxed to the owner by § 58-20 of the Code. Section 58-810 provides that improvements added to the land shall be added to and included in the value of the land.

Therefore, I am of the opinion that the land and improvements in this instance should be taxed to the owner of the land.

TAXATION—Collection—No compensation allowable for services rendered in collection of taxes under § 58-54(b) of the Code of Virginia, as amended.

CLERKS—Compensation for Services Rendered in Collecting Taxes Under § 58-54(b)—Not authorized.

October 7, 1968

HONORABLE J. E. CROCKETT, Clerk
Circuit Court of Wythe County

This is in reply to your letter of September 25, 1968, which reads as follows:

"Relative to your above opinion [to the Honorable Joseph S. James, Auditor of Public Accounts, dated September 5, 1968] that there is no authority in Chapter 778 for the Board of Supervisors to pay a commission on the tax collected under § 58-54 b my Board had gone along with the assumption that it could, and they have for the past two months, paid a commission of 5%.

"By resolution, when the tax imposed by § 58-65.1 was adopted by Wythe County, our Board allowed a commission of 5% and when the new tax became effective on June 28, 1968 I was permitted to remit 95% to the County Treasurer and retain 5% as my commission.

"If and when I collect taxes for another locality under this new tax my plans were to send them a statement showing the tax due and show that the 5% had been charged for collection and handling.

"This office is in the process of an audit at this time and, of course this audit will not cover any of the new taxes or how the commission is handled, but it will be much easier to refund the County of Wythe the commissions for the months of July ($11.09) and August in the amount of $10.89 at this time, if the resolution of the Board is not in order, than to have to make the adjustment when the amount has increased to a greater amount.

"I will appreciate your advice as to whether or not the action of the Board in allowing the 5% commission would be ruled improper."

In my opinion, the Board of Supervisors was authorized to pass a resolution providing compensation to you for services rendered in collecting taxes assessed under § 58-65.1. However, for the reasons stated in my letter to the Honorable Joseph S. James, Auditor of Public Accounts, dated September 5, 1968, I am of the opinion that it did not have the authority to pass a resolution providing compensation to you for services performed in collecting taxes assessed under § 58-54(b) of the Code of Virginia (1950), as amended.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Collection of City Personal Property Taxes—When city may change due dates set forth in § 58-963.

December 18, 1968

HONORABLE J. H. JOHNSON
Treasurer of City of Roanoke

This is in reply to your letter of December 10, 1968, in which you asked the following two questions:

"1. Can the Roanoke City Treasurer legally impose a 5% penalty for the non-payment of 1969 personal property taxes prior to December 6, 1969?

"2. Can the Commissioner of the Revenue legally require a taxpayer to attach to his personal property tax return a check or money order for the amount of tax he owes at the time he files his return, between January 1, and May 1, 1969, if so, does the state law hold a Treasurer responsible for those funds so long as they are in the hands of the Commissioner of Revenue?"

I am of the opinion that the answer to your first question is in the negative. Section 58-963 of the Code of Virginia (1950) establishes the dates upon which State taxes and county and city levies are due and payable. This section reads:

"Any person failing to pay any State taxes or county and city levies on or before the fifth day of December shall incur a penalty thereon of five per centum, which shall be added to the amount of taxes or levies due from such taxpayer, which, when collected by the treasurer, shall be accounted for in his settlements, provided, that any person other than a public service corporation owning taxable real property in any county having a density of population in excess of two thousand inhabitants per square mile, according to the last preceding United States census, shall pay, on or before August fifteenth of each year, the taxes assessed against such real property for that year, and upon failure so to do shall incur a penalty as hereinabove provided."

Authority to change the due date of the taxes set forth by this section is found in § 58-847 of the Code which reads:

"The governing body of any county or of any city or town in this State may provide by ordinance for the collection of county, city or town taxes or levies on property in installments at such times and with such penalties for nonpayment in time as may be fixed by ordinance."

The City of Roanoke in amending section 5 of Title 6 of Chapter I of its city code did not provide for the collection of city taxes on personal property in installments as authorized by § 58-847. Therefore, the penalty levied for the non-payment of the 1969 personal property tax prior to December 6, 1969, is improper.

I am of the opinion that the first part of your second question should also be answered in the negative. Section 5 of the city code as proposed is not sufficient authority for the Commissioner of the Revenue to require the payment of taxes on personal property between January 1, and May 1, 1969. The collection of these taxes must be in conformity with the dates set forth in § 58-963, the general law in effect on this subject, unless and until the city complies with § 58-847. The first part of your second question being answered in the negative precludes an answer to the second part of that question.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Correctness of Personal Property Book—Responsibility of the commissioner of the revenue.

COMMISSIONERS OF REVENUE—Personal Property Book—Responsibility for correctness.

HONORABLE FRED M. FARLEY
Commissioner of the Revenue for City of Lynchburg

December 5, 1968

This is in reply to your letter of November 25, 1968, which reads as follows:

"Please give me your ruling as to the responsibility of the Commissioner of the Revenue when the personal property tax bills going to the taxpayer and the tax rolls pertaining to personal property are made up by the Data Processing Department of the City of Lynchburg, Virginia."

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."

The duties of the commissioner of the revenue for cities and counties are set out in Title 58 of the Code. Section 58-881 provides that the commissioner shall make out the original personal property book, and § 58-885 provides that this book is not to be subsequently altered by him.

The responsibility for the correctness of the personal property book is that of the commissioner of the revenue, and he cannot pass this responsibility on to any other person.

TAXATION—Delinquent Real Estate—Release of liens for taxes delinquent twenty years or more.

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

December 30, 1968

This is in reply to your letter of December 26, 1968 in which you state:

"In December of 1965, the treasurer sold certain real estate for delinquent taxes to certain individuals. These individuals paid the three years delinquent taxes under the sale and since that time have paid the annual real estate taxes assessed by the County of Prince Edward. There were taxes due in some cases for more than twenty years and in some cases for less than twenty years.

"My questions are (1) would the purchasers as set forth above be required to pay the taxes other than those already paid by them which had been imposed prior to the sale if the property had been delinquent for more than twenty years, and (2) would the purchasers as set forth above be required to pay the taxes other than those already paid by them which had been imposed prior to the sale if the property had been delinquent for less than twenty years."

The purpose of § 58-767 is to release liens for taxes and levies due the Commonwealth and its political subdivisions when such taxes and levies have been delinquent for twenty years or more.

Real estate taxes for any year become delinquent as of June 30 of the following year. Therefore, the twenty-year limitation on the lien for delinquent taxes on real estate is computed from July 1 of the year following the tax assessment year.
This section does not release the lien where the taxes have been delinquent for less than twenty years.

Therefore, the answer to your first question is that the lien still exists within the twenty-year limitation as above set out and the purchasers, in order to remove the liens, must pay all delinquent taxes now secured by liens. The answer to your second question is in the affirmative.

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**TAXATION—Distraining Property For**

Treasurer may levy upon and sell vehicle of delinquent.

**TAXATION—Transfer of Title to Vehicle Sold For Delinquent Taxes**

May be accomplished by bill of sale executed by the Treasurer.

**TREASURERS—Transfer of Title to Vehicle Sold For Delinquent Taxes**

May be accomplished by bill of sale executed by Treasurer.

May 29, 1969

HONORABLE H. BENJAMIN VINCENT
Commonwealth's Attorney for Greensville County

This is in reply to your letter of May 20, 1969, which reads as follows:

"Title 58, Section 965 of the Code of Virginia of 1950, as amended, provides in part that the treasurer of counties shall proceed to collect delinquent taxes by distress or otherwise. Would you please give me your opinion as to whether or not this authorizes the treasurer to levy on a vehicle owned by an individual who is delinquent in the payment of his taxes and have the same sold at public auction. Furthermore, should your answer to the first inquiry be in the affirmative, I would like to know what procedure is necessary to properly transfer title to the vehicle to the purchaser."

By §§ 58-965 and 58-1001 of the Code, the treasurer is authorized to collect taxes by distress and therefore has authority to levy on a vehicle owned by an individual who is delinquent in the payment of his taxes and to sell the same at public auction. See, opinion of this office to the Honorable Julius Goodman, Commonwealth's Attorney for Montgomery County, dated June 4, 1954, found in the Report of the Attorney General (1953-1954), p. 204.

While no specific procedure is provided by statute for the transfer of title to the vehicle, I am of the opinion that a bill of sale for the vehicle executed by the treasurer, which describes the vehicle and states the authority under which it was sold, is sufficient authority to transfer title of the vehicle to the purchaser.

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**TAXATION—Exemptions—Child Health Care Center not exempt.**

December 3, 1968

HONORABLE THOMAS R. NELSON
County Attorney for Augusta County

This is in reply to your letter of November 22, 1968, in which you request my opinion as to whether the Child Health Care Center in Verona is exempt from State and local taxation under § 58-12 of the Code.

For the Center to be exempt, it must qualify under clause (d) of Section 183 of the Virginia Constitution and Section 58-12 (4) of the Code as an incorporated institution of learning.

The term "college or other institution of learning" presupposes the existence of a faculty, a student body and prescribed courses of study. An institution of learning must be something like a college under the rule *ejusdem generis.*
In your letter you state:

"The Child Health Care Center in Verona was built from monies accumulated in the Health & Welfare Fund of the Baltimore Regional Joint Board, Amalgamated Clothing Workers of America. Payments are made to this fund by the Baltimore Regional Joint Board itself and by approximately seventy clothing manufacturers whose production and maintenance employees (and certain other categories) are members of the Amalgamated Clothing Workers of America (Baltimore Regional Joint Board). The Center is operated as a trusteeship, with an equal number of Union members and representatives of the participating manufacturers constituting a Board of Trustees which provides guidance. The Center is a non-profit institution with a fee of $5.00 per week, per child, being charged of mothers whose children are in the Center. The children are at the Center eight hours per day, Monday thru Friday, and are served breakfast, lunch and a snack each day. As you may imagine, the $5.00 charge does not nearly meet corresponding operating costs per child.

"The Center was built to serve the employees of the nearby plant of L. Greif & Brother, a division of Genesco."

In reviewing the foregoing, it can be seen that the Child Health Care Center does not qualify as an institution of learning. It, therefore, is not exempt from the payment of State and local taxation.


HONORABLE HELEN B. SHARP
Commissioner of the Revenue for the City of Hopewell

November 26, 1968

This is in reply to your letter of November 12, 1968, which reads as follows:

"Please advise me whether or not the following real estate comes within the purview of the tax exemption provided in Section 183 of the Constitution of Virginia or Section 58-12 of the Code of Virginia:

"1. Real estate owned by the Optimist Club of Hopewell, Incorporated. This organization was formed for the purpose of engaging in youth work and is planning to erect a youth center, available to all youth in the community. This center would be operated for benevolent purposes and not for profit.

"2. Real estate owned by Columbus Club, Incorporated. The building on this property is used solely as a meeting room for the Knights of Columbus, a religious and benevolent association, and not for profit.

"3. Real estate owned by the Veterans of Foreign Wars. Their center is used as a meeting place for the V. F. W., and is available to the various civic organizations. They engage in benevolent and civic improvement activities, and their center is not conducted for profit.

"4. Real estate owned by the Loyal Order of the Moose. Their center is used as a meeting place for their organization and is available for use by the various civic organizations, and it is not conducted for profit. They engage in benevolent and fraternal work.

"5. Real estate owned by the Dupont Lodge 289, the local Masonic organization. Their temple is used as a meeting place by the local Masonic organizations and is also available for use by the various civic organizations, and it is not conducted for profit. They engage in benevolent, religious and fraternal work."
Section 183 (f) of the Constitution of Virginia reads thusly:

"Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

"(f) Buildings with the land they actually occupy and the furniture and furnishings therein, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes . . . ."

This portion of the Constitution is identical with that in the Code, § 58-12 (6).

For there to be an exemption under this language, the buildings with the land they actually occupy must belong to a benevolent or charitable association and be used exclusively for lodge purposes or meeting rooms by such association.

