OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1970 to June 30, 1971

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1971
Letter of Transmittal

THE HONORABLE LINWOOD HOLTON
Governor of Virginia
State Capitol
Richmond, Virginia 23219

July 1, 1971

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.

While the official opinions for the past fiscal year and the statement of cases constitute a useful summation of the work of this office, they do not present a readily comprehensible view of its contributions. For this reason, I take the opportunity now to preface my Annual Report in some detail.

The growth of Virginia's State Government and the services it provides are clearly reflected in the growth of the Office of the Attorney General. During the year that ended June 30, 1971, it was found necessary to increase the number of personnel employed in my office and to expand the functions of the office to new areas of legal activity.

At the conclusion of Fiscal Year 1970-71, my staff included 27 assistant attorneys-general, 12 legal secretaries, 1 file clerk and 1 receptionist. Sixteen of the assistant attorneys-general were quartered in my offices in the State Supreme Court Building; the remaining 11 had office space in the agencies they represent. Even with such distribution, space in the Office of the Attorney General, due to additional requirements of the Supreme Court, has dwindled to the point that, during the forthcoming fiscal year, consideration must be given to acquiring additional space in the vicinity of the Capitol. The amount of litigation in which the Department of Law is certain to be involved, the increasing number of requests for official opinions and the initiating of a number of federally-funded projects by my office already indicate the necessity for employment of further personnel.

Despite the limitations imposed by a relatively small staff of assistants, my office was able to make significant contributions to the Commonwealth in the past year, particularly in two new and highly specialized fields: Consumer Protection and Environmental Protection. I think it appropriate that I convey to you in this Annual Report an accounting of my office's endeavors in both areas as well as several others.

CONSUMER PROTECTION

The General Assembly, at its Regular Session of 1970, created the Division of Consumer Counsel in the Office of the Attorney General (§ 2.1-133.1, Code of Virginia, 1950, as amended) and charged the Division with the duty of representing the people of Virginia as consumers. In its first year, the Division has discharged that duty admirably.

The Division's most significant cases were those involving requests for higher rates by two public utilities serving vast numbers of Virginia con-
sumers, Virginia Electric & Power Company and the Chesapeake and Potomac Telephone Company. In the VEPCO cases, we were successful in our arguments before the State Corporation Commission in May, 1970, to reduce a $25 million rate increase to $22.5 million.

A year later, we were successful in limiting VEPCO's request for an additional emergency increase of 1.5 mils per kilowatt hour to 1.28 mils per kilowatt hour. This was within .03 mils of the increase of 1.25 my office proposed.

In the Chesapeake and Potomac Telephone Company case, it was determined by the Virginia Supreme Court that a multi-million dollar rate increase had been improperly ordered by the State Corporation Commission. Since the Commission has failed to direct the utility to cease collection of the higher rates, we anticipate petitioning for a writ of mandamus from the Virginia Supreme Court to order the SCC to direct C&P to stop charging such rates pending a full hearing.

Less publicized actions of the Division of Consumer Counsel were, nevertheless, of great benefit to Virginia consumers. We were successful in enjoining Blue Cross of Virginia from continuing to fix prices of prescription drugs available to its subscribers, thus saving consumers thousands of dollars. Another antitrust suit, filed against the manufacturers of an antibiotic known as tetracycline has recovered $1.4 million. $806,600 of that amount is being distributed to individual consumers; the remainder to state agencies.

Price fixing conspiracies were also targets of actions we filed in the past fiscal year against General Motors, Chrysler and Ford and against American Cast Iron Pipe, et al. In the first case, the automobile manufacturers were sued for conspiring to fix prices on fleet discount sales. In the second case, a group of manufacturers of cast iron pipe were sued in order to recover excessive charges for pipe used in a variety of state, county and municipal projects.

The Division of Consumer Counsel also anticipates success in action taken against the operators of two pyramid promotion schemes (Bestline Products and Dare To Be Great) conducted in several Virginia localities, and an auto leasing scheme in which fraud is indicated. It is hoped that successful results will be obtained by the Division in these cases early in the forthcoming fiscal year.

The Division is now studying existing consumer protection legislation and programs in other states with a view toward drafting new and effective legislation to be presented to the 1972 session of the General Assembly.

Finally, I would be remiss if I failed to point out that the Division of Consumer Counsel is cooperating fully with the Office of Consumer Affairs which the General Assembly established in the past fiscal year under the capable direction of Roy A. Farmer. The mutual effort of Mr. Farmer's office and the Division of Consumer Counsel within the Office of the Attorney General assures Virginia consumers that their interests are fully protected by their state government.

ENVIRONMENTAL PROTECTION

The gradual realization that pollution of the environment has become not only a cause celebre but a national problem has had a significant side effect: the development of Environmental Law. As business, industry and the private individual turn their attention to means of abating pollution of the nation's waterways, the land and the air we breathe, laws to assist and enforce pollution abatement are evolving.

For this reason, three assistant attorneys general have been assigned to duty in the field of environmental protection. They have been fully occupied during the past fiscal year with litigation as well as other activities related to this developing field of law.
Representing the State Water Control Board, the Environmental Protection section of the Office of the Attorney General succeeded in deterring the City of Roanoke and Fairfax County from authorizing initiation of new residential and business construction in order to prevent overloading of substandard sewage treatment facilities. In another action, suit was brought in behalf of the State Air Pollution Control Board against a building company to stop an air pollution problem. It was the first time the Air Pollution Control Board had sought relief in the courts.

In a unique case, the assistant attorneys general assigned to Environmental Protection matters launched a landmark suit to stop a landfill operation along the Eastern Branch of the Elizabeth River at Norfolk. The suit is unusual in that it seeks to assert and protect Virginia's ownership of the beds, bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth.

The attorneys in this section of the Attorney General's Office also have been actively engaged in protecting Virginia's interest in the case known as U.S. v. Maine. The suit seeks to establish ownership of the seabed off the Atlantic Coast by the states contiguous to it rather than by the federal government. Thus, the suit seeks to protect for Virginia's own benefit the potential wealth of these coastal lands that reach seaward from the Commonwealth's shores.

The assistant attorneys general assigned to environmental matters work closely with the Governor's Council on the Environment. They have also been instrumental in aiding Virginia schools of law develop courses in environmental law.

SOCIAL SERVICES

The problems of the health, welfare, safety and security of Virginia's citizens have grown as rapidly as has our population. It is not surprising, therefore, to find that the Office of the Attorney General has been called upon more frequently in the past year to act in these fields.

In its determination to ensure that Virginians are afforded only the most reliable hospital care, my office took action twice during the past fiscal year to eliminate hospital operations found to be illegal. In Commonwealth of Virginia ex rel. State Hospital Board v. Overbrook Children's Center, Inc., we obtained an injunction to close the hospital down. It was in violation of numerous health, fire and safety regulations and had no license to operate. All the children were later returned to the agencies or parents who had placed them there.

A second case, Commonwealth of Virginia ex rel. State Hospital Board v. Schiff Rehabilitation Project resulted in the granting of an injunction to close this unlicensed psychiatric facility.

Litigation, however, was not the only service performed in the field of human resources by this office. My staff reviewed, rewrote or modified the administrative rules of the State Board of Health in several areas, and drafted Virginia's new Minor Consent Act (§ 32-137, Code of Virginia). In addition, the Medical Practice Act, the Dental Practice Act and statutes concerning the Funeral Services profession were revised, stressing the development and control of para-professionals in all these professions.

My office also drafted the Commonwealth's new Drug Paraphernalia Act, and I anticipate it will offer significant new legislation to assist in Virginia's fight against drug abuse when the General Assembly convenes in January of 1972.

Two other valuable contributions to the Commonwealth in the field of social resources were made by the Office of the Attorney General in the fiscal year that ended June 30, 1971. Through careful renegotiating of Medicaid contracts, I estimate that state taxpayers have been saved more than $1.5 million annually. Additionally, savings of up to $2 million have
been achieved through the efforts of this office in ensuring certification of all certifiable hospital beds in the Commonwealth.

IN OTHER AREAS

Beyond these specialized activities, the Office of the Attorney General was involved in a vast amount of litigation and other legal work. Representing the Division of Motor Vehicles, we argued successfully that the Division has the right to require individuals to furnish social security numbers as a prerequisite to obtaining operators' licenses. As has been widely reported in the news media, my office has represented the Commonwealth in suits challenging both legislative and congressional reapportionment, and the state's role in the process of school desegregation.

Assistant attorneys general assigned to the Department of Highways have played major roles in the drafting of a Relocation Assistance Act, and I anticipate this important legislation will be favorably received by the General Assembly in 1972.

The Criminal Litigation Division saw to it that constitutional deficiencies cited by the Supreme Court of Virginia in the 1968 Riot Control Act, as amended in 1970, were corrected with dispatch so that the amended Act could be presented to and passed by the General Assembly in its Extra Session of 1971. Assistant attorneys general assigned to this Division have also been instrumental in preparation of a handbook for Virginia police officers and in conducting two seminars for commonwealth's attorneys in an effort to provide them new tools and useful information to better perform their vital functions in the localities.

The foregoing is only a summation of the work of this office in the past fiscal year. It merely touches on the highlights and should not be regarded as a measure of the quantity of the work undertaken in behalf of the Commonwealth and its citizens. I trust, however, that it will serve as a qualitative report of an eventful year.

Respectfully submitted,

ANDREW P. MILLER
Attorney General
PERSONNEL OF THE OFFICE
(Post Office Address, Richmond)

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>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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<tr>
<td>Troy G. Arnold, Jr.</td>
<td>Richmond City</td>
<td>Assistant</td>
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<td>William P. Bagwell, Jr.</td>
<td>Nottoway County</td>
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<td>Gerald L. Baliles</td>
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<td>Thomas W. Blue</td>
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<td>William G. Broadbush</td>
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<td>John W. Crews</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>James E. Kulp</td>
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<td>D. Patrick Lacy, Jr.</td>
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<td>Vann H. LeFcoe</td>
<td>Portsmouth City</td>
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<td>William T. Lehner</td>
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<td>Theodore J. Markow</td>
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<td>Henry M. Massie, Jr.</td>
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<td>Walter A. McFarlane</td>
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<td>William M. Phillips</td>
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<td>William P. Robinson, Jr.</td>
<td>Norfolk City</td>
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<td>Daniel E. Rogers, II</td>
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<td>Robert E. Shepherd, Jr.</td>
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<td>Robert L. Simpson, Jr.</td>
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<td>Richard K. C. Sutherland</td>
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<td>Anthony F. Troy</td>
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<td>A. R. Woodroof</td>
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<td>Donald F. Murray</td>
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<td>Administrative Ass't.</td>
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<td>Lillian Cersley</td>
<td>Hanover County</td>
<td>Secretary</td>
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<td>Marie G. Cook</td>
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<td>Connie P. Juberg</td>
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<td>Lavinia C. Harrison</td>
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<td>Ann E. LaFratta</td>
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<td>Mary W. Llewellyn</td>
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<td>Irene B. Longest</td>
<td>King and Queen County</td>
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<td>Deborah R. Lotz</td>
<td>Staunton City</td>
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<td>Joyce H. Luck</td>
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<td>Dorothy P. Lumpkin</td>
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<td>Barbara F. Marshall</td>
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<td>Agnes Reid Pickral</td>
<td>Pittsylvania County</td>
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<td>Ima M. Sowers</td>
<td>Richmond City</td>
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<td>Eleanor W. Tilley</td>
<td>Smyth County</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 1971

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 F. 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.
REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF APPEALS


Blue Cross of Virginia v. Commonwealth, ex rel., etc. From State Corporation Commission. Appeal from order finding prescription drug coverage plan violative of antitrust laws. Affirmed.


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.) Affirmed.


Cosby, Edward Lewis v. Commonwealth. From Hustings Court, City of Richmond. From a conviction of breaking and entering. Affirmed.


Garris, William McCoy v. Commonwealth. From Circuit Court, City of Chesapeake. Appeal from conviction of grand larceny. Affirmed.

Green, George Henry v. Commonwealth. From Corporation Court, City of Newport News. From writ of error—contempt of court. Reversed and dismissed.

Harris, Frank Louis v. Commonwealth. From Hustings Court, City of Richmond, Part Two. Forgery and uttering. Affirmed.

Hatfield, Edward J., Jr., Chairman, Save Our State Committee, etc. v. State Board of Elections. Petition for writ of prohibition to enjoin new Virginia Constitution. Denied.


Hill, Owen Guion v. M. L. Royster, Superintendent, etc. From Circuit Court, Southampton County. Appeal from dismissal of habeas corpus petition on the grounds of mootness. Reversed.
Hooper, Norman Lloyd v. Commonwealth. (Two cases.) From Hustings Court, City of Newport News. Involving sufficiency of search warrant based on information received from another suspect at scene of arrest. One case affirmed, one reversed.


Land, Peter Edward v. Commonwealth. (Two cases.) From Circuit Court, City of Virginia Beach. Appeal from conviction of murder; rape. Reversed and remanded.


Manley, Melvin Lloyd, alias, etc. v. Commonwealth. From Corporation Court, City of Norfolk. Appeal from conviction for possession of narcotics. Affirmed. (Cert. denied by United States Supreme Court.)


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


Moss, Melvin C. v. Commonwealth. From Hustings Court, City of Richmond. Sufficiency of circumstantial evidence to convict for burglary. Affirmed.


Phelps, Cecil Lawrence v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of statutory burglary (12 counts). Reversed and remanded.


Polk, Lacy Carleton, Jr. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of possession of marijuana. Affirmed.


REPORT OF THE ATTORNEY GENERAL


Riggin, James H., Jr. v. Major M. Hillard and Jerry G. Bray. From Circuit Court, City of Chesapeake. From petition for writ of mandamus. Petition denied.

Saunders, Marvin F., Jr. v. Commonwealth. From Circuit Court, Nelson County. Appeal from conviction for breaking and entering; grand larceny; fair trial-references to other crimes. Affirmed.


Sims, William R. v. Commonwealth. From Circuit Court, City of Richmond. Prisoner can be twice sentenced for third-conviction recidivism as long as each sentence is based on different convictions. Affirmed.

Snider, Frank Jimmy, Jr. v. James D. Cox. From Hustings Court, City of Roanoke. From a judgment voiding a sentence and ordering a jury retrial on the issue of punishment. Affirmed.

State Board of Pharmacy v. Gabriel Kavadias. Appeal by Pharmacy Board from order of Corporation Court of City of Norfolk reversing Board's order revoking pharmacy license. Affirmed.

Stover, James David v. Commonwealth. From Circuit Court, Fairfax County. Appeal from conviction for murder and assault with intent to maim, disfigure, disable and to kill; prosecution suppression of evidence. Reversed.

Strother, James W. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of attempted grand larceny. Affirmed.


Williams, Robert Lee v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of first degree murder. Affirmed.


Wynn, Richard v. Cox. From Circuit Court, City of Chesapeake. Appeal from denial of habeas corpus petition. Affirmed.

CASES PENDING IN THE SUPREME COURT OF APPEALS

Bibb, David L. v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of misdemeanor—suspended operator’s license.

Bloodgood, Claude F., III v. Commonwealth. From Corporation Court, City of Norfolk. Sufficiency of evidence, constitutionality of death penalty, and burden of proof of insanity.

Brown, Sherman v. Commonwealth. From Circuit Court, Albermarle County. From a conviction of murder.


Coleman, Leslie E. v. Commonwealth. (Two cases.) From Circuit Court, Hanover County. Appeal from conviction of misdemeanor—(1) driving under the influence and (2) refusal to take blood test.
Commonwealth of Virginia v. One 1970, 2 Dr. H. T. Lincoln Automobile, Identification # OY89A826838, Richard Michael Lindenstruth, owner. From Circuit Court, Albemarle County. Forfeiture of vehicle pursuant to § 46.1-351.2.

Commonwealth of Virginia, Department of Mental Hygiene and Hospitals v. Francis Key Shepard, Incompetent, et. al., etc. From Circuit Court, Fairfax County. Petition for writ of error concerning interpretation of § 20-61 and legal liability of parent to support child.

Evans, Robert Frank v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of trespass.


Gardner, Claude Maybury, Jr. v. Commonwealth. From Circuit Court, Henrico County. Appeal from conviction of armed robbery.

Girl Scout Council of the Nation's Capital v. State Tax Commissioner. From Circuit Court, Arlington County. Appeal of complaint for declaratory judgment and for other relief.


Johnson, Edward Devine, Jr. v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of trespass.


Massie, William v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of trespass.


McClung, James W. v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of trespass.

McKoy, William Harold v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of grand larceny.

Morris, Richard G. v. C. C. Peyton. From Corporation Court, City of Charlottesville. Appeal from dismissal of habeas corpus petition.


Nicolls, William H., Jr. v. Commonwealth. From Circuit Court, Accomack County. Appeal from conviction of misdemeanor—driving a motor vehicle while under the influence of intoxicants.


Robinson, Larry D. v. Commonwealth. From Corporation Court, City of Alexandria. Whether proper continuity of possession of evidence by police proved so that expert testimony could be admitted regarding analysis of the evidence by FBI agents.
Rochelle, Stephen B. v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of trespass.

Sanders, Mary K. v. William A. Harris. From Circuit Court, City of Roanoke. Appeal of a teacher nonreappointment case.

Seventh District Committee, Virginia State Bar v. E. Eugene Gunter. From Circuit Court, City of Winchester. Appeal from order dismissing Committee's evidence of improper conduct of attorney.

Simpson, O'Wighton Delk, etc., et. al. v. Joan S. Mahan, et. al. Mandamus; Congressional Redistricting, Compactness of Fourth and Fifth Districts.

Skinner, Nicholas Lee v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of rape and abduction. Central issues are the admissibility of defendant's statements taken without knowledge of his attorney and the seizure of items not listed on the search warrant.

Stewart, Carlton, et. al. v. State Highway Commissioner. From Circuit Court, Culpeper County. Injunction.

Sword, Lewis Hazen v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of trespass.


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

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Manley, Melvin Lloyd, alias, etc. v. Commonwealth. From Supreme Court of Appeals of Virginia. Appeal of conviction for possession of narcotics. Affirmed by Virginia Supreme Court; cert. denied by United States Supreme Court.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Kirby, Robert Woodford v. J. D. Cox. Appeal from the United States Court of Appeals for the Fourth Circuit involving search of an automobile. Petition for a writ of certiorari.


CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


American Civil Liberties Union v. Radford College. Court gave judgment for plaintiffs who sought recognition of American Civil Liberties Union chapter by Radford College.


Avens, Howard v. B. K. Wright. Suit to enjoin appointment of members of Board of Supervisors. Affirmed.


Beach, Earl H., et al. (Fraternal Order of Police) v. City of Norfolk, et al. Class action; whether police and firemen may live outside of City of Norfolk. Commonwealth of Virginia dismissed as party defendant.


Bradley, Carolyn v. School Board of the City of Richmond. Suit seeks desegregation of Richmond public schools and consolidation of Richmond, Henrico and Chesterfield Counties school systems. Pending.


Bufford, John, et al. v. Linwood Holton, Governor of Virginia. One year residency statute for voting declared unconstitutional. [Appealed to United States Supreme Court by Commonwealth, State Board of Elections; pending.]


Commonwealth of Virginia v. Automobile Manufacturers Association, Inc., et al. Complaint for treble damages and injunctive relief arising under the antitrust laws of the United States with respect to the development and installation of antipollution devices for motor vehicle use. Pending.


Conant, George H., Jr., et al. v. Division of Motor Vehicles. Requirement of social security number on application for driver's license. Motion for summary judgment by defendants granted May 3, 1971. [Appealed to United States Court of Appeals for Fourth Circuit on June 1, 1971; pending.]


Evans, K. Stewart, Jr. v. Melvin Laird, etc. Conscientious objector. Pending.


Harris, Rodney v. Joseph Shinpaugh. Court gave judgment for defendant. Suit sought reinstatement of student into Virginia School for the Deaf and Blind.

Hayes, Larry Robert v. Arthur Colonna. Civil action filed against highway employee who was in pursuit of performance of his official duties. Motion to dismiss filed by Commonwealth. Pending.

Holliman, Mary B. v. Charles K. Martin, Jr. Suit seeking reinstatement of faculty member. Pending.


Penn Central Transportation Company, In the matter of. Bankruptcy proceedings. Pending.


Rawlings, George C., Jr. v. L. Stanley Hardaway, etc. Maintenance of registration books. Dismissed [Affirmed by United States Court of Appeals for Fourth Circuit.]


Scruggs, Timothy Lindbergh v. State Highway Department. Wage earner proceeding. Seeking discharge for damage to bridge claim. Pending.


Sittwell, Mrs. H. C. FitzRoy v. S. A. Burnette. Suit seeks reinstatement of faculty member. Dismissed.


Sword, Lewis Hazen v. James W. Foz. Court granted judgment for students seeking reinstatement. Case appealed and argued before Fourth Circuit.


Tracy, Arthur L. v. Commonwealth. Denial of right to vote because of felony conviction. Dismissed by Judge as "frivolous and harassing and does not state a cause of action." [Appealed to United States Court of Appeals for Fourth Circuit; pending.]


United States of America v. Commonwealth. The right to use and occupy 3.38 acres of land, more or less, situate in City of Alexandria. Pending.

Virginia National Bank v. Commonwealth, ex rel. State Corporation Commission, et al. Request for injunction denied to keep State Corporation Commission from holding a hearing on December 11, 1970, regarding meaning of word “contiguous” in banking statutes, but granted as to evidence to be presented. [Defendants appealed to United States Court of Appeals for Fourth Circuit; pending.]


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

A C W Corporation v. Virginia A.B.C. Board. Circuit Court, City of Richmond. Decision of Board sustained as to two charges, but reversed as to third charge. Remanded to Board for imposition of penalty May 18, 1971.


Agee, Judith v. Rector and Visitors of the University of Virginia. Circuit Court, Accomack County. Court denied petition for injunction against honor council trial.


Basic Construction Co. v. Virginia Commonwealth University. Law and Equity Court, City of Richmond. Claim against Commonwealth arising out of construction contract. Judgment for plaintiff.


Buddy's and Jack's, Inc. v. Virginia A.B.C. Board. Circuit Court, City of Richmond. Appeal from suspension of license. Plaintiff took nonsuit April 1, 1971.

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

City of Richmond v. State Water Control Board. Hustings Court, City of Richmond, Part Two. Appeal from a decision of an Order of the State Water Control Board. Dismissed.

City of Roanoke, In the matter of v. State Water Control Board. Circuit Court, City of Roanoke. Appeal from decision of the State Water Control Board. Pending.

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


Commonwealth of Virginia v. Dare To Be Great, Inc., et al. Circuit Court, City of Richmond. Bill for injunction and restoration of monies. Pending.


Commonwealth of Virginia, State Hospital Board v. Overbrook Children’s Center, Incorporated. Circuit Court, Dinwiddie County. Suit for temporary and permanent injunction. Judgment in favor of State Hospital Board.


Farmers & Merchants State Bank, etc. v. Everett V. Adair, et al. (Comptroller) Circuit Court, Spotsylvania County. Bill of complaint. Pending.


Lawhorne, Julia v. University of Virginia Hospital. Circuit Court, Albermarle County. Pending.


Madison, J. Hugo v. J. Anthony Sharp. Law and Equity Court, City of Norfolk. Court granted injunction against unlawful acts by students.

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.


Northern Virginia Hospital Corporation and Doctors Hospital Pharmacy, Inc. v. Department of Taxation. Circuit Court, Arlington County. Application for correction of assessment of sales and use tax. Denied.


Sanders, Mary K. v. William A. Harris. Circuit Court, City of Roanoke. Court sustained motion to strike.


Shaw, Donald v. State Board of Pharmacy. Circuit Court, Fairfax County. Appeal of order of State Board of Pharmacy. Judgment for appellant.

Sibley, N.J. v. Medical College of Virginia. Hustings Court, City of Richmond, Part Two. Court sustained demurrer.


Tenth District Bar Committee v. Harris and Hall. Circuit Court, Fairfax County. Action for injunction and reprimand of two attorneys. Pending.


Virginia Education Assoc. v. Commonwealth. Circuit Court, City of Richmond. Injunction granted July 22, 1970, regarding applicability of Conflict of Interests Act to teachers, etc. Pending.


Virginia State Board of Examiners in Optometry v. Universal Service Agency, Inc. Circuit Court, City of Richmond. Injunction against advertising prices of eyeglasses by foreign firm. Pending.


Wright, et al. v. Bolen. Circuit Court, Bath County. Motion for declaratory judgment as to plaintiff’s rights to use of water. Pending.


CASES TRIED OR PENDING BEFORE THE STATE CORPORATION COMMISSION

Adley Corporation. Show Cause why company should not be required to purchase license plates. Company agreed to purchase additional plates as requested by Commission.


Castlewood Water Company. Application for Revision of Rates. Application granted substantially as requested with certain requirements of the company to install pipe by order of the Commission of May 17, 1971.


Commonwealth of Virginia, ex rel. State Corporation Commission, ex parte. Case No. 18894. Administrative hearing regarding construction of State branch banking statute. Decision rendered on meaning of "contiguous." Appealed to Supreme Court of Virginia.


County Utilities Corporation. Application for revision of rates. Increase granted less than that requested by order of the Commission of November 19, 1970.


Insurance Premium Finance Companies. Application to revise rules and regulations for licensing and to determine maximum interest rates and service charge. Rules and regulations granted substantially as requested and interest rate request not granted by order of the Commission of April 28, 1971.


Marshall Water Works. Investigation of inadequate service provided by the company under continuing review by the State Corporation Commission. Pending.

Merchants and Farmers Telephone Company. Application for an increase in rates. Increase granted as requested by order of the Commission of December 17, 1970.

Middle Atlantic Conference. Application for increase in rates for truckers. Increase granted substantially as requested by order of the Commission of December 21, 1970.
Nuckolls Water Works Co., Inc. Application for increase in rates. Increase granted less than requested by order of the Commission of November 17, 1970.

Old Dominion Telephone Company. Application for revision of rates. Increase granted less than requested by order of June 17, 1970.


Roanoke and Botetourt Telephone Company. Application for revision of rates. Increase granted less than requested by order of the Commission of July 13, 1971, after extended hearings on the service of the company in Botetourt County and in Richmond.


Virginia Electric & Power Company. Application to amend terms of gas service.


Virginia Insurance Rating Bureau. Application for an increase in automobile physical damage rates. Increase granted substantially as requested by order of the Commission of December 4, 1970.

Virginia Insurance Rating Bureau. Application for approval of increase in rates and amendment to rules and forms for writing fire insurance. Increase granted substantially as requested by order of the Commission of April 8, 1971.


Virginia Telephone and Telegraph Company. Hearing on inadequate service.


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


Clark, Herman M., Sr., and Herman M. Clark, Jr. Corporation Court, City of Winchester. Motion for Declaratory Judgment, Mandatory Injunction and Temporary Injunction filed. Suspension of privileges pursuant to § 46.1-167.4. Vehicle covered with liability insurance. Closed.

Clark, Lena Mildred v. Vern L. Hill, Commissioner, Division of Motor Vehicles. Circuit Court, Henry County. Petition from action of Commissioner suspending licenses under § 46.1-167.4. Pending.

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. Dismissed.

Ferguson, Hugh Robert. Circuit Court, Roanoke County. Petition for appeal from order of suspension pursuant to § 46.1-430. Pending.

Gaither, James Herman, Sr. Petition for appeal from order of suspension pursuant to § 46.1-430. Pending.

Gibson, Ora May v. Vernon L. Hill, Commissioner, Division of Motor Vehicles. Circuit Court, Fairfax County. Bill of Complaint from suspension of license pursuant to § 46.1-449. Dismissed.


Harris, James Thomas, Jr. v. Commissioner of Division of Motor Vehicles of Virginia. Corporation Court, City of Norfolk. Petition of Appeal from suspension of licenses pursuant to § 46.1-430. Commissioner's action affirmed—modified.


Heath, Buddy Gene and Eula Mae. Circuit Court, Smyth County. Petition from suspension of licenses under §§ 46.1-167.4 and 46.1-449. Dismissed.


Link, Mildred Christensen. Law and Chancery Court, City of Hampton. Petition questioning acuity examination required pursuant to § 46.1-357.2. Dismissed.


Miller, Dolorous L. Circuit Court, City of Virginia Beach. Notice to stay execution of an Order pursuant to § 46.1-167.4 filed. Dismissed.


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.


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


CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY, CHANCERY, HUSTINGS AND CORPORATION COURTS OF THE STATE IN WHICH THE VIRGINIA DEPARTMENT OF HIGHWAYS WAS INVOLVED


Averaano v. Commonwealth of Virginia, et al. Circuit Court, Fairfax County. Tort claim. Motion to Dismiss and Plea in Abatement filed by Commonwealth and sustained by Court.


Commonwealth, ex rel, Department of Welfare and Institutions v. Moss. Circuit Court, City of Richmond. Automobile property damage claim. Compromised.


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

Doss v. State Highway Commissioner. Circuit Court, Alleghany County. Inverse condemnation versus Motion to Dismiss. Compromised.


Layne, et ux v. Powell, et al. Circuit Court, Rockbridge County. Inverse condemnation versus Motion to Dismiss. Motion to Dismiss sustained in part. Overruled in part. Trial date being sought.


Navarra v. Commonwealth of Virginia, et al. Circuit Court, Fairfax County. Tort claim. Motion to Dismiss and Plea in Abatement filed by Commonwealth and sustained by Court.


Putnam, et ux v. Fugate. Circuit Court, Alleghany County. Inverse condemnation versus Motion to Dismiss. Pending.

Snyder, Bennie v. Comptroller. Circuit Court, City of Richmond. Claim on three defaulted contracts. Motion to dismiss; order to amend; amended motion; answer.

State Highway Commissioner v. Campbell. Circuit Court, Prince Edward County. Exceptions and memorandum filed; exceptions overruled; final order.

State Highway Commissioner v. Gorecki. Circuit Court, Augusta County. Condemnation proceeding and declaratory judgment proceeding; trial with verdict substantially for Commissioner; no appeal sought; closed.

State Highway Commissioner v. Goria. Hustings Court, City of Roanoke. Condemnation proceeding; settlement.


State Highway Commissioner of Virginia v. McClure. Civil Justice Court, City of Richmond. Payment made by defendant; case dismissed with prejudice.


State Highway Commissioner v. Wilmer. Circuit Court, Bedford County. Injunction sought by Commonwealth; granted by Court along with easement; closed.

Teer, et al. v. Commonwealth, et al. Circuit Court, City of Richmond. Contract claim versus Motion to Dismiss; Commonwealth won verdict at Circuit Court level; plaintiff now appealing to Supreme Court for writ of error.

Tomlinson v. State Highway Commissioner. Circuit Court, Scott County. Inverse condemnation versus Motion to Dismiss. Pending.


Warsing v. Fugate. Circuit Court, City of Richmond. Contract claim. Motion to Dismiss filed; pending.

HABEAS CORPUS CASES

During the fiscal year ending June 30, 1971, the Criminal Litigation Division handled 375 habeas corpus cases in the courts of record of this Commonwealth, and 337 habeas corpus cases in the federal courts. In addition, 170 original petitions for writs of habeas corpus were filed in the Supreme Court of Appeals of Virginia, and 84 original petitions for mandamus. Twenty-two petitions for mandamus were handled in courts of record of this Commonwealth, and 184 petitions for mandamus in federal courts.

Some 237 appearances were made in connection with the handling of the above litigation. The vast majority of the habeas corpus cases were disposed of on the pleadings filed and the records before the court. There has been a reduction in the number of hearings required in these cases, as a result of the availability of transcripts of trials of prisoners incarcerated in the penal system.

Most of the original petitions for mandamus filed in the Supreme Court of Appeals of Virginia sought copies of court records. The vast majority of these were dismissed. Mandamus petitions filed in the courts of record also sought records and were normally dismissed.

The petitions for mandamus filed in the federal courts basically involved complaints by prisoners incarcerated in the penal system with reference to their treatment therein. Some hearings were held in connection with these.

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

| July 20, 1970 | Phillip N. Nissen                               |
| August 17, 1970 | Gaither Warner                                    |
| September 21, 1970 | Lawrence Kirk, Jr.                                |
| September 21, 1970 | Stephen Leon Walker                              |
| May 18, 1970 | Harold Eugene Brice                              |
| August 17, 1970 | Joseph Clinton Ballance                          |
| November 16, 1970 | James Strickland                                 |
| November 16, 1970 | Paul Wayne Martin                                |
| November 16, 1970 | Charles T. Morey                                  |
| November 16, 1970 | Jesse Funderberke                                |
| November 16, 1970 | James Russell Hoover                             |
| November 16, 1970 | A. D. Kelly                                       |
| November 16, 1970 | L. J. Veal                                       |
| December 21, 1970 | Wiley L. Dillon                                  |
| December 21, 1970 | Harry Lee Barker                                 |
| December 21, 1970 | Gilbert D. Acrey                                 |
| January 18, 1971 | Paul Wayne Martin                                |
| September 21, 1970 | Kerry D. Simmons                                  |
| December 21, 1970 | Donald Wayne Byars                               |
| February 16, 1971 | James Raymond Ford                               |
| March 18, 1971 | James D. Fisher                                   |
| March 15, 1971 | J. W. Bryant                                     |
| November 16, 1970 | Harold Edward Lavely                             |
| February 16, 1971 | Edward D. Holt                                   |
| May 17, 1971 | Ronald E. Fariss                                 |
| May 17, 1971 | Montilee Stone                                   |
| April 19, 1971 | David Thomas McBride                             |
| April 19, 1971 | Anita Sue Hayes                                  |
| June 21, 1971 | Larry Dean Arp                                   |
| June 21, 1971 | Willie Fleming                                   |
| June 21, 1971 | John Phillips                                    |
ABORTION—Age of Consent—“Over eighteen years of age” defined.

March 25, 1971

THE HONORABLE W. CHARLES POLAND
Commonwealth’s Attorney for the City of Waynesboro

I am in receipt of your letter of March 15, 1971, wherein reference is made to § 18.1-62.1 (e), Code of Virginia (1950), as amended, relative to age of consent for abortion. Your request for an opinion reads as follows:

“I respectfully request that you give me your opinion as to whether the language ‘over the age of 18 years’ means the day following the 18th birthday of a married woman or upon her attainment of her 19th birthday.”

Section 18.1-62.1 (e) of the Code reads in pertinent part as follows:

“... For purposes of this section any married woman over the age of eighteen years shall be deemed competent to give her consent in the same manner as though she were twenty-one years of age or older, notwithstanding the provisions of § 32-137 of the Code of Virginia. . . .”

It is a well established principle of statutory construction that, with respect to penal statutes, a person is over a certain age when he or she has reached that particular anniversary of his or her birth. Therefore, in my opinion, the phrase “over the age of eighteen years” as used in § 18.1-62.1 (e) of the Code must be construed to include “any married woman” who has reached the eighteenth anniversary of her birth.

ABORTION—Hospital Abortion Review Board—Membership of board—Specialist in obstetrics or gynecology defined.

November 20, 1970

THE HONORABLE ROBERT I. ASBURY
Commonwealth’s Attorney for Smyth County

I am in receipt of your letter of November 11, 1970, wherein reference is made to the Hospital Abortion Review Board as defined in Section 18.1-62.2 of the Code of Virginia (1950), as amended. Your inquiry reads as follows:

“Will you please render an opinion as to what is intended by the word specialist in Obstetrics or Gynecology as provided for in Section 18.1-62.2 of the Code?”

Section 18.1-62.2 of the Code of Virginia (1950), as amended, states in pertinent part that the Hospital Abortion Review Board “shall consist of at least three physicians and shall have at least one physician who is a specialist in obstetrics or gynecology licensed to practice medicine and surgery.” Therefore, in my opinion, the statute contemplates a physician who has successfully passed his specialty boards in obstetrics or gynecology.

ACCOUNTANTS—Certified Public Accountants—May form professional corporations.

PROFESSIONAL CORPORATIONS ACT—Application of § 13.1-543 to Certified Public Accountants.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Accountants—Certified public accountants may form professional corporations.
REPORT OF THE ATTORNEY GENERAL

November 12, 1970

The Honorable Turner N. Burton, Director
Department of Professional and Occupational Registration

This is in response to your letter of November 2, 1970, in which you requested my opinion as to the applicability of the Professional Corporations Act to Certified Public Accountants. You indicated that since Certified Public Accountants were not listed with the other professions in Va. Code Ann. § 13.1-543 (1) (1950), as amended, a question had been raised as to the applicability of the Act to Certified Public Accountants.

In my opinion, Va. Code Ann. § 13.1-543 (1) does not exclude Certified Public Accountants and such persons may form professional corporations.

Section 13.1-543 of the Code of Virginia, as amended, defines the term "professional service." The Professional Corporations Act applies only to persons engaged in rendering "professional services." The statute enumerates certain professions which render professional services. This enumeration omits Certified Public Accountants. However, this listing is preceded by the phrase, "but shall not be limited to such profession." Therefore, the failure to list Certified Public Accountants does not result in excluding them from the Act.

"Professional service" is further defined to:

"Mean any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license..."

A Certified Public Accountant does render a personal service for which he must obtain a license.

For these reasons I conclude that Certified Public Accountants are included in Chapter 7 of Title 13.1 of the Code, and may organize professional corporations.

Administrative Agencies Act—Public Hearing on Requests for Variances—Notice requirements.

June 10, 1971

The Honorable Clive L. DuVal, 2d Member, House of Delegates

This will acknowledge receipt of your letter of May 24, 1971, in which you requested my opinion "as to whether a series of public hearings on requests for variances for open burning permits require a public notice of 30 days or some lesser time period."

In Rule 2.5 (Hearings) of the State Air Pollution Control Board's Rules for the Control and Abatement of Air Pollution provision is made for a public hearing before the adoption of rules and regulations or before the granting of local variances. As stated in Rule 2.5(b) (1):

"... The procedure for a public hearing [on a variance] shall conform to Sec. 9-6.6 except as modified by Sec. 10-17.18(b) and (c) of the Code of Virginia of 1950, as amended."

It is clear that Code § 9-6.6—and by reference 9-6.4—requires public notice of fifteen to thirty days prior to the day on which the public hearing is to be conducted; this time frame has been adopted by the Board in Rule 2.5 in regard to public notice provisions for public hearings except to the extent modified by § 10-17.18(b) and (c) of the Code.

Analysis of Code § 10-17.18 reveals that the General Assembly contemplated three distinct stages of Board activity: (1) an intensive and comprehensive study of air pollution in Virginia; (2) adoption and promulgation of rules and regulations; and (3) enforcement in accordance with adopted rules and regulations. The Legislature specifically provided in the second stage [§ 10-17.18(b)] that with respect to the adoption and promul-
RATION OF RULES AND REGULATIONS thirty days' prior notice shall be given by public advertisement of the date, time and place of such hearing. Further, the Legislature in the aforesaid subsection (b) provided that no such rule or regulation shall become effective until sixty days after adoption by the Board. However, no similar time constraints with respect to the Board's other powers and functions can be found in § 10-17.18. It appears, therefore, that the time requirements of § 9-6.6 with respect to public hearings have been modified by § 10-17.18(b), but only to the extent that greater periods of time are required prior to adoption of rules and regulations and the effective dates for their implementation and enforcement.

Accordingly, I am of the opinion that with respect to public hearings on requests for variances for open burning activities public notice of not less than fifteen nor more than thirty days meets all present legal requirements.

ADOPTION—Child Placing Agency—When license not required.

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

December 28, 1970

This is in response to your letter of December 3, 1970, in which you request my opinion regarding the legality of lawyers and doctors or other persons privately arranging adoption of children. You indicated that oftentimes doctors and lawyers, because of their contact with persons who are not able to have children of their own, arrange for the adoption of children. Specifically, you ask if this practice constitutes a "child placing agency" pursuant to § 63-347. Section 63-347 of the Code has been amended and is now designated as Va. Code Ann. § 63.1-195 (1950), as amended.

In my opinion, the practice that you described does not require a license and is not in violation of the Code. Virginia Code Ann. § 63.1-195 (1950), as amended, defines "child placing agency" as follows:

"... any person, other than the parent or guardian of the child, who places, or obtains the placement of, or who negotiates or acts as an intermediary for the placement of any child in a foster home;"

Virginia Code Ann. § 63.1-196 (1950), as amended, formerly § 63-233, requires that such an agency be licensed by the Commissioner of Public Welfare.

It is clear, however, that the child placing agency applies only to the placement of children in "foster homes." Virginia Code Ann. § 63.1-195 (1950), as amended, defines "foster homes" as follows:

"'Foster home' means the place of residence of any natural person in which any child, other than a child by birth or adoption of such person, resides as a member of the household;" (Emphasis supplied).

Inasmuch as the practitioner in question involves placing persons for adoption, it does not constitute a child placing agency and the persons need not secure the licenses prescribed in § 63.1-196 of the Code.

AGRICULTURE AND COMMERCE—Pesticides—Local control—County may adopt ordinance not inconsistent with general laws of State.

COUNTIES—Ordinances—Pesticides—County may adopt pesticide ordinance not inconsistent with general laws of State.

ORDINANCES—Pesticides—Local—County may adopt ordinances not inconsistent with general laws of State.
REPORT OF THE ATTORNEY GENERAL

September 22, 1970

THE HONORABLE DAVID A. SUTHERLAND
Member, House of Delegates

This will acknowledge receipt of your letter of August 24, 1970, in which you requested an opinion whether the Board of Supervisors of Fairfax County is authorized to enact an ordinance governing the sale, and use of pesticides and other economic poisons.

The Department of Agriculture and Commerce exercises general control over the sale, distribution, use and disposition of pesticides and other economic poisons in Virginia as stated in Chapter 14, Title 3.1 of the Code of Virginia, as amended. In regard to authority granted counties, § 15.1-510 of the Code of Virginia confers upon any county the power to adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of its inhabitants, provided that such measures enacted are not inconsistent with the general laws of this state.

While the General Assembly has conferred upon the Department of Agriculture and Commerce the authority to prescribe rules and regulations relating to the sale, distribution, use and disposition of economic poisons, the language is discretionary and, in my opinion, does not exclude local regulation. In fact, Rockingham and Clarke Counties now regulate certain uses of pesticides. After a review of the statutes, including recent amendments by the 1970 General Assembly, I am unable to conclude that localities are precluded from adopting ordinances related to the sale and use of economic poison.

Accordingly, I am of the opinion that the Board of Supervisors of Fairfax County is authorized to enact an ordinance, not inconsistent with the general laws of this state, governing the sale and use of pesticides and other economic poisons.

AGRICULTURE AND COMMERCE—Virginia Truck and Ornamentals Research Station—No executive authority to close.

September 17, 1970

THE HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

This is in reply to your letter of September 1, 1970, in which you ask my opinion as to whether the Governor by executive order, the Commissioner of Agriculture, or any other individual, board, commission or department is empowered to close the Virginia Beach branch of the Virginia Truck and Ornamentals Research Station.

The answer to your question is in the negative.

An examination of the antecedent acts and statutes of the present § 3.1-32 discloses that Chapter 268 of the Acts of Assembly (1920) first provided that the "...Virginia truck experiment station, located in Princess Anne county, near the City of Norfolk, is hereby established as a permanent State institution." Another portion of that Act prescribed the particular property in Princess Anne County on which the station was to stand. The next major amendment to this statute was in 1966 when § 3.1-32 was changed to read as follows:

"The Virginia Truck Experiment Station, located in the City of Virginia Beach, shall be a permanent State institution." (Emphasis added.)

A substantial change was made in these statutes by the 1970 Legislature (Acts of Assembly [1970], c. 47). At this time the name of the station was changed to the "Virginia Truck and Ornamentals Research Station" and § 3.1-37, which prescribed the precise location for the station in the City of Virginia Beach, was repealed. The Legislature, however, did not make
a material change in § 3.1-32, with regard to the permanency of the station at Virginia Beach as a State institution.

