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

From July 1, 1969 to June 30, 1970

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1970
Letter of Transmittal

December 1, 1970

THE HONORABLE LINWOOD HOLTON
Governor of Virginia
State Capitol
Richmond, Virginia

My dear Governor Holton:


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 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,

ANDREW P. MILLER
Attorney General
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<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>Andrew P. Miller</td>
<td>Washington County</td>
<td>Attorney General</td>
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<tr>
<td>M. Harris Parker</td>
<td>Greensville County</td>
<td>Chief Deputy</td>
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<td>Reno S. Harp, III</td>
<td>Richmond City</td>
<td>Deputy</td>
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<td>Troy G. Arnold, Jr.</td>
<td>Richmond City</td>
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<td>William P. Bagwell, Jr.</td>
<td>Nottoway County</td>
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<td>Gerald L. Baliles</td>
<td>Patrick County</td>
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<td>C. Tabor Cronk</td>
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<td>Lee F. Davis, Jr.</td>
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<td>Stuart H. Dunn</td>
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<td>Robert A. Johnson</td>
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<td>Vann H. Lefcoe</td>
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<td>Overton P. Pollard</td>
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<td>William P. Robinson, Jr.</td>
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<td>Walter H. Ryland</td>
<td>Middlesex County</td>
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<td>Robert L. Simpson, Jr.</td>
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<td>Richard R. K. Sutherland</td>
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<td>Randolph E. Trow, Jr.</td>
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<td>Anthony F. Troy</td>
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<td>D. Gardiner Tyler</td>
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<td>A. R. Woodroof</td>
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<td>Lillian Cersley</td>
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<td>Marie G. Cook</td>
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<td>Lavinia C. Harrison</td>
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<td>Mary W. Llewellyn</td>
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<td>Joyce H. Luck</td>
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<td>Barbara F. Marshall</td>
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<td>Barbara N. Novak</td>
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<td>Agnes Reid Pickral</td>
<td>Pittsylvania County</td>
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<td>Eleanor W. Tilley</td>
<td>Smyth County</td>
<td>Secretary</td>
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<td>Olga M. Bruggeman</td>
<td>Richmond City</td>
<td>File Clerk</td>
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<tr>
<td>Frances T. Robertson</td>
<td>Richmond City</td>
<td>Receptionist</td>
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ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1970

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 ..................................... 1962-1970
Andrew P. Miller ...................................... 1970-

*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

Agricultural Services Association, Inc. v. Commonwealth, ex rel., etc. (Two cases.) From State Corporation Commission. Appeal involving violation of § 56-304.6:1; revocation of right to operate motor vehicles on Virginia highways. Reversed.

Barden, Kerwin, Jr. v. Commonwealth. From Circuit Court, City of Chesapeake. Appeal from conviction of rape. Dismissed.


Barrett, Billy Joe v. Commonwealth. From Circuit Court, Tazewell County. Appeal from conviction of statutory rape of daughter. Reversed and remanded.


Boykins, Ralph v. Commonwealth. From Corporation Court, City of Norfolk. Appeal from conviction of first degree murder. Affirmed.


Bryson, Roy Lee v. Commonwealth. From Hustings Court, City of Roanoke. Appeal from conviction of lottery commonly known as the numbers game. Reversed and remanded.


Cameron, Herman Roosevelt v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of a felony—Robbery. Reversed and remanded.


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


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. Reversed and final judgment for the Commonwealth.

Commonwealth, ex rel. State Tax Commissioner, et al. v. Shell Oil Company. (Two cases.) From Circuit Court, City of Richmond. Appeal involving refund of tax on aviation fuel under Title 58, Chapter 13, Code of Virginia. Reversed and final judgment for the Commonwealth.


Evans, George Bolding, Jr. v. Commonwealth. From Hustings Court, City of Richmond. Reckless driving. Affirmed.


Hall, Alvin v. Commonwealth. From Hustings Court, City of Richmond. Upon conviction of unlawful assembly. Reversed.


Hudson, George Lee v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from convictions for statutory burglary (7 charges); forgery. Writs dismissed.

Hughes, Elbert v. Commonwealth. From Circuit Court, Amherst County. Appeal from conviction of unlawfully shooting into occupied dwelling. Affirmed.


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


Luck, Bertha, Administratrix, etc. v. The Central Mutual Telephone Company. From Circuit Court, Prince William County. Petition for appeal rejected; the effect of which is to affirm the order of the Circuit Court awarding proceeds to the Commonwealth.


Painter, Henry Boyd v. Commonwealth. From Circuit Court, City of Waynesboro. Appeal from conviction of first degree murder. Reversed and remanded.

Penn, Thomas Lee v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of first degree murder. Affirmed.

Penn, William v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of first degree murder. Affirmed.


Robertson, Lester, Jr. v. Commonwealth. [Two cases.] From Circuit Court, Pittsylvania County. Appeal from conviction of statutory rape. Affirmed.


Thaxton, Gordon L. and Koscot Interplanetary, Inc. v. Commonwealth. 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. Affirmed.


CASES PENDING IN THE SUPREME COURT OF APPEALS

Allen, Ray William v. Commonwealth. From Circuit Court, Campbell County. Appeal from conviction of felony—hit and run.

Blue Cross of Virginia v. Commonwealth, ex rel. &c. From State Corporation Commission. Appeal from order denying prescription drug coverage.

Bridgers, Bernard, Jr. v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of malicious wounding.

Cephas, G. D. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of statutory burglary.
Comer, Thomas James v. Commonwealth. From Hustings Court, City of Richmond. From a conviction under § 18.1-164 of the Code of Virginia (robbery and grand larceny).
Cook, Clarence Junior v. Commonwealth. From Circuit Court, Augusta County. Appeal from conviction revoking probation.
Cosby, Edward Lewis v. Commonwealth. From Hustings Court, City of Richmond. From a conviction of breaking and entering.
Fearon, Joseph F. v. Commonwealth. From Circuit Court, Fairfax County. Appeal from uttering a forged check.
Ferguson, Roy Lee, Jr. v. Commonwealth. From Corporation Court, City of Charlotteville. Appeal from conviction of misdemeanor—unlawful assembly.
Gardner, Claude Mabry, Jr. v. Commonwealth. From Circuit Court, Henrico County. Appeal from conviction of armed robbery.
Garnett, Lucy v. Fugate. From Circuit Court, Nansemond County. Arising out of a condemnation case. Brief in Opposition to Petition filed.
Green, George Henry v. Commonwealth. From Corporation Court, City of Newport News. Appeal from conviction for contempt of court.
Harris, Frank Louis v. Commonwealth. From Hustings Court, City of Richmond, Part Two. Forgery and uttering.
Hefflin, Carlton Morris v. Commonwealth. From Circuit Court, Albemarle County. Appeal from conviction for unauthorized use of an automobile.
Holt, Robert v. Sixth District Bar Committee. Appeal of action of Bar Committee revoking license.
Howell, Henry E., Jr. [Intervenors: Board of Supervisors of Fairfax County and County Board of Arlington County] v. Chesapeake and Potomac Telephone Company. From State Corporation Commission. Appeal from application of C. & P. for increase in telephone charges.
Jackson, Robert S. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of grand larceny.
Kavadias, Gabriel v. State Board of Pharmacy. From Corporation Court, City of Norfolk. Appeal from Order setting aside State Board revocation of license to practice pharmacy.
Kirkpatrick, Michael Allen v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of felony—robbery.
Land, Peter Edward v. Commonwealth. (Two cases.) From Circuit Court, City of Virginia Beach. Appeal from conviction of murder; rape.
Lewis, Alfred Lynwood v. Commonwealth. From Circuit Court, Halifax County. Appeal from conviction of statutory burglary.
Lewis, T. E. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of involuntary manslaughter.
Manley, Melvin Lloyd, alias, &c. v. Commonwealth. From Corporation Court, City of Norfolk. Appeal of conviction for possession of narcotics.
REPORT OF THE ATTORNEY GENERAL


Massie, Thurston James v. Commonwealth. From Circuit Court, Amherst County. From a conviction of statutory burglary.


Mitchell, Sherman Earl v. Commonwealth. From Circuit Court, Fairfax County. From a conviction of robbery.

Moss, Melvin Chenault v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction for statutory burglary.


Pattler, John v. Commonwealth. From Circuit Court, Arlington County. Appeal from conviction of first degree murder.

Phelps, Cecil Lawrence v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of statutory burglary (twelve counts).


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

Poole, Wayne Edward v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of armed robbery.

Poole, William, II v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of robbery.

Portsmouth, City of v. Aubrey G. Sweet, Sr. From Hustings Court, City of Portsmouth. Arising out of a condemnation case. Petition for Writ of Error.


Robbs, Delois V. v. Commonwealth. Hustings Court, City of Richmond. Possession of heroin.

Robinson, Larry Donell v. Commonwealth. From Corporation Court, City of Alexandria. Admission of evidence in rape case.


Saunders, Marvin F., Jr. v. Commonwealth. From Circuit Court, Nelson County. Appeal from conviction for breaking and entering; grand larceny.

Shook, Lawrence Henry v. Commonwealth. From Hustings Court, City of Richmond, Part II. Appeal from conviction of felony—malicious wounding and abduction.

State Board of Pharmacy v. Gabriel Kavadias. From Corporation Court, City of Norfolk. Appeal by Pharmacy Board from Order of Corporation Court reversing Board’s Order revoking pharmacy license.


Staunton, City of v. Aldhizer. From Circuit Court, City of Staunton. Arising out of a condemnation case. Writ of Error granted.

Stover, James D. v. Commonwealth. From Circuit Court, Fairfax County. Appeal from conviction of murder and convictions for maiming.

Sutton, Joseph Linwood, Jr. v. Commonwealth. From Hustings Court, City of Richmond, Part II. Appeal from conviction for statutory burglary.

Sweeny, Henry Arthur v. Commonwealth. From Circuit Court, Greene County. Appeal from conviction of misdemeanor—speeding.

Upton, Davis v. Commonwealth. From Law and Chancery Court, City of Hampton. Appeal from conviction under § 54-488 (Search warrant).


Williams, Albert Kennedy v. Commonwealth. From Hustings Court, City of Richmond. From a conviction of possession of marijuana.

Wilson, Larry v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction for contempt of court in the 1963 Danville riot.

Woodson, George Delano v. Commonwealth. From Circuit Court, Amherst County. Appeal from conviction of felony—murder.


CASES DECIDED 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 denied.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Coz, J. D. v. James F. May. Appeal from judgment of the United States Court of Appeals for the Fourth Circuit involving the question as to whether or not a prisoner can receive an increased sentence upon retrial.

Coz, J. D. v. Thomas E. McLarn. Appeal from a judgment of the United States Court of Appeals for the Fourth Circuit involving the question as to whether or not a prisoner can receive an increased sentence upon retrial.

Martin, David Neal v. Commonwealth. Appeal from judgment of the Supreme Court of Appeals of Virginia affirming conviction of attempted robbery. Notice of appeal and request for stay of execution of judgment filed.

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 members of board of supervisors. Pending.


Buehler, Thomas Alfred v. William and Mary. Suit for readmission to college. Injunction granted.

Ciesielski, Dennis R. v. Lewis W. Webb, Jr., President, etc., et al. Suit for readmission to college. Pending.


Dowdy, Carl Thomas. Proceedings for a Wage-Earner Plan under Chapter XII and to restrain the Division of Motor Vehicles from enforcing the motor vehicle financial responsibility laws, §§ 46.1-449, et seq. Directed to satisfy judgment and file proof of financial responsibility before operating a motor vehicle.


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


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. Settled.


Rainey, Jay, etc., et al. v. G. Tyler Miller, etc., et al. Suit seeking admittance to Madison College. Settled.

Rawlings, George C., Jr. v. L. Stanley Hardaway, &c. Injunction to keep registration books open, Denied; Affirmed, United States Court of Appeals for the Fourth Circuit.


Woodfork, Vivian, et al. v. Otis L. Brown, etc., et al. Suit to enjoin enforcement of State Board of Welfare regulation No. 211.3. Pending.

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

Accountants 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.


Basic Construction Co., Inc. v. Virginia Commonwealth University. Law and Equity Court, City of Richmond. Motion for Judgment for damage arising out of withholding funds for delay in construction. Pending.


Carrington, Clarice B., etc. v. David B. Ayres, Jr., etc. Circuit Court, City of Richmond. Petition for the payment of escheated funds. Settled.


Cliff Weil, Inc. v. Commonwealth. Law and Equity Court, City of Richmond. Application for the correction of wholesale merchants license tax assessment. Pending.


Commonwealth v. Oliver and Old Dominion. Circuit Court, City of Richmond. Property damage. Settled.


Conley, Nita F. v. Chesapeake Insurance Company, et al. (Thirty-four cases.) Circuit Court, City of Richmond. Commissioner's report and final order entered disbursing funds in hands of Treasurer of Virginia to claims of Virginia residents against Chesapeake Insurance Company.


Department of Welfare and Institutions v. Ollie Moss, Jr., et al. Circuit Court, City of Richmond. Automobile property damage. Pending.


Grahame, Raymond B., et al. v. Otis L. Brown, Director, &c., et al. Transferred from Hustings Court, City of Roanoke to Circuit Court, City of Richmond. Petition for declaratory judgment and injunction (to remove lien on property of recipient of Air to Permanently & Totally Disabled). Dismissed by agreed Order.


REPORT OF THE ATTORNEY GENERAL


Kirner, Milton F., &c. v. Sidney C. Day, Comptroller. Circuit Court, City of Richmond. To recover $604.40 that is property of petitioners; §§ 8-752, 8-749. Recovery granted.


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


Myatt, Thomas M., Sr., deceased, In the matter of the Estate of. Circuit Court, City of Virginia Beach. Application made for relief from the assessment made against the Estate for Inheritance Tax. Pending.


Natkin, Bernard J., etc. v. Commonwealth, et al. Circuit Court, Rockbridge County. For the payment of certain income and inheritance taxes which may be due and owing unto the Commonwealth. Dismissed.


Renee’s, Inc. v. Virginia A.B.C. Board. Circuit Court, City of Richmond. Appeal from order revoking license. Dismissed.


Rose, Dorothy Mae v. Mrs. Vivian Buchanan, etc., et al. Circuit Court, Rockbridge County. Mandamus to restrain Department of Welfare from enforcing Welfare regulations, § 203.10. Pending.


Sitwell, Mrs. Herbert C. F. v. Dana B. Hamel. Law and Equity Court, City of Richmond. Suit for breach of teaching contract. Pending.


Snyder v. Department of Highways. (Two cases.) Circuit Court, City of Richmond. Suits arising out of contract. Pending.


State Highway Commissioner v. Gulf Oil. Circuit Court, City of Richmond. Property damage. Pending.


Stephens, Fred James v. State Fire & Casualty Company, &c., et al. (Twelve cases.) Circuit Court, City of Richmond. Suit to apply funds in hands of Treasurer of Virginia to claims of Virginia residents. Pending.


Thomas, Raymond Arthur v. Lewis H. Vaden, &c. (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.


Tynes, George W. v. David B. Ayres, Jr., Comptroller. Circuit Court, City of Richmond. Petition for the payment of escheated funds. Pending.


CASES TRIED OR PENDING BEFORE THE STATE CORPORATION COMMISSION


Crystal Water Company. Increase in rates granted as modified by order of the State Corporation Commission.


 Malone Freight Lines, Inc., et al. v. Commonwealth. [Stanley Bise, truck operator, held subject to statutes as carrier for compensation.] Pending.


Southwestern Virginia Gas Company. Order entered granting rate increase.

CASES BEFORE FEDERAL AGENCIES

Application of Appalachian Power Company for construction of dams in Grayson County for hydroelectric purposes. Project No. 2817. 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.
CASE PENDING IN SUPREME COURT OF PENNSYLVANIA


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


Buckaneer Use Cars, Inc. v. Commissioner of Motor Vehicles. Law and Chancery Court, City of Norfolk. Appeal from suspension of dealer's license, plates and salesmen license. Suspension withdrawn and appeal dismissed.


Cooper, Donald Wayne v. C. H. Lamb, Commissioner. Circuit Court, City of Fredericksburg. Appeal from suspension of operator's license under § 46.1-419. License surrendered appeal withdrawn.

Cooper, Margaret Lucille v. Commissioner, Division of Motor Vehicles. Corporation Court, Part II, City of Norfolk. Appeal from suspension of operator's license under § 46.1-417. Commissioner's action affirmed.

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.


Francis, Robert Frederick v. C. H. Lamb, Commissioner. Circuit Court, City of Richmond. Appeal from suspension of chauffeur's license pursuant to § 46.1-430. Commissioner's action affirmed, with modifications and observance of the motor vehicle laws of this Commonwealth.


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. Liquidated damages denied; awarded recovery for additional services.


Smith, John Junior v. Commissioner, et al. Law and Chancery Court, City of Richmond. Bill of Complaint claiming automobile liability insurance policy was in full force and effect. Under advisement.


Wood, Ray Anderson v. Commonwealth of Virginia, Division of Motor Vehicles. Circuit Court of Botetourt County. Appeal from suspension of chauffeur’s license and operating privilege pursuant to § 46.1-430. Bond posted and stay entered. 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.


Virginia Employment Commission v. Mayfair Glebe, Inc. and Mayfair Petersburg, Inc. Circuit Court, City of Richmond. (Injunction) Dismissed upon payment in full.


HABEAS CORPUS CASES

During the past fiscal year, 736 petitions for writs of error were filed in the State and Federal courts; 210 petitions were filed in the Supreme Court of Appeals of Virginia. Appearances were made on some 315 occasions in both State and Federal courts in habeas corpus and mandamus matters.
EXTRADITION HEARINGS CONDUCTED AND REPORTS
SUBMITTED PURSUANT TO REQUEST OF THE GOVERNOR

July 21, 1969       Emmit Jones
July 21, 1969       Clarence Edward Hall
August 18, 1969     Welford Lee Braxton
August 18, 1969     Harrison Gwynn
August 18, 1969     Robert Edgar Sisk
September 15, 1969  W. E. Cooper
October 20, 1969    Ira Walter Pace
October 20, 1969    Joseph Domossy
October 20, 1969    William Turner Johnson, Jr.
October 20, 1969    John M. Russo
October 20, 1969    Charles Wayne Bogle
November 17, 1969   Harold Dean Rutherford
December 15, 1969   J. T. Vample
December 15, 1969   Barbara S. Blake and
                    William A. Blake
December 15, 1969   Clay Watts
January 20, 1970    Richard Gregory
January 20, 1970    Aaron Winslow Townsend
January 20, 1970    Charles William Roth
February 16, 1970   James Emanuel Quinton
March 16, 1970      Robert Eugene Reid
March 16, 1970      Paul Gregory
March 16, 1970      Carl Toomer
March 16, 1970      James B. Morris
March 16, 1970      Jerry Frank Turner
April 20, 1970      James Gilchrist
April 20, 1970      Eddie Webster
May 18, 1970        Paul Wayne Martin
OPINIONS

ADMINISTRATIVE AGENCIES ACT—Rules and Regulations—Publication of notice of adoption—May be in Richmond newspaper where affects significant area of State.

June 22, 1970

HONORABLE RICHARD D. GUY
Member, House of Delegates

This is in response to your letter of June 1, 1970, in which you request my opinion as to the following:

"The Board of Health of the Commonwealth of Virginia has recently distributed to local boards of health a pamphlet entitled "Rules and Regulations of the Board of Health Governing Sanitary and Sowerage Facilities at Marinas and Other Places Where Boats are Moored". The regulations were adopted 'in conformity with the provisions of Title 9, Chapter 1.1', according to a recitation in the regulations.

"The particular section to which reference is here made is 9-6.4. The publication by the Board of Health was by insertion in a Richmond paper only and the Virginia Beach City Attorney questions whether this was adequate. His feeling is that these regulations affect only a very limited number of localities and that the advertising should have been done so as to give notice to those areas that are affected.

"I would appreciate receiving your opinion as to the validity of the rules and regulations adopted by the Board of Health concerning marinas where the only publication was in a Richmond newspaper."

In my opinion the rules and regulations that you refer to were validly adopted by the Board of Health. As you noted, Virginia Code Ann. § 9-6.4, as amended, controls in this situation. This section provides that prior to an agency adopting such a rule, or regulation, it must publish notice of the express terms or an informative summary of the proposed rule in "at least one newspaper of general circulation published in Richmond, Virginia, or, if the rule has only local application, in the locality to which it applied." The rules and regulations to which you refer are not such that they have only local application but they affect a significant area of the state. Therefore, publication of notice in a Richmond paper was in compliance with the statute.

ADOPTION—Entrustment Agreements for Permanent Surrender of Child—Agency empowered to consent to adoption.

ADOPTION—Entrustment Agreements for Permanent Surrender of Child—Child must be ten days of age.

February 18, 1970

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

I am in receipt of your letter of February 10, 1970, enclosing from CW-26 of the local Department of Social Services entitled "Entrustment Agreement for Permanent Surrender of Child". You raise two questions in connection with this form which I will paraphrase as follows:
1. If the entrustment agreement is signed by the parent, is it necessary to require the parent to appear in court “to reapprove release of adoption rights”?  
2. Should the entrustment agreement be completed even though the child is not ten days of age?

In my opinion both questions should be answered in the negative. Sections 63.1-56 and 63.1-204 of the Code of Virginia (1950), as amended, provide respectively for entrustment agreements with local boards of welfare and child placing agencies. Both sections empower the agency to which the child is entrusted to consent to the child’s adoption if the entrustment agreement provides for a permanent separation of the child from his parents. It is therefore not necessary for the parent of the child to reapprove the release of adoption rights.

In response to the second question, it is noted that § 63.1-225 provides that whenever a petition for adoption is filed with a court, written consent of a parent to the adoption must be filed with the petition. In order for the consent to be valid, the child must be at least ten (10) days old. Though there is no such ten-day provision found in either § 63.1-56 or § 63.1-204, this office has previously advised the Department of Welfare and Institutions that entrustment agreements providing for permanent separation should follow the mandate of the restriction contained in § 63.1-225.

AGRICULTURE AND COMMERCE—Promotion of Sale and Use of Poultry and Poultry Products—How tax should be levied and when handler may deduct.

June 26, 1970

HONORABLE W. H. WHITE
Acting State Tax Commissioner

This is in reply to your letter of June 19, 1970, in which you ask my opinion as to certain questions as they relate to Chapter 625 of the Acts of Assembly of 1970, which amended and reenacted several sections of the Code of Virginia (1950), as amended, pertaining to The Virginia Poultry Products Commission and the tax that is to be levied to promote the poultry industry in this State. You state in your letter that some question exists as to whether the “handlers” should deduct the tax in each transaction with a farmer in the following circumstances:

1. A farmer who, at the time prescribed by § 3.1-781, owned more than 2000 laying hens for the purpose of producing chicken eggs, but who failed to certify to such production.
2. A farmer who, at the time prescribed by § 3.1-781, owned more than 2000 laying hens for the purpose of producing chicken eggs, who certified to such production, and who was declared eligible to vote, but whose flock some time after the referendum or after the effective date of the tax drops below the minimum number of laying hens.
3. A farmer who, at the time prescribed by § 3.1-781, owned no laying hens at all, or fewer than the minimum number for eligibility to vote, but who after the referendum or after the effective date of the tax acquires a flock of laying hens over 2000 in number.

I shall cite the statutes which are most germane to the resolution of your questions and then answer those questions seriatim:

“§ 3.1-781. Persons eligible to vote.—Each farmer who owned more than two thousand laying hens for the purpose of producing chicken
eggs, except those who sell directly to household consumers only, ... during the year next preceding the date of the referendum held pursuant to this article shall be eligible to vote in the referendum provided for in this article concerning his particular commodity, provided that he shall certify to such production and which shall be prepared by the State Board. Any person meeting such requirements shall not be required to be an eligible voter in other respects." (Emphasis added.)

"3.1-790. Handler to deduct tax from payment to farmer; report and payment of tax by handler—... . Deductions shall be made on each purchase or separate farmer-to-handler transaction in instances where the farmer is eligible to vote as set forth in § 3.1-781 ..." (Emphasis added.)

1. A farmer who, at the time prescribed in § 3.1-781, owned more than 2000 laying hens for the purpose of producing chicken eggs, but who failed to certify to such production is nonetheless subject to the tax. Section 3.1-781 clearly states the requisites for voting eligibility and then further provides that those so eligible must certify or affirm so; but this proviso does not, in my opinion, create an additional requirement for "eligibility" because such an interpretation would make the words "shall be eligible", which precede the certification proviso, meaningless or accidently placed. A construction of this nature is not favored in law. I am further persuaded in my opinion in that the statutes in question are reenactments of legislation that contained identical language, insofar as it is in question here, as to eligibility to vote and the certification proviso. It is important to note that during the five-year history of that legislation, the taxes were levied and collected without challenge from those who had not certified to vote in the first referendum, if those individuals were otherwise eligible to vote. It is generally held that the administrative interpretation given revenue laws by the agency that is responsible for its administration is a significant aid in construction. This is especially so when the interpretation has been formulated contemporaneously with the enactment of the statute and has been long in usage when the statute is reenacted in substantially the same form. (See 3 Sutherland, Statutory Construction, Section 6709 (3rd ed. 1943).)

2. A farmer who was eligible to vote and thereby becomes subject to the tax, but whose flock at some time thereafter drops below the minimum number of laying hens, remains subject to the tax. The statute (3.1-790) is completely silent as to such a situation and simply declares that if the farmer is eligible to vote (eligibility is apparently determined on a one-time basis), deductions shall be made. In that the statute sets forth, in clear and unambiguous terms, who is subject to the tax, the plain words must be given effect, regardless of the wisdom of the law or its presumed intent.

3. A farmer who at the time of the referendum was not eligible to vote, but who after the referendum acquires a flock of over 2000 laying hens, is not subject to the tax for the same reason expressed in #2 infra.

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AIR POLLUTION CONTROL BOARD—Proposed Local Ordinance—Must be approved by State board.

BOARDS OF SUPERVISORS—Authority—May enact ordinance regarding air pollution if comply with rules and regulations of State board.

HONORABLE E. EUGENE GUNTER
County Attorney for Frederick County

This will acknowledge receipt of your letter of February 25, 1970, in
which you inquired if the Frederick County Board of Supervisors "has the right and power to enact an ordinance in reference to air pollution in Frederick County." You also inquired with regard to the form and legality of such an ordinance.

Section 10-17.30(b) of the Code of Virginia permits the adoption of such a local ordinance:

"The governing body of any locality proposing to adopt an ordinance, or an amendment to an existing ordinance, relating to air pollution after June twenty-seven, nineteen hundred sixty-six, shall first obtain the approval of the state board as to provisions of such an ordinance or amendment."

Your attention is directed also to Section 10-17.19 of the Code which authorizes the Air Pollution Control Board, upon its own motion or upon the request of the governing body or bodies, to create, "within any area of the State, local air pollution control districts comprising a city or county or a part or parts of each, or two or more cities or counties, or combination or parts thereof."

The State Air Pollution Control Board is available to assist localities in adopting local ordinances compatible with the rules and regulations of the State and neighboring jurisdictions. Your queries with regard to the form and substance of a proposed ordinance should be directed to the Executive Secretary, State Air Pollution Control Board, Ninth Street Office Building, Richmond, Virginia 23219.

AIRPORTS—Luray—Page Airport Commission—May not legally limit liability.

April 30, 1970

HONORABLE A. ERWIN HACKLEY
Commonwealth's Attorney for Page County

This is in reply to your letter of April 14, 1970, with which you enclosed copies of correspondence between Mr. H. T. N. Graves, Chairman of the Luray-Page Airport Commission, and Mr. Williard G. Plentl, Director, Division of Aeronautics, and request my opinion in regard to the matter.

Examination of the correspondence mentioned reveals that Mr. Graves has raised the question of whether or not the Luray-Page Airport Commission has the right to legally limit its liability.

The authority for establishing such commission or joint action in connection with establishing municipal and county airports and other air navigation facilities is found in Chapter 3, Title 5.1 of the Code of Virginia. This chapter controls both as to express grant of authority and as to limitations which the legislature has imposed in carrying out the provisions of the chapter. I find nothing in this chapter, nor elsewhere in the law, which would authorize any such commission to legally limit its liability. Accordingly, the question presented is answered in the negative.

AIRPORTS—Twin County Airport Commission — Commission may not enter into contract with chairman to install pumps and sell gas but may give bare permission.

September 25, 1969

MR. RALEIGH M. COOLEY, Secretary

This is in reply to your inquiry of September 4, 1969, in which you inquire as to whether the chairman of the Twin County Airport Commission
may install pumps and sell gasoline at the airport. You state that "he would put in the facilities himself and sell the gasoline."

In previous opinions, this office has ruled that members of airport commissions are officers of the political subdivision which they represent, Report of the Attorney General (1962-1963) at 213, and that as such they are subject to the applicable conflict of interest statute, Report of the Attorney General (1964-1965) at 280. In his case, the chairman represents the city of Galax and § 15.1-73 would be applicable to prohibit his entering into any contract with the Commission.

However, from your description of the proposed arrangements, it is my opinion that the individual of whom you speak may sell gasoline at the airport. In this case any contract which may be involved will be entered into with the purchasers of the gasoline and not with the commission itself. Since the chairman may not contract with the commission, this would mean that he could not be given a franchise to sell the gas, and the commission may give only its bare permission to sell the gas. The arrangement would, of course, have to be revocable at the will of either party and entered into without consideration.

ALCOHOLIC BEVERAGE CONTROL LAWS—Advertising Matter Concerning Alcoholic Beverages—Board may regulate.

August 27, 1969

HONORABLE ROY B. WILLET
Assistant Commonwealth's Attorney, City of Roanoke

This is in reply to your letter of July 18, 1969, which is in part as follows:

"Local retail merchants offer for sale and sell replicas of beer cans which have mounted on their tops cigarette lighters and the like; some of these merchants also sell beach towels, beach bags, T-shirts, and similar goods which have 'life-size' and larger likenesses of various brands of beer. None of these merchants is licensed to sell alcoholic beverages in any form.

* * *

"It is my feeling that these activities do not amount to advertising, and as such are not prohibited. The merchants are not drawing attention to a product to be sold; they are merely selling novelties; it does not seem that the merchants are attempting to induce the public to acquire alcoholic beverages in general, or specific brands of alcoholic beverages in particular.

"Your opinion will be appreciated and helpful to this office as the activities in question are current, and have been the subject of inquiry recently made of this office."

I am unable to concur in your view that the foregoing activities are not prohibited.

The use of an article having a utility or secondary value, such as a cigarette lighter, for advertising purposes has long been familiar. Whether such an article is in fact an advertisement, is not determinable by the type of license held by the distributor of the article, or by the intent of the vendor or distributor. A picture of a product bearing the name of the manufacturer thereof, and distributed to the public by gift or sale, in my opinion constitutes an advertisement of that product.

Section 4-69 of the Code of Virginia (1950), as amended, is as follows:

"Illegal advertising.—If any person shall advertise in or send any advertising matter into this State about or concerning alcoholic beverages other than such alcoholic beverages as may legally be
manufactured or sold without any license under the provisions of this chapter, except in accordance with rules and regulations of the Board, he shall be guilty of a misdemeanor."

The power of the Virginia Alcoholic Beverage Control Board to regulate advertising was specifically upheld in Commonwealth v. Anheuser-Busch, Inc., 181 Va. 678. The Court noted that the regulations of the A.B.C. Board at that time permitted only licensed dealers to advertise, and did not authorize billboard advertising of the type involved in the case.

While the Board has adopted a number of regulations pertaining to advertising, there appear to be none authorizing the activities to which you refer, although § 71 of the Board's regulations authorizes certain licensees of the Board to distribute novelties bearing advertising matter provided such novelties do not exceed in value the sum of twenty-five cents.

ALCOHOLIC BEVERAGE CONTROL LAWS—Club—No license—May not rent portion of premises to private organization for activity where alcoholic beverages will be consumed.

ALCOHOLIC BEVERAGE CONTROL LAWS—Restaurant—No license—May not rent entire premises to group which will consume alcoholic beverage.

February 6, 1970

HONORABLE SAM GARRISON
Commonwealth's Attorney for City of Roanoke

This is in reply to your letter of February 2, 1970, in which you request my opinion as to certain hypothetical questions arising under the Alcoholic Beverage Control Act.

You inquire whether a club, which holds no license issued by the Virginia Alcoholic Beverage Control Board, may rent out a portion of the club's premises, consisting of the banquet hall and adjoining kitchen, to a private organization for the purpose of conducting a dance, banquet, reception or similar activity, at which alcoholic beverages will be possessed and consumed under various circumstances.

Section 4-61.1 of the Code of Virginia is as follows:

"Keeping, etc., alcoholic beverages upon premises of club.—No person operating a club for profit or otherwise, either public or private, shall keep or allow to be kept, either by himself or any other person, upon its premises any alcoholic beverages, or beverages as defined in § 4-99, nor shall he permit the consumption of any alcoholic beverages or beverages as defined in § 4-99, upon its premises, unless he shall have a license to sell alcoholic beverages, or beverages as defined in § 4-99, issued by the Virginia Alcoholic Beverage Control Board.

"Any person violating the provisions of this section shall be punished in accordance with the provisions of § 4-92."

The banquet hall and kitchen of a club are a part of the "premises" of the club, and the fact that they may be rented to a private organization for an evening does not relieve them of this status. There is no exception contained in the statute that would permit the activities you describe.

Club licenses issued by the Virginia Alcoholic Beverage Control Board confer certain privileges with respect to the keeping, selling and consumption of alcoholic beverages. For example, your attention is invited to §§ 4-25 (h) (3), 4-98.2 and 4-89 (d). It seems to me that a club undertaking to operate without obtaining any type of license authorized under the Alcoholic Beverage Control Act must do so subject to the prohibition of § 4-61.1.
Your final question is whether a restaurant, which holds no license issued by the Virginia Alcoholic Beverage Control Board, may rent for one evening the entire premises to a group which will keep and consume alcoholic beverages therein under certain circumstances. In an opinion given Honorable Alfred W. Whitehurst, dated October 25, 1966, Attorney General Button ruled that the provisions of § 4-61 of the Code of Virginia would prohibit this. A copy of this opinion is enclosed.

ALCOHOLIC BEVERAGE CONTROL LAWS—Forfeitures—Confiscation of whiskey of other bona fide occupants of cars.

ALCOHOLIC BEVERAGE CONTROL LAWS—Transportation—Excessive quantity—Confiscation of whiskey of bona fide owners.

January 26, 1970

HONORABLE THOMAS B. BAIRD, JR.
Assistant Commonwealth's Attorney for Wythe County

This is in reply to your letter of January 16, 1970, in which you request my opinion as to the following hypothetical facts:

"FACTS: 'A' purchases one gallon and one pint of legal whiskey at a Wythe County ABC Store. His companions, 'B', 'C', 'D', 'E', and 'F', purchase one gallon each of legal whiskey at the Wythe County ABC Store. No permit was secured to transport over a gallon of whiskey. The vehicle was stopped with 'A' operating the same and it is noted that he is in possession of one gallon and one pint and that 'B', 'C', 'D', 'E', and 'F' are in possession of one gallon each.

"QUERY: Under the above set of facts, may the Commonwealth confiscate, in addition to 'A's' automobile and whiskey, the five gallons of whiskey in the possession of 'B', 'C', 'D', 'E', and 'F', the bona fide owners thereof?"


As to the whiskey in the possession of the bona fide owners thereof, it is my opinion that this whiskey is contraband.

The principle that a State may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation, was recognized in Ziffrin v. Reeves, 308 U.S. 132 (1939). The Court noted that the Kentucky statute involved in the case declared every phase of whiskey traffic illegal unless definitely allowed, and that under the statute whiskey "... becomes contraband upon failure to observe the statutory requirement and whenever found in unauthorized possession." (308 U.S. at 134). You will note that under § 4-72 of the Code of Virginia (1950), as amended, the transportation "... in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Board..."

The regulation of the Virginia Alcoholic Beverage Control Board pertinent to situations of this kind is § 42, subsection (c) thereof being as follows:

"(c) Transportation of alcoholic beverages on vehicle occupied by more than one (1) person.—Nothing in this section shall prevent or prohibit the transportation within Virginia of lawfully acquired..."
alcoholic beverages in a quantity in excess of one (1) gallon in a vehicle occupied by more than one (1) person, provided the transportation of such alcoholic beverages is for legitimate purposes, the alcoholic beverages being transported are in the possession of the bona fide owners thereof and no person in such vehicle has a quantity of alcoholic beverages, other than those referred to in items (1) and (2) of subsection (b) of this section, in excess of one (1) gallon in his possession without a permit issued by the Board, which permit must accompany the alcoholic beverages being transported." (Emphasis added)

Since the fact was that "A" had in his possession more than one gallon, his transportation was not "in accordance with" the regulation, and was therefore prohibited.

As to the other occupants, it is assumed from your statement of facts each knew that, in addition to his own whiskey, other whiskey was being transported in the vehicle. That being so, it was incumbent upon each to ascertain that his transportation was in accordance with the law.

Under § 4-56 (a) it is the officer's duty to seize "... alcoholic beverages being illegally transported in amounts in excess of one quart ..." Under § 4-56 (k) the alcoholic beverages so seized "... shall be deemed contraband as provided in § 4-53 and disposed of accordingly ..." It is provided in § 4-53 that "... alcoholic beverages ... which are kept, stored, possessed, or in any manner used in violation of the provisions of this chapter ... shall be deemed contraband and shall be forfeited to the Commonwealth."

ALCOHOLIC BEVERAGE CONTROL LAWS—Local Option—Whiskey-by-the-drink—Status of local option unit upon consolidation.

October 7, 1969

HONORABLE RAY L. GARLAND
Member, House of Delegates

This is in response to your letter of September 26, 1969.

You advise that on November 4, 1969, a vote will be taken on the question of whether Roanoke County, Roanoke City and the Town of Vinton shall be consolidated into a single city. Your further advise:

"Roanoke City approved the sale of liquor-by-the-drink last year but it was defeated in Roanoke County (including the Town of Vinton). This year Roanoke County (less the Town of Vinton) is to vote on it again—at the same time as the consolidation vote. This referendum is taking place in Roanoke County because last year Vinton voted as a part of the County whereas it should have voted separately."

You ask my opinion on the following question:

"The question is: if consolidation is approved in all three political units what will be the status of liquor-by-the-drink? ... The new city is not scheduled to come into existence until September 1, 1970."

Chapter 7 of the 1968 Acts of the General Assembly, which is codified as Chapter 1.1 of Title 4 of the Code of Virginia (1950), as amended, does not cover the situation presented by your question. We are not familiar with any court decision in Virginia relative to this situation. Under these circumstances, it is impossible for this office to give a firm answer to the question which you propounded.
It appears from decisions in other states that the general rule is that "status" as "wet" or "dry" acquired as a result of a local option election is not altered by the mere consolidation of such local option unit, or portion thereof, with a unit having a different "status." See 45 Am. Jur. 2d., Intoxicating Liquors, § 113; 48 C.J.S., Intoxicating Liquors, § 68; Anno. 25 A.L.R. 2d. 853, and the cases therein cited and referred to.

The cases from other jurisdictions referred to above appear to be reasonable and logical; but, until the matter is clarified either by action of the General Assembly of Virginia or by some court decision, any answer to your question that we might give would be subject to considerable doubt.

ALCOHOLIC BEVERAGE CONTROL LAWS—Mixed Beverages—Licensee may be sold fortified wine by wine wholesaler for use in combination with spirit in drink.

ALCOHOLIC BEVERAGE CONTROL LAWS—Fortified Wines—May be sold for on premises consumption by holders of certain licenses.

ALCOHOLIC BEVERAGE CONTROL LAWS—Tax on Certain Alcoholic Beverages—Amount imposed on wine sold to persons holding mixed beverage licenses.

June 4, 1970

HONORABLE THOMAS W. MOSS, JR.
Member, House of Delegates

This is in reply to your letter of May 13, 1970, in which you request my opinion upon three questions pertaining to the Alcoholic Beverage Control Act.

Your first question is:

"Does the language of Section 4-28 as amended by the 1970 session of the General Assembly allow a licensed wine wholesaler to sell wine having an alcoholic content of more than 14, but less than 21 per centum to a person licensed under Chapter 1.1 of Title 4 to sell mixed beverages and if such sale is legal, may, in light of Section 4-98.11, such person licensed under Chapter 1.1 use such wine in combination with a spirit in a drink and sell such drink as a mixed beverage?"

In my opinion both questions should be answered in the affirmative.

Chapter 329 of the 1970 Acts of Assembly amended § 4-28 of the Code so that the same reads as follows:

"Beverages sold at retail only at government stores; mixed beverages excepted.—No alcoholic beverage having an alcoholic content of more than fourteen per centum by volume shall be sold at retail in the State of Virginia, except at government stores or except by licensees under the provisions of chapter 1.1 (§ 4-98.1 et seq.) of this title. Nothing in this section shall be construed to prohibit sales by druggists as authorized by § 4-49, nor such sales as are authorized by § 4-85.

"Nothing in this title shall prohibit the sale of wines containing more than fourteen per centum but less than twenty-one per centum of alcohol by volume by the Board and by persons licensed under the provisions of this chapter to sell wine at wholesale to persons licensed under the provision of this chapter and Chapter 1.1 to sell wine for consumption on premises only nor prohibit such retail licensee from selling such wine for consumption on the premises."
The amendment which will become effective June 26, 1970, consisted of adding the second paragraph to § 4-28.

Formerly, persons holding mixed beverage licenses, issued pursuant to Chapter 1.1 of Title 4 of the Code, were required by the provisions of § 4-98.11 to purchase all alcoholic beverages sold as mixed beverages from the A.B.C. Board. However, § 4-98.11 is a part of “this title” referred to in the amendment to § 4-28, and whatever prohibitory effect it had upon the sale of wine “by persons licensed under the provisions of this chapter to sell wine at wholesale to persons licensed under the provision of this chapter and Chapter 1.1 to sell wine for consumption on premises only” was expressly removed by the amendment to § 4-28.

I conclude that persons holding mixed beverage licenses are authorized “to sell wine for consumption on premises only” within the meaning of the amendment to § 4-28. I reach this conclusion by reference to §§ 4-98.1, 4-98.2, 4-98.3, 4-98.10(o) and 4-2(2), the provisions of which are too lengthy to be set out in this opinion. It, therefore, appears that a person holding a wholesale wine distributor’s license under § 4-25(g) is not prohibited from selling “fortified” wine (wine containing more than fourteen per centum but less than twenty-one per centum of alcohol by volume) to mixed beverage licensees.

I am not aware of any existing statute that would prohibit such licensees from using such wine in combination with a spirit in a drink and sell such drink as a mixed beverage. Prior to the amendment of § 4-28 a regulation of the Board, § 46.3(e), would have had such prohibitory effect inasmuch as it limited the use of alcoholic beverages to those purchased from the Board. While an administrative agency may use its regulatory power to implement a statute, it may not use it in such a way as to nullify a legislative enactment. If “fortified” wine purchased from the Board may be used with spirits in preparing a mixed beverage, no good reason occurs to me as to why such a “fortified” wine purchased from a wholesale wine distributor may not be so used. To the extent that Regulation § 46.3(e) would prohibit such use it would, in my opinion, be invalid.

Your second question is as follows:

“I would like to know whether, under Amended Section 4-28, a wholesale wine distributor may sell fortified wines to a retail licensee under the ABC Act if he holds a license which includes the wine on and off premises privileges, with, of course, the basic beer privileges, or will such sales be limited as far as that Act is concerned to a person with a license which includes the wine on premises privilege alone, with the basic beer privileges?”

Persons holding the following types of retail licenses may sell wine:
1. On-premises wine and beer [§ 4-25(h)]
2. Off-premises wine and beer [§ 4-25(j)]
3. Off-premises winery [§ 4-25(k)]
4. On and off premises wine and beer [§ 4-25(m)]
5. Mixed beverage restaurant license [Chapter 1.1]
6. Mixed beverage carrier license [Chapter 1.1]

You will note that prior to the amendment to § 4-28, the sale of wine by retail licensees was limited to that having an alcoholic content of 14% or less, except in the case of mixed beverage licensees. It will be noted that the last phrase of the amendment to § 4-28 is “. . . nor prohibit such retail licensee from selling such wine (“fortified” wine) for consumption on the premises.” While this language removes the existing total restriction on the sale of “fortified” wine upon all retail licensees, except mixed beverage licensees, a partial restriction is still retained by the words “for consumption on the premises.” Thus, persons licensed under categories 2 and 3 above [§ 4-25(j) and (k)] would not be authorized to sell “fortified”
wine at retail since their licenses confer the privilege of making off-premises sales only.

The wholesale wine distributor's license authorizes him to sell to persons licensed to sell wine in Virginia [§ 4-25(g)]. Accordingly, he could not sell "fortified" wine to the (j) and (k) licensees, because their licenses do not authorize them to make on-premises sales.

The retail licensees to whom the Board and wine distributors are not prohibited from selling "fortified" wine are described as being "... persons licensed under the provision of this chapter and Chapter 1.1 to sell wine for consumption on-premises only ..." (Emphasis added)

As has been demonstrated, apparently the Legislature did not intend to remove the "fortified" wine restriction from all persons licensed to sell wine at retail, that is, § 4-25(j) and § 4-25(k) licensees. The remaining categories are: On-premises wine and beer [§ 4-25(h)], on-and-off-premises wine and beer [§ 4-25(m)], and the mixed beverage licenses, which are essentially on-premises licenses. The subsection (h) licensees and the mixed beverage licensees are clearly within the legislative description, and the privileges conferred upon such licensees under existing licenses are manifestly enlarged by the amendment to § 4-28. Some doubt has been cast upon whether the (m) licensees fall within the legislative description because of the use of the word "only." However, the following language appears in § 4-25(m):

"Retail on-and-off premises wine and beer licenses . . . which licenses shall confer all the rights and powers conferred by retail on-premises wine and beer licenses and in addition thereto shall authorize . . ." (Emphasis added)

It seems clear that (m) licensees were intended to have not only the same privileges as (h) licensees, but broader privileges. Repeal by implication is not favored, and in my view whatever ambiguity exists because of the use of the word "only" should be resolved by according to the (m) licensees the same on-premises privileges that will accrue to the (h) licensees under the amendment to § 4-28.

In sum, I conclude that on-premises wine and beer licensees [§ 4-25(h)], on-and-off-premises wine and beer licensees [§ 4-25(m)], and mixed beverage licensees [Chapter 1.1] may all sell "fortified" wine for on-premises consumption.

Your third question is as follows:

"In light of the Amendments to Section 4-15.1 which increased the state tax on certain alcoholic beverages to 14%, but states partially 'on all wine sold to retail licensees, the state tax imposed shall be ten per centum of the price charged such retail licensees; . . . what will be the tax on wine sold to person holding a license under Chapter 1.1 of Title 4 to sell mixed beverages since 'retail licensee' is defined in Paragraph (g) of Section 4-15.1 as 'one who is licensed under this chapter to sell wine at retail' (emphasis added)§"

While other statutes impose taxes on the sale of wine, I shall limit my answer to the tax imposed pursuant to § 4-15.1.

Under § 4-15.1, as amended by the 1970 General Assembly, the State tax on alcoholic beverages in some instances is 14%. However, from the language contained in subsection (b), which you have quoted in part, it appears to me that "wine sold to retail licensees" was singled out for special treatment and the tax imposed upon such sales is 10%.

Section 4-15.1 is a part of Chapter 1 of Title 4 and you point out that a retail licensee is defined in subsection (g) of 4-15.1 as one who is licensed under "this chapter." Your attention is invited to § 4-98.8, in which it is stated that when reference is made to "this chapter" in Chapter 1 of Title
4, this shall be deemed to include also Chapter 1.1, except where the provisions of Chapter 1 are expressly made inapplicable to or are plainly inconsistent with the provisions of Chapter 1.1. I find no such inconsistency, and in my view the tax on wine sold to persons holding mixed beverage licenses issued under chapter 1.1 is 10%, whether the sale is made by the Board or by a wholesale wine distributor.

ALCOHOLIC BEVERAGE CONTROL LAWS—Rules and Regulations—Validity of Regulation 46—Construction.

March 5, 1970

HONORABLE SAM GARRISON
Commonwealth's Attorney for City of Roanoke

This is in reply to your letter of February 17, 1970, in which you request my opinion as to several questions.

First, you ask whether Regulation 46 of the Virginia Alcoholic Beverage Control Board is "... a valid regulation, the violation of which subjects one to a criminal sanction?"

The referred to regulation is as follows:

"Section 46. Drinking beverages, or tendering to another, in public place prohibited; exceptions.—(a) No person shall take a drink of a beverage, as defined in Section 4-99, or tender a drink thereof to another, whether accepted or not, at or in any public place, as defined in Section 4-2 (20).

"(b) This section shall not prevent a person from drinking a beverage or offering a drink thereof to another in the dining room or other room designated for such purpose by the Board of any establishment licensed for the consumption of beverages on the premises and the beverages drunk or offered was purchased therein."

The original law pertaining to "3.2 beverages" appears in 1933 Acts, Chapter 3. The title of this Act, which was approved August 29, 1933, in part, is as follows:

"An Act to legalize, regulate and control the manufacture, bottling, sale and disposition of beer, lager beer, ale, porter, wine, similar fermented malt or vinous liquor, and fruit juice, containing one-half of one per centum or more of alcohol by volume, and not more than 3.2 per centum of alcohol by weight . . . ."

The Alcoholic Beverage Control Act was approved the following year on March 7, 1934 (1934 Acts, Chapter 94). By Act approved March 14, 1938 (1938 Acts, Chapter 146) the licensing power as to "3.2 beverages" was transferred to the Virginia Alcoholic Beverage Control Board, which was by the same act given the same power to pass regulations as was conferred upon it by the Alcoholic Beverage Control Act. The power to pass regulations as to "3.2 beverages" appears as follows in Code § 4-103 (b):

"Regulations.—The Board shall have the power to pass regulations, having the force and effect of law, necessary to carry out the provisions and purposes of this chapter and to prevent the illegal manufacture, bottling, sale, distribution and transportation of beverages, or any one or more of such illegal acts; and from time to time it may alter, repeal or amend such regulations, or any of them. Such regulations shall be published in the same manner as regulations are required to be published under chapter 1 (§ 4-1 et seq.) of this title."
In my view Regulation 46 of the Board is reasonable and consistent with the purposes of the act pertaining to "3.2 beverages." Cf. Commonwealth v. Anheuser-Busch, Inc., 181 Va. 678, wherein the Court sustained the power of the Virginia Alcoholic Beverage Control Board to regulate advertising.

While in my opinion the Board's regulation is valid, you also inquired whether one violating it would be subject to a "criminal sanction." No penalty is provided in the regulation itself.

Section 4-116 of the Code reads, in part, as follows:

"Any person who . . . shall violate any other provision of this chapter for which no other penalty is prescribed, shall be deemed guilty of a misdemeanor . . . ." (Emphasis added).

I do not believe that regulations of the Board would be construed as "provisions of this chapter," particularly since statutes imposing criminal penalties are strictly construed. This does not mean that the regulation has no vitality at all, however, for situations might arise where the violation by a licensee of the regulation would subject his license to suspension or revocation under § 4-114 of the Code.

Your final question is as to whether a prosecution will lie under § 4-81 of the Code for habitually allowing "3.2 beer" to be consumed in an unlicensed place.

Under § 4-81 certain houses and places "where alcoholic beverages are . . . used contrary to law . . . shall be deemed common nuisances." "Alcoholic beverages" are defined in § 4-2 (2) of the Code, and the definition does not include "3.2 beer," which is defined as a "beverage" in § 4-99. It is therefore clear that the answer to your last question is in the negative.

While I have answered the specific questions you asked, I might comment on the following statement in your letter with which I cannot fully concur:

"It would seem to me that Section 4-98 would prevent a prosecution under Section . . . 4-61.1 from being based upon keeping or allowing '3.2 beer' to be kept upon the premises . . . ."

I shall not add to the length of this opinion by setting out §§ 4-98 and 4-61.1 verbatim. However, you will note that § 4-98 was enacted by 1934 Acts, Chapter 94, whereas § 4-61.1 was amended so as to include "beverages" by 1954 Acts, Chapter 147. By the usual rules of statutory construction, it would thus appear that the latest enactment, if it is repugnant to § 4-98, would have the effect of repealing § 4-98 to the extent of the repugnancy. It might therefore be possible for a person permitting the consumption of "beverages" in violation of § 4-61.1 to be prosecuted under that section, and for the person doing the consuming to be prosecuted as an aider and abettor under § 4-87.

ANNEXATION—Legislative Officers—Continue in office for term for which elected.

ANNEXATION—Legislative Officers—After term expires, must reside in county in which re-election sought.

ELECTIONS—Annexed Territory—Persons residing in annexed territory eligible to vote in city elections.

July 23, 1969

HONORABLE JUNIE L. BRADSHAW
Member, House of Delegates

I am in receipt of your letter of July 7, 1969, in which you present the following situation and inquiries:

"I have been requested to seek the Attorney General's opinion on the
following questions in light of the recent court decision in the Richmond vs. Chesterfield annexation case, if the judgment of the Court takes effect as scheduled on December 31, 1969:

“1. Do the legislative officers who live in the annexed area forfeit their office, or do they continue to hold their office?

“2. Will the citizens in the annexed area be subject to representation by their former delegation, or the delegation in the political division to which they have been transferred?

“3. What can the General Assembly do to help the people in the annexed area have the representation they desire whether such representation is new or old?”

With respect to your initial question, I am of the opinion that a legislative officer who lives in the annexed area would continue to hold the office to which he was elected prior to the annexation. While Section 44 of the Virginia Constitution prescribes that the “removal of a senator or delegate from the district for which he is elected shall vacate his office,” I am constrained to believe that this provision envisions a positive change in residence by a senator or delegate from the district for which he was elected and does not operate to cut short the term of an incumbent senator or delegate who, having been elected to represent a county in which he lives, involuntarily becomes a resident of an adjoining city into which his home is annexed.

With respect to your second and third questions, I am of the opinion that, once his term has run, no such senator or delegate would be eligible to re-election from the county unless by that time he has once again taken up residence in the county in which he formerly resided. Further in this connection, I am forwarding to you a copy of a previous opinion of this office, dated March 16, 1961, to the Honorable Levin Nock Davis, former Secretary of the State Board of Elections, in which the view was expressed that when an order of annexation has become final “those persons who live in the annexed territory and . . . who have been properly registered in the county will be automatically eligible to be transferred” to the city registration books and will be entitled to vote in the city election. This opinion is set out in the Report of the Attorney General (1960-1961), p. 129.

APPROPRIATIONS—Alcoholic Studies and Rehabilitation—May not be expended for rehabilitation of drug addicts unless State Board of Health determines it would affect original legislative intention and Governor, on Board’s request, reappropriates.

HEALTH—Drug Addiction—Rehabilitation—Funds appropriated for alcoholics’ rehabilitation may be expended therefor only if Governor reappropriates after State Board of Health determines it would affect Legislature’s intention.

June 16, 1970

HONORABLE MACK I. SHANHOLTZ
Commissioner, Department of Health

This is in response to your letter of June 1, 1970, in which you state:

“Chapter 506 of the 1970 Acts of Assembly amends § 32-355 through § 32-378.4 of the Code of Virginia to add responsibility for the study, rehabilitation and treatment of drug addicts to the Division of Alcohol Studies and Rehabilitation. Also the title of the program was changed to the Bureau of Alcohol and Drug Studies and Rehabilitation. Although additional responsibilities were added
to the program, no additional funds were provided for this purpose.

"It would be appreciated if you would advise as to whether or not funds appropriated for this program during the next biennium could be expended for the treatment and rehabilitation of drug addicts."

In my opinion, the funds appropriated for this program could not be expended for the treatment and rehabilitation of drug addicts. Item 335 of Chapter 461 of the Acts of Assembly of 1970 provides for the appropriation in question as follows:

"Alcoholic studies and rehabilitation:
First year—$699,210; Second year—$772,730".

As you noted in your letter, the General Assembly omitted any reference in this appropriation to treatment and rehabilitation of drug addicts, even though it did impose responsibilities on the Department of Health for their treatment and rehabilitation.

Section 8 of Chapter 461 of the Acts of Assembly of 1970 provides that:

"Except as provided by Section 9 of this Act, none of the monies mentioned in this Act shall be expended for any other purpose than those for which they are specifically appropriated". (Emphasis supplied).

The Governor is charged with the duty of seeing that "this provision is strictly observed." Therefore, inasmuch as the General Assembly made a "specific" appropriation and that appropriation was for "alcoholic studies and rehabilitation", I must conclude that none of the funds in question can be expended for the treatment and rehabilitation of drug addicts, unless the funds were transferred pursuant to Section 9 of Chapter 461 of the Acts.

Section 9 of 461 of the Acts provides that the

"Governor may transfer an appropriation within a state agency . . . to supplement an appropriation or re-appropriation for a closely and definitely related purpose. The Governor and the governing board and/or executive head, if there is no governing board, of the affected state agency must first determine that the transfer effects the original intention of the General Assembly in making the appropriations."

Therefore, the State Board of Health should determine whether or not the General Assembly intended that these appropriations be applied to the treatment and rehabilitation of drug addicts. And then, if an affirmative determination be made, request that the Governor reappropriate the funds in question to include the treatment and rehabilitation of addicts.

In my opinion, such a reappropriation would be for a purpose that would definitely be closely related to the purpose of the original appropriation and would effect the original intention of the General Assembly in making the appropriation. Inasmuch as the General Assembly has enacted House Bill # 395 designated as Chapter 506 of the Acts of Assembly of 1970 which combines the treatment and rehabilitation of persons addicted both to alcohol and to drugs into one bureau and inasmuch as the entire section relating to the problem of alcoholism has been expended to the responsibility for the prevention, treatment, and rehabilitation of drug addicts, there is no doubt that the original intention of the General Assembly was to provide funds to place in effect House Bill # 395 and such an interpretation by the State Board of Health would be entirely proper. I would, therefore, recommend that the Board make a formal determination of
this fact and transmit it to the Governor with a request that he reappropri-
ate the fund to include drug treatment and rehabilitation.

ASSESSMENTS—Boards of Supervisors—May not reassess by magisterial
districts.

ASSESSORS—Computing Fair Market Value—May consider zoning re-
requirements.

February 12, 1970

HONORABLE J. HARRY MICHAEL, JR.
Member, Senate of Virginia

This is in reply to your letter of December 10, 1969, and your supple-
mental letter of February 2, 1970. In your letter of December 10 you
ask the following questions: (1) Whether the county may undertake a re-
assessment of its property by magisterial district, putting into effect the
new assessment rates for the particular magisterial district which has
been completed, but not making a county-wide reassessment, making the
effective date for the county-wide reassessment the same for the whole
county, and (2) Are the assessors required to take into account zoning
requirements in assessing on the basis of the highest and best use to which
the land can be put?

The answer to your first question is in the negative. Sections 58-791
and 58-792 of the Code contemplate the completion and filing of the reassess-
ment in a county within the times specified therein. This relates to the
whole county and not a part of it. I am aware of no authority to under-
take reassessment of county property by magisterial districts and to put
into effect new assessment rates solely on the magisterial districts.

With regard to your second question the rule laid down in the Virginia
Constitution that "all assessments of real estate and tangible personal
property shall be at their fair market value," is the only legal rule pro-
vided by law for the assessment of real estate and tangible personal prop-
erty situated in this Commonwealth. There is no statute in Virginia pro-
viding a rule by which assessors should be guided in ascertaining the fair
market value of property. It has been held, however, that the fair market
value of property is the price it will bring when offered for sale by one
who desires but is not obliged to sell, and is bought by one who is under
no necessity of having it. Assessors are justified in considering more than
one factor in reaching values. It follows, therefore, that assessors may take
into account zoning requirements in assessing on the basis of the highest
and best use to which the land can be put, but they are not required to do
so.

ATTORNEYS—Counsel Fees for Defense of Juveniles—Maximum amount.

JUVENILE AND DOMESTIC RELATIONS COURTS—Proceedings in
Felony Cases—Not analogous to proceedings in municipal or county
courts.

December 10, 1969

HONORABLE PHILIP L. RUSSO, Judge
Juvenile and Domestic Relations Court
City of Virginia Beach

I am in receipt of your letter of November 17, 1969, in which you request
my opinion as to the maximum allowable payment which can be made for
legal services rendered by attorneys pursuant to appointment under § 16.1-
173 of the Code of Virginia (1950) as amended. In your note you equate
appointments under § 19.1-241.5 of the Code of Virginia (1950) as amend-
ed, which require appointments for those charged with felonies to be the same as those charged with felonies in the Juvenile and Domestic Relations Court.

As you note in your letter, the maximum payment allowable under § 19.1-241.5 is $75.00 whereas the maximum payment allowed under § 16.1-173 is $50.00. You are of the opinion that the maximum allowable payment should be $75.00 in all cases in which the defendant is charged with a felony regardless of whether the appointment is under § 19.1-241.5 or § 16.1-173.

The Supreme Court of Appeals of Virginia has held that proceedings conducted in juvenile and domestic relations courts in felony cases are separate and apart from and not analogous to those proceedings conducted in a municipal or county court disposing of adults charged with felonies. Peyton v. French, 207 Va. 73, 147 S.E.2d 739. In Peyton v. French, supra, the Supreme Court said that preliminary hearings under general criminal procedure are not analogous to or the same as those for an offense committed by a child under the purview of the juvenile and domestic relations court law. In the above mentioned case, French was charged with grand larceny and breaking and entering which are, of course, felonies and it was in this context that the Supreme Court made the distinctions above.

Accordingly, it is my opinion that the maximum allowable payment which can be made to attorneys appointed pursuant to § 16.1-173 is $50.00.


April 9, 1970

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

This will acknowledge receipt of your recent letter with reference to the fees to be allowed court-appointed counsel. You point out that when an attorney is appointed in the Police Court of the City of Richmond to represent an indigent defendant charged with a felony, the maximum compensation to be allowed pursuant to the provisions of § 19.1-241.5 is $75.00. This cost is certified to the Hustings Court of the City of Richmond for payment. You also point out that the maximum compensation allowed court-appointed counsel for representing an indigent charged with a capital felony in the Hustings Court of the City of Richmond is $400.00 as prescribed by § 14.1-184.

You inquire if the $400.00 maximum compensation allowed in § 14.1-184, includes the $75.00 fee allowed by § 19.1-241.5. Your question must be answered in the negative. The fees prescribed by the aforementioned code provisions are for services rendered in different courts. The maximum of $75.00 allowed by § 19.1-241.5 is for the representation afforded the indigent in the court not of record. The maximum of $400.00, prescribed by § 14.1-184, is for the representation afforded the indigent in the court of record. Moreover, I am informed that in many instances throughout the State the same attorney does not represent the indigent in both courts.

ATTORNEYS—Fees for Defense of Indigents—Separate fee for each indictment.

December 10, 1969

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

This is in response to your letter of November 11, 1969, in which you inquire as to the maximum compensation to be allowed by the Court to an
attorney appointed to represent an indigent defendant who is charged under several indictments. You ask if the attorney should be paid by a single fee for representing the indigent on all charges or by a fee predicated upon each indictment. You point out that the Comptroller has consistently allowed such fees on a "per indictment basis."

Section 14.1-184 of the Code of Virginia (1950), as amended, provides for the payment of compensation to court-appointed counsel for representing an indigent defendant charged with "an offense." I am, therefore, of the opinion that court-appointed counsel are to be compensated for their representation upon each offense with which their client is charged. The Judge, therefore, may allow a separate fee for each indictment brought against the indigent defendant.

BAIL AND RECOGNIZANCE—Guaranteed Arrest Bond Certificates Issued by Automobile Clubs—No requirement for surety to advise clerks or police judges of becoming surety on bonds.

STATE CORPORATION COMMISSION—Commission of Insurance—No requirement to supply list of automobile clubs and associations.

HONORABLE THOMAS B. REDD
Deputy Commissioner of Insurance
State Corporation Commission

This is to acknowledge receipt of your letter of February 2, 1970, to Mr. Tyler of this office in which you indicate that the National Surety Corporation has become surety on Guaranteed Arrest Bond Certificates issued by a number of automobile clubs and associations for the year 1970, in compliance with § 38.1-644.1 of the Code of Virginia (1950), as amended. I quote from your letter:

"In this connection will you kindly advise the writer if it is incumbent upon Surety to advise Clerks of Courts, Police Judges, etc., of their becoming Surety on Guaranteed Arrest Bond Certifications or will the information furnished Clerks of Courts by this office suffice as is required by Section 38.1-647."

You discharge your duty under § 38.1-647 by furnishing the Clerks of the Circuit and Corporation Courts a list of all fidelity and surety companies licensed to transact fidelity and surety insurance. There is no requirement that you furnish the list of automobile clubs and associations mentioned in § 38.1-644.1 of the Code.

"At the time I wrote to you I was under the impression that a local O.E.O. agency did in fact operate in the county, but upon further investigation and from information obtained, I find that Giles County does not have an O.E.O. agency. The residents who represented themselves before the Board of Supervisors as the Giles County O.E.O. anti-poverty agency are directors in New River Community Action, Inc., with offices in Montgomery County, and no resolution has been presented by Community Action, Inc., requesting an appropriation from Giles County.

"Nine Giles County residents are on the Board of Directors of New River Community Action, Inc., and the City of Radford and the counties of Craig, Floyd, Pulaski and Montgomery, the other participating units, have directors, the number varying by city and county.

"From information received, the local directors have no office, telephone or regular meeting room in Giles County. Their duties are
REPORT OF THE ATTORNEY GENERAL

advisory in nature and are concerned with Community Action, Inc. They have no particular local organization."

Section 15.1-24 of the Code of Virginia (1950), as amended, reads:

"Counties, Cities and towns of this Commonwealth are authorized to make appropriations of public funds, of personal property or of any real estate to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society. The words 'sectarian society' shall not be construed to mean a nondenominational Young Men's Christian Association or a nondenominational Women's Christian Association. Nothing in this section shall be construed to prohibit any county or city from making contracts with any sectarian institution for the care of indigent, sick or injured persons." (Emphasis added.)

Assuming, without deciding, that the New River Community Action, Inc. is a charitable association, the question presented is whether it is an association located within Giles County. According to the Charter, the business office of this corporation is the same as its registered agent, to-wit, in Christiansburg, Virginia, and there its business meetings are held. From the information you supply it is apparent that this corporation is not located in Giles County.

This office in a letter to the Honorable E. Bruce Harvey dated April 24, 1970, held that a board of supervisors had no authority to appropriate funds to a legal aid society although same was a charitable association because its charter indicated that it was located without the county in an adjoining city. A copy of this opinion is enclosed.

I am therefore of the opinion that Giles County cannot appropriate public funds under Section 15.1-24 of the Code to the New River Community Action, Inc., for an O.E.O. anti-poverty program.

BOARDS OF SUPERVISORS—Authority—To appoint advisory commission on environmental conservation.

January 28, 1970

HONORABLE ADELARD L. BRAULT
Member, Senate of Virginia

This is in reply to your letter of January 21, 1970, in which you ask whether the Fairfax County Board of Supervisors presently has the power to create and appoint an advisory County Environmental Conservation Commission which will be charged with the responsibility of reviewing aspects of the total physical environment of the county and matters affecting the same and providing advice and recommendations thereon to the Board of Supervisors, or to other appropriate public bodies.

"The powers and duties of the Board of Supervisors are fixed by statute, and it has no other powers than those conferred expressly, or by necessary implication." Supervisors of Nottoway County v. Powell, 95 Va. 635, 29 S.E. 682 (1898). Section 15.1-510 of the Code of Virginia (1950), as amended, relates to the general powers of counties and provides, in part, as follows:

"Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State. . . ."
From your description of the proposed advisory commission which would deal with environmental conservation it is implied that such a commission is one which would tend to promote the health, safety and general welfare of the inhabitants of the county. In addition, I am not aware of any constitutional or statutory provision which would prohibit the Board of Supervisors from appointing such a commission.

In answer to a similar inquiry, this office has heretofore ruled that a county board of supervisors has the power to appoint a committee of local citizens to investigate the operation of local schools. See opinion to the Honorable S. Page Higginbotham, dated April 3, 1957, found in Report of the Attorney General (1956-1957), p. 28.

In conclusion, it is my opinion that the Fairfax County Board of Supervisors presently possesses the power to appoint an advisory County Environmental Conservation Commission if it so desires.

BOARD OF SUPERVISORS—Authority—To appropriate funds to prevent spread of rabies—Action must be necessary and measure proposed must substantially accomplish end sought.

ANIMALS—Rabid—Inoculation to prevent spread—Livestock—Would not justify expenditure of public funds.

April 21, 1970

HONORABLE HARRY W. GARRETT, JR.
Commonwealth's Attorney for Bedford County

This is in reply to your letter dated April 8, 1970, which reads as follows:

"The County of Bedford is unfortunately experiencing a rabies problem.

"In this regard my inquiry to you is this—does a county have the power, pursuant to Section 15.1-510 of the Code of Virginia of 1950, as amended, to pay for from public funds, and provide to its citizens, vacciné [sic] for the inoculation of livestock against rabies?"

It is my opinion that the answer to your question is in the negative. Section 15.1-510, to which you refer, relates to the general powers of counties and provides that counties may adopt measures, not inconsistent with the general laws of this State, to secure and promote the health, safety and general welfare of the county's inhabitants. That statute goes on to state that the aforementioned power includes: "the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals. . . " (Emphasis added.)

It is my belief that in order for a county government to promulgate rules, regulations or ordinances pursuant to the general powers granted to them by this statute, the Board of Supervisors must not only consider the action necessary but the measure proposed must also be of such nature that it would tend to substantially accomplish the end for which the measure is proposed. In this regard, I have spoken to officials of the Division of Animal Health and Dairies in The Virginia Department of Agriculture and Commerce and they inform me that they never recommend rabies inoculation of livestock as a measure to control that disease because rabies is rarely spread through these animals.

Although this office has heretofore ruled that Bedford County may adopt an ordinance, pursuant to Section 15.1-510, setting forth the necessity for employing persons to hunt and trap foxes and skunks and to appropriate public funds for this purpose, it is felt that such a measure was not only necessary but also one which would substantially aid in controlling the spread of rabies. [See letter to Honorable A. A. Rucker, dated March 15,
1967, found in Report of the Attorney General (1966-1967) at 11]. However, in view of the fact that the inoculation of livestock is of little value with respect to controlling the spread of rabies, it does not appear to be the type of necessary measure that would justify the expenditure of public funds.

BOARDS OF SUPERVISORS—Authority—To prohibit hunting within 100 yards of highway—May prescribe lesser distance.

February 3, 1970

HONORABLE ROBERT E. BROWN
Commonwealth's Attorney for King George County

This is in reply to your letter dated January 23, 1970, which reads as follows:

"Section 29-144.5, Code of Virginia, as amended, authorizes the governing body of any County, by ordinance, to prohibit the hunting, etc., with a firearm on or within one hundred yards of any primary or secondary highway in such county.

"May the Board of Supervisors by ordinance prohibit hunting or within a prescribed lesser distance than one hundred yards e.g. twenty-five yards, of any highway?"

It is my opinion that the answer to your question is in the affirmative.

In enacting § 29-144.5 of the Code the General Assembly empowered counties to "prohibit the hunting or attempting to hunt with a firearm, of any game bird or game animal while the hunting or attempting to hunt is on or within one hundred yards of any primary or secondary highway in such county. . . ." The exercise of this power is at the option of the county governing body. Therefore, it is unlikely that the General Assembly intended that a county may either permit hunting in this area or, if they did limit this area with regards to hunting, that the county must then extend the prohibition all the way out to one hundred yards of such highway.

Accordingly, it is reasonable to construe that § 29-144.5 enables a county to prohibit such hunting as far from a primary or secondary highway as one hundred yards or any distance within that one hundred yard range, e.g., twenty-five yards.

BOARDS OF SUPERVISORS—Authority—To provide compensation to county attorney.

January 27, 1970

HONORABLE LAWRENCE R. AMBROGI
Acting Commonwealth's Attorney for Frederick County

This is in reply to your letter of January 16, 1970, in regard to the action of the Frederick County Board of Supervisors in passing a motion to compensate E. Eugene Gunter, Esq., for his services as the "County Attorney and advisor to the Board." You seek my confirmation of your opinion as to the correctness of the Board's action.

Section 15.1-9.1:1 of the Code of Virginia, with exceptions not here applicable, authorizes the governing body of any county to create the office of county attorney. Such county attorney shall be appointed by the governing body to serve at the pleasure of the governing body and at a salary to be fixed by such governing body. In the event of such appointment, the county attorney relieves the Commonwealth's Attorney of certain duties, as outlined in this section.
Assuming the action of the Board was taken pursuant to Section 15.1-9.1:1, and his services as "County Attorney and advisor to the Frederick County Board of Supervisors," set forth in the first paragraph of your letter, are compatible with such assumption, I am in agreement with your opinion that the Board has authority to take action indicated in providing for his compensation.

BOARDS OF SUPERVISORS—Authority—To require bond of subdivider conditioned in payment of all labor and material costs incurred in installing improvements designed for public use.

June 19, 1970

HONORABLE DONALD C. STEVENS
County Attorney, County of Fairfax

This is in response to your letter of April 27, 1970, in which you state:

"A group of contractors engaged in the business of installing subdivision improvements has approached the Board of Supervisors with the request that our subdivision ordinance be amended to require, in instances in which the subdivider elects to furnish a bond, to furnish not only a so-called performance bond, conditioned upon installation of the facilities, but also a payment bond, conditioned upon payment by the subdivider, of all labor and material costs incurred in installing such facilities, with surety by a surety company authorized to do business in the state."

Neither can I find any statute which imposes upon the Attorney General the duty to furnish this information to the Clerks of Courts, Police Judges, etc. Your obligation is discharged by the furnishing of this information to the surety or to any interested person requesting it. Of course, such surety company or interested person can circularize the information to anyone who may desire it. I suggest that this information be furnished by you in the form of a certificate. I see no need for you to notify this office. The certificate issued (as suggested) by the State Corporation Commission should be recognized by all the officials empowered to issue bail bonds of the type mentioned in §§ 38.1-644.1 and 38.1-644.2.

After March 1, 1970, this office will no longer issue a certificate addressed to the aforementioned public officers to the effect that compliance with § 38.1-644.1 has been accomplished by certain surety companies writing Guaranteed Arrest Bond Certificates.

BANKING AND FINANCE—Charges on Loans Secured by Second Mortgages—Business incorporated under Virginia law may only charge fees enumerated in § 6.1-330.

March 16, 1970

HONORABLE GEORGE B. ANDERSON
Member, House of Delegates

This is in reply to your letter dated March 11, 1970, which reads as follows:

"I would be grateful to you if you would render me an opinion as to whether or not a business incorporated under the laws in Virginia and dealing primarily with second mortgages on residential real property is required to conform to Section 6.1-330 and 331 of
the Code of Virginia, specifically whether or not they may legally charge a brokerage fee for their service and whether or not they must follow the regulations provided with respect to the percentages they may charge for investigation fees, interest, etc."

Section 6.1-331 of the Code of Virginia (1950), as amended, relates to corporations conducting safe deposit businesses and thereby would not appear to be applicable to the type of businesses to which you refer in your letter.

Section 6.1-330 of the Code deals with interest and charges on loans secured by mortgages or deeds of trust, other than first mortgages, on certain real property. The language of subsection (a) of § 6.1-330 is broad, embracing any "person, copartnership, association, trust, corporation or other similar legal entity . . ." engaged in such business. Subsection (b) of that section provides that "[i]n 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." (Emphasis added.)

I would also direct your attention to § 6.1-330.3 which provides that this chapter, in which the above § 6.1-330 is included, "shall not apply to loans made by any lender licensed by, and under the supervision of the State Corporation Commission or the federal government."

It is my opinion, therefore, that a business incorporated under the laws in Virginia and dealing primarily with second mortgages on residential real property, must operate in accordance with § 6.1-330 and can charge only those fees enumerated therein. However, if the corporation to which you refer is licensed as a lender by the State Corporation Commission or the federal government, then § 6.1-330 does not apply.

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BANKS—Depositories of County Funds—Undivided profits not included in sixty per centum limitation established by § 58-944 (b).

TREASURERS—Depositories of County Funds—Undivided profits not included in sixty per centum limitation established by § 58-944 (b).

September 25, 1969

HONORABLE BETTY HANSEL
Treasurer of Highland County

This is in reply to your letter of September 19, 1969, which reads as follows:

"In computing the sixty per centum limitation provided for under Section 58-944 (b), the question has arisen as to whether or not undivided profits should be considered part of capital."

Undivided profits are the undistributed amounts of a bank's net income not yet formally transferred to earned surplus. Capital is the amount invested in a bank by its owners and includes earned surplus. Since the undivided profits have not been transferred to earned surplus they should not be considered as capital.

I am, therefore, of the opinion that undivided profits should not be considered as capital and should not be included in the sixty per centum limitations provided for in Section 58-944 (b) of the Code of Virginia (1950), as amended.
REPORT OF THE ATTORNEY GENERAL

BANKS—Depository of County Funds—Securities deposited in escrow with a bank may not be used by that bank as escrow for another bank.

TREASURERS—Depository of County Funds—Securities deposited in escrow with a bank may not be used by that bank as escrow for another bank.

September 30, 1969

HONORABLE WILLIAM J. HASSAN
Commonwealth's Attorney for the City of Arlington

This is in reply to your letter of September 9, 1969, in which you requested my opinion whether or not it is proper for a bank, acting as a depository for county funds, to have escrow with an affiliated bank that is part of the holding company and pledge the bonds with the bank, which, in turn, might use the securities as escrow for its bank.

Pertinent to the resolution of your question are the provisions of Section 58-945 of the Virginia Code which prescribe:

"All securities pledged by any depository or custodian to protect money or securities deposited with it under the provisions of this article shall be deposited in escrow with some bank or trust company in this Commonwealth, other than the depository or custodian, which shall be acceptable to and approved by the depository or custodian and the county finance board and shall be accompanied by powers of attorney authorizing such bank or trust company, in event of any default by the depository or custodian, to deliver the securities to the county finance board and empowering such board to sell, transfer, and deliver all or any part of such securities in such manner as it may elect for the satisfactions of any claim that may arise from such default."

In view of the language of this section, I am of the opinion that it would be improper for the securities which have been deposited in escrow with a bank under this section to be used by that bank as escrow for another bank.

BOARD OF SUPERVISORS—Appropriation of Funds—May appropriate funds to provide school bus transportation to local Community College.

October 14, 1969

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

This will acknowledge receipt of your letter of October 10, 1969, which reads:

"Please advise me if the Board of Supervisors of Tazewell County, Virginia, may properly appropriate and authorize the expenditure of funds to provide free transportation by school bus for Tazewell County students to the local Community College."

Section 15.1-22 of the Code of Virginia (1950), as amended, provides that the governing body of any county may appropriate funds for capital outlays, and operation and maintenance of any State-supported college. Section 23-218 (c) provides that the State Board for Community Colleges "shall be authorized, with the approval of the Governor, to accept from any government or governmental department or agency . . . grants or contributions of money or property which the Board may use for or in aid of any of its purposes."
In view of the above statutes, I am of the opinion that the Board of Supervisors of Tazewell County is authorized to appropriate funds in order that the State Board of Community Colleges may, subject to the approval of the Governor, provide the desired school bus transportation.

BOARDS OF SUPERVISORS—Authority—May assign vehicle to Commissioner of Revenue.

EXPENSES—Commissioner of Revenue—Operation of county vehicle—Compensation by State.

February 11, 1970

HONORABLE BLAIR ZIRKLE
Commissioner of the Revenue for Shenandoah County

This is in reply to your letter of January 27, 1970, in which you request my opinion on the legality of the contemplated action in regard to the following, which I quote:

"The County of Shenandoah has in the past furnished to the Sheriff's Office of Shenandoah County, vehicles for the use of the Sheriff and his deputies on official business. It is my understanding that the cost and operating expenses of these vehicles is shared on a percentage basis between State and County.

"Four of these vehicles are to be retired from the Sheriff's Office in the near future and, the local governing body is contemplating assigning one of these retired vehicles to me as principal officer for the official use of this office, if the statutes will permit this and if the state will participate in the expenses of operating this vehicle on the same basis as it does for the Sheriff's Office."

The statutes do not specify what expense items the State will allow for a commissioner of the revenue. Instead, the statutes place the authorization for such expenses under the control of the State Compensation Board. In Article 7, Chapter 1, Title 14.1 of the Code of Virginia, § 14.1-50 controls as to the procedure for submitting requests for salary and expenses to the Board. This section states, "such requests shall be filed on or before April first preceding the beginning of the fiscal year for which such requests are made." Section 14.1-51 provides, among other things, that the "Board shall fix and determine what constitutes a fair and reasonable salary which is to be paid to each such officer and to his clerks, assistants and deputies, and all other expense items requested." (Emphasis supplied.)

I know of no statute that would prevent the governing body's assigning you one of the vehicles in question. The matter of the State participating in the expenses of the operation of such vehicle, however, is for the State Compensation Board to determine. In this connection, a representative of the Board advises that the State will not participate in the expense of operating the vehicle under the stated conditions. The reason given for this is that the Board compensates you for mileage in the use of your private vehicle, but would not feel justified in compensating you for the use of a county owned vehicle. If you have additional questions in regard to this matter they may be presented to the Compensation Board direct, in accordance with the statutes cited.
May 19, 1970

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

This is to acknowledge receipt of your letter of April 23, 1970, in which inquiry is made whether the Board of Supervisors of Giles County can appropriate funds to the New River Community Action, Inc., for an O.E.O. anti-poverty program.

In your letter of May 12, 1970, you furnish the following information concerning the O.E.O. agency in question:

"After discussing with you my letter of April 23, 1970, concerning the question of whether or not the county may appropriate public funds to the Giles County O.E.O. anti-poverty agency, I have inquired into the organization of the group involved and I think the following information may assist you in considering the question presented.

You also indicated:

"It has been my position that the intent of § 15.1-466 (F) was to ensure construction of subdivision improvements without cost to the locality, and that the local governing body may not extend that to a regulation by ordinance of the relationship between the subdivider and his contractors; . . ."

* * *

"I will appreciate your opinion on the question of the Board's power to enact such an ordinance should it be disposed, as a matter of policy, to desire to do so."

In my opinion Va. Code Ann. § 15.1-466 does provide the Board of Supervisors with the authority to require a bond of the owner or subdivider conditioned on the payment of all labor and material costs incurred in installing of improvements designed for public use.

Section 15.1-466 provides:

"A subdivision ordinance may include, among other things, reasonable regulations and provisions that apply to or provide: (F) for the acceptance of dedication for public use of any right-of-way located within any subdivision which has constructed therein or proposed to be constructed therein, any street, curb, gutter, sidewalk, drainage or sewerage system or other improvement, financed or to be financed in whole or in part by private funds only if the owner or developer (1) certifies to the governing body that the construction costs have been paid to the person constructing such facilities, or (2) furnishes to the governing body a certified check in the amount of the estimated cost of construction or a bond, with surety satisfactory to the governing body, in an amount sufficient for and conditioned upon the construction of such facilities, or a contract for the construction of such facilities and the contractor's bond with like surety, in like amount and so conditioned." (Emphasis supplied)

The Supreme Court of Virginia in National Realty Corporation v. Virginia Beach, 209 Va. 172, (1968), stated that the power of a municipality was limited to an express grant of such power. Section 15.1-466 granted to the locality the power to enact subdivision ordinances that might include "reasonable regulations" applying to dedication for public use of streets,
etc., as found in subsection (F) of 15.1-466. It is conceded that with regard to these improvements the Legislature narrowed the scope of its powers granted with regard to security that a municipality could require to those enumerated and designated as sections (1) and (2) of subsection (F) of 15.1-466. However, the term “construction” used in this section is subject to statutory construction and interpretation, and so long as the Board’s action is reasonable with regard to defining this term, its ordinances with regard to bond would be valid. In my opinion it would not be unreasonable to construe the term to include persons who supplied materials and labor. In the case of Aetna Casualty v. Earle Lansdell Co., 142 Va. 435, (1925), the court construed the term “faithful performance of the work in strict conformity with the plans and specifications for the same” to extend to a requirement to pay all persons performing labor or furnishing material. In my opinion the General Assembly in using the term “construction of such facilities” also intended that the term include the persons performing labor or furnishing material with regard to the said construction.

**BOARDS OF SUPERVISORS—Members—Elimination of at-large seat by referendum.**

January 15, 1970

HONORABLE J. MERCER WHITE, JR.
County Attorney for Henrico County

I am in receipt of your request of December 22, 1969, for an opinion regarding §15.1-623.1 of the Code of Virginia as it relates to the abolition of the seat of an “at large” member of the board of county supervisors.

Although the matter is not entirely free from doubt, I am constrained to believe that the referendum mentioned in your communication may be conducted as prescribed in § 15.1-623.1 of the Virginia Code. I believe, however, that the questions to be voted on in such referendum should be those set out in the statute and that, to accomplish your stated result, it would be necessary for the voters (1) to adopt the first alternative in the initial question presented, i.e., “By the qualified voters of each magisterial district” and (2) to vote “No” on the second question presented. I would add, however, my opinion that it would be a surer course to follow to have such a referendum as you contemplate specifically authorized by the General Assembly of Virginia.

Subject to the foregoing, I am of the opinion that the initial inquiry presented in your subsequent letter of January 9, 1970, should be answered in the affirmative. Assuming the referendum mentioned in your communication of December 22 may be conducted as prescribed in § 15.1-623.1 of the Virginia Code, such referendum may eliminate or abolish the vacant “at large” seat on the board of supervisors before the expiration of the term of such office. See, Lipscomb v. Nuckols, 161 Va. 936; Walker v. Massie, 202 Va. 886. It follows from the foregoing that no statutory or constitutional provision of Virginia law would prohibit enabling legislation of the General Assembly which would permit elimination of a vacant “at large” seat on the board of supervisors by referendum.

**BOARDS OF SUPERVISORS—Members—May be interested in sub-contract with county except where work is done on a no-pay basis.**

October 1, 1969

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

This is in reply to your letter of September 23, 1969, in which you present the following inquiry:
REPORT OF THE ATTORNEY GENERAL

"Under Section 15.1-67 of the 1950 Code of Virginia, as amended, may a corporation, whose chief stockholder is a member of the county Board of Supervisors, perform grading work on an hourly basis for a contractor who has a contract with the Roanoke County School Board and/or Roanoke County Board of Supervisors where the general contractor is constructing buildings on County property, said grading work being done on the aforementioned County projects, where the said corporation (of which a member of the Board of Supervisors is the principal stockholder) turns any profit it might make from any of such grading work over to Roanoke County?

"Secondly, or in the alternative, may a corporation, one of whose stockholders is a member of the Board of Supervisors, perform the aforementioned grading work on a no-pay basis?"

This office has previously ruled that a county officer is precluded by the terms of § 15.1-67 of the Virginia Code from acting as a subcontractor on school construction projects. See, Report of the Attorney General (1953-1954) at 185, a copy of which is enclosed. Accordingly, I am constrained to believe that the situation which you present is not distinguishable from the above.

Inasmuch as § 15.1-67 requires forfeiture of the proceeds of a contract entered into in violation of that section, this requirement cannot be satisfied by returning only the profits therefrom to the board. If the job were performed without any compensation, there would be no interest in the proceeds of the contract and, thus, no violation of the statute.

BOARDS OF SUPERVISORS—Members—Not conflict of interest to be employed by school board.

PUBLIC OFFICERS—Compatibility—Member of board of supervisors may be employed by school board.

April 30, 1970

HONORABLE M. W. SWOOPESheriff of the City of Covington

I am in receipt of your letter of April 22, 1970. You state that a member of the Board of Supervisors of the adjoining county is currently employed by the City School Board. You inquire as follows:

"Would this come under the Conflict of Interest Law, and in your opinion, can this member continue to be employed by the City of Covington, and still serve on the Board of Supervisors?"

I am of the opinion that the situation you outlined would not be a conflict of interest and the member of the county board of supervisors may thus continue to be employed by the city school board.

BOARDS OF SUPERVISORS—Mileage—When should be paid and how much.

May 8, 1970

HONORABLE ROBERT C. WRENN, ClerkCircuit Court of Greensville County

This is to acknowledge receipt of your letter of May 4, 1970, in which you request my opinion concerning the payment of mileage to members of boards of supervisors. I shall answer your inquiries seriatim:
REPORT OF THE ATTORNEY GENERAL

Question No. 1. "When mileage should be paid to the Board of Supervisors."
Answer: The pertinent portion of § 14.1-7, Code of Virginia (1950), as amended, is as follows:

"Any person traveling on business of any county, except as hereinafter provided, wherein no part of the cost is borne by the State may be reimbursed by such county on a basis not in excess of that provided in § 14.1-5,..."

Therefore, when members of the Board of Supervisors are traveling on business for the county including the cost of travel from their homes to the place where the Board meets, they can be reimbursed by the county. In this connection I am enclosing copies of the following opinions issued by this office:


Question No. 2. "The amount per mile."
Answer: If the travel is by private transportation reimbursement is at the rate of nine cents per mile. If travel is by public transportation reimbursement is the actual cost thereof. This is in accordance with § 14.1-9 of the Code, amended by Chapter 711, Acts 1968.

Question No. 3. "The required distance to be traveled before payment."
Answer: None.

BOARDS OF SUPERVISORS—No authority—To enact ordinance paralleling State law or regulating hunting.

March 25, 1970

HONORABLE E. EUGENE GUNTER
County Attorney for Frederick County

This is in reply to your letter dated March 10, 1970, in which you inquire as to whether the Frederick County Board of Supervisors could validly enact ordinances pertaining to the following:

(1) Making it illegal for any person to have in his possession a loaded rifle and/or shotgun, the magazine of which all shells and cartridges have not been removed, in or on any vehicle or conveyance or its attachment;
(2) Making it unlawful for any person to have in his possession a loaded rifle and/or shotgun, on any public road, and/or hunt from any public road;
(3) Making it illegal to carry an uncased gun in a vehicle between sunset and sunrise.

It is my opinion that the answer to your question is in the negative with respect to all three of the proposed ordinances.

Although none of the proposed ordinances specifically so state, it is apparent that the consequences of such ordinances would be to regulate hunting in, and hunters passing through, the county. Since the general power to regulate hunting was once conferred upon counties, and subsequently repealed by Chapter 247 of the Acts of Assembly 1930, this office has ruled that counties have no regulatory powers over hunting, unless expressly conferred by the legislature. See letter to Honorable Ernest E. Orange, dated July 17, 1950, found in Report of the Attorney General (1950-1951), p. 31.
In addition, this office has heretofore rendered the opinion that a board of supervisors does not have the authority to enact ordinances which parallel general criminal laws of the State, unless expressly so conferred. In this regard, the legislature has enacted laws relating to the carrying of weapons and hunting, including the firing of weapons along roadways. These facts considered with the nonexistence of express authority for the adoption of such local ordinances as you specify, lead me to the conclusion that the proposed county enactments would be of doubtful validity.

I am enclosing a copy of the aforesaid 1950 opinion rendered to the Honorable Ernest E. Orange which considered a like problem and reached the same conclusion as I do today.

BOARD OF SUPERVISORS—No Authority—To establish police department without specific authority from General Assembly.

May 28, 1970

HONORABLE JOSHUA PRETLOW
County Attorney for Nansemond County

This is to acknowledge receipt of your letter of May 5, 1970, in which you state in part:

"The Board of Supervisors of Nansemond County, Virginia is considering the appointment of a Police Department to assume the duty of law enforcement in place of the Sheriff's Department. . . . "My question is, whether the Board of Supervisors of Nansemond County has the authority under Section 15.1-137 of the Code of Virginia, or any other Section to establish a County Police Department?"

Section 110 of the Constitution of Virginia provides *inter alia* that in each county there shall be elected a sheriff. The terminal paragraph of that section provides that the General Assembly may by general law provide for complete forms of county organization and government different from that provided for in that Article (VII). It will be noted that in every instance when the General Assembly has provided for a form of county government, the office of Sheriff has been retained. In this particular reference is made to: Chapter 13, Title 15.1 (Sections 15.1-608, 15.1-643) of the Code of Virginia (1950), as amended; Chapter 14, Title 15.1 (Sections 15.1-670, 15.1-674, 15.1-706), and Chapter 15, Title 15.1 (Section 15.1-769).

As you point out in your letter, Section 15.1-137 of the Code provides: "The governing body of any city or town may protect the property of the city or town and its inhabitants and preserve peace and good order therein," and that Section 15.1-522 of the Code (made applicable to Nansemond County by virtue of paragraph 3 thereof) provides, "The board of supervisors of counties: . . . Are hereby vested with the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the Acts of the General Assembly passed pursuant thereof; . . . " By Section 15.1-13 of the Code the governing bodies of cities and towns are vested with the authority to make ordinances so as to carry into effect the enumerated powers conferred upon them by the charters of the cities and towns. There is no mention therein of the establishment of a police force. The only Code section of which I am aware pertaining specifically to police force in cities is Section 15.1-143.1 permitting the establishment of an auxiliary police force in certain cities. Section 15.1-13 of the Code corresponds to Section 15.1-510 which grants the counties general powers.

I do not believe that the legislature intended that Sections 15.1-522 and 15.1-137 be interpreted in a manner as to empower boards of supervisors to establish special police departments. The General Assembly by enacting
Sections 15.1-144 through 15.1-153 of the Code providing for the appointment of special policemen in any county thereby assured the means by which the inhabitants therein can be protected.

Furthermore, the legislature by enacting statutes authorizing various counties to establish police departments (Sections 15.1-156 through 15.1-159.1) strongly indicates that specific authority is necessary to enable a county to establish a police department. There would have been no need for these special Acts, had the General Assembly felt that Section 15.1-522 and Section 15.1-137 were broad enough to authorize any county to establish a police department. The antecedents of both of these statutes (Sections 15.1-137 and 15.1-522) antedate the enactment of the said special statute (Sections 15.1-153 to 15.1-159.1). A cursory review of these special statutes indicates that they do not refer to the office of Sheriff or attempt to abolish that office.

Therefore it is my opinion that your question should be answered in the negative.

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BOARDS OF SUPERVISORS—No Authority—To exonerate penalty for delinquent taxes.

TAXATION—Delinquency—Penalty—May not be exonerated by board of supervisors.

January 16, 1970

HONORABLE W. O. JONES, Treasurer
County of Nansemond

This is in reply to your letter of January 8, 1970, in which you request my advice as to whether the Board of Supervisors of Nansemond County may exonerate a penalty in the amount of $83.34 assessed against a taxpayer for delinquent taxes.

I am aware of no authority whereby the Board of Supervisors may exonerate the penalty. Therefore, I answer your question in the negative.

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BOARDS OF SUPERVISORS—No Authority—To grant exclusive franchise to private individual to operate machine disposing of junked cars.

June 15, 1970

HONORABLE THOMAS R. NELSON
Commonwealth’s Attorney for Augusta County

This is in reply to your letter of June 8, 1970, in which you inquire as to whether a county could grant an exclusive franchise to a private individual to operate a machine which will dispose of junked cars within the boundaries of the county.

I am unable to find any statute which would give the Board of Supervisors such authority. I am enclosing a copy of an opinion of this office to the Honorable Julius Goodman, Commonwealth’s Attorney for Montgomery County, dated August 27, 1956, published in Report of the Attorney General (1956-1957), page 34, in which a similar opinion was expressed with regard to the granting of an exclusive franchise for the collection of garbage.

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BOARDS OF SUPERVISORS—No Authority—To make loan to hospital corporation.

BOARDS OF SUPERVISORS—Authority—To make gift to hospital—Must be charitable or nonprofit organization.
This is in reply to your letter of January 22, 1970, requesting my opinion regarding the following:

"The Page Memorial Hospital, Inc., which is a community hospital, has agreed to operate a Nursing Home for the aged and infirm, said home to be built onto and connected with the present hospital building. It is desired to apply for Hill-Burton Funds to be used in this connection. The proposition was submitted to the Page County Board of Supervisors that the Board provide the amount needed, which is merely estimated to be the amount of One Hundred Thirty-Five Thousand Dollars ($135,000.00), of the local share in order to get the Hill-Burton Funds. The Page Memorial Hospital, Inc. would agree to repay the One Hundred Thirty-Five Thousand Dollars ($135,000.00) at the rate of Five Thousand ($5,000.00) Dollars per year in any year that they make that much profit off the operation of the Nursing Home. My question is, can the Page County Board of Supervisors make a loan to a hospital corporation? If this were at all possible, would it be legal to provide for repayment only, in case the hospital should make a profit off operating the Nursing Home?"

It is my opinion that such a loan is not permissible under existing law. However, pursuant to §§ 15.1-25 and 32-134.1, Code of Virginia (1950), as amended, the county may make a gift to the hospital of the sum required assuming that the hospital is a charitable or nonprofit organization.

It is my opinion that such a loan is not permissible under existing law. However, pursuant to §§ 15.1-25 and 32-134.1, Code of Virginia (1950), as amended, the county may make a gift to the hospital of the sum required assuming that the hospital is a charitable or nonprofit organization.

BOARDS OF SUPERVISORS—No Authority—To make monthly meal allowances to sheriff or his deputies.

This is in reply to your letter of April 9, 1970, in which you ask my opinion regarding the action of the Board of Supervisors of Campbell County in adopting a resolution making monthly meal allowances to the staff of the Sheriff's Department.

The salary and allowances for the necessary expenses of the sheriff and his full-time deputies are fixed by the Compensation Board under § 14.1-51 of the Code. Section 14.1-75 of the Code lists the expenses which are required to be reported by the officer concerned. The furnishing of meals to the sheriff or his deputies does not come within the expenses of his office listed and is not an item of expense which the Compensation Board has approved. The Board of Supervisors may not appropriate money to supplement the salary of the sheriff. See, Report of the Attorney General (1942-1943), p. 18.

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

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

Again in Board of Supervisors of Nottoway County v. Powell, 95 Va. 635, the Supreme Court of Virginia, at page 637, citing the case of Roper v. McWhorter, supra, made this observation:
"The powers and duties of the Board of Supervisors are fixed by statute, and it has no other powers than those conferred expressly, or by necessary implication."

Both of these statements have been cited in subsequent opinions of the Supreme Court of Virginia, the most recent case being Ernst v. Patrick County, 158 Va. 565, at page 567.

I am unable to find any statutory authority whereby the Board of Supervisors of Campbell County may establish or supplement the salary and expense allowances of the sheriff and his full-time deputies.

Therefore, I am of the opinion that the Board of Supervisors is not authorized to make monthly meal allowances to the sheriff or his deputies.

BOARDS OF SUPERVISORS—Not Required to Let Public Work by Bid Unless County Has Employed Purchasing Agent.

HONORABLE E. EUGENE GUNTER
County Attorney for Frederick County

I am in receipt of your letter of December 11, 1969, wherein you advise that Frederick County has let a contract for the operation of a sanitary landfill county dump and inquire whether the letting of the contract should have been on a competitive bid basis pursuant to Article 7, Chapter 2 of Title 15.1 of the Virginia Code. (§§ 15.1-103 through 15.1-114.) It is my understanding that Frederick County has not employed a county purchasing agent nor designated anyone to act in that capacity.

Section 15.1-113 provides that Article 7 is not applicable until a county has employed a purchasing agent or designated someone to act in that capacity. See also a previous ruling of this office to the Honorable Julius Goodman, Commonwealth's Attorney of Montgomery County, dated August 29, 1950, found in the Report of the Attorney General (1950-1951), at p. 35, copy of which I enclose.

Your inquiry is therefore answered in the negative.

BOARDS OF SUPERVISORS—Standing to Sue for Declaratory Judgment to Determine Status of Road—Depends on whether county owns fee.

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

This is in reply to your letter dated December 17, 1969, in which you inquired as follows:

"The question for which we are seeking an answer is . . . whether the Board of Supervisors of Warren County has standing to bring suit for a declaratory judgment to determine the status of Route 623 (i.e., the location of the road and the distance which it continues as a County road rather than a private farm road), and whether the Board can legally expend the public funds for that purpose, or whether Section 33-44 et seq of the Code of Virginia of 1950 deprives them of this standing, thereby making the expenditure of public funds by the Warren County Board of Supervisors for this purpose improper."
As I have previously stated in an opinion contained in Report of the Attorney General (1965-1966) at page 145, when an issue is presented requiring a factual determination of the status of a road, such issue must be resolved by proper judicial determination.

Assuming that in this case there is an actual controversy that will satisfy the requirements of § 8-578 of the Code of Virginia (1950), as amended, a primary requisite for bringing suit for a declaratory judgment is stated in *Brinkley v. Blevins*, 157 Va. 41, 45, "The person who raises a question to be settled by a declaratory judgment must have a real interest in the subject matter in controversy." To determine if Warren County has a "real interest" depends on the effect of Chapter 415 of the Virginia Acts of Assembly of 1932 (Byrd Road Act) as codified in § 33-44 et seq. of the Code. It is my opinion that although this Act and the subsequent codification thereof vests control, supervision, management, and jurisdiction over county roads (with exception to those counties utilizing their election to withdraw entirely from the Secondary System under the terms of the Act) within the Department of Highways, it does not, however, divest ownership of the fee. Therefore, if Warren County does in fact own the fee in this case, it has a "real interest" in the subject matter.

Under § 15.1-507 of the Code,

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

In summary, if Warren County does in fact own the fee, it is my opinion that the Board of Supervisors, as the governing body of the county, has standing to bring suit and may expend public funds for that purpose.

BONDS—Entered by Justice of Peace—Amount must be increased to $2,500.

May 26, 1970

HONORABLE MARION K. RIDLEY, Clerk
Circuit Court of Sussex County

This is to acknowledge receipt of your letter of May 18, 1970, in which you state that the Circuit Court has appointed two justices of the peace, one on November 11, 1968, and the other on February 20, 1970, on which dates a bond of $500.00 was posted in each instance. You ask whether the bonds should be increased to $2,500.00 each.

Section 39.1-9 of the Code of Virginia, as amended by Chapter 639, Acts 1968, requires that a justice of the peace enter into a bond in the sum of $2,500.00. The amount ($500.00) of the bonds in these instances was apparently fixed in accordance with § 19.1-131 of the Code so as to enable the justice of the peace to receive cash deposit for bail. However, that section was also amended in 1968 by said Chapter 639, eliminating the provision concerning the taking of the bond.