This office has opined that buildings and the land they occupy owned by Masonic lodges and used exclusively for lodge purposes are exempt from taxation under these provisions. See, Report of the Attorney General (1950-1951), p. 283. Therefore, I am of the opinion that the buildings and the land they actually occupy used exclusively for lodge purposes by the Dupont Lodge 289 is exempt from State and local taxation.

Paragraph (c) of the Articles of Incorporation of the Columbus Club, Incorporated reads as follows:

"The purposes for which the corporation is formed are as follows: Charitable, benevolent and literary; to erect, establish, maintain and hold title to a home in or near the vicinity of Hopewell, Virginia, for the use of members of Council No. 4568, Knights of Columbus, as a reading room and meeting hall, collecting income therefrom, and turning over the entire amount thereof, less expenses, to Council No. 4568, Knights of Columbus; and to create, and foster literary, fraternal and benevolent relations among members of said Council No. 4568, Knights of Columbus, who are in good standing in said council. As a literary, social and philanthropic club, it is to be non-profit and no part of the net earnings shall inure to the benefit of any individual."

From this it is clear that the home involved will be made available to the members as a reading room and a meeting hall. Here we have essentially a social club. The club does not qualify as a benevolent or charitable association within the meaning of clause (f) of Section 183.

Paragraph (3) of the Articles of Incorporation of Hopewell Lodge No. 1472, Loyal Order of Moose, Incorporated, reads as follows:

"The purpose for which this corporation is formed is to give corporate existence to the members of a fraternal lodge association known as Hopewell Lodge No. 1472, Loyal Order of Moose, for the sole purpose of operating a club and social or lodge rooms; to purchase, take, hold, lease, rent, sell or mortgage personal property for the purpose of owning or operating a social club or lodge rooms, and to do all things incidental, necessary or convenient in the carrying out of the foregoing purposes. It is no part of the purpose of this corporation to have any part whatever in the exercise of the powers granted to said Hopewell Lodge No. 1472 by the Supreme Lodge of the World, Loyal Order of Moose, or by the Fraternal System known in the aggregate as the Loyal Order of Moose, to operate a secret society or lodge under the laws and rituals of the said Loyal Order of Moose. The sole purpose of the corporation is to exercise property rights with reference to a social club or lodge rooms and is to be a non-profit corporation."

From this language it is clear that here we also have essentially a social club. The club does not qualify for exemption under clause (f) of Section 183.
REPORT OF THE ATTORNEY GENERAL

The property owned by the Optimist Club of Hopewell is not exempt. That club is not a fraternal association and the purpose for which the property is to be used is not exclusively for lodge purposes or as meeting rooms for the club.

Section 183 (g) of the Constitution exempts from taxation posts of the American Legion and such other organizations or societies as may be prescribed by law. Section 58-12 (7) exempts from taxation the posts of Veterans of Foreign Wars. Therefore, I am of the opinion that this property is exempt.

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TAXATION—Income—Funds donated for bond issue and expended to defeat bond issue not allowable deductions.

HONORABLE E. B. PENDLETON, JR.
Member, House of Delegates

This is in reply to your letter of April 22, 1969, in which you requested my opinion whether funds donated for the promotion of the $81 million Bond Issue are allowed as deductions on the State income tax returns. Also, whether funds expended in the defeat of this bond issue are likewise allowed as deductions.

I am of the opinion that the funds donated in either case are not allowable deductions from State income tax returns since they do not come under § 58-81(m) of the Code of Virginia (1950) nor are they allowable deductions under any other provisions of law.

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TAXATION—Income Tax Deductions—May be established by the legislature.

HONORABLE D. FRENCH SLAUGHTER, JR.
Member, House of Delegates

This is in reply to your letter of January 28, 1969 in which you ask to be advised if it is necessary that the Constitution of Virginia be changed before the legislature could amend § 58-81 of the Code of Virginia (1950), as amended.

The authority to levy a tax on incomes is found in Section 170 of the Constitution of Virginia. This section does not restrict the legislature from providing for deductions from income which it may consider appropriate.

Therefore, I am of the opinion that no amendment to the Constitution would be necessary in order for the legislature to amend § 58-81 in the manner proposed by you.

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TAXATION—Inheritance—Levied on the shares of beneficiaries in real estate held by husband and wife with the right of survivorship.

HONORABLE JOHN H. MATTHEWS, Clerk
Circuit Court of Henry County

This is in reply to your letter of August 29, 1968, which reads as follows:

"A problem has arisen in this office on which we would like to have your opinion. This pertains to whether or not real estate which has been conveyed to husband and wife by right of survivorship deed is subject to inheritance tax upon the death of either the husband or wife."

I am of the opinion that by § 58-152(5) of the Code of Virginia (1950), as amended, the property held by the husband and wife as joint tenants or tenants by the entireties, with right of survivorship, is subject to the State inheritance tax upon the death of either the husband or wife.
REPORT OF THE ATTORNEY GENERAL

Section 58-152(5) reads, in part, as follows:

"State inheritance taxes as hereinafter prescribed are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this Commonwealth, real, personal and mixed, and any interest therein, which shall pass:

* * *

(5) By virtue of the fact that it is held by the decedent and another as joint tenants or tenants by the entireties, with the right of survivorship, . . . except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth; provided, that when such property or any part thereof or any part of the consideration with which such property was acquired is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person. * * *

The provisions of this section, however, are modified by § 58-153 of the Code of Virginia (1950), as amended, if the real property involved meets the definition of a single family residence. By § 58-153, such property is treated thusly:

"Where a parcel of real property is owned by husband and wife as tenants by the entireties or joint tenants, with the right of survivorship, and such parcel is a single family residential property occupied by such husband and wife as their home place at the time of the decedent's death, one-half of the full value of such property shall be included in the surviving tenant's share, unless a lesser portion of the full value is found to be so includable in such share under clause (5) of § 58-152, as amended; but the amount of any deed of trust or other lien outstanding upon such property at the time of the decedent's death shall be first deducted from the full value of such property prior to the computation of such one-half, or such lesser portion, as the case may be, and the amount of any such deed of trust or other lien shall not be otherwise deductible. The term "single-family residential property", as herein used, means the dwelling house, limited in design to the accommodation of a single family, and the land it actually occupies, together with only such additional adjacent land as may be necessary for the convenient use of the dwelling house as a dwelling house.

TAXATION—Leasehold Interest of Lessee in Real Estate of Virginia Ports Authority—May be taxed by municipality. March 17, 1969

HONORABLE J. SARGEANT REYNOLDS
Member, Senate of Virginia

This is in reply to your letter of March 11, 1969 in which you inquire into the propriety of a municipality assessing a tax against a leasehold interest of a lessee of the Virginia State Ports Authority.

Section 58-758 of the Code of Virginia provides for the taxing of a leasehold interest in every case in which the land or improvements, or both, are exempt from assessment for taxation to the owner. This section has been construed by the Supreme Court of Appeals of Virginia to apply to a leasehold interest in property owned by the State. See, Shaia v. City of Richmond, 207 Va. 758.
Therefore, I am of the opinion that a municipality may assess a tax against a leasehold interest of a lessee of the Virginia State Ports Authority.

TAXATION—License Tax on Business—County ordinance not effective in city.  
March 24, 1969

HONORABLE THOMAS R. NELSON  
Attorney for Augusta County

This is in reply to your letter of March 14, 1969 in which you state the following facts:

The County of Augusta has adopted a business license ordinance which levies a gross receipts tax on the renting of houses, apartments or commercial property in the county. A resident of the county owns some ten rented houses which are located in Staunton, which municipality does not require a license tax to be paid on gross receipts of rental properties.

You ask to be advised if the county ordinance is effective in the City of Staunton and thereby requires a license of the Augusta County resident.

Section 58.266.1 of the Code of Virginia (1950), as amended, provides that “The council of any city or town, and the governing body of any county, may levy and provide for the assessment and collection of city, town or county license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the city, town or county . . .”

The situs for levying the business license ordinance by Augusta County is on the businesses located and being carried on in that county. Since the City of Staunton is not a part of the county, I am of the opinion the ordinance is not effective within the city and that the resident of the county cannot be required to obtain a license and pay the tax required by the ordinance solely because he lives in the county.

TAXATION—Licenses—Dry cleaning and laundries—Licensing ordinance constitutional.  
March 17, 1969

HONORABLE TAYLOR L. BARR  
Commissioner of Revenue for the City of Winchester

This is in reply to your letter of March 13, 1969, in which you enclosed a copy of a letter under date of January 2, 1969, from the Eastern Overall Cleaning Company, in which that company asserted that the business license tax imposed by Section 19 of the Taxing Ordinance of the City of Winchester was an unconstitutional burden on interstate commerce and unfairly discriminated against out-of-state laundries in favor of laundries located in the City of Winchester.

You also enclosed a copy of the Licensing Ordinance. Section 19 of the ordinance reads as follows:

"DRY CLEANING AND LAUNDRIES. The specific license tax on a steam or other than hand laundry operating in the City shall be $20.00 and 28 cts. per $100.00 on the first $500,000 gross receipts and 25 cts. per $100.00 on all additional gross receipts in excess of $500,000 of such business including rug cleaning, dry cleaning, pressing and dyeing. On every person other than a laundry or dry cleaning establishment located in the City of Winchester (paying regular laundry or dry cleaning license tax in the City of Winchester) engaged in soliciting general service or the renting or furnishing of towels and linens for compensation where
said person does the laundry or dry cleaning work thereon outside of the City, or has it done outside of the City, $300.00 for the first truck and $50.00 for each additional truck operated within the City. Said tax shall be per annum and shall not be prorated. But nothing in this section shall be construed to impose a license upon persons who wash bed-clothing, wearing apparel and so forth and who do not keep shops or other regular places of business for laundry purposes."

I am of the opinion that the license tax assessed by this Section is not an unconstitutional burden on interstate commerce and does not unfairly discriminate against out-of-state laundries in favor of laundries located in the City of Winchester. This question has recently been dealt with by the Supreme Court of the United States in *Dunbar-Stanley Studios, Inc., v. State of Alabama*, 37 Law Week 4135. In this decision on facts similar to those involved here, the court held that the tax was constitutional. See also *Richmond Linen Co. v. Lynchburg*, 160 Va. 644, 169 S.E. 554.

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**TAXATION—Local License—County may impose tax on business of extracting natural resources if business sufficiently defined.**

April 4, 1969

HONORABLE WILLIAM E. ASTLE
Assistant County Attorney, County of Fairfax

This is in reply to your letter of March 26, 1969 in which you request my opinion whether Fairfax County, under § 58-266.1 of the Code of Virginia (1950), as amended, in drafting a professional, occupational business privilege tax ordinance may include therein the business of "extracting natural resources."

I am unable to find any provision in Title 58 of the Code, or any other statute, which would prohibit the levying of a license tax for this purpose. None of the limitations expressly set forth in § 58-266.1 seem to prohibit the tax. The extraction of natural resources on a regular basis seems to fall within the definition of a business.

Therefore, I am of the opinion that Fairfax County may, under § 58-266.1 of the Code, as amended, include as a category for license taxes the business operation of extracting natural resources provided the term "extracting natural resources" is sufficiently defined.

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**TAXATION—Local License Tax—Alcoholic beverages—May not be levied by county.**

January 24, 1969

HONORABLE THOMAS R. NELSON
County Attorney of Augusta County

This is in response to your letter of January 7, 1969, which is as follows:

"The County of Augusta has recently adopted a business license ordinance and questions have been raised as to the legality as to Section 25 covering alcoholic beverages, a copy of which is enclosed. The questions raised are as follows:

1. Section 4-38 of the Code only permits cities and towns to impose a license tax on the handlers of alcoholic beverages, but it appears to me that Section 15.1-522 gives the County the power to enact an ordinance of this type on alcoholic beverages as well as Section 58-266.1.

2. A second question involves the legality of the tax on the ground that it imposes a license tax greater than that imposed by the Commonwealth of Virginia."
"It will be very much appreciated if you will give me your opinion as to the legality of this section of the Augusta County License Tax Ordinance."