In light of the foregoing, it is my opinion that in that the General Assembly has expressly stated that the Virginia Beach Station is a permanent State institution, only the General Assembly has authority to close that station. The repeal of § 3.1-37 merely allows the station to now stand anywhere within the limits of Virginia Beach, rather than restricting the location to a particular place in that city.

AIR AND WATER POLLUTION—Control of State Waters—Power of State Water Control Board is paramount.

COUNTIES—Water Pollution Prevention—Measures for must conform to State Water Control Board policies.

BOARDS OF SUPERVISORS—Water Pollution Prevention—Ordinances for must conform to State Water Control Board policies.

AIR AND WATER POLLUTION—Objectionable Odors—Control of regulated by State Air Pollution Control Board's rules.

COUNTIES—Objectionable Odors—Ordinances to control may not be less restrictive than State rules.

BOARDS OF SUPERVISORS—Objectionable Odors—Ordinances to control may not be less restrictive than State rules.

TAXATION—Air and Water Pollution—May not regulate public nuisance by local tax.

COUNTIES—Air and Water Pollution—May not regulate nuisance by local tax.

BOARDS OF SUPERVISORS—Authority—May not regulate air or water pollution nuisance by local tax.

AIR AND WATER POLLUTION—Local Control—Counties may not regulate by local tax.

COUNTIES—Zoning Ordinances—Regulating use of land may abate air or water pollution.

BOARDS OF SUPERVISORS—Authority—To adopt reasonable zoning ordinances regulating land uses which also abate air or water pollution.

AIR AND WATER POLLUTION—Local Control—Reasonable zoning ordinance regulating land uses which also abate air or water pollution may be adopted.

August 18, 1970

THE HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This will acknowledge receipt of your letter of July 14, 1970, in regard to methods of disposal of certain liquid industrial waste in Nelson County. Your questions have received careful and considerable attention. They will be answered seriatim:

"1. Is it correct that the State Water Control Board has exclusive jurisdiction to prohibit pollution of State waters, and that the Board of Supervisors of Nelson County could not legally pass any law relating to the pollution of waters in this County?"

In the area of water pollution control, the power of the State Water Control Board is paramount. Section 62.1-44.4 of the Code of Virginia
states explicitly that "The right and control of the state in and over all state waters is hereby expressly reserved and reaffirmed." While § 15.1-510 of the Code permits counties in the specific situations of impending health hazards to adopt measures "for the prevention of the pollution of the water in the county . . . ." § 62.1-44.6 of the Code declares that "the administration of any such laws pertaining to the pollution of state waters . . . shall be in accord with the purpose of this chapter and general policies adopted by the Board."

"2. Assuming that the State Air Pollution Control Board approved the same, could the Board of Supervisors pass a valid ordinance prohibiting the above operation [disposing of certain liquid industrial waste by dumping and spreading said waste on land in Nelson County] as long as bad odors are emitted into the air from the operation, to the extent that other property owners in the vicinity are affected?"

The governing body of any locality may adopt an ordinance relating to air pollution control after obtaining the approval of the State Air Pollution Control Board as to the provisions of such an ordinance. Section 10-17.30 of the Code of Virginia. It should be noted that State Rule 6.1 of the Rules for the Control and Abatement of Air Pollution, adopted by the State Air Pollution Control Board on February 1, 1969, states that:

"No owner shall allow the emission into the outdoor atmosphere of any odor which is determined by the Board to be objectionable to the extent that it causes an unreasonable interference with human life on the reasonable use of property."

Rule 6.3 provides, in the event that a determination has been made as to violation of Rule 6.1, for the submission of a control program by the owner for control or abatement of objectionable odor within the limits of available technology and within a reasonable time for implementation of said plan.

The policy of the State Board has been that all provisions of local ordinances are intended to be a reemphasis, or more a restrictive local application, of rules adopted by the State Air Pollution Control Board. Thus, while a local ordinance could be more restrictive than State Rule 6, the precise answer to your question cannot be stated until the language of the local air pollution control plan has been submitted to, and reviewed by, the State Board.

"3. Could the Board of Supervisors pass a valid ordinance imposing any kind of a tax on this waste dumping and spreading operation in Nelson County or imposing any kind of general restrictions on the depositing of any industrial waste on any land in Nelson County?"

Your last question must be answered in two parts:

(a) Section 188 of the Virginia Constitution states that no other or greater amount of tax or revenue shall, at any time be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the State.

It is well settled that a County can exercise only those powers of taxation authorized by the Legislature. It seems clear from your letter that the purpose of the proposed tax is to eliminate a public nuisance. I cannot locate any authority for the enactment of such a local tax. I am of the opinion, therefore, that a tax upon the practices outlined in your letter would not conform to constitutional principles and would be invalid.

(b) Title 15, Chapter 11, Article 8, of the Code of Virginia permits counties to enact and enforce zoning regulations with respect to a number
of land uses, including agricultural. Said ordinance, however, must be in a form not unreasonable or arbitrary, and must bear some relation to the public safety, health, morals, and general welfare. In addition to the foregoing, I would call your attention to Title 48, Chapter 1, of the Code of Virginia, which sets forth procedures for abating public nuisances.

AIR POLLUTION CONTROL—Local Districts—May be created only by State Air Pollution Control Board.

AIR POLLUTION CONTROL—Powers of Board—Established as paramount mechanism by which air pollution abatement and control to be affected.

August 28, 1970

THE HONORABLE FRANK E. KINZER, Acting Chairman
State Air Pollution Control Board

This will acknowledge receipt of your letter of August 19, 1970, in which you requested an interpretation of the Air Pollution Control Law of Virginia. Your letter, in part, states as follows:

"The National Air Pollution Control Administration initiated a meeting with the Director, Virginia State Division of Planning & Community Affairs, which was held in the Director's office on Thursday, August 13, to consider the establishment of Air Quality Control Regions (Air Pollution Control Districts) in Virginia. While one member of our Board and its Executive Secretary were invited to attend the meeting, the tentative agreements reached between the representatives of the National Air Pollution Control Administration and the Director of Planning were of concern to our representatives.

"We are, therefore, requesting from your office an interpretation of the Law as to the Board's authority to establish Air Quality or Pollution Control Regions or Districts. Can such regions or districts be established without the formal approval of the State Air Pollution Control Board?"

The Air Pollution Control Law, Chapter 1.2, Title 10 of the Code of Virginia, was enacted by the 1966 General Assembly after receipt and review of a Virginia Advisory Legislative Committee study of air pollution in the Commonwealth. The Act was amended in 1968 and again in 1970.

The structure of the Air Pollution Control Law may be viewed in terms of five basic segments: (1) policy; (2) definitions; (3) administrative structure to enforce the Act; (4) powers of the Air Pollution Control Board and (5) enforcement—review procedures. The policy of the Commonwealth with respect to air pollution control is clear:

"... to achieve and maintain such levels of air quality as will protect human health, welfare and safety and to the greatest degree practicable prevent injury to plant and animal life and property, will foster the comfort and convenience of its people and their enjoyment of life and property, and will promote the economic and social development of the Commonwealth and facilitate enjoyment of its attractions." Section 10-17.9:1 of the Code of Virginia (1950), as amended.

While the administrative powers of the State Air Pollution Control Board are subject to the scope and limitations imposed by the law which created it, it is evident that the Board was established as the paramount mechanism by which air pollution abatement and control are to be affected
in Virginia. Sections 10-17.17 and 10-17.18 of the Code outline some of the broad powers of the Board. They include, among others, conducting studies, hearings and securing scientific information and emissions data, preparing and supervising state-wide programs, rules and regulations, advising and cooperating with other governmental units, interested persons and groups. In addition, the Board is authorized to enforce its rules, regulations or orders by injunction, mandamus or other appropriate remedy. See § 10-17.23 of the Code. In short, the power is present for significant—and visible—corrective measures to be taken by the Board to reduce the adverse effects of air pollution to human health, to vegetation and materials, to visibility and climate.

As to the authority of the Board to establish air quality regions or districts, I am of the opinion that your question must be answered in the affirmative. Section 10-17.19 of the Code provides, in part, that:

“(a) The Board may create, within any area of the State, local air pollution control districts comprising a city or county or a part or parts of each, or two or more cities or counties, or any combination of parts thereof. Such local districts may be established by the Board on its own motion or upon request of the governing body or bodies of the area involved.” (Emphasis supplied.)

It should be noted that the law does permit the Board to “call upon any state department or agency for technical assistance. All departments and agencies of the state shall, upon request, assist the Board in the performance of its duties.” Section 10-17.14 of the Code of Virginia. While § 2.1-63.3 of the Code permits the Division of State Planning and Community Affairs to encourage, assist and coordinate the planning efforts of state agencies, I cannot locate any authority that would permit the Division—or any other state agency—to assume on its own motion any authority or direct any activities of the State Air Pollution Control Board. Accordingly, I am of the opinion that as to state agencies only the State Air Pollution Control Board may authorize and establish the type of districts to which you refer in your letter.

AIRPORTS—Municipal—Bond referendum necessary.
TOWNS—Airports—May issue bonds to pay for site.
TOWNS—Bond Referendum—Second referendum not necessary because of lapse of time.

May 4, 1971

THE HONORABLE G. W. DALTON
Member, House of Delegates

This is in reply to your letter of April 29, 1971, which reads in part as follows:

“About mid-year 1957 a bond issue in the amount of $102,000.00 was passed by the citizens of the Town of Richlands for the purpose of providing a suitable local municipal airport. The vote was almost two to one in favor. Shortly thereafter the town acquired by lease an airport site, meeting the minimum standards required by the state, and since no large amount of money was needed for development at that time, the bonds were not issued.

* * *

“The question is: Can the town now go ahead and issue these bonds after a delay of fourteen years. Or will another bond election be necessary?”
Section 5.1-42, Code of Virginia (1950), as amended, authorizes a city, town or county to issue bonds for the acquisition of airports or landing fields after a referendum is held, provided a referendum is a prerequisite to the issuance of bonds by the town for public purposes generally. Section 127 of the Constitution of Virginia requires a referendum on the bond issue in question. I can find no statute of the State which requires a town to act within a certain period of time after a referendum has been held.

I am therefore of the opinion that another bond election on this question is not necessary.

ALCOHOLIC BEVERAGE CONTROL LAWS—Depreciation on Building Fund—Created from and credited to the general fund.

THE HONORABLE T. RODMAN LAYMAN
Chairman, Virginia Alcoholic Beverage Control Board

June 8, 1971

This is in response to your letter of June 4, 1971, which reads, in part, as follows:

"Under § 4-22 of the Code of Virginia (1950), as amended, the General Assembly made provision for the creation of two reserve funds pertaining to the Virginia Alcoholic Beverage Control Board. The first of these reserve funds is for the amount of 2.5 million dollars to provide for depreciation on buildings, plant and equipment, and was created by deducting from net profits over a period of years such sums as were allowed the Board by the Governor.

The second reserve fund of 3.5 million dollars was provided for acquiring or constructing and equipping a central warehouse. This last mentioned reserve fund has now been fully accumulated by amounts allowed by the Governor as provided in the statute, all of which allowances were directed by the Governor to be deducted entirely from the share of net profits allocable to the general fund of the State Treasury, and not from the share distributable to the counties, cities and towns.

The warehouse for which the last special reserve fund was created has been purchased, and is now being altered and equipped. Upon completion and occupancy of the premises, the Board will commence making depreciation and amortization charges against the reserve in accordance with the established policy of the Board. In the past, funds provided from depreciation charges have been credited back to profits available for distribution to the general fund and to the locality.

In view of the fact that the Governor authorized the accumulation of the special warehouse reserve fund out of the share allocable to the general fund of the State Treasury, the Auditor of Public Accounts has raised the question as to whether depreciation charges against the reserve should be credited back to the general fund, rather than being made available for distribution both to the general fund and to the localities."

In my opinion, depreciation charges against the special warehouse reserve fund should be credited back to the general fund. Your attention is invited to the following paragraph, appearing in § 4-22 of the Code:

"In making the aforesaid apportionment between the general fund of the State treasury on the one hand and the several counties, cities and towns on the other, the normal computation of respective shares under this section shall be modified to the extent that any sums allowed by the Governor during any of the above specified
fiscal years for the creation of the above-described special warehouse reserve fund shall be deducted entirely from the share allocable to the general fund of the State treasury and not from the share distributable to the several counties, cities and towns."

I believe that the intent of the General Assembly from the above language is that depreciation charges made in recovering the amount of the special reserve should be credited back proportionately to the funds from which the reserve was created. Since you have advised that the special reserve was created entirely out of allocations from the general fund, I believe that this fund should be credited with the depreciation charges.

ALCOHOLIC BEVERAGE CONTROL LAWS—Local Option Elections—Payment of costs incurred in holding.

ELECTIONS—Local Option—Payment of costs incurred in conducting.

February 12, 1971

MR. HARVEY E. GILES, Secretary
Pittsylvania County Electoral Board

This will acknowledge your letter of February 2, 1971, which is as follows:

"On December 15, 1970 a Special Election was held to determine if the sale of alcoholic beverages by the Alcoholic Beverage Control Board, other than beer, be permitted in the Town of Hurt, Virginia.

"The point in question is who shall pay for the cost of the election, that is the cost of printing ballots, Judges, Clerks, Electoral Board Members, etc.

"The question has arisen as to whether the Town of Hurt, or Pittsylvania County shall pay the aforementioned costs.

"Your opinion in regard to the above will be appreciated."

Provision is made for local option elections of the nature indicated in your letter in § 4-45 of the Code of Virginia (1950), as amended, but this statute is silent as to how the costs of such an election shall be paid. It is further noted that reference to a master in chancery may be had in some situations under §§ 4-45.2 and 4-45.3, and that the expenses of such references are part of the costs of election.

The costs of an election conducted pursuant to § 4-45 are determinable under Title 24 of the Code, which title pertains to the conduct of elections. Section 24.1-96 of the Code is as follows:

"The cost of conducting elections under this Chapter shall be paid by the counties and cities, respectively."

While most of the charges you have mentioned should be paid by the County of Pittsylvania, your attention is invited to § 24.1-107 of the Code. The first paragraph of this section authorizes the governing body of a county, city or town to supplement the compensation prescribed for officers of election, and the last paragraph would require the Town of Hurt to pay the specific expenses therein mentioned.

ALCOHOLIC BEVERAGE CONTROL LAWS—Possession and Consumption by College Students.

January 29, 1971

MR. JAMES M. CARSON, President
Richard Bland College of The College of William and Mary
This will acknowledge receipt of your letter of January 20, 1971, in which you ask my opinion as to several matters of concern to you.

It is my understanding from your letter that you want me to assume the following facts: that Richard Bland College allows student groups to sponsor dances in the College gymnasium; that the dances are limited in attendance to students and their invited guests; that while food is neither provided nor served, setups are served at a price; that there are no restrictions as to the age of the students and their invited guests who may attend.

Based on the foregoing assumed factual situation, you ask the following questions:

"A. Assuming that the obtaining of a banquet license from the Board is a prerequisite, may students over 21 possess and consume alcoholic beverages in these circumstances? What obligation rests upon the College to insure that students under 21 do not possess and consume alcoholic beverages?

"B. Campus organizations such as Student Government Association, fraternities, and sororities are sponsored by the College. Sponsorship means that the organizations exist with the College's permission. Facilities for their business and social activities are provided by the College. (a) What obligation rests upon the College concerning observance of law in the case of a private party conducted on campus by the organization for its members and bona fide guests only, that is, when the party is not open to all students and no admission is charged? (b) Does the College have a responsibility concerning the observance of law by these organizations when they conduct dances and parties on premises off the College campus?"

As to the first part of your Question A, you have asked me to assume that a banquet license has been issued by the Virginia Alcoholic Beverage Control Board. While the issuance of such licenses is discretionary with the Board, and it is by no means certain that such a license would be issued under the factual situation you have outlined, assuming that such a license has been issued students over twenty-one might lawfully possess and consume alcoholic beverages under the provisions of § 4-89(j) of the Code of Virginia (1950), as amended. In the absence of such license the provisions of § 4-61 would prohibit the keeping of alcoholic beverages where refreshments are served for compensation. The purchase or possession of alcoholic beverages by persons under twenty-one years of age is prohibited under any aspect of your assumed factual situation by § 4-62 of the Code. Copies of these two last mentioned statutes are enclosed.

I am not certain as to the precise meaning of the second part of your Question A when you ask what "obligation" rests upon the College to "insure" that students under twenty-one do not possess and consume alcoholic beverages. I am not aware of any way in which College officials could insure that students will not violate the criminal laws of the Commonwealth of Virginia, or that the law imposes any such obligation upon College officials. If, however, a situation arose in which an official of the College could be said to have aided or abetted, by some overt act, a student to violate the Alcoholic Beverage Control Act, such official might thereby incur criminal liability under § 4-87 of the Code. Additionally, criminal responsibility might be incurred by College officials who knowingly permit College property to be used in violation of § 4-61 of the Code.

The relationship between students and the College is essentially contractual. College officials may formulate and enforce reasonable rules and regulations as to scholastic and disciplinary requirements. I see no reason why College officials may not formulate a policy with respect to the use of alcoholic beverages by students and adopt reasonable rules and
REPORT OF THE ATTORNEY GENERAL

regulations for the observance of such policy. The failure of college officials to formulate any such policy and to adopt implementing regulations does not subject the officials to any criminal penalty. Whether situations may arise that would impose liability in tort is beyond the scope of this opinion.

With respect to your Question B, I might make some general observations. The consumption of alcoholic beverages in a public place is unlawful. Nor, in the absence of any license, may alcoholic beverages be kept or allowed to be kept at a place where food or refreshments are served for compensation, though such place is being used for a private party. Minors may not lawfully possess alcoholic beverages at either private or public parties. It is not inconceivable that College officials who tolerate the continued use of College property as a place for habitually violating the Alcoholic Beverage Control Act may incur criminal liability for maintaining a common nuisance in violation of § 4-81 of the Code.

I believe my views as to other aspects of your Question B are sufficiently indicated in the answer to your first question.

ALCOHOLIC BEVERAGE CONTROL LAWS—Records Required to Be Kept by § 4-14(a) (4).

May 19, 1971

THE HONORABLE T. RODMAN LAYMAN
Chairman, Virginia Alcoholic Beverage Control Board

This is in response to your letter of May 14, 1971, which reads in part as follows:

"Pursuant to the recommendation of the Governor's Management Study Commission, the Virginia Alcoholic Beverage Control Board has engaged the services of a management consulting firm to recommend new accounting systems and procedures, with proper computer applications, in order to streamline operations and to reduce operating costs.

"At the present time the A.B.C. stores make daily sales reports showing sales by individual item, which information is introduced into a computer and thereby a running inventory of alcoholic beverages in each store is maintained. Weekly physical inventories are taken and reconciled against the running inventory maintained by the computer.

"The consulting firm advises that the maintenance of a running inventory on a daily basis no longer represents efficient business practice, and has suggested, among other changes, a system of accountability based on weekly, or perhaps monthly, physical inventories.

"Section 4-14 of the Code of Virginia reads, in part as follows:

"‘(a) The Board shall keep such complete and accurate records as shall be necessary to show: * * * (4) The kinds and amounts of alcoholic beverages on hand and the location thereof . . . .'"

"Inasmuch as the proposed changes represent a departure from the present system, the Auditor of Public Accounts has requested that we obtain a legal opinion as to whether the proposed procedures would comply with the requirements of completeness and accuracy in showing the kinds and amounts of alcoholic beverages on hand, and the location thereof, as is contemplated by § 4-14 of the Code. Accordingly, your opinion in this regard will be greatly appreciated."

In my view, the requirement of § 4-14 of the Code that the Board shall keep "such complete and accurate records as shall be necessary" must be
construed in the light of what is considered necessary under present day business procedures. I do not think the General Assembly intended to impose any greater degree of accountability than that which modern businessmen consider to be reasonably sufficient. I would think that the controls recommended by a reliable management consulting firm as reflecting present day practices would satisfy the requirement of § 4-14(a) (4) of the Code.

ALCOHOLIC BEVERAGE CONTROL LAWS—Sunday Sale of "Beverages"—Counties may regulate.

COUNTIES—Sunday Sale of "Beverages"—May regulate.

April 19, 1971

THE HONORABLE DON E. EARMAN
Member, House of Delegates

This is in response to your letter of April 7, 1971. You advise that the Board of Supervisors of Rockingham County passed an ordinance on July 1, 1948, prohibiting the sale of beer or wine in the county between the hours of twelve o'clock p.m. of each Saturday and six o'clock a.m. of each Monday. You also advise that the sale of wine and beer (other than 3.2 beverages) was prohibited in Rockingham County as the result of a referendum held in 1934. You request my opinion as to the following question:

"When only 3.2 beverages may be sold in the confines of Rockingham County, is an ordinance attempting to prohibit their sale valid?"

As pertinent to this question, you make the following statement:

"At first glance this inquiry may appear very similar to previous inquiries made to your office but I must inquire if the prior opinions considered and addressed themselves to the proposition that § 4-97 [Which is the only section in the Code concerning Sunday sales] comes under Chapter 1 of Title 4 which deals only with 'High Test' beverages. Under Chapter 1 a licensee may also elect to sell 'Low Test' beverages if he so desires. It therefore appears reasonable and proper to say that the purpose of the provisions of § 4-97 presupposes that a 'High Test' license exists and what the legislature has determined is that where under Chapter 1 a governing body desiring to restrict the sale of 'High Test' may also restrict the sale of 'Low Test' but this presupposes the existence of a 'High Test' license.

"If the legislature had desired to provide for the means of restricting sales of 3.2 beverages would they not do so under Chapter 2 which deals with all aspects of 3.2 sales? It seems a proper construction of legislative intent can logically support this conclusion."

I find that former Attorney General Robert Y. Button, in an opinion given Honorable Arthur B. Crush, Jr., Commonwealth's Attorney for Craig County, under the date of December 13, 1965, has already ruled on this question. In that opinion it was indicated that Craig County, which was "dry," might prohibit the Sunday sale of beverages between the hours of twelve p.m. of each Saturday and six a.m. of each Monday (or fix hours within such period during which they may not be sold) by adopting an ordinance restricting the Sunday sale of beer and wine pursuant to the power conferred under § 4-97. It was pointed out in the opinion that the provisions of such an ordinance would, by virtue of the language used in § 4-97, "have like effect upon the sale of beverages."
It is true as you indicate that a person who holds a license to sell wine and beer under the provisions of Chapter 1 of Title 4 may also sell beverages without obtaining an additional license under Chapter 2, which deals exclusively with beverages. However, I do not agree with your thought that because of this the provisions of § 4-97 were intended to apply only to licensees under Chapter 1 of Title 4. I am inclined to believe you may be overlooking the precise language used in § 4-97. The third paragraph of this section reads as follows:

"On and after the effective date of any ordinance adopted pursuant to the provisions of this section, the provisions of such ordinance shall have like effect upon the sale of beverages as defined in § 4-99, and further during the hours between which wine and beer or wine or beer shall not be sold, persons holding licenses to sell wine, beer and beverages or one or more of such shall not permit the consumption of either wine, beer or beverages upon the premises mentioned in such licenses." (Emphasis added)

Since the express language of the statute is applicable to a person holding any of the types of licenses mentioned, the statute must have been intended to apply to Chapter 2.

I am also enclosing copy of opinion dated March 4, 1966, given Honorable Arthur B. Crush, Jr., which pertains to this matter.

ANIMALS—Owners of Dogs—Exempt from general provisions of statute on mistreating animals.

CRIMINAL LAW—Mistreating Animals—Dog owners exempt from general provisions.

The Honorable Raymond R. Robrecht
Commonwealth's Attorney for Roanoke County

August 26, 1970

This is in reply to your letter of August 13, 1970 in which you request an opinion regarding the apparent conflict between §§ 29-193 and 18.1-216. The relevant portion of § 29-193 provides:

"... It shall be unlawful for any person except the owner or his authorized agent to administer poison to any such dog or expose poison where it may be taken by any such dog, or to injure, disfigure, disable or kill any dog except as otherwise provided in this chapter ... ."

Section 18.1-216 states:

"Any person who (1) overrides, overdrives, overloads, tortures, ill-treats ... 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; or (2) willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal; or (3) shall carry or cause to be carried in or upon any vehicle or vessel or otherwise any animal in a cruel, brutal, or inhuman manner, so as to produce torture or unnecessary suffering, shall be guilty of a misdemeanor; but nothing in this section shall be construed to prohibit the dehorning of cattle."

I would agree that a casual reading of these two sections would indicate an irreconcilable conflict between them. However, these statutes are
in pari materia, that is to say they are not inconsistent with one another and they relate to the same subject matter. The rule of statutory construction where sections are in pari materia is that such statutes should not be construed so that the two enactments in effect cover the same subject matter wholly or in part. 17 Michies Jurisprudence 293. These statutes should be read and construed together as if they formed parts of the same statute and were enacted at the same time. Where there is a discrepancy or disagreement between them such interpretation should be given as that two may stand together. In addition the power conferred by a general statute may and will be restrained by special enactment. If the conflict between general and special enactments is irreconcilable then the special enactment is controlling. School Board of Harrisonburg v. Alexander, 126 Va. 407, 101 S.E. 349 (1919).

Applying these principles of construction to the question proposed in your letter, I am of the opinion that § 29-193 is a special enactment conferring special privileges upon the owners of dogs and will, therefore, exempt the owners from the general provisions of § 18.1-216.

ANNEXATION—Compensation of General Registrar and Assistants for Transferring Voting Records.

ELECTIONS—Transfer of Registered Voters—Payment of compensation for service.

TAXATION—Collection of Taxes—May not attach conditions not allowable by statute.

March 24, 1971

THE HONORABLE E. EUGENE GUNTER
County Attorney of Frederick County

This is in reply to your recent letter in which you ask several questions which will be stated and answered seriatim:

"As you may know, the City of Winchester recently annexed a portion of Frederick County. The voting records of those voters in the annexed area had to be transferred from Frederick County to the City of Winchester. At the meeting on February 8, 1971, the Frederick County Board of Supervisors considered a bill from the electoral board for transferring these records. The Board promptly asked me to inquire as to whether this bill should be paid by Frederick County or the City of Winchester."

Section 24.1-46 (10), Code of Virginia (1950), as amended, provides for the transfer of registered voters upon annexation, merger or similar means. Since the City of Winchester annexed a portion of Frederick County and the registered voters were transferred to the city, I am of the opinion that the city and not the county should compensate the general registrar and his assistants for their services in making the transfer.

"Secondly, the annexation referred to above leaves the magisterial districts in Frederick County in a disproportionate state as far as population is concerned. Please advise as to if and when Frederick County must be redistricted. It would be appreciated if you would refer to all of the pertinent statutes."

Redistricting of the county during the year 1971 is required by Article VII, Section 5, of the new Constitution. This can be done by the Board of Supervisors under Senate Bill Nos. 9 and 12, copies of which are enclosed. To date these bills have not received approval of the Justice Department under the Voting Rights Act.
"Thirdly, Frederick County has adopted a subdivision ordinance. The ordinance does not refer to the payment of back taxes as a condition of having a subdivision approved. At the present time, a large out of state corporation is developing many subdivisions in Frederick County while it is allowing its real estate taxes to lag approximately two years behind the due date. Can the Frederick County Board of Supervisors refuse to approve subdivisions for this corporation on land on which the taxes have not been paid? Can the Board refuse to approve a subdivision on the grounds that the corporation has other lands upon which the taxes have not been paid even if the land upon which the subdivision is to be located is current in taxes? If the answer to both of the questions above is no, please advise as to whether the subdivision ordinance can be constitutionally amended to make the payment of taxes on all property to be a condition precedent to the approval of any subdivision for any applicant."

I am of the opinion that the answer to both of your questions is in the negative. I do not believe that the subdivision ordinance can be amended to make payment of all taxes owed by an applicant a condition precedent to the approval of any subdivision application.

Legislative authority to permit the collection of taxes in this manner would be necessary. It is true that in the collection of taxes the provisions of the statute must be followed, and the State must be able to put its finger upon the statute. *Chambers v. Higgins*, 169 Va. 345 (1937). An example of such legislation is § 46.1-65(c) of the Code requiring the payment of personal property taxes on a motor vehicle before issuing a license therefor.

APPEAL—Commonwealth's Right—Unconstitutionality of motor vehicle forfeiture laws may be challenged.

MOTOR VEHICLES—Forfeiture Proceeding—Not criminal, but in rem against property.

MOTOR VEHICLES—Forfeiture Proceeding—Commonwealth may appeal ruling that law unconstitutional.

**HONORABLE DOWNING L. SMITH**
Commonwealth's Attorney for Albemarle County

July 24, 1970

This is in reply to your letter of July 16, 1970, in regard to a confiscation proceeding against one 1970 2 Dr. H. T. Lincoln automobile in the Circuit Court of Albemarle County, pursuant to § 46.1-351.2 of the Code of Virginia.

You state that the court has ruled that the statute providing for confiscation is unconstitutional and you have noted an appeal. You request my opinion as to whether or not an appeal lies in this case.

My answer is in the affirmative. Section 88 of the Constitution of Virginia provides that the Supreme Court of Appeals shall "have appellate jurisdiction in cases involving the constitutionality of a law as being repugnant to the Constitution of this State or of the United States."

From the facts given and the copy of the pleading filed by the owner of the vehicle which was the subject of the forfeiture proceedings, it is apparent that the constitutionality of §§ 46.1-351.1 and 46.1-351.2 of the Code of Virginia were called in question and decided in the trial court. This situation meets the requirements for appeal stated in the case of *Hulvey v. Roberts*, 106 Va. 189, 55 S.E. 588.
The proceedings under statutes of forfeiture are not criminal proceedings against the person but are proceedings in rem against the property. *Landers v. Commonwealth*, 126 Va. 780, 101 S.E. 778. The provision prohibiting an appeal to the Commonwealth in cases "involving the life or liberty of a person" does not apply in a civil proceeding. *Smyth v. Godwin*, 188 Va. 753, 51 S.E. 2d 230.

**APPROPRIATIONS—Nature—Transfer of railroad stock to State agency was appropriation of property.**

**STATE AGENCIES—Appropriation—Transfer of railroad stock was appropriation of property.**

September 11, 1970

The Honorable David B. Ayres, Jr., Comptroller
Commonwealth of Virginia

I have received your letter of August 6, from which I quote:

"By an Act of Assembly of 1970, Chapter 687, the stock held by the State in the Richmond, Fredericksburg and Potomac Railroad was transferred to the Virginia Supplemental Retirement System at a valuation of $8,660,000. At or about the same time the transfer was authorized, the general fund appropriation to the Virginia Supplemental Retirement System—Item 85 of the current Appropriation Act—was reduced $6,585,360 for the first year of the biennium and $2,074,640 for the second year, a total of $8,660,000.

"In order to record properly the transfer of the stock authorized by Chapter 687, it is imperative that the amount deleted from the Appropriation Act be appropriated. Does the reduction in the appropriation by the General Assembly preclude appropriating the deleted amount at this time?"

Our Constitution contemplates appropriations of property as well as of public funds. See Section 67 of the Virginia Constitution. In my opinion, Chapter 687 of the 1970 Acts was an appropriation of property and should be so treated.

**ARMED FORCES—War Orphans—Father must be resident for educational benefits.**

August 19, 1970

Mr. Harry F. Carper, Jr., Director
Division of War Veterans' Claims

This is in reply to your letter of August 14, 1970, in which you state that Mrs. "X" was a resident of Virginia at the time her husband entered the Armed Forces but her husband was not. You ask if a child of the "Xs" qualifies for educational benefits under the Virginia State World War Orphans Education Act.

Section 23-7.1 of the Code clearly requires that for a child of a Virginia veteran to be eligible for educational benefits the parent through whom he makes claim for benefits must be a resident of Virginia at the time he entered the Armed Forces.

Since the father through whom the child seeks benefits was not a citizen of Virginia at the time he entered the Armed Forces I am of the opinion that the child does not qualify for educational benefits under the language of the Act.
ART COMMISSION—Authority—No control over construction activities at Gunston Hall.

November 3, 1970

MR. FLOYD E. JOHNSON, Chairman
Art Commission

This is in reply to your letter of October 26, 1970, in which you raised the question as to whether the Art Commission has any power of supervision of, or control over, proposed construction at "Gunston Hall," state-owned property, in Fairfax County. You noted that part of the funds would come from the Commonwealth.

The 1932 General Assembly approved and accepted a deed of gift dated February 25, 1932, of the estate known as Gunston Hall, formerly owned by George Mason, the author of the Virginia Declaration of Rights, to the Commonwealth of Virginia from Louis Hertle, subject to a life estate reserved unto the grantor, said estate to be managed and supervised according to the terms and conditions set forth. See Chapter 138, Acts of Assembly (1932).

In 1948 the General Assembly approved legislation to constitute a Board of Regents of Gunston Hall and to prescribe the powers, duties and functions of that body, among which is the power to manage, control, maintain and operate the Gunston Hall estate, together with any additions thereto. In Chapter 175, Acts of Assembly (1948), the General Assembly also stated:

"The powers conferred upon the Board of Regents under the Deed of Gift from Louis Hertle, and on the corporation by this act, may be exercised free of any supervision and control by the Art Commission." (Emphasis added.)

Upon a review of the Appropriations Act of 1970, the Acts of the General Assembly of 1932 and 1948, and other sections of the Code, I cannot locate any language of limitation upon the above-mentioned powers of the Gunston Hall Regents. Accordingly, I am of the opinion that the proposed construction activities contemplated by the Regents of Gunston Hall are exempt from review by the Art Commission.

ASSESSORS—City—Real estate—Examination of records by others.

CITIES—Council—May select investigator to report to council.

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

May 12, 1971

This is in reply to your letter of April 29, 1971, in which you ask my opinion on four questions:

"1] Whether or not the Council and the City Manager of the City of Alexandria have the right to examine records in the Real Estate Assessor's office;

"2] Whether or not the Council and the City Manager of the City of Alexandria have the right to make public disclosure of the results of this examination;

"3] Whether or not the Council and the City Manager of the City of Alexandria have the right to designate the investigatory powers to some Council appointee; and

"4] What information the employees of the Assessor's office can make available to citizens who make inquiries of their office."

Section 4.08(a) and (b) of the charter of the City of Alexandria provide as follows:
“(a) The city manager shall provide for the annual assessment and equalization of assessments of real estate for local taxation, and to that end may establish a city real estate assessment office and appoint an assessor to assess such real estate for taxation and to equalize such assessment. The budget for the city real estate assessment office shall be approved by the city council.

“(b) All duties imposed and all powers conferred by law on the commissioner of the revenue with respect to the assessment of real estate shall be transferred to the assessor appointed pursuant here-to, except that the commissioner of the revenue shall continue to prepare the land book and make disposition of the copies thereof as required by law. The land book shall be prepared by the commissioner of the revenue on the basis of the assessments made by the assessor and certified to him. Transfers shall be verified by the commissioner of the revenue.”

Since all duties imposed and all powers conferred by law on the commissioner of the revenue which relate to real estate assessment have been transferred to the city assessor, the rules pertaining to the records of commissioner of the revenue shall apply equally to the records of the city assessor.

Section 58-46 of the Code of Virginia prohibits the commissioner of the revenue from giving information to the city manager acquired by him in respect to the transactions, property, income or business of any person while in the performance of his duties. See opinion of this office to the Honorable W. D. Johnson, Sr., Commissioner of the Revenue of the City of Franklin, dated February 24, 1967, and found in Report of the Attorney General (1966-1967), p. 67. In the absence of charter provisions to the contrary, the conclusions in this opinion apply equally to the records of the city assessor.

I am, therefore, of the opinion that your four questions are answered thusly:

(1) The Council and the City Manager of Alexandria have no right to examine the records in the real estate assessor's office.

(2) The Council and the City Manager have no right to make public disclosure of the records.

(3) The Council is empowered by Section 3.04(d) to inquire into the conduct of any office, department or agency of the city and make investigation as to municipal affairs. This power cannot be delegated; however, duties involved in exercising the power may be delegated. Therefore, an appointee could be selected to investigate and report to the Council.

(4) The employees of the assessor’s office can make available to citizens only that information which the assessor himself might give. This precludes the giving of information relating to transactions, property, income or business of a taxpayer.

ATTORNEYS—Appointed in Juvenile Court—Fees.
FEES—Attorneys—When appointed in juvenile court.

May 24, 1971

THE HONORABLE WILLIAM K. SLATE, II
Clerk, Hustings Court of the City of Richmond

This is in reply to your letter of May 12, 1971, which reads in part as follows:

“... if an attorney is appointed in the Juvenile Court, would Virginia Code, section 16.1-173, sub-section a. and e., jointly qualify the attorney appointed for one fee of up to $75 for both the Juvenile and Hustings Court trials? Second, if counsel is first appointed at the
Hustings Court level for a juvenile charged with a misdemeanor, may a fee for counsel be paid pursuant to 16.1-173, or does that fee allowance apply only to the Juvenile and Domestic Relations Courts? If this section is not applicable to the payment of a fee to counsel appointed in this Court for a juvenile charged with a misdemeanor, would you be so kind as to advise me of any section under which a fee for counsel may properly be paid?"

I am of the opinion that the counsel fee in the maximum amount of $75.00 pursuant to § 16.1-173 applies only to the representation of a juvenile in the Juvenile and Domestic Relations Court. Pursuant to § 14.1-184, an attorney who represents a juvenile charged with a felony, in a court of record, would be entitled to an additional fee, for the reason that he has rendered services in different courts. A similar view was expressed with regard to court appointed counsel in the Police Court and Hustings Courts of the City of Richmond, in an opinion directed to the Honorable Thomas R. Miller, dated April 9, 1970, and found in Report of the Attorney General (1969-1970) page 17.

With regard to your second inquiry, I am of the opinion that the fees payable pursuant to § 16.1-173 are applicable only to the proceedings before the Juvenile and Domestic Relations Court. I am of the further opinion that even though counsel must be appointed to represent a juvenile charged with a misdemeanor, before the Hustings Court of the City of Richmond, there is no statutory provision authorizing the payment of counsel fees for such representation. I am enclosing a copy of an opinion to the Honorable Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, dated April 19, 1971, which states that a court appointed counsel would not be entitled to compensation for his representation of indigents charged with misdemeanors.

ATTORNEYS—Appointment of for Indigents in Civil Cases.

CLERKS—Courts of Record—May waive fees and costs in indigent cases.

March 23, 1971

This is in response to your recent letter of March 12, 1971, in which you referred to an attached bill of complaint for divorce which was accompanied by an affidavit of indigency, wherein the complainant asked that the action be commenced without the payment of costs, writ taxes and other court fees. You asked:

"I would like to have your opinion as to whether there is any authority for the Clerk to file such a suit without collecting the usual statutory fees and costs. And, anticipating the collateral problems of compensating an attorney, appointed by the Court to represent the complainant, for his time and expenses; the fee of a Commissioner in Chancery, etc., by what authority could such disbursements be made?"

The Supreme Court in the recent case of Boddie et al. v. Connecticut et al.———U. S. ————39 U. S. Law Week 4294, (March, 1971) has stated that persons seeking divorces cannot be denied access to the courts merely on account of their inability to pay court fees. For your guidance, I am enclosing a copy of that opinion.

The Clerks in the Commonwealth of Virginia have authority to comply with the mandate of the Supreme Court under § 14.1-183 of the Code of Virginia (1950), as amended. This section states:
REPORT OF THE ATTORNEY GENERAL

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

It is clear, therefore, that any court in the Commonwealth, when satisfied that the party filing the suit or defending the suit is unable to pay fees or costs, may allow the filing, the service and all other necessary incidents of the action to be commenced and prosecuted without the payment of fees or costs.

ATTORNEYS—Oaths—May not administer unless otherwise qualified.

THE HONORABLE C. F. CULLIS
Justice of the Peace

This is in reply to your letter of June 30, 1970, in which you inquire whether "a lawyer has the authority to give the oath of office to another person who has to be sworn in."

The applicable statutory provision to your question is § 49-3 of the Code of Virginia (1950), as amended, which designates those who may administer oaths to officers. The statute reads as follows:

"The oaths to be taken by a person elected a member of either house of the General Assembly shall be administered by the clerk or presiding officer of the houses, respectively, or a notary. Those to be taken by any judge of any court of record elected by the General Assembly shall be administered in a court of record, or by a judge of such court, or by any officer authorized by law to administer an oath. Those to be taken by any person elected or appointed an officer of either house of the General Assembly shall be administered by such person and in such manner as such house may prescribe by its rules; and the oaths to be taken by a person elected or appointed to any other office or post shall, except in cases in which it may be otherwise directed by law, be administered in a court of record or, if no bond is required of such officer, by the judge of such court or the clerk thereof in vacation. . . ."

Therefore, an attorney may administer such an oath if he is a notary public or is otherwise specifically conferred such authority by statute. Absent this, he has no authority to administer an oath of office solely by virtue of his being an attorney. Thus, your inquiry is answered in the negative.

AUCTION SALES—Regularly Established Out-of-State Auction Company Not Prohibited from Auctioning Off Jewelry, etc.

THE HONORABLE FLOURNOY L. LARGENT, JR.
Member, House of Delegates

I have received your letter of February 17, asking whether a regularly established auction company having been in business continuously for more than five years outside of this State is prohibited by Virginia Code § 54-795 from conducting auction sales of jewelry and certain other articles.
Section 54-795 does not apply to a, "regularly established auction company having been in business continuously for five years." Nor does it apply to a company, "that has been continuously in business in the same city, town or county in this State as a retail or wholesale merchant at a regularly established place of business for the two years next preceding the sale, and dealing in such articles." The five-year exemption was added in 1968, while the two-year exemption was in effect before that time. While the two-year exemption is quite explicit as to the location of the regularly established place of business, no limiting language was placed in the subsequently added five-year exemption.

In my opinion, a regularly established auction company having been in business without the State continuously for five years is not prohibited by § 54-795 from conducting auction sales of jewelry and the other articles set forth therein.

BANKING AND FINANCE—Interest and Charges on Loans—Individuals, trusts or corporations permitted to charge in advance interest on second mortgage or deed of trust on residential property.

January 14, 1971

THE HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

I have received your letter of December 17, in which you ask:

"Does Section 6.1-330 permit an individual, trust or corporation other than an industrial loan association to charge in advance a maximum of seven per cent per annum interest, i.e., 'seven per cent add on,' on a second mortgage or deed of trust on residential property, or is an individual, trust or corporation other than an industrial loan association limited to a maximum interest rate of eight per cent per annum in accordance with Section 6.1-319 for such loan?"

Section 6.1-319 of the Code of Virginia provides that, except as otherwise permitted by law, a loan bearing interest in excess of eight percent per annum is usurious. Section 6.1-319.1 of the Code permits higher interest rates for certain first mortgage loans. Sections 6.1-234 and 6.1-234.1 permit industrial loan associations to charge a higher rate of interest.

Virginia Code § 6.1-330 is couched in language which would not ordinarily be construed as permissive. The statute is, under a literal interpretation, redundant in that it forbids what is already forbidden by § 6.1-319. Yet § 6.1-330(e) provides that, "Nothing contained herein shall prohibit charges for such mortgages or deeds of trust being made pursuant to § 6.1-319." Taken as a whole and in the context of the other usury laws, § 6.1-330 must be construed so as to permit individuals, trusts or corporations, other than industrial loan associations, to charge in advance seven percent per annum interest on a second mortgage or deed of trust on residential property.

BANKING AND FINANCE—Savings and Loan Associations—May convert to deposit institutions in accordance with statute and regulations.