I am therefore of the opinion that said bonds should be increased to $2,500.00 each.

CHARITABLE ORGANIZATIONS—Legal Aid Society—City may appropriate public funds to it.

CITIES—Appropriations—May be made to legal aid society if charitable.
HONORABLE WILLIAM M. DUDLEY  
Member, House of Delegates  

This is in reply to your letter of April 21, 1970, in which you requested my opinion whether or not the City of Lynchburg may appropriate public funds to the Legal Aid Society of Greater Lynchburg.

I have reviewed the Articles of Incorporation of Legal Aid Society of Greater Lynchburg and find that the society is located within the City of Lynchburg.

The articles further provide that "the corporation is organized for purely benevolent purposes and not for profit and no part of the net earnings shall inure to the benefit of any individual."

"Charitable" is defined as "liberal in benefactions to the poor; beneficent." See, City of Richmond v. United Givers Fund, 205 Va. 432 (1964).

"Benevolent associations" are those having a philanthropic or charitable purpose, as distinguished from such as are conducted for profit. Black's Law Dictionary, Third Edition, page 209.

In view of the foregoing, I am of the opinion that the Legal Aid Society of Greater Lynchburg is a charitable association and under § 15.1-24 of the Code the City of Lynchburg may make appropriations of public funds to it.

CHARITABLE ORGANIZATIONS—Legal Aid Society—City may appropriate public funds to it if within limits of locality.

CITIES—Appropriations—May be made to legal aid society if charitable and within limits of locality.

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

This is in reply to your letter of April 9, 1970, which reads as follows:

"Section 15.1-24 of the Code of Virginia allows counties, cities and towns to appropriate public funds to charitable institutions or associations located within their respective limits. A legal aid society has been organized serving the City of Lynchburg and Counties of Amherst, Appomattox and Campbell. This will be an extension of legal aid beyond that provided in cases of felonies and in certain juvenile cases. It will be completely charitable and incorporated. As far as Campbell County is concerned, this legal aid society will serve many persons needing legal aid within the county. My question is whether the Board of Supervisors of Campbell County can legally appropriate public funds to such a legal aid society operating within Campbell County as well as within the City of Lynchburg and other counties under Section 15.1-24 or any other Code provisions?"

Section 15.1-24 of the Code reads:

"Counties, cities and towns of this Commonwealth are authorized to make appropriations of public funds, of personal property or of any real estate to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society. The words 'sectarian society' shall not be construed to mean a nondenominational Young Men's Christian Association or a nondenominational Women's Christian Association. Nothing in this section shall be construed to prohibit any county or city from making contracts with any sectarian institution for the care of indigent, sick or injured persons." (Emphasis added.)
The articles of incorporation of the Legal Aid Society of Greater Lynchburg provide that "the corporation is organized for purely benevolent purposes and not for profit and no part of the net earnings shall inure to the benefit of any individual."

"Charitable" is defined as "liberal in benefactions to the poor; beneficent." See, *City of Richmond v. United Givers Fund*, 205 Va. 432 (1964).

"Benevolent associations" are those having a philanthropic or charitable purpose, as distinguished from such as are conducted for profit. Black's Law Dictionary, Third Edition, page 209.

In view of the foregoing, I am of the opinion that the Legal Aid Society of Greater Lynchburg is a charitable association and under the provisions of § 15.1-24 of the Code the county could make appropriations of public funds to it if it were located within the county. Inasmuch as the charter of the Society indicates it is located without the county and within the City of Lynchburg, I am of the opinion the county cannot appropriate public funds to it under § 15.1-24.

CHARTER—Bristol—Permits appropriations by council to expense budget.

CITIES—Council—Charter allows appropriations to members for expenses.

CITIES—Council—Expense allowance—Itemization of expenses—Not required.

Honorable George M. Warren, Jr.
Member, Senate of Virginia

April 20, 1970

This is in reply to your letter of March 24, 1970, in which you inquire as follows:

"Section 56 of the Charter of the City of Bristol (Acts 1920, Ch. 309, p. 432, et seq.) provides for the payment of a salary of $300.00 per year to each member of the City Council, payable in equal monthly installments, but is silent with regard to expenses incurred by the individual members.

"On January 13, 1970, the Council adopted a motion to appropriate $1500.00 to the municipal Council expense budget for 1969-70, allocating $50.00 per month to each councilman. No provision is made to require each council member to give any accounting to the City of his expenditure of such expense allowances.

"Since the adoption of the above motion, each councilman has been sent a monthly check for $50.00 for expenses and the question has now arisen as to whether the City has the authority under its charter to make such an appropriation, and whether members of the Council have the right and authority to accept such payments without making any accounting as to how they are expended."

The charter of the City of Bristol was amended by Chapter 40 of the Acts of Assembly, 1960, as follows:

"§56. The respective officers provided for in this charter shall receive such salaries, compensation, fees and emoluments as may be provided by the general laws of the State, and prescribed by the council of the city of Bristol except as herein otherwise provided.

"The members of the present council shall each receive *a salary *at the rate of one hundred dollars per year for the city's fiscal year ending June thirtieth, nineteen hundred sixty. Thereafter the members of the present and each succeeding council shall each receive a salary at the rate of three hundred dollars per year."
I draw your attention to the fact that the first paragraph of §56 permits the council to prescribe "compensation, fees and emoluments" in addition to those prescribed by general law.

As long as the expense budget appropriated by the council bears a reasonable relation to the expense incurred by members of the council, it is my opinion that §56 would permit such an appropriation. If the appropriation does not reflect the expenses incurred by the members of council, then it must be regarded as an attempt to raise salaries contrary to the provisions of the charter. But, assuming this not to be the case, the council would be authorized to make a blanket appropriation without requiring an itemization of expenses. This opinion is expressly restricted to instances in which the language of the charter is as permissive as that of §56, for charters of many other cities are more restrictive in this regard.

This office has ruled in a previous opinion that counties do not have to require itemization of expenses, Report of the Attorney General (1966-1967), p. 46: Similar reasoning would apply in the case of cities, unless the charter required that expenses be itemized. Generally, this office has ruled that a governing body may compensate only for those expenses as authorized by general law, Report of Attorney General (1957-1958), p. 18. That opinion, a copy of which is enclosed, cites the case of Johnson v. Black, 103 Va. 478, 49 S.E. 633 (1905), which held that a taxpayer could maintain an action for recovery of sums paid to members of a board of supervisors for attendance on committees. However, in this case, §56 does permit the council to appropriate funds for expenses other than those provided by general law.

CITIES AND TOWNS—Sanitary Sewer System May Be Extended into Adjacent Counties Without Permission of Governing Bodies Thereof.

HONORABLE BENJAMIN H. WOODBRIDGE, JR.
Member, House of Delegates

This is in reply to your letter of January 19, 1970, in regard to a proposed amendment to the Fredericksburg City Charter, for the purpose of incorporating within the charter the powers set forth in § 15.1-292 of the Code of Virginia.

In this connection, you request my opinion as to whether or not § 15.1-292 empowers the City to sell its water and sewage services to customers in adjacent counties without seeking the express or implied permission of the governing bodies of the counties, in which services are to be rendered. You further request that I consider situations where the potential customers reside within the jurisdictional limits of sanitary services authorities, or in areas in which no water or sewage facilities are available.

Section 15.1-292 empowers the governing body of every county, city and town to establish, maintain, operate, extend and enlarge water works and certain other public utilities within or without the limits of the county, city or town and authorizes condemnation whenever necessary for such purposes. There is nothing in this section to require a political subdivision acting thereunder to obtain permission from an adjacent jurisdiction into which services are extended. I find no other law which would require the City of Fredericksburg to seek or obtain permission from an adjacent county as a prerequisite to extending its water and sewage services into such county pursuant to Section 15.1-292, whether or not a sanitary service authority may exist in such county. Accordingly, in my opinion, such permission is not required. This is consistent with the view expressed in the Report of the Attorney General (1958-1959), p. 20, citing the case of Mount Jackson v. Nelson, 151 Va. 396.
CIVIL PROCEDURE—Service of Process—Invalid where served in another locality when suit brought on contract where cause of action arose—Not waived where defendant makes no appearance.

COURTS NOT OF RECORD—Venue—Court may raise issue ex mero motu when defendants have not appeared to object to invalid service.

PUBLIC OFFICERS—Failure to Observe Statutes in Serving Process—No penalty imposed by statute.

April 21, 1970

HONORABLE FRED E. MARTIN, JR., Judge
Civil Justice Court, City of Norfolk

This is to acknowledge receipt of your letter of April 7, 1970, in which you state in part:

"This Court rendered judgment as indicated in the abstract. The plaintiff is located in the city of Norfolk; the defendants are residents of and located at the city of Virginia Beach and the cause of action arose in the city of Norfolk."

"Process was served by the High Constable of Virginia Beach at request of plaintiff although technically not directed to him by the justice of the peace."

". . . Is it in order for this Court to raise the question of venue when defendants have not appeared to object under provision of 8-133?

1. Is the High Constable of the city of Virginia Beach in violation of Section 16.1-76?
2. If he is in violation what would be his penalty, if any?
3. Is the justice of the peace in violation of Section 16.1-76 for sending the process to be executed in the city of Virginia Beach?
4. If so, what would be the penalty, if any?"

The venue prescribed for suit, cause of action, etc., for courts not of record is outlined in § 16.1-76, Code of Virginia (1950), as amended, which reads as follows:

"§ 16.1-76.—The provisions of § 8-38 prescribing in what counties and cities actions at law may be brought in courts of record shall apply to civil actions brought in courts not of record when such actions are within the jurisdiction of the latter courts. In addition to such venue, any civil action within the jurisdiction of a court not of record may be brought in any county or city wherein the defendant, or one or more of them if there be more than one defendant, is regularly employed or has his regular place of business, or in which the cause of action or any part thereof arose, although neither the defendant nor any one of the defendants reside therein; and any warrant or process against any such defendant may be directed to a sheriff or sergeant of any other county or city wherein the defendant resides or may be found; but no such warrant or other process shall be served or executed in any other county or city than that wherein the action is brought unless it be:
(1) An action against a corporation;
(2) An action upon a bond taken by an officer under authority of some statute;
(3) An action to recover damages for a wrong;
(4) An action against two or more defendants on one of whom such warrant or process has been executed in the county or city in which the action is brought; or
(5) Unless it be otherwise specifically provided.” (Emphasis supplied.)

Jurisdiction in civil actions for such courts is found in § 16.1-77 of the Code.

There is no question that your court had potential jurisdiction to try such a case. The real question is whether the judgment is valid due to the service of process on the defendants in violation of § 16.1-76.

The case of Texaco, Inc. v. Runyon, 207 Va. 367, which you cite, turned on the point that the defendants had waived their privilege of contesting the venue, they having made a general appearance in the County Court. I quote from this opinion (pp. 369-370):

"... and hence the question involved was not one of jurisdiction, in the sense of power to decide, but one of venue, which could be waived and which the defendants did waive by their general appearance to the action in the County Court and filing pleadings therein.

"** Venue and jurisdiction, though sometimes confounded, are, accurately speaking, separate and distinct matters. Jurisdiction is authority to hear and determine a cause, or "it may be defined to be the right to adjudicate concerning the subject matter in the given case." It is, like venue, regulated by statute or organic law. Venue is merely the place of trial, and the purpose of statutes prescribing venue is to give defendants the privilege of being sued only in the place or places prescribed by the statutes. "But it is a privilege which may be waived, and which, if about to be denied, must, in Virginia, be claimed by plea in abatement filed in pursuance of [Code 1950, § 8-133], otherwise it will be lost, if the court in which the action or suit is brought has general jurisdiction of such an action or suit and has the subject matter and the proper parties, plaintiff and defendant, before it." Burks Pleading & Practice, 4 ed., § 37, pp. 45, 46." (Second underscoring supplied.)

This office in an opinion to the Honorable E. C. Westerman, Jr., dated September 21, 1959, Report of the Attorney General (1959-1960), at page 338, expressed the view that it was doubtful whether under § 16.1-76 process could be effectual on a non-resident tax delinquent, and suggested that the action to collect the taxes be instituted in the court not of record of the city where the defendant resided.

In the instant case where an action was instituted on a contract, the record does not show on its face that the parties are before the court. The aborted service on the defendants by the High Constable of the City of Virginia Beach is without legal effect.

In the case of Moore v. Norfolk & Western Railway Co., 124 Va. 628, 637, it was held that § 3260, Code of 1887 (the antecedent of § 8-133 of the 1950 Code) “has no application where the defendant is not before the court;” and “the court should, ex officio, mero motu, dismiss the action or suit, . . .”

It is the opinion of this office that where the record on its face shows that the defendants are not before the court, due to an invalid service, the court should on its own motion dismiss the action. Your first question is therefore answered in the affirmative.

I know of no specific statute which imposes penalties upon an officer where the officer (into whose hands a process is placed for service) does not observe the limitations placed upon him by § 16.1-76.

The justice of the peace who issued the warrant directed it to be served by the High Constable of the City of Norfolk. This was in accordance with § 16.1-76. The justice of the peace is required to deliver it to the officer to whom it is addressed or to the plaintiff. You state the justice of the peace
sent it to the City of Virginia Beach. This was in violation of § 16.1-80. There is no statute which imposes penalties for such violation.

The apparent misinterpretation by the justice of the peace and by the High Constable of § 16.1-76 in a single instance would not be ground for removal from office in a proceeding under § 15.1-63, et seq., of the Code.

It is therefore the opinion of this office that these officers under the circumstances mentioned in your letter should not be penalized.

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CIVIL RIGHTS ACT—Public Accommodations—Barber shop not covered unless located within physical premises of place of public accommodation.

June 12, 1970

HONORABLE C. G. HUGHES
Trial Justice for the Town of Pembroke

This is in reply to your letter of May 26, 1970, in which you inquire as to whether a local barber violates any law by refusing to cut Negro hair because of insufficient training in such art.

The Civil Rights Act of 1964 prohibits discrimination or segregation in places of public accommodation. 42 U.S.C. § 2000a. A barber shop was held not to be covered by this section in *Pinkney v. Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965), unless it was located within the physical premises of a place of public accommodation and held itself out to serve the patrons of that public accommodation. This case is the only one directly dealing with the question you presented. The district court referred in its opinion, however, to statements made by Representative Celler, Chairman of the House Judiciary Committee, on January 31, 1964 on the floor of the House of Representatives. He stated "... barber shops, beauty parlors and other establishments are not covered unless they are contained within a hotel or are intended for the use of the patrons of the hotel, if the hotel is covered."

CCH Civil Rights Act of 1964, p. 25.

It should be noted that the mere inability through lack of training of the barber to cut Negro hair is not a sufficient defense if the other criteria to bring him within the Act are present. The district court expressly held that the degree of skill or proficiency in any occupation or profession covered by the Act is irrelevant.

I am of the opinion, then, that as long as the barber is not located within a hotel, motel, or other place of public accommodation, then he will not be subject to the prohibitions of the Civil Rights Act of 1964.

In your letter you did not indicate whether any local ordinance existed on this matter. Should one exist, then its provisions may be controlling in this situation.

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CLERKS—Books—Indexing of contracts—Indexed under both the buyer’s and seller’s name.

October 17, 1969

HONORABLE M. HENRY TURNBULL, Clerk
Circuit Court of Brunswick County

This is to acknowledge receipt of your letter of October 13, 1969, in which you state in part:

"If a ratified bona fide contract between a buyer and seller of real property is presented for recordation and the signature of the buyer has been properly notarized, should the contract be indexed under both the buyer's and seller's name?"
The question is answered in the affirmative. Your attention is invited to § 17-79 (1) of the Code of Virginia (1950), as amended, which reads as follows:

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

May 26, 1970

HONORABLE ALARIC R. MACGREGOR
Sheriff of Stafford County

This is to acknowledge receipt of your letter of May 7, 1970, in which you request my opinion on the question of whether a clerk of a county court can be employed as a clerk in the Sheriff's department.

The Attorney General in an opinion expressed in a letter to the Honorable Mark D. Woodward dated December 21, 1967, held that the Clerk of the County Court is prohibited from serving as a bookkeeper for the Sheriff's office. Annual Report of the Attorney General (1967-1968), p. 224. That opinion was based on § 15.1-67 of the Code of Virginia (1950), as amended, which contained this language: “... no paid officer of the county shall become interested ... in any contract, fee, commission ... paid, in whole or in part by the county ...” That section was repealed and superseded by Chapter 463, Acts of 1970, effective June 26, 1970. The new Act does not include the exact language quoted above. Be that as it may, I am not passing on the question of whether the new statute would prohibit such employment as you mention or whether such employment of the Clerk of the County Court would be prohibited by § 15.1-50 of the Code.

The Clerk of the County Court is vested with certain powers and duties by § 16.1-44, including the issuance of warrants and processes. Such clerk is a conservator of the peace within the territory for which the court has jurisdiction. As a member of the sheriff's staff although only a part-time bookkeeper, it would be difficult for him to exercise the required judicial discretion if confronted by the sheriff with a demand for the issuance of legal process. This office has ruled that an employee of a sheriff may not with propriety simultaneously serve as a justice of the peace. See opinion expressed in a letter to the Honorable Nick E. Persin, dated January 15, 1968 [Annual Report of the Attorney General (1967-1968), p. 139.], a copy of which is enclosed.

I am therefore of the opinion that a Clerk of a County Court cannot serve as a bookkeeper for the County Sheriff.

March 5, 1970

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

This is in reply to your letter of February 14, 1970, which I quote as follows:
"Your opinion is requested in regard to what sums may be disregarded in determining excess fees under § 14.1-143 for King George County, which has a population of less than fifteen thousand, for the year 1969.

"The Board of Supervisors paid to me, as Clerk the following amounts for the year 1969:

$1,400.00 as County Clerk
300.00 in road matters
1,800.00 for office help

"§ 14.1-143 reads in part as follows: In determining the compensation allowed to any such officer hereunder any compensation allowed to such officer by his city council or county board of supervisors, other than commission allowed by State law for the discharge of any duties imposed upon such officer by the council of the city, board of supervisors of the county, or laws of this State shall be disregarded to the extent of:—not more than twenty five hundred dollars in cities or counties having a population of less than two hundred thousand.

"Please give me your opinion as to what amount should be disregarded in determining excess fees for my office for the year 1969."

The amount of fourteen hundred dollars paid to you as County Clerk may be disregarded in determining excess fees for your office for the year 1969. The allowance to a county clerk is controlled as to the minimum and maximum in any given county by § 14.1-164 of the Code of Virginia. For King George County, the range in this respect is from seven hundred dollars to two thousand dollars per annum.

The amount of three hundred dollars paid you in road matters likewise may be disregarded for the purposes of determining excess fees. This is governed by § 33-160 of the Code of Virginia which prescribes not less than one hundred dollars and not to exceed three hundred dollars per annum.

The amount of eighteen hundred dollars for office help may not be disregarded as this is an offset against expenses you paid your office help and does not qualify as compensation paid you within the purview of § 14.1-143.

CLERKS—County and Circuit Courts—Guarantors of checks received and accepted in business transacted in his office.

CLERKS—County and Circuit Courts—May require certified checks as reasonable assurances of collection.

HONORABLE H. BRUCE GREEN, Clerk
Circuit Court of Arlington County

This is in reply to your letter of September 15, 1969, in which you refer to § 19.1-346 of the Code of Virginia and previous opinions of this office relative thereto and pose the questions which I quote as follows:

"1. Is the County Clerk and Clerk of the Circuit Court a guarantor of checks received and accepted in relation to all other business transacted in his office, such as for suits filed, marriage licenses issued, deeds recorded, etc.?"

"2. If question #1 is answered in the affirmative, what would be the Clerk's legal position if he insisted on certified checks in some instances and not in others? Would those from whom he demanded certified checks have any redress because they were so singled out, especially if the statute of limitations was expiring or a deed had to be recorded on the date the uncertified check was presented?"
As you know, Chapter 2, Title 14.1, of the Code of Virginia, prescribes in §§ 14.1-112 and 14.1-113, and related sections, the fees which shall be charged by clerks of the circuit courts and other courts of record for services performed. Under the same chapter, § 14.1-169 provides that, with exceptions not here applicable, such officers shall not be compelled to perform any service unless their fees, if demanded, be paid or tendered or otherwise satisfactorily secured them. Section 58-969 of the Code requires the clerk to keep a record of all fees collected or which should be collected by the clerk. While § 19.1-346, to which you refer, requiring that certain fines be paid and collected “only in lawful money of the United States” does not embrace the fees mentioned in your first question, I reach the inescapable conclusion that the clerk of a court of record charged with performing such services is responsible for the collection of the appropriate statutory fees for such performance. Accordingly, your first question is answered in the affirmative.

In regard to your question numbered 2, since no particular manner of collection is prescribed by law, the clerk may collect the required fees in any appropriate manner, including in cash or by check or otherwise. In my opinion, it is within the discretion of the clerk performing the service to require any reasonable assurances of collection, especially in view of the statute, previously herein cited, which states that any such officer shall not be compelled to perform unless the requisite fee be paid to him. I see no reason why a certified check may not be required in any instance in which the clerk is not otherwise reasonably assured of the collection of the applicable fee and, therefore, your final question is answered in the negative.

Clerks—Deputy—Compensation—Appropriations may be paid to county clerk for dispensation.

Boards of Supervisors—Authority—To pay appropriations for deputy clerk to county clerk.

March 18, 1970

Honorable Boyd W. Gwyn
Commissioner of Revenue for Gloucester County

This is in reply to your letter of March 5, 1970, which I quote, in part, as follows:

“In Supervisor's Book 15, page 373, dated January 26, 1968 the Gloucester Board approved an appropriation to the County Clerk's Office for the 'Deputy Clerk and other employees under Section 14.1-167 if deemed necessary' in the amount of $7000.00. The Board has now started approving a monthly check made payable to B. B. Roane, Clerk under the said agreement in the amount of $583.33.

“I retain [sic] that Section 14.1-167 of the Code authorizes the appropriation to be paid only to deputy clerks and other employees, and the checks should not be made payable to the County Clerk. Therefore, my question to your office is, does the Board of Supervisors have the authority to pay the County Clerk appropriations made under 14.1-167, or must those checks be made payable to the Deputy Clerk and other employees?”

Section 14.1-167 of the Code of Virginia, to which you refer, provides that, in the counties in which it applies, the governing body “may contribute from funds derived from the general county levy such sum or sums as, in its discretion, it deems proper towards the salary or compensation of the deputy clerk and other employees of the circuit court of the county.” It is clear that sums contributed from the general county levy pursuant to this statute are for the benefit of “the deputy clerk and other employees,” to the exclusion of clerks. Any other view would conflict with § 14.1-164.
of the Code which prescribes the limits within which the governing body of every county is empowered to determine what annul allowances, payable out of the county treasury, shall be made to the county clerk of such county.

It is my understanding that, as a procedural matter, most counties making such contributions under the authority of § 14.1-167 pay these sums to the county clerk who, in turn, applies them toward the salary or compensation of his deputy clerk and other employees of the circuit court in accordance with the purpose of the statute. I am advised that this meets the approval of the State Auditor of Public Accounts and, in my opinion, the Board of Supervisors is authorized to proceed in such manner under this section.

CLERKS—Deputy—Must be resident of city—No exception under Section 32 of Constitution.

CLERKS—Deputy—Length of residence necessary for appointment.

PUBLIC OFFICERS—Deputy Clerk—Length of residence necessary.

February 4, 1970

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

This is in reply to your letter of January 28, 1970, from which I quote the following:

"Five and one-half years ago, I employed a resident of the City of Danville as a Deputy Clerk of this Court. Ten months later she removed her residence from the City of Danville and moved a few miles across the state line into North Carolina. I removed her as a Deputy and continued her employment as Administrative Secretary and she has continued in this capacity for the last five years. In this length of time, she has acquired a high degree of technical and professional training and experience, and her performance compares most favorably with any deputy in any clerk's office within the State. You realize, of course, the value of such a person. In light of this technical professional training and experience, could she be appointed Deputy Clerk of the Court within the meaning of the exception set out in Section 32 of the Constitution?"

"A similar type question, though not pertaining to a Deputy Clerk of Court, was asked of the Attorney General in 1944 by the late Senator Robert C. Vaden. The pertinent part of the opinion is covered in the Reports of the Attorney General 1943-1944, at page 79."

"I would like to have your opinion on the following question also. What is the minimum length of time necessary for a person to reside in a City before he can be appointed a Deputy Clerk of a Court of Record. I ask this question because of the fact that recently I have had to employ two new people in this office, both of whom are newcomers to the City of Danville."

The pertinent part of Section 32 of the Constitution of Virginia, to which you refer, is as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law pro-
vides otherwise; and except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience."

You first inquire whether or not the person with the experience outlined, as quoted herein, who lives in North Carolina could be appointed Deputy Clerk of the Corporation Court of the City of Danville under the constitutional exception in this section regarding "special technical or professional training and experience." In my opinion, it could not be reasonably maintained that the position of deputy clerk requires special technical or professional training and experience within the meaning of Section 32. Accordingly, this question is answered in the negative. The opinion found in the Report of the Attorney General (1943-1944), at page 79, which you cite, expresses a similar view in regard to the office of registrar.


In reference to the length of time a person must reside in a city before he can be appointed a deputy clerk of a Court in such city § 15.1-51 of the Code of Virginia provides as follows:

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

In respect to your other question, therefore, in the absence of any charter provision to the contrary, it is my opinion that a person must have resided in the City of Danville one year next preceding his appointment as Deputy Clerk of a Court of Record in such city.

CLERKS—Fees—Felony fee of $2.50 is only one payable out of State treasury.

FEES—Clerks—Felony fee of $2.50 is only one payable out of State treasury.

HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

February 18, 1970

This is in reply to your letter of February 11, 1970, which reads, in part, as follows:

"Section 14.1-115 (formerly Section 14-125 and previously Section 3506) of the Code of Virginia provides a fee of $2.50 to the clerk of the court for each felony case tried in his court to be charged only once. This fee has generally been payable out of the State treasury when not paid by the defendant if allowed in conformity with Section 14.1-85 (formerly Section 14-96 and previously Section 3504). Section 14.1-112 (15) and (16) (formerly Section 14-123 and previously Section 3484) provides for a clerk’s fee to be charged the accused upon conviction in each felony case of $20.00 and upon conviction in each misdemeanor case of $10.00 in lieu of any other fees allowed in the section. It has been my interpretation that these fees charged the accused under Section 14.1-112 when not collected from the defendant have not been payable out of the State treasury. Also, it has been my understanding that the only clerk’s fee in felony
cases payable by the State is the one provided in Section 14.1-115. The following opinions of the Attorney General seem to support these interpretations:

"On January 4, 1949 in a letter to the Clerk of the Circuit Court of Accomack County the opinion was expressed that the clerk’s fees in felony cases set forth in Section 3484 of the Code were to be charged the accused and were not payable out of the State treasury. It was also held that the only clerk’s fee in a felony case payable out of the State treasury was that provided by Section 3506.

"On March 22, 1946 an opinion was given to the Clerk of the Hustings Court of the City of Richmond holding that the fees in misdemeanor cases mentioned in Section 3484 should not be paid out of the State treasury and that any departure from that practice should be by amendatory legislation.

"In an opinion given to the Clerk of the Circuit Court of Madison County on May 14, 1938, it was held that the only clerk’s fee to be paid out of the State treasury in felony cases was the sum of $2.50 provided by Section 3506.

"On July 30, 1964 an opinion was given to the Clerk of the Circuit Court of Nansemond County, apparently confirming the previous opinions, that the only clerk’s fee in felony cases to be paid out of the State treasury is the $2.50 provided by Section 14.1-115.

I have been unable to ascertain where any amendatory legislation has been enacted materially changing the pertinent statutes referred to in the cited opinions, except to increase the fees to be charged the accused in felony and misdemeanor convictions. However, I will appreciate it very much if you will advise me whether you concur in the aforementioned opinions and that the only fee which should be paid out of the State treasury to a clerk, when not collected from the accused under Sections 14.1-112 (15) and (16) and 14.1-115, when allowed under Section 14.1-85 is the felony fee of $2.50 provided by Section 14.1-115."

I have reviewed the aforementioned opinions and concur in them. There has been no amendatory legislation enacted which materially changed the pertinent statutes referred to in these except to increase the fees to be charged the accused in felony and misdemeanor convictions. Therefore, I am of the opinion that the only fee which should be paid out of the State treasury to a clerk, when not collected from the accused under §§ 14.1-112 (15) and (16) and 14.1-115, when allowed under § 14.1-85, is the felony fee of $2.50 provided by § 14.1-115.

CLERKS—Fees—For various services.
COSTS—Assessed for Various Services.
COURTS NOT OF RECORD—Fees.
FEES—Criminal and Civil Cases—Amounts allowable for various services.
JUDGES—Fees.
JUSICE OF PEACE—Fees.
SHERIFFS AND SERGEANTS—Mileage.
This is in reply to your letter of January 9, 1970, to the Honorable Robert Y. Button, and in reference to several recent conversations with this office. I shall quote from your letter the paragraphs in which you raise questions and reply to these separately and in the order presented.

"The court fee for judges and clerks for issuing a capias pro fine as permitted by Section 19.1-338 is being assessed in amounts varying from 50¢ to $3.25. It would appear that a capias pro fine would be a form of arrest warrant for which a fee of $3.00 is provided by Section 14.1-123 (1). I would like to know whether my interpretation with respect to this fee is correct. The fee taxed for the sheriff or sergeant for serving a capias varies from $1.00 to $7.25. Under opinions given by your office, dated February 16, 1965 and March 19, 1965 (pages 302 and 303), you held that the serving of a capias would come under the provisions of Section 14.1-111 but you did not indicate the amount of the service fee to be assessed. One court is assessing an officer's service fee of $1.00 and cited the above opinions as the authority; while it would appear that the $1.50 fee for serving an arrest warrant would apply, or would the amount of the fee be contingent upon whether the defendant paid the capias, including all costs, or whether it was necessary to place the defendant under arrest? Your specific advice regarding this service fee will be appreciated."

In regard to the fee for judges and clerks for issuing a capias pro fine permitted by § 19.1-338 of the Code of Virginia, this is controlled by § 14.1-123 (1) which prescribes a fee of three dollars. The appropriate fee to be taxed for a sheriff or sergeant serving a capias pro fine is one dollar, as prescribed by § 14.1-111 for serving a warrant. This is consistent with the view expressed in Reports of the Attorney General (1964-1965) pages 302 and 303, and (1966-1967) page 266, although as you have stated none of these specified the applicable fee.

"Most courts report that they assess a trial fee of $2.00 in each criminal case as provided by Sections 14.1-123(3) and 14.1-123(4). One court reported that it collects a trial fee of $3.00 for handling local traffic tickets, but furnished no Code or ordinance reference. Do you know of any authority for assessing this latter fee?"

The trial fee for courts not of record is two dollars for trying or examining a case of misdemeanor and two dollars for examining a charge of a felony, as prescribed in § 14.1-123 paragraphs (3) and (4), respectively. I know of no authority for collecting a trial fee of three dollars.

"The fee of $3.00 assessed under the provisions of Section 14.1-123(5) and 14.1-128(3) for admitting persons to bail, as permitted by Sections 19.1-110, 19.1-111 and 19.1-130 through 19.1-132, seems to be consistently charged. Section 19.1-111, however, provides a fee of $2.00 for certain juvenile and domestic relations courts and courts of limited jurisdiction for admitting a person to bail on a felony charge as compared with the $3.00 fee permitted by the same section for bail in other criminal cases. This section does not seem to be very pertinent to this study of the fees to be charged and, therefore, possibly should not be included in the final schedule of fees."

As you state, the fee of three dollars is assessed under the provisions of §§ 14.1-123 (5) and 14.1-128 (3) for admitting persons to bail. Section 19.1-111 states the law in respect to when a judge of a juvenile and domestic
relations court may charge a fee for admitting any person to bail and when he may not. When any such judge is permitted to charge a fee for admitting to bail under this section, the fee shall be the same as allowed by law to justices of the peace (three dollars) except that in admitting to bail in felony cases the fee shall be two dollars.

“One City Municipal Court reported that it charges a fee of 25¢ for filing papers in local ordinance violations, as compared with the $1.25 fee provided by Section 14.1-123(6) for filing papers with the clerk of the Court of Record under the provisions of Sections 19.1-335 and 19.1-337. I would like to know whether this 25¢ filing fee is proper and, if so, the section by which such is permitted. The fines in such cases are paid into the city treasury.”

The applicable fee prescribed for filing and indexing all papers connected with any criminal action in a county or municipal court is one dollar and twenty-five cents under § 14.1-123 (6) of the Code. In my opinion, the fee of twenty-five cents mentioned in your question is not proper.

“Section 14.1-121 provides for a fee of $5.00 for the Commonwealth’s attorney in misdemeanor cases, when he is required by statute to appear, and in preliminary felony hearings. Section 18.1-315 provides for an attorney’s fee in every case of conviction for an offense under the provisions of Sections 18.1-316 through 18.1-354, except for Section 18.1-330. Would the services required under these sections be rendered by the Commonwealth’s attorney and, if so, would this fee be collected by the courts for credit one-half to the locality and one-half to the Commonwealth?”

The services required under §§ 18.1-316 through 18.1-354 except § 18.1-330, would be rendered by the attorney for the Commonwealth. The fee of ten dollars in every case of conviction for an offense under any of the provisions of these sections shall be taxed in the costs and paid by the defendant pursuant to § 18.1-315. The fees would be collected by courts for credit one-half to the Commonwealth and one-half to the locality.

“Inconsistency exists with respect to the fees assessed for sheriffs and sergeants for serving certain papers in criminal matters. Section 14.1-111 provides for an allowance to the sheriff or sergeant for carrying a person to jail under order of justice for each mile traveled in going and returning of 8¢ per mile and also an allowance of 8¢ per mile for each mile traveled in carrying the prisoner to jail in excess of ten miles. It is my understanding that the first cited allowance is for the services of the officer in carrying a prisoner to jail under order of the court, while the second allowance is for transporting of the prisoner, except that in the latter case ten miles would be deducted. Several courts have reported that they are assessing these costs at 9¢ per mile, which is the present statutory maximum allowance for use of personally-owned automobiles. Section 14.1-111 was not amended to allow 9¢ per mile and, therefore, it would appear that the amounts taxed by the courts should be limited to 8¢ per mile. I will appreciate advice as to whether the courts should tax as costs the allowances provided for an officer for his services and for transporting a prisoner and whether the amounts should be limited to 8¢ per mile.”

In my opinion, the courts should tax the amounts provided in § 14.1-111 as costs in criminal cases and the amounts for transporting a prisoner should be limited to eight cents per mile as therein indicated. A similar view is expressed in an opinion found in Report of the Attorney General (1963-1964) page 277.
"Some courts reported that a commission of 5% to the serving officer is computed under Section 19.1-341 on collections on a capias pro fine, while others reported that no commission is collected. Is this a mandatory provision and should the 5% be added to the amounts of fines and costs to be collected under capiases?"

In my opinion, § 14.1-69 requires the collection of a commission to which a sergeant or sheriff is entitled under the provisions of § 19.1-341. Further, it is my opinion that such commission should be added to the amounts of fines and costs to be collected under capiases.

"In lieu of the 8¢ per mile for transporting a prisoner to jail, it is my understanding that several city courts impose an automobile fee or a wagon fee of 50¢ to $1.00 for each prisoner transported to jail. I would assume that such sums as are imposed and collected would be pursuant to some ordinance of the governing body. Would these nominal fees if provided for by a local ordinance be proper in lieu of the 8¢ per mile statutory provision?"

I know of no law which would permit a fee other than that set forth in the statute as previously indicated herein, supra. This question is answered in the negative.

"In only a few courts are fees assessed for county, city and town police for serving a summons and making an arrest. These fees vary from $1.00 to $1.50 and are apparently assessed pursuant to local ordinances or under the provisions of Sections 15.1-138 and 15.1-148. There seems to be no summons or arrest fees assessed for State police. The statutes apparently prohibit county, city or town police officers from deriving any benefit from summons or arrest fees, and it would be assumed that such fees as are collected would be payable into the local treasuries. Sections 46.1-6, 46.1-38, 19.1-96 and 52-10 seem to relate to the matter of summons and arrest by such officers. I would like to inquire whether ordinances may be enacted by governing bodies imposing fees payable into local treasuries for county, city or town police and if there is any statutory provision for assessing such fees for State police. If a county, city or town policeman appears as a witness in a case, may a witness fee also be assessed against the accused?"

Your questions as to arrest fees are answered in the affirmative, except as they relate to fees for State Police which is answered in the negative. The answer as to witnesses is in the negative, except as otherwise provided by city or town charters. Witnesses for the Commonwealth are paid out of the State treasury and in all other cases by the party for whom the summons issued, as set forth in § 14.1-191.

"There seems to be some inconsistency as to the mileage allowed witnesses for the Commonwealth. Section 14.1-189 provides for an allowance to a witness of necessary tolls and 7¢ per mile over five miles in going and returning. Does this mean that a total of ten miles would be deducted in figuring the mileage of the witness, or would five miles be deducted from the total miles in going and returning? One court reported that they deduct ten miles."

In my interpretation of § 14.1-189, only five miles should be deducted in going and returning.

"Sections 42-19.1 through 42-19.4 permit assessing a law library fee of not exceeding $1.00 as costs in each civil action upon direction of the governing body of the locality. Fees of not exceeding $1.00 are being currently assessed by a number of courts. Would such fees
be applicable to all of the civil proceedings referred to in Section 14.1-125?"

Such fees are applicable to each civil action filed in the courts of record and the courts not of record located within the boundaries of the city or county, except civil actions in which the Commonwealth or a political subdivision thereof or the federal government shall be a party, under §§ 42-19.1 and 42-19.2. Under §§ 42-19.3 and 42-19.4 the exception applies only to any action in which the Commonwealth or any political subdivision thereof or the federal government is a party and in which the costs are assessed against the Commonwealth, political subdivision thereof, or the federal government.

"Several courts reported that in civil cases they were assessing a fee of $1.25 for the sheriff or sergeant for summoning a witness or garnishee on an attachment, and serving any order of court not otherwise provided, instead of the $1.00 fee provided by Sections 14.1-105(2) and 14.1-105(6). These courts seem to be making these assessments under Section 14.1-105(1), and I would like to be advised whether the $1.00 or the $1.25 fee would be appropriate."

The fee of one dollar would be appropriate as prescribed in § 14.1-105 (2).

"Some courts are assessing a separate court fee for issuing subpoenas in criminal matters. Am I right in construing your opinion of June 21, 1968 to the Honorable Fletcher B. Watson of the Second Regional Juvenile and Domestic Relations Court to mean that a Court Not of Record may not make a separate charge for issuing criminal subpoenas regardless of whether the warrant was issued by the court or a justice of the peace?"

Your construction of the opinion of June 21, 1968, to the Honorable Fletcher B. Watson (1967-1968) page 113 is correct. Section 14.1-123 of the Code of Virginia prescribes a fee of three dollars for a judge or clerk of a court not of record for issuing a warrant of arrest, including the issuance of all subpoenas.

In regard to the schedule of fees you enclosed for my review and advice, I find these to be generally correct with the following exceptions:

At the middle of page 2 the officers are paid for carrying a prisoner to jail when the distance is over ten miles the amount of eight cents per mile. At the bottom of the same page, I find no statute authorizing automobile fee or wagon fee as such. Section 14.1-111 authorizes eight cents per mile as therein indicated for transporting prisoners to jail.

Referring to fees for summons and arrest as set forth at the top of page 3, § 14.1-111, in reference to sheriffs, sergeants and criers in criminal cases, sets the amount of one dollar for serving a warrant or summons on a witness when no arrest is made and the fee of one dollar and fifty cents for an arrest.

CLERKS—Fees—Not chargeable against Commonwealth except when allowed by statute.

FEES—Clerks—Not chargeable against Commonwealth except where allowed by statute.

MOTOR VEHICLES—Habitual Offenders—Commissioner of Division of Motor Vehicles does not institute suit.

HONORABLE LUTHER LIBBY, JR., Clerk
Circuit Court of the City of Richmond

November 19, 1969

This is in reply to your letter of November 13, 1969, requesting my
opinion as to whether you, as the clerk of a court of record, may collect the fee prescribed by § 14.1-112 (23), Code of Virginia (1950), as amended, in cases brought by the Commonwealth pursuant to the Virginia Habitual Offender Act (§§ 46.1-387.1 et seq., of the Code).

Section 14.1-87 of the Code provides that:

“No clerk, sheriff, sergeant or other officer shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by statute.”

Inasmuch as neither § 14.1-112 (23) nor the Virginia Habitual Offender Act expressly provide for the payment of a clerk's fee by the State, I am of the opinion that no such fee is allowable. This view is in accord with a previous opinion of this office to the Honorable Douglas B. Fugate, Commissioner, Department of Highways, dated May 28, 1968 [Report of the Attorney General (1967-1968) p. 52]. I enclose a copy of that opinion here-with.

The Commissioner of the Division of Motor Vehicles does not institute suit under the Virginia Habitual Offender Act. The Commissioner is merely furnishing the attorney for the Commonwealth the certified transcripts of the conviction record in accordance with § 46.1-387.3 of the Code. The opinion you cite in your letter is distinguishable in that it concerns an instance where the Commonwealth instituted suit to collect a debt owed to the State.

CLERKS—Fees—Transfer—Applies to transfer of land conveyed by a county.

TAXATION—Recordation — Exemption — Deed conveying property by county not exempt.

October 14, 1969

HONORABLE ARTHUR T. BURCHETTE, Clerk
Circuit Court of Lee County

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

“Recently, the Lee County Board of Supervisors, subject to the approval of the Court in accordance with the provisions of Section 15.1-262, Code of Virginia, as amended, and by order duly entered of record, consumated a contract with an individual of the County, conveying standing timber on a tract of land owned by the County, known as the 'Poor Farm.'

“In anticipation of the recordation of this instrument, I am quite sure, from former opinions of your office, that the recordation tax as imposed by Section 58-54, Subsection (a) would be charged and further, that such contract would be subject to the additional tax as imposed by Section 58-54, Subsection (b). In as much as the third paragraph of Subsection (b) provides that the grantor is a political subdivision, i.e., Lee County? Also, would there be a transfer fee charged?”

The exemptions from the recordation tax by § 58-64 relate to deeds conveying real estate to a county and does not exempt deeds of conveyance by a county. Since the conveyance concerned is by the county, the exemption doesn't apply and the recordation tax is chargeable under both § 58-54 (a) and § 58-54 (b).

The transfer fee provided by § 58-816 of the Code will apply in this case, since the county is not exempted from paying this fee.
REPORT OF THE ATTORNEY GENERAL

CLERKS—Fees—Where suit for declaratory judgment filed in both law and chancery side of the court. October 7, 1969

HONORABLE MARION K. RIDLEY, Clerk
Circuit Court of Sussex County

This is in reply to your letter of September 25, 1969, from which I quote the following:

"Under date of 11th, August, 1969, we had a suit for Declaratory Judgment filed in this office, which we entered on the Law side of the Court, collecting the writ tax and Clerk's fee, of $1.00 and $5.00 respectively.

"On 11th of September, 1969, the attorney asked that we transfer this suit to the Chancery side of the Court. On this transaction we charged an additional writ tax of $1.50 and Clerk's fee of $20.00.

"In which of the above courts is a suit for Declaratory Judgment to be filed, and do we collect the additional writ tax and fee when a suit is changed from one side of the court to the other? Do I refund the original fee of $6.00?"

The general law relative to declaratory judgments is found in Chapter 25, Title 8, of the Code of Virginia. In my opinion, a petition for declaratory judgment may be filed either in law or in equity. The court in which such petition should be filed is dependent upon the matter of actual controversy to be resolved in such proceeding. That is to say, equitable claims may be filed in courts of equity and legal demands in courts of law.

In regard to the question of fees, I do not believe a fee should be charged solely for the transfer of a case from one side of the court to the other. If filing the petition on the side to which the case is transferred calls for fees in excess of those previously collected, however, the additional fees should be collected. In any such case credit should be allowed for the fees originally paid. Under the given facts, if the fee of $6.00 was not so credited, it should be refunded.

CLERKS—Recordation of Contract of Sale—Acknowledgement by only one of parties—May be admitted to record.


HONORABLE CARLETON PENN
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of January 12, 1970, addressed to the Honorable Robert Y. Button and requesting his opinion in regard to the following:

"Should a Clerk of a Court of Record admit to record a real estate contract of sale signed, but not acknowledged by a Seller, which has been, subsequent to execution, acknowledged by the Buyer before a Notary Public either with or without the knowledge and acquiescence of the Seller?

"If so, should any document be indexed in the name of the Seller?"

When §§ 11-1, 55-95, and 55-96, Code of Virginia (1950), as amended, are read together, it is obvious that the law contemplates recordation of a contract for the sale of real estate signed by the owner of the property. Section 55-106 states in part that:
The mandate of § 55-113 is conditioned upon acknowledgment or proof of signature substantially in conformity to those forms set forth in paragraphs one through three of § 55-113.


"The General Assembly has determined that certain writings, including but not limited to deeds, deeds of trust, conditional sales, contracts, leases, etc., shall be admitted to record when duly acknowledged, but I find no statute pertaining to any such paper writing as that described by you. If it be a memorandum or note of a promise, contract, agreement, representation or assurance made with respect to real estate, then it should be admitted to record and taxed accordingly . . . . On the other hand, if it is not by its terms or effect a contract relating to real property, then I am of the opinion that the clerk is not required to admit the same to record."

Since the contract at hand relates to real property, and is signed by the owner of the property, although not properly acknowledged by him, I am of the opinion that this instrument may be admitted to record, but only as to the buyer, assuming that his signature is properly acknowledged, by virtue of the language of § 55-106 and § 55-113 underlined above. While as a practical matter, no distinction between admitting this contract to record as to the buyer but not to the seller will appear of record, this is not the concern of the clerk. This problem is for the party seeking protection by the filing. See, for example, the opinion of the Attorney General dated March 31, 1966, which appears in the Report of the Attorney General for 1965-1966 at page 41 thereof.

Section 17-79 requires the clerk to enter in the appropriate index all instruments admitted to record,

"... indexing each instrument in the names of all parties appearing therein who are thereby shown to be affected by the instrument." (Emphasis supplied.)

Therefore, in answer to your second question, I am of the opinion that the instrument in question should be indexed in both the name of the seller and the buyer.

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CLERKS—Salary—City council may decrease during term of office within limits set by general law.

March 4, 1970

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

This is in reply to your letter of February 12, 1970, from which I quote the following:

"Section 63 of the Constitution provides that the 'General Assembly shall not exact any local, special or private law in the following cases . . . 14. Creating, increasing or decreasing or authorizing to be created, increased or decreased, the salary, fees, percentages or allowances of public officers during the term for which they are elected or appointed.'
“Prior to my present appointment, the Clerks of the Court of 
Hustings and the Circuit Court, the two courts of record in Ports-
mouth, were each receiving $15,000 per annum. Upon my appoint-
ment for the unexpired term the City Council action was taken 
setting my salary at $12,000.

“My inquiry is whether the City Council, which derives its au-
thority from the General Assembly, is prohibited by Section 63 of 
the Constitution from reducing by ordinance applicable to the Clerk 
of the Circuit Court only, my salary for the unexpired term I am 
now filling.”

Section 63 of the Constitution of Virginia from which you quote, pro-
hibits the General Assembly from enacting any local, special or private 
law increasing or decreasing the salaries, fees, percentages, or allowances 
of public officers during the term for which they are elected or appointed. 
Insofar as this may conflict with the opinion expressed in the letter of my 
(1968-1969), p. 40, the same is hereby superseded. Section 64 of the Con-
stitution, however, states, in part, as follows:

“In all cases enumerated in the last section, and in every other 
case which, in its judgment, may be provided for by general laws, 
the General Assembly shall enact general laws. . .” (Emphasis 
supplied.)

The essence of these two sections, when considered in relation to in-
creasing or decreasing the salary of public officers, is that the General 
Assembly may do this by the enactment of general laws but not by local, 
special or private laws.

You question the action of the City Council in setting your salary at 
etwelve thousand dollars annually in appointing you for the unexpired term 
of your predecessor whose salary was then at fifteen thousand dollars. 
Since, you have said, the City of Portsmouth falls within the population 
bracket of one hundred fourteen thousand to one hundred fifty thousand 
inhabitants, the salary of twelve thousand dollars per annum is within the 
limits prescribed by § 14.1-144 of the Code of Virginia. There is no pro-
vision in general law prohibiting the City Council from changing a clerk’s 
salary within these limits.

In consideration of the foregoing, it is my opinion that the action of the 
City Council was within the scope of the general laws and, therefore, was 
not in conflict with Section 63 of the Constitution of Virginia. In this I 
concur in the conclusion reached in the prior opinion previously herein cited.

CLERKS—Term of Office—Term expiring before November, 1979, is ex-
tended by 1970 amendment to January 1, 1980.

June 16, 1970

HONORABLE J. HAMILTON HENING, Clerk
Circuit Court for City of Hopewell

This is to acknowledge receipt of your letter of June 3, 1970, in which 
you state in part:

“Please advise if I am correct in assuming that by reason of the 
enactment of Chapter 462 of the Acts of the General Assembly of 
Virginia, 1970, Article 3, page 848, Section 24.1-87, second para-
graph, my eight-year term of office which ordinarily would have ex-
pired on January 31, 1974, has been extended to December 31, 1979, 
and I will not have to run again until November, 1979?”
Section 24.1-87 of the Code of Virginia as amended by Chapter 462, Acts of 1970, provides in part:

"The qualified voters of the several cities having a court or courts of record shall elect a clerk or clerks of the court or courts of record of the city at the general election in November, nineteen hundred and seventy-nine, and every eight years thereafter. Every clerk of a court of record elected prior thereto for a term of eight years, which term may have expired, shall continue in office until the first day of January nineteen hundred and eighty." (Emphasis added.)

As your term of office expires January 31, 1974 (§ 24-165) which is of course prior to November, 1979, the date set forth in the statute, your term of office is extended to January 1, 1980. This means that it will not be necessary for you to offer again for re-election until November 1979.

CLERKS—Wife of Member of Board of Supervisors—Not conflict of interest to be appointed.

COUNTIES—Conflict of Interest—Not applicable to appointment of wife of member of board of supervisors as clerk.

HONORABLE MARK D. WOODWARD
Judge, Page County Court

Acknowledgement is made of your letter of March 5, 1970, requesting an opinion concerning whether it would be a conflict of interest for the wife of a member of the Board of Supervisors to be appointed Clerk of the Page County Court and Juvenile and Domestic Relations Court of Page County.

I am in agreement with your opinion that no conflict of interest would exist in the above situation. The salary for clerks of courts not of record is determined and fixed by the committee of judges as established by Article 5, Chapter 1, of Title 14.1 of the Code of Virginia (1950), as amended, and is paid out of the appropriations in the general Appropriation Act for criminal charges. See §§ 14.1-43 and 16.1-50. I am unaware of any provision which would allow the governing body of Page County to supplement or determine the salary for the Clerk of the County Court. The member of the Board of Supervisors would therefore not have an interest in his wife's contract within the prohibition of § 15.1-67, the general conflict of interest statute applicable to counties.

COLLEGES AND UNIVERSITIES—Appropriation for Student Loans and Scholarships—Available only to Virginia residents.

COLLEGES AND UNIVERSITIES—Appropriation for Student Loans and Scholarships—Approval of State Council of Higher Education necessary only for transfers from student loan fund to scholarship funds.

MR. JOHN R. MCCUTCHEON, Director
Division of the Budget

This is in reply to your letter of May 5, 1970, in which you state that the Appropriation Act for the 1970-72 biennium, Chapter 461, Acts of Assembly, 1970, appropriates specific sums for student loans and scholarships to each institution of higher learning in the state. You state that question has arisen as to the discretion of the various institutions in disbursing the funds and the role of the Council of Higher Education in specifying guidelines and establishing policy in this regard. You present the following questions, which will be answered seriatim:
"1. Do Sections 39 and 40 [of the Appropriations Act] prohibit the use of any part of an appropriation for 'scholarship and loan assistance for students' for scholarships or for loans to students who do not qualify as graduates of Virginia high schools and/or as Virginia residents?

"2. Do Sections 39 and 40 require State Council of Higher Education approval for use of
   a. existing loan funds of the institutions?
   b. sums added by institutions to loan funds out of 1970-72 appropriation items of the institution?
   c. scholarship funds created from loan funds pursuant to Section 40?
   d. scholarship awards from amounts remaining in institution appropriations after transfers, if any, to loan funds pursuant to Section 39?"

Sections 39 and 40 of the Appropriations Act make it clear that the funds appropriated to the colleges for scholarship and loan assistance to students may be made available only to students who qualify as Virginia residents. State colleges have funds for financial aid other than those appropriated by the General Assembly, and these funds may be made available to out-of-state students unless otherwise restricted by the donors of the funds.

The approval of the State Council on Higher Education is not required for the use of student loan funds. The colleges must file with the Council the statements required by § 39 of the Act. But these statements are for the purpose of enabling the Council to certify that the colleges have taken proper steps to prevent depletion of the funds and have otherwise complied with the requirements of the Act. This would apply both to existing loan funds as well as those appropriated for the 1970-72 biennium.

Pursuant to § 40, the Council must approve the amount of funds which a college transfers from student loan funds to scholarship funds. Section 23-9.7 of the Code would permit the Council to make recommendations as to appropriate state-wide policy in this regard. However, there is no grant of authority in the Appropriations Act for the Council to impose conditions on the distribution and administration of these funds after they are approved. The following language from § 39 of the Act indicates that the disbursement of the funds is to be executed in pursuance to policy established by the boards of visitors of the respective institutions:

"The appropriations provided for in this act, within items for student aid, for making loans to students at the several state institutions of higher education shall be expended upon such terms and according to such rules as may be prescribed by the respective governing boards of the institutions for which the appropriations are made . . . ."

Sections 39 and 40 make no provision for making scholarship awards from institution appropriations except to the extent that funds are transferred from loan funds to scholarship funds with the approval of the Council pursuant to § 40.

COLLEGES AND UNIVERSITIES—Community Colleges — Residency—Citizen of foreign country may have domicile in Virginia—Question of fact.

April 24, 1970

DR. DANA B. HAMEL, Chancellor
Department of Community Colleges

This is in reply to your recent letter in which you draw attention to the
policy established by the State Board of Community Colleges to process applications with regard to the following priorities:

1. Residents of the local supporting jurisdiction;
2. Residents of Virginia;
3. Out-of-state or foreign resident.

You state that because of the number of applicants from Virginia residents persons in category 3 above are presently denied admission to community colleges, except in certain specific programs. In § 6.18 of its "Policies, Procedures, and Regulations Operating Manual" the board formulates the following definition of a Virginia resident:

"A student shall be classified as either a resident of Virginia or as a nonresident of Virginia. A Virginia resident is a person who has been domiciled in, and is and has been an actual bona fide legal resident of Virginia for a period of at least one year prior to the commencement of term or quarter for which the student enrolls. (See also Section 6.25.)"

You inquire whether it is proper for a community college to apply this regulation to deny the application of a student who lists his citizenship as that of a foreign country.

The above language from the operations manual makes it clear that to fall within categories 1 and 2 an applicant must be a domiciliary of Virginia. This means in effect that the person must intend to make Virginia his permanent home. While the term "residence" is sometimes used to refer merely to one's present place of abode, it is clear that such use is not intended here.

Regulation 6.183 of the manual states that, "a foreign student is a person in this country on visa from a foreign country. These students are not considered permanent residents of the Commonwealth of Virginia and will be charged the out-of-state tuition rate." If the individual in question is on visa from a foreign country, that individual would then fall within the third category above, and would not qualify for admission under the present policy of the board.

If the individual is a citizen of a foreign country and is in this country on some other basis than an educational visa, then the college should ascertain whether he is a Virginia domiciliary as defined in Regulation 6.18. Mere foreign citizenship would not foreclose one from having domicile in Virginia, and the admissions officer should look to the surrounding circumstances to ascertain the true intent of the applicant.

While it is regrettable that the facilities of the community colleges cannot be made available to all applicants, the board is charged with the duty of administering the community colleges system and must allocate scarce resources as best it can. The present policies and definitions are within the authority conferred on the board.

COLLEGES AND UNIVERSITIES—Resident Tuition—School teacher not entitled to reduced rate where not domiciled for one year in Virginia.

June 8, 1970

HONORABLE M. PATTON ECHOLS, JR.
Member, Senate of Virginia

This is in reply to your letter of June 2, 1970, in which you inquire whether a teacher in the public schools who has resided in Virginia for ten months and contracted to teach in the public schools for the 1970-71 school year is eligible to enroll in a summer session at a state college and pay the tuition rate applicable to Virginia residents.

In this regard I refer you to § 23-7 of the Code, which provides that, in order to be eligible for the reduced tuition rate for Virginia residents, an
individual must be domiciled in Virginia for a period of one year prior to the term for which the reduced rate is sought. While the individual to whom you refer is undoubtedly a Virginia domiciliary, the statute requires that domicile be established for one year in order to be eligible for the resident tuition rate. No exception is made for public school teachers in the situation which you describe, and I am therefore of the opinion that the individual in question is not eligible for the reduced in-state tuition rate.

COLLEGES AND UNIVERSITIES—Scholarship and Loan Assistance—1970-1972 appropriations should be allocated as determined by individual institutions.

COLLEGES AND UNIVERSITIES—Student Loan Funds—Sections 39 and 40 of Chapter 461 applicable to loan funds designated as such by individual institutions of higher learning.

HONORABLE JOHN R. McCUTCHEON
Director, Division of the Budget

June 1, 1970

This is in reply to your letter of May 27, 1970, in which you present the following questions relative to the scholarship and loan assistance appropriations provisions in Chapter 461, Acts of Assembly, 1970:

“1. In appropriation items entitled ‘Scholarship and loan assistance for students’ (e.g., Item 585.1, Chapter 461) is the apportionment of the appropriation as between scholarships and loans the responsibility of the individual institutions of higher learning.

“2. Sections 39 and 40 of Chapter 461 are preceded by the heading ‘Student Loan Funds’. Are these two sections applicable only to (a) that portion of ‘Scholarship and loan assistance for students’ appropriation items which is designated for loans (i.e. placed in student loan funds), and (b) those scholarships created through the conversion of loan funds in accordance with Section 40? For the purpose of this question, loan funds are understood to consist of the corpus accumulated in past years plus that portion of the 1970-72 appropriation items for ‘Scholarship and loan assistance for students’ which has been designated for loans?”

It is the responsibility of the individual institutions to allocate the respective portions of the appropriation to scholarship aid and to loan assistance. Under the provisions of the Appropriation Act for the 1968-1970 biennium, Chapter 806, Acts of Assembly, 1968, separate appropriations were made for scholarships and for loans. The present Appropriation Act for the 1970-1972 biennium does not differentiate between the two types of aid. In the absence of any other directions by the General Assembly as to how the funds should be allocated, I am of the opinion that the determination should be made by the individual institutions.

The provisions of §§ 39 and 40 of Chapter 461 would then refer to the amount of loan funds designated as such by the individual institutions of higher learning. Funds for scholarships created in accord with § 40 would consist of those funds which may be subsequently diverted from the loan funds established by the colleges. You are correct in your assumption that the loan funds in question also include the portion of the corpus accumulated from previous appropriations. In this regard, § 39 of Chapter 461 provides in part that the loan funds shall be used for the purpose of the act “together with the repayments and accretions thereto”.
COMMISSIONERS OF REVENUE—Authority Over Employees — City council or city manager may not prohibit hiring of typist.

March 31, 1970

HONORABLE WILLIAM H. ROSSER, JR.
Commissioner of Revenue for City of Petersburg

This is in reply to your letter dated March 13, 1970, in which you relate that the City Manager and City Council of Petersburg, acting pursuant to rules promulgated by the Council, recently prohibited you from hiring a part-time typist for the office of the Commissioner of the Revenue because she lacked certain residential requirements. You further state that due to circumstances at that time, an emergency existed in your office and that you were hindered in the performance of your duties because of this action by the City.

The question you propose is whether the City Manager or Council can exercise such authority over a constitutional office, such as that of Commissioner of the Revenue, with respect to employment of personnel necessary to the operation of the office.

I am enclosing a copy of an opinion rendered to the Honorable C. L. Marcum, dated March 9, 1967, found in Report of the Attorney General 1966-1967, at 65, where in answer to a similar inquiry this office ruled that it is not the prerogative of any city official, or of the City Council, to make personnel determinations for the office of the Commissioner of the Revenue.

It was pointed out that the traditional view and practice in Virginia is that an officer elected by the people, pursuant to the Constitution, should not have the control over his office impaired by local officials.

As a constitutional officer, the Commissioner of the Revenue is distinguished from other city officials whose duties are exclusively of a local nature in that, although serving a particular locality, his duties are of a public or general nature [See 13 Michie's Jurisprudence, Municipal Corporations, Sec. 68, at 439 (1950)]. In other words, the Commissioner of the Revenue is required by law to perform certain governmental functions, not strictly local in nature, within the corporate limits of the municipality and, as such, he is a State officer governed by State laws. Therefore, as a State officer, he must not be hindered in the performance of his duties by acts of dominion or control by the locality over his office.

Accordingly, in the absence of any statutory or City Charter provision to the contrary, it seems clear that the City's refusal to permit the Commissioner of the Revenue to hire the part-time employee, in light of the urgent need for such assistance, constitutes an improper attempt to exercise control over the Commissioner's office.

COMMISSIONERS OF REVENUE—Records of Office—Retention—Time requirements.

February 9, 1970

HONORABLE BLAIR ZIRKLE
Commissioner of the Revenue for Shenandoah County

This is in reply to your letter of January 27, 1970, from which I quote the following:

"Shenandoah County has reached a crisis in the storage of old records from this office and at the suggestion of the Circuit Judge we will have to clear out the basement of the Court House in order to eliminate a very real fire hazard.

"These records have been accumulating in the basement for many, many years and I desire your opinion on the legal time required by statutes for the keeping of the following records of the Office of Commissioner of the Revenue."
REPORT OF THE ATTORNEY GENERAL

"Personal Property Returns
Personal Property Books
Real Estate Books
License Applications
License Reports
Income Assessment Sheets
Income Assessment Forms"

There are several statutes found in the Code of Virginia which have bearing upon the retention and disposition of the various records which you have listed. I shall consider these in the order in which you have listed the records in question.

Under § 58-877, after personal property returns have been on file in the office of the commissioner of the revenue for at least six years after the tax assessment year, the commissioner of the revenue may destroy such returns.

Section 58-884 prescribes that each commissioner of the revenue shall retain in his office the original personal property book. I interpret this to mean the commissioner of the revenue shall not destroy the original. The same section permits the clerk of the court and the treasurer of the county to dispose of their copies of the personal property book after six years following the tax assessment year to which such book relates. The term "personal property book", as used in this section, includes capitation tax assessment books or sheets.

The situation is reversed in respect to the preservation of land books, to which I assume you have reference by the term "real estate books." In this instance § 58-806 prescribes that the clerk of the circuit court shall preserve the copies of the land books furnished his office under this section by the commissioner of the revenue, while the commissioner of the revenue need not preserve the original nor the treasurer his copy for a longer period than six years following the tax year to which such books relate.

The commissioner of the revenue of each county is required under § 58-263.1 to preserve in his office for a period of at least three years following the license year his copy of all license applications received and his copy of all licenses issued by him pursuant to Chapter 7, Title 58 of the Code of Virginia. After expiration of such three year period, he may destroy his copies. The same section prescribes that he shall preserve in his office for a period of at least six years his copy of all license reports made by him to the Department of Taxation and thereafter he may destroy these papers.

The income assessment sheets and income assessment forms are covered in § 58-111. Herein it is provided that after such sheets or forms have been on file in the office of the commissioner of the revenue for at least six years following the tax assessment year, he may thereafter destroy such assessment sheets or forms.

COMMONWEALTH ATTORNEYS—Compensation—Expenses of office included—May not receive payment out of State Treasury from appropriation for criminal charges.

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

This is in reply to your letter of March 4, 1970, in which you request my opinion as to whether or not § 19.1-315 of the Code of Virginia provides for payment to you for toll telephone charges, registered mail and legal advertisement expenses by the State of Virginia from the appropriation for criminal charges.

The named statute authorizes payment out of the State treasury from the appropriation for criminal charges on the certificate of the court when
“in a criminal case any person renders any other service in the State for which no specific compensation is provided.” The compensation for Commonwealth’s Attorneys is set according to law and the Compensation Board, in making its determination, takes into consideration the expenses of office. It is my opinion, therefore, that such expenses do not qualify as service “for which no specific compensation is provided” within the purview of § 19.1-315.

When a Commonwealth’s Attorney is confronted with an expense which falls outside of his allotted compensation, then he may request an allowance from the Compensation Board to cover such expense or to reimburse him. In Article 8, Chapter 1, Title 14.1 of the Code of Virginia, wherein § 14.1-53 prescribes the limits for annual salaries of attorneys for the Commonwealth, § 14.1-66 authorizes the Compensation Board to increase the salary of Commonwealth’s Attorneys and other officers included therein when changed circumstances so require or when requested in writing by the governing body having jurisdiction, or by the officer whose compensation is affected.

COMMONWEALTH ATTORNEYS—Conflict of Interest—May be employed by town or by local welfare department.

PUBLIC OFFICERS—Compatibility—Commonwealth Attorney — May be employed by town or by local welfare department.  

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

I am in receipt of your letter of March 31, 1970, wherein you state that as Commonwealth’s Attorney for Highland County you are also employed on a small retainer for the Town of Monterey. Further you state that you represent the local Welfare Department. You inquire whether your employment by the Town of Monterey and your special employment by the local Welfare Board would constitute a conflict of interest.

I am of the opinion that neither employment would constitute a conflict of interest. With reference to your employment by the Town of Monterey I enclose a previous ruling by this office to the Honorable Curtis A. Supter, Commonwealth’s Attorney for Floyd County, dated March 7, 1961, found in the Report of the Attorney General (1960-1961), at page 44, which opinion expressed the view that there was no objection to such employment.

Your employment by the local Department of Welfare is specifically authorized by § 15.1-67 of the Code of Virginia (1950), as amended, which reads in pertinent part as follows:

“On application of the board of supervisors, board of public welfare, or school board, the circuit court may designate such attorney, who may be the attorney for the Commonwealth or judge of the county court, to represent either or all such boards in matters requiring the services of an attorney, such attorney so designated to be paid such compensation by the county or school board or by the board of public welfare, as requisite, as the court prescribes.” (Emphasis added.)


HONORABLE JOHN E. KENNAHAN  
Commonwealth’s Attorney for the City of Alexandria  

This is in reply to your letter of January 13, 1970, in which you request an opinion as to whether the official files, papers, records and accumulated
Opinions of the Attorney General, in the office of the Commonwealth's Attorney are private property or property of the Commonwealth.

No prior opinion covering this question has been found. In my opinion, however, all official files, papers and records of the office of the Commonwealth's Attorney are public records belonging to that office and should be maintained for the official use of the incumbent of such office.

This is true of all papers of an official nature appertaining to the proper conduct of the duties ascribed to the office of Commonwealth's Attorney by law. All official files, records and papers, including accumulated Opinions of the Attorney General, coming into the possession of a Commonwealth's Attorney because of his position as such, rather than as a private attorney, remain the property of that office. That is to say, when his term of office is concluded these should be turned over to his successor.

COMPENSATION—Local Officials—Reports thereof — Not required of judge, clerk and deputy clerk where derived solely from city.

FEES—Constable—Required to be reported to Clerk of Corporation Court where total compensation not received from city.

June 4, 1970

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

This is to acknowledge receipt of your letter of May 22, 1970, in which you state in part:

"We do have a City Constable who receives certain fees in civil cases only. The constable does not receive any set salary from the City or State. The Constable is elected for a period of two years and his sole compensation is derived from certain fees in civil cases.

"Since the Judge of the Municipal Court, the Clerk and all Deputy Clerks derive all compensation from the City, does section 14.1-137 require me to make any report to the Clerk of the Corporation Court?

"Is the Constable of the City of Danville required to comply with section 14.1-137?"

Section 14.1-137, amended by Chapter 89, Acts of 1970, provides that certain officials including those you mentioned are to make reports of their earnings including "all fees, allowances, commissions, salary or other compensation or emolument of office derived from the State or any political subdivision thereof, or from any other source whatever, collected by him [them], also charged and not collected by him [them] . . . ."

However, the act further provides:

"Nothing in this article shall apply to any such officer when the total compensation received by such officer from all sources is paid by a city, town, or county."

I am of the opinion that your first question should be answered in the negative inasmuch as the total compensation of these officials is paid by the City of Danville.

I am of the opinion that the second question should be answered in the affirmative as the Constable is paid on a fee basis, his total compensation is not received from the City.

COMPENSATION BOARD — Compensation Determined by Population Limits Based on Last U. S. Census.

January 20, 1970

HONORABLE W. CARY CRISMOND, Clerk
Circuit Court of Spotsylvania County

This is in reply to your letter of January 15, 1970, which reads in part, as follows:
“Reference is made to Section 14.1-136 of the Virginia Code of 1950 as amended, and further reference is made to Section 14.1-143 which reads in part as follows, ‘with a population between fifteen thousand and twenty-five thousand, such compensation shall not exceed sixty-five hundred dollars per annum; and with a population of fifteen thousand or less, such compensation shall not exceed four thousand five hundred dollars per annum;’.

“Will you please advise me if the population limits referred to would be based on the Federal census of 1960 or that census taken by the Bureau of Population and Economic Research, located at the University of Virginia at Charlottesville.”

By § 14.1-157 of the Code, as amended, the population limits referred to in § 14.1-143 are the last decennial United States census report and not the census taken by the Bureau of Population and Economic Research, located at the University of Virginia at Charlottesville. This section reads, in part, as follows:

“For the purposes of this article, the population of each county and city shall be as shown from time to time by the last decennial United States census report, . . .”

COMPENSATION BOARD—Salary of Treasurer of Hampton—Maximum permitted.

TREASURERS—Treasurer of City of Hampton—Compensation—Maximum salary permitted by statute.

HONORABLE JOHN D. GRAY
Member, House of Delegates

October 21, 1969

This is in reply to your letter of October 1, 1969, which reads as follows:

“I previously wrote you concerning the maximum salary for the Treasurer of the City of Hampton, Virginia. Your reply indicated that Mr. Otis Johnson is presently at his maximum salary allowable. I have discussed this with Mr. Johnson, and we arrived at a numerically different figure as his possible maximum salary.

“It would appear that in 1960, his maximum salary would have been $13,500.00, plus an additional $1,500.00 under the statute allowing a $1,500.00 increase to Treasurers in cities and adjoining cities of 100,000 people or more, thus making his possible salary in 1960, $15,000.00.

“In 1964, this $1,500.00 permissive increase above the maximum, (Virginia Code Section 14-75) was rescinded, except as to those treasurers who had been eligible prior to that date. It would seem to be applicable to the Treasurer of the City of Hampton, Virginia.

“Thereafter, the General Assembly provided for a 10% increase, which under our figuring would make the maximum salary for the City of Hampton, including the 10% increase, $16,500.00.

“Thereafter, the General Assembly provided for a 5% increase, which under our figuring would make the present maximum salary for the Treasurer of the City of Hampton, $17,325.00.

“It would be appreciated if you would let me have your opinion on this matter”

In 1960, the maximum salary of the treasurer of Hampton was not set at $13,500.00. That maximum was set in 1964 by Chapter 386, Acts of 1964. In 1960, the maximum allowable by the several statutes was $14,568.00. These statutes were:
Section 14-68. "The annual salaries of city treasurers under this article shall be within the limits hereinafter prescribed, that is to say:

* * *

"In cities of the first class having aggregate levies of more than one million dollars and a population of not more than seventy-five thousand, such salary shall not be less than five thousand dollars nor more than seven thousand dollars, and when such population exceeds seventy-five thousand, not less than six thousand dollars nor more than eighty-five hundred dollars. (Emphasis added.)

* * *

"On and after July one, nineteen hundred forty-eight the maximum salary applicable to each officer whose salary is prescribed by this section shall be raised by twenty per centum for those officers who are authorized by law to receive a maximum salary of forty-eight hundred dollars; and by ten per centum and not to exceed five hundred dollars for those officers authorized to receive a maximum salary in excess of forty-eight hundred dollars but such increase shall not operate to raise any such salary by more than one thousand dollars a year. (Maximum $9,000.00)"

Section 14-68.1. "On and after July one, nineteen hundred fifty-two, the maximum salary applicable to each officer whose salary is prescribed by § 14-68 shall be raised by ten per centum of the amount prescribed by such section and all amendments thereof." (Maximum $9,900.00)

Section 14-68.2. "The minimum and maximum salary brackets provided for city treasurers by Section 14-68 and 14-68.1 applicable to each treasurer shall be increased by twenty per centum. This act shall become effective January one, nineteen hundred fifty seven." (Maximum $11,880.00)

Section 14-68.3. "The maximum salary brackets provided for city treasurers by §§ 14-68, 14-68.1 and 14-68.2 applicable to each treasurer shall be increased by ten per centum." (Maximum $13,068.00)

Section 14-75. "The maximum limits of the salaries provided by this article are hereby increased to the extent of fifteen hundred dollars in the case of officers in counties adjoining one or more cities of more than twenty-five thousand inhabitants, whether such cities be within or without this State, and in case of cities adjoining or within one mile of another city or more than one hundred thousand inhabitants." (Maximum $14,568.00)

In 1964, by Chapter 386, Acts of 1964, the classification of cities of the size of Hampton was changed to the present classification, which appears in § 14.1-55. When this new classification appeared, the provisions of the section changing it stated:

"Notwithstanding the repeal of Sections 14-8.1, 14-68, 14-68.1, 14-68.2, 14-68.3, and 14-75, effective July one, nineteen hundred sixty four, the prior authority of such sections is continued in effect as to persons holding office on such date." (Emphasis added.)

In adopting this language the General Assembly insured that a treasurer did not suffer a reduction in maximum salary already set under these sections. The effect of this was to allow the treasurer of Hampton to keep the maximum then allowed by these statutes, which was $14,568.00, rather than be controlled by the maximum of $13,500.00 as set by § 14.1-55, as then amended.

Since 1964, legislation affecting this maximum of $14,568.00 has been § 14.1-62.1, adopted by Chapter 637, Acts of 1966. This increased the maxi-
REPORT OF THE ATTORNEY GENERAL

mum by 10% to a total of $16,024.80. Subsequently, the General Assembly enacted Chapter 769, Acts of 1968, codified as § 14.1-58.1 of the Code, as amended, which increased the maximum salary allowable by 5%. This increased the maximum salary allowable to $16,826.04.

The opinion of August 20, 1969, used the maximum of $13,500.00 set for the treasurer of Hampton in 1964 by § 14.1-55, as amended, as the starting point. In using the statutes in effect in 1964 prior to the change, the foregoing maximum of $16,826.04 is established.

CONSTITUTION — Power to Determine Interest Rates — Delegation to Federal Government is unconstitutional.

GENERAL ASSEMBLY—May Not Delegate Power to Determine Interest Rates to Federal Government.

February 10, 1970

HONORABLE WILLIAM F. PARKERSON, JR.
Member, Senate of Virginia

This is in reply to your letter of February 6, 1970, which reads as follows:

"I request your opinion as to whether or not the General Assembly could enact legislation providing that contracts made for the loan or forbearance of money, secured in whole or in part by a first deed of trust or mortgage on real estate, could be lawfully enforced at the rate of interest permitted by the Federal Housing Administration, or the Commissioner thereof, or by the Veterans Administration, or the Administrator thereof.

"In other words, would there be any constitutional prohibition on the legislature should the legislature determine to permit first mortgage conventional loans to bear an interest rate at a rate no higher than the interest rates permitted by the Federal Housing Administration and the Veterans Administration on loans which they respectively insure and guarantee."

Although there are cases to the contrary, it is generally held, by a great majority of the courts, that acts of a legislature, which adopt prospective laws or regulations of other states or of the federal government or which adopt existing laws or regulations of other states or of the federal government, which laws or regulations are subject to future modification or revision by those states or the federal government, are unconstitutional delegations of legislative authority.

Since the legislation which you describe would make interest rates on contracts made for the loan or forbearance of money, secured in whole or in part by a first deed of trust or mortgage on real estate, subject to interest rates as authorized now or in the future by the Federal Housing Administration or by the Veterans Administration it is unconstitutional and invalid since it delegates to the Federal government the power possessed by the General Assembly to determine interest rates to be charged in Virginia.

I am unable to find any cases in Virginia which deal directly with the problem, but there is no reason to believe that the Supreme Court of Appeals of Virginia would not follow the majority view.

Therefore, it is my conclusion that the legislation as proposed would be unconstitutional and invalid.

CONSUMER CREDIT—Service Charges—Bills must be mailed within eight days of billing date—Means "from" billing date and includes Sundays.
HONORABLE WILLIAM F. PARKERSON, JR.
Member, Senate of Virginia

I am in receipt of your letter of May 13, 1970, relative to Chapter 616 of the 1970 Acts of Assembly amending the Code of Virginia as follows:

"§ 6.1-362. Any seller or 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 per centum per month, computed on maximum fiscal monthly balances, provided that no service charge shall be charged unless the bill is mailed within eight days of the billing date." (Emphasis added.)

Your specific inquiries question the meaning of the underscored portion of the statute and are:

(1) Does the language . . . mean within eight after the billing date, or within eight days before the billing date? (2) Does the eight day period include Sundays and holidays or is it limited to business days? (3) What would be the case if the eighth day falls on a Sunday?

The clear intent of the statute is to allow a period, free from imposition of a service charge, of twenty-five days from billing date within which the amount can be paid if the seller or lender mails the bill within eight days of the billing date. Therefore, I am of the opinion that the underscored portion of the statute relates to eight days after the billing date.

The answer to your second inquiry is that the eight-day period does include Sundays and holidays. "[W]hen a statute prescribes a certain number of days within which an act is to be done, and says nothing about Sunday [or holidays, such days are to be included providing the contrary is not clearly expressed] unless the last day falls on a Sunday [or a holiday], in which case the act may generally be done on the succeeding day." Bowles v. Brauer, et als., 89 Va. (14 Hansbrough) 466, 468, 16 S.E. 360 (1892). However, "if the act to be done may be . . . performed on Sunday [or a holiday], and the last day for its performance falls on Sunday [or a holiday], then, in such a case, Sunday [or the holiday] is not to be excluded." Bowles v. Brauer, supra.

As is evident from the above, the reply to your third inquiry is dependent upon whether mail is picked up and postmarked on Sundays and holidays. I am informed that in certain areas of the state it is at the present time. Therefore as to those areas Sundays and holidays, if they were the last day of the eight-day period, would not be excluded.

Of course, if revised postal regulations eliminated postal service on Sundays and holidays, then this ruling would necessarily be revised.

Though you do not inquire as to the method of computing the eight days I would point out, as pertinent to your other inquiries, that the billing date would not be counted as one of the eight days. Virginia Code § 1-13.3 provides that "where a statute requires a[n] . . . act to be done within a certain time after any event . . . that time shall be allowed in addition to the day on which the event . . . occurred."

CONTRACTORS—Certificate of Registration—Necessary to show evidence of before bid may be considered.

PUBLIC CONTRACTS—Bids—Failure to show evidence of registration—Voids bid.
HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

March 20, 1970

I am in receipt of your letter of March 4, 1970, concerning contract bids for the metal building pre-release center at Pocahontas State Park.

The low bidder for the contract failed in compliance with Paragraph 7-C of the “General Conditions of the Contract for Capital Outlay Projects” to show evidence that he was a registered contractor. You inquire if by neglecting to place on the bid the Registered Virginia Contractor number, the bid is now void, and further direct my attention to § 54-139 of the Code of Virginia (1950), as amended.

Section 54-139 in pertinent part provides that it is necessary for a contractor to show evidence of a certificate of registration before his bid may be considered. Paragraph 7-C of the General Conditions of the Contract for Capital Outlay Projects provides the manner in which a contractor must comply with the statute and states that he shall place on the bid his Registered Virginia Contractor number.

It is clear from the language that these provisions are mandatory and constitute requirements for all bids. Therefore, I am of the opinion that failure to comply does void the bid.

CONTRACTORS—Registration Board—Effect of amendment to § 54-113(2).

April 2, 1970

MR. E. L. KUSTERER, Executive Secretary
State Registration Board for Contractors

This is to acknowledge receipt of your letter of March 20, 1970, in which you state that § 54-113 (2) of the Code of Virginia was amended by the Acts of the General Assembly, 1970, Committee amendment for House Bill No. 197, Chapter 319, and request my opinion as to whether under the new definition certain former opinions of this office are still applicable.

Section 54-113 (2) as amended is as follows:

"'General contractor' or 'subcontractor' shall mean any person, firm, association or corporation that for a fixed price, commission, fee or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing or superintending in whole or in part, the construction, removal, repair or improvement of any building or structure permanently annexed to real property owned, controlled or leased by another person or any other improvements to such real property when either (a) the total value of all such construction, removal, repair or improvements referred to in a single contract or project is thirty-thousand dollars or more, or (b) the total value of all such construction, removal, repair or improvements undertaken by such person within any twelve month period is one hundred fifty thousand dollars or more."

The following comments are made to said opinions:

(1) That portion of the opinion of April 25, 1942, expressed in letter to Mr. Charles P. Bigger, Executive Secretary, State Registration Board for Contractors, [Report of the Attorney General (1941-1942), p. 133], pertaining to "specialty contractors" is no longer applicable because under the new definition contracts for "performing or superintending in whole or in part" would cover so-called "specialty contractors" so long as the amount of his contract amounts to $30,000 or more.

That portion of the said opinion dealing with the installation of heating plant costing $20,000 to replace the one already installed is still applicable, provided the cost amounts to $30,000 or more.
(2) The opinion expressed in the letter to Mr. E. L. Kusterer, Executive Secretary, State Registration Board for Contractors, dated April 19, 1954, [Report of Attorney General (1953-1954), p. 40], held that where the project is primarily one of installation of a manufactured product, which installation is performed by the manufacturer, such installation may be construed as incidental to the sale of the manufactured equipment, the performance of which is not to be considered as a practice of contracting within the meaning of the law.

The new definition does not alter this opinion.

(3) The opinion expressed in the letter to Mr. E. L. Kusterer, Executive Secretary, State Registration Board for Contractors, dated November 2, 1956, [Report of Attorney General (1956-1957), p. 63], held that a company which sells food service equipment which is not permanently installed in a building but may be moved to other locations, which company supplies a contractor to install said equipment, such operation should be considered as incidental to the sale of the product and therefore the said company is not a contractor within the meaning of the statute.

The new definition does not alter this opinion.

(4) The opinion expressed in the letter to the Honorable E. L. Kusterer, Executive Secretary, State Registration Board for Contractors, dated November 7, 1957, [Report of Attorney General (1957-1958), p. 62] held that where a company agrees to erect directional signs for a turnpike authority on spans consisting of concrete foundations on both sides of the highway, the company would be a contractor within the meaning of the statute provided the cost is $20,000 or more. However, a firm could contract to furnish directional signs to be hung from spans constructed by another principal contractor without complying with the statute.

The new definition does not alter this opinion.

(5) The opinion expressed in the letter to the Honorable Theodore C. Pilcher, Member, House of Delegates, dated October 29, 1963, [Report of Attorney General (1963-1964), p. 53], held that a company, a supplier of kitchen equipment, which is responsible for the preparation of plans for the proper installation of equipment, responsible for the proper fittings and placing of equipment by the metal workers of the contractor or supplier, responsible for effecting the electrical, steam, gas, water and venting connections of the equipment on a permanent basis, even though the equipment may be moved at the end of the tenancy, responsible for the proper functioning of the equipment, is a general contractor within the meaning of the statute.

The new definition does not alter this opinion.

(6) The opinion expressed in the letter to Douglas H. Hamner, Jr., Director, Division of Engineering and Building, dated June 15, 1967, [Report of Attorney General (1966-1967), p. 72], held that a company which agrees to erect and install a crane to be used by the State Ports Authority requiring the construction of concrete and metal uprights and foundations therefor would be a contractor within the meaning of the statute. (Presumably, the cranes would be a permanent fixture used by the Ports Authority in its operation.)

The new definition does not alter this opinion.

(7) In the Memorandum dated January 12, 1960, made by Reno S. Harp, III, Assistant Attorney General, the view was expressed that a nurseryman contracting to plant shrubbery and trees, not involving extensive excavation, would not be required to register as a contractor under the statute (Chapter 7 of Title 54). The only portion of the definition which could possibly cover such a project would be: "or any other improvement to such real property." Now the "real property" to which reference is made is that described in the foregoing portion of the definition, to-wit: "real property owned, controlled or leased by another person." Hence shrubbery or trees where placed upon such real estate can be termed as improvement thereto and such nurseryman would be required to register as a contractor.
The new definition does alter the opinion expressed in said memorandum. You make the further inquiry, I quote from your letter:

"Sections 54-129 and 54-131 as amended 1970 provide for submission of a financial statement 'which may be the applicant's last financial statement as of a date not more than fifteen months prior thereto.' Under this will the Board be required to accept a statement as much as fifteen months old or could the Board adopt by-laws or regulations specifying a date less than fifteen months past."

The apparent purpose of requiring a statement of applicant's financial condition is to be assured that the applicant is in a sound financial condition so that it may fulfill the contracts it may secure as a registered contractor or a registered subcontractor. The statute directs that:

"... a statement of the applicant's reasonably current financial position which may be the applicant's last financial statement as of a date not more than fifteen months prior thereto on a form prescribed by the Board which will include an affidavit regarding the correctness of such statement."

Unless the Board believes the financial condition has materially changed within the last fifteen months, a statement as much as fifteen months should be accepted. It seems to me that such a statement could be accepted but the acceptance is not mandatory. Hence, the Board would not be required to accept such a statement in lieu of other evidence of the financial status. The language of the statute in this particular is only directory. It is believed the appropriate language in the form adopted by the Board could accomplish the desired result, rather than a formal by-law or regulation.

COUNTIES — Amendment of Zoning Ordinances — When written notice required.

ZONING—Amendment of Ordinances—When written notice required.

HONORABLE CARLETON PENN
Commonwealth's Attorney for Loudoun County

September 18, 1969

This is in reply to your letter of August 27, 1969, which I quote as follows:

"The third paragraph of Section 15.1-431 of the Code of Virginia, as amended, provides:

'Except upon application of a property owner or his agent, when a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or less parcels of land, then, in addition to the advertising as above required, written notice shall be given at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. Notice sent by registered or certified mail to the last known address of such owner as shown on the current real estate tax assessment books shall be deemed adequate compliance with this requirement.'

"Would you be kind enough to render your opinion as to whether the exclusion at the beginning of said paragraph, 'Except upon application of a property owner or his agent,' makes it unnecessary for a property owner or his agent to give the written notice provided for in said section."
The written notice required by the paragraph quoted from § 15.1-431 of the Code is the requisite procedure to be followed, under the circumstances therein stated, by the named local authorities prior to any such hearing. The responsibility for giving the written notice, whenever it is required by this section, rests with these authorities rather than with a property owner or his agent. As I interpret the exception clause, when the proposed amendment is upon application of a property owner or his agent the advertising otherwise required by this statute is sufficient without the written notice being given.

COUNTIES—Authority—No authority to execute agreement with labor union.

COUNTIES—Torts—May not assume by contract responsibility for damages in tort.

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

June 22, 1970

This is to acknowledge receipt of your letter of June 15, 1970, in which you enclosed a copy of a Labor Standard Agreement which must be entered into by the City (or County) and Union officials, in conjunction with the execution of an agreement relative to a Summer Youth Transportation project in order to obtain a grant to finance special transportation services to certain youth groups pursuant to the Urban Mass Transportation Act of 1964 (49 U.S.C.A. § 1601 to 1611). You state in your letter:

"In connection with a summer program, I was requested to review the attached agreements.

"My review prompted me to advise our County officials that the General Assembly in Senate Joint Resolution No. 12 of the Acts of Assembly of 1946, at page 1006, it was against public policy for the County to engage in negotiation with representative of labor unions. I have consistently further advised them that since the County is not liable in tort, it can not accept the responsibility for tort damages in any of the contracts that it executes.

"...I would appreciate it if you would advise me whether or not the County has authority to enter into the agreements forwarded herewith."

The pertinent portion of Senate Joint Resolution No. 12, dated February 8, 1946, is as follows:

"1. It is contrary to the public policy of Virginia for any State, county, or municipal officer or agent to be vested with or possess any authority to recognize any labor union as a representative of any public officers or employees, or to negotiate with any such union or its agents with respect to any matter relating to them or their employment or service."

This resolution sets forth the public policy of the State and the same has not been changed or altered in any manner. For the County or City to execute the Labor Standard Agreement referred to above, would place upon the City or County the obligation to negotiate with a labor union relating to the employees, their employment or service which would be contrary to said resolution.

This office has held that the Virginia Right to Work Law is not applicable to public employees. See opinion expressed in a letter to the Honorable Edward E. Willey, dated July 30, 1962, [Annual Report of the Attorney General (1962-1963), p. 117], a copy of which is enclosed.
A review of the material you enclosed indicates that there is a possibility that entering into such a contract that the County would assume the responsibility for damages in tort. This is contrary to the well recognized principle that a County is not liable in tort. Mann v. County Board, 199 Va. 169.

I am therefore of the opinion that the County is without authority to enter into the aforementioned agreements.

COUNTIES—Authority—No authority to purchase and maintain television relay stations.

COUNTIES—Television Relay Stations—No authority to purchase and maintain.

August 21, 1969

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of August 13, 1969, from which I quote the following:

"The Board of Supervisors of Shenandoah County, Virginia, is contemplating erecting two television relay stations (UHF Transmitters) in Shenandoah County for the purpose of transmitting interference-free television pictures to the citizens of Shenandoah County. A feasibility survey has been made of the county area and site selection has been made. It is proposed that these television relay stations and the maintenance and service of such stations be paid for out of the general fund of the Treasurer of Shenandoah County. The Board of Supervisors proposes to place a referendum on the November, 1969, ballot regarding the question as to whether or not the tax payers of Shenandoah County would approve the expenditure of the funds from the general tax revenue for the erection of such units."

"My question is this: May the County of Shenandoah undertake such a project as the erection of these television relay stations and pay for the same out of the general funds of the Treasury of Shenandoah County? If the county may do so, under what authority may this be done?"

There appears no statute giving counties specific authorization to make expenditures for the erection of television relay stations of the nature outlined. Neither is there any showing that the contemplated activity falls within the purview of § 15.1-510 of the Code of Virginia, relating to promotion of the health, safety and general welfare of the inhabitants of the county. Accordingly, I find no authority under which the County of Shenandoah may undertake such a project and your question is answered in the negative.

COUNTIES—Authority—Regulation of "security" police in county—No authority to enact parallel ordinances involving §§ 18.1-311 and 18.1-312.


July 7, 1969

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

This is in reply to your letter of June 13, 1969, in which you present the following inquiry:
"The Sheriff of Roanoke County has asked me to inquire whether it is possible for the County to pass an ordinance regulating the operation of security police within the County.

"We have had a bit of a problem recently with certain security groups who have represented themselves as being connected with the Sheriff's Office and who have worn uniforms similar to those worn by members of the Sheriff's Department."

I refer you to §§ 18.1-311 and 18.1-312 of the Code of Virginia which prohibit the impersonation of an officer and the unlawful wearing of the uniforms of certain officers. These sections would be applicable, in appropriate cases, to regulate the activities of the "security groups" described in your letter.

However, in view of the fact that §§ 18.1-311 and 18.1-312 do not specifically grant to political subdivisions the authority to enact parallel ordinances, the county would lack authority to enact ordinances which parallel those statutes.

COUNTIES—Authority to Regulate Private Security Patrol Groups—May regulate where necessary for public health, safety, and general welfare.

COUNTIES—Security Groups—County may prescribe reasonable standards for regulation.

August 18, 1969

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

This is in reply to your letter of July 22, 1969, in which you inquire "whether a county may regulate the license applications and licensing of private security patrol groups, the intent being to see that such groups employ persons of decent moral character, etc."

In this regard, I refer you to § 15.1-510 of the Code of Virginia (1950) as amended, which states in part that:

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

This section has been construed to confer authority on political subdivisions to regulate a number of activities which are related to the public health, safety and general welfare. Among the activities which may be regulated under the statute are the keeping of dogs, King v. County of Arlington, 195 Va. 1084, 1090, 81 S.E.2d 587, and the performance of plumbing work, Roundtree Corp. v. City of Richmond, 188 Va. 701, 713, 51 S.E.2d 256.

Accordingly, it is my opinion that the board of supervisors may prescribe reasonable standards for the regulation of security groups as long as the proposed ordinance is necessary for the public health, safety, and general welfare, and is founded upon a demonstrably rational basis. See, Report of the Attorney General (1954-1955), p. 11, a copy of which is enclosed. The standards applicable in making this determination were thoroughly discussed in a prior opinion of this office, which I enclose for your reference. See, Report of the Attorney General (1957-1958), p. 59.

COUNTIES—Automobile Graveyards—Limitation on extent to which State preempted field.

ORDINANCES—Automobile Graveyards—May regulate in areas outside of § 33-279.3.
HONORABLE THOMAS R. NELSON
County Attorney for Augusta County

This is in response to your letter of April 20, 1970, in which you indicated that the County of Augusta is in the process of preparing a new zoning ordinance, which would define an automobile graveyard as a site on which one or more motor vehicles of any kind incapable of being operated and which it would not be mechanically practical to make operative, are placed, located or found. Inasmuch as § 33-279.3(2) of the Code of Virginia defines an automobile graveyard as such a site on which more than five of such vehicles are placed, located or found, you have requested an opinion concerning the power of the Board of Supervisors to enact an ordinance containing such a provision.

Pertinent to a consideration of this question is § 15.1-498 which provides:

"Whenever the regulations made under authority of this article require a greater width or size of yards, courts or other open spaces, require a lower height of building or less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this article shall govern. Whenever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, require a lower height of building or a less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are required by the regulations made under authority of this article, the provisions of such statute or local ordinance or regulation shall govern."

While the above quoted statute empowers a local authority to enact a zoning ordinance imposing higher standards than are required in any statute, such authority is necessarily limited in those areas wherein the General Assembly intended to preempt the field on behalf of the State as to regulation of automobile graveyards. It is my opinion that the General Assembly through its enactment of § 33-279.3 intended to preempt the field with respect to the locating and fencing of automobile graveyards, any portion of which is within one thousand feet of any interstate or primary highway or within five hundred feet of any other highway or city street and therefore the answer to your question as to those areas must be in the negative.

It is further my opinion, however, that a study of the legislative history of § 33-279.3 reveals no intent of the General Assembly to preempt the field outside of the areas regulated under said section. The answer to your question insofar as it relates to those areas outside of those regulated by § 33-279.3 would be in the affirmative. To the extent that this opinion is in conflict with a previous opinion of this office, dated October 11, 1966, to the Honorable J. Patrick Graybeal, found in Report of the Attorney General (1966-1967), p. 75, the latter opinion shall be deemed to have been superseded.

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

COUNTIES — Automobile Graveyards — Regulation of — May not declare them to be nuisance unless in fact injurious to public health.
HONORABLE E. EUGENE GUNTER
County Attorney for Frederick County

This is in reply to your letter of March 12, 1970, which reads, in part, as follows:

"Please be advised that the Frederick County Board of Supervisors would like to enact a local ordinance prohibiting junkyards in Frederick County under penalty of punishment as a misdemeanor. The proposed ordinance would apply to unsightly accumulations of old and inoperable motor vehicles, old and inoperable household appliances, and other bulky and unsightly items.

"I realize that the state Code has a section, which vests the Commissioner of Highways with certain powers in reference to automobile graveyards. Please advise me as to whether or not this section pre-empts the local governing body from enacting legislation concerning automobile graveyards.

"If it does, please advise me as to whether there is any reason why the Frederick County Board of Supervisors could not enact a statute prohibiting the accumulation of unsightly items as set forth above as constituting a nuisance with a specified penalty for the violation of such ordinance."

This office has heretofore ruled that by the enactment of § 33-279.3 of the Code of Virginia (1950), as amended, the State has preempted the field relative to the fencing and location of "automobile graveyards" and "junkyards." On the other hand, § 15.1-28 of the Code states that "[t]he governing body of each county . . . in this State may adopt ordinances imposing license taxes upon and otherwise regulating the maintenance and operation of places commonly known as automobile graveyards and junkyards and may prescribe fines and other punishment for violations of such ordinances" (Emphasis added).

It is my opinion, therefore, that although a county is not authorized to enact ordinances pertaining to the location of "junkyards," it may regulate the maintenance and operation of such establishments (See letter to Honorable Julius Goodman dated April 14, 1959, found in Report of the Attorney General 1958-1959 at 44). I would also point out that § 15.1-11.1 of the Code empowers the governing body of a county to enact ordinances that make it "unlawful for any person, firm or corporation to keep, except within a fully inclosed building or structure, on any property zoned for residential purposes any automobile or automobiles whose condition is such that it is economically impractical to make them operative"; thereby persuading me that § 33-279.3 is not to be construed so as to impair what powers the locality may have in this regard under zoning statutes.

Relating to the second part of your inquiry, § 15.1-522 of the Code vests with the boards of supervisors of counties the "same powers and authority the councils of cities and towns by virtue of the Constitution of the State of Virginia or the Acts of the General Assembly passed in pursuance thereof . . ." (citing exceptions not affecting the issue at hand). In this connection, § 15.1-13 grants to the governing bodies of cities and towns, for the purpose of carrying into effect the "enumerated powers conferred upon them," authorization to make ordinances and prescribe fines or other punishment for the violation thereof. Section 15.1-14(5) grants that every city and town may "[p]revent injury or annoyance from anything dangerous, offensive or unhealthy and cause any nuisance to be abated" (Emphasis added).

While it therefore is possible for a "junkyard" to be declared a nuisance, the State law on the subject cannot be circumvented in such a manner merely because of location or unsightliness. In White v. Town of Culpeper,
172 Va. 630, 1 S.E.2d 269 (1939), the Supreme Court of Appeals held that an ordinance cannot create a nuisance out of a lawful occupation by mere declaration. In order for an otherwise lawful automobile graveyard to be declared a nuisance it must in fact be a public nuisance, that is, be injurious to the public health, safety or morals.

COUNTIES—"Cloud Seeding"—No authority to adopt ordinance prohibiting.

COUNTIES—Ordinances—No authority to adopt ordinance prohibiting "cloud seeding."

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

This is in reply to your letter of July 15, 1969, in which you request my advice as to whether a county may constitutionally adopt an ordinance making it a felony to conduct any operation commonly referred to as "cloud seeding."

There appears no specific statute under which a county would be authorized to enact such an ordinance. In the absence of some showing that the activity in question may be injurious or dangerous to the safety, health or welfare of the community there is no general basis for such a prohibiting ordinance.

I am of the opinion, therefore, that the validity of an ordinance of the nature outlined would be subject to grave doubt.

COUNTIES—Conflict of Interest—Independent contractor may contract with county.

COUNTIES—Contracts—Conflict of interest provisions of § 15.1-123 do not extend to independent contractor.

HONORABLE CHARLES W. GUNN, JR.
Member, House of Delegates

This is in reply to your letter of August 7, 1969, in which you inquire as to the applicability of § 15.1-123 of the Code in the following situation:

"At present a person holding a ten month contract for providing two school buses and drivers to the County School Board has been offered a contract for the maintenance of all county owned school buses and other vehicles owned and operated by the School Board. The question has been raised that the contract for providing the school buses and the contract for maintenance of all county owned vehicles would be in conflict of this section of the Code, and that such individual must either elect to work under the contract of maintaining the vehicles or fulfill the contract of providing two school buses and drivers.

"If the above two contracts would be conflicting with this Code section, could one contract be drafted between the School Board and said individual which would provide that he furnish the two buses and drivers as well as maintenance upon all of the County owned vehicles."

Section 15.1-123 is the conflict of interest section applicable to counties which have a county executive secretary and provides in part that, "No member of the governing body or other officer or employee of the county, or person receiving a salary from funds appropriated by the county, shall be interested directly or indirectly in any contract to which the county is a party, either as principal, surety or otherwise . . . ."
It is my opinion that the situation which you describe would not be within the coverage of the statute. From your letter it would appear that the individual in question is an independent contractor and not a county employee or person receiving a salary from county funds. This section should not be construed to preclude a person contracting with a county from entering into subsequent contractual agreements with the county.

While the contracts could be combined as you suggest in the second paragraph of your inquiry, in view of the answer to the foregoing, this would appear to be unnecessary.

COUNTIES—County Board Form of Government—Filing of petition—Meaning of fifteen per centum of qualified votes.

COUNTIES—County Board Form of Government—Filing of petition—No requirement that signatures endorsed on petition be attested or witnessed.

HONORABLE JERRY H. GEISLER
Member, House of Delegates

This is in reply to your letter of July 30, 1969, in which you refer to §§ 15.1-697 and 15.1-698 of the Code of Virginia authorizing counties to adopt the county board form of government. In regard to the provision found in § 15.1-698 for filing a petition with the circuit court of the county signed by fifteen per centum of the qualified voters of such county asking that a referendum be held on the question of adopting the county board form of county government, you present the questions which I quote as follows:

“(1) What would constitute fifteen per cent of the qualified voters, or (2) What does amount to fifteen per cent of the qualified voters of Carroll County at the present time?

“I am also requesting an opinion as to whether or not the signatures on such petition would need to be attested or witnessed.”

In respect to your questions (1) and (2), I interpret the language “fifteen per centum of the qualified voters” to mean fifteen per centum of the total number of qualified voters for the county appearing on the most recent registration rolls. This information should be in the hands of the county clerk, since § 24-255 of the Code of Virginia requires the clerk to transmit to the State Board of Elections, on the first day of April and October of each year, a list of the number of election districts together with the number of voters in such districts.

I am advised by the State Board of Elections that the information submitted by the County Clerk of Carroll County in the last such report filed on April 22, 1969, shows 11,612 registered voters. Assuming this figure has not been changed by any additions or deletions the number of qualified voters required for the petition in question would be fifteen percent of this figure.