In my opinion the County of Augusta does not have authority to impose license taxes with reference to alcoholic beverages, other than "mixed beverages" as defined in § 4-98.1. Section 4-96 of the Code of Virginia (1950), as amended, is as follows:

"Local ordinances or resolutions regulating alcoholic beverages.—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."

The foregoing statute seems to me to be indicative of legislative intent to pre-empt for the Commonwealth the entire domain of control over alcoholic beverages, and to yield to political subdivisions only the limited and specific authority set forth in §§ 4-38 and 4-97. This view seems consistent with that expressed by Attorney General J. Lindsay Almond, Jr. in an opinion on a related question given Honorable John M. Hart, dated January 6, 1949, copy of which opinion is enclosed.

While a limited authority with respect to licensing was conferred upon cities and towns by § 4-38, none was conferred upon counties. You suggest that § 15.1-522 as well as § 58-266.1 have the effect of conferring upon the County of Augusta the same powers cities and towns have under § 4-38. I doubt that this conclusion is sound.

As to § 58-266.1, the following language therein seems to me to be pertinent:

"Cities, towns and counties may impose local license taxes; limitation of authority.—The council of any city or town, and the governing body of any county, may levy and provide for the assessment and collection of city, town or county license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the city, town or county, whether any license tax be imposed thereon by the State or not, subject to the following limitations:

(1) No city, town or county shall levy any license tax in any case in which the levying of a local license tax is prohibited by any general law of this State, or on any public service corporation except as permitted by other provisions of law, nor shall this section be construed as repealing or affecting in any way any general law limiting the amount or rate of any local license tax."

You will note that under subsection (1) the county has no power to impose a local license tax which is prohibited by general law. As I have indicated, I think § 4-96 has such prohibitory effect.

I do not think that § 15.1-522 would be controlling here—it deals generally with the powers and authority of county boards of supervisors, whereas § 58-266.1 deals specifically with, and limits, the licensing power.

As to mixed beverages, assuming that Chapter 1.1 of Title 4 of the Code is effective in Augusta County, you will note that § 4-98.19 confers authority upon the county to impose local license taxes within certain limits upon persons holding mixed beverage restaurant licenses. The amount fixed in the copy of the county ordinance you sent me is within the statutory limits.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Local License Tax—Town may levy annual license tax plus a percentage based on gross receipts from occupation. January 30, 1969

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of January 24, 1969 in which you request my opinion on the following question:

"May an incorporated town levy a definite annual license tax plus a percentage based upon the gross receipts of the occupation as set forth in the Town of Woodstock's ordinance?"

By § 58-266.1 of the Code of Virginia, the town of Woodstock is authorized to impose a town license tax upon persons engaged in professional occupations in the town. This section does not limit the manner or mode in which the taxes may be imposed.

This office has opined that this tax may be measured by the gross receipts of the occupation being taxed. See Report of the Attorney General (1966-1967), p. 79. It is well established law that a license tax on professional occupations may be levied in the form of an annual license tax of a fixed amount.

In general, the same property cannot be taxed twice by the same taxing authority. It is not necessarily double taxation, however, where an occupation tax is imposed upon a particular business and a license tax is imposed upon a particular article sold in such business.

Since § 58-266.1 of the Code does not limit the manner or mode of the license taxes to be imposed, and since the method chosen by the town of Woodstock does not necessarily involve double taxation, I am of the opinion that the town may levy a definite annual license tax plus a percentage based upon the gross receipts of the occupation.

TAXATION—Local Licenses—Cities, towns and counties may not levy for privilege of operating radio or television broadcasting station or service. February 10, 1969

HONORABLE RAYMOND R. ROBRECHT
Commonwealth's Attorney for Roanoke County

This is in reply to your letter of February 1, 1969, which reads in part as follows:

"Section 58-266.1, of the Code of Virginia provides in Paragraph 3 that no city, town or county shall require a license to be obtained for the privilege or right of operating or conducting any radio or television broadcasting station or service. In view of this section, does Roanoke County (or for that matter, Salem or Roanoke) have the authority to require and/or grant a franchise for cable television for the consideration of money?"

Section 58-266.1, Code of Virginia (1950), as amended, to which you refer, authorizes cities, towns and counties to levy local license taxes on businesses, trades, professions, occupations and callings within such cities, towns and counties. Paragraph (3) of this section precludes the levying of these taxes for the privilege or right of operating or conducting any radio or television broadcasting station or service, any municipal charter provisions to the contrary notwithstanding. Sections 58-266.2 and 58-266.3, as amended, contain similar language precluding counties from levying such a tax.

The granting of a franchise by a municipality involves the granting of an exclusive privilege or right to use public property upon such conditions as the granting authority may impose.
The authority to grant franchises to companies or persons to use the public property of a city or town is found in Sections 124 and 125 of the Constitution of Virginia and in §§ 15.1-307 through 15.1-316 of the Code of Virginia (1950), as amended.

While Section 124 of the Constitution does not specifically name television broadcasting or related businesses as businesses which must obtain the consent of a city or town before using public property, it appears to be included in the companies engaged in like enterprises to those mentioned. Therefore, I am of the opinion that if a cable television company seeks to use the public property of a city or town, it can be required to obtain a franchise from the city or town and the city or town may grant the franchise.

While the local license tax provided for above is levied for the privilege or right to operate or conduct a business, this tax has no direct bearing on a franchise granted by a municipality which may require consideration for its issuance. Therefore, I am of the opinion that the provisions of § 58-266.1 of the Code of Virginia do not affect any right the cities of Salem or Roanoke may have to require the operator of a cable television business to obtain a franchise for consideration before operating such a business. I am aware of no authority whereby a county may require or grant a franchise to a cable television company.

TAXATION—Local Licenses—County without authority to levy on public service corporation.

HONORABLE THOS. R. NELSON
County Attorney for Augusta County

This is in reply to your letter of October 16, 1968, which reads in part as follows:

"The County is in the process of obtaining a business and professional licensing ordinance which will include a provision requiring certain public utilities to pay a license tax for conducting their businesses in the County. A copy of the provisions of the proposed ordinance covering these utilities is herewith enclosed. Section 58-266.1 (1) appears to permit counties to require a license tax to be paid by the public utilities mentioned in the attached provision of the ordinance, but under certain conditions. I have been unable to find in the Code any provisions of the law which exempts these utilities from this tax, and it would be very much appreciated if you would give Augusta County an opinion on whether or not the enclosed provision is valid under the above section of the Code of Virginia."

Section 58-266.1 of the Code of Virginia (1950), as amended, to which you refer, provides in part:

"(1) No city, town or county shall levy any license tax in any case in which the levying of a local license tax is prohibited by any general law of this State, or on any public service corporation except as permitted by other provisions of law. . . ."

I am aware of no other provision of law which permits a county to impose a license tax on public service corporations covered in the ordinance which you attached; namely, telegraph and telephone companies and water or heat, light and power companies.

I am, therefore, of the opinion that the county is without authority to levy a license tax on the public service corporations covered in the proposed ordinance.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Local Licenses—Peddler’s—Not affected by permit issued under § 40-118.3 of the Code.

October 23, 1968

HONORABLE ROBERT E. BROWN
Commonwealth’s Attorney for King George County

This is in reply to your letter of October 11, 1968, which reads as follows:

“A defendant accused in King George County of peddling (children’s books, cook books, dictionaries) without license required by Sections 58-340, et seq., Code of Virginia, as amended, has displayed permit to solicit, copy attached, issued by the Virginia Department of Labor and Industry.

‘Opinion is respectfully requested as to whether possession of the said permit by permittee corporation to solicit obviates requirement of cited code sections for possession of peddler’s license by individual representing said corporation selling books door to door in this county. Additionally does possession of said permit affect permittee corporation or its representatives vis a vis requirement of Code Section 58-340 for maintenance of regular place of business open at all times in regular business hours.”

The permit, copy of which you attached, was issued by the Department of Labor and Industry under § 40-118.3 of the Code of Virginia (1950), as amended, and is designed to assist that Department in enforcing the child labor laws of the Commonwealth.

Any permit granted under that section in no way relieves the permittee from the license requirements of §§ 58-340, et seq., of the Code. Under these sections a peddler is required to obtain a peddler’s license if he carries the books or wares from place to place and sells and delivers the same to the customer whether or not the company for which he works keeps a regular place of business.

I am, therefore, of the opinion that the possession of the permit from the Department of Labor and Industry does not obviate the license requirements imposed by §§ 58-340, et seq., or in any way change the statutory definition of a peddler as therein defined.

TAXATION—Local Licenses—Tax levied on attorneys by county.
COUNTIES—Taxation—May levy license tax on attorneys.

December 3, 1968

HONORABLE RICHARD C. COTTER, Judge
County Court of Mathews County

This is in reply to your letter of November 25, 1968, which reads in part as follows:

‘Title 58 Section 371 provided that attorneys at law ‘in addition to being licensed, sworn and admitted to prosecute and defend action or other proceedings in the Courts of this Commonwealth, shall obtain a revenue license; and no person shall act as an attorney at law or practice law in any Court of this Commonwealth without a separate revenue license. A revenue license to practice law in any county or city shall authorize such attorney to practice in all the Courts of this State without additional license.’

‘In view of this provision, is the county under Title 58-266.1 permitted to levy a license tax on the gross earnings of attorneys in addition to the revenue license referred to in Title 58-371?”

I am of the opinion that § 58-266.1 of the Code, as amended, is authority for the county to impose a local license tax on the practice of the profession of law.
The term *without additional license*, used in § 58-371, to which you refer, simply relieves an attorney who has secured a State license in one city or county from securing a State license elsewhere even though he may practice in courts of other localities. It has not been construed to prevent cities, towns and counties from imposing a local license tax under the provision of § 58-266.1.


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**TAXATION—Local Tax Levy—On consumers of utility services—May be imposed only where utility service supplied by public service corporation.**

October 23, 1968

HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

This is in reply to your letter of October 9, 1968, which reads as follows:

"Scott County, as of July 1, 1968, enacted an ordinance which levies a tax upon the users of all utilities in Scott County; said ordinance requires the seller of said utilities to collect said tax and remit to the County Treasurer.

"Scott County is situated near the City of Bristol, Virginia. The City of Bristol operates and distributes power to its residents and a portion of the subscribers in Scott County. Our question is, 'Under Chapter 12, Article 10—58-602 through 58-617.2, is the City of Bristol, Virginia, exempt as a Seller of utilities and will they be required, under said ordinance, to collect this tax from the consumer to be forwarded to the County Treasurer?""

The tax on the consumers of electric utility services under the provisions of § 58-617.2 of the Code may be imposed by a county where the utility service is provided by a public service corporation supplying water or heat, light and power as defined in Article 10, Chapter 12, of Title 58. Since the City of Bristol, which is supplying the electrical utility services, is not a public service corporation, I am of the opinion that the tax provided for by the ordinance of the county, copy of which you enclosed, may not be imposed against the city by the county.

The City of Bristol, therefore, would not be required to collect and forward the tax to the County Treasurer.

This is consistent with an opinion to the Honorable Philip P. Burks, Treasurer of Bedford County, dated June 28, 1968, a copy of which I am attaching.

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**TAXATION—Machinery and Tools Used in Manufacturing or Mining—May not be lawfully assessed as real estate.**

August 23, 1968

HONORABLE SIDNEY A. GILMORE
Commissioner of the Revenue for Giles County

This is in reply to your letter of August 1, 1968, relative to assessments for the tax year 1968, which reads in pertinent part as follows:

"We have had an established procedure for reporting machinery and tool values for a number of years. During the last reassessment of real
estate which occurred in Giles County in the year 1965, effective in 1966, the majority of the property at the two lime plants was assessed as real estate. Included in the real estate value was the majority of the machinery and tools at these plants, with the exception of the rolling stock such as Euclids, Dozers, etc. The Assessors gave me a list of the machinery and tools which I was to assess for the year 1966.

"Both lime plants have made major expansions at their plant site effective this year. They have reported the major part of their expansion as Real Estate stating as a basis the procedure that was followed by the Reassessment Board in 1965. They carry most of their property as machinery and tools for Federal and State Tax purposes.