July 27, 1970

THE HONORABLE THOMAS D. JONES, JR.
Commissioner of Banking State Corporation Commission

I am in receipt of your correspondence of July 20, 1970, relative to § 6.1-155.1 of the Code of Virginia (1950), as amended, which allows state
chartered savings and loan associations to convert to deposit institutions under regulations promulgated by the Commissioner of Banking. You state that presently the state chartered savings and loan associations' accounts are insured by the Federal Savings and Loan Insurance Corporation. In permitting such associations to convert to deposit institutions, the Federal Home Loan Bank Board has promulgated the following regulations:

"RESOLVED FURTHER, That institutions adopting the bylaw provisions and security forms approved hereby, shall submit the following written evidence:

1. From the appropriate State Attorney General that:

   "(a) The issuance of such security forms is legal under its State laws, which permit such institutions to raise capital in the form of savings deposits;

   "(b) Such savings deposits and any other savings account in the institution would, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the institution or in the event of any other situation in which the priority of such savings deposits or savings account is in controversy, have, to the extent of their withdrawal value, the same priority as general creditors of the institution not having priority (other than any priority arising or resulting from consensual subordination) over other general creditors of the institution;

   "(c) In the event surplus assets remain after satisfying all other claims in the liquidation of a mutual institution, the savings deposits and savings accounts will share in those surplus assets on a pro rata basis; and

   "(d) The terms 'savings deposits' and 'savings accounts' under its State laws come within the definition of 'an insured account' as defined in the Rules and Regulations for Insurance of Accounts of the Federal Savings and Loan Insurance Corporation."

You request that this office provide you with an opinion in accordance with the above regulations. I have reviewed the regulations, §6.1-155.1, and the regulations issued by the Commissioner of Banking effective June 29, 1970, which were attached to your correspondence, and I am of the opinion that:

1. Section 6.1-155.1 of the Code of Virginia authorizes state chartered savings and loan associations to convert to deposit institutions under regulations promulgated by the Commissioner of Banking. If such an association converts in accordance with this section and the regulations, the issuance of security forms referring to the account as a savings deposit, eliminating any language characterizing the account as representing share interests, and bearing in the title thereof "A Permanent Stock Deposit Institution (Association)" or "A Mutual Deposit Institution (Association)", whichever is applicable, would be legal under the laws of Virginia.

2. Such savings deposits and any other savings account in the institution would, in the event of voluntary or involuntary liquidation, dissolution or winding up of the institution or in the event of any other situation in which the priority of such savings deposits or savings accounts is in controversy, have, to the extent of their withdrawal value, the same priority as general creditors of the institution not having priority (other than any priority arising or resulting from consensual subordination) over other general creditors of the institution.

3. In the event surplus assets remain after satisfying all other claims in the liquidation of a mutual institution, the savings deposits and savings accounts will share in those surplus assets on a pro rata basis.
BANKING AND FINANCE—Small Loans—Principal amount of loan may exceed maximum by amount of added on interest; accrued interest need not be separately stated.

January 18, 1971

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

I have received your recent letter asking, with respect to small loans bearing interest under the optional method provided by Virginia Code § 6.1-271(2):

"Is $1,000.00 the limit for which small loan companies may request judgment since $1,000.00 is the limit of the loan itself?"

Under the optional method of § 6.1-271(2), interest is computed on the basis of the amount actually loaned to the debtor and expressed in terms of dollars per one hundred dollars per year. The amount of interest so computed is then added to the amount loaned to determine the face amount of the note. Although Virginia Code § 6.1-286 limits to $1,000 the principal amount of any such loan, § 6.1-271(2) (a) explicitly permits the note to exceed $1,000 by the amount of the added on interest. I am of the opinion that such a note, otherwise complying with the law, is enforceable in accordance with its terms, notwithstanding the fact that the face amount exceeds $1,000 by the amount of added on interest. The same result would follow if the debt were accelerated and part of the interest rebated in accordance with the provisions of § 6.1-271(2) (g).

You also ask:

"Is there any reason our Court should not allow 'accrued interest' as a separate figure in addition to the principal amount due on the judgment? This would be treated in the same way as an attorney fee or fine is treated now."

In the light of my answer to your first question, there would seem to be no reason for you to separately state accrued interest. I would advise against this practice with respect to add-on interest, for it involves going behind the express terms of the note.

I am advised by the Commissioner of Banking that he concurs in this opinion.

BOARDS OF SUPERVISORS—Authority—May not grant a loan to Sanitary Authority.

December 16, 1970

THE HONORABLE EDWARD McC. WILLIAMS
Commonwealth's Attorney for Clarke County

This is in reply to your letter of December 7, 1970, which reads as follows:

"It will be appreciated very much if you will render your opinion in answer to the following question:

"The duly incorporated Clarke County Sanitary Authority in the performance of the construction of sewer facilities in a thickly populated area adjacent to the Town of Berryville in Clarke County has
incurred indebtedness for labor and materials, now past due, in the amount of Forty Thousand Five Hundred ($40,500.00) Dollars. The Authority advises the Clarke County Board of Supervisors that it has a commitment from the Farm Home Administration for a loan in that amount which has been approved; the Authority advises the Board that the draft in the proper amount has actually been made, but cannot be delivered because of a delay being encountered because the papers involved in the application were not properly completed. The Authority gives to the Board its assurance that the omission has now been supplied, and that the delay in receipt of the funds will not be greater than sixty (60) days.

"May the County of Clarke on the authority of the Board of Supervisors advance this money to the Authority taking therefor the note of the Authority to be paid when the funds are received from the Federal Home Administration?"

Section 15.1-26.1 of the Code authorizes the governing body of a county to make a temporary loan to a sanitary district. See opinion of this office to the Honorable J. Gordon Bennett, Auditor of Public Accounts, found in Report of the Attorney General (1954-1955), p. 14, a copy of which is enclosed. The Virginia Water and Sewer Authorities Act, §§ 15.1-1239 through 15.1-1270, contains no express authority for the governing body to make a loan to a sanitary authority.

In the absence of specific authority for the governing body of a county to make a loan to the county sanitary authority, I am aware of no authority for it to enter into the proposed loan agreement.

BOARDS OF SUPERVISORS—Authority—To appoint and fix salaries of welfare and health departments personnel.

BOARDS OF SUPERVISORS—No Authority—To employ and fix salaries of school personnel.

WELFARE—Local Personnel—Boards of supervisors have authority to employ and fix salaries.

HEALTH—Local Personnel—Boards of supervisors have authority to employ and fix salaries.

SCHOOLS—Personnel—Boards of supervisors have no authority to employ and fix salaries.

July 30, 1970

THE HONORABLE EDGAR BACON
Member, House of Delegates

This is in response to your letter of July 21, 1970, in which you request my opinion regarding the powers of the Board of Supervisors of Lee County. You state that the county had adopted the County Board form of government. Your request states five different sets of facts, each asking a separate opinion. Each question will be set out in the order in which you presented them with the appropriate answer following each question.

"1. Does the County Board of Supervisors have the power and authority to employ and fix the compensation of the employees of the Department of Public Welfare of the county?"

Section 15.1-710, Va. Code Ann., provides for the appointment of the Board of Public Welfare and the Superintendent of Public Welfare by the County Board of Supervisors. Section 15.1-702 of the Code provides that the Board of County Supervisors is authorized to appoint all officers and
employees of the County and to fix their salaries, subject to "such limitations as may hereafter be prescribed by general law..." Va. Code Ann. § 15.1-702 (c), (1950), as amended. Section 63.1-60 of the Code also provides that the Board of Supervisors shall employ or authorize the employment for the local Board of such workers as required by the Commissioner of Public Welfare. The Board of Supervisors shall also set the compensation for these employees provided that the compensation is within the merit plan. Va. Code Ann. § 63.1-66, (1950) as amended.

"2. Does the County Board of Supervisors have the power and authority to employ and fix the compensation of the employees of the Health Department of the county operated as a part of a State Board of Health district?"

In my opinion, the Board of Supervisors does have the power to fix the compensation of and employ the personnel of the Health Department. This power is derived from the general provisions of § 15.1-702, § 15.1-709 and § 32-46 of the Code.

"The board of county supervisors shall, subject to such limitations as may hereafter be prescribed by general law, and except as herein otherwise provided, fix the compensation of all officers and employees of the county, including deputies and assistants, . . ." Va. Code Ann. § 15.1-702 (c) (1950).

Section 32-46 of the Code, as amended, provides that the Health Officer shall receive the compensation that is set by the governing body. Section 15.1-709 allows the supervisors to choose the county health officer from a "list of eligibles furnished by the State Health Department". The employment of personnel for the department is governed by the provisions of § 15.1-702 (a) of the Code.

"3. Does the County Board of Supervisors have the power and authority to employ and fix the compensation for employees in the transportation system of the county in transporting children to and from the public schools?"

In my opinion, the County Board of Supervisors does not have such power and authority. This power and authority is vested in the County School Board.

"The supervision of schools in each county and city shall be vested in a school board, . . . ." Va. Const. § 133.

The employment of persons to operate the transportation systems for the county system is a supervisory function and therefore is within the sole province of the school board as opposed to the County Board of Supervisors.

"4. Does the County Board of Supervisors have the power and authority to employ and fix the compensation for aides for teachers in the public school system of the county?"

In my opinion, the County Board of Supervisors does not have such power and authority. For the reasons, see the opinion to question number three.

"5. Does the County Board of Supervisors have the power and authority to employ and fix the compensation for service, administrative, custodial and maintenance personnel for the county schools?"

In my opinion, the Board of Supervisors does not have such power. For the reason, see the answer to question three above.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Authority—to create position of Executive Secretary.

BOARDS OF SUPERVISORS—Voting—Vote final once cast; may not be changed after meeting adjourned.

COUNTIES—Executive Secretary—Board of Supervisors has authority to create position.

COUNTIES—Executive Secretary—Qualifications.

COUNTIES—Board of Supervisors—Member may not change vote after meeting adjourned; vote final once cast.

COUNTIES—School Bus Driver—School Board may employ wife of Supervisor as.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Sister-in-law of member of Board of Supervisors may be appointed county executive secretary although husband is principal in county.

VIRGINIA CONFLICT OF INTERESTS ACT—School Bus Driver—County School Board may employ wife of Supervisor as.

September 17, 1970

THE HONORABLE R. W. BICKERS, Clerk
Greene County Circuit Court

I am in receipt of your letter of August 24, 1970, wherein you raise various questions, each of which will be answered seriatim:

"1. Does the Board of Supervisors of Greene County have the authority to create the position of an executive secretary and employ the sister-in-law of one of the members of the Board of Supervisors as county executive secretary? Her husband also being principal of one of the elementary schools in the county. The Board of Supervisors sets salary and appropriates money for same."

You also ask:

"3. Are there any qualifications for an Executive Secretary for a County?"

The Board of Supervisors of Greene County is authorized to appoint an executive secretary to such governing body. See § 15.1-115 of the Code of Virginia (1950), as amended. The qualifications of such person are set forth in § 15.1-116. He is appointed with regard to merit only and need not be a resident of the county at the time of his appointment, but must subsequently "become an actual resident of the county and in due course a bona fide resident."

Though the person being considered is related to a member of the Board of Supervisors, no conflict of interest would arise unless the individual resided in the same household. See § 2.1-348 (f). Also see opinion of this office to the Honorable Donald C. Stevens, County Attorney for the County of Fairfax, dated July 27, 1970, copy of which I enclose. Further, the fact that the individual under consideration is married to a principal of one of the elementary schools in the county would not constitute a conflict of interest. The powers and duties of an executive secretary would not affect the position of the husband principal. See § 15.1-117.

You next inquire:

"2. Does the Greene County School Board have the authority to employ the wife of a member of the Board of Supervisors as a school bus driver when the Board of Supervisors appropriate the money for same?"
I enclose herewith a copy of an opinion of this office to the Honorable John P. Alderman, Commonwealth's Attorney of Carroll County, dated July 2, 1970, which is responsive to this inquiry. If the member of the Board of Supervisors can be employed as a school bus driver, his wife may also be so employed.

Your next questions will be considered together and are as follows:

"Does a member of the Board of Supervisors have the right to change his vote after a meeting has been adjourned?"

"When does the vote of a member of the Board of Supervisors become final?"

I presume that your questions do not relate to a matter that is under reconsideration upon proper motion. If so, I am of the opinion that the member has no right to change his vote after the meeting has been adjourned. It becomes final once cast. See § 15.1-540, and also opinion of this office to the Honorable William Wellington Jones, Commonwealth's Attorney for Nansemond County, dated January 3, 1964, found in the Report of the Attorney General (1963-1964), at p. 25, a copy of which I enclose.

BOARDS OF SUPERVISORS—Authority—To use county funds for employee death benefits.

COUNTIES—Authority—To use county funds for employee death benefits.

THE HONORABLE DOWNING L. SMITH
Commonwealth's Attorney for Albemarle County

July 29, 1970

I am in receipt of your letter of July 6, 1970, concerning the establishment by the Board of Supervisors of a fund to provide death benefits payable to the estates of certain county employees.

In your letter you state that the Albemarle County Board of Supervisors may decide to authorize County participation in the Virginia Supplemental Retirement System's group life insurance program. Certain county employees are too old to participate in that group plan. The Board of Supervisors wants to establish a program of death benefits payable to the widow or estate of each of those over-age employees. You ask whether the Board of Supervisors may guarantee the payment of such benefits from county funds.

Section 51-112 of the Code of Virginia provides:

"The governing body of each county, city and town may, by ordinance adopted by a recorded vote of a majority of the members elected or of a majority elected to each branch, if there be more than one branch, establish a system of pensions, including death benefits, covering injured, retired or superannuated officers and employees of such county, city or town, and payable to such officers and employees, or their dependents, estates or designated beneficiaries, and to provide for accrued vested or contractual rights thereunder. . . . Such governing body may by such ordinance establish a fund for the payment of such pensions, including death benefits, and for the payment of such insurance and annuity premiums and charges by making appropriations out of the treasury of the county, city or town or by requiring contributions, payable from time to time through payroll deductions or otherwise, or by both, or by any other mode not prohibited by law."

I am of the opinion that in accordance with the aforementioned statute the Board of Supervisors may establish a system of death benefits to
cover those over-age employees who are not eligible to participate in the Virginia Supplemental Retirement System and guarantee payment from county funds.

BOARDS OF SUPERVISORS—Bond Issue Referendum—Vote binding on governing body.

BOARDS OF SUPERVISORS—No Authority—To vary terms of approved referendum question.

PUBLIC FUNDS—Bond Referendum—Vote binding on board of supervisors.

PUBLIC FUNDS—Bond Referendum—Board of supervisors without authority to vary terms of approved bond issue.

PUBLIC FUNDS—Bond Referendum—Board of supervisors has discretion to issue or not, though approved.

BOARDS OF SUPERVISORS—Bond Issue Referendum—Though approved, has authority as to whether to issue bonds or not.

August 5, 1970

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in reply to your recent letter in which you inquire as follows:

"Based upon the attached order a Referendum was held in Chesterfield County on February 10, 1970, and it was approved by a 250 vote majority. On the same day a referendum vote on a comparable order in Henrico County was defeated by 200 votes.

"The Chesterfield Board of Supervisors at this time is considering not implementing the vote of approval on the basis that it was a package deal and that failure to approve in Henrico removes the need to implement the Chesterfield County portion.

"A ruling is requested on the following:

"Is the approval of the referendum by the Chesterfield County voters as stated on the ballot, binding upon the Board of Supervisors of the county?

"If the first ruling is yes, then may the Board of Supervisors have two options available to them, as follows?

"Option 1. Issue $750,000. general obligation bonds to finance their share of the Capital Region Park Authorities program.

or

"Option 2. With the agreement of the Capital Region Park Authority can they make a commitment to include $150,000. each year for five years in the County's General Administrative Budget?"

The referendum to which you refer was held pursuant to the terms of the Public Finance Act of 1958, Chapter 5 of Title 15.1 of the Code of Virginia. Under the terms of the Act, counties must obtain the approval of the electorate in order to issue general obligation bonds. The effect of voter approval is to confer upon the governing body all powers necessary to contract a debt and issue general obligation bonds. See § 15.1-188 of the Code of Virginia. I am of the opinion, however, that the ultimate decision as to the issuance of the bonds lies with the governing body of the county. While the Board of Supervisors does possess discretion as to the time and amount of a bond issuance, it must be careful to comply with the specific terms of the referendum question. Miller v. Ayres, — Va. —, — S.E.2d — (1970). To that extent the approval of the referendum
by the Chesterfield County voters is binding upon the Board of Supervisors of the County. Accordingly, if a decision is made by the Board to issue the bonds it must follow the course of action stated in the referendum question which you have set forth in your letter as Option 1. I am constrained to advise, however, that Option 2 would not be permissible for the reasons set forth in Miller v. Ayers, supra and section 115-a of the Constitution of Virginia, that is, because that proposal was not the question submitted to the voters of Chesterfield County.

BOARDS OF SUPERVISORS—Community Antenna Television Systems—Licensing and regulation of.

COUNTIES—Community Antenna Television Systems—Licensing and regulation of.

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

This is in reply to your letter of June 14, 1971, in which you ask my opinion of the following matter:

"...if the Board of Supervisors decides that there should, in the public interest, be only one CATV license granted for Roanoke County, would the Board of Supervisors, under Section 15.1-123.1 of the 1950 Code of Virginia, as amended, have the authority to prohibit the operation of a CATV company which had installed line poles and related equipment in a portion of the county but which had not begun actual operation?"

Section 15.1-23.1(b) of the Code to which you refer reads as follows:

"(b) The governing body of any county, city or town may by ordinance provide for the licensing and regulation of, and impose a license tax upon any community antenna television system which employs wires or cables or other apparatus in, on, under or over any street, highway or other public place within such county, city or town."

The power to license necessarily includes the power to inhibit unlicensed persons from doing the acts authorized by the license. 38 Am. Jur. 24, § 332. Since the Board of Supervisors may issue a license and inhibit the activities of the unlicensed, it has the power to inhibit the operation of the CATV company in question, provided that any action taken by the Board with respect to the issuance of a license or inhibition of operation is not arbitrary. 53 C.J.S. 717, § 61.

BOARDS OF SUPERVISORS—Consolidation of Offices of Treasurer and Commissioner of Revenue.

TREASURERS—Office—Consolidation of with commissioner of revenue.

THE HONORABLE SAM E. POPE
Member, House of Delegates

This is in reply to your letter of March 19, 1971, which reads in part as follows:

"There has been much discussion in Southampton during the past several months as to whether or not the Board of Supervisors should
propose a referendum on the consolidation of the offices of treasurer and commissioner of revenue. I am aware of the fact that Article VII, Section 4 of the new constitution requires the election of these officials. The third paragraph of Section 4 seems to indicate that a county or city can do most anything provided it is adopted in a referendum and a special act enacted by the General Assembly.

"My question is: can Southampton make such a move of consolidation of the offices of treasurer and commissioner of revenue, and if so, what would be the procedure?"

Article VII, Section 4, of the new Constitution relating to county and city officers reads in part as follows:

"The General Assembly may provide for county or city officers or methods of their selection, including permission for two or more units of government to share the officers required by this section, without regard to the provisions of this section, either (1) by general law to become effective in any county or city when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon in each such county or city, or (2) by special act upon the request, made after such an election, of each county or city affected. No such law shall reduce the term of any person holding an office at the time the election is held. A county or city not required to have or to elect such officers prior to the effective date of this Constitution shall not be so required by this section.

"The General Assembly may provide by general law or special act for additional officers and for the terms of their office."

Under this section the county may submit the question of consolidation of these two offices to the qualified voters. After receiving a favorable vote the county could then request a special act from the General Assembly approving the consolidation. I am of the opinion that the county could proceed at this time to hold the referendum.

BOARDS OF SUPERVISORS—County Manager Form of Government—Election of.

COUNTIES—County Manager Form of Government—Election of.

May 20, 1971

THE HONORABLE B. EARL DUNN
Member, House of Delegates

This is in reply to your letter of recent date which reads as follows:

"Henrico County operates as you know under the county manager form of government."

"There are two questions I would like for you to answer for me:"

"1. Under the present provision of law can the county elect 5 supervisors, one from each magisterial district and is it possible after a referendum to also elect 2 supervisors at large from the county?"

"2. If the answer to the 2 supervisors at large question is yes, what percentage of the registered voters will be necessary to petition the Circuit Court to call for the referendum?"

Under § 15.1-623.1, Code of Virginia (1950), as amended, the governing body of any county which has adopted the county manager form of government, at an election held pursuant to Chapter 368 of the Acts of 1932,
may by resolution petition the circuit court of the county requesting that
a referendum be held on the following two questions: (1) Shall the county
board of supervisors be elected solely by the qualified voters of each mag-
isterial district, or by the qualified voters of the county at large? (2)
Shall the Board have in addition to the members for each magisterial dis-
trict, one member from any district elected from and representing the
county at large?

I am of the opinion that a referendum to elect two supervisors at large
is not permitted under question (2) above. The election of an at large
member is limited to one. I, therefore, answer your first question in the
negative which renders unnecessary an answer to your second question.

BOARD OF SUPERVISORS—Courthouses—Responsibility for mainte-
nance.

COUNTIES—Courthouses—Governing body must provide.

COURTHOUSE—Maintenance—Board of Supervisors responsible.

THE HONORABLE L. L. STANLEY
Sheriff of Appomattox County

April 26, 1971

This is in reply to your recent letter wherein you inquire concerning the
responsibility for supervising the "... maintenance, repair and upkeep
of the Courtyard buildings and grounds ...", and whether the sheriff or
the County Board of Supervisors is charged with this responsibility. You
also inquire concerning the authority of the Board of Supervisors for pur-
chase of the materials necessary to maintain the premises and make
necessary repairs, etc., in the event the responsibility rests with the
sheriff.

Section 15.1-257 of the Code of Virginia, as amended, reads, in part:

"The governing body of every county and city shall provide a
courthouse with suitable space and facilities to accommodate the
various courts of record and officials thereof serving the county or
city ... The costs thereof and of the land on which they may be,
and of keeping the same in good order, shall be chargeable to the
county or city."

Section 15.1-267 of the Code of Virginia, as amended, reads, in part:

"When it shall appear to the circuit court of any county ... that
the courthouse of such county ... is insecure or out of repair, or
otherwise insufficient, such court shall award a rule, in the name
and on behalf of the Commonwealth against the supervisors of the
county ... to show cause why a peremptory mandamus should not
issue, commanding them to cause the courthouse of such county
... to be made secure, or put in good repair, or rendered otherwise
sufficient, as the case may be, and to proceed as in other cases of
mandamus to cause the necessary work to be done."

The Supreme Court of Appeals of Virginia has ruled that mandamus is
an extraordinary proceeding and that its principal purpose is "... to en-
force a clearly established right and to enforce a corresponding impera-
tive duty created or imposed by law." [Stroobants v. Fugate, 209 Va. 275,
278, 163 S.E.2d 192 (1968)]

Since the Board of Supervisors must provide for a courthouse and funds
for maintenance and upkeep, and since mandamus is an available remedy
for failure to comply with these requirements, I am of the opinion that
the responsibility for supervising the maintenance, repair and upkeep of
the buildings and grounds upon which the courts are located rests with
the Board of Supervisors. The Board of Supervisors would likewise have
the authority and responsibility for purchasing necessary materials for
the maintenance and upkeep of the buildings and grounds.

BOARDS OF SUPERVISORS—Member—May not be elected as director of
defense.

THE HONORABLE THOS. R. NELSON
Attorney for County of Augusta

This is in reply to your letter of January 21, 1971, which reads as fol-
lows:

"The Board of Supervisors of Augusta County is contemplating
the appointment of a director of Civil Defense as required
by Section 44-145(3) of the Code of Virginia. This section does not
specify who may be elected by the Board to this office. If the
Board wishes to elect one of its own members, would that be in
violation of the above section?"

Section 15.1-50 of the Code of Virginia (1950), as amended, provides
that a member of the board of supervisors, with certain exceptions not
here applicable, shall not hold any other office elective or appointive. See
also Section 110 of the Virginia Constitution. Section 44-145(3) of the
Code to which you refer provides that the director of civil defense is
an elective office.

I am of the opinion, therefore, that the board of supervisors may not
elect one of its members as director of civil defense.

BOARDS OF SUPERVISORS—Member—May not serve as member of
Sewerage Authority.

COMPATIBILITY OF OFFICES—Member of Board of Supervisors May
Not Serve as Member of Sewerage Authority.

THE HONORABLE DONALD C. STEVENS
County Attorney, County of Fairfax

This is in reply to your letter of February 16, 1971, in which you ask
my opinion whether a member of the board of supervisors of the County
of Fairfax may serve as a member of the Upper Occoquan Sewerage Au-
thority.

Article VII, Section 6, of the revised Constitution of Virginia, which
replaces Section 113 of the present Constitution, provides as follows:

"Unless two or more units exercise functions jointly as authorized
in Sections 3 and 4, no person shall at the same time hold more
than one office mentioned in this article. No member of a govern-
ing body shall be eligible, during the term of office for which he
was elected or appointed, to hold any office filled by the governing
body by election or appointment, except that a member of a govern-
ing body may be named a member of such other boards, commis-
sions, and bodies as may be permitted by general law."

Under the exception stated in this section members of the governing
body of a county are permitted to serve on other boards. For instance,
§ 63.1-40, Code of Virginia (1950), as amended, permits a member of the
board of supervisors to serve on a local welfare board.
Section 15.1-50 of the Code prohibits a member of the board of supervisors from holding any other office, elective or appointive.

Sewerage authorities are created by one or more political subdivisions under § 15.1-1241. Section 15.1-1249 of the Code provides that members of the authorities shall be selected in the manner and for the terms provided by the ordinance or resolution or concurrent ordinances or resolutions creating the authority.

Since the office of member of the Sewerage Authority would be filled by election or appointment by the governing body of the county and since there is no legislative authority authorizing a member of the governing body to serve as a member of the Authority, I am of the opinion that a member of the governing body may not serve as a member of the Authority due to the foregoing constitutional and statutory prohibitions.

BOARDS OF SUPERVISORS—No Authority—To pay bounty on ground hog tails.

ANIMALS—Bounties—Boards of supervisors may not establish on ground hog tails.

August 10, 1970

THE HONORABLE L. J. HAMMACK, JR.
Commonwealth's Attorney for Brunswick County

This is in reply to your letter of July 27, 1970, which reads as follows:

"A group of citizens of Brunswick County has presented a petition to the Board of Supervisors requesting that the Board pay a premium, or bounty, for the tails of woodchucks, commonly known as ground hogs.

"I have advised the Board of Supervisors that Section 15.1-521 of the Code of Virginia does not authorize a county to award a premium for woodchuck tails, and there is, therefore, no statutory authority pursuant to which the Board may award such a premium or bounty.

"Have I correctly advised the Board?"

Yes. It has been repeatedly held that the duties of the Board of Supervisors are fixed by statute and that it has no powers other than those conferred upon it expressly or by necessary implication.

In the instant case, Section 15-521 of the Code of Virginia (1950), as amended, enumerates those animal scalps or tails upon which a county may award a premium. In that ground hogs (woodchucks) are not included among those animals enumerated in Section 15-521, this is to be construed as excluding ground hogs and all those other animals not expressly mentioned, from its effect.

BOARDS OF SUPERVISORS—No Authority to Require Sheriffs to Have Vehicles Marked.

BOARDS OF SUPERVISORS—No Authority to Determine Use of Jail Facilities.

SHERIFFS AND SERGEANTS—Board of Supervisors Cannot Require to Mark Vehicles.

December 29, 1970

THE HONORABLE JAMES S. CAMPBELL, Clerk
Page County Board of Supervisors

This is in response to your letter of December 15, 1970 in which you seek an opinion on behalf of the Page County Board of Supervisors. Your letter reads in part as follows:
"At a regular meeting of the Page County Board of Supervisors***, it was voted that the Board purchase five (5) marked police cars***. The Board ordered the Clerk to notify the Sheriff of Page County that the two unmarked cars used by the Sheriff's Department shall be marked before the December meeting of the Board of Supervisors ***.

The Sheriff has failed to comply with the above order of the Board. The Board respectfully requests your opinion as to whether it has the authority to do whatever is necessary to make these two vehicles conform with the other vehicles in the Sheriff's Department.

At the December meeting of the Board of Supervisors ***, a resolution was unanimously passed requesting the Honorable Judge of the Twenty-Fifth Judicial Circuit to incorporate Page County into the now existing Ninth Regional Juvenile and Domestic Relations Court.

The Board understands that providing living quarters in new jails is no longer mandatory. If this is true can these living quarters be used as offices for the aforementioned Regional Juvenile and Domestic Relations Court."

In 1966 the legislature established the Sheriffs and City Sergeants Standard Car Marking and Uniform Commission. This legislation has been codified and can be found in § 15.1-90.1 of the Code of Virginia, 1950, as amended. The Commission is authorized to prescribe a uniform of standard design for all sheriffs, city sergeants and their deputies, and to prescribe a color and design of car marking for motor vehicles used by them. Sub-section (d) of this Code Section provides that after January 1, 1967, the uniform, and motor vehicles prescribed by the Commission shall be used by all sheriffs, city sergeants and their deputies, while in the performance of their duties, if the office of the sheriff or city sergeant prescribes that uniforms be worn and marked vehicles be utilized. It is my opinion that the language in this section allows the sheriff to determine whether marked or unmarked vehicles will be utilized by his department. Therefore it is my opinion that the Board of Supervisors has no authority to require that the vehicles used by the sheriff of Page County be marked.

In answer to your second inquiry, I am advised by the Jails Consultant of the Department of Welfare and Institutions that it is not now nor has it ever been mandatory that jails contain living quarters. Such quarters have been provided at the option of the governing body. Further, it is my understanding that the living quarters referred to in your letter are an integral part of the jail building itself. I am enclosing a copy of an opinion to the Honorable K. E. Kerkhoff, Sheriff of Page County dated December 8, 1970, in which I ruled that the jailor's quarters located within the jail building involved the operation of the jail, and the occupancy of those quarters lay solely within the sheriff's jurisdiction. It is therefore my opinion that the Board of Supervisors has no authority to determine the use of these quarters.

BOARDS OF SUPERVISORS—Not Authorized to Pass Ordinance for Spotlighting Wild Animals.

ORDINANCES—Board of Supervisors Not Authorized to Pass Regulating Spotlighting of Wild Animals.

October 21, 1970

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for County of Rockingham and City of Harrisonburg
This is in reply to your letter of recent date in which you seek an opinion as to the validity of an ordinance passed by the Board of Supervisors of Rockingham County which regulates spotlighting at night. You have enclosed a copy of the said ordinance for my review.

As you point out in your letter this office has previously rendered an opinion concerning a like ordinance in Augusta County. See the Attorney General's opinion to the Honorable Robert L. Rhea dated July 8, 1969, a copy of which is enclosed for your information. I concur with this previous opinion and insofar as the ordinance you have presented attempts to regulate the hunting of wild animals by spotlight, I am of the opinion that the Board of Supervisors of Rockingham County has no authority to enact such an ordinance for the reasons given in the opinion to Mr. Rhea.

I am of the opinion, however, that the Board of Supervisors would have the authority under the provisions of § 15.1-510 of the Code of Virginia to enact an ordinance to prohibit the shining of spotlights into dwelling houses.

BOARDS OF SUPERVISORS—Prince Edward County—May not condemn property for Bush River Water Shed—May not borrow money without referendum.

November 4, 1970

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

This is in reply to your letter of October 22, 1970, which I quote as follows:

"The Board of Supervisors of Prince Edward County is contemplating the securing by purchase, condemnation or otherwise approximately 820 acres of land, with flowage easements of approximately 200 additional acres, and the construction of a water storage lake as a part of Bush River Water Shed in Prince Edward County. It is estimated that this lake will contain approximately 10,000 acre feet and will cost approximately $927,000.00, of which the Board of Supervisors would pay approximately $612,000.00. This project would provide for recreation services for the county and in the future provide an excellent source of impounded water. The Board of Supervisors contemplates paying for its portion of the cost of this project by loans from the Virginia Soil and Water Conservation Commission, if available, and the Farmer's Home Administration. Prince Edward County does not contain any sanitary districts, nor does not have the 500 persons per mile standard as set forth in certain of the Virginia statutes. I would appreciate the opinion of your office as to the following:

1. Can the Board of Supervisors condemn property and pay for the above project and borrow money without a referendum under its present governmental status?

2. Can Prince Edward County form itself into a sanitary district of all of its territory and take the above course of securing land, constructing the proposed lake and borrowing money for the above purposes?

3. Is it necessary, assuming that the above can be done, to have a referendum on the proposed loan?

I might also state that it is contemplated that the loans above mentioned would be paid for by an increased levy on the assessables in Prince Edward County."

In regard to your first question, I am of the opinion that the county may not condemn property for this purpose under its present governmental status. See opinion of this office to the Honorable Philip Lee

In regard to your second question, I am of the opinion that the county may not form itself into a sanitary district of all of its territory where under existing laws or charter provisions the power to provide sanitary facilities is already vested in a competent governing authority. See opinion of this office to the Honorable J. Gordon Bennett, Auditor of Public Accounts, dated May 28, 1959, found in the Report of the Attorney General (1958-1959), p. 68. Should the county form a sanitary district in accordance with the provisions of Chapter 2, Title 21, it would then have the authority to condemn land under Section 21-118 (2), (10) of the Code. In such event, the county could not incur an indebtedness for this construction without holding a referendum. See the opinion of this office to the Honorable Philip P. Burks, County Treasurer of Bedford County, cited above.

In answer to your third question, I am of the opinion that a referendum would be required.

In response to your last statement, I point out that Section 21-118 (6) of the Code authorizes the County to levy and collect an annual tax upon all of the property in the sanitary district subject to local taxation. The levy you plan to make on the assessables in Prince Edward County to pay these taxes should be limited to the property owners in that district.

BOARDS OF SUPERVISORS—Selection of School Board Members.

SCHOOLS—School Boards—Selection of members.

HONORABLE CYNTHIA NEWMAN
Secretary of the Commonwealth

November 20, 1970

This is in reply to your recent letter in which you inquire as follows:

"I have had a request for information relative to the selection of school board members in Lee County, which is now operating under the county board form of government.

"I would appreciate you advising me whether each member on the County Board of Supervisors is entitled to select his own representative, or whether he merely makes a nomination which must be approved by the entire Board. Any clarification you can give me on this matter will be very much appreciated."

By § 15.1-708 (b), Code of Virginia (1950), as amended, the members of the school board of a county which has adopted the county board form of government are chosen by the Board of Supervisors. See, Report of the Attorney General (1967-1968), p. 235, a copy of which is enclosed.

An individual supervisor has no authority to select his own representative. He may nominate an individual, but the selection of the member is subject to the approval of a majority of the supervisors voting as required by § 15.1-540, Code of Virginia (1950), as amended.

BOARDS OF SUPERVISORS—Taxation—May levy capitation tax.
BOARDS OF SUPERVISORS—Adoption of Parallel Ordinances—Does not affect State’s contribution to sheriff’s salary.

TAXATION—Capitation Tax—Localities may levy.

SHERIFFS AND SERGEANTS—Salary—State’s share not affected by localities adopting parallel ordinances.

Mr. C. F. Callis
Justice of the Peace

This is in reply to your letter of April 17, 1971, in which you requested my opinion on the following two questions:

“(1) Is it legal for a county board of supervisors to levy a head tax on every registered voter in the county? Said tax to be earmarked and used for school purposes. Having nothing whatsoever with the right of voting which has already been declared illegal.

“(2) The second question is: Can a county board of supervisors pass a group of county ordinances involving traffic, which parallel town and state laws without losing any of the state support of the sheriff’s department.”

I shall answer your questions seriatim:

(1) Section 58-851.1 of the Code of Virginia (1950), as amended, provides:

“The governing body of any county in this State may levy upon every resident of the county not less than twenty-one years of age and not exempt by law from the payment of the State capitation tax, a county capitation tax not exceeding one dollar per annum. The revenue derived from this tax shall be applied to general county purposes.”

Under this section the county may levy a capitation tax on every resident of the county not less than twenty-one years of age, not pensioned by this State for military service. It cannot levy this tax on just registered voters. The tax must be applied to general county purposes.

(2) Section 14.1-79 of the Code of Virginia (1950), as amended, provides that the Commonwealth shall pay two-thirds of the salary and expense allowance of the sheriff and that the other one-third shall be paid by the county.

I am, therefore, of the opinion that the State’s share of the salary and expense allowance of the sheriff will not be lost nor diminish as a result of the county’s adoption of an ordinance paralleling the State law on a subject.

BOATS—Motor—Do not have to be numbered if on privately owned body of water.

BOATS—Motor—Required to comply with equipment regulations even though on privately owned body of water.

The Honorable R. P. Zeehler, Jr., Judge
Fluvanna County Court

I am in receipt of your letter of recent date which reads in part as follows:

“Lake Monticello is a privately owned body of water in this County, containing approximately five hundred acres, surrounded by land which has been sub-divided for sale to private owners. Each
owner who buys a lot buys certain privileges to use the lake for boating, fishing and swimming. It is not available to the public and the only persons permitted to use the lake are lot owners and their guests.

The question has arisen whether or not a boat which is kept and operated on this lake must comply with the requirement of § 62.1-169 that every motor boat on the waters of this State shall be numbered except as exempt in § 62.1-173.

Also, must such a boat comply with the provisions of § 62.1-172, especially sub-section (f)."

Section 62.1-169 of the Code provides in part that every motor boat on the waters of this State shall be numbered except those specifically exempt in § 62.1-173. The phrase "waters of this State" is defined in § 62.1-167 (4) to mean "any public waters within the territorial limits of this State, and the marginal sea adjacent to this State and high seas when navigated as a part of a journey or ride to or from the shore of this State." It is my opinion that the legislature has limited the provisions of § 62.1-169 to motor boats on public waters and therefore the provisions of this section would not apply to motor boats on privately owned bodies of water such as Lake Monticello.

In your second inquiry you seek an opinion as to whether motor boats on Lake Monticello must comply with the provisions of § 62.1-172, especially sub-section (f). This section of the Code deals with the classifications and equipment required on motor boats. The various provisions of this section, including sub-section (f), relate to every motor boat and contain no exclusions. The policy of this State concerning motor boats and water safety, as set forth in § 62.1-166 is to promote safety for persons and property in and connected with the use, operations, and equipment of vessels. Keeping the State policy in mind and since § 62.1-172 contains no exceptions, it is my opinion that its provisions apply to motor boats on Lake Monticello.

BONDS—School—Proceeds may be used where scope and nature of project not changed.

October 8, 1970

THE HONORABLE J. PATRICK GRAYBEAL
Commonwealth's Attorney for Montgomery County

I am in receipt of your recent letter concerning a school bond issue in Montgomery County.

On April 8, 1969, the voters of Montgomery County approved a referendum authorizing the issuance of general obligation bonds of the County of Montgomery in the maximum amount of $7,500,000.00 "to finance the cost of a school project within Montgomery County, Virginia, consisting of the constructing and equipping of new school buildings for two high schools and for two elementary schools and, to the extent that surplus funds are available after adequate provision has been made for the constructing and equipping of the aforesaid new school buildings, the renovation of, and the constructing and equipping of additions to, some of the existing school facilities within Montgomery County. . . ." Since that time, the County has issued and sold bonds in the amount of $7,500,000.

The building of the four new schools was to be the first phase of a school building program in the County. The school board has established no priority among these schools, since the same urgency exists for all. Accordingly, plans for the building of all four schools are in progress, although plans for certain schools have progressed more rapidly than those for others.
It has now become obvious that the total cost of the two elementary schools and the two high schools will far exceed the funds derived from the bonds issued. The board of supervisors has assured the school board that the necessary funds will be forthcoming.

In light of the foregoing facts, you have asked whether the school board may properly enter into contracts for the construction of three of the schools when sufficient funds are not available for the construction of the fourth school.

This office has ruled on a number of occasions that a board of supervisors or a school board does not have authority to direct proceeds of a bond issue to a new and different purpose. An example is found in an opinion addressed to Honorable Reginald H. Pettus, dated June 12, 1957, found in Report of the Attorney General (1956-1957), p. 225. In that situation the voters were asked whether the board of supervisors should issue bonds for the construction of two new elementary schools in the maximum amount of $500,000. This office ruled that the board of supervisors could not divert a portion of the proceeds of the bond issue to construct an addition to a presently existing school building.

More recently, the Supreme Court of Appeals of Virginia in the case of Miller v. Ayres, 211 Va. 69 (1970), ruled on a somewhat similar question. In that case, the Court ruled that the interest payable on the bonds could not be increased above the maximum approved by the voters. In reaching its decision, the Court held that pertinent to every bond issue are four considerations, one of which is: "the project—the purpose for which the money is being borrowed." The Court noted that in voting on the bond referendum, "a taxpayer, to make an intelligent and considered judgment, first must determine whether the project is necessary, and whether he wishes his county or city to go into debt to finance it."

Thus, the question before us is whether the school board, in entering into contracts for the construction of three rather than four schools, has diverted proceeds of the bond issue to a new project or purpose which was not considered by the voters. I am of the opinion that the school board may proceed with the construction of three schools and expend all of the proceeds of the bond issue on that construction. All of the previous opinions issued by this office concern the expenditure of funds on a project which was not approved by the voters. By failing to build all of the facilities mentioned in the question put to the voters, the school board is not changing or enlarging the scope or nature of the project. The overall project remains the same and will be, it is anticipated, completed when the board of supervisors is able to provide the necessary additional funds. It would be unrealistic and impracticable to require a governmental body to forego construction of a project when it becomes obvious that proceeds of a bond issue which were originally believed to be sufficient are no longer sufficient to finance the completion of all phases of the project. Such a result is not required by the law.

BONDS—State Revenue—Use for financing tunnel.

The Honorable Henry E. Howell, Jr.
Member, Senate of Virginia

I have received your letter of February 9, from which I quote:

"Under the provisions of the new Constitution, assuming the proper vote by the General Assembly and proper certification by the Governor, could a tunnel or tunnel bridge connecting Norfolk and Portsmouth and paid for by tolls be financed through State revenue bonds."
I assume that you refer to those revenue bonds permitted by, and subject to the dollar limitations of Article X, Section 9(c) of the revised Constitution. These bonds, unlike those permitted by Article X, Section 9(d), are secured by the full faith and credit of the Commonwealth.

I am aware of nothing in the revised Constitution which would prohibit the use of § 9(c) bonds for such a purpose. The facility may not be constructed or operated by an authority or similar organization but must be a capital project of an institution or agency, such as the Department of Highways, "administered solely by the executive department of the Commonwealth." Any such bond issue must, of course, meet the other requirements of § 9(c), but these other requirements do not affect the nature of the project.

BUILDING PERMITS—Failure to Obtain—Criminal responsibility.

CONTRACTORS—Construction Permits—Required to obtain.

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

December 23, 1970

This is in reply to your recent letter wherein you inquire as to possible violations of § 58-766 of the Code of Virginia by building contractors and/or owners of property upon which buildings are constructed. You state, in part:

"... (M)any buildings are constructed, etc., with no permit being obtained and when our Commissioner of Revenue investigates, the contractor denies responsibility for obtaining the permit and states that it is the owners responsibility, and the owner states that it is the contractor's responsibility, and so on."

You then inquire as to whether it is proper to charge both the owner and contractor with violation of § 58-766, which provides, in part:

"... (N)o person, firm or corporation shall commence the construction, repair or improvement of any building or structure located within such county and permanently annexed to the freehold ... until there shall have been first obtained from the Commissioner of the Revenue of the county a permit in writing, signed by the Commissioner of the Revenue. The Commissioner of the Revenue shall issue such permits, when the same are required, to every person who shall apply therefore, and describe, with reasonable certainty, the kind and character of the work to be done and the estimated cost thereof; and each such permit shall state the matter so described ... .

"Any person, firm or corporation violating this section shall be guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding $25.00."

You advise that the applicability requirements of § 58-766 are to be presumed.

The word "commence" is used in § 58-766, and generally the commencement of building occurs when some work or labor which everyone can easily recognize as the beginning of construction of a building or addition thereto, etc., has begun. (See Rupp v. Earl H. Cline & Sons, Inc., 230 Md. 537, 188 A2d 146, 1 ALR 3rd 815 (1963), wherein this interpretation was followed for mechanic's lien purposes and McClung v. County of Henrico, 200 Va. 870, SE2d 513 (1959), wherein certain preliminary operations, such as clearing of land and setting up stakes, etc., were held not to constitute the starting of construction.)
Section 54-138 provides for prerequisites necessary to the issuance of a building permit by a "building inspector or such other authority", and the provisions of that section refer to the issuance of a permit to the person performing the work. Considering § 58-766 in conjunction with § 54-138 and the cases referred to above, I am of the opinion that the contractor (or the person performing the work) would be subject to the penal portion of § 58-766. Penal statutes are construed strictly in favor of persons charged with crimes, and I am of the opinion that only persons "... commencing the construction, repair or improvement..." (the contractor) should be charged.