In answer to your other question, there appears no statute specifically requiring the signatures of the petitioners to be witnessed in such cases. Where candidates for certain offices are required to file a petition along with the notice of candidacy pursuant to § 24-133 of the Code the signature of each person signing any such petition must be witnessed by a person whose affidavit to that effect is attached to the petition. In the absence of any similar statute in regard to signatures endorsed on a petition circulated pursuant to § 15.1-698 I am of the opinion that there is no requirement that the signatures be attested or witnessed, although to do so may facilitate ascertaining whether or not such petition has been signed by fifteen per centum of the qualified voters.
COUNTIES—Game Laws—No Authority in counties to enforce.

GAME AND INLAND FISHERIES—Hunting of Wild Animals by Spotlight—Authority to enforce prohibitory.

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney for Augusta County

This is in reply to your letter of June 19, 1969, in which you inquire as to the power of the board of supervisors to enact an ordinance which, in effect, makes it unlawful to cast a spotlight or other illumination upon livestock, poultry and wild animals.

Insofar as this ordinance attempts to regulate the hunting of wild animals by spotlight, it is my opinion that the board of supervisors has no authority to act in this regard. While § 29-144.4 of the Code makes it a misdemeanor to shine a light on places used by elk or deer, the General Assembly has made no grant of authority to counties to enact ordinances in this regard. This office has ruled in a previous opinion that unless the General Assembly has conferred express power upon a particular county governing body to regulate the hunting of wild animals, such power does not exist. See, Report of the Attorney General (1962-1963), p. 98, a copy of which is enclosed.

COUNTIES—Garbage and Trash Trucks—Regulation of..

COUNTIES—Ordinances—Requiring garbage and trash trucks to be covered —County may adopt.

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

I am in receipt of your inquiry of August 20, 1969, as to whether a county may enact an ordinance requiring that trash and garbage be moved on the highways in covered trucks or in trucks carrying covered containers.

In this regard, I refer you to § 15.1-28.1 of the Code which confers upon counties the authority to regulate the pick up and disposal of garbage and trash. It is my opinion that this section authorizes the enactment of an ordinance such as you describe.

COUNTIES—Impaired Driving—Authorized by subsection (t) of § 18.1-55.1 to adopt ordinances paralleling statute.

MOTOR VEHICLES—Impaired Driving—Counties authorized to adopt ordinances relating to the offense.

HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

I am in receipt of your inquiry of June 30, 1969, in which you inquire as follows:

"Amherst County already has an ordinance regarding driving under the influence and wishes to pass an ordinance to cover the new impaired driving. To do this, they would have to have the right to obtain blood samples and an implied consent ordinance. Is the implied consent and blood test statute authorized for use by a county?"

The implied consent and blood test statute to which you refer is § 18.1-55.1 of the Virginia Code. In response to your inquiry, I refer you to subsection (t) of the statute which specifically states that counties are authorized to enact ordinances paralleling the substantive provisions thereof.
COUNTIES — Industrial Development — County appropriations limited to one per centum of its annual revenue.

INDUSTRIAL DEVELOPMENT—Appropriations—County limited to one per centum of its annual revenue.

October 20, 1969

HONORABLE FRANK D. HARRIS
Commonwealth's Attorney for Mecklenburg County

This is in reply to your letter of October 7, 1969, in which you present the following questions with regard to §§ 15.1-10 and 15.1-10.1 of the Virginia Code.

"(1) Does the County have the right under the above Code Sections to use three percentum of its revenues for promoting industrial development within the County?"

No. It is my opinion that the county may appropriate funds for industrial development only within the one per cent limitation of § 15.1-10.1. Section 15.1-10 permits a county to appropriate funds for promoting the "resources and advantages" of the county and should not be read in conjunction with § 15.1-10.1 as authorizing a three per cent expenditure for industrial development.

"(2) In computing the revenues referred to under the above Code Sections, can the County include its share of the local sales tax revenue, the auto license revenue, and the revenue received from the ABC Board?"

Yes. This office has ruled in a previous opinion that, while the sum expended under § 15.1-10.1 must be appropriated from funds raised by the general levy, the amount appropriated may be equivalent to one per cent of all revenues, including those to which you refer. See, Report of the Attorney General (1958-1959) at 56, a copy of which is enclosed. Such would not be the case where the county makes an appropriation under § 15.1-10, since that section provides for the appropriation of only two per cent of "locally derived" revenues.

"(3) What distinction should be made between the two above Code Sections wherein § 15.1-10 permits the County to expend certain of its funds for promoting the resources of the County and § 15.1-10.1 permits the County to appropriate certain revenues for industrial development?"

There is no material distinction in the use of the terms.

"(4) If the County makes a loan to a new industry in anticipation that its tax revenue from the industry will more than offset the loan and the tax incomes does amount to more than the loan, will such loan be charged against the maximum amount authorized under the above Code Sections, or can the County take the position that the tax income is balancing their obligation under such circumstances?"

Section 15.1-10.1 does not authorize a county to promote industrial development by lending money to a new industry. See, Report of the Attorney General (1958-1959) at 55, a copy of which is enclosed. This practice is in fact specifically prohibited by Section 185 of the Constitution of Virginia, which prohibits counties from lending credit to any corporation.

COUNTIES—No Authority to Require Fees for Examination and Approval of Subdivision Plats.
This is in reply to your letter of January 8, 1970, in reference to those provisions of the subdivision ordinance of Fluvanna County which impose fees for the examination and approval of subdivision plats by the planning commission. You inquire as to the authority of the county to impose such fees in the absence of enabling legislation.

The question which you present was decided by the Supreme Court of Appeals of Virginia in the case of National Realty Corp. v. City of Virginia Beach, 209 Va. 172, 163 S.E.2d 915 (1968). In that case the court ruled that there was no specific grant of authority to localities to impose fees such as you describe, and that in the absence of such a grant the fees could not be lawfully required. I am, therefore, of the opinion that specific action of the legislature would be required before a county could require fees for the examination and approval of subdivision plats.

COUNTIES—Ordinance—Regulation of minors playing or loitering in public poolrooms or billiard rooms—Overrides statute.

March 11, 1970

HONORABLE D. DORTCH WARRINER
Attorney for the City of Emporia

This is in reply to your letter of February 10, 1970, written on behalf of Mr. Elmer L. Grizzard, City Sergeant for the City of Emporia, from which I quote the following:

"The City of Emporia has an ordinance, § 22-4, as follows:

"No owner, proprietor or person in charge of any poolroom or billiard room within the corporate limits of the city shall permit any minor under the age of 18 years to play pool or billiards in any such room or to loiter therein.

"No owner, proprietor or person in charge of any poolroom or billiard room within the corporate limits of the city shall employ or permit the employment of any minor under the age of 18 years.

"No minor under the age of 18 years shall play pool or billiards in any such room within the corporate limits of the city.

"A State statute on the same subject, Va. Code Ann. § 18.1-349 (Supp. 1968), makes similar provisions for minors but contains the following exception:

"The term ‘public poolrooms’ as used herein shall not be construed to include an establishment in which not more than three miniature pool tables that operate on the coin-in-the-slot principle are exclusively kept or played.

"The initial question is whether or not the exception contained in the State statute would override or take precedence over the blanket prohibition contained in the City ordinance. "If the first question is answered in the affirmative, the second question is what is a miniature pool table. The Sergeant has been told that a ‘regulation’ pool table measures 4½’ x 9’. The establishment in question here in Emporia has three pool tables operated on a coin-in-the-slot principle with the tables measuring 4’ x 8’."

Appropos to your initial question, § 18.1-349, to which you refer, contains the following:
"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."

Chapter 25, Acts of Assembly 1968, added § 18.1-349.1 which is as follows:

"The governing body of any county, city or town may, by ordinance, regulate the frequenting, playing in or loitering in public poolrooms or billiard rooms by minors in lieu of the provisions of § 18.1-349, and may prescribe the punishment for violation of such ordinances; provided, the punishment provided for shall not exceed that set out in § 18.1-349."

The effect of the quoted language is to permit any county, city or town to enact an ordinance regulating the frequenting, playing in or loitering in public poolrooms or billiard rooms by minors. When any such ordinance is adopted, it replaces the provisions of § 18.1-349, except that the punishment for such an ordinance may not exceed that set out in § 18.1-349.

In view of the foregoing, it is my opinion that the exception which you have quoted from the statute would have no application in respect to the ordinance adopted by the City of Emporia and, therefore, your first question is answered in the negative. No further consideration is necessary for your other question, since it is predicated upon an affirmative answer to the first.

COUNTIES—Ordinances—Paralleling State statutes on drunk driving and reckless driving.

MOTOR VEHICLES—Drunk Driving—County ordinances paralleling State statutes on subject—Penalties provided.

MOTOR VEHICLES—Reckless Driving—County ordinances paralleling State statutes on subject—Penalties provided.

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

September 15, 1969

This is in reference to your letter of September 9, 1969, concerning county ordinances paralleling the state statutes with regard to driving while intoxicated and reckless driving.

Section 15.1-505, Code of Virginia (1950), as amended, is a general limitation as to penalties which may be imposed by localities for violations of local ordinances. Section 15.1-132 is an exception to the general rule and relates only to ordinances concerning drunk driving. The provisions of § 15.1-132 control with respect to this particular matter. In this wise, I refer you to my opinion dated April 1, 1965, to the Honorable Joseph Motley Whitehead, Commonwealth's Attorney for Pittsylvania County, published in Report of Attorney General (1964-1965), p. 189.

With respect to reckless driving, § 46.1-180, Code aforesaid, is also a specific exception to § 15.1-505 in that it authorizes localities to adopt ordinances not in conflict with other provisions of Title 46.1. Therefore, I am of the opinion that the penalties for reckless driving contained in Title 46.1 may be incorporated into the proposed county ordinance.
COUNTIES—Ordinances—Trailer camps—If ordinance adopted must cover trailer camps, trailer parks and the parking of a trailer in an individual lot not in a trailer camp or park.

TRAILER CAMPS—Ordinances—If adopted must cover trailer camps, trailer parks and the parking of a trailer in an individual lot not in a trailer camp or park.

September 3, 1969

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

This is in reply to your letter of August 18, 1969, which reads as follows:

"Section 35-64.5 allowing the County to impose an annual license on the operator or owner of any trailer park or trailer camp or person parking a trailer in an individual lot not in a trailer camp or park states that it must be uniform in its application. Would this uniform application allow a County imposing a license tax on any person, firm or corporation operating a trailer park to exempt a person parking a trailer in an individual lot not in a trailer park or camp from the payment of the license tax if the ordinance so stated this exemption?"

The authority for governing bodies of political subdivisions of the State to levy and collect license taxes upon the operation of trailer camps and trailer parks and the parking of trailers in individual lots not in a trailer park or camp is found in Section 35-64.1 of the Code, which reads as follows:

"The governing body of any political subdivision in this State is authorized to levy, and to provide for the assessment and collection of, license taxes upon the operation of trailer camps and trailer parks and the parking of individual trailers in individual lots not in trailer parks or camps."

The authority granted in this Section is to levy and collect license taxes upon the operation of trailer camps and trailer parks and the parking of individual trailers not in a trailer park or camp. The operations listed are in the conjunctive rather than the disjunctive. Therefore, I am of the opinion that it was the intent of the General Assembly in adopting this language to prohibit the exemption of any one of the three operations from an ordinance of the county once the ordinance was adopted. Therefore, it would be improper for an ordinance adopted by a county levying a license tax under Section 35-64.1 of the Code to exempt a person parking a trailer in an individual lot not in a trailer park from the payment of the license tax.

COUNTIES—Prohibition of Traffic Over Streets—Limited to streets under their jurisdiction.

HIGHWAYS—Streets in Counties—Prohibition of traffic over—Limitations.

July 17, 1969

HONORABLE LEE R. GORDON
Commonwealth Attorney for Chesterfield County

This is in reply to your letter of June 2, 1969, which reads as follows:

"The Chesterfield County Board of Supervisors have expressed a desire to enact an ordinance prohibiting the use of motor trucks and private carriers for hire on certain designated streets within the County."
'Under the 1968 amendment, the words, 'under their jurisdiction' were added to this section. Do these words mean 'within their political subdivision' or do they mean only such streets or roads that are owned and maintained by a political subdivision and not under the jurisdiction of the Highway Department? If the more restricted interpretation was intended and is applied, will the Highway Department entertain a resolution from a political subdivision to make effective restrictions on the use of certain streets?'

Section 46.1-181 of the Code of Virginia (1950), as amended, to which you refer, provides:

§ 46.1-181. Local regulation of trucks and carriers.—The governing bodies of counties, cities and towns may by ordinance, whenever in their judgment conditions so require:

(a) Prohibit the use of motortrucks, except for the purpose of receiving loads or making deliveries on certain designated streets under their jurisdiction;
(b) Restrict the use of motortrucks passing through the city or town to such street or streets under their jurisdiction;
(c) Prohibit the use of certain designated streets under their jurisdiction by private carriers for hire as well as common carriers, except for the purpose of receiving passengers or goods or making deliveries. (Code 1950, § 46-206; 1958, c. 541; 1968, c. 463.)

The 1968 amendment to this statute inserted "under their jurisdiction" in sections (a), (b) and (c) of this statute; the impact of this 1968 amendment on the statute is dispositive of the first question posed in your letter.

It is elementary that the governing body of town, city or county in the absence of special authority granted by the Constitution of Statutes of the Commonwealth, exercises jurisdiction only within the boundaries of the particular locality, and has no authority to exercise its police power outside its geographical limits. No such special statute or constitutional provision existed prior to the 1968 amendment, nor does such provision exist now which would confer upon a locality the authority to prohibit or regulate traffic of trucks or commercial carriers for hire outside its territorial limits. Accordingly, if the General Assembly by adding in 1968 the restrictive wording, "under their jurisdiction" intended to limit the authority of localities to the regulation and restriction of the traffic of motortrucks and commercial carriers on streets and roads within the geographical boundaries of such localities then the General Assembly has performed a needless act; it must be presumed that the purpose of the General Assembly was otherwise.

The most accurate interpretation of the intent of the legislature in enacting the 1968 amendment may best be reached by comparing the language employed in such amendment with that which is utilized in other sections of the Code which grant to the governing bodies of localities the authority to regulate traffic on the highways of such localities. Section 46.1-180 (a) which grants to local governing bodies the general authority to regulate traffic states:

"In counties, cities and towns the governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities, and towns not in conflict with the provisions of this title and may repeal, amend or modify such ordinances and may erect appropriate signs or markers on the highway showing the general regulations applicable to the operation of vehicles on such highways. No governing body of any county, city or town may:
“(1) Increase or decrease the speed limit *within their boundaries* unless such increase or decrease in speed shall be based upon an engineering and traffic investigation by such county, city or town and unless such speed area or zone is clearly indicated by markers or signs.

“(2) Enact ordinances requiring vehicles to come to a full stop or yield the right-of-way at a street intersection if *one or more of such intersecting streets has been designated as a part of the State highway system* in a town which has a population of less than thirty-five hundred people.” (Emphasis added.)

It is obvious from the language employed by the legislature that the authority conferred by the above section extends to all highways within the geographical limits of the locality. It is equally apparent that when this general authority was intended to be limited to certain streets within the geographical limits of a locality the legislature specifically so stated, as can be seen in the above emphasized wording in subsection (2). This specific language in the above subsection (2) was again employed in § 46.1-180.1, exempting under certain conditions intersections involving a street that “has been designated a part of the State Highway System” from the provisions of that section.

In § 46.1-180.2 of the Code the legislature granted to the governing body of a county, city or town the authority to “regulate the operation of vehicles on the highways in such county, city or town in the event of snow, sleet, hail, freezing rain, ice, water, flood, high wind or storm or the threat thereof.” (Emphasis added.) It is again apparent from the language chosen in this section that the general power conferred by this section, and its subsections, was intended to extend to all the streets and highways within the geographical limits of the particular county, city or town.

The words “under their jurisdiction” which the 1968 amendment added to sections (a), (b) and (c) of § 46.1-181 when viewed in comparison with the specific language employed in the above sections clearly indicate that it was the deliberate intent of the General Assembly in 1968 to limit the authority previously conferred on governing bodies of counties, cities and towns to regulate or restrict traffic of trucks and commercial carriers. Had the General Assembly intended to allow local authorities to regulate or restrict traffic of trucks and commercial carriers on all streets within the geographical limits of the locality it would have chosen appropriate language reflecting such an intent, as it did in section 46.1-180 (a) and 46.1-180.2 discussed above. To answer your question specifically, it is my opinion that the words “under their jurisdiction” as added in the 1968 amendment, do not mean “within their political subdivision”; but do mean streets or roads that are not under the jurisdiction of the Highway Department.

Pursuant to § 33-12(3) of the Code of Virginia, the State Highway Commission has the power and duty to “make rules and regulations, from time to time, not in conflict with the laws of this State, for the protection of and covering traffic on and the use of the State Highway System and Secondary System and to add to, amend or repeal the same. Accordingly, the Highway Commission may entertain, review and consider a resolution submitted in proper form to make effective restrictions on the use of certain streets by motortrucks and carriers for hire.

COUNTIES—Torts—Immune from liability for fire escaping from public dump.

TORTS—Immunity—Employees of county liable when arising from performance of ministerial duties—Not protected for negligence in allowing fire to escape from public dump.
HONORABLE S. PAGE HIGGINBOTHAM  
Commonwealth's Attorney for Orange County  

This is to acknowledge receipt of your letter of April 24, 1970, in which you state in part:

"We would appreciate an opinion from your office as to the liability of the county or county employees for negligence in allowing a fire to escape from the Orange County Public Dump."

A county, like the State, enjoys absolute immunity from suit for torts committed by its agents and employees. Mann v. Arlington County, 199 Va. 169, 98 S.E.2d 515.

It is my opinion there is no liability on the County resulting from a fire escaping from a public dump.

However, employees of a county are liable for their torts arising from the performance of their duties which are purely ministerial. Wynn v. Gandy, 170 Va. 590, 197 S.E. 527. Enclosed herewith is a copy of an opinion expressed in a letter to the Honorable Harry G. Lawson dated July 11, 1966 [Annual report of the Attorney General (1966-1967), page 311].

I am therefore of the opinion that government immunity does not protect county employees from damages resulting from negligence in allowing a fire to escape from a public dump.

COUNTIES—Torts—Not authorized to purchase liability insurance.

BOARDS OF SUPERVISORS—Not authorized to Purchase Liability Insurance.

TORTS—Counties—Not authorized to purchase liability insurance.

HONORABLE ERNEST W. GOODRICH  
Commonwealth's Attorney for Surry County  

This is to acknowledge receipt of your letter of May 21, 1970, in which you state in part:

"The county is in the process of acquiring a radio tower for use by the law enforcement department here in the county. The question has arisen as to whether or not liability insurance should be carried on this tower.

* * *

"In view of the current tendency to limit the immunity enjoyed by political subdivisions of the State and because of the risk involved in maintaining this tower, the Board of Supervisors of this county would like an opinion from your office as to whether or not the payment of premiums on a liability policy would be a proper expenditure of public funds. As I indicated, I am aware that the office has previously ruled that such expenditure would not be proper."

The ruling to which you refer in the last quoted paragraph was expressed in a letter to the Honorable Stirling M. Harrison dated February 4, 1966 [Annual Report of the Attorney General (1965-1966), p. 67], a copy of which is enclosed.

The only statute relating to this subject of which I am aware is § 15.1-506.1, Code of Virginia (1960), as amended. This statute was enacted by
Chapter 421, Acts of 1966, and amended by Chapter 427, Acts of 1970, and reads as follows:

"In any county having a population of over two hundred forty thousand inhabitants, the board of county supervisors may provide liability insurance, or may provide self-insurance, for certain or all of its officers and employees in the administrative service of the county to cover negligent acts committed or alleged to be committed while discharging their duties. The liability insurance coverage shall be placed with insurance companies authorized to do business in this State by the State Corporation Commission, on a competitive bidding basis."

Obviously the statute which is applicable only to certain counties would not authorize the county of Surry to expend public funds to carry liability insurance.

I am of the opinion that an expenditure for liability insurance by counties not within the purview of § 15.1-506.1 of the Code would not be lawful until specifically authorized by the General Assembly.

COUNTIES, CITIES AND TOWNS—Streets—Grant of right of way to corporation to bury transmission lines—Procedure depends on nature of right to be conferred.

May 5, 1970

HONORABLE RICHARD D. GUY
Member, House of Delegates

This is in reply to your letter of April 23, 1970, which reads as follows:

"Your opinion is requested with respect to the following set of circumstances.

"A corporation seeks to be engaged in the business of transporting fuel oil between two points wholly within the City of Virginia Beach. The fuel is owned by the United States, which is the sole customer of the Corporation. Further, the Corporation is not regulated by the State Corporation Commission.

"The Corporation desires to use the rights of way of several streets in the City in order to bury its transmission lines. All of the affected streets are supported for maintenance by the State Highway Department, and they were, prior to the merger of Princess Anne County and the City of Virginia Beach on January 1, 1963, a part of the State Highway System and maintained directly by the State.

"Under this set of circumstances, must permission to use the public right of way be granted pursuant to the provisions of Sec. 15.1-307, Code of Virginia, or may the City grant a permit pursuant to the provisions of Secs. 15.1-892, -893? What is the effect of Sec. 15.1-896?"

Whether or not the City should proceed pursuant to the provisions of § 15.1-307 or § 15.1-892 would depend upon the nature of the right to be conferred by the City. If the City intends to grant a property right such as an easement or lease, it is my opinion that such grant would have to be pursuant to § 15.1-307; however, should the City intend to grant a mere license, it is my opinion that such grant may be given pursuant to § 15.1-892.

It is further my opinion that § 15.1-896 is of no effect since, it would appear from your letters the affected streets are not a part of any of the State Highway Systems.
COUNTIES, CITIES AND TOWNS—Virginia Area Development Act—Service district—Created upon approval of all members of planning districts.

VIRGINIA AREA DEVELOPMENT ACT—Service Districts—May not be created without approval of all members of planning district.

April 22, 1970

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of March 26, 1970, in which you present the following questions regarding the creation of a service district pursuant to the Virginia Area Redevelopment Act, Chapter 34 of Title 15.1 of the Code:

"1. In the event two or more of the governmental subdivisions in the planning district with a majority of the population vote to create a service district, what would be the effect on the remaining three subdivisions? That is, would the remaining subdivisions, under Section 15.1-1432, be merged into the service district, where the voters in the remaining subdivisions defeated the proposal for a service district or would they be excluded from the service district?"

"2. What would then happen to the planning district?"

The Division of State Planning and Community Affairs establishes the boundaries of planning districts. See, § 15.1-1403. The governing bodies of the political subdivisions comprising the planning district may then elect to form a planning district commission. One of the duties of the commission is the promulgation of plans for creation of a service district pursuant to §§ 15.1-1420, et seq.

After the planning district commission promulgates a plan for a service district, the service district is created upon the approval of each of the governmental subdivisions in the planning district. If all members of the planning district do not approve creation of the service district the plan fails.

Section 15.1-1421 provides in part that,

"No plan shall be promulgated which does not include two or more governmental subdivisions embracing the majority of the population within the planning district and all the governmental subdivisions which are parties to the planning district commission charter."

This wording of the statute is probably due to the fact that all members of a planning district may not be parties to the planning district charter. However, it is the clear intent of § 15.1-1420 that all members of a planning district approve the creation of a service district. Section 15.1-1421 does not require the plan to be promulgated by all members of the planning district commission. However, it is not to be interpreted as permitting two or more subdivisions to create a service district.

The reply to your questions would then be that to organize a service district commission, unanimous agreement by referendum is required from all local governments which are parties to a planning district. Once organized, a service district commission merges with the planning district commission, and becomes the planning division of the service district commission. This is provided in § 15.1-1432, to which you refer.

COURTSM—Suspension of Sentence Where One Runs Concurrently With Another—Computation of sentence where revocation proceeding held on one sentence.

PRISONERS—Sentences—Suspension of one where it runs concurrently with another—How computed.
HONORABLE JAMES PENDLETON BABER  
Commonwealth's Attorney for Cumberland County

I am in receipt of your letter of September 27, 1969, in which the following factual situation is presented:

On April 7, 1967, "X" was convicted of a felony and sentenced by the Fluvanna Circuit Court to confinement in the penitentiary for a period of two years. The execution of said sentence was suspended and "X" was placed on probation for a period of four years.

On April 25, 1967, "X" was convicted of another felony by the Cumberland Circuit Court and received a like two year suspended sentence and four year probationary period. The order of the Cumberland Court further provided that "said term of two years is to run concurrently with any sentence he has received in another county or may receive within the next six months."

On January 28, 1969, "X" was arrested in Fluvanna on a charge of unauthorized use of a vehicle. He was subsequently convicted, given a twelve month jail sentence and his April 7, 1967, Fluvanna sentence was revoked.

In September 1969 the Cumberland Court revoked one year of the April 25, 1967 two-year suspended sentence, the remaining year left suspended, to be revoked and served upon any subsequent violation of the condition of suspension.

The questions you raise are as follows:

"1. Whether the fact that the April 25 order states that the sentence is to run concurrently with the Fluvanna sentence requires that the service thereof be computed from January 28, 1969 (the date the Fluvanna sentence began) even though the revocation proceeding was not held until September 1969.

"2. Whether the fact that the order of April 25 states that the sentence runs concurrently with the Fluvanna sentence requires that the time begin to run even though no revocation proceedings were ever held in Cumberland.

"3. The Cumberland court having revoked only one year of its sentence, the question then arises as to whether the remaining year could at a later time, upon subsequent breach of the conditions of suspension, be revoked, and the defendant required to serve this additional year, even though the full term of the Fluvanna sentence had then been served."

Your first two questions are answered in the negative. I am of the opinion that the term of the revoked Cumberland sentence could not commence until the date of judgment revoking such suspension. [See §§ 53-207 and 53-275 of the Code of Virginia (1950), as amended.] Service of the revoked suspension would be concurrent with any other sentence "X" was then serving which fell within the terms of the proviso of the Cumberland order, in this case the original Fluvanna sentence.

Your third question is answered in the affirmative. The suspension and revocation of sentences are in the sound discretion of the trial Court. Only that portion of the suspended sentence which was revoked would have to be served. The remaining year could be subsequently revoked within the original period of probation and such sentence would be served concurrently only if "X" was serving a sentence he had received prior to April 25, 1967, or within six months of such date.

COURTS—Trial—Adjournment of—Limited to periods of ten days.

COURTS—Trial—Adjournment—May adjourn for additional period of ten days if valid reason.
REPORT OF THE ATTORNEY GENERAL

COURTS—Trial—Pending—Term "pending before him" includes trial as well as preliminary examination.

October 22, 1969

HONORABLE W. BYRON KEELING
Commonwealth's Attorney for Charlotte County

This is in reply to your letter of October 9, 1969, in which you refer to § 19.1-102 of the Code of Virginia and present the questions which I quote, as follows:

"Does the phrase 'not exceeding ten days at one time' mean that the trial judge may adjourn the trial for ten days and on the tenth day entertain a motion to adjourn and order an adjournment for an additional period of ten days, etc., so as to allow the Commonwealth an opportunity to have the chief prosecuting witness present in court to testify? Or does it mean that the judge may only adjourn the trial for one ten-day period?

"Does the phrase 'pending before him' mean that the trial must have already started or does it mean simply that a warrant has been issued or an offense has been charged against the accused?"

In absence of statutory control, certainly the continuance or postponement of a trial is in the sound discretion of the trial court. It is stated in 22A C.J.S. Criminal Law, 482, that the granting or refusing of a continuance on motion of the accused or the State, or ex mero motu, rests largely in the sound discretion of the trial court.

The wording and history of the statute now embodied in § 19.1-102, as well as its location in the Code, show a primary association with examination of a person for the purpose of determining the charge, if any, to be placed against him. The use of the word "trial," however, indicates the inclusion of a trial as well as a preliminary examination. It appears, therefore, that whereas the general authorities place a wide discretion in such matters, adjournment of a trial is limited by this statute to ten days at one time.

In my opinion, where a trial has been adjourned for one period of ten days the court may then adjourn it for additional periods of ten days. In view of the constitutional right of an accused to a speedy trial, of course, there must be valid reason for any adjournment. When it is because of the physical inability of the witness to attend it must be shown that the testimony of such witness is essential and not merely cumulative and that the witness may be expected to testify at a later date. Unless the court has actual knowledge of the reasons for postponement, affidavits are generally required.

In regard to your last question, as I have previously indicated, I believe the phrase "pending before him," as used in this section, has reference to the examination of an accused to determine the charges, if any, as well as to a trial, from its inception until the rendition of final judgment.

COURTS NOT OF RECORD—Expenses—State not responsible for postage necessary for use of county court.

February 16, 1970

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

This is in reply to your letter of February 3, 1970, in which you quote § 16.1-49 of the Code of Virginia, requiring the State to furnish certain "books, stationery and supplies" necessary for the efficient operation of county courts in counties having a density of population not in excess of 5000 per square mile, and raise the question of whether the County or the
State is responsible for furnishing postage necessary for the use of such courts. This section has been interpreted not to include postage. An opinion touching directly on the point is found in the Report of the Attorney General (1962-1963), at page 43, which expresses the view that postage is not included within the term "supplies" as used in this statute and § 16.1-153 pertaining to juvenile and domestic relations courts in counties of such category as to density of population. A copy of that opinion is enclosed.

The year following publication of that opinion, in amending the law in respect to regional juvenile and domestic relations courts by Chapter 135, Acts of Assembly of 1964, § 16.1-143.2 was enacted to specifically provide for the payment of postage by the State. As no similar provision was added to either § 16.1-49 or § 16.1-153, regarding county courts and local juvenile and domestic relations courts, it must be presumed that the above interpretation is in accordance with the legislative intent. In my opinion, therefore, the County is responsible for this expense.

CRIMES—Abduction—Extraditable offense.

CRIMINAL PROCEDURE—Extradition for Abduction—Parent may be extradicted unless in contempt of court.

CRIMINAL PROCEDURE—Extradition for Abduction—No duty on State to return abducted child.

HONORABLE WILLARD M. ROBINSON, JR.
Commonwealth's Attorney for Newport News

May 26, 1970

This is to acknowledge receipt of your letter of May 19, 1970, in which you request my opinion on several questions. I shall answer them seriatim:

"(1) Does 18.1-37 make the abduction a misdemeanor and non-extraditable?"


Section 18.1-36 reads as follows:

"Abduction for which no punishment is otherwise prescribed shall be punished by confinement in the penitentiary for not less than one year nor more than twenty years, or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for not more than twelve months or a fine of not more than one thousand dollars, either or both; provided, however, that such offense, if committed by the parent of the person abducted and not punishable as contempt of court in any proceeding then pending, shall be a misdemeanor." (Italicizing supplied.)

In order that a person be guilty of a felony and therefore extraditable, it must be shown that the action of the parent in abducting the child can be punished as contempt. This would mean the the person having custody of the child would have to have been given that custody by a court of competent jurisdiction, either in a divorce proceeding or a proceeding before a Juvenile & Domestic Relations Court before the parent abducting the child from the person could be found guilty of a felony.
I am therefore of the opinion that abduction is an extraditable offense but if committed by a parent the offense is a misdemeanor unless it can be shown that the parent abducting the child can be punished for contempt of the court which awarded custody to the person in charge of the child.

"(2) Does the fact that custody has been awarded by a court in a foreign state alter this opinion?"

Full faith and credit must be given the order of the court of the foreign state granting custody, otherwise the purpose of the statute would be defeated. The question is therefore answered in the negative.

"(3) Is there any provision for the state to return the children, who were the victims, when the parent is placed in custody on our charge of abduction?"

I know of no statute that would place the duty in the foreign state to return the abducted child to Virginia.

CRIMES—Cruelty to Animals—Experiments conducted by high school science departments exempted.

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

February 24, 1970

This will acknowledge receipt of your letter of February 20, 1970, in which you describe various experiments conducted with live animals by high school science departments. You inquire whether such experiments are in violation of § 18.1-216 of the Code of Virginia, which reads in pertinent part:

"Any person who (1) overrides, overdrives, overloads, tortures, ill-treats, abandons, willfully inflicts inhumane injury or pain not connected with bona fide scientific or medical experimentation to, or cruelly or unnecessarily beats, maims, mutilates, or kills any animal, whether belonging to himself or another, or deprives any animal of necessary sustenance, food, or drink, or causes any of the above things, or being the owner of such animal permits such acts to be done by another . . . shall be guilty of a misdemeanor . . . ."

The foregoing language of the statute specifically exempts medical and scientific experimentation from the provisions of the statute. It is my opinion that experiments conducted by high school science classes are scientific experimentation within the meaning of § 18.1-216 and therefore do not violate the provisions of the chapter.

CRIMES—Drunkenness in Public—May be charged when accused is on front porch of home.

GAME AND INLAND FISHERIES—Game Wardens—May search without search warrant incident to arrest.

MOTOR VEHICLES—Traffic Violations—Speeding—May be charged by officer traveling in opposite direction.

BAIL—Release on Personal Recognizance—Authority in Justice of Peace must be given by judge—Health of prisoner may be considered.

BAIL—Accused—May be released on bond even though AWOL from military service.
HONORABLE E. R. HUBBARD
Justice of the Peace for Wise County

May 6, 1970

This is in reply to your letter dated April 17, 1970, in which you request my opinion on several questions which, for the sake of convenience, I shall paraphrase and answer seriatim.

(1) Can a person be charged with public drunkenness when he is on the front porch of his home?

Answer: Yes, if the facts and circumstances are such that the rule stated in Hackney v. Commonwealth, 186 Va. 888, 892, 45 S.E. 2d 241, 242 (1947) can be applied to the particular case.

(2) Can a game warden at any time while a person is in his vehicle, while said vehicle is upon a public highway, conduct a search without a search warrant?

Answer: I direct your attention to §§ 29-32 and 29-33 of the Code of Virginia (1950), as amended, which deal with powers of game wardens with regard to arrests, searches and seizures. Section 29-32 vests with game wardens the authority "to arrest any person found in the act of violating any of the provisions of the hunting, trapping, inland fish and dog laws." (Emphasis added.) Section 29-33 provides, in part, that game wardens may "search any person arrested as provided in the preceding section (§ 29-32) ... and to enter and search any ... vehicle, car, ... or other place of whatsoever nature in which the officer making such search has reasonable ground to believe that the person arrested has concealed or placed any wild bird, wild animal or fish, which will furnish evidence of a violation ... and such search may be made without a warrant ... ." (Emphasis added.)

Therefore, inasmuch that by statute a game warden may make a warrantless arrest and search of any person found violating, in the game warden's presence, any provision of the hunting, trapping, inland fish and dog laws, and that these acts could conceivably transpire upon a public highway, the answer to your question is in the affirmative.

(3) Can an officer of the law charge a person with speeding when the officer is going West and the driver charged is going East, or does the officer have to follow and clock the speed of the offender?

Answer: I am unable to find any requirement that a police officer "clock" a motorist before charging him with the violation of speeding. I am also unaware of any prohibition against charging a motorist with speeding upon the observation by a police officer traveling in the opposite direction. If in the officer's mind he has reasonable grounds to believe that the motorist was, in fact, exceeding the speed limit that officer may so charge the motorist, but the ultimate determination of whether the speed was excessive, in a case such as you present, is then a matter of fact which must be determined by the trier of fact.

(4) Can a Justice of the Peace allow a person the right to sign his or her own bond, when such a person is a diabetic or is sick, or does such person described have to be released by the jailor, who is on duty at the time?

Answer: Pursuant to Section 19.1-110(a) of the Code of Virginia (1950), as amended, a justice of the peace has power to release a person charged
with a misdemeanor on his own recognizance, without security, only if so authorized by the judge of any municipal or county court not of record having jurisdiction. It is further provided that "[n]otwithstanding the provisions of § 19.1-127, the judge of such municipal or county court, may prescribe the regulations and requirements to be observed by the justices of the peace in releasing persons charged with a misdemeanor on their own recognizance without security . . . ." In this regard, the health of the prisoner is one of the factors which might be considered and made part of the above-mentioned regulations promulgated by the judge of the municipal or county court. [For a discussion along these lines, see 8 Am. Jur. 2d Bail and Recognizance § 41 at 808 (1963).]

In any event, whether charged with a bailable offense or not, §§ 53-184 and 53-185 of the Code provide for medical services for those confined to jail; thus a person so confined is always to be afforded proper medical attention should he become ill.

(5) Can a person who is in custody and confined in jail on any charge, and such person is also AWOL from the service, make bond?

Answer: Section 19.1-110 provides, in part, as follows: (a) That a justice of the peace before whom a person charged with a misdemeanor is brought "shall set bail in a reasonable amount . . . to secure the appearance of such person before the applicable court not of record. If such person is unable to obtain bail he shall be committed to jail . . . ."

"(b) If the offense charged is a felony such person shall be committed to jail . . . provided that a justice of the peace may admit such person 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 of the city or county wherein the justice of the peace has jurisdiction."

"(c) No justice of the peace shall admit any person to bail who has been committed . . . ."

Upon examination of the above cited provisions of Section 19.1-110, it is clear that before a justice of the peace can release any person on bail the offense charged must be a bailable offense within the scope of that section. If the offense charged is bailable but the person so charged is also absent without leave from the armed forces, should bail be denied this person because of his military status?

Absence without leave is a military crime and federal law provides that any civil officer having authority to apprehend an offender under the laws of a state may summarily apprehend a deserter from the armed forces and deliver him into the custody of those appropriate officers. [10 U.S.C. Section 808(8).] At least one state court has held that this federal statute gives a constable not only the right to arrest a deserter, but imposes a duty to do so, thereby leaving the fair implication that there is an equal duty to deliver the deserter to the proper authorities. [See Boatwright v. State, 120 Miss. 883, 83 So. 311 (1919).] Although this interpretation is persuasive, I do not find it compelling in this instance in view of the fact that while the Mississippi Court has so construed the federal statute an equally reasonable interpretation could be that the language is permissive and not mandatory; on the other hand, Section 19.1-110(a) of the Code of Virginia, as we have seen, provides that in a case where a misdemeanor is charged the justice of the peace "shall set bail . . . ." (Emphasis added.)

While it is my opinion that a person should not be denied bail merely because of his military status, one of the factors a justice of the peace might appropriately consider when he sets bail to insure the person's appearance in court would be the fact that the party to be released on bail is also charged with a military crime, the essence of which is unlawful flight.
(6) When a person owes a fine and court costs and a capias is issued on him, can he be bonded by the Justice of the Peace, or does the judge who issued the capias have to release him from jail?

Answer: Under the provisions of Section 19.1-110 of the Code of Virginia (1950), as amended, a justice of the peace can release such an individual except that under subsection (c) of that statute the justice of the peace shall not "admit any person to bail who has been committed by a court, nor shall any person committed by order of a justice of the peace be admitted to bail by any other justice of the peace in a less sum than was required by such order." (Emphasis added.)

(7) Can a capias expire?

Answer: No.

CRIMES — Petty Larceny — Third offense constitutes felony — Section 19.1-293 applies to other statutory crimes constituting larceny.

March 11, 1970

HONORABLE WILLIAM H. FULLER, III
Commonwealth's Attorney for City of Danville

I am in receipt of your letter of February 25, 1970, wherein you inquire if § 19.1-293 of the Code of Virginia (1950), as amended, which makes third offense petty larceny a felony is applicable only to the petty larceny statute (§ 18.1-101), or is it also applicable to the various other statutes which declare what constitutes larceny, specifically, § 6.1-115, which declares the uttering of a bad check, larceny.

I am of the opinion that § 19.1-293 would be applicable to § 6.1-115. Enclosed herewith is a former opinion of this office to the Honorable Jack F. DePoy, Attorney for the Commonwealth for Rockingham County, dated February 17, 1969, found in the Annual Report of the Attorney General (1968-1969) at page 98. While not directly answering your inquiry, this opinion did express the view that an individual who issued a number of bad checks and left the Commonwealth, could be extradited and tried as a felon.

Statutes such as § 19.1-293 create no new offense but rather a status, subjecting one to a heavier penalty. They are highly penal and must be construed strictly against the Commonwealth. Tyson v. Hening, 205 Va. 389, 395, 136 S.E.2d 832 (1964). However, the underlying and paramount purpose of the statute is to protect society from habitual criminals and to impose further punishment against that particular class of offenders. If a construction of the statute against the Commonwealth results in an interpretation so narrow as to be unreasonable, it must be rejected. Wesley v. Commonwealth, 190 Va. 268, 276, 56 S.E. 2d 362 (1949).

Larceny embraces many statutory crimes, including among others, receipt of stolen property (§ 18.1-107); embezzlement (§ 18.1-109); obtaining money by false pretenses (§ 18.1-118); and uttering a bad check (§ 6.1-115). Also, as you point out, § 18.1-126 which deals with concealed merchandise and does not now come within the meaning of § 19.1-293, is, by House Bill No. 287, being amended so that concealment of merchandise will be deemed larceny.

Since the legislature has seen fit to classify larceny as it has, then an interpretation of § 19.1-293 which would limit its applicability as suggested would be unreasonable within the meaning of Wesley v. Commonwealth, supra.

CRIMES—Use of Profane or Indecent Language over Telephone—Duty of telephone company to furnish certain information.
CRIMES—Giving Certain False Information Over Telephone or Causing Telephone to Ring With Intent to Annoy—Telephone company’s duty under § 18.1-238 not extended to § 18.1-238.1 or § 18.1-238.2.

December 17, 1969

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

This is in response to your letter of November 25, 1969, in which you refer to § 18.1-238 of the Virginia Code, which reads in part as follows:

“If any person shall curse or abuse anyone, or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor . . . It shall be the duty of each telephone company in this State to furnish immediately in response to a subpoena issued by a court of record such information as it, its officers and employees, may possess which, in the opinion of the court, may aid in the apprehension of persons suspected of violating the provisions of this section. Any telephone company or any officer or employee thereof who shall fail or refuse to furnish such information when so requested, may be fined not more than one hundred dollars.” (Emphasis added.)

You further make reference to § 18.1-238.1 which makes it a misdemeanor to falsely and maliciously advise another, over the telephone, of an injury to or disappearance of a third party; also § 18.1-238.2 which states that if any person should cause another’s telephone to ring with the intent to annoy and not converse, or condone such use of his telephone, he shall be guilty of a misdemeanor. It is important to note that the above language found in § 18.1-238, italicized above relating to the duty of telephone companies, is not contained in §§ 18.1-238.1 or 18.1-238.2 of the Virginia Code.

You inquire whether or not the language of § 18.1-238, directing a telephone company to furnish information to investigatory authorities, upon order of a court of record, may be extended to investigations of offenses under §§ 18.1-238.1 and 18.1-238.2.

I am constrained to believe that your inquiry should be answered in the negative. By its terms the statutory language in question is limited to situations involving “the apprehension of persons suspected of violating the provisions of this section” i.e., § 18.1-238 of the Virginia Code. (Emphasis supplied.) No phraseology similar to that contained in § 18.1-238 is present in § 18.1-238.1 or § 18.1-238.2 of the Virginia Code.

Moreover, a review of the legislative history of § 18.1-238.1 and § 18.1-238.2 reveals that these sections of the Virginia Code originated as HB 318 and HB 457, respectively, of the General Assembly of 1962. See, Acts of Assembly (1962) pp. 336, 822. As originally introduced, both bills contained provisions similar to that now found in the concluding two sentences of § 18.1-238. Such provisions were excluded from both bills, however, before their final passage as Chapter 225 and Chapter 495, respectively, of the Acts of Assembly of 1962. I believe that such action clearly indicates a legislative design not to extend the subject language of § 18.1-238 to situations arising under § 18.1-238.1 and § 18.1-238.2 of the Virginia Code.

CRIMINAL PROCEDURE—Arrest Without Warrant—Accused must be brought before officer authorized to issue warrants—Means personal confrontation.

JUSTICE OF PEACE—Duties—Issuing warrants and setting bonds or committing to jail—May not discharge by closed circuit television and radio communication.
March 11, 1970

HONORABLE FRANK E. SWAIN
Justice of the Peace for Pulaski County

This is in reply to your letter of February 18, 1970, in which you inquire whether or not a justice of the peace may discharge his duties of issuing warrants and setting bonds or committing to jail by means of closed circuit television and radio communications rather than by personal contact with the accused.

Section 19.1-100.1 of the Code of Virginia states 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 was made, unless such person is released on summons as provided by law". Section 19.1-110 states that "A justice of the peace before whom a person is brought charged with the commission of an offense, shall proceed according to the provision of § 19.1-100.1 if no warrant has been issued".

The word "brought" means "taken" or "carried". The word "before" means "in the presence of". See, Blacks Law Dictionary, Fourth Edition. The term "brought before" as used in these and related sections means a personal confrontation. Hence, it is my opinion that closed circuit television and radio communication may not be substituted for a personal appearance before a justice of the peace as required under the laws of this State. Your question, therefore, is answered in the negative.

CRIMINAL PROCEDURE — Blood Analysis — Implied consent — Accused must be arrested within two hours of alleged offense.

May 25, 1970

HONORABLE LESLIE D. CAMPBELL, JR.
Member, Senate of Virginia

This is in reply to your letter of May 15, 1970, from which I quote the following:

"Mr. H. E. Willaford, a Justice of the Peace for Middlesex County, Hardyville, Virginia, has requested that I write you with reference to the alcoholic blood test under Section 18.1-55.1 of the Code.

"Under the language of the Code, Mr. Willaford would like to know whether or not the two hour provision therein pertains to the time of arrest or the time of the alleged offense. A typical example would be: assume that Mr. Jones was involved in an automobile accident at 2:00 o'clock P.M. He had been drinking, but for some reason the officer did not arrest him until 4:30 P.M., at which time he was advised of his rights and took the blood test at 4:40 P.M. Under these circumstances, would the results of the blood test be admissible under Section 18.1-55.1 of the Code?"

In regard to the question raised, paragraph (b) of § 18.1-55.1 of the Code of Virginia provides as follows:

"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."

The two hour provision in the quoted paragraph pertains to the time between the offense and the arrest. In the given situation more than two
hours, i.e. from 2:00 p.m. to 4:30 p.m., elapsed between the time of the offense and the time of arrest. In my opinion, therefore, § 18.1-55.1 would not be applicable and your question as to whether the blood test would be admissible under § 18.1-55.1 is answered in the negative. This office has consistently ruled that neither this section nor its forerunner, § 18.1-55, would have any application unless the arrest is made within two hours of the offense.

This section, however, imposes no limitation with reference to the time within which a sample of the blood of the accused is to be taken. Hence, the question presented in Mr. Willaford's letter of May 16, 1970 regarding the admissibility of the blood test under § 18.1-55.1 where less than two hours elapsed between the time of the offense and the time of the arrest and the request by the accused, is answered in the affirmative, even though the blood test was not taken until more than two hours after the offense. See, Reports of the Attorney General (1965-1966) p. 170 and (1966-1967) p. 176.

CRIMINAL PROCEDURE—Blood Analysis—Independent Analysis—Disqualified laboratories on official list—Accused not prejudiced if qualified laboratories make analysis.

April 3, 1970

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

I am in receipt of your letter of April 1, 1970, wherein you refer to a previous opinion of this office to the Honorable Oliver D. Rudy dated February 16, 1970, found in the Report of the Attorney General (1969-1970), p. —, wherein we ruled that since the Chief Medical Examiner had a financial interest in certain laboratories listed on the approved list for blood alcohol analysis proceedings that analyses made by such laboratories were not "independent" within the meaning of § 18.1-55.1 (d 1) of the Code of Virginia (1950), as amended.

You state that you are now confronted with three cases of drunk driving in which qualified laboratories made the independent blood analysis but request "an opinion as to whether the use of blood analysis obtained while disqualified laboratories were upon the official list deprives the accused of his liberty because the result is arbitrary and capricious and denies the accused due process of law and equal protection of the laws contrary to the State and Federal Constitutions."

Your inquiry is answered in the negative. Section 18.1-55.1 (s) clearly states that the steps set forth to obtain a blood analysis are procedural in nature and not substantive.

CRIMINAL PROCEDURE—Blood Analysis—Laboratories approved for independent analysis—not restricted to clinical laboratories operated in support of practice of medicine.

March 30, 1970

HONORABLE MACK I. SHANHOLTZ
State Health Commissioner

By letter of March 13, 1970, you requested my opinion concerning whether laboratories approved by your office for independent analysis of blood samples pursuant to the provisions of Section 18.1-55.1, Code of Virginia (1950), should be restricted to clinical laboratories which are operated in support of the practice of medicine.

Section 18.1-55.1 states in its title and substantive provisions that the determination of the alcoholic content of blood samples shall be by chemical tests. Paragraph (d 1) of this section provides that an accused may direct
that a sample of his blood be sent to an approved laboratory for independent analysis. Paragraph (e) provides that the certificate pertaining to the results of the independent analysis shall be received in evidence, "... when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner."

The reference to a pathologist, above quoted, does not in itself restrict the laboratories to be approved, since the quoted language is directed to a point of procedure and does not limit the certification of the results of analysis to a pathologist. Therefore, upon consideration of the terms of this section as a whole, it is my opinion that approval of laboratories is not restricted to clinical laboratories operated in support of the practice of medicine.

CRIMINAL PROCEDURE—Campus Police—Authority and jurisdiction in off-campus searches and arrests.

May 27, 1970

DR. WARREN W. BRANDT, President
Virginia Commonwealth University

In response to your previous inquiry, I have reviewed the authority and jurisdiction of the VCU campus police with regard to their participation in off-campus searches and arrests.

The campus police are appointed pursuant to § 19.1-28(3) of the Code, authorizing the appointment of conservators of the peace for colleges and universities. Under the statute, the jurisdiction of such police may extend to the streets and sidewalks adjacent to campus property, and such is the case in the appointment of the VCU police. Pursuant to § 19.1-30 of the Code, such policemen may exercise the powers conferred on special policemen for counties by §§ 15.1-152 and 15.1-153. These statutes confer statewide jurisdiction on officers in pursuit of persons accused of crime, authorize execution of search warrants, and authorize arrest without a warrant for offenses committed in the presence of the officer. Such officers may require any persons to aid in making an arrest.

Campus police would not be prohibited from accompanying law enforcement officers of cities, towns, and counties in conducting searches and making arrests beyond the designated jurisdiction of the campus police. The campus police would lack authority to obtain or execute search warrants beyond their jurisdiction. In view of the fact that the making of an arrest beyond the campus and the adjacent streets and sidewalks could interject additional legal issues into a prosecution, I could not recommend that such a practice be followed absent necessitous circumstances.

In the event that you have further question in this regard, I shall be most willing to meet with you to discuss the matter.


May 27, 1970

COLONEL H. W. BURGESS, Superintendent
Department of State Police

This is in reply to your letter of April 30, 1970, wherein you advise several questions have arisen as the result of the amendment of Section 19.1-19.3 of the Code of Virginia by the General Assembly at the 1970 session. This section, (the amendment of which becomes effective on June 26, 1970), requires the reporting to the Central Criminal Records Exchange "... of any arrest on a charge of treason or of any felony or of any offense punishable as a misdemeanor, except drunkenness, disorderly conduct,
and misdemeanors committed in violation of Title 46.1 or any similar ordinance of any county, city or town.” (The new language is italicized.) In addition to the information in the report, fingerprints are to be submitted.

At the present time, Section 19.1-19.3 requires reporting of specified offenses punishable as misdemeanors (“bribery; petit larceny; obtaining money or property under false pretenses; indecent exposure; vagrancy; or any violation of the laws relating to the manufacture, possession or sale of narcotics, prostitution, keeping of bawdy places, child abuse, or obscenity”).

You pose several questions which I shall answer seriatim.

“1. Does this amendment include all misdemeanor violations which are not specifically exempt, for example violations of Titles 56, 33, 15.1, 22 and 54?”

Since Section 19.1-19.3, as amended, specifies only the offenses which need not be reported, I am of the opinion that a report should be submitted when persons are arrested for any offense punishable as a misdemeanor, except arrests for the offenses specifically excluded. Accordingly arrests for violations of Titles 56, 33, 15.1, 22 and 54 are, in my opinion, reportable.

“2. Does the exclusion from reporting violations for disorderly conduct exclude all of the acts which constitute disorderly conduct under Sections 18.1-253.1 and 18.1-253.2?”

Sections 18.1-253.1 and 18.1-253.2 deal with offenses specifically designated as disorderly conduct offenses, and consequently I am of the opinion that arrests for violation of those sections do not require reports. Some of the language in Sections 18.1-253.1 and 18.1-253.2, however, would tend to encompass offenses other than disorderly conduct, and in the event that the arrest is made for violation of other statutes (such as Sections 18.1-254.01 to 18.1-254.12), I am of the opinion that the offense should be reported.

“3. Does the exclusion from reporting violations for drunkenness also exclude the reporting for violations of Section 18.1-54?”

Arrests for violation of Section 18.1-54 are, in my opinion, reportable offenses since that statute does not refer to drunkenness per se (which is exempt), but instead the reference is to the operation of an automobile while under the influence of alcohol (or drugs).

“4. Does the arresting officer have the authority to take the person arrested for any of the offenses mentioned to a different location for the purpose of fingerprinting either before or after a Summons is issued?”

I am of the opinion that the arrested person can be taken to another location for fingerprinting purposes. The officer must, of course, comply with the statutory procedures governing arrest. For your information, I am enclosing a copy of an opinion rendered by my predecessor dealing with the necessity of taking an arrested person before a magistrate in accordance with Section 19.1-100.1 (See Report of the Attorney General, 1968-1969, page 75, Opinion to Honorable Leroy Moran, dated December 18, 1968). If an arrest is made without a warrant, it would seem advisable to conduct a fingerprinting immediately following the issuance of a warrant by the magistrate. If the police officer issues the warrant, the fingerprinting should be conducted before there is any action on the part of the officer which would tend to relinquish custody of the person arrested, such as release of an arrested person in accordance with Section 46.1-178.

“5. If the answer to the preceding question is in the affirmative, how much force, if any, may be used to gain compliance?”
REPORT OF THE ATTORNEY GENERAL

Recently, the Virginia Supreme Court of Appeals considered the question of force used upon a suspect, who was stopped by a police officer during early morning hours near the scene of a crime and asked to identify himself. When the suspect refused and resisted, the court held he was guilty of obstructing an officer in the discharge of official duties, a misdemeanor specified under a local ordinance. I am of the opinion that the logical teachings of that case (Sullivan v. Commonwealth, 210 Va. 201) would allow a police officer, after making a lawful arrest, to use whatever force is necessary to conduct a fingerprinting, and if the person arrested should resist, the officer could make an additional charge under Section 18.1-310 of the Virginia Code, dealing, in part, with the obstruction of officers in the performance of their duties. Of course, if there is a local ordinance similar to that applied in Sullivan v. Commonwealth, noted above, a charge under said ordinance could be made.

CRIMINAL PROCEDURE—Driving While License Revoked—Conviction bars prosecution under § 46.1-387.8.

MOTOR VEHICLES—Habitual Offenders—Subsequent violations—Conviction of driving while license revoked bars prosecution under § 46.1-387.8.

May 22, 1970

HONORABLE SIDNEY BARNEY
Assistant Commonwealth’s Attorney for the City of Petersburg

This is in reply to your letter of May 5, 1970, which I quote, in part, as follows:

“A defendant was found to be a habitual offender pursuant to § 46.1-387.1, et seq. 1950 Code of Virginia as amended. Subsequently, he was arrested for driving on a revoked permit, tried in the Municipal Court, found guilty, fined and sentenced to ten days in jail, all of which he served. A copy of the operating record containing the information that the defendant was a habitual offender and that he had violated § 46.1-387.8 of the 1950 Code of Virginia as amended was sent by the Division of Motor Vehicles to the Commonwealth Attorney. Upon receipt of this information, the defendant was indicted by the grand jury for violation of the statute.

“At the trial, the attorney for the defendant raised the defense of double jeopardy pursuant to Code § 19.1-259 in that the defendant had been tried in Municipal Court and judged guilty. * * *

“Will you please let me know if there is double jeopardy based on the above set of facts and whether or not the Commonwealth can issue a warrant charging the defendant with driving after having found to be a habitual offender and proceed to try him according to statute, even though he had been tried previously in the Municipal Court.”

In regard to a situation in which the same act is a violation against two or more statutes or ordinances § 19.1-259 of the Code of Virginia states the following:

“If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute.”

The given facts show that the defendant was convicted of the misdemeanor of driving while his license to drive was revoked, in violation of
§ 46.1-350 of the Code of Virginia or a local ordinance paralleling this section. He was later indicted and brought to trial under § 46.1-387.8, which makes it a felony for a person to drive a motor vehicle while prohibited from driving by a court order issued pursuant to the habitual offender statutes.

The only act performed by the defendant was that of driving a motor vehicle while his privilege to drive was revoked. Under the existing conditions, therefore, the same act constituted the violation in both of the above named prosecutions and the facts necessary to convict on the second prosecution would necessarily have convicted on the first. Accordingly, I am of the opinion that the conviction of the misdemeanor was a bar to the later prosecution under the felony section. While § 19.1-259 has not been previously construed in regard to the habitual offender statutes, a similar construction was expressed in respect to the violations of driving without a license and driving while the license was revoked, in Report of the Attorney General (1966-1967) p. 106.

CRIMINAL PROCEDURE—Driving Without License or While License Revoked—Conviction of one bars prosecution under other. 

MOTOR VEHICLES—Driving Without License or While License Revoked—Conviction of one bars prosecution under other. January 29, 1970

HONORABLE VALENTINE W. SOUTHALL, Judge  
County Court of Amelia County

This is in reply to your letter of January 21, 1970, in which you relate the fact of conviction of a person for operating an automobile without a license and the subsequent charge that such person was operating the vehicle while his license was revoked. You pose the question of whether or not a conviction on a charge of driving with no operator's license precludes convicting such person of driving after his license to do so has been revoked, both charges arising out of the same incident.

This situation is controlled by Section 19.1-259 of the Code of Virginia, which states, in pertinent part, as follows:

"If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

Under the given facts, both charges arise from one act of driving on the highway while not permitted by law to do so. Since the same act constitutes the basis upon which both charges are predicated, I shall answer your question in the affirmative. This answer is consistent with an opinion given by my predecessor in office in reply to a similar question. A copy of that opinion, found in Report of the Attorney General (1966-1967), p. 106, is enclosed.

CRIMINAL PROCEDURE—Grand Jury—Witnesses—Certified public accountant may be summoned to examine records and give testimony. 

COSTS—Witness Allowance—Criminal case—Certified public accountant summoned by grand jury as expert—Paid by treasurer of county or corporation and refunded by State. February 5, 1970

HONORABLE WILLARD M. ROBINSON, JR.  
Commonwealth's Attorney for City of Newport News

This is in reply to your letter of January 23, 1970, which I quote as follows:
"Since November of 1969 the Grand Jury of the Hustings Court of this city has been investigating a certain matter in this city. They requested that certain records of a corporation be produced before them by way of a subpoena duces tecum. After a hearing on a motion to quash, the Court ordered that certain records be produced before the Grand Jury. These records constitute five years' records of a great quantity of transactions. Prior to the issuance, the Grand Jury had received evidence and records from another corporation. Due to the nature of the business records the Grand Jury requested that an expert Certified Public Accountant be appointed to review the records subpoenaed and the records voluntarily turned over from the other corporation and give evidence before the Grand Jury. This expert must necessarily be appointed by the Court and paid for by the State.

"My first question is does the Court have authority to appoint an expert Certified Public Accountant to go into the Grand Jury room, examine the records, and then give testimony before the Grand Jury; and second, if this expert is employed by the Court to make such examination will the State pay for the cost of his services which may be rather high due to the extensive records which he must examine."

Section 19.1-157 of the Code of Virginia provides that a grand jury may make a presentment or find an indictment upon the information of two or more of their own body, or on the testimony of witnesses called on by the grand jury, or sent to it by the court.

In regard to your first question, it is my opinion that, under the stated circumstances, a certified public accountant can be summoned as a witness to examine the records and give testimony before the grand jury.

The answer to your other question is found in Section 14.1-189 of the Code of Virginia, which provides that all allowances to witnesses summoned on behalf of the Commonwealth shall be paid by the treasurer of the county or corporation in which the grand jury is summoned and refunded to him out of the State Treasury.

CRIMINAL PROCEDURE—Insanity Hearing—Order of commitment in court not of record for observation not appealable to circuit court.

MENTALLY ILL—Commitment—Person charged with crime—May not appeal order of court not of record to circuit court but may petition for writ of habeas corpus.

June 4, 1970

HONORABLE MARTIN F. CLARK
Commonwealth's Attorney for Patrick County

This is in response to your letter of May 20, 1970, in which you request my opinion as to three questions posed relative to Va. Code Ann. § 19.1-228, as amended.

You state the following facts:

"A person is charged with the commission of a misdemeanor, which is before the County Court. After his arrest on this warrant, on motion of the Attorney for the Commonwealth, as contemplated in Section 19.1-228, a hearing is had as provided in said Section. The Court appoints a doctor to examine the defendant, and also appoints counsel for the defendant, both of whom are present at the hearing. The doctor, after his examination of the defendant, and an investigation of the defendant's background, testifies that the defendant should be committed for observation, and files a written report accordingly with the Court. The Court enters an order committing the defendant to a mental institution for observation and report as to whether or not
he is capable of pleading and standing trial. From this order, the defendant, through counsel, appeals to the Circuit Court.”

Based on these facts you ask the following three questions:

“(1) Whether or not the Court’s committal for observation is appealable to the Circuit Court, and if so, on what section or authority?

(2) If the committal for observation is appealable, is the only issue whether or not the lower Court has abused its discretion, and from which would naturally follow, whether or not the defendant would be entitled to a trial by jury to determine his sanity?

(3) Would not the proper procedure be that the only way that commitment could be raised would be by a writ of habeas corpus?”

I shall answer your questions seriatim:

(1) The committal is not appealable to the Circuit Court.

(2) Since the committal is not appealable, this question is moot.

(3) The answer to this question is in the affirmative.

In my opinion, the court’s action pursuant to Va. Code Ann. § 19.1-228, as amended, in committing the defendant for pre-arraignment observation is not appealable to the Circuit Court and the only method of testing the county court’s action would be by petitioning for a writ of habeas corpus.

The only statutory provision for appealing the decision of a county court with regard to a criminal matter, excluding considerations of bail and recognizance, is provided in Va. Code Ann. § 16.1-132 which states in part:

“Any person convicted in a court not of record of an offense not felonious shall have the right, at any time within ten days from such conviction, and whether or not such conviction was upon a plea of guilty, to appeal to the Circuit Court of the county or Corporation or Hustings Court of the Corporation, as the case may be.” (Emphasis supplied).

This section provides an appeal only from a “conviction” of a court not of record. It does not provide for an appeal from orders other than conviction. The commitment for observation pursuant to § 19.1-228 of the Code is not and cannot be construed to be an order of conviction. See Taylor v. Commonwealth, 208 Va. 316; 157 S. E. 2d 185 (1967) which held that the commitment proceeding under Va. Code § 19.1-228 was not adversary in character and is “benevolent in concept and can only enure to the benefit of an accused”. This cannot be construed as of the nature of a conviction which is punitive rather than benevolent in concept. There are no specific provisions for appeal of commitment under Va. Code Ann. § 19.1-228.

It would, therefore, be my conclusion that the only method of testing the order of commitment pursuant to Va. Code Ann. § 19.1-228, as amended, would be by petition for a writ of habeas corpus ad subjiciendum under Va. Code Ann. § 8-596, as amended, et seq.

CRIMINAL PROCEDURE—Instructions—In absence of requests by either party, court not required to give instructions.

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

This is in reply to your letter of September 22, 1969, which reads in part as follows:
REPORT OF THE ATTORNEY GENERAL

"Please advise whether the verdict of a jury should be set aside in a case of driving under the influence where the jury is instructed on the law of driving under the influence, but is not instructed on the law of impaired driving because neither the attorney for the Commonwealth nor the attorney for the accused offered or requested an instruction of impaired driving."

I am of the opinion that the verdict should not be set aside. A judge is not obligated to give any instruction unless asked for, and in the absence of any requests for instructions by the parties to the suit, it is not error to allow the case to go to the jury, without instructing them as to the law. 10 M.J., Instructions, § 12, p. 200, and voluminous cases there cited. See, also, 53 Am. Jur., Trial § 513, p. 414, to the same effect. In Fadely v. Commonwealth, 208 Va. 198, 205, 156 S.E. 2d 773 (1967), a case involving involuntary manslaughter, error was assigned to the courts failure to give an instruction on reckless driving. The Supreme Court of Appeals held the assignment of error to be without merit.

CRIMINAL PROCEDURE—Issuance of Warrant for Giving Bad Check—Does not depend upon payment of the check or related costs.

CRIMES—Giving of Bad Check—Gravamen of offense is fraudulent intent of drawer. July 17, 1969

HONORABLE JACK F. DEPOY
Commonwealth’s Attorney for City of Harrisonburg

This is in reply to your letter of July 8, 1969, in which you inquire as follows:

"A number of local businesses have a sign posted in their place of business stating that in the event they receive a bad check from a customer under the provisions of Section 6.1-117 and proceed to have the sheriff serve a so-called five-day notice under the provisions of said section, that they will charge said customer the sum of $1.25 representing the cost paid by them to the sheriff for said service. It then develops that the customer, after receiving the notice, goes in and attempts to pay the check in the face amount and this is refused by the merchant stating that they also want the $1.25. Can the justice of the peace, with full knowledge of these facts, issue a warrant under section 6.1-115 after the tender of payment has been made in the face amount?"

Section 6.1-117 of the Virginia Code, to which you refer, provides that issuance of a bad check is prima facie evidence of the drawer’s intent to defraud or his knowledge of insufficient funds unless he “shall within five days after receiving written notice that such check, draft, or order has not been paid to the holder thereof.” The section further provides for giving notice by mail.

It is my opinion that issuance of the warrant should not depend on whether the check or any of the related costs and fees have been paid after receipt of the notice referred to in § 6.1-117. The gravamen of the offense for which one is charged under § 6.1-115 is the fraudulent intent of the drawer of the check, and payment of the check itself upon receipt of the above notice is not a bar to prosecution but merely negative of the presumption of fraudulent intent that arises from failure to make payment within the time specified in § 6.1-117. See, Cook v. Commonwealth, 178 Va. 251, 16 S.E.2d 635 (1941). The mere refusal of the drawer to pay the service fee would not bear on the question of the maker’s intent when the check was drawn.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Juveniles—Violation of § 18.1-78.1 or § 18.1-78.3—Tried as adult.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—No jurisdiction over juvenile offenders who violate § 18.1-78.1 or § 18.1-78.3.

April 10, 1970

HONORABLE JOHN T. CAMBLOS
Commonwealth’s Attorney for City of Charlottesville

This is to acknowledge receipt of your letter of April 1, 1970, in which you state in part:

"I would like your opinion as to the proper interpretation of Sections 18.1-78.1, 18.1-78.3 and 18.1-78.5 of the Code of Virginia as applied to persons between the ages of 14 and 18. Does the inclusion of the language ‘any person 14 years of age or over’ mean that persons within this age bracket are not to be treated as juveniles when prosecuted under these sections? If they are not to be treated as juveniles is the preliminary hearing to be held in juvenile court or in municipal court?"

The pertinent parts of §§ 18.1-78.1 and 18.1-78.3 are as follows:

"§ 18.1-78.1.—Any person fourteen years of age or over who makes and communicates to another, whether by writing, telephone, telegraph, or other means, any threat to bomb, burn, destroy or in any manner damage any school building, church, meeting house, store building, factory, place of assembly, or any building, structure, or dwelling house, or aircraft, motor vehicle, or other means of public transportation, shall be guilty of a felony and upon conviction shall be punished by confinement in the penitentiary not less than one nor more than ten years or in the discretion of the court or jury trying the case be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars."

"§ 18.1-78.3.—Any person fourteen years of age or over who communicates to another, whether by writing, telephone, telegraph or other means, information, knowing the same to be false, as to the existence of any peril of bombing, burning, destruction or damage to any school building, church, meeting house, store building, factory, place of assembly, or any building, structure, or dwelling house, or aircraft, motor vehicle, or other means of public transportation, shall be guilty of a felony and upon conviction shall be punished by confinement in the penitentiary not less than one nor more than ten years or in the discretion of the court or jury trying the case be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars."

The legislature in enacting §§ 18.1-78.1 and 18.1-78.3 apparently realized the severity of such offenses and intended that all persons fourteen years of age or over be punished as criminals. Unless it was intended to include juveniles over fourteen years of age and have them punished there would have been no purpose of including the term "any person fourteen years or over" in the statute.

The Court in the case of Mickens v. Commonwealth, 178 Va. 273, 279, 16 S.E.2d 641 (1941), observed:

"No power is given to the juvenile courts to convict any child of any crime, either misdemeanor or felony, or to commit any child to any penal institution."
Although the statutes concerning Juvenile and Domestic Relations Courts have been revised, re-codified since that opinion, there is nothing in the present statute to indicate that the juvenile courts have the authority to punish children as criminals. § 16.1-179. That authority is vested in courts of record. §§ 16.1-175 and 16.1-177. The latter section reads as follows:

“...In the hearing and disposition of cases properly before a court of record having criminal jurisdiction of such offenses if committed by an adult the court may sentence or commit the juvenile offender in accordance with the criminal laws of this State or may in its discretion deal with the juvenile in the manner prescribed in this law for the hearing and disposition of cases in the juvenile court.”

Where the case involving a juvenile is before the court of record, such court may try the same or transfer it to the Juvenile and Domestic Relations Court.

But the court of record must have the case investigated as provided in § 16.1-176 in order to retain jurisdiction. Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955).

Section 16.1-175 reads in part as follows:

“§ 16.1-175.—If during the pendency of a criminal or quasi-criminal proceeding against any person in any other court it shall be ascertained that the person was under the age of eighteen years at the time of committing the alleged offense, such court shall forthwith transfer the case, together with all papers, documents and evidence connected therewith, to the juvenile court of the city or county having jurisdiction, provided if such is pending in a court of record, the judge thereof, in his discretion upon completion of an investigation as prescribed in § 16.1-176 (b), may continue with the trial thereof ...”

Once the juvenile is indicted under said sections the case is properly before the court of record regardless of whether the case initiated before the Juvenile and Domestic Relations Court, that court assuming jurisdiction pursuant to § 16.1-158 (1). Unless this were true the purpose of §§ 18.1-78.1 and 18.1-78.3, to punish juveniles between the ages of fourteen and eighteen would be defeated by the act of the Juvenile and Domestic Relations Court in refusing to certify the child for proper criminal proceedings under § 16.1-176. That section must be considered together with §§ 18.1-78.1 and 18.1-78.3, which sections modify it. However, the court of record may in its discretion transfer the case to the Juvenile and Domestic Relations Court for final disposition. The legislature undoubtedly felt that due to the severity of the crime described in said sections that courts of record should be given the authority to determine whether the juveniles should be tried under said sections and not the Juvenile and Domestic Relations Courts. It is well to point out here that §§ 18.1-78.1 and 18.1-78.3 were enacted in 1959, long after the pertinent sections of Chapter 8 of Title 18.1 were enacted.

Answering your first inquiry, it is the opinion of this office that juveniles prosecuted under §§ 18.1-78.1 and 18.1-78.3 should not be treated as juveniles except when the court of record determines that the case be transferred to the Juvenile and Domestic Relations Court under the provisions of § 16.1-175.

Answering your second question, it is the opinion of this office that the preliminary hearing, if there be any, be held in the Juvenile Court. As pointed out above, an indictment under either of the said sections would vest the court of record with authority to proceed and the Juvenile and Domestic Relations Court would lose jurisdiction over the juvenile.
CRIMINAL PROCEDURE — Warrant of Arrest — May include several charges arising out of one arrest if particularized.

WARRANTS—May Include Several Charges Arising Out of One Arrest if Particularized.

HONORABLE WM. M. MCCLENNY, Judge
County Court for Amherst County

This is in reply to your letter of September 26, 1969, which I quote, as follows:

"I would appreciate information concerning the number of charges permissible in one warrant of arrest. I find in some instances that one warrant would have as much as three or four charges arising out of one arrest and others would have separate warrants arising from each charge arising out of the same happening or arrest and I have been requested to obtain your opinion on this matter."

In the absence of any statute prescribing the number of charges permissible in one warrant of arrest, I am aware of no legal prohibition against including more than one charge in the same warrant under the stated conditions. This seems to have been the practice in some parts of the State, although in other localities a single charge for each warrant is preferred. In the case of Hundley v. Commonwealth, 193 Va. 449, the Supreme Court of Appeals states that several misdemeanors may be tried under one warrant. An opinion found in Report of the Attorney General (1951-1952), page 172, approves the inclusion of several charges in one warrant "if the offenses are of the same nature and are committed on the same day."

In view of the foregoing, it is my opinion that so long as several charges arising out of one arrest are properly particularized they may be included in the same warrant.

CRIMINAL PROCEDURE—Witnesses—Wife compelled to testify against husband in prosecution for manslaughter of minor child.

HUSBAND AND WIFE—Witnesses—Wife compelled to testify against husband in prosecution for manslaughter of minor child.

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

This is in reply to your inquiry of September 5, 1969, as to whether a wife can be compelled to testify against her husband in a prosecution for manslaughter of a minor child under age 16. As you state in your letter, § 8-288 of the Virginia Code provides that a husband and wife shall not be compelled to testify against the other, except in the case of a prosecution for an offense committed by one against the other or against a minor child of either.

In Meade v. Commonwealth, 186 Va. 775, 784, 43 S.E.2d 858 (1947), it was held that an offense as used in § 8-288 refers to "a 'prosecution for a criminal offense,' and not a proceeding based merely on a private wrong." See, 20 M.J. Witnesses § 7. Accordingly, it is my opinion that manslaughter of a minor child is an offense for which a wife can be compelled to testify against her husband.

DEEDS—Books—May be microphotographed by Virginia corporation.

PUBLIC RECORDS—Deed Books—May be microphotographed by Virginia corporation.
HONORABLE SHELBY J. MARSHALL, Clerk
Circuit Court of Albemarle County

This is in reply to your letter of February 27, 1970, in which you ask whether a Virginia corporation could microphotograph deed books and similar record books in the Clerk's Office of the Circuit Court.

I am of the opinion that the corporation may make the microphotographs. See, Report of the Attorney General (1968-1969), p. 33. I call to your attention the language cited in that opinion from § 17-43 of the Code as follows:

"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."

Whether or not the manner in which the corporation contemplates making the microphotographs will or will not interfere with the reasonable use by the general public of your office is a matter for you to decide after evaluating all the facts.

DOG LAWS—Kennel License—Separate license required for each kennel of 50 dogs.

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

This is to acknowledge receipt of your letter of September 9, 1969, in which you make inquiry as to the interpretation of § 29-184 of the Code of Virginia (1950), as amended, relative to the licensing of dogs.

You state in part:

[A person] "keeps at different times approximately 250 beagles six months of age or over. Does this fact situation require a license for a kennel?"

As far as the licensing provisions of the law are concerned an owner is not required to purchase a kennel license, but he may do so if he so desires. If the dogs are not covered by a kennel license, each dog must be licensed separately.

I quote further from your letter:

"The Code Section is not clear as to whether a kennel owner, who owns more than 50 dogs, is required to buy a kennel license for 50 dogs, thereby having the required license for 50 dogs or more, or is he required to buy kennel license for every 50 dogs? In other words, would the [person] be required to buy kennel license for each 50 dogs when he has 250 dogs six months of age or over?"

Said § 29-184 of the Code reads in part:

"Except as hereinafter provided, it shall be unlawful for any person to own a dog six months old or over in this State unless such dog is licensed, as required by the provisions of this chapter . . . . the license tax, . . . . shall be as follows:

"Male.—For a male dog, one dollar.
"Unsexed female.—For an unsexed (successfully spayed) female dog, one dollar.
"Female.—For a female dog, three dollars.
"Kennel, for twenty dogs.—For a kennel of twenty dogs, fifteen dollars."
"Kennel, for fifty dogs.—For a kennel of fifty dogs, twenty-five dollars."

The term "kennel" is defined in § 29-183 (d) as follows:

"'Kennel' means an enclosure wherein dogs are kept and from which they cannot escape."

Certainly the import of Chapter 9, Title 29, is that all dogs of a certain age must be licensed and their owners are liable for such licenses which are required by law.

A person who owns as many as 50 dogs may secure a kennel license to cover the licensing thereof at a cost of $25.00. A person may license as many kennels as he desires. I can find nothing in the law limiting the number of dogs kept in any kennel, so long as the kennel conforms to the regulations prescribed in § 29-192 of the Code. The concluding sentence of that section is as follows:

"A kennel shall not be operated in such a manner as to defraud the county or city of the license tax applying to dogs which cannot be legally covered thereunder or to in any manner violate other provisions of this chapter."

I believe that a kennel license for which the owner pays $25.00 would cover the licensing of only 50 dogs. On the other hand, it would not be in the spirit or language of the statute to require the owner to license each dog, in excess of 50, separately at the rate of $1.00 or $3.00 per dog, as the case may be.

Furthermore, I do not believe it would be necessary for such an owner to have separate kennels in order to take advantage of the kennel fee, when the number of his dogs exceeds 50.

I am therefore of the opinion that in the case you mention, the person [if he elects to purchase kennel licenses, rather than licensing each dog separately] should be required to buy kennel license for each 50 dogs which would be five separate licenses at $25.00 per license when he has 250 dogs six months of age or over.

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DOG LAWS—Kennel Licenses—No authority in city or county to increase amount of kennel license.

October 13, 1969

HONORABLE G. HUGH TURNER
Treasurer of Franklin County

I am in receipt of your inquiry of October 10, 1969, relative to licensing tax for kennels wherein you inquire as follows:

"My question is, if we go to a two dollar ($2.00) tag for any sex of dog, could the kennel tag price be increased also?"

Section 29-184 of the Code of Virginia (1950), as amended, reads in part:

"Except as hereinafter provided, it shall be unlawful for any person to own a dog six months old or over in this State unless such dog is licensed, as required by the provisions of this chapter. . . . the license tax, . . . shall be as follows:

"Male.—For a male dog, one dollar.
"Unsex'd female.—For an unsexed (successfully spayed) female dog, one dollar.
"Female.—For a female dog, three dollars.
"Kennel, for twenty dogs.—For a kennel of twenty dogs, fifteen dollars."
"Kennel, for fifty dogs.—For a kennel of fifty dogs, twenty-five dollars."

Though there are various exceptions wherein certain counties and cities may increase the license tax for the licensing of individual dogs, I am unable to find any provision in the Code that would authorize any county or city to increase the amount of the kennel license as set forth above in § 29-184. Your inquiry is therefore answered in the negative.

DOG LAWS—Kennel Tags—License fee chargeable may not exceed fees provided by State law.

DOG LAWS—License Tax—County may assess $2.00 on all dogs regardless of sex—Kennel dogs excepted.

HONORABLE G. HUGH TURNER
Treasurer of Franklin County

This is in reply to your letter of March 10, 1970, in which you request my opinion as to whether or not the Board of Supervisors may set a license fee of two dollars each for any sex dog and eliminate issuing any kennel tags.

Section 29-184 of the Code of Virginia requires all dogs six months old or over in this State to be licensed and prescribes the amount of license tax payable. It further provides 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 license tax for all dogs regardless of sex, the amount of which shall not exceed five dollars."

Another provision of this section, however, is that "no ordinance adopted by a city or county under the provision of this section shall provide for kennel fees in excess of those provided by State law." The kennel fees so provided by State law, under this section, are "For a kennel of twenty dogs, fifteen dollars" and "For a kennel of fifty dogs, twenty-five dollars."

In my opinion, this statute controls as to the license fees chargeable for kennel tags and since a fee of two dollars each would be in excess of the prescribed kennel fees, this part of your question is answered in the negative. A similar view is expressed in an opinion reported in the Report of the Attorney General (1966-1967), p. 125. If the county has assumed responsibility for enforcement of the dog laws under § 29-184.2, I see no reason why it may not assess the license tax of two dollars for all dogs regardless of sex, with the exception herein indicated for kennel dogs.

DOG LAWS — Kennel Tags — Must be purchased if operate kennel for boarding of dogs.

HONORABLE JACK F. DEPOY
Commonwealth’s Attorney for
Rockingham County and City of Harrisonburg

This is in reply to your letter dated February 6, 1970, which reads as follows:

“The following are questions which have been raised by our County Treasurer and we would appreciate your opinion.

"An individual operates a kennel strictly for boarding of dogs, not for dogs of his own. Does he need to purchase a kennel tag? If not, should he be required to obtain a business license?"
REPORT OF THE ATTORNEY GENERAL

In answer to your question I direct your attention to §§ 29-183(c), 29-183(d) and 29-184 of the Code of Virginia (1950), as amended. Section 29-184 reads, in part, as follows:

“Amount of license.—Except as hereinafter provided, it shall be unlawful for any person to own a dog six months old or over in this State unless such dog is licensed, as required by the provisions of this chapter.

* * *

“Kennel, for twenty dogs.—For a kennel of twenty dogs, fifteen dollars.
“Kennel, for fifty dogs.—For a kennel of fifty dogs, twenty-five dollars.”

Section 29-183 reads, in part, as follows:

“Definitions generally.—For the purpose of this chapter, and unless otherwise required by the context:

* * *

“(c) ‘Own’ and ‘owner’ include any person having a right of property in a dog, and any person who keeps or harbors a dog or has it in his care, or who acts as its custodian, and any person who permits a dog to remain on or about any premises occupied by him.
“(d) ‘Kennel’ means an enclosure wherein dogs are kept and from which they cannot escape.”

In light of the above quoted sections of the Code it is my opinion that an individual who operates a kennel, although strictly for boarding of dogs and not for dogs of his own, is deemed to “own” the dogs for the purpose of § 29-184 and is, therefore, required by law to purchase a kennel tag.

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DOG LAWS—License—Issuance may be refused where effective date of rabies inoculation expires before tag applied for. April 17, 1970

HONORABLE GUY R. PADGETT
Treasurer for Carroll County

This is in reply to your letter dated April 1, 1970, in which you request my interpretation of Section 29-188.1 (a) of the Code of Virginia (1950), as amended.

In the letter you explain that in Carroll County veterinarians are using a rabies vaccine which is effective for a three-year period and, therefore, a situation may arise where the effective date of the inoculation or vaccination will expire in a matter of months but is valid at the time of presentation for the dog license tag.

Your inquiry then is as follows:

“[D]oes the Treasurer have any discretion or obligation in the issuance of a dog tag if the effective date of the inoculation expires before expiration of the tag applied for.”

The following is the portion of Section 29-188.1 which is pertinent to your question:

“(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." (Emphasis added.)

From the above italicized words of Section 29-188.1, it is apparent that the Treasurer, or other county officer who issues dog tags, is granted some discretion as to the sufficiency of the evidence of inoculation. In addition, the intent of the dog laws is to curb a potentially dangerous health and safety problem, especially relating to the control of rabies and, in my opinion, such statutes should be construed so as to advance the remedy.

In this connection, this office has heretofore ruled that the treasurer or other officer charged with the duty of issuing license tags for dogs should require a certificate from a currently licensed veterinarian showing that the inoculation or vaccination is applicable to the full period for which the license is requested. [See letter to Honorable Ernest C. Vaughan, dated February 12, 1968, found in Report of the Attorney General (1967-1968) at 83.]

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**DOG LAWS—Licenses—Rabies inoculation requirement—No exception in ordinance regardless of reaction on dog.**

**COUNTY — Ordinances — Rabies inoculation requirement — No exception based on effect on animal.**

February 5, 1970

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

This is in reply to your letter dated January 26, 1970, which reads as follows:

"In 1955, when Highland County was infested with rabies, the Board of Supervisors found it necessary to adopt an ordinance requiring vaccination against rabies before issuance of licenses for dogs.

"Specifically, the ordinance provides that any dog over four months of age shall not be owned or detained by any owners in Highland County unless it shall have been vaccinated with a modified live virus rabies vaccination approved by the Virginia State Department of Health within a period of thirty-six months. A certificate of vaccination is required to be presented to the license issuing agent as evidence that the dog is entitled to be licensed. Any violation of the ordinance provides for a fine.

"A dog owner in Highland County presented her dog to be vaccinated to the veterinarian and stated that her dog took convulsions after vaccination and that she was entitled to be exempt from the ordinance. The veterinarian gave her an excuse from vaccination which she presented to the licensing agent who refused to issue a license.

"My question is whether or not the ordinance can be voided in such a way, and, if it can, should the ordinance be amended to take care of exceptions of this nature? My opinion is that the ordinance should not provide for any exception and the dog should be vaccinated regardless of its effect on the animal."

Section 29-188.1 of the Code of Virginia (1950), as amended, provides in part:

"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.”

In addition, § 29-196 of the Code provides in part:

“The governing body of any county, city or town may adopt such ordinances, regulations or other measures as may reasonably be deemed necessary to prevent the spread within its boundaries of the disease of rabies, . . . .”

Although I do not have the ordinance before me it appears, from your description, to be entirely consistent with the above portion of § 29-188.1 of the Code in that both the statute and the Highland County ordinance requires evidence of inoculation or vaccination for rabies to be presented before a license will issue. Section 29-188.1 of the Code contains no language which would tend to except any dog with a condition or reaction to rabies inoculation such as you describe. It is apparent from your letter that the county ordinance also does not make exceptions and as such would seem to be a reasonable measure to prevent the spread of rabies within the county’s boundaries.

Accordingly, it is my opinion that since the ordinance is silent as to exceptions and, in this regard, is consistent with the State Code, that in order for a dog license to be issued evidence of actual inoculation or vaccination against rabies must first be presented.

DOG LAWS—Ordinances—Clarke County authorized to adopt ordinance permitting Dog Warden to take possession of dog pending decision on warrant.

HONORABLE EDWARD MCC. WILLIAMS
Commonwealth’s Attorney of Clarke County

This is in reply to your letter of August 7, 1969, in which you present the following inquiry:

“Please be kind enough to advise the undersigned whether or not the Board of Supervisors may adopt a valid ordinance permitting the Dog Warden to take possession of a dog who he believes to be a killer of livestock and hold the animal pending a decision on a warrant issued by him under the provisions of Section 29-197 of the 1950 Code of Virginia, as amended.”

Section 29-197, to which you refer, is found in Chapter 9 of Title 29 and provides for an evidential hearing to permit the court to determine the truth of the charge and to afford to the dog owner a chance to defend his property interest in the dog. This statute was the subject of comment in Laing v. Commonwealth, 205 Va. 511, 137 S.E.2d 896 (1964), wherein the court stated in part that, while the statute did not require the warden to take possession of the dog prior to obtaining the warrant, the dog owner’s actions had shown “that taking custody of the dog may be the better course.” Id. at 514.

From the foregoing I conclude that under the present statute, the warden may take the dog into custody pending a decision on the warrant. Under the provisions of § 29-184.3 Clarke County is authorized to adopt dog ordinances which correspond in scope to the provisions of Chapter 9 of Title 29. Inasmuch as the warden may take the dog into custody under § 29-197, I do not feel that it would be improper for the county ordinance to so specify.
REPORT OF THE ATTORNEY GENERAL

DOG LAWS—Ordinances—May not be inconsistent with State law.

DOG LAWS—Kennel Tags—May not be entirely eliminated by ordinance.

HONORABLE G. HUGH TURNER
Treasurer of Franklin County

October 30, 1969

I am in receipt of your letter of October 16, 1969, wherein you inquire:

“If the Board of Supervisors adopt the ordinance [dog license] for the $2.00 tag for any sex dog can they at the same time adopt an ordinance to eliminate the kennel tags?”

In King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954), the Virginia Supreme Court held that though “‘dog laws’ are comprehensive and provide for the exclusive licensing and taxing of dogs by the State, and for their regulation in many particulars,” they do not prohibit further local legislation. However, local legislation cannot be inconsistent with the provisions of the State law in the sense that ordinances may not “attempt to authorize . . . what the legislature has forbidden or forbid what the legislature has expressly licensed.” Virginia Code § 29-192 authorizes the keeping of a kennel of dogs. Obviously such kennels may be further regulated by local ordinance since a kennel “may be entirely reasonable in a rural area and yet might constitute a nuisance in a city or urban community;” however, kennels cannot be entirely eliminated, since the legislature has expressly provided for their licensing. I am of the opinion that the ordinance you propose would be inconsistent with the provisions of State law and your inquiry is answered in the negative.

ELECTIONS—Absentee Ballots—Counting of—Should be counted where voting machine used and only one absentee ballot received at the precinct.

MR. GRIER L. CARSON, Secretary
Augusta County Electoral Board

October 22, 1969

I am in receipt of your letter of October 20, 1969, in which you inquire whether or not an absentee ballot should be counted under the following circumstances:

“The secrecy of the ballot has been questioned where voting machines are used and only one (1) mail ballot has been delivered to a precinct. Even though the ballot will be placed in a ballot box as the law requires, it will not longer be a secret ballot. . . . it would no longer be a secret ballot if the Judges had opened and recorded it with the voting machine count.

“We would like to get a ruling on this, if possible, before the November 4, 1969 General Election.”

I am of the opinion that the ballot in question should be counted, tallied and included in the statement of canvass as required by § 24-313 of the Virginia Code. While the secrecy of the ballot should be maintained so far as consistent with law, there are instances in which such secrecy is necessarily compromised—as is the case of a physically or educationally handicapped voter being assisted in the preparation of his ballot by one of the judges of election pursuant to § 24-251 of the Virginia Code. In the situation you present I believe that considerations of secrecy should be subordinated to the right of the elector to vote and to have his vote counted and included in the canvass.
Further in this connection, I call your attention to the language contained in the above mentioned § 24-251 which directs that the judge of election assisting a physically or educationally handicapped voter "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." Similarly, in the present instance, I am of the opinion that the judges of election canvassing the absentee ballot should also refrain from divulging or indicating in any manner the name or names of the person or persons for whom the absentee voter casts his ballot.

ELECTIONS — Absentee Voting — Qualifications — Voter must be absent from city in which entitled to vote.

Mrs. Leslie C. Curdts
General Registrar, City of Norfolk

I am in receipt of your letter of July 25, 1969, in which you present the following situation and inquiry:

"In the City of Norfolk, there are many Judges and Clerks of Election who work in polling places other than the one in which they are registered to vote.

"We would appreciate your opinion on the following question. May these Judges and Clerks vote by absentee ballot under Section 24-319, if they so request?"

In this connection Section 24-319 of the Virginia Code provides:

"Any duly qualified voter who will, in the regular and orderly course of his business, profession, occupation, or other personal affairs, or while on vacation during his attendance as a student at any school or institution of learning, be absent from the city, town, or from the precinct in which he is entitled to vote, if in a county, and any such voter who may be physically unable to go in person to the polls on the day of election, may vote in any primary, second primary, special or general election, in accordance with the provisions of the following sections of this chapter, as amended." (Italics supplied)

I am constrained to believe that the language of the statute italicized above contemplates that a duly qualified voter of a city or town will be absent from the city or town—and that a duly qualified voter of a county will be absent from the precinct of the county—in which he is entitled to vote in order to qualify to vote by absentee ballot. Since the Judges and Clerks of Election mentioned in your communication are duly registered voters of the City of Norfolk who will not be absent from the city on the day of election, they would not come within the scope of the language of the statute in question or qualify to vote by absentee ballot.

While I have been unable to discover any previous opinion of this office in which the question you present has been considered, this view of the statutory provisions appears to be consistent with the prior legislative history of the enactment under consideration. See, § 202, Code of Virginia (1919); Acts of Assembly (1924), Chapter 425, p. 651; Acts of Assembly (1928), Chapter 397, p. 1016.
HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

I am in receipt of your letter of February 3, 1970, in which you draw attention to the following language in Senate Bill No. 70, which is currently pending before the Senate:

"On and after July 1, 1970, candidates for Council under the provisions of this charter shall be nominated only by petition in the manner prescribed by general law. Prior to July 1, 1970, candidates shall be nominated under general law."

You inquire whether such a provision is in conflict with § 63 of the Constitution of Virginia.

Section 63 provides that the General Assembly shall not enact special legislation in certain specified cases, one of which is, "For conducting elections or designating the places of voting." Section 64 of the Constitution requires the enactment of general laws in those cases enumerated in § 63. Also of relevance is § 117 of the Constitution which provides in part that:

"The General Assembly may, by general law or by special act (passed in the manner provided in Article IV of this Constitution) provide for the organization and government of cities and towns without regard to, and unaffected by any of the provisions of this article. . . ."

It is my opinion that the above provision of Senate Bill No. 70 is not a provision relating to the conduct of elections as that phrase is used in § 63. Section 63 refers purely to the manner in which elections are conducted, whereas Senate Bill No. 70 refers only to the method of nominating candidates for office. In accord with this view are the cases of Davis v. Dusch, 205 Va. 676, 684, 139 S.E. 2d (1964), and Porter v. Jay, 188 Va. 801, 805, 51 S.E. 2d 156 (1949).

It is within the power of the General Assembly to enact such a provision because of the grant of power in § 117 of the Constitution authorizing special legislation relating to the government of cities and towns. The Supreme Court of Appeals has consistently "upheld special legislation applicable to cities and towns, enacted pursuant to § 117, which was at variance with other provisions of Article VIII of the Constitution and with general statutes antedating such special legislation." Dusch v. Davis, supra, at 683.

Section 117 does not conflict with §§ 63 and 64, but is to be read in conjunction with them as a specific exception to the general requirements enunciated in those sections. Special legislation regarding laws for the organization and government of cities and towns is specifically provided in § 117, and this section must be looked to when the validity of such laws is questioned. See Pierce v. Dennis, 205 Va. 478, 485, 138 S.E. 2d 6 (1964).

ELECTIONS—Candidates—Political parties may endorse for City Council—Must nevertheless qualify by petition.

HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in reply to your letter dated May 6, 1970, which reads as follows:

"I would like the Attorney General's opinion as to whether it is constitutional for political parties to endorse candidates for the of-
REPORT OF THE ATTORNEY GENERAL

I am not aware of any provision of the Constitution or general law which would tend to prohibit political parties from endorsing a candidate for an office such as City Council. This endorsement, of course, does not relieve such a prospective candidate of otherwise qualifying as a candidate. That is to say, the endorsee would still have to file by petition and otherwise qualify under general law and charter provisions relative to such an election.

ELECTIONS — Counting Votes — Independent candidate entitled to have representative present while votes are canvassed.

HONORABLE JAMES E. BAYLOR
Chairman, Electoral Board City of Norfolk

This is to acknowledge receipt of your letter of May 12, 1970, in which you state in part:

“There are nineteen candidates running for six City Council seats in the election to be held June 9, 1970 in the City of Norfolk.

“As this is a non-partisan election, may each of the candidates have a representative present during the tally of the votes? If not, how are the representatives chosen?”

The purpose of Sections 24-260 and 24-261 of the Code of Virginia (1950), as amended, is to assure that the mandate expressed in Section 27 of the Constitution of Virginia is carried out, to-wit: that the ballots shall not be canvassed or counted in secret.

This office in an opinion expressed in a letter to the Honorable Leon Owens dated May 6, 1960, Annual Report of the Attorney General (1959-1960), pages 172-174, passed on the question you now raise. The following is the portion of that opinion pertinent to your inquiry:

“Your question 4 is as follows:

“Assuming that all of the candidates for election to the Town offices are independent candidates not affiliated with a political party in any way, are each of the candidates entitled to a representative in the room where and while the votes are being counted?

“Section 24-260 fails to make provision for representatives except for political parties. Section 24-175 provides that the ballots shall be received and canvassed in conformity with general law. I am constrained to express the opinion that each candidate would be entitled to have representatives in accordance with Section 24-260. This section expressly provides that ‘the ballots shall not be taken from the ballot box in secret, etc.’”

The General Assembly in revising and amending the general laws of elections by Chapter 462, Acts 1970 (effective December 1, 1970), made provision for the representative of an independent candidate to be present when the ballots are counted. See Section 24-1-136 in the new Act.

I concur in the view expressed in the above cited opinion. However, I believe that there should be at least four persons present when the ballots are counted upon the failure of a candidate to be represented in order to comply with Section 24-261 of the Code.

I am therefore of the opinion that each of the candidates in the so-called non-partisan election may have a representative present during the counting of the votes.
ELECTIONS—Electoral Board—Member may be candidate for Board of Supervisors.

BOARDS OF SUPERVISORS—Candidate for Election—May be member of electoral board.

PUBLIC OFFICERS—Compatibility—Electoral board member—May be candidate for board of supervisors.

February 18, 1970

HONORABLE H. P. SCOTT, Clerk
Circuit Court of Bedford County

This is in reply to your letter dated February 9, 1970, which reads as follows:

"The question has been raised in Bedford County as to whether or not a member of the County Electoral Board can become a candidate for a County Office. Please advise me if, in your opinion, a member of the County Electoral Board can become a candidate for a County Office, such as a candidate for the Board of Supervisors while still serving on County Electoral Board."

In a letter to the Honorable James P. Baber dated May 14, 1968, this office ruled that a person could not serve as a member of the board of supervisors and simultaneously serve as a member of the electoral board of the county (Report of the Attorney General (1967-1968), p. 96). It has also been heretofore ruled that a person may be a candidate for an office which, if he is elected, would be incompatible with the office he presently holds. The reason for this is that when the time comes to qualify for the office for which he was a candidate the person may no longer hold the incompatible office. See letter to the Honorable Edward L. Breeden, Jr., dated May 8, 1944, found in Report of the Attorney General (1943-1944), p. 51.

Although § 24-198 of the Code of Virginia (1950), as amended, disqualifies a person from acting as a judge or clerk of any election if that person "is a candidate for, or the deputy or employee of any person who is a candidate for, any office to be filled at such election," there does not appear to be any such like prohibition relating to a member of the electoral board being a candidate. The apparent rationale being that judges and clerks of elections, who are appointed by the electoral board, are too intimately involved in the machinery of the election to permit them to be candidates therein.

With the view that an electoral board member is, in fact, also associated with election machinery, it should be pointed out that there is no statutory provision which would prevent a member of an electoral board from resigning and thereafter becoming a candidate for an elective office. There is, however, no constitutional or statutory provision which would prohibit him from remaining on the electoral board and, at the same time, being a candidate for the board of supervisors.

ELECTIONS—Electoral Board—Member may be town clerk.

PUBLIC OFFICERS—Compatibility—Member of electoral board may hold position as town clerk.

MRS. IRVA L. PEARSON, Secretary
Westmoreland County Electoral Board

April 23, 1970

I am in receipt of your letter of April 10, 1970, wherein you inquire if the Secretary of a county electoral board may also hold the position of a town clerk which is an appointive, salaried position.
Section 31 of the Virginia Constitution as embodied in § 24-31 of the Code of Virginia (1950), as amended, states:

"No person, nor the deputy of any person, holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city or town thereof, shall be appointed a member of the electoral board or a registrar or judge of election."

Since the clerkship of the town is not an elective office, the above provision would not be applicable. Further, the prohibitions contained in § 15.1-50, the general incompatibility statute, are not applicable. In my opinion the two positions are not incompatible and may be held by the same individual.

ELECTIONS—Electoral Board—Member of city committees and boards not elective nor federally funded may serve.

PUBLIC OFFICERS—Compatibility—Members of city committees and boards not elective nor federally funded—May serve on Electoral Board.

HONORABLE PETER M. AXSON, JR.
Commonwealth’s Attorney for City of Chesapeake

March 11, 1970

This is in reply to your letter dated March 5, 1970, to which you attached questions you received from the Chesapeake Republican City Committee. The inquiries are in regard to the eligibility of an individual to serve on the Chesapeake Electoral Board if that person is serving on the following:

(1) City Board of Adjustments and Appeals;
(2) City Air Pollution Committee;
(3) Tidewater Detention Home Board.

Section 24-31 of the Code of Virginia (1950), as amended, states that "[N]o person, nor the deputy of any person, holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city or town thereof, shall be appointed a member of the electoral board. . . ."

I am informed that the above Chesapeake City committee and boards to which you refer are not federally funded and, in addition, membership in said organizations is not elective. Accordingly, it is my opinion that an individual may serve on the specific city bodies to which you refer and still be eligible to serve on the electoral board.

ELECTIONS—Electoral Board—New members—Not appointed until expiration of terms of incumbents or until vacancy occurs.

HONORABLE EDGAR BACON
Member, House of Delegates

March 26, 1970

This is in reply to your letter dated March 19, 1970, which reads as follows:

"The Electoral Board in Lee County is composed of two Democrats and one Republican who were members of the board prior to the recent gubernatorial election and whose terms of office will not expire until dates more than one year from this date."
"Since Section 24-29 of the Code of Virginia (1950 as amended) provides, in part, that, . . . 'A majority of the electoral board shall be from the political party which cast the highest number of votes in the State for Governor at the last preceding gubernatorial election . . .', I would appreciate your opinion as to whether the present board members are entitled to serve the full terms of office for which they were appointed."

It is my opinion that the answer to your question is in the affirmative. Although § 24-29 of the Code provides for representation on the electoral board in the manner you have quoted above, that same statute also provides the following:

"During the month of February in each year, as the terms of the members of the board respectively expire, their successors shall be appointed for a term of three years." (Emphasis added.)

In addition, Section 31 of the State Constitution provided upon the expiration of the terms of the electoral board members who were then serving in those offices, that "thereafter their successors shall be appointed for the term of three years." (Emphasis added.)

Accordingly, it is my opinion that from the plain meaning of § 24-29 of the Code and Section 31 of the Constitution, the legislature intended that new members would not be appointed to electoral boards until the expiration of the three-year terms of incumbent members or until such times as vacancies occur for other reasons.

ELECTIONS—Judges—List of five qualified individuals may be submitted to board by party receiving next highest number of votes.

ELECTIONS—Judges—No requirement that majority thereof be of party which cast highest number of votes.

HONORABLE JOHN N. DALTON
Member, House of Delegates

June 16, 1970

This will acknowledge receipt of your letter of May 27, 1970, wherein you inquire if, pursuant to § 24-195 of the Code of Virginia (1950), as amended, relating to qualifications and appointments of judges of elections, "it is necessary for the political party receiving the highest number of votes at the last preceding election to provide the electoral board members with the names of five qualified voters for each position."