"Both plants transport their stone from their mining operation to a centralized area whereby it is processed into their finished product.

"Prior to the real estate reassessment of 1966 the major portion of the property was assessed on the books as Machinery and Tools which included two lime kilns, rock crushers and conveyor system.

"The question is, 'Should I assess this new property as Machinery and Tools or as Real Estate?' I say that it should be assessed as Machinery and Tools and our Commonwealth's Attorney says it should be assessed as Real Estate. The Board of Supervisors say they are governed by the advice of the Commonwealth's Attorney.'"

I am of the opinion that the expansions at the lime plants insofar as they involve machinery and tools must be assessed as machinery and tools and not as real estate.

By § 58-412 of the Code of Virginia (1950), as amended, machinery and tools used in manufacturing or mining must be assessed as machinery and tools and cannot lawfully be assessed as real estate.

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**TAXATION—Motor Vehicles—Assessment of wrecked vehicle may be based on salvage value.**

**MOTOR VEHICLES—Taxation—Assessment of wrecked vehicle may be based on salvage value.**

_Honorable Charles A. Callahan_  
Commissioner of the Revenue of the City of Alexandria

August 23, 1968

This is in answer to your letter of August 14, 1968, in which you ask my opinion as to the value of assessment that should be placed upon a car which has been totally wrecked prior to January 1 the assessment date and which is still in the possession of the owner, and on which the insurance has not been settled.

Section 169 of the Constitution of Virginia provides that the assessment of tangible personal property shall be at its fair market value.

I am of the opinion that in arriving at the fair market value of the wrecked vehicle which you describe that it is proper for you to consider the salvage value in making your assessment.

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**TAXATION—Motor Vehicles—Local license—Taxable situs.**

_Honorable A. Burke Hertz_  
Commissioner of the Revenue for the City of Falls Church

December 6, 1968

This is in reply to your letter of December 4, 1968, in which you requested a clarification of two former opinions of this office. They are opinion dated May 13, 1968, to the Honorable Ora A. Maupin, Commissioner of the Revenue...

In a subsequent opinion dated September 25, 1968, to the Honorable W. P. Parsons, Commonwealth’s Attorney for Wythe County, a copy of which is enclosed, this office has undertaken to clarify the taxable situs of the automobiles mentioned in the two former opinions.

You will note that the taxable situs does not depend only upon the domicile of the owner of the automobile or where it is located on January 1 of any year but also upon the period of time that the automobile is physically present in a particular area of the State.

TAXATION—Motor Vehicles—Personal property—Taxable by locality in which physically located during greater part of the year.

HONORABLE IRVINE C. BAKER
Commissioner of the Revenue for the City of Lexington

This is in reply to your letter of February 19, 1969, in which reads in part as follows:

"* * * can the City of Lexington assess all of the cars registered at Washington & Lee as tangible personal property and can the City of Lexington request all of the owners to purchase local license tags that do not have local license tags attached to their vehicles from their own localities?"

Assuming that the vehicles in question are physically located in Lexington during the greater part of the year, I am of the opinion that the answers to your questions above are in the affirmative. I am attaching an opinion to the Honorable W. P. Parsons, Commonwealth’s Attorney for Wythe County, dated September 25, 1968, which concurs in this conclusion.

TAXATION—Partial Abatement and Proration—No authority to prorate taxes on real estate owned by religious body.

HONORABLE ADELARD L. BRAULT
Member, Senate of Virginia

This is in reply to your letter of December 4, 1968 in which you ask to be advised if the assessor may prorate taxes for the period of time within a year that property owned by a religious body is found to be exempt under Section 183(b) of the Constitution and § 58-12(5) of the Code.

Under § 58-796 of the Code, land is assessed for taxation on January 1 of each year. The liability for taxes for the year is determined and fixed on this date.

While there are sections relating to partial abatement and proration of taxes in Article 5, Title 58 of the Code (§§ 58-818 through 58-828) I am aware of no authority to partially abate or prorate the taxes upon land owned by a church upon which buildings have been constructed and are being used for religious purposes during the year.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Personal Property—Livestock—County must levy tax but may fix different rate of levy thereon.

HONORABLE ARTHUR R. GIESEN, JR.,
Member, House of Delegates

This is in reply to your letter of May 5, 1969 which reads as follows:

“Could you please give me an interpretation of the law on the following:
“What is a County Government’s authority on levying personal property taxes on livestock under our present constitution?
“It is my understanding that the constitution requires a tax on personal property other than household goods and personal effects. Is this a proper interpretation of the law?”

Section 168 of the Constitution provides that:

“All property, except as hereinafter provided, shall be taxed *

Section 171 of the Constitution provides that:

“* * * Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or reassessed for local taxation in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws.”

Section 58-851 of the Code of Virginia (1950) provides, in part, that:

“The governing body of any county, city or town may in its discretion classify farm machinery, farm tools, farm livestock * * * separately from other tangible personal property and may fix the rate of levy thereon * * *.”

In view of the cited language, I am of the opinion that a county not only has the authority to levy personal property taxes on livestock, but is required to do so. The county, however, in levying such taxes may classify this property separately from other tangible personal property and fix the rate of levy thereon.

TAXATION—Personal Property—Taxable situs of automobile of student.

HONORABLE W. P. PARSONS
Commonwealth’s Attorney for Wythe County

This is in answer to your letter of September 20, 1968, in which you asked to be advised as to the proper place for your son to report his automobile for purposes of paying his personal property taxes thereon.

In your letter you state that he is attending the University of Virginia at Charlottesville. I assume from this statement that he is in regular attendance there for at least a greater part of the year. In your earlier letter of December 6, 1967, to this office in which you asked an opinion on this matter, you stated that he was “temporarily” living in Charlottesville. That language indicated a possible casual, incidental or temporary sojourn in that city.

The answer to your question depends not only upon the domicile of the owner of the automobile or where it is located on January 1 of any year but also upon the period of time that the automobile is physically present in a particular area of the State.

Assuming that your son is a student at the University of Virginia for a greater part of the year, I am of the opinion that the language of my opinion to the
REPORT OF THE ATTORNEY GENERAL

Honorable Ora A. Maupin, Commissioner of Revenue for the City of Charlottesville, dated May 13, 1968, is applicable.

That language reads:

"In the cases given by you, the automobiles of the students have acquired a taxable situs, in my opinion, in the City of Charlottesville because they are actually there during and by far the greater part of the year. The fact that the automobiles were not physically present in Charlottesville on January 1 is by no means conclusive. The automobile acquired a taxable situs in Charlottesville by reason of physical location there which by no means is transitory and yet not entirely permanent, but such physical location is so substantial in length of time in any year as to effect a change in situs to Charlottesville from the locations the students return to during the Christmas holidays and the summer.

"Therefore, I am of the opinion that your decision is correct and the automobile in question should be taxed as tangible personal property by the City of Charlottesville."

TAXATION—Recordation—Applies to deeds conveyed by trustees.

November 8, 1968

HONORABLE S. W. SWANSON, Clerk
Circuit Court of Pittsylvania County

This is in reply to your letter of October 30, 1968, which reads as follows:

"Recently we recorded a deed prepared by an attorney pursuant to the settlement of an estate. The intestate left twelve children and a widow and at his death owned considerable real estate. In order to avoid complications resulting from possible death or incompetency of any of the heirs, a deed was prepared in which each of the heirs and spouses and the widow conveyed all of their interest in specifically described parcels of real estate to two individuals as trustees. The trust provisions of the deed directed the two trustees to sell the property publicly or privately and distribute the proceeds according to the various interests. Some of the property has been sold publicly and other parcels have been sold to several of the heirs individually.

"At the time the trust deed was recorded taxes were paid on the entire value of the property. The trustees have now presented deeds conveying several of the individual properties to this office for record and have inquired of us as to whether the full recording tax must be paid again on each individual conveyance by the trustees. The trustees take the position that full credit should be given, and even if this is not the case, that some credit should be given in that in the case of the heirs purchasing from the trustees they would actually be paying a double tax on property acquired by them through descent and for which a probate tax was previously paid in addition to the recording tax on the trust deed.

"Would you please advise me, therefore, whether any credit should be given for recording taxes on deeds prepared by the trustees, and whether it would make any difference if the conveyance was to a stranger rather than to any of the heirs who were parties to the original trust deed."

In my opinion, the deeds prepared by the trustees do not come within the provisions of § 58-60 and are taxable under the provisions of § 58-54 (a) and (b) upon the basis of the consideration of the deeds or the actual value of the property conveyed, whichever is greater.

These deeds, in my judgment, are not supplemental documents within the meaning of that term as used in § 58-60. They are deeds as contemplated by § 58-54.
This is in reply to your letter of October 5, 1968, which reads as follows:

"We enclose herewith photo copy of an assignment of contract. You will note that the parties wish to make this assignment 'for love and affection.' The contract as recorded in this office is for the purchase of a farm for the sum of $11,000 payable in one hundred and fifty monthly installments.

"Please advise if we can record an assignment under love and affection."

The assignment in this case is a contract relating to real property and, therefore, a recordable instrument under § 58-58 of the Code. This section, to the extent that it is applicable to the present situation, is as follows:

"On every contract relating to real property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for. . . ."

The consideration stated in the assignment of contract is the love and affection of the assignors for their father, the assignee. While this consideration will support the contract among the parties, its pecuniary value is not readily ascertainable.

Since the recordation tax is based on either the consideration or value of the property contracted for, I am of the opinion that, in this instance, the recorded value which you state to be $11,000, payable in one hundred and fifty monthly installments, should be used in determining the recordation tax.

I am of the opinion that the deed of trust securing the county is not subject to the recordation tax.
In an opinion of this office, January 20, 1967, to the Honorable J. N. Harris, Deputy Clerk of Pittsylvania County, published in the Report of the Attorney General (1966-1967), p. 60, situations similar to those which you present were considered and discussed, and the conclusion reached that the recordation tax did not apply. A copy of this opinion is enclosed.

TAXATION—Recordation—Deeds conveying real estate to YMCA and Salvation Army taxable.  

Honorable T. F. Tucker, Clerk  
Corporation Court of the City of Danville  
March 17, 1969

This is in reply to your letter of March 11, 1969, in which you request my opinion as to whether or not a deed conveying real estate to a YMCA or The Salvation Army may be recorded without the payment of the recordation tax imposed by §§ 58-54 and 58-55 of the Code of Virginia.

A recordation tax is not a tax on property and, as such, does not come within the provisions of Section 183 of the Constitution. Section 58-64 of the Code of Virginia lists the exemptions from the State recordation tax. This list of exemptions does not include a YMCA or The Salvation Army. Therefore, I am of the opinion that the deeds conveying real estate to these organizations are subject to the recordation tax.

TAXATION—Recordation—Exemption—Deed of trust involving friendly foreign government not exempt.  

Honorable J. H. Wood, Jr., Clerk  
Circuit Court of Clarke County  
December 10, 1968

This is in reply to your letter of December 4, 1968 to which you attached a deed of trust and asked my opinion on several questions relating to the recordation tax thereon.

Your questions were:

"(1) Would the tax required by Section 58-55 of the Code of Virginia apply in this case since a friendly foreign government is involved.
"(2) Should this office refuse to accept this document for recordation since no corporate seal is affixed and the corporate officer attesting same is not identified.
"(3) Is the acknowledgement of the Notary in such form as to constitute a proper acknowledgement."

I shall answer your questions seriatim.

(1) There are no exemptions from the recordation tax where a friendly foreign government is involved. Therefore the deed of trust is subject to the recordation tax required by § 58-55.

(2) The document is signed by J. F. Edwards, president of the Waterford Park, Inc. I am of the opinion that this signature is substantial compliance with the certificate required by § 55-120 of the Code and is sufficient.