CEMETORIES—Endowment Care Fund—When required.

THE HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for County of Wise and City of Norton

November 24, 1970

I have received your letter of November 9, in which you ask whether the $25,000 deposit requirement of Virginia Code § 57-35.2 applies to a cemetery in existence before June 26, 1964, if it now begins selling lots under an agreement for perpetual care. Heretofore, lots have been sold without any provision for perpetual care.

Section 57-35.2 provides:

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

The $25,000 provision applies only to persons who "undertake to develop" a cemetery after June 26, 1964. In contrast, all persons "owning, operating or developing" a cemetery after that date are required to make adequate financial provision for the perpetual care of any lots sold subject to an agreement requiring such care. The words, "owning" and "operating", may not be limited to a passive construction, for the adequate provision requirement applies only to persons who sell lots after June 26, 1964. Owners and operators who sell lots after that date are therefore subject only to the adequate provision requirement. Developers who sell lots after that date are subject to the adequate provision requirement and the $25,000 requirement.

I am of the opinion that a person who plots, marks or physically develops a cemetery after June 26, 1964, is a developer, subject to the $25,000 requirement. I am further of the opinion that a person whose activities after that date are limited to the ownership and operation of a previously existing cemetery and the sale of previously laid-out lots is not a developer, regardless of whether the previously sold lots were subject to a perpetual care agreement.
REPORT OF THE ATTORNEY GENERAL

CENTRAL CRIMINAL RECORDS EXCHANGE—Reportable Offenses.

March 31, 1971

COLONEL H. W. BURGESS, Superintendent
Department of State Police

I have your letter of March 10, 1971, in which you make reference to the 1971 amendment to Section 19.1-19.3 of the Code relating to the reporting of certain arrests and dispositions to the Central Criminal Records Exchange. You raise two questions with reference to the proper interpretation to be given the phraseology “of any offense punishable as a misdemeanor under Title 54, under Title 18.1.” I shall answer your questions seriatim.

“1. Are offenses contained in other Titles which are classified as misdemeanors, but with no specific punishment provided in such Titles, reportable to the Exchange when the applicable punishment is contained in Section 18.1-9 of the Code?”

Each provision of law to which you refer usually conclude with the words “shall be punishable as a misdemeanor.” Punishment is fixed in the appropriate title of the Code as a misdemeanor. Reference must be made to Section 18.1-9 of the Code only to determine the amount of punishment to be imposed upon the defendant. I am of opinion that the offenses to which you refer are not punishable as a misdemeanor under Title 18.1 and consequently need not be reported to the Central Criminal Records Exchange.

“2. In cases where an arrest is made for a violation of a local ordinance which parallels or is similar to an offense proscribed by Title 54 or Title 18.1, is the arrest and disposition required to be reported to the Exchange since the phraseology is ‘punishable under’ rather than ‘punished under’?”

Only those offenses which are referred to in § 19.1-19.3(a) must be reported to the Central Criminal Records Exchange. In the instances referred to in your inquiry, a warrant could be issued for violation of the State statute or the local ordinance. If the warrant is issued for violation of the State statute, then, of course, the report must be made to the Exchange as required. If, however, the warrant is issued for violation of the local ordinance, I am of opinion that a report need not be made to the Central Criminal Records Exchange.

CITIES—Division of Authority—Newport News charter vests council with power to establish salary schedules; director of public safety with power to establish working conditions.

CITIES—Authority—State policy to permit municipal employees to form own organizations, but final decisions reserved to municipal officials.

HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

I am in receipt of your letter of August 7, 1970, concerning the City Council of the City of Newport News. In your letter you ask if the Charter of the City of Newport News will allow the city council to negotiate working conditions with the Firefighters Association and the Fraternal Order of Police, as long as the city council maintains the right to make the final decision regarding any specific point.
Section 4.02 of the City Charter provides that "the council shall be the policy determining body of the city." That section also provides that council shall fix a schedule of compensation for all city officers and employees. The authority of the council is limited, however, by Section 5.03 of the Charter which provides "except for the purpose of inquiry, the council and its members shall deal with the administrative services solely through the city manager."

The city manager's authority is controlled by Section 5.05 of the Charter which provides that "it shall be the duty of the city manager to . . . (h) have direction of and control over all departments of the city except as otherwise provided by this Charter." Sections 17.03 and 17.04 of the Charter provide that the director of public safety shall promulgate through the chief of police and the fire chief all orders, rules and regulations for the government of the two forces. According to Section 17.01 of the Charter, the director of public safety is under the supervision and control of the city manager.

It appears that the Charter has given the council power to only set schedules of compensation, while vesting in the director of public safety the power to promulgate rules regulating the working conditions of the two forces.

With this distinction in mind I will now answer the question set forth in your letter. It has long been the policy of this Commonwealth to permit municipal employees to form organizations not affiliated with any labor union for the purpose of discussing with the employing agency the conditions of their employment. The General Assembly recognized this policy in 1946 in Senate Joint Resolution No. 12. That being so, it is permissible for the city council to discuss salary schedules and for the director of public safety to discuss working conditions with the Firefighters Association and the Fraternal Order of Police. However, since the Charter vests in the city council and the director of public safety the power and duty to make decisions regarding compensation and working conditions, those bodies must retain the right to make the final decision regarding any specific point.

CITIES—Revenue Bonds—Issuance for expansion of municipal water system.

THE HONORABLE JAMES E. DURANT
Treasurer of City of Falls Church

September 25, 1970

I have received your letter of September 16, asking whether the City of Falls Church may issue revenue bonds for the expansion of the municipal water system, pursuant either to the City Charter or to the Public Finance Act of 1958.

Certain federal and State constitutional questions are raised with respect to § 7.06 of the City Charter which provides, in part, as follows:

"The procedure for the passage of an ordinance authorizing the issuance of bonds shall be the same as for the passage of any other ordinance, except that no such ordinance shall be passed as an emergency ordinance and that the affirmative votes of two-thirds of the entire council shall be necessary for its adoption. Upon adoption by the council of a bond ordinance, the city clerk shall forthwith certify a copy of said ordinance to the Circuit or Corporation Court having jurisdiction or to the Judge thereof, in vacation, who shall thereupon order a special election of the qualified voters of the city to be held by general law in such cases provided. If a majority of those voting therein at such election shall approve the ordinance, it shall take effect immediately, and if not, it shall be
void; provided, however, that such majority shall include a majority of the qualified voters who are freeholders voting in such election."

Because of the purely prospective nature of the applicable United States Supreme Court decisions, I shall first consider the federal question. In *Phoenix* v. *Kolodziejski*, — U.S. —, 38 LW 5496 (June 30, 1970), the United States Supreme Court held invalid a local bond issue which had been approved by a restricted referendum. Only freeholders had been permitted to vote in that referendum.

The procedure set forth in your City Charter has the same effect as if two separate referenda were held, one open to all qualified voters, the other restricted to freeholders. This second referendum is forbidden by the *Phoenix* case and is not validated by being intertwined with the first.

The Falls Church City Charter was enacted in 1950, superseding a prior charter. The earlier charter permitted indebtedness only upon a referendum of qualified freeholders. 1946 Acts of Assembly, ch. 323. I am unable to say that the General Assembly intended to permit Falls Church to incur indebtedness without the approval of a majority of all qualified voters and am of the opinion that § 7.06 of the Charter must fall.

Having reached this conclusion, it is not necessary for me to examine the validity of § 7.06 under the State Constitution.

In *Taxpayers League* v. *Falls Church*, 203 Va. 604 (1962), the Court said, at 610:

"The City of Falls Church is not required to issue its bonds under the general law, known as the 'Public Finance Act of 1958' §§ 15-666.13, et seq. It has the authority to issue its bonds under the provisions of its charter. § 15-666.14. Since the city has proceeded under its charter, we must look to the provisions therein governing bond elections to decide whether the form of the ballot was sufficient."

Section 15-666.14 to which the Court referred is now Virginia Code § 15.1-171, which provides in part:

"Nothing in this chapter shall repeal, amend, impair or in any wise affect any of the provisions of any charter or special or local act authorizing or regulating the issuance of bonds by a municipality, and bonds may be issued pursuant to and in accordance with provisions of such charter or special or local act and without regard to the requirements, restrictions or other provisions of this chapter."

Virginia Code § 15.1-175 provides:

"Any municipality shall have power and is hereby authorized:

* * *

(b) To contract debts for any project, to borrow money for any project, and to issue its negotiable bonds to pay all or any part of the cost of acquiring, constructing, reconstructing, improving, extending, enlarging and equipping any project or refund any bonds issued therefor, and to provide for the right of the holders of such bonds and to secure the same as hereinafter further provided, and to purchase any of such bonds for investment, resale or cancellation;"

The specific language of § 15.1-175 extends to Falls Church the right to incur indebtedness. No valid provision of the Falls Church City Charter conflicts with the Public Finance Act of 1958. In my opinion, the City of Falls Church may, under the provisions of the Act, issue bonds to finance the expansion of the municipal water system.
REPORT OF THE ATTORNEY GENERAL

CIVIL DEFENSE—Natural Disaster—Declaration of.

March 30, 1971

THE HONORABLE JOHN L. JEFFRIES, III
Commonwealth's Attorney for Culpeper County

This is in reply to your letter of March 19, 1971, with which you enclosed a copy of the following resolution to be adopted by the Board of Supervisors of Culpeper County:

"BE IT RESOLVED that in order to take prompt, effective emergency actions to save lives and to minimize property damage during or just preceding a Natural Disaster, the Chairman of this board, or any other member of this Board, upon the unavailability of the Chairman, may declare a Natural Disaster Condition to exist in Culpeper County or any portion thereof, in the name of the Board, subject to confirmation by the entire Board as soon as it is possible for them to meet and consider the circumstances."

Your letter reads as follows:

"Our local Civil Defense co-ordinator has asked me to determine what is necessary to declare a natural disaster condition; keeping in mind, of course, that when such a condition is declared to exist, the civil functions of government in fact or in principal cease, and the power is in the exclusive hands of the Civil Defense co-ordinator.

"He has submitted for consideration a resolution a copy of which I enclose herewith. His resolution, if adopted, would allow any member of the Board, preferably the chairman, to declare the existence of such a natural disaster in the County and thereby let the co-ordinator assume or delegate all or as much of the functions of civil government as his purposes would require.

"This seems to me to be unconstitutional because it is allowing one man to assume such power with no safeguards against him."

Section 44-142.2, Code of Virginia (1950), as amended, provides that only the Governor may declare an emergency in the State or any portion thereof. While subsections (b) (3) and (d) of § 44-145 authorize the Governor to delegate certain duties to the local councils of defense and the coordinator, I find no authority for the board of supervisors, on its own motion, to pass the resolution above quoted.

CIVIL PROCEDURE—Secured Transactions—Debts—No creditor may require another to divulge amount of unpaid debt secured by a chattel mortgage.

March 30, 1971

THE HONORABLE CLIVE L. DUVAL, 2d
Member, House of Delegates

I have received your letter of March 23, asking whether one creditor may compel another to divulge the amount of unpaid debt secured by a chattel mortgage.

Virginia Code § 8.9-208 provides a procedure for a debtor to obtain a statement of unpaid indebtedness from his creditor. The official comment to this section provides:

"1. To provide a procedure whereby a debtor may obtain from the secured party a statement of the amount due on the obligation and in some cases a statement of the collateral.

"2. The financing statement required to be filed under this Article (see Section 9-402) may disclose only that a secured party may
have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement third parties are told neither the amount of the obligation secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under which the secured party will be required to make disclosure. On the other hand, the secured party should not be under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only when his own records identify the collateral and that if he claims all of a particular type of collateral owned by the debtor he is not required to approve an itemized list."

In my opinion the procedure authorized by § 8.9-209 is exclusive and no creditor may require another to divulge the amount of unpaid debt secured by a chattel mortgage.

CLERK OF COURT—Lease, a Security Agreement—May be filed as a financing statement.

COMMERCIAL CODE—Security Agreements—Lease may be filed as financing statement.

June 29, 1971

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

I have received your letter of June 15, enclosing a copy of an equipment lease, across the top of which has been typed the words, "Financing Statement." You ask whether this instrument may be filed as a financing statement.

Virginia Code § 8.9-102(2) provides that, "This title applies to security interests created by contract including . . . lease or consignment intended as security." Section 8.9-402 of the Code provides, "A copy of the security agreement is sufficient as a financing statement if it contains [certain required] information and is signed by both parties." The lease is a security agreement. Va. Code § 8.9-105(h). It may be filed as a financing statement in the clerk's office of the city or county in which the lessee has his place of business or residence.

CLERK OF COURT—Marginal Release—A satisfied note may not be assigned; release should be made by insurance company, authorized agent or attorney.

June 28, 1971

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

I have received your recent letter, from which I quote:

"Here is a Xerox copy of the front and back of a note presented to me by an attorney to make a marginal release, as well as a copy of a letter directed to the attorney."
"The first question I have, is the assignment, you will note that this contains the following language 'This Note is hereby assigned without recourse to — for the purpose of marginal release only, Southern Life Insurance Company, Greensboro, North Carolina, By: T. S. Collins, Jr., V-President.' Is this a proper assignment and is this sufficient authority for me, as Clerk, to permit the individual named to make the marginal release as noteholder?

"On the face of the note are the following words 'Paid in Full this 24th day of May, 1971. Southern Life Insurance Company. By: ——.' Is this note properly marked satisfied? Or should it have been marked satisfied by the individual as noteholder, if your answer to the question on the assignment is in the affirmative? Or should the note have been marked satisfied by the true creditor, Southern Life Insurance Company? And if your answer to this is in the affirmative, then the assignment becomes moot, and if so, would not the Southern Life Insurance Company, its duly authorized agent or attorney make the release."

I concur in your analysis. A satisfied note may not be assigned. In my opinion, the release should be made by the Insurance Company or its authorized agent, attorney or attorney in fact.

CLERK OF COURT—Requisites of Financing Statement—Instrument not containing information required in a financing statement should not be accepted for recordation.

COMMERCIAL CODE—Financing Statement Requisites.

THE HONORABLE KENNETH L. FIGG, JR., Clerk
Circuit Court of Prince George County

June 29, 1971

I have received your letter of June 17, enclosing a "Consent and Disclaimer Agreement," United States Department of Agriculture form VA-PS-12. You ask whether this agreement may be recorded as a financing statement.

The agreement does not contain all of the information required by Virginia Code § 8.9-402. The Virginia Comment to that section contains the following:

"A failure to comply with any of the formal requisites set forth in the Virginia statutes means that the instrument has not been validly recorded, docketed or filed and so it fails to accomplish the purpose of recordation—perfecting a security interest. Virginia has adopted a rule of strict compliance with formal requisites for recordation, so that recorded instruments have frequently failed of their purpose. See In re Adkins, 197 F. Supp. 287, 288 (E.D. Va. 1961)."

Although it is not the duty of a clerk of court to examine each instrument offered to record in order to ascertain whether it meets the requirements of § 8.9-402, I am of the opinion that an instrument such as this, which neither purports to be a financing statement nor contains the information required in a financing statement, should not be accepted for recordation.

CLERKS—City Courts of Record—Terms extended to January 1, 1980.

ELECTIONS—Clerks' Terms—Extension of some to obtain uniformity not unconstitutional.
ELECTIONS—City Officers—Extension of some terms to obtain uniformity not unconstitutional.

CITIES—Officers—Extension of terms to obtain uniformity not unconstitutional.

September 17, 1970

THE HONORABLE RICHARD D. GUY
Member, House of Delegates

This is in reply to your letter of August 4, 1970, in which you requested my opinion as to whether §§ 24.1-86 and 24.1-87 of the Code of Virginia, as amended, effective December 1, 1970, will be in conflict with Sections 118, 119 and 120 of the Virginia Constitution as presently written.

Sections 24.1-86 and 24.1-87 of the Code, as amended, read as follows:

"The qualified voters of the various counties shall elect a sheriff, an attorney for the Commonwealth, a treasurer, and a commissioner of the revenue at the general election in November, nineteen hundred and seventy-one, and every four years thereafter.

"The qualified voters of the various cities shall elect a city sergeant, an attorney for the Commonwealth, a treasurer, a commissioner of the revenue, and such other elective city officers not otherwise provided for by law or charter, at the general election in November, nineteen hundred and seventy-three, and every four years thereafter.

"Such officers shall hold office for a term of four years from the first day of January next succeeding their election."

"The qualified voters of the several counties shall elect a clerk of the court of record of the county at the general election in November, nineteen hundred and seventy-five and every eight years thereafter. Such clerks shall hold office for a term of eight years from the first day of January next succeeding their election.

"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."

You question whether or not Section 118 of the Virginia Constitution conflicts with § 24.1-87 on the same subject.

Section 118 provides in part as follows:

"In each city which has a court in the office of which deeds are admitted to record, there shall be elected, for a term of eight years, by the qualified voters of such city, a clerk of said court, who shall perform such duties as may be required by law."

Section 24.1-87, heretofore set out, provides for a term of eight years. It thereafter continues in office, until the first of January nineteen hundred and eighty, all clerks whose eight-year terms may have expired in the meantime. Insofar as this is not a change in the term of eight years, but an extension thereof to insure continuity of office, I am of the opinion it is not violative of Section 118.

Section 119 provides in part as follows:

"In every city, so long as it has a corporation court, or a separate circuit court, there shall be elected, for a term of four years, by the qualified voters of such city, one attorney for the Commonwealth, who shall also, in those cities having a separate circuit court, be the attorney for the Commonwealth for such circuit court."
"In every city there shall be elected one commissioner of the revenue for a term of four years."

Section 120 provides in part as follows:

"In every city there shall be elected, by the qualified voters thereof, one city treasurer, for a term of four years; one city sergeant, for a term of four years, whose duties shall be prescribed by law . . . ."

You ask if these sections conflict with § 24.1-86 of the Code. The pertinent part of that section reads:

"The qualified voters of the various cities shall elect a city sergeant, an attorney for the Commonwealth, a treasurer, a commissioner of the revenue, and such other elective city officers not otherwise provided for by law or charter, at the general election in November, nineteen hundred and seventy-three, and every four years thereafter.

"Such officers shall hold office for a term of four years from the first day of January next succeeding their election."

Sections 119 and 120 as above quoted provide for a term of four years for the officers listed. Section 24.1-86 of the Code, above cited, provides similarly.

Section 24.1-86 still retains the term of the offices listed at four years. The period of time in office for those officers whose terms expire before the new election date is covered by Section 33 of the Virginia Constitution which provides:

"Unless otherwise prescribed by law, the terms of all officers elected under this Constitution shall begin on the first day of February next succeeding their election, unless otherwise provided in this Constitution. All officers elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified."

The terms of the officers having expired on the dates set, the individuals in question continue in office until their successors have qualified. Section 24.1-86 is therefore not violative of Sections 119 and 120 of the Constitution.

CLERKS—Closing of Office—When charter provision prevails over general law.

March 24, 1971

THE HONORABLE DICK B. ROUSE
Commonwealth's Attorney for City of Bristol

This is in reply to your letter of March 10, 1971, in which you state that the provisions of § 17-41(6), Code of Virginia (1950), as amended, relating to the closing of offices of clerks of courts of record are in conflict with Section 21(e) of the City Charter of Bristol. Section 17-41(6) provides that the judge of the court may authorize the clerk of any court of record of a city of certain population to close his office on Saturday. Section 31(e) of the City Charter of Bristol provides as follows:

"'Location of office and court; when court held. The civil and police justice shall keep his office and hold his court in such place as the council may prescribe, which court shall be open for the transaction of business every day in the year except Sundays, and Christmas and Thanksgiving Days.'"
Where an amendment of a city charter is in irreconcilable conflict with a prior statute which is general in its terms and applicable to all cities and towns of the State, the amendment must be construed to qualify the general law and to be controlling in the locality to which it applies. *Pierce v. Dennis*, 205 Va. 478, 138 S.E.2d 551 (1964).

The provisions of the city charter are adopted under Section 117 of the Virginia Constitution and do not conflict with Sections 63 and 64 thereof. I am therefore of the opinion that the charter provision in question supersedes and takes precedence over the provisions of § 17-41(6) of the Code.

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**CLERKS—Closing of Office on Holidays—When clerk has discretion.**

**LEGAL HOLIDAYS—Clerks Offices in Certain Cities—When clerk may determine for office.**

_February 12, 1971_

_The Honorable Hugh L. Stovall, Clerk_  
_Circuit Court of the City of Norfolk_

In your letter of January 13, 1971, you inquire whether a clerk of court in a city with a population of 140,000 or more has discretion to close his clerk's office on certain holidays prescribed in § 2.1-21 of the Code, in accordance with the provisions of § 17-41(3) of the Code. In the alternative, you inquire whether Subsection (5) of § 17-41 would require the clerk to obtain the authorization of the Judge after approval by the governing body of the county or city before the clerk's office could be closed on such holidays.

Section 17-41(3) reads as follows:

"(3) In cities having a population of one hundred forty thousand or more, and in cities having a population of not less than ninety thousand nor more than ninety-five thousand, the clerk's office of any court may be closed on all days which are made legal holidays under the provisions of § 2.1-21;"

Section 17-41(5) provides as follows:

"(5) The judge of the circuit or corporation court of any county or city may authorize the clerk to close the office on Saturday and/or on any or all days which are made legal holidays under the provisions of § 2.1-21, provided the governing body of such county or city approves such action as evidenced by a resolution adopted by such governing body;"

It is my opinion that Subsection (3) should be read independently of Subsection (5), and that such a reading would have the effect of leaving the decision to close the clerk's office on the specified holidays in the discretion of someone other than the judge or the governing body of the county or city. Only by reading the subsections in this manner can any effect be given to Subsection (3), since if Subsection (5) were to operate on cities having a population of 140,000 or more, Subsection (3) would amount to surplusage. Such an effect cannot be intended by the Legislature. This is clear because Subsection (3) refers specifically to cities of a certain population, while Subsection (5) refers to any county or city.

Subsection (3) does not specifically state in whose discretion the decision to close the clerk's office is to be placed. It is my opinion, however, that in the absence of such direction, this discretion was intended to be placed in the clerk himself. This is because Subsections 2, 4, 5 and 6 of § 17-41 all refer to an authorization by the judge, while Subsection (3) is silent.
It must be inferred that the Legislature did not intend to place the discretionary authority envisaged by Subsection (3) in the judge. Having thus ruled out the judge and the governing body, the clerk himself remains as the only logical official in whom the discretionary authority to close the clerk's office could be vested.

CLERKS—County—Duties assumed by executive secretary.

COUNTIES—Clerks—Duties assumed by executive secretary.

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February 18, 1971

THE HONORABLE GEORGE B. WHITACRE, Clerk
Circuit Court of Frederick County

This is in reply to your letter of February 15, 1971, which reads as follows:

"On January 4, 1971, Frederick County employed an Executive Secretary, . . . , as the Code Section 15.1-122 states all duties of the County Clerk cease upon this action. We would like an opinion as to the possibility of the Clerk and the Executive Secretary sharing the duties. The county governing body is requesting this and we shall appreciate your reply."

Section 15.1-122 of the Code provides:

"Upon the appointment and qualification of the executive secretary authorized by § 15.1-115 the county clerk of such county shall be relieved of his duties in connection with the governing body and all of his duties shall be imposed upon and performed by the executive secretary."

This section imposes upon the executive secretary all of the duties of the county clerk with the governing body. I am, therefore, of the opinion that these duties may not thereafter be shared by the county clerk and the executive secretary. I therefore answer your question in the negative.

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CLERKS—Deputies—Number and compensation. How determined.

COMPENSATION BOARD—Deputy Clerks—Determines number and compensation.

February 5, 1971

THE HONORABLE SHELBY J. MARSHALL, Clerk
Circuit Court of Albemarle County

This is in reply to your letter of January 27, 1971 in which you ask my opinion on the following two questions:

"(1) Is a determination by the State Compensation Board of the number of deputy clerks, and the compensation to be paid them for the calendar year 1971 mandatory upon the Board of Supervisors of Albemarle County so as to require the Board of Supervisors to pay that amount to those deputies throughout the calendar year 1971?

(2) May I, as Clerk, subject to Compensation Board approval, determine the timing and amount of salary increases to be paid to my deputies? If funds are in the fiscal budget for the fiscal year ending June 30, 1971, for positions that are not presently being used in the Clerk's office."
The County of Albemarle has a county executive form of government provided for under Article 2 of Chapter 13 of Title 15.1. Section 15.1-600 provides that the board of county supervisors shall, subject to such limitations as may be made by general law, fix the compensation of all officers and employees of the county.

Section 15.1-610 provides that the clerk of court shall exercise all the powers conferred and perform all the duties imposed upon him by general law and be subject to the obligations and penalties imposed by general law. Section 15.1-614 of that article provides that the clerk shall be selected in the manner and for the terms as provided by general law. Section 15.1-616 provides that the schedule of compensation of officers shall be as provided by general law. Section 15.1-619 abolished the fee system as to officers and employees of the county.

In view of the foregoing, I am of the opinion that the general law prevails and that the Compensation Board under § 14.1-141 determines the number of deputies in your office and their compensation and the manner in which such compensation is paid. This section reads:

"The State Compensation Board shall determine: (1) How many deputies and assistants, if any, are necessary to the efficient performance of the duties of the office of the officer filing a report required by § 14.1-136, (2) what should be the compensation of such deputies and assistants, (3) what allowance, if any, should be made for office expenses and premiums on official bonds, and (4) the manner in which such compensation should be paid or such allowance made. Each of such officers shall, on or before the first day of November in each year, report to the Board, on official estimate blanks, furnished for such purpose, an estimate in itemized form showing the amount of expenses expected to be incurred in the operation and maintenance of his office for the ensuing year, and all such expenses must be approved in advance by the Board in order to be deductible under § 14.1-140; provided, however, that nothing in this section shall be construed as prohibiting the State Compensation Board from increasing at any time in the year allowances for such expenses as provided in § 14.1-142. The State Compensation Board shall report annually to the Governor on the expenses of such office."

Under this section I am of the opinion that your questions are answered thusly:

(1) The Compensation Board determines the number of deputies and their compensation. This determination is the maximum salary that may be paid which does not prevent the Board of Supervisors from paying less than this maximum. Therefore, it is not a mandate to pay the maximum allowance permitted.

(2) I am unable to find any authority for you, as clerk, to determine the timing and amount of salary increases to be paid the deputies.

Clerks—Docketing and Indexing Judgments—May require fee before performing service.

January 15, 1971

The Honorable Katherine V. Respess
Clerk of Courts, City of Norfolk

This is in reply to your letter of January 12, 1971, in which you ask my opinion whether you may refuse to accept abstracts of judgments tendered under § 8-374 when no fee has been tendered, or should you accept such abstracts and file rather than docket and index them.

Section 14.1-112(22) provides a fee as follows:
"For docketing and indexing a judgment from any other court, a fee of one dollar; and for issuing an abstract of any recorded judgment, when proper to do so, a fee of one dollar and fifty cents."

Section 14.1-169 provides in part as follows:

"[N]or shall such officer be compelled to perform any service unless his fees, if demanded, be paid or tendered or otherwise satisfactorily secured him . . . ."

In view of the foregoing I am of the opinion that you are not required to docket and index the abstracts of judgment until the fee has been tendered. In instances where the abstracts are delivered to you and no fee tendered they should be filed.

CLERKS—Docketing of Abstract of Judgment—Should docket abstract for support.

December 18, 1970

THE HONORABLE SAMUEL W. SWANSON, Clerk
Circuit Court of Pittsylvania County

This is in reply to your letter of December 10, 1970, in which you ask my opinion whether you have the authority to docket in your Judgment Lien Docket an abstract of judgment for support from the Juvenile and Domestic Relations Court.

Since receiving your letter you have advised that the parties concerned in the order are both adults. The order, therefore, is not restricted from public inspection or recordation under § 16.1-162 of the Code as involving juveniles.

Under § 8-373 of the Code the clerk of the court is required to docket every judgment for money rendered in his court or office. I am of the opinion that this judgment for support is not excepted. See opinion of this office to the Honorable John H. Powell, Clerk of Circuit Court of Nansemond County, dated June 24, 1963, and found in Report of the Attorney General (1962-1963), p. 20.

I am, therefore, of the opinion that you have the right and authority to docket the abstract in your Judgment Lien Docket.

CLERKS—Duties—Administering oaths—No duty to inquire into eligibility requirements of affiant.

POLICE OFFICERS—Special—Bond must comply with § 15.1-151.

October 30, 1970

THE HONORABLE SHELBY J. MARSHALL, Clerk
Circuit Court of Albemarle County

This is in reply to your letter of October 19, 1970, wherein you inquire into the duties of a Clerk with regards to determining whether persons are qualified to serve as Deputy Sheriffs and whether certain bonds signed by persons sworn in as Deputy Sheriffs would also be applicable to the same persons who have been designated as Special Police Officers.

With regards to your first question, you advise that you have taken the position that the Clerk's responsibility is "... merely to comply with the Code in giving the proper oath and ascertaining that proper bond with approved surety is given." I am of the opinion that an officer, who administers an oath, has the duty of insuring that: (1) the signer represents himself to be the person mentioned in the oath and that (2) the signer manifests all intent to be bound by the oath. Accordingly, I agree with
you that a Clerk has no duty to inquire into the eligibility of the affiant once you have been properly advised of the affiant's appointment. (Mc-Knight v. State Land Board, 381 P. 2d 726 (Utah 1963).

With regards to your second question, you state that the Deputy Sheriffs (referred to in your first question) "... were appointed on October 15, 1970, as Special Police Officers for Albemarle County, in compliance with Section 15.1-145 of the Virginia Code, the oath was given and bonds signed, but the County of Albemarle takes the position that it is not necessary for the bonding company to sign these bonds, (and that) ... the bonds signed by these men on August 31, 1970, (can) be transferred from Deputy Sheriff(s) to that of Special Police Officers".

You further advise that you "take the position that before these men have properly qualified (the) surety must sign these bonds in compliance with Section 15.1-151 of the Virginia Code ..."

Section 15.1-151 reads as follows:

"Before entering upon the duties of their office the persons so appointed shall give bond in the penalty of one thousand dollars, with approved security before the county clerk, with condition faithfully to discharge their official duties."

Since the bonds were issued for Deputy Sheriffs, I am of the opinion that Section 15.1-151 has not been complied with, and accordingly, I agree with you that the bonds signed on August 31, 1970, cannot be transferred.

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CLERKS—Fees—For making certified copy of marriage license.

THE HONORABLE WILLIAM K. SLATE, II, Clerk
Hustings Court of the City of Richmond

February 5, 1971

This is in reply to your letter of January 21, 1971 in which you ask my opinion as to the fee for providing a certified copy of a marriage license. Paragraphs (10) and (11) of § 14.1-112 of the Code, pertaining to your inquiry read:

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

(10) For making out a copy of any paper or record to go out of the office, which is not otherwise specifically provided for, for each page, one dollar.
(11) For annexing the seal of the court to any paper, writing the certificate of the clerk accompanying it, one dollar, and for attaching the certificate of the judge, if the clerk be requested to do so, fifty cents."

In cases where the seal of the court and the certificate of the clerk are not imprinted on the marriage license itself at the time a copy thereof is made, I am of the opinion that a fee of $2.00 may be charged, $1.00 for the copy of the license and $1.00 for the separate seal and certification which had to be added separately.

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CLERKS—Fees—For release of microfilm copies of records.

THE HONORABLE JOSEPH T. MARTZ, Clerk
Circuit Court of Loudoun County

October 2, 1970
I have received your recent letter concerning the use of microfilm copies of your deed book records. You say that you have had all of your records microphotographed. The microfilm is kept for your use by the microfilm company. Another corporation has now requested your permission to microfilm your deed books for its own records.

You ask whether you may authorize the microfilm company to make a duplicate microfilm copy of the film now being kept by it and to release the duplicate to the corporation. You further ask whether you may charge the corporation for the duplicate, pay the microfilm company for its services, and retain the balance as a clerk's fee.

I am of the opinion that you may, but need not, authorize the microfilm company to release a duplicate copy of your film. Once released, the copy will be the property of the corporation, to do with as it sees fit.

Section 14.1-112(10) of the Code of Virginia provides a clerk's fee for "making out a copy of any paper or record. . ." I am aware of no provision of the Code, however, which would permit you to make a charge for simply authorizing the release of the microphotograph film.

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CLERKS—Fees—Not due on State Bar suit to enjoin unauthorized practice of law.

CLERKS—Writ Tax—Not due on State Bar suit to enjoin unauthorized practice of law.

FEES—Clerk of Court—Not due on State Bar suit to enjoin unauthorized practice of law.

VIRGINIA STATE BAR—Court Costs—Neither clerk's fee nor writ tax due on suit to enjoin unauthorized practice of law.

September 11, 1970

THE HONORABLE CHARLES B. CROSS, JR., Clerk
Circuit Court of the City of Chesapeake

I have received your letter of August 13, in which you ask whether the Virginia State Bar is exempt from the payment of a clerk's fee or writ tax upon the prosecution of a suit to enjoin the unauthorized practice of law.

Section 14.1-87 of the Virginia Code provides:

"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."

The State Bar Fund is a special fund in the State Treasury, from which disbursements are made by the State Treasurer upon warrants of the State Comptroller. Va. Code § 54-52. The fund may be used to prosecute suits to enjoin the unauthorized practice of law. Button v. Day, 204 Va. 547 (1963). In my opinion no clerk's fee is payable upon the prosecution of such a suit by the Virginia State Bar.

I am also of the opinion that no writ tax is due. See Opinions of the Attorney General (1951-1952), p. 163.

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CLERKS—Issuing Marriage License After Divorce—No duty to require certified copy of divorce decree.

MARRIAGE—Issuance of License After Divorce—No duty on clerk to require certified copy of divorce decree.

January 14, 1971

THE HONORABLE KATHERINE V. RESPESS
Clerk of Courts, City of Norfolk
This is in reply to your letter of January 4, 1971, in which you state that you have required divorced parties to show certified copies of their divorce before issuing a marriage certificate. You ask if this practice is required by law.

I am of the opinion that if the parties seeking the marriage license execute the affidavit required by § 20-16 of the Code, you should issue the license. This office has previously noted that it is not incumbent upon the clerk to question the legality of a divorce. Therefore, it is not required that a certified copy of a divorce decree be shown in order to obtain a marriage license.


CLERKS—Judgment Lien Docket Index—Clerk may not purge index.

March 19, 1971

The Honorable Katherine V. Respress
Clerk of Courts, City of Norfolk

I have received your recent letter in which you ask if you may purge your judgment lien docket index of all entries relating to judgments which are more than twenty years old and have not been revived.

Virginia Code § 8-393 requires that suit to enforce the lien of a judgment be brought within the period of limitations set forth in §§ 8-396 and 8-397 of the Code. While these sections establish a normal twenty-year statute of limitations there are certain conditions under which the running of the statute is tolled. However unlikely the existence of these conditions, I am of the opinion that, in the absence of explicit statutory authority, you should not purge your index of any entry relating to any unsatisfied judgment.


November 20, 1970

The Honorable John V. Fentress, Clerk
Circuit Court of City of Virginia Beach

This is in reply to your letter of November 2, 1970, which reads as follows:

"My total compensation from all sources for the calendar year 1969 was $25,008.80. ($20,908.80 from fees plus $4,100.00 supplementary payment by the City for services rendered to the City Government)"

"For the calendar year 1970, because of the fact we obtained another Judge for our Court on July 1, 1970, the amount I am entitled to receive from fees will be $21,780.00.

"Based on the above facts, please give me your opinion as to the maximum supplementary payment which the City may make to me for the calendar year 1970."

Section 14.1-143 of the Code, as amended, which establishes the total annual compensation of your office, provides, in part, as follows:

"Nothing herein shall be construed to alter or affect in any manner the increases heretofore provided and now in effect; provided, however, that this section shall not affect any officer mentioned in § 15.1-89; and provided, further, that this section, as hereby amended, shall neither operate to increase the net retainable compensation of
any clerk from all sources to an amount above twenty-five thousand dollars for any year, nor shall this proviso decrease such compensation, if earned, of any clerk who has been earning more than twenty-five thousand dollars in net retainable compensation from all sources below the amount so retainable by him for the calendar year nineteen hundred sixty-nine from fees and commissions allowed by State law, but excluding any compensation allowed by his county or city if not paid.

Under this language your net retainable compensation from all sources for the year of 1969 was $25,008.80. This also establishes your net retainable compensation for successive years at that amount.

You state that the net retainable compensation for 1970 which you are entitled to receive, exclusive of compensation allowed by the City of Virginia Beach, is $21,780.00.

Since the maximum net retainable compensation for your office for 1970 is limited to $25,008.80, I am of the opinion that the maximum supplementary payment which the city could make to you for that calendar year is $3,228.80.

CLERKS—Release of Deeds of Trust—May not acknowledge own signature.

THE HONORABLE H. P. SCOTT, Clerk
Circuit Court of Bedford County

I have received your letter of September 9, from which I quote:

"I am frequently asked by banks and persons outside of Bedford County, who are holders of notes secured by deeds of trust on property in Bedford County and recorded in my office, to make a release of the deed of trust for the creditor in the deed of trust. The release would be made pursuant to the provisions of Section 55-66.3 of the Code of Virginia of 1950 as amended. It has always been a question in my mind as to whether it was proper for me to act as the agent for the creditor and sign a release and then turn and sign a statement attesting the signature or the signing of the certificate of release.

"Please advise if you think it is proper for such a release to be made by me.

"I also wonder if it would be proper for a deputy clerk to sign the release for the creditor and then for me to attest the release as Clerk or vice versa."

In my opinion it is not improper for you or your deputy to serve, without compensation, as attorney-in-fact for a creditor in releasing a deed of trust. I would counsel against this practice because of the additional liability assumed by you in so serving. I would suggest that the creditor utilize a local attorney or correspondent bank.

A clerk may not, in my opinion, take the acknowledgement of his own signature. See Davis v. Beazley, 75 Va. 491 (1881). It would be proper for a deputy to take the clerk's acknowledgement or vice versa.

CLERKS—Salary of Clerk of Hustings Court of City of Petersburg—Controlled by § 14.1-143.

THE HONORABLE RUTH M. BAILEY, Clerk
Hustings and Circuit Courts of the City of Petersburg

This is in reply to your letter of November 12, 1970, in which you ask several questions concerning your salary as clerk of the Hustings Court of
the City of Petersburg. You question whether under the applicable statutes any population bracket of that city now controls your maximum compensation and whether the maximum compensation of $9,500.00 allowable under § 14.1-143 is affected in any manner by the increases heretofore provided your office by statute.

Your salary is controlled by § 14.1-143 of the Code, as amended. Under this section your compensation is neither determined by nor dependent upon the population bracket of the City of Petersburg. Under this section the several increases heretofore provided your office by various sections of the Code are not included in the maximum compensation of $9,500.00 established and may be added to it.


THE HONORABLE J. E. CROCKETT, Clerk
Circuit Court of Wythe County

This is in reply to your letter of January 7, 1971, which reads as follows:

"We are beginning a new index of heirs and devisees, and we would like to have your opinion as to the following:

(1) When indexing the devisees in a will which contains a long list of small pieces of personal property, should each name mentioned in the will be listed in the devisee index?
(2) When the devisees listed in the will are different from the actual List of Heirs, should those in the List of Heirs, who are not mentioned in the will, be indexed in the devisee index?"

Section 64.1-94 of the Code requires the clerk to record every will admitted to probate and to index the same as required by law.

Section 17-79 of the Code provides that the wills shall be indexed in the name of all parties appearing therein who are thereby shown to be affected by the will. This provides, in part, as follows:

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

Section 64.1-134 of the Code required the clerk to record in the decedent as grantor and the heirs as grantees in the index of the will book.

In view of the foregoing, I am of the opinion that all persons affected by the will and all persons listed as heirs should be listed in the index of the will book.

COLLEGES AND UNIVERSITIES—Church Affiliated—State financial assistance—Prohibited through student or directly.

VOCATIONAL REHABILITATION—Church Affiliated College—State financial assistance prohibited to student or to institution.

THE HONORABLE DON W. RUSSELL, Commissioner
Department of Vocational Rehabilitation

I am in receipt of your letter of July 17, 1970, concerning the legality of providing state financial assistance to an individual attending a sectarian or church related institution.
Ferrum Junior College, the institution in question, is a private institution administered by a board appointed by the Methodist Church. The College also receives a portion of its funding from the Methodist Church. The Department of Vocational Rehabilitation has been asked to provide financial assistance to a disabled individual who is attending Ferrum. You have asked if the Department can spend public funds on the individual involved.

In *Almond v. Day*, 197 Va. 419 (1955), the Supreme Court of Appeals of Virginia declared unconstitutional an item in an appropriation act which provided for financial assistance to persons attending any educational institution in Virginia approved by the Superintendent of Public Education. In so ruling the Court relied on Section 141 of the Constitution of Virginia which prohibits appropriations of public funds to nonpublic educational institutions with certain exceptions not relevant here. The Court also held that the act would violate, among others, Section 67 of the Constitution of Virginia which provides:

"The General Assembly shall not make any appropriation of public funds . . . 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. . . ."

In reaching its decision, the Court noted that it was immaterial that the funds could be given directly to the individuals rather than to the educational institution itself. The Court reasoned that the individual would only be acting as a conduit for the funds and that the funds would at least indirectly reach the prohibited institution.

I am of the opinion that Ferrum Junior College is a private, church controlled, educational institution and, for that reason, the Department is prohibited from providing assistance to persons attending it.

COLLEGES AND UNIVERSITIES—Compatibility of Offices—Faculty member may serve as member of board of supervisors.

February 12, 1971

THE HONORABLE JOHN R. THOMPSON
Commonwealth's Attorney for County of Wythe

I am in receipt of your letter of February 1, 1971, in which you inquire whether there is any prohibition, state or federal, which would prevent any of the faculty members of the Wytheville Community College from serving in the General Assembly or as a member of the Board of Supervisors of Wythe County. There is no prohibition in the federal law which would affect a faculty member's desire to engage in political activity. The Hatch Act specifically exempts individuals employed by an educational or research institution which is supported in whole or in part by the State. A faculty member of a state community college would come within this exemption.

Sections 44 and 45 of the Constitution of Virginia prohibit a person from serving in the General Assembly if that person holds a salaried office under the State government. This limitation is carried forward in Section 4 of Article IV of the new Constitution. This office has previously ruled, however, that an employee of a college is an employee of a governmental agency and does not hold a salaried office under the government of the Commonwealth. Accordingly, the constitutional restrictions would not prohibit a community college professor from serving in the General Assembly, and there are no provisions in the Code of Virginia which would prohibit such service.

Section 15.1-50, Code of Virginia (1950), as amended, prohibits any person serving as a member of the County board of supervisors from holding any other office, elective or appointed, at the same time. Not all employees of governmental agencies, however, hold office within the purview of this
section. Wytheville Community College is not a governing body as such. Its faculty members are not vested with statutory powers and duties. They are not denominated officers by statute. They do not serve specified statutory terms, nor are they required to take an oath of office or give bond. On the contrary, faculty members of the Wytheville Community College are merely employees of a governmental agency and have no official status under Virginia law. I am of the opinion that the provisions of § 15.1-50, Code of Virginia (1950), as amended, governing incompatibility of office would not apply to the situation which you present. Therefore, it is legally permissible for a faculty member of a community college to serve on a board of supervisors.

The Virginia Conflict of Interests Act would not prohibit an employee of a community college from serving in the General Assembly or on a county board of supervisors, provided that a disclosure is made pursuant to § 2.1-349(a)(2) of the Act. That section requires that a letter be lodged both with the college and the Clerk of the House or Senate if a person is elected to the General Assembly, or the Clerk of the county if the person is to serve on the board of supervisors, advising that the employee does have a contract with Wytheville Community College. There would be no need for a finding of non-competitive bidding as required by that section, since such a finding has already been made by the Governor’s office.