I am of the opinion your inquiry must be answered in the negative. Section 24-195 provides that whenever it is possible to do so, judges of elections shall be chosen from persons known to belong to the two political parties casting the highest and next highest number of votes at the last preceding election "and whenever the local party authorities of the party casting the next highest number of votes . . . shall nominate for any voting place five qualified voters who are members of that party and qualified to act as judges of election, it shall be the duty of the electoral board to appoint one of such persons to serve as judge of election . . ." It is the party receiving the next highest number of votes, not the party casting the highest at the last preceding election which may submit the list of five qualified individuals to act as judges of elections.

I believe the answer to this question makes it unnecessary for me to comment with regard to your inquiry if the list must be communicated to all three members of the electoral board, or if it may simply be communicated to one member of the electoral board.
Lastly, you have indicated that the problem precipitating your inquiry is that in a certain county a majority of the election judges for each precinct are not from the political party which cast the highest number of votes in the last preceding general election. I am unaware of any provision wherein a majority of the election judges must be from the political party casting the highest number of votes. Both §§ 24-30 and 24-195 provide that in appointing judges of election representation shall be given to each of the two political parties casting the highest and next highest number of votes. However, there is no provision requiring that the majority of the judges for each precinct shall be of the political party which cast the highest number of votes.

ELECTIONS—Judges—Regular judge while serving as primary judge may conduct bond referendum in conjunction with primary election.

HONORABLE DONALD C. STEVENS
County Attorney for Fairfax County

I am in receipt of your letter of May 26, 1970, wherein you inquired:

"[M]ay the regular judges of election appointed pursuant to Section 24-193 of the Code, who are also appointed primary judges pursuant to Section 24-353, also conduct a referendum on sanitary district bonded indebtedness pursuant to Section 21-123, in conjunction with the primary election?"

Section 21-124 of the Code of Virginia (1950), as amended, provides that a bond referendum for a sanitary district shall be conducted "in accordance with the provisions of § 24-141." This latter section provides that the election on the bond question shall be conducted by "the regular election officers" which officers are appointed during May of each year (§§ 24-193, 24-194); the officers appointed judges of election being "chosen ... from persons known to belong to the two political parties casting the highest and next highest number of votes at the last preceding general election."

Judges for primary elections are appointed from members of the party participating in the primary. (§ 24-353) Consequently, since the primary judges are not the regular judges who must conduct the referendum, a separate set of election officials must be appointed to conduct the primary and the referendum. See opinion of this office to the Honorable Levin Nock Davis, Secretary of the State Board of Elections, dated June 5, 1961, found in the Annual Report of the Attorney General (1960-1961), p. 128.

However, I understand that on July 14th in addition to the referendum there is both a Democratic and a Republican primary with the regular election officials each serving their respective party at the primaries.

As long as the special election for the bond referendum is conducted by "the regular election officers," I am aware of no law which would prohibit the regular election judges, when serving as primary judges, from also conducting the bond referendum. Your inquiry therefore is answered in the affirmative.

ELECTIONS—Justice of Peace—Declaration of vacancy required where magisterial districts rearranged.

JUSTICE OF PEACE—Elections—Unless court declares vacancy no election held for office where magisterial districts changed.

JUSTICE OF PEACE—Status—Upon rearrangement of magisterial districts.
REPORT OF THE ATTORNEY GENERAL

August 20, 1969

HONORABLE HELEN C. LOVING, Clerk
Circuit Court of Henrico County

This is in reply to your letter of August 8, 1969, in which you request my opinion as to whether an election for the office of justice of the peace may be held in the November general election under the circumstances which I quote, as follows:

"On March 13, 1969, the magisterial districts of the County of Henrico, which has adopted the County Manager form of government, were rearranged from four (4) magisterial districts to five (5) magisterial districts, thereby creating one (1) new district (Three Chopt). As a result of establishing new magisterial district lines, the elected Justice of the Peace from the old Tuckahoe District now resides in the newly created Three Chopt Magisterial District, thereby leaving no elected Justice of the Peace residing in the new Tuckahoe District."

You refer to my letter of March 3, 1967, to the Commonwealth's Attorney for Prince William County, Report of the Attorney General (1966-1967), page 167, in which similar circumstances existed. There I referred to previous rulings of this office that the jurisdiction of a justice of the peace is county-wide and expressed the view that the court need take no action except that the court may wish to appoint one or more justices of the peace in the new magisterial district to fill any vacancies which may exist. Similarly, no action is necessary in regard to the elected justice of the peace from old Tuckahoe District now residing in the newly created Three Chopt Magisterial District, as he may continue to act in the district in which he is now located because of rearranging the districts. Jurisdiction of a justice of the peace remains coterminous with the boundaries of the city, county or town for which he is appointed, as indicated in § 39.1-14 of the Code of Virginia.

Where a county rearranges its magisterial districts under the provisions of Article 4, Chapter 12, Title 15.1, of the Code of Virginia, § 15.1-576 empowers the court to declare a vacancy in any office and provide for filling the same. If the court fails to take such action in regard to justices of the peace there will be no change in the number of justices and the present justices will continue to serve the whole county. If the court does declare a vacancy pursuant to this section it may provide for filing same. In response to your specific question, therefore, it is my opinion that unless a vacancy has been declared and an election ordered no election for this office may be held in the November general election.

ELECTIONS—Party Committeemen—Not required to file list of expenses.

August 11, 1969

HONORABLE J. HAMILTON HENING, Clerk
Circuit Court of the City of Hopewell

I am in receipt of your letter of July 28, 1969, in which you present the following inquiry:

“When a local political committee of any party uses the facilities of an already scheduled party primary to elect membership to that local political committee (which to it is tantamount to a general election), are the candidates required to comply with Section 24-442 of the Code of Virginia pertaining to filing list of expenses?”

I am constrained to believe that your inquiry should be answered in the
negative. This office has consistently ruled that ballots for the election of local party committeemen are not to be printed at public expense and that party committeemen do not hold "public office". See, Report of the Attorney General (1962-1963) p. 81; (1956-1957) p. 98; (1954-1955) pp. 88 and 44. In this connection I am forwarding to you a copy of a previous opinion of this office, dated May 25, 1935, to the Honorable Charles R. Fenwick, Chairman of the Democratic Executive Committee of Arlington County, in which the then Attorney General (later Justice) Abram P. Staples expressed the view that candidates for party committeemen were not required to pay an entrance fee and that the provisions of Section 249 (now Section 24-398 et seq.) of the Virginia Code were applicable "only to a person filing as a candidate for nomination to a State, county, or city office" and did not apply to elections "for the purpose of selecting party authorities." See, Report of the Attorney General (1934-1935) p. 57.

I am of the opinion that the views expressed by Judge Staples in the enclosed opinion would be equally applicable to the question presented in your communication.

ELECTIONS—Purge of Registration Books—Not required of town where its county has purged.

ELECTIONS—Registration Books—Expense of purging—Borne by county, not town, where town election list drawn from county registration books.

HONORABLE HARVEY E. GILES, Secretary
Pittsylvania County Electoral Board

June 9, 1970

I am in receipt of your inquiry of June 4, 1970, regarding who should bear the cost of the purging of precinct books for the towns of Chatham, Gretna, and Hurt, Virginia, which purge has recently been directed by the Pittsylvania County Electoral Board. You observe that § 24-110 of the Code of Virginia (1950), as amended, deals with the cost of purging registration books by the General Registrar for counties and cities but makes no mention of towns.

I am enclosing herewith a former opinion of this office to Mr. E. S. Bishop, Secretary of Montgomery County Electoral Board, dated May 23, 1950, found in the Report of the Attorney General (1949-1950), p. 114, which is pertinent to your inquiry. In addition, I call your attention to Article 5, Chapter 10, Title 24 of the Code, §§ 24-168 through 24-175, which are the special provisions pertaining to town elections, as well as § 24-56 of the Code which provides for the appointment of registrars and judges for town elections and is discussed in the Bishop opinion.

The determination of eligibility to vote in town elections is made in accordance with the special list provided for in §§ 24-56 and 24-174. The determination is not made from "town registration books." Section 24-56 provides that the County Electoral Board shall, not less than fifteen days before any town election, appoint one registrar and three judges of election for each voting precinct. The registrars shall, from the registration books of the county, compile a list of only those voters who are residents of the respective precincts of such town and "who shall have previously registered as voters in the County." Such list, in conformity with § 24-174, must be placed "in the hands of the judges of election, who shall, at the time and in the manner prescribed by law, open a poll at the place designated . . . ."

Consequently, in view of the above requirements, a purge of town precinct books is not required. Any purging would be done from the county registration books, from which the town election list is drawn, the cost, as you point out, being borne by the County, pursuant to § 24-110.
ELECTIONS—Registration—When move back to county from annexed portion—Must request transfer.

ELECTIONS—Registration—When move back to county after former residence annexed—Six months residency requirement.

HONORABLE GEORGE W. JONES  
Member, House of Delegates

I am in receipt of your letter of January 12, 1970, in which you present several questions relating to the registration of voters following the annexation of a part of Chesterfield County by the City of Richmond. As I do not have a copy of the annexation order, the answers to your questions, which will be stated and considered seriatim, are, of course, subject to any controlling provisions of such annexation order.

"(1) Can a registered voter, who was registered in the County of Chesterfield and whose voter registration has been transferred to the City by court action ‘en masse’ and not by his action, request that his registration remain in the County based on the fact that he had been a resident of the County and has now moved back into the County after his former residence was annexed?"

Answer: No. I am not aware of any provision of Virginia law which would permit such a voter to request that his registration remain in the county. I am of the opinion that a voter who has "moved back into the County after his former residence was annexed" must affirmatively request that his registration be transferred to the proper registration books of the county pursuant to the provisions of § 24-86, et seq. of the Code.

"(2) Could a former resident request that his voter registration remain in the County based on his intent to move back into the County; either in the near future or at some distant time?"

Answer: No.

"(3) In the event that the registered voters are not allowed to leave their registration in the County, do they now have to establish a new six months residency when they move back into the County?"

Answer: Yes. See, § 24-86 and § 24-87 of the Virginia Code. I am not aware of any provision of Virginia law which alters the six-months residency requirement with respect to registered voters who "move back into the County" under the circumstances you present.

In regard to your further verbal inquiry concerning a voter registered in the annexed area who moved to another part of the county before his former residence was annexed, it would appear that his six-months residency in the county prior to his initial registration would not be affected and that he could be transferred to the proper registration books of the county without the necessity of establishing a new six-months residency.

ELECTIONS—Residence—Annexation—Eligibility of annexed citizens to vote or run for office.

ANNEXATION—Elections—Eligibility of annexed citizens to vote or run for office in city.

HONORABLE GEORGE W. JONES  
Member, House of Delegates

I am in receipt of your inquiries relative to exercise of the franchise by
citizens in the newly annexed area of the City of Richmond. You first inquire whether residents of the annexed area must reside in the City for six months before voting. You then inquire further as follows:

"Can citizens of the annexed area, who were qualified to register to vote as county residents, register and vote in the city councilmanic election in June?"

"Would citizens of the annexed area be eligible to run for office in June in compliance with the charter of the City of Richmond and the laws of Virginia?"

As to whether the residents must reside in the City six months and whether they may vote in the June councilmanic elections, I refer you to § 24-90 of the Code which is dispositive of your inquiry. This section provides in part that in a situation such as you describe, "such persons shall at once acquire the right to vote in the districts, respectively, to which they are so transferred."

The only requirement for eligibility as a candidate for city council is that the individual be qualified to vote for candidates for that office. See, Constitution of Virginia § 32. Inasmuch as residents of the annexed area are eligible to vote for the office of city councilman, I am of the opinion that they are eligible to run for the office.

ELECTIONS—Residence—Student may establish legal residence at place where institution is located.

HONORABLE GEORGE W. KEMPER, Clerk
Circuit Court for the City of Harrisonburg

April 2, 1970

This is in response to your letter dated March 25, 1970, in which you ask the following:

"If a student at Bridgewater College in Bridgewater, Virginia, who came from Danville, Virginia in September of 1969 and has subsequently become 21 years of age wants to register before the registrar of the voting precinct, claiming that he intends to remain in Bridgewater, should he be allowed to register? If he is silent on intent or does not intend to remain in that area would the opinion be the same?"

Section 24-20 of the Code of Virginia (1950), as amended, pertains to residence of students and inmates of charitable institutions and provides, in part, as follows:

"[N]o student in any institution of learning shall be regarded as having either gained or lost a residence as to the right of suffrage, by reason of his location or sojourn in such institution."

Although a student is therefore not entitled to be registered at the place where the institution is located merely by the fact that he is a student there, this does not mean that a student at an institution, who is more than twenty-one years of age, may not of his own volition establish his legal residence at such place. [See letter to the Honorable H. W. Browning, dated April 22, 1938, found in the Report of the Attorney General (1937-1938) at p. 62.] Whether a student, otherwise qualified, is entitled to claim the place at which the school is situated as his place of residence for voting purposes is a fact which the registrar of the precinct must pass upon. In this regard, this office has repeatedly said that no hard and fast rule can be laid down on this subject, as each case must be decided upon the particular surrounding facts and circumstances relating largely to the intention of the applicant.
On the other hand, if the student is silent as to intent or admits that he does not intend to make that area his permanent domicile, or intends to return in the future to his previous residence, then it would be clear that he did not intend to make the area his residence and, therefore, would not be entitled to be registered.

ELECTIONS—Special Attendants for Voting Machines—May not be hired.

ELECTIONS—Secretary of the Electoral Board—Compensation allowed.

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

I am in receipt of your letter of October 11, 1969, in which you present two questions which will be stated and considered in the order set out in your communication:

Question No. 1: "Dickenson County has ten voting machines. The Secretary of the Dickenson County Electoral Board wants to hire ten attendants on election day, November 4, 1969. Can he legally do this?"

Answer: Section 24-303 of the Virginia Code provides that, not less than ten nor more than twenty-one days before each election the electoral board shall instruct, or cause to be instructed in the use of the voting machines and their duties in connection therewith, the judges and clerks appointed to serve in such election, and shall not permit any person to serve as a judge or clerk who is not fully qualified properly to conduct an election with the voting machines. Moreover, § 24-309 provides for the instruction of voters on election day in the use of such machines and prescribes that if any voter after entering the voting machine shall request further instructions, two of the judges shall give such instructions to him. In light of these provisions, I am of the opinion that the applicable Virginia statutes do not contemplate the hiring of separate attendants for each precinct voting machine on election day.

Question No. 2: "How much can the Secretary of the Electoral Board be paid per year?"

In this connection I call your attention to § 24-37 of the Virginia Code which, in pertinent part, provides:

"The secretary of the electoral board shall receive from the county, city of town for each day of actual service the sum of twenty dollars, and each other member of the electoral board shall receive from the county, city or town for each day of actual service the sum of fifteen dollars; provided, that the governing body of any county, city or town may supplement the compensation herein prescribed for such members, and the secretary of the electoral board. Each member of the electoral board shall receive from the county, city or town, respectively, the same mileage as is now paid to jurors; provided that no member of such board shall receive from the county, city or town, respectively, more than one thousand dollars for two hundred fifty dollars for other members in any one year exclusive of mileage;"

In addition, § 24-38 of the Virginia Code provides that the secretary of the electoral board shall be allowed his expenses not to exceed three hundred dollars in any one year.

ELECTIONS—Voting—Person committed but not adjudicated insane may vote.
INSANE AND MENTALLY ILL—Voting—Person committed but not adjudicated insane may vote.

HONORABLE PHILIP LEE LOTZ
Commomwealth's Attorney for Augusta County

This is in reply to your inquiry of October 6, 1969, as to whether a person who has been committed to Western State Hospital, "having been adjudged mentally ill and on furlough but not discharged, may register and vote."

Section 23 of the Constitution of Virginia states that persons who are "insane" are precluded from registering to vote. You will note that §§ 37.1-1 (10) and (15) of the Code establish different definitions of the phrases "insane" and "mentally ill." These definitions are as follows:

"'Insane' means a person who has been adjudicated legally incompetent by a court of record or other constituted authority because of mental disease under chapter 4 (§ 37.1-127 et seq.) of this title;"

"'Mentally ill' means any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment; provided, that, for the purposes of chapter 2 (§ 37.1-63 et seq.) of the title, the term 'mentally ill' shall be deemed to include any person who is afflicted with mental deficiency or mental retardation or is a drug addict or inebriate;"

Accordingly, this office has ruled in a previous opinion that a person who is "mentally ill" is not necessarily "insane." See, Report of the Attorney General (1958-1959) at 215.

I am therefore of the opinion that a mere commitment to a State mental hospital for mental illness, without an adjudication of insanity as provided in § 37.1-1 (10), is not sufficient to deprive one of the right to register and vote.

ELIZABETH RIVER TUNNEL COMMISSION—Tolls—No reduction for students.

ELIZABETH RIVER TUNNEL COMMISSION—Contract With Bondholder—No free passage to students.

TOLLS AND TOLL BRIDGES—Free Use By Students—Prohibited on facilities of Elizabeth River Tunnel Commission.

HONORABLE WILLARD J. MOODY
Member, Senate of Virginia

This is in reply to your letter of October 14, 1969, in which you request an opinion as to the legality of amending the Elizabeth River Tunnel Commission Act in order to provide reduced passage rates to students attending Frederick Community College.

According to the excerpts furnished with your letter, the contract between the Commission and the bondholders, with exceptions not bearing on the question raised, provides that no free vehicular passage will be permitted over or through the project except for students residing in the District while going to and returning from immediate attendance of any state supported educational institution of higher learning in the District. The information furnished further shows that Frederick College, which is located in Nansemond County, is not in the District which is comprised of Norfolk and Portsmouth and Norfolk County.

Section 22-277 of the Code of Virginia, which prohibits collection of high-
way or bridge tolls from students going to and from schools and colleges, makes an exception for facilities financed by the issuance of bonds payable solely from tolls and other revenues of the project. As you know, the bonds issued under the provisions of Chapter 130, Acts of Assembly of 1942, creating the Elizabeth River Tunnel District, are payable solely from the funds therein provided from tolls and revenues from the project.

In view of the covenant of the Commission that no free passage will be permitted over or through the project, except as noted, the suggested reduction of the rates would be in derogation of the contract upon which the bonds were based and, in my opinion, could not be legalized by amending the Elizabeth River Tunnel Commission Act.

EMINENT DOMAIN—State Institutions—Displaced persons payments—
Construction of § 25-46.35.

DR. HENRY I. WILLETT, JR., President
Longwood College

This is in reply to your letter of May 14, 1970, in which you present the following questions regarding § 25-46.35 of the Code, as amended by Chapter 344 of the Acts of Assembly, 1970:

"1. Is Longwood College entitled to offer additional compensation to a home owner not to exceed $5,000 beyond the fair market value of his present dwelling to acquire a comparable dwelling after being displaced by the College?

2. If so, when should this additional payment be made to the home owner? The Act states that a new dwelling must be occupied within one year subsequent to the date on which he is required to move from the dwelling sold. It has been our practice to make payment when title changes. However, this usually occurs long before a displaced owner occupies a new dwelling. Must we make some certification to the Comptroller of Virginia that a new dwelling is occupied within the year limitation and make a second payment to the displaced home owner?"

The statute to which you refer, provides in pertinent part as follows:

"(b) (1) Whenever any person or entity vested by law with the power to exercise the right of eminent domain acquires any real property by purchase, gift, or the power of eminent domain and the acquisition results in the displacement of any eligible person, such eligible person shall be entitled to receive a payment therefor, not in excess of five thousand dollars, in an amount which, when added to the just compensation for the real property acquired, equals the average price required for a decent, safe and sanitary dwelling of modest standards and of comparable size, reasonably accessible to public services and places of employment and available on the private market; provided, however, that such payment may be made only to a displaced owner who purchases and occupies a dwelling within one year subsequent to the date on which he is required to move from the dwelling acquired.

(2) In addition to any payment in paragraph (b) (1) of this section, any eligible person shall be entitled to receive reasonable and necessary moving expenses caused by his displacement; provided, however, that such payment shall not exceed the cost of moving fifteen miles from the point of displacement, or the sum of two hundred dollars, whichever is less.

(c) In the event the person or entity vested by law with power to exercise the right of eminent domain and the eligible person are
unable to agree on the amount payable under this section, either party may petition the court having jurisdiction of eminent domain proceedings in the county or city in which such real property lies, for the payment of a reasonable amount in accordance with the provisions of this section. Upon hearing the matter the court shall ascertain the proper amount due the eligible person subject to the limits in subsection (b), and order payment of the amounts so ascertained in accordance with the provisions of this section."

Longwood College is vested with the right of eminent domain by § 25-232 of the Code and is therefore subject to the provisions of § 25-46.35(b) (1) above.

Payments under paragraph (b) (1) can only be made to owner-occupants, of at least one year's duration prior to initiation of negotiations who are actually displaced. And this payment can only be made if the displaced owner purchases and occupies a comparable dwelling within one year from the date he is required to move.

It should also be noted that payment up to five thousand dollars is to be based on the difference between the actual compensation received for the property taken and "the average price required for a decent, safe and sanitary dwelling of modest standards and of comparable size, reasonably accessible to public services and places of employment and available on the private market . . . ." This average would be based on values in the same general neighborhood as the condemned property. The price that the displaced owner actually pays—if above the average—would not be controlling. The appraisers should be able to assemble the facts necessary to make this determination at the onset of the acquisition procedure.

If there is a family involved, as defined in § 25-46.35(a)(3), and the family members decide to seek separate housing following the displacement, there would be only one payment under § 25-46.35(b) (1).

In addition, § 25-46.35(b) (2) provides for the payment of reasonable and necessary moving expenses for a distance of up to fifteen miles from the taken property, or the sum of two hundred dollars, whichever is less. The eligible person would be entitled to this sum without regard to the amount of compensation paid for the acquired property, nor how far he moved, though payment would stop at fifteen miles. Again, there would be but one payment to the family whether its members moved to the same site or not.

Payment of this relocation assistance would be separate and apart from the condemnation of the property. That is, it is not a part of the consideration paid for the acquired property. If there is a disagreement as to the amount due for relocation assistance, the statute provides a separate legal remedy; thus, if commissioners were appointed to determine the value of the property taken, the amount of relocation assistance would not properly be brought before them.

If there is agreement as to the amount of relocation assistance to be paid, the funds to be paid, if available then, should be put in escrow until the owner-occupant has actually moved or has actually purchased and occupied a comparable dwelling within the time limit fixed by the statute, and has submitted the necessary documents. If they are not available initially, payment would be made when the owner-occupant has complied with the statute.

The method of payment is provided in subsection (c) above. If the purchase price offered the owner is sufficient to permit the purchase of a comparable dwelling and moving costs as defined in the statute these sections will not become relevant. Naturally, to avoid subsequent question the terms of the deed should specifically include these expenses in the purchase price. In the event that the fair market value is agreed to by the parties, a separate application may be made to the court pursuant to subsection (c). If an award is made by the court before replacement or moving costs have been determined, the court can arrange to hold the funds in escrow.
until the property owner has replaced his home. A similar procedure may be followed in the event that both the fair market value, as well as replacement and moving expenses, must be determined in a condemnation proceeding.

While the statute does not preclude the college from making a direct payment of an agreed upon sum, it is not difficult to visualize that the payments for replacement value may result in a windfall to a land owner in some circumstances. Accordingly, it is desirable to employ adequate safeguards to insure that payment is not made for an inflated replacement value. I would therefore, recommend that even where the parties are able to agree on a replacement value some sort of escrow arrangement be developed to insure that payment is made only for fair replacement value within one year of the date from which the property owner must vacate the premises.

FEES—Judges—County judge may receive fee for holding hearing pursuant to § 37.1-67.

JUDGES—Fees—County judge may receive fee for holding hearing pursuant to § 37.1-67.

Honorable T. B. Kingsbury, III
Judge, Southampton County
Juvenile and Domestic Relations Court

This is in response to your letter of April 29, 1970, in which you request an opinion as to whether or not Va. Code Ann. § 37.1-89 which was amended by the 1970 Session of the General Assembly, allowed the “County Judge” to receive the $25.00 fee for holding hearings under Va. Code Ann. § 37.1-67 or whether this fee provision was restricted to “special justices” appointed under Va. Code Ann. § 37.1-88.

In my opinion, the provisions for the fee of $25.00 provided for in Va. Code Ann. § 37.1-89, as amended, would apply to all persons defined as justices under Va. Code Ann. § 37.1-1 (11). This includes judges of county courts. I am enclosing a copy of the bill as enacted by the General Assembly. You will note that Va. Code Ann. § 37.1-89 formerly restricted the fee to “special justices” defined in Va. Code Ann. § 37.1-88 by specific reference to that section. The amendment, however, deletes the reference to Va. Code Ann. § 37.1-88 and adds that:

“Any justice as defined in § 37.1-1 who presides over hearings pursuant to the provisions of § 37.1-67 shall receive a fee of $25.00 for each hearing.”


FEES—Judges—Received for holding hearing under § 37.1-67—Must be paid to clerk who pays same into State treasury.

JUDGES—Fees—Received for holding hearing under § 37.1-67—Must be paid to clerk who remits to State treasury.

Honorable T. B. Kingsbury, III
Judge, Southampton County Court

This is to acknowledge receipt of your letter of June 2, 1970, in which you state in part:

"... while I see ample reason to compensate special justices appointed under Sec. 37.1-88, who receive no salary; I am a little dubious about whether it was intended to compensate other justices as defined in Sec. 37.1-1(11), who do receive salaries, based partly (I would suppose) on performing duties under Title 37 of the Code.

"I hate to belabor this matter, but do I actually receive the fees or do I remit them to the county or state as is done in cases of other fees? (Sec. 14.1-44; Sec. 14.1-86; Sec. 14.1-100) I do not receive other fees and I am a little puzzled as to whether your opinion of May 27, 1970, means I charge the fee as part of the costs of the proceeding and then remit it as I do other fees, or whether I actually receive the fee for services . . . .

"If you agree that Sec. 14.1-44 governs; then in cases where the patient's family pays the fee under Sec. 37.1-89, it would appear that my fee would go to the state. In most cases, however, the fees under Sec. 37.1-89 must be paid by the county. In such cases, should my fee be paid by the county and then remitted to the state with a civil right of recovery over to the county, or should the county not be charged my fee in such instances?"

Section 37.1-89, as amended by Chapter 673, Acts of 1970, among other things, provides:

"Any justice as defined in § 37.1-1 who presides over hearings pursuant to the provisions of § 37.1-67 shall receive a fee of twenty-five dollars for each hearing." (Emphasis supplied.)

Section 14.1-44 provides in part:

"All fees paid to and collected by a judge, substitute judge, clerk, deputy clerk or a substitute clerk of a county or municipal court . . . shall be paid promptly to the clerk of the circuit court, who shall pay same into the State treasury." (Emphasis supplied.)

The fact that the legislature characterized the emolument to be paid to the justices as a fee indicates that the intent was that same be treated and accounted for as a fee under § 14.1-44. Had it been intended that the county judge (termed a justice under § 37.1-1(11)) be entitled to this fee in addition to his salary, other language than "a fee" would have been used in the statute.

The county judges are paid out of the State treasury. § 14.1-43. Apparently the legislature felt that it was proper that the counties bear a portion of the costs in administering the provisions of Title 37.1, Code of Virginia namely of the hearings under § 37.1-67, including instances when the hearing is held by the County Judge. Had this not been the intent, § 14.1-44 would have been amended.

I am therefore of the opinion that the fees imposed under § 37.1-89 and collected by the County Court should be paid to the Clerk of the Circuit Court and disposed of pursuant to § 14.1-44.

FIRE DEPARTMENTS—By-laws—May be amended to include nonresidents as members.

TOWNS—Fire Departments—Nonresidents not precluded from membership.

January 22, 1970

HONORABLE SAM E. POPE
Member, House of Delegates

I am in receipt of your letter of January 15, 1970, in which you inquire
whether the Windsor Volunteer Fire Department may amend its by-laws to provide that membership "shall include persons residing or employed not only in the Town, but also residing within two (2) miles of the Town corporate limits."

Pertinent to your inquiry, you state that the town charter provides that the town "shall have the power to prevent and provide against fire by accident." You also refer to § 27-8 of the Code, which provides that twenty persons residing in a town may form a fire company.

It is my opinion that the fire company may have members which reside outside the town limits. The provisions of § 27-8 require that a company be formed by at least twenty residents of the town. But I am aware of no provision of law which would preclude non-residents of the town from serving as members thereof as long as the company was established by the appropriate number of residents as specified in § 27-8. Inasmuch as the provisions of §§ 27-7 and 27-9 of the Code provide for the promulgation of by-laws and regulations consistent with the objectives of the company, it would be appropriate to provide therein for non-resident members.

FIRE LAWS—Brush Burning—Fire may continue to burn after midnight when contractor complies with all safety requirements.

April 14, 1970

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

This is in reply to your letter of April 8, 1970, which reads, in part, as follows:

"At the present time a contractor here is clearing a strip through some woodland in my county preparatory to the construction of an electric power transmission line through the cleared strip. Several tracts of woodland are involved and the operation will take some time.

"The contractor apparently has been advised by certain persons in the Division of Forestry that when the leaves and grass are too wet to burn, it is no violation of Section 10-62 (b) to set fire. He has also been advised by the same source that he may let his fires burn 24 hours a day provided he adds no fuel between midnight and 4:00 P.M. The contractor, I am informed, is setting his fires between 4:00 P.M. and midnight (admittedly when he may lawfully burn) but lets the stumps and tree laps and limbs continue their burning the remainder of the night and into the daytime.

"My inquiry is simply this: Do you place the same construction on the statute as the forestry officials or must the contractor extinguish his fire after midnight?"

This office has expressed previously the opinion that during the period of March 1-May 15 of each year Section 10-62(b) of the Code of Virginia authorizes the starting of certain fires only between the hours of 4:00 p.m. and midnight and permits the continuance of burning after midnight only where Sections 10-62(a) and 10-63 have been strictly followed. See Report of the Attorney General—1954-55 at 112-113 (Opinion to Honorable Arthur B. Crush, Jr., Commonwealth's Attorney for Craig County), a copy of which is enclosed.

Therefore, I am of the opinion that where the contractor referred to in your letter complies with all safety requirements of the law, and the fire is not left untended, the fire may be permitted to burn after midnight.
REPORT OF THE ATTORNEY GENERAL

FIRE LAWS—Special Levy—Funds may not be used for a rescue squad.

COUNTIES—Fire Department Special Levy—May not be used for a rescue squad.

HONORABLE N. C. SHARP, Executive Secretary
Board of Supervisors of Prince William County

This is to acknowledge receipt of your resolution dated June 26, 1969, in which you request a ruling of the Attorney General as to whether fire levy funds may be used for a rescue squad.

Under the provisions of § 27-26 of the Code of Virginia (1950), as amended, a county may establish one or more fire departments and, to raise funds for such a purpose, a tax may be levied. This section contains the following language:

“The amount realized from such levy shall be kept separate from all other moneys of the county and shall be applied to no other purpose than the maintenance and operation of the fire departments established under the provisions of this section.” (Italics supplied)

A fire department so established and a rescue squad are separate organizations.

I am therefore of the opinion that the question must be answered in the negative.

GAME AND INLAND FISHERIES—Deer and Bear Stamp Fund—May not pay claim for cow killed during turkey season.

GAME AND INLAND FISHERIES—Deer and Bear Stamp Fund—May not be used to pay for damage to trailer or dwelling house.

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

By letter of February 13, 1970, you requested my opinion regarding the application of Chapter 692, Acts of Assembly of 1968, to the following questions:

“Question No. 1. Can a claim for a cow killed on November 8 or 9, 1969, which was during Turkey season, but before Bear season, be paid from the Special Damage Fund?

“Question No. 2. Can claims for damages to a trailer or dwelling house, which were caused by shooting of big game hunters during big game season, be paid from the Special Damage Fund? In the instance of trailer damage, it has no connection with a farm, however, in the case of the dwelling house it is located on a farm and used as a farm dwelling.”

Chapter 692, Acts of Assembly of 1968, amended and reenacted Section 2, Chapter 420, Acts of Assembly of 1962. Section 1 of Chapter 420 authorizes the governing bodies of certain enumerated counties, including Bath County, to enact ordinances adopting the provisions of Chapter 420, effective only upon, and in, those counties enacting such ordinances. Section 2 of Chapter 420 provided, in part, that it shall be unlawful for any person to hunt bear and deer in any of the enumerated counties without first having purchased a special stamp. The fees resulting from the sale of the special stamps would be paid into the treasuries of the individual counties to the credit of a special fund and 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 . . . ." Chapter 692 amended Section 2 of Chapter 420 to provide for payment of damages to the enumerated items by " . . . deer, or bear at any time or by big game hunters during hunting season in the county . . . ."

I believe that it was the intent of the General Assembly to limit payments for damages caused by big game hunters, that is, persons hunting deer and bear, to the hunting seasons prescribed for deer and bear. Therefore, I am of the opinion that Question No. 1 must be answered in the negative, assuming that the cow was killed by a hunter. Further, I am of the opinion Question No. 2 must also be answered in the negative because the property damage does not fall into any of the classes enumerated in the Act.

GAME AND INLAND FISHERIES—Game Wardens—Qualification when appointed under § 29-37.1 is sufficient without repetition for subsequent appointment under § 29-24.

April 10, 1970

HONORABLE JOHN ALEXANDER
Commonwealth’s Attorney for Fauquier County

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

"In 1965, an individual was appointed a Special Game Warden for certain specified lands under the provisions of Section 29-37.1 of the Code and thereafter qualified before the Clerk of the Circuit Court for Fauquier County and gave bond in the penalty of $1,000.00 in accordance with the provisions of Section 29-27. From time to time thereafter, the boundaries of the property for which he was appointed were increased by the Game Commission and subsequently, in April of 1969, this individual was appointed as a Special Game Warden under the provisions of Section 29-24 of the Code.

"The individual concerned did not subscribe to the oath of office nor did he enter into any new bond subsequent to his appointment under Section 29-24 but the payment of premiums has been continued upon his bond which he executed in 1965 following his appointment under the provisions of Section 29-37.1."

You inquire as to whether or not this individual has qualified as a Special Game Warden appointed pursuant to the provisions of Section 29-24 of the Code.

I am advised that the powers of Special Game Wardens appointed pursuant to the provisions of Section 29-37.1 and Section 29-24 are the same. I understand that the purpose in enacting Section 29-37.1 was to authorize the appointment of a Special Game Warden who would have jurisdiction only over certain specified lands.

I am of opinion that insomuch as this individual took the oath and gave the bond prescribed by Section 29-27 of the Code at the time of his appointment as a Special Game Warden pursuant to the provisions of Section 29-37.1 of the Code, it was unnecessary for him to repeat these actions when he was appointed a Special Game Warden in accordance with the provisions of Section 29-24 of the Code, insomuch as the powers conferred upon him under both appointments are identical.

GAME AND INLAND FISHERIES—License—Revocation for violation of laws or regulations within two years of a previous conviction.

GAME AND INLAND FISHERIES—Revocation of License—Civil and not criminal in nature.
I am in receipt of your letter of July 17, 1969, relative to the provisions of § 29-77 of the Code of Virginia (1950), as amended, in which you inquire whether "the code section contemplates an interval of time from the first violation to the second violation or an interval of time from the first conviction to the second conviction."

Section 29-77 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." (Emphasis added.)

The above statute was amended by Chapter 469 of the Acts of Assembly of 1962 by the insertion of the emphasized phrase. Prior to the 1962 amendment there was no time limitation placed on the two violations. The effect of the amendment was to place a two year limitation on the time which could be considered when undertaking to revoke a license pursuant to the statute.

Though this office has issued some opinions with reference to § 29-77, the precise question you raise has never been ruled upon. Pertinent to your question is a consideration of the nature of the revocation of a license. In this regard I refer you to the case of Prichard v. Battle, 178 Va. 455, 462, 17 S.E.2d 393 (1941) wherein it was held that the revocation of a license "... is civil and not criminal in its nature... [It] is a finding that by reason of the commission of the act or the conviction of the licensee, the latter is no longer a fit person to hold and enjoy the privilege which the State had theretofore granted to him under its police power. The authorities agree that the purpose of the revocation is to protect the public and not to punish the licensee."

In view of the nature and purpose of a revocation, I am of the opinion that any person who violates any provisions of the laws and/or regulations set forth in the statute, and such violation is "within two years of a previous conviction of violating any such law or regulation," should have his license revoked.

GARNISHMENTS—Amount—Federal law governs in State from July 1, 1970 to October 1, 1970.

GARNISHMENTS—Date Governing Applicable Law—Employer should be governed by return date of summons but may also be bound by § 8-445 after having knowledge of its issuance.

HONORABLE T. B. KINGSBURY, III
Judge, Southampton County Court

This is to acknowledge receipt of your letter of June 3, 1970, in which you state in part:

"Section 34-29 parallels Federal law on this subject, but the Federal Law is effective July 1, 1970, and Chapter 428 is effective October 1, 1970. While this latter date might me all right for Sections 34-26 and 34-27, which law governs garnishments from July 1, 1970, to October 1, 1970, the present Code Section 34-29 or the Federal Law on July 1, 1970?

"In this connection, should the employer be governed by the date the garnishment process is issued, by the date (or dates) the wages become due, or by the return date?"

I am of the opinion that Sections 301 through 307 of Public Law 90-321, (15 USC §§ 1671 to 1677), on garnishments effective July 1, 1970 governs the amount of garnishment in the State from July 1, 1970 to October 1, 1970.

In answer to your second question I refer you to § 8-445, Code of Virginia (1950), as amended. That section provides that the employer after being served with a summons in garnishment can only lawfully pay his employee the wages or salary not exceeding the amount exempted by § 34-29 of the Code. Section 8-445 also provides that the employer "shall answer such garnishment summons . . . showing the amount of wages or salary due on the return date of the garnishment summons and the amount of wages or salary so exempted . . . ."

I am therefore of the opinion that the employer is governed by the return date of the summons in garnishment but must also be bound by the provisions of § 8-445 after he has knowledge of the issuance of the summons in garnishment, as indicated above.

GENERAL ASSEMBLY—Appropriation to Church of Funds for Restoration Prohibited.

HONORABLE GEORGE N. MCMATH
Member, House of Delegates

This is in reply to your letter of February 11, 1970, in which you inquire whether the General Assembly may appropriate funds for the repair and restoration of a mural painting in St. James Episcopal Church.

The purpose for which the appropriation is sought is a most worthy one, and I share your desire for the success of the restoration. However, I am constrained to say that such an appropriation would be in conflict with § 67 of the Constitution of Virginia. This section provides that:

"The General Assembly shall not make any appropriation of public funds, or personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the State; except that it may, in its discretion, make appropriations to nonsectarian institutions for the reform of youthful criminals; but nothing herein contained shall prohibit the General Assembly from authorizing counties, cities, or towns to make such appropriations to any charitable institution or association."

It is my opinion that the appropriation which you describe would be an appropriation to a church such as precluded by the terms of the above provision. The applicable legal principles were discussed in the case of Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).
GENERAL ASSEMBLY—Lobbying—Amendment excluding State agencies and employees thereof is not unconstitutional.  

April 15, 1970

HONORABLE LESLIE D. CAMPBELL, JR.  
Member, Senate of Virginia

This is in reply to your letter of March 31, 1970, in which you request that I examine House Bill 133, proposed by the House Committee on General Laws, amending §§30-28.1, 30-28.2, 30-28.3, 30-28.5 and 30-28.8 of the Code of Virginia, relating to lobbying, and rule upon its constitutionality.

Specifically, you express concern about the exclusion from the definition of “person” under paragraph (a) of §30-28.1, of “an officer, board, department, institution or agency of the Commonwealth of Virginia or employee thereof” and “an officer, board, department, institution or agency of any political subdivision of the State or employee thereof, or a political subdivision of the State”.

The net change resulting from the amendment to this paragraph is the exclusion of any officer, board, department, institution or agency of the Commonwealth or employee thereof, from the requirements of State law relating to lobbying. Any political subdivision of the State, or an officer, board, department, institution or agency of any political subdivision of the State, or employee thereof, is already excluded under the present law. This exclusion is reflected in §30-28.1 (a), Chapter 2.1, Title 30 of the Code of Virginia, as embodied in Chapter 511, Acts of Assembly of 1964. Thus, the 1970 amendment found in House Bill 133 places the various agencies of the State and employees thereof in the same category as the agencies of the State’s political subdivisions and employees thereof have been previously.

In my interpretation, the statutory exclusion of employees of the State and its political subdivisions has reference to these employees while acting in behalf of the State or political subdivisions for which they are employed. It may be reasonably argued that such employees acting on behalf of the State, or a political subdivision thereof, already are under such governmental control as to place them in a category different from private individuals and firms, and that control of the latter in the matter of lobbying is essential to the public interest. In the absence of a constitutional prohibition, it is the prerogative of the Legislature to determine what controls are desirable and needed for the protection of the public.

Considering the foregoing, in my opinion, the amendment excluding State agencies and employees thereof, along with the political subdivisions of the State and employees thereof, which are excluded under the present law, is not such an amendment as to render the laws regulating lobbying unconstitutional.


April 14, 1970

HONORABLE CYNTHIA NEWMAN  
Secretary of the Commonwealth

This is in reply to your predecessor’s letter of March 24, 1970, with which she enclosed a letter dated March 19, 1970, addressed to her and signed by Ronald Nowland, General Manager, Automotive Trade Association of Virginia.

Miss Conway requested that I give my opinion on the points raised in Mr. Nowland’s letter. I shall state the questions and give my answer to each in the order presented:

“1. Does the term expenses, as it relates to all that is in Par. G of Sec. 30-28.1, refer to or imply exclusively to the definition of lobbying in Par. C, and the definitions of promoting, advocating, and opposing
in Par. E, which appears to limit the control of lobbying exclusively to activity within the Capitol Building?"

The term "Expenses", as set forth in paragraph (g) of § 30-28.1, Chapter 2.1, Title 30 of the Code of Virginia, is defined as follows:

"Expenses" includes (i) moneys directly or indirectly paid, or to be paid, by the lobbyist in connection with lobbying; (ii) all moneys paid, or to be paid, by the employer of a lobbyist which moneys are used or are intended to be used to assist such lobbyist in his work and shall, without excluding moneys expended for other purposes, include moneys expended to inform any person of the matter upon which the lobbyist is engaged as such or to have any other person communicate in any manner with any member of the General Assembly so as to assist the lobbyist in any matter upon which he may be engaged."

This definition by no means limits the term "Expenses" to expenditures made in the Capitol building, but includes moneys paid directly or indirectly by the lobbyist in connection with lobbying. For example, it includes the expenses incurred and paid for travel, food and lodging, and all incidentals. This question, therefore, is answered in the negative.

"2. If Chapter 21 of the Code applies only to lobbying within the Capitol Building, do the expenses incurred, such as hotel, travel, correspondence, parking, etc., which are expenses incurred outside of the Capitol Building, have to be disclosed?"

Mr. Nowland has reference to Chapter 2.1, Title 30 of the Code of Virginia. I shall answer this question in the affirmative. As indicated in my answer to the previous question, the term "Expenses", as defined in paragraph (g), includes such expenses.

"3. I am General Manager of our Association and as such, in the course of a year's work, only a very small part of my time is consumed in affairs which would be considered lobbying. Question on the Lobbyist's Expense Statement, 'If on annual salary, amount allocated to lobbying.' In our organization we do not have any amount of my salary strictly allocated to lobbying. Is it required that I estimate the portion of the time I spend lobbying as the figure for this statement?"

The answer to this question is in the affirmative. Because you are on an annual salary, it is necessary that you allocate the applicable portion thereof to lobbying.

"4. For the purpose of Chapter 21, do I conclude that lobbying would include only that time which I spend in the Capitol Building, talking with legislators?"

Assuming the question relates to computing time for the purpose of making the proper allocation to expenses and salary related to lobbying, my answer to this question is in the negative. The time necessarily consumed in waiting to see a legislator and travelling to and from the Capitol, etc., should be included. See answers to previous questions.

"5. How do I account for the time when I am in the Capitol Building but not in the process of promoting, advocating, or opposing any matter?"

This inquiry is covered in my answer to question #4.
“6. In the process of appearing before committees of either House, do I understand that this time would not be chargeable against my annual salary, as time spent lobbying?”

In my opinion, such time would be chargeable. As a person who is employed or retained for the purpose of lobbying, in whole or in part, Mr. Nowland is included within the purview of § 30-28.1 (c)(ii).

“7. Finally, to get clear in my mind about what ‘expenses’ means, as far as my obligation to disclose, can I presume that Par G. Sec. 30.28.1, is limited to the definition of Par. E which limits the control of conduct within the Capitol Building? This last matter, appears to me to be a crux of much confusion among those of us affected by Chapter 21, and as a layman it would seem to me that Par. G is not consistent (sic) with the definition and limitations as spelled out in Par. E of Sec. 28-1.”

The answer to this question is in the negative, for the reasons expressed in my answer to question #1.

GENERAL ASSEMBLY — Members — No prohibition against receiving salary as professor while in attendance.

STATE INSTITUTIONS—Norfolk State College—Board of Visitors has discretion to continue salary to professor while attending General Assembly.

January 26, 1970

HONORABLE WILLIAM P. ROBINSON, SR.
Member, House of Delegates

I am in receipt of your letter of January 21, 1970, wherein you inquire if there are any constitutional or statutory provisions which would prohibit you from receiving your salary as a professor at Norfolk State College, while serving as a member of the General Assembly of Virginia. It is my understanding that you are currently on a leave of absence from the College.

The expenditure of funds for salaries of teachers at Norfolk State College is, pursuant to § 23-174.6 of the Code of Virginia (1950) as amended, under the control of the College’s Board of Visitors, who are subject only to the control of the General Assembly.

Though I know of no constitutional or statutory prohibition disallowing you from receiving your salary while attending the General Assembly, I am unaware of the policy of the Board of Visitors, who in accordance with the above cited statute, would have the discretion whether salaries should continue in situations such as you outline.

GENERAL ASSEMBLY—Senator—Salary—Member of House of Delegates elected to Senate in special election loses salary until officially sworn in.

April 3, 1970

HONORABLE JOHN W. HAGEN
Member, House of Delegates

This is in reply to your letter of March 14, 1970, which reads, in part, as follows:

“Would a delegate who is elected in a special election to the Senate of Virginia and resigns from the House after that election, lose his
compensation until he was officially sworn in as a member of the Senate, or would he be entitled to compensation upon his election to the Senate without being sworn in.”

In my opinion, a senator who is elected to fill an unexpired term is not entitled to receive payment for his services until he is sworn in.

Section 34 of the Constitution provides that a member of the General Assembly must take a prescribed oath “before they enter on the performance of their public duties.” (Emphasis supplied.) Section 45 of the Constitution allows members of the General Assembly to be paid “for their services. . . .”

Virginia Code Section 14.1-17 provides that a delegate be paid a per diem “for expenses, attendance and services . . .” at regular or special sessions. A $1200 per year allowance for expenses is also allowed for members of the Senate and the House. This section also states that one who succeeds to the unexpired term of a former member of either body purportedly “shall receive the per diem beginning from the date of his election.”

Section 45 of the Constitution allows payment of a salary to a member of the General Assembly only for services that he might render. Section 14.1-17 provides for that payment only for “expenses, attendance and services” rendered. Both of these sections are dependent upon Section 34 which prohibits a member of the General Assembly from entering into the performance of his public duties until he has taken the oath. Therefore, a senator who has been elected and has not taken the oath would be precluded from receiving the salary provided for him under Section 45 or Section 14.1-17 because he cannot legally render the performance of the duties upon which payment of his salary is dependent.

HEALTH—Communicable Diseases—Disposal of dead animals.

ORDINANCES—County—Authority to regulate disposal of dead animals.

ORDINANCES—May enlarge upon terms of general statute.

HONORABLE WM. ROScoe REYNOLDS
Commonwealth’s Attorney for Henry County

December 10, 1969

This is in reply to your letter of December 2, 1969, in which you state that the board of supervisors is considering passage of an ordinance relating to the disposal of dead animals. After stating that an ordinance adopted pursuant to § 32-70 of the Code would not be broad enough to meet the requirements of local conditions, you inquire as follows:

“[T]he director of the Henry County Health Department has requested that a far-reaching ordinance be written in which specific methods would be set forth as to how dead animals were to be disposed of. This ordinance would fix a stiffer penalty than provided in Sec. 32-70 for abandoning a dead animal on the property of another and would also fix a punishment for disposal of a dead animal in a manner not set forth in the ordinance.

“My question is this: Since the legislature has provided Sec. 32-70 which may be adopted by a county to handle such a matter, would it be constitutional for the county to enact an ordinance which is in effect substantially different from and more stringent than Sec. 32-70, in that it fixes a stiffer punishment for abandonment of dead animals and, further, sets forth methods in which animals should be disposed?”

Section 32-70, to which you refer, imposes a fine for the failure by the owner of a dead animal to dispose of same and also allows a fee to an
officer who disposes of the animal as provided in the statute. This statute is not a general criminal statute authorizing localities to enact parallel ordinances, but by its terms "shall not apply to any county until the governing body thereof shall adopt the same."

It is my opinion that the authority to regulate disposal of dead animals is within the scope of the general powers conferred on counties by § 15.1-510. The enactment of § 32-70 would not preclude the exercise of such authority. Therefore, if the ordinance you envision merely details additional provisions for disposing of dead animals by cremation or burial in a certain way, and prescribes more stringent penalties for violation thereof, I do not believe such ordinance would be invalid. A number of cases have recognized instances in which an ordinance may enlarge upon the terms of a general statute without creating a conflict or inconsistency therewith. See, e.g., *Allen v. City of Norfolk*, 196 Va. 177, 181, 83 S.E.2d 397 (1954); *King v. Arlington County*, 195 Va. 1084, 1088, 81 S.E.2d 587 (1954); *Shaw v. City of Norfolk*, 167 Va. 346, 352, 189 S.E. 335 (1937).

In view of the foregoing, it is my opinion that the board of supervisors would be authorized to adopt an ordinance of the type which you describe.

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HEALTH—Septic Tanks and Disposal of Sewage—Local directors may place qualified signatures on subdivision linens to remove implied blanket approval for use of septic tanks thereon.

_Honorably Mack I. Shan Holtz_  
Commissioner, Department of Health

This is in response to your letter of June 4, 1970, in which you request my opinion as to whether or not the local health directors can place qualified signatures on subdivision linens prior to the subdivisions being put to record. You stated:

"The difficulty encountered is that once a plat has been signed by the local health director, there is implied a consent or approval for the use of septic tanks on such subdivision."

You ask:

"If it will be legally permissible for our local health directors to approve subdivision linens with specified reservations, if any, stated on the linen itself."

_Virginia Code Ann. § 32-9_ states:

"The Board (State Board of Health) may regulate the method of disposition of garbage or sewage and any other refuse matter or any combination thereof in this state."

Section 32-6 of the Code provides authority for the Board to:

"Make, adopt, promulgate and enforce reasonable rules and regulations from time to time requiring and providing for the subjects which follow in this chapter."

Included in this authority are the provisions of Section 32-9 as previously mentioned, relating to regulation of the disposition of sewage.

Pursuant to the authority granted by these two Code sections, the State Board of Health has adopted _REGULATIONS OF THE BOARD OF HEALTH, COMMONWEALTH OF VIRGINIA, GOVERNING THE DISPOSAL OF SEWAGE_ (1968). These regulations provide for the issuance of permits to any person intending to construct, alter or extend a sewage
disposal system in the Commonwealth of Virginia. Since the Board has adopted these regulations pursuant to statutory authority and its local officers are charged with their enforcement, the officers must have the authority to refuse to engage in any practice or practices which would hinder the execution of their duties imposed under these regulations. If their signatures on subdivision linens have been or are being construed to create an implied consent or approval of each lot as being suitable for the installation of septic tanks, when in fact they are not, the health officer has not only the right but the obligation to refuse to give his blanket endorsement to the subdivision. Therefore, he has a legal right and obligation to endorse the plat with specified reservations and qualifications.

HEALTH—Tourist Camps—Definition—Refers to the function of the facility as a whole.

TOURIST CAMPS—Definition—For purpose of applying rules and regulations of State Department of Health.

HONORABLE MACK I. SHANHOLTZ
State Health Commissioner

July 31, 1969

This is in reply to your letter of July 7, 1969, in which you inquire as to whether the Department's regulations pertaining to tourist camps are applicable to the following situation:

"The Indian Acres Subdivision is currently being developed in Spotsylvania County. The developers are proceeding with the sale of 2,800 square foot lots to be used by individual owners for camping purposes. Water supply and sewage disposal facilities will be provided by public type comfort stations convenient to each camping area. Final disposal of sewage wastes will be accomplished by the installation of an approved public sewage treatment facility.

* * *

"The company will not own any of the ground being camped upon and will not operate a camp or tourist facility of any kind."

The statutory definition of a tourist camp as contained in § 35-54(3) of the Virginia Code is:

"'Tourist camp' shall be construed to mean any plot of land used, maintained, or held out to the public as a place for use for camping or lodging purposes, whether equipped with tents, tent houses, huts, cabins, or cottages, or not so equipped, and by whatever name the same may be called, whether any fee is charged for the use thereof or not. Such words shall not be construed to include the following:

(a) A hotel as defined in §§ 35-1 or 58-380, provided such hotel is located in a city or in an incorporated town or contains ten or more bedrooms in a single structure of more than one story.

(b) Tourist home."

It is my opinion that you may properly determine that the subdivision as a whole qualifies as a tourist camp subject to the regulations of the State Department of Health. This determination would not be affected by the fact that the various lots in the subdivision are individually owned. The word "plot" as used in the statute may refer to one or more parcels of land, depending on the context in which the word is used. See, Reitman v. Village of River Forest, 9 Ill. 2d 448, 137 N.E.2d 801, 803 (1956); Jennings v. Calumet National Bank, 348 Ill. 108, 180 N.E. 811, 813 (1932).
In this instance, the statute refers to the function of the facility as a whole and not to the individual use of each of its component parts.

HOUSING—Regional Housing Authority—Procedure for establishment—No referendum necessary, but resolution and public hearing required.

June 18, 1970

MR. JERRY V. MANUEL
Recreation/Housing Planner
Cumberland Plateau Planning District

This is to acknowledge receipt of your letter of June 11, 1970, in which you state in part:

“We are attempting to create a Regional Housing Authority in the Cumberland Plateau Planning District under the Code of Virginia Housing Authorities Law, Sec. 36-40, 36-44.

“The statutory procedures for establishing a Regional Housing Authority are quite unclear. Under Sec. 36-44 of the code, we would like to know if, in your opinion, it will be necessary to have a public referendum in each of the four counties to establish the Regional Housing Authority.”

Section 36-44, Code of Virginia (1950), provides in part:

“The board of supervisors of a county shall not adopt any resolution authorized by §§ 36-40, 36-41 or 36-42 unless a public hearing has first been held. The clerk of such county shall give notice of the time, place, and purpose of the public hearing at least ten days prior to the day on which the hearing is to be held, in a newspaper published in such county, or if there is no newspaper published in such county, then in a newspaper published in the Commonwealth and having a general circulation in such county. Upon the date fixed for such public hearing an opportunity to be heard shall be granted to all residents of such county and to all other interested persons.”

There is nothing in Article 6, Chapter 1, Title 36, Code of Virginia, which indicates that a public referendum is necessary to establish a Regional Housing Authority. However, the Board of Supervisors of each of the contiguous counties must adopt a resolution creating a regional housing authority. (§ 36-40 of the Code) Before the adoption of such a resolution a public hearing must be held pursuant to § 36-44 of the Code after notice of the hearing is given.

HONORABLE HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

I am in receipt of your letter of December 19, 1969, in which you inquire as follows:

“May patients who are under court order reported as psychotic and insane, and who in accordance with Section 19.1-231 should remain involuntarily in the hospital as criminally mentally ill until recovery, be considered for sterilization under Sections 37.1-156 through 37.1-171?”
Section 37.1-156, which is a part of Chapter 6 of Title 37.1, provides for the sterilization of any patient of a State hospital afflicted with the “hereditary forms of mental illness that are recurrent or mental deficiency.” In a prior opinion, reported in Report of the Attorney General (1957-1958) at 162, this office expressed doubt that the provisions of this chapter (then Chapter 9 of Title 37) embraced commitments under what is now § 19.1-231. In § 37.1-1(16) the word patient is presently defined as “a person certified or admitted to a hospital according to the provisions of this title.” This office has ruled on several occasions that the provisions of Chapter 6 are to be strictly observed. See, Reports of the Attorney General (1962-1963) p. 256; (1951-1952) p. 92. In view of the foregoing, I am of the opinion that the above definition of a patient would render these provisions applicable only to persons admitted pursuant to the provisions of Title 37.1 and not to persons admitted under Title 19.1.

INSURANCE—Motor Vehicles—Uninsured motorist—Minimum amounts to be carried on school buses.

SCHOOLS—Insurance—Uninsured motorist—Minimum amounts to be carried on school buses.

June 19, 1970

HONORABLE WOODROW W. WILKERSON
Superintendent of Public Instruction

This is in reply to your letter of June 12, 1970, which reads in part as follows:

“The 1970 session of the General Assembly amended Section 22-285 which specifies the amounts of insurance to be carried on school buses. A part of this amendment dealing with the uninsured motorist coverage is not clear as to the limits required under this coverage.

“We respectfully request your opinion, in light of Section 22-285 as amended, as to what the required amounts of coverage are under the provisions for the uninsured motorist.”

Chapter 681, Acts of Assembly of 1970, in amending § 22-285 of the Code provided:

“. . . and, in addition, said policy of insurance shall provide for loss or damage caused by an uninsured motorist, said coverage to be in accordance with the provisions of § 38.1-381(b) and the limit of said coverage shall be an amount equal to the aforesaid limits of liability.”

Section 38.1-381 (b) to which the amendment refers is commonly referred to as the uninsured motorist clause. This clause provides in part that no policy or contract of insurance relating to maintenance or ownership of a motor vehicle may be issued “unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . .”. The provisions of the uninsured motorist clause further state that the minimum limits of coverage required shall be no less than the requirements of § 46.1-1(8).

However, for the purposes of § 22-285, I am of the opinion that it is not necessary to refer to this latter statute [§ 46.1-1(8)] to determine the limits of the uninsured motorist coverage. Chapter 681 states that the limits of liability for uninsured motorist coverage under § 22-285 must be in an amount equal to the “aforesaid limits of liability” contained in the statute (§ 22-285).
Therefore, in response to your inquiry the minimum amounts of insurance to be carried on school busses based on the amounts required of an uninsured motorist is in the amount of fifty thousand dollars because of bodily injury to or death of any one person and, subject to such limit for one person, in the amount of two hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of ten thousand dollars because of injury to or destruction of property in any one accident.

INTEREST—Certain Contracts Enforceable at Rate Stated Therein—Section 6.1-319.1 would not apply to loan made subsequent to expiration date pursuant to unilateral commitment entered into prior to that date.

June 8, 1970

HONORABLE WILLIAM F. PARKERSON, JR.
Member, Virginia State Senate

I have received your letter of June 2, from which I quote:

"I would appreciate your opinion pertaining to certain provisions of Chapter 38 of the Acts of Assembly of 1970, which act was passed as an emergency measure to expire on July 1, 1972, unless extended by the General Assembly.

"My question concerns the situation where a lender, prior to July 1, 1972, issues a commitment to loan money to be secured by a first deed of trust on real estate, which commitment by its terms extends for a period of time beyond July 1, 1972. May, under these circumstances, such a loan be made within the term of the commitment but subsequent to July 1, 1972."

Chapter 38 added a new § 6.1-319.1, paragraph (b) of which provides:

"The provisions of this section shall cease to be of any force or effect on July one, nineteen hundred seventy-two, unless extended by the General Assembly of Virginia; provided, however, that any contract lawfully made prior to the expiration date hereof shall be and remain valid and enforceable according to the terms of such contract."

It is my opinion that the term, "contract" would include a loan commitment only if the commitment were binding upon both parties. Unless extended by the General Assembly, § 6.1-319.1 would not apply to a loan made subsequent to July 1, 1972, pursuant to an unilateral commitment entered into prior to that date.

INTEREST—Contracts at Rates Stated Therein—Construction and application of § 6.1-319.1.

May 15, 1970

HONORABLE JAMES M. THOMSON
Member, House of Delegates

I have received your letter of May 1, 1970, in which you ask:

"1. Does 6.1-319.1 preclude the charging of points on any conventional first trust real estate loan, or just those where the combined interest and points exceed 8% under 6.1-319?

"2. Does 6.1-319.1 preclude a prepayment penalty in excess of 1% on any conventional first trust real estate loan under $75,000.00, or just those where the interest exceeds 8% under 6.1-319?"
"3. Bearing in mind that 6.1-319.1 has the proviso 'not otherwise governmentally regulated as to prepayment privilege,' does 6.1-319.1 preclude the 2% prepayment penalty allowed savings and loan associations under 6.1-161, or just to such associations' conventional first trust real estate loans where the interest exceeds 8% under 6.1-319'.

The first sentence of Virginia Code § 6.1-319.1 permits the enforcement of certain first mortgages, otherwise usurious. It is my opinion that § 6.1-319.1 does not forbid the charging of points. If points are charged, the creditor simply may not avail himself of § 6.1-319.1 to collect the debt. He will have other adequate remedies at law if the combined interest and points do not exceed eight percent.

The second sentence of § 6.1-319.1 requires that certain contracts permit prepayment with a maximum penalty of one percent of the unpaid principal balance. In my opinion any contract meeting all of the following criteria comes within the scope of this sentence: (1) it is for the loan or forbearance of money, in an amount less than $75,000.00; (2) it is secured by a first mortgage on real estate; and (3) it is not otherwise governmentally regulated as to prepayment privilege. The eight percent interest rate is not, in my opinion, relevant to the application of the second sentence of § 6.1-319.1.

In order to answer your third question, it is necessary to construe the language, "not otherwise governmentally regulated as to prepayment privilege. . . ." The second clause of the first sentence of § 6.1-319.1, "unless otherwise regulated by the provisions of this Title," clearly demonstrates that the required regulation may be by statute. I construe the word, "governmentally," to mean that regulation by a trade association or similar private body will not satisfy the statutory requirement. It is my opinion that savings and loan associations may charge, pursuant to Virginia Code § 6.1-161, a two percent prepayment penalty, notwithstanding the provisions of § 6.1-319.1 and regardless of the rate of interest charged.

INTEREST—Loans—Exemptions of Virginia-chartered lending institutions to rates set.

HONORABLE H. CLYDE PEARSON
Member, Senate of Virginia

This is in reply to your letter of October 29, 1969, wherein you draw attention to Chapter 7.1 of Title 6.1 of the Code and inquire as to which lending institutions are exempted from the coverage thereof by the provisions of § 6.1-330.3.

Section 6.1-330.3 states that, "This chapter shall not apply to loans made by any lender licensed by, and under the supervision of the State Corporation Commission or the federal government." This is a broad exemption and would apply to Virginia chartered banks, national banks, Virginia chartered savings and loan associations and credit unions, and federally chartered savings and loan associations and credit unions. Also exempted would be industrial loan associations and small loan licensees, all of which are Virginia chartered.

JAILS AND PRISONERS—Prisoners Working on County or City Property—Construction of § 53-165.

HONORABLE W. K. CUNNINGHAM, JR., Director
Division of Corrections

This will acknowledge receipt of your letter of January 20, 1970, in
which you make certain inquiries relative to the meaning of certain provisions of § 53-165 of the Code of Virginia. I shall answer your questions seriatim.

"1. Can a judge of a circuit or corporation court satisfy the requirements of this statute by issuing a blanket court order allowing prisoners to work or must a separate court order be issued for each prisoner allowed to work?"

There is no requirement contained in § 53-165 which would require the court to issue an order for each prisoner who is to be allowed to work. I am of opinion that the court could enter a blanket order relative to the working of prisoners under this section.

"2. Must the court order prescribe how much credit the prisoner will receive for his voluntary work?"

Section 53-165 reads in part as follows:

"... such prisoners to receive such credit on their respective sentences for the work done as the court may in the order prescribe."

The answer to your second question is, therefore, in the affirmative.

"3. If the answer to question 2 is in the negative, how should credit be given on the sentence?"

In view of my answer to question 2, no answer is needed to this question.

"4. Is it mandatory that the Court designate who is to have charge of the prisoners assigned for work duty?"

Section 53-165 by implication indicates that the court shall in its order designate the person who is to have charge of such prisoners while so working. The statute further requires that persons other than the sheriff or city sergeant must post a bond. In view of the foregoing, I am of opinion that the court order should designate the person who is to have charge of the prisoners assigned for work duty.

"5. Does this statute require direct supervision and observation by the person designated by the court to have charge of prisoners working outside the jail on public property?"

The statute is silent in this regard. It is clear, however, that the sheriff, city sergeant or such other person as designated by the court is responsible for the prisoners while working outside the jail on public property.

"6. If the court order designates a person other than a duly authorized law enforcement officer to have charge of the prisoner and no bond is required by the court order of such designated person, is the designated person liable for acts of omission or commission of the prisoner while the prisoner is working?"

This provision of law contemplates specifically the entry of an order by the court before prisoners can be allowed to work on county or city property. In such cases where the city sergeant or the sheriff is not designated by the order, a bond must be posted. Sheriffs and city sergeants must be bonded as required by § 15.1-41 of the Code.

"7. If the prisoner to be worked is to be worked for a non-profit making organization of the county or city such as a fair association, can the court require or should the court require in the court order how much this organization must reimburse the county or city for the work of the prisoner?"
I find no authorization contained in § 53-165 for the working of prisoners by a non-profit making organization of the county or city such as a fair association. Section 53-166 provides that no prisoner shall be worked by a sheriff or sergeant on property owned by him or his relatives or on projects in which he is interested. In addition, it provides that no prisoner shall be "used for the personal gain or convenience of any sheriff or sergeant or his assistant, or of any private individual."

Moreover, I find no authority contained in § 53-165 permitting the court to require reimbursement. Accordingly, this question is answered in the negative.

"8. When a prisoner is being worked on public property without a court order, who is responsible for the acts of omission or commission of the prisoner?"

I am enclosing for your information a copy of an opinion to Honorable W. E. Newman, Sheriff of Mecklenburg County, Report of Attorney General, 1964-65, page 141, wherein Attorney General Button ruled that prisoners could not be worked unless a court order had been entered as required by § 53-165. I adhere to the views expressed therein. Of course, the sheriff or city sergeant is ultimately responsible for the care of prisoners committed to his charge.

"9. If the prisoner is injured through no fault of his own while working on public property and no court order has been issued, who is liable for the injury?"

As I have pointed out earlier, a court order must be entered before prisoners are allowed to work under this section. As noted above, the sheriff or city sergeant is responsible for the prisoners committed to his charge.

"10. Can the Commonwealth of Virginia be required to reimburse the county or city for medical bills of a prisoner injured while working under a court order? Without a court order?"

The answer to this question is in the negative. The city or county assumes responsibility for all charges in connection with the care and feeding of prisoners worked pursuant to the statute.

JUDGES—Retirement—Amendment to § 51-29.8 applicable to part-time county judge.

HONORABLE W. FRANCIS BINFORD, Secretary-Treasurer
Association of Judges of the County
and Municipal Courts of Virginia

June 2, 1970

This is to acknowledge receipt of your letter of May 25, 1970, in which you state that § 51-29.8 of the Code which provided for the retirement of certain trial justices was amended by the General Assembly in 1968. I quote from your letter:

"The question I am being asked is whether or not this provision of the law is incorporated in the new act passed by the 1970 General Assembly that takes effect the 1st of July, 1970, and does it apply as well to part-time judges as it does to full time County Judges."

The said § 51-29.8 which was a part of Chapter 2.2, Title 51 of the Code, was repealed by Chapter 779, Acts of 1970, § 2 thereof, to-wit:

"Chapter 2, 2.1 and 2.2 of Title 51 of the Code of Virginia consisting of §§ 51-3 through 51-29.19 are repealed."
REPORT OF THE ATTORNEY GENERAL

This section (§ 51-29.8) was a part of the previous retirement system for Trial Justices. A similar provision to § 51-29.8 is not in the new act. However, the new act does incorporate the same benefits which judges (who were members of one of the previous systems immediately prior to July 1, 1970) had under the previous systems, both as to age [§ 51-167 (a)] and to retirement pay [§ 51-168 (b)].

County judges are included in the new act. The term "judge" as defined in § 51-3 includes any judge of a county court. Section 51-162 sets forth of what the membership of the new Judicial Retirement System shall consist. The term "judges" is used throughout that section.

The term "part-time judges" is not used in the act. The fact that they hold the office of County Judge is the determining factor. Whether such judges devote their entire time to their duties as judges or only part of their time does not affect their membership in the newly established Judicial Retirement System. Substitute judges appointed under the provisions of § 16.1-7 of the Code are not included as members and are therefore not covered by the act.

Therefore your inquiry as to whether the new act applies to a so-called part-time judge is answered in the affirmative.

JUDGES—Salary—May not be supplemented if not within specification of §§ 16.1-43.1 and 16.1-43.2.

COUNTIES—Judges—No authority for Chesterfield County to supplement salaries.

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

In your letter of December 18, 1969, you inquire as to the authority of a county to supplement the salaries of judges of the county courts and state as follows:

"Section 16.1-43.2 of the 1950 Code of Virginia, as amended, states as follows:

"In any county adjoining a city lying wholly within this State having a population of two hundred thirty thousand or more and having the executive, manager, or other optional form of government in operation, the governing body of such county may supplement the salaries of the judges of the county courts. Nothing in this section shall affect the salaries paid to such judges by the State.

"Chesterfield County does not have the county executive or county manager form of government. I do not think that Chesterfield has the 'other optional form of government' referred to in the above cited section since we have a county board form with an executive secretary, which executive secretary was empowered by a special act of the legislature.

"However, Section 15.1-522 of the Code vests the Board of Supervisors with the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the acts of the General Assembly based in pursuance thereof. Section 16.1-62 provides that the salaries of all judges, associate judges, etc., shall be fixed and paid by the governing body of the city in which such court is held.

"My question is in two parts:

"(1) Does the County have authority to supplement the County Court Judges' salaries under Section 16.1-43.2 of the Code, and if not;
“(2) Does the Board have the authority to supplement judges’ salaries based on the provisions of Section 15.1-522 which brings into consideration Section 16.1-62?”

(1) It is my opinion that § 16.1-43.2 of the Code does not confer authority upon Chesterfield County to supplement the salaries of the judges of the county court. The “optional form of government” mentioned therein has reference to those forms of government specified in Chapters 13, 14 and 15 of Title 15.1 of the Code.

(2) Your second inquiry has reference to the provisions of § 16.1-62, which states that, “Except as otherwise provided herein the salaries of all judges, associate judges, substitute judges, clerks, deputy clerks, clerical assistants and bailiffs of each municipal court shall be fixed and paid by the governing body of the city in which such court is held.” Section 15.1-522 authorizes counties to exercise those powers which are delegated to cities by general law. However, § 16.1-62 only confers upon cities the authority to fix the salaries of municipal court judges. That section is not a general grant of authority to cities to supplement salaries and therefore delegates no authority to cities which counties may exercise by virtue of any authority conferred by § 15.1-522.

The salary of judges of county courts is determined by a committee of three circuit judges, pursuant to § 14.1-40, et seq., of the Virginia Code. Only those counties which fall into the categories specified in §§ 16.1-43.1 and 16.1-43.2 are authorized to supplement the salaries of county judges. In view of the above authorities applicable to your inquiry and the absence of any general authority for cities to supplement such salaries, it is my opinion that your second question must therefore be answered in the negative. See, Smith v. Kelley, 162 Va. 645, 651, 174 S.E. 842 (1934).

JUSTICE OF PEACE—Authority—May not issue interrogatory summons.

HONORABLE FRED M. BURNETT, III
Justice of the Peace for City of Chesapeake

March 27, 1970

This is in reply to your letter of March 17, 1970, in which you inquire as to whether a justice of the peace has the authority to issue an interrogatory summons.

After a writ of fieri facias is issued in execution of a judgment, § 8-435 of the Code provides for proceedings by interrogatories to ascertain the estate of the judgment debtor. This section provides that the interrogatory summons may be issued by the clerk of the court from which the writ of fieri facias was issued. In special situations not pertinent to your inquiry, other officials are authorized to issue the summons. A justice of the peace is not one of those listed.

In addition, § 39.1-15, which enumerates the powers of a justice of the peace, does not authorize the justice of the peace to issue an interrogatory summons. Pursuant to § 39.1-15(4), the justice of the peace is authorized to issue the attachments, warrants, and subpoenas which the clerk of court not of record may issue, but none of these terms would authorize the issuance of an interrogatory summons. I am, therefore, of the opinion that there is no authority which would enable a justice of the peace to issue an interrogatory summons pursuant to § 8-435 of the Code.

JUSTICE OF PEACE—Compatibility of Office—Not affected by employment of member of immediate family other than spouse by law enforcement authority.
HONORABLE PAUL SHUPE, Secretary and Treasurer
Newport News Justices of the Peace Association

This is in reply to your letter of November 28, 1969, in which you present the following questions:

"The question has arisen as to whether a Justice of The Peace can run, be elected and hold the office of city councilman and still retain the office of Justice of The Peace.

"Also, the question has arisen as to whether it is lawful for a Justice of The Peace to hold such office when members of his immediate family are employed by the law enforcement authority in the city where he sits as a Justice of The Peace."

In reply to your first question, this office has previously ruled that a member of a town council may serve as a justice of the peace. See, Report of the Attorney General (1960-1961), p. 326. This opinion would be equally applicable to members of a city council in the absence of any provision to the contrary in the city charter. You should refer to the charter of the City of Newport News to determine the applicability of any provision thereof to your inquiry.

The answer to your second question should be considered in light of § 39.1-10 of the Code, which reads as follows:

"No person shall be eligible for election or appointment to the office of justice of the peace under the provisions of this title if he or his spouse is a law-enforcement officer or is otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof, nor shall any person who is or whose spouse is a clerk, deputy clerk, assistant clerk, or employee of any such clerk of a court not of record or a police department or a sheriff's office of a county, city or town be eligible for election or appointment to the office of justice of the peace of such county, city or town, nor shall any person who is not a resident of the county, city or town be eligible for appointment to the office of justice of the peace of such county, city or town. This section shall not apply to incumbents of such office who are in office when this section becomes effective."

While this section would make ineligible for election or appointment as a justice of the peace a person whose spouse is employed in the circumstances which you describe, it does not make reference to other members of the immediate family. I am aware of no authority which would indicate that eligibility to the office of justice of the peace is affected by the employment of a member of one's immediate family.

HONORABLE A. L. PHILPOTT
Virginia Code Commission

This is in reply to your letter of September 17, 1969, which I quote as follows:
"The Justices of the Peace for the City of Martinsville have been elected for four year terms under the provisions of their City Charter. In view of the provisions of Title 39.1, Section 1 and Section 6, as adopted by the 1968 General Assembly, please advise whether the charter provisions for the City of Martinsville dealing with election of Justices of the Peace have been repealed.

"Can they be elected by popular vote hereafter?

"Also, please advise the status of Justices of the Peace that were elected and took office in January 1966. Do they have authority to act as Justices of the Peace until a successor is appointed under new provisions of law?"

The charter provision for the City of Martinsville dealing with election of justices of the peace, in my opinion, was repealed effective January 1, 1969, by the terms of Chapter 1, Title 39.1, of the Code of Virginia. 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 the requirements of § 39.1-6, except as otherwise therein provided, in every city the justices of the peace shall be appointed by the "appointing court" as defined in § 39.1-5.

There is no applicable exception found in this section, or elsewhere in Title 39.1, and, therefore, your question as to whether such justices hereafter may be elected by popular vote is answered in the negative. A similar view was expressed in my letter of September 3, 1968, to Honorable T. Taylor Cralle, Judge of the Municipal Court of the City of Petersburg. A copy of that letter is enclosed.

In respect to your last question, Section 33 of the Constitution of Virginia prescribes that all officers elected or appointed shall continue to discharge the duties of their office after their terms of service have expired until their successors have been qualified. Accordingly, this question is answered in the affirmative.

JUSTICE OF PEACE—Fees—For issuing warrant of arrest and admitting out-of-State resident to bail.

FEES—Justice of Peace—For issuing warrant of arrest and admitting out-of-State resident to bail.

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

December 2, 1969

This is in reply to your letter of November 21, 1969, in which you present the following question:

"What fees is a Justice of the Peace entitled for issuing a warrant of arrest and admitting an out of state resident to bail in accordance with a pre-determined schedule all of which takes place as part of one transaction?"

The fees a justice of the peace shall charge in criminal actions and proceedings are prescribed by § 14.1-128 of the Code of Virginia. Specifically applicable to your question, this section prescribes in parts (1) and (3) thereof, respectively, that the fee for issuing a warrant shall be three dollars and the fee for admitting any person to bail shall be three dollars. In my opinion, these are the fees to which a justice of the peace is entitled in the situation you describe.

JUVENILE AND DOMESTIC RELATIONS COURTS—Authority—May not employ services of marriage counsellor.
CRIMINAL PROCEDURE—Criminal Fund—May not be used to pay for services of marriage counsellor.

HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

I am in receipt of your letter of March 12, 1970, in which you advise that your court has need for the services of a marriage counsellor and inquire as follows:

"I know that we are allowed to employ physicians, psychiatrists and psychologists and pay them the sum of $30.00 for examining a person before this court and $30.00 if he appears to testify. Would that cover the services of a marriage counsellor and can we pay a marriage counsellor out of the criminal funds if we think it is necessary?"

Section 16.1-190 of the Code of Virginia (1950), as amended, which you call to my attention, reads in pertinent part:

"The court may cause any person within its jurisdiction under the provisions of this law to be examined and treated by a physician, or psychiatrist, or examined by a clinical psychologist; and upon the written recommendation of the physician or psychiatrist the court shall have the power to send any such person to a State mental hospital for observation."

This section would not be applicable to the employment of a marriage counsellor. Further I am unaware of any statute enabling the court to employ the services of a marriage counsellor or to pay for such services out of the appropriation for criminal charges.

JUVENILE AND DOMESTIC RELATIONS COURTS—Authority—May not require State to pay support payments under § 20-63 where person convicted of misdemeanor or felony other than non-support.

HONORABLE J. ENGLISH FORD, Judge
Sixth Regional Juvenile and Domestic Relations Court

I am in receipt of your letter of November 28, 1969, wherein you inquire if the Commonwealth of Virginia will pay monies set forth in § 20-63 of the Code of Virginia (1950), as amended, for persons committed to the Bureau of Correctional Field Units for offenses other than non-support.

I am of the opinion that payment of the sums prescribed in § 20-63 may be initiated only in those instances where an individual is committed to the road force for failure to support or as authorized by statute—e.g., § 20-115, which expressly authorizes a court of record to initiate the sums prescribed in § 20-63 upon the conviction of any party for contempt of court in failing or refusing to comply with an order or decree of support of such court. In this connection I enclose herewith a previous ruling of this office to the Honorable Elwood H. Richardson, Jr., Commonwealth's Attorney for the City of Hampton, dated August 26, 1965, and found in the Report of the Attorney General (1965-1966), at p. 162.

The authority to commit, pursuant to § 53-103, to the State Convict Road Force any male person eighteen years of age or over who is convicted of any misdemeanor or felony for which a jail sentence might be imposed does not authorize monies from the criminal fund to be paid for support. Your inquiry therefore is answered in the negative.
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JUVENILE AND DOMESTIC RELATIONS COURTS—Authority—No authority to require minor to submit contraceptive treatment.

MINORS—Female—Contraceptive Treatment—No authority in Juvenile and Domestic Relations Court to require.

HONORABLE WILLIAM P. HAY, JR., Judge
Juvenile and Domestic Relations Court

I am in receipt of your letter of October 21, 1969, wherein you inquire if the Juvenile Court has authority to require female minors under the court's jurisdiction to submit to a treatment consisting of the application of a contraceptive device known as an "intra-uterine contraceptive."

As you correctly point out, the statutes on sterilization are not applicable to your inquiry, nor applicable, in my opinion, are §§ 16.1-158(3) or 16.1-178(10) of the Virginia Code, concerning medical treatment.

I am unable to locate any statute which would grant the Juvenile Court the authority relative to your inquiry.

________________________________________

JUVENILE AND DOMESTIC RELATIONS COURTS—Authority to Suspend Driving Permit for Traffic Violation—Duration of suspension.

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

This is in response to your letter of November 26, 1969, in which you present the following inquiries:

"I would appreciate your advice as to whether the statutes of Virginia authorize the Judge of a Juvenile and Domestic Relations Court to suspend indefinitely the operator's license of a juvenile convicted of reckless driving and, if so, please advise the particular statute which does authorize this action."

"If the Juvenile Judge does not have such authority, what is his authority with respect to suspension of operator's licenses of juveniles."

Section 16.1-158 brings the juvenile within the purview of the Juvenile and Domestic Relations Court.

Section 16.1-178(8), Code of Va. (1950), as amended, provides that:

"If the court shall find that the child or minor is within the purview of this law, it shall so decree and by order duly entered proceed as follows:

"(8) In case of traffic violations, the court may suspend an operator's license or require restitution in accordance with provisions of this law, or it may impose the penalties which are authorized to be imposed on adults for such violations."

The Code section quoted above indicates that in case of a traffic violation by such juvenile, the judge may suspend the operator's license for such period as the judge deems necessary, or he may treat the violator as an adult and impose appropriate penalties.

Although the judge of a juvenile court may impose a greater period of suspension upon the operator's license of a juvenile offender than may be imposed on that of an adult for the same offense, I am of the opinion that the suspension must be of a definite duration. It may be of a specific time limitation, such as one year, or it may be conditioned upon a certain happening.
In light of the foregoing, I find it unnecessary to consider your second question.

JUVENILE AND DOMESTIC RELATIONS COURTS—Judges, Clerks and Employees Are State Employees—Entitled to rights and responsibilities of other State employees not covered by Virginia Personnel Act.

April 17, 1970

HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

This is to acknowledge receipt of your letter of April 6, 1970, in which you state in part:

"Please advise if in your opinion we are state employees and are entitled to all the privileges of every other state employee."

By the term "we" I take it that you mean Judges and Associate Judges of the Regional Juvenile and Domestic Relations Courts together with the clerks, deputy clerks and other employees of such courts.

Section 16.1-143.3 of the Code of Virginia (1950), as amended, was amended by Chapter 317, Acts of the General Assembly, 1970. The pertinent portion of that Chapter is as follows:

"The salaries of the judges and associate judges of a court established under § 16.1-143.1 shall be fixed annually by the committee created under § 14.1-40 at an amount not in excess of the amount paid judges of courts of record and the salaries of the clerk, deputy clerk and other employees of said courts shall be fixed by the same committee. The salaries of such probation officers as may be appointed shall be fixed by the committee created under § 14.1-40 at an amount within the range established by the Department. Each substitute judge of any such court shall receive for his services per diem compensation equivalent to one twenty-fifth of the monthly salary of the judge of his court in the same manner as such committee pays substitute judges for other courts not of record. All salaries payable under this section shall be paid by the State out of the appropriation for criminal charges, and all personnel of regional juvenile and domestic relations courts shall be employees of the State."

The underscored portion was added in 1970.

The Virginia Personnel Act, Chapter 10, Title 2.1 of the Code, §§ 2.1-110 to 2.1-116, inclusive, prescribes the method of appointment, promotion, rating for State employees. The Governor is made Chief Personnel Officer. Rules are promulgated prescribing compensation plan, a system of service rating, minimum hours of work, leaves of absence, and the manner of layoffs, etc. Under these rules an employee may appeal to the Governor if he is discharged by the employing agency. However, certain officers and employees are exempt from the operation of this Act. In § 2.1-116 we find the following excluded from the operation of the Act, to-wit:

"(6) Judges, referees, receivers, arbitrers, masters and commissioners in chancery, commissioners of accounts, and any other persons appointed by any court to exercise judicial functions, and jurors and notaries public, as such;"

Clerks and employees of regional juvenile and domestic relations courts are included in the meaning of State employees in the Virginia Supplemental Retirement System, § 51-111-10 (5) of the Code as amended by Chapter 779, Acts, 1970.
Judges of such courts are now covered by the Judicial Retirement System. Chapter 7, Title 51, § 51-100, et seq., Chapter 779, Acts, 1970.

A person may be a State employee and not covered by the Virginia Personnel Act, supra. For instance, the employees of a State college are not within the purview of that Act but they are nevertheless State employees and are covered by the Virginia Supplemental Retirement Act. Their job classification, duties, hours of work, rating, etc., are prescribed by the local administrative authority.

Under § 16.1-143.3, supra, that responsibility insofar as the personnel of the Regional Juvenile and Domestic Relations Courts devolves upon the Committee of Judges (acting under § 14.1-40) and not upon the Governor through the Director of Personnel under Chapter 10, Title 2.1, supra.

If the Governor did this, then the Judicial branch and the Executive branch of the government would not be separate and would be incompatible with § 39 of the Constitution of Virginia.

The obvious purpose of the 1970 amendment to § 16.1-143.3, supra, was to afford the personnel of such courts the rights and responsibilities enjoyed and required by other State employees who are not covered by the Virginia Personnel Act, supra. This could be accomplished by the Committee (Judicial) created under § 14.1-40 of the Code putting into operation a system supervising the personnel of such courts similar to that provided in the Virginia Personnel Act, supra, compatible with the proper operation of said courts.

It is the opinion of this office that the Judges, Associate Judges, clerks, deputy clerks, and other employees of the Regional Juvenile and Domestic Relations Courts are exempt from the operation of Chapter 10, Title 2.1, Code of Virginia.

JUVENILE AND DOMESTIC RELATIONS COURTS—Probation Officers
—Must be employed full time to be State employees.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Coverage—Does not cover part-time probation officers of juvenile and domestic relations court.

HONORABLE JOHN F. EAKIN, Judge
Juvenile and Domestic Relations Court of Botetourt County
April 28, 1970

I am in receipt of your recent letter relating to certain probation officers of the Juvenile and Domestic Relations Courts of Alleghany, Bath and Botetourt Counties and the cities of Clifton Forge and Covington which reads in part as follows:

"A study of Section 51-111.10 (5) convinces me that these probation officers are 'state employees' as therein defined. You will notice that under exception (b) judges, etc. are not considered to be state employees but that the exception does not apply to 'employees of county courts.' In other words, the county courts employees provision is an exception to an exception. Note also that the underlined word 'courts' is plural so that it would include a juvenile and domestic relations court (16.1-143) as well as THE County Court.

* * *

"In view of the power of the three judges to hire, direct, control and fire these employees it is clear to me that they are employees of the Courts—not the localities—and therefore meet the definition of 'state employees' under Section 51-111.10 (5) of the Code. I would greatly appreciate your opinion in this regard."

I am enclosing copy of an opinion to the Honorable Harold B. Singleton, Judge, Fifth Regional Juvenile and Domestic Relations Court, dated April
17, 1970, in which it is stated that employees of regional juvenile and domestic relations courts are included within the meaning of State employees in the Virginia Supplemental Retirement System, § 51-111.10(5) of the Code as amended by Chapter 779, Acts of 1970, but exempt from the operation of the Virginia Personnel Act, Chapter 10, Title 2.1, Code of Virginia.

In order for your probation officers to be covered under the Virginia Supplemental Retirement System, they must qualify as “State employees” under § 51-111.10(5) of the Code of Virginia (1950). The excepted employees of county courts in § 51-111.10(5)(b) still must meet the general qualifications of a “State employee.”

Upon review of the file in this matter, I find no information stating that a regional juvenile and domestic relations court has been created in your area in accordance with § 16.1-143.1, Code of Virginia (1950), as amended. Accordingly, your probation officers must be employed “full time.” I am not advised that such is the case. Your information is that these probation officers are employed by three separate courts. They are, therefore, part-time employees of each one and do not comply with the statutory requirement.

In my opinion, your probation officers do not meet the qualification as full time employees as set out in the statute and, therefore, cannot be covered by the Virginia Supplemental Retirement System.

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional—City and county may form with approval of judges of circuit courts therein.

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional—Population requirements—Certificate from Board of Welfare and Institutions in lieu of.

HONORABLE JACK F. DEPOY
Commonwealth’s Attorney for City of Harrisonburg and Rockingham County

I am in receipt of your letter of April 28, 1970, which reads, in part, as follows:

“The governing bodies of the City of Harrisonburg, and Rockingham County are considering the establishment of a Regional Juvenile and Domestic Relations Court as provided by Section 16.1-143.1 of the 1950 Code of Virginia, as amended. The pertinent part of the section read as follows:

‘The governing bodies of two or more cities or two or more counties or of any combination of cities and counties may . . .’

Our question is can the one city, Harrisonburg, and the one county, Rockingham, establish a regional court under this section.”

The portion of Section 16.1-143.1 to which you allude provides that the governing bodies of any combination of cities and counties may, with the approval of the judge or judges of the circuit court or courts of said cities and/or counties, establish and operate a regional juvenile and domestic relations court. A combination of the City of Harrisonburg and Rockingham County would apparently be authorized by the provision of the statute quoted above.

However, your attention is respectfully directed to a further provision of Section 16.1-143.1 which reads as follows:

“. . . provided that, on and after June twenty-eight, nineteen hundred sixty-eight, the cities, counties or combination thereof seeking such approval and establishing such regional court shall con-
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constitute a contiguous geographic area which contains a population of not less than sixty thousand, unless it shall be certified to the judge or judges of such circuit court or courts by the Board of Welfare and Institutions that the population requirement of this clause constitutes an unusual restriction in view of geographic considerations, for example surrounding bodies of water or mountain ranges, which may make larger combinations of localities impractical;"

This provision imposes population requirements which must be met before authority is conferred upon those governmental entities concerned to take advantage of the statutory benefits.

The latest census reports available to this office show the population of Rockingham County to be 39,559 and that of the City of Harrisonburg to be 12,842. The addition of these two figures results in a total population of only 52,401. This is, of course, less than the minimum total population requirement of 60,000.

Therefore, in my opinion, Rockingham County and the City of Harrisonburg are not authorized to establish a regional juvenile and domestic relations court unless a certificate from the Board of Welfare and Institutions is obtained in accordance with the statute.

JUVENILE AND DOMESTIC RELATIONS COURTS—Prisoners Under Age of Eighteen Years Must be Separated From Adult Prisoners Even Though Tried as Adult.

May 27, 1970

HONORABLE WALTER B. MARTIN, JR.
Member, House of Delegates

This is in response to your letter of May 20, 1970, in which you inquire whether it is permissible to place juveniles between the ages of 14 and 18 with adult prisoners subsequent to that juvenile’s conviction of a misdemeanor under Va. Code Ann. §16.1-177.1.

In my opinion the juvenile who was convicted and sentenced to be punished as an adult pursuant to Va. Code Ann. §16.1-177.1, as amended, must be placed separate and apart from adult prisoners.

Va. Code Ann. §16.1-196 provides that:

“No person known or alleged to be under the age of 18 years shall be transported or conveyed in a police patrol wagon, or confined in any police station, prison, jail or lock-up, or be transported or detained in association with criminals or vicious or dissolute persons . . .”

This statute taken alone prohibits any intermixture of juveniles with adult prisoners.

It is not qualified by §16.1-177.1 of the Code, which provides: that as to a child over 14 years of age under certain circumstances a court “may . . . try such child and impose the penalties which are authorized to be imposed on adults for such violations.” Va. Code Ann. §16.1-177.1, as amended. The latter section does not refer to the confinement of the juvenile offender but rather to his trial and to the penalty that might be imposed upon him. It merely allows a court to impose the same penalty which could be a jail term or fine or combination thereof, that could be imposed upon an adult.

The authorities charged with his incarceration would then be required to refer to §16.1-196 of the Code to determine the manner in which the child could be confined, which would dictate that the child could not be confined with adult prisoners. This is one of the purposes of the exception in Code §16.1-196 which states:
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"... except that a child fourteen years of age or older may, with the consent of the judge, clerk or the juvenile probation officer, be placed in a jail or other place of detention for adults in a room or ward entirely separate from adults."

The intent is that where a child must be confined to a jail, and conviction pursuant to § 16.1-177.1 of the Code would be such an instance, he must be separated. Therefore, it is my conclusion that whenever a juvenile is convicted of a misdemeanor and the court elects to punish him as an adult under Va. Code Ann. § 16.1-177.1, as amended, the court may sentence the child to a jail, but Va. Code Ann. § 16.1-169 requires that he must be kept separate and apart from the adult prisoners.

I am enclosing a copy of an opinion of this office issued to the Honorable Frederick L. Wright, Clerk of Court, Juvenile and Domestic Relations Court of Roanoke, on January 6, 1961 which is found in Report of the Attorney General (1960-1961) Page 179. In that opinion the question presented was the same as that posed here. I concur with that interpretation of the Code sections involved.

LABOR—Union—Governmental employees—Collective bargaining contracts.

HONORABLE JUNIE L. BRADSHAW
Member, Virginia House of Delegates

February 16, 1970

This is in reply to your letter of February 4, 1970, which states in part as follows:

"I have been requested by some of my constituents to introduce a bill to clarify the present law concerning State, County and Municipal employees' right to enter into collective bargaining contracts with their employers ... I shall thank you to advise me if in your opinion State, County, and City employees have a legal right to associate and enter into collective bargaining contracts under Virginia law."

I assume that the word "associate" in the context of the language quoted above refers to whether the employees in question may legally belong to a labor union.


The Senate Joint Resolution referred to above is as follows:

"Be it resolved by the Senate of Virginia, the House of Delegates concurring, as follows:

1. It is contrary to the public policy of Virginia for any State, county, or municipal officer or agent to be vested with or possess any authority to recognize any labor union as a representative of any public officers or employees, or to negotiate with any such union or its agents with respect to any matter relating to them or their employment or service.

2. Nothing in this resolution shall be construed to prevent employees of the State, its political subdivisions, or of any governmental agency of any of them from forming organizations, not affiliated with any labor union for the purpose of discussing with the employing agency the conditions of their employment, but not claiming the right to strike."

The portion of § 40-68 set forth in your letter is as follows:
"... that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization."

An opinion of the Attorney General dated July 30, 1962 (Report of the Attorney General 1962-1963, p. 117), dealt with the authority of the officers of the City of Richmond to recognize and negotiate with a union purporting to represent city employees. This opinion made reference to a contest by firemen of the enforceability of a municipal regulation forbidding firemen from joining labor unions.

"In 1965, the late Honorable J. Hume Taylor, Judge of the Court of Law and Chancery for the City of Norfolk, handed down an opinion in the case of Verhaegen, et als v. Reeder, et als, involving the right of certain firemen to join a labor union in the City of Norfolk in violation of a rule or regulation promulgated by the City Manager, in which he held that the rule was enforceable and that the Virginia Right-to-Work Act does not apply to city or state employees. From this decision the Supreme Court of Virginia denied a petition for an appeal. On the 27th day of May, 1957, the Supreme Court of the United States denied a petition for a writ of certiorari in the case. While there were no opinions issued by the Supreme Court of Virginia or the Supreme Court of the United States with respect to Judge Taylor's decree, nevertheless, that decree was, in effect, upheld by the refusal of these two courts to review the decision." Report of the Attorney General 1962-1963, p. 119.

As you know, a three-judge District Court has ruled that North Carolina statutes prohibiting government employees from joining national labor unions are unconstitutional as an abridgement of freedom of association protected by the First and Fourteenth Amendments to the Constitution of the United States. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D. N.C. 1969). Similar results were reached in American Federation of State, Co., & Mun. Emp. v. Woodward, 406 F.2d 137 (8th Cir. 1969), and McLaughlin v. Tilenidis, 398 F.2d 287 (7th Cir. 1968).


Assuming that the outcome of the Newport News case is as in those federal cases cited above, it is arguable that Senate Joint Resolution No. 12 would nevertheless be a valid statement of policy on collective bargaining. In Atkins v. City of Charlotte, the Court specifically considered a statute prohibiting collective bargaining contracts between units of government and unions, and found that the state was within the powers reserved to it under the United States Constitution.

The opinion of July 30, 1962, points out that Senate Joint Resolution No. 12 does not prohibit officials from negotiating with unions. However, if a unit of government undertook to negotiate a collective bargaining contract contrary to the stated public policy, it would be necessary to imply the power to so do in the absence of legislative authorization. Although the question of the propriety of an implied power and its scope probably is not a novelty, it has met with scant favor. SeeDole, State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization, 54 Iowa L. Rev. 539 (1969).

Therefore, it is my opinion that if collective bargaining contracts between units of government and the several unions are desired, the better practice would be to enact legislation authorizing such negotiations, together with any desirable limitations thereon.
HONORABLE RANDOLPH W. CHURCH
State Librarian

This is in reply to your inquiry of May 19, 1970, as to whether the requirements for proration of aid to libraries pursuant to Chapter 606 of the Acts of Assembly of 1970 may be satisfied by adoption of the following method of distribution:

1. Under Section 42.1-48(a) we have determined from tables of local expenditures for public libraries the maximum grant to each library on the basis of 35% of local expenditures not to exceed $150,000.
2. Under Section 42.1-48(b) we have determined the maximum per capita grant to each library on the basis of the number of city or county units, or combination of units, served under the cents per capita set out in this section.
3. Under Section 42.1-48(c) we have determined the maximum mileage grants to each library on the basis of the number of city or county units, or combination of units, served under the dollars per square mile set out in this section.
4. Under Section 42.1-49 we have determined the maximum grant to each municipal library serving less than 5,000 population on the basis of their earned share, but not less than $400.
5. Under Section 42.1-53 we have reserved to the State Library not more than 30% of available funds for administrative purposes.
6. Under the limits set out under item 481 of the Appropriations Act (Chapter 461) of the General Assembly of 1970 we have not allotted less to any library from these funds than they received during the year ending June 30, 1970.
7. Under Section 42.1-50 we have (a) determined that no library receives more State aid than their local expenditures and (b) we have prorated the sum of the maximum grants ($3,421,983) to each library in such a manner that each library receives its exact fractional part of available funds that it would have received if the full maximum amount had been available.

This subject was discussed in the prior opinion rendered to you on April 21, 1970. It is my opinion that the present formula for distribution as outlined above is in conformity with the applicable statutory requirements and the opinion of April 21, 1970.

LIBRARIES—Regional Library Boards—Effect of revision of libraries on terms of present members.

HONORABLE RANDOLPH W. CHURCH, State Librarian
Virginia State Library

This is to acknowledge receipt of your letter of June 15, 1970, with which you enclosed a letter addressed to you by the Honorable Russell L. Davis, in which he poses several questions concerning the establishment and operation of regional library boards as effected by Chapter 606, Acts of 1970.

The pertinent portion of Mr. Davis’ letter is as follows:

“The Franklin County-Patrick County Regional Library has made an agreement for their Library Board to consist of, two members from Franklin County, and two members from Patrick County with a third member being the ex officio Superintendent of schools in the county in which they meet.
"The question we have is concerning the new law which goes into effect on June 26th, which states that the Library Boards shall consist of five (5) members; the Library Board of Franklin and Patrick Counties would like to know if this makes a change from the original meetings, as planned by the two counties.

* * *

"Also, the Library Board would like to know if, after June 26th the terms of all members of the Regional Library Board terminate and new ones have to be appointed by the respective supervisors or will they continue until the end of their original term."

Chapter 606, Acts of 1970, repealed Title 42, Code of Virginia (1950), and added a new title numbered 42.1, which contains the law relative to libraries. The new chapter is a complete revision of the laws concerning libraries. However, § 5 of said Chapter 606 provides in part:

"The repeal of Title 42 shall not affect any act or offense done or committed, or any penalty or forfeiture incurred, or any right established, accrued or accruing on or before the effective date of its repeal, or any prosecution, suit or action pending on that date."

Persons holding appointments as members of a regional library board at the time the new statute becomes effective do have a right which is preserved by the above section (5). Therefore, the present members hold their office until their term expires. Then their successors must be appointed by the governing bodies as provided in the new statute.

Likewise, rights existing under the agreement between Boards of Supervisors of Franklin and Patrick Counties are preserved and hence the place and time for the meetings of the board, as heretofore established, are to continue until changed.

I am of the opinion that the terms of the present members of the Regional Library Board terminate when the terms for which they were appointed expire.

LIBRARIES — State Board for Certification of Libraries — May require State-supported institutions of higher learning to furnish certain information on library personnel.

HONORABLE RANDOLPH W. CHURCH
State Librarian

April 15, 1970

This is in reply to your letter of March 31, 1970, in which you inquire as follows:

"Under Code sections 54-261—54-272 and under its Rules adopted officially in 1952 under the provisions of the General Administration Agencies Act (Code 9-6.1—9-6.14) this Board requires personnel reports from the libraries involved.

"I enclose our Rules and a copy of the Report form.

"With the approval of the State Council on Higher Education and the Governor librarians in many State-supported institutions of higher learning have been removed from the classified service and placed in the instructional category. Some reluctance has been shown on the part of some institutions to provide the information required on faculty rank, salary, vacation and sick leave for their staff members. . . .

"In your opinion may this Board continue to require the furnishing of this information on the Report form?"
It is my opinion that the State Board for Certification of Librarians may properly require information as to faculty rank, salary, vacation and sick leave for the above-described individuals.

Section 54-271 of the Code states as follows:

“No public library serving a political subdivision or subdivisions having over five thousand population and no library operated by the State or under its authority, including libraries of institutions of higher learning, shall have in its employ, in the position of librarian or in any other full-time professional library position, a person who does not hold a librarian's certificate issued by the board.

“A professional library position as used in this section is one that requires a knowledge of books and of library technique equivalent to that required for graduation from an accredited library school. . .”

Section 54-267 authorizes the Board “to establish the qualifications of those seeking certificates as librarians.”

In order for the Board to perform its statutory duties, it must ascertain which librarians or other professionals are in fact employed in full-time professional library positions. The information which you have described will aid in ascertaining this fact and is therefore reasonable in view of the purposes for which it is sought. I am aware of no other provision of law which would preclude you from requiring that the information be furnished.

LIBRARIES—State Librarian—Revision of library laws did not exempt from classification plan of Virginia Personnel Act.

HONORABLE RANDOLPH W. CHURCH, State Librarian
Virginia State Library

This is to acknowledge receipt of your letter of June 17, 1970, in which you state in part:

“[T]he General Assembly in its 1970 recodification of library laws rewrote the section concerning the appointment, compensation and duties of the State Librarian.

“Is the effect of this revision such that the State Librarian is removed from the classified service?”