(3) While the acknowledgment purports to be that of a notary, there is no affirmative language therein to the effect that the party signing it is in fact a notary. Therefore I am of the opinion that the acknowledgment is not proper since it lacks substantial compliance with the certificate required by § 55-113 of the Code.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Not charged upon lien to secure deferred purchase price unless party executes deed of trust or mortgage. September 20, 1968

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

This is in reply to your letter of September 16, 1968, which reads in part as follows:

"A contract for the sale of standing timber provides as follows, "SECURITY INTEREST. The Bank of S and S of Wakefield, Virginia, shall be deemed a secured party in the property and proceeds hereinabove described for the purchase money advanced."

"The question may be more simply put by asking, should the Clerk charge one recordation tax or two recordation taxes when the language above quoted is found in an otherwise valid contract for the sale of standing timber?"

I am of the opinion that the clerk should charge only one recordation tax on the contract. There is no provision in the Code under which a recordation tax may be charged upon the amount of a lien to secure the deferred purchase price, except in those instances where the purchaser executes a deed of trust or mortgage, in which event the tax on such an instrument is imposed under § 58-55 of the Code.

This is in accord with the opinion to the Honorable John H. Powell, Clerk of the Circuit Court of Nansemond County, dated August 7, 1962, Report of the Attorney General (1962-1963), p. 280, to which you referred.

TAXATION—Recordation—Proof of delivery of deed a factual question. September 24, 1968

HONORABLE ARNOLD MOTLEY, Clerk
Circuit Court of Essex County

This is in reply to your letter of September 20, 1968, which reads as follows:

"A ruling is hereby requested on subsection (b) of Section 58-54 of the Code of Virginia, which states in substance that on or after June 28, 1968, each deed admitted to record shall be subject to a specified tax.

"The second paragraph of subsection (b) states that no such deed shall be admitted to record without the certification of the clerk that the tax has been paid.

"The Virginia Department of Taxation in a Notice to Clerks of Courts —Re: Tax etc., dated May 23, 1968, at the beginning of page two states as follows:

'"The new and additional tax on deeds of conveyance of realty will become effective on June 28, 1968, and will apply to recordations on and after that date, except were deeds were fully executed and delivered (my italics) to grantees prior to that date.'"

"This Clerk's Office has been presented on September 20, 1968, a deed bearing date October 3, 1966, with the last execution by a notary public dated August 27, 1967. It is verbally claimed to have been delivered before June 28, 1968. How does this office prove delivery if this deed is not subject to the tax imposed by Section 58-54 (b)? And does Section 58-54 exempt deeds as interpreted by the Department of Taxation in its memorandum?"
The proof of delivery of a deed is a question of fact which should be determined in every instance by the clerk. In the case which you cite, it would appear that affidavits under oath would be helpful in reaching a determination of this question. The interpretations of conveyances not subject to the tax under § 58-54 (b) listed by the Honorable C. H. Morriseett, State Tax Commissioner, in his memorandum to the Clerks of Court entitled “Additional Tax on Deeds of Conveyance of Realty”, dated May 23, 1968, in my opinion, are correct.

TAXATION—Recordation—Required where deed of trust is to secure loan made by mortgage investment corporation.

HONORABLE AUSTIN EMBREY, Clerk
Circuit Court of Nelson County

This is in reply to your letter of October 25, 1968, which reads as follows:

“I enclose copy of a deed of trust which has been presented in my office for recording without payment of the recording tax as provided for in Section 58-55 of the Code of Virginia.

“It is claimed to be exempt because it may be insured or guaranteed by a Federal agency.

“It will be appreciated if you will advise me whether this particular instrument is exempt from the recording tax provided for in Section 58-55.”

The recordation tax cannot be collected upon deeds of trust securing loans made by the United States Government or one of its agencies unless the act creating the agency or some other federal act permits the imposition of the recordation tax.

The copy of the deed of trust which you enclosed indicates that the loan is being made by the Mortgage Investment Corporation rather than by the United States or one of its agencies. Therefore, I am of the opinion that the instrument is subject to the recordation tax.

TAXATION—Recordation—Tax not applicable under § 58-54(b) to conveyance of realty based on “love and affection.”

HONORABLE W. CLAUDE DODSON, Clerk
Bath County Circuit Court

This is in reply to your letter of January 15, 1969 in which you ask my opinion as to whether the recordation tax levied by § 58-54(b) of the Code of Virginia, 1950, as amended, applies to the recordation of a deed of conveyance where the consideration stated in the deed is for “love and affection.”

Section 58-54(b) of the Code of Virginia, as added by Chapter 778 of the Acts of 1968, imposes a tax upon deeds, instruments, or other writings, whereby realty sold is granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or, at his direction, any other person, when the consideration for, or value of, the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100.

The tax is limited to conveyances of realty sold and does not apply to other conveyances. The term “sold” imports a transfer of an interest for a valuable consideration, which may involve money or anything of value.

While a consideration for “love and affection” entertained by and for one within degree recognized by law is considered good consideration, it is not considered valuable consideration.
Therefore, I am of the opinion that a conveyance of realty which is based on "love and affection" does not involve a "sale" and the tax imposed by § 58-54(b) of the Code does not apply.

TAXATION—Sales and Use Tax—Applicable to farmer selling apples.

TAXATION—Severance—No authority in county to levy.

December 3, 1968

HONORABLE RUFUS V. MCCOY, SR.
Member, House of Delegates

This is in reply to your letter of November 25, 1968, in which you pose two questions as follows:

"1. A part time farmer has an orchard that produces apples. He has no stand or place to sell them. He does haul away several truck loads and sells to people in mining camps who want to buy them in any quantity they want. Does this farmer have to collect the sale or use tax from his customers?

"2. Does the Board of Supervisors have the authority to place a tax on raw materials in Dickinson and Russell Counties? These raw materials would be coal, oil, timber and gas, or would they have the power to tax utilities such as telephone, and power?"

In answer to question 1, the sales tax applies to the retail sales of farm products, whether sold by farmers, peddlers or at a public market, roadside stand, farm or any other place, provided such activity is regular or recurring and not occasional. Since the farmer you describe sells several truck loads of apples by individual quantities at retail, I am of the opinion that these sales are regular and recurring and are subject to the Sales tax.

Concerning your second question, I am aware of no statutory authority whereby the Board of Supervisors may levy a severance tax on the raw materials you mention. The counties may, however, under § 58-587.1 of the Code, as amended, impose a tax on the consumers of services provided by telegraph and telephone companies and by § 58-617.2 of the Code, as amended, impose a tax on the consumers of the services provided by water or heat, light and power companies.

TAXATION—Sales and Use Tax—Motor Vehicles—Levied on the sales price of vehicle.

October 2, 1968

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

This is in reply to your letter of September 26, 1968, in which you request my opinion on the question raised in the following:

"The usual practice in the sale of a new automobile is for the dealer to price the automobile at the list price with any discount to be given to be included in the allowance for the customer's automobile which was traded in. The titling tax is then levied on the full amount of the list price. If the list price is discounted or reduced and allowance made for the customer's traded-in automobile at its actual value, would the titling tax be levied on the discounted sales price?"

In respect to each new automobile sold in this State the titling tax, i.e. the motor vehicle sales and use tax, is based on two percent of the sale price, as indicated in § 58-685.12 of the Code of Virginia. The term sale price is defined in
§ 58-685.11 of the Code to 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."

It will be seen from the quoted language that the trade-in allowance does not affect the sale price as defined by statute. If the list price is the sale price, or the records furnished the Division of Motor Vehicles upon application for title indicate that the list price is the sale price for the motor vehicle, then the tax will be based on such list price. Since the tax is based on the sale price, rather than on the list price, however, any reduction in the list price, so as to result in a reduced sale price, will necessarily reduce the amount of tax payable. Accordingly, your question is answered in the affirmative. The Commissioner of the Division of Motor Vehicles, of course, is authorized by § 58-685.18 of the Code to examine the records, books, papers or other documents of any motor vehicle dealer to verify the truth and accuracy of any information regarding a particular sale.

TAXATION—Sales and Use Tax—Non-profit rescue squad not exempt. August 16, 1968

HONORABLE LEWIS JONES, JR.
Commonwealth's Attorney for Middlesex County

This is in reply to your letter of August 8, 1968, in which you ask if non-profit rescue squads are exempt from the Virginia Retail Sales and Use Tax Act.

The exemptions from the sales and use taxes are found in § 58-441.6 of the Code of Virginia (1950), as amended. For there to be an exemption of the non-profit rescue squads they would have to qualify under paragraph (p) which reads:

"Tangible personal property for use or consumption by this State, any political subdivision of the State, or the United States; but this exclusion shall not apply to sales and leases to privately owned financial and other privately owned corporations chartered by the United States."

In my opinion, the non-profit rescue squads are not the State nor a political subdivision thereof and, therefore, do not qualify for an exemption from the payment of the sales and use tax.

TAXATION—Sales and Use Tax—On outdoor boards—Billboards—Application of tax. October 11, 1968

HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in answer to your recent letter concerning the interpretation of §§ 1-3 and 1-100 of the Virginia Retail Sales and Use Tax Rules and Regulations.

Your question is whether the word billboards as used in § 1-3 also includes signs which are painted on outdoor boards, and also under § 1-100 whether the tax applies to outdoor boards as the sales tax has been paid on items that are purchased which go into the making of the signs.

I am of the opinion that as used in Regulation § 1-3, the word "billboard" should not be construed to include signs painted on outdoor boards. In Black's Law Dictionary, 3rd Edition, the word "billboard" is defined as "an erection next to the land in the nature of a sign for the purpose of posting advertising bills and posters."

If a sign is painted and then placed on the billboard, or if a blank sign is placed on the billboard and then painted, such sign falls under the first paragraph of Regulation § 1-100; viz:
“When a sign manufacturer or painter fabricates and paints signs from his own materials, or from materials furnished by others, the tax applies to the total charge for the finished product.”

Outdoor boards, as referred to in Regulation § 1-100, are not billboards as the term is normally used, and if a sign is painted on the outdoor board, which is usually made of wood, the sign so painted is controlled by the second paragraph of Regulation § 1-100; viz.:

“The tax does not apply to charges for painting signs on buildings, trucks, outdoor boards, windows, doors and the like. Materials and supplies used in performing such services are taxable at the time of purchase or removal from a non-tax paid inventory.”

In the case of the outdoor boards, you will note that the sales and use tax does not apply to the charges for painting the signs, but that the materials and supplies used in performing the painting are taxable at the time of purchase or removal from a non-tax paid inventory.

**TAXATION—Tobacco and Tobacco Products—No authority for county to levy a sales and use tax or excise tax on.**

**COUNTIES—Taxation of Tobacco and Tobacco Products—No authority to levy a sales or use tax or excise tax on.**

October 7, 1968

HONORABLE DEXTER S. ODIN
County Attorney for Fairfax County

This is in reply to your letter of September 23, 1968, which reads as follows:

“After reviewing the provisions of Sections 58-441.49 and 58-757.27 of the 1950 Code of Virginia as amended, a question has arisen as to whether or not the County has the power to levy taxes upon the sale or use of tobacco or tobacco products or a local excise tax on cigarettes.”

This office has consistently expressed the opinion that counties may not impose taxes unless they are expressly authorized to do so by statute. See opinion of this office, dated March 15, 1950, to the Honorable W. Carrington Thompson, Commonwealth’s Attorney for Pittsylvania County, published in the Report of the Attorney General (1949-1950), p. 33.

A review of the language in §§ 58-441.49 and 58-757.27, to which you refer, discloses that in neither of these sections is there a grant of power to a county to levy a sales or use tax or an excise tax on tobacco or tobacco products.

I am aware of no express statutory authority for a county to levy a sales or use tax or excise tax on tobacco or tobacco products. I, therefore, am of the opinion that the County of Fairfax does not possess that authority.

**TAXATION—Trailer Camps—County may not impose a registration fee on owner of trailer.**

**COUNTIES—Taxation of Trailer Camps—No authority to impose registration fee on owner of trailer.**

January 28, 1969

HONORABLE R. H. L. CHICHESTER
Commonwealth’s Attorney for Stafford County

This is in reply to your letter of January 17, 1969 in which you refer to your former letter of December 9, 1968 which apparently strayed in the mails since my
REPORT OF THE ATTORNEY GENERAL

records do not disclose its receipt. This accounts for you not receiving an earlier reply.