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COLLEGES AND UNIVERSITIES—Local Police Relations—Interpretation of § 23-9.2:3(b).

September 28, 1970

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth’s Attorney for the City of Norfolk

I am in receipt of your letter of September 17, 1970, in which you requested an opinion regarding the application of § 23-9.2:3(b) of the Code of Virginia to Old Dominion University.

The above-mentioned section provides:

Upon receipt of an appropriate resolution of the Board of Visitors or other governing body of an educational institution, the governing body of a political subdivision which is contiguous to the institution shall enforce State statutes and local ordinances with respect to offenses occurring on the property of the institution.

You have suggested that the provision does not apply to Old Dominion University since that Institution’s property is completely within the City of Norfolk. I am of the opinion that the word “contiguous” should be construed in its broadest sense and that the provision does apply to Old Dominion University.

This does not preclude your local police department from enforcing state law and local ordinances on the University’s property, however. The provision makes mandatory the enforcement of such laws when enforcement is requested by an appropriate resolution. It does not prohibit a local police department from enforcing such laws in the absence of such a request.

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COMMISSIONERS OF REVENUE—Information—May not divulge information on building permit.

December 4, 1970

THE HONORABLE W. TALMAGE KEMP
Commissioner of the Revenue for Rockbridge County

This is in reply to your letter of December 1, 1970, in which you enclosed a copy of a building permit and asked my opinion whether you may divulge the information on this permit.
I am of the opinion that the permit may not be duplicated nor the contents thereof disclosed by you in view of the provisions of § 58-46 of the Code. This section prohibits you from divulging any information acquired with respect to property.


COMMISSIONERS OF REVENUE—Land Book—May not charge town for preparing.

THE HONORABLE GORDON C. BERRYMAN
Commissioner of Revenue for Surry County

December 10, 1970

I have received your letter of November 18, from which I quote:

“For a long number of years my Deputy-Secretary and I have prepared a list of all Real Estate, Tangible Personal Property and Public Service Corporations in the Town of Claremont of this County, showing the names and addresses of all taxpayers, with the amount of assessment and Town Tax due opposite each item.

“Such list required several and many hours of our time, for which we only made a small charge. The entire hours consumed were at times when our regular and daily work had first been completed in full, never a minute was neglected from our daily routine of business.”

You ask whether you are required to pay the amount received by you from the town into the county or State treasury. You are required as a part of your duties as Commissioner of the Revenue to prepare a land book which separately states the town property. Va. Code §§ 58-804(c) and 58-805. The form of personal property book prescribed by the Department of Taxation pursuant to Virginia Code § 58-879 also requires the separate statement of town property. The State Corporation Commission breaks down its assessments of public service corporation property by towns. In my opinion you may not charge the town for performing any of these services.

I am aware, however, of no statute or custom requiring a Commissioner of the Revenue for a county to compute the amounts of the town taxes. The “amount of the tax at the legal rate” referred to in § 58-805 has been traditionally construed as being the amount of county and district, not town, levies. The extension of the tax is a service which you render apart from your normal duties. I understand that a number of Commissioners of the Revenue pursue other vocations in addition to their duties as Commissioner. They are not required to remit their profits from their other work; neither should you be required to remit your profits received from the town for performing the clerical function of extending the town taxes from the assessment records in your office.

You are, however, an officer of the State and of the county, acting as a contractor with another governmental agency. You are therefore required by Virginia Code § 2.1-349(a)(2) to give prior written notice of this fact to the State, the county and the town. In addition, the town council must either let the contract after competitive bidding or determine in writing that it is not in the public interest to do so. Failure to follow these procedures will result in the contract being voidable under Virginia Code § 2.1-350(a).

COMMONWEALTH ATTORNEYS—Advice to Board of Supervisors Regarding Redistricting is Within Scope of Official Duties; May Not Be Additionally Remunerated for.
PUBLIC OFFICERS—Commonwealth Attorney May Not Be Additionally Remunerated by Board of Supervisors for Advice Regarding Redistricting.

REDISTRICTING—Commonwealth Attorney May Not Be Additionally Remunerated by Board of Supervisors for Advice Regarding.

May 4, 1971

THE HONORABLE M. WILLIAMSON WATTS
Commonwealth's Attorney of Madison County

I am in receipt of your recent letter wherein you request my opinion whether the Board of Supervisors has authority to employ the Commonwealth's Attorney of the County to assist the Board by rendering legal advice regarding reapportionment of magisterial or election districts in the county.

Chapter 199 of the 1971 Acts of Assembly enacting §§ 15.1-37.4 through 15.1-37.8 allows the governing body of each county and city to reapportion immediately its representation of districts and wards as required and mandated by Article VII, Section 5, of the revised Constitution of Virginia. Section 15.1-37.6 enacted by such Chapter reads:

"Effective in nineteen hundred seventy-one, the governing body of a county, city, or town may, and it is hereby authorized to, expend such funds, and employ such persons and/or agencies, as it may deem necessary to carry out the responsibilities relating to reapportionment provided by this chapter."

However, I am of the opinion that this section which is general in nature would not be applicable to the employment of Commonwealth's Attorneys in those counties where the Commonwealth's Attorney is the legal advisor for the Board of Supervisors.

As this office has previously ruled, the Board of Supervisors cannot lawfully pay the Commonwealth's Attorney for any services rendered which come within the scope of his official duties.


Since § 15.1-37.6 does not specifically authorize payment of compensation to the Commonwealth's Attorney, I am of the opinion that he may not be additionally remunerated for any services rendered to the Board regarding redistricting.

COMMONWEALTH ATTORNEYS—Duties—Represents county in recovery and collection of fees, costs and expenses referred to in § 37.1-89.

May 27, 1971

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

I am in receipt of your recent letter of May 10, 1971, wherein you make reference to § 37.1-89 of the Code of Virginia (1950), as amended, and pose the following inquiry:

"I would appreciate your telling me whether or not, in your opinion, it is the duty of the Commonwealth's Attorney to represent his County in recovering and collecting fees, costs and expenses paid for the admission of mentally ill persons to a State Hospital under the provisions of 37.1-89 of the Virginia Code."
REPORT OF THE ATTORNEY GENERAL

Section 37.1-89 of the Code reads in pertinent part as follows:

"... Any such fees, costs and expenses incurred in connection with an examination or hearing for an admission pursuant to § 37.1-67 in carrying out the provisions of this chapter, when paid by any county, city or the State, shall be recoverable by such county, city or the State from the person who is the subject of the examination, or hearing, or from his estate, or from the person at whose request the certification was requested or the proceedings were instituted, in an appropriate action or proceeding for such purpose; . . . ."

The phrase "appropriate action or proceeding" referred to in the above code section contemplates a civil proceeding instituted by the appropriate county, city, or State for the collection of fees, costs and expenses incurred pursuant to § 37.1-67 of the Code. Though there is no specific statutory duty which requires the Commonwealth's Attorney to represent his county in collecting the above referred to amounts, the general duties imposed upon him would require him to represent his county in such a matter. But, an exception to the aforesaid rule would arise when a County Attorney has been appointed by the governing board, in which case:

"The attorney for the Commonwealth of any such county shall be relieved of the duty of advising the governing body, of drafting or preparing county ordinances and of defending or bringing civil actions in which the county, or any of its officials shall be a party. . . ."

Therefore, in my opinion, with the above exception noted, it is the duty of the Commonwealth's Attorney to represent his county in recovering and collecting fees, costs and expenses referred to in § 37.1-89 of the Code.

COMMONWEALTH ATTORNEYS—Duties—Required to act as legal adviser to city school board unless city charter imposes such duty on city attorney.

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

May 24, 1971

In your letter of April 29, 1971 you inquire whether it is the duty of the Commonwealth's Attorney in the City of Alexandria to act as legal advisor to the school board.

It has been the opinion of this office for many years that it is the duty of the Commonwealth's Attorney to give legal advice and opinions to all public officials and boards of his county. See Report of the Attorney General, (1962-1963), p. 22, a copy of which is attached. Section 15.1-822 of the Code of Virginia, (1950), as amended, makes the Attorney for the Commonwealth in a city subject to the same duties as the Attorney for the Commonwealth in a county. It is my opinion, therefore, that the Commonwealth's Attorney of a city has a duty to render legal advice to the city school board.

I might point out that the duty to render such advice and opinions as outlined above does not necessarily extend to any duty to represent school board officials in pending litigation. Section 22-56.1 of the Code provides:

"Notwithstanding any other provision of law, the attorney for the Commonwealth or other counsel approved by the school board may be employed by the school board of any county, city or town, to defend it, or any member thereof, or any school official, in any legal pro-
ceeding, to which the school board, or any member thereof, or any school official, may be a defendant, when such proceeding is instituted against it, or against any member thereof by virtue of his actions in connection with his duties as such member . . . ."

It is my opinion, therefore, that the Commonwealth's Attorney is not under a duty to represent the school board or any members thereof, but may be retained by the school board in the event such representation as is outlined by the statute becomes necessary.

**COMMONWEALTH ATTORNEYS—Duties—To personally represent other constitutional officers.**

**SHERIFFS AND SERGEANTS—Deputies—Not constitutional officers.**

July 7, 1970

The Honorable Richard C. Grizzard
Commonwealth's Attorney for Southampton County

In your letter of June 23, 1970, you pose three questions with regard to the new statute enacted by the 1970 General Assembly which is designated as § 15.1-66.1, which reads as follows:

"The attorney for the Commonwealth of any county or city is hereby authorized and directed, in the event that any other constitutional officer is made defendant in any civil action arising out of the performance of his official duties, to provide legal counsel to such officer in such action, upon the request of such officer."

I will answer the questions in the order presented.

1. Does the section provide for counsel for a deputy sheriff acting in an official capacity?

In the case of Hilton v. Amburgey, 198 Va. 727, 96 S.E.2d 151 (1957), the Supreme Court of Appeals pointed out that while a sheriff is a constitutional officer because he holds his office by virtue of Section 110 of the Constitution, other public officers who hold their office by virtue of authority from the General Assembly or by virtue of a city, town or county authority, whether by election or appointment, are not constitutional officers. It is my opinion that a deputy sheriff would come under the latter classification and would, therefore, not be eligible for the assistance of counsel as provided by this Section.

2. Does this section direct the Attorney for the Commonwealth to employ counsel or appoint counsel to defend the officer?

Since the statute reads that the Attorney for the Commonwealth is authorized and directed to provide legal counsel to such officer, this means that the Attorney for the Commonwealth is to personally act as the legal counsel to the officer as a part of the duties of his office rather than employing or appointing outside counsel.

3. If a civil suit were filed prior to the effective date of this legislation, but a responsive pleading had not been filed by such date, could the officer request counsel pursuant to this section?

The effective date of this code section was June 26, 1970. Subsequent to that date, any constitutional officer could request the assistance of counsel as provided by the code section in any manner then pending or subsequently arising.
COMPATIBILITY OF OFFICES—Member of Board of Supervisors May Not Serve on Community Mental Health and Mental Retardation Board.

BOARDS OF SUPERVISORS—Member—May not serve on Community Health and Mental Retardation Board.

THE HONORABLE J. MERCER WHITE, JR.
County Attorney of Henrico County

March 23, 1971

I am in receipt of your letter requesting an opinion, which letter reads in pertinent part as follows:

"I would appreciate an opinion . . . as to whether or not the prohibition contained in § 15.1-50 of the Code of Virginia of 1950, as amended, as the same apply to members of the Board of County Supervisors prohibit a member of the Board of County Supervisors from serving on the Community Mental Health and Mental Retardation Board as set out in § 37.1-195."

Section 15.1-50 provides, with certain exceptions, that no person holding the office of county supervisor may hold any other office, elective or appointive, at the same time. None of the exceptions set forth in the statute would be applicable to your inquiry. Membership on the Community Mental Health and Mental Retardation Board being an office, the prohibition would apply. Therefore, your inquiry is in the affirmative.

COMPATIBILITY OF OFFICES—Regional Sewer Authority—Statute and charters control problem for appointed county, town, and city officials.

VIRGINIA CONFLICT OF INTERESTS ACT—Appointment to Separate Agency—Problem of compatibility rather than conflict.

VIRGINIA CONFLICT OF INTERESTS ACT—Attorneys Representing Agencies—No conflict if attorney-client relationship; conflict if attorney employee of either agency.

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for County of Rockingham and City of Harrisonburg

September 15, 1970

I am in receipt of your letter of July 22, 1970, regarding the formation of a Regional Sewer Authority by the County of Rockingham, together with the City of Harrisonburg and the Towns of Dayton, Bridgewater and Mt. Crawford. You state that:

"There have been several either elected or appointed County, Town and City officials appointed to the governing body of the Authority, and the Authority has employed two attorneys to represent it who are presently employed as the attorney for some of the municipalities involved."

You inquire if "[i]n light of the conflict of interest legislation, would these appointments to the governing body and the employment of these two attorneys be proper?"

A Regional Sewer Authority created pursuant to Chapter 28 of Title 15.1 of the Code of Virginia (1950), as amended, is deemed to be a separate instrumentality exercising public and essential governmental functions. Section 15.1-1250. An appointment of a county, town or city official to the governing body of the Authority does not, by itself, raise a conflict of interest question but rather a question of compatibility of office. Section 15.1-50 of the Code of Virginia (1950), as amended, deals with compatibility
of office for various county officials. Compatibility of office for city and town officials would be controlled by their respective city or town charters.

The conflict of interest problem would arise only if the various county, town or city officials were to enter into a contract with the Authority. Such contract would be prohibited by the provisions of § 2.1-349 (a) (1). Contracts with agencies other than the Authority or their respective county, town or city would be controlled by § 2.1-349 (a) (2).

With reference to the attorneys who have been employed by the Authority, if they are employees within the definition of § 2.1-348 (e), then the provisions of the Conflict of Interests Act would be applicable and, more specifically, the prohibition found in § 2.1-349 (a) (1) as discussed above would disallow any additional contract to be entered into with the Authority. However, I would presume that the attorneys with reference to which you inquire are not employees within the meaning of the Act but maintain an attorney-client relationship, rendering to the Authority such legal service as needed. If that is the case, then the Conflict of Interests Act would have no applicability to such attorneys.

COMPENSATION BOARD—Salaries—Authority to fix salary of employee of treasurer.

December 30, 1970

THE HONORABLE J. H. JOHNSON
Treasurer, City of Roanoke

This is in reply to your letter of December 28, 1970 in which you ask the following question:

"Does the State Compensation Board have a legal right to reduce the salary of an employee whom I have promoted to a vacant position of Statistical Clerk and Third Deputy Treasurer with a $6,535.00 annual salary, which was fixed for that position by the State Compensation Board and later affirmed by a Three-Judge Court?"

The salary approved by the Compensation Board on June 1, 1970 for "X", Deputy Treasurer, was $6,535.00. This salary was based on the time in office and other criteria particularly related to "X". Subsequently on November 15, 1970, "X" resigned and you requested the Compensation Board to approve "Y" to replace her at the same salary.

The policy of the Compensation Board as set forth on many of its forms is that:

"Whenever an employee's position becomes vacant, and it is necessary to fill it, the policy is to fix the salary of the new incumbent at a figure substantially lower than that received by the old employee after years of experience in the particular position."

On November 25, 1970, the Compensation Board approved the promotion of "Y" to succeed "X" at an annual rate of $6,080.00 effective November 16, 1970. I am of the opinion that the Board acted within its authority in fixing the salary of "Y" at this amount even though it was below the salary which was being paid to her predecessor.


October 2, 1970

THE HONORABLE JOHN M. RASNICK, JR.
Executive Secretary, Compensation Board
This is in reply to your letter of recent date in which you, on behalf of the Compensation Board, ask my advice and opinion on the meaning of § 14.1-143 of the Code of Virginia, as revised by the 1970 Legislature, in regard to several situations. I shall quote the narrative and related questions from your letter and consider them separately and in the order presented, as follows:

"Section 14.1-143, as amended, reads in part as follows: The total annual compensation, exclusive of expenses authorized by the State Compensation Board, of any officer mentioned in 14.1-136 and 14.1-150 shall not exceed nine thousand five hundred dollars per annum exclusive of any supplementary compensation allowed by their respective political subdivisions and commissions on the collections of taxes allowed by law." (Emphasis supplied.)

"The Board has considered that compensation paid to the clerk by counties under Sections 14.1-164 (now 14.1-164.1), 15.1-533 and 33-160, and the compensation paid to clerks by cities pursuant to 14.1-165 and 15.1-823 should be disregarded, within the statutory limits formerly contained in Section 14.1-143 and the exemptions contained in Section 15.1-533, when determining excess fees. The amounts paid to clerks of counties as permitted by Sections 14.1-166 and 14.1-167 as a local contribution towards the salaries of deputies and employees have not been considered as excludable in determining excess fees. The Board would like to be advised whether the compensation now paid to clerks by their respective localities should be disregarded entirely when determining excess fees, and whether this exclusion would be applicable to the contributions paid by the localities to the clerks towards the salaries of deputies and employees."

The excess fees represent the amount of income of office to be credited to the State and local treasuries, respectively, after all expenses and salaries are deducted. In regard to your question as to whether or not the compensation now paid clerks by their respective localities should be disregarded entirely when determining excess fees, my answer is in the affirmative. This is indicated by the emphasized language of § 14.1-143, quoted above, which excludes any supplementary compensation paid to clerks by their respective political subdivisions. Since the total compensation paid deputies and employees constitutes expenses of office to be deducted from the income of office in order to arrive at the amount of excess fees, your question as to whether the foregoing exclusion would be applicable to local contributions toward the salaries of such deputies and employees is answered in the negative.

"The new provision excluding 'commissions on the collections of taxes allowed by law' seems to relate solely to commissions earned by a clerk on the collections of local delinquent real estate taxes and land redemptions and local recordation taxes on deeds, wills, etc., when imposed by Sections 58-65.1 and 58-67.1. Are these commissions under the provisions of Section 14.1-143 limited to these local taxes, and if so are the amounts collected to be disregarded in determining excess fees?"

The answer to both questions is in the affirmative. These are the "commissions on the collections of taxes allowed by law" which are excluded from the limits placed upon the annual compensation of a clerk by § 14.1-143, as revised by Chapter 694, Acts of Assembly of 1970.

"The last paragraph of Section 14.1-143 reads in part as follows: 'and provided, further, that this section, as hereby amended, shall neither operate to increase the net retainable compensation of any clerk from all sources to an amount above twenty-five thousand dollars for any year, nor shall this proviso decrease such compensa-
tion, if earned, of any clerk who has been earning more than twenty-five thousands dollars in net retainable compensation from all sources below the amount so retainable by him for the calendar year nineteen hundred sixty-nine from fees and commissions allowed by State law, but excluding any compensation allowed by his county or city if not paid.’ (Emphasis supplied.)

“The intent of the above proviso is not entirely clear except that it places a ceiling on the net retainable compensation of those clerks who made over $25,000 in the calendar year 1969 at the amount retained for that year and prohibits any clerk who made less than $25,000 in 1969 to receive more than $25,000 in 1970 and subsequent years. The final condition in the proviso which has been underscored above likewise needs interpretation.

“Assuming that a clerk in 1969 was entitled to and retained $22,650 from fees and received a $5,000 salary supplement from the locality, making a total retainable compensation of $27,650. Also, assume that this same clerk in 1970 because of changes in entitlements may retain $26,136 from fees exclusive of commissions estimated at $1,000 on the collections of taxes allowed by law and that the locality discontinues the supplementary salary allowance. Under these circumstances, would the clerk be entitled to receive a total compensation of $27,650 in 1970, or would his net retainable compensation be limited to the $26,136 maximum to be retained from fees and the $1,000 estimated to be derived from commissions on collections of local taxes? The closing part of the above quotation from Section 14.1-143, which has been underscored, indicates that it was intended that if a county or city did not pay in years subsequent to 1969 a salary supplement which may have been paid in 1969 that such should not operate to reduce the net retainable compensation of the clerk, if earned, below that received for the calendar year 1969. Please advise whether this is the correct interpretation to place upon this provision.”

In my opinion, under the given facts in the last quoted paragraph, the clerk’s net retainable compensation would be limited to the $26,136 maximum to be retained from fees and the $1,000 derived from commissions and collections of local taxes. I base this on the language, quoted above, from the final paragraph of § 14.1-143, which, in effect, indicates that any clerk who made more than $25,000 in the year 1969 may retain up to a like amount in 1970, if earned. This proviso does not intend to prevent a decrease if not earned, for otherwise the words if earned would have no meaning. The use of the word earning, elsewhere in the sentence, makes it clear that the word earned refers to the compensation of the clerk rather than to the total fees of office collected by the clerk.

CONSERVATION AND ECONOMIC DEVELOPMENT—Appalachian Trail

Authority to exercise eminent domain.

June 10, 1971

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

This will acknowledge receipt of your letter of April 23, 1971, requesting my opinion as to the authority of the Department of Conservation and Economic Development to acquire lands for the Appalachian Trail through the exercise of the power of eminent domain. Your letter states, in part, as follows:

“At the recent Special Session of the General Assembly, the passage of House Bill 160 placed with this Department the responsibility to acquire, protect and manage the Appalachian Trail through the
Commonwealth. This legislation is silent regarding the use of eminent domain.

"Also, during the Special Session, a similar bill was introduced which provided for the acquisition of Trail lands by exercising the power of eminent domain. This bill did not pass.

"In view of the fact that House Bill 160 does not specifically authorize the use of eminent domain, and in view of the fact that a similar bill that did possess such power did not pass, can this Department, pursuant to Section 10-21 of the Code, exercise the power of eminent domain to acquire lands to be utilized in the Appalachian Trail?"

In this regard, it should be noted that the language of H.B. 160, enacted as Chapter 136 of the Acts of Assembly of 1971, is directed to and authorizes the Division of Parks to acquire lands and interests therein for purposes of the Appalachian Trail. Specifically, Chapter 136 provides, in part, that:

"The Commonwealth of Virginia, through the Division of Parks of the Department of Conservation and Economic Development, hereinafter referred to as the Division, is authorized (1) to enter into written cooperative agreements with land owners, private organizations and individuals and (2) to acquire by agreement, gift or purchase land, rights-of-way and easements for the purpose of establishing, protecting and maintaining a walking trail right-of-way across the Commonwealth . . . ."

Section 10-21 of the Code of Virginia (1950), as amended, however, is directed to and authorizes the Director of the Department of Conservation and Economic Development, with the approval of the Board, to exercise broad powers, including that of eminent domain in order to acquire property for recreational and other purposes. The pertinent provisions of § 10-21(1) of the Code are as follows:

"The Director, with the approval of the Board, shall have full power and authority to acquire by gift or purchase or by the exercise of the power of eminent domain, areas, properties, lands or any estate or interest therein, of scenic beauty, recreational utility, historical interest, remarkable phenomena or any other unusual features which in the judgment of the Board should be acquired, preserved and maintained for the use, observation, education, health and pleasure of the people of Virginia . . . ."

In addition thereto, § 10-21(2) of the Code provides that:

"The Director shall have the power to institute and prosecute any proceedings in the exercise of the power of eminent domain for the acquisition of such properties for public use in accordance with the laws relating to the exercise of such right and power, being chapters 1 and 4 (§ 25-120 et seq.) of Title 25."

Thus, the Director, with the approval of the Board, is given broad powers including that of condemnation, to acquire property for a variety of purposes; and, clearly, the condemnation of property for purposes of the Appalachian Trail comes within the scope of the authority vested in the Director by the provisions of § 10-21 of the Code. The deletion by the General Assembly, in its amendment of H.B. 160, of any reference to the Division of Park's authority to exercise the power of eminent domain cannot be construed to deny to the Director similar power and authority expressly provided for by statute. In this regard, the amendment of H.B. 160 is merely consistent with the general statutory scheme for the division of powers between the Director of the Department of Conservation and
Economic Development and the Commissioner of the Division of Parks found in Chapter 2 of Title 10 of the Code.

In light of the foregoing, I am of the opinion that the provisions of H.B. 160, now Chapter 136 of the Acts of Assembly of 1971, do not preclude the exercise of the power of eminent domain by the Director of the Department of Conservation and Economic Development pursuant to § 10-21 of the Code to acquire lands to be utilized in the Appalachian Trail.

CONSERVATION AND ECONOMIC DEVELOPMENT—Mined Land Reclamation—Issuance of permits for surface mining—Conditions under which issued.

MINES AND MINING—Surface Mining—Reclamation plans.

October 14, 1970

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

This will acknowledge receipt of your letter of October 8, 1970, in which you pose a number of questions in regard to the mined land reclamation laws of the Commonwealth. Because of the nature of the problems, your letter is set forth as follows:

"This Department is responsible for administration of two laws which require the reclamation of lands disturbed by surface mining. Chapter 15 of Title 45.1 of the Code of Virginia was enacted in 1966 and concerns itself only with the surface mining of coal. Chapter 16 of Title 45.1 of the Code of Virginia was enacted in 1968 and concerns itself with the surface mining of all minerals other than coal.

"We have been able to give reasonably satisfactory attention to the 1966 law; however, recent developments in the coal industry have brought about a much greater work load under this part of the program. The number of operations is increasing steadily and at a rate greater than we are able to handle properly with our available resources. Measures of the increasing volume of work are contained in the following table:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Number of Active Operations</th>
<th>Number of New Permits Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966-67</td>
<td>95</td>
<td>95</td>
</tr>
<tr>
<td>1967-68</td>
<td>147</td>
<td>65</td>
</tr>
<tr>
<td>1968-69</td>
<td>187</td>
<td>91</td>
</tr>
<tr>
<td>1969-70</td>
<td>240</td>
<td>121</td>
</tr>
<tr>
<td>First Quarter of 1970-71</td>
<td></td>
<td>58</td>
</tr>
</tbody>
</table>

"The 1968 law has not been properly funded since the beginning and we have been unable to do more than provide for the clerical work involved in recommending issuance of permits. We have not had the staff with which to provide adequate review of reclamation plans and adequate inspection and enforcement of the law.

"[1.] In light of the circumstances involved in both programs, we seem to be faced with a question of priority. Should we continue to do the clerical work involved in approving new reclamation plans without adequate review and without adequate follow-up, or should we discontinue the review of new reclamation plans in order to concentrate our efforts on the inspection and enforcement aspects of active operations for which permits have already been issued. To phrase the question in a different way, we ask: Is it legally per-
missible for this Department to delay reviewing or to decline to review and make recommendations on reclamation plans which are required for the issuance of permits under Sections 45.1-163 and 45.1-181 of the Code of Virginia when we are faced with the certainty that we cannot adequately inspect and enforce the reclamation requirements thereunder?

"[2.] Representatives of this Department make determinations concerning adequacy of reclamation work and they do not recommend the release of bonds required under Sections 45.1-165 and 45.1-167, or Sections 45.1-183 and 45.1-185 of the Code of Virginia until the reclamation has been carried out in a manner satisfactory to this Department. It is often difficult to know whether the reclamation has been properly completed until a considerable length of time has elapsed following the initial reseeding or revegetation. These circumstances prompt us to ask the following: Is there any limitation on the length of time performance bonds can be required to be continued in force in order that we may insure that reclamation has been properly established?

"[3.] Sections 45.1-165 and 45.1-167 of Chapter 15 of the Code of Virginia require the operators to furnish bond on the acreage to be disturbed by strip mining. Section 45.1-168 of Chapter 15 of the Code of Virginia gives authority for releasing the bond if certain requirements are met. We find occasionally that once the bond has been released, deep mining operations are commenced on the land which has been reclaimed. Is there any statutory authority to insure that the reclaimed land, once bond has been released, will not be redistributed by any form of mining operation not regulated under this law (e.g., deep mining operations)?

"[4.] In reviewing reclamation plans we occasionally see situations where unusually serious conditions of acid drainage or soil erosion may occur. In such situations it is helpful for us to obtain advice from other governmental agencies or individuals having specialized knowledge in such areas. In such situations, do we have the authority to delay our review and recommendations on a specific project until we obtain the advice from the governmental agency or individual qualified to be of assistance? . . . ."

With respect to your first question, Sections 45.1-163 and 45.1-181 of the Code of Virginia (1950), as amended, state that no permit for the surface mining of coal or other minerals shall be issued by the Division of Mines until a reclamation plan and bond have been submitted and approved by the Department of Conservation and Economic Development. While certain minimum requirements for reclamation plans are stated in Sections 45.1-164 and 45.1-182 of the Code, the precise administrative procedures for reviewing and approving reclamation plans are not set forth in Chapters 15 and 16 of Title 45.1 of the Code; those matters are left to the exercise of the Department's professional judgment.

Although Chapters 15 and 16 are clear as to the express command that reclamation plans must be submitted, evaluated and either approved or rejected, the legislative background surrounding the enactment of Virginia's reclamation laws should be reviewed for illumination as to the intent of the General Assembly.

Chapters 15 and 16 of Title 45.1 of the Code of Virginia (1950), as amended, resulted from actions of the General Assembly in response to recommendations of the Virginia Advisory Legislative Council (VALC). In directing the VALC to conduct a study of surface mining in Virginia, the 1964 General Assembly, through House Joint Resolution No. 40, recognized that surface mining accelerates and increases erosion, "thus adding to the pollution of streams, and shortening the useful life of water storage impoundments, . . . [leaving] the land in an unsightly and unproductive
condition, and reduce[s] its residual taxable value; . . . [and affects] the future economy of the State . . . ."

The VALC Surface Mining Report of 1966 is replete with statements calling for enforcement of strip mining reclamation plans:

"It is . . . necessary that some form of State regulation to compel reclamation of [surface mined areas] . . . be enacted . . . ."

". . . [C]ompulsion of some nature must be applied to ensure that all surface mined areas will be reclaimed . . . ."

"It was thought advisable to have the plan approved before any mining was begun to ensure that the work would be done according to the plan developed and acceptable to the Department." Report of the Virginia Advisory Legislative Council to the Governor and The General Assembly of Virginia (Highway Construction Practices and Surface Mining—1966), p. 10.

Similar views and recommendations were voiced by the VALC in its 1967 report in regard to surface mining of minerals other than coal.

Based upon a review of the statutes and the above-mentioned legislative reports, it is clear that the Department is required to analyze carefully each reclamation plan submitted; the purpose of Virginia's reclamation laws would not be served by a mere clerical review, nor would those laws be served by approving more plans than can be enforced by the Department.

Accordingly, I am of the opinion that the Department of Conservation and Economic Development is charged first with the duty to enforce the reclamation plans now under its jurisdiction, and, to that end, it may make such use of the resources at its disposal as its discretion dictates will serve best the purpose contemplated by the General Assembly. This could include a Department decision to concentrate its efforts on current operations and decline to process future reclamation plans without some administrative assurance of adequate review and enforcement of those plans.

Your second inquiry may be answered briefly. Sections 45.1-167 and 45.1-185 of the Code of Virginia (1950), as amended, provide that a bond covering any area disturbed during the last twelve months may be released if reclamation has been completed and the approval of the Director obtained. Sections 45.1-168 and 45.1-186 require that the Director, upon receipt of the plans required by Section 45.1-167 and Section 45.1-185, shall make an inspection, and if he approves the reclamation work, shall so notify the Division of Mines of his approval.

There is no time limit set upon the duration of the bond in the provisions requiring it. The bond continues until a determination is made that reclamation work has been satisfactorily completed, and this would seem to include a reasonable time in which to determine whether the reclamation work has proven effective. Such a determination is primarily factual and must depend upon the exercise of professional judgment within the Department.

With respect to your third question, the statutes do not preclude a subsequent disturbance of reclaimed land; however, I am of the opinion that once surface mined land has been reclaimed to the satisfaction of the Department, any further surface mining activities on that land would be subject to the reclamation requirements of Chapters 15 and 16 of Title 45.1 of the Code.

In regard to deep mining operations, Chapter 15 does not apply; however, Chapter 16 specifically exempts from reclamation requirements only "those aspects of deep mining not having significant effect on the surface, . . . ." The clear implication is that those aspects of deep mining that do have a significant effect on the surface are covered by the reclamation requirements of Chapter 16.

In response to your final inquiry, it should be noted that Sections 45.1-177 and 45.1-192 specifically provide that in approving plans for reclamation
and in issuing rules and regulations for reclamation, the Department may seek the advice and assistance of local soil and water conservation district supervisors.

Further, Section 45.1-192 provides for the assistance of any federal, state or local agency. Obviously, such assistance cannot be supplied immediately and, in my opinion, these provisions must necessarily embrace a reasonable period of time in order to take full advantage of the assistance they permit.

CONSTITUTION—Effective Date Limitation of Revised Constitution Applicable to 1971 Session.

AMENDMENTS—Effective Date Limitation of Revised Constitution Applicable to 1971 Session.

February 9, 1971

THE HONORABLE GEORGE R. RICH
Clerk of the House of Delegates

I am in receipt of your letter of February 5, 1971, wherein you inquire when certain measures passed by the current session of the General Assembly become effective.

Section 5 of the schedule of the new Constitution provides that when the General Assembly convenes on the first Wednesday in January 1971 it "shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution except that this session shall continue as long as may be necessary; . . . and that the effective date limitation of Section 53 of the Constitution of 1902 as amended shall not be operative."

The equivalent section of the schedule as proposed by the Commission on Constitutional Revision was similar to present Section 5 but provided "that the effective date limitation of Article IV, Section 13, shall not be operative." The purpose of such proposal, as indicated in the Commentaries, was to provide that, the new Constitution for the purposes of such session of the General Assembly being in full force and effect, the effective date limitation of the revised Constitution would not be operative, thus enabling "the effective date of laws enacted at this session [to] be as the General Assembly sees fit."

As seen from the present language of Section 5 of the schedule, the exception of this effective date limitation was rejected. I am therefore of the opinion that for purposes of this session of the General Assembly the effective date of legislation is subject to the limitations of Article IV, Section 13. Such legislation is effective, in accordance with the provisions of such Section, on the first day of the fourth month following the month of adjournment, unless a subsequent date is specified. The specification of an earlier date must be by a vote of four-fifths of the members voting in each house.

This opinion, of course, does not relate to the apportionment bills, Article II, Section 6, specifically stating that any reapportionment law takes effect immediately and is not subject to the limitations contained in Article IV, Section 13.

CONSTITUTION—Effective Date Limitation of Revised Constitution Applicable to 1971 Session; Lack of Emergency Clause.

AMENDMENTS—Effective Date Limitation of Revised Constitution Applicable to 1971 Session; Lack of Emergency Clause.

February 18, 1971

THE HONORABLE GEORGE R. RICH, Clerk
House of Delegates
I am in receipt of your inquiry wherein you request my opinion as to the effective date of a bill passed at this session of the General Assembly, the last clause of which reads, "[t]his act shall be effective upon its passage."

As previously ruled, by my letter to you dated February 9, 1971, the effective date limitation of Article IV, Section 13, is applicable to this session of the General Assembly. An earlier date than that set forth by the Constitution may be established in the case of an emergency "which emergency shall be expressed in the body of the bill" by a vote of four-fifths of the members voting in each house.

As you indicate, the clause which you refer to does not express, as required, that an emergency exists. The failure to so state does not mean that the act is void. Such act will, in my opinion, be effective on the first day of the fourth month following the month of adjournment of the session.

CONSTITUTION—Legislation—No law shall embrace more than one object.

THE HONORABLE A. LINWOOD HOLTON Governor of Virginia

I am in receipt of the request on your behalf wherein my advice is sought as to the following:

"(1) Will a bill to amend a number of Chapters of the 1971 Acts for the purpose of supplying proper emergency clauses meet the constitutional requirement that 'no law shall embrace more than one object which shall be expressed in its title'? Such a title would be along the following lines:

"To amend and reenact Chapters 1 through 50 of the 1971 Acts of Assembly so as to provide that an emergency exists with respect to their enactment and to specify the date on which they shall take effect.

"(2) In such a bill, is it necessary to set out at length the entire content of each Chapter or is it sufficient to amend and reenact only the clauses which specify the effective date?"

Article IV, Section 12, of the revised Constitution of Virginia provides:

"No law shall embrace more than one object, which shall be expressed in its title. Nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length."

Pertinent to the applicability of the above section are the Commentaries from the Report of the Commission on Constitutional Revision wherein the above provisions which were proposed by the Commission, and derived from Section 52 of the Virginia Constitution of 1902, were discussed. The comments were:

"No change in substance. The only change, one of style, is to break the section into two sentences, rather than one long sentence, in the interest of clarity.

"Historically, provisions like that set out in this section were designed to prevent several abuses in the legislative process: (1) log-rolling, whereby two or more blocs (which might separately be minorities in the legislative body) combines forces on a bill containing several unrelated features, no one of which by itself could command a majority; (2) lack of notice to legislators who, but for the one object requirement, might be unaware of the real contents.
of a bill; (3) lack of notice to the public of what measures are being considered by the Legislature; (4) lack of notice to those likely to be affected by enacted bills; (5) careless amending and reenacting, and therefore problems of construction, meant to be cured by requiring publication at length of a law revived or amended. Most state constitutions agree with Virginia's section 52 in requiring that bills be confined to one subject or object."

I find that none of the five purposes for enactment of Article IV, Section 12, would be violated by the bill proposed in your correspondence.

A problem that does arise, of course, is that bills of various subjects which have been enacted previously by the 1971 General Assembly will be incorporated into this one bill.

In the case of Commonwealth v. Iverson Brown, 91 Va. 763, 771 (1895), the purpose of Section 15, Article V of the Constitution, a predecessor to the present Article IV, Section 12, was discussed at length. Therein the Court held that the provisions of the Constitution were wise and wholesome with an apparent purpose to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other; and to prevent surprise or fraud in legislation by means of provisions in bills of which the titles gave no intimation.

"On the other hand" the Court stated, "it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single subject. Although the act or statute authorizes many things of a diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable. . . . it [is] unnecessary to set forth in the title the various subjects of . . . different sections, which would . . . indeed, [make] the title, what the constitutional provision never intended to require, an abstract of the law or an index of its contents."

I am therefore of the opinion that the bill proposed may be enacted without any violation of the constitutional section in question since such bill would have but one object.

I am, however, of the opinion that the requirement of Article IV, Section 12, would be that each Chapter in question must be set forth and "published at length."


THE HONORABLE GEORGE R. RICH, Clerk
The House of Delegates

February 26, 1971

I am in receipt of your inquiry of February 26, 1971, relating to whether "it will be permissible for the presiding officers of the Houses to sign legislation outside of the presence of their respective Houses during a recess of the General Assembly." As you pointed out, this question arises with respect to legislation adopted by both Houses on or before February
26, which will be enrolled during the anticipated recess of the Houses until March 29.

Article IV, Section 11, applicable to this Session of the General Assembly by Section 5 of the Schedule, provides for the enactment of laws and is derived from Section 50 of the present Constitution. Section 50 provided that the presiding officer of each house had to sign bills "in the presence of the house over which he presides." There being no such limitation in the new Constitution which, as indicated, is applicable, I am of the opinion that your inquiry may be answered in the affirmative.

CONSTITUTIONAL LAW—Movie Previews—May be controlled as commercial advertising.

CRIMINAL LAW—Movie Previews—Constitutional to control as commercial advertising.

July 16, 1970

THE HONORABLE EDWARD E. LANE
Member, House of Delegates

I am in receipt of your letter of June 8, 1970, with enclosures, wherein you ask my opinion as to the constitutionality of Chapter 504 of the 1970 Acts of Assembly, now codified as § 18.1-246.1 of the Code of Virginia (1950), as amended, which reads as follows:

"It shall be unlawful for any person to exhibit any trailer or preview of any motion picture which has a motion picture industry rating which would not permit persons in the audience viewing the feature motion picture to see the complete motion picture from which the trailer or preview is taken. Persons violating the provisions of this section shall be guilty of a misdemeanor."

This office has made an exhaustive review of all pertinent judicial precedent relative to your inquiry, including a suit now pending in the United States District Court for the Eastern District of Pennsylvania wherein a similar but distinguishable statute of the Commonwealth of Pennsylvania is now under attack. While your question has not been determined by any court, I am of the opinion that the statute is constitutional.


COUNTIES—Authority to Appoint Full-Time Policemen.

POLICE OFFICERS—Special Police—County executive and chief of police have no authority to appoint.

November 25, 1970

THE HONORABLE DONALD C. STEVENS
County Attorney of Fairfax County

In your letter of November 18, 1970 you request an opinion relating to the appointment of regular full-time police officers and special police officers in counties operating under the Urban County Executive form of government. Your questions will be answered in the order submitted.

1. "May the County Executive and Chief of Police, appropriately authorized by the Board of Supervisors, appoint regular full-time police officers governed under the Urban County Executive form of government provided for in Chapter 15 of Title 15.1 of the Code of Virginia?"
My answer to your question is in the affirmative. Section 15.1-769 of the Code deals with the Department of Law Enforcement in counties operating under the Urban County Executive form of government. In that section it provides that any policeman appointed by the Urban County Executive or the Board of Supervisors shall be under their supervision and control. Section 15.1-734 provides that the County Board of Supervisors shall appoint all employees in the administration service of the county except where the Board of Supervisors has authorized the County Executive or Department Head to make such appointments. You have advised me by telephone that regular police officers are employees in the administration service of the county. I am of the opinion that when §§ 15.1-734 and 15.1-769 are read together that § 15.1-734 provides full authority for the appointment of regular police officers in counties operating under the Urban County Executive form of government.

2. "In the event the answer to the foregoing question is yes, may they also similarly appoint special police officers of limited function and jurisdiction under the authority of that same section, or must special police officers be appointed by the Circuit Court under all of the terms and conditions of Section 15.1-144 et. seq., Code of Virginia, 1950, as amended?"

It is my opinion that § 15.1-144 is the controlling statute for the appointment of special policemen in counties. Therefore the County Executive and Chief of Police would have no authority to make such appointments.

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COUNTIES—Authority to Supplement Salaries of Sheriffs' Employees.

BOARDS OF SUPERVISORS—Authority to Supplement Salaries of Sheriffs' Employees.

SHERIFFS—Employees' Salaries—May be supplemented by boards of supervisors.

THE HONORABLE C. A. HODNETT
Sheriff of Campbell County

This is in reply to your letter of July 10, 1970, in which you request my opinion whether Chapter 153 of the Acts of Assembly of 1970 is authority for the Board of Supervisors of Campbell County to supplement the salaries of employees of your office in the amount of $1,070.00.

I am of the opinion that effective June 26, 1970, Chapter 153 of the Acts is authority for the Board to supplement the salaries of employees of your office in the stated amount.

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COUNTIES—CATV Systems—Licensing, regulating and taxing.

TAXATION—Licenses—CATV systems.

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

This is in reply to your letter of January 20, 1971, which reads, in part, as follows:

"Section 15.1-23.1 of the 1950 Code of Virginia, as amended, permits counties to provide by ordinance for the licensing, regulation and taxation of community antenna television systems. Under such an ordinance could the county require the following:

(a) That the licensee observe a specific schedule of connection and/or service charges for subscribers to the services provided by the licensee;
“(b) That the licensee provide, where possible, reasonable amounts of local public service programming and channel(s) for use as an educational TV network for the County school system?

“Also, under such an ordinance, would a county have the power to limit the number of CATV systems simultaneously operating within different and/or the same areas within the county?”

Section 15.1-23.1 of the Code to which you refer reads as follows:

“(a) The words ‘community antenna television system’ as used in this section shall mean any facility which is operated to perform for hire the service of receiving and amplifying signals broadcast by one or more television stations and redistributing such signals by wire cable or other means to members of the public who subscribe to such service, except that such definition shall not include (1) any system which serves fewer than twenty subscribers or (2) any system which serves only the residents of one or more contiguous apartment dwellings under common ownership, control or management, and commercial establishments located on the premises of such dwellings.

“(b) The governing body of any county, city or town may by ordinance provide for the licensing and regulation of, and impose a license tax upon, any community antenna television system which employs wires or cables or other apparatus in, on, under or over any street, highway or other public place within such county, city or town.”