The State Librarian is appointed by the State Library Board pursuant to § 42.1-13, Code of Virginia, as enacted by Chapter 606, Acts of 1970.

Section 42.1-14, also enacted by Chapter 606, Acts of 1970, is as follows:

“The State Librarian, assistants and employees shall be paid such salaries from appropriations out of the public treasury as are provided by law.”

It becomes the duty of the Governor under the Appropriations Act (Chapter 461, Acts of 1970) and the Virginia Personnel Act (Chapter 10, Title 2.1, Code of Virginia) to establish and maintain classification plans for all officers and employees of the executive branch of the State government. Section 2.1-116 of the Code, as amended by Chapter 677, Acts of 1966, exempts certain officers and employees from the Virginia Personnel Act. The State Librarian is not included in § 2.1-116. Had the General Assembly intended that the State Librarian be so exempted, said section would have been amended or a specific reference to the exemption would have been made in Chapter 606, Acts of 1970.

This office has ruled that the Virginia State Ports Authority is subject to the Virginia Personnel Act as the Authority is dependent upon appropria-

I am therefore of the opinion that the effect of the said revision of the library laws is not to remove the State Librarian from the classified service as established under the Virginia Personnel Act.

LIBRARIES—State Library Board—Has discretion to render aid at less than 35% where funds are insufficient—May prorate to insure that each applicant receive proportionate share.

April 21, 1970

HONORABLE RANDOLPH W. CHURCH
State Librarian

This is in reply to your letter of April 14, 1970, in which you draw attention to Senate Bill No. 98, which was approved as Chapter 606 of the Acts of Assembly, 1970, and which authorizes State aid to libraries.

One formula for assistance is that contained in §42.1-48(a):

"Thirty-five cents of State aid for every dollar expended, or to be expended, exclusive of State and federal aid, by the political subdivision or subdivisions operating or participating in the library or system. The grant to any one library or system shall not exceed one hundred fifty thousand dollars."

You also refer to §42.1-50 of the Act, which provides in part that:

"If the State appropriations provided for grants under §§42.1-48 and 42.1-49 are not sufficient to meet approved applications, the Library Board shall prorate the available funds in such manner that each application shall receive its proportionate share of each type of grant."

You state that insufficient funds are available to comply with the formula of §42.1-48(a) and inquire as to whether the board may prorate aid in the amount of ten percent of the aid which would otherwise be furnished. You also inquire as to whether the ten percent proration would also apply to the $150,000 ceiling so as to impose a $15,000 maximum on aid furnished pursuant to §42.1-48(a).

It is my opinion that where there are insufficient funds, the language of §42.1-50 confers discretion upon the board to render assistance at a rate of less than the 35% maximum allowed by §42.1-48(a). However, there is no grant of authority which would permit the board to alter the $150,000 ceiling imposed by §42.1-48. Section 42.1-50 requires the proration to insure that each applicant for aid receive its proportionate share of each type of grant. The proposed proration would have the effect of aiding those libraries with small expenditures in greater proportion than libraries with much more substantial expenditures. The larger libraries would therefore be denied the proportionate share required by statute. To "prorate" means "to divide, distribute, or assess proportionately." Wright v. Coberly-West Co., 250 Cal. App. 2d 31, 58 Cal. Rptr. 213, 217; 34A Words and Phrases at 470.

LIBRARIES—State Library Board—No authority to prorate aid at different rate for each category.
This is in reply to your letter of April 13, 1970, relating to the proration of State aid to libraries pursuant to §§ 42.1-48 and 42.1-50 of the Code, as enacted by Chapter 606 of the Acts of Assembly, 1970. You present the following questions:

1. "The opinion asked for is as follows: assuming that the funds appropriated permit distribution of grants to each participating library in an amount equal to 10% of the amount for which each qualifies, is the limitation under Section 42.1-48(a) 10% of local effort up to a ceiling of $150,000, or 10% of the ceiling of $150,000, that is, $15,000?"

2. "The additional opinion asked for is as follows: assuming that funds must be prorated, is the Board required to prorate the distribution under each paragraph in an equal amount, say 10% of each, or can the Board prorate the amounts to be distributed in a different percentage for each part of the formula, say 10% based upon local effort as set forth in [Par. (a)]; 20% based upon population as set forth in [Par. (b)]; and 25% based upon area as set forth in [Par. (c)]?"

In reply to your first question I am enclosing a copy of an opinion rendered April 21, 1970, to the Honorable Randolph Church, State Librarian, in which a similar question was presented and discussed.

Your second inquiry has reference to § 42.1-48, which provides in part as follows:

"The grants to each qualifying library or system in each fiscal year shall be as follows:

"(a) Thirty-five cents of State aid for every dollar expended, or to be expended, exclusive of State and federal aid, by the political subdivision or subdivisions operating or participating in the library or system. The grant to any one library or system shall not exceed one hundred fifty thousand dollars;

"(b) A per capita grant based on the population of the area served and the number of participating counties or cities: thirty cents per capita for the first six hundred thousand persons to a library or system serving one city or county, and an additional ten cents per capita for the first six hundred thousand persons for each additional city or county served. Libraries or systems serving a population in excess of six hundred thousand shall receive ten cents per capita for the excess; and

"(c) A grant of ten dollars per square mile of area served to every library or library system, and an additional grant of twenty dollars per square mile of area served to every library system serving more than one city or county."

Also relevant to this question is that language of § 42.1-50 which provides that in the event of insufficient funds, "the Library Board shall prorate the available funds in such a manner that each application shall receive its proportionate share of each type of grant." It is my opinion that this language does not authorize the board to prorate the aid at a different rate for each category. In passing § 42.1-48 the legislature has established the relative weight to be given the factors of local effort, population and area. It would therefore be improper for the board to adopt a proration formula which would alter these proportions.
LIEUTENANT GOVERNOR — Committee on Rules — Not prohibited by Constitution from serving thereon.

GENERAL ASSEMBLY—Senate—May authorize Lieutenant Governor to serve on Committee on Rules. 

HONORABLE EDWARD T. CATON, III
Member, Senate of Virginia

This is in reply to your letter of January 19, 1970, in which you present the following inquiry:

"As you know, pursuant to Section 47 of the Constitution of Virginia the Senate has for years in Rule 17, paragraph XV provided that the President of the Senate shall be a member of the Committee on Rules.

"Does the Constitution of Virginia, specifically Section 41, 78 or 79 prohibit the Lieutenant Governor, as President of the Senate, from serving on the Committee on Rules?

"Your attention is directed to the opinion of Robert Y. Button, dated October 28, 1969 concerning the same subject."

Section 41 of the Constitution of Virginia provides for membership in the Senate to consist of the members elected thereto. Sections 78 and 79 list the duties imposed on the Lieutenant Governor, one of which is to serve as President of the Senate. These sections contain no specific provision which pertains to the question which you present, and they do not prohibit the Lieutenant Governor from serving on the committee any more than do they entitle him to sit thereon.

In his letter of October 28, 1969, to which you refer, the Honorable Robert Y. Button also reached the conclusion that the above sections did not entitle the Lieutenant Governor to serve on the committee. By the same token the above letter did not state that the Lieutenant Governor is constitutionally prohibited from so serving. The answer to your question must, therefore, be determined by reference to other authority.

Section 47 of the Constitution authorizes each house of the General Assembly to settle its rule of procedure. It is fundamental that the Constitution of the State is not a grant of power to the legislature, but a limitation thereon, Commonwealth v. United Cigarette Mach. Co., 120 Va. 835, 844, 92 S.E. 901 (1917).

By the terms of Senate Rule 17, paragraph XV, the Senate Rules Committee is empowered to report to the floor its recommendations as to the Senate rules and resolutions. I am aware of no provision of the Constitution which directs that the membership of such a committee consist only of elected members of the Senate. It is, therefore, my opinion that the Senate may, under the authority conferred by Section 47 of the Constitution, authorize the Lieutenant Governor, as President of the Senate, to serve on the committee.

LOTTERIES—Advertising—No violation of Virginia law to erect sign advertising bingo in another state.

ADVERTISING—Lotteries—No violation of Virginia law to erect sign advertising bingo in another state.

LOTTERIES—Sponsoring in Another State—Within plain meaning of prohibition against promoting.

HONORABLE WALTHER B. FIDLER
Member, House of Delegates

This is in reply to your letter of November 11, 1969, in which you for-
warded to me a photograph of a sign located on a street in Colonial Beach "advertising Bingo with cash prizes of up to $500.00 which is conducted on the Reno Pier which extends out into the Potomac River in Maryland." You present the following questions:

"1. Whether there is any violation of our state law in the erection and maintenance of such a sign advertising Bingo which is actually being conducted in another state?

"2. Apparently, the Colonial Beach Chamber of Commerce is sponsoring these Bingo games and [the] question is whether an organization such as the local Chamber is permitted to sponsor these games when they are conducted in another state?"

In regard to both questions which you propose, the relevant statute is § 18.1-340, Code of Virginia (1950), as amended. In particular, paragraph (1) of this statute is in point in that it prohibits "any person" to "set up, promote or be concerned in managing or drawing a lottery or raffle for money or other thing of value, . . ." (Emphasis added.) This office has heretofore ruled that the game of "Bingo" constitutes a lottery. See, Report of the Attorney General (1954-1955), p. 114; (1953-1954), p. 121.

Your first inquiry poses the question of whether or not it is a violation of Virginia law to "advertise" in Virginia a lottery legally conducted in another State. There are many Virginia statutes which expressly prohibit advertising an activity and, in doing so, the General Assembly has usually seen fit to employ the precise term "advertising" when legislating against that act. See, § 18.1-63 of the Code of Virginia (abortion); § 18.1-231 of the Code of Virginia (obscene items). There are also statutes which use the words "promote" and "advertise" in the same prohibitive sentence. In this connection, § 18.1-245, Code of Virginia (1950) as amended, prescribes that "no person, firm, or corporation shall maintain, operate, promote, conduct or advertise . . . ." any endurance contest. (Emphasis added.)

Moreover, most of the States which have laws prohibiting lotteries and the advertisement thereof specifically forbid one to "advertise" or "advertise and promote" a lottery. Since the Virginia enactment is silent with respect to "advertising" a lottery, it is my opinion that the erection and maintenance of the sign concerning which you inquire is not violative of Virginia law.

Your second inquiry poses the question of whether or not a Virginia resident who sponsors a lottery legally conducted in another state falls within the ambit of the statute forbidding one to "promote or be concerned in managing" a lottery. While you do not specify the activities of the organization mentioned in your communication, it would appear that it is actively engaged in the furtherance of the game and has a direct interest in its attendance and continuation. Under these circumstances, it is my opinion that sponsoring the Bingo game in question comes within the plain meaning of the statute which prohibits any person to "promote" or "be concerned in managing" such an activity. By the express terms of § 18.1-314 of the Virginia Code, all laws for the suppression of lotteries are remedial in nature and are to be liberally construed. See, Abdella v. Commonwealth, 174 Va. 450. In the situation you present, I do not feel that it is stretching the clear meaning of the above-italicized terms of the statute to include within them one who is sponsoring a lottery, even though the lottery is being conducted in another State. Finally, the fact that the activity under consideration is legal in the State in which it is conducted does not remove the vice of its promotion in this State. In this regard, the statute does not forbid one to promote a lottery being conducted in Virginia; instead, it forbids one to promote in Virginia a lottery, regardless of where the lottery is actually conducted.
LOTTERIES—Consideration—Participation in enterprise without charge or purchase does not constitute.

LOTTERIES—Purchase of Tickets or Tokens by Person Who Distributes Them Does Not Constitute Lottery. December 29, 1969

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This is in reply to your inquiry of December 9, 1969, as to whether the operation of a give-away promotion of the type conducted by gasoline stations constitutes a lottery under Virginia law due to the fact that the individual dealers or station operators purchase the cards, tickets, tokens or literature used in the promotion from the oil distributors. I understand that the price paid by the stations constitutes partial reimbursement of the total cost of operating the promotion.

Operation of a lottery is not a common law offense but is proscribed by § 18.1-340 of the Code of Virginia. Courts in numerous jurisdictions have defined a lottery as consisting of the three elements of prize, chance and consideration. See, Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931).

Section 18.1-340.1 of the Code states the following with regard to the meaning of the term consideration:

“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.”

In accord with the above provisions of § 18.1-340.1, this office has ruled in a previous opinion that a gasoline station, which distributed to persons who came to the station “ballots” or registration slips for a prize-drawing, was not operating a lottery since no purchase was required as a condition to registration for the prize. See, Report of the Attorney General (1960-1961), p. 184. While the precise question which you present has not been considered by the Supreme Court of Appeals of Virginia, the recent trend of those authorities which have considered similar questions is that purchase of the tickets or tokens by the person who distributes them does not constitute a lottery. Such conclusions were reached in reference to a gas station promotion in California Gasoline Retailers v. Regal Petroleum Corp., 50 Cal.2d 844, 330 P.2d 778 (1958), and a grocery store promotion in Cudd v. Aschenbrenner, 233 Ore. 272, 377 P.2d 150 (1962). It is my opinion that the facts of the above cases are not materially distinguishable from those presented in your letter, and in the absence of any definitive determination by the courts of this State, I am constrained to believe that the foregoing decisions would be equally applicable in Virginia.

LOTTERIES—Pari-mutuel Betting. January 28, 1970

HONORABLE HENRY E. HOWELL, JR.
Member, Senate of Virginia

This is in reply to your letter of January 20, 1970, as to whether pari-mutuel betting is a prohibited lottery within the meaning of § 60 of the Constitution of Virginia. Section 60 reads as follows:

“No lottery shall hereafter be authorized by law; and the buying, selling, or transferring of tickets or chances in any lottery shall be prohibited.”
pari-mutuel betting is now proscribed by §§ 18.1-319 and 18.1-320 of the Code.

The question which you present has been considered by numerous other jurisdictions. While the majority view would appear to be that pari-mutuel betting does not constitute a lottery, those states which subscribe to the contrary view are by no means a small minority. Our Supreme Court has not ruled on the question, but it has recognized that any scheme involving the elements of prize, chance and consideration is a lottery. Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931); Abdella v. Commonwealth, 174 Va. 450, 5 S.E. 2d 495 (1939); Motley v. Commonwealth, 177 Va. 896, 14 S.E. 2d 28 (1940).

I am enclosing for your reference copies of two prior opinions of this office which have considered the question which you present. See, Report of the Attorney General (1949-1950), p. 131 and (1944-1945), p. 33. The question has been resolved with conflicting results in the following recent decisions: Bedford Sportspark, Inc. v. Leslie, 80 Ohio, L. ABS. 124, 155 N.E. 2d 730 (1959); Opinion of Justices, 272 Ala. 478, 132 So. 2d 142 (1961); Scott v. Dunaway, 228 Ark. 943, 311 S.W. 2d 305 (1963); Oneida County Fair Bd. v. Smylie, 86 Id. 341, 386 P. 2d 374 (1963).

In view of the fact that no consistent answer to your question has been formulated in other jurisdictions, and upon consideration of the broad definition given a lottery in the prior decisions of the Supreme Court of Appeals of Virginia, it cannot be said that § 60 of the Constitution does not prohibit the General Assembly from enacting legislation permitting pari-mutuel betting. While you will note that the enclosed prior opinions of this office express doubt as to the validity of such legislation, the question is one which ultimately must be resolved by the Court of Appeals as long as the present language of § 60 is retained.

As you know, there is currently pending a proposed amendment which would strike § 60 from the Constitution in its entirety and, if adopted, remove any constitutional bar to pari-mutuel betting which may presently exist.

MENTAL HYGIENE AND HOSPITALS — Admissions — Retention of patients—Notice of intent to apply—Application.

HONORABLE FRANCIS M. HOGE
Judge, Smyth County Court

This is in response to your letter of April 10, 1970, in which you request my opinion as to several provisions with respect to admission and retention of patients under Chapter 2 of Title 37.1 of the Code of Virginia. With regard to these procedures, your questions are answered as follows:

1. "Does Section 37.1-79, Code of Virginia (1950), as amended, apply only to voluntarily admitted patients?"

In my opinion, § 37.1-79, Code of Virginia (1950), as amended, applies to all patients that have been admitted to a mental hospital and who have been examined pursuant to § 37.1-70 of the Code. Section 37.1-70 requires that all persons admitted to a mental hospital, with the exception of those admitted voluntarily, pursuant to § 37.1-65, must be examined by a physician at the hospital within 24 hours of his arrival to determine whether or not there is sufficient cause to retain that person in the hospital. Once such a person has been examined pursuant to § 37.1-70, the hospital may retain him for another fourteen days, and then must take the action pursuant to § 37.1-79. Section 37.1-79 is intended to apply to all persons admitted to the hospital. The exception noted in line 2 of that section which refers to § 37.1-70 is included for the purpose of granting the patient the added protection provided under the latter section.
2. "At what time should the notice of intent to apply for retention order, Form 1010, under § 37.1-83 be issued and served, i.e., within the 60 days of initial admission, immediately thereafter or just prior to the expiration of six months?"

In my opinion, a reading of § 37.1-81 and § 37.1-83 of the Code leads to the conclusion that the Commissioner must take his action pursuant to § 37.1-83 at any time prior to the expiration of the six months' period. The reference in § 37.1-83 to the 60-day period is for the purpose of erasing the six months' deadline if the person has been afforded a hearing within the 60 days under § 37.1-81. Therefore, the Commissioner must file the application for retention order at any time within the six months' period. The exact time is within his discretion so long as it is within the six months' period.

3. "At what time should the application for retention order . . . be issued and served, and acted upon by the Court, i.e., prior to the expiration of the six months from the initial admission or immediately thereafter?"

The time for the application and service of the retention order is discretionary with the Commissioner so long as the action is instituted within the period of six months from the date of admission. Service should be made immediately following filing of the application for retention order. The Court must act upon the application as under § 37.1-81 of the Code which requires the Court to fix a date for hearing at a time no later than five days from the date the request and order are received. . ." In the event that no application for hearing on behalf of the patient is made as provided under § 37.1-83 of the Code, the Court may act upon the application for retention order without a hearing. In this event the Court should act upon the application for retention order within the same five days.

4. "Would Form 1010, (Notice of intent to apply for retention order) be used as notice of determination under § 37.1-79(3) and, if so, would it then be followed by issuance and service of Form 1013, (application for retention order) in the event no hearing is requested?"

In answer to this question, reference is made to line 10 of § 37.1-83, Virginia Code Annotated, which states, "The Commissioner or Superintendent shall cause notice of such application to be served upon the persons and in the manner provided by § 37.1-99". (Emphasis supplied). Therefore, a form that has been prepared that is sufficient to comply with § 37.1-79 (Form 1010) would also be a sufficient form of notice of intent to apply for retention under § 37.1-83. This should be followed by an appropriate order issued by the Court which would provide that the hospital should retain custody of the patient. Form 1013, I assume, is such a form and its use would be appropriate in a proceeding under § 37.1-79 (3).
a person who is charged with a criminal offense but not incarcerated at
the time of his court appearance may be admitted to a state mental
hospital pursuant to § 37.1-65 of the Code for a psychiatric evaluation.
Section 37.1-65 is the provision relating to voluntary admissions, whereas
§ 19.1-228 relates to the psychiatric evaluation of a person charged with
crime.

It is my opinion that no provision of Title 37.1 authorizes the commit-
ment of a person charged with crime solely for the purpose of ascertaining
whether he is competent to plead and stand trial. Such admissions are
made pursuant to the authority conferred upon the court by §§ 19.1-228,
et seq. I am aware of no provision of law which requires that an individual
be confined in jail immediately prior to being committed for observation
pursuant to the provisions of Title 19.1.

MENTAL HYGIENE AND HOSPITALS — Community Mental Health
Services Board—Membership—Restrictions on size.

MENTAL HYGIENE AND HOSPITALS — Community Mental Health
Services Board—Deposit of fees—Must be with designated treasurer.

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

I am in receipt of your letter of October 14, 1969, presenting the follow-
ing questions relative to the establishment of a combined Mental Health-
Mental Retardation Services Board to serve the cities of Roanoke and
Salem and Roanoke County, as provided in Chapter 10 of Title 37.1 of
the Code:

"Article III 'Membership' provides in its first paragraph:
"'Membership shall number not less than 5 nor more than 15,
with 4 members from each of the jurisdictions with 3 members at
large to be appointed by the jurisdictions based on recommendations
from the Board.'

"Would you please advise as to whether or not this section is
acceptable in view of Section 37.1-195 of the 1950 Code of Virginia.

Another question has arisen with regard to Section 37.1-197 (g)
of the 1950 Code of Virginia, as amended, which provides among
the powers and duties of said Board:

"'Prescribe a reasonable schedule of fees for services provided by
personnel or facilities under the jurisdiction or supervision of the
board and for the manner of collection of the same; provided, how-
ever, that all collected fees shall be deposited with the treasurer of
the political subdivision of which the board is an agency, or in the
case of a joint board, with the treasurer of the political subdivision
of which the board is an agency, or in the case of a joint board,
with the treasurer of the political subdivision specified by agree-
ment; provided further, that such collected fees shall be used only
for community mental health purposes.'

"The question arises as to whether, since the two cities and the
County have a joint board, the three governing bodies could au-
thorize the Board itself to handle funds, including collection fees,
through its (the Board's) own treasurer."

In reply to your first question, it should be noted that § 37.1-195 pro-
vides for certain officials of the participating localities to fix the size of
the board and appoint the members thereof. The statute makes no specific
provision for the appointment of members at large but, inasmuch as the
restriction on the size of the board is the only limitation applicable to the
appointment and selection of the board, it would appear that the selection of the board may be by any method agreed upon by the appointing authority.

It is not the intent of § 37.1-197(g) to require that all finances of the board must necessarily be handled by the treasurer of one of the participating political subdivisions. The board will handle funds from various sources and I know of no authority which would prohibit the board from selecting a treasurer to administer such funds. However, § 37.1-197(g) does impose a specific requirement that the fees referred to therein be deposited with the designated treasurer of one of the participating political subdivisions. A board which had its own treasurer would not be exempt from compliance with this requirement.

MINES AND MINING—Strip Mining—Kind of Operator—Commissioner may not accept savings certificates or similar documents in lieu of.

HONORABLE WILLIAM O. ROLLER, Commissioner
Virginia Division of Mined Land Reclamation

This will acknowledge receipt of your letter of May 28, 1970, in which you stated that you have accepted certified checks from a construction company over a period of two years as surety for reclamation performance for strip mine operations. You then noted:

"... Our Division has requested that [the construction company] post additional bond to cover the additional acres which [it] proposes to disturb under this permit. [The construction company] has asked if we can accept a certificate of deposit in exchange for the cash [it] has submitted so that [it] can receive interest in the future for the cash [it] has posted. ..."

"In 1968 the Code of Virginia was amended by adding in Title 45.1, Chapter 16. This chapter provides for reclamation on land disturbed for the mining of minerals other than coal. Chapter 16 is similar in text to Chapter 15 (strip mining laws); however, there are a few minor exceptions. Chapter 16 states that the required bond can be surety, cash or collateral security acceptable to the Chief. Mr. Sidney C. Day, Jr., Comptroller, in his letter dated August 28, 1968, to Mr. James E. Fox stated that the Honorable Joseph S. James, Auditor of Public Accounts, agreed that he would approve of accepting collateral securities in the form of savings certificates.

"Please advise me if we can accept savings certificates or similar documents from the coal operators as we do from operators mining for minerals other than coal."

Your question is governed by § 45.1-165 of the Code of Virginia (1950), as amended, which states in part:

"Such bond shall be executed by the operator and by a corporate surety licensed to do business in this state: Provided, however, that in lieu of such bond the operator may deposit cash or a certified check for the amount required." (Emphasis supplied.)

The present language of the above-mentioned statute is the result of an amendment by the 1968 General Assembly which substituted "a certified check for the amount required" for "collateral security acceptable to the Chief". Chapter 16 of Title 45.1, of the Code, to which you have made reference, clearly does not apply to those provisions which govern the strip mining of coal. See § 45.1-180 of the Code of Virginia (1950), as amended.
In view of the foregoing, I am of the opinion that you should not accept savings certificates or similar documents in lieu of such bond as required by § 45.1-165 of the Code of Virginia (1950), as amended.

MINES AND MINING—Strip Mining—Reclamation of land and posting of bond—Other mining operations may be conducted if comply with Chapter 15, Title 45.1.

MINES AND MINING—Strip Mining—Reclamation of land and posting of bond—Bond reduced if other mining operations conducted.

April 29, 1970

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

This will acknowledge receipt of your letter of April 16, 1970, in which you stated as follows:

"Pursuant to Chapter 15, Title 45.1 of the Code of Virginia, this Department and the Division of Mines administer a program whereby strip mining operators are required to reclaim land disturbed by the strip mining of coal.

"An instance has arisen where a coal company owning mineral rights to a tract of land employed Operator A to conduct strip mining operations on said tract. Operator A complied with the planning, bonding and permitting requirements of Chapter 15, conducted the strip mining and reclaimed the disturbed area. The reclamation work has not as yet been approved nor the bond released.

"The coal company has now employed Operator B and wishes to conduct deep mining operations on said tract which will disturb approximately three acres of land currently under bond posted by Operator A and held by this Department.

"1. Can Operator B, pursuant to Section 45.1-170 of the Code, be required to comply with the provisions of Chapter 15 of Title 45.1?

"2. If the answer to the above is in the affirmative, can the Chief reduce Operator A’s bond in an amount equal to that required to be posted by Operator B?"

Chapter 15, Title 45.1 of the Code of Virginia sets forth certain requirements with regard to the strip mining of coal in the Commonwealth. However, Section 45.1-170 of the Code states, in part, as follows:

"If the owner or owners of surface rights or the owner or owners of mineral rights desire to conduct other mining operations on lands disturbed by the operator furnishing bond hereunder, such owner or other person shall be in all respects subject to the provisions of this chapter and the Chief shall then release an equivalent amount of bonds of the operator originally furnishing bond on the disturbed area."

Accordingly, in view of the unequivocal language of the statute, I am of the opinion that both of your questions should be answered in the affirmative.

MOTOR VEHICLES—Abandoned Vehicles—Meaning of diligent search—Contemplates search within confines of Virginia unless actual knowledge of nonresidency present.

December 10, 1969

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

This is in reply to your letter of December 3, 1969, in which you set forth the following inquiry:
"I have been requested by our Police Division to inquire from you as to Title 46.1-3.2 in connection with the sale of vehicles held more than 60 days which have been abandoned and were removed to the Police Property Yard, and which are under preparation for sale at public auction.

"... The statute provides in part: '... after a diligent search for the owner, after notice to him at his last known address and to the holder of any lien of record in the office of the Division of Motor Vehicles in Virginia against such motor vehicle ...'

"Would our Police Division be within the law if it confined its search for the owner to the records of the County and the Commonwealth of Virginia and gave notice to the last known local address of the owner and notice to the holder of any lien of record in the Division of Motor Vehicles in Virginia, prior to the sale of such a vehicle?"

Your question concerns the weight to be given to the phrase "diligent search" as set forth in §§ 46.1-3 and 46.1-3.2, Code of Virginia (1950), as amended.

I am of the opinion that unless actual knowledge is had on the part of the impounding law enforcement agency that the vehicle is registered in another jurisdiction or the owner resides in another state, that the statutes contemplate a search within the confines of Virginia. To require otherwise would unreasonably hamper the effectiveness of the law. Of course, if such fact of nonresidency is known, information from the Division of Motor Vehicles or comparable agency of that jurisdiction should be requested.

MOTOR VEHICLES—Blood Analysis—Implied consent—Arresting officer not authorized to send sample to laboratory after expiration of 72 hours following receipt of the sample by chief police officer.

MOTOR VEHICLES—Drunk Driving—Court may exclude blood analysis and consider other relevant evidence.

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

I am in receipt of your letter of October 10, 1969, in which you present the following situation:

"Assume that two routine blood samples are taken from a driver pursuant to 18.1-55.1 and the driver fails to send his specimen for analysis. The Commonwealth sample upon arrival at the laboratory is found to have been destroyed by reason of being sun baked while in possession of the arresting officer. Upon learning this the officer, a little more than 72 hours later, takes the driver's specimen from the Sheriff's office and sends it to the state laboratory for analysis, the test result being in excess of 0.15% by weight of alcohol. It should be borne in mind that the accused driver did not particularly insist upon a blood test but merely submitted to the same under 18.1-55.1, and did not send in his sample to be tested. A trial of the defendant raises no question about his rights being prejudiced. Assume further that there is ample evidence of intoxication through other indicia, i.e., unsteadiness, odor of intoxicants, erratic driving, etc."

Thereafter, you present three inquiries which will be stated and considered seriatim:

"1. Even though, the 72 hour period had expired and the defendant's sample had not been destroyed, is the Commonwealth neces-
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sarily precluded from having that sample tested and the results admitted in evidence?"

Answer: In this connection, I am forwarding to you a copy of a previous opinion of this office, dated March 17, 1965, to the Honorable W. Byron Keeling, Commonwealth's Attorney for Charlotte County, in which it was ruled that a person accused of operating a motor vehicle while under the influence of intoxicants has "a period of only 72 hours after receipt by the chief police officer of the accused's blood sample within which to direct such officer to mail the sample to a laboratory of the accused's choice." See, Report of the Attorney General (1964-1965), p. 179. On that occasion, we pointed out that § 18.1-55.1 (d4) directs the chief police officer to destroy the sample if no proper request is made within 72 hours of his receipt of the same. In light of the views expressed in the enclosed ruling, I am of the opinion that the Commonwealth (through the arresting officer) is not authorized to direct that the sample in question be forwarded to the office of the Chief Medical Examiner for analysis.

"2. Do you find that 18.1-55.1 (i) (r) (s) clearly provides that regardless of the result of the blood test or tests, if any, the Court could, and should, disregard the blood test procedure, in light of the particular circumstances stated, and consider all other relevant evidence?"

Answer: I am of the opinion that, upon objection by the accused in the situation you present, the court should exclude evidence of the blood alcohol analysis and may proceed to consider the case upon such other relevant admissible evidence as may be available. In this regard, I am forwarding to you copies of two previous opinions of this office, dated May 19, 1964, and October 29, 1964, in which questions substantially identical to the instant inquiry were considered and discussed at length. See, Reports of the Attorney General (1963-1964), p. 188; (1964-1965), p. 74. Your attention is particularly drawn to Question II and Question III in the latter opinion and our responses thereto.

"3. Do you find Winston v. Commonwealth, 188 Va. 386, 49 S.E.2d 611, to be in point upon the issue of whether or not the accused in the circumstances I've stated was denied due process by reason of there being only one blood specimen tested?"

Answer: Since it does not appear from your communication that the situation under consideration entails any failure by the arresting officer or other official of the Commonwealth to perform any statutory duty enjoined upon him, I am of the opinion that the decision of the Supreme Court of Appeals of Virginia in the Winston case would not be applicable to the matter concerning which you inquire.

MOTOR VEHICLES - Blood Analysis - Implied consent - Independent analysis - Removal of laboratory from approved list of facilities.

CRIMINAL PROCEDURE - Blood Analysis - Implied consent - Independent analysis - Test by laboratory in which Chief Medical Examiner has interest does not constitute.

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

This is in reference to your letter of February 10, 1970, in which you request my opinion as to the following:

Section 18.1-55.1, Code of Virginia (1950), as amended, requires that an individual, who has been charged with driving while under the influence of
intoxicants and thereafter consents to have a sample of his blood analyzed by the Chief Medical Examiner of Virginia, shall be provided the opportunity to have a separate analysis performed by an independent laboratory, said laboratory to be chosen by the accused from a list of facilities which have been approved for such purpose by the State Health Commissioner and which list is printed and distributed by the Chief Medical Examiner. The list of facilities as approved by the State Health Commissioner contains the names and addresses of twenty-three laboratories.

You inquire as follows:

"QUERY 1: Do I have the authority to strike from the approved list of facilities the names of the laboratories in which the Chief Medical Examiner or personnel of that office reportedly have an interest?

"QUERY 2: Does the fact that the Chief Medical Examiner or personnel of his office allegedly have an interest in the laboratory which conducts the second blood analysis preclude the accused from having an ‘independent analysis’ as provided for in the above mentioned Code section?"

With reference to your first question, I am of the opinion that you do not have the authority to remove the laboratories in question from the list. Section 18.1-55.1 (d1) provides that the State Health Commissioner is the approving authority. Conversely, the State Health Commissioner, absent the voluntary withdrawal of the facilities in question, is the sole authority invested with power to remove facilities from the list.

With reference to your second question, I am of the opinion that the blood test conducted by a laboratory in which the Chief Medical Examiner or personnel of his staff have an interest does not constitute the "independent analysis" as contemplated by the statute. However, subsection (s) of § 18.1-55.1 provides that the methods as outlined are procedural, not substantive. Therefore, a discrepancy in the administration of the test should not affect the admissibility of the evidence, but only the weight to be ascribed to such evidence.

MOTOR VEHICLES—Blood Analysis—Implied consent—Refusal to submit to test—Committing magistrate may swear out warrant.

HONORABLE RICHARD CRAWFORD GRIZZARD
Commonwealth’s Attorney for Southampton County

April 20, 1970

This is in reply to your letter of April 6, 1970, with which you enclosed copies of Section 17-78.1 of the Franklin City Code, relating to the use of chemical tests to determine alcoholic content in the blood of a person charged with driving under the influence of intoxicants, and form of warrant for a person who has refused such test. You inquire whether the committing magistrate can actually swear out the warrant himself or whether it would be necessary for him to call another officer for this.

It is provided in Section 18.1-55.1 of the Code of Virginia, from which the Franklin ordinance is derived under paragraph (j), that the committing justice, clerk or assistant clerk shall certify the fact of refusal of the person to take the test and forthwith issue a warrant charging such person with violation of this section. In answer to your question, therefore, I am of the opinion that the committing magistrate may also swear out the warrant.

MOTOR VEHICLES—Blood Analysis—Implied consent—Time within which test to be made.

CRIMINAL PROCEDURE—Blood Analysis—Implied consent—Time within which test to be made.
HONORABLE D. R. TAYLOR, Judge
County Court of James City County

This is in reply to your letter of May 21, 1970 in which you request my opinion in the following, which I quote:

“In connection with the trial of a case now pending before the County Court of James City County, the question has arisen as to whether or not the accused charged with operating a motor vehicle under the influence of intoxicants, or other self administered drugs, can consent to the taking of a blood sample after the expiration of two hours.”

In regard to the limitation of two hours contained in § 18.1-55.1 of the Code of Virginia, I quote paragraph (b) thereof, as follows:

“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.”

The two hour provision in the quoted passage pertains to the period of time between the alleged offense and the arrest. If the person is arrested within two hours of the alleged offense, he shall be deemed to have consented to have a sample of his blood taken to determine the alcoholic content thereof.

It is provided, in paragraph (c) of § 18.1-55.1, that in the event the accused has refused to have the blood sample taken, after having the requirements of this law recited to him upon arrest and again when taken before the committing magistrate, and has declared his refusal in writing, or the fact of his refusal has been certified as provided by this section, “then no blood sample shall be taken even though he may thereafter request same.” This section, however, does not specify any limit as to the time within which an accused may consent to the taking of a blood sample. The question raised in your letter, therefore, is answered in the affirmative. A consistent view is expressed in an opinion found in Report of the Attorney General (1962-1963) p. 155.

MOTOR VEHICLES—Blood Test—Independent analysis—Test by laboratory in which there is conflict of interest with Chief Medical Examiner's Office does not constitute.

CRIMINAL PROCEDURE—Blood Analysis—Admissibility in evidence—Discrepancy in administration of test does not affect except as to weight to be ascribed it.

HONORABLE LAWRENCE R. AMBROGI
Acting Commonwealth's Attorney for Frederick County

This is in reply to your letter of June 8, 1970, from which I quote the following:

“In a case in which the accused was arrested and charged with driving under the influence of alcohol, and a blood test made pursuant to the appropriate statute, the accused's blood sample or second
container was forwarded for an independent analysis to St. Elizabeth's Hospital, Inc., in Richmond, Virginia and received and tested there February 14, 1970. Subsequent to the test but prior to the accused's trial, this particular hospital was removed from the approved list of laboratories by the State Health Commissioner for an apparent conflict of interest between the laboratory and personnel within the office of the Chief Medical Examiner. I would appreciate it very much if you could advise me as to the following:

1. What the nature of the conflict of interest was between the personnel in the Chief Medical Examiner's Office and the laboratory at St. Elizabeth's Hospital, Inc.

2. Whether this conflict existed or was discovered prior to February 12, 1970.

3. Whether, in your opinion, the conflict was such as to prohibit 'an independent analysis of the blood in the second container'.

4. Is the certificate from St. Elizabeth's Hospital, Inc., admissible and competent evidence?

In answer to your question numbered 1, the conflict of interest arose from the fact that a person in the Chief Medical Examiner's Office, as pathologist at St. Elizabeth's Hospital, Inc., had the responsibility for the test of blood, to determine the alcohol content, being run properly and according to prescribed methods.

Your question numbered 2 is answered in the affirmative. The situation existed for several months prior to February 12, 1970. The matter was brought to my attention by the Commonwealth's Attorney for Chesterfield County in a letter dated February 10, 1970, which, in turn resulted from a decision of the Circuit Court of Chesterfield County a few days prior to that date.

In answer to your questions numbered 3 and 4, I quote from my letter of February 16, 1970 to the Honorable Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, the following:

"...I am of the opinion that the blood test conducted by a laboratory in which the Chief Medical Examiner or personnel of his staff have an interest does not constitute the 'independent analysis' as contemplated by the statute. However, subsection (s) of § 18.1-55.1 provides that the methods as outlined are procedural, not substantive. Therefore, a discrepancy in the administration of the test should not affect the admissibility of the evidence, but only the weight to be ascribed to such evidence."

MOTOR VEHICLES—City Auto Tag—City may not require on car carrying dealer's license plates.

MOTOR VEHICLES—Dealer's License Plates—City may not require additional city auto tag.

HONORABLE TAYLOR L. BARR
Commissioner of Revenue for the City of Winchester

July 25, 1969

This is in reply to your letter of June 24, 1969 in which you state:

"Due to persons other than authorized representatives of Duly Licensed Motor Vehicle Dealers using Dealers License plates, I have been requested by a member of the City Council of the City of Winchester, Virginia to obtain your opinion on the legality of passing a City Ordinance requiring Automobile Dealer's to buy and display City Auto Tags on each car using Dealer's plates whether used as a demonstrator or by friends or members of the family."
The question you pose is dealt with by § 46.1-66, Code of Virginia (1950), as amended, which reads, in part, as follows:

"No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(5) The motor vehicle, trailer or semitrailer is kept by a dealer or manufacturer for sale or for sales demonstration;"

Inasmuch as the legislature has, without limitation, prohibited localities from imposing a tax or license fee when the motor vehicle is kept by a dealer or manufacturer for sale or for sales demonstration, it is my opinion that a motor vehicle kept for such purposes, but also used partially for personal or family use falls within this section. It follows, that an ordinance such as you describe would not be legal because of the quoted statutory prohibition.

MOTOR VEHICLES—Commissioner—May increase compensation of contractual license sub-agencies within limits set by 1970 amendment to § 46.1-30.

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is in reply to your letter of May 12, 1970 from which I quote the following:

"House Bill No. 506, which was enacted into law as Chapter 754 of the 1970 Acts of the Assembly recently adjourned, increases the compensation to the Contractual License Agents whose contracts continue from year to year unless cancelled by one of the parties. No reference is made to the Contractual License Subagencies (agencies operating thirty days each year during the Annual License Renewal Period), whose contracts are made each year for a definite term.

"Since the contract is for a definite period at a fixed compensatory rate, do I have authority to increase the said Subagents compensation effective April 6, 1970, in an amount greater than that stipulated by the contract but not more than the statutory limitation of fifty cents (50¢) for each set of license plates issued or sold annually at each agency?"

Chapter 754, Acts of Assembly of 1970, which you cited, amends § 46.1-30 of the Code of Virginia, which authorizes the appointment of agency personnel by the Commissioner of the Division of Motor Vehicles. Paragraph (b) thereof prescribes that the compensation of the personnel of each agency is to be fixed by the Commissioner, within the stated maximum amount. The 1970 amendment increased this maximum effective April 6, 1970.

There is no authorization for the establishment of "subagencies," as such, and those so denominated by your office are actually agencies, so that compensation of the personnel of each such agency is controlled by § 46.1-30. Accordingly, it is my opinion that you are authorized to increase the compensation of such personnel within the new limits established by the 1970 amendment and, therefore, your question is answered in the affirmative.

MOTOR VEHICLES—Condemnation—For driving while permit or privilege suspended or revoked—In rem proceeding.

MOTOR VEHICLES—Suspended or Revoked Permit—Condemnation of vehicle—In rem proceeding.
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HONORABLE SAM L. HARDY
Commonwealth's Attorney for Bland County

This is in reply to your letter of July 16, 1969, which states as follows:

"A licensed car dealer in Bland County sold an infant a used car on an installment plan. The infant paid the car dealer a down payment and drove the car off of the dealer's sales lot. The infant's license had been revoked, and one of the Virginia State Troopers stationed in Bland arrested the infant and charged him with violating our motor vehicle laws. No title was executed at the time the youth purchased the automobile, and the following day the car dealer returned the infant's money to the infant's father.

"There is a question as to whether or not I can proceed in Circuit Court to condemn the car."

The situation you describe is dealt with by § 46.1-351.2, Code of Virginia (1950), as amended. The proceeding under §§ 46.1-351.1 and 46.1-351.2 is an in rem proceeding and, therefore, the fact that the installment purchaser is an infant is of no significance. The salient fact is whether the installment seller knew, or had reason to believe, that the installment purchaser was to operate the motor vehicle in violation of § 46.1-350.

Section 46.1-351.2 provides statutory relief for a bona fide owner or lienor in the event that the subject motor vehicle was driven in violation of the law without his connivance or consent, express or implied. Such connivance or consent is a factual question to be determined by the trial court and, as you know, anyone having an interest in the subject motor vehicle shall be made a party defendant.

In my opinion, under the stated conditions you are authorized to file the information and your question, therefore, is answered in the affirmative.

MOTOR VEHICLES—Drunk Driving—Conviction automatically revokes license—No discretion in court to suspend.

CRIMINAL PROCEDURE—Suspension of Sentence—May not suspend revocation of license when conviction for drunk driving.

HONORABLE RICHARD C. COTTER, Judge
Mathews County Court

This is in reply to your letter of May 18, 1970, in which you suggest an apparent conflict between § 18.1-59 and § 46.1-417 of the Code of Virginia in regard to the revocation of license upon a conviction of driving a motor vehicle while under the influence of alcohol and request my advice in clarification of these sections.

Specifically, you make reference to the terminal clause of § 18.1-59, which provides that "the court may, in its discretion, suspend the sentence during the good behavior of the person convicted or found not innocent." In my opinion, however, this does not clothe the court with discretion to suspend the revocation of driving privileges imposed by this section upon a judgment of conviction under § 18.1-54, or for a similar offense under any county, city or town ordinance.

This section mandatorily states that such judgment of conviction, for a first offense, shall of itself operate to deprive the person so convicted of the right to drive or operate a motor vehicle for a period of one year from the date of judgment. The deprivation of the right to drive is no part of the penalty provided in the judgment of conviction and it is not necessary to be considered by the court or made a part of the judgment of conviction. Commonwealth v. Ellett, 174 Va. 403, 4 S.E. (2d) 762.
When considered in light of the foregoing, it becomes apparent that § 18.1-59 is not in conflict with § 46.1-417, which prescribes that the Commissioner of the Division of Motor Vehicles shall forthwith revoke, and not thereafter reissue during the period of one year, the license of any person, upon receiving a record of his conviction for a violation of the provisions of § 18.1-54, or a violation of a valid town, city or county ordinance paralleling such statute.

MOTOR VEHICLES—Habitual Offender—Not prohibited from operating tractor upon highway.

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

January 15, 1970

This is in reference to your letter of January 12, 1970, in which you request my opinion as to whether an individual who has been certified an habitual offender pursuant to § 46.1-387.6, Code of Virginia (1950), as amended, may operate a farm tractor under the provisions of § 46.1-352.1 of the Code.

Section 46.1-352.1 reads as follows:

“The conviction of a person for driving under the influence of intoxicants or some other self-administered drug in violation of any State law or local ordinance shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of land shall not exceed five miles.” (Emphasis supplied.)

The individual here was not convicted of “driving under the influence of intoxicants or some self-administered drug” except incidentally and prior to being declared an habitual offender. In other words, the individual in question is not prohibited from driving by virtue of his conviction for drunk driving, but by virtue of having been declared an habitual offender.

Section 46.1-352 of the Code states that:

“No person shall be required to obtain an operator’s or chauffeur’s license for the purpose of driving or operating a road roller, road machinery or any farm tractor or farm machinery or vehicle defined in § 46.1-45, temporarily drawn, moved or propelled on the highways.”

Logically, it would seem that where no operator’s license is required to operate certain vehicles under given circumstances, the revocation of the operator’s license would have no effect as to the operation of those certain vehicles under the given circumstances. Therefore, I am of the opinion that if the farm tractor meets the definition set out in § 46.1-45, the habitual offender may operate same as provided in § 46.1-352.


MOTOR VEHICLES—Habitual Offender—Procedure after certification—Indictment or presentment necessary unless waived.

CRIMINAL PROCEDURE—Indictment or Presentment—Necessary unless waived in habitual offender cases.
December 11, 1969

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

This is in reply to your letter of December 8, 1969, in which you set forth the following inquiry:

"In event an operator of a motor vehicle has been found to be an habitual offender as provided by 46.1-387.8 of the 1950 Code of Virginia as amended, I would appreciate your outlining to me the procedure to be taken when the case is certified to the Court of record.

"Inasmuch as the offense constitutes a felony, I particularly wonder whether or not the case should be certified to the grand jury before trial."

After the case is certified to the court of record pursuant to § 46.1-387.8, it should proceed as any other felony. Specifically in regard to your question concerning grand jury action, at common law a felony could be tried on the basis of an information verified by a competent public officer on his oath of office. However, § 19.1-162, Code of Virginia (1950), as amended, provides:

"An information may be filed upon presentment or indictment by a grand jury or upon a complaint in writing verified by the oath of a competent witness; but no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction or unless such person, by writing signed by such person before the court having jurisdiction to try such felony or before the judge of such court in vacation, shall have waived such indictment or presentment, in which event he may be tried on a warrant or information. If the accused be in custody, or has been recognized or summoned to answer such information, presentment or indictment, no other process shall be necessary; but the court may, in its discretion, issue process to compel the appearance of the accused."

In light of the statutory provision quoted above, it is my opinion that unless the accused shall waive his right to grand jury action, securing an indictment or presentment is a necessary procedure incidental to trying the accused for driving after being certified an habitual offender.

MOTOR VEHICLES—Licensing and Inspection Requirements for Motorcycles—Applies to mini-bikes and go-carts.

HONORABLE JOHN D. BUCK
Commonwealth's Attorney for City of Radford

This is in reply to your letter of recent date in which you present the questions which I quote as follows:

"Is it necessary to license and obtain an inspection sticker for either a mini-bike or go-cart? If they are not classified as a motor vehicle under the applicable law thereto, can a person without a valid operator's license operate either one of the said vehicles?"

The term "motor vehicle" is defined as every vehicle which is self-propelled or designed for self-propulsion. A motorcycle is a motor vehicle designed to travel on not more than three wheels in contact with the ground and any four-wheeled vehicle weighing less than five hundred
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pounds and equipped with an engine with less than six horsepower, except a farm tractor as defined in Title 46.1 of the Code. See, § 46.1-1 (14) and (15) of the Code of Virginia.

Examination of the information furnished with your correspondence reveals that each of the vehicles in question is self-propelled or designed for self-propulsion. From this information, those vehicles with only two wheels as well as the ones with four wheels, provided the latter weigh less than five hundred pounds and are equipped with an engine of less than six horsepower, fall within the definition of a motorcycle.

Considering your specific questions, all of these vehicles are subject to the registration and title laws and, therefore, must be licensed before the same are operated upon any highway in this State. As you know, under the Virginia Operators' and Chauffeurs' License Act, Chapter 5, Title 46.1 of the Code of Virginia, an operator's or chauffeur's license is required before operating a motor vehicle upon any highway in this State. Likewise, before operating a motorcycle upon any highway a person must qualify by special examination pursuant to § 46.1-370.1 thereof. The latter section became effective January 1, 1969.

In regard to your question of whether an inspection sticker must be obtained, with exceptions not here applicable all motor vehicles are subject to inspection, with the exception of four-wheeled vehicles weighing less than five hundred pounds and having less than six horsepower and bicycles with motors installed if the vehicle can be propelled by human power. The exception does not appear in the Code but is contained in the Governor's Proclamation effective January 1, 1967, issued under authority of § 46.1-315 of the Code. Thus, the vehicles illustrated in the information furnished with your letter are subject to the inspection laws, with the possible exception of the four-wheeled three horsepower vehicle which is exempt only if it weighs less than five hundred pounds.

MOTOR VEHICLES—Local License—Issuance of tags may be conditioned on payment of personal property taxes.

March 12, 1970

HONORABLE BENJAMIN H. WOODBRIDGE, JR.
Member, House of Delegates

I have received your letter of March 9, asking whether a county or city may properly refuse to sell local automobile license tags to an individual who has not yet paid his personal property tax.

Virginia Code § 46.1-65(c) provides:

"A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town."

This office has previously held:

"The only tax which may be required to be paid in order to obtain a license plate is the personal property tax upon the assessed value of the motor vehicle itself." Report of the Attorney General (1963-1964), p. 196.

It is my opinion that the only payments upon which the issuance of local automobile license tags may be conditioned are the license fee and the personal property taxes upon the motor vehicle sought to be licensed.
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MOTOR VEHICLES—Maximum Safe Speed Signs—Relevancy in charge of reckless driving.

MOTOR VEHICLES—Speed Limits—Maximum safe speed signs warning not a speed limitation.

HONORABLE PAT B. HALE, Judge
Buchanan County Court

August 13, 1969

This is in reference to your inquiry of August 4, 1969 concerning the legal significance of the facts set out below:

“What would be the legal significance, if any, of ‘Maximum Safe Speed’ sign on a highway posted for speed limit of 55 miles per hour. An automobile approaches a curve where a sign has been erected as follows: ‘Maximum Safe Speed 20 MPH’, the automobile in question approached and entered this curve at 50 miles per hour and due to the automobile excessive speed, said automobile failed to negotiate said curve and ran off the road resulting in damage to the vehicle and injuries to the occupants of the car.”

There is no speeding infraction because the “Maximum Safe Speed” sign is not a speed limitation but is merely a warning to motorists that a change in the conditions and circumstances of the highway is imminent. Because it is a warning and the operator of the motor vehicle had knowledge of the danger involved, however, a charge of reckless driving would not be improper.

Section 46.1-189, Code of Virginia (1950), as amended, reads, in part, as follows:

“Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person shall be guilty of reckless driving; . . .”

Section 46.1-190, which reads, in part, as follows, would also be applicable:

“A person shall be guilty of reckless driving who shall:

(h) Exceed a reasonable speed under the circumstances and traffic conditions existing at the time regardless of any posted speed limit;”

These statutes cannot be applied indiscriminately to all cases of this type, but there is no question as to their relevancy to your stated facts.

MOTOR VEHICLES—Motorcycles—Drivers and riders required to wear helmets by 1970 amendment—Not enforceable until standards are set by Superintendent of State Police and copies have been available to public for sixty days.

June 19, 1970

Mr. James H. Young, Sheriff
City of Richmond

This is in reply to your letter of June 12, 1970, from which I quote the following:

“The recent session of the General Assembly passed a law that requires all motorcycle riders to wear helmets beginning June 26, 1970.
"Recently, Mr. John T. Hanna, Director of the Division of Highway Safety, issued a statement saying 'technically, the law will not go into effect until the end of a public hearing on recommendations and objections to the standards and possible changes to be made.' This could run, he said, well into September.

"In view of Mr. Hanna's statement, are we to consider that the law, governing wearing of motorcycle helmets on highways and streets, is not to be enforced before standards are adopted?

"I would appreciate your opinion on this."

The law to which you refer is contained in Chapter 99, Acts of Assembly of 1970, which amends § 46.1-172 of the Code of Virginia. Although the amendatory act becomes effective June 26, 1970 this section contains a clause prescribing that the Superintendent of State Police shall within one year from enactment of this bill establish standards for the protective helmets required herein. The Superintendent advises that he expects to adopt the standards at a hearing set for Monday, June 29, 1970. Because of legal requirements, however, the standards adopted on that date do not become enforceable until copies of the printed pamphlet containing such standards have been available to the public at the office of the Department of State Police for more than sixty days. See, § 9-6.7 (c) of the Code of Virginia. Accordingly, your question is answered in the affirmative.

MOTOR VEHICLES—Notice of Revocation of License—Prima facie presumption when sent by certified mail—How rebutted.

HONORABLE A. ERWIN HACKLEY
Commonwealth's Attorney for Page County

This is in reply to your letter of January 22, 1970, which I quote below:

"Under Section 46.1-441.2 of the 1950 Code of Virginia, as amended, which provides that the certificate of the Commissioner or someone designated by him for that purpose that notice or copy of notice of revocation of license has been sent by Certified Mail to the last known address supplied by an operator of a motor vehicle shall be deemed prima facie evidence that such notice or copy has been sent and delivered to such operator for all purposes involving the application of the provisions of that title of the Code, can an operator rebut the prima facie evidence by proof that he had moved and did not receive the notice, and further claiming that the records of the Motor Vehicle Department show that the notice was returned marked "ADDRESSEE UNKNOWN."

The Code section you refer to removes from the Division of Motor Vehicles the burden of ascertaining whether each and every suspension or revocation notice mailed was actually received by the addressee. The certificate of the Commissioner or his designated agent that the notice was mailed creates a prima facie presumption that such notice was mailed and delivered. In my opinion, the presentation of proper evidence showing that the records of the Division of Motor Vehicles reflect that the notice was returned marked "ADDRESSEE UNKNOWN" and that the addressee had changed his address and therefore not received the notice and was not otherwise provided with notice of the suspension or revocation is sufficient to rebut the presumption.

MOTOR VEHICLES—Operator's License—Revocation for two convictions of speeding—Date of offense rather than date of conviction controls.
HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in reply to your letter of June 19, 1970, from which I quote the following:

"I am writing in reference to a constituent of mine who has been notified by the DMV that his permit is suspended. However, you will note from the enclosed notice that was mailed out that the two convictions are not within the year. Therefore, I feel that the notice is invalid on its face.

"I would appreciate it if you would interpret for me whether DMV has the authority to suspend a person's license on the basis of two charges of speeding and not two convictions; and if the person is convicted, whether the time period runs from the date of the charge or date of conviction."

The required revocation based upon two or more convictions of exceeding the speed limit is controlled by § 46.1-419 of the Code of Virginia. This section requires the Commissioner of the Division of Motor Vehicles to revoke the driver's license of any person for not less than sixty days nor more than six months upon receiving records of his two or more successive and distinct convictions "of violations committed within a twelve-month period of any provision of law, or any rules, regulations, or ordinances duly enacted in pursuance thereof, establishing the lawful rates of speed of motor vehicles and making the violation thereof punishable as a crime; ...." This section applies when a person is convicted of two or more violations of the speed laws committed within a twelve-month period. The date of the offense, rather than the date of conviction, controls. It is not necessary that the two convictions fall within a twelve month period.

The order of revocation mentioned in your letter shows speeding convictions on April 16, 1969 and April 17, 1970. The applicable abstracts of conviction on file in the Division of Motor Vehicles, however, further show that the offenses upon which these convictions were based occurred on March 29, 1969 and March 2, 1970, respectively. It is apparent, therefore, that the two violations were committed within a twelve-month period and the action taken by the Commissioner in revoking the driver's license for sixty days was mandatory under the above cited statute.

MOTOR VEHICLES—Operator's License—Revoked for one year where resident of Virginia is convicted of drunk driving in a North Carolina court. Limited driving permit issued by North Carolina not valid in Virginia.

MOTOR VEHICLES—Operator's License—Revoked for one year where North Carolina resident convicted in Virginia court for drunk driving—Limited permit issued by North Carolina not effective in Virginia.

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is in reply to your letter of September 29, 1969, in which you present the following facts and inquiries:

"As you are undoubtedly aware, the North Carolina General Assembly passed a bill on July 2, 1969 which enables judges to issue 'limited driving permits' to persons convicted of first offenses of driving while under the influence of intoxicating liquor. I am enclosing herewith a copy of the law as enacted.
"When an operator of a motor vehicle is convicted of a first offense of drunk driving in this Commonwealth, the Division of Motor Vehicles is required to notify the individual and the Division of Motor Vehicles in his home state, if the operator is a nonresident, that his privilege to drive in Virginia has been revoked for one year. In light of this fact, will you be good enough to render to me an opinion as to the effect of the above referenced statute in the following two circumstances:

"1. A resident of Virginia is convicted of drunk driving in a North Carolina court. The judge issues a limited license to drive. The limited area may include part of Virginia, or it may be without any condition being stated. The Division of Motor Vehicles receives an abstract of the conviction. What is this resident's driving status in Virginia?

"2. A North Carolina resident is convicted in a Virginia court of drunk driving and thereafter applies to a court of competent jurisdiction in North Carolina for a limited license and receives same. The restrictions thereon purport to allow the nonresident to drive in Virginia. What is this nonresident's driving status in Virginia?"

In answer to your question numbered 1, § 46.1-466 (a), Code of Virginia (1950), as amended, provides that:

"The Commissioner shall suspend or revoke the license and registration certificate and plates of any resident of this State upon receiving notice of his conviction, in a court of competent jurisdiction of this State, any other state of the United States, the United States, the Dominion of Canada or its provinces or any territorial subdivision of such state or country, of an offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license granted to him or registration of any motor vehicle registered in his name. No suspension or revocation under this paragraph shall continue for a longer period in this State than in the jurisdiction in which such offense occurred, provided such person gives proof of his financial responsibility in the future for the period provided in § 46.1-439 of this chapter."

North Carolina revokes the operator's license for one year upon the first conviction of drunk driving. Although in that state the judge may in his discretion issue a limited driving privilege, in my interpretation it is the conviction and attendant revocation which governs the applicability of § 46.1-466 of the Code, quoted supra. I am of the opinion, therefore, that you must revoke the Virginia resident's operator's license for a period of one year since that is the length of the period of revocation imposed by North Carolina.

The second instance cited is controlled by §§ 18.1-59 and 46.1-417, Code of Virginia (1950), as amended. By virtue of § 18.1-59 the conviction of itself operates to deprive the person so convicted of the right to operate a vehicle in this Commonwealth for a period of one year. Section 46.1-417 requires you, as Commissioner, to revoke the offender's operator's license for one year upon receipt of the abstract of conviction. Moreover, § 46.1-439 requires proof of future financial responsibility for three years from the expiration of the period of revocation. The limited license issued by a North Carolina court would not work to abrogate the effect of the cited statutes.

MOTOR VEHICLES—Operator's License—When required for citizen of foreign country.
HONORABLE D. R. TAYLOR, Judge
James City County Court

This is in reply to your letter of April 14, 1970, which I quote as follows:

“In my capacity as County Judge of the James City County Court, I have had occasion to have a lady brought before the Court by an officer of the Virginia State Police Department upon a charge that she did not operate a motor vehicle on the highways of Virginia without a Virginia operator's license. This particular lady is a British national and is married to a professor who is currently teaching at the College of William and Mary here in Williamsburg, Virginia. At the time of her arrest, she had in her possession a valid British driver's license which is valid until October 24, 1970, and an International Driving permit which is valid for one year from July 29, 1969. The accused entered the United States on July 29, 1969. In connection with her arrest, I have received from Mr. K. E. Malmborg, Assistant Legal Advisor for the Administration and Consular Affairs of the State Department, the enclosed letter, dated February 27, 1970, and a copy of the convention on road traffic. In Mr. Malmborg's letter, he makes reference to Article 24 of the convention and other related sections, which according to his interpretation, exempts the accused from the requirement of obtaining a Virginia operator's license during her sojourn in the United States. The undersigned is writing to obtain your opinion as to whether or not the said treaty and its applicable provisions exempt an accused who would otherwise be required to obtain a Virginia operator's license.”

A nonresident who has in his immediate possession a valid driver's license issued him in his home state or country is permitted to drive upon the highways of this State under the conditions set forth in § 46.1-355 of the Code of Virginia. The question of when a person is considered a nonresident for the purposes of Title 46.1 of the Code of Virginia, however, is controlled by § 46.1-1 (16). The latter, in paragraphs (b) and (c), prescribes that a person (1) who becomes engaged in a gainful occupation in this State for a period of sixty days or (2) who has registered a motor vehicle in this State listing an address within this State in the application for registration or (3) who has resided in this State for a period of six months, whether employed or not, is deemed a resident. Thus, when any one or more of the three enumerated situations becomes applicable to a person who, as a nonresident, has been permitted to drive a motor vehicle in this State on a valid driver's license issued him by his home state or country, § 46.1-355 would no longer apply since such person must be deemed a resident for the purposes of Title 46.1.

I find no Virginia statute which authorizes an exception from the foregoing for nationals of any other state or country by virtue of the provisions of the “Convention on Road Traffic,” a copy of which you furnished me. In the absence of any such exception and in view of the provisions of law cited above, I shall answer your question in the negative. While apparently this specific question has not been the subject of a previous opinion of this office, a similar view has been expressed in regard to nonresident members of the armed forces, in Reports of the Attorney General (1965-1966) page 205 and (1966-1967) page 194.

MOTOR VEHICLES—Payment to Independent Contractual Agents—Compensation for determining whether application for license conforms with uninsured motorist law—Not affected by amendment to § 46.1-30.
HONORABLE CHESTER H. LAMB
Commissioner, Division of Motor Vehicles

This is in reply to your letter of April 10, 1970, from which I quote the following:

"Reference is made to House Bill 506 which was enacted into law as Chapter 754 of the 1970 Acts of Assembly recently adjourned. This enactment carries an emergency clause and has become effective on passage.

"The Division of Motor Vehicles for many years contracted with various independent individuals on a contractual basis to pay certain commissions for the sale of state license plates and related transactions. Until the above referred to statute, the contractual situation was as described below.

"We have paid such independent contractors 35¢ for each set of license plates issued (46.1-30). In addition, we have paid these contractual agents 15¢ for each application for license which is examined when issuing a set of license plates to determine whether the same conforms with the provisions of Article 10 beginning with Section 46.1-167.1 of Chapter 3, Title 46.1. This payment was authorized under opinion of the Attorney General dated September 11, 1958, and funds to provide for such payments have been appropriated by succeeding sessions of the General Assembly since that time.

"In addition, contractual agents handling title transactions under the provisions of the Virginia Motor Vehicle Sales and Use Tax Act have received 25¢ per title transaction since September 1, 1966. This payment was authorized by the Governor on August 3, 1966, and appropriations have been forthcoming to provide for such payment by the General Assembly since that time.

"The 1970 session of the General Assembly increased from 35¢ to 50¢ the commission for each set of license plates issued, and in addition provided further payment of 35¢ for title transactions as indicated above. No reference is contained in this new enactment regarding the payment of 15¢ to determine whether a particular motor vehicle is properly insured under the Uninsured Motorists Act in Article 10, Chapter 3 of Title 46.1.

"Since the statute is silent in respect to the last sentence above, am I to construe that the General Assembly did not intend to alter this payment of 15¢, or am I to believe that their reexamination of such payments and the upward revision of payment for two of the activities described above indicates that such compensation is all that the General Assembly intended such agents to be paid by the Commissioner of Motor Vehicles?"
motor vehicle law. In my opinion, the 1970 amendments to § 46.1-30 do not alter this payment.

MOTOR VEHICLES—Reckless Driving—Speed in excess of 80 miles per hour constitutes.

HONORABLE HENRY L. LAM, Associate Judge
Municipal Court for the City of Virginia Beach

October 1, 1969

This is in reply to your letter of September 24, 1969, which I here quote:

"I find an apparent discrepancy and seek your advice with respect thereto. Under the Reckless Driving Statute, 46.1-193 (1) (a), (b), (c), and (e), or in excess of 80 mph, is to be construed as Reckless Driving.

"The apparent conflict I find is that in using the 20 mile figure in this instance, it would not become Reckless Driving until 85 mph had been exceeded, and, of course, this appears to conflict with the limitation of 80 mph."

In my opinion, the inherent dangers attendant to the operation of a motor vehicle at very high speeds prompted the General Assembly to classify driving a motor vehicle at a speed in excess of 80 miles per hour as reckless driving, regardless of the posted speed limit. Section 46.1-190 (i) makes driving a motor vehicle upon a highway at a speed of 20 or more miles per hour in excess of the posted limit reckless driving, and it also makes driving a motor vehicle upon the highway in excess of 80 miles per hour reckless driving. In other words, the two clauses should be read in the alternate. Therefore, driving a motor vehicle at a speed in excess of 80 miles per hour on an interstate highway does constitute reckless driving, although the posted speed limit is 65 miles per hour.

MOTOR VEHICLES—Registration—Out-of-State vehicles—Controlled by § 46.1-53.

MOTOR VEHICLES—Registration—Limited foreign certificate of title—Only probative evidence in application of § 46.1-53.

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

November 3, 1969

This is in response to your letter of October 23, 1969 in which you present the following facts and inquiry:

"Forty-three states and the District of Columbia issue certificates of title for motor vehicles. The remaining eight states do not have title laws and merely register the vehicles, their motor vehicle departments recording no lien.

"If a vehicle registered in one of the non-title jurisdictions is brought into Connecticut, South Carolina, New Hampshire, or Mississippi for registration, these states place a legend on the certificate of title which reads, 'This is a valid and assignable certificate of title. However, it may be subject to an undisclosed lien.'

"The Motor Vehicle Division of the state of Wisconsin did not become the office of official recording of liens until July 1, 1966, and all vehicles manufactured before this date and registered in
Wisconsin are issued a title bearing the wording, 'This vehicle may be subject to an undisclosed security interest.'

"When issuing a duplicate or replacement title, the states of Connecticut, Georgia, New Hampshire, Mississippi, and Michigan stamp on the face of the certificate, 'This is a duplicate certificate and may be subject to the rights of a person under the original certificate.'

"As these legends are placed on these states' titles by statutory requirement and, in most instances, with no provisions for its removal, may this Division accept these out-of-state titles as evidence of ownership and issue a clear and unrestricted Virginia title?"

As you have stated and research has confirmed, the legends described in your facts are placed upon the certificates of title by mandate of statute in each of the jurisdictions you have set forth. There is no comparable statutory authority in the Code of Virginia which provides for the issuance of such a limited certificate of title.

Section 46.1-53, Code of Virginia (1950), as amended, controls when a vehicle is brought into this State from a foreign jurisdiction. That section reads as follows:

"In the event that the vehicle for which the registration of a certificate of title is applied is a specially constructed, reconstructed or foreign vehicle as defined in § 46.1-1, such fact shall be stated in the application and, with reference to every foreign vehicle which has been registered outside of this State, the owner shall exhibit to the Division the certificate of title and registration card or other evidence of such former registration as may be in the applicant's possession or control or such other evidence as will satisfy the Division that the applicant is the lawful owner or possessor of such vehicle."

Possession of the limited but valid assigned foreign certificate of title is, of course, of probative value. However, in my opinion that certificate should not be accepted as the sole evidence of worthy title inasmuch as the jurisdiction of issuance admittedly has doubts as to the existence of outstanding liens or, in the instance of duplicate certificates of title, the status of ownership.

MOTOR VEHICLES—Registration—Uninsured and inoperable vehicle parked on lot with special permission not subject to.

MOTOR VEHICLES—Operator's License—May not be suspended when vehicle not subject to registration is involved in reportable accident while parked.

April 10, 1970

HONORABLE ADELARD L. BRAULT
Member, Senate of Virginia

This is in reply to your letter of March 23, 1970, with which you enclosed a letter regarding the circumstances which resulted in the suspension of the operator's license of the owner of a parked motor vehicle. I quote from such letter the following:

"Her license was revoked following receipt by the Division of Motor Vehicles of an accident report for her inoperable 1960 Volkswagen, which had been parked for some time at the Circle Shopping Center, Fairfax, Virginia by her husband, . . ., manager of the bowling center at that location who was authorized to park vehicles in that area. The Volkswagen was struck by a hit and run driver and a report made by the Fairfax Police Department. The vehicle was not insured."
The suspension was ordered by the Division of Motor Vehicles under Section 46.1-167.4 of the Code of Virginia, which states, in pertinent part, as follows:

"When it shall appear to the Commissioner from the records of his office:

(1) That an uninsured motor vehicle, as herein defined, subject to registration in this state, is involved in a reportable accident in this state, resulting in death, injury or property damage, with respect to which motor vehicle the owner thereof, has not paid the uninsured motor vehicle fee of fifty dollars as prescribed in Section 46.1-167.1 . . . the Commissioner shall . . . suspend such owner's . . . operator's and/or chauffeur's license . . . ."

You request my opinion as to whether the suspension was proper and, if so, what steps, if any, are available for judicial review on appeal of the decision of the Commissioner.

In the situation described, it must be determined whether the vehicle was "subject to registration in this state" within the meaning of Section 46.1-167.4. Section 46.1-41 of the Code of Virginia, with certain exceptions, requires every person owning a motor vehicle intended to be operated upon any highway in this state, before the same is so operated, to obtain registration and a certificate of title from the Division of Motor Vehicles. Under Section 46.1-167.2, a motor vehicle, for the purposes of Article 10, Chapter 3, Title 46.1 of the Code of Virginia, which includes Section 46.1-167.4, is a vehicle capable of self-propulsion which is required to be titled and licensed and for which a license fee is required to be paid by the owner thereof.

The given facts are that the vehicle in question was not registered and has been inoperable during the entire registration year, during which time it had remained parked in a parking lot. There was no intention on the part of the owner to operate the vehicle again. It is further indicated that the vehicle was parked with permission of the owner of the lot and such lot would not qualify as "publicly maintained" within the purview of Section 46.1-1 (10), which defines the word "highway" as used in Title 46.1 of the Code of Virginia.

In consideration of these facts, it is my opinion that the vehicle was not subject to registration within the meaning of Section 46.1-167.4 and, therefore, the law does not require the suspension of the operator's license of the owner of the parked vehicle. Having so answered, no further consideration is necessary in regard to the second phase of your inquiry.

A representative of the Division of Motor Vehicles advises that the suspension involved is being rescinded.

MOTOR VEHICLES—Safety Glass—Superintendent of the Department of State Police may require in all vehicles.

STATE POLICE—Superintendent of Department—May require safety glass in all vehicles.

HONORABLE FLOURNOY L. LARGENT, JR.
Member, House of Delegates

October 20, 1969

This is in reply to your letter of October 13, 1969, with enclosure, concerning § 46.1-293, Code of Virginia (1950), as amended, and requesting my opinion on the following question: May the Superintendent of the Department of State Police require all motor vehicles, trailers and semi-trailers to be equipped with safety glass.

Section 46.1-293 is somewhat ambiguous in that it refers in part to "motor vehicle" and in other parts to "vehicles" or "motor vehicles, trailers
and semitrailers." However, subsection (d) of that statute reads as follows:

"No glazing material other than safety glass shall be used in any motor vehicle registered in this State, except that the Superintendent may permit safety glazing materials other than glass to be used in lieu of safety glass in portions of motor vehicles, trailers and semitrailers designated by him; provided any such material so used bears a trade name or identifying mark, and has been submitted to and approved by the Superintendent for such use prior to being used in any such motor vehicle, trailer or semitrailer."

In light of the specific language quoted, it is my belief that safety glass is required in all vehicles, except the Superintendent may permit other safety glazing materials in portions of motor vehicles, trailers and semitrailers designated by him. This view is strengthened by the language of paragraph (e) of this section which refers only to "vehicle" without qualification.

MOTOR VEHICLES—Traffic Control—Responsibility of police officers of localities.

HONORABLE CHARLES L. MCCORMICK, III
Commonwealth’s Attorney for Halifax County

March 19, 1970

This is in reference to your letter of March 2, 1970, concerning traffic congestion occasioned by school buses in your area. Specifically you request my opinion "as to who is primarily responsible for traffic control and regulation on certain highways in the (Halifax) county and in the Town of Halifax, which is an incorporated town with its own police force."

Traffic control and regulation is controlled by State statute and, in certain instances, by local ordinance. Peace officers are chargeable with the enforcement of such statutes and ordinances.

Under local ordinances the control and regulation of traffic within the corporate limits of South Boston would be the primary responsibility of the Chief of Police of South Boston. Likewise, the control and regulation of traffic in the Town of Halifax and the County of Halifax would be the primary responsibility of the police officers of such localities.

While the primary responsibility for the control and regulation of traffic lies with the police officers of these localities, the State police officers have authority to regulate and control traffic over the highways of the Commonwealth.

MOTOR VEHICLES—Traffic Offenses—Disposition of Fines—May be paid to county if it adopts ordinances regulating operation of vehicles on highways of county.

HONORABLE E. EUGENE GUNTER
County Attorney for Frederick County

March 27, 1970

This is in reply to your letter dated March 12, 1970, which reads, in part, as follows:

"The Frederick County Board of Supervisors has asked me to inquire whether there is any constitutional method through which the fines for traffic violations committed in Frederick County, Virginia can be retained by the County government. At the present time, Frederick County does not have a code of traffic laws, but it would be willing to enact such a code if the fines from traffic violations would then inure to the benefit of the County directly rather than the State."
In answer to your inquiry I direct your attention to §§ 46.1-180 and 46.1-182 of the Code of Virginia (1950), as amended.

Section 46.1-180 provides, in part, that "the [county] governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties . . . not in conflict with the provisions of this title . . . ."

Section 46.1-182 relates to the disposition of fines in traffic cases and reads as follows:

“(a) In such counties, cities and towns in which the governing body shall adopt the ordinances authorized by §§ 46.1-180 and 46.1-181, all fines imposed for a violation of such ordinances shall be paid into the county, city or town treasury, as the case may be. Fees shall be disposed of according to law.

“(b) But in all cases in which the arrest is made or the summons is issued by an officer of the Department of State Police or of any other division of the State government, for violation of the motor vehicle laws of the State, the person arrested or summoned shall be charged with and tried for a violation of some provision of this title and all fines and forfeitures collected upon convictions or upon forfeitures of bail of any person so arrested or summoned shall be credited to the Literary Fund. Wilful failure, refusal or neglect to comply with this provision shall subject the person who is guilty thereof to a fine of not less than ten dollars nor more than fifty dollars and may be ground for removal from office. Charges for dereliction of the duties here imposed shall be tried by the court of record having jurisdiction over the officer charged with its violation.”

MOTOR VEHICLES—Traffic Regulations—Northern Virginia Community College—Traffic may be controlled by local ordinance adopted at request of governing body of such institution.

STATE INSTITUTIONS—Northern Virginia Community College—Authority to enforce regulations on campus grounds.

HONORABLE ROBERT R. HURLESS
Chief of Police
Northern Virginia Community College

I am in receipt of your inquiry of September 17, 1969, with reference to the authority to enforce traffic regulations on the campus grounds.


As you will note from these opinions, the authority to enforce city or county ordinances depends on whether or not the governing body of the college has requested a county, city or town to regulate the parking of motor vehicles upon those portions of the grounds which encompass the institution. If the city or county ordinances are applicable to the campus grounds, then § 19.1-28 of the Code of Virginia (1950), as amended, would authorize you to enforce such ordinances upon the grounds of the college.

Whether your authority to enforce ordinances extends to the streets and sidewalks adjacent to the grounds would depend upon any limitations prescribed in the order appointing you as a conservator of the peace. In this connection I enclose herewith a copy of an opinion to the Honorable Jay A. Price, Judge of the County Court of Montgomery County, dated August 9, 1963, found in the Report of the Attorney General (1963-1964), at p.
279, which is an example of a campus policeman's jurisdiction being confined to the campus.

The question which we discussed of whether an operator's license is needed in order to operate a motor vehicle on the roads of the college would depend on whether such roads are within the definition of "highway" as found in § 46.1-1 (10) of the Code of Virginia. In this connection see Crouse v. Pugh, 188 Va. 156, 49 S.E.2d 421 (1948), wherein the Court held that the "true test of a highway" is whether the "way or place of whatever nature" is "open to the use of the public for purposes of vehicular traffic." This would be a factual determination which you must make.

MOTOR VEHICLES—Traffic Violations—Issuance of citation to nonresident in lieu of bond—Language of § 46.1-179.2 is mandatory.

MOTOR VEHICLES—Traffic Violations—Issuance of citation to nonresident—Nonresident may request right to post bond.

February 13, 1970

HONORABLE MARK D. WOODWARD, Judge
Page County Court

This is in reply to your letter of February 5, 1970, in which you set forth the following:

"Section 46.1-179.2 (a) Code of Virginia, 1950, (as amended) provides, in pertinent part, as follows: 'Notwithstanding the provisions of clause (3) of § 46.1-179 of the Code of Virginia, a police officer making an arrest for a traffic violation shall issue a citation as appropriate to any motorist who is a resident of or holds a license issued by a reciprocating state and shall not, subject to the exceptions noted in paragraph (b) of this section, require such motorist to post collateral or bond to secure appearance for trial, but shall accept such motorist's personal recognizance that he will comply with the terms of such citation; * * *' Emphasis supplied.

"It would appear that the italicized portions of the above section are mandatory and not discretionary."

You are quite correct in your conclusion that the language of the statute is mandatory. However, the proviso contained in § 46.1-179.2 (a) of the Code is also mandatory. The proviso reads:

". . . provided, however, that a person so arrested shall have the right upon his request to post collateral or bond in a manner provided by law and, in such case, the provisions of this article shall not apply."

In other words, no bond or collateral may be required of a person arrested unless he specifically requests same. Upon his request, the person shall have the right to post bond or collateral. If no request is forthcoming, or if the person specifically refuses to post bond or collateral, none may be required.

MOTOR VEHICLES—Traffic Violations—Issuance of warrant on oath of private person—Officer bound by warrant rather than § 46.1-178.

March 5, 1970

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This is in reference to your letter of February 27, 1970, in which you
inquire as to whether §§ 46.1-178 and 46.1-179, Code of Virginia (1950), as amended, are applicable to the following situation:

An individual is arrested on the basis of a warrant issued by a proper official for a violation of a provision of Title 46.1 of the Code, but not a violation enumerated in § 46.1-179 of the Code. The arrest warrant is issued on the oath of a private citizen or a police officer, however, the officer to whom the warrant is directed has no knowledge of the alleged offense.

Inasmuch as § 46.1-178 of the Code provides that an individual arrested for a violation of any provision of Title 46.1 of the Code punishable as a misdemeanor except as provided in § 46.1-179, shall be issued a summons to appear at a specified time and place for a hearing, and upon execution of a written promise to so appear, shall be released from custody, your question is: is the officer to whom the warrant is directed bound by the provision of § 46.1-178 or is he bound by the warrant?

In my opinion, the arresting officer is bound by the warrant. He is not apprehending the alleged offender for a violation of the motor vehicle laws, but is acting pursuant to a valid warrant, issued by a proper officer, directing him to apprehend the named individual. The arresting officer cannot look behind the warrant to determine the alleged offense upon which it is premised, but he is bound to apprehend the individual and escort him to the place specified in the warrant.

MOTOR VEHICLES—Transfer For Purposes of Insurance and Liability—Takes place upon proper assignment of title under § 46.1-87.

This is in reply to your letter of March 23, 1970, from which I quote the following:

"I am writing to request your opinion in clarification of when an automobile sold and titled to a Virginia resident has been technically transferred for purposes of respective insurance coverage and liability as between the seller and the purchaser in the event of damage or injury to a third person."

I am of the opinion that the transfer of an automobile from seller to buyer for the purpose of insurance coverage and liability takes place upon proper assignment of title under § 46.1-87 of the Code of Virginia (1950), as amended. See, Insurance Company v. Storm, 200 Va. 526 (1959).

The opinion to which you refer is found in a letter set forth in Report of the Attorney General (1965-1966), p. 268, and has reference to a specific personal property tax situation. Insofar as the view expressed in that letter may be taken as inconsistent with the opinion expressed herein, the former is hereby superseded.

MOTOR VEHICLES—Used Car Dealer—Bond required—Aggregate limit is $5,000 during any one license year for which licensed to do business.

This is in reply to your letter of May 21, 1970, which reads in part as follows:
"Please refer to Chapter 298 of the Acts of Assembly of 1970 concerning the requirement of a bond with corporate surety to be filed with this Division under certain conditions.

* * *

"In this connection, the following question has been presented to this Division by parties subject to this statute:

"Does the bond referred to envision a limit of liability of $5,000 during any one year a used motor vehicle dealer is licensed to do business in Virginia, or does the bond referred to envision a limit of $5,000 for each and every separate act which may be the basis of litigation against such dealer and the sureties upon his bond?"

Chapter 298, Acts of Assembly of 1970, reads in part as follows:

"Before any used motor vehicle dealer's license shall be issued by the Commissioner to any applicant therefor, such applicant shall procure and file with the Commissioner a good and sufficient bond in the amount of five thousand dollars with corporate surety duly licensed to do business within the State, approved by the Attorney General and conditioned that said applicant shall not practice fraud, make any fraudulent representation or violate any of the provisions of this chapter in the conduct of the business for which he is licensed."

By § 46.1-526 of the Code of Virginia all licenses granted for used motor vehicle dealers expire on June thirtieth of the year following date of issue and, therefore, are issued on an annual basis. In view of this and of the language above quoted from Chapter 298, I am of the opinion that the aggregate bond limit referred to is $5,000.00 during any one license year for which a used motor vehicle dealer is licensed to do business in Virginia.

MOTOR VEHICLES—Used Car Dealers—Bond with surety required—Corporate surety must be licensed to do business within this State.

MOTOR VEHICLES—Used Car Dealers—Bond with surety required—Section 46.1-525.1 is not unconstitutional.

HONORABLE JERRY H. GEISLER
Member, House of Delegates

June 16, 1970

This is in reply to your letter of May 26, 1970, from which I quote the following:

"Senate Bill 387, as passed by the 1970 General Assembly, provides for a $5,000.00 Bond to be posted by used motor vehicle dealers with corporate surety as approved by your office. This act is Section 46.1-525.1 of the Code of Virginia. I have been trying for the last few days to find a corporate surety duly licensed to do business in this state who is able and willing to write such a bond as required by this section, but have been unable to do so.

"I, therefore, would make this inquiry: (1) What, if any, corporate sureties licensed to do business within this state are approved by your office for the writing of such bonds? (2) I am also requesting a ruling as to whether or not this bill is unconstitutional as class legislation and as being unduly restrictive and burdensome on a single group or segment of business and whether or not this legislation is requesting an impossible act for used car dealers and, therefore, would be an undue restraint of trade."

In answer to your question numbered (1), Chapter 298, Acts of Assembly of 1970, prescribes that the required five thousand dollar bond shall be with
corporate surety duly licensed to do business within this State. So long as it is a corporate surety duly licensed to do business within this State no further approval of the surety is required. The statutory requirement for approval of this office has reference to the bond form. For your convenience, I enclose a list of insurance companies licensed to transact fidelity and surety business in this State as of December 31, 1969.

In regard to your request numbered (2), for a ruling as to whether or not this statute is unconstitutional, my answer is in the negative. The statute makes the same requirement for every applicant for a used motor vehicle dealer's license. I do not believe it requests an impossible act. The laws of this State require that a bond be furnished as a requisite to a number of undertakings. Further, as pointed out by the Supreme Court of Appeals in the case of Newport News v. Elizabeth City County, 189 Va. 825, every presumption is made in favor of the constitutionality of an act of the Legislature and a reasonable doubt as to the constitutionality of a law must be resolved in favor of its validity.

MOTOR VEHICLES—Violation of Weight Limits—Assessment of liquidated damages—Construction of § 46.1-342.

March 2, 1970

HONORABLE CARLETON PENN
Commonwealth's Attorney for Loudoun County

This is in reference to your letter of February 23, 1970, concerning the operation of overweight vehicles on the highways of this State and the assessment of liquidated damages in accordance with § 46.1-342, Code of Virginia (1950), as amended.

You present the following inquiries for my consideration:

1. "In the case of a jury trial, must the jury first convict and then later be given the separate issues of what liquidated damages shall be assessed and who shall be assessed, or does the use of the word 'Court' mean that the Judge, after jury verdict convicting the operator, shall make the appropriate determination and assessment?"

2. "May the liquidated damages be assessed against persons and/or firms within more than one of the prescribed classes?"

3. "The Section provides that such assessment shall constitute a lien upon the overweight vehicle. Does this lien attach whether or not the officer seized the vehicle, and if it attaches only upon a seizure, is the lien of the Commonwealth lost if the vehicle be released without bond being given?"

4. "Since the language of Sub-section (b) seems to give the power of seizure only as to vehicles not registered with the Division of Motor Vehicles (making this applicable primarily to non-residents), what action should the police officer take respecting storage in a place of security 'as may be designated by the owner or operator of the vehicle' should such owner or operator designate a place outside of the State of Virginia?"

I shall answer your questions in the order presented.

1. Section 46.1-342 (a) reads, in part, as follows:

   "Upon conviction of any person for violation of any weight limit . . . the court shall assess the owner, operator, or other person causing the operation of such overweight vehicle liquidated damages . . ." (Emphasis supplied.)

Following the above language there is set forth a formula for the assessment of liquidated damages.
The words of the statute are mandatory. In the event of a conviction for the operation of an overweight vehicle, the liquidated damages must be assessed in accordance with the formula as set out in the above-mentioned statute. See, Report of the Attorney General (1968-1969), p. 177. It is, therefore, my opinion that upon the return of a jury verdict of guilty the judge should assess damages in accordance with the statute.

2. The damages may be assessed against any person or combination of persons who are defendants. It should be borne in mind that § 46.1-342 does not call for the assessment of liquidated damages against the person causing the overloading of the vehicle, but provides for the assessment of damages against the person or persons causing the operation of the overweight vehicle. The offense is malum prohibitum and hence, intent does not have to be proved. This is in accord with an opinion of this office published in Report of the Attorney General (1957-1958), p. 211, at 212. In my opinion the court may assess damages against anyone who caused the operation of the overweight vehicle, or in the event that more than one person caused the operation of such vehicle the court may assess damages against each of them as long as each is a named defendant and has been found guilty of the charge. I, therefore, answer your second question in the affirmative.

3. Sub-section (a) of § 46.1-342, following the formula for assessing liquidated damages, reads as follows:

"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." (Emphasis supplied.)

Sub-section (b) of § 46.1-342 provides that the arresting officer may seize the vehicle if it is not registered with the Division of Motor Vehicles. This sub-section merely provides a method whereby the Commonwealth may protect the security on a future lien. In my opinion, the lien provided for in § 46.1-342 (a) is not destroyed if the vehicle is not seized or if seized, subsequently released without bond being given.

4. If a vehicle is seized by the arresting officer, a conviction results and thereafter the person so convicted fails to pay the assessment or to post a bond for the release of the vehicle, sub-section (c) of § 46.1-342 comes into effect. That sub-section reads, in part, as follows:

"In the event the amount so assessed be not paid or no bond be given as provided hereinabove, the vehicle in the overweight violation shall be stored in a place of security, as may be designated by the owner or operator of the vehicle."

It is my opinion that neither the owner nor the operator may designate a place of storage outside the State of Virginia. The statute specifically calls for "a place of security." This means not only a place of physical safety for the vehicle itself, but also a place where the court may exercise its jurisdiction in accordance with sub-section (d) of the statute. That sub-section calls for the sale of the vehicle in the event the assessment imposed by this section is not paid within sixty days from the time of conviction.

MOTOR VEHICLES—Virginia Habitual Offenders Act—Abstract of record —Sufficient if identifies person before court as person convicted—Requirements of § 46.1-414 are not jurisdictional.

HONORABLE HAROLD E. AMBLER
Assistant Commonwealth's Attorney for the City of Norfolk

This is in reply to your letter of April 14, 1970, in which you request my opinion on the following, which I quote:
"Several issues have arisen here in the Corporation Court of the City of Norfolk as to whether each and every requirement or any of the requirements as set forth under Section 46.1-414 of the Code of Virginia, 1950, as amended, apply when a defendant is being tried pursuant to Section 46.1-387.2 of the 1950 Code of Virginia, as amended.

"Section 46.1-414 states abstracts required by Section 46.1-413 states: . . . It shall include the nature and date of the offenses, the date of judgment, the penalty or forfeiture as the case may be; and the operator's or chauffeur's license number, if there be, the month, day and year of birth, the sex and the residence address or whereabouts of the defendant, etc.

"Are the above requirements jurisdictional in order to proceed on an information and if not what in your opinion could be the bare minimal allegation necessary to be contained in the certified abstract required for proceedings and also for the proof required.

"The opinion of April 18, 1969 is noted in reference to operating without a license under 46.1-387.2 (a) (5) in which it is stated that unless the abstract states that the individual was convicted of 'willfully' operating a motor vehicle without a license so to do is not included in an offense is noted and in our opinion the requirements of 46.1-414 must be present and alleged in the filing of the information and also proven when question of proof arises."

The "Virginia Habitual Offender Act," as embodied in Article 7, Chapter 5, Title 46.1 of the Code of Virginia, in § 46.1-387.1, declares it to be the policy of Virginia (1) to provide maximum safety for all persons who travel the public highways of the State and (2) to deny the privilege of operating motor vehicles on such highways to persons who by their conduct and record have demonstrated their indifference to the safety and welfare of others and their disrespect for the traffic laws of the Commonwealth. An habitual offender is defined in § 46.1-387.2 as 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 such section, committed within a ten year period.

This article further prescribes, in § 46.1-387.3, that the Commissioner of the Division of Motor Vehicles shall certify, substantially in the manner prescribed in § 46.1-34.1, three transcripts or abstracts of the conviction record as maintained in the office of the Division of Motor Vehicles of any person whose record brings him within the definition of habitual offender as defined in § 46.1-387.2 to the attorney for the Commonwealth of the political subdivision in which such person resides according to the records of the Division. The same section prescribes that such transcript or abstract may be admitted as evidence as provided in § 46.1-34.1, and shall be prima facie evidence that the person named therein was duly convicted of each offense shown by such transcript or abstract. It is further provided that if such person shall deny any of the facts as stated therein he shall have the burden of proving that such fact is untrue.

Section 46.1-387.4 requires that the attorney for the Commonwealth, upon receiving the aforesaid transcript or abstract from the Commissioner, shall forthwith file information against the person named therein. Section 46.1-387.5 states that the court in which such information is filed shall enter an order, which incorporates the aforesaid transcript or abstract, to show cause why the person named therein should not be barred from driving a motor vehicle on the highways of this State. If such person denies he was convicted and if the court cannot, on the evidence available to it, make such determination, the court may certify the decision of such issue to the court of such conviction and the latter court shall forthwith
hold a hearing to determine the issue and send a certified copy of its final order to the court in which the information was filed.

As set forth in § 46.1-387.6, if the court finds that such person is the same person named in the aforesaid transcript or abstract and that such person is an habitual offender, the court shall so find and by appropriate order direct such person not to drive on the highways of the Commonwealth and to surrender to the court all licenses or permits to operate a motor vehicle.

In regard to your first question, therefore, it is my opinion that the requirements of § 46.1-414 are not jurisdictional in a proceeding under the Virginia Habitual Offender Act. In light of the foregoing summary of the applicable law, it is apparent that the crux of the matter is the identification of the person before the court as the same person who was convicted as shown in the Commissioner's transcript or abstract of the records maintained in the office of the Division of Motor Vehicles. If the court so finds him to be the same person who was convicted, as prescribed in the laws herein mentioned, the other details required by § 46.1-414 are not essential to such proceeding.

Your other question involves paragraph (5) of § 46.1-387.2, "wilfully operating a motor vehicle without a license so to do." This clause was deleted from the statute by Chapter 724, Acts of Assembly of 1970, approved April 5, 1970 as emergency legislation, effective from date of passage. Consequently, no further comment is needed in this regard.

MOTOR VEHICLES—Virginia Habitual Offenders Act—Commissioners required to keep records of convictions related to operation of motor vehicles.

MOTOR VEHICLES—Virginia Habitual Offenders Act—Procedure when officer arrests for violation of § 18.1-54.

MOTOR VEHICLES—Virginia Habitual Offenders Act—Abstracts of convictions maintained by Commissioner admissible to prove prior convictions.

November 21, 1969

HONORABLE GEO. A. PRUNER
Commonwealth’s Attorney for Russell County

This is in reply to your letter dated November 15, 1969, in which you present the following inquiry: Are the abstracts of conviction as maintained by the Commissioner of the Division of Motor Vehicles pursuant to Title 46.1, Code of Virginia (1950), as amended, admissible as evidence to prove prior convictions for an act made unlawful by Title 18.1 of the Code, specifically § 18.1-54.

While it is true that the Commissioner is required by § 46.1-413 to keep records of convictions relating to the operation of a motor vehicle, § 18.1-61 more specifically requires the Commissioner to preserve records of conviction of anyone found guilty of violation of Article 6, Chapter 2, Title 18.1 (Driving Automobiles, etc., While Intoxicated).

Section 46.1-413.1 requires a law enforcement official who has arrested any person for violating § 18.1-54 to request from the Division an abstract of such person’s conviction record, the record to be sent “to the Commonwealth’s attorney of the jurisdiction in which the case will be heard, to be held available for the court in which such person is to be tried for such violation or charge . . .” (Emphasis supplied.)

In view of the language of the statutes, it is my opinion that the abstracts of conviction as maintained by the Commissioner, properly certified, are admissible to prove the prior conviction.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Virginia Habitual Offenders Act—Service of process—Proper to serve by publication where defendant cannot be located at address according to records of Division of Motor Vehicles.

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

This is in reply to your letter of October 6, 1969, from which I quote the following:

"We are receiving quite a few abstracts from the Division of Motor Vehicles requiring action under the new Virginia Habitual Offender Act (Section 46.1-387.1, et seq., 1950 Code of Virginia, as amended).

"In a number of these cases, we have been unable to obtain service upon the person involved. Whether these people are intentionally avoiding service, I do not know, but local investigation has failed to locate them.

"Section 46.1-387.5 provides that service on the person shall be made 'in the manner prescribed by law for the service of notices.' I am not aware of any provision in the Virginia Habitual Offender Act that covers the situation when a person is 'not found'. However, Section 8-71 of the Code of Virginia provides that, if diligence has been used to locate a defendant or service has been twice returned without being executed, then an order of publication may be entered against such defendant.

"My question is whether it would be proper to obtain service under the Virginia Habitual Offender Act by order of publication where diligence has been used and the officer cannot serve the papers upon the person involved at the address last known to the Division of Motor Vehicles."

The Habitual Offender Act, § 46.1-387.3 thereof, directs the Commissioner of the Division of Motor Vehicles to forward the transcript of convictions "to the attorney for the Commonwealth of the political subdivision in which such person resides according to the records of the Division." (Emphasis supplied.) Section 46.1-387.5 then provides that "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."

It is my opinion, therefore, that an order of publication is a valid method of serving process under the Habitual Offender Act when the defendant cannot be located at the address as shown in the records of the Division of Motor Vehicles and there is no actual knowledge that the defendant has removed himself from that political subdivision.

Should it be determined, however, that the defendant actually resides in a political subdivision other than that shown in the records of the Division of Motor Vehicles, the procedure discussed in a previous opinion of this office dated May 26, 1969, directed to the Honorable W. Byron Keeling, Commonwealth's Attorney for Charlotte County, should be followed. I am enclosing a copy of that opinion for your information. Of course, the method of serving process on nonresidents of this State is specifically set forth in § 46.1-387.5.

MOTOR VEHICLES—Virginia Habitual Offenders Act—To sustain conviction under this Act offenses must be separate and distinct and arise from separate acts.

VIRGINIA HABITUAL OFFENDER ACT—Motor Vehicles—To sustain conviction under Act offenses must be separate and distinct and arise from separate acts.
HONORABLE CARTER R. ALLEN
Commonwealth’s Attorney for the City of Waynesboro

This is in reply to your letter of September 9, 1969, concerning § 46.1-387.2 (a), Code of Virginia (1950), as amended (Virginia Habitual Offender Act), and with more particular reference to your question as quoted below:

"Is a conviction of driving on a revoked license a separate act from driving under the influence when both charges occurred from the single act of operating a vehicle? Are these separate and distinct offenses arising out of separate acts or arising out of the same act?"

The General Assembly has, by its language, specifically manifested its intent that no proceeding shall lie under § 46.1-387.2 (a) unless the convictions be had on separate and distinct offenses arising from separate acts (emphasis added). This is made all the more clear by the language of § 46.1-387.2 (b), wherein only convictions of separate and distinct offenses, with no proviso as to separate acts, are called for. This leads to the conclusion that the Legislature intended to prohibit repeated violators from using the highways and did not intend for two violations occurring simultaneously to fall within the purview of § 46.1-387.2 (a). Here, although the offenses are clearly separable, and indeed, a conviction was had on each offense, the single act of driving an automobile while intoxicated and with a revoked operator’s license gave rise to each offense simultaneously.

Therefore, I am of the opinion that, under this specific set of circumstances the offenses did arise from the same act.

MOTOR VEHICLES—Weight Laws—Five percent tolerance in weight—Granted for practical and equitable purposes—Not authorized by statute.

HONORABLE GEORGE E. ALLEN, JR.
Member, House of Delegates

This is in answer to your letter of February 5, 1970, in which you relate the following:

"A recent weight study report published by the Department of Highways in Appendix A on page 109 states:

'The State allows a 5% tolerance on all axles, tandem and gross weights, this is a policy and not a written law. No summons is issued or arrest made unless the vehicle exceeds any of the weight limits plus the 5% tolerance.'

I would like to be advised whether or not Section 46.1-339 permits a tolerance in weight to be granted administratively."

There is nothing statutory that would permit a “tolerance” in weight to be granted administratively; however, it is my understanding that since 1932 such a “tolerance” has been so granted for practical and equitable purposes. From information available to me, it would appear that at some indefinite time prior to September, 1950, the Department of Commerce issued a bulletin dealing with loadometers recommending a 5% “tolerance” to cover any error that might occur in the use of these scales. It appears that this policy has been continued into the present to allow for possible errors and variations in the scales and further to compensate for change of elements, accumulation of mud, sleet, snow, and ice, and various other circumstances possibly beyond the control of the driver or carrier. Further, due to the fact that Section 46.1-339 of the Code of Virginia, 1950, as amended, is a criminal statute, to convict an individual requires proof be-
yond a reasonable doubt. As an aid in satisfying this burden, the Depart-
ment of State Police has allowed a 5% "tolerance."
I am informed that this is not a practice limited to Virginia. Certain
states continue in this policy of allowing a 5% "tolerance" and as I under-
stand it, North Carolina, an immediate neighbor, has incorporated a 5% "tolerance" into their Code.
In summary, there is nothing statutory to permit "tolerances" but it
has been conceded in the past that such extension should be allowed in the
practical and equitable administration of justice.

MOTOR VEHICLES—Weight Laws—Special permits for vehicles exceeding
limits—Not unconstitutional to issue to vehicles used exclusively for
mixing of concrete but not to vehicles hauling components without
mixing.

HIGHWAYS—Weight Laws—Special permits for vehicles exceeding limits
—Not unconstitutional to issue to vehicles used exclusively for mixing
of concrete but not to vehicles hauling components without mixing.

HONORABLE W. CARRINGTON THOMPSON
Member, Senate of Virginia

I have your letter of March 12, 1970, concerning my interpretation of
subsection (b) of § 46.1-343 of the Code of Virginia.
The entire section provides generally for the use, under certain circum-
stances, of vehicles weighing in excess of those weights allowed by § 46.1-
339. Subsection (a) of 46.1-343 allows the Department of Highways to
issue special permits for passage of vehicles exceeding size and weight
limitations upon the highways. Subsection (c) pertains to certain coal
hauling or mining operations. Subsection (cl) regulates refuse collection
trucks. Subsection (b), to which you refer, regulates three axle trucks
hauling road construction materials and more specifically provides the
following:

"Provided, further, the State Highway Commission and local au-
thorities of cities and towns, in their respective jurisdictions, upon
application in writing made by the owner or operator of three axle
vehicles used exclusively for the mixing of concrete in transit and
having a gross weight not exceeding fifty thousand pounds, a single
axle weight not exceeding eighteen thousand pounds, and a tandem
axle weight not exceeding thirty-six thousand pounds, shall issue to
such owner or operator, without cost, a permit in writing authorizing
the operation of such vehicles upon the highways."

You refer specifically to trucks not used exclusively for mixing concrete
in transit but rather those vehicles which haul the necessary components
for such concrete with the actual mixing to be completed after arrival at
the site or destination.
Specifically, your question is, does the existing Statute make "an in-
vidious discrimination in that the privileges are afforded to vehicles used
exclusively in mixing in transit, but denies it to all other when the weight
factor is the same." You question this as possibly "an arbitrary classifica-
tion without a constitutional basis". The objection is that the Statute's
coverage discriminates unlawfully in favor of certain classes of users.
While there is obviously a physical distinction between a mixer type
vehicle and a hauler type vehicle, I am not aware of this being the basis
for a historical distinction within the Statute. It is evident that some classi-
fication is involved and contained within the Statute. The question resolves
itself as to whether or not this classification is, in fact, reasonable. To my
knowledge, there exists no case in Virginia on this particular point; how-

ever, there are cases indicating that if any reasonable doubt exists as to
its constitutionality, an act will be upheld. "To doubt is to affirm. The
mere passage of a statute is an affirmance by the General Assembly of its
constitutional power to adopt it, and the case must be plain indeed before
a court will declare a statute null and void. These principles have been
repeatedly announced by this court from a very early date." City of

"It is only where an act is plainly repugnant to some constitutional
provision that the courts can declare it null and void. If there be reasonable
doubt whether the act violates the fundamental law, that doubt must be
resolved in favor of the act." Almond v. Day, 199 Va. 1, 6, 97 S.E. 2d 824.