Your letter of December 9, 1968, a copy of which you enclosed, reads in part as follows:

"Will you please give me your opinion on the following question:
"Under Section 35-64.5 of the Code as to license or taxes imposed on trailers or trailer parks, fix the maximum license of $50.00. This amount has been fixed by the Board of Supervisors of Stafford County. In addition to this $50.00, which is the maximum under the statute, would it be legal for the county to, in addition thereto, impose a registration fee for trailers brought into the county and used as a home therein."

I am aware of no statutory authority whereby the county may impose a registration fee upon the owners of trailers brought into the county and used as homes therein.

In the absence of specific legislative authority authorizing the county to levy a registration fee on trailers, I am of the opinion that the county may not levy such a fee.

TAXATION—Trailer Camps—License tax—Applicable to City of Franklin's operation of trailer camp.

TRAILER CAMPS—License Tax—Applicable to City of Franklin's operation of trailer camp.

HONORABLE RICHARD C. GRIZZARD
Commonwealth's Attorney for Southampton County and City of Franklin

May 5, 1969

This is in reply to your letter of May 1, 1969 which furnished additional information to that included in your letter of March 7, 1969. In your letter of March 7, 1969 you included a copy of an ordinance of the County of Isle of Wight regulating and imposing a license tax upon the operation of trailer camps in the county. You ask my opinion whether the county ordinance is applicable to the City of Franklin.

In the enclosures to your letter of May 1, 1969 the following additional information was submitted:

"The City of Franklin owns the land used as a trailer park and rents individual spaces to trailer owners. The rental charged is $20.00 per month, which includes water, sewer service, and garbage refuse collection. Funds left over after the provision of these services are used for maintenance and capital improvements at the Franklin Municipal Airport. The City does not own any of the trailers."

The ordinance of the County of Isle of Wight was adopted pursuant to the authority under Chapter 6, Article 1.1 (§§ 35-64.1 through 35-64.6). Neither the ordinance nor these statutes suggest that the City of Franklin is exempted from this trailer camp ordinance while operating a trailer camp as described.

I am therefore of the opinion that the City of Franklin is subject to regulation by this ordinance and therefore required to pay the license tax imposed by it.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Trailer Camps—Uniformity required. March 7, 1969

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

This will acknowledge receipt of your letter of March 3, 1969, which reads as follows:

"Under the Virginia statutes a local governing body may impose a house trailer fee, which must be uniform throughout the county.

"Please advise me whether or not under this law there can be a distinction in the amount of the fee based upon the size of the trailer, that is to say, can a 30-foot trailer be charged one fee and a 60-foot trailer charged a higher fee."

Section 35-64.5 of the Code of Virginia 1950, as amended, provides for the imposition of a different annual license tax on the operator of a trailer camp which accepts trailers which do not exceed certain sizes. This reads in part as follows:

"Provided however, that the annual tax upon the operator of a trailer camp which does not accept trailers exceeding twenty-six feet in length, measured at the longest point of the trailer but excluding the rear bumper and the trailer hitch, may be less than the annual tax upon the operator of a trailer camp which does accept trailers exceeding twenty-one feet in length, measured at the longest point of the trailer but excluding the rear bumper and the trailer hitch."

Unless the operator of a trailer camp falls within this classification I am of the opinion that the provisions of § 35-64.5 of the Code of Virginia 1950, as amended, prohibit the local governing body from requiring a different tax on trailers based upon the size of the trailer. 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 is 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 trailers be uniform in application. This, therefore, precludes the local governing body from establishing different classifications other than those above for tax purposes on trailers based solely upon the size of the trailer.

TAXATION—Water and Sewer—Collection of local tax.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Collection of tax.

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

August 23, 1968

This is in reply to your letter of July 30, 1968, which reads as follows:

"Mr. Dwight L. Estep, Treasurer of Rockingham County, has requested that I write you for an opinion concerning the collection of monthly water and sewer assessments imposed on the residents of Park View Sanitary District, a duly constituted sanitary district within the County of Rockingham.

"These payments have been made in the past, and are presently being
made, to Mr. Estep as Treasurer. However, recently the First National Bank of Harrisonburg established a branch in the Park View community and is receiving electric and telephone payments from the residents on behalf of the companies. Many of the residents have inquired of Mr. Estep as to whether it would be possible to make their water and sewer payments to the bank also. Mr. Estep has indicated that this is agreeable with the bank and that he would continue to accept payments from those residents who wish to pay through his office should the bank be recognized to receive payments."

Treasurers are constitutional officers and the Constitution provides that their duties "shall be prescribed by general law." Section 110 of the Constitution of Virginia. Section 58-958 of the Code requires the treasurer to receive the State revenue and the levies and other amounts payable into the treasury of the political subdivision of the Commonwealth.

I am aware of no statutory authority whereby the bank may collect these public funds for the treasurer.

TOWNS—Authority to Adopt Ordinance Establishing Curfew—Principles involved in determining.

JUVENILES—Curfew—Authority of town to adopt depends on conditions in existence.

HONORABLE SAMUEL H. ALLEN
Commonwealth’s Attorney for Lunenburg County

October 14, 1968

This is in reply to your letter of September 27, 1968, with which you enclose a copy of a proposed ordinance and ask my opinion as to its validity. The ordinance cannot be quoted here in full but the first paragraph provides as follows:

"It shall be unlawful for any parent, guardian, or other adult person having the care and custody of any minor under eighteen years of age, to permit or allow such minor child to loiter or remain in or upon any street, alley, or other public place within the Town of Victoria, or to loiter or remain in or about any motor vehicle in and upon any street or alley with in the said Town, whether the same shall be parked or in motion, between the hours of 12 o'clock midnight and 5:00 A.M., of the following day unless such minor shall be accompanied by said parent, guardian, or other adult person having the care, custody, and control of such minor, or unless such minor shall be accompanied by any other adult person with permission of such parent, guardian, or other adult person having such care, custody and control of such minor."

The remaining provisions of the ordinance contain additional restrictions relative to minors loitering or remaining in or about public places between the hours of 12 o'clock midnight and 5:00 a.m.

I am unable to find any provision of general law or of the Charter of the Town of Victoria specifically authorizing the enactment of such an ordinance. (The Charter of the Town was first enacted by the Acts of the General Assembly, 1916, Chapter 158, page 277, amended by the Acts of 1966, Chapter 17, page 58.)

The only statute which I find specifically dealing with the type of curfew proposed by this ordinance is § 15.1-514, authorizing counties to enact ordinances prohibiting minors, unattended by their parents, from frequenting or being in public places. I am unable to find any similar provision applicable to cities or towns. In addition, I am unable to find any recorded opinion of a court of record in Virginia construing the validity of an ordinance enacted pursuant to § 15.1-514.

The only provision of general law I find which could be construed as authorizing
the enactment of the proposed ordinance by the Town of Victoria is § 15.1-137, which authorizes the governing body of a town to protect the property of the town and to "preserve peace and good order therein." The charter of Victoria contains no similar provision nor does it contain any provision similar to § 15.1-510 of the Code.

Decisions from other states dealing with the constitutionality of curfew enactments are sparse. I am able to find only two reported decisions from the highest courts of a state: Thistlewood v. Ocean City, 204 A(2d) 688 (Md. 1964), decided by the Court of Appeals of Maryland, (upholding the constitutionality of an ordinance declaring a state of curfew for persons under twenty-one during prescribed hours) and City of Portland v. Goodwin, 210 P(2d) 577 (Ore. 1949), decided by the Supreme Court of Oregon (upholding the validity of an ordinance making it unlawful for a person to remain or be on a public street between certain hours). See also, 107 Univ. Pa. L. Rev. 66, 97 (1958); City of Eastlake v. Ruggiero, 7 Chio App. 2d 212, 220 N.E.2d 126 (1966); and State v. Grant, 216 A(2d) 790 (N.H. 1966).

The statutory authority necessary for the enactment of the proposed ordinance must be found in the provisions of § 15.1-137. This section grants general police power to the governing body of the town for the preservation of peace and good order. The Supreme Court of Appeals of Virginia has defined the scope of general police power as granted in § 15.1-510 [former § 15-8(5)]. In King v. County of Arlington, 195 Va. 1084 (1954), a county ordinance prohibiting the keeping of dogs known to be vicious and evidencing a disposition to attack human beings was upheld. The ordinance had been attacked on the ground that it was not authorized by the general grant of police power. The Court rejected this argument, finding that because Arlington County was a thickly settled urban community where vicious dogs could be a public menace, the county had the power to enact such legislation.

Most of the opinions dealing with the validity of curfew legislation rest upon conclusions of "reasonableness" or "unreasonableness," meaning that the validity of such enactments must be determined by weighing the seriousness of the evil to be prevented, and the need for a curfew, against the gravity of the invasion of individual liberties. As is stated in the Thistlewood case, supra, at 204 A(2d), page 693:

"A curfew law, like any other which restricts the activity or conduct of individuals, adult or minor, must not exceed the bounds of reasonableness. Three primary tests have often been invoked. (1) Is there an evil? (2) Do the means selected to curb the evil have a real and substantial relation to the result sought? (3) If the answer to the first two inquiries is yes, do the means availed of unduly infringe or oppress fundamental rights of those whose activities or conduct is curbed?"

In City of Portland v. Goodwin, supra, at 210 P(2d), page 586, the court stated:

"The real question is whether an ordinance such as this bears a sufficiently close relation to the peace, safety and welfare of the public so as to justify the inconvenience to which the law-abiding citizens may occasionally be subjected."

The generally recognized rule is that municipal corporations are prima facie sole judges respecting the necessity and reasonableness of their ordinances, and the presumption of their validity governs unless it is overcome by unreasonableness apparent on the face of the ordinance or by extrinsic evidence which clearly establishes the unreasonableness. This presumption is based upon the broad general principal that every intendment will be made in favor of the lawfulness of the exercise of municipal power. National Linen Service v. Norfolk, 196 Va. 277, 279-80 (1954); Housing Authority v. Denton, 198 Va. 171, 177 (1956); Funeral Directors' Assoc. v. Groth, 202 Va. 792, 795 (1961).

The entire question is by no means free of doubt. It is difficult to predict the validity of the proposed ordinance without also knowing the specific conditions
within the Town of Victoria which prompt its enactment, for upon those conditions turns the "reasonableness" or "unreasonableness" of the legislation.

I am enclosing a copy of pages 98-101 from Vol. 107, University of Pennsylvania Law Review, contained in a carefully prepared and thorough article entitled, "Curfew Ordinances and the Control of Nocturnal Juvenile Crime." These comments provide an insight into the factors which must be considered in weighing the seriousness of the evil to be prevented against the need for the type of ordinance which is proposed.

In my opinion if the evidence of conditions of juvenile crime within the Town of Victoria discloses that this ordinance would bear a substantial relation to the maintenance of order and the protection of persons and property, so that it reasonably meets the evil to be remedied, the governing body would have the authority to enact it. However, without being familiar with the conditions which motivate the governing body in its consideration of the ordinance, I am unable to categorically answer your question. Nevertheless, I trust that this brief recitation of the principles involved will assist you in reaching a conclusion.

TOWNS—Council—Member ineligible to be appointed chief of police.

March 10, 1969

HONORABLE DON E. EARMAN
Member, House of Delegates

I have your letter of March 7, 1969, which reads as follows:

"A member of the Council of the Town of Elkton in Rockingham County desires to resign his position as councilman and have the remaining council appoint him Chief of Police of said Town to fill an existing vacancy.

"I would appreciate very much your opinion as to whether or not this would come within the prohibition of Section 15.1-800, Code of Virginia, 1950, as amended."

Section 15.1-800 of the Code of Virginia reads as follows:

"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."

The above quoted section is very clear. The Council of the Town of Elkton would be prohibited from appointing a member of the Council who has resigned for a period of one year from the date of his resignation as Chief of Police of said town to fill an existing vacancy. Therefore, your question is answered in the affirmative.

TOWNS—Jurisdiction For Exercise of Zoning Powers—Limited to incorporated area of town.