I shall answer your above questions seriatim:

(a) Section 15.1-522 of the Code vests the county board of supervisors with the powers conferred upon all cities and towns by general law. Section 125 of the Constitution of Virginia, regulating the granting of franchises by municipalities to public service corporations, contains a specific requirement that the grant shall make adequate provision by way of forfeiture or otherwise to secure service at reasonable rates. In an opinion of this office to you dated February 10, 1969, CATV systems were included among the businesses which may be required to obtain a permit under Section 124 of the Constitution.

Section 15.1-23.1 of the Code, specifically authorizing the county to regulate CATV systems, along with Sections 124 and 125 of the Constitution, in my opinion, authorize the county to require the licensee to observe a specific schedule of connection or service charges to subscribers to the services provided.

(b) The county may, under its authority to license and regulate, prescribe only those regulations which are reasonable. The requirements which you suggest appear to be reasonable and would therefore be within the authority of the county to prescribe.

In your last question you ask whether the county can limit the number of CATV systems in the county.

The authority to license and regulate an activity does not confer the power to grant an exclusive license. 38 Am. Jur. 23, § 332. It is only where a particular occupation is of such a character that it can fairly be supposed that the public welfare will be best subserved if it is carried on by but one party that an exclusive license to engage therein may be granted. Unless the CATV system meets this test, I am of the opinion that the county does not have the authority to grant it an exclusive license.

Your other inquiries regarding conflict of interest will be separately answered.

COUNTIES—City of Second Class Deemed Part of County Where Located Even Though Not Specifically Named in Legislative District.
DISTRICTS—Reapportionment—City of second class deemed part of county where located even though not specifically named in legislative district.

CITIES—Second Class; Deemed Part of County Where Located Even Though Not Specifically Named in Legislative District.

May 10, 1971

THE HONORABLE ADELARD L. BRAULT
Member, The Senate

I am in receipt of your recent letter regarding Chapter 120 of the Acts of Assembly of 1971, the Senate Redistricting Bill, specifically Senatorial District Thirty-four. You point out that the geographic area described in Senate District Thirty-four includes that area which comprises the City of Fairfax, a city of the second class, but fails to mention such city by name. You question whether there is need to amend the Act specifically to include the City of Fairfax by name. This matter was previously considered and resolved, though not reduced to a formal opinion.

Section 24.1-15 of the Code of Virginia (1950), as amended, is applicable to your inquiry and reads as follows:

“For purposes of the apportionment of members of the Senate of Virginia and members of the House of Delegates, cities of the second class, not mentioned by name, whether now existing or hereafter created, are deemed to be parts of the county or counties, respectively, wherein the area occupied by such city was formerly located, and are so deemed to be included in the enumerations of counties heretofore.”

As you can see from the above statute, the Thirty-Fourth Senatorial District would include the City of Fairfax, a city of the second class, even though said city is not specifically mentioned by name. Your inquiry is therefore answered in the negative.

COUNTIES—County Board Form—Executive Secretary—Residence.

GAME AND INLAND FISHERIES—Dog Warden—Residence requirement.

February 9, 1971

THE HONORABLE E. EUGENE GUNTER
County Attorney of Frederick County

This is in reply to your letter of January 21, 1971, in which you ask to be advised whether the executive secretary recently appointed by the Frederick County Board of Supervisors under § 15.1-704 of the Code must reside in Frederick County.

Section 15.1-704 provides that the executive secretary need not be a resident of the county at the time of his appointment. I am, therefore, of the opinion that the executive secretary is not required to reside in Frederick County at the time of his appointment or so long as he serves as executive secretary of the county.

You further state:

“Due to a resignation, Frederick County has also found it necessary to appoint a new Dog Warden. Even though the newly appointed Dog Warden services Frederick County and the County Dog Pound is located in Frederick County, the Dog Warden resides at or near Boyce, Virginia in Clarke County. Is there any requirement that the Dog Warden be a resident of Frederick County? If there is such a requirement, how long does he have to meet this requirement?”
REPORT OF THE ATTORNEY GENERAL

I am of the opinion that the dog warden is an officer of the county, and pursuant to the provisions of § 15.1-51 of the Code, is required to have resided six months next preceding his appointment in Frederick County. See opinion of this office to Honorable J. Edgar Pointer, Jr., Commonwealth’s Attorney, Gloucester County, dated September 12, 1958, and found in Report of the Attorney General (1958-1959), p. 107. Therefore, the dog warden must be a resident of Frederick County before his appointment. In the absence of authority to the contrary, he must continue to be a resident of that county so long as he serves as dog warden of the county.

COUNTIES—Debts—County may not borrow or contract a debt for construction of a county office building with referendum.

THE HONORABLE OTIS B. CROWDER
Treasurer of Mecklenburg County

I have received your recent letter in which you ask whether, under the revised Virginia Constitution, Mecklenburg County may borrow or contract a debt for the purpose of building a county office building without the approval of the voters by local referendum.

Section 10 (b) of Article VII of the revised Constitution provides, in part:

"No debt shall be contracted by or on behalf of any county... except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt [except for certain specified purposes, not including the construction of a county office building] unless in the general law authorizing the same provision be made for submission to the qualified voters of the county... for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt."

In my opinion, Mecklenburg County may not borrow or contract a debt for the construction of a county office building without the approval by referendum of the qualified voters of the county. Of course, the second paragraph of Section 10 (b) of Article VII permits the qualified voters of the County to elect to have the County treated as a city for the purposes of issuing bonds.

COUNTIES—Election Districts—May be reduced to one county-wide district.

ELECTIONS—Election Districts—May be reduced to one county-wide district.

THE HONORABLE JOHN PAUL CAUSEY
Commonwealth’s Attorney for King William County

In your recent letter you inquire whether a county may, under the traditional form of county government, realign its magisterial districts to provide for the election of more than one supervisor from any single district.

Article VII, Section 5, of the Constitution of Virginia effective July 1, 1971, provides as follows:

"The governing body of each county, city, or town shall be elected by the qualified voters of such county, city, or town in the manner provided by law."
If the members are elected by district, the district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. When members are so elected by district, the governing body of any county, city, or town may, in a manner provided by law, increase or diminish the number, and change the boundaries, of districts, and shall in 1971 and every ten years thereafter, and also whenever the boundaries of such districts are changed, reapportion the representation in the governing body among the districts in a manner provided by law.

These provisions are also found in statutory form in § 15.1-37.5 of the Code of Virginia (1950), as amended, which was enacted by the 1971 General Assembly and as emergency legislation took effect on its passage on March 16, 1971. Acts of Assembly, 1971, Chapter 199. Section 15.1-37.4, a part of Chapter 199 of the 1971 Acts, provides in part:

"... The governing body of any county shall be composed of not less than three nor more than eleven members. Nothing in this section shall preclude the apportionment of more than one member of the governing body of any county, city, or town to a single district or ward."

The effect of these constitutional and statutory provisions is to permit the creation of multi-member magisterial districts as long as there is equal representation on the basis of population in accordance with the "one-man, one-vote" principle. See, e.g., Abate v. Mundt, ___U.S.____ (June 7, 1971). It is my opinion, therefore, that a county with the traditional form of government may provide for the election of more than one supervisor from a given district, and that such a provision would not be a change in the form of county government which would require approval by referendum.

COUNTIES—Election Districts—May be reduced to one county-wide district.

ELECTIONS—Election Districts—May be reduced to one county-wide district.

THE HONORABLE CHARLES J. ROSS, Clerk
Board of Supervisors

In your recent letter, you inquire whether a county existing under the traditional form of county government may by resolution of its governing body provide for the creation of one election district for the entire county with all members of the board of supervisors elected at large from the said district.

I have ruled, in an opinion to the Honorable John Paul Causey, a copy of which is attached, that a county may provide for the creation of multi-member magisterial or election districts. Prior to March 16, 1971, § 15.1-572 of the Code of Virginia, (1950), as amended, provided that each county must have at least three and not more than eleven districts, with certain exceptions as provided in § 15.1-573. On the above mentioned date, however, these sections were repealed. Acts of Assembly, 1971, Chapter 200. Section 15.1-571.1, enacted as part of Chapter 200 of the 1971 Acts, provides, in part, as follows:

"... Whenever in the opinion of the governing body it is necessary, or whenever the boundaries of such county have been altered, the governing body shall, as may be necessary, redistrict the county in magisterial districts, change the boundaries of existing districts,
change the name of any district, or increase or diminish the number of districts.” (Emphasis supplied)

It is my opinion, therefore, that the governing body of a county may diminish the number of districts to one, provided that the number of supervisors is not diminished below three as required by § 15.1-37.4. See Acts of Assembly, 1971, Chapter 199.

COUNTIES—Executive Secretary—Signs warrants of county.

COUNTIES—Records—Location, care and custody controlled by governing body.

This is in reply to your letter of April 20, 1971, in which you ask my opinion on the following three questions:

1. Where should the Minute Books of the Frederick County Board of Supervisors now be kept if the Executive Secretary's office is separate from the offices of the Clerk of the Circuit Court of Frederick County, Virginia, in which all other county records are kept? If such records should be kept in the Executive Secretary's office, when should the transfer be made?

2. Should the Executive Secretary replace the Clerk of the Circuit Court of Frederick County as one of the signers of the County's checks? If so, can such change be accomplished by simply notifying the bank and filling out the necessary cards with the said bank?

3. Is it not correct that the Clerk of the Circuit Court of Frederick County should have his books audited in reference to his work with the Frederick County Board of Supervisors before such books are closed out and his bond, if any, is released?

I shall answer your questions seriatim:

(1) Under § 15.1-119 of the Code the governing body of the county determines the location of the records to be kept by the executive secretary. I am, therefore, of the opinion that the location of the records and the time at which they should be transferred from the clerk to the executive secretary are matters to be determined by that body.

(2) Section 15.1-117(4) of the Code provides that the executive secretary shall sign all warrants issued by the governing body. He, therefore, replaces the clerk as the signer of the warrants. Notification to the bank of this change would be sufficient.

(3) I am aware of no statute requiring an audit of the books and records of the clerk under the factual situation posed by you. An annual audit of the books and records of the board of supervisors will be made in due course, which audit will be made whether the clerk or the executive secretary actually kept the books.

COUNTIES—Expenditures—County may not borrow in anticipation of revenues of a subsequent fiscal year; may not adopt budget which assumes such a debt.

I have received your letter of May 25, in which you ask:
Your two questions are inextricably intertwined. I am aware of no requirement, statutory or otherwise, that a county budget be balanced, such budgets being “for informative and fiscal planning purposes only...” Va. Code § 15.1-160. Yet I am of the opinion that a budget which is incapable of being followed does not meet the requirements of Virginia Code § 15.1-160. A deficit budget may be adopted only if the county may constitutionally borrow to meet the deficit.

Section 115(a) of the present Virginia Constitution permits counties to borrow, “to meet casual deficits in the revenue...” This provision is not effective after July 1, 1971.

In conformity to this change in the Constitution, the General Assembly amended Virginia Code §§ 15.1-545 and 15.1-546. These changes are as follows:

“§ 15.1-545. Loans in anticipation of revenue.—For the purpose of meeting casual deficits in the revenue, or creating a debt in anticipation of the collection of the revenue of the county, the board is hereby authorized to borrow not earlier than February first the fifteenth day of any fiscal year of the county a sum of money not to exceed one half of the amount reasonably anticipated to be produced by the county levy laid in such county for the fiscal year in which the loan is negotiated.

“§ 15.1-546. Terms of such loans; extensions; additional loans.—Such temporary loans shall be evidenced by notes or bonds, negotiable or non-negotiable as the board may determine; shall bear interest at a rate not exceeding six per centum per annum; and shall be repaid not later than December fifteenth fifteen days prior to the expiration of the fiscal year in which they are borrowed; except that loans made prior to July one, nineteen hundred seventy-one, shall be repaid not later than December fifteen, nineteen hundred seventy-one. No extension of any such loan shall be valid. No additional loan under this and the preceding section (§ 15.1-545) shall be made until all temporary loans of preceding years shall have been paid.” 1971 Acts of Assembly, ch. 186.

In my opinion a county may not borrow in anticipation of the revenues of a subsequent fiscal year and may not adopt a budget which assumes such a debt.

COUNTIES—Incorporation as a City—May obtain charter from General Assembly.

March 25, 1971

THE HONORABLE E. EUGENE GUNTER
County Attorney of Frederick County

This is in reply to your letter of March 11, 1971, in which you ask whether Frederick County may become an incorporated city.

Article VII, Section 2, of the new Constitution of Virginia authorizes the General Assembly to provide by special act for the organization and governmental powers of any county so long as the special act does not extend or change the boundaries of the county. Senate Bill No. 56 adopted
by the General Assembly, Special Session 1971, prohibits the granting of a city charter to a county which adjoins a city or more than one hundred twenty-five thousand population until 1976. A copy of this bill is enclosed. Since Frederick County does not adjoin such a city it may apply to the General Assembly for a charter establishing it as a city.

COUNTIES—Industrial Development—Contributions of funds to.

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

March 25, 1971

This is in reply to your letter of March 11, 1971, in which you ask my opinion whether the limitations imposed by § 15.1-10.1, Code of Virginia (1950), as amended, regarding the expenditure of funds by the board of supervisors of a county apply also to appropriations made under the authority granted by §§ 15.1-511.1 and 15.1-1388.

Section 15.1-10.1 of the Code reads:

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

A municipality is defined under the Industrial Development and Revenue Bond Act by § 15.1-1374(b) as any county or incorporated city or town in the Commonwealth with respect to which an authority may be organized and in which it is contemplated the authority will function.

The language of § 15.1-1388 specifically provides that the acquisition and transfer of facility sites shall not be limited by any other general, special or local law. This section reads:

"Any municipality may acquire a facility site by gift, purchase or lease and may transfer any facility site to an authority by sale, lease or gift. Such transfer may be authorized by a resolution of the governing body of the municipality without submission of the question to the voters and without regard to the requirements, restrictions, limitations or other provisions contained in any other general, special or local law. Such facility sites may be located within or without or partially within or without the municipality creating the authority." (Emphasis supplied.)

I am, therefore, of the opinion that the limitations imposed by § 15.1-10.1 do not apply to the board of supervisors of a county in the acquisition and transfer of a facility site under this section.

Section 15.1-511.1 of the Code reads as follows:

"The governing body of any county in this State may give, lend or advance in any manner that to it may seem proper funds or other county property, not otherwise specifically allocated or obligated, to any authority created by such governing body pursuant to law."
This section does not contain language removing the limitations established by § 15.1-10.1. In an opinion of this office construing §§ 15.1-10 and 15.1-10.1 it was opined that § 15.1-10.1 limits the appropriation of funds for industrial development to one percent of annual revenues. See Report of the Attorney General (1969-1970), p. 78. I concur in this opinion and am further of the opinion that the lending or advancement of funds to an industrial authority under § 15.1-511.1 is limited to the amounts established by § 15.1-10.1 of the Code.

COUNTIES—Licenses—May have graduated fee for building permits under zoning ordinance.

COUNTIES—Permits—May have flat fee for mobile home placements.

COUNTIES—Authority—To establish graduated fee for building permits under zoning ordinance.

LICENSES—Building Permits—Counties may have graduated fee for issuance under zoning ordinance.

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

I have received your letter of July 28, asking whether a fee of $5.00 for mobile home placement permits and a graduated fee for building permits is proper, if adopted by your county.

Section 15.1-491(f) of the Virginia Code permits a zoning ordinance to provide for "the collection of fees to cover the cost of . . . issuing permits . . . ." I can understand how the cost of issuing a building permit would increase with the cost of the building. I am of the opinion that your board of supervisors could reasonably determine that the schedule submitted by you was necessary to cover the cost of issuing the building permits. The mobile home placement permit fee also appears proper.

COUNTIES—Ordinance—Weed ordinance conforming to State statute is constitutional.

COUNTIES—Ordinance—Weed ordinance to be constitutional must avoid vague and undefined phrases.

THE HONORABLE E. EUGENE GUNTER
County Attorney for Frederick County

This is in reply to your letter of August 11, 1970, in which you ask my opinion as to the constitutionality of a proposed weed ordinance of Frederick County.

Section 15.1-11 of the Code, as amended, authorizes a county to adopt limited ordinances on this subject. This reads:

"That the owners of vacant property therein shall cut the grass, weeds and other foreign growth on such property or any part thereof at such time or times as the governing body shall prescribe; or may, whenever the governing body deems it necessary, after reasonable notice, have such grass, weeds or other foreign growth cut by its agents or employees, in which event, the cost and expenses thereof shall be chargeable to and paid by the owner of such property and may be collected by the county, city or town as taxes and levies are collected; provided, however, that no such ordinance adopted by any county shall have any force and effect within the corporate
limits of any town; provided, further, that no such ordinance adopted by any county having a density of population of less than five hundred per square mile shall have any force or effect except within the boundaries of platted subdivisions; and . . .”

By this section, your proposed ordinance would be enforceable throughout the county only if there were a population density of 500 per square mile or more, except within the boundaries of “platted subdivisions,” where such ordinance would be enforceable regardless of the population density. Further, due to the limitation by the statute, your proposed ordinance would have no effect within the corporate limits of any town.

As to your concern of unconstitutionality due to ambiguity and vagueness, public health regulations, such as your proposed ordinance, are of necessity rather broad in scope and lacking in restrictive detail. Here, the lack of explicit detail would not, in my opinion, make the ordinance unconstitutionally vague or ambiguous.

Thus, with a slight modification of your proposed ordinance to bring it in line with § 15.1-11 (2) of the Code of Virginia, by substituting “platted subdivisions” for “duly dedicated subdivisions,” a phrase which is vague and undefined in the ordinance, in my opinion, the proposed ordinance would be constitutional.

COUNTIES—Redistricting—Effect on county school board.

June 3, 1971

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

I am writing in response to your letter of May 14, 1971, relating to the effect of the redistricting of King George County upon that county’s school board. King George County does not have a county manager or county executive form of government, and its school board is selected pursuant to the provisions of Article 2 of Title 22 of the Code of Virginia.

During the present special session of the legislature, the General Assembly enacted, with an emergency provision, § 15.1-571.1, Code of Virginia (1950), as amended, which provides that “representation on the governing body [of a county] shall be by election districts . . . such election districts shall also constitute school districts as prescribed by § 22-61 of this Code.”

The General Assembly also enacted, with an emergency provision, § 15.1-37.5, Code of Virginia (1950), as amended, which directs the governing body of a county, city or town to reapportion in 1971. The statute provides that “such reapportionment shall be commenced by July one, nineteen hundred seventy-one and shall be effective December thirty-one, nineteen hundred seventy-one.”

Pursuant to the requirements of these statutes, the Board of Supervisors of King George County introduced an ordinance providing for the establishment of three election districts from which members of the Board of Supervisors shall be elected. The present form of the proposed ordinance provides that it “shall be in full force and effect upon its adoption . . .”

The King George County School Board consists of three members, each representing a separate magisterial district. Two of the members live in the same proposed election district. The term of one of the two living in the same election district will expire on June 30, 1971.

The Board of Supervisors is concerned that the adoption of the ordinance will vacate the appointments of the members of the county school board, and you have raised several questions relating to this problem.

I am of the opinion that for purposes of representation, the redistricting of the county will not become effective until December 31, 1971. This result is required by § 15.1-37.5 of the Code which provides that the required
reapportionment "shall be effective" on that day. The General Assembly's use of the term "shall" is mandatory rather than permissive, and a local governing body does not have authority to vary the General Assembly's intent. Accordingly, the school trustee electoral board should appoint a successor to the school board member whose term expires June 30, 1971, from the magisterial district which the retiring member represents, rather than from the unrepresented proposed election district.

On December 31, 1971, when the election districts become effective for purposes of representation, the existing positions on the school board will be vacated by force of law. In appointing persons to the new positions, the school trustee electoral board must select a member from each election district of the county. The school trustee electoral board may reappoint a previous member, but the board is not required to reappoint a previous member.

Section 22-64 of the Code provides that terms of members of school boards shall be for four years "beginning the first day of July next following their appointments." Because vacancies are created during December rather than June, it will obviously be impossible to delay the effective dates of the new school board appointments until July 1, 1972. The procedure for making appointments outlined in § 22-64 of the Code should be followed as closely as practicable, however, and the appointments should be made within sixty days prior to December 31, 1971. The new terms will become effective when the existing terms are vacated. The new terms should be staggered in a manner similar to that employed in 1944 as specified in § 22-64 of the Code. The new terms should expire in a manner consistent with § 22-64 of the Code.

With regard to your questions concerning the necessity of giving notice, § 22-62 of the Code provides that before any appointment is made, the school trustee electoral board "shall give notice, by publication for two successive weeks in a newspaper having general circulation in such county, of the time and place of any meeting for the purpose of appointing the members of the county school board." Before appointing any person to the school board, the school trustee electoral board must comply with this statute.

COUNTIES—Redistricting—Effect on county school board.

June 8, 1971

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

I am writing in reply to your letter of May 21, 1971, concerning the effect on the county school board of the redistricting of Floyd County. In your letter you ask when the redistricting becomes effective for purposes of representation on the county school board.

Enclosed you will find a copy of my letter dated June 3, 1971, to The Honorable Robert E. Brown, Commonwealth's Attorney for King George County, in which I discussed several problems which you have raised. As you will see from reading that letter, I am of the opinion that reapportionment of a county pursuant to § 15.1-37.5, Code of Virginia (1950), as amended, does not become effective for purposes of representation until December 31, 1971. Accordingly, vacancies occurring on a school board prior to that date should be filled by persons from the appropriate magisterial district.

On December 31, 1971, when the election districts become effective for purposes of representation, the existing positions on the school board will be vacated by force of law. In appointing persons to the new positions, the school trustee electoral board must select a member from each election district of the county. The school trustee electoral board may reappoint
a previous member, but the board is not required to reappoint a previous member.

COUNTIES—Special Legislation for Fairfax County May Be Enacted in Special Session.

THE HONORABLE ADELARD L. BRAULT
Member, The Senate

I am in receipt of your January 7, 1971, inquiry which reads:

"Will you kindly let me have your opinion as to whether special legislation applying to Fairfax County only by name, to be effective July 1, 1971, the effective date of the new Constitution, can properly be enacted in this Special Session."

The Schedule of the revised Constitution, Section 5, provides in pertinent part: "The General Assembly shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution."

In view of this language, I am of the opinion that the General Assembly may enact, to be effective July 1, special legislation for Fairfax County in accordance with the provisions of Article VII, "Local Government."

COUNTIES—Special Policemen—Provisions relative to appointment are constitutional.

COUNTIES—Special Policemen—No limitation as to number.

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

This is in reply to your letter of July 28, 1970, which reads in part as follows:

"It is contemplated that each and every special policeman for the county will be appointed by the Judge of the Nansemond County Circuit Court pursuant to Article 3, Chapter 3 of Title 15.1 of the 1950 Code of Virginia, as amended, and the Board of Supervisors would have nothing to do with the appointment of these special policemen and would have no part in the creation of the special police force except to authorize the amount of compensation for such special policemen pursuant to the provisions of Article 3, Chapter 3 of Title 15.1, as aforesaid.

"Accordingly, it would be greatly appreciated if you would give me your opinion on the following questions."

Your questions will be quoted and answered seriatim.

"(1) Are the provisions of Article 3, Chapter 3 of Title 15.1 of the 1950 Code of Virginia, as amended, relative to the appointment of special policemen, namely Section 15.1-144 through Section 15.1-154, constitutional in their entirety?"

I am of the opinion that the provisions of §§ 15.1-144 through 15.1-154 are constitutional enactments.

"(2) Is there any limitation whatsoever as to the number of special policemen which the Circuit Court may appoint pursuant to the provisions of Section 15.1-144 of the 1950 Code of Virginia, as amended?"
There is no limitation to the number of special policemen that may be appointed by the Circuit Court under this section.

“(3) Are there any other limitations whatsoever as to the authority and duty of special policemen appointed under Section 15.1-144 of the Code of Virginia, as aforesaid, other than those requirements governing the jurisdiction and authority of such special policemen as set forth in Article 3, Chapter 3 of Title 15.1 of the 1950 Code of Virginia?”

Article 3, Chapter 3 of Title 15.1 of the Code of Virginia of 1950, as amended, contains the only jurisdictional limitations and sets forth the authority of the special policemen appointed under § 15.1-144.

“(4) Did your opinion of May 28, 1970, given to the Honorable Joshua Pretlow, County Attorney for the County of Nansemond, relate to or have any bearing on the authority and power of the Circuit Court to appoint special policemen under the provisions of Article 3, Chapter 3, Title 15.1, as aforesaid?”

My opinion to the Honorable Joshua Pretlow, County Attorney for Nansemond County, related only to the authority of the Board of Supervisors to appoint special policemen and did not relate to the authority of the Circuit Court to appoint such policemen under the provisions of Article 3, Chapter 3, Title 15.1 of the Code.

COUNTIES—Welfare—When budget not met, welfare may reach any State appropriation to county beyond constitutional requisites.

WELFARE—Local Budgets—When county fails to meet, any State appropriation to county may be reached that is beyond constitutional requisites.

THE HONORABLE J. MADISON MACON, JR.
Commonwealth’s Attorney for Charles City County

This is in response to your letter of July 31, 1970 in which you request my opinion concerning § 63.1-122 and § 63.1-123 of the Code of Virginia. In your letter you stated:

“In the event that a county is unable, because of its limited budget, or for any other reason fails to meet the welfare budget as determined by the County and State Welfare Department, and in the event that the Welfare Department considers this a violation of Virginia Code Section 63.1-122 as amended. It then follows that the procedure outlined in Virginia Code 63.1-123 is put into operation, then exactly what funds is the Welfare Department able to reach or control through this Section?”

Section 63.1-123 of the Code, as amended, provides in part, for the withholding of funds thusly:

“. . . funds appropriated by the State, in excess of requirements of the Constitution of Virginia, for distribution to such county or city such amount or amounts as shall be required to reimburse the State for expenditures incurred under the provisions of this section.”

Therefore any appropriation to a locality which is not specifically required by some section of the Constitution of Virginia is subject to being withheld under § 63.1-123 of the Code. Some examples of funds required by the Constitution to be appropriated to the localities and which are not subject to being withheld for the operation of the local welfare program are set forth in Section 135 of the Constitution for the maintenance of public free schools. Specifically, they are:
Because of the complexity of the area involved, no attempt will be made to list all local appropriations that are required by the Constitution of Virginia, and which are exempted from the operation of § 63.1-123 of the Code.

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

HIGHWAYS—Automobile Graveyards—Commissioner’s power to regulate.

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

June 16, 1971

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

This is in reply to your recent letter in which you asked my opinion whether § 33.1-348, Code of Virginia (1950), as amended, authorizes the removal or control of an automobile graveyard which lies within five hundred feet of a primary highway and which came into existence after 1958 but before 1962. Your questions are:

“(1) Assuming the absence of any local ordinance on the subject what action can be taken to control or remove such an automobile graveyard, and

“(2) Would the authority to take such action be vested in the local county authorities or in the State Highway Department?”

In adopting § 33.1-348 of the Code, formerly § 33-279.3, the State preempted the field with respect to the location and the fencing of automobile graveyards. See opinion of this office to the Honorable J. Patrick Graybeal, Commonwealth’s Attorney for Montgomery County, dated October 11, 1966, and found in Report of the Attorney General (1966-1967), p. 75. Section 15.1-28 of the Code, formerly § 15-18, authorizes the governing body of a county, city or town to adopt ordinances imposing taxes and otherwise regulating the maintenance and operation of automobile graveyards, and to prescribe fines and other punishments for violations of such ordinances.

In the absence of local ordinances on the subject, any action on the automobile graveyard in question would have to be taken under paragraph (d) of § 33.1-348 of the Code inasmuch as this is the sole portion of the entire section that deals with graveyards in existence prior to April 4, 1968. Under paragraph (d), the State Highway Commissioner may take certain steps to screen a graveyard if it was “lawfully in existence” on April 4, 1968.

Chapter 552, Acts of Assembly of 1958 added § 33-279.3 to the Code prohibiting the establishment thereafter of automobile graveyards within 1000 feet of a primary highway unless the county or city in which the graveyard was to be established had specifically designated or zoned such land for use as an automobile graveyard. In 1962 the legislature amended and reenacted § 33-279.3 in Chapter 8, Acts of Assembly of 1962, changing none of the previous contents but adding a new paragraph making it a
REPORT OF THE ATTORNEY GENERAL

misdemeanor for anyone to violate the section. By amending and reenacting the section, the term "hereafter", contained therein, no longer referred to the 1958 enactment date but to the new 1962 enactment date. Therefore, even though the Acts of 1958 prohibited the establishment of the graveyard in question, it was as of the 1962 enactment no longer in contravention of the Code because § 33-279.3 thereafter dealt only with those graveyards established after the 1962 enactment.

It is, therefore, my opinion that since the automobile graveyard in question was not in contravention of the Code after the enactment of Chapter 8, Acts of Assembly of 1962, it was lawfully in existence on April 4, 1968, and falls within the purview of § 33.1-348 (d) of the Code.

COUNTIES, CITIES AND TOWNS—Police Service Contracts—Cooperation or consolidation specifically authorized.

THE HONORABLE RICHARD N. HARRIS
Director Division of Justice and Crime Prevention

In your letter of August 31, 1970, you inquire whether § 15.1-131.2 of the Code of Virginia would authorize a contractual agreement by which a county sheriff's department could assume the responsibility for providing police services for towns within the county, including a consolidation of town police departments within the county with the sheriff's department.

This section of the 1970 Act has been assigned Code § 15.1-131.3. It reads as follows:

"The governing body of any county, city or town may, in its discretion, enter into a reciprocal agreement with any other county, city or town or combination thereof for such periods and under such conditions as the contracting parties deem advisable, for the consolidation of police departments or divisions or departments thereof, or cooperation in furnishing of police services." (Emphasis supplied.)

It was the intent of the Legislature in passing this section to authorize the very type of consolidation about which you inquire. It is my opinion, therefore, that such a contract and consolidation would be authorized by this section of the Code.

COUNTIES, CITIES AND TOWNS—Section 15.1-51 Not Applicable to Policemen and Firemen Employed by County—Such individuals deemed employees not officers.

FIREMEN—Employees of County—Not officers.

POLICE OFFICERS—Employees of County—Not officers.

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

I am in receipt of your letter of November 6, 1970, which reads as follows:

"I would like to request your opinion as to the applicability of Section 15.1-51, Code of Virginia, 1950, as amended, as it regards County police officers and County firemen.

"Section 15.1-51 requires, with certain specific limitations, that officers of the County must reside therein for a period of thirty (30) days next preceding his appointment. The last sentence of
said Section 15.1-51 reads: '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.' This provision obviously eliminates any one year residency requirement for a policeman or a fireman being employed by a County. It does not alleviate any provision for residency requirement on the thirty (30) day basis.

"Primarily, however, my question is more related to policemen and firemen who were employed under rules and regulations of the departments, which requires residency prior to employment, but who desire to move from the County and continue to be employed by the respective departments. Does Section 15.1-51 make it mandatory for a policeman or a fireman being a resident of the County to continue employment?"

I am of the opinion that § 15.1-51 is not applicable to policemen and firemen employed by a County. Such individuals are deemed employees of the County, not officers. Section 15.1-51 being applicable to County officers, your inquiry is answered in the negative.

COUNTIES, CITIES AND TOWNS—Zoning Ordinances—Compliance with statutes required.

COUNTIES, CITIES AND TOWNS—Zoning Ordinances—May not be extended into adjacent county, city or town.

THE HONORABLE WM. ROSCOE REYNOLDS
Commonwealth’s Attorney for Henry County

December 21, 1970

This will acknowledge receipt of your letter of November 23, 1970, and subsequent communications in regard to questions concerning a proposed contract for sewage treatment between the City of Martinsville and Henry County. In your letter you stated that Henry County has "no zoning, subdivision or plumbing code," and asked:

"Would it be possible for Henry County to spot zone, without going through the procedure in Section 15.1-486-498 of the Code of Virginia to adopt a zoning ordinance for Henry County?"

The purpose of zoning ordinances is to promote the health, safety or general welfare of the public. Section 15.1-489 of the Code of Virginia (1950), as amended. The General Assembly has conferred upon counties, cities and towns the power to enact and amend zoning ordinances but has prescribed the procedures by which such land use regulations may be adopted and enforced. In order to avail itself of any of the powers conferred by Article 8, Chapter 11, Title 15.1 of the Code (Zoning), a governing body must comply with the statutory requirements contained therein. Accordingly, I am of the opinion that your inquiry must be answered in the negative.

With respect to your second inquiry, you set forth the following:

"During 1968, the City of Martinsville and the County of Henry discussed the possibility of the City receiving and transporting sewage from the Villa Heights area of Henry County. After a request by the Henry County Public Service Authority, the Council of the City of Martinsville agreed to receive and treat the sewage from the said area on a year-to-year basis until a formal contract was approved."
“Subsequently the City officials proposed a contract which included, among others, the following provisions:

(1) Any new development in the area served would have to comply with the City Zoning Ordinances and with the City Subdivision Ordinances.

(2) All structures newly built or altered would have to conform to the City's Plumbing Code before being allowed to connect onto the sewage system.

(3) The owners of new or altered buildings would have to establish restrictive deed covenants limiting use of the property, and the covenants would have to be acceptable to the City Council and Planning Commission.

“After further discussion, the City officials have maintained that the contract must contain the above mentioned conditions before they will sign the contract and receive and treat the sewage from the Villa Heights area.”

You then requested my opinion on whether “the City of Martinsville [could] be given authority to enforce in Henry County the requirements spelled out in the contract with regard to new structures or alterations to existing structures.”

It is a matter of well-settled law that either party to a contract may seek to enforce the terms and provisions of that agreement. In the instant case, contract terms in regard to character of waste, charges for sewage treatment service and specifications as to sewer mains to be installed and operated by the Henry County Public Service Authority would appear to be provisions appropriate for mutual agreement between, and enforcement by, the City and the Public Service Authority.

From the City's point of view it may be desirable for a number of reasons to require of all persons using City services compliance with city zoning, subdivision and plumbing codes. The proposed contract, however, would not be executed by the affected County residents and the City, but between the City and the Public Service Authority, which, in my opinion, does not have the authority to agree to the requested extensions of City ordinances into Henry County. Clearly, the provisions of Chapter 28 of Title 15.1 (The Virginia Water and Sewer Authorities Act) authorize water and sewer authorities to contract with other entities, governmental or otherwise, with respect to water or sewer systems, sewage disposal systems or garbage and refuse collection and disposal systems. See Code Sections 15.1-1250 and 15.1-1269. While said authorities possess broad powers, including those of eminent domain, I am of the opinion that they cannot assume—nor exercise through contract—those powers related to land use regulation.

There is statutory procedure for the extension of subdivision ordinances of cities and incorporated towns for specified distances into surrounding counties in order to assure orderly subdivision of land and its development. See Section 15.1-467 of the Code of Virginia (1950), as amended. The responsibility for administration and enforcement of such “extended subdivision regulations,” is vested, according to Code Section 15.1-474, in the governing body of the political subdivision in which the improvements are—or are to be—located.

If the City of Martinsville gave due notice to Henry County, as required by Code Section 15.1-467, in regard to the December 17, 1957 ordinance adopted to extend the City's subdivision regulations three miles into the County, and the County did not register disapproval, then the City's subdivision regulations would extend into Henry County for a distance of three miles and would be enforced by the governing body of Henry County. Section 15.1-474 of the Code. (It is my understanding that all of the County area affected by the proposed contract is located within three miles of the City's boundaries.) Thus, if the City's subdivision regulations now, in fact,
extend into the County, there would seem to be little need in including in the contract such assurances sought by the City with respect to its subdivision ordinance. On the other hand, if it be determined that the subdivision regulations of Martinsville do not extend into the County, notwithstanding the fact that an ordinance was adopted to that effect on December 17, 1957, because the City did not give written notice to the County as required in Section 15.1-467, then I am of the view that Martinsville cannot extend through contract what it has failed to do by statute.

In regard to the territorial scope of zoning ordinances, your attention is called to Code Section 15.1-486 which provides, in part:

"The governing body of any county or municipality may, by ordinance, divide the territory under its jurisdiction into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article . . . .

"For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality." (Emphases supplied.)

From this language it seems clear that the General Assembly, in delegating the police power of zoning to counties, cities and towns, did not make provisions for, nor did it authorize, the extension of zoning ordinances of one jurisdiction into an adjacent county, city or town.

While this office cannot dictate or be concerned with the specific terms of a proposed agreement between two localities, for the reasons discussed above I am of the opinion that your second inquiry must be answered in the negative.

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COURTS—May Not Remit Fine Imposed for Violation of Local Ordinance.

FINES—May Not Be Remitted When Imposed for Violation of Local Ordinance.

THE HONORABLE VON L. PIERSALL, JR.
Commonwealth's Attorney for City of Portsmouth

March 9, 1971

In your letter of February 25, 1971, you inquire whether the provisions of § 19.1-351 of the Code apply to violations of City ordinances. You also ask whether the Judge can remit fines in any case other than contempt cases.

Section 19.1-351, Code of Virginia (1950), as amended, provides as follows:

"No court shall remit any fine, except for a contempt, which the court during the same term may remit either wholly or in part. This section shall not impair the judicial power of the court to set aside a verdict or judgment, or to grant a new trial."

This section makes it quite clear that a court has authority to remit a fine only in cases of contempt. It is my opinion that in all other cases, whether the fine be for a felony, a misdemeanor, or a violation of city ordinance, no court has the power to excuse a prisoner from the penalties for his crime. See Richardson v. Commonwealth, 131 Va. 802, 109 S.E. 460 (1921).

CRIMINAL LAW—Cockfighting—Spectator, not a participant, not engaged in.

CRIMINAL LAW—Cockfighting—Placing metallic spurs on fighting cocks controlled by specific statute, not by cruelty to animals section.
CRIMINAL LAW—Cockfighting—No authority found for confiscating paraphernalia used.

THE HONORABLE H. WOODROW CROOK, JR.
Commonwealth's Attorney for the County of Isle of Wight

This is in reply to your recent letter wherein you make certain inquiries concerning cockfighting and cruelty to animals. You refer specifically to §§ 18.1-216, 18.1-225 and 18.1-242 of the Code of Virginia (1950), as amended. I shall answer your questions seriatim. Questions (1) and (2) shall be taken together.

Query #1: "Would a person who was a spectator, but who paid admission, at a cockfight be guilty of engaging in the fighting of cocks under § 18.1-242?"
Query #2: "Would a person who was merely a spectator, and who had not paid admission, be guilty of engaging in the fighting of cocks under § 18.1-242 where betting and wagering was going on and a prize was being offered for the winning cock or cocks?"

Section 18.1-242 reads as follows:

"If any person engage in the fighting of cocks, dogs or other animals, for money, prize or anything of value or upon the result of which any money or other thing of value is bet or wagered; or to which an admission fee is charged, directly or indirectly, or for any championship, he shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense."

I do not believe that a spectator would be a participant and, accordingly, would not be engaging in cockfighting, with the question of paid admission being irrelevant. This is borne out by Jones v. Commonwealth, 208 Va. 370, 157 S.E. 2d 907 wherein it was held that presence at the scene of a crime and consent to its commission were insufficient to sustain a conviction.

Query #3: "Would a person who placed metallic spurs on a cock and then engaged in the fighting of cocks in which the metallic spurs were used by the cocks to injure one another, be guilty of cruelty to animals under §§ 18.1-216 and 18.1-225?"

Section 18.1-216 reads as follows:

"Any person who (1) overrides, overdrives, overloads, tortures, ill-treats, . . . 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, or (2) wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal; or (3) shall carry or cause to be carried in or upon any vehicle or vessel or otherwise any animal in a cruel, brutal, or inhuman manner, so as to produce torture or unnecessary suffering, shall be guilty of a misdemeanor; but nothing in this section shall be construed to prohibit the dehorning of cattle."

Section 18.1-225 reads as follows:

"The word 'animal,' as used in this article, shall be construed to include birds and fowl."

It is my opinion that a person who places metallic spurs on a cock and then engages in the fighting of cocks in which the metallic spurs were used would not be guilty of cruelty to animals under §§ 18.1-216 and 18.1-225 because of the specific section dealing with cockfighting.

September 14, 1970

REPORT OF THE ATTORNEY GENERAL
Query #4: "Is there any statutory or other authority for the forfeiture of the metallic spurs and other paraphernalia seized in a raid upon cockfighting where an admission fee was charged to the cockfighting, prizes were offered for winning cocks, and wagering and betting were being made upon the outcome of the cockfight?"

I can find no authority, statutory or otherwise, for the proposition that the metallic spurs referred to in this query may be forfeited.

CRIMINAL LAW—Drug Control—Sentence—Second conviction of possession of marijuana is felony.

CRIMINAL LAW—Drug Control—Sentence—Legislative intent to be more severe on distribution than on mere possession.

The Honorable Andre Evans
Commonwealth's Attorney for City of Virginia Beach

July 22, 1970

This is in response to your letter of June 18, 1970, in which you request my opinion as to the interpretation of the new Drug Control Act of Virginia. You ask two questions:

"Whether it is a felony under the new Drug Control Act (§ 54-524.1 et seq of the Code of Virginia when a person is convicted for the second time of the possession of marijuana. This requires an interpretation of § 54-524.101 (c), which seems to say that possession may be considered a second conviction (and a felony) if the first conviction was for distribution or manufacture, but no mention is made of a prior conviction for possession."

Secondly, "Your opinion is also requested as to the meaning of the words in the second paragraph of § 54-524.101 (c), or when in the case of a first conviction of violation of Schedule I, II or III. This phrase refers to a punishment of two to twenty years for a subsequent offense of distribution or manufacturing, and it seems to conflict with § 54-524.101 (b) (1) which provides for a sentence of ten years to life for a subsequent conviction of distribution or manufacture."

In answer to your first question, it is my opinion that when a person is convicted for the second time of possession of marijuana, the crime is a felony. The second paragraph of § 54-524.101 (c) begins "[f]or a second or any subsequent violation of § 54-524.101 (c) with respect to any drug classified in Schedule I, II or III, . . . the defendant shall be imprisoned in the penitentiary for not less than two years 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 not exceeding twelve months and fined not more than ten thousand dollars." Section 54-524.101 (c) makes illegal possession of a controlled drug a crime. The second paragraph which refers to punishment for subsequent violations incorporates that section and thereby does bring the drug, marijuana, along with all other drugs classified in Schedules I, II and III into the same category. Therefore, it is my opinion that a person convicted for a second time for the possession of marijuana would be convicted of a felony.

In answer to your second question, it is my opinion that the two sections cited do not conflict. Section 54-524.101 (b) (1) which provides for the sentence of ten years to life and/or a fine of $50,000 refers to the second conviction for distribution, possession with intent to distribute and/or manufacture of a controlled drug. Section 54-524.101 (c) refers to the situation where mere possession was either the first or subsequent conviction.
Section 54-524.101 (b) excludes a consideration of convictions for *mere possession*; it is designed solely to stop the person from trafficking in controlled drugs.

The second paragraph of § 54-524.101 (c) uses language similar to that in § 54-524.101 (b) and appears to conflict with the penalty described for a second conviction under § 54-524.101 (a) (distribution or possession with intent to distribute a controlled drug). However, general rules of statutory construction require that a statute be given a construction which best harmonizes with the design of the statute or the end in view and a construction that will not render a statute nugatory. The General Assembly, in creating the penalty under § 54-524.101 (a) and (b), indicated their intent to deal harshly with the person who was trafficking in drugs. In separating the description of the crime as well as the penalties provided for mere possession in § 54-524.101 (c) from those for distribution, etc. in § 54-524.101 (a) and (b), the General Assembly indicated that it intended that the *mere possessor* of a controlled drug not be punished as severely as the person involved in distribution of drugs, either for first or second offense convictions.

It is, therefore, my opinion that the two sections are not in conflict when construed in light of the design of the statute and the legislative intent.