Also, at page 165, Peery v. Board of Funeral Directors, 203 Va. 161, the
court stated: "It has long been established that every presumption is to
be made in favor of an act of the legislature, and it is not to be declared
unconstitutional except where it is clearly and plainly so. Courts uphold
acts of the legislature when their constitutionality is debatable, and the
burden is upon the assailing party to prove the claimed invalidity. Martin's
Ex'rs. v. Commonwealth, 126 Va. 603, 102 S.E. 724; Roanoke v. Michael's
Bakery Corporation, 180 Va. 132, 142, 21 S.E. 2d 788; Staples v. Gilmer,
183 Va. 613, 621, 33 S.E. 2d 49; Joyner v. Centre Motor Co., 192 Va. 627,
4 Michie's Jurisprudence, Constitutional Law § 59, pages 149 et seq.; and
17 Michie's Jurisprudence, Statutes, § 29, pages 273 et seq."

Also, at page 618, Martin's Ex'rs. v. Commonwealth, supra, 126 Va., the
Court said: "'Laws may be made to apply to a class only, and that class
may be in point of fact a small one, provided the classification itself be a
reasonable and not an arbitrary one, and the law be made to apply to all
persons belonging to the class without distinction.'"

Further, "The fact that a law affects only one class or only certain
classes, does not render it invalid." 89 A.L.R. 2d 1359 n.

Section 63 of the Constitution of Virginia generally sets forth the powers
of the General Assembly and the limitations thereon. Of the list contained
within § 63, I find no exception under which the General Assembly has
acted against its constitutional powers. I am obliged, therefore, to say that
as presently written, § 46.1-343 and specifically subsection (b) thereof must
be presumed to be constitutional.

NORTHERN VIRGINIA RECREATION AND CULTURAL AUTHORITY
—Authority to Lease Property.

May 13, 1970

HONORABLE WARREN J. DAVIS
Acting Chairman
Northern Virginia Recreation and Cultural Authority

This is to acknowledge receipt of your letter of May 6, 1970, in which
you request my opinion on the question of whether the Northern Virginia
Recreation and Cultural Authority (hereafter referred to as the Authority)
can acquire real property "for the purposes of leasing parcels [real prop-
erty] thereof to private interests for the purpose of constructing motels,
restaurants, office and other space for those peripheral activities essential
to the concept of a complete recreation and cultural Center".

The Authority was created by Chapter 676, Acts 1968, and amended by

The term (word) project is defined in § 3 (b) of said Act as follows:

"(b) The word 'project' shall be deemed to mean and include the
acquisition, construction, equipping, maintenance and operation of a
civic auditorium and athletic stadium and the usual facilities related
thereto, parking facilities or parking areas in connection therewith, recreation and cultural centers and areas, including, but not limited to, exhibition, concert and entertainment halls, athletic fields, parking facilities or parking areas in connection therewith, club houses, gymnasiums and related buildings and the usual and convenient facilities appertaining to such undertakings, and extensions and improvements of such facilities, acquiring the necessary property therefor, both real and personal, and the lease and sale of any part or all of such facilities, including real and personal property, so as to assure the efficient and proper development, maintenance and operation of such facilities and areas, deemed by the Authority to be necessary, convenient or desirable."

According to the powers granted the Authority under said Act, the following are included: § 4, paragraph (b) to lease real and personal property; paragraph (d) to make contracts for the construction of projects; paragraph (e) to construct projects as hereinabove defined; paragraph (i) to exercise any power usually possessed by private corporations, and paragraph (k) to do all things necessary to carry out the powers expressly given.

Section 16 of this Act provides that the Act shall be liberally construed.

I am therefore of the opinion that the question you ask must be answered in the affirmative so long as the leasing of the property for the purposes enumerated is necessary for the construction, maintaining, extending or improving of projects as defined in the Act.

NOTARIES PUBLIC—City of Galax—May be commissioned a notary of City of Galax and take acknowledgements in Counties of Carroll and Grayson.

HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County

This is to acknowledge your letter of July 17, 1969, in which you state that you question the application for a notary commission for the City of Galax.

The charter for the City of Galax is set forth in Chapter 562, Acts of the General Assembly 1954. The same was amended by Chapter 244, Acts 1968. Section 11.01 thereof, bearing on the jurisdiction of Circuit Court in the city reads as follows:

"11.01.—Jurisdiction.
"The circuit court of Carroll county and the circuit court of Grayson county shall have concurrent jurisdiction in the City, in all respects as corporation courts have in other Cities, in so far as such jurisdiction is applicable to cities of the second class; provided, however, that the power of appointment of any officer or board required under the constitution to be made by the circuit court, or the judge thereof, having jurisdiction over the City, shall be vested in the circuit court of Grayson County."

Hence, either of these Circuit Courts are considered the Corporation Court of the City of Galax within the meaning of the term "corporation court" as used in § 47-1(4) Code of Virginia 1950 as amended, which provides that: "Each notary shall give bond with surety in the Circuit Court of the County, or in the Corporation Court of the city. . . ."

The Secretary of the Commonwealth is required by § 47-1(6) to send the notorial commission to the Clerk of the Corporation Court of the city in which the notary public is required to qualify. I am advised by the Sec-
retary's office that there have been a number of notaries appointed for the City of Galax and these commissions have been sent to the Clerk of Grayson County at Independence, Virginia. This practice is in accordance with the statute. However, I am constrained to say that a notary appointed for the City of Galax could likewise qualify before the Clerk of Circuit Court of Carroll County. It is noted that the proviso set forth in Section 11.01 of the Charter, supra, does not apply to appointments made by the Governor. There is no need for the person to qualify before the clerks of both counties. I am of the opinion that a person can be commissioned a notary for the City of Galax.

You raise two other questions which will be answered seriatim:

(1) "In case a person can qualify for the City of Galax, it lying in both Carroll and Grayson Counties, would the fee be $5.00 and could he take acknowledgments in both counties?"

Reference is made to § 47-1(2) and (3) of the Code which reads as follows:

"(2) Serving for two or more counties or cities; fees for commissions.—The Governor may appoint the same person to serve for two or more counties and cities, in which case only one commission shall be issued and the fee for issuing the same shall be three dollars for the first county or city and five dollars for each additional county or city, for which such notary is appointed to serve.

"(3) Acting in contiguous counties or cities.—A notary for a city shall also have authority to act as such in counties and cities contiguous thereto, and a notary for a county shall also have authority to act as such in cities contiguous thereto."

Since the person qualifies as a notary for the City of Galax, the proper fee would be $3.00, (plus the $2.00 tax imposed by § 58-52 of the Code, paid to the Secretary of the Commonwealth when the lessor seal of the Commonwealth is affixed to the commission) making a total of $5.00. He could take acknowledgments in both Carroll and Grayson Counties.

(2) "Would a notary for Carroll or Grayson County be qualified to notarize in the City of Galax in its entirety?"

The question is answered in the affirmative.

ORDINANCES—Zoning—Amendments—Provision for control over motor vehicles not currently licensed—Must be consistent with State law.

BOARDS OF SUPERVISORS—Zoning—No authority to enact ordinance which is inconsistent with § 15.1-11.1.

HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for Botetourt County

February 27, 1970

This is in reply to your letter of February 20, 1970, in which you request my opinion as to the following:

"The Board of Supervisors desire to amend our zoning ordinance to make provision for some control over motor vehicles not currently licensed as follows: 'In all districts, all motor vehicles not currently licensed and displaying a valid inspection sticker must be parked in an entirely enclosed building or otherwise screened from public view by the use of hedges or approved fencing.' A violation of this provision would come under the penalty section of our ordinance thereby making the violation of the same a misdemeanor."

Section 15.1-11.1, Code of Virginia (1950), as amended, reads as follows:
"The governing body of any county, city and town may, by ordinance provide that it shall be unlawful for any person, firm or corporation to keep, except within a fully inclosed building or structure, on any property zoned for residential purposes any automobile or automobiles whose condition is such that it is economically impractical to make them operative."

Inasmuch as Section 1-13.17 of the Code provides that ordinances shall not be inconsistent with the laws of this State, I am of the opinion that the Board of Supervisors does not have the authority to enact the ordinance in the proposed form.

ORDINANCES—County—Regulation of Trailers—Invalid where definition of "trailer" or "trailer park" varies from statutory definition.

HONORABLE BENJAMIN H. WOODBRIDGE, JR.
Member, House of Delegates

This is in reply to your letter of May 25, 1970, which I quote as follows:

"I have been asked by some residents of Stafford County, Virginia to solicit an opinion from you regarding the following:

"Effective July 1, 1969, the Stafford County Board of Supervisors enacted the enclosed Mobile Home Ordinances. These ordinances include, under Article 9 on page 6, an imposition of a license tax on trailer and trailer parks. In addition, under Article XII, on page 7, there is a strict limitation on the renting of mobile homes.

"It is maintained by this group that the definitions set forth in Article 3 of the ordinances are in substantial conflict with the definitions set forth in 35-64.3 of the Code of Virginia. They further maintain that, since this conflict exists, the entire package of ordinances are unenforceable. I particularly call your attention to the provisions which define, in the ordinance, a mobile home trailer as '... any vehicle designed, or used or maintained for use as a conveyance upon highways so designed or so constructed to permit occupancy thereof as a dwelling.' It is submitted that this definition is not in conformity with the definition of trailer set forth in the cited Code section. In addition, there appears to be a substantial various between the definition of mobile home park set forth in the ordinance and the Code.

"I would, therefore, sincerely appreciate it if you would render an opinion regarding the enforceability of these ordinances as presently drafted with their apparent conflict with the Code."

Article 1 of the "Stafford County Virginia Mobile Home (Trailer) Ordinance," a copy of which you furnished with your letter, cites as authority for the ordinance § 15.1-504 and Article 1.1, Chapter 6, Title 35 of the Code of Virginia. Section 15.1-504 only contains the provisions for the adoption of ordinances in general by the governing body of any county. The specific authority for the adoption by the County of a trailer ordinance is derived from Article 1.1, Chapter 6 of Title 35.

The latter, in § 35-64.3, states that the term "trailer" for the purposes of this article, "shall mean any vehicle designed or used or maintained for use as a conveyance upon highways, so designed and so constructed as to permit occupancy thereof as a temporary dwelling or sleeping place for one or more persons." The definition contained in the ordinance under consideration, that, a "mobile home (trailer): shall mean any vehicle designed, used or maintained for use as a conveyance upon highways so designed or so constructed to permit occupancy thereof as a dwelling," does not conform to the statutory definition. This is aggravated by the supplemental
definitions in the ordinance of "Dependent trailer," "Camping trailer," "Independent trailer," "Transient trailer" and "Travel trailer," some or all of which would fall within the term "trailer" as defined by the statute, but are excluded from application of the license imposed under the ordinance.

It is provided in § 35-64.2 that whenever a license is required by ordinance no person shall conduct any trailer camp or trailer park or park any trailer on an individual lot not in a trailer park or camp in any political subdivision without first obtaining a license issued by the governing body thereof. The term "any trailer" obviously refers to "trailer" as defined in § 35-64.3 and, consequently, includes the several trailers defined and excepted from license requirements by the ordinance. The only exception to the license requirements of the statute are found in § 35-64.4 of the Code, which does not include those trailers enumerated as excepted from license in the ordinance.

Further, I find no authority for the definitions of "mobile home park (trailer park)" or "travel trailer park" as set forth in the ordinance. These definitions are at variance with the statutory definition of "trailer park" or "trailer camp." Accordingly, I am of the opinion that the ordinance in question is invalid and, therefore, unenforceable. Consistent views were expressed in opinions reported in Reports of the Attorney General (1967-1968) p. 271 and (1968-1969) p. 180.

ORDINANCES—Minor Changes After Hearing or Publication—Necessitates repetition of steps required for enactment in § 15.1-504(a).

December 3, 1969

HONORABLE W. L. PERSON, JR.
Commonwealth's Attorney for City of Williamsburg and County of James City

This is in reply to your letter of November 19, 1969, in which you request my opinion whether or not the County of James City had followed the statutory provisions of § 15.1-504(a), Code of Virginia (1950), as amended, in adopting a county license tax on professions and businesses, including wholesale merchants and amusements so that it would be effective on January 1, 1970.

Section 15.1-504(a), as amended, reads:

"No governing body shall adopt or amend any ordinance imposing a county capitation tax, county motor vehicle license tax, county license tax on professions or businesses, including wholesale merchants, or county tax on amusements, except under the conditions hereinafter set forth, and any such ordinances adopted without compliance with such conditions shall be void and of no effect:

(a) Any such ordinance may only be introduced at a regular meeting of the governing body and may not be adopted prior to the second regular meeting following introduction and only then if not less than sixty days have elapsed between introduction and adoption."

In your letter you state that the present ordinance is substantially the same as that which was introduced on September 30, 1965. It therefore appears that some changes were made from the original version. This office has ruled in a previous opinion that the making of minor changes in an ordinance after the hearing or publication necessitates repetition of the steps required for enactment under § 15.1-504(a). See opinion to the Honorable Catesby G. Jones, Commonwealth's Attorney for Gloucester County, dated October 29, 1968, a copy of which is attached.

Therefore, I am of the opinion that the action of the county on September 30, 1965, was not sufficient compliance with § 15.1-504(a) to dispense with the necessity of introduction of the second ordinance, and that the
PHARMACY—Certificate of Registration—When required for physician.

MEDICINE—Medicaid Program—When certificate of registration of pharmacy required for physician.

HONORABLE RUSSELL L. DAVIS
Member, House of Delegates

I am in receipt of your letter of November 26, 1969, wherein you raise the question whether a physician who dispenses medicines to his Medicaid patients is required to have a certificate of registration of pharmacy in order to be reimbursed under the Medicaid program.

A certificate of registration of pharmacy is required by a physician if he "engages in selling medicines, ... to persons who are not his own patients, or sells ... to his own patients either for his own convenience, or for the purpose of supplementing his income." Section 54-317 (12) of the Code of Virginia (1950), as amended. I am unable to find any language either in the applicable statutes or under the Medicaid program which would require a physician to obtain a certificate of registration of pharmacy, other than in the above circumstances.

HONORABLE BETSY N. JORDAN, Clerk
Circuit Court, City of Waynesboro

This is in reply to your letter of June 11, 1970, in which you inquire whether under Chapter 288 of 1970 Acts of Assembly (Section 56-277.1 of the Code of Virginia) application by trucking companies for the appointment of police agents should be made in each court of record wherein terminal facilities are located, or if application to the court of record wherein the main office of such company is situated would be sufficient to qualify such police agents to act anywhere within the State.

The jurisdiction and authority of special police cannot extend further than the limits of the county or city in which they are appointed. See Section 15.1-152 of the Code of Virginia (1950), as amended. Accordingly, I am of the opinion that special police agents must be appointed by each court of record wherein terminal facilities are located.

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

This is in reply to your letter of February 20, 1970, which I quote, in part, as follows:

"The Chairman of my Board of Supervisors has requested that I obtain from you a legal opinion in regard to the appointment of a special police officer under the division [sic] of 15.1-144 of the Virginia Code. The questions which the Board desires answered are:
REPORT OF THE ATTORNEY GENERAL

"1. Who is responsible for payment of bond for this special officer?
2. If this special police officer had to make an arrest who would then collect the fee?
3. If an offender who is arrested by this special officer were convicted and fined who would receive the proceeds of the fine?
4. Who would this special police officer be responsible to?
5. Would there be any further responsibility of the Board when and if this appointment is made? If so, what?"

In respect to special policemen appointed by the circuit court of any county, § 15.1-144 of the Code of Virginia is as follows:

"The circuit court of any county, or the judge thereof in vacation, may appoint special policemen for so much of such county as is not embraced within an incorporated town located in the county, who shall be suitable and discreet persons and who shall serve as such for such length of time as the court or judge may designate, but not exceeding four years under any one appointment. Such person or persons so appointed shall be conservators of the peace in their respective counties."

Such special policemen have been appointed under various arrangements as to compensation, including payment solely by a private corporation. The arrangement upon which the appointment is based is a factor for consideration in answering your question numbered 1. Section 15.1-151 requires all special policemen to give bond before entering upon the duties of their office but is silent as to who shall pay the cost of the bond. I gather from the tenor of your letter that the Board of Supervisors desires such an officer for duty in the County. Section 15.1-146 authorizes the governing body of a county, if deemed proper, with the exception therein stated, to "allow such compensation to the policeman appointed under the provisions of § 15.1-144 as, together with any expenses incurred in executing his duties, shall be deemed right and proper by such governing body to be paid out of the county levy." In my opinion, therefore, it is discretionary with the Board of Supervisors as to what compensation and expenses, including or excluding the cost of bond for such officer, it shall pay.

In answer to your question numbered 2, § 15.1-148 provides that in criminal prosecutions the same fees and mileage shall be charged and taxed for services rendered by special policemen of counties as provided for by law to be collected for the services of sheriffs and their deputies in similar cases. Such fees and mileage allowances shall be collected by the clerk of court in which the prosecution is had and paid into the treasury of the county.

The answer to your question numbered 3 is found in § 14.1-44. The fact that a special police officer makes the arrest does not change the situation. Hence, all fines collected for violations of the laws of the Commonwealth shall be paid promptly to the clerk of the circuit court, who shall pay same into the State treasury, and fines collected for violations of local ordinances shall be paid promptly into the treasury of the county, city or town whose ordinance has been violated.

In answer to your question numbered 4, the special policemen appointed under § 15.1-144 shall be conservators of the peace in their respective counties. They are bonded with condition faithfully to discharge their duties, which are set forth in § 15.1-153 of the Code of Virginia. The court may, at any time, remove any or all of such police pursuant to § 15.1-149 and, in my opinion, such officers are responsible to the court.

In answer to your question numbered 5, as indicated previously in my answer to your first question, § 15.1-146 provides that the governing body
in any county in which such special policeman is appointed may allow such compensation for such officer as it deems proper. In my opinion, however, neither this section nor any other statute places responsibility upon the Board of Supervisors in respect to the appointment of such officers.

PORTSMOUTH PORT COMMISSION—Commissioner—Not prohibited from becoming paid employee of Commission after resignation.

PUBLIC OFFICERS—Compatibility—Former member Portsmouth Port Commission may become employee.

HONORABLE PETER K. BABALAS
Member, Senate of Virginia

November 26, 1969

I am in receipt of your inquiry of November 20, 1969, which reads as follows:

"I should like to inquire as to whether or not it would be proper for a member of the Board of Commissioners of the Portsmouth Port and Industrial Commission to resign his commissionship and immediately thereafter (during the course of the term for which he was appointed) become a paid employee of the Commission."

I find no provision in the Acts of Assembly creating the Portsmouth Port Commission nor any applicable provision in the Code of Virginia that would prohibit a member of the Commission who resigns from subsequently becoming a paid employee of the Commission.

My opinion would not be dependent upon when the position was created.

PRISONERS—Employment—May not be worked on sheriff's farm.

SHERIFFS AND SERGEANTS—Malfeasance—Whether working of prisoners on farm for two years constitutes is question for judicial determination.

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

April 22, 1970

This is in reply to your letter of April 16, 1970, wherein you refer to § 53-166 of the Virginia Code and pose several questions relative to the statutory prohibition against employment of prisoners in certain circumstances. Section 53-166 reads, in part:

"No sheriff or sergeant shall work any prisoner on property owned by him or by his relative, or on projects in which he is interested, nor shall any such prisoner be used for the personal gain or convenience of any sheriff . . . ."

You pose the following questions which I shall answer seriatim:

"1. If a sheriff works prisoners on his farm, does this constitute a violation of the law under the above cited Section?"

Since the statute specifically prohibits the working of prisoners by a sheriff on his land, the sheriff would not be complying with the statutory prohibition.

"2. If a sheriff working prisoners on his farm does constitute a violation of the law, is this violation a crime . . . (and) is it punishable?"
Since penal statutes are construed strictly in favor of an accused, I am of the opinion that failure to comply with the prohibition as set forth in § 53-166 would not constitute a crime. Nothing in the statute would indicate an intention to make noncompliance a crime, and no penalty provisions are included in the statutory language.

"3. If a sheriff worked prisoners on his farm off and on over a period of two (2) or more years, does this, in view of the language of § 53-166 (of the Code of Virginia), constitute malfeasance for which a sheriff could be removed from office under Section 15.1-63?"

Section 15.1-63 reads, in part:

"The circuit courts of counties and of cities having no corporation court and the corporation courts of cities may remove from office all State, county, city, town and district officers elected or appointed, except such officers as are by the Constitution removable only and exclusively by methods other than those provided by this and the following section (§ 15.1-64), for malfeasance, misfeasance, incompetency or gross neglect of official duty, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any law of this State, . . ."

In Commonwealth v. Malbon, 195 Va. 368, 78 S.E. 2d 683 (1953), the Supreme Court of Appeals ruled that a proceeding for removing a public officer is highly penal in nature and that the Commonwealth must prove by clear and convincing evidence the allegations supporting grounds for removal. The allegations in Malbon involved illegal gambling and the illegal sale of intoxicating liquors being conducted with the full knowledge of the sheriff.

In Warren v. Commonwealth, 136 Va. 573, 118 S.E. 125 (1923), a case involving alleged misconduct on the part of a Commissioner of the Revenue, the Supreme Court of Appeals was careful to point out that a public officer might not be punishable for a mistake of law.

In accordance with the Virginia decisions I am of the opinion that the factual situation which you have presented would have to be judicially weighed to determine whether malfeasance as set forth in § 15.1-63 has occurred.

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PRISONERS—Jurisdiction for Trial—Section 53-295 applicable only to crime committed while defendant is inmate.

COURTS—Jurisdiction for Trial of Convicts—Section 53-295 applicable only to crimes committed while defendant is inmate.

HONORABLE ROBERT F. HORAN, JR.
Commonwealth's Attorney for Fairfax County

December 8, 1969

I am in receipt of your letter of November 28, 1969, wherein you inquire if § 53-295 of the Code of Virginia (1950), as amended, would be applicable in the following situations:

"1) A defendant is convicted of a misdemeanor in Fairfax County Court and appeals his conviction. While the appeal is pending he is convicted of a felony by the Circuit Court of Fairfax County and transferred to the penitentiary in Richmond.

"2) A criminal defendant has felony indictments pending in both Arlington County and Fairfax County. His trial in the County of Arlington is set prior to the trial in the County of Fairfax and a detainer is lodged by Fairfax against him. Upon conviction by an
Arlington County jury and sentence to the Virginia State Penitentiary, he is inadvertently transferred to the penitentiary rather than delivered to Fairfax County for trial. He is presently incarcerated in the penitentiary in Richmond."

I am of the opinion that §53-295 entitled, "Jurisdiction for trial of convicts," is applicable only to crimes committed while the defendant is an inmate. 

**Ruffin v. Commonwealth,** 62 Va. (21 Gratt.) 790 (1871). Venue in each of the above examples would be in the County of Fairfax.

**PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Barber License—Not required for licensed professional hairdresser employed in barber shop to dress human hair.**

April 30, 1970

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in reply to your letter of April 15, 1970, in which you request my opinion as to the following: Whether or not a Registered Professional Hairdresser is totally exempt from the provisions of Chapter 4.1 of Title 54 and may be employed to dress human hair for compensation in a licensed barber shop without first securing a barber license.

Section 54-83.5, Code of Virginia (1950), as amended, states in part, as follows:

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

(c) "Persons practicing *beauty culture*" (emphasis supplied).

The term "beauty culture" and "professional hairdresser" are synonymous. Therefore, §54-83.5 (c) would act to exempt a person properly licensed as a professional hairdresser from the requirements of Chapter 4.1 of Title 54, Code of Virginia (1950), as amended. Such a person could be employed in a barber shop to dress human hair for compensation without having secured a license as a barber.

**PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Board of Psychologists Examiners—Member may succeed himself only once after term of five years—Applies to appointments made before effective date of §54-102.2(b).**

April 24, 1970

MR. GEORGE W. WOODALL, Assistant Director
Department of Professional and Occupational Registration

I am in receipt of your letter of March 17, 1970, in which you state that some question has arisen as to the propriety of the appointment of one of the members of the Virginia Board of Psychologists Examiners pursuant to §54-102.2(a) and (b) of the Code, which states:

"(a) The examining Board for the Certification of Clinical Psychologists appointed pursuant to §54-104 is continued, and shall hereafter be known as the Virginia Board of Psychologists Examiners and shall consist of five members. Members of the Board in office when this act becomes effective shall continue in office until the expiration of the terms for which respectively appointed. Subsequent appointments shall be made by the Governor for terms of five years each. The Board shall hereafter consist of at least two members chosen from and members of the faculties of accredited colleges and universities in this State and actively engaged in teaching psychology, and at least two clinical psychologists who are li-
censed or qualified to be licensed in this State. The fifth member
shall be chosen from any field of psychology.

"(b) In making appointments to the Board, the Governor may
select appointees from lists of not less than three names submitted
to him by the Virginia Psychological Association at least thirty
days before the vacancy occurs if by expiration of term and within
thirty days of a vacancy occurring otherwise. A person shall be
eligible to succeed himself only once after serving a term of five
years."

This section was enacted as Chapter 657 of the Acts of Assembly, 1966,
and repealed the former § 54-105, which at that time fixed the terms of
office. Section 54-105 did not preclude members of the former board from
succeeding themselves. You then state as follows:

"The Board Member, who's membership has been questioned, was
initially appointed to the Board for a five-year term on July 1, 1959.
He was reappointed for another five-year term, while the Board
was still functioning under the original statutes, on July 1, 1964.
On July 1, 1969, the same person was appointed for another five-
year term, but, on that occasion, under the statutes as they are now
constituted. Undoubtedly, the restriction on a Board Member suc-
ceding himself more than once, as incorporated in Paragraph (b)
of the instant law, contributes to this confusion. Under the original
regulatory statutes, Board Members were appointed not by the
Governor but by the Virginia Academy of Science, and thus this
Member has actually been appointed only once by a Governor of the
Commonwealth."

It is my opinion that the individual to whom you refer was not entitled
to succeed himself and that his appointment for the present term is im-
proper. Section 54-102.2 changed the name of the Board for the Certification
of Clinical Psychologists to its present form. That statute continued the
terms of the incumbent members until they expired. Subsection (b) of the
statute is explicit in saying that a person may succeed himself only once
after serving a term of five years. There is no language in the act that in-
dicates that the provisions of § 54-102.2(b) are to apply only to appoint-
ments made after the effective date of the new act.

However, the fact that one of the members of the board was ineligible
to office does not in any way affect the legality of prior or future actions
of the board. Assuming that the individual in question has duly qualified
to hold the office and no question was raised at the time, he is a de factor
officer and his official acts (and those of the board) are valid. Section 2.1-
37 of the Code validates the acts of de facto officers. The status of a de
facto officer was fully discussed in a prior opinion of this office, Report of
the Attorney General (1959-1960), p. 169, a copy of which is enclosed.
A de facto officer is not entitled to the salary of his office. See, Report of the

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate
Commission—Authority—May deny license to blind person.

REAL ESTATE—Virginia Real Estate Commission—Authority—May deny
license to blind person.

May 11, 1970

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in response to your letter of May 4, 1970, in which you request
my opinion as to whether or not the Virginia Real Estate Commission has
the authority under Virginia Code Annotated § 54-750 (1950), as amended, to deny a blind person a license to sell real estate in the state of Virginia. Such denial would be based only on the person's disability.

In my opinion, the Commission would have the authority to deny this person a license. Virginia Code Annotated, § 54-750 (1950), as amended, states in part, "a license shall be granted only to persons who ... are competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interest of the public." If it is the Commission's opinion that a person with any such disability could not competently transact the business of a real estate salesman and thereby would not be in a position to safeguard the interests of the public, the Commission has the authority to deny him a license.

PUBLIC CONTRACTS—Bid Bond—Submission of five percent bond rather than required six percent cannot be considered informality.

HONORABLE H. DOUGLAS HAMNER, JR., Director
Division of Engineering & Buildings

I am in receipt of the letter of March 9, 1970, regarding bids for the construction of a Female Geriatric Building at Southwestern State Hospital.

A bid bond submitted with one of the proposal forms was in the amount of 5% of the bid in lieu of 6% as required in the General Conditions of the Contract for Capital Outlay Projects. This proposal was disqualified and though filed with the bids it was not read. The contractor has now submitted the required 6% bond requesting reconsideration of the disqualification.

You inquire "if the submission of the 5% Bid Bond can be considered an informality which can be waived by the State Hospital Board and if they could accept the 6% Bid Bond."

Sections 11-18 and 11-19 of the Code of Virginia (1950), as amended, are pertinent to your inquiry. Section 11-18 requires that a bidder shall accompany his bid with a certified check in an amount fixed by the department, institution or agency letting the contract. It is my understanding that the General Conditions of the Contract for Capital Outlay Projects requires pursuant to this section a certified check in an amount equal to 5% of the bid. Section 11-19 provides that a bond may accompany the bid in lieu of a certified check but that such bond shall be in an amount 20% in excess of the amount required when a certified check is filed. This is why in the situation you present a 6% bond was required.

As you point out, Senate Bill No. 52 passed by the 1970 General Assembly allows a bond to accompany the bid in an amount equal to the amount required when a certified check is filed. However, this bill does not have retroactive effect.

Since the legislature has seen fit to require bonds to be in excess of the amount required for a certified check, then I am of the opinion that the statutory requirements must be fulfilled and the submission of the 5% bid bond cannot be considered an informality. Your inquiry is answered in the negative.

PUBLIC FUNDS—Investments—Funds of Commonwealth may be invested in bonds issued by FNMA and guaranteed by GNMA.

HONORABLE WALTER W. CRAIGIE, JR.
Treasurer of Virginia

I have received your letter of May 13, 1970, asking whether funds of the Commonwealth may be invested in certain bonds to be issued by the
Federal National Mortgage Association (FNMA), fully guaranteed as to principal and interest by the Government National Mortgage Association (GNMA).

By letter of February 20, 1970, I advised Governor Linwood Holton that funds of the Commonwealth may be legally invested in FNMA obligations. The primary liability of FNMA for payment of the bonds to which you refer is not lessened by the GNMA guaranty. Accordingly, it is my opinion that the funds of the Commonwealth may be legally invested in the bonds.

PUBLIC FUNDS—Special—Includes funds derived from federal government to be used for specific purposes—Funds of Disability Determination Section should be treated as special and not trust funds.

June 18, 1970

MR. EDWARD T. JUSTIS, Assistant Commissioner
Rehabilitation Service Operations

This is to acknowledge receipt of your letter to our Mr. Parker dated May 18, 1970, in which you enclose a copy of a letter from Mr. Roy F. Williams, Acting Regional Representative, Bureau of Disability Insurance, Department of Health, Education, and Welfare, dated March 19, 1970, in which he states in part:

"In the excerpt from Chapter 806 of the Acts of the General Assembly of Virginia, Section 49, related in your letter of December 31, 1969, to us, it is indicated that 'trust funds' are excluded from the special account for surplus property. We, therefore, would like to know whether the definition of the term 'trust funds' applies to either Federal monies or State monies or whether any distinction is made between the two once Federal monies are funded to the State. We also wish to know whether your State agency is specifically excluded since it is fully federally funded, if Federal monies are excluded."

Section 49 of Chapter 806, Acts of 1968 (Appropriation Act), is as follows:

"When any special fund, excluding trust funds, has had neither accretions nor withdrawals for a period of twelve months, the Comptroller shall promptly transfer and pay the balance into the unappropriated balance of the general fund of the State treasury; provided, however, that the Governor may direct the restoration of such special fund balance, or a part of it, within the twelve months following the transfer, if he deems there exists an appropriate need for expenditure of the sum, or a part of it, during this period."

General funds are those that are not segregated by law. Those funds that are segregated by law are known as special funds. The language in § 1 of the said Appropriation Act indicates that this is the meaning which should be given the term special fund.

Funds derived from the Federal Government to be used for specific purposes are termed special funds within the meaning of the Appropriation Act. Therefore, the funds of the Disability Determination Section (DDS) should be treated as special funds under Section 49 and not as trust funds.

PUBLIC MEETINGS—Disturbance Of—What constitutes.

PUBLIC MEETINGS—Disturbance Of—Misdemeanor at common law.
REPORT OF THE ATTORNEY GENERAL

GENERAL ASSEMBLY—Committee Chairman—May evict any person disturbing meeting without any personal liability.

CAPITOL POLICE—Powers and Duties—Within limits of Capitol Square same as City Police—May evict and/or arrest any misdemeanant.

October 30, 1969

HONORABLE EDWARD E. LANE
Member, House of Delegates

I am in receipt of your letter of October 10, 1969, wherein you raise various questions set forth below concerning what steps the chairman of a committee of the General Assembly may take in the event that a member or members of the public become loud, abusive or violate the rules or procedure laid down by the chairman at a regular meeting of the committee open to the public; who may evict such persons; and the liabilities if the person evicted is injured. You further inquire whether the answers to these questions would apply to legislative committees, including V.A.L.C. committees conducting hearings when the legislature is not in session. Prior to answering your specific questions, I would first point out that disturbance of a public meeting is a misdemeanor offense, indictable at Common Law. 27 C.J.S., Disturbance of Public Meetings, p. 816. Although the offense is usually applicable to religious meetings, it is also applicable to various other public meetings.

"What constitutes an interruption or disturbance of a public meeting cannot easily be brought within a definition applicable to all cases, but must depend to a large extent on the nature and character of the particular meeting, the purposes for which it is held, and the usage and practice governing such meetings. Generally speaking, any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the congregation in whole or in part, is a disturbance; and a meeting may be said to be 'disturbed' when it is agitated, aroused from a state of repose, molested, interrupted, hindered, perplexed, disquieted, or diverted from the object of the assembly.

"The conduct, however, must be of such disorderly nature that it in itself constitutes a disturbance, and it must be such as to cause the required disturbance and interruption of those present without voluntary co-operation on the part of others. The exercise of a legal right in a lawful manner does not constitute a disturbance of a meeting. . . ."

Although there are two Virginia cases concerning the above offense [Commonwealth v. Jennings, 3 Gratt (44 Va.) 595 (1846) and Commonwealth v. Daniels, 2 Va. Cas. (4 Va.) 402 (1824)], I am unable to find any case directly applicable to the questions you raise.

I will answer your questions in the order presented. You first inquire:

"1. What steps can the chairman of a committee of the General Assembly take in the event that a member or members of the public become loud, abusive or violate the rules or procedure laid down by the chairman at a regular meeting of the committee open to the public?

"2. Does the chairman of the legislative committee have the right to evict one or more members of the public from committee hearings?"

Answer: Naturally any person disturbing a public meeting can be requested by the chairman of the meeting to cease his conduct and warned that unless such conduct is ceased the person is liable to be evicted.
"3. Does the committee chairman have the right to call on the Capitol police or anyone else to carry out such eviction?

"4. How else may the rulings of the chairman be enforced?"

Answer: Pursuant to the provisions of § 2.1-93 of the Code of Virginia (1950), as amended, the Capitol Police have, within the limits of Capitol Square, all the powers and duties of the police of the city. They certainly have the authority to evict and/or arrest any misdemeanant.

Your last two questions are as follows:

"5. What are the liabilities, if any, of the chairman or members of his committee in connection with such eviction or other action?

"6. Suppose the person evicted is injured, then, what, if any, are the liabilities of the chairman or members of the committee?"

Answer: I am not aware of any personal liabilities that could attach to either the chairman or members of his committee.

As you can see, the applicability of the above answers, from their very nature, would apply whether the General Assembly is, or is not, in session.

PUBLIC OFFICERS—Compatibility—Justice of peace may not be employed by Federal government in the surplus food distribution program.

JUSTICE OF PEACE—Compatibility—May not be employed by Federal government in the surplus food distribution program. July 18, 1969

HONORABLE G. D. SHELOR
Justice of the Peace

This is to acknowledge receipt of your letter of recent date in which you request my opinion on the question of whether a justice of the peace can be employed by the Federal Government in the surplus food distribution program. The costs of such program is borne by the United States.

Section 2.1-30, Code of Virginia (1950), as amended (formerly designated as § 2-27), reads in part:

"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; . . ."

There are several exceptions to this statute set forth in §§ 2.1-31, 2.1-32 and 2.1-33 of the Code, but none of them permits a justice of the peace to be so employed by the United States. These exceptions must be strictly construed. See opinion of the Attorney General in a letter to the Honorable A. Dunston Johnson dated December 5, 1963, Report of the Attorney General (1963-1964), page 247, copy of which is enclosed.

I am therefore of the opinion that a justice of the peace would be disqualified under the aforementioned statute from being employed by the Federal Government in the surplus food distribution program.

PUBLIC OFFICERS—Compatibility—Member of County Board of Welfare —May not serve as member of school trustee electoral board.

SCHOOLS—School Trustee Electoral Board—Member of County Board of Welfare may not serve as member.
REPORT OF THE ATTORNEY GENERAL

HONORABLE JAMES P. BABER
Commonwealth’s Attorney for Cumberland County

This is in response to your letter of December 8, 1969, in which you present the following inquiry:

“The question has arisen as to whether a member of the county welfare board could also serve as a member of the county school trustee electoral board, and I do not find in the statutes and previous rulings any direct answer to the question.

“I should very much appreciate your opinion concerning this.”

Pertinent to the resolution of the question you present is that portion of § 22-60 of the Virginia Code which prescribes:

“In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or state officers, . . ..” (Emphasis added.)

This office has previously ruled that a member of a local board of public welfare is an officer of a county. See, Report of the Attorney General (1952-1953), p. 179; see, also, §§ 63.1-39, 63.1-47 and 63.1-49, Code of Virginia (1950), as amended, relating to members of local boards of public welfare.

Since the above-quoted statute restricts the class of those who may be members of a county school trustee electoral board to individuals “who are not county or state officers . . .,” I am of the opinion that a member of a county welfare board may not also serve as a member of the school trustee electoral board. This view is consistent with prior opinions of this office holding other county officers ineligible to serve on school trustee electoral boards. See, Reports of the Attorney General (1966-1967), p. 231 (medical examiner); (1950-1951), p. 262 (deputy treasurer).

PUBLIC OFFICERS—Compatibility—Member of county planning commission ineligible to serve on county school trustee electoral board.

SCHOOLS—Trustee Electoral Board—Member of county planning commission ineligible to serve.

SCHOOLS—Trustee Electoral Board—Board action is valid though one member serving is incompatible.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Contract with government agency by member thereof—Unless material financial interest disclosed.

HONORABLE FRANK M. CONNER
Commonwealth’s Attorney for Hanover County

This is in reply to your letter of May 23, 1970, which reads as follows:

“The Hanover County School Trustee Electoral Board appointed on May 20, 1970 a new member of the Hanover County School Board, whose term would take effect on July 1, 1970 for a four year period. This appointment was by a two to one vote. The terms of office of the School Trustee Electoral Board expire on June 30, 1970.

“Among the members of the said School Trustee Electoral Board is a man who also is a member of the Hanover County Planning Commission, whose term there expires December 21, 1972.
"Would you please be kind enough to advise me at your very earliest moment your opinion concerning the following questions:

1. Does the prohibition of Section 22-60 of the Code of Virginia, that no member of the School Trustee Electoral Board shall be a County or State officer, apply here?

2. If a Planning Commission member is a County officer, does that fact render that member of the School Trustee Electoral Board an ineligible member, with no authority to act, and thereby is the above stated appointment to the School Board invalid?

3. Is an insurance agent who deals with school insurance matters and through his company issues policies on school properties, to be considered as being paid from public school funds, and thereby ineligible to serve on such Trustee Electoral Board?

Should you rule that the member described above is ineligible to serve on the School Trustee Electoral Board and his service was invalid, thereby making the appointment to the School Board a nullity, would you please advise what procedures should be followed to rectify this matter."

I shall answer your questions seriatim:

1. The answer to this question is in the affirmative. A member of the Hanover County Planning Commission is ineligible to serve on the County School Trustee Electoral Board and should relinquish one of the positions in question. (See opinion of this office to the Honorable Robert E. Gillette, Commonwealth's Attorney for Nansemond County, dated June 5, 1968, found in report of the Attorney General (1967-1968), p. 220.)

2. I am of the opinion that the appointment to the Hanover County School Board is valid. The acts of the individual mentioned in your communication would, in any event, constitute those of a de facto public officer, whose acts have been repeatedly ruled by this office to be valid. (See, Reports of the Attorney General (1953-1954), p. 178; (1959-1960), p. 169; (1967-1968), p. 220.)

3. Section 22-213 of the Code which precludes school officers from being interested in contracts has been construed to include members of the School Trustee Electoral Board. See, Report of the Attorney General (1966-1967), p. 252. Therefore, the member of the School Trustee Electoral Board, under the present law, is precluded from being interested in the insurance contract. However, under the newly enacted conflict of interest law, Chapter 463, Acts of Assembly of 1970, which will be effective June 26, 1970, a different result is reached. Section 3(a)(2) of that Act provides that no officer or employee of any governmental agency shall have a material financial interest in a contract or subcontract with any governmental agency other than the governmental agency of which he is an officer or employee, "unless full written disclosure of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest shall not be acquired through competitive bidding."

Therefore, if the member of the Hanover County School Trustee Electoral Board follows this procedure he will be eligible to serve on the Board. The answer to question numbered 2 above makes an answer to your last question unnecessary.
REPORT OF THE ATTORNEY GENERAL

HONORABLE J. FRANK ALSPAUGH, Director
Division of Industrial Development

April 14, 1970

I am in receipt of your letter of March 31, 1970, with regard to the Industrial Development and Revenue Bond Act, Chapter 33, Title 15.1 of the Code of Virginia (1950), as amended. Section 15.1-1377 which outlines the qualifications of members of the Authorities established under the Act provides in part that “[n]o director [of the Authority] shall be an officer or employee of the municipality.”

You inquire if members of a county planning commission would be prohibited by the above language from serving as directors of an Industrial Development Authority. You also raise the same inquiry as to school board members.

Both inquiries are answered in the affirmative. This office has previously ruled numerous times both as to school board members and county planning commission members that they are officers of the county. They would thus fall within the prohibition of § 15.1-1377.

PUBLIC OFFICERS—Compatibility of Office—Commonwealth's Attorney—May be member of Marine Resources Commission.

COMMONWEALTH ATTORNEYS—Compatibility of Office—May be member of any commission or board appointive by Governor.

HONORABLE G. DUANE HOLLOWAY
Commonwealth's Attorney for York County

May 22, 1970

I am in receipt of your letter of May 13, 1970, wherein you advise that in addition to your position as Commonwealth's Attorney of York County you are also a member of the Virginia Marine Resources Commission. You inquire whether your participation in hearings held by the Commission "will constitute any statutory violation of law or any statutory conflict of interest."

The issue raised by your letter concerns, not a conflict of interest problem, but rather, a problem of compatibility of office or "dual office holding." Consequently, § 15.1-50 of the Code of Virginia (1950), as amended, is applicable. This statute provides in pertinent part that "[n]o person holding the office of . . . attorney for the Commonwealth, . . . shall hold any other office, elective or appointive, at the same time, except: (1) That of a . . . member of any commission or board appointive by the Governor."

Members of the Marine Resources Commission, being appointed by the Governor (§ 28.1-4), there exists by statute no incompatibility of office and thus your inquiry is answered in the negative.

PUBLIC OFFICERS—Issuing Justices in Towns—May not commit prisoners to jail.

CRIMINAL PROCEDURE—Issuing Justices in Town—May not commit prisoners to jail.

HONORABLE J. R. PAINTER
Justice of the Peace for Page County

February 12, 1970

This is in reply to your letter of January 28, 1970, in which you request my opinion as to whether or not an "issuing justice" appointed for the town of Shenandoah is authorized to commit a prisoner to jail.
The law covering "issuing justices in towns" is set forth in Chapter 2, Title 39.1 of the Code of Virginia, comprising §§ 39.1-20 through 39.1-25. Section 39.1-20 prescribes that the "council of any town may elect one or more special justices of the peace to be known as issuing justices, who shall hold office during the pleasure of the council and shall have such powers as are hereby conferred, and no other." (Emphasis supplied.) Section 39.1-22 authorizes such justices to issue warrants and subpoenas for witnesses within the limitations of that section. Section 39.1-23 prescribes that, in the absence of the judge of the municipal court of a town, each issuing justice shall have the same power to admit persons to bail as the municipal court judge would have under general law of the State if present.

In reviewing Chapter 1, Title 39.1 of the Code, I note that § 39.1-15, which enumerates the powers of justices of the peace, includes the power to "commit to jail." In contrast, I find no law authorizing the issuing justices in towns, as covered in Chapter 2 of this title, to commit a prisoner to jail. In view of this fact and the limiting language of Section 39.1-20 as herein emphasized, my answer to your question is in the negative.

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RECORDATION—Acknowledgement—Impression through photostatic process not sufficient to admit to record.

SIGNATURES—Photostat of Power of Attorney Not Sufficient to Admit to Record.

April 16, 1970

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

By letter of April 2, you have sent me a photostat copy of a power of attorney. You ask whether you should admit the photostat to record and whether a surety bond may be accepted if signed by the attorney-in-fact under the power.

This office has previously ruled that a power of attorney may be signed, acknowledged and sealed by facsimiles. Report of the Attorney General (1961-1962), p. 213. That opinion specifically stated that, "‘to sign’ means to attach a name by any known method of ‘impressing the name on paper with the intention of signing it.’" [Emphasis supplied.]

It is my opinion that there could be no intention to sign when the names of different persons are simultaneously impressed through a photostat process. Thus, the copy of the power has never been signed and you should not admit it to record.

In my opinion you should not accept for bonding purposes a power of attorney on which the Secretary's certificate of full force and effect is undated. The certificate has no meaning.

I do not object to the fact that the corporate Secretary signed on behalf of the corporation, for this is authorized by the Board of Directors resolution set forth in the power. His signature is properly acknowledged by a notary public.

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REDISTRICTING—Changes in Magisterial District—Insufficient time to change precincts—Effect on voters.

February 2, 1970

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter dated January 15, 1970, which reads as follows:

"Pittsylvania County has been recently re-districted creating new boundary lines as to seven magisterial districts. The effect of this has been to place voters of magisterial election districts or precincts
into different magisterial districts. Pursuant to Section 24-46 of the Code of Virginia, the governing body of the County has filed a petition with the Court to change, rearrange and alter the boundaries of the election districts, however, it is the feeling that insufficient time is available to complete this task prior to the Primary Election in 1970.

"My question is whether or not the voters could continue to vote at the same precincts as before in the Primary Election since this election does not affect representation or officials from any magisterial district, but rather would be for State or Congressional Offices."

Under the provisions of § 24-17 of the Code of Virginia (1950), as amended, in addition to other qualifications, it is provided that a person is entitled to vote only in that precinct in which he lives and has been duly registered. In this regard, it is necessary that the precincts in a county be established so that all the voters therein will reside in the same magisterial districts, the purpose being to insure that in case of elections for supervisor, or any magisterial district question, the voters in that magisterial district will be limited to residents thereof. (See letter to The Honorable Andrew J. Ellis, Jr., found in Report of the Attorney General (1964-1965), p. 287.)

From your letter it appears that due to the rearrangement of magisterial districts in Pittsylvania County a situation exists wherein some precincts presently lie partly within one magisterial district and partly within another magisterial district. It follows, therefore, that since only the districts have been altered the voters continue to live in, and be registered in, the same precincts.

In light of the above stated purpose of having a precinct lie entirely in a single magisterial district, and the fact that the upcoming election in Pittsylvania County is not magisterial in nature but instead for State or Congressional offices, it is my opinion that the voters can continue to vote in the precincts as they currently exist. Of course, should the court alter said precincts to conform with the new magisterial districts, as must be accomplished in accordance with §§ 24-46 and 24-49 though 24-51 of the Code, prior to any magisterial election, those persons affected will then have to vote in such new precincts.

REDISTRICTING—Changes in Magisterial Districts—Effect on Board of Supervisors.

BOARDS OF SUPERVISORS—Redistricting of County—Effect on membership.

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

December 11, 1969

I am in receipt of your letter of November 24, 1969, in which you state that the boundaries of the seven magisterial districts of Pittsylvania County have been redrawn so as to give rise to the following inquiry:

"1. Where two of the districts with the new boundary lines are created by the Commissioners and none of the presently elected members of the Board of Supervisors reside in these two districts, but rather the redistricting leaves two of the other districts each with two of the presently elected supervisors residing therein, and referring to your opinion dated June 7, 1967, what could be done with respect to the two newly formed districts having no representation on the Board of Supervisors, while the other two newly formed
magisterial districts each have two resident members on the Board of Supervisors?

"2. What, also, could be done with respect to the justices of the peace who are in the same situation as members of the Board of Supervisors as stated above in question number one?"

With regard to your first question, it must be noted that the members of the board of supervisors are constitutional officers elected for a term of four years. Accordingly, this office has previously ruled that the elected members of the board may not be deprived of their office merely because the boundaries of the county's magisterial districts have been redrawn. See, Report of the Attorney General (1956-1967), p. 240. However, there is at present a vacancy in the office of supervisor for those districts in which no member of the board presently resides. Section 111 of the Constitution of Virginia requires that the board consist of supervisors from each district. The reference in Section 111 to the election of members of the board by the electors of the district pertains to the manner in which supervisors are initially selected for their term of office. Interim vacancies should be filled in the manner provided by law. In this case, interim vacancies are filled by the judge of the circuit court of the county by appointment. See, §§ 15.1-575, 24-145 of the Code and Section 56 of the Constitution of Virginia. In accord with the foregoing are a number of prior opinions of this office. See, Report of the Attorney General (1966-1967), p. 237 and (1964-1965), p. 286.

With regard to your second question, I am enclosing a recent opinion of this office to the Honorable Helen C. Loving, Clerk, Circuit Court of Henrico County, dated August 20, 1969, in which a similar inquiry was presented and discussed.

RETIREMENT SYSTEM—Benefits Under City Employees Fund—Retired chief of police may receive benefits even though elected to city council.

CITIES—Council Member—May receive retirement benefits which accrued before election.

April 9, 1970

HONORABLE LEWIS A. MCMURRAN, JR.
Member, House of Delegates

Acknowledgement is made of your letter of March 27, 1970, which presents the following factual situation: The Chief of Police of the City of Newport News retired on February 24, 1970, and is presently receiving retirement benefits from the "City of Newport News Employees' Retirement Fund." He now desires to offer as a candidate in the upcoming councilmanic race. You inquire what effect his election may have upon his retirement benefits.

After reviewing Chapter 32 of the Code of the City of Newport News regarding retirement, as well as the charter of the City of Newport News, Acts of Assembly, 1958, Chapter 141, as amended, I find that the following provisions of the charter as set forth in § 27.02 (g) are the only pertinent provisions pertaining to your inquiry:

"* * * If any employee who is entitled to retirement, or who has retired from either of the cities, is employed by the consolidated city, he shall not receive his pension during the term of his employment with the consolidated city but shall be entitled to receive such pension when his employment with the consolidated city ends.

"This provision applies to all pension or retirement systems of both cities and includes the systems that provide retirement to employees of school boards or other boards or commissions and to the city officers and their employees if such employees were included in
REPORT OF THE ATTORNEY GENERAL

retirement systems prior to consolidation."

A Councilman is an officer of the City and further is defined as an employer by § 32-9 of the City Code. I am therefore of the opinion that the above provisions would not prohibit the Chief of Police from continuing to receive his retirement benefits if he were elected as a member of the City Council.

However, if elected to the City Council, any action by the Council relating to the Retirement Fund could constitute a conflict of interest and consequently the individual would have to disqualify himself in accordance with the Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly, copy of which I enclose.

RURAL AREA DEVELOPMENT CORPORATIONS—Buchanan-Dickenson
—Membership on board—Member cannot appoint his successor.

HONORABLE N. E. PERSIN
Commonwealth's Attorney for Buchanan County

May 8, 1970

This is to acknowledge receipt of your letter of April 22, 1970, in which you state in part:

“A few days ago I called you regarding a situation that has developed in our County pertaining to membership on the Board for the Buchanan-Dickenson Rural Area Development Corporation.

“I have examined the regulations issued by the Government regarding representation on the Board. The pertinent provision under Public Law 90-222 is Section 211 (b) which provides: 'Each board to which this subsection applies shall consist of not more than fifty-one members and shall be so constituted that (1) one-third of the members of the board are public officials, including the chief elected official or officials, or their representatives, unless the number of such officials reasonably available or willing to serve is less than one-third of the membership of the board, (2) at least one-third of the members are persons chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area served, and (3) the remainder of the members are officials or members of business, industry, labor, religious, welfare, education, or other major groups and interests in the community. Each member of the board selected to represent a specific geographic area within a community must reside in the area he represents. No person selected under clause (2) or (3) of this subsection as a member of a board shall serve on such board for more than three consecutive years, or more than a total of six years.'

“This section has been construed to mean that ‘public officials’ includes ‘those employees of agencies and members of boards established under State or local law who have the responsibility and authority to decide and carry out the policies of those agencies or boards. However, those public officials who are designated for representation on the governing or administering board of a CAA may, if they wish, choose permanent representatives to serve on the board in their place or in their absence.’

“In addition to the foregoing, Article IV, Section 2, of the By-Laws of the Buchanan-Dickenson Rural Area Development Corporation provides: ‘The Directors required to be public officials shall be appointed by the Board of Supervisors of Buchanan County, Virginia and Board of Supervisors of Dickenson County, Virginia; each of the Counties having the right to appoint five Directors to the Board, each being a public official either elective or appointive in conformity with the 1967 Amendment of the Economic Opportunity Act.’
"The new appointments to the Board were made by our Board of Supervisors and one of the Directors designated was Mr. "X".* Supervisor from the Knox District. As I informed you Mr. "X" subsequently resigned and selected Mr. "Y"* as his permanent representative to serve in his place. At no time was his resignation taken up with the Board of Supervisors, nor was the appointment by Mr. "X" of Mr. "Y" discussed or approved by the Board.

*—"X" and "Y" substituted for real names.

"Considering the foregoing, I would appreciate your opinion as to whether or not Mr. "X" had the right to resign in the manner in which he did and appoint Mr. "Y" to serve in his place without any official action being taken by the Board of Supervisors."

You do not state who made the construction of Section 211 (b) Public Law 90-222, 42 U.S.C.A. § 2791, which you quote. I presume that the construction was made through a regulation promulgated by the administrators of said law. (Economic Opportunity Act.) As I understand "this construction" it does not mean that a member (or representative) can resign and name his successor. All it means is that the member can name a person to serve on the board in his place or in his absence. The designee is subject to being replaced by the member at any time. A person who is appointed by a Board of Supervisors in accordance with the Charter of the Buchanan-Dickenson Rural Area Development Corporation vacates his appointment upon resignation and the Board of Supervisors would then appoint his successor.

Therefore, when Mr. "X" resigned he did not have the right to appoint Mr. "Y" to serve in his place without any official action being taken by the Board of Supervisors.

SALARIES—Increases—Approval of Governor—Necessary for Board of Community Colleges to raise Chancellor's salary.

PUBLIC OFFICERS—Salaries—Increases—Consent of Governor necessary for State Board of Community Colleges to raise Chancellor's salary.

June 3, 1970

MR. EUGENE B. SYDNOR, JR., Chairman
State Board for Community Colleges

This is in reply to your letter of May 21, 1970, in which you refer to the fact that Item 552 of the Appropriations Act, Acts of Assembly, 1970, fixes the salary of the Director of the State Department of Community Colleges at $28,000 per annum. You state that Chapter 728 of the Acts of Assembly, 1970, amends § 23-223 of the Code to permit the State Board for Community Colleges to fix the salary of the Chancellor. This Act changed the Director's title to that of Chancellor and was passed as an emergency measure so that it is presently effective. You state that the Board desires to increase the Chancellor's salary to $32,500 and inquire as to whether this may be done in view of the relevant provisions of the Appropriations Act.

In this regard, I refer you to § 14.1-2 of the Code, which provides as follows:

"The salary of no State officer or employee which is payable by the State and which is not specifically fixed by law and the salary of no officer or employee of any State institution, board, commission of agency which is not specifically fixed by law, shall be hereafter increased, or authorized to be increased, without prior authorization of such board or commission and the consent of the Governor first
obtained in writing in each case. Any violation of this section shall constitute misfeasance in office. Nothing herein contained shall apply to teachers in the elementary or high schools of the Commonwealth or to employees receiving compensation not in excess of one hundred dollars per month."

This section confers authority for the Board to increase the salary as indicated upon obtaining the consent of the Governor as indicated. This procedure has been discussed and approved in prior opinions of this office over the years. See, Report of the Attorney General (1939-1940), p. 194; (1931-1932), p. 147. Salary increases of this type are made by transferring from unsegregated appropriations the amount of the proposed increase, Report of the Attorney General (1930-1931), p. 185. It is my opinion that this is in accord with present provisions in the Appropriations Act relating to the transfer of appropriations within an agency.

SCHOOLS—Authority—To regulate length of student's hair—May regulate when necessary to avoid disruption or interference with educational purposes of the school.

April 16, 1970

HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

This will acknowledge receipt of your letter of March 19, 1970, in which you inquire as to the authority of schools to promulgate regulations concerning the length of students' hair. You draw attention to two recent cases in which regulations of this type have been struck down. See, Meyers v. Arcata Union High School District, 75 Cal. Repr. 68 (1969); Breen v. Kahl, 296 F.Supp. 702 (W.D. Wisc. 1969). You also refer to the fact that litigation questioning a similar regulation at Richmond Professional Institute was presented to the Circuit Court of the City of Richmond several years ago.

The answer to your question is one which the courts have been unable to resolve in the last five years. Ferrell v. Dallas Independent School District, 261 F.Supp. 545 (N.D. Tex. 1966), aff'd 392 F.2d 697 (5th Cir. 1968), cert. denied 393 U.S. 856, upheld the validity of such a rule on grounds that it was a reasonable administrative procedure. This case cited with approval the case of Marshall v. Oliver, No. B-2932 (Cir. Ct., City of Richmond, 1965), cert. denied 385 U.S. 945, the Virginia case to which you have referred. In each of the foregoing cases, the rules involved have been similar in all essential respects. Some judges have treated the question as one involving the resolution of grave constitutional issues. Others have referred to it as a "tempest in a teapot."

The cases which you have cited do not hold that promulgation of such regulations is beyond the control of school authorities. They do hold that the particular rules in question fail to bear a rational relationship to the educational purposes of the school.

It is my opinion that schools have the authority to regulate the length of students' hair in cases where it is necessary to avoid disruption or interference with the educational purposes of the school. The determination of the need for such a rule is one which must be made by the educators involved. The varying conditions from school to school may render some rules acceptable which in other circumstances might be held impermissible. The determination of the necessity for regulating the length of students' hair should not be made lightly, for the recent trend of judicial decisions has been to require school officials to present substantial evidence in justification of the rule.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Bond Referendum—Defeated referendum may be resubmitted within a year if a different proposal. October 22, 1969

HONORABLE J. HARRY MICHAEL, JR.
Member, Virginia State Senate

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

"On April 22, 1969, the City of Charlottesville held a referendum on a $7,000,000 school bond issue, principally for the construction of two new high schools. The two proposed sites for such schools were a matter of public information. The question put to the voters read as follows:

"Shall the City of Charlottesville, Virginia, issue its general obligation bonds in an amount not to exceed Seven Million Dollars ($7,000,000) for the purpose of acquiring the sites for and constructing and furnishing two additional schools and for other school improvements, said bonds to be issued at one time or from time to time, be payable in maturities not exceeding twenty (20) years from their date or dates and bear interest at a rate or rates not exceeding five per cent (5%) per annum, payable semi-annually?

"A majority of the qualified voters failed to approve the bond issue. This failure has been attributed to many things not the least of which was citizen opposition to the building of two smaller high schools instead of one large campus type high school.

"Now the School Board of the City of Charlottesville and the City Council wish to consider the holding of another bond referendum which will be based on plans to build one large central high school in lieu of two smaller ones.

"My question is whether the provision in § 15.1-183 of the Code of Virginia, 1950, that allows 'no other election for a similar purpose . . . within one year after such election' will prohibit a school bond referendum, primarily for one high school, under the circumstances outlined above if such referendum were to be held prior to April 22, 1970."

To my knowledge, the portion of § 15.1-183 to which you refer has not been construed by the courts of this State. However, it is my opinion that the second bond issue may be held within one year of the first or prior to April 22, 1970. A number of States have similar statutes prohibiting the resubmission of a defeated bond issue to the electorate for some period of time, usually one year. The rule which has emerged from the decisions of these States is that as long as the second bond issue differs in some material or essential feature it may be submitted to the electorate without the necessity of observing the statutory waiting period. See, 15 McQuillin, Municipal Corporation, § 40.19 (3d Ed.); Selle v. City of Henderson, 309 Ky. 599, 218 S.W.2d 645, 649 (1949); Wilson v. Featherson, 122 N.C. 211, 30 S.E. 324 (1898).

From the facts which you have stated it appears that the new proposal is essentially different from that which was defeated in the prior election. Consequently, the proposed new bond issue would not be an election for a "similar purpose" such as is subject to the one year waiting period imposed by § 15.1-183.

SCHOOLS—Contracts—Teachers—May incorporate by reference agreement between school board and teachers association.
This is in reply to your letter of April 14, 1970, in which you inquire as follows:

"Kindly let me have your opinion as to whether the following provision proposed to be contained in an agreement between the Arlington School Board and the Arlington Education Association would be in conflict with § 22-217.2 or any other section of the Code of Virginia:

"A provision will be added in writing to the individual contract of all professional employees which reads as follows: 'The terms, conditions and policies, where applicable, as set forth in the 1970-71 agreement dated —— between the Arlington County School Board and the Arlington Education Association are incorporated in this contract.'"

Section 22-217.2 of the Code provides that teachers' contracts will be on a form prescribed by the State Board of Education.

The standard form contract as promulgated by the State Board of Education permits the local boards to add special covenants. The clause which you quote is an attempt to incorporate by reference the terms of the agreement negotiated by the school board and the teachers association. I am of the opinion that it is proper to thus incorporate any terms of the agreement which the school board could have added to the form contract as a covenant.

It is settled law in Virginia that the terms of a contract may embody the terms of other instruments. 4 M.J. Contracts § 49. I am enclosing a copy of an opinion of this office to Senator Hunter B. Andrews, dated February 18, 1970. Insofar as that opinion limits the authority of school boards to enter into certain types of negotiation agreements, it should be noted that the board has no authority to incorporate such provisions into the teachers' contracts, either by special covenant or by reference to the negotiation agreement itself.

SCHOOLS—Pupils—Residency categories of § 22-218 exclusive for free public schooling.

SCHOOLS—School Boards—May make regulations concerning admission to schools.

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

This is in reply to your letter of November 18, 1969, in which you ask the following question:

"It would be greatly appreciated if you would advise me as to whether or not the provisions of Section 22-218 of the 1950 Code of Virginia, as amended, relating as to when persons, within certain age limits, are deemed to reside in the County are exclusive of any other factual situation under which a person within the prescribed age limits may in fact be residing in the County so as to be entitled to free schooling?"

Section 22-218 of the Virginia Code was amended in 1958 to define particularly the three instances when a person shall be deemed to reside in a county, city or town for the purpose of free public schooling within the scope of the amendment. Prior to the 1958 amendment, the statute did not
attempt to define a resident for the purposes of this section. In view of this fact, I am of the opinion that unless a child falls within one of the three categories of residency enumerated by § 22-218 he is not entitled to free schooling in such county, city or town.

I would, however, refer you to § 22-219 which reads in part:

"The school board of each county, city or town operating as a separate school district shall have the power to make regulations whereby persons other than those defined in § 22-218 who are residents of the State of Virginia may attend school in such county, city or town, and may charge tuition for the attendance of such persons in such schools . . . ." (Emphasis added).

SCHOOLS—Religion in Public Schools—May afford "moment of meditation."

SCHOOLS—Religion in Public Schools—Study of religion may be included in curriculum.

SCHOOLS—Religion in Public Schools—Bible readings subject to same restrictions as prayer.

June 4, 1970

HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in reply to your letter of May 6, 1970, in which you inquire as follows:

"(1) Can prayer be used in the class rooms of our public schools? (a) Voluntary and non-denominational? (b) What about the practice of a moment of meditation as an alternate? "

"(2) Religious instruction—objectively, as part of a secular program of education."

"(3) Reading of the Bible—without comment to expose nor impose."

You are no doubt aware that the questions which you have presented are among the most difficult of the many issues which our educators must resolve in the administration of our schools. The difficulties arise in large part because of the conflict between the traditional views of the proper role of religion in the public schools and recent Supreme Court rulings in this regard.

None of the recent court decisions have prohibited voluntary and non-denominational prayer in the schools. Such activity would most certainly be within the first amendment privilege of freedom of religion. However, once a public school attempts to provide this type of prayer, constitutional issues do arise. Such practices have been disapproved by the courts. In the case of Engel v. Vitale, 370 U.S. 421 (1962), the Supreme Court ruled that a non-sectarian prayer composed by the regents of the New York public school system was in violation of the first amendment even though observance by the students was voluntary. See also, McCollum v. Board of Education, 333 U.S. 203 (1948). These decisions have imposed the requirement that government be strictly neutral in matters of religion.

The foregoing decisions would not preclude a school from affording an opportunity for student initiated prayers. Such a practice was approved by a lower federal court in Reed v. Van Hoven, 237 F. Supp. 48 (W. D. Mich. 1965). There the court promulgated a plan to insure the neutrality of the school system while protecting the right of students to participate or not to participate. It is clear, however, that school officials could not
adopt a plan for the sole purpose of attempting to do that which is pro-
hibited by other court decisions.

The practice of providing "a moment of meditation" would not be im-
proper if conducted solely for the purpose of increasing the appreciation
and awareness of students, Despain v. DeKalb Co. Com. Sch. Dist., 255 F.
Supp. 655 (N.D. Ill. 1966). Such a practice would not be permitted if it
were treated by school officials as a prayer. See, Stein v. Oskinsky, 348 F.
2d 999 (2d Cir. 1965).

The study of religion may be included in the curriculum of a public
school. This point was recently recognized in the enclosed opinion of the
United States District Court for the Western-District of Virginia, Vaughn
v. Reed, Civil Action No. 69-C-39-D, May 15, 1970. But such practices will
be closely examined for violations of constitutional mandate. In the Vaughn
case, the exclusion of pupils not desiring to participate was regarded as
evidence that the particular program involved was in violation of the
school's position of neutrality. A program conducted as a devotional exer-
cise rather than a course of instruction would not be constitutionally
proper.

Bible readings would be subject to the same guidelines as prayer. In
Abingdon Sch. Dist. v. Schempp, 374 U.S. 203 (1963), the Supreme Court
held improper Pennsylvania's practice of reading without comment ten
verses of the Bible daily.

SCHOOLS—School Boards—Agreement with association of teachers—
Authority to execute.

HONORABLE HUNTER B. ANDREWS
Member, Virginia State Senate

This is in reply to your letter of February 10, 1970, in which you inquire
whether a school board and an association of teachers could enter into an
agreement which would embody the following points:

"1. The recognition by the board of a local association of teachers
as the agency to discuss on behalf of the teachers (so long as it
embraced more than fifty percent of all certificated personnel) mat-
ters covered by the agreement.

"2. Specifically reserving the rights of others (including individual
members of the local association) the full right to be heard by the
board.

"3. A limitation of the matters to be discussed to items of eco-
nomic importance to the teachers and elements of actual working
conditions. Note: This would not prohibit the establishment of a
professional council of representatives of the teachers, the adminis-
tration and the board for the purpose of improving and upgrading
curriculum and systems of instruction and providing for open chan-
nels of communication on matters of importance to the entire school
system but not specifically involving the economics and working con-
ditions of the teachers.

"4. Providing that when and if there would arise from the dis-
cussions matters failing of agreement, the parties shall submit such
matters to mediation and/or arbitration but expressly stating that
the results of the mediation shall not be binding on the board.

"5. Containing a clause that the teachers recognize that the State
law provides that teachers shall not strike.

"6. Including in the representation school principals and super-
visors but excluding the superintendent, associate and assistant
superintendents and, where in existence, area administrators.

"7. Not requiring any individual teacher to become a member or
maintain membership in the local association."
REPORT OF THE ATTORNEY GENERAL

I am enclosing a copy of an opinion rendered to the Honorable Junie L. Bradshaw, Member, Virginia House of Delegates, dated February 16, 1970, in which the right of public employees to join a union was discussed and recognized. You will note that the authority of political subdivisions to enter into collective bargaining agreements was regarded as a minority practice which should be founded on a specific grant of authority rather than implied from the existing powers of political subdivisions.

While you do not refer to a teachers' union or a collective bargaining agreement in your letter, it must be noted that a collective bargaining agreement would contain many of the points which you present above. Nevertheless, while a collective bargaining agreement entered into by a school board would be of doubtful enforceability, this would not preclude the board from adopting an agreement or a resolution embodying one or more of the above points. It would be necessary for the board to retain the right to make the final decision in such matters, and membership in the association could not be required as a condition of employment.

The board would be free to discuss such matters with any group, including a teachers' association, which desired to present its views to the board. Under the Virginia Freedom of Information Act, as embodied in Chapter 21 of Title 2.1, such discussions would have to be open to the public.

While the board could limit the discussions to specific issues, as you suggest in point 3, it could not deny the right of others to be heard on matters which relate to decisions within the purview of the board's authority. There would appear to be no authority which would preclude submission of a disputed issue to mediation or arbitration. However, it would be necessary that final decision rest with the board. The case of McKennie v. Charlottesville R. Co., 110 Va. 70, 65 S.E. 503 (1909), held that a municipal corporation had the power to contract, and therefore had the implied power to submit an issue to arbitration. However, § 133 of the Constitution of Virginia vests administration of the public schools in the school board. This grant of authority has been interpreted strictly to require that the board not delegate the final decision in such a matter. See, Howard v. School Board of Alleghany County, 203 Va. 55, 122 S.E.2d 891 (1961).

Point five, as to recognition that teachers do not have the right to strike, may properly be included in any written agreement which a school board may elect to enter. Section 40-65 of the Code prohibits strikes by public employees and would be applicable and enforceable irrespective of whether it was acknowledged by contract.

While a group such as you describe might undertake to discuss employment conditions of school principals and supervisors, such individuals would not be precluded from being heard individually. (This would appear to be expressly provided in point two above.)

As indicated above, it would be a prerequisite to the execution of the agreement that no individual teacher would be required to become a member or maintain membership in the local association.

The board would have the authority to execute the described agreement, subject to any limitations of authority suggested by the foregoing comments.

SCHOOLS—School Boards—Authority to employ administrative personnel.

HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

July 16, 1969

In response to your letter of July 8, 1969, I am forwarding to you a copy of a previous opinion of this office, dated September 19, 1967, to the Honorable E. M. Craft, Chairman of the Scott County School Board, in which the view was expressed that the applicable Virginia statutes are sufficiently
broad “to confer upon the school board the power to employ clerks, secretaries and other administrative personnel involved in the operation of the public schools under the school board’s control.” See, Report of the Attorney General (1967-1968), pp. 237, 238.

As you will note from the enclosed opinion, § 22-203 of the Virginia Code provides for the employment of teachers “on recommendation of the division superintendents” of schools, but I have been unable to discover any similar provision of Virginia law which stipulates the recommendation of the division superintendent as a prerequisite to the employment of administrative personnel by the school board. Finally, in this connection I am advised that the provision of the School Board Manual to which you refer is not a rule or regulation of the State Board of Education, but is simply a statement of policy adopted by the local school board which may be altered by action of the local board not inconsistent with State law.

SCHOOLS—School Boards—Authority to provide health insurance coverage for teachers which extends to their families.

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

April 30, 1970

This is in reply to your letter of April 9, 1970, in which you state that the school board desires to know whether it may purchase group health insurance as a fringe benefit for teachers and their families. You present the following question:

“Does the local School Board or Board of Supervisors have authority to appropriate local funds for the purchase of group family hospital insurance for school teachers and their families?”

The school board itself does not appropriate funds. So any appropriation would be made by the board of supervisors after consideration of the school budget submitted by the school board. See § 22-72(9) of the Code of Virginia. This would mean that absent an appropriate provision in the budget the school board would lack the authority to supplement the budgeted salaries by providing group health insurance for employees and their families.

But once the assumption is made that the county budget provides for such expenditures, further consideration of your question is required. On several prior occasions, this office has ruled that counties could furnish insurance to their employees only if the employees bore the expense—either through salary deductions or deferred raises—and no public funds were used. See Report of the Attorney General (1963-1964) at 266; (1961-1962) at 217, copies of which are enclosed. This is certainly true where the governing body is acting pursuant to a statutory grant of power which specifies the type of insurance to be provided and the method by which it is to be financed.

However, in the present case, the school board is acting pursuant to its general powers to establish conditions of employment and to provide for the payment of teachers. See § 22-75(5). Supervision of the schools is specifically conferred on the school board by § 133 of the Constitution of Virginia. While § 132 of the Constitution qualifies this to the extent that it confers rule-making power on the State Board of Education, I am not informed of any regulation of the State Board which would prohibit the school board from providing the fringe benefit which you have described. Expenditures of this type have been held to be for a proper public purpose. Riddlestorfer v. City of Rahway, 82 N.J. Super. 36, 196 A.2d 550 (1963); 3 McQuillin, Municipal Corp., § 12.173; 62 C.J.S. Municipal Corp., § 723.
It is my opinion that § 22-72(5) of the Code and § 133 of the Constitution authorize a school board to provide health insurance coverage for teachers which extends to their families. This is a condition of employment the determination of which is within the authority thus conferred on the board. This is only true in the absence of any more specific regulation of the matter by the General Assembly or the State Board of Education, and the exercise of this authority would be subject to such regulations as may be adopted by those bodies in the future.

SCHOOLS—School Boards—May not directly pay employees’ contributions to Group Life Insurance under Virginia Supplemental Retirement System—Employee must pay.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—School Boards—May not directly pay employees’ contributions to Group Life Insurance under system—Employee must pay.

HONORABLE PAUL B. EBERT
Commonwealth’s Attorney for Prince William County

I am in receipt of your inquiry of September 4, 1969, in which you inquire as follows:

“1. May a School Board pay for its professional employees, including teachers, the total cost of Group Life Insurance under the provisions of the Virginia Supplemental Retirement System the cost of which is a mandatory deduction from the gross pay of each employee since July 1, 1960?

“2. May a School Board pay for its professional employees, including teachers, a portion of the employee contribution to the Virginia Supplemental Retirement System, the cost of which is a mandatory deduction from the gross pay of all employees since July 1, 1960?”

By statute, the sums to which you refer are required to be contributed by the employees and are to be deducted from the gross salary of the employees. In the case of the retirement deduction, the applicable statute is § 51-111.46(a), (b). The provisions as to the group life deduction are similar to the foregoing. See, §§ 51-111.67:5 and 51-111.67:6.

In a previous opinion of this office, it was ruled that the retirement deduction must be paid by the employee. Report of the Attorney General (1966-1967), p. 253. Under this ruling the board may increase the salary of the individual by the amount of his contribution as long as the increase is treated as income to the employee. In view of the similarity of the applicable statutes, the group life deduction may be treated in the same fashion as the retirement contribution.

SCHOOLS—School Boards—May provide free transportation to students living considerable distance from school if equal service provided for all students similarly situated.

HONORABLE BENJAMIN H. WOODBRIDGE, JR.
Member, House of Delegates

This is in reply to your letter of May 13, 1970, in which you state that the school board of the City of Fredericksburg is contemplating providing free bus service to students attending an elementary school built at some distance from major population concentrations. You state that the transportation will be provided by arranging for those students to ride city
buses free of charge and inquire as to whether the board may provide this service to the particular school without providing similar service to other schools in the city.

As stated to you in the opinion of this office rendered on February 25, 1970, § 22-97.1 of the Code authorizes cities to provide for the transportation of pupils. There is no statutory restriction on the power of the board to promulgate the terms under which such transportation will be furnished. In accord with this, I am of the opinion that the board may properly provide transportation to a particular group of students to the exclusion of others. However, it would be improper for the board to fail to provide equal services for all students similarly situated.

From the facts which you present in your letter, the fact that students attending a particular school incurred a hardship in reaching the school would constitute grounds for the board to furnish transportation thereto. You will note that § 22-275.3 of the Code exempts persons living certain distances from a school from the compulsory attendance law unless transportation is provided. In some circumstances the age of the pupils could dictate that special transportation be provided. Transportation of handicapped persons might also be required.

Without having access to all the facts and circumstances surrounding the situation you describe, I am unable to state categorically whether or not the proposed course of action provides equal services for all students similarly situated. However, in the event that the further assistance is required, please be assured of my willingness to assist to the fullest degree.

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SCHOOL—School Boards—Notice of special meetings—Limits business to be transacted but not authority of board in dealing with such matters.

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

May 6, 1970

This is in reply to your letter of April 28, 1970, in which you request the opinion of this office relative to whether the action of a school board at a special meeting was proper in view of the purpose of the meeting as stated in the notice calling the meeting. Your inquiry states in part as follows:

"Pursuant to the applicable provisions of Sections 22-46 and 22-97 (8), Code of Virginia, 1950, the School Board has fixed its own procedure for the calling and holding of special meetings, which is as follows:

‘Special Meetings of the School Board may be held at any time on call for the same by the Chairman of the School Board, or when requested by two or more members thereof; such call or request shall be in writing; duly signed, and shall be presented to the School Board Clerk, who shall proceed immediately to prepare written notices of the same, and shall cause said notice to be served upon each member of the School Board either in person, notice left at his or her residence, or deposited in the mail at least twenty-four (24) hours before the time of the meeting; such notices of each special meeting shall state the date and hour of the meeting and shall contain a statement of the specific item or items of business to be transacted thereat and no other business shall be transacted at such meeting except by the unanimous consent of all the members of the School Board.’"

From the extensive documentation which accompanied your request, it appears that the stated purpose of the special meeting was "to discuss
kindergartens and the budget." At this meeting the board adopted a motion that funds not be requested for kindergartens and then gave tentative approval to the budget. Your inquiry is whether the wording in the notice to the effect that matters would be "discussed" permits the board to vote on the matters discussed.

It is my opinion that the wording of the notice is sufficiently broad to permit the board to vote on the matters which you have described. To hold otherwise would be to construe the terms of the notice very strictly, and I know of no rule of law which would require such a strict construction. The board's rules of procedure for the calling of special meetings state that the notice shall state the business to be transacted at the meeting. The notice stated in effect that business would be transacted relative to kindergartens and the budget. The purpose of the notice requirement is to inform the public of the business to be transacted at the meeting, and not to limit the authority of the board in dealing with matters on the agenda. It would be unusual to hold a meeting for the sole purpose of discussion of the stated issues, and in such a case the notice would have to state that no vote or other disposition of the issues would be taken.

SCHOOLS—School Boards—Proceeding for sale of property—Not Chancery cause.

FEES—Clerks—Proceedings for sale of property by school board.

HONORABLE J. E. CROCKETT, Clerk
Circuit Court of Wythe County

December 29, 1969

This is to acknowledge receipt of your letter of December 11, 1969, in which you state in part:

"I am herewith enclosing to you copy of Petition and Order in the matter of the School Board of Wythe County relative to the sale of certain property to the Town of Wytheville.

"Please advise me whether this is covered as a miscellaneous matter under 14.1-112 (23) with a charge of $5, or if we should charge $20 under 14.1-113."

Section 14.1-113 of the Code of Virginia (1950), as amended, prescribes the fees to be charged by the Clerk in "chancery causes"; the sum of $20.00 is chargeable to the plaintiff "at the time of instituting the suit." Subsection (23) of § 14.1-112 applies "in any court proceeding for which no specific fee is provided."

The proceeding in this matter is provided by statute, §§ 22-161 and 15.1-262. The only purpose of invoking the proceeding is to secure the approval of the court, which is necessary under § 15.1-262 of the Virginia Code. This is a statutory proceeding and an adequate and complete remedy can be had at law and therefore it is not a chancery cause. 7 M.J., Equity, § 3.

Therefore, I am of the opinion that § 14.1-112 (23) is applicable and you should charge the sum of $5.00 for your service as Clerk.

SCHOOLS—Transportation of Public School Pupils—City may contract with local transit company to provide this service.

CITIES—Transportation of Public School Pupils—Financial assistance from State—Depends on compliance with standards for buses of State Board of Education.
This is in reply to your letter of February 18, 1970, in which you present the following questions pertaining to transportation of public school pupils by the City of Fredericksburg.

"There is a privately owned bus company operating in the area, and the City Council is of the opinion that it might be more economical to lease buses from this company and operate them with City employees—or, in the alternative, subsidize this company which would operate the buses itself.

"1. Is there any prohibition against a City engaging in either of the two above stated practices?
"2. Could the City apply to the State for financial assistance in both cases?"

Section 22-97.1 of the Code of Virginia (1950) authorizes cities to provide for the transportation of public school pupils. This grant of authority is sufficiently broad enough to enable the school board to contract with the local transit company to provide this service. Such a contract could provide for the lease of the buses, with the operators to be furnished by the city, or it could provide for the rendering of total pupil transportation services. A contract under which the transit company provided buses, drivers, and other services, would not be a "subsidy" such as is prohibited by § 185 of the Constitution of Virginia. Chapter 13 of Title 22 contains provisions of law applicable to the transportation of pupils. Section 22-276 of this chapter provides that the State Board of Education may regulate the "construction, design, operation, equipment and color of buses". This section also authorizes the State Board to issue an order prohibiting the operation of any school bus which does not comply with the regulations. I am unaware of any regulation which would prohibit such an arrangement as you describe. However, the financial aid to localities who transport public school pupils is administered by the State Board and made available only to those localities which operate approved school buses. Therefore, the success of an application for State financial assistance in the circumstances which you present would depend on whether the buses complied with the standards established by the State Board.

SCHOOLS—Tuition—Children of disabled war veterans—Eligible to receive payments prior to fulfilling application requirements.

EDUCATION—Tuition—Children of disabled war veterans—Eligibility for payments not affected by procedural requirements.
application requirements are procedural and they were designed to allow the Division to determine the validity of the claim. It was not the legislature's intent that these procedures bar the child from receiving funds from the time that the need for them arose.

SHERIFFS—Deputy—Eligibility to hold office—Six months residence in county required.

HONORABLE JOHN W. SLATER
Sheriff of Clarke County

This is in reply to your letter of July 9, 1969, in which you inquire as to your authority to appoint as your deputy a man who has resided in Clarke County less than thirty days.

In this regard, I refer you to § 15.1-51 of the Virginia Code which states in pertinent part that, "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 . . . in the county for which he is elected . . . ." This requirement reflects the proviso in Section 32 of the Constitution of Virginia that a county officer must be eligible to vote in county elections, for which Section 18 of the Constitution imposes a six months county residency requirement.

This office has ruled many times that a deputy of an officer is also an officer; accordingly, a deputy of an officer must meet any residency requirement imposed as a prerequisite to the holding of the office itself. In a previous opinion of this office, Report of the Attorney General (1940-1941) p. 157, it was ruled that the residency requirement for county officers in what is now § 15.1-51 was applicable to deputy sheriffs.

In view of the foregoing, it is my opinion that the person to whom you refer may not properly hold the office of deputy sheriff until such time as he becomes eligible to vote for county officers, one of the requirements of such eligibility being six months residence in the county.

SHERIFFS AND SERGEANTS—Deputy City Sergeant—Duties—May be executed by jailer if appointed deputy and takes oath.

HONORABLE JOHN R. NEWHART
City Sergeant, City of Chesapeake

This is in reply to your letter of March 3, 1970, requesting my opinion regarding whether it would be proper for you to use a jailer to perform the duties of a deputy sergeant in the event that an extra deputy is at any time needed. In this connection, you have asked whether the nature of the duties of your employees is determined by the penalty of their bonds.

Under Section 15.1-41, Code of Virginia (1950), a sergeant of a city must, at the time of his qualification, give bond with penalty as prescribed by Section 15.1-42. By virtue of Section 53-174, the city sergeant, who by law is the keeper of the jail, shall not be held responsible for acts of omission or commission on the part of his jailer if the jailer has executed a bond in accordance with the terms of this section.

There is nothing in the statutes relating to the bonds of a city sergeant or his jailer which determines the nature of their duties. However, Section 15.1-48 confers the authority upon a city sergeant to appoint deputies, " . . . who may discharge any of the official duties of their principal during his continuance in office, unless it be some duties the performance of which by a deputy is expressly forbidden by law." Before entering upon his
duties, the deputy must take and prescribe the oath now provided for county officers, which shall be filed with the clerk of the court in whose office the oath of the city sergeant is filed. Therefore, it is my opinion that before your jailors may execute the duties of deputy city sergents, they must be appointed as such and take the oath of office prescribed by Section 15.1-48, if they have not previously done so. I should also point out that under prior rulings of this office, deputies must meet the same qualifications for office as their principal.

SHERIFFS AND SERGEANTS—Deputy sheriff and jailer—May not be employed as janitor and caretaker of county grounds.

PUBLIC OFFICERS—Compatibility—Deputy sheriff and jailer—May not be employed as janitor and caretaker of county grounds.

March 19, 1970

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

This is in reply to your letter of March 10, 1970, in which you request my opinion as to whether or not a deputy sheriff and jailer employed by the Commonwealth and the County of Rappahannock may be employed as janitor and caretaker.

Section 15.1-67 of the Code of Virginia provides that no paid officer of the county shall become interested in any contract paid, in whole or in part, by the county. In my opinion, therefore, this section prohibits a deputy sheriff and jailer of a county from contracting with the county for his employment as janitor and caretaker. A similar view is expressed in an opinion found in Report of the Attorney General (1955-1956), p. 198. Accordingly, your question is answered in the negative.

SIGNATURES—Plates—Must be separate plate for each signatory—Only one signature on plate.

SIGNATURES—Plates—May be used only in presence and under personal supervision of signatory.
HONORABLE COLIN C. MACPHERSON
Treasurer for Arlington County

This is to acknowledge receipt of your letter of April 16, 1970, in which you state in part:

"The annual audit of the records of Arlington County is just being completed for the fiscal year ended June 30, 1969. The auditors have raised a question as to mechanical signatures of checks from signature plates, specifically as to the number of signatures per plate and the presence or absence of the signatory at the time the plates are being used for check signing.

"Mr. Hassan has suggested I write you for your opinion on the following questions:

1. Can there be more than one signature on a plate?
2. If the answer to question No. 1 is affirmative, under whose control must it be kept?
3. Must the plate be used only in the personal presence and under the personal supervision of the signatory, or may the signatory designate someone who may substitute for him while his signature plate is being used for check signing?"

The excerpt from the Auditor's 1968 report which you enclose reads as follows:

"It was determined that County and School Board checks, except those for payrolls, were being signed by means of signature plates of certain officials, which plates were not being kept in the possession of such officials, and were being used during their absence. The signatures of the Chairman and Clerk of the County Board are on one signature plate and there are separate signature plates for the Chairman and Clerk of the School Board which are being used in the manner described. The Attorney General has expressed the opinion that the use of a check-signing machine is proper and lawful provided each officer retains custody of his plate and does not allow its use by anyone other than himself, or in his presence (Annual Report for 1952-53, page 21). The signing of checks in the manner described above appears to be in conflict with the aforementioned opinion and weakens the control over the disbursement of funds."

The auditors have stated correctly the ruling of this office in this connection. That opinion was issued by the Honorable J. Lindsay Almond, Jr. It is well to state here that the Honorable Abram P. Staples in a letter to the Honorable E. C. Lacy dated October 22, 1937, Annual Report of the Attorney General (1937-1938), page 101, expressed the view that the use of a check-signing machine was lawful if there were separate plates for each signatory and each officer retained custody of his plate and did not allow its use by anyone other than himself or in his personal presence.

The decree entered in the case of Green, Treasurer v. Campbell, Chancery No. 4945, Circuit Court of Arlington County, on November 29, 1950, a copy of which you enclosed, is of the same import as the opinions of the Attorney General. The term "agent" in this decree means the agent of the school board whose signature is being reproduced. I do not understand this decree to mean that there could be two names on a single plate.

In answer to the third question I am of the opinion that the plate can be used only in the presence and under the personal supervision of the signatory.
REPORT OF THE ATTORNEY GENERAL

SOCIAL SECURITY—County—May pay shares of officers and employees.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Counties—May not pay shares of officers and employees.

INSURANCE—Group Life Insurance—County—May not pay shares of officers and employees.

March 9, 1970

HONORABLE ALICE JANE CHILDS
Commissioner of Revenue for Fauquier County

This is in reply to your letter of February 13, 1970, which I quote as follows:

"I would like to know if a county may pay the constitutional officers and their employees share of the social security, Virginia Supplemental Retirement or Group Life Insurance payments.

"If they can't pay all of the above-named items, is there any one that could be paid."

In reference to social security, it is my opinion that Chapter 3.1, Title 51 of the Code of Virginia, is broad enough to permit a county to pay the contributions for its employees. Section 51-111.5 authorizes a political subdivision, required to make payments as to services which are covered by an approved plan, to impose upon its employees a contribution with respect to wages, as therein indicated, but does not require that it do so. Failure to deduct these contributions does not relieve such subdivision from liability therefor. A similar view is expressed in an opinion found in the Report of the Attorney General (1951-1952), p. 150.

The Virginia Supplemental Retirement Act which is composed of Chapter 3.2, Title 51 of the Code of Virginia, in § 51-111.46, requires that "Each member shall contribute for each pay period for which he receives compensation five and one half per centum of his creditable compensation". Similarly, each participating employee under the group life insurance plan is required by § 51-111.67:5 to "contribute to the cost of such life insurance and accidental death and dismemberment insurance an amount to be determined," with the exceptions therein indicated. It is my opinion, therefore, that a county may not pay its employees' share of the retirement or insurance contributions. A similar view was expressed by my predecessor in office, the Honorable Robert Y. Button, in a letter dated September 25, 1969, to Honorable Paul B. Ebert, Commonwealth's Attorney for Prince William County, copy of which is enclosed.

SOIL CONSERVATION DISTRICTS—Easement From Property Owner to Store Water—No liability for personal injury or person drowning in water.

TORTS—Immunity—On land where easement conveyed to soil conservation districts.

July 29, 1969

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

I am in receipt of your letter of recent date in which you present the following situation and inquiries:

"'A' owns a farm on Cherrystone Creek in Pittsylvania County and he has given an easement to the Pittsylvania Soil and Water Conservation District to store permanent water and floodwater on approximately 10 acres of land. If 'B', an adult, is injured or drowned on the 10 acres, is 'A' liable? If 'C', an infant, comes on to this
property and is injured or drowned, is 'A' liable? In either of the above situations, would anyone be liable?"

I am constrained to believe that "A" would not be liable in either of the situations set out in your communication. Moreover, in the absence of any additional facts or circumstances respecting these situations, it does not appear that any other party would incur liability.

STATE INSTITUTIONS—Madison College—Board of Visitors may transfer nonrestricted gifts to foundation.

STATE INSTITUTIONS—Madison College—Board of Visitors may not transfer trusts or conditional gifts to foundation.

Mr. Adolph H. Phillips
Business Manager, Madison College

This is in regard to your inquiry of December 9, 1969, as to the propriety of transferring to the Madison College Foundation, Inc., gifts of non-restricted funds, presently held by the treasurer of the college, which were donated prior to the establishment of the foundation.

The purpose of the foundation is to accept and administer gifts and endowments intended for the benefit of the college. Section 23-164.6 of the Code confers upon the board of visitors the general power to control and expend the funds of the college. In view of this grant of authority, I am of the opinion that it would be proper for the board of visitors to transfer the funds from the treasurer to the foundation for administration. This answer assumes the absence of any provision to the contrary in the charter of the foundation.

It should also be said that the foregoing would not apply in the case of trusts, in which college officials are named trustee, or gifts conditioned upon administration by the college itself. In the case of a trust it would be necessary to petition the appropriate court for an order naming the foundation as a substitute trustee. The administration of a conditional gift would have to be in conformity with the restrictions placed thereon by the donor.

STATE INSTITUTIONS—Virginia Commonwealth University—Health Services—May establish educational program for training counselors for sick.

CONSTITUTIONAL LAW—Separation of Church and State—Prohibition against state's establishment of religion—Not violated by V.C.U. establishing educational program for training counselors for sick.

Dr. Warren W. Brandt, President
Virginia Commonwealth University

This is in response to your request for an opinion through your letters dated March 20, 1970, and April 8, 1970. You inquire as to whether or not the Virginia Commonwealth University's Health Sciences Division would be allowed to establish an educational "program for training counselors for the sick" without violating Section 67 of the Constitution of Virginia and the first and fourteenth amendments of the United States Constitution.

It is my understanding that the program is designed to render postgraduate training in "counselling of the sick and dying and their families." The program will be open to persons with various types of undergraduate training and would not be limited to or conditioned upon any religious affiliations. In practice, the majority of students who apply will have
background training in psychological counselling, religious education and in divinity.

The program as planned would not be affiliated with or under the direct or indirect control of any religious group, sect, or institution, nor is the program established or designed as a part of or as a supplement to the curriculum of any such group, sect or institution.

Training would consist of seminars, lectures, and actual floor "rounds" by the students. Emphasis will be placed on the various counselling phases of the care, observation and treatment of the physically and emotionally ill and of the reaction of these individuals and their families to their condition and their treatment. The object of the program is the preparation of the student to assist the patient in the "psychological counselling of the sick, dying and their families" as opposed to religious counselling.

In my opinion, a program as outlined above would be permissible under Section 67 of the Constitution of Virginia and under the first and fourteenth amendments to the United States Constitution.

Section 67 of the Constitution of Virginia and the first and fourteenth amendments to the United States Constitution prohibit a state from giving aid to religious groups or institutions or in the state's establishment of a religion.

The Supreme Court of the United States in case of Illinois v. Board of Education, 333 U. S. 203 (1947) stated:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal government can openly or secretly participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect a 'wall of separation between Church and State.'"

With this there can be no argument. However, the test as to whether or not the program in question breaches this "wall of separation" is whether or not the program assists and becomes an integral part of some religious sect's program. Illinois v. Board of Education, supra.

A program, so long as it closely adheres to this proposed form, would not have the effect of becoming an integral part of some religious sect, even though the majority of participants in the program might be persons from religious sects. Its primary effect is the training of individuals, be they religious or non-religious, in the care of the sick. The fact that such organizations would receive incidental benefit does not render the program void. Everson v. Board of Education, 330 U.S. 1 (1947). Therefore, it is my opinion that the establishment of such a program, so limited, would not amount to an appropriation of public funds to a religious organization or to the establishment of a religion, and would be permissible under the Virginia Constitution and the United States Constitution.

SUBDIVISIONS—Ordinances—Approval of plat by both county and town necessary for area within two miles of corporate limits.

ORDINANCES—Subdivisions—Application of municipal regulations beyond corporate limits—Requirements of § 15.1-467(c) must be fulfilled.

February 23, 1970

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for the County of Shenandoah

This is in reply to your letter of February 5, 1970, in which you request my interpretation of § 15.1-467 (c) of the Code of Virginia (1950), as
amended, in respect to the questions contained in the part of your letter which I quote as follows:

"The Town of Woodstock has a subdivision ordinance as does the County of Shenandoah. Both governing bodies, the Town Council and Board of Supervisors, require that approval of plats by such bodies be noted on said plats before recordation.

"My question is this: In considering Section 15.1-467 (c) is it necessary for a subdivision to acquire the approval of both the town and the county regarding a subdivision plat and plan for the area which is within the county, but also within two miles of the corporate limits of an incorporated town which has a subdivision ordinance?

"We will assume for the answer to this question that the town and county did all that was necessary for the town's ordinance to apply to the said two mile area.

"A second question on which I would like your opinion is concerning the applicability of a municipal subdivision ordinance beyond the corporate limits of a town when such subdivision ordinance has been amended and such amendment has not been brought to the attention of the governing body of the county in which such area is located by notification in writing and no request made to the County Board to review and approve or disapprove the same. The Town of Woodstock amended their subdivision ordinance in December of 1968, and did not follow the steps regarding notification and request for review on the part of the County of Shenandoah. Does this mean that the subdivision ordinance of the Town of Woodstock, newly adopted as amended in 1968, would not apply to any area outside the actual corporate limits of the town?"

In answer to your first question, consideration must be given not only to § 15.1-467 (c) but to the other related sections found in Article 7, Chapter 11, Title 15.1, of the Code of Virginia. While § 15.1-467 prescribes the procedure prerequisite to application of the municipal subdivision regulations beyond the corporate limits of a town when such subdivision ordinance has been amended and such amendment has not been brought to the attention of the governing body of the county in which such area is located by notification in writing and no request made to the County Board to review and approve or disapprove the same. The Town of Woodstock amended their subdivision ordinance in December of 1968, and did not follow the steps regarding notification and request for review on the part of the County of Shenandoah. Does this mean that the subdivision ordinance of the Town of Woodstock, newly adopted as amended in 1968, would not apply to any area outside the actual corporate limits of the town?

The given facts indicate that the County of Shenandoah and the Town of Woodstock located therein have adopted subdivision ordinances and that it will be assumed for the answer to this question that both have done "all that was necessary for the town's ordinance to apply to the two mile area". On the other hand, there is nothing to show that the procedure prescribed in § 15.1-468 was implemented so as to make the County regulations effective in the area of the County subject to municipal jurisdiction reposing in the Town. I interpret this to mean that both jurisdictions have agreed that the Town's ordinance is to apply to the said two-mile area of the County adjacent to the Town. In this connection you are directed to § 15.1-474, which is as follows:

"The administration and enforcement of subdivision regulations insofar as they pertain to public improvements as authorized in § 15.1-466 shall be vested in the governing body of the political subdivision in which the improvements are or are to be located.

"Except as provided above, the governing body which adopts subdivision regulations as authorized in this article shall be responsible for administering and enforcing the provisions of such subdivision regulations, through its planning commission or otherwise."

Construing this section in respect to the situation herein outlined, it is my opinion that the County has authority to administer and enforce the Town's subdivision regulations insofar as they pertain to public improve-
ments as authorized in § 15.1-466, while, with this exception, the Town is responsible for administering and enforcing the provisions of the remainder of its subdivision regulations. Hence, in answer to your first question specifically, the approval of both the County and the Town is necessary for the purposes indicated.

The answer to your latter question is in the affirmative. This conclusion is based on the language contained in § 15.1-467(c) which positively states that "no such regulations shall be finally adopted by any such municipality until the governing body of the county in which such area is located shall have been duly notified in writing by the governing body of the municipality" and the prescribed steps accomplished. In other words, before any subdivision regulations adopted by a municipality may apply beyond its corporate limits, the statutory requirements of § 15.1-467 (c) must be fulfilled.

SUNDAY—Sale of Prohibited Item—By employee—Employer guilty of misdemeanor if has scienter.

HONORABLE I. CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

Your recent letter requests my opinion as to whether Code of Virginia 1950, § 18.1-358 and its enforcement statute, § 18.1-358.1 would apply to a store manager who hired an employee who sold a prohibited item on Sunday.

The pertinent part of the statute reads as follows:

"On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor or business, or to employ others to engage in work, labor or business, except in household or other work of necessity or charity. The exemption for works of necessity contained in the preceding sentence shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, on Sunday, any of the following: . . ."

Section 18.1-358.1 provides in part:

"Any persons violating the provisions of § 18.1-358 shall be guilty of a misdemeanor. . . ."

It is my opinion that the language in § 18.1-358 "or to employ others to engage in work" when read with the enforcement provisions of § 18.1-358.1, would include employers as well as employees.

Since the statute, as generally interpreted in Mandell v. Haddon, 202 Va. 979, 121 S. E.2d 516 (1961), would fall within the range of acts which are malum prohibitum I believe that in order to hold the employer guilty of the misdemeanor, proof of scienter is indispensable.

SUPPORT LAWS—Uniform Reciprocal Enforcement—Not applicable where obligor and obligee are both residents of this State.

HONORABLE RALPH P. ZEHLER, JR., Judge
Eighth Regional Juvenile and Domestic Relations Court

This is to acknowledge receipt of your letter of April 24, 1970, in which you request my opinion on the question of whether or not the Uniform Reciprocal Enforcement of Support Act as amended by Chapter 669, Acts of 1970, applies where both the obligee and obligor are in the same county or city.
Chapter 5.1, Title 20 (§§ 20-88.1 to 20-88.11), Chapter 423, Acts of 1950, was repealed by Chapter 516, Acts of 1952. This statute as you state did allow civil proceedings against a person residing in this State "for support of any other person wherever resident to whom the duty of support is owed under any law of this state or would be owed if such other person were a resident of this State..." Jurisdiction to enforce this statute was in the circuit, corporation or hustings court of the county or city of residence of the person to whom this duty is owed.

When Chapter 5.1 was repealed and Chapter 5.2 was enacted, the new Act did not include language which confers civil jurisdiction upon the courts therein named to enforce obligation upon a person to support his or her dependents, where both parties to the proceeding were residents of this State, as is found in paragraph 1 of Chapter 423, Acts 1950, § 20-88.1.

The only portion of the amended Chapter 5.2 dealing specifically with enforcement of the obligation to support where both parties are resident of Virginia is § 20-88.28:4; that section is as follows:

"This law applies if both the obligee and the obligor are in this State but in different counties or cities. If the court of the county or city in which the petition is filed finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and finds that a court of another county or city in this State may obtain jurisdiction over the obligor or his property, the clerk of the court shall send the petition and a certification of the findings to the court of the county or city in which the obligor or his property is found. The clerk of the court of the county or city receiving these documents shall notify the Commonwealth's attorney of their receipt. The Commonwealth's attorney and the court in the county or city to which the copies are forwarded then shall have duties corresponding to those imposed upon them when acting for this State as a responding state."

I am of the opinion that said Chapter 5.2, Title 20, Code of Virginia, as amended, is not applicable to cases where both the obligee and obligor are in the same county or city.

SUPPORT LAWS—Uniform Reciprocal Enforcement—Woman may apply for action if she is obligee.

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

May 5, 1970

This is to acknowledge receipt of your letter of April 30, 1970, in which you request my opinion concerning the interpretation of the Uniform Reciprocal Enforcement of Support Act.

You are correct in your opinion that the remedies under said Act are in addition to and not in substitution for any other remedies. Section 20-88.14 of the Code of Virginia (1950), as amended.

I quote from your letter:

"I would appreciate an opinion from you setting forth under what circumstances a woman who is a resident of Chesterfield County may apply to our Juvenile and Domestic Relations Court for action under the Uniform Reciprocal Enforcement of Support Act."