ZONING—Town—Power to zone limited to incorporated area of town.

April 10, 1969

HONORABLE E. BRUCE HARVEY
Commonwealth's Attorney of Campbell County

I am in receipt of your letter of April 4, 1969, in which you inquire to what extent the Town of Altavista has zoning powers outside its boundaries.

Section 15.1-486 of the Code of Virginia (1950), as amended, states in part that:
"For the purpose of zoning, . . . the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality."

Though § 15.1-501 provides: "No provision in any municipal charter in conflict with this chapter shall be affected hereby" I find no conflicting provision in the municipal charter of Altavista and therefore am of the opinion that the jurisdiction of the town's zoning power is controlled by § 15.1-486.

Chapter 18 of Title 15.1 (in which is included § 15.1-838 to which you direct my attention) refers to powers which may be conferred upon municipalities and is not a direct grant of power. See Board of Supervisors v. Corbett, 206 Va. 167, 142 S.E.2d 504 (1963). It does not appear that this chapter is applicable to Altavista.

TREASURERS—Deputy—Roanoke County—Eligible for appointment as treasurer of county provided residency requirements met.

HONORABLE JAMES E. PETERS
Treasurer of Roanoke County

April 15, 1969

I am writing in further connection with your letters of March 25 and April 11, 1969, and your subsequent telephone conversation with Mr. McIlwaine of this office concerning the following situation and inquiry set out in your initial communication:

"I expect to become a candidate for Treasurer for the City of Salem. As this will leave an unexpired term of two years, I shall appreciate your opinion as to eligibility of appointment of my Deputy Treasurer and Bookkeeper who has been a long time employee and fully qualified for the position.

"She, the same as I, lives in the City of Salem. I understand that any county officer who lived in the Town of Salem (which was in the county) and became a city January 1, 1968, would be eligible for another term. I want to know if this applies to a deputy as well as a principal officer."

Since the office held by the individual in question at the time of the transition of the Town of Salem to the City of Salem was that of deputy treasurer of Roanoke County rather than treasurer of Roanoke County, I do not believe that the situation you present would fall within the scope of the transition provision contained in § 15.1-995 of the Virginia Code. However, as you point out, § 15.1-51 of the Virginia Code, which prescribes the residence requirements for county officers, in pertinent part prescribes:

"Every county officer, except deputy clerks of courts of record, shall, at the time of his election or appointment, have resided six months next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county, . . ." (Italics supplied.)

You advise that the courthouse of Roanoke County is located in the City of Salem and that the City of Salem lies wholly within the boundaries of Roanoke County. I am therefore of the opinion that, so far as residence requirements are concerned, your deputy treasurer would be eligible to the office of treasurer of Roanoke County if, at the time of her appointment as such, she will have resided six months next preceding her appointment in the Town of Salem.
UNITED STATES—Deputy Marshal—Mileage allowance for transporting Federal prisoner to State courts to stand trial—Within discretion of court.

October 10, 1968

HONORABLE ANDRE EVANS
Commonwealth's Attorney for the City of Virginia Beach

This is in response to your recent inquiry, in which you advise that several defendants who are presently detained in Federal prisons throughout the United States have been brought to Petersburg by the Federal government at no expense to the Commonwealth. These Federal prisoners have then been transported to Virginia Beach by a Deputy United States Marshal.

The question has arisen as to the amount which may be allowed this Federal officer for transporting these prisoners. The United States Marshal for the Eastern District of Virginia has advised that under ordinary circumstances the Marshal would be compensated at the rate of 10 cents per mile. You inquire as to whether or not the provisions of § 19.1-315 of the Code of Virginia (1950), as amended, limit the amount which may be paid the Federal government to 8 cents per mile.

I am of opinion that the limitation of 8 cents per mile set forth in § 19.1-315 is applicable only to officers of this Commonwealth. A Deputy United States Marshal would not be such an officer. Section 19.1-315 provides in part:

"When in a criminal case an officer or any person renders any other service in the state for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the state treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service."

There is, of course, no specific provision of Virginia law providing for the payment of Federal officers for transporting Federal prisoners to State courts to stand trial. In view of the foregoing, I am of opinion that the Court may, pursuant to the provisions of § 19.1-315 allow the Deputy United States Marshall 10 cents per mile under the circumstances set forth in your letter.

USURY—Service Charges—Not treated as interest when determining.

August 6, 1968

HONORABLE R. BAIRD CABELL, Judge
Municipal Courts of the City of Franklin

This is in reply to your letter of July 19, 1968, in which you call my attention to § 6.1-361 of the Virginia Code and inquire whether a merchant extending credit under an open-end credit plan violates the usury laws by including the service charge from the previous month in the outstanding balance upon which the 1½% monthly service charge is imposed.

Section 6.1-361 of the Virginia Code states as follows:

"Any lender engaged in the extension of consumer credit under an open-end credit or similar plan under which no service charge is imposed upon the cardholder or consumer if the initial billing is paid within a period of twenty-five days from billing day may charge and collect a service charge at a rate not to exceed one and one half percent per month, computed on maximum fiscal monthly balances." (Italics supplied.)

It is my opinion that this practice is not improper under the above statute. While applying the service charge to the maximum balance in the account, rather than to the principal balance, may have the effect of compounding the service
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charge, it is not "charging interest on interest" since service charges are not normally treated as interest. See the enclosed copy of a previous opinion of this office, contained in the Report of the Attorney General (1960-1961) p. 46. You will note that under § 6.1-353 (d)(1) service charges and interest are only two of a number of items that constitute a finance charge under the act in question.


PAUL C. WHITE, JR., M.D., Director
Bureau of Epidemiology, Department of Health

This is in reply to your letter of November 20, 1968, in which you direct attention to § 29-188.1(c) of the Code and inquire as to the effect of a refusal by one of the specified counties to approve the rabies clinic referred to therein.

Pertinent portions of the statute read as follows:

"§ 29-188.1(a) No license tag shall be issued for any dog unless there is presented, to the treasurer or other officer of the county, city or town charged by law with the duty of issuing license tags for dogs at the time application for license is made, evidence satisfactory to him showing that such dog has been inoculated or vaccinated against rabies by a currently licensed veterinarian.

* * *

"(c) The provisions of this section shall not apply in the counties of Buchanan, Dickenson or Lee, if rabies clinics are not established and available by January one, nineteen hundred sixty-nine, said clinics to be held in each county at least three times per year, and which clinics shall be approved by the appropriate health department and board of supervisors of the said counties and provided, further, that if there is a failure to have such clinics established and available by January one, nineteen hundred sixty-nine, because of a failure of the health department and/or board of supervisors to take appropriate action to establish same, all provisions of this section shall apply in each of said counties where they have not been established."

Section 29-188.1(a) thus requires that dog licenses be issued only upon presentment of a certificate showing that an anti-rabies injection has been administered by a currently licensed veterinarian. Section 29-184 makes it unlawful to own a dog six months of age, or over, unless the dog is licensed pursuant to § 29-188.1.

However, § 29-188.1 (c) permits Buchanan, Dickenson, or Lee Counties to issue licenses based on inoculations given at rabies clinics to be established with the approval of the board of supervisors and the health department. Should any of these three counties not establish such a clinic by January 1, 1969, the provisions of § 29-188.1(a) would be applicable in that county.

It is, therefore, my opinion that the failure of one of the specified counties to approve the clinic would mean that licenses in that county could be issued only for dogs which have been inoculated by a currently licensed veterinarian.
VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—Application of language in § 2.1-344(a)(7) to meetings of board of supervisors to discuss subject matter of public hearing after hearing has taken place.

PUBLIC MEETINGS—Executive or Closed Meetings—Application of § 2.1-344 (a)(7) to meeting of board of supervisors.

August 22, 1968

HONORABLE ROBERT E. GILLETTE
Commonwealth’s Attorney for Nansemond County

This is in reply to your letter of August 2, 1968, in which you quote § 2.1-344(a)(7), Code of Virginia (1950), as amended, and then ask:

"I would appreciate your opinion as to whether or not the Board of Supervisors or other public County bodies may hold a discussion in executive sessions of any matter immediately following a public hearing held on that matter after the required ten days notice had been given for the said public hearing?

"The language of (a) (7) says . . . any matter which will be . . . while technically speaking an executive session to discuss the subject matter of a public hearing after the public hearing has been held would be a discussion of a matter which was or had been the topic of a public hearing.

"It would seem to me that the intent of this Code Section would be to allow an executive session either before or after a public hearing on the subject matter thereof provided the other requirements of the statute are complied with."

In my opinion the answer to your question is in the negative. I do not believe that subparagraph (a)(7) of § 2.1-344 permits public bodies of the county to hold a discussion in an executive meeting, as defined in § 2.1-341, "of any matter immediately following a public hearing on that matter." In my opinion the words "will be," as used in subparagraph (a)(7), must be accorded their customary future tense meaning and cannot be construed to mean "was" or "had been," as you suggest. This is not to say, however, that "executive meetings" cannot be held in the situation which you present for the purposes set forth in subparagraphs (1) through (6) of § 2.1-344(a).

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—May be held for briefing by staff members to discuss matters which will be topics of a public hearing.

PUBLIC MEETINGS—Executive or Closed Meetings—Application of §§ 2.1-344 (a)(6) and 2.1-344(a)(7) to meeting of board of supervisors.

August 22, 1968

HONORABLE ROBERT L. GILLIAM, III
Commonwealth’s Attorney for Westmoreland County

This is in reply to your letter of July 15, 1968, which reads as follows:

"The recently enacted Virginia Freedom of Information Act (Sections 2.1-340 through 2.1-346, Code of Virginia 1950, as amended) is restrictive on the purposes for which a Board of Supervisors may hold executive or closed meetings, and does not include provisions for the working meetings which such a board must have with its Executive Secretary.

"The Westmoreland County Board of Supervisors had hoped it could schedule a 30-minute closed session prior to each regular meeting to review the Executive Secretary’s operations during the month, issue necessary policy guidance, and exchange views and opinions concerning programs in exploratory stages. With the increased complexity of
county operations, such regular communication between the Board as a whole and its Executive Secretary appears necessary and compatible with the intent of the acts which authorized establishment of an office of County Executive Secretary.

“Request your opinion whether the new act will permit repetitively scheduled closed meetings of the Board and Executive Secretary for the foregoing cited purpose.”

If the board passes a resolution at a public meeting scheduling such “closed sessions,” in my opinion the answer to your question is in the affirmative.

From your letter it appears that the purpose of the sessions would be to give the executive secretary an opportunity to brief the board with reference to various matters. Section 2.1-344(a)(6), Code of Virginia (1950), as amended, authorizes meetings to be closed where the purpose is “briefings by staff members.”

It would also appear that the provisions of § 2.1-344(a)(7) are applicable, permitting a closed session where the discussion concerns topics which will be on the agenda of a public hearing.

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings Defined.

PUBLIC MEETINGS—Executive or Closed Meetings Defined. August 22, 1968

HONORABLE KENNETH N. WHITEHURST, JR.
Member, House of Delegates

This is in reply to your letter of July 8, 1968, which reads as follows:

“Chapter 479, Acts of the Assembly of 1968 establishes certain purposes for which a public body as therein defined, may hold executive or closed meetings. It further establishes the formal requirements necessary to create a closed meeting.

“I would like your opinion as to whether an informal Assemblage of the constituent membership, with no clerk or recording secretary present, no minutes being kept, and no votes being cast on any item, and where the sole purpose of the Assembly is to familiarize the membership with the topics to be considered and acted upon at a formal open meeting to be held shortly thereafter constitutes a meeting within the meaning of section 2(a) of the statute.”

Section 2(a) of Chapter 479 of the Acts of Assembly of 1968, to which you refer, has been codified as § 2.1-341(a), Code of Virginia (1950), as amended. That section provides in part as follows:

“The following terms, whenever used or referred to in this chapter, shall have the following meanings, respectively, unless a different meaning clearly appears from the context:

“(a) ‘Meeting’ or ‘meetings’ means the meetings, when sitting as a body or entity, of any authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State, including cities, towns and counties. . . .”