CRIMINAL LAW—Juvenile May Be Interrogated in Absence of Parents if Properly Warned of Rights.

JUVENILES—May Be Interrogated in Absence of Parents if Properly Warned of Rights.

May 19, 1971

THE HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for the City of Amherst

In your letter of May 5, 1971, you inquire whether Federal or State law requires that parents be present at the time a juvenile is interrogated by police.

The case of *Miranda v. Arizona*, 384 U.S. 436 (1966), requires, of course, that certain warnings as to the right to remain silent and the right to have counsel present be given to any accused prior to interrogation. If the warnings are not given, any statement taken from the accused will not be admissible in evidence against him. Even if the warnings are properly given under *Miranda*, no statement will be admissible which is not shown to be voluntary on the part of the defendant. Since the making of a voluntary decision requires foreknowledge of the alternatives, the *Miranda* rule was promulgated to insure that an accused could make an intelligent choice between making a statement and remaining silent.

Statements obtained from juveniles are, of course, subject to the same requirements that they be voluntarily given and that the decision to make the statement be based on an intelligent understanding of the rights involved. There is no mandatory requirement that parents be present when a statement is obtained, but depending on the individual involved, any statement so obtained might be proved involuntary by a showing that the particular juvenile did not understand the rights explained to him, and had no parent or guardian present on whom he could rely for intelligent advice. Consequently, I am of the opinion that the presence of parents at the interrogation of a juvenile is not required by either Federal or State law, but that the best practice from the standpoint of both the Commonwealth and the defendant would be to make every effort to locate at least one parent and have him or her present at any interrogation.

CRIMINAL LAW—Obscenity—Movies and movie theaters—“Trailer” and “preview” synonymous.
CRIMINAL LAW—Obscenity—Movies and movie theaters— "To exhibit" means "to show" or display.

CRIMINAL LAW—Obscenity—Movies and movie theaters—No violation to announce future film without showing scenes. July 30, 1970

THE HONORABLE José R. DÁVILA, JR.
Commonwealth's Attorney for City of Richmond

I am in receipt of your letter of July 21, 1970, relative to § 18.1-246.1 of the Code of Virginia (1950), as amended, which reads as follows:

"It shall be unlawful for any person to exhibit any trailer or preview of any motion picture which has a motion picture industry rating which would not permit persons in the audience viewing the feature motion picture to see the complete motion picture from which the trailer or preview is taken. Persons violating the provisions of this section shall be guilty of a misdemeanor."

Your inquiries are as follows:

"1— Please distinguish Trailer from Preview.
"2— What is the connotation of the word 'exhibit' under the statute?
"3— If a theatre merely announces the future showing and does not show scenes from the prohibited X or R film, would this constitute a violation under the above section?"

The answer to question number 1 is that "trailer" and "preview" are synonymous. Webster's New International Dictionary, Second Unabridged Edition, page 2686, defines "trailer" as a short film made by the cast of a feature picture and displayed for advertising purposes a week or so in advance of a featured presentation. Absent any legislative intent to the contrary, the commercial terms "trailer" and "preview" must be presumed to have been intended to announce their trade meaning. 2 Sutherland Statutory Construction, Section 4919, Third Edition, 1943.

In response to your second inquiry, I am of the opinion that the word "exhibit" would be used in its ordinary meaning of "to show" or "to display." The words in the connotation of the statute in question would mean to show or to display the trailer or preview which, as indicated, is a short film.

In view of my responses to your first and second inquiries I am of the opinion that your third question should be answered in the negative.

CRIMINAL LAW—Obscenity Statute—Juvenile when accompanied by parent or guardian may be admitted to movie otherwise prohibited. December 8, 1970

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

I am in receipt of your letter of December 3, 1970, which reads:

"Your opinion is requested as to whether or not § 18.1-236.7 of the Code of Virginia, as amended, requires the operators of motion picture theaters to refuse admission to juveniles when accompanied by a parent or guardian."

Chapter 560 of the 1970 Acts of Assembly enacted Article 3.1, Chapter 4 of Title 18.1 of the Code of Virginia (1950), as amended, §§ 18.1-236.6 and 18.1-236.7, providing for a variable concept of obscenity in the regulation
of the sale of pornography to juveniles similar to that upheld by the United States Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274, reh. den. (1968).

Pertinent to your question is § 18.1-236.7 (b)-(d) which reads as follows:

"(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles.

"(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

"(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b)." (Emphasis added.)

Your inquiry of course arises from the language "that he is the parent or guardian of any juvenile' as emphasized above.

It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute, so that no part will be inoperative, void or insignificant. 2 Sutherland, Statutory Construction, 3rd ed., § 4705.

If a juvenile is to be barred from a certain movie regardless whether he is with his parent there would be no need for the language in question. Likewise, there would be no need for it to be unlawful for an individual to falsely represent that he is the parent or guardian of the juvenile. It would suffice that such person falsely represent the juvenile to be eighteen years of age. Being a criminal statute, the language in question, in addition to being given meaning, must be strictly construed against the Commonwealth.

Consequently I am of the opinion that a juvenile when accompanied by a parent or guardian (it would be unlawful for an individual to falsely represent that he is a parent or guardian) may be admitted to a movie otherwise prohibited.

Your inquiry is answered in the negative.

CRIMINAL LAW—Statute Not Voided for Lack of Minimum Term of Imprisonment or Maximum Fine.

March 23, 1971

THE HONORABLE SAM GARRISON
Commonwealth's Attorney for the City of Roanoke

In your letter of March 18, 1971, you inquire whether § 18.1-257 of the Code of Virginia, (1950), as amended, is invalid on its face because it does not specify a minimum penitentiary sentence or a maximum limitation on the fine that may be imposed.

Section 18.1-257 reads as follows:

"If any person write or compose and also send or procure the sending of any letter or inscribed communication, so written or composed, whether such letter or communication be signed or anony-
It is my opinion that the failure of this statute to provide a minimum penitentiary term or a maximum fine does not render the statute invalid on its face. The absence of a minimum penitentiary term together with the specification of a maximum jail term of twelve months leads, to the only reasonable construction of the statute, that is, that the minimum penitentiary term is to be one year as in other felony cases. The absence of a statutory maximum on the fine that may be imposed does not make the statute invalid on its face, but may make a particular fine invalid, depending on the nature of the case. May I direct your attention to Southern Express Company v. Walker, 92 Va. 59, 22 S.E. 809 (1895), aff'd, 168 U.S. 705 (1897) in which the Supreme Court of Appeals stated:

"The bare possibility that an excessive fine might be imposed by a jury does not invalidate a statute which does not fix the maximum amount of fine which may be imposed. . . If a jury were to render a verdict so excessive as to contravene the inhibition of the constitution (against excessive fines) the wrong or vice would lie in the verdict and not in the statute. The question as to an excessive fine is a judicial one and does not affect the validity of the statute. . . ."

92 Va. at p. 67.


CRIMINAL LAW—Trespassing—May be committed on posted parking lot after business hours.

THE HONORABLE S. PAGE HIGGINBOTHAM
Commonwealth's Attorney for Orange County

August 14, 1970

This will acknowledge receipt of your letter of August 7, 1970, requesting my opinion as to whether or not trespass is committed by one who goes upon or remains upon a business parking lot after the business has been closed for the night and after "No Trespassing" signs have been posted.

Section 18.1-173 of the Code states, in part, as follows:

"If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so . . . by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor. . . ."

I know of no reason why the owner of a business should not be afforded the protection of the above section if he chooses to post his parking lot after business hours, either by conspicuously placing "No Trespassing" signs at the end of each day, or by erecting permanent signs which forbid trespassing between certain hours. Therefore, it is my opinion that your question should be answered in the affirmative.
CRIMINAL LAW—Violation of Code Section Not Punishable as Misdemeanor Where No Penalty Provision Provided.
June 15, 1971

The Honorable J. Mason Grove
Associate Judge of the Fairfax County Court

In your letter of May 28, 1971, you inquire whether any penalty can be applied to a violation of § 3.1-776 of the Code of Virginia (1950), as amended, inasmuch as no penalty provision is specifically made applicable thereto.

Section 3.1-776, which constitutes the entirety of Article 7, Chapter 27, of the Agriculture, Horticulture and Food Acts found in Title 3.1 of the Code, provides as follows:

"No person shall sell, offer for sale, barter or give away, in quantities of less than six, living baby chicks, ducklings, or other fowl under two months old."

As you correctly point out, there is no separate code section labeling a violation of § 3.1-776 as a misdemeanor, although such penalty sections are found in the other Articles of Chapter 27. The wording of the section itself, as quoted above, does not label a violation of its terms as unlawful. It is my opinion, therefore, that no penalty can be applied to a violation of § 3.1-776. However, an injunction could be obtained against any person found to be violating the provisions of that section, following which repeated violations would be punishable as a contempt.

CRIMINAL PROCEDURE—Arrest—Arresting officer may discharge person from his custody without appearance before magistrate if no formal charge is placed.
February 19, 1971

The Honorable Sam Garrison
Commonwealth's Attorney for the City of Roanoke

In your recent letter you inquire whether the effect of § 19.1-100.1 of the Code of Virginia would be to require the police to bring a formal criminal charge against every person whom they arrest without a warrant, or forcibly detain for questioning. Section 19.1-100.1 of the Code of Virginia provides, in pertinent part:

"A person arrested without a warrant shall be brought forthwith before an officer authorized to issue criminal warrants in the county or city where the arrest is made. . ." (Emphasis added)

Although § 19.1-100.1 was enacted only in 1968, its antecedents in the Code of Virginia predate the case of Mallory v. United States, 354 U.S. 449 (1957). (See Code of 1942, § 4827(a). Cases interpreting this section have held that the word "forthwith" is to be construed literally, providing the same effect as the Mallory rule). Winston v. Commonwealth, 188 Va. 386 (1948); McHone v. Commonwealth, 190 Va. 435 (1950).

These cases, as well as more recent cases, such as Holt v. City of Richmond, 204 Va. 364 (1963), arise out of the context where a formal charge is sought to be sustained after the "forthwith" rule has not been complied with. It is my opinion, however, that the Legislature did not intend for this rule to operate where no formal charge is to be placed, since the purpose of the rule is to protect an arrestee from being held incommunicado by the police without formal charge or access to bail. If no formal charge is ultimately placed, there would be no occasion for the rule to be invoked against the Commonwealth. This does not mean, of course, that the police officer may "hold for investigation" a person for an unduly long time and then
release him, since this might create an action for false imprisonment by the detainee.

It is my opinion, therefore, that an arresting officer, who may have had probable cause to initially make the arrest without a warrant, may thereafter conclude that further prosecution of the arrestee would be improper or fruitless and may, subsequently, discharge him from custody without the necessity of taking him before a magistrate. I do not believe that this position is affected by Howard v. Commonwealth, 210 Va. 674 (1970), since that case specifically provides that a police officer may detain a person for investigation without placing him under arrest. This is in accord with the principles of Terry v. Ohio, 392 U.S. 1 (1968), and has recently been codified as § 19.1-100.2 of the Code of Virginia. In an "investigatory stop" or "stop and frisk" situation, the police officer may, of course, conclude that he has no probable cause to arrest, and may discharge the person from his custody.

CRIMINAL PROCEDURE—Bail—Obligation of surety on bond imposed by municipal court continues when case appealed to court of record.

April 13, 1971

THE HONORABLE A. A. RUCKER, Judge
Bedford County Court
Juvenile and Domestic Relations Court

In your letter of April 1, 1971 you inquire whether a recognizance bond, which is entered into in a municipal court, imposes a continuing obligation on the surety where the defendant is convicted and appeals to a court of record.

You correctly point out that the applicable Code provision is § 19.1-128 of the Code of Virginia (1950), as amended which reads in pertinent part as follows:

"The condition, when it is taken of a person charged with a criminal offense, shall be that he appear before the court or judge before whom the proceedings on such charge will be at such time or times as may be prescribed by the court or officer taking it, and at any time or times to which the proceedings may be continued or further heard, and before any court or judge thereafter having or holding any proceedings in connection with the charge, to answer for the offense for which he is charged. . . . The recognizance shall remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court."

Where these provisions are embodied in the recognizance itself the surety would be liable until the final disposition of the case, which would include the disposition of an appeal from a municipal court to a court of record. As you point out in your letter, this office has previously rendered a similar opinion to the Honorable James M. Settle on July 18, 1950, which is found at Report of the Attorney General (1950-1951), page 19. I continue to be of that opinion.

You also ask whether the form of the recognizance would be improper where it adds the words "or appealed" after the words "at any time or times to which the proceedings may be continued or further heard." I agree that the two words "or appealed" are for clarification only and do not enlarge the conditions spelled out in § 19.1-128.

CRIMINAL PROCEDURE—Blood Analysis Certificate—Steps prescribed under § 18.1-55.1 procedural and not substantive.

April 8, 1971

THE HONORABLE DUNCAN C. GIBB
Member, House of Delegates
This is in reply to your letter of March 18, 1971, in which you refer to instances in which the name of the accused on the certificate differs from that shown on the blood sample taken pursuant to the law relative to driving under the influence of intoxicants. Particularly, you refer to typographical errors and failure to decipher the doctor's handwriting, and anticipate that the local court might rule the results of the test inadmissible because of such variations.

I have no doubt that these difficulties arise in other jurisdictions from time to time, although, I believe yours is the first mention of this to reach this office during my tenure. Formerly, the law was much more strict in regard to this type of technicality. Presently, however, § 18.1-55.1, in paragraph(s) thereof, states that the "steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive" and "substantial compliance therewith shall be deemed to be sufficient."

Naturally, different courts will place different interpretations on this, although, in my opinion, the reference to identification in the quoted language indicates a legislative intent that substantial compliance, i.e., sufficient to identify the blood sample as that of the accused, generally will suffice.

The real need is the exercise of greater care in accomplishing the procedure outlined in the statute. In the event you desire to sponsor additional curative legislation in this area, this office will cooperate with you in the consideration of any proposals you deem appropriate.

CRIMINAL PROCEDURE—Central Criminal Records Exchange—Game wardens must report arrests.

CRIMINAL PROCEDURE—Game Wardens—Have power to arrest for felony.

CRIMINAL PROCEDURE—Central Criminal Records Exchange—All arrests should be reported except those specifically exempted.

GAME AND INLAND FISHERIES—Wardens—Have power to make arrest for felonies.

GAME AND INLAND FISHERIES—Central Criminal Records Exchange—Arrests, except for those specifically exempt, must be reported.

THE HONORABLE CHESTER F. PHELPS
Executive Director
Commission of Game and Inland Fisheries

This is in reply to your letter of June 22, 1970, in which you pose several questions relating to the provisions of § 19.1-19.3 Code of Virginia. I shall answer your questions seriatim.

1. "I would appreciate your opinion as to whether a state game warden is required to conform to the provisions of § 19.1-19.3 Code of Virginia as amended when it applies only to officers having the power to arrest for a felony?"

The power of game wardens to make arrests is provided for in § 29-32. In addition to providing the power to make arrests, this section also gives game wardens general police power while in the performance of their duty on properties owned or controlled by the Commission of Game and Inland Fisheries. General police power would certainly include the power to arrest for a felony. Accordingly, I am of the opinion that state game wardens are required to conform to the provisions of § 19.1-19.3.
2. "In the event that your answer to my first question is in the affirmative, does the requirement of this statute apply to misdemeanors committed under title 29 and chapter 17 of title 62 Code of Virginia?"

This section 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."

Since this section excludes only specific misdemeanor offenses, 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 those offenses specifically excluded. Accordingly, arrests for violations of Title 29 and Chapter 17 of Title 62 are, in my opinion, reportable.

I am enclosing a copy of my opinion dated May 27, 1970 to Colonel H. W. Burgess which I believe will be of further assistance to you.

CRIMINAL PROCEDURE—Expunging Criminal Records—No authority to expunge.

June 11, 1971

THE HONORABLE VAIL W. PISCHKE, Judge
Juvenile and Domestic Relations Court
City of Falls Church, Virginia

This is in reply to your letter of May 18, 1971, which reads in part as follows:

"I was recently asked by a woman who was convicted in the Falls Church Municipal Court of shoplifting on January 5, 1965, to expunge her record. She had no criminal record prior to that occurrence and has had no law violations since. She advises that she suffered an emotional breakdown as a result of the guilt she feels over the incident. She has difficulty in obtaining employment because employers feel she is not trustworthy, and if she fails to advise them of the record and she is hired, they later discharge her after a record check discloses the shoplifting charge.

"I would greatly appreciate your advising me whether there is any authority for the Court to give relief to this lady and other deserving individuals. If there is none, please advise whether there is relief available to misdemeanants in cases like the one cited above. The woman in question is an alien. Would this effect any suggested remedy?

"Another area where the reward of expunging records is needed is for the alcoholic who has been successfully reformed. We spend a great deal of money and effort to reform people. It seems contradictory to not let them live as members of society after successful rehabilitation."

I can find no statutory authority or decision of the Supreme Court of Appeals of Virginia which would authorize the record of a misdemeanant or felon to be expunged under the circumstances outlined in your letter.

Pursuant to § 19.1-19.3, local law enforcement agencies and every state official or agency having the power of arrest are required to report to the Central Criminal Records Exchange the arrest records of all felonies and offenses punishable as misdemeanors under Title 54 and under Title 18.1 except drunkenness and disorderly conduct. Section 19.1-19.6 of the Code provides that local law enforcement agencies with the power of arrest may fingerprint and photograph all persons charged with felonies and misdemeanors which are required to be reported pursuant to § 19.1-19.3.
These sections make no reference to the expunging of records retained pursuant to authority provided therein.

I am of the further opinion that there is no provision for expunging or modification of records of persons convicted for public drunkenness.

CRIMINAL PROCEDURE—Fine—Indigent person may not be immediately incarcerated for nonpayment of fine.

JAILS AND PRISONERS—Jailer Has No Authority to Admit Inmate to Bond.

April 27, 1971

THE HONORABLE E. R. HUBBARD
Justice of the Peace

In your letter of April 12, 1971, you ask the following two questions:

1. Does a jailer have the authority to admit an arrested person to bond on his own recognizance after a cash bond has been fixed by a Justice of the Peace?

2. Can a person be held in jail for nonpayment of a fine?

I will answer these questions in the order presented.

Title 19.1, Chapter 6 of the Code of Virginia, (1950), as amended, provides for the admission of bail by several different authorities, including the arresting officer (§ 19.1-109), a justice of the peace (§ 19.1-110), a judge or clerk (§§ 19.1-111 and 19.1-112), and a bail commissioner (§ 19.1-116). There is no provision for the admission to bail by a jailer. It is my opinion, therefore, that unless the jailer also holds one of the offices provided for by the code that he does not have the authority to admit a person to bail.

In answer to your second question, I might point out that § 53-221 of the Code does provide for the incarceration of persons for nonpayment of fines. The Supreme Court of the United States has recently ruled, however, that an indigent person cannot be immediately incarcerated for nonpayment of a fine. It is my opinion, therefore, that while a person may still be incarcerated pursuant to the Code of Virginia for non-payment of a fine, such incarceration may not be immediately imposed where the accused is determined by the judge to be too poor to make immediate payment of his fine.

CRIMINAL PROCEDURE—Grand Jury—Individual citizen cannot go before to present complaint.

June 25, 1971

THE HONORABLE CHARLES B. PHILLIPS
Commonwealth's Attorney for City of Salem

This is in reply to your letter of recent date in which you advise that certain citizens desire to go before a grand jury and present an allegation concerning a violation of the City Building Code. You further advise that these parties refuse to swear out a criminal warrant, and that you refuse to sign a presentment because you have been advised by both the City Building Inspector and the City Attorney that no violation has taken place. You have further advised me by telephone that you have presented this matter by way of bill of indictment to two separate grand juries, neither of which acted on the matter. I shall answer your inquiries seriatim:

1. "May a citizen, as a complaining witness, go before a Grand Jury and allege a criminal violation without a presentment being made by the Commonwealth's Attorney."

The statutes dealing with grand juries are found in the Code in §§ 19.1-147-19.1-161. I have examined these statutes and the case law in Virginia,
and find no authority for an individual to go before a grand jury and present a complaint. There is some authority that an individual has the right to present a complaint or charge to a grand jury. See Annotation 156 ALR 330. The cases which recognize such a right have generally been stated by way of dicta, or in situations where the prosecutor has refused to act, or where the right is provided for by statute. However, in other jurisdictions it is held that a private individual has no right on his own motion to go before a grand jury for the purpose of communicating information and preferring charges. See 38 C.J.S., Grand Juries, § 41 (b). Section 19.1-154 of the Code provides in part that the judge shall charge the grand jury. In preparing recommended standard procedures to be used in criminal cases the Judicial Council of Virginia, in its handbook for judges and clerks in Virginia, sets forth a suggested charge to the grand jury on pages 17 and 18. There is nothing in the recommended charge to suggest that the grand jury can hear matters presented by individual complainants. In view of the fact that the complainants have the right to take out the warrant, that you have not refused to act in the matter, and that there is no statutory authority for such procedure, it is my opinion that individual citizens may not appear before a grand jury to make a complaint.

2. "May an individual upon a complaint in writing, verified by the oath of a competent witness, make his own written presentment to the grand jury?"

For the same reasons, stated in answer to question No. 1, I answer question No. 2 in the negative.

3. "Section 19.1-162 of the Code of Virginia states that 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. Does this writing go before the Grand Jurors along with the testimony of the complaining witness?"

Accusations of crime against persons may be made by way of indictment, presentment, or information. An indictment is a written accusation against one or more persons for a crime or misdemeanor, presented to, and preferred upon oath by a grand jury. A presentment is the written notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government. An information is an accusation in the nature of an indictment from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. As you point out, § 19.1-162 provides for the alternative methods by which an information may be filed. The phrase "upon a complaint in writing verified by the oath of a competent witness" refers only to an information and such writing would not go before the grand jurors. Therefore I answer question No. 3 in the negative.

4. "Can the complaining parties request the judge of the Circuit Court to impanel a Grand Jury to hear their complaint?"

Section 19.1-149 of the Code provides that special grand juries may be ordered at any time to investigate any given condition or conditions. A special grand jury is qualified to perform any business that may properly come before it, and generally has the same powers as a regular grand jury. It is, therefore, my opinion that the judge of the circuit court could impanel a special grand jury to hear complaints of citizens. Therefore, I answer question No. 4 in the affirmative.

CRIMINAL PROCEDURE—Habeas Corpus—Right to court records for filing.
CRIMINAL PROCEDURE—Habeas Corpus—Right of person convicted as recidivist to court records.

The Honorable Dick B. Rouse
Commonwealth's Attorney, City of Bristol

This is in reply to your recent letter wherein you inquire as to whether § 14.1-183 of the Code of Virginia of 1950, as amended, entitles a prisoner, proceeding in forma pauperis, to certified copies of the "warrant of arrest, transcript of preliminary hearing had in lower court, indictment, any statements of accused reduced to writing, pre-trial and post-trial rulings and motions thereon, pre-sentence investigation report and final order of judgment, sentence and commitment."

You also advised by telephone that your question relates to habeas corpus proceedings.

Generally, prisoners seeking to invoke the remedy of habeas corpus are entitled to certain documents which are necessary for preparation of habeas corpus forms required by § 8-596.1 of the Code of Virginia. In McCoy v. Lankford, 210 Va. 264, 170 S.E.2d 11 (1969), the Supreme Court of Appeals held that the petitioner therein was entitled to certified copies of arrest warrants, indictments, and orders of conviction. Unless the court wherein the habeas corpus petition is filed concludes that other documents are necessary, I am of the opinion that a prisoner is entitled to no more than the documents required by McCoy, supra.

A prisoner serving a recidivist sentence would be entitled to attack the validity of a judgment upon which the recidivist judgment is based and would thus occupy the same status as one who is serving the sentence of which he complains.

CRIMINAL PROCEDURE—Narcotics—Localities with facilities may analyze drugs.

The Honorable Von L. Piersall, Jr.
Commonwealth's Attorney for City of Portsmouth

In your letter of August 25, 1970, you ask whether the City of Portsmouth can employ a chemist to make analyses of narcotics and act as the Commonwealth's witness in prosecutions involving narcotics and drugs.

Section 54-524.77 of the Code of Virginia provides, in pertinent part:

"It shall be the duty of the State Department of Agriculture and Commerce to make such chemical analyses as may be necessary for carrying out the provisions of this chapter."

It is my opinion that this section does not bar localities from employing their own chemists to perform drug analyses. On the contrary, it provides that where localities do not have any such facilities, it is to be the duty of the State Department of Agriculture and Commerce to act in that capacity. Therefore, it is my opinion that if Portsmouth has a qualified chemist and laboratory, the Portsmouth Police Department does not have to send its drugs to the State Department of Agriculture and Commerce for analyses.

CRIMINAL PROCEDURE—Preliminary Hearing—Responsibility for appearance of person charged.

The Honorable I. Clinton Miller
Commonwealth's Attorney for Shenandoah County

February 17, 1971
This is in reply to your recent letter wherein you pose certain questions with regard to § 19.1-241.2 of the Code of Virginia of 1950, as amended. Your inquiries will be answered seriatim and are as follows:

1. 

"(In view of) (t)he language of the statute making it mandatory that every person charged with commission of a felony, not free on bail or otherwise, be brought before the court not of record on the first day the Court sits after the person is charged, is it primarily the duty of the arresting officer to bring such person before the Court?"

You also state that you are asking the above question in light of the requirements of § 19.1-98.

Section 19.1-98 provides, in part:

"An officer arresting a person under a warrant for an offense shall bring such person before and return such warrant to a Court of appropriate jurisdiction . . . unless such person be let to bail as hereinafter mentioned, or it be otherwise provided."

This section relates to the procedure for the arresting officer making a return of the warrant of arrest, and the arresting officer would not be required to bring the arrested person before the Court not of record pursuant to § 19.1-241.2, assuming that the person is in custody.

Section 19.1-110 (b) provides, in part:

"If the offense charged is a felony such person shall be committed to jail by written order stating that he is committed for further examination on the date specified by the Judge of the applicable court not of record; . . . ."

In accordance with the above Code section, considered in conjunction with § 19.1-241.2, I am of the opinion that the responsibility for bringing the person before the Court not of record on the appointed date would be the officer in whose custody the person is entrusted. Likewise, if the accused person is committed by a Judge, the person responsible for bringing the accused before the court is governed by § 19.1-107 which provides, in part: " . . . (the accused) may be brought before such Judge by his verbal order to the officer by whom he was committed, or by written order to a different person."

(2) "If such person as required by 19.1-241.2 is not brought to court as required by the Code section, is there any criminal remedy against any person responsible for his not being so brought which the arrested person may exercise?"

Since the arrested person is lawfully in custody, I am of the opinion that there is no criminal remedy. Additionally, § 18.1-36, which defines abduction and kidnapping, states, in part: " . . . the provisions of this section shall not apply to any law enforcement officer in the performance of his duty."

(3) "What is the effect of the failure to so bring such person before the Judge of a Court not of record on the first day on which such Court sits after the person is charged concerning the criminal charge against the defendant?"

Although the Supreme Court of Appeals of Virginia was faced with the question of the admissibility of a confession because of the failure to bring an accused before the Judge of the Court not of record in accordance with § 19.1-241.2 (on the first day that the Court was sitting) the question was not considered from the standpoint of the admissibility of the confession.
because a proper objection was not made. (*Woodson v. Commonwealth*, 211 Va. 285 (1970)). It would appear that had proper objection been made, the Court would have considered the effect of the delayed preliminary hearing upon the admissibility of the confession. Accordingly, I can only say that the effect will likely be governed by proof (or lack of same) of any constitutional violation.

You also inquire as to whether there would be any automatic constitutional violation resulting from failure to comply with the statute allowing an officer to admit an accused person to bail. In *Holt v. City of Richmond*, 204 Va. 364, (1963), the Supreme Court of Appeals of Virginia ruled that a defendant who was not brought with reasonable promptness before an officer authorized to admit the accused to bail violated the defendant's rights, but that the delay did not necessarily affect a subsequent criminal prosecution. Thus, the detention may be a constitutional violation, but unless the defendant is denied rights which directly affect his defense, a subsequent criminal prosecution will not be voided.

**CRIMINAL PROCEDURE—Prisoners' Hospitalization in State Penitentiary Hospital to be Paid by County Whether Individual Charged or Not.**

JAILS AND JAIL PRISONERS—Prisoners' Hospitalization in State Penitentiary Hospital to Be Charged by County Whether Individual Charged or Not.

The Honorable L. H. Sands, Clerk
Board of Supervisors of Bland County

In your letter of January 20, 1971, you inquire whether a county is liable to the State Penitentiary Hospital for treatment of a prisoner who was arrested in the county following an automobile accident but was never charged or tried in the county following his release from the hospital.

The State Penitentiary Hospital is utilized by cities and counties as a less expensive means of providing medical services for local prisoners. The Penitentiary Hospital officials, of course, have no way of knowing whether the locality which sends a prisoner for treatment will ultimately bring him to trial, and consequently should not be left uncompensated because the county is unable to or does not choose to prosecute the individual. It is my opinion, therefore, that the county is liable for the costs of the State Penitentiary Hospital regardless of the fact that the individual is not charged or tried in the county following his release. The State will, however, pay two-thirds of the costs as provided for by §§ 53-179 and 53-184. I might suggest that you undertake to determine where the particular prisoner you referred to was ultimately charged and attempt to recover your costs from that jurisdiction.

**CRIMINAL PROCEDURE—Search Warrant—Failure to file list of articles seized not fatal.**

JUSTICE OF PEACE—Search Warrant—Failure to include designation as such on otherwise good search warrant not fatal.

CRIMINAL PROCEDURE—Search Warrant—Omission of justice of peace's title not fatal.

The Honorable Sol Goodman
Commonwealth's Attorney for City of Hopewell

This is in reply to your letter of September 16, 1970, wherein you refer to § 19.1-87.1 of the Code of Virginia of 1950, as amended, and inquire as
to whether a search warrant is valid and whether the Commonwealth can introduce items obtained during a search (1) if a law enforcement officer failed to make a list, (2) if he failed to execute the list under oath, and (3) where the justice of the peace has executed the search warrant properly in all respects except that he fails to designate the fact that he is a justice of the peace.

As you correctly noted, § 19.1-87.1, provides in part:

"Any law enforcement officer who executes a search warrant shall make a list under oath of all articles, instruments or other property seized within a reasonable time of making the search."

Since the list must obviously be prepared subsequent to the search, and further since the search warrant is not based upon the list, I do not believe that failure to execute the list would affect the validity (or legality) of the search. The statute simply requires the preparation of a list by the officer for record purposes, and accordingly I do not believe that the articles obtained in the search would be inadmissible simply because a record is not kept.

In Carter v. Commonwealth, 209 Va. 317, 163 S.E. 2d 589 (1968), the Virginia Supreme Court held that only unreasonable searches were prohibited by the Virginia statutes and that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Accordingly, I believe that the mere failure of a justice of the peace who executes a search warrant to properly designate his title would not be a fatal defect.

The authority of a justice of the peace to accept an affidavit for a search warrant was attacked in the recent case of Manley v. Commonwealth, — Va. — (September 4, 1970), but the Virginia Supreme Court declined to rule on the question because of the fact that the point was not raised in the trial court. In Manley, the court was considering § 19.1-85 before the provision providing for the taking of affidavits by justices' of the peace was restored. Nevertheless, judging from the recent search and seizure cases which have been considered by the Virginia Supreme Court, I am inclined to believe that the defect to which you refer would be ruled insufficient to violate the reasonable requirement of the Fourth Amendment.

CRIMINAL PROCEDURE—Warrants—Return of with fines and costs.

CLERKS—Fees—For return of papers.

FEES—Clerks—For return of papers.

THE HONORABLE F. NELSON LIGHT, Judge
Pittsylvania County Court

In your letter of June 2, 1971, you inquire whether the provisions of §§ 19.1-335 - 19.1-337 of the Code of Virginia, (1950), as amended, apply to cases which are tried in courts not of record without warrants. As you point out, such cases might arise under the provisions of § 46.1-178 of the Code as interpreted by my opinion to the Honorable Lawrence R. Ambrogi, dated November 10, 1970, to the effect that warrants should not be written where the arrest procedure was completed by the issuance of a summons.

This office has previously ruled in an opinion to the Honorable J. Gordon Bennett, dated July 20, 1956, which is found in the Report of the Attorney General, (1956-1957), at 106, that the purpose of requiring the return of warrants in all criminal cases in § 19-310, the predecessor section to § 19.1-335, was to indicate clearly each criminal case that had been disposed of during each month. I continue to be of that opinion as to the purpose of this section. Accordingly, it is my opinion that cases which are tried without a
warrant should be reported to the clerk of the court of record, as well as cases tried pursuant to a warrant. Section 19.1-335 provides, in part, as follows:

"Between the first and tenth day of each month every county court and every municipal court shall make return of the warrants in all criminal cases finally disposed of by such court in the preceding month. . . . Upon every such return shall be itemized the fine and cost, or costs, if there be no fine, imposed in each case, or other disposition thereof. . . ."

It is my opinion that the intent of this section is to require a return in each case of the papers relating to the trial of the case whether those papers be a warrant or its equivalent and, accordingly, the clerk's fee specified in § 19.1-337 should also be paid. I might add that the clerk of the court not of record may use the warrant for convenience in transmitting these returns, and to that end may write out a warrant in each case. In accordance with my previous opinion, however, no fee may be assessed against the defendant in connection with the writing of such a warrant.

You also ask whether in cases of uncollected fines the papers should be filed with the clerk of the court of record after six months. Since I have ruled that the papers should be filed on a monthly basis as required by § 19.1-335, it will not be necessary to proceed differently for uncollected fines in such cases.

CRIMINAL PROCEDURE—Warrants—Should not be issued in addition to traffic summons.

COSTS—Warrants—Should not be issued in addition to traffic summons.

WARRANTS—Should not be issued in addition to traffic summons.

The Honorable Lawrence R. Ambrogi
Acting Commonwealth's Attorney for Frederick County

In your letter of October 21, 1970, you inquire whether it is proper for a justice of the peace to issue a warrant when a traffic summons has been issued by a law enforcement officer pursuant to § 46.1-178 of the Code, and if so, whether the $3.00 warrant fee may be charged against the defendant as costs.

It is my opinion that it would be improper to issue a warrant in such circumstances. The situations in which a warrant may be issued by a justice of the peace in connection with arrests under § 46.1-178 are found in § 46.1-179, which reads as follows:

"If any person is: (1) Arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person; (2) believed by the arresting officer to have committed a felony; (3) believed by the arresting officer to be likely to disregard a summons issued under § 46.1-178; (4) charged with reckless driving; the arresting officer, unless he issues a summons, shall take such person forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons required by § 46.1-178, who shall determine whether or not probable cause exists that such person is likely to disregard a summons, and may issue either a summons or warrant as he shall determine proper."

Once a summons has been issued, therefore, either by the arresting officer or by the justice of the peace himself, the arrest procedure is
complete. A warrant should be issued only in lieu of a summons, not in addition to a summons.

The $3.00 fee should be charged against the defendant as costs only in cases where the warrant was properly issued. Therefore, if a warrant is issued after a summons has previously been issued, the warrant fee may not be charged against the defendant as costs.

I am attaching hereto a copy of an opinion previously issued to the Honorable W. H. Overbey on April 7, 1964, which also indicates that there is no authority for a justice of the peace to issue a warrant under these conditions.

DEEDS—Timber—Deemed sale of personalty where future growth merely incidental.

DEEDS—Timber—No tax imposed.

TAXATION—Recordation—Timber deed—No tax imposed.

September 1, 1970

THE HONORABLE J. FULTONAYRES, Clerk
Circuit Court of Accomack County

I have received your letter of August 24 in which you ask whether a tax is imposed by Virginia Code § 58-54.1 upon a deed conveying standing timber. The particular deed to which you refer provides that the grantee shall have three years in which to cut and remove the timber.

Section 58-54.1 corresponds to a federal stamp tax on deeds now repealed. In Milwaukee Land Co. v. Poe, 31 F.2d 733 (9th Cir. 1929), a contract for the sale of standing timber was found, under local law to be a deed, instrument or writing whereby lands, tenements or other realty was sold, so that the federal tax applied.

The rule in Virginia is otherwise. In Virginia, "when growing trees are sold under a contract providing for their separation from the soil immediately, or within a reasonable and convenient time, the contract converts them into personal property." Straley v. Fisher, 176 Va. 163, 168 (1940). The tax would not apply to such a contract.

Whether a specified time is reasonable and convenient will depend on the facts of each case. My interpretation of the Court's criterion is that the contract is to be considered a sale of personalty only if the future growth of the trees is merely incidental to the sale.

DENTISTS—Students—May not practice dentistry except as student under conditions established by § 54-147(3) of the Code.

May 7, 1971

DR. THOMAS C. BRADSHAW, President
Virginia State Board of Dental Examiners

This is in reply to your letter of May 3, 1971, in which you request my interpretation of § 54-147(3) of the Code of Virginia (1950), as amended, as it applies to a program proposed by the Dean of the Medical College of Virginia School of Dentistry. Specifically, the program suggested is outlined as follows:

"Two summer programs could be established immediately, on a pilot basis, to test the validity of this concept. The first would involve the assignment of highly qualified students to the offices of practitioners of recognized capability. The dentists who would participate
in this program would be selected by the Dental Education Committee of the Virginia Dental Association, in cooperation with the Board of Dental Examiners. Students would be chosen by the Faculty Council of the School of Dentistry. The participating dentists would be appointed to the faculty as instructors in the Department of General and Preventive Dentistry. A full-time faculty member would coordinate the entire program from his office at the school. He would pay periodic visits to the participating offices to assure that the student was gaining the maximum benefit from his experience.

"The second program would involve the assignment of selected students to various field offices in the Appalachian Region, now under the supervision of the State Department of Health. Students would only be assigned to those offices when the dentist in charge possessed a permanent state license to practice dentistry. Faculty would be requested to spend time with the students in these offices, particularly when services were being administered. (A portion of this program would be related to taking surveys and studying problems and probably would not require direct faculty supervision.)

"I would very much appreciate a prompt ruling from your offices as to whether such programs are legally permissible under our current statutes."

The program proposed would apply only to rising seniors in the dental school.

Section 54-147(3) of the Code provides:

"Nothing in the preceding section (§ 54-146) shall prevent: (3) students from performing dental operations, under the supervision of competent instructors within a dental school or college or dental department of a university or college recognized by the Virginia State Board of Dental Examiners; . . ."

Section 54-146 of the Code defines the practice of dentistry, and for the purposes of this opinion it is assumed that the acts to be performed by the students constitute the practice of dentistry and therefore, the only question raised is whether an exception is provided under § 54-147(3).

In my opinion, the programs outlined above do not fall within the exception provided in § 54-147(3) in that the dental operations performed would not be performed "within" the physical limits of the dental school, college or department. The statute clearly contemplates such physical presence within the confines of the school. The fact that the dentists involved would be appointed to the faculty as instructors in the Department of General Preventive Dentistry does not transfer the private practitioner's office into a portion of the dental school, college or dental department of such school or college. Of course, that portion of the program involving the State Health Department in which the students would be "taking surveys and studying problems" would not be prohibited in that this does not appear to constitute the practice of dentistry.

DISTRICTS—Redistricting—Definition of term "racial minority" in reference thereto.

May 17, 1971

THE HONORABLE CARL E. BAIN
Member, House of Delegates

I am in receipt of your letter of May 11, 1971, wherein you refer to the letter of May 7, 1971, from the Attorney General of the United States, signed by David L. Norman, Acting Assistant Attorney General, Civil Rights
Division, to the Governor of Virginia, interposing an objection to certain multi-member districts in Virginia's redistricting of her House of Delegates' legislative districts. You ask for the definition of the term "racial minority" as used in Mr. Norman's letter.

It is clear that Mr. Norman's use of that term was in the context of the Indiana case of *Chavis v. Whitecomb*, 305 F.Supp. 1364, 1373 (S.D. Ind. 1969). In describing the minority group in question, the three-judge Federal court in that case had reference to a "ghetto" area defined as follows:

"A primarily residential section of an urban area characterized by a higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom."

DOG LAWS—Dog Warden—Arlington County—Appointment provided by statute.

**March 23, 1971**

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

This is in reply to your letter of March 10, 1971, which reads, in part, as follows:

"A question has arisen regarding the legal status of the present Arlington County Dog Warden, and I would like to request your opinion in the matter.

"He was originally employed by, and has continued his employment, under the Arlington County Civil Service Commission, as authorized by former Virginia Code Sections 29-184.2 and 15.1-687. The 1970 amendment to Section 29-184.2, however, has changed the law to require appointment by the 'governing body of the County' apparently ending administration of the position through the Civil Service Commission.

"Does Section 29-184.2, as amended, apply only as of such time as the present Dog Warden completes his existing indefinite term of employment by the Civil Service Commission, or is the Arlington County Board required to forthwith appoint a dog warden in accordance with the provisions of revised Section 29-184.2?"

Section 29-184.2 of the Code of Virginia (1950), as amended by Chapter 112 of the 1970 Acts of Assembly, provides that the governing body of the county shall appoint the dog warden and that such appointments shall be by the governing body on or before the thirtieth day of June for one, two, three or four years, whichever is deemed appropriate in the sole discretion of the governing body commencing on the first day of July and expiring on the thirtieth day of June of the year of expiration.

I am of the opinion that the procedure established by this amendment is controlling and the Board of Supervisors of Arlington County is required to forthwith appoint a dog warden.

DOG LAWS—Dog Wardens—Not permitted to sell dogs.

**June 10, 1971**

**THE HONORABLE DON E. EARMAN**  
Member, House of Delegates
This is in reply to your letter of May 10, 1971, which has been supplemented by your letters of May 26 and June 8, 1971. You request an opinion as to the validity of an ordinance permitting a county dog warden to sell unlicensed dogs and appropriate the money to his own use. In this connection you have referred to § 29-194.1 of the Code and have forwarded for review the ordinances of the Board of Supervisors of Page County of January 8, 1962 and January 11, 1965.

Section 29-194.1 provides in part that the governing body of any county may maintain a pound and require dogs running at large without the tag required by § 29-191 to be confined therein. This section further provides that such governing body may require that any dog which has been so confined for a period of five days and has not been claimed by the owner thereof shall be destroyed or otherwise disposed of by the game warden of such county. In your letter of June 8, 1971, you advised that the ordinances you have furnished are all of the ordinances which have been adopted by the Page County Board of Supervisors relating to dogs. I have examined these ordinances and am unable to find in either where the Board of Supervisors has adopted the provisions of § 29-194.1.

The duty of game wardens regarding unlicensed dogs running at large is contained in § 29-199 which provides in part as follows:

“It shall be the duty of the game warden to kill any dog of unknown ownership found running at large on which license has not been paid; provided, that the game warden may deliver such dog to any person in his county or city who will pay the required license fee on such dog, with the understanding that should the legal owner thereafter claim the dog and prove his ownership, he may recover such dog by paying to the person to whom it was delivered by the game warden, the amount of the license fee paid by him and a reasonable charge for the keep of the dog while in his possession.”

This section provides no authority for a dog warden to sell any dog. On the contrary, he may only destroy the dog or deliver such dog to a person of his county who was willing to pay the required license fee. In addition if the legal owner of the dog should thereafter claim the dog and prove his ownership he may recover the dog by paying the amount of the license fee and a reasonable charge for the keep of the dog. This provision would not allow for the reimbursement of any purchase price a person may have paid the dog warden. It is my opinion that these provisions govern the disposition of unlicensed dogs whether or not the provisions of § 29-194.1 have been adopted by the Board of Supervisors. In view of the foregoing, it is my opinion that a dog warden could not sell unlicensed dogs and appropriate the money to his own use.

DRUGS—Drug Control Act—Prior action of Board of Pharmacy not necessary before criminal prosecution.