Answer: The woman would have to show that she was an "obligee" under the Act. This term is defined by § 20-88.13 (7) of the Code:

"Obligee means any person to whom a duty of support is owned."
REPORT OF THE ATTORNEY GENERAL

In a divorce proceeding this could be shown by exhibiting a copy of the decree allowing support and evidence that the husband has defaulted in making payment. She also must furnish the address of her former husband to enable the Virginia court (the initiating state court) to act under § 20-88.22 of the Code. She should also furnish any facts and circumstances which would enable the court in the foreign jurisdiction to decide the case. All of this data should be set forth in the petition which is the duty of the Commonwealth's Attorney to prepare and file under § 20-88.20 of the Code. (Added by Chapter 494, Acts of 1964.)

TAXATION—Abatement of Tax Levies on Buildings Destroyed or Damaged—Procedure required to be followed.

TAXATION—Rebate to Property Owners Where Property Damaged by Flood—No authority in county to rebate.

HONORABLE M. G. ANDERSON
Member, House of Delegates

This is in reply to your letter dated October 11, 1969, which reads as follows:

"The Board of Supervisors in Fluvanna County has requested that I get an opinion from your office as to whether they have a right to rebate taxes to property owners whose property was seriously damaged by the recent flood."

The county has no authority to rebate taxes, however, if Fluvanna County has acted, or will now act, under § 58-811.1 of the Code of Virginia, relating to the assessment of new buildings substantially completed, then § 58-811.2 can be invoked so far as buildings are concerned.

Under § 58-811.1 new buildings may be assessed at their taxable value for only that portion of the year for which they were usable.

Under § 58-811.2 abatement of tax levies on buildings destroyed or damaged by circumstances beyond the control of the owner may be made for that portion of the year when they are not usable.

The statutes do not provide for a proration of the taxes on personal property for the tax year and under existing law nothing can be done with respect to that phase.

TAXATION—Assessments—Board of equalization—May not consider application for equalization for prior years.

HONORABLE DONALD C. STEVENS
County Attorney, County of Fairfax

I have received your letter of February 27, asking whether the Fairfax County Board of Equalization may consider applications for equalization of assessments for prior years.

Virginia Code § 58-910 provides:

"The commissioner of the revenue shall make on his land book the changes so ordered by the board and, if such changes affect the land book for the then current year and such land book has been then completed, the commissioner of the revenue may for that year make a supplemental assessment in case of an increase in valuation; and in case of a decrease in valuation, the order of the board shall entitle the taxpayer to an exoneration from so much of the assessment as exceeds the proper amount, if the taxes have not been paid by him and, in case the taxes have been paid, to a refund of so much thereof as is erroneous."
As I read the statute, the limitation to "the then current year" applies not only to increases in valuation, but also to decreases. In *Woodward v. Staunton*, 161 Va. 671 (1933), the Virginia Supreme Court of Appeals held that no supplemental assessment for a prior year could be made under the predecessor to § 58-910. Nor, in my opinion, could any refund for prior years' taxes be made pursuant to that statute.

While Virginia Code § 58-904, when read literally, would extend the equalization powers of the Board of Equalization to the assessments of prior years, "the intention of the legislature is plain that changes made by a local board of equalization ... shall become effective in that year ..." *Strother Drug Co. v. Taylor*, 160 Va. 427, 437 (1933). It is my opinion that the Fairfax County Board of Equalization may not properly consider applications for equalization of assessments for prior years.

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**TAXATION—Assessments—Commissioner of Revenue—May make deduction from value of real estate caused by easement to public service corporation.**

**COMMISSIONERS OF REVENUE—Assessments—May make deduction from value of real estate caused by easement to public service corporation.**

December 2, 1969

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

This is in reply to your letter of November 21, 1969, in which you ask the following question:

"May the Commissioner of Revenue or the Board of Supervisors reduce the real estate assessment on a parcel of land on which the owner has granted an easement to a public service corporation?"

Section 58-763 of the Code of Virginia, as amended, permits the Commissioner of the Revenue upon application of the landowner to make a total or partial deduction from the value of the real estate caused by any easement affecting the real estate.

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**TAXATION—Assessments—Commissioner of Revenue—No authority to change assessed value of tangible personal property after beginning of tax year.**

**BOARDS OF SUPERVISORS—Authority—May not direct Commissioner of Revenue after beginning of tax year to change personal property assessment ratio for that year.**

June 8, 1970

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

I received your letter of June 4, asking whether the Board of Supervisors of Greene County may, after the beginning of the County's tax year, direct the Commissioner of Revenue to change the personal property assessment ratio for that year.

The use of an assessment ratio is merely a device to insure the uniformity required by Section 168 of the Virginia Constitution. See *Smith v. Covington*, 205 Va. 104 (1964). The result determined by multiplying the appraised value of the property by the assessment ratio is the "assessed value." Virginia Code § 58-4 provides that, "all assessments shall be made as of the first day of January of each year." A change in the assessment
ratio after January 1 would change the assessed value so as to be an 
"assessment" for which I can find no legal authority.

In my opinion, the Commissioner of Revenue may not change, whether 
by direction of the Board of Supervisors or otherwise, the assessed value 
of tangible personal property after the beginning of the County's tax year.

TAXATION — Assessments — Fair market value — Measured by "willing 
buyer — willing seller" concept and not use value.

HONORABLE DONALD C. STEVENS 
County Attorney of Fairfax County

By your letter of May 5, you have asked me for my opinion as to the 
following advice which you have given the Fairfax County Board of Super-
visors:

"I have advised the Board that Section 169 of the Constitution 
of Virginia provides that assessment of real estate shall be at fair 
market value, and that the Supreme Court of Appeals has repeat-
edly affirmed the use of the theoretical 'willing buyer-willing seller' 
measure of that value. I have further advised the Board that the 
Supreme Court of Appeals has specifically rejected the individual 
use value theory in Tuckahoe Woman's Club v. City of Richmond, 
199 Va. 734, 101 S.E. 2nd 571 (1958). I have advised both the 
Supervisor of Assessments and the local Board of Equalization that 
they may take into consideration current use of any land only inso-
far as it impacts upon fair market value, and may not consciously 
appraise for that single use, and that, under the law, their duties 
of evaluation are fixed and may not be altered or affected by re-
quests of the local governing body to base appraisals upon con-
siderations other than those established by law."

In my opinion your advice is a correct statement of the applicable 
Virginia law.

TAXATION—Assessments—How made on property of public service corpo-
ration within sanitary district.

HONORABLE HARRISON MAY 
Commonwealth's Attorney for Augusta County 
HONORABLE THOMAS R. NELSON 
County Attorney for Augusta County

By your letter of April 23, you have asked how Augusta County may 
levy the annual tax on property within a sanitary district as required by 

The sanitary district in question contains public service corporation 
property which is required by Section 169 of the Virginia Constitution 
to be assessed by the State Corporation Commission. Augusta County does 
not, however, come within the provisions of Virginia Code § 58-681 which 
requires the State Corporation Commission to separately assess the public 
utility property within a sanitary district. Although the State Corporation 
Commission might voluntarily make the separate assessment, I am aware 
of no authority whereby the County may compel it to do so.

This office has previously ruled that a commissioner of the revenue is 
without power to assess public utility property under § 21-138. Report of 
the Attorney General (1964-1965), p. 337. That opinion was based on the 
exclusive power of the State Corporation Commission to assess public ser-
vice corporation property and on a definition of "assessment" which included
any fixing of value. This definition has recently been narrowed by our Supreme Court of Appeals in *Transcontinental Gas Pipe Line Corp. v. Prince William County*, Va. (Mar. 9, 1970).

In the Transco case, the County alleged that the application for the correction of erroneous assessment should have been brought in the Circuit Court of the City of Richmond because the assessment complained of was made by the State Corporation Commission. The substantive issue was whether certain property was real or personal. The Court determined that, "It is the function of the assessing officer in each locality to classify the [public service corporation] property as real or tangible personal property." *Id.* at -_. Since "[n]one of the statutes requires the Commission to classify and assess Transco's property as real or tangible personal property . . .," *id.* at —-, the Court's decision necessarily implies that the local assessing officer may break down a State Corporation Commission assessment into such classification as may be necessary for the extension of the taxes.

Accordingly, it is my opinion that your assessing officer should allocate to the sanitary district so much of the assessed value of the public service corporation property as may be attributed to the sanitary district.

TAXATION—Assessments—May not be split if it would increase base of personal property fixed by § 58-514.2.

November 20, 1969

HONORABLE VICTOR J. SMITH
Commissioner of Revenue for City of Harrisonburg

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

"Prior to 1966, the City of Harrisonburg had assessed telephone companies as to both Real Estate and Tangible Personal Property. The break down as to categories had been followed for a number of years.

"In 1966, according to our breakdown, one of the phone companies had a very nominal value of $19.00 for personal property and because the amount was so insignificant, I added this figure to the Real Estate portion. The same procedure was used in 1967 and 1968.

"In 1969, the value of the telephone company tangible personal property according to the breakdown we had used prior to 1966 had increased very considerably and this office decided to revert to the split assessment under the appropriate tax rates.

"When the phone company in question received the two tax bills this year, they contacted me and stated that we could not now split the property because under the provisions of 58-514.2, the City of Harrisonburg was 'locked in' to the 1967 assessment based on the 1966 values.

"We feel that under 58-514.2, we can split the assessment because we had used a split assessment prior to 1966. The code section states that 'except with respect to the assessed valuation of any class of property taxed as tangible personal property by any taxing district before January 1, 1966, such class of property may continue to be taxed by . . .'."

The splitting of the assessment at this time would result in an increase in the base of the personal property established on January 1, 1966. This base was fixed on January 1, 1966, by Section 58-514.2 of the Code. Therefore, it would not be proper to split the assessment.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Assessments—Valuation of land—Proper method to ascribe residential site value to one acre of each farm and farmland value to remaining acreage.

May 7, 1970

HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

In your letter of April 22, you say that the City Assessor of Chesapeake is presently assessing farm property by ascribing residential site value to one acre of each farm and farmland value to the remaining acreage. You ask if this is proper.

All real estate within the City of Chesapeake must be taxed uniformly. Section 168 of the Constitution of Virginia. The fair market value mandate of Section 169 of the Constitution must be followed. A valuation technique is not invalid unless it yields non-uniform results.

I assume that the farm property in question is zoned for farm use only; otherwise, it should be assessed at the value of the highest use to which the land could be put. I further assume that the zoning ordinance permits a residence to be built on each farm, and that in determining the use value of farmland the City Assessor discounts the selling price of comparable land by the value of the one-acre residential site. Under these facts, the method used by the City Assessor would appear to have a basis in theory and would be presumed valid unless it could be empirically demonstrated that the resulting values do not bear a uniform relationship to the assessed values of other real property in the City.

In the absence of such empirical evidence, it is my opinion that the valuation technique of the City Assessor is proper.

TAXATION—Assessments—Water system of city extended into county—Lines and appurtenances subject if water company holds fee or easement to land.

February 5, 1970

HONORABLE SAM E. POPE
Member, House of Delegates

This is in reply to your inquiry of January 28, 1970, as to whether the County of Isle of Wight may assess taxes on “water lines and appurtenances” of the water system of the Town of Smithfield for the purpose of supplying water to county residents.

Section 58-19 of the Code, to which you refer, provides in part as follows:

“In the event any land or buildings constituting any portion of any water system or other public utility owned directly or indirectly by any political subdivision of the State shall be legally assessable for taxation by any political subdivision other than the owner of such public utility, such property located without the limits of such owner shall be assessed only for the portion of fair market value thereof in the proportion that the gross revenues of the utility derived from consumers outside of the limits of the owner bears to the gross revenues derived from the whole utility. . . .”

This section is enacted pursuant to Section 183(g) of the Constitution of Virginia which provides in part that:

“Whenever any building or land, or part thereof, mentioned in this section, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and building in the same county, city or town. But the General Assembly may provide for the partial taxation of property not exclusively used for the purposes herein named.”
The question of whether taxation of "any land or building," as used in § 58-19, applies equally to "water lines and appurtenances" is answered in Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1932). In that case the Supreme Court of Appeals held that the "mains, gates, hydrants, water pipes", etc., of a water company were taxable as "land" where the water system had title in fee or by easement to the land occupied by such fixtures. 159 Va. at 603. If such is the fact with regard to the "water lines and appurtenances" which you describe, then they are subject to taxation under § 58-19 if they are a source of revenue or profit as defined in Norfolk v. Nansemond Supervisors, 168 Va. 606, 192 S.E. 588 (1937).

You will note that the above language of Section 183(g) would permit modification of § 58-19 without constitutional amendment.

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**TAXATION—Assessments on Tangible Personal Property of Public Service Corporation—Same rate as applicable to other real estate.**

December 1, 1969

HONORABLE J. H. WOOD, JR., Clerk  
Board of Supervisors of Clarke County

This is in reply to your letter of November 24, 1969, which reads in part as follows:

"Section 58-514.2 of the Code of Virginia provides in part that 'such class of property may continue to be taxed by such taxing district at rates no higher than those levied on other tangible personal property on January 1, 1966.'

"Our personal property rate on January 1, 1966, was $3.10, and currently is $2.95. There has been some confusion as to whether the rate if 'frozen' at the January 1, 1966, rate of $3.10, or whether the public service corporations should be taxed at our lower present rate of $2.95."

The public service corporation should be taxed at the lower present rate of $2.95.

The basic rule set out in § 58-514.2 of the Code of Virginia is that all local taxes on the real estate and tangible personal property of public service corporations shall be at the same rate as is applicable to other real estate in the respective locality.

Clarke County has adopted a rate of $2.95 for both tangible personal property and real estate for 1969. This being true, the basic rule is applicable and the exceptions set out in the cited section of the Code do not apply.

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**TAXATION — Board of Equalization — Appointment as members of the board of assessors.**

September 10, 1969

HONORABLE EDWARD MCC. WILLIAMS  
Commonwealth's Attorney for Clarke County

This is in reply to your letter of August 15, 1969, to which you attached a letter from the Honorable C. H. Morrissett, State Tax Commissioner, in which he stated:

"The Board of Supervisors feels that there would be economy, as well as facility, in appointing as members of an equalization board the three members of the Board of Assessors, and you desire to know whether or not such action will be objectionable.

"No objection, legal or otherwise, is known to me and I concur in the view of the Board of Supervisors."
You asked if I concurred in this opinion. Sections 58-787 through 58-792, formerly Sections 242-247 of the Tax Code, provide for the appointment of land assessors, and the assessment of real estate by them. Section 58-792 provides that reassessments made by assessors shall be completed not later than December 31 of the year of the reassessment.

The duties of the Board of Assessors are completed before the Board of Equalization is established. The duties of the Board of Equalization expire on December 31 of the year they are appointed.

Since the Board of Assessors and the Board of Equalization do not exist at the same time, there would be no conflict in one person being a member of both boards at different times if it were not for a possible conflict in the duties of the two boards.

Sections 58-895 through 58-915 of the Code of Virginia, formerly Sections 344-347 of the Tax Code, provide for the establishment of local Boards of Equalization. Under Section 58-904 of the Code of Virginia the local Board of Equalization is charged with the especial duty of increasing as well as decreasing assessments, if in its judgment the same be necessary to equalize and accomplish the end that the burden of taxation shall rest equally upon all citizens of such county or city. This language must necessarily be interpreted to comprehend and apply only to the assessments made by the land assessors. See, City of Lynchburg v. Taylor, 156 Va. 53, 60-61, 157 S.E. 718 (1931).

When the member of the Board of Assessors later sits as a member of the Board of Equalization, he then in the latter capacity passes on the correctness of his former assessments after receiving additional evidence. While this is not prohibited by statute, I am constrained to believe that it would be the better policy to refrain from appointing the same members to serve on the Boards in question.

TAXATION—Capitation Tax—Bills for present year should be sent whether or not repeal of tax may occur during year.

May 12, 1970

HONORABLE SAM T. BARFIELD
Commissioner of the Revenue for the City of Norfolk

This is in reply to your letter of May 7, 1970, in which you ask my opinion whether favorable action for the repeal of the poll tax will eliminate the necessity of sending out bills this year.

Section 173 of the Virginia Constitution requires the General Assembly to levy an annual $1.50 poll tax. The levy is made by § 58-49 of the Code of Virginia. Section 58-4 of the Code provides that the tax year begins on the first day of January and that all assessments shall be made as of the first day of each year. I am, therefore, of the opinion that the capitation tax for the year 1970 is due on January 1, 1970, and that bills for these taxes should be sent during the year whether or not favorable action for the repeal of the tax may occur.

In an opinion of this office to the Honorable Wallace G. Dickson, Member, House of Delegates, dated June 4, 1968, found in Report of the Attorney General (1967-1968), p. 295, this office opined that the mailing of bills for capitation taxes was discretionary in cases where the total tax of the taxpayer was less than two dollars. A copy of that opinion is enclosed.

TAXATION—Coin-Operated Machine or Device—County tax not applicable within town limits where town imposes tax.
REPORT OF THE ATTORNEY GENERAL

HONORABLE W. GARLAND TURNER
Commissioner of Revenue for Pittsylvania County

I have received your letter of March 26.

Pittsylvania County and the Town of Gretna each impose a tax on coin-operated machines. You have asked:

"1. Does the limitation in Section 58-266.1 (7) apply to coin-operated machines?

"2. If not, is it legal for both the county and the town to tax coin-operated machines situated in the town and county?

"3. If the town tax only applies to revenue produced by the coin-operated machines, and not the machine, what then would be the legality of a county tax on the machine?"

Counties may not impose license taxes unless they are specifically authorized to do so by statute. Although certain statutes authorize counties to impose specific taxes, the only general grant of authority for the levy of license taxes is found in Virginia Code § 58-266.1 which provides:

"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:

"(7) Any county license tax imposed hereunder shall not apply within the limits of any town located in such county, where such town now, or hereafter, imposes a town license tax on the same privilege; . . . ."

Both the County and the Town taxes are restricted to the classifications of Virginia Code §§ 58-355 and 58-362. Hill v. Richmond, 181 Va. 744 (1943). The only authority for the imposition of the County tax is that of § 58-266.1. It is therefore my opinion that your first question must be answered in the affirmative, rendering your second question moot.

Section 58-266.1(7) forbids coincident taxes "on the same privilege." The measure of the tax is not relevant. Accordingly, I am of the opinion that a county tax of a fixed dollar amount per coin-operated machine could not be imposed in a town which imposes a license tax based on the revenue from coin-operated machines.


HONORABLE G. M. WEEMS
Treasurer of Hanover County

This is in reply to your letter of February 5, 1970, from which I quote the following:

"What is the responsibility of the treasurer under Section 58-960 of the Virginia Code for not sending a tax bill under the following circumstances?
"1. When no address is given to the treasurer and he is unable to locate the owner in the ordinary course of his work, even though the owner is living in the county or in a nearby county or city.

"2. When the property land owner is deceased, or has moved out of the State, so that no address is available with result that a bill may be sent to some other person with the same name, but who does not own the property.

"3. During the busy season, requests come in by the hundreds from banks, finance and other loan organizations requesting bills on property which they proceed to pay, under circumstances making it very difficult to obtain a request in writing from each one of the property owners to send such bills to the obligees."

Section 58-960 of the Code of Virginia, to which you refer, is as follows:

"The treasurer of every city and county shall, as soon as may be in each year, not later than December first, send by United States mail to each taxpayer assessed with taxes and levies for that year amounting to two dollars or more as shown by an assessment book in such treasurer's office, a bill or bills in the form prescribed by the Department of Taxation. The failure of any such treasurer to comply with this section shall be a misdemeanor, punishable by a fine not exceeding five dollars; provided, that such treasurer shall be deemed in compliance with this section as to any taxes due on real estate if, upon the request in writing of the obligor upon any note or other evidence of debt secured by a mortgage or deed of trust on such real estate, he mails the bill for such taxes to the obligee thereof."

This section is clothed in mandatory language which requires a treasurer to send the prescribed bill or bills by United States mail to each taxpayer assessed for two dollars or more as shown by an assessment book in such treasurer's office. The failure of any treasurer to comply with this section shall be a misdemeanor, punishable by a fine not exceeding five dollars. In regard to the situation expressed in your paragraph numbered 1, in my opinion, the statute places the responsibility upon a treasurer to mail the bills to the correct owner of the real estate. A similar view is expressed in an opinion found in the Report of the Attorney General (1966-1967), p. 280.

The same responsibility rests upon the treasurer in the situations outlined in your paragraph numbered 2, except that in instances in which the landowner is deceased, the executor or administrator or, if none, the heirs or nearest of kin, if such be ascertainable, should be notified. I believe due diligence would dictate such action on the part of the treasurer under such circumstances. It is difficult to arrive at an iron-clad rule of procedure for all occasions, since varied factual patterns would change the procedural requirements. However, due diligence should be exercised in all instances.

The situation outlined in your paragraph numbered 3 is controlled by the provision appearing in the terminal clause of § 58-960 as herein quoted. The treasurer shall be deemed in compliance in such cases if, upon request in writing of the obligor, he mails the bill for such taxes to the obligee. The statute makes no exception for volume and, in my opinion, the request in writing of each obligor under such conditions should be sought with the same due diligence whether there be many or only one such instance.

TAXATION—Consumer Use—May not tax interstate telephone calls.

TAXATION—Consumer Use—May not tax sale of bottled gas or heating oil.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Consumer Use—May not tax cable television service.

BOARDS OF SUPERVISORS—No Authority—To tax interstate telephone calls.

BOARDS OF SUPERVISORS—No Authority—To tax sale of bottled gas or heating oil.

BOARDS OF SUPERVISORS—No Authority—To tax cable television service.

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

June 25, 1970

I have received your letter of June 4, in which you ask whether Accomack County may levy consumer use taxes upon the consumers of the following products: interstate long distance telephone calls; bottled gas; heating oil; and cable television service.

Virginia Code § 58-587.1 permits localities to impose a tax on the consumers of the utility services provided by telegraph and telephone companies. The tax base is not fixed by the statute but is left up to the localities. When collect telephone calls, credit card calls and calls charged to other numbers are considered, I do not believe that there is any rationale which will support the inclusion of long distance telephone calls in the § 58-587.1 tax base. An attempt to subject long distance telephone calls to the local tax would, in my opinion, violate the interstate commerce clause of the federal Constitution.

Virginia Code § 58-617.2 permits a consumer's tax on the customers of certain public service corporations coming within the provisions of article 10 of chapter 11 of Title 58 of the Code. The tax may be imposed only on "the utility service or services. . ." Neither the sale of bottled gas nor the sale of heating oil is a utility service. Virginia Code § 58-441.49(a) twice prohibits the imposition of "any local general sales or use tax" and by its exclusions indicates that taxes such as you propose would come within the prohibition. In my opinion, Accomack County may not impose a tax on the purchasers of bottled gas or heating oil.

Section 58-441.49(a) prohibits certain taxes, but permits, "consumer utility taxes to the extent authorized by law. . ." (Emphasis supplied.) I am aware of no authority permitting a county to impose a tax on the customers of a cable television company, and am of the opinion that such a tax would be invalid.

June 11, 1970

HONORABLE V. A. ETHERIDGE
Treasurer of Virginia Beach City

I received your letter of May 25, from which I quote:

“When a person leaves the state of Virginia owing local Personal Property Taxes can I, as Treasurer, mail directly to that person by Certified Mail, in another state, a copy of a Notice and Motion for Judgment?”
"This Notice states that I will appear in our Municipal Court on a given day and ask that a Judgment be given against this delinquent taxpayer."

I am of the opinion that the Municipal Court of the City of Virginia Beach lacks jurisdiction over the person of a non-resident taxpayer whose sole connection with the state is a delinquent personal property tax. Jurisdiction will not be established by mailing to the taxpayer a copy of a Notice and Motion for Judgment.

You may, of course, attach any property which the taxpayer may have in Virginia. Va. Code § 8-520(1). The period of limitations provided by Virginia Code § 8-533 is suspended during the taxpayer’s absence from this State, Virginia Code § 8-33; you may therefore proceed against the taxpayer or his property if you should in the future be able to acquire jurisdiction over either. If the amount of the unpaid tax warrants such action and if the laws of the other state permit (see Va. Code §§ 58-27.1 and 58-1021.1), you may proceed against the taxpayer in the courts of any state with jurisdiction over him.

TAXATION—Delinquent—Notice may be given in any newspaper having general circulation in county or city wherein delinquent.

TREASURERS—Collection of Delinquent Taxes—Notice may be given in any newspaper having general circulation therein.

June 2, 1970

HONORABLE V. A. ETHERIDGE
Treasurer, City of Virginia Beach

I have received your letter of May 22, from which I quote:

"I, as Treasurer of the City of Virginia Beach, now advertise the list of delinquent real estate taxes in the Beacon which is a section of the Norfolk Newspaper. This section is delivered only to the residents of Virginia Beach.

"It cannot be subscribed to by anyone other than residents of Virginia Beach as it is an insert to the papers delivered in Virginia Beach. The Norfolk Newspaper has the greatest circulation of any paper distributed in Virginia Beach.

"Am I meeting the requirements of Section 58-1030 of the Code of Virginia which section states the procedure for advertising this property?"

Section 58-1030 of the Code of Virginia requires the Treasurer to publish a notice of delinquent taxes, "in one issue of some newspaper published in his County or City or having a general circulation therein . . . ." It is my opinion that the procedure which you now follow complies with the statutory requirements.

TAXATION—Employment Tax—Applicable to State employees working within city.

TAXATION—Employment Tax—Not applicable to State employees working within confines of Capitol Square.

STATE LANDS—Capitol Square—Boundaries.

December 15, 1969

HONORABLE FREDERICK T. GRAY
Member, House of Delegates

This is in reply to your letter of December 9, 1969, which reads as follows:
"The action of the Supreme Court of Appeals of Virginia in upholding Richmond’s so-called employment tax has given rise to several questions on which I would appreciate your opinion.

(1) Does the Richmond tax apply to the employees working for the Commonwealth of Virginia, whose place of employment is within the city.

(2) Will those employees of the Commonwealth of Virginia who work within the confines of Capitol Square be affected by the tax, and if the answer to this question is in the negative, I would appreciate being advised as to the boundaries of Capitol Square."

The answer to your first question is in the affirmative.
The tax applies to all persons who work in the City of Richmond more than 90 days a calendar year. There is no exemption in the ordinance for State employees. Therefore, I am of the opinion that the tax applies to the employees working for the Commonwealth of Virginia, whose place of employment is in the city.

The answer to your second question is in the negative.

Capitol Square is not a part of the City of Richmond and is not within the jurisdiction of said city, but subject to the sole jurisdiction of the Commonwealth of Virginia. See opinion of this office to the Honorable L. M. Kuhn, Director of the Budget, dated September 25, 1961, found in the Report of the Attorney General (1961-1962), p. 250.
The land composing Capitol Square is the land acquired by the Commonwealth, pursuant to Chapter 21 of Volume 10 of Hening’s Statutes at Large. The land set apart for Capitol Square is described in this Act as follows:

"That six whole squares of ground surrounded each of them by four streets, and containing all the ground within such streets, situate in the said town of Richmond, and on an open and airy part thereof, shall be appropriated to the use and purpose of publick buildings: On one of the said squares shall be erected, one house for the use of the general assembly, to be called the capitol, which said capitol shall contain two apartments for the use of the senate and their clerk, two others for the use of the house of delegates and their clerk, and others for the purposes of conferences, committees and a lobby, of such forms and dimensions as shall be adopted to their respective purposes: On one other of the said squares shall be erected, another building to be called the halls of justice, which shall contain two apartments for the use of the court of appeals and its clerk, two others for the use of the high court of chancery and its clerk, two others for the use of the general court and its clerk, two others for the use of the court of admiralty and its clerk and others for the uses of grand and petty juries, of such forms and dimensions as shall be adopted to their respective purposes; and on the same square last mentioned shall be built a publick jail; One other of the said squares shall be reserved for the purpose of building thereon hereafter, a house for the several executive boards and the offices to be held in: Two others with the intervening street, shall be reserved for the use of the governor of this Commonwealth for the time being, and the remaining square shall be appropriated to the use of the publick market. ** *"

Today's boundaries of Capitol Square are those shown on the "Original Plan of Land Taken for Capitol Square, August 17, 1784", upon which plan is superimposed the boundary of Capitol Square as it existed March 1, 1930. The boundaries are more clearly shown on a topographic map of The Richmond Department of Public Works and Virginia State Planning.
REPORT OF THE ATTORNEY GENERAL

Board prepared by J. C. Harrison, Topographer in 1935. See also, "Plans of the City of Richmond Drawn From Actual Survey and Original Plans by Micajah Bates, 1835." All of these plans are on file at the State Library.

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TAXATION—Exemptions—American Legion Post—Limit on account of land which can be held for their use. February 20, 1970

HONORABLE THELMA M. HENSLEY
Commissioner of the Revenue for Prince William County

I have received your letter of February 9, pertaining to the tax exempt status of certain land owned by Woodbridge Post 364 (the Post), a Virginia non-stock corporation.

In 1964 the Post purchased approximately sixty-four acres of land for the benefit of an unincorporated post of the American Legion. In 1966 the Post sold thirty-five acres of the property at a substantial profit. In 1969 the Post constructed a building on the property to be used as a meeting hall and for social activities of the American Legion post for which it holds the property. You have asked whether the property owned by the Post is exempt from taxation.

Exemptions from property taxation are controlled by Section 183 of the Constitution of Virginia and, with limited exceptions, the General Assembly is prohibited by that section from extending or enlarging the exceptions provided therein. Clause (g) of Section 183 exempts from taxation "Property of the posts of the American Legion." Virginia Code § 58-12 (7) provides an exemption for "any real or personal property, the legal title to which is held by any person, firm or corporation subject to the sole use and occupancy of any [American Legion post]." It seems to me that the extension of the constitutional provision to beneficial ownership is an appropriate exercise of legislative power where the constitutional language, "property of," is not clear.

I agree with you that the framers of the Constitution did not intend to permit unreasonable holdings of land by exempt organizations. Although the other posts in your county own about one acre of land each, a post of the American Legion is specifically permitted by Virginia Code § 57-20 to own as much as seventy-five acres of land.

The property is not, however, owned by a post of the American Legion but rather for the use of such a post. Section 57-20 clearly limits the amount of land which may be held "by a trustee for the use of [an American Legion post]" to five acres. It is, therefore, my opinion that only the building and five acres of the land are exempt from taxation.

Finally, because the deed conveying the property to the Post makes no reference to the alleged trust, I would require that the Post execute and record a declaration of trust as a condition to the exemption of the building and five acres.

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TAXATION—Exemptions—National banks—No longer exempt from State taxes.

TAXATION—Personal Property—Assets of national bank—Prohibited.

TAXATION—Utility Taxes—May be imposed on national banks. February 20, 1970

HONORABLE SAM T. BARFIELD
Commissioner of the Revenue for City of Norfolk

This is to acknowledge receipt of your letter of February 2, in which you ask whether the City of Norfolk may now levy personal property and utility taxes against banks located in that city.
Any Federal problems as to the taxation of national banks were removed by the enactment of Public Law 91-156 which permits the imposition on domestic national banks by a State or political subdivision thereof of "any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision . . . ."

Virginia Code § 58-466.1 provides that no tax shall be assessed against State banks after the tax has been held invalid as to national banks. It is my opinion that § 58-466.1 does not require the reenactment of taxing statutes heretofore held invalid as to national banks when the basis of such holding has subsequently been removed by the enactment of Public Law 91-156.

Section 58-466 of the Virginia Code provides: "No tax shall be assessed upon the capital of any bank . . . ." The Department of Taxation has construed the word "capital" as used in § 58-471 as being equal to net worth. Taxation of Banks and Trust Companies in Virginia and Their Stockholders (Jan. 1, 1969), § 9. The deduction of real estate in the determination of the value of the shares of stock of a bank (§ 58-471) for taxation under § 58-466, when compared with the taxability to the bank of real estate (§ 58-484) makes clear the intention of the General Assembly that the bank's assets constitute its capital. This conclusion is supported by a comparison with §§ 58-411 and 58-833 of the Code which specifically treat personal property as part of the capital of other businesses. It is my opinion that § 58-466 prohibits the imposition by the City of Norfolk of a tax on the personal property of State or national banks.

No similar objection is found as to utility taxes. It is my opinion that State and national banks are subject to any tax imposed by the City of Norfolk pursuant to Virginia Code § 58-617.2.

TAXATION—Exemptions—Organization which does not use building exclusively for lodge purposes or meeting rooms not exempt.

HONORABLE WM. H. ROSSER, JR.
Commissioner of Revenue for City of Petersburg

March 6, 1970

This is to acknowledge your letter of February 17, 1970, in which you ask whether the organization described therein is exempt from State and local taxation. The facts provided by you are as follows:

"Aerie #882—Fraternal Order of Eagles: This organization has a building located at 237-245 Franklin Street, in Petersburg, Virginia. The Eagles rent their facilities to persons and organizations to hold public and private dances; they have a large dining area and cater to various persons, groups and organizations. The Eagles use their building as a meeting place for their organization. They engage in benevolent and civic improvement activities and they do not conduct their business for a profit."

If property is to be exempted from taxation, it must be brought within some provision of Section 183 of the Virginia Constitution. Clause (f) of that section provides for the exemption of:

"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; . . . ."
Under the facts you have given me, Aerie #882 does not use its buildings "exclusively" for lodge purposes or meeting rooms. I must emphasize that this is a question of fact and that my conclusions expressed herein are subject to modification on the basis of additional information. Section 183 further provides that the General Assembly "may provide for the partial taxation of property not exclusively used for the purposes herein named." This the General Assembly has done by providing in Virginia Code § 58-14 that:

"...when a part but not all of any such building or land shall be leased or otherwise be a source of revenue or profit, and the remainder of such building or land shall be used by any organization specified in § 58-12 for its purposes, only such portion thereof shall be liable to taxation as is so leased or is otherwise a source of profit or revenue. . . ."

It is my opinion that only that part of the building which is used exclusively for lodge purposes or meeting rooms is exempt from property taxation. If part of the building is found to be exempt, all of the land on which any exempt portion is located should also be exempt, "together with such additional adjacent land as may be necessary for the convenient use of the building for such [exempt] purposes." In addition, the Aerie would be liable for the tax on any personal property not used exclusively for exempt purposes.

No exemption is permitted under Section 183 for any organization which pays death, accident or sickness benefits. I have assumed that the Aerie pays no such benefits.

I am aware of no provision of the Virginia Code which would exempt a benevolent association from the payment of license taxes or from the collection or payment of sales taxes, if such taxes would otherwise be due.

TAXATION—Exemptions—Real estate—Social club not exempt since not primarily benevolent or charitable association.

June 24, 1970

HONORABLE ANNA LEE PULLIN
Commissioner of the Revenue for the City of Staunton

I have your letter of June 10, in which you ask whether The Home of Elliott's Knobb Aerie, No. 680, Fraternal Order of Eagles is exempt from local property taxes.

The only purposes set forth in the Aerie's articles of incorporation are "To unite fraternally for mutual benefit, protection, improvement and association generally . . . and to maintain and conduct a social club . . . ."

This office has previously held similar organizations to be subject to taxation. Report of the Attorney General (1968-1969), p. 229. More recently, in an opinion dated March 6, 1970, to the Honorable Wm. H. Rosser, Jr., Commissioner of the Revenue for the City of Petersburg, I treated an Eagles' aerie as partially exempt where, "They engage in benevolent and civic improvement activities and do not conduct their business for a profit."

In order to be exempt under Section 183(f) of the Virginia Constitution the Aerie must be a "benevolent or charitable association." Not until this test is met is it necessary to consider the use to which specific property is put.

Our Supreme Court of Appeals has stated that it is in accord with the rule that, "To come within a provision for the exemption of property used exclusively for charitable purposes, an organization must have charity as its primary, if not sole, object." Richmond v. United Givers Fund, 205 Va. 432, 438 (1964). Section 183(f), however, exempts "benevolent or charitable associations." Professor Cooley has considered this distinction:
"Constitutional provisions or statutes often exempt by name both 'benevolent' and 'charitable' institutions or associations. Are the two kinds one and the same? On the one hand it has been said that the word 'benevolent' may include 'purposes which may be deemed charitable by a court of equity,' and it may also include 'acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick, or the afflicted, the support of public works or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense.' In other jurisdictions, 'benevolent' and 'charitable' are held to be synonymous, as used in exemption statutes. A church club maintaining a home for itinerant members, and running a public restaurant in such home, is not exempt as a 'benevolent association' where its only benevolent features consist in securing positions for a few young men and the furnishing of a small number of free meals." 2 Cooley, The Law of Taxation § 730 (4th ed. 1924).

It is clear that, under either interpretation, the Aerie is not organized as a primarily benevolent or charitable association. In the absence of facts showing that it is operated primarily for such purposes, it is my opinion that the Aerie is subject to local property taxes.

TAXATION—Exemptions—Real estate of religious camp not exclusively used for religious purposes not exempt.

HONORABLE CLINTON MILLER
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of January 5, 1969, in which you request my opinion whether the religious camp in Shenandoah County known as the Green Mountain Camp, Inc., is exempt from real estate taxes under Section 183 of the Constitution of Virginia.

Section 183 of the Constitution of Virginia contains the exemptions from taxation, State and local. Clause (b) of this section is germane to your inquiry reads:

"Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

"(b) Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

The purposes of the Corporation are set forth in its Articles of Incorporation as follows:

"The purposes for which the corporation is organized are: To provide a camp for boys and girls where they may hear the gospel and be instructed in the word of God; to teach boys and girls the importance of being good citizens of the United States of America and to its political subdivisions; to promote loyalty and patriotism to the United States of America and to its political subdivisions; to promote comradeship and good fellowship; to provide clean, wholesome, supervised recreation; and to acquire, develop and to operate camp sites, playgrounds; recreational equipment and facilities."
From the purposes set forth in the Articles of Incorporation, it can be seen that the property of the corporation is not to be used wholly and exclusively for religious worship, or for the residence of the minister of any church.

Therefore, I am of the opinion that the corporation doesn't qualify for exemption from taxes under Section 183 of the Constitution of Virginia.

TAXATION—Exemptions—Real estate of religious organizations—Unused land not exempt.

May 4, 1970

HONORABLE VICTOR J. SMITH
Commissioner of Revenue for Harrisonburg City

In your letter of April 17, you state:

"Recently, the Circuit Court for this area has ruled that the Mennonite Board of Missions and Charities, which board owns a particular real estate tract in Harrisonburg, is a charitable organization within the meaning of § 58-12(5) of the Code of Virginia and Section 183(e) of the State Constitution.

"The Mennonite Board owns a tract of 13.9 acres of land on which is situated a two-story brick building in which the business of the organization is transacted.

"The building, lawns, roads and parking area adjacent thereto occupy approximately 3.9 acres. The balance of the land, approximately 10 acres, is unused for any purpose."

"Can your office please inform me if the unused land of the subject organization can be taxed and please quote any statute, court decision or any other legal authority which gives the local taxing jurisdiction the right to tax such excess property."

The Court determined that the Mennonite Board of Missions and Charities was a religious mission board, the property of which was exempt from taxation under Virginia Code § 58-12(5) and Section 183(e) of the Virginia Constitution. After reviewing the court papers in the case to which you refer, I am of the opinion that the issue which you now raise was not before the Court and that you are not estopped from asserting such a contention as to post-1968 years.

Section 183(e) of the Constitution and § 58-12(5) of the Code each require that the property be "actually and exclusively occupied and used by . . . [the charitable organization]." I am not familiar with any Section 183(e) case dealing with the question of occupation and use by the charity. But in Commonwealth v. Smallwood Mem'l Inst., 124 Va. 142 (1919), the Court denied exemption to land not used for the requisite purpose. Accordingly, it is my opinion that the city has the right to tax that portion of the board's property which is not "actually and exclusively occupied and used by . . ." it.

TAXATION—Income Tax—Not subject to uniformity of taxation provisions applicable to property tax.

TAXATION—Income Tax—Surtax—Not violation of Section 168 of Constitution.

February 11, 1970

HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

This is in reply to your letter of February 9, 1970, in which you ask my
opinion as to whether a plan which you propose for the imposition of a
"surtax" on income would be violative of Section 168 of the Constitution
of Virginia which provides, in part:

"All property, except as hereinafter provided, shall be taxed; all
taxes, whether State, local or municipal, shall be uniform upon the
same class of subjects within the territorial limits of the authority
levying the tax, . . . ."

The Virginia income tax is an excise tax and not a property tax, and it
is not a tax on the property from which the income is derived. *Ryan v.
16.

The surtax which you contemplate imposing is a tax on income only and
therefore not a tax on property. Where the tax involved is not a prop-
erty tax it is not affected by the provisions as to the uniformity of taxa-
tion contained in Section 168 of the Constitution of Virginia above quoted.*

Therefore, I am of the opinion that the class definition of taxpayers
which you propose would not be violative of Section 168 of the Constitu-
tion of Virginia.

Concerning the segregation of incomes to the State by § 58-80 of the
Code under the authority of Section 168 of the Constitution, I believe that
your bill should amend § 58-80 so as to provide that incomes are no longer
so segregated. This amendment should also spell out the levying and man-
ner of collecting the tax.

The surtax would have to be collected by the State and paid back to the
localities. Therefore, it appears to me that you should consider a similar
procedure as that followed in adopting and collecting the sales and use
taxes.

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**TAXATION—Licenses—Contractors—Subject to county tax in any year
that does more than $25,000 business therein.**

**TAXATION—Licenses—Contractors—Measure of county tax is gross re-
ceipts of preceding year.**

_HONORABLE A. HOWELL THOMAS, JR._
Commissioner of Revenue for City of Fairfax

March 6, 1970

I have received your letter of February 2, 1970, pertaining to the Fair-
fax County license tax on contractors.

On October 1, 1969, the Board of Supervisors of Fairfax County
adopted a comprehensive Business, Professional and Occupational Licens-
ing Tax, to be effective January 1, 1970. Section 25-42 of the Ordinance
imposes an annual license tax on contractors. Persons beginning business
during a year pay a tax based on their gross receipts for that year; others
pay a tax based on their gross receipts for the preceding year. There is a
$25 minimum, but no tax is imposed where gross receipts do not exceed
$1,000. No distinction is made between contractors who do and those who
do not have an office in the County. Section 25-24 A of the Ordinance pro-
vides that the term, "gross receipts," includes not only amounts earned in
the County but also "the gross receipts from all sales made or services
rendered or activities conducted from a place of business within the
County, both to persons within the County and to persons outside the
County."

_Virginia Code § 58-299 provides:_

"When a contractor, electrical contractor or a plumbing and steam
fitting contractor shall have paid the aforesaid State license and
any local license required by the city, town or county in which his principal office and any branch office or offices may be located, no further license shall be required by the State or other city, town or county for conducting any such business within the confines of this State, except where the amount of business done by any such contractor in any other city, town or county exceeds the sum of twenty-five thousand dollars in any year such other city, town or county may require of such contractor a local license, and the amount of business done in such other city, town or county in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the city, town or county in which the principal office or any branch office of the contractor is located...

You have asked:

"1. If a contractor has paid his Virginia State license tax and his local license tax in Fairfax City, in which jurisdiction that contractor's principal place of business is located (said contractor has no branch offices), and if that contractor, having paid the aforesaid 1970 licenses, does more than $25,000 of business in Fairfax County in 1970, is that contractor subject to licensing by Fairfax County under Sec. (25-42) of its ordinance, or does the ordinance on its face exceed the authority granted Fairfax County with respect to non-resident contractors, thereby vitiating the entire Sec. (25-42) with respect to any liability by non-resident contractors?

"2. If Fairfax County's ordinance in its present form is saved by the implied addition of the prohibitory and permissible features of Va. Code Sec. 58-299, may Fairfax County base its license tax on non-resident, liable contractors for the 1970 license year on their 1969 gross receipts derived from business done in Fairfax County in 1969. . .?"

Section 58-299 requires that there be a sufficient nexus, measured by the existence of an office or the doing of $25,000 of business, before a contractor becomes subject to license taxation by a locality. It is not necessary that a taxing statute by its terms exclude those who are immune from the tax.

Implicity, § 58-299 also limits the tax base to the "business done" in any locality in which a contractor does not have an office. This limitation is incorporated into the Fairfax County ordinance by § 25-24 A which permits the taxation of out-of-county business if the business is conducted from "a place of business within the County."

In answer to your first question, it is my opinion that a contractor with a principal office in Fairfax City and no branch office is subject to the Fairfax County license tax in any year in which that contractor does more than $25,000 of business in the County.

In answer to your second question it is my opinion that the measure of the Fairfax County license tax on contractors is the "gross receipts of the preceding year." Fairfax County Code, § 25-42. The provisions of § 25-81 of the ordinance would, of course, apply to a contractor beginning business in the County; the initial tax would then be based on the current year's gross receipts. These provisions are similar to those of Virginia Code §§ 58-300 and 58-301, which fix the amount of the State license tax on contractors.

TAXATION—Licenses—County, city or town may impose license greater than State if no statutory restrictions.
HONORABLE W. GARLAND TURNER
Commissioner of Revenue for Pittsylvania County

March 24, 1970

I have received your letter of March 18, asking "whether a town may set a license tax fee at a higher rate than the same enterprise or facility is taxed under state law."

The Supreme Court of Appeals has upheld a local ordinance imposing a $200 license tax on the manufacture of bottled soft drinks where the State tax was only $25.00. *Home Brewing Co. v. Richmond*, 181 Va. 793 (1943). This office has reached the same conclusion with respect to other local license taxes. Report of the Attorney General (1957-1958), p. 270. The power of a town to impose license taxes is derived from Virginia Code § 58-266.1. That section contains no restrictions on the rate of taxation. Restrictions are placed by various statutes on the rates of specific taxes. In the absence of any such restriction a town may in my opinion fix a license tax at a higher rate than that imposed by State law.

TAXATION—Licenses—Parking of trailers—No distinction between house trailer and camping trailer.

February 10, 1970

HONORABLE HARRY W. GARETT, JR.
Commonwealth's Attorney for Bedford County

This is in reply to your letter of February 7, 1970, from which I quote the following:

"I am enclosing herewith a copy of an Ordinance enacted by the Bedford County Board of Supervisors known as the "Trailer Parking Ordinance". You will observe that the same is enacted pursuant to Section 35-64.1 through 35-64.2, which said sections are found in Article 1.1 of Chapter 6 of Title 35 of the Code of Virginia of 1950, as amended.

"Since the enactment of this Ordinance, the County of Bedford has been levying and collecting a license tax on sites used for the parking of "housetrailers", as well as "camping trailers". By "housetrailers" I intend to designate the larger mobilehome used primarily as a permanent dwelling. By "camping trailer" I mean the more mobile-type associated primarily with vacation uses. In the enforcement of this Ordinance no distinction is made between a "housetrailer" and a "camping trailer".

"My inquiry is this: Does Article 1 of said Chapter 6 address itself to the regulation of the parking of "housetrailers" only? Does Article 1.1 of said Chapter give the authority to the local governing body of a county the right to regulate only "camping trailers"? If these two articles are, in fact, separate and distinct in their applicability to these two types of trailers, is Bedford County improperly collecting a license tax on "housetrailers" sites, pursuant to the above-mentioned Ordinance?"

In reply to your first question, Article 1, Chapter 6, Title 35 of the Code of Virginia defines a "trailer" to mean "any vehicle used of constructed for use as a conveyance upon highways, so designed and so constructed as to permit occupancy thereof as a dwelling or sleeping place for one or more persons." See, § 35-61 of the Code of Virginia. I do not interpret this definition to make any distinction between "house trailer" and "camping trailer" as you defined these in your letter. So long as either comes within the quoted statutory definition it is subject to regulation pursuant to the authorization of Article 1 of Chapter 6 and your first question, therefore, is answered in the negative.
In regard to your second question, as to whether Article 1.1 of Chapter 6 gives the local governing body of a county the right to regulate only "camping trailers", the answer is also in the negative. This Article defines the term "trailer" in language similar to that found in Article 1. The context in which the word "temporary" is used does not import limitation to "camping trailers." Further, the Supreme Court of Appeals expressed the view in the case of County of Loudoun v. Parker, 205 Va. 357, that the purpose of Article 1.1 is for revenue raising, as distinguished from regulation purposes. This case held that an ordinance which levies a license tax on trailer camps may also contain provisions which regulate the operation of such camps. The license fee of ten dollars per trailer lot falls within the limits of § 35-64.5 of the Code, which authorizes an annual license fee of not less than five dollars nor more than fifty dollars per trailer lot.

In view of my answering your first and second questions in the negative, no answer is required for your other question. The purpose of Article 1 is that of regulation, while the purpose of Article 1.1 is that of raising revenue. In view of the case cited herein, it appears that a county may combine the two and regulate trailer camps as well as levy fees for revenue purposes upon such camps and the parking of trailers.

The foregoing is in accordance with information furnished by this office in a telephone conversation on yesterday with Mr. H. P. Scott, Clerk of the Circuit Court.

TAXATION—Licenses—Section 58-266.1(7) does not violate Section 63 of Virginia Constitution.

POPULATION—Construction in Act of General Assembly—Construed to mean population as shown by United States census latest preceding time at which provision is applied.

June 1, 1970

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

I have received your letter of April 20, 1970, asking whether the 1970 amendment to § 58-266.1(7) of the Code of Virginia is a special or local law forbidden by Section 63 of the Virginia Constitution.

The amendment to which you refer adds the following language to § 58-266.1(7):

"... provided, however, that if the governing body of any town within a county, which county has a population of at least fourteen thousand six hundred fifty but not in excess of fourteen thousand seven hundred, shall provide that a county license tax shall apply within such town, then such license tax may be imposed within such town."

Section 63 of the Constitution provides that "[t]he General Assembly shall not enact any local, special or private law ... [f]or the assessment and collection of taxes ..." The license taxes referred to in the statute are taxes on "businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the ... county ..." It is clear that such taxes may be imposed for revenue, as well as regulatory, purposes and that the amendment is a law for the assessment and collection of taxes. See, Board of Supervisors v. American Trailer Co., 193 Va. 72 (1951).

The only question therefore is whether the amendment is a special or local law. I have reviewed the decisions in which our Supreme Court of Appeals has spoken to this point and find that the rules laid down, "are necessarily vague and general." Bohannon "Local Bills—Some Observations," 42 Va. L. Rev. 845, 863 (1956). However, I have been unable to find
any decision of that court in which the present classification has been found unconstitutional under Section 63 of the Virginia Constitution.

In the absence of any such decision of the Supreme Court of Appeals, I am of the opinion that the proviso about which you inquire is constitutional.

Your second question was:

"... If the proviso in question is not unconstitutional, what effect would an increase in population, as evidenced by the 1970 census, have on the validity of an ordinance enacted by Warren County subsequent to the effective date of the amendment to Section 58-266.1(7), but prior to the release by the Bureau of the Census of the 1970 census figure for Warren County."

By § 1-13.22 of the Code of Virginia population used in any act of the General Assembly shall be construed to mean the population of such county as shown by the United States census latest preceding the time at which the provision is applied. Therefore, I am of the opinion that the population of Warren County as of the 1960 census should be used in the application of this provision until the 1970 census is released and interim changes disregarded.

TAXATION—Licenses—Town may not impose license tax on person selling farm products grown or produced by such person.

TOWNS—Imposition of License Taxes—May not impose license taxes on person selling farm products grown or produced by such person.

July 18, 1969

HONORABLE M. W. CALDWELL, Treasurer
Town of Pamplin

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

"We have man here that has bees all over the county and brings the honey into town to sell. The buyers come to town to buy the honey. We have a license tax on merchants sales. Is he supposed to pay a license tax as other merchants, garages, gas stations & etc.?"

By Chapter 151, Acts of Assembly of 1966, wholesale and merchants' business taxes were repealed.

Section 58-266.1 of the Code of Virginia (1950), as amended, authorizes cities, towns and counties to impose license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the city, town, or county, subject to the following limitations:

* * *

"(2) No city, town or county shall impose upon or collect from any person any tax, fine or other penalty for selling farm or domestic products or nursery products, ornamental or otherwise, or for the planting of nursery products, as an incident to the sale thereof, within the limits of any such town, county or city outside of the regular market houses and sheds of such city, county or town; provided, such products are grown or produced by such person."

The keeping of bees is considered an agricultural pursuit and honey produced from bees is considered a farm product.

From the facts stated by you, it appears that the person in question produces the honey which he later sells in town.

I am therefore of the opinion that the town is prevented from levying a local license tax on the seller of the honey by paragraph (2) of Section 58-266.1 of the Code.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Licenses—Trailer camps—Requirements of § 15.1-504(a), (b) and (c) must be complied with.

ORDINANCES—Counties—Not required to publish verbatim copy thereof when giving notice required by § 15.1-504.

June 4, 1970

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

I refer to your letter of May 15 from which I quote:

"Question No. 1: Is this Trailer Ordinance an Ordinance imposing a county license tax on businesses, within the meaning of Section 15.1-504 of the Code of Virginia, as amended, so that the special requirements (a), (b), (c), in this Section of the Code must be complied with?

"Question No. 2: If (a), (b) and (c), of this Section of the Code must be complied with in order to pass this Ordinance, is it permissible under the above Section of the Code to publish a descriptive notice of the intention to propose this Ordinance for passage, with a statement that a copy of the full text of the Ordinance is on file in the Clerk's Office, or must the entire Ordinance be published under sub-section (b)?"

The Trailer Ordinance to which you refer imposes an annual license tax "upon any person engaged in the business of operating a trailer camp or trailer park in Nelson County . . . ." It is my opinion that the requirements of Virginia Code § 15.1-504(a), (b) and (c) must be complied with.

In order to answer your second question, I call your attention to the third paragraph of § 15.1-504:

"Except as otherwise authorized by law, no such ordinance shall be passed until after descriptive notice of an intention to propose the same for passage shall have been published once a week for two successive weeks prior to its passage in some newspaper published in the county, and if there be none such, in some newspaper published in an adjoining county or a nearby city and having a general circulation in the county. The publication shall include a statement that a copy of the full text of the ordinance is on file in the clerk's office of the circuit court of the county."

The requirement in the third paragraph that the publication include a statement that a copy of the full text is on file elsewhere indicates to me that publication does not necessarily require a verbatim copy of the ordinance. Accordingly, I am of the opinion that the procedure suggested by your second question is permissible.

TAXATION—Local License—May be levied by county on research and development firms.

COUNTIES—Authority—to impose license taxes on research and development firms.

March 9, 1970

HONORABLE VINCENT F. CALLAHAN, JR.
Member, House of Delegates

I have received your letter of February 27, in which you ask whether research and development firms are excluded from the Fairfax County gross receipts tax as manufacturers under Virginia Code § 58-266.1.
Section 25-44 of the Fairfax County Business, Professional and Occupational License Tax provides:

"Every person conducting or engaging in one or more of the following professions, occupations or businesses shall pay for the privilege an annual license tax of $0.20 for each one hundred dollars of gross receipts from the preceding year, the minimum annual license tax shall be $25.00. No license shall be required where gross receipts do not exceed $1,000.00.

"Scientific research and development service"

Virginia Code § 58-266.1 provides:

"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:

(4) No city, town or county shall levy any license tax on a manufacturer for the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture, whether the same be measured by gross receipts or otherwise, any city or town charter provisions to the contrary notwithstanding;

You will note that the exemption extends only to the manufacture of "goods, wares and merchandise" sold at wholesale at the place of manufacture. It is my understanding that the product of a research and development firm is an intangible which would be neither goods nor wares nor merchandise. The intrinsic value of any tangible product of such a firm would lie in its usefulness for testing purposes rather than in the normal use to which such a product would ultimately be put.

Furthermore, the exemption applies only to sales at wholesale. I am unable to extend the term, "at wholesale," to the sale of a service or even to the sale of a product which would not normally be resold by the purchaser.

Accordingly, it is my opinion that Virginia Code § 58-266.1 does not limit the power of localities to impose license taxes on research and development firms.

TAXATION—Local License—Trailers not constructed to permit occupancy, and portable buildings assembled on site, are not subject to.

June 24, 1970

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

By your letter of June 5, you ask whether a local license tax enacted pursuant to Title 35, chapter 6, article 1.1 of the Virginia Code, may be imposed on certain office trailers and portable buildings.

None of the trailers to which you refer has a sleeping place, kitchen or lavatory. They are not, in my opinion, "so designed and so constructed as to permit occupancy thereof as a temporary dwelling or sleeping place for one or more persons." Va. Code § 35-64.3.

The portable buildings are assembled on-site. I am unable to call them "vehicles."

In my opinion neither the office trailers nor the portable buildings come
within the definition of “trailer” set forth in § 35-64.3. They are not subject to the license tax.

TAXATION—Local License Tax—City council may exempt contractors working on Federal reservation.

CITIES—Taxation—City council may exempt contractors working on Federal reservation from local license tax.

TAXATION—Local License Tax—Not affected by constitutional provisions as to uniformity of taxation.

December 30, 1969

HONORABLE LESTER E. SCHLITZ
Member, House of Delegates

This is in reply to your letter of December 24, 1969, which reads as follows:

"Under its license tax ordinance, the City of Portsmouth imposes a business license tax on all persons doing business within the City of Portsmouth specified in the ordinance. This ordinance is typical of similar ordinances enforced throughout Virginia. Specifically, the ordinance imposes a license tax on contractors based on gross receipts. By authority of the Buck Act (4 U.S.C.A. Sec. 106), this taxing power can be extended on to Federal reservations. "Recently, the license inspector for the City of Portsmouth discovered a number of contractors doing business on construction projects within certain federal reservations situated within the City of Portsmouth. Under the authority of the above mentioned statutes, he assessed a business license tax on these contractors. Some contractors have paid the tax as assessed; others have protested it; and still others have been fined by the Municipal Court for failing to comply with the license tax ordinance. In view of these circumstances, does the City Council now have authority to relieve these contractors doing work on Federal reservations of the payment of the license tax? If the City Council does choose to relieve these contractors of payment of the license tax, must it also relieve contractors doing work not on Federal reservations of the payment of the tax at the same time?"

The tax involved is not a property tax and therefore is not affected by the provisions as to uniformity of taxation contained in Section 168 of the Constitution of Virginia. Town of Ashland v. Supervisors, 202 Va. 409, 413, 117 S. E. 2d 679 (1964).

The imposition of the business license tax on all persons doing business within the City of Portsmouth specified in the ordinance, excluding those doing work on a Federal reservation, would involve no discrimination as it would apply equally to all persons included in the ordinance.

Therefore, I am of the opinion that the City may remove the contractors doing work on Federal reservations from the general class of contractors and from the payment of the tax and not relieve all other contractors from payment of the tax.

TAXATION—Local Licenses—Manufacturers and processors—Drawing distinction between.

HONORABLE W. THEODORE MYRICK
Commissioner of the Revenue for the City of Suffolk

This is in reply to your letter of May 22, 1969, which reads as follows:
"The City of Suffolk imposed during the fiscal year beginning July 1, 1968, and ending June 30, 1969, a license tax on manufacturers and processors based on gross receipts for the preceding year. Under state law, manufacturers cannot be taxed after January 1, 1969, on goods, wares and merchandise manufactured and sold at wholesale at the place of manufacture. However, the city desires to retain its license tax on processors. The question of what is manufacturing and what constitutes processing arises.

"Since the revenue involved is of considerable importance to the city, I am writing to respectfully request that you give me definitions which will distinguish manufacturing from processing.

"Tea leaves from different sections of the world are shipped to Suffolk and different blends of the tea leaves are mixed and put in paper bags (not cut or changed) and sold at wholesale for the consumer to make tea by the addition of hot water. Would you classify this as manufacturing or processing?"

The tea operation in Suffolk which you describe has always been classified as manufacturing for State tax purposes, and it is hard to see how it can now be classified as non-manufacturing.

All manufacturers are processors and almost all processors are manufacturers. The Virginia Supreme Court of Appeals has held that curing hams is manufacturing. (Commonwealth v. Meyer), 180 Va. 466 (1942); but that pasteurizing milk is not manufacturing. (Richmond v. Dairy Co.), 156 Va. 63, 75 (1931).

The line of distinction between a manufacturer on the one hand and a processor on the other is too finely drawn for practical use in administering a tax intended to apply to processors and not to manufacturers. Therefore, I am unable to attempt to draw a distinction between manufacturing and processing as applied to the tea operation described by you.

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TAXATION—Local Tax On Consumers—Town tax supersedes county tax on consumers of utility services.

TOWNS—Local Tax On Consumers—Town tax supersedes county tax on consumers of utility services.

HONORABLE RACHAEL P. BROWN, Treasurer
Town of Blacksburg

July 18, 1969

This is in reply to your letter of July 14, 1969, in which you ask my opinion as to the interpretation of that portion of Section 58-617.2 of the Code of Virginia of 1950, as amended, which states:

"Any ... county tax imposed hereunder shall not apply within the limits of any incorporated town located within such county, which town now or hereafter imposes a town tax on consumers."

You ask if a county imposes a tax on the consumers of utility services and a town located within the county subsequently imposes such a tax, would the town tax replace and supersede the county tax.

I am of the opinion that the town tax would replace and supersede the county tax.

The language in Section 58-617.2 clearly provides that a county tax on consumers of utility services would not apply within the limits of any incorporated town located in such county if the town has subsequently imposed a town tax on such services provided that such town:

(1) Provides police or fire protection, and water or sewer or
(2) Constitutes a special school district and is operated as a
special school district under a town school board of three members appointed by the town council.

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**TAXATION—Motor Vehicles—Sales and use tax—Non-resident serviceman subject to tax.**

**TAXATION—Sales and Use Tax—Motor vehicles—Non-resident serviceman subject to tax.**

Honorable C. H. Lamb, Commissioner
Division of Motor Vehicles

August 28, 1969

This is in reply to your letter of August 20, 1969, relative to the Virginia Motor Vehicle Sales and Use Tax. Specifically, you present three questions which I shall quote and consider in the order presented.

"1. Must a nonresident serviceman stationed in Virginia as a result of military or naval orders, or who is absent from his state of domicile under these same orders, who purchases a vehicle in Virginia, register that vehicle in Virginia or does he have the election of registering it elsewhere?"

A nonresident serviceman stationed in Virginia under the circumstances outlined would have an election as to whether he registered his motor vehicle here or in the State of his residence or domicile. Under the United States Code, Title 50 USC App. 574, § 514, provides that any such serviceman shall not be deemed to have lost a residence or domicile in any State solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of any other State. Paragraph (2) (b) thereof makes this applicable to motor vehicle license fees. This office has always interpreted this law, generally known as the Soldiers' and Sailors' Civil Relief Act, as permitting a nonresident serviceman stationed in this State solely because of military or naval orders to register his motor vehicle in his home State, if he so elects.

"2. If the serviceman described above does register the vehicle in Virginia, does he then become subject to the tax?"

The motor vehicle sales and use tax prescribed by § 58-685.12, under Chapter 12.1, Title 58 of the Code of Virginia, is levied and imposed upon the sale of every motor vehicle sold in this State and upon the use in this State of any motor vehicle, with exceptions not here applicable. The tax shall be paid by the purchaser or the user of such motor vehicle and collected by the Commissioner at the time the owner applies to the Division of Motor Vehicles for and obtains a certificate of title.

In the case of Sullivan v. United States, 23 Law Ed. 2d 182, decided May 26, 1969, the Supreme Court of the United States held that § 514 of the Soldiers' and Sailors' Civil Relief Act does not exempt servicemen from the sales and use tax imposed by the State of Connecticut. In arriving at its decision the court concluded that the named section had reference to annually recurring personal property taxes and motor vehicle registration fees to the exclusion of such sales and use taxes. The Sullivan case has been carefully examined in light of the Connecticut law and the Virginia law in respect to sales and use tax and, in my opinion, the principles expressed in that case apply equally to the Virginia motor vehicle sales and use tax.

"3. Does a serviceman as described above who purchases a vehicle in a state other than Virginia and subsequently registers the vehicle in Virginia become subject to the tax?"

For the reasons expressed in my reply to the previous question, this question is also answered in the affirmative.

TAXATION—Occupational Tax—Collectible from local, State or Federal employees.

TAXATION—Occupational Tax—Not applicable to persons employed on Federal Reservation over which United States has exclusive jurisdiction.

December 19, 1969

HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

This is in reply to your letter of December 11, 1969, which reads in part as follows:

"It is respectfully requested you kindly render an opinion relative to the decision of December 1 of the Supreme Court of Appeals as to constitutionality of the City of Richmond application of the so-called 'occupation tax.'

"(1) Is the occupation tax to be collected from each individual employee working for local, state or federal governments provided they make more than $3,100 per year, and work within a community at least 120 days during the year?

"(2) Would members of the armed forces of the United States on active duty in Virginia, living off military reservations and declaring themselves domiciliary residents of Virginia by all indices of such, be liable to such a tax?

"(3) Would the same member of the armed forces residing on a military reservation, on active duty and declaring themselves to be Virginia citizens, be liable for such a tax?"

I shall answer your questions seriatim:

(1) The purpose of the Richmond ordinance is to raise revenue by levying and collecting an occupation tax. The City Council determined that the taxpayer class should include all persons engaged in an occupation for profit, other than those who earn less than $3,100 or work less than 120 days per year and those who pay a license tax. The tax is a privilege tax as distinct from a property tax. The tax, therefore, is collectible from local, State, or Federal employees.

(2) (3) The answers to your second and third questions depend upon whether or not the member of the armed forces is employed in a Federal Reservation over which the United States has exclusive jurisdiction. In the event he is so employed, the tax would not apply; as in such instances, he would not be engaged in any occupation in the city or county.

TAXATION—Partial Abatement and Proration—No authority to prorate on lake, dam, boat docks and appurtenances destroyed or damaged by hurricane.

December 1, 1969

HONORABLE C. PEMBROKE PETTIT
Commonwealth's Attorney for Louisa County
REPORT OF THE ATTORNEY GENERAL

This is in reply to your letter of November 21, 1969, in which you request my opinion whether the Board of Supervisors may prorate taxes on a lake, dam, boat docks and appurtenances destroyed or damaged by hurricane "Camille".

The Board has no authority to prorate these taxes. Under Sections 58-811.1 and 58-811.2, the authority to prorate taxes extends only to buildings which are damaged or destroyed. Since no buildings are involved in the damages stated, the Board has no authority to prorate the taxes nor waive the penalty and interest on the taxes.

TAXATION—Payroll Tax—Prohibitions against levying. July 24, 1969

HONORABLE ELEANOR P. SHEPPARD
Member, House of Delegates

This is in reply to your letter of June 26, 1969, in which you enclosed a proposed ordinance of the City of Richmond and presented the following question:

"It would be much appreciated if you would give me your opinion on the enclosure. Is it in conflict with Section 58-851.2 of the Code of Virginia and also Chapter 2, Section 2.02 (a) of the Charter of the City of Richmond?"

Section 58-851.2 of the Code of Virginia of 1950, as amended, reads, in part, as follows:

"No political subdivision of this State shall impose, levy or collect, directly or indirectly, any tax on payrolls. All such taxes in force on the effective date hereof are repealed." (Emphasis supplied.)

Chapter 2, Section 2.02 (a) of the Charter of the City of Richmond reads, in part, as follows:

". . . provided, however, that nothing herein contained shall be construed as permitting the city to levy and collect directly or indirectly a tax on payrolls." (Emphasis supplied.)

Both § 58-851.2 of the Code of Virginia and Chapter 2, § 2.02 (a) of the Charter of the City of Richmond prohibit the city from directly or indirectly levying a tax on payrolls.

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 considered. In the absence of any such relevant authority, resolution of this matter is by no means free from doubt, however, I am constrained to believe that the tax sought to be imposed by the ordinance in question would constitute at least an indirect levying of a tax on payrolls and would thus fall within the prohibitions of the above mentioned provisions of the Virginia statute and the Charter of the City of Richmond.

TAXATION—Penalty for Delinquent Taxes—Effective date. April 20, 1970

HONORABLE J. H. JOHNSON
Treasurer of Roanoke City

I have received your letter of April 15.

In 1968, the Roanoke City Council enacted Ordinance No. 18065, providing for the payment of personal property taxes on or before May 1 of
ch year, with a five per cent penalty for late payment. You were sub-
sequently advised by this office that the penalty could be imposed only
on taxes delinquent after December 5. See Report of the Attorney General
19138, providing for the payment of personal property taxes in install-
ments on May 1 and June 15 of each year, with the penalty to be imposed
on taxes unpaid as of the latter date. The ordinance was designated an
emergency measure. By bringing the tax under the provisions of Virginia
Code § 58-847, the City validated its penalty.

You have asked:

"1. Does Section 14 of Senate Bill # 81, passed in the last session
of the Legislature allow Roanoke City Council to amend, re-ordain,
and pass an emergency ordinance becoming effective upon date of
passage, requiring the City Treasurer to impose a 5% penalty for
the nonpayment of a 1970 Personal Property Tax on or before June
15, 1970?

"2. In case City Ordinance # 19138 is not proper as an emergency
ordinance, did the Legislature intend that the Roanoke City Charter
permit such ordinance to automatically become effective in 30 days or
did the Legislature intend that a new ordinance be drawn?

"3. Please clarify the legal terminology in Sections 5 and 6 and
advise whether or not the 5% penalty in Section 5 be imposed on
June 15, 1971, and in Section 6 be imposed on June 15, 1970?"

Senate Bill No. 81, to which you refer, amended the charter of the City
of Roanoke. Section 13 thereof provides that the Council may enact emer-
gency measures, to be effective immediately. The effective date provisions
of § 14 of the charter apply only to "the general compilation, codification
or recodification of ordinances . . . . ," which I construe to refer to the en-
actment of a new city code. It is my opinion that Ordinance No. 19138
became effective on April 13, 1970, the date of its passage.

No penalty is imposed by § 5 of the ordinance. The penalty imposed by
§ 6 is, in my opinion, imposed on taxes delinquent after June 15 of 1970
and of subsequent years.

TAXATION—Personal Property—Both county and incorporated town lo-
cated therein may levy on same personal property.

November 18, 1969

HONORABLE DON E. EARMAN
Member, House of Delegates

This is in reply to your letter of November 11, 1969, which reads as
follows:

"I would like to inquire whether or not, in your opinion, a County
and an incorporated Town located therein can each levy a tangible
personal property tax against the same personal property located
within the limits of the Town, pursuant to Section 58-9 of the Code
of Virginia, 1950, as amended."

A county and an incorporated town therein may each levy a tangible
personal property tax on the same personal property located within the
town as this would not be double taxation. See, County of Brunswick v.
Peebles & Purdy Co., 138 Va. 348, 122 S.E. 424 (1924). The exercise of
this power, however, is subject to such limitations as may be placed upon
it from time to time by the General Assembly.
TAXATION—Probate—Real estate of Indian living on reservation—Subject to tax if located off reservation.

TAXATION—Personal Property—Intangibles—Situs for purpose of taxation—Limited by business situs doctrine.

TAXATION—Probate—Personal property of Indian living on reservation—Bank deposits outside reservation not subject to.

This is in reply to your letter of January 16, 1970, requesting my opinion concerning the estate of the late Chief O. T. Custalow. The relevant portion of your letter is as follows:

“I am writing to ask your opinion if the estate of the late Chief O. T. Custalow, of the Mattaponi Indian Reservation in this County is subject to State and County probate tax. I realized that nothing on the Reservation is subject to tax. His estate is valued at approximately $150,000.00, consisting primarily of money in various banks and some real estate in this County outside of the Reservation.”

Section 58-66, Code of Virginia (1950), as amended, provides for a tax on the probate of every will or grant of administration based on the value of the estate, real, personal or mixed, passing by such will or by intestacy of the decedent. Section 58-67 provides that the value of the decedent’s real estate is to be included in the value of the estate for the purpose of determining the amount of the probate tax. Section 58-68 provides that until the probate tax is paid, no one shall be permitted to qualify and act as executor or administrator.


“In the case of George F. Custalow v. Commonwealth, the Circuit Court of King William County decided October 1919 (Recorded E.F. 20) and held that an Indian residing on the reservation of the Mattaponi Tribe was not subject to taxation either by the County of King William or the Commonwealth of Virginia, but that the personal property owned by an Indian off the reservation was liable to taxation.”

I am of the opinion that the value of the real estate owned by the late Chief O. T. Custalow is subject to the probate tax. I am also of the opinion that only the value of personal property located off the reservation may be included in determining this tax.

While the tax in question purports to be levied on probate, it is nevertheless based on the value of property. A general deposit in a bank gives rise to a debtor-creditor relationship and is an intangible. 51 Am. Jur. § 479. According to 51 Am. Jur. § 463, a “general rule of very extensive application is that the situs of intangibles for the purpose of property taxation is at the domicile of the owner, and only there.” This rule is limited by the “business situs” doctrine. Quoting from 51 Am. Jur. § 469:

“The doctrine is ordinarily formulated so as to limit its application to cases where the possession and control of the property right have been localized in some independent business or investment away from the owner’s domicile, so that its substantial use and value primarily attach to and become an asset of the outside business.”

I am not unmindful of the fact that a different rule is applied to determine the situs of a debt for the purpose of determining the proper
jurisdiction for the probate of wills under § 64.1-75. See Dominion Bank v. Jones, 202 Va. 502, 505.

While in the larger sense Chief Custalow was a domiciliary of Virginia by virtue of the bestowal of citizenship upon his tribe by the Commonwealth, nevertheless, the reservation of the Mattaponi has historically been treated in effect as a separate domicile for the purposes of taxation. As stated in the opinion of the Attorney General referred to above, "the fact that the Commonwealth has bestowed citizenship upon them (the Mattaponi) does not divest them of the rights reserved to them under the early acts of the General Assembly". Therefore, it is my opinion that in order to scrupulously observe the protocol of our Indian policy, only the value of that portion of Chief Custalow's estate consisting of real estate should be subjected to the probate tax, State and county, unless facts exist which would bring the bank deposits squarely within the "business situs" doctrine stated above.

TAXATION — Property Owned by Educational Institutions — When not exempt from taxation.

July 7, 1969

HONORABLE HUNTER SHOMO
Commissioner of the Revenue for Augusta County

This is in reply to your letter of May 23, 1969, in which you request my opinion whether Bridgewater College is subject to real estate and tangible personal property taxes on its farm property.

Your letter reads in part as follows:

"The farm, owned by the college and located at Bridgewater, is partially in Augusta County and partially in Rockingham County. A portion of the products produced on the farm is used by the college and a portion is sold on the market. The profit earned is put back into the educational program at the college.

"We shall appreciate your opinion regarding the local tax status of the property."

It is the use to which property is put, and not the use to which profits which are realized from such property are put, which determines whether it shall be exempt or not. It is the buildings, together with such additional land as may be reasonably necessary for the convenient use of such buildings, wholly devoted to educational purposes, which alone are exempt from taxation under our constitution. It is not lands or buildings, the rents or profits of which are applied to educational purposes, that are exempt. Commonwealth v. Hampton Institute, 106 Va. 614, 621-622.

Paragraph (d) of Section 183 of the Constitution, enacted as part of Section 58-12 (4) of the Code of Virginia, is as follows:

"Property owned by public libraries, incorporated colleges or other incorporated institutions of learning, not conducted for profit, together with the endowment funds thereof not invested in real estate. But this provision shall apply only to property primarily used for literary, scientific or educational purposes or purposes incidental thereto. It shall not apply to industrial schools which sell their product to other than their own employees or students." (Italics supplied.)

I assume from your letter that the property in question is not used primarily for "literary, scientific, or educational purposes or purposes incidental thereto." Therefore, it is my opinion that it is not exempt from taxation under the above quoted constitutional provision. See opinion of this office dated April 25, 1949, to the Honorable Robert P. Jackson, Com-
HONORABLE BILLY K. MUSE
Commissioner of Revenue for Roanoke County

March 6, 1970

I have received your letter of March 2, asking:

"Exactly what constitutes a taxable leasehold? Must the lease be written and recorded? Is monthly rental for an unspecified term that may be terminated at any time by either party considered a taxable leasehold? If so, what is the basis for value? The State Code of Virginia requires all property, both real and personal, to be assessed at a fair market value. In the case of a leasehold, is the value of the property leased taxable, or is the yearly value of the lease used for a basis for taxation? If the rental value is used for a basis for taxation, should the full yearly rental be used, or should the County rate of 40 per cent of appraised value be used for the assessment?"

Your question relates to "the various leasehold interests in the property owned by the City of Roanoke now being used as a municipal airport and the property incident thereto also owned by the City of Roanoke." This office has previously ruled that the County was required to tax such leasehold interests if the City was not subject to taxation on such property. Report of Attorney General (1965-1966) at 269.

A leasehold is taxable in Virginia if the fee is exempt from assessment to the owner. Virginia Code § 58-758. There is no requirement in the statute that the lease be in writing, even if the term is for more than one year. See Smith v. Payne, 153 Va. 746 (1930).

In Shaia v. Richmond, 207 Va. 885 (1967), the Court assumed at 892, n. 6, that a lease would continue for its full term, notwithstanding options for termination. Following this line of reasoning, the lease should be assumed to continue for so long as it will be to the mutual benefit of both parties. This is a question of fact which should be determined on the basis of the prior experience of the parties and of those similarly situated. This issue is identical with that posed in a long line of federal cases, cited at Prentice-Hall Federal Taxes Par. 11,853, where the taxpayer was attempting to amortize leasehold improvements over a lease having a shorter term than the useful life of the improvements.

The Shaia case held that "the value of the . . . leasehold interest should be appraised for tax purposes in relation to the potential income a buyer could derive from his right to use and occupy the premises." 207 Va. at 896. If it appears that the lease will continue for the remaining useful life of the premises, the value of the leasehold will approach the value of the fee, or that portion thereof subject to the lease. The value of the fee is a maximum value and should be discounted for any estimated salvage value as well as, if the lease is not in writing and recorded, for the risk of termination by the lessor (Virginia Code § 55-222) or by creditors or purchasers (Virginia Code §§ 11-12 and 55-96).

The County's assessment ratio should be applied to the fair market value of the leasehold before extending the tax.
HONORABLE JAMES W. RENNEY
Commissioner of Accounts for Sussex County

This is in reply to your letter of May 21, 1969, which reads in part as follows:

"The question arises whether we should pay a double recordation tax on a conveyance of standing timber, or other real estate for that matter, where following the notary acknowledgments there is inserted or typed the following language:

"For value received, the undersigned does hereby assign, grant, and convey the foregoing timber Deed and agreement to the Bank of Sussex and Surry, Wakefield, Virginia, to secure the purchase money this day of , 1969.

"Witness the following signature and seal.

.................................. (SEAL)

"Following that is a second notary acknowledgment for the grantee in the deed.

"If a second recordation tax should be paid, would there be any difference if this language were inserted in the body of the deed itself before the grantors executed it?"

I am of the opinion that the quoted language when inserted in the conveyance of standing timber is an assignment of the timber deed and agreement and therefore subjects the instrument to a double recordation tax under Section 58-58 of the Code as a contract relating to real or personal property. This same conclusion applies whether the language is inserted in the body of the timber deed and agreement or after the acknowledgment.

TAXATION—Recordation—Bill of sale of personal property subject to the tax.

HONORABLE HARRY B. WRIGHT, Clerk
Circuit Court of Rockbridge County

This is in reply to your letter of July 18, 1969, which reads, in part, as follows:

"A Deed of Trust, securing real and personal property, was presented for recordation and upon inspection it was found that a 'Bill of Sale' for personal property, duly acknowledged, was attached and referred to in the Deed of Trust.

"Please advise this Office if a recordation tax should be collected on the 'Bill of Sale.'"

I am of the opinion that the recordation tax should be collected on the Bill of Sale. There were two instruments involved in this case; the Deed of Trust which was subject to the recordation tax under Section 58-55 of the Code and the Bill of Sale for the personal property which was subject to the tax under Section 58-58 of the Code as a contract relating to personal property.

TAXATION—Recordation—Contract relating to real property—Agreement not to encumber or transfer property—Basis for tax.
HONORABLE CARL E. HENRICH, Clerk
Corporation Court, City of Charlottesville

March 6, 1970

By letter of February 20, you have sent me a form of "Agreement Not to Encumber or Transfer Property," together with a letter from Thomas J. Michie, Jr., a local attorney. You have asked for my opinion as to the amount of recordation tax due on the filing of the agreement.

The agreement is clearly a contract relating to real property and, as such, is subject to taxation under Virginia Code § 58-58. That section provides that the tax is based on the "consideration or value contracted for." Paragraph 3 of the agreement provides:

"This Agreement is expressly intended for the benefit and protection of the Bank and all subsequent holders of the note or notes, contract or contracts described above. Borrower warrants and represents that Borrower owns the above described real property."

Mr. Michie has stated his belief that the value of the agreement is nominal because of the difficulty of enforcing it. He further states that the agreement creates no security interest in land.

By its terms, the agreement is for the "protection" of the noteholder. It is my opinion that the consideration bargained for would be the unpaid principal and interest of the note or notes. Accordingly, the recordation tax should be computed on that amount.

TAXATION—Recordation—Conveyance to joint ownership where consideration paid is subject.

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

March 5, 1970

I have received your letter of February 16, 1970. You ask whether a deed transferring property from the name of a husband to that of the husband and his wife as joint tenants is subject to the full recordation tax. The consideration recited in the deed is "One Dollar"; no mention is made of "love and affection." You do not say whether the deed is designated a deed of gift.

Virginia Code § 58-54 sets forth two separate State recordation taxes. Paragraph (a) imposes on every non-exempt deed a tax based on "the consideration of the deed or the actual value of the property conveyed, whichever is greater." Paragraph (b) provides for a tax "on each deed, instrument, or writing by which any lands, tenements or other realty sold shall be granted, assigned, transferred, or otherwise conveyed . . . ." This latter tax is based on "the consideration or value . . . ." In addition, Virginia Code § 58-65.1 permits a locality to impose an additional recordation tax.

It is my opinion that the conveyance to joint ownership is subject to the State tax under § 58-54(a) and the local tax under § 58-65.1. The tax imposed by § 58-54(b), by its terms, applies only to realty sold and would not be applicable unless consideration was paid for the transfer. If there was a sale, i.e., if consideration was paid, the tax under § 58-54(b) would be measured by "the consideration or value," which I construe to mean the greater of the consideration or the value of the property.

Where, as in the instant case, the deed is not clearly a deed of gift, I believe that it would be appropriate for you to require, as a condition to not imposing the tax prescribed in § 58-54(b), an affidavit of the parties that there was no consideration for the transfer.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Deed conveying house subject to the tax.

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

This is in reply to your letter of June 30, 1969, which reads in part as follows:

"I enclose a copy of a deed dated June 30, 1969 from W. C. Jackson and wife to William T. Reed, III and wife in which a dwelling without any land was conveyed. You will note that the grantees have until July 1, 1972 in which to remove the dwelling from the premises.

"This deed is being recorded and as the dwelling and no land is conveyed, is this deed subject to the grantor tax as fixed by Section 58-54?"

In my opinion the deed is subject to the recordation tax under Section 58-54 (a) and (b) of the Code.

The general principle of law is that a building permanently affixed to the freehold becomes a part of it and prima facie a house is real estate. The house in this case being real estate, its conveyance by deed is subject to the tax.

TAXATION—Recordation—Deed conveying property to political subdivision of State—Not subject to.

HONORABLE B. B. ROANE, Clerk
Circuit Court of Gloucester County

I received your letter of May 11 in which you ask whether the tax imposed by § 58-54(b) of the Virginia Code applies to a deed transferring property to the Virginia Institute of Marine Science.

The Institute is an agency of the State of Virginia, created by Chapter 9 of Title 28.1 of the Code. Section 58-64 of the Code exempts from the recordation tax imposed by § 58-54, “any deed conveying property to the State or to any . . . other political subdivision of this State . . . .”

It is my opinion that the recordation tax provided for by § 58-54(b) does not apply to a conveyance to the Virginia Institute of Marine Science.

TAXATION—Recordation—Deed conveying property to Young Men's Christian Association subject to tax.

HONORABLE AUSTIN EMBREY, Clerk
Circuit Court of Nelson County

This is in reply to your letter of July 22, 1969, in which you asked my opinion as to whether a deed conveying property to the National Board of Young Men's Christian Associations is subject to the State Recordation tax.

On March 19, 1957, this office held that, "A recordation tax is not a tax on property and, as such, does not come within the provisions of Section 183 of the Constitution." See, Report of the Attorney General (1956-1957), p. 262. It follows, therefore, that it does not come within the provisions of § 55-12 of the Code of Virginia. Section 58-64 of the Code gives the exemptions from the State recordation tax. This list of exemptions does not include the National Board of Young Men's Christian Associations or similar organizations.
I am of the opinion, therefore, that a deed conveying property to the Young Men's Christian Associations is subject to the usual recordation tax.

TAXATION—Recordation—Deed from wife to husband of her interest in tenancy by entirety after divorce—Assessed on value of her interest equal to one-half.

HONORABLE CALVIN W. FOWLER
Member, House of Delegates

By your letter of May 8, 1970, you have asked my opinion as to the amount on which the State recordation would be based under the following circumstances:

“A certain parcel is conveyed to husband and wife, or the survivor, wherein part of the consideration was the assumption of an outstanding deed of trust and upon which the recordation tax was paid. Husband and wife are subsequently divorced and wife conveys her undivided one-half interest in the property to husband for the consideration that he assume the obligations of the deed of trust which was previously assumed in the original deed referred to above.”

Under these facts, I am of the opinion that the assumption by the husband of an obligation for which he is already primarily liable does not constitute consideration to the wife within the meaning of Virginia Code § 58-54. If the deed conveys the property from husband and wife as tenants by intestacies to husband, the tax will be imposed on the full value of the property. If the deed simply conveys the wife's interest to the husband, the tax will be imposed on the value of her interest. Before a divorce a vinculo that interest must be actuarly determined. After such a divorce it is a tenancy in common having a value equal to one-half of the value of the property. See Virginia Code § 20-111.

TAXATION—Recordation—Deed of trust—Modified deed with amendment—Computed on full amount of new trust.

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

I have received your letter of April 27, enclosing a modified deed of trust and an amendment thereto. You ask my opinion as to the proper amount on which to base the tax imposed on the recordation of the amendment.

The amendment itself is not a supplemental deed of trust within § 58-60 of the Virginia Code, for its sole purpose is not to secure, “the payment of the amount contracted for in the original instrument . . . .” Neither does it come within the exception of the third paragraph of § 58-55 of the Code, for the modified deed of trust did not provide for the issuance of, “additional bonds, unlimited in amount . . . .”

It is therefore my opinion that the recordation tax should be computed on the full amount of the new trust, i.e. $524,945.55.

TAXATION—Recordation—Deed of trust and assignment subject to tax.

NOTARIES PUBLIC—Acknowledgement—Deficient if not in substantial compliance with form in § 55-113.
REPORT OF THE ATTORNEY GENERAL

January 16, 1970

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

This is in reply to your letter of January 7, 1970, which reads as follows:

"I have received a deed of trust in the amount of $7,757.10 in this office for recordation purposes. A copy of same is enclosed for your information.

"You will note after the printed part of the trust and Notary certificate, the Beneficiary assigns the deed of trust without recourse over to another party and this is acknowledged before a Notary Public.

"The attorney mailing in the instrument does not feel that a recordation tax should be charged on the assignment while I feel that the Code of Virginia and previous Attorney General Opinions strongly indicate that a tax should be charged on the original instrument based on $7,757.10 and an additional tax on $7,757.10 for the assignment. Am I correct in this decision of mine?

"I also question the Notary acknowledgement of the assignment as it does not indicate the State and County or who did the swearing and subscribing before the Notary. Should the Notary acknowledgement be more complete?"

The deed of trust and assignment are both subject to the recordation tax. The deed of trust is taxable under Section 58-55 of the Code and the assignment under Section 58-58 of the Code as a contract relating to property.

The Notary acknowledgment is not in substantial compliance with the form required by § 55-113 of the Code and therefore is deficient. It should be resubmitted in the form required by § 55-113.

TAXATION—Recordation—Deed of trust from industrial development authority—Not subject to tax.

April 22, 1970

HONORABLE GEORGE E. HOLT, JR., Clerk
Circuit Court of Botetourt County

I have received your letter of April 7, in which you ask whether deeds of trust conveying realty from an industrial development authority, created pursuant to Virginia Code § 15.1-1373, are subject to State and local recordation taxes.

Virginia Code § 15.1-1376 provides that industrial development authorities are political subdivisions of the State. This office has previously ruled that housing authorities were exempt from the recordation tax imposed by Virginia Code § 58-55 on deeds of trust. Opinions of the Attorney General (1951-1952), p. 163. It is my opinion that industrial development authorities are likewise exempt.

The local tax permitted by Virginia Code § 58-65.1 applies only when a State tax is imposed.

TAXATION—Recordation—Deed of trust subject to tax.

October 17, 1969

HONORABLE SHELBY J. MARSHALL, Clerk
Circuit Court of Albemarle County

This is in reply to your letter of September 25, 1969, which reads as follows:
"I am enclosing herewith copies of two instruments which were this date presented to me for recording. I have taxed the Deed of B & S on the full consideration, and have charged only a fee on the Deed of trust, given as additional security. However, since there is a possibility that the $150,000.00 may at some future date be payable to the trustees, I question whether or not the fee only is proper. "The Attorneys pointed out that the total amount of deferred purchase money, amounting to $946,000.00 was fully secured by the first instrument with a Vendors Lien (deed of B & S) which was why they felt that the $150,000.00 instrument was clearly additional security. "Would you be kind enough to read this instrument and give me your opinion as to whether or not I should have taxed this deed of trust on the basis of $150,000.00."

The deed of trust is not a supplemental deed of trust as referred to in Section 58-60 of the Code. The original instrument was a deed of bargain and sale for a consideration. No tax was paid on the vendors lien. Therefore, the recordation tax should be charged on the deed of trust on the basis of $150,000.00.

TAXATION—Recordation—Deed of trust to secure alimony payments—Formula used. January 29, 1970

HONORABLE B. C. GARRETT, JR., Clerk
Circuit Court of King William County

This is in reply to your letter of January 16, 1970, requesting the opinion of the Honorable Robert Y. Button regarding "the proper amount to base the recordation tax on" for a certain deed of trust, a copy of which was attached to your letter.

In essence, the grantor in the deed of trust conveyed certain real estate to secure an obligation to pay a sum certain each month, as well as an additional annual amount as alimony pursuant to a decree of the Circuit Court of the City of Norfolk, Virginia. The deed of trust recites that the payments are to continue until the death or remarriage of the recipient of the alimony, whichever first shall occur, and shall survive the grantor in the event he should predecease the recipient of the alimony.

Section 58-55, Code of Virginia (1950), as amended, states in part that:

"On deeds of trust or mortgages the tax shall be fifteen cents on every one hundred dollars or portion thereof of the amount of bonds or obligations secured thereby."

The problem at hand is somewhat analogous to that contained in an opinion of the Attorney General dated March 16, 1960, (Report of Attorney General 1959-1960, p. 362), in which the deed of trust offered for recording stated that it was to secure as much as $50,000, although only $38,000 was advanced on the execution of the deed of trust. The Attorney General ruled that the deed of trust actually secured the amount of $50,000.

It is my opinion that the deed of trust at hand secures the sum of the payments over the balance of the natural life expectancy of the recipient, although less may in fact be paid in the event that the recipient remarries. Therefore, in determining the amount of recordation tax to be paid on such an instrument, it will be necessary to determine the recipient's present age and her reasonable life expectancy according to some reliable source. The formula would then be the balance of life expectancy times the annual sum to be paid plus the balance of life expectancy times the amount of the monthly payments times twelve.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Deed transferring real estate without consideration to previously existing trust—Subject to tax of § 58-54 and not § 58-54.1.  

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

June 30, 1970

I have received your letter of June 25, 1970, asking whether a recordation tax should be imposed on a deed transferring real estate, without consideration, to a previously existing trust.

The tax imposed by Virginia Code § 58-54 applies and is measured by the value of the property conveyed. The tax imposed by § 58-54.1 does not apply.

TAXATION—Recordation—Exemption—Deed conveying property by county not exempt.

COUNTIES—No Authority to Make Loan to Rescue Squad.  

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

December 30, 1969

This is in reply to your letter of December 23, 1969, which reads as follows:

"I need an opinion in regard to the tax imposed by Section 58-54b of the 1950 Code of Virginia as amended.

"(1) According to Section 58-64 of the Code, the Grantor Tax or that imposed by Section 58-54b does not apply to a deed conveying property to the State or County, but is silent on property where the State or County is Grantor. Recently the Rappahannock County School Board sold some property. Is the County as Grantor, required to pay the Additional Tax?

"(2) The Sperryville Rescue Squad is buying an ambulance which is partially financed by the State or Federal Government. I understand the Federal or State authorities have assured the Sperryville Rescue Squad that a specified amount will be paid by the government. Should the Rescue Squad receive the rescue vehicle before the check is received from the government, is it lawful for the County of Rappahannock to advance to the Sperryville Rescue Squad the specified amount to be paid by the State or Federal Government in order that the Squad may pay for the vehicle in full without borrowing money from the bank?"

The answer to your first question is in the affirmative. The county as grantor is not exempt from the recordation tax. See, opinion dated October 14, 1969, to the Honorable Arthur T. Burchette, clerk of Circuit Court of Lee County, a copy of which is enclosed.

Under Section 15.1-25 of the Code of Virginia, the governing body of the county may make gifts of money to a rescue squad within or without the county. However, I am unable to find any authority permitting the county to make an advancement in the form of a loan to a rescue squad. Therefore, I answer your second question in the negative.

TAXATION—Recordation—Exemption—Deed of trust securing a loan made by the Small Business Administration exempt.

TAXATION—Recordation—Exemption—Deed of trust of Small Business Administration guaranteeing a loan made by a local bank is not exempt.
REPORT OF THE ATTORNEY GENERAL  

HONORABLE FRANCES R. ROBENS, Clerk 
Circuit Court of City of Buena Vista

October 10, 1969

This is in reply to your letter of September 30, 1969, in which you ask if the state and local recordation tax is chargeable on a deed of trust securing a loan made directly by the Small Business Administration. Also whether the tax is chargeable on a deed of trust securing a loan made by a local bank where the Small Business Administration has guaranteed the loan.

The deed of trust securing the loan of the Small Business Administration is not subject to State or local recordation tax since 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 such recordation tax. See opinion of this office dated November 7, 1967, to the Honorable Margaret B. Brown, Clerk of the Culpeper Circuit Court, published in Report of the Attorney General (1967-1968), p. 262.

The deed of trust securing the loan made by a local bank which is guaranteed by the Small Business Administration is subject to the tax. This loan is not made by the Small Business Administration and the exemption stated above does not apply.

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TAXATION—Recordation—Exemptions—Deeds of gift from husband to wife, wife to husband, or parent to child.

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

The 1970 General Assembly amended § 58-61 of the Code of Virginia, which exempts certain deeds from the recordation tax, by adding the following language: “or for any deed between parent and child or husband and wife and no monetary consideration passes between the parties . . . .” 1970 Acts of Assembly, ch. 420. By letter of June 8, you have asked whether this exemption is from the tax now imposed by § 58-54(a) or that of § 58-54(b) of the Code.

When § 58-61 says that no “additional” tax shall be imposed, it means that no tax shall be imposed in addition to the tax paid at the time of recordation of the deed to, in the case of the newly added language, the grantor. Accordingly, it is my opinion that § 58-61, as amended, exempts from all recordation taxes deeds of gift from husband to wife, wife to husband and parent to child.

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TAXATION—Recordation—Gifts between certain family members—How to compute tax.

HONORABLE BETSY N. JORDAN, Clerk
Circuit Court of the City of Waynesboro

I have received your letter of June 11, in which you ask my opinion as to the correct computation, under present law and under the law as amended by chapter 420 of the 1970 Acts of Assembly, of the recordation tax on gifts between certain family members.

I construe joint tenancies and tenancies-in-common as creating an ownership, distinct from either of the tenants. See Report of the Attorney General (1959-1960), p. 361. In imposing the tax, you should treat any co-tenancy as a separate taxpayer, irrespective of the right of survivorship. A tenant may, without joining his co-tenant, convey his interest to the co-
tenant, in which case the tax is imposed only upon the interest conveyed. See the enclosed Opinion of the Attorney General to Honorable Calvin W. Fowler, Member of the House of Delegates, dated May 14, 1970.

Gifts from husband to wife or wife to husband, presently taxable in full, will be exempt under the 1970 amendment, as will be gifts from parent to child or child to parent. No conveyance having two parties as grantors or as grantees is made exempt by the 1970 amendment. Of course, a mere change of tenancy where husband and wife are both grantors and grantees of the same property will continue to be exempt as in the past.

A gift from husband to wife of a one-half undivided interest in property owned by husband would be exempt under the new law; a conveyance from husband to husband and wife as co-tenants would be taxable in full. A conveyance from X to Y, an unrelated party, of an undivided interest in property owned by X would be taxed on the value of the interest (or the consideration paid, if greater).

Nothing in the present law or in the 1970 amendment exempts transfers to or from an in-law, a stepparent or a grandparent.

TAXATION—Recordation—Permanent loan deed of trust or mortgage—No tax after effective date of § 58-55.1 notwithstanding recordation of construction loan deed of trust or mortgage prior thereto.

April 8, 1970

HONORABLE EDWARD E. LANE
Member, House of Delegates

I have received your letter of March 31, from which I quote:

"House Bill No. 29, which I introduced, provides that the recordation tax provided for in § 58-55 of the Code of Virginia shall not be imposed upon a permanent loan deed of trust or mortgage as defined in the Act, if such deed of trust or mortgage is recorded within three years of the date of the recordation of the construction loan deed of trust or mortgage as defined in the Act, unless the instrument secured by the permanent loan deed of trust or mortgage has a principal amount greater than the construction loan deed of trust or mortgage. The effective date of the Act is July 1, 1970. A copy is enclosed.

"I am writing to seek your opinion as to whether or not the provisions of this Act will apply to a permanent loan deed of trust or mortgage which is recorded after the effective date of the Act, if the construction loan deed of trust or mortgage has been recorded prior to that date."

The tax on the recordation of a construction loan deed of trust or mortgage will be determined by Virginia Code § 58-55, whether before or after the effective date of § 58-55.1 of the Code. If the requirements of § 58-55.1 (c) are otherwise met, I am of the opinion that no tax under § 58-55 will be imposed on the recordation of a permanent loan deed of trust or mortgage after June 30, 1970, notwithstanding the recordation of the construction loan deed of trust or mortgage prior to July 1, 1970.

TAXATION—Recordation—Perpetual right-of-way easement is subject to.

April 16, 1970

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

I have received your letter of April 8, asking whether a perpetual right-of-way easement is "realty" within the meaning of Virginia Code § 58-54.
REPORT OF THE ATTORNEY GENERAL

The Honorable C. H. Morrissett, then State Tax Commissioner, interpreted much of the language of § 58-54(b) in a memorandum to the Clerks of Courts, dated May 23, 1968. On page 3 of that memorandum he said:

"(3) (i) The term 'realty' includes—(a) Those interests in real property which endure for a period of time, the termination of which is not fixed or ascertained by a specific number of years, such as an estate in fee simple, life estate, perpetual easement, etc. . . ."

I am in accord with Mr. Morrissett's interpretation and am of the opinion that the tax imposed by § 58-54(b) applies to the recordation of perpetual right-of-way easements where the consideration or value exceeds one hundred dollars ($100).

TAXATION—Recordation—Tax deed—How tax determined.

TAXATION—Recordation—Deed of sale of land—How tax figured and full value estimated.

HONORABLE R. S. CAMPBELL, Clerk
Circuit Court of Caroline County

This is in reply to your letter of October 1, 1969, which reads as follows:

"In recording a tax deed is the recordation tax based on the amount of delinquent taxes paid, the delinquent tax plus the cost of suit, attorney fees, etc., or on the actual value of the property? No. 1.

"In recording the deed of a bona fide sale, is the actual price paid for the land or the actual value of the property used for figuring the recordation tax? If the latter is used how does the clerk determine actual value? No. 2."

The answer to your first question is found in Section 58-54 (a) and (b) of the Code, as amended. Subsection (a) of this Section provides that the recordation tax on deeds shall be based on the consideration of the deed or the actual value of the property conveyed, whichever is the greater. Subsection (b) provides that the tax shall be based on the consideration or value. The term "whichever is greater" does not appear in this Subsection. In determining the consideration of a tax deed, the amount of the delinquent tax paid and costs should be used. Attorney fees cannot be assessed as costs and, therefore, should not be considered as part of the consideration.

Subsections (a) and (b) of Section 58-54 of the Code, as amended, are applicable to your second question. If it is obvious that the actual price paid for the land is less than its value, a convenient way of estimating full value would be to start with the assessed value of the land and divide this by the ratio of assessed value to full value, which in the County of Caroline is 14.2 percent.

TAXATION—Recordation—Trust agreement—Subject to State and county tax.

TAXATION—Recordation—Conveyance of trust to remainderman—Subject to § 58-54(a) but not § 58-54(b).

TAXATION—Probate—May not be imposed on property passing at death under trust agreement.

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

I have received your letter of March 17, enclosing a copy of a trust
agreement which was recorded by you on September 22, 1969, and your letter of March 18.

The agreement is between a married couple as trustors and a bank and an individual as trustees. By the agreement, the trustors convey their interest in eleven parcels of land, some of which are in Buchanan County, to the trustees to manage during the trustors' lifetimes. The income from the property may be paid to or for the benefit of the trustors. On the death of the survivor of the husband and wife the property is to be conveyed to the individual trustee or his heirs. Some of the parcels of land were originally owned by the husband and some by the wife. The wife has recently died.

You have asked:

"(1) Should I have charged the state and county tax imposed by Section 58-54, sub-sections (A) and (B)?

"(2) Whether or not the taxes imposed by the aforesaid sections should be collected on a deed of transfer, assignment, or conveyance of the trust after its termination?

"(3) Is there any probate tax on the real estate owned by her and included in said Trust Agreement?"

The trust agreement is a deed in that it conveys title to land. It is a deed of sale in that consideration flowed between the trustor-beneficiaries, i.e. each contributed property for the benefit of the other. The trust agreement is not a "deed of trust" as that term is used in Virginia Code § 58-55. Accordingly, it is my opinion that both taxes imposed by § 58-54 of Virginia Code were applicable on the recordation of the agreement.

The trust agreement does not automatically terminate on the death of the survivor of the husband and wife; the trustees are then required to convey the property to the remainderman. This conveyance is subject to the tax imposed by § 58-54(a). The property will not then be "lands, tenements or other realty sold. . . ." For this reason the tax imposed by § 58-54(b) will not, in my opinion, apply to the conveyance from the trust.