In my opinion the answer to your question is in the negative. I do not believe that the “assemblage” which you describe is a “meeting” as defined in § 2.1-341. From your description it does not appear that the board would be “sitting as a body or entity,” as those terms are used in § 2.1-341(a). In my opinion a public body would be “sitting as a body or entity” when it meets in regular or special sessions provided for by statutes, charters, ordinances or resolutions. The situation which you describe is not in that category.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA FREEDOM OF INFORMATION ACT—Notice of Meeting Required—Publication in newspaper within terms of statute sufficient.

VIRGINIA FREEDOM OF INFORMATION ACT—Notice to Individuals of Meetings—Required to be sent separately upon request of individual concerning a specific meeting.

April 15, 1969

HONORABLE JAMES E. BAYLOR, Secretary
Electoral Board, City of Norfolk

I am in receipt of your letter of April 8, 1969, in which you ask two questions concerning "The Virginia Freedom of Information Act" which is found in Chapter 21, Title 2.1, §§ 2.1-340 through 2.1-346 of the Code of Virginia (1950), as amended. I will answer each question separately.

(1) "What kind of notice of time and place of meeting is required of a board?"

Answer: "[N]otice of every . . . public hearing shall be published generally in the community not less than ten days prior to such public hearing." Section 2.1-344(a)(7). Publication in a newspaper within the terms of the statute would be satisfactory notice.

(2) "When a citizen requests to be notified of board meetings, is it the obligation of the board to separately notify him indefinitely?"

Answer: No. Under the provisions of § 2.1-343, a citizen who requests information as to time and place of a specific meeting must be sent such information, but there is no obligation for a board to establish a mailing list for every public meeting it holds.

WATER—Impoundment—Entry upon land by county to make surveys and studies—No authority.

EMINENT DOMAIN—Counties—Water impoundment—No authority to enter upon land to make surveys.

August 30, 1968

HONORABLE JOHN ALEXANDER
Commonwealth's Attorney for Fauquier County

This is in reply to your letter of August 20, 1968, from which I quote the following:

"The County of Fauquier together with the Soil Conservation Service of the United States Government is undertaking to locate and construct various water impoundments within this County. One of the sites which they have under consideration is on the property of two landowners who have declined to give the surveyors and engineers employed by the County permission to enter upon their lands in order to make surveys and feasibility studies.

"The County has, of course, the power of eminent domain to acquire lands for water supply purposes, but I am unable to find any authority giving the County the right of entry upon lands for the purpose of making surveys and feasibility studies.

* * *

"In view of the fact that this specific authority has been granted to certain bodies corporate under certain circumstances, I have concluded that without such express statutory authorization, the County has no
authority to enter upon lands of others for the purposes of examination and survey unless such authority is expressly granted by statute.

"Would you advise me of your opinion on the proposition that lacking express statutory authority, whether or not the County has the right to enter upon lands of any person for the purpose of examination and survey in contemplation of an eminent domain proceeding."

As you point out, each public service corporation of this State has the authority under § 56-49 of the Code to enter upon the lands of any person to make examinations and surveys for its proposed line or location of its works as necessary to the selection of the most advantageous location or route. A similar authority is granted any "person," including counties and municipalities, authorized by law to acquire lands within this State for public parks and vested with the power of eminent domain, in § 25-123 of the Code. Certain counties, not including Fauquier, are extended this authority pursuant to § 25-232.1 of the Code in connection with the actual or proposed acquisition, construction, improvement, enlargement, extension and equipment of any project wherein the power of eminent domain may be exercised. Likewise, § 33-57.2 of the Code authorizes the State Highway Commissioner to enter upon any land in the Commonwealth to make examinations and suitable surveys.

I find no statute which would authorize Fauquier County to make the examinations and surveys on the lands of any person for the stated purposes. Considering the fact that the legislature has dealt specifically with the matter under various situations and, especially, in view of the authority granted certain counties under § 25-232.1, previously cited, I am in agreement with your conclusion that the authority does not extend to the quoted factual situation and, therefore, I shall answer your question in the negative.

In respect to your letter of August 22, 1968, I agree that § 15.1-1250 of the Code does not grant the right of pre-entry upon lands not under the control of the county for purposes of surveying and examination.

WATER—Impoundment—Provisions of Chapter 8, Title 62.1 (formerly Chapter 5.1 of Title 62) not applicable to municipal or county owned impoundments.

HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

August 21, 1968

I am in receipt of your letter of August 1, 1968, in which you forwarded to me a copy of a letter you received from Mr. Marion Steele of Wiley & Wilson, Consultant Engineers for the County of Prince William, and inquire whether or not the provisions of Chapter 5.1 of Title 62 of the Virginia Code are applicable "to municipal or county owned impoundments when the same is to be used for furnishing water to the general public?"

I am constrained to believe that your inquiry should be answered in the negative. In this connection, I have contacted the Division of Water Resources and the State Water Control Board and am advised that neither of these agencies which are mentioned in Chapter 5.1 of Title 62 of the Virginia Code have construed the statutes in question as applicable to undertakings by municipal subdivisions to provide a water supply reservoir.

In addition, I am forwarding to you a copy of a previous opinion of this office, dated August 23, 1956, to the Honorable John H. Daniel, Member of the House of Delegates, in which it was ruled that the provisions of Virginia law under consideration were not mandatory, but permissive only, and designed for the protection of complying landowners. See, Report of the Attorney General (1956-1957) p. 271. Finally, I am forwarding to you a copy of an opinion of this office, dated January 20, 1966, to the Honorable George C. Rawlings, Jr., Member, House of Delegates, in which an analogous situation involving the nonapplicability of the
provisions of Chapter 6 of Title 62 to the establishment of a public water supply was considered and a similar conclusion reached. See, Report of the Attorney General (1965-1966) p. 312.

WATER AND SEWER AUTHORITIES—Authority to Borrow Money From County.

BOARDS OF SUPERVISORS—Lending of Money—May make loan to county sanitation authority.

HONORABLE E. EUGENE GUNTER
Commonwealth’s Attorney for Frederick County

November 12, 1968

This is in reply to your letter of October 24, 1968, in which you present the following inquiry:

"Please be advised that the Frederick County Board of Supervisors has set up and appointed members for the Frederick County Sanitation Authority. The Frederick County Sanitation Authority has employed an engineer to conduct certain feasibility studies in reference to water and sewer in Frederick County. The Frederick County Sanitation Authority has asked Frederick County Board of Supervisors to loan them approximately $15,000 to pay the engineer for the Feasibility Study. The Sanitation Authority will then conduct a project financed by floating bonds and the Authority proposes to repay the loan from this money.

"Please advise me as to whether or not the Frederick County Board of Supervisors can constitutionally loan money to the Frederick County Sanitation Authority to defray the expenses of a preliminary feasibility study."

It appears that the Frederick County Sanitation Authority was established pursuant to the Virginia Water and Sewer Authorities Act set out in §§ 15.1-1239 through 15.1-1270 of the Virginia Code. In this regard, I direct your attention to § 15.1-1250 (hl) of the Water and Sewer Authorities Act, which states that one of the powers of an authority established under that act is:

"To borrow at such rates of interest not to exceed six per centum per annum as the authority may determine from individuals, partnerships, or private or municipal corporations, to issue its notes, bonds, or other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property and income. Any county, city, or town which has formed or joined an authority may lend money to such authority;" (Italics supplied.)

Section 15.1-1252 provides for the issuance of revenue bonds by an authority to pay for the cost of the projects undertaken by the authority. Section 15.1-1240(n), in defining "cost" as used in the act, states in part:

"Any obligation or expense incurred by the authority prior to the issuance of revenue bonds under the provisions of this chapter for engineering studies and for estimates of cost and of revenues and for other technical or professional services which may be utilized in the acquisition, improvement or construction of such system, may be regarded as a part of the cost of such system."

Therefore, it is my opinion that pursuant to the foregoing sections, it is permissible for the county to advance the funds described in your letter to the authority, and for these funds to be considered part of the cost of the system to be repaid from the proceeds of the revenue bonds.
WITNESSES—Fees—Physician or clinical psychologist limited to $50.00 for each day.

HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

October 16, 1968

This is in reply to your letter of October 3, 1968, in which you ask for a clarification of the provisions of § 37.1-89 pertaining to the payment of physician's fees.

The provisions of that section to which you refer read as follows:

"Every physician or clinical psychologist not regularly employed by the State of Virginia, or, if regularly employed by the State of Virginia but on authorized leave therefrom, who is required to serve as a witness for the State in any proceeding under this chapter or who executes a medical certificate pursuant to § 37.1-66 shall receive a fee of $50.00 for each day during which he serves."

In my opinion the physician or clinical psychologist described therein who is required to serve as a witness for the State in any proceeding under Chapter 2, Title 37.1, or who executes a medical certificate pursuant to § 37.1-66, shall receive a fee of $50.00 for each day during which he serves, whether during that day he participates in one or more proceedings or whether he executes one or more medical certificates. In other words, if during a given day he participates in one or more proceedings or executes one or more medical certificates, or does both, he shall receive a fee not to exceed $50.00. Regardless of the number of proceedings in which he testifies and regardless of the number of medical certificates which he executes during a given day, his fee for that day is $50.00.

WITNESSES—Physician Not Precluded From Testifying Unless Physician-Patient Relationship Exists or Proceedings Civil in Nature.

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

October 18, 1968

This is in reply to your letter of October 10, 1968, in which you inquire if § 8-289.1 of the Virginia Code would prohibit a physician from testifying: (1) to the physical condition of an individual brought to a hospital by an officer for a blood test pursuant to the implied consent statute; (2) to the physical condition of a person, involved in a vehicle accident, treated by the physician and which person had been charged with driving under the influence; and (3) to what a hospitalized patient voluntarily told a physician as to details of an accident, the patient being charged with driving under the influence.

It is my opinion that the statute in question would not be applicable to any of the situations you outline.

In order to establish the privilege there must first be a physician-patient relationship. In the first situation that you describe, it does not appear that there is any such confidential relationship of physician-patient as is contemplated by § 8-289.1 of the Code.

Assuming that a physician-patient relationship does exist in the second and third situations you mention, § 8-289.1 still would not be applicable since the proceedings involved would be criminal in nature. The statute expressly excepts workmen's compensation proceedings and, with this exception, the privilege applies only in a "civil action suit or proceeding . . ." (Emphasis supplied.) See 20 M.J. Witnesses, § 28, (1967 Cumulative Supp.), pp. 83-84, and citations thereunder.
REPORT OF THE ATTORNEY GENERAL

WORKMEN'S COMPENSATION ACT—Records and Reports of Accidents—Employer to file within ten days of accident.

HONORABLE LEE R. GORDON
Commonwealth's Attorney for Chesterfield County

This is in reply to your letter of June 25, 1968, in which you present the following situation:

"With reference to Section 65-115 of the Virginia Code, as amended, entitled 'Records and Report of Accidents', this section requires that the employer shall report injuries to the Industrial Commission and to the Department of Labor and Industry.

"It is my opinion that when it is obvious when the accident is in the course of their employment, this report shall be submitted; to the contrary, if it is obvious that the injury did not occur in the course of their employment, no report is necessary, but when there is a question or conflict as to where the injury took place, it is also my opinion that this report should be submitted and the decision made by the Industrial Commission or the Compensation Board.

"It has been reported to me that this decision has been made at the county level and I would respectfully request an opinion from you, outlining the correct procedure on the three above situations, the County of Chesterfield being the employer in question."

The provision of § 65-115, Code of Virginia (1950), as amended, upon which you correctly rely for the proper procedure, in part states:

"... Within ten days after the occurrence and knowledge thereof as provided in § 65-82, of an injury to an employee, a report thereof shall be made in triplicate in writing and mailed to the Industrial Commission and two copies turned over to the Department of Labor and Industry on blanks to be procured from the Commission for this purpose."

In my opinion, within ten days after the occurrence of an accident and knowledge thereof by the employer, as provided in § 65-82, the employer is required to file the report provided for in § 65-115 in all three of the situations which you present.
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## OPINIONS

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