The Honorable Joseph H. Campbell
Commonwealth's Attorney for City of Norfolk

This is in response to your letter of August 26, 1970, in which you request my opinion as to the construction of Section 54-524.89 of the Code of Va., as amended. You stated, in part:

“Before any violation of this chapter is reported to any such attorney for the institution of a criminal proceedings (sic), the person against whom proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the Board or
its designated agent, either orally or in writing, in person, or by attorney, with regard to such contemplated proceeding."

You indicated that:

"I have been told that recently in Alexandria several charges of violation of the drug control act were dismissed, because of this section. Obviously the word 'chapter' was intended to be 'article'."

In my opinion, it is not necessary that every violation of the Drug Control Act be acted upon by the Board of Pharmacy prior to the institution of criminal proceedings against the person by the Commonwealth's Attorney or the local law enforcement officers and that the use of the word "chapter" in this section is proper.

One must read Va. Code Ann. Section 54-524.89 in its entirety in order to render a proper construction to the statute. Your letter provided the second sentence only. The first sentence of that section provides:

"It shall be the duty of each Commonwealth attorney to whom the Board reports any violation of this chapter to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law." (Emphasis supplied.)

The sentence you cited completes the section. It is clear that the entire section refers only to those actions that have been previously acted upon or are proper subjects for Board action, i.e., those disciplinary actions taken by it against persons licensed by that Board. As example, see Va. Code Ann. Section 54-524.16, and Section 54-524.33 (1950) as amended. Other violations of the Drug Control Act are without the scope of Va. Code Ann. 54-524.89 (1950) and may be proceeded against as would other criminal matters.

DRUGS AND DRUGGIST—Drug Control Act—Penalty provisions of §§ 54-524.55 and 54-524.106 not inconsistent with § 54-524.101.

January 18, 1971

THE HONORABLE ANDRE EVANS
Commonwealth's Attorney, City of Virginia Beach

This is in response to your letter of January 11, 1971 in which you asked my opinion regarding an interpretation of the Drug Control Act of 1970. You stated, in part:

"The question has been raised that as to whether or not § 54-524.101 is duplicitous and irreconcilable with § 54-524.55 of the 1950 Code of Virginia, as amended in 1970. The penalty for violation of acts under § 54-524.101 makes such offenses a felony whereas the same acts under § 54-524.55 are misdemeanors, it being noted that the penalty for acts prohibited under the last named section is found in § 54-524.106."

In my opinion, the two sections are not duplicitous and irreconcilable. A basic principle of statutory construction is that wherever possible the statute be construed so as to give effect to all sections. It is my opinion that such a construction can be given these sections of the Code.

Section 54-524.55 of the Code of Virginia provides:

"It shall be unlawful for any person to manufacture or produce any drug, or possess, have under his control, sell, prescribe, administer, dispense, compound or otherwise dispose of, any controlled drug except as authorized in this chapter."
Section 54-524.106 of the Code provides:

"Any person who violates any provision of this chapter, for which no penalty is specified, shall be deemed guilty of a misdemeanor . . ."  
(Emphasis supplied.)

In my opinion, § 54-524.55 of the Code states certain prohibited acts. These same acts are also prohibited by § 54-524.101 of the Code which describes as offenses, possession, distribution, possession with intent to distribute and manufacturing and prescribes penalties for their violation. Certain of the acts prohibited under § 54-524.101 are also proscribed by § 54-524.55 of the Code. Unlike the later section, however, § 54-524.101 does provide for penalties and is, therefore, excluded from the provisions of § 54-524.106 with the result that the three sections do not provide for separate and different penalties for the same crime.

EDUCATIONAL INSTITUTIONS—Employee Scholarships—Conditions under which permitted.

DR. T. MARSHALL HAHN, JR., President  
Virginia Polytechnic Institute and State University

I am in receipt of your letter of November 19, 1970, requesting my opinion concerning the establishment of a program for the further education of your faculty and staff and their dependents. You suggest that the Board of Visitors might, pursuant to its authority to specify conditions of employment, establish the program in order to improve the position of the University in the recruitment and retention of highly sought personnel.

Section 23-124, Code of Virginia (1950), as amended, gives the Board of Visitors of the University power to appoint professors. Section 23-125 allows the Board to prescribe the duties of each professor, and § 23-128 directs the Board to fix a "stated salary" for each professor. Read together these statutes authorize the Board to specify the conditions of employment of faculty and staff.

As you are aware, Section 23-31 limits the Board's authority to grant unfunded scholarships to students who fall within certain categories. This office has previously ruled that a College may not, pursuant to this provision, establish a policy of remitting or waiving fees for dependents of employees. Report of the Attorney General (1966-1967), p. 270. That section is, however, limited to the regulation of unfunded scholarships.

I am of the opinion that, consistent with § 23-31 of the Code, the Board may establish a program as you have outlined in your letter provided that such a program does not utilize unfunded scholarships subject to the regulation of § 23-31. The establishment of such a program could be authorized by the Board pursuant to its powers to specify conditions of employment. The benefits of such a program could be extended to all three categories of persons listed in your letter.

I also wish to call to your attention Chap. 461 § 41, Acts of Assembly of 1970, which provides that:

"Subject to uniform rules and regulations established by the Governor, the head of any State department, institution or other agency may authorize, from any funds appropriated to such department, institution or other agency in this act or subsequently made available for the purpose, compensation or expenses or both compensation and expenses for employees pursuing approved training courses or academic studies for the purpose of becoming better equipped for their employment in the State service. The rules and regulations shall in-
clude reasonable provision for the return of any employee receiving such benefits for a reasonable period of duty, or for reimbursement to the State for expenditures incurred on behalf of the employee."

This provision provides an additional approach for the granting of tuition to your employees. Enclosed please find a memorandum dated June 12, 1968, from John W. Garber, Director of Personnel, to The Heads of All State Agencies. This memorandum sets forth the rules and regulations designed to implement the foregoing provision of the Appropriations Act.

EDUCATIONAL INSTITUTIONS — Employee Scholarships — Unfunded — Limitations on. December 8, 1970

DR. JAMES L. BUGG, JR., President
Old Dominion University

I acknowledge receipt of your letter of November 30, 1970, concerning the granting of unfunded scholarships by Old Dominion University. In your letter you state that the University now grants twenty-three unfunded scholarships to the school boards of neighboring localities to be awarded to students in these localities. Under certain circumstances, Old Dominion also awards unfunded scholarships to faculty and staff dependents. You have asked my opinion of the legality of these two practices.

Section 23-49.18, Code of Virginia (1950), as amended, providing that the Board of Visitors may fix tuition rates, is limited by § 23-31 which regulates the granting of unfunded scholarships. That section provides that unfunded scholarships may be granted under such regulations and conditions as the Board of Visitors may prescribe, but subject to the following limitations:

"(1) All such scholarships shall be applied exclusively to the remission, in whole or in part, of instructional charges, which charges or fees except for laboratory fees shall be included in a single item designated as tuition.

"(2) The number of such scholarships awarded in any one institution for any year to Virginia students therein shall not be in excess of twenty per centum of the enrollment of Virginia students in undergraduate studies in such institution for the preceding year. . . .

"(3) Such scholarships shall be awarded only to undergraduate students in the first four years of undergraduate work, and shall not be renewed for any subsequent year after the first unless the holder thereof maintains a high scholastic standard.

"(4) Such scholarships shall be awarded by the governing boards of the respective institutions on a selective basis to students of character and ability who are in need of financial assistance.

"(5) Each scholarship awarded shall entitle the holder thereof to the remission of not less than one half of the annual tuition charge to nonscholarship holders at such institution, provided that no such remission shall exceed in value the sum of three hundred dollars."

The scholarships which you mention may be granted provided they meet the foregoing limitations of § 23-31 of the Code. I hasten to add that § 23-31 concerns only unfunded scholarships. It does not limit the University's authority to grant funded scholarships or to make arrangements with its faculty and staff for the education of their dependents pursuant to § 23-49.17 setting forth the powers of the Board of Visitors.

I also wish to call to your attention Chap. 461 § 41, Acts of Assembly of 1970, which provides that:
“Subject to uniform rules and regulations established by the Governor, the head of any State department, institution or other agency may authorize, from any funds appropriated to such department, institution or other agency in this act or subsequently made available for the purpose, compensation or expenses or both compensation and expenses for employees pursuing approved training courses or academic studies for the purpose of becoming better equipped for their employment in the State service. The rules and regulations shall include reasonable provision for the return of any employee receiving such benefits for a reasonable period of duty, or for reimbursement to the State for expenditures incurred on behalf of the employee.”

This provision provides an additional approach for the granting of tuition to your employees. Enclosed please find a memorandum dated June 12, 1968, from John W. Garber, Director of Personnel, to The Heads of All State Agencies. This memorandum sets forth the rules and regulations designed to implement the foregoing provision of the Appropriations Act.

ELECTIONS—Absentee Ballot; Mandatory to State Reason for Applying for; Registrar May Request Doctor’s Certificate.

MRS. JEAN P. HUFFMAN
General Registrar of Page County

I am in receipt of your letter of April 22, 1971, wherein you inquire whether you may demand a doctor’s certificate from individuals who are qualified to apply for an absentee ballot under the provisions of § 24.1-227 (4) of the Code of Virginia (1950), as amended.

Section 24.1-227 (4) reads:

“The following persons may vote by absentee ballot in accordance with the provisions of this chapter in any election in which they are qualified to vote:

* * *

“(4) Any duly registered person who is ill or physically unable to attend the polls on the day of election.”

An application for an absentee ballot by such persons is, insofar as pertinent, pursuant to § 24.1-228 (3) (c):

“(3) An application made under subsections 3 or 4 of § 24.1-227 . . . shall be signed by the applicant in the presence of one subscribing witness, who shall subscribe the same and vouch, subject to the penalty of perjury, that to the best of his knowledge and belief the facts contained in the application as to which he has knowledge, are true and shall contain the following appropriate information:

* * *

“(c) In the case of a person who is ill or physically unable to attend the polls on the day of election, the nature of the illness or physical disability;”

As this office has previously ruled, the reasons for applying for an absentee ballot must be set forth on the application and this is a mandatory requirement. See opinion to Mrs. Waneta M. Buckley, General Registrar of Fairfax County, dated February 16, 1971, found in the Report of the Attorney General (1970-1971), p. , wherein this office so ruled, copy of which I am enclosing. Absentee voting is a privilege granted electors and is not
an absolute right. Each registrar should insure that sufficient statements are set forth to verify in his judgment that only those eligible for absentee ballots receive them. In order to make this verification, I am of the opinion that a registrar under sufficient circumstances is justified in requesting a doctor’s certificate. I know, however, of no authority for a registrar to require that every application by persons coming within the provisions of § 24.1-227 (4) be accompanied by a doctor’s certificate.

ELECTIONS—Absentee Ballot; Who May Assist Educationally Handicapped Individuals in Marking.

April 20, 1971

THE HONORABLE HOWARD C. MORRIS
General Registrar for Giles County

I am in receipt of your letter of April 13, 1971, wherein you inquire who may legally assist educationally handicapped individuals in the marking of an absentee ballot applied for under the provisions of § 24.1-227 (1) of the Code of Virginia (1950), as amended.

Section 24.1-227 provides who may vote by absentee ballot and sets out four classes of individuals who may so vote. Subparagraph (1) provides the following as one class who may vote by absentee ballot:

"Any duly registered person who will, in the regular and orderly course of his business, profession, or occupation or while on vacation, be absent on the day of election from the county or city in which he is entitled to vote;"

Such individuals, however, must apply for an absentee ballot in person and must mark the ballot before either the general registrar or secretary of the electoral board and immediately return the marked ballot, the same not to be removed from the office of the registrar or secretary. See §§ 24.1-229 and 24.1-232.

The marking of an absentee ballot is the same as provided in § 24.1-129 of Chapter 7, Article 1, "The Election."

Section 24.1-132 contained in such Article provides:

"Any qualified voter who is physically or educationally unable to prepare his ballot without aid, may, if he so requests, be aided in the preparation of his ballot by one of the officers of election designated by himself, except that any qualified voter who is blind may be so aided by any person designated by himself. The officer of election or other person so designated shall assist the qualified voter in the preparation of his ballot in accordance with his instructions, but shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote. For a willful violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months."

I am of the opinion that such provision would apply mutatis mutandis to the registrar or secretary of the electoral board as it applies to officers of election. Either the secretary or registrar may legally assist educationally handicapped voters in the marking of an absentee ballot.

I am enclosing herein a copy of an opinion of this office to Mr. Grier L. Carson, Secretary, Augusta County Electoral Board, dated October 22, 1969, and found in the Report of the Attorney General (1969-1970), p. 113, which I believe is also pertinent to your inquiry.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Absentee Ballots—Employee of registrar may not furnish ballot to applicant.

ELECTIONS—Absentee Ballots—Employee of registrar may act as notary, unless is candidate.

ELECTIONS—Registrars—Employees may not furnish absentee ballots, but may act as notary, if not a candidate.

July 16, 1970

THE HONORABLE ANN C. ROUDABUSH
Registrar, City of Richmond

This is in reply to your letter of June 22, 1970, in which you state:

“"In regard to the duties of the Registrar with reference to absentee ballots. My understanding of the law is, after the application of an individual requesting an absentee ballot is certified by the Registrar to the effect they are properly registered to vote, it is then turned over to the Secretary of the Electoral Board and they either mail the ballot or give it to the individual in person. My question is does an employee of the Registrar have the right to furnish an absentee ballot to the applicant and vote them in person if they are a notary public?""

In my opinion an employee of the registrar may not furnish an absentee ballot to an applicant. Section 24-327 of the Code of Virginia (1950), as amended, provides that the ballot is to be furnished by the electoral board by registered mail or given by it to him personally. The employee of the registrar is not prohibited from acting as a notary under the provisions of § 24-334 unless he is a candidate for nomination and therefore precluded by § 24-335 from performing in this capacity.

ELECTIONS—Absentee Ballots—Should be forwarded to qualified voter even if necessary postage not tendered; substantial compliance required.

ELECTIONS—Absentee Ballots—Applicant who fails to forward any postage should be refused ballot.

ELECTIONS—Absentee Ballots—Stating reasons for applying for is mandatory requirement.

ELECTIONS—Revised Constitution Does Not Distinguish Between Cities of First and Second Class.

ELECTIONS—No Change in Law for Elections for Officials Who Serve Both a County and a City of Second Class.

February 16, 1971

MRS. WANETA M. BUCKLEY
General Registrar of Fairfax County

I am in receipt of your letter of January 15, 1971, wherein you set forth the following questions which will be answered seriatim:

“"Question: Section 24.1-228 (3) (f) of the revised election laws, requires that certain applications for absentee ballots shall be accompanied by cash or postage to cover the cost of mailing the ballots to the voters. If a properly completed application is received from a qualified voter, but it is not accompanied by the proper amount of cash or postage, should a ballot be mailed to the voter with postage paid by the County, or, should he be refused a ballot for his failure to send postage?""
Answer: I am enclosing a copy of an opinion to the Honorable Levin Nock Davis, Secretary of the State Board of Elections, dated October 21, 1947, wherein this office previously ruled that an absentee ballot should be forwarded a qualified voter notwithstanding that necessary postage is not tendered. Although the exception mentioned in the enclosed ruling [that "failure to enclose the necessary postage shall not render void a vote"] is no longer found in the present statute, I am nevertheless of the opinion that such ruling is still valid.

The construction to be given absentee voting laws is substantially set forth in 26 Am.Jur.2d, Elections, § 245, p. 73, which reads:

"Absentee voting laws usually contain detailed provisions with respect to the preparation and furnishing of ballots for use by absentee voters, the time and manner of making application therefor, and the manner of marking and returning the same to the election officers. The scope, application, and effect of such provisions depend, of course, on the proper construction of the statutes. Although there is no longer authority for the view that absentee voting laws should be strictly construed, in most jurisdictions absentee voting laws have been liberally construed so as to further their purpose of protecting and furthering the right of suffrage.

"There is authority to the effect that absentee voting laws are merely directory. However, as a general rule the statutory directions to the voter with respect to the time and manner of making application for an absentee ballot, the manner of marking the same, the taking of the prescribed affidavit, and the return of the ballot together with the affidavit, are regarded as mandatory, and strict compliance therewith is required. In most jurisdictions, substantial compliance with mandatory provisions is all that is required."

In view of the above, I feel that substantial compliance with § 24.1-228 (3) (f) is required. As indicated in the enclosed Davis opinion, if the necessary postage is not tendered a ballot should nevertheless be forwarded. However, where there is, by failure to forward any postage, no attempt to comply with statutory requirements then the applicant should be refused a ballot.

"Question: If an application for absentee ballot from a qualified voter does not contain certain required information, should the voter be refused a ballot? (We are particularly concerned about persons who are physically unable to go to the polls, who may understandably have reservations about stating the nature of their illness or disability.)"

Answer: Stating reasons for applying for an absentee ballot is a mandatory requirement. Section 24.1-227 of the Code sets forth who may vote by absentee ballot. Each registrar should insure that sufficient statements are set forth, as required by § 24.1-228, to verify that only those eligible for absentee ballots receive them. This is, of course, a judgment to be made by each registrar. While one isn’t required to state in detail the nature of his illness or cause of physical disability, sufficient information must be set out to insure his qualification under the provisions of the absentee ballot law.

"Question: Has there been any change in Title 15.1-994 of the Code of Virginia, relative to elections for officials who serve for both a county and a city of the second class? In 1971 elections for Sheriff and Commonwealth’s Attorney, will the Fairfax County Electoral Board still be required to prepare ballots, appoint election officials, etc., for the Cities of Fairfax and Falls Church?"
Answer: There has been no change in the law with regard to elections for officials who serve both a county and a city of the second class. The new Constitution, Article VII, does not distinguish between cities of the first and second class, and does require each county and city to elect a treasurer, a sheriff, an attorney for the Commonwealth, a clerk of court for the office where deeds are recorded, and a commissioner of the revenue. However, a "county or city not required to have or to elect such officers prior to the effective date of [the] Constitution shall not be so required. . . ." Article VII, Section 4.

ELECTIONS—Absentee Voting by Members of Armed Forces—Application for absentee ballot not in conformity with law when received prior to forty days before election.

ELECTIONS—Members of Armed Forces May Use Postcard Application for Absentee Ballot.

THE HONORABLE L. STANLEY HARDAWAY
Executive Secretary, State Board of Elections

January 20, 1971

I am in receipt of your inquiry of December 21, 1970, regarding the Revised Election Law applicable to absentee voting by members of the armed forces. You first inquire as follows:

"According to Section 24.1-228 of the Code the applications for absentee ballots are to be sent to the appropriate registrar not less than five nor more than forty days prior to the election in which the applicant offers to vote. If this time limit applies to servicemen and their spouses, what must the registrars do who receive them earlier or later?"

Section 24.1-228 of the Code of Virginia (1950), as amended, provides that "[a]ll applications for absentee ballots shall be made in writing to the appropriate registrar and delivered to him by the applicant in person or by mail as may be required not less than five nor more than forty days prior to the election in which the applicant offers to vote." I find no exceptions to the above provision and am thus constrained to rule that only those applications received during the period set forth should be processed by the registrars. If an application is received prior to forty days before an election, the registrar should notify the applicant that the application is not in conformity with law. Of course, no application may be received less than five days before an election.

Your next inquiry is as follows:

"Also, may the members of the armed forces and their spouses use the Postcard Form 76 application which is supplied at all military and naval installations by the United States Government? This form contains all the necessary information required to obtain a ballot under the new law."

This inquiry may be answered in the affirmative. Section 24.1-228 sets forth how applications for absentee ballots shall be made. You will note that § 24.1-228 (1) requires that applications made by individuals under § 24.1-227 (1) [absent while on vacation or business] must be made on a form furnished by the registrar. There is no requirement that such form must be used by servicemen who make application pursuant to § 24.1-228 (2).

With reference to your last inquiry, concerning the necessity of servicemen using Registered Mail in returning absentee ballots, this problem as previously indicated has been brought to the attention of Statutory Research and Drafting which, I understand, is drafting a bill in this regard.
ELECTIONS—All Members of General Assembly Have Right to Insist Upon a Primary.

ELECTIONS—Right of Incumbent Senator to Insist Upon Primary Relates Only to the Particular Seat He Holds, Not to All Seats in General Assembly for That County or City.

ELECTIONS—Party May Fill Different House or Senate Seats by Varying Methods of Nomination.

ELECTIONS—Reapportionment—Would create new seat for which there is no incumbent.

ELECTIONS—No Names of Political Parties Shall Appear on Ballots, Except in Presidential Elections.

ELECTIONS—General Assembly Would Have to Amend Election Laws if Deadline for choosing Method of Selecting Nominees Is to Be Extended.

January 11, 1971

THE HONORABLE HERBERT H. BATEMAN
Member, The Senate

I am in receipt of your inquiry regarding that portion of § 24.1-172 of the Code of Virginia (1950), as amended, which reads:

"Each party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committee, except that no party which at the immediately preceding election for a particular office nominated its candidate for such office by a primary, and such nominee was elected at the general election, shall choose to nominate a candidate for the next election for such office by any method other than by a primary, without the consent of the incumbent. (Emphasis added.)

"Nothing in this article shall be construed to limit or circumcribe the power of any political party to prescribe the rules and regulations for its own government, and to determine its own methods of making nominations for public office."

Based upon the following facts, you raise six questions which will be answered seriatim:

FACTS: "I was selected as the nominee of the Democratic Party for the Virginia Senate in a primary in 1967. The three incumbent members of the House of Delegates from Newport News were also selected as Democratic nominees in that primary election. In 1969, the three incumbent members of the House of Delegates offered as candidates for the Democratic nomination subject to a primary but being unopposed no primary was held nor was a convention held. They were certified by the Democratic Committee as Democratic nominees in the general election."

Question 1. "Whether I am the only member of the Newport News delegation to the General Assembly having the right to insist upon a primary or whether the members of the House of Delegates from Newport News also have that right;"

Answer: All members of the General Assembly from Newport News have the right under the above statute to insist upon a primary. Though the incumbent Delegates were unopposed at the last primary and thus became nominees for the general election under the provisions of § 24-350 of the Code [now § 24.1-175], they in fact became candidates pursuant to the method of nomination adopted by the party—a primary.
REPORT OF THE ATTORNEY GENERAL

Question 2. "Does any right which I may have to insist upon a primary relate only to the Senate seat or does it embrace all the seats in the General Assembly for the City of Newport News;"

Answer: Any rights you possess under the above statute relate only to the particular seat you hold, the Senate seat for the 27th Senatorial District, which comprises the entire City of Newport News.

Question 3. "To the extent either I or others have any right to insist upon a primary election for the House of Delegates, does this right, if exercised, require a primary as to all three nominees for the House of Delegates or could it be exercised so as to require a primary as to the seat being held by one or two of the incumbents but not all;"

Answer: As indicated above, I am of the opinion that the statute in question relates to each and every seat up for election. Consequently a situation may well arise where there is a primary for one House seat held by an incumbent and another method of nomination for the House seats held by the other incumbents. Section 24.1-173 would forbid a party from nominating by convention a candidate for the seat subject to the primary, but there is no prohibition for a party to fill different House or Senate seats by varying methods of nomination.

Question 4. "In the event, through the reapportionment process, the Newport News Senatorial District is expanded or contracted, how would this affect my right to insist upon a primary as opposed to a convention method of selecting a nominee?"

Answer: As indicated, the statute in question relates to the specific seat in question. If through reapportionment the make-up of such seat is changed either by enlargement (e.g., Newport News is enlarged to encompass additional political subdivisions) or contraction (e.g., a portion of Newport News is separated and placed with another political subdivision) then I am of the opinion that a new seat is created for which there is no incumbent. The pertinent language in the second paragraph of § 24.1-172 would not therefore be applicable.

Question 5. "If a change in size or make-up of the district is finally determined by the General Assembly at a time subsequent to the time by which party committees are supposed to give notice of the method of selecting nominees, [and] all candidates simply run in the general election as Independents . . . could a candidate's name appear on the ballot as (a) an Incumbent-Democrat, (b) as an Independent-Democrat, (c) as an Independent-Republican or (d) only as a Democrat or Republican."

Answer: Section 24.1-111 provides that "[n]o names of political parties shall appear on the ballot, except in presidential elections. . . ."

Question 6. "Is it possible that the deadline for choosing the method of selecting nominees would, under the circumstances posed in question 5, be waived or extended by virtue of necessity, or would the General Assembly have to amend the present election laws if deadlines were to be extended."

Answer: The General Assembly would have to amend the present election laws if deadlines are to be extended.

ELECTIONS—Amendments to Election Laws and Reapportionment Bills May Be Implemented; No Objection Interposed by Attorney General Within Sixty Days after Submission.
VOTING RIGHTS ACT—No Objection Interposed by Attorney General Within Sixty Days After Submission; Period Not Extended by Asking for Additional Information.

May 3, 1971

MRS. JOAN S. MAHAN, Secretary
State Board of Elections

I am in receipt of your letter of April 27, 1971, which reads as follows:

"In consideration of the requirements of Section 5 of the Voting Rights Act of 1965, it will be appreciated if you will render your opinion as to the effective date of Chapter 119 [the amendments to the election laws] and the reapportionment bills, Chapters 116, 118 and 120 which were forwarded to the Attorney General of the United States on March 2, 1971."

As indicated in the ruling to you, issued by this office on March 29, 1971, the Reapportionment Acts became law upon the Governor's signature and also became effective upon his signature, in accordance with the provisions of Article II, Section 6, of the revised Constitution of Virginia. The amendments to the Election Laws, Title 24.1 of the Code of Virginia (1950), contained in Chapter 119 similarly became law upon signature of the Governor and their effective date is as indicated by Section 2 of the Act which reads:

"The amendments to § 24.1-90 shall be effective on and after January one, nineteen hundred seventy-three. The amendments to §§ 24.1-31, 24.1-86, 24.1-227, 24.1-228 and 24.1-229 shall be effective at noon, July one, nineteen hundred seventy-one. An emergency exists and all other provisions of this act are in force from its passage."

However, as indicated in our previous ruling, though an Act may become law and be effective, there still remains the question whether such laws may be implemented.

As we have previously advised, changes in voting procedures and laws may not, after they are effective, be implemented immediately; Virginia being one of the States subject to the 1965 Voting Rights Act, 42 U.S.C. § 1973. et seq.

Section 5 of the Voting Rights Act provides that any change in law affecting voting procedures may be enforced by a State if such change has been submitted to the Attorney General of the United States "... and the Attorney General has not interposed an objection within sixty days after such submission..."

The four Acts of the General Assembly about which you inquire were personally delivered by the Governor to the Attorney General of the United States on March 2, 1971. They were submitted as required by Allen v. Board of Elections, 393 U.S. 544, 571, 22 L.ed.2d 1, 89 S.Ct. 817 (1969), in an "unambiguous and recordable manner... directly to the Attorney General with a request for his consideration pursuant to the Act." There can be no doubt that such delivery constituted a submission.

Additionally, submitted with the Acts was related information, including maps showing the changed boundaries of the Congressional, Senate and House legislative districts, in order to enable the Attorney General to understand the changes proposed.

A request for further information was subsequently received from the Department of Justice on or about March 18, 1971, and immediate fulfillment of that request was made four days later (including a weekend). That was immediately followed up the next day, March 23, 1971, by this office personally going to the Department of Justice and advising them in detail as to all changes and reasons for such changes. A subsequent visit to this office was made by the Department of Justice on April 6, 1971, for an additional
REPORT OF THE ATTORNEY GENERAL

conference. Numerous phone calls were also made with an attempt always to provide promptly documented responses to all inquiries, including responses to written complaints received by the Department of Justice from various sources, the majority of which complaints, if not all, were received between February 24, 1971, and March 11, 1971.

Pertinent to your inquiry, this office has received no communication from the Attorney General regarding the Acts in question and it has been verified that no letter has been sent by the Attorney General with regard to the submission of March 2, 1971. The sixty day period from that date expired on May 1, 1971, and I am unaware of any provision that would extend the period in question. Consequently the Reapportionment Acts and those revisions of the election laws contained in Chapter 119 which have become effective may now also be implemented; "... the Attorney General ... not interposing an objection within sixty days after ... submission . . .".

The language of the Voting Rights Act, specifically 42 U.S.C. § 1973 (c), cannot be plainer. It is unambiguous and expresses the clear intent that there be a sixty day period provided, within which the Department of Justice is given power to disapprove administratively any changes in voting procedures. At the expiration of this period so also expires the Attorney General's power to administratively disapprove. Failure to disapprove, however, does not bar any subsequent action to enjoin in a legal proceeding the enforcement of a qualification, standard, practice or procedure affecting the right to vote.

An interpretation of the Act allowing the Attorney General to extend the sixty day period merely by asking for additional information would indefinitely postpone the implementation of any voting procedure. It would further be contrary to the Congressional purpose in establishing the sixty day submission period and would destroy certainty with regard to all election processes, creating chaos in the representative form of government mandated by the Constitution of the United States.

Any departure from the mandate of the statute should be only by legislative amendment thereto.

All other changes affecting voting procedures were submitted to the Attorney General on March 23, 1971, and the sixty day period for review of those changes will not expire until May 22, 1971, at which time they may be implemented, there being no objection by the Attorney General.

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ELECTIONS—Assistant General Registrar May Also Be Employed in Treasurer's Office as Part-Time Employee—Employee and not officer of county.

THE HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

February 24, 1971

I am in receipt of your letter of February 11, 1971, wherein you inquire if an assistant general registrar may also be employed in the treasurer's office as a part-time employee.

Section 24.1-43 of the Code of Virginia (1950), as amended, provides for the employment of registrars and their qualification. Such registrars "shall not hold any other office, by election or appointment, during [their] term; ..." Section 24.1-44 further provides that "the appointment or election of a general registrar to any other office shall vacate the office of general registrar."

Section 24.1-45 provides for the appointment of assistants to general registrars. Such statute clearly states that assistants "shall have the same limitations, qualifications and fulfill the same requirements as the general registrar except that an assistant registrar may be an officer of election." I presume for the purposes of this opinion that the position in your office...
would definitely be that of an employee and would not be considered an
office of the county. If so, I am of the opinion that your inquiry may be
answered in the affirmative.

I have also, in responding to your inquiry, considered § 15.1-50 which pro-
hhibits treasurers of the counties with certain exceptions, none being perti-
nent, from holding any other office, elective or appointive. As this office has
previously ruled, such prohibition would apply not only to the treasurer
but any assistant. However, in view of the fact that the position in your
office is that of a part-time employee and is not an elective or appointive
office, I find that § 15.1-50 is not applicable.

Generally with regard to indicia of office as compared to employment, see

ELECTIONS—Assistant Registrar May Notarize Absentee Ballot—See §
24.1-45.

THE HONORABLE L. STANLEY HARDAWAY
Executive Secretary, State Board of Elections

I am in receipt of your letter of December 21, 1970, wherein you request
my opinion as to whether an assistant registrar may notarize an absentee
ballot under the provisions of the revised election laws.

Section 24.1-45 of the Code of Virginia (1950), as amended, is responsive
to your inquiry and reads as follows:

"The electoral board shall determine the number, set the term, and
establish the duties of such assistant registrars as may be required.
The general registrar shall appoint such assistants who shall have
the [same] [sic] limitations, qualifications and fulfill the same re-
quirements as the general registrar except that an assistant registrar
may be an officer of election. Their compensation shall be fixed and
paid [by] [sic] the local governing body."

In view of the above, your question is answered in the affirmative.

ELECTIONS—Ballot—Names of candidates may be listed in any manner
providing a "due and orderly succession."

MR. E. J. SULZBERGER, JR., Chairman
Hampton Electoral Board

I am in receipt of your letter of August 18, 1970, with enclosures,
wherein you request an opinion of this office whether the Hampton Electoral
Board must follow the form of ballot supplied by the State Electoral Board
regarding the order listing United States Senate candidates. This inquiry
is answered in the negative.

The listing of the names of the candidates must meet the requirements
of § 24-215 of the Code of Virginia (1950), as amended, and be "in due and
orderly succession." The form of the ballot, in addition to meeting the
requirements of § 24-215 must within the jurisdiction of each electoral
board "be the same in all places when the same persons shall be voted for
to fill the same office."

I would point out that this office has previously interpreted the "due and
orderly succession" requirement to mean that incumbents could be listed
first, the names could be listed in alphabetical order, or the names could be
listed according to the date of filing.

The form suggested by the State Board of Elections complies with each
of the above interpretations.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Candidate—Must be qualified to vote for the office.

MENTALLY ILL—Person Adjudicated Mentally Incompetent—May not be candidate.

THE HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County

This is in response to your letter of June 21, 1971, in which you inquire whether an individual who has been committed, through standard judicial procedure, to Eastern State Hospital as a mental incompetent, might have his name placed on the ballot in the general election. You indicated that this man's name was not stricken from the list of registered voters when he was committed.

As you are aware, Article II, Section 1, of the new Constitution of Virginia, to be effective July 1, 1971, states in part:

"As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished."

Furthermore, Article II, Section 5, stipulates that in order to hold any elective office in the Commonwealth, the prospective candidate must be qualified to vote for that office.

I am of the opinion that the gentleman to which you refer should have been stricken from the list of registered voters upon his commitment. Moreover, he would be unqualified to seek elective office in Mathews County until such time as his mental competency has been reestablished "as prescribed by law."

In commenting upon this provision, the Commission on Constitutional Revision stated that: "Restoration of the right to vote (to a mental incompetent) could be accomplished by either judicial or nonjudicial proceedings, as the General Assembly sees fit." Report of the Commission on Constitutional Revision (1969), p. 107. However, the current legal incompetency procedure, which would affect the right to vote, is entirely judicial. See §§ 37.1-127 through 37.1-147 of the Code of Virginia (1950), as amended.

It is my opinion that only upon a judicial finding of competency could an individual, who had been judicially declared incompetent, register to vote or have his name placed on a ballot for elective office in the Commonwealth. The discharge papers from a state institution would not be determinative of mental competency in so far as qualification for elective office is concerned.

ELECTIONS—Candidate for Office Must Be Qualified Voter at Time of Election; Must Be Resident of District at Time He Offers.

ELECTIONS—Candidates; Independents and Primary Nominees Must Be Residents by Deadline for Filing as Candidates; Party Nominees Other Than by Primary, by Certification Date.

MRS. JOAN S. MAHAN, Secretary
State Board of Elections

I am in receipt of your letter regarding candidates for the General Assembly wherein you inquire whether a person must be a resident of and a qualified voter of the election district in which he would offer as a candidate for nomination or election at the time he so offers.

I am enclosing copies of prior opinions of this office to the Honorable Henry E. Howell, Jr., Member, the Senate, dated March 8, 1971, found in the Report of the Attorney General (1970-1971), pp. 132-134; and to the
Honorable C. Harrison Mann, Jr., Member, the House of Delegates, dated April 25, 1967, found in the Report of the Attorney General (1966-1967), p. 131, therein referred to, in which similar matters were previously considered. These opinions would be applicable to those candidates nominated by primary or convention as well as to independent candidates.

As previously ruled in the Mann opinion, one at the time of offering as a candidate need not be a qualified voter provided such qualifications would be met by the time of the general election. See also §§ 24.1-182 and 24.1-183. In the Mann opinion the individuals in question, though not qualified voters, were residents. The Howell opinion considered for the first time whether an individual must be a resident at the time he offers as a candidate. I hereby reaffirm these rulings.

Article IV, Section 4, of the revised Virginia Constitution sets forth the qualifications as to who may be elected to the Senate or House of Delegates and reads:

"Any person may be elected to the Senate who, at the time of the election, is twenty-one years of age, is a resident of the senatorial district which he is seeking to represent, and is qualified to vote for members of the General Assembly. Any person may be elected to the House of Delegates who, at the time of the election, is twenty-one years of age, is a resident of the house district which he is seeking to represent, and is qualified to vote for members of the General Assembly. A Senator or Delegate who moves his residence from the district for which he is elected shall thereby vacate his office."

This provision must be read in conjunction with Article II, Section 5, of the Constitution which sets forth the qualifications to hold an elective office and states in pertinent part:

"The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year and be qualified to vote for that office, except as otherwise provided in this Constitution, ... ."

The basic principle of Section 5 is that those persons and only those persons entitled to vote for an office elective by the people are entitled to hold that office.

In order to be qualified to vote for an office, one must first be registered and a registrar must insure that the residency requirements of Article II, Section 1, will be met prior to registering an individual.

A candidate for office must demonstrate that he will at the time of election be qualified to hold the office for which he is running. This can only be done by a proper foundation being laid in order that the Commonwealth, prior to incurring the cost of utilization of her electoral machinery, may determine that an individual will meet the qualifications that he is a resident and a registered voter, a registered voter being a qualified voter. Therefore, an individual offering as a candidate must be a resident of the district for which he offers at the time he offers. Independent candidates and candidates for nomination by primary must be residents by the deadline for filing as a candidate. Party candidates nominated by a method other than primary must be a resident of the district by the date of certification as required by § 24.1-169. Resident in this regard means a candidate must actually reside in the district from which he offers. Such an individual need not be a qualified voter at that time, provided he will meet the qualifications to hold office and vote by the date of the general election.
ELECTIONS—Candidate for Public Office—Employee of county may be.

COUNTIES—Zoning Administrator—May offer for public office.

THE HONORABLE JOSHUA PRETLOW
County Attorney for Nansemond County

This is in reply to your letter of March 16, 1971, in which you request my opinion whether the Zoning Administrator for Nansemond County may seek the Democratic nomination as a constitutional county official and offer in the general election while retaining the position of Zoning Administrator.

There is no statute which prevents a person who is in the employment of a county from running for an elective office. I am aware of no ordinance of the county which would prevent this. I am, therefore, of the opinion that the Zoning Administrator for Nansemond County may seek the Democratic nomination as a constitutional county official. Whether he may continue to hold office as Zoning Administrator until the date of election depends upon his ability to perform his duties as Zoning Administrator while running for public office.

ELECTIONS—Candidate in Multi-member District Must Obtain Greater Number of Signatures on Petition Than for Single District Senatorial Seat—Not violative of Fourteenth Amendment Equal Protection Clause.

THE HONORABLE HENRY E. HOWELL, JR.
Member, The Senate

I am in receipt of your letter of December 11, 1970, relative to the Virginia Election Law, and that portion of § 24.1-185 of the Code of Virginia (1950), as amended, as applied to multi-member districts, which requires a candidate in a primary for a State Senate or House seat to file with a declaration of candidacy “a petition therefor signed by a number of qualified voters equal to at least one per centum of the number of voters registered within the election district as of the first day of January of the year preceding the year in which such petition must be filed.”

As you point out, a candidate for office in a multi-member district, such as the Second Senatorial District which presently has three seats, must obtain a greater number of signatures on the required petition than a candidate for a single district senatorial seat.

You ask if, in my opinion, the statute in question would be unconstitutional as violative of the Fourteenth Amendment Equal Protection Clause.

I have thoroughly reviewed the pertinent cases touching upon the subject matter of your letter and am of the opinion that your inquiry must be answered in the negative. The requirement in question is not an undue burden nor does it lack the equality to which the exercise of political rights is entitled. The fact that a greater number of signatures must be obtained in multi-member districts does not amount to a discrimination violative of the Fourteenth Amendment.

ELECTIONS—Candidate Must Be Qualified Voter on Date of Primary; Not Necessary at Time of Filing Notice of Candidacy.

ELECTIONS—Candidate Must Be Resident of District at Time of Filing Notice of Candidacy.

THE HONORABLE HENRY E. HOWELL, JR.
Member, The Senate

March 26, 1971

December 18, 1970

March 8, 1971
REPORT OF THE ATTORNEY GENERAL

I am in receipt of your letter of March 4, 1971, wherein you advise that you may offer for election from the newly created Seventh Senatorial District in Norfolk instead of from the Fifth Senatorial District where you now reside. You inquire:

"...if I offer in the Democratic Primary for District Seven, do I have to live in that district on the date of the primary, prior thereto, or do I meet all qualifications so long as I reside in the Seventh District on the date of the general election."

Section 24.1-183 of the Code of Virginia (1950), as amended, provides:

"The name of a candidate shall not be printed upon any official ballot used at any primary unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary in which he seeks to be a candidate."

Further, Section 35 of the Constitution of Virginia (1902) provides:

"No person shall vote at any legalized primary election for the nomination of any candidate for office unless he is at the time registered and qualified to vote at the next succeeding election."

In view of the above, I am of the opinion that you must be a qualified voter and thus resident of the Seventh Senatorial District on the date of the primary in order to offer as a candidate from that district. You do not at the time of filing your notice of candidacy have to be a qualified voter of the Seventh District, as long as you will be qualified to vote in the primary. See previous opinion to the Honorable C. Harrison Mann, Jr., Member, House of Delegates, dated April 25, 1967, and found in Report of the Attorney General (1966-1967), p. 131, wherein this office so ruled.

Although, as indicated, it is not necessary to be a qualified voter of the district at the time of filing your notice of candidacy, I am of the opinion that, in order for such notice to be properly filed, one must be residing in the district at the time notice is filed thereby laying the foundation for registration as a voter, whether by transfer or otherwise, prior to the primary date.


March 31, 1971

THE HONORABLE HENRY E. HOWELL, JR.
Member, The Senate

I am in receipt of your inquiry of March 24, 1971, wherein you ask my opinion as to the legality of the action of the City of Norfolk Democratic Committee of reportedly requiring a Senatorial candidate for the Democratic primary to pay to the Committee a fee of $200.00 and requiring a fee of $100.00 from House candidates. Additionally, if the fee can be imposed, you inquire whether such requirement is subject to the provisions of the Voting Rights Act of 1965.

I am enclosing herein a copy of an opinion to the Honorable Robert A. Maloney, Member, House of Delegates, dated December 16, 1968, wherein this office has previously ruled that a political party which selects the primary method of nomination must follow all statutory provisions relating to the primary. Sections 24-364 and 24-347 quoted in the Maloney opinion are now §§ 24.1-172 and 24.1-170, respectively, of the Code of Virginia (1950), as amended.

The power to nominate party candidates is one of the inherent powers of any political party. Such power is reflected in the Democratic Party Plan wherein § 3 under "Democratic County and City Committees" states:
"Said county and city committees shall have charge of the nomination of candidates of the party in their respective jurisdictions and shall regulate and direct same."

Primary laws enacted by a state legislature do not confer such power on a political party or compel its use. They do however, when adopted by the party as the method of nomination, regulate the exercise of the power of selecting candidates. Again, such a policy is reflected in the Democratic Party Plan wherein § 11 states in pertinent part:

"Whenever such nominations for office or elections of committee-men or delegates are ordered to be made by primary election such primary elections shall be held in conformity with all of the provisions of State primary law."

Also, § 24.1-170 states:

"A primary when held shall be conducted in all respects under the provisions of this article."

When a primary method of nomination is chosen, the only fee required of a candidate is the filing fee set forth in §§ 24.1-198 and 24.1-199. The only time the party is granted, under the primary laws, the right to set a filing fee is in the case of a candidate for an office for which compensation is paid in whole or in part by fees. In all other instances candidates for salaried office must pay a filing fee of two percent of one year's salary. I am of the opinion that under the primary laws no other fee may be extracted from an individual as a condition of his qualification as a candidate in the primary.

In view of the above, your remaining inquiry regarding submission under the Voting Rights Act does not demand a reply. But see, however, Commonwealth v. Willcox, 111 Va. 849, 859, 69 S.E. 1027 (1911); and cf. United States v. Democratic Executive Committee of Wilcox, Alabama, — F.Supp. — (S.D. Ala. 1970), C.A. No. 6047-70-P.

ELECTIONS—Central Registration Roster—Board of elections may start now gathering necessary data for establishment in 1973.

ELECTIONS—Central Registration Roster—Giving social security number not now prerequisite to voting.

July 9, 1970

The Honorable Henry E. Howell, Jr.
Member, The Senate

I am in receipt of your telegram of July 6, 1970, which in pertinent part reads as follows:

"I am advised . . . that the State Board of Elections has instructed . . . electoral boards to determine from prospective voters in the July primary social security numbers of persons planning to participate in the election. . . . The Virginia election