The probate tax imposed by Virginia Code § 58-66 applies only to assets passing under a will or by intestacy. Section 58-67 of the Code amplifies this coverage by providing:

"The value of all real estate shall be included in determining the tax imposed by § 58-66, although the personal representative does not administer upon the real estate and whether or not the personal representative under a will is charged with any duty with respect to the real estate. . . ."

Section 58-67 makes clear the taxability of real estate where it does not pass through the hands of the personal representative. The Section does not remove the requirement of § 58-66 that the property pass by will or intestacy. While the decedent may have retained an equitable interest in the property conveyed to the trust, on her death the property passed under the terms of the trust agreement and not under her will or by intestacy. Accordingly, it is my opinion that no probate tax may properly be imposed on any of the trust property.

TAXATION—Sale of Delinquent Lands—Treasurer conducting sale prohibited from purchasing the real estate.

TREASURERS—Conducting Sale of Delinquent Lands—Prohibited from purchasing the real estate.

July 21, 1969

HONORABLE C. B. COVINGTON, JR.

Treasurer for City of Newport News

This is in reply to your letter of July 14, 1969, which reads as follows:
REPORT OF THE ATTORNEY GENERAL

"Section 58-1034 of the Code of Virginia forbids the Treasurer purchasing land at a Treasurer's Tax Sale. However, I did not find any section prohibiting the Treasurer from purchasing delinquent lands at a Special Commissioner's Sale.

"Would you be kind enough to advise me at your convenience if there is any law forbidding a treasurer from purchasing land at a Special Commissioner's Sale."

Section 58-1034 of the Code prohibits the Treasurer conducting a sale of land from directly or indirectly purchasing the real estate sold. I am unable to find any similar prohibition against the treasurer purchasing land at a Special Commissioner's Sale. I, therefore, answer your question in the negative.

TAXATION—Sales and Use Tax—Meals and lodging given to guests of Southern Conference of Council of State Governments not exempt.

May 14, 1970

HONORABLE SAM POPE
Member, House of Delegates

The State of Virginia will host the Southern Conference of the Council of State Governments at a meeting to be held June 23 through June 26 in Williamsburg. The General Assembly has appropriated funds for this purpose.

By letter of April 20, you have asked whether the State "may furnish Colonial Williamsburg with a sales tax exemption certificate on meal functions and room requirements paid for from state funds".

Meals are made subject to the Virginia Retail Sales and Use Tax as "the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises . . ." Virginia Code § 58-441.2(b). The furnishing of transient lodging is subjected to the tax by Virginia Code § 58-441.2(d).

Section 58-441.6(p) of the Code of Virginia excludes from the tax, "Tangible personal property for use or consumption by this State. . . ."

The tax applies to the furnishing of transient lodging, not because tangible personality may be involved, but because § 58-441.2(d) specifically requires its application. The exclusion provided by § 58-441.6(p) deals only with tangible personal property. I am aware of no provision of the Virginia Retail Sales and Use Tax Act which excludes or exempts services provided the State and am of the opinion that the tax is imposed on the furnishing of transient lodging to the State.

Food, however, is tangible personal property. Meals would therefore be excluded from the tax if they are "for use or consumption by this State. . . ." The term, "use," is defined by Virginia Code § 58-441.3(h) as meaning, "the exercise of any right or power over tangible personal property incident to the ownership thereof. . . ." I am of the opinion that no such right or power is exercised over the food by the State when it merely contracts with a restaurant for the serving of meals.

No similar definition is given for "consumption." Reference to § 58-441.2(b) makes clear the inclusion in that term of the eating of meals. Yet the use of the term in connection with several of the exclusions of § 58-441.6, especially the research and development exclusion, makes it equally clear that the intended definition is broader. "Consumption," under a retailer's occupation tax, has been defined as "destruction by use." Keuzan v. Nudelman, 18 N.E. 2d 219, 222 (1938).

The meals will be used and consumed by the guests at the conference. It is my opinion that they will be neither used nor consumed by the State unless the State exercises over the food rights and powers substantially greater than those customary in a normal banquet. It is accordingly my
REPORT OF THE ATTORNEY GENERAL

opinion that the State may not give a sales tax exemption certificate to the supplier of transient lodging and meal functions.

TAXATION—Sales and Use Tax—Revenues may be withheld by State Comptroller pursuant to § 63.1-123.

PUBLIC WELFARE—Failure of Locality to Provide Assistance—Withholding of funds appropriated by State in excess of requirements of Constitution—Applicable to sales and use tax revenues.

March 31, 1970

HONORABLE OTIS L. BROWN, Director
Department of Welfare & Institutions

I am in receipt of your letter of March 23, 1970, wherein you request my opinion as to whether § 63.1-123 of the Code of Virginia (1950), as amended, is applicable to the sales and use tax revenues which are distributable to the various counties and cities of the Commonwealth.

The "governing body of each county and . . . of each city in the State [must] each year appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance and to provide [welfare] services." Section 63.1-91 of the Virginia Code.

"If any county or city . . . shall fail or refuse to provide for the payment of old age assistance, medical assistance to the aged, aid to the blind, aid to the permanently and totally disabled or aid to dependent children . . . or to provide services as required to meet federal standards . . ." then the State Board through appropriate proceedings shall require such localities to perform the duties required by law. As long as such failure or refusal by the locality to provide payments for the above mentioned programs continues, then the State Board must provide for the payment of such assistance. "In such event . . . the Comptroller shall from time to time as such funds become available deduct from funds appropriated by the State, in excess of the requirements of the Constitution of Virginia, for distribution to such county or city such amount or amounts as shall be required to reimburse the State for expenditures incurred . . ." by the locality's refusal or failure to provide for the payment of public assistance. Section 63.1-123, emphasis supplied. As seen from the portions emphasized, the authority of the Comptroller to withhold funds pursuant to § 63.1-123 is limited to funds appropriated by the State and if such funds are in excess of requirements of the Constitution of Virginia.

The sales and use tax revenues apportionable and distributable to the several counties and cities are for the maintenance, operation, capital outlay, debts, interest payments and other expenses incurred in the operation of the free public schools. See § 58-441.48 (d). The Commonwealth of Virginia is required and has the mandatory duty under § 129 of its Constitution to maintain and operate a system of public free schools. "Section 129 is not self-executing. It leaves to the judgment of the General Assembly the manner and means of its execution implemented with no further requirement other than that of § 135 with respect to the application of the constitutional minimum funds . . . The only funds for the operation of public schools required to be furnished by the General Assembly are the three funds constituting the 'constitutional minimum' referred to [§ 135]." School Board v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963); Scott County School Board v. Scott County Board of Supervisors, 169 Va. 213, 193 S.E. 52 (1937). The sales and use tax revenues are not included in the "constitutional minimum" requirements. Being in "excess of the requirements of the Constitution of Virginia" they may in my opinion be withheld by the State Comptroller pursuant to the provisions of § 63.1-123.

As mentioned above, a limitation of § 63.1-123 is that only funds appropriated may be withheld by the State Comptroller. In view of that
qualification this opinion should not be construed to be applicable to the local general sales or use tax levied by the localities pursuant to § 58-441.49.

TAXATION — Tangible Personal Property — Equipment and machinery leased to or from Federal government.

TAXATION — Tangible Personal Property — Property on loan from Federal government not subject to local taxation.

December 30, 1969

HONORABLE LESLIE T. MITCHELL
Deputy Commissioner of Revenue for Campbell County

This is in reply to your letter of December 22, 1969, which reads in part as follows:

"Research by this office has ascertained that the Babcock and Wilcox Company located in Campbell County has on loan (without charge) from the Federal Government certain machinery and equipment used by them in component manufacturing.

"Please advise as to whether Campbell County can or cannot assess such machinery and tools to either of the above."

I am of the opinion that the county may not assess for taxation to either of the above, the machinery and equipment on loan (without charge) from the Federal Government.

The only authority to tax tangible personal property owned by the United States is found in Sections 58-831.1 and 58-831.2 of the Code of Virginia (1950), as amended.

The object of Sections 58-831.1 and 58-831.2 is to subject to local taxation personal property owned by any person and leased to the Federal Government, as well as personal property owned by the Federal Government and leased to any person engaged in business for profit.

Since the property in this instance is not leased but loaned to the Babcock and Wilcox Company, the statutes do not apply and the property is not subject to local taxation.

February 17, 1970

HONORABLE CHARLES L. MCCORMICK, III
Commonwealth's Attorney for Halifax County

This is in reply to your letter of February 3, 1970, in which you inquire whether mobile homes which have been mounted on permanent foundations on land owned by the owner of the trailer (mobile home) should be classified as real property and therefore exempt from an ordinance enacted pursuant to §§ 35-64.1 through 35-64.6 of the Code of Virginia.

Section 58-829.3 of the Code of Virginia, which you also cite, places all vehicles without motive power, used or designed to be used as mobile homes, in a separate classification for local taxation and classifies them as personal property. It was held, in an opinion found in the Report of the Attorney General, (1967-1968), p. 291, that such mobile homes do not lose their identity as personal property because of having their wheels removed and being placed on permanent solid masonry foundations.
In regard to your question, in my opinion, removing the wheels from such vehicles and placing them on permanent foundations does not exempt them from a valid ordinance enacted pursuant to §§ 35-64.1 through 35-64.6 of the Code, so long as such vehicles meet the definition of "trailer" set forth in § 35-64.3. The latter section defines a "trailer" as "any vehicle designed or used or maintained for use as a conveyance upon highways, so designed and so constructed as to permit occupancy thereof as a temporary dwelling or sleeping place for one or more persons." Similar views were expressed in opinions found in Reports of the Attorney General (1961-1962), p. 251 and (1964-1965), p. 347, which were issued even before the word "designed" was inserted in § 35-64.3 by Chapter 359, Acts of Assembly of 1966, which enlarges the definition of "trailer" as defined in this section. It is significant that the terms "designed" or "used" or "maintained for use" appear in the alternative and a "trailer", as herein defined, which meets any of these terms would qualify as subject to an ordinance which imposes the license tax under these sections.

TAXATION—Unit Tax—No additional tax imposed on account of severance and separate trials of claims in omnibus condemnation proceeding.

June 10, 1970

HONORABLE J. H. WOOD, JR., Clerk
Circuit Court of Clarke County

I have received your letter of May 27, in which you ask whether additional writ taxes should be imposed where a court orders severances and separate trials for the defendants in an "omnibus" or "multi-party" condemnation proceeding.

This office has previously ruled that only one writ tax is payable on the institution of such a suit. Opinions of the Attorney General (1968-1969), p. 48. The writ tax is imposed when the suit is commenced. Va. Code § 58-71. No new suit or action is commenced by the severance and separate trial of a claim or issue. I am of the opinion that no additional writ taxes should be imposed on account of the severance and separate trials of claims or issues in an omnibus condemnation proceeding.

TAXATION—Utility—On consumers of public service corporation—May not be imposed if other citizens of county receive identical services from municipality.

April 30, 1970

HONORABLE JOSHUA PRETLOW
County Attorney of Nansemond County

I have received your letters of April 9 and 27, in which you ask whether a county may impose a tax on the consumers of utility services provided by public service corporations if some of its citizens receive the same utility service from a municipality.

A tax on the consumers of utility services provided by a public service corporation is authorized by Virginia Code § 58-617.2. You are familiar with the prior opinion of this office that a county may not impose a tax on the consumers of utility services provided by a municipality. See Report of the Attorney General (1968-1969), p. 239.

Section 108 of the Virginia Constitution requires that, "all taxes, whether State, local or municipal shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. . . ." If consumers of services provided by public service corporations fall within the same class as those of services provided by municipalities, a tax imposed only on the former would be void.
In Richmond v. Fary, — Va. — (Dec. 1, 1969), the Supreme Court of Appeals required that a classification: (1) rest on "real and not feigned differences;" (2) have "relevance to the purpose for which the classification is made;" and (3) not be "wholly arbitrary." I am unable to discern any meaningful difference between the two classes of consumers and am therefore of the opinion that a county may not impose a tax on the consumers of services provided by a public service corporation if other citizens of the county receive identical services from a municipality.

TAXATION—Utility Tax—May not be imposed upon persons on military installation.

MILITARY RESERVATION—Taxation by State—Utility tax may not be imposed therein.

HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

By letter of May 1, you have asked whether Prince William County may levy upon persons receiving telephone service on the military installation at Quantico the utility consumer tax authorized by § 58-587.1 of the Code of Virginia.

In 1918 the United States acquired from private persons the land now constituting the Quantico Marine installation. In that same year the General Assembly ceded to the United States exclusive jurisdiction over military installations, "except the service upon such sites of all civil and criminal process of the courts of this State. . . ." 1918 Acts of Assembly, ch. 382. In 1932, the General Assembly attempted to reassert its authority over persons residing on United States military installations, including those lands, "heretofore acquired." 1932 Acts of Assembly, ch. 213. The attempt, "came too late and is in itself a legislative confession of casus omissus in the conditions of the transfer." Buttery v. Robbins, 177 Va. 368, 383 (1941).

The Buck Act, USC Title 4, ch. 4, permits the imposition of certain state and local taxes within federal areas. Section 105 authorizes sales and use taxes. However § 110(b) defines "sales or use tax" as "any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property. . . ." In my opinion the Buck Act does not authorize the imposition of utility consumer taxes upon persons receiving such services on the military installation at Quantico.

TAXATION—Utility Taxes—May be adopted by Board of Supervisors by general ordinance.

COUNTIES—Ordinance—Utility taxes—May be adopted in accord with general provisions of § 15.1-504.

HONORABLE CHARLES L. MCCORMICK, III
Commonwealth's Attorney for Halifax County

This is in reply to your letter of April 10, 1970, which reads, in part, as follows:

"The Halifax County Board of Supervisors is considering the enactment of an ordinance levying a tax on purchases of utility services under the statutory authority conferred in Sections 58-587.1 and 58-617.2 of the Code of Virginia.

"There is some question in my mind as to whether this ordinance can be enacted pursuant to that portion of Section 15.1-504 of the Code which has reference to the adoption of general ordinances or
whether it would be necessary to follow the requirements of that portion of said Section 15.1-504 which pertains to ordinances imposing certain county taxes. It is noted that the utility tax is not cited therein as being subject to that portion of said section, but I wonder if the utmost caution might not require the following of the requirements set forth therein. I would appreciate your opinion concerning this matter."

The portion of § 15.1-504 of the Code which is relevant to your inquiry reads as follows:

"No governing body shall adopt or amend any ordinance imposing a county capitation tax, county motor vehicle license tax, county license tax on professions or businesses, including wholesale merchants, or county tax on amusements, except under the conditions hereinafter set forth, and any such ordinances adopted without compliance with such conditions shall be void and of no effect:” (Emphasis supplied.)

I am of the opinion that a tax on consumers of utility services is not contained within this language and, therefore, the ordinance adopting such a tax is not required to be adopted in accordance with the special conditions set forth. It therefore can be adopted in accordance with the general provisions of § 15.1-504.

TAXATION—Writ Tax—Not applicable to application for change of name since not adversary proceeding.

TAXATION—Writ Tax—Not applicable to cross claims nor petition to intervene because not “original suits.”

HONORABLE W. FRANKLIN GOODING, Clerk
Circuit Court of Fairfax County

June 9, 1970

I have received your letter of May 13, from which I quote:

"In view of the change by the recent legislature of § 58-71, I wonder whether or not there should be taxed a writ tax in the amount of $5.00 on all change of name petitions that are filed in this court.

"I would also appreciate your opinion as to whether or not a writ tax should be charged upon the filing of a cross-claim under Rule 2:13 and 2:14 as well as upon the filing of a petition by intervener under Rule 2:15."

I am of the opinion that an application to a court for a change of name is neither a suit nor an action, both terms implying an adversary proceeding, and that no writ tax is payable on such an application.

I am further of the opinion that neither cross claims nor petitions to intervene are "original suits" on which the writ tax is payable.

TOWNS—Bonded Indebtedness—Limitations under Section 127, Constitution of Virginia.

HONORABLE HENRY L. PUCKETT
Commissioner of the Revenue for City of Galax

July 8, 1969

This is in reply to your letter of May 26, 1969, which reads as follows:

"The Mayor and members of City Council have asked me to write
you for your opinion on whether the following indebtedness would be in the 18% constitutional limitation:

"1. Agreement to pay Grayson and Carroll Counties for school bonds and accrued interest as they come due as a result of recent annexation by the city.

"2. A pledge by the City Council to pay a certain amount to a non-profit community hospital to be paid over a period of five years.

"3. Literary loan for school construction."

The constitutional limitation upon the bonded indebtedness of cities and towns is eighteen per centum of the assessed valuation of the taxable real estate in such cities and towns, respectively. Section 127 of the Constitution of Virginia.

Paragraphs (a) and (b) of Section 127 authorizes the issuance of obligations under certain conditions which obligations are not included in determining the limit of indebtedness set forth in the first paragraph of that Section. However, none of the three items of indebtedness listed by you qualify for the issuance of obligations under paragraphs (a) and (b).

Therefore, I am of the opinion that the three items of indebtedness listed by you are within the 18% constitutional limitation imposed by Section 127 of the Constitution.

TOWNS—Cleaning of Debris From Stream Flowing Through Town—Town's responsibility.

WATERS AND WATERCOURSES—Streams—Cleaning of debris from stream flowing through town—Town's responsibility.

September 30, 1969

HONORABLE THOS. R. NELSON
Attorney for the County of Augusta

This is in reply to your letter of September 17, 1969, in which you seek my opinion on the matter of duty of the Town of Craigsville to clean the debris out of the stream flowing through the town, such debris having been deposited in the stream bed inside the corporate limits.

You state there is a question as to whether or not it is the duty of Augusta County or the Town of Craigsville to clean the debris out of its stream thereby lessening the danger of flooding the community. Section 15.1-31 of the Code of Virginia authorizes any county, city or town to construct a dam, levee, seawall, or other structure or device, or perform dredging operations for the purpose of preventing the flooding or inundation of such county, city or town, or part thereof. Since the given facts indicate flood damage only within the Town of Craigsville and caused by debris deposited within the town limits, I am inclined to believe it is the responsibility of the town to take whatever lawful action it deems proper to prevent future flooding or inundation.

TRAILER CAMPS—Licenses—Warrants for failure to obtain—Responsibility for swearing out warrant.

October 1, 1969

HONORABLE JACK P. BLANKENSHIP
Commissioner of the Revenue for Campbell County

This is in reply to your letter of September 18, 1969, in which you ask to be advised whether it is the duty of the Commissioner of the Revenue or the Treasurer to swear out a warrant for unlicensed trailer park operators.
I am of the opinion that it is the duty of the Commissioner of the Revenue to swear out such warrant. Section 58-874 of the Code of Virginia provides that a county commissioner of the revenue shall assess and issue licenses. In view of this, I am of the opinion that he should swear out any warrants necessary because of failure to obtain a license.

The issuance of warrants is covered by Section 58-252 of the Code, which reads as follows:

"It shall be the duty of the commissioner of the revenue to report every person, firm or corporation who shall commence to prosecute any licensable business, employment or profession without a license or who shall unlawfully fail for a longer period than one month to obtain a new license to the attorney for the Commonwealth, who shall cause warrants to be issued for such persons, firms or corporations and shall prosecute them."

TREASURERS — Compensation — Governing body of county may supplement as it may deem expedient.

May 4, 1970

HONORABLE F. B. HUBER
Treasurer for Campbell County

This is in reply to your letter of April 10, 1970, which I quote as follows:

"The last paragraph of Section 14.1-56 of the Code of Virginia reads as follows:

"'Nothing herein contained shall prevent the governing body of any county from supplementing the salary of the treasurer in such county for additional services not required by general law, provided, however, that any such supplemental salary shall be paid wholly by such county.'"

"I would appreciate your opinion as to whether the selling and handling of local automobile licenses may be construed as 'additional services not required by general law' for which the local governing body may supplement the treasurer's salary."

In my opinion, it is the duty of a county treasurer to issue local automobile licenses and collect the fees authorized by local ordinance. Section 58-958 of the Code of Virginia provides that county treasurers shall receive the amounts payable into the local treasury and § 14.1-59 provides that county treasurers shall collect license fees. A similar view is expressed in an opinion found in Report of the Attorney General (1955-1956), page 221. Accordingly, your question is answered in the negative. Apropos to the situation, however, Chapter 153, Acts of Assembly of 1970, enacted a new section, namely § 14.1-11.4, which is as follows:

"Notwithstanding any other provision of law, the governing body of any county or city, in its discretion, may supplement the compensation of the sergeant, sheriff, treasurer, commissioner of the revenue, or attorney for the Commonwealth, or any of their deputies or employees, above the salary of any such officer, deputy or employee established in this title, in such amounts as it may deem expedient. Such additional compensation shall be wholly payable from the funds of any such county or city."

On and after June 26, 1970, the effective date of this new section, the governing body of a county, in its discretion, may supplement the salary of the treasurer as it may deem expedient, so long as such additional compensation is paid wholly from county funds.
VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Definitive detailed financial statement required.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Contracts existing prior to effective date not exempted.

June 18, 1970

HONORABLE JOSEPH H. CAMPBELL
Commonwealth’s Attorney for the City of Norfolk

I am in receipt of your letter of June 10, 1970, wherein you raise two inquiries with respect to the Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly, which questions shall be answered seriatim:

First question. With respect to the disclosure requirements of § 7 of the Act, may an officer or employee of the City simply state that he holds a material financial interest in a business or company, or is he required to file a definitive detailed financial statement.

Answer: Though § 12 (d) (vii) regarding disclosure requirements for members of the General Assembly states that the values of any interests need not be disclosed nor the entity in which the interest exists need not be identified by name, such requirements are not existent in § 7 of the Act which section is applicable to officers and employees of State and local governments. Section 7 requires that “the precise nature and value” of a material financial interest must be disclosed in writing. I am constrained to rule that only with a definitive detailed financial statement may the requirements of § 7 be met. A copy of the required § 7 disclosure forms is being prepared by this office and will be available shortly for distribution to you.

Second question. Are contracts existing prior to June 26, 1970, the effective date of the Virginia Conflict of Interests Act, exempted from the provisions of said Act.

Answer: No. I am of the opinion that the Act prohibits not only the entering into of a contract but also the relationship of being a contractor or having a material financial interest in a contract or subcontract with the governmental agency of which one is an officer or employee. Of course, only those contracts which would be violative of § 3 (a) (1) of the Act would be voided. Contracts which would be subject to § 3 (a) (2) of the Act may be continued, subject to the written disclosure requirements.

I am enclosing herewith a copy of an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which will be found in the Report of the Attorney General (1969-1970), p. ——, which delineates the differences between § 3 (a) (1) and (2).

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Material financial interest in transaction—Required by member of planning commission selling to housing authority—Not otherwise violation to sell if also disqualifies himself in any official action thereon.

May 1, 1970

HONORABLE J. WARREN WHITE, JR.
Member, House of Delegates

I am in receipt of your letter of April 24, 1970, which reads as follows:

“I have a friend of mine that has been appointed a member of the Norfolk City Planning Commission in a non-paying capacity position. He is a major stockholder in his company that is selling materials to the Norfolk Redevelopment and Housing Authority. Under House Bill No. 387 dealing with Virginia's Conflict of Interests Act, in your opinion, would he be in violation of this Act if he continues
REPORT OF THE ATTORNEY GENERAL

House Bill No. 387 was enacted as Chapter 463 of the 1970 Acts of the General Assembly. I am enclosing, for your convenience, a copy of the Act.

The City Planning Commission would be included in the definition of "advisory agency" as found in § 2 (b) of the Act. See also § 15.1-427 of the Code of Virginia (1950), as amended. The portions of the Act applicable to your inquiry would be §§ 5 and 6.

Under § 5 "[n]o officer or employee of any governmental agency or advisory agency shall: (a) Offer or accept money or anything of value for or in consideration of obtaining an appointment, promotion or privilege with any governmental agency or with any advisory agency; or (b) Disclose to any person not entitled thereto, information gained by virtue of his office or employment, nor otherwise use such information for his personal gain or benefit; or (c) Accept any gift, favor or service that might reasonably tend to influence him in the discharge of his duties."

Under § 6 any member of the Planning Commission who may have a material financial interest (defined as "ownership of an interest of five per cent or more in a firm, partnership or other business, or aggregate annual compensation of five thousand dollars or more") in any transaction in which the Planning Commission is or may be in any way concerned must disclose such interest to the Commission and further must disqualify himself from voting or participating in any official action thereon in behalf of the Commission.

It would thus not be a violation of the Act for a member of the Planning Commission to continue selling materials to the Norfolk Redevelopment and Housing Authority as long as the procedures outlined in § 6 are complied with.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Must be made by member of commission who is also member of consulting firm that commission is considering retaining.

June 23, 1970

HONORABLE CHARLES H. GRAVES, Director
Division of State Planning and Community Affairs

I am in receipt of your letter of June 15, 1970, with the enclosure from the Central Virginia Planning District Commission, presenting the following situation: The Central Virginia Planning District Commission is in the process of developing an area-wide sewer and water study for the Planning District. The Commission desires to retain the services of a consultant firm. However, a member of the Commission is also a partner in the firm. You request this office to review these facts and issue a ruling as to any possible conflict of interest which may be existent.

I am enclosing for your information a copy of the Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly, as well as an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which discusses the applicable provisions of §§ 3 (a) (1) and (2), respectively, forbidding contracts with the governmental agency of which one is an officer or employee and allowing contracts with a governmental agency other than the agency of which one is an officer or employee, pursuant to specific provisions. However, the Baugh opinion and § 3 of the Act are applicable only to a governmental agency. I am of the opinion that the Planning District Commission would be within the definition of an advisory agency. An "Advisory Agency"... include[s] any board, commission, committee or post which does not exercise any sovereign power or duty, but is appointed by a governmental agency or created by law for the purpose of making
studies or recommendations, or advising or consulting with a governmental agency.

Pertinent provisions of the Act applicable to officers or employees of advisory agencies are §§ 5 and 6. Section 5 is self-explanatory and reads:

“No officer or employee of any governmental agency or advisory agency shall:

“(a) Offer or accept money or anything of value for or in consideration of obtaining an appointment, promotion or privilege with any governmental agency or with any advisory agency; or

“(b) Disclose to any person not entitled thereto, information gained by virtue of his office or employment, nor otherwise use such information for his personal gain or benefit; or

“(c) Accept any gift, favor or service that might reasonably tend to influence him in the discharge of his duties.”

Section 6 is as follows:

“Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualified himself from voting or participating in any official action thereon in behalf of such agency. If disqualifications in accordance with this section leave less than the number required by law to act, the remaining member or members shall have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members. Official action taken under circumstances which violate this section may be rescinded by the agency on such terms as the interests of the agency and innocent third parties require.”

Pursuant to this section I am of the opinion that the member of the Commission who is also a partner in the consulting firm should, when the Commission is determining whether to retain the firm, disclose to the Board that he is a partner of the firm and further disqualify himself from voting or participating in the decision of whether the firm’s services should be retained. If these provisions are complied with, then I am of the opinion that the Central Virginia Planning District Commission may enter into a contract with the consulting firm for its services, notwithstanding the fact that a partner of the firm is also a member of the Commission.

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**VIRGINIA CONFLICT OF INTERESTS ACT—Effect on Other Statutes—**
Repeals and supersedes all general and special acts which purport to deal with matters covered herein and are inconsistent therewith.

**VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—**
Pecuniary interest accruing to spouse—Contract by wife with school board of which her husband is member is prohibited.

May 28, 1970

**HONORABLE WILLIAM J. HASSAN**
Commonwealth’s Attorney for Arlington County

I am in receipt of your letter of May 25, 1970, wherein you present the following:

“This letter is directed to you for the purpose of receiving written clarification concerning the continued employment of a substitute
teacher in our school system following the appointment of this person's husband to the School Board of Arlington County.

"The wife of the School Board member is, and has been, a substitute teacher and as such her name has appeared on the official substitute list for this school system since 1967. In 1967 she was paid $1,212.63 during the calendar year for substituting. In 1968 she earned $3,258.20 which included a ten-week period when she worked full-time and in the calendar year of 1969 she earned $1,921.

"It is quite clear to the school system that this person has been regularly employed as a substitute but in order that there will be absolutely no doubt as to any possible conflict with Section 22-206 of Virginia School Laws, we would appreciate a ruling from your office."

As you are aware, Section 22-206 of the Code of Virginia prohibits, insofar as pertinent to your inquiry, the employment of a teacher in a school system if her husband is a member of the school board unless such teacher had been regularly employed by the school board prior to her husband taking office.

However, Section 1 of the new Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly, provides in part that the "Act shall repeal and supersede all general and special acts . . . which purport to deal with matters covered by this Act and are inconsistent with this Act."

Under Section 3 (a) (1) of the Act, no officer or employee of any governmental agency, the definition of which includes a school board, may contract with or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee. A material financial interest includes "A personal and pecuniary interest accruing to an officer or employee or to his spouse . . . ."

I am of the opinion that Section 22-206 of the Code is inconsistent with the Act and consequently has been repealed and superseded. As a result, any contract by the wife with the school board would constitute a conflict of interest under the new Act and would be prohibited if her husband were a member of the school board.

VIRGINIA CONFLICT OF INTERESTS ACT—Forbidden Activities—
"Other remuneration" includes research grant funds.

VIRGINIA CONFLICT OF INTERESTS ACT—Forbidden Sales or Purchases—Officer or employee purchasing from government agency thereof—Hospital services rendered upon uniform price schedule to general public exempted.

HONORABLE EPPA HUNTON, IV
Rector, Board of Visitors
Virginia Commonwealth University

I am in receipt of your inquiry relative to the applicability of § 3 (a) (4) of the Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly, to professors and administrative officers whose compensation is supplemented from outside sources in the form of grants made to them for research projects.

The language in § 3 (a) (4) that no officer or employee may accept anything of value in addition to "other remuneration paid him" clearly outlawed bribes and any analogous kick-back or fee arrangement. It is designed to prevent double-dealing by local officials and employees. City of Bristol v. Dominion National Bank, 153 Va. 71, 79, 149 S.E. 632 (1929). The concept of the quoted language, "other remuneration paid," would in my opinion include all actual compensation inuring to the employment of the
officer or employee which for a professor would include research grants such as the type with reference to which you inquire.

In addition to the above inquiry, you direct my attention to § 3 (a) (1) of the Act which provides that no officer or employee of any governmental agency shall "be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, . . ." You inquire if this section prohibits officers and employees from becoming patients in the hospitals of Virginia Commonwealth University. I am of the opinion that this inquiry would be answered in the negative. Section 3 (a) (3) provides that no officer or employee shall "be a purchaser at any sale made by him in his official capacity or by the governmental agency of which he is an officer or employee, except in respect to the sale of goods or services when provided as public utilities or offered to the general public on a uniform price schedule." The entering into a contract for services as a patient in a hospital of the Virginia Commonwealth University would be exempted by the above quoted section, since such hospital services are rendered upon a uniform price schedule to the general public.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Less than $5,000 annual compensation to county supervisor from non-profit hospital does not constitute.

June 18, 1970

HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

I am in receipt of your letter of May 18, 1970, which reads as follows:

"One of the County Supervisors has asked me for an opinion on the effect of Sections 15.1-67 and 15.1-717. The question is this: Can a County Supervisor serve as a trustee of a non-profit general hospital where the hospital is a corporation and the trustees, as a group, exercise the powers of the corporation? This hospital deals with the County in that it provides hospital services to indigents and is reimbursed by the County for this service. The County also provides grants to the hospital to assist it in meeting its operating expenses. This hospital is non-profit."

I am enclosing herewith a copy of the Virginia Conflict of Interests Acts, Chapter 463 of the 1970 Acts of Assembly, which as you can see repeals effective June 26, 1970, both §§ 15.1-67 and 15.1-717. In view of the effective repeal of the sections with reference to which you inquire, my response will be with respect to the new Act.

Also enclosed is a copy of an opinion to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which will be found in the Report of the Attorney General (1969-1970), p. ---, and which discusses the distinctions of the new Act with relation to a material financial interest in any contract with the governmental agency of which one is an officer or employee [§ 3 (a) (1)], and a material financial interest in any contract with a governmental agency other than that of which one is an officer or employee [§ 3 (a) (2)].

Of course the pertinent inquiry in the situation you present is whether a "material financial interest" is existent. This term is defined in § 2 (f) as:

"'Material Financial Interest' shall include a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household."

and is presumed to exist if the provisions of § 2 (f) (1) are met:
"ownership of an interest of five per cent or more in a firm, partnership or other business, or aggregate annual compensation of five thousand dollars or more from a firm, partnership or other business shall be deemed to be a material financial interest in such firm, partnership or other business;"

Assuming the County Supervisor does not receive a salary of $5,000.00 or more from the hospital then a personal and pecuniary interest, as that term is used in the Act, would not exist and your inquiry would be answered in the affirmative.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest
—Less than five percent interest does not constitute.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest
—Pecuniary interest accruing to relative does not constitute unless resides in same household.

May 28, 1970

HONORABLE J. S. CALDWELL, Division Superintendent
Powhatan County Public Schools

I am in receipt of your letter of May 8, 1970, in which you present the following:

"Mr. E. F. Yates, Sr., a retired business man in Powhatan County, is being considered for appointment to the Powhatan County School Board. He owns stock in two companies in the County with which the School Board does business, namely, Yates Motor Company run by his son, E. F. Yates, III, from which Company we receive bids on Ford school bus chassis, and Yates Oil Company run by his brother-in-law, L. J. Bowles, from which Company we receive bids on fuel oil and gasoline."

You inquire "(i) If Mr. Yates were appointed to the Powhatan County School Board could the Board legally buy from the two companies on bids?"

I am enclosing a copy of an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which will be found in the Report of the Attorney General (1969-1970), p. ——, and which fully discusses the provisions of the newly enacted conflict of interest law. Due to the prospective nature of the School Board appointment my reply to your inquiry will be with respect to the new Act.

If Mr. Yates were a member of the School Board, then Section 3 (a) (1) of the Act would in effect prohibit the Board from entering into any contract in which Mr. Yates was the contractor or subcontractor or any contract in which Mr. Yates had a material financial interest.

As reflected in the Baugh opinion, a material financial interest would be presumed to exist if Mr. Yates, as to each company, had ownership of an interest of five percent (5%) or more, or an aggregate annual compensation of five thousand dollars ($5,000.00) or more.

If such ownership by Mr. Yates is existent then contracts with such companies would be prohibited. It should be stressed at this point that contracts would be prohibited with any company in which ownership of an interest of five percent (5%) or more is existent. The contracts are not prohibited solely because of the relationship of Mr. Yates to the individuals who run the company, unless such relatives are within the scope of Section 2 (f) of the Act which reads as follows:

"(f) 'Material Financial Interest' shall include a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household."
REPORT OF THE ATTORNEY GENERAL

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Less than five percent interest in nursing home by member of county welfare board does not constitute.

HONORABLE OTIS L. BROWN, Director
Department of Welfare & Institutions

You inquire, by letter of May 11, 1970, whether a conflict of interest is existent in the following:

“Mr. Marion P. Boswell, a member of the Board of Supervisors of Nottoway County and Chairman of the Nottoway County Welfare Board, has notified this Department that he is also a member of the Board of Directors of the Holly Manor Nursing Home in Farmville, Virginia, and owns 3% of its stock.

“Since this institution was established, the Nottoway County Welfare Board has received one application for public assistance from an inmate of this home and expects, in the future, to receive other such applications from Nottoway County residents living in the home.”

I am enclosing a copy of an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which will be found in the Report of the Attorney General (1969-1970), page ——. This opinion contains an explanation of the new Virginia Conflict of Interests Act, Section 3 (a) (1) and (2), which provisions are also pertinent to your inquiry.

Since Mr. Boswell has less than a 5% interest in the nursing home, and assuming he does not receive a salary from the home of five thousand dollars ($5,000.00) or more, a material financial interest does not exist. Thus Mr. Boswell’s position on the County Welfare Board and also being a stockholder in the nursing home does not constitute a conflict of interest.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Ownership of less than five percent in contracting company does not constitute.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Not required where officer has no material financial interest in contract.

HONORABLE WILL D. BAUGH, Secretary
Lynchburg City Electoral Board

I am in receipt of your letter of April 24, 1970, in which you advise that you are Secretary of the local Electoral Board and further are vice president and member of the board of directors of the Brown-Morrison Printing Company. You indicate that there are twenty-five hundred (2500) outstanding shares of stock in the printing company; your interest consists of five shares of stock valued at ten dollars ($10.00) per share. You inquire whether a conflict of interest exists under the recently passed legislation, Chapter 463 of the 1970 Acts of Assembly, a copy of which I am enclosing for your convenience.

In determining the applicability of the Act to any factual situation, the first determination to be made is whether we are concerned with a governmental agency or an advisory agency. You will note that in Section 2 of the Act a distinction is made between these two types of agencies with certain prohibited acts being applicable to each. A local electoral board would be within the definition of “governmental agency” and therefore would be subject to Section 3 of the Act. Sections 5 and 6 of the Act are applicable to both governmental agencies and advisory agencies.
Paragraphs (1) and (2) of Section 3 (a), pertinent to your inquiry, distinguish between contracts with the governmental agency of which you are an officer or an employee on the one hand, and contracts with governmental agencies other than the one of which you are an officer or employee. Under paragraph (1) an officer or employee of a governmental agency may not be a contractor or subcontractor with the governmental agency of which he is an officer or employee, nor may he have a material financial interest in any contract or subcontract with that governmental agency regardless of the fact that such contract or subcontract is let either by negotiation or competitive bidding. Thus all such contracts with your own governmental agency are forbidden.

Under paragraph (2) an officer or employee of a governmental agency may be a contractor of subcontractor with a governmental agency other than the one of which he is an officer or employee or he may have a material financial interest in any contract or subcontract with such other governmental agency if full written disclosure of the interest is made in advance both to the governmental agency of which the individual is a member and to the governmental agency with which such contract is proposed to be made, with the further qualification under paragraph (2) that any such contracts be let only after competitive bidding or such contract is for property or services which in the judgment of the head of the governmental agency (such judgment must be in writing and made a part of public record) should not be acquired through competitive bidding.

Of course, contracts or subcontracts in which the officer or employee does not have a material financial interest are not subject to the provisions of paragraph (1) nor paragraph (2). A material financial interest is a personal and pecuniary interest accruing to an officer or employee or to the spouse or any other relative residing in the same household. However, there is a prima facie presumption that a material financial interest does not exist if there is an ownership of an interest of less than five percent (5%) of a firm, partnership or other business or an aggregate annual compensation of less than five thousand dollars ($5,000.00).

Presumably your inquiry relates to the Brown-Morrison Printing Company contracting for printing services with the local Electoral Board.

Assuming that you do not receive from the company an annual salary of five thousand dollars or more, then in view of your interest in the company of less than five percent, a material financial interest does not exist and the local Electoral Board may contract for services with the Brown-Morrison Printing Company.

Further, I am of the opinion that Brown-Morrison may contract with governmental agencies other than the local Electoral Board pursuant to the provisions of section 3 (a) (2) which have been discussed. Also to be noted in this instance is that since you do not have ownership of a material financial interest in the company, the written disclosure requirements of Paragraph (2) would not be applicable. These disclosure provisions are required only if you yourself are contracting or subcontracting with a governmental agency other than the one of which you are an officer or employee, or if you have a material financial interest as defined above in any contract or subcontract with such governmental agency.

I must stress, however, that if you do acquire a material financial interest in the Brown-Morrison Printing Company, then all contracts with the local Electoral Board itself would be prohibited.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Pecuniary interest occurring to spouse—Contract by wife with school board of which her husband is member is prohibited.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Must be made of any material financial interest by member of governmental agency in contract with another agency of which he is not a member.
VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Contract with governmental agency in which member thereof has material financial interest—Not prohibited if sole interest is by reason of employment by contractor unless participates or has authority to participate in letting of contract.

May 29, 1970

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

I am in receipt of your letter of May 18, 1970, relative to the newly enacted Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly. You inquire as follows:

“(1) Can the husband of a school teacher who has been teaching in the County system for some years be appointed to the school board.

“(2) The particular husband is also an undertaker and from time to time is called upon by the Welfare Department and occasionally the Sheriff to bury dead bodies.

“(3) Can an insurance broker who acts as agent of record on behalf of himself and other insurance brokers insuring county buildings, including the school buildings, and also issuing other insurance on his own behalf as broker to the school board, become a member of the school board.”

I shall answer your questions seriatim:

(1) The answer to this question is in the negative. I enclose herewith a copy of an opinion to the Honorable William J. Hassan, Commonwealth's Attorney for Arlington, dated May 28, 1970, which will be found in the Annual Report of the Attorney General (1969-1970), page - - - . This office in response to the question raised ruled that § 22-206 of the Virginia Code which would allow, in your case, a husband to be appointed to the school board if his wife was a regularly employed teacher prior to his taking office, has been repealed by the new Conflict of Interests Act. Under the new Act if the husband is a member of the school board neither he nor his wife may have a personal and pecuniary interest in any other contract with such school board.

(2) If the husband were a member of the school board he would not be prohibited from contracting with the Welfare Department or Sheriff's Department in his funeral director's business. I enclose herewith another opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which will be found in the Annual Report of the Attorney General (1969-1970), page - - - . This opinion discusses § 3 (a) (1) and (2) of the Act which provisions distinguish between contracts with the agency of which one is a member and contracts with an agency other than that of which one is a member.

In the latter category, contracts in which a material financial interest exists are allowed if “full written disclosure of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding; . . .”

(3) As you can see from the Baugh opinion and the answer to question (2), insurance contracts with agencies other than the school board would be allowed if the procedures in § 3 (a) (2) of the Act are followed. Contracts of insurance with the school board would be prohibited under § 3
(a) (1) of the Act unless the provisions of § 3 (b) (3) are applicable. This section reads as follows:

"(3) to officers or employees whose sole interest in a contract or subcontract with the governmental agency is by reason of employment by the contracting firm, partnership or other business, unless such officer or employee participates, or has authority to participate, in the procurement or the letting of such contract, in which event the provisions of such paragraphs shall be applicable; . . ."

and creates an exception to the prohibition contained in § 3 (a) (1)—that of having a material financial interest in a contract—if the sole interest in the contract is by reason of employment with the contracting firm. It should be stressed at this point that this exception is applicable only to employment and would not apply if the officer or employee was the contractor or if the officer or employee owned more than 5% of the firm or business.

It appears from your question that the above exception would not be applicable. Therefore your inquiry, insofar as it relates to the school board member having an interest in insurance contracts with the school board, is answered in the negative.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Contract existing prior to effective date not exempted.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Member of school board may not have material financial interest in contract with board.

June 23, 1970

HONORABLE JOHN L. JEFFRIES, III
Commonwealth's Attorney for Culpeper County

I am in receipt of your letter of June 17, 1970, wherein you raise two inquiries regarding the Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly. I have paraphrased your inquiries and they will be answered seriatim.

First Question. The wife of a member of the school board who was regularly employed in the system prior to his appointment has entered into a contract for the 1970-1971 school year. You inquire if the contract may be honored. I am enclosing herewith a copy of an opinion to the Honorable William J. Hassan, Commonwealth's Attorney for Arlington, dated May 28, 1970, wherein this office ruled that § 22-206, which previously allowed a wife to teach in the same system where her husband was a member of the school board, has been repealed and that such a relationship would be barred under the new Act. However, your inquiry raises the additional question, whether the contract would be valid for the 1970-1971 school year since it was executed prior to June 26, 1970, the effective date of the new Act. I am of the opinion that this inquiry should be answered in the negative. I am enclosing herewith copies of opinions to: Mr. J. G. Blount, Jr., Assistant Superintendent for Administration and Finance of the Department of Education, dated June 17, 1970; and the Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, dated June 18, 1970, wherein this office has so ruled.

Second Question. You inquire whether the School Board could buy from a retail organization by purchasing either direct or through competitive bidding where a Board member is a part owner of the retail business. You advise that you recognize that § 3 of the Act would prohibit such contracts but ask "whether or not the school bus maintenance department can purchase necessary odds and ends of automotive repair parts on an over the
counter basis at the regular set price schedule charged by the concern to all customers.” I am of the opinion this inquiry also would be answered in the negative. Again § 3 (a) (1) of the new Act would prohibit a member of the School Board from having a material financial interest in any contract or subcontract with the governmental agency of which he is an officer. From your inquiry I must assume that you felt that § 3 (a) (3) of the Act was perhaps applicable. However, this section is applicable only for the purchase of goods from the governmental agency of which one is an officer when such goods or services are provided to the public on a uniform price schedule, e.g., an employee or officer of a State hospital becoming a patient.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Contract with governmental agency in which member thereof has material financial interest—Not prohibited if sole interest is by reason of employment by contractor unless participates or has authority to participate in letting of contract.

May 28, 1970

HONORABLE JOHN L. JEFFRIES, III
Commonwealth's Attorney for Culpeper County

I am in receipt of your letter of May 13, 1970, wherein you state that it appears the Culpeper County School Board is able to receive bids for school insurance needs only from one specific company. An agent for this company is also a member of the school board. You inquire if "(u)nder these circumstances would the agent of the company who is a member of the school board be acting in conflict of interests if his company submitted a bid and was selected as the company offering the plan most advantageous to the school board."

I am enclosing a recent conflict of interest ruling of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, which will be found in the Report of the Attorney General (1969-1970), page ___.

As you can see from this opinion and from the Act, a copy of which I also enclose, Section 3 (a) (1) prohibits an officer or employee of a governmental agency from having a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, regardless of the fact that the contract will be let only after negotiation or competitive bidding.

I assume that the member of the school board who is also an agent for the insurance company receives from the company an aggregate annual compensation of five thousand dollars ($5,000.00) or more. This being true, a material financial interest is presumed to exist and it would appear that a conflict of interest may exist.

However, Section 3 (b) (3) provides that the provisions of Section 3 (a) (1) and (2) are not applicable "to officers or employees whose sole interest in a contract or subcontract with the governmental agency is by reason of employment by the contracting firm, partnership or other business, unless such officer or employee participates, or has authority to participate, in the procurement or the letting of such contract, in which event the provisions of such paragraphs shall be applicable; . . .”

Thus the answer to your inquiry is dependent upon whether the member of the school board receives from his company a salary of five thousand dollars ($5,000.00) or more and participates or has authority to participate in the procurement or letting of such contract. If he does, then your inquiry is answered in the affirmative.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Contracts existing prior to effective date not exempted.
I am in receipt of your letter of June 16, 1970, wherein you inquire if a contract which is of the type that may be declared void under the newly enacted Conflict of Interests Act (the husband of a teacher is a member of the School Board) may be honored for the 1970-1971 school year if entered into prior to June 26, 1970, the effective date of the Virginia Conflict of Interests Act.

I am of the opinion that your question must be answered in the negative. I am enclosing herewith two recent rulings of this office to the Honorable Joseph H. Campbell, Commonwealth's Attorney, for the City of Norfolk, dated June 18, 1970, and to Mr. J. G. Blount, Jr., Assistant Superintendent for Administration and Finance of the State Department of Education, dated June 17, 1970, wherein this office ruled that not only does the Act prohibit the entering into of a contract which would be violative of the Conflict of Interests Law, but it also forbids the relationship of being a contractor or having a material financial interest in a contract or subcontract with the governmental agency of which one is an officer or employee.

A material financial interest is defined under the Act as a personal and pecuniary interest accruing to an officer, employee, or to his spouse. The School Board member would be an officer of local government; "officer" being defined as including "any person appointed or elected to any governmental or advisory agency and who shall be deemed an officer of such agency whether or not such person receives compensation or other emolument of office." Section 3 (a) (1) of the Act would prohibit an officer of the School Board from contracting with or having a material financial interest in any other contract with the School Board. Due to the very definition of a material financial interest, the husband in the case you present would have a prohibited interest in any contract entered into between the School Board and his wife. Though as you point out the contract was entered into in good faith, such contracts are subject to the public policy of the Commonwealth as set forth in the Act and therefore may be declared void.

I am constrained to concur in your opinion that it will be necessary for either the wife or the member of the School Board to resign.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—County Supervisor's spouse may be employed as teacher if Supervisor fulfills disclosure requirements.

VIRGINIA CONFLICT OF INTERESTS ACT—Disqualification from Participating in Official Action—County Supervisor whose spouse is teacher not precluded from consideration of school budget.

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

I am in receipt of your letter of June 1, 1970, wherein you inquire if a conflict of interest exists when the wife of a member of the Board of Supervisors is employed by the County School Board as a teacher.

I am enclosing for your convenience a copy of the Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly. In addition I am also enclosing a copy of an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which discusses §§ 3 (a) (1) and (2) of the Virginia Conflict of Interests Act.

Under the Act an officer or employee and his spouse are treated as one; a material financial interest being defined as a personal and pecuniary...
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interest accruing "to an officer or employee or to his spouse." Any prohibitive act applicable to an officer or employee would also be applicable to the spouse.

You will note that under § 3 (a) (1) of the Act as discussed in the Baugh opinion, no officer or employee (or the spouse of the same) may be a contractor or subcontractor with the governmental agency of which he is an officer or employee nor have a material financial interest in any contract or subcontract with such governmental agency. However, under the provisions of § 3 (a) (2) an officer or employee may be a contractor or subcontractor or have a material financial interest in a contract or subcontract with any governmental agency other than the one of which he is an officer or employee, if the disclosure requirements are made in advance both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made. Further requirements of course are that such contract be let after competitive bidding, or that the contract be for property or services which are not the proper subject matter for competitive bidding.

I am of the opinion that § 3 (a) (2) would be applicable to the situation you present. The spouse who is a teacher in the Southampton County School System may continue to be employed by the County School Board providing her husband gives written disclosure to both the Board of Supervisors and the School Board that he does in fact have a material financial interest in the contract his wife is entering into. The School Board would then as a matter of public record determine that the services of a teacher are not a proper subject matter to be acquired through competitive bidding.

Your inquiry raises the additional question of whether the husband who is a member of the Board of Supervisors must, pursuant to § 6 of the Act, disqualify himself from voting or participating in any action concerning the approval of the county school budget. I am of the opinion that § 6 would not be applicable. The pertinent provisions of this section are:

"Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualify himself from voting or participating in any official action thereon in behalf of such agency."

The action of the member of the Board of Supervisors in considering approval of the school budget is to determine approval or disapproval of the entire budget; a matter of general application not directly related to either salary paid or identity of any specific salaried teacher or employee or officer of the School Board. Consequently this would not be a transaction "not of general application" within the purview of § 6.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Lease of property to governmental agency by member thereof not prohibited.

May 25, 1970

HONORABLE L. J. HAMMACK, JR.
Commonwealth's Attorney for Brunswick County

I am in receipt of your letter of May 6, 1970, wherein you state that a member of the Board of Supervisors of Brunswick County owns a controlling interest in a local corporation with members of his immediate family owning the remaining interest. The County of Brunswick is now seeking an area to be used for sanitary land fill purposes, and a parcel of
land owned by the corporation is being considered. You inquire as to the legality of the corporation leasing the land to the County for sanitary land fill purposes and in the alternative you inquire whether the land can be legally sold to the County by the corporation.

I am enclosing herewith an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, of this date which will be found in the Report of the Attorney General (1969-1970), page ——, which discusses under § 3 (a) (1) and (2) of the recently enacted Conflict of Interests Act the permissibility of an officer of a governmental agency contracting with the governmental agency of which he is an officer, or with any other governmental agency other than the one of which he is an officer.

However, § 3 (b) (1) states that the provisions of paragraphs (1) and (2) of subsection (a) of § 3 are not applicable "to the sale, lease or exchange of real property between an officer or employee and a governmental agency provided the officer or employee does not participate in any way as such officer or employee in such sale, lease or exchange, and this fact is set forth as a matter of public record by the governing body of such governmental agency or by the administrative head thereof; . . ."

The corporation may therefore lease the land in question to the County of Brunswick pursuant to the applicable provisions of the above quoted section.

VI RGINIA CONFLICT OF INTERESTS ACT— Prohibited Contracts—
Member of governmental agency contracting with another—Not applicable to member of Board of Supervisors who handles food stamps in his grocery business—Contract is with customer.

VI RGINIA CONFLICT OF INTERESTS ACT—Disclosure—Not required of member of Board of Supervisors who handles food stamps in his grocery business when Board is considering budget of county welfare department which regulates food stamp program.

Honorable Joseph M. Whitehead
Commonwealth's Attorney for Pittsylvania County

I am in receipt of your letter of April 27, 1970, wherein you set forth the following factual situation: "A" is an official of a county by virtue of being a member of the Board of Supervisors and is also engaged in the retail grocery business. "A" is qualified to handle in his business food stamps issued by the Federal Government and regulated and supervised by the County Welfare Department. The County bears a certain percentage of the costs of the food stamps. You inquire whether "[u]nder the newly enacted conflict of interest statute [Chapter 463 of the 1970 Acts of Assembly, a copy of which I am enclosing], Section 3, would 'A' be required to disclose that he may have a financial interest in the food stamp program by virtue of accepting the same in his business and further would he be required to disqualify himself from voting or participating on any official action thereon?"

From the purport of your question it is clear that your inquiry relates to § 3 (a) (2) of the newly enacted Act. Enclosed herewith is a copy of an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg Electoral Board, dated May 25, 1970, which will be found in the Report of the Attorney General (1969-1970), p. ——. This opinion fully discusses §§ 3 (a) (1) and (2) of the Conflict of Interests Act, and the distinguishments between the two paragraphs.

It is evident though that neither of the two paragraphs of § 3 is applicable to the situation you present, for "A" is not entering into any contract with a governmental agency; his contract is with each customer purchasing merchandise in his store.
However, your further inquiry, relative to whether "A" must disqualify himself from voting or participating on any official action concerning the food stamp program, raises the question of the applicability of § 6 of the Act, which section must be read on its own, and is as follows:

"Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualify himself from voting or participating in any official action thereon in behalf of such agency. If disqualifications in accordance with this section leave less than the number required by law to act, the remaining member or members shall have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members. Official action taken under circumstances which violate this section may be rescinded by the agency on such terms as the interests of the agency and innocent third parties require."

I am of the opinion that § 6 is not applicable to your inquiry. "A" as a member of the Board of Supervisors would be voting on the approval of the total budget for the County Welfare Department. He would not be voting for approval of an allocation of moneys to the food stamp program. Thus the transaction (approval of the County welfare budget) with which the Board of Supervisors is concerned would be of general application throughout the county and would not be a transaction of direct interest to "A".

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Member of governmental agency prohibited from having material financial interest in contract with said agency—Spouse of Superintendent of Schools may not contract with School Board as teacher.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—Spouses of members of School Trustee Electoral Board, Boards of Supervisors, City Councils, and Town Councils may be employed as teachers if disclosure requirements met.

June 17, 1970

MR. J. G. BLOUNT, JR.
Assistant Superintendent for
Administration and Finance
Department of Education

I am in receipt of your inquiry relative to the new Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly. Your inquiries will be answered seriatim and are as follows:

Question 1. "Do the prohibitive provisions of Chapter 463, Acts of Assembly, 1970, apply to the employment of teachers who are relatives of and reside in the household of:

"a. Division Superintendent of Schools
"b. Members of School Trustee Electoral Board
"c. Members of Boards of Supervisors, City and Town Councils"

I am enclosing herewith a copy of an opinion to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which will be found in the Report of the Attorney General (1969-
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1970, p. —, which discusses the applicable provisions of paragraphs (1) and (2) of § 3 (a) of the Act.

Under § 3 (a) (1) an officer or employee may not be a contractor or have a material financial interest in any contract with the agency of which he is an officer or employee. The provisions of § 3 (a) (2) govern the entering into of a contract or having a material financial interest in a contract with an agency other than the one of which one is an officer or employee.

In addition, a material financial interest is defined as a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household. Under the Act an officer or employee and his spouse are treated as one and the same. Thus the prohibited conduct applicable to the officer or employee is also applicable to the spouse, as well as to any relative residing in the same household.

Applying the pertinent provisions of the Act to your inquiry, it is clear that if a Division Superintendent of Schools has a contract with the School Board, he may not have a material financial interest in any other contract with the School Board. Consequently the spouse of the Superintendent or any relative of the Superintendent residing in the same household may not be employed in the same school system.

Members of the School Trustee Electoral Board and members of Boards of Supervisors, City Councils and Town Councils would be subject to the provisions of § 3 (a) (2) of the Act. The employment of their spouses or any other relative residing in the same household by the County or City School Board would be permissible if the disclosure requirements of § 3 (a) (2) are followed and, in addition, the School Board as a matter of public record finds that the services contracted for should not be acquired through competitive bidding.

Question 2. "Section 2(f) reads in part, 'officer or employee or to his spouse or to any other relative who resides in the same household.' Can 'same household' be construed to mean 'immediate household, next door, etc.'?"

I am of the opinion that the language "resides in the same household" should be construed as you indicate.

Question 3. "We are advised that Chapter 463 will become effective June 26, 1970.

  "a. Will annual teacher contracts for 1970-71 executed under existing law prior to June 26, 1970, be valid or does Chapter 463 invalidate such contracts?
  
  "b. Does the amended Act invalidate continuing contracts executed under the provisions of 22-217.1 - 22-217.8 including amendment passed at the 1969 Special Session of the General Assembly?"

I am of the opinion that the new Conflict of Interests Act would invalidate the contracts you inquire about. The Act forbids the relationship of being a contractor or having a material financial interest in a contract with the governmental agency of which one is an officer or employee regardless of the date when such contracts were executed.

VIRGINIA CONFLICT OF INTERESTS ACT — Prohibited Contracts — Member of school board may not contract with school board to give medical examinations to bus drivers.

VIRGINIA CONFLICT OF INTERESTS ACT — Prohibited Contracts — Member of school board has material financial interest in contract which his associates in clinic enter into on behalf of clinic to give examinations to bus drivers — But not if contract entered by associates in individual capacity.
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HONORABLE A. ERWIN HACKLEY
Commonwealth's Attorney for Page County

June 9, 1970

This is in reply to your letter of June 4, 1970, to which is attached a letter from Mr. Jack Harner, Division Superintendent of Page County Public Schools, in which he presents the following questions relating to the prospective appointment of Dr. James R. Holsinger to the Page County School Board:

“(1) After Dr. Holsinger assumes his duties as a member of the Page County School Board on July 1, 1970, will a conflict of interest exist if he continues to perform physical examinations on bus drivers employed by the school board, with the cost of said physicals being paid from school board funds?

“(2) After Dr. Holsinger assumes his duties as a member of the Page County School Board on July 1, 1970, will a conflict of interest exist if any of his associates in the Luray Clinic, representing themselves as associates in the clinic, perform physical examinations on bus drivers employed by the school board, with the cost of said physicals being paid from school board funds?

“(3) After Dr. Holsinger assumes his duties as a member of the Page County School Board on July 1, 1970, will a conflict of interest exist if any of his associates in the Luray Clinic, representing themselves as private physicians, and not as associates in the clinic, perform physical examinations on bus drivers employed by the school board, with the cost of said physicals being paid from school board funds?”

I am enclosing herewith a copy of the Virginia Conflict of Interests Act, Chapter 463 of the 1970 Acts of Assembly. Also enclosed is a copy of an opinion of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which will be found in the Report of the Attorney General (1969-1970), p. —. This opinion discusses in general the distinctions between § 3 (a) (1) and 3 (a) (2) of the new Act.

However, applicable to your situation is § 3 (a) (1). You will note that in § 3 (a) (1) no officer or employee of any governmental agency, the definition of which includes a school board, may, (1) be a contractor or subcontractor with the governmental agency of which he is an officer or employee; or, (2) have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or an employee.

Applying this section to your inquiries, the first question is answered in the affirmative. Dr. Holsinger would in effect be a contractor with the school board. This relationship is banned by the first portion of § 3 (a) (1).

I am of the opinion that, assuming Dr. Holsinger has a material financial interest in the clinic, the second inquiry must also be answered in the affirmative. Under § 3 (a) (1) not only may Dr. Holsinger not be a contractor with the school board, he may not have a material financial interest in any contract with the school board. A material financial interest is a personal and pecuniary interest accruing to the officer or employee and is assumed to exist if there is ownership of an interest of five percent (5%) or more in a firm, partnership, or other business or an aggregate annual compensation of five thousand dollars ($5,000.00) or more, from such firm, partnership, or other business.

In response to your third inquiry, assuming that the fees paid Dr. Holsinger’s associates are not used for the clinic, then a statutory conflict of interest does not exist. However, your inquiry does raise a question of professional ethics which is not a determination for this office but which
should be properly submitted to the State Board of Medical Examiners, Dr. Russell M. Cox, Secretary, 509 Professional Building, Portsmouth, Virginia 23704, for an opinion.

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—May be held to consider acquisition of land for public park.

June 19, 1970

HONORABLE STANFORD E. PARRIS
Member, House of Delegates

This is in reply to your inquiry of June 15, 1970, as to the propriety of the Fairfax County Park Authority barring the press from a meeting held to consider the desirability and feasibility of acquiring a tract of land for use as a public park.

The Virginia Freedom of Information Act imposes limitations on the extent to which closed meetings may be held by certain public bodies. These public bodies are specified in § 2.1-341(a) of the Code of Virginia (1950), as amended. They are as follows:

"... any authority, board, bureau, commission, district or agency of the state or of any political subdivision of the state, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; and other organizations, corporations or agencies in the state, supported wholly or principally by public funds."

In light of the broad language quoted above, I am of the opinion that the meetings of the Park Authority are subject to the limitations imposed by the Act. The instances in which closed meetings may be held by such a body are specified in § 2.1-344 of the Code of Virginia (1950), as amended. It reads in part:

"(a) Executive or closed meetings may be held only for the following purposes: ... (2) Discussion or consideration of the condition, acquisition or use of real property for public purpose, or of the disposition of publicly held property."

Clearly, such a meeting as you specified would be a "discussion or consideration of the... acquisition... of real property for public purpose..." Therefore, I am of the opinion that the Park Authority was acting in compliance with the law in holding a closed meeting under the circumstances which you indicated.

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—May not be held merely at the direction of the presiding officer.

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—May be held to protect the privacy of individuals in personal matters.

October 29, 1969

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

This is in reply to your inquiry of October 21, 1969, as to whether a board of welfare may properly hold an executive session at the direction of the Superintendent of the board and preclude attendance by members of the board of supervisors. You state that the executive session was desired because "questions involving personalities were to be on the agenda."
Pertinent to your inquiry is § 2.1-344 of the Virginia Code. This section is part of the Virginia Freedom of Information Act and specifies the instances in which a public body may hold executive sessions from which the public is excluded. The act is made applicable to county boards of welfare by § 2.1-341(a). You will note that § 2.1-344 (7) (b) specifies that an executive session may be held only upon a recorded affirmative vote to that effect. Therefore, a public body subject to the act may not go into executive session merely at the direction of the presiding officer thereof.

Executive sessions may be held only for those purposes set forth in § 2.1-344. In this connection I direct your attention to § 2.1-344 (3) of the act which reads as follows:

"Executive or closed meetings may be held only for the following purposes:

* * *

"(3) The protection of the privacy of individuals in personal matters not related to public business."

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**VIRGINIA FREEDOM OF INFORMATION ACT—Official Records—Records pertaining to salaries paid county officials may be examined by any citizen.**

**June 16, 1970**

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

This is to acknowledge receipt of your letter of June 8, 1970, in which you state in part:

"Section 2.1-342 (a) provides in part that all official records shall be open to inspection and copying by any citizen of this State having a personal or legal interest in specified records and that access to such records shall not be denied to any such citizen. Sub-paragraph (b) of this Section excludes certain records from the provisions of the Virginia Freedom of Information Act.

"It would be appreciated if you give me your opinion as to whether or not the salary of any county official is excluded from the provisions of the Virginia Freedom of Information Act by Sub-paragraph (b) of Section 2.1-342 of the Code of Virginia."

Official records which disclose how the public revenue is spent are certainly records which can be inspected by the public pursuant to § 2.1-342, Code of Virginia, as enacted by Chapter 479, Acts of 1968. Indeed a taxpayer and citizen has a personal interest in such records.

I am therefore of the opinion that the records pertaining to salaries paid county officials may be examined by any citizen.

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**VIRGINIA FREEDOM OF INFORMATION ACT—Public Records—Salary information on school board officials open to public information.**

**June 18, 1970**

HONORABLE W. O. JONES
Treasurer of Nansemond County

This is in reply to your letter of May 26, 1970, in which you state that you have been requested by various citizens' groups to furnish to them "salary information on different departments, especially the school board
and all of its office personnel." You inquire as to the extent to which you are authorized to divulge the information.

The right of the public to access to public records in proper circumstances is founded on consideration of strong public policy, and has long been recognized by statute and discussed in numerous prior opinions of this office. Section 58-919 of the Code provides in part that "the treasurer shall keep the books, papers, and moneys pertaining to his office at all times ready for inspection of . . . any taxpayer of the county . . . ."

See Report of the Attorney General (1954-1955), p. 240. In an opinion of this office reported in Report of the Attorney General (1962-1963), p. 237 it was ruled that while there was no duty imposed on a school board to compile data relating to teachers' salaries, a citizen would have the right to examine the records and make memoranda therefrom. Section 2.1-342 of the Virginia Freedom of Information Act, provides for the open inspection and copying of public records under the conditions specified therein.

In view of the fact that the information which you have described could have been obtained from the school board, and in light of the language of § 58-919, there is no limitation upon your authority to permit access to the described records. None of the foregoing authorities require you to compile the information, although this may be done if you find it desirable to do so.

VIRGINIA STATE BAR—Subpoena Power of District Committee—Does not include power to summon prisoners incarcerated by State.

HONORABLE N. SAMUEL CLIFTON, Executive Director
Virginia State Bar

May 7, 1970

This is to acknowledge receipt of your letter of April 30, 1970, in which you request my opinion on the question of whether or not the subpoena power of the District Committee under Rule 13 (e), Part Six of the Rules of the Supreme Court of Appeals relative to the Integration of the State Bar Section IV (205 Va. 1033, 1042), extends to the power to summon prisoners incarcerated by the State.

The pertinent part of said Rule 13 (e) is as follows:

"In any investigation or hearing provided for herein the Committee or any member thereof shall have the power to summon and examine witnesses under oath administered by any member of the Committee and to compel their attendance and the production of books, papers, letters and other documents necessary or material to the inquiry. Such summons or subpoena shall be issued under the hand of any member of the Committee and have the force of a subpoena issued by a court of competent jurisdiction, and any witness or other person who shall fail to appear, or to be sworn, or to testify, or to produce books, papers, letters or other documents demanded, shall be liable to a rule or an attachment upon application to the Judge of any circuit or corporation court within the Congressional District in which the investigation is being conducted, as in cases of contempt. The accused shall have the right to have such subpoena issued on his behalf and to be represented by counsel."

The only statutes authorizing the production of prisoners as witnesses are §§ 8-300 and 8-300.1 of the Code of Virginia (1950), as amended. A close reading of § 8-300 indicates that it is limited to a criminal prosecution in any court of record. A close reading of § 8-300.1 indicates that it is only applicable to civil proceedings (cases) pending in any court of record and the order of the court directing the production of the prisoner is issued in the discretion of the judge.
As I understand, the proceedings before these District Committees are not denoted as criminal proceedings. The Virginia State Bar is an administrative agency for the purpose of investigating and reporting violations of such rules and regulations as are adopted by the Supreme Court of Appeals. Section 54-49 of the Code. They are investigatory in nature and probably more akin to civil proceedings than they are to criminal proceedings.

Inasmuch as the proceeding is before the District Committee and not before a court of record and is not a criminal prosecution before a court of record, neither Section 8-300 nor 8-300.1 is applicable. The rules of the Supreme Court of Appeals adopted pursuant to § 54-48, which have the effect of law, do not provide a procedure for the production of prisoners as witnesses before the District Committee.

I am therefore of the opinion that the District Committee's power to summon witnesses under Rule 13 (e), supra, does not include the power to produce prisoners incarcerated in the penitentiary, or in the State Farm, or in State Convict Road Camps.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Coverage—Hospital or Health Center Commission must elect to join or its employees not covered even though county belongs.

June 26, 1970

HONORABLE H. C. DEJARNETTE, Clerk
Circuit Court of Orange County

This is to acknowledge receipt of your letter of June 22, 1970, in which you state in part:

“Orange County is now constructing a nursing home with Hill-Burton funds. The nursing home will be leased & operated by a nursing home commission, established by resolution of the Orange County Board of Supervisors in accordance with Section 32-276 Code of Virginia.

“My inquiry is whether or not employees of this quasi public corporate body would be county employees and covered by the Virginia Supplemental Retirement System which the county has joined.”

The pertinent portion of the Virginia Supplemental Retirement Act is § 51-111.31 of the Code of 1950, as amended, which reads in part as follows:

“The governing body of any county, city or town, and the commission, directing or governing body of any political entity, subdivision, branch or unit of the Commonwealth or of any commission or public authority or body corporate created by or under an act of the General Assembly and subdivision of any of the foregoing, may, by resolution legally adopted and approved by the Board, elect to have those of its officers and employees who are regularly employed full time on a salary basis, whose tenure is not restricted as to temporary or provisional appointment, become eligible to participate in the retirement system.”

Hospital or Health Center Commissions are created and function pursuant to Chapter 14, Title 32 (§§ 32-276, et seq.) of the Code of Virginia (1950), as amended. Among the powers granted these commissions as set forth in § 32-280 is:

“To employ such technical experts, and such other officers, agents and employees as it may require, to fix their qualifications, duties and compensation and to remove such employees at pleasure.”

These commissions are bodies corporate created by or under an act of the General Assembly (§ 32-278) within the meaning of § 51-111.31.
I am of the opinion that the employees of the Health Center Commission (Nursing Home Commission) are not employees of the County but employees of said Commission. However, such employees may be covered by the Supplemental Retirement System under § 51-111.31 upon the Commission making the proper arrangement with the Board of Trustees of the Virginia Supplemental Retirement System pursuant to the provisions of the Virginia Supplemental Retirement Act.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM — Employees in Positions Comparably Hazardous With State Police—Includes city sergeant, deputies, town sergeants and jailers.

HONORABLE BOYD F. COLLIER, Director Designate
Virginia Supplemental Retirement System

June 3, 1970

This is to acknowledge receipt of your letter of May 29, 1970, in which you state in part:

"In revising the Virginia Supplemental Retirement Act, this past Session of the General Assembly under Virginia Code Section 51-111.37 provided that political subdivisions which participate in the Virginia Supplemental Retirement System may, under certain conditions, elect to provide benefits for their employees who are employed in positions comparably hazardous to that of a State Police Officer, equivalent to those provided State Police Officers under the State Police Officer's Retirement System. Several of our participating political subdivisions have already requested that necessary steps be taken to affect this coverage.

"... an opinion from your office is respectfully requested as to whether or not the following positions would be deemed comparably hazardous to those of State Police Officers: (i) city sergeants and their deputies, (ii) town sergeants or jailers.""

Section 51-111.37, Code of Virginia, as amended by Chapter 476, Acts 1970, reads in part as follows (the amended portion is italicized):

"Employees who become members under this article and on behalf of whom contributions are paid as provided in this article shall be entitled to benefits under the retirement system; provided, however, that for any such employees who are employed in law enforcement positions comparably hazardous to that of a State police officer, the employer may, by resolution legally adopted and approved by the Board, elect to provide benefits equivalent to those provided for State police officers of the Department of State Police, as set out in §§ 51-144, 156, 51-157 in lieu of the benefits that would otherwise be provided hereunder."

Section 120 of the Constitution of Virginia provides, among other things, that in every city there shall be one city sergeant whose duties shall be prescribed by law.

Section 15.1-824 of the Code provides that the sergeant of a city shall perform the duties as prescribed in the charter of his city and perform and exercise the same powers and duties that a sheriff of a county exercises and performs.

Section 15.1-796 of the Code provides that sergeants of towns shall have the same powers and discharge the same duties as sheriffs within the corporate limits of the town and a distance of one mile beyond the same.

It seems to me that the office of sheriff would fall in the same category with that of the State Police within the meaning of the Act (§ 51-111.37).
An examination of the charter provisions would have to be made to determine the duties of the concerned city sergeant and the concerned town sergeant. However, both of these officials have the duties of a sheriff within the corporate limits of their city or town under the general law as indicated above. Furthermore, the position of jailer is hazardous as history shows that there have been cases where jailers have been killed and injured in attempting to suppress a jailbreak and in the handling of prisoners they have in their custody.

I am therefore of the opinion that the positions of city sergeants, their deputies and town sergeants or jailers are deemed comparably hazardous to those of State Police officers.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Group Insurance

—Reduction of coverage—How to apply to those who attained age 65 before effective date.

May 22, 1970

MR. BOYD F. COLLIER, Director Designate
Virginia Supplemental Retirement System

This is in reply to your letter of April 8, 1970, in which you inquire as to the effect of the amendment of § 51-111.67:4 of the Code by Chapter 774 of the Acts of Assembly, 1970. You further state as follows:

"Under the existing law, a covered employee attaining age sixty-five ceases to pay insurance premiums, and his insurance coverage is an amount equal to his salary at age sixty-five rounded off to the next highest thousand. It begins then to reduce at a rate of 2 per cent per month until a maximum reduction of 75 per cent has been reached.

"The real question is, when reading subsections (a) and (b) of Section 51-111.67:4 together, how is this agency to apply the reduction of coverage to those that have attained age sixty-five prior to the effective date of the act? For example, suppose A is now covered under the act and is seventy years of age with an annual salary of $15,000.00. When he attained age sixty-five, his annual compensation was $10,000.00. He would now have, under the existing law, $2,500.00 of paid up insurance coverage. Are we to apply the reduction rate to the amount of insurance coverage A had at age sixty-five, or, in view of subsection (a), is his insurance coverage $30,000.00 before applying the reduction factor and hence having reduced to a maximum reduction of 75 per cent of his $30,000.00 coverage, would it be $7,500.00 after the effective date of this act?"

Section 51-111.67:4 to which you refer, states in pertinent part as follows:

"Amounts of life and accident insurance for each employee; termination of insurance.—(a) Each employee to whom this article applies shall, subject to the terms and conditions thereof, be eligible to be insured for an amount of group life insurance equal to twice the amount of his highest annual compensation plus an equal amount of group accidental death and dismemberment insurance; provided that the amounts of such group life insurance or group accidental death and dismemberment insurance shall in neither case exceed sixty thousand dollars; and provided, further, that the amount of such group life insurance and group accidental death and dismemberment insurance shall in each case be the even thousand dollar amount equal to or next highest to the amount which is twice his highest annual compensation.

* * *
"(b) The amounts of life and accidental death and dismemberment insurance on employees who remain employed after age sixty-five shall be reduced by two per centum thereof at the end of each full calendar month following the date the employee attains age sixty-five; but such reduction shall not decrease the amount of insurance on an employee to less than twenty-five per centum of the insurance in force immediately preceding the first reduction therein; provided that the amounts of life and accidental death and dismemberment insurance in force from time to time on an employee who becomes insured under this article after having attained the age of sixty-five shall be the same as would be in force had he been insured at age sixty-five and shall be based on the lesser of his annual compensation (1) at the time he becomes so insured, or (2) at age sixty-five provided he was eligible at that time to be insured under this article.

"(c) The amount of life insurance on each employee who retires (i) for service on an immediate annuity shall be reduced by two per centum of the amount of insurance in force at such employee's age sixty-five, or other lesser age if so retired prior to age sixty-five . . . ."

As of June 26, 1970, the effective date of the Act, State employees become eligible under the terms of subsection (a) of the Act for group life insurance in an amount equal to twice their annual compensation. There is no language in the Act which denies this coverage to employees in service at or beyond age 65.

However, the two per cent monthly reduction factor referred to in subsection (b) must be applied as soon as the individual attains age 65. Should he remain in service past age 65 and receive a salary increase, the amount of his coverage would be twice his salary minus two per cent of this per month since he attained age 65. Therefore, in your above mentioned example the applicable coverage would be $30,000.00 ultimately reduced to a minimum of $7,500.00.

This interpretation is awkward at best, and results from the fact that subsection (b) was not amended to conform to the amendments of Chapter 774 to subsection (a). Before the enactment of Chapter 774, the insurance in effect at age 65 was equal to the employee's salary and coverage did not increase even if the employee continued in service past age 65 at increased compensation. Now, however, there is no language in subsection (a) which restricts the amount of coverage to that in force at age 65.

As the Act is presently written, the reduction factor applicable to persons who retire for service on an immediate annuity, as mentioned in subsection (c), expressly applies to the salary at age 65, rather than the "highest annual compensation" referred to in subsection (a). While there is no apparent reason for the distinction in the coverage of persons within these categories, it is necessary to reach this result in order to give full effect to the words of the legislation.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Group Insurance
—State may require public school teachers to purchase with deductions from salary.

May 27, 1970

HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

This is in reply to your letter of May 5, 1970, in which you present the following questions:

"The first question is whether the State of Virginia can legally require a public school teacher to purchase term life insurance from one or more companies without regard to whether the teacher
in question already has in force permanent life insurance policies with greater amounts of coverage than the coverage provided in the state's group life insurance policy.

"The second question is whether or not a teacher or group of teachers by a class action could institute a suit against the Commonwealth or the trustees of the Supplemental Retirement System seeking to declare any deductions for group life insurance premiums from their compensation unconstitutional or otherwise unlawful."

Section 51-111.67:1 of the Code authorizes the Board of Trustees of the Virginia Supplemental Retirement System to establish a group insurance plan. Section 51-111.67:5 authorizes the contributions to be deducted from the salary of the employee. The General Assembly may establish the terms of employment of its employees. The foregoing sections are enacted pursuant to this authority and I am of the opinion that it is within the power of the General Assembly to so provide.

Virginia has no procedure whereby a party can maintain a pure class action. Naturally, this would not preclude one or more individuals from litigating the issues which are presented in your letter.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM — Refunding of Accrued Contributions—Not refundable when membership remains continuous though employee changes employment where both positions covered by system.

HONORABLE BENJAMIN H. WOODBRIDGE, JR.
Member, House of Delegates

June 18, 1970

This is to acknowledge receipt of your letter to Mr. W. Luke Witt dated June 2, 1970, in which you request my opinion on the question: whether a person (hereinafter designated "S") can withdraw his accrued contributions from the Virginia Supplemental Retirement System under the following circumstances:

"'S', an employee of the Highway Department on February 27, 1970, gave notice in writing that he intended to terminate his employment with said department on March 13, 1970, and this was done. At the same time (February 27) he requested that he be paid his accumulated contributions. On March 16, 1970, he accepted a position with 'X' county. The employees of this county are covered by the Virginia Supplemental Retirement Act as that county participates in the said retirement system. Article 4, Chapter 3.2, Code of Virginia, as amended."

The following portions of the Virginia Supplemental Retirement Act are pertinent to the question presented:

"§ 51-111.10 (6) 'Employee' means any teacher, State employee, officer or employee of a locality participating in the retirement system as provided in article 4 (§ 51-111.31 et seq.), or any employee of a corporation participating in the retirement system as provided in article 4.1 (§ 51-111.38:1 et seq.) or any civilian employee of the army or air national guard participating in the retirement system as provided in article 4.2 (§ 51-111.38:10 et seq.);"

"§ 51-111.10 (8) 'Member' means any person included in the membership of the retirement system as provided in this chapter;"

"§ 51-111.10 (15) 'Creditable compensation' means the full compensation payable to an employee working the full working time for his covered position which is in excess of twelve hundred dollars per annum; in cases where compensation includes maintenance or other
perquisites, the Board shall fix the value of that part of the compensation not paid in money:"

"§ 51-111.17 The Retirement system shall be administered by a board of trustees to be known as the 'Board of Trustees of the Virginia Supplemental Retirement System,' which Board is hereby established."

"§ 51-111.38:12 Membership in the retirement system shall be compulsory for all employees who are eligible as provided in § 51-111.38:10 and who enter service of an employer after the date the approval is given."

"§ 51-111.46 (c) In determining the creditable compensation of a member in a payroll period, whether semimonthly or monthly, the Board may consider the rate of compensation payable to such member on the date of entry or removal of name from payroll as having been received throughout the month if service for the month is creditable. If service for the month is not creditable, the Board may consider any compensation payable during the month as not being creditable compensation."

"§ 51-111.58 If a member has ceased to be an employee, otherwise than by death, or by retirement under the provisions of this chapter, he shall be paid, on demand, but not later than ninety days thereafter, the amount of his accumulated contributions reduced by the amount of any retirement allowances previously received by him under any of the provisions of this chapter or the abolished system."

The Virginia Supplemental Retirement System covers full time salaried State employees, teachers, and employees of some 240 participating political subdivisions. It is the same system, administered uniformly, for its members, irrespective of where they may be employed.

The Board under § 51-111.46 (c) has the authority to determine creditable compensation of a member in a payroll period, that is, how much of a monthly salary is to be credited and how much of a month will be credited as service rendered in the retirement system. For many years the Board in administering the Act has taken the position that if a member is paid as much as one-half a month's salary, his retirement contribution will be the same as if he had worked the entire month. If the employee is paid for less than a half month's salary, no retirement contribution is made and there will be no credited service for that month, thereby causing a break in service for that month.

As you know, the construction of a statute placed upon it by the agency which administers it is most important and is entitled to great weight by the Courts and in doubtful cases will be regarded as decisive. Southern Spring Bed Co. v. State Corporation Commission, 205 Va. 272, 136 S.E.2d 900 (1964). This is especially true when the practical construction has long continued. 17 M.J., Statutes, § 58.

According to the action of the Board in the case of "S" (following the practical construction placed upon the statute), he having been paid for one-half the month of March 1970 by the Department of Highways, he was duly credited one full month of service and contributed for one full month. His employment with the Highway Department terminated on March 13, 1970, and began with "X" County on March 16, 1970. The County did not carry him for retirement purposes during the balance of the month of March (as he had contributed to the System for that month) but did begin to carry him for retirement purposes as of April 1, 1970. Therefore, insofar as the retirement system was concerned, his employment was continuous within the meaning of the statute.

I am advised that the Board since its establishment on July 1, 1942, has never refunded accumulated contributions and interest to a member when his membership remains continuous, even though the employee should change employment from one position to another, where both positions are
covered by the retirement system. This seems to be reasonable and proper application of the statute.

I am therefore of the opinion that "S" cannot withdraw his accrued contributions from the Supplemental Retirement System so long as he is employed by "X" County or in any position covered by said system.

WARRANTS—Issuance in Duplicate—Purpose.

WARRANTS—May be Issued in Triplicate.

JUSTICE OF PEACE—Warrants—May issue in triplicate.

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

December 24, 1969

I am in receipt of your recent letter which is quoted, in part, below:

"Section 19.1-91 of the Code of Virginia allows a Justice of the Peace and other officers to issue a warrant reciting the offense and requiring the person being arrested be brought before a Court of appropriate jurisdiction of the County. This process is in duplicate. Quite often the person accused is being held for trial in another jurisdiction or has already been tried and is confined in the penitentiary. In these cases the original warrant is sent as a detainer and the copy left with the person charged. In these cases the County Court is not notified and neither is the Commonwealth's Attorney notified. The first notification to the Commonwealth's Attorney is quite often a request for a trial from the person charged. Would it be proper in these cases to instruct the Justice of the Peace to issue three copies of the process so that the original be filed with the County Court, a copy be left with the person charged and the other copy be used as the detainer. If this would not remedy the situation, please inform me of the proper procedure."

Section 19.1-92, Code of Virginia 1950, as amended, provides that any process issued against a person charged with a crime "shall be in duplicate." The purpose of this section is to inform the defendant of the specific charge in order to allow him to prepare his defense. Dorchinoz v. Commonwealth, 191 Va. 33, 59 S.E.2d 863; Gooch v. Lynchburg, 201 Va. 172, 110 S.E.2d 236.

It appears that the purpose of the statute would not be compromised by issuing the process in triplicate.

Accordingly, in my opinion, it would be proper for the Justice of the Peace to issue three copies of the process to be disseminated as you suggest above.

WATER AND SEWER AUTHORITIES—Contracts for Services—One authority may contract to render services to another.

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

January 26, 1970

I am in receipt of your letter of January 19, 1970, in which you inquire whether the Blacksburg-Christiansburg-VPI Water Authority may contract to furnish water to the Montgomery County Public Service Authority. You state that such a contract would not result in a duplication of services of the two authorities.

In this regard, I refer you to §§ 15.1-1250 (1) (1), and (1) (2) of the
Code of Virginia, a portion of the Virginia Water and Sewer Authorities Act. These provisions authorize water and sewer authorities to contract with other "units" as to the use of the facilities of the authority. I am of the opinion that under the above statute an authority established pursuant to the Act may contract to render services to another authority.

The Blacksburg-Christiansburg-VPI Water Authority is established pursuant to the Water and Sewer Authorities Act and may therefore enter into the contract which you describe. This answer assumes that contract will conform to the requirement of § 15.1-1250 (1) (2) that such contracts not violate the terms of any outstanding revenue bonds. Furthermore, under the terms of section one of the original resolution, under which the authority was established, a public hearing would have to be held before the project could be undertaken.

WATER AND SEWERAGE SYSTEMS—Surplus Funds From Fees and Service Charges—Must be placed in sinking fund—Limited use.

HONORABLE J. MERCER WHITE, JR.
County Attorney for Henrico County

I am in receipt of your letter of November 4, 1969, relative to sanitary districts. You inquire if accumulated surplus funds derived from fees and service charges to customers in the operation of the water and sewer facilities can be used for sanitary district functions or the creation of facilities such as libraries and parking lots.

Section 11 of Chapter 161, Acts of Assembly, 1926, as amended, reads in pertinent part as follows:

"The net revenue derived from the operation of such systems shall be set apart by the board to pay the interest on the bonds so issued or to be issued, and to create a sinking fund to redeem the principal thereof at maturity. The board of supervisors is hereby authorized and empowered to apply any part or all of such sinking fund to the payment, if redeemable by their terms, or to the purchase of any such bonds, at any time, and all bonds so paid off or purchased by the board of supervisors shall be immediately cancelled, and shall not be reissued. The board of supervisors is authorized and empowered to invest all accumulations of money to the credit of the sinking fund in bonds of the United States, of the State of Virginia, or of any county, city or town of the State of Virginia, or to lend out, upon real estate security, the loan not to exceed fifty per centum of the assessed value of such real estate, or deposit in bank at interest, all accumulations of money to the credit of the sinking fund and to collect and reinvest the same and the interest accruing thereon from time to time, so often as is necessary or expedient, until the bonds become subject to call; provided that no money to the credit of the sinking fund shall be loaned out or deposited or invested by the board of supervisors unless such loan, deposit or investment is first approved by the circuit court of the county, or the judge in vacation, and the form of the security be examined and approved by the Commonwealth's attorney of the county, which approval shall be entered of record in the order book of the court."

I have carefully considered your inquiry in light of the above quoted language and feel that the surplus you inquire about would be the net revenue required to be placed in a sinking fund. In view of the limitations placed upon the use of the revenue placed in the sinking fund, your inquiry must be answered in the negative.
REPORT OF THE ATTORNEY GENERAL

WELFARE—Local Boards—Appointments controlled by § 63.1-40.

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

November 10, 1969

I am in receipt of your inquiry of November 3, 1969, relative to membership of the local Board of Public Welfare.

You state that Greene County has three magisterial districts, “A”, “B” and “C”. A member of the Board of Supervisors from “A” District recently resigned his position on the local Board of Welfare and the Board of Supervisors concurrent with this resignation, acting pursuant to § 63.1-40 of the Code of Virginia (1950), as amended, passed a resolution that henceforth the Board of Welfare “shall consist of one member residing in each magisterial district.”

The remaining membership of the local board consists of two members, one from “B” District and one from “C” District.

The Circuit Judge, whose duty it is to make appointments to the local Board of Welfare has appointed the Supervisor from “B” District, not realizing that one of the remaining members of the local Board of Welfare also resided in “B” District.

You request my opinion and advice concerning the membership of the local Board of Welfare.

Section 63.1-40 reads in pertinent part:

“The judge in making appointments shall so arrange the membership that at all times one member of the local board of each county shall also be a member of the board of supervisors, except in those cases where the board of supervisors has determined otherwise, in which case one member of the local board shall be selected from a list of three persons submitted by the board of supervisors.”

I concur with the opinion of the Honorable Lyttelton Waddell, Judge of the Eighth Judicial Circuit, as reflected in his letter of October 28, 1969, to Mr. E. Z. Morris, Chairman of the Greene County Board of Supervisors.

Since the appointment of the Supervisor from “B” District is in apparent conflict with the Board’s resolution, then the Board should submit for appointment, a list of three persons from “A” District.

I am further of the opinion that Judge Waddell’s appointment of the Supervisor from “B” District in no way affected or disqualified from further service the member of the local Board of Welfare who was a resident of “B” District.

WELFARE AND INSTITUTIONS—Child Committed to Mental Institutions
—Not discharged from custody of State Board.

HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

December 31, 1969

I am in receipt of your letter of December 22, 1969, wherein you inquire whether a child committed to the State Board of Welfare & Institutions under the provisions of § 16.1-178 (4) of the Code of Virginia (1950), as amended, and who thereafter is formally committed to a mental institution, should be discharged from the custody of the State Board.

I am of the opinion that your inquiry should be answered in the negative. Section 63.1-243 authorizes the State Board to place children received pursuant to § 16.1-178 in such facilities deemed best for the child's physical or mental health. However, placement of a child in a facility such as a mental institution does not have the effect of discharging the child from the custody of the State Board.
WELFARE AND INSTITUTIONS — Computation of Sentences — Proper method where sentence imposed at later date or in different jurisdiction.

WELFARE AND INSTITUTIONS — Sentence Computation — Method where sentence imposed at later date or in different jurisdiction.

Mr. Otis L. Brown, Director
Department of Welfare and Institutions

November 7, 1969

I am in receipt of your recent letter which reads as follows:

"The Division of Corrections has been computing time to be served on concurrent sentences from the date they were imposed by the court. This does not alter the discharge date when the sentences are alike and imposed the same day. However, frequently a sentence is imposed several months later and ordered to run concurrently with an earlier sentence. Some courts do not specify when this sentence is to commence; therefore, the date of imposition is considered to be the proper date to start the sentence. Some courts indicate in the order that the starting date will be that date when the individual was taken into custody or tried on the offense for which he is then serving a sentence. Often our Records Section must interpret the order thus presenting the possibility of inequitable treatment of those concerned.

It would be appreciated if this Department could receive your opinion on the proper method of computing the sentences received that are to be served concurrently with existing sentences when they are imposed at a later date and/or in a different jurisdiction."

Section 19.1-294, Code of Virginia, 1950 as amended, provides that sentences are to run consecutively unless the Court expressly orders that they are to be served concurrently. Section 53-207, Code of Virginia 1950, as amended, provides that the term imposed commences from the date of final judgment. Section 53-207 must be read in conjunction with § 19.1-294 and being general in its terms must give way to § 19.1-294 when the two are in conflict. Wilkinson v. Youell, 180 Va. 321, 23 S.E.2d 356.

The terms of the orders entered are controlling, Conner v. Commonwealth, 207 Va. 455, 150 S.E.2d 478 (1966). Accordingly, in my opinion, the proper method of computing sentences imposed at a later date or in a different jurisdiction is to commence the term from the date of final judgment unless the order of the court states that it should commence at a different time, in which case the sentence should be computed in accordance with the specific directions of that order.

Honorable Otis L. Brown, Director
Department of Welfare and Institutions

April 9, 1970

This is in reply to your letter of March 19, 1970, in which you inquire as to whether or not you should issue a discharge to a child who has been placed in your custody and who subsequently has been committed under Title 37 of the Code of Virginia to a mental institution.

I am of the opinion that you should not issue a discharge to such child. Under § 16.1-130 of the Code, as amended, once a child has been committed to your custody, such a commitment "shall be for an indeterminate period having regard to the welfare of the child and interest of the public."

A commitment under Title 37 of the Code is merely procedural and
REPORT OF THE ATTORNEY GENERAL

orders entered pursuant to § 37.1-66, as amended, or § 37.1-67, as amended, are merely certifications that there is sufficient cause to believe that the person is mentally ill and requires hospitalization and should be transferred to a hospital. Such certification does not supersede a commitment order entered pursuant to § 16.1-178 (4) of the Code, as amended, and relieve the Department of Welfare and Institutions of the custody of the child.

WELFARE AND INSTITUTIONS—Records of Local Welfare Boards—Confidential nature—Exceptions.

WELFARE—Local Board Records—Confidential nature—Exceptions.

HONORABLE Otis L. Brown, Director
Department of Welfare and Institutions

July 15, 1969

I am in receipt of your letter of June 24, 1969, and attachments thereto regarding the interpretation of the phrase “persons having a legal interest” as found in § 63.1-53 of the Code of Virginia (1950), as amended. In view of the attachments to your letter I assume that your concern is whether or not a judgment creditor would be an individual having a legal interest within the terms of the statute.

Section 63.1-53, as amended by the 1968 General Assembly, reads in pertinent part as follows:

“All records of the local boards and other information pertaining to assistance and services provided any individual shall be confidential and shall not be disclosed except to persons having a legal interest and persons specified hereinafter and in § 63.1-209.”

In view of the above quoted language I am of the opinion that the questioned phrase would not include a judgment creditor of an individual who is also a welfare recipient. Any judgment creditor can ascertain the estate of a judgment debtor pursuant to the provisions of Article 6, Chapter 19, Title 8 of the Code of Virginia (1950), as amended, and it is clear that § 63.1-53 as amended is not intended as a substitute for the above mentioned procedure.

WELFARE AND INSTITUTIONS—State Convict Road Force—Support payments to family of prisoner made on sentence running concurrently.

August 26, 1969

Mr. D. P. Edwards, Superintendent:
Bureau of Correctional Field Units

I am in receipt of your recent letter which reads in part as follows:

“. . . We are requesting an opinion on a case that has developed in this office where a man was committed from Carroll County on a charge of assault from the Circuit Court. At the same time, we received an order from the Juvenile and Domestic Relations Court committing the same subject to our custody on a charge of non-support with the notation, ‘This sentence is to run concurrently with any other sentence heretofore imposed.’

Our question is, in view of this order, is the family of subject supposed to receive payments on the sentence that is running concurrently with the assault case.”

The Code of Virginia provides for payment of sums to the family of those committed to the State Convict Road Force by § 20-63, Code of Virginia 1950, as amended, which reads in part as follows:
"(b) If the prisoner be sentenced to the State convict road force the sum or sums provided for in paragraph (a) shall be paid by the State Treasurer out of the funds appropriated for the payment of criminal costs, and such payments shall begin when such prisoner is admitted to the State convict road force;"

This section demands that the money be paid and is qualified only by a provision which apparently does not apply in your case. Therefore, in my opinion, the answer to your question is in the affirmative. The family of the subject should receive payments on the sentence which is running concurrently.

WORKMEN'S COMPENSATION ACT—"Employees"—Certain elected officials and certain other employees of county deemed employees within meaning of § 65.1-4.

June 10, 1970

HONORABLE LEWIS JONES, JR.
Commonwealth's Attorney for Middlesex County

This is to acknowledge receipt of your letter of June 5, 1970, in which you state in part:

"I would like to have your opinion as to who are deemed employees under the Workmen's Compensation Act and in particular those defined under Section 65.1-4 of the Code of Virginia. My question goes to those employees and elected officials of a county. "The question has arisen as to whether or not elected and appointed officials in a county government are deemed to be employees."

The portion of § 65.1-4, Code of Virginia (1950), as amended by Chapter 660, Acts of 1968, which pertains to your inquiry is as follows:

"Policemen and firemen, and sheriffs and their deputies, town and city sergeants and town and city deputy sergeants, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, clerks of courts of record, juvenile and domestic relations courts and county and municipal courts, and their deputies, officers and employees, shall be deemed to be employees of the respective cities, counties or towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable."

The said section of the Code has been amended many times since the enactment of the original Virginia Workmen's Compensation Act in 1918. Each of these amendments has enlarged the coverage of the Act so now both certain elected officials and certain other employees of a county are deemed employees within the meaning of the statute.

WORKMEN'S COMPENSATION ACT—Occupational Diseases—Coal miner's pneumoconiosis included.

July 1, 1969

HONORABLE GRADY W. DALTON
Member, House of Delegates

This is in reply to your letter of June 12, 1969, in which you present the following inquiry:

"For several years pneumoconiosis was not listed as an eligible disease for workmen's compensation. House Bill No. 721 ... in-
tended to give relief to coal miners afflicted with pneumoconiosis, a
disease commonly known as 'black lung'.

"Under paragraph (15) of § 65-43.1, schedule of occupational
diseases, does the new provision include coal miners pneumoconiosis
on the same basis for compensation as is accorded other lung diseases
such as silicosis?

"In other words: Would a coal miner disabled by inhaling coal
dust be eligible for compensation under the law as now amended?"

House Bill No. 721, which amended § 65-43.1(15) of the Code, to which
you refer, appears as Chapter 236 of the Acts of Assembly of 1968, and is
now § 65.1-47(15) of the Code. Section 65.1-47 is the schedule of afflictions
which are deemed occupational diseases. Paragraph 15 of this section in-
cludes silicosis and coal miner's pneumoconiosis. An individual who con-
tracts coal miner's pneumoconiosis from inhalation of coal dust would
therefore be entitled to such compensation as is prescribed by statute.

In this connection, however, while silicosis is listed in the schedule of
occupational diseases, compensation for it is determined by § 65.1-56(20)
(a-c) which fixes compensation as follows:

"(a) For silicosis and asbestosis medically determined to be in
the first stage, whether or not physical capacity for work is impair-
ed, or in the second stage where physical capacity for work is not
impaired, sixty per centum of the average weekly wages during
twenty-six weeks.

"(b) For silicosis and asbestosis medically determined to be in the
second stage, and physical capacity for work is impaired, sixty per
centum of the average weekly wages during seventy-eight weeks.

"(c) For silicosis and asbestosis medically determined to be in the
third stage, compensation shall be according to the provisions of §§
65.1-54 and 65.1-55."

By contrast, no provision similar to § 65.1-56(20) is applicable to coal
miner's pneumoconiosis, and to be eligible for compensation in such cases
an individual would have to incur disability resulting in a loss of wages.
Therefore, under the present law, both silicosis and coal miner's pneumo-
coniosis are occupational diseases for which compensation may be obtained;
but coal miner's pneumoconiosis is not compensated under § 65.1-56 (20)
(a-c).

ZONING—Board of Zoning Appeals—May deny special permit for con-
struction of transmitter which interferes with television reception—if
deemed injurious to property.

May 13, 1970

HONORABLE ROBERT C. OLIVER, JR.
Commonwealth's Attorney for Northampton County

This is to acknowledge receipt of your letter of May 1, 1970, in which
you state in part:

"On the basis of State law and the Northampton County Zoning
Ordinance, a copy of which is enclosed, may the Board of Zoning
Appeals inquire into possible interference with television reception
and either (1) deny the application on the ground of interference,
or (2) condition its approval of the application upon the ground of
no interference with reception?"

That portion of the County Zoning Ordinance pertaining to the issue of
"Special Permit Uses" includes the following:

"The board of zoning appeals shall issue a permit for such use
if it finds that the use for which the permit is sought . . . (3) will
not be detrimental to public welfare or injurious to property or improvements in the neighborhood; . . ." (Italicizing supplied.)

Due to the fact that television is in universal use and apparently is in such use in the section of the county wherein this transmitter tower will be located, it can be perceived that the deprivation of the use of a television in a house may be injurious to the property value thereof. Sale of such a house may well be affected; on the other hand, it may not be. The only way that such a question could be resolved is for the Board of Zoning Appeals to consider evidence on this point and make a determination.

I am therefore of the opinion that should the evidence before the Board clearly show that interference with the television reception would diminish the sale value of the property, then the Board would be justified in denying the application for the construction of the FM Radio Station transmitter.

I am also of the opinion that should the evidence warrant as aforesaid, the Board of Zoning Appeals could condition its approval of the application upon the ground of no interference with reception.

ZONING—Ordinance—Roanoke County—Nonconforming use discontinued for a period exceeding one (1) year valid provision. October 1, 1969

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

This is in reply to your letter of September 22, 1969, in which you refer to provision numbered 10-1-3 in the Roanoke County zoning ordinance adopted April 18, 1960, pursuant to Article 2, Chapter 24, Title 15 of the Code of Virginia as it then existed, and present the question as to whether or not, in view of § 15.1-492 of the Code, such provision is valid. I quote provision numbered 10-1-3 of the ordinance from your letter:

"If any non-conforming use (structure or activity) is discontinued for a period exceeding one (1) year after the enactment of this ordinance, it shall then conform to the requirements of this ordinance."

Former § 15-848 of the Code of Virginia, from which authorization for the quoted ordinance provision was apparently derived at the time of its adoption, stated:

"If a non-conforming use has been discontinued any future use of such land, building or structure shall be in conformity with the provisions of the ordinance regulating uses in the district in which such land, building or structure may be located."

Section 15.1-492 of the Code, in preserving from impairment any vested right, makes the exception "that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the regulations and restrictions prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years." You express concern over the imposition of a higher standard in the existing ordinance provision numbered 10-1-3, which requires conformance to the requirements of the ordinance after the non-conforming use is discontinued for a period exceeding one year, whereas present § 15.1-492 seems to permit an ordinance to prescribe reversion to the ordinance requirements where the non-conforming use is discontinued for more than two years.

In respect to ordinances existing when Chapter 407 of the Acts of Assembly of 1962 was enacted, covering Chapter 11, Title 15.1 of the Code of
Virginia, as you point out, § 15.1-500 provides that this chapter shall not affect any ordinance enacted under any law adopted prior to June twenty-ninth, nineteen hundred sixty-two, except as specifically provided. Further, § 15.1-502 states that all zoning ordinances adopted prior to that date by any county so authorized to adopt the same under any provision of former Chapter 24, Title 15 of the Code of Virginia "are hereby validated, ratified and confirmed notwithstanding noncompliance with any technical requirement of such chapter." In addition, § 15.1-498 provides that whenever the provisions of a local ordinance impose higher standards than are required by the regulations made under authority of Article 8, Chapter 11 of Title 15.1, the provisions of such local ordinance shall govern.

In my opinion, the foregoing sections uphold the validity of the ordinance provision numbered 10-1-3, as quoted, supra, and, therefore, your question is answered in the affirmative.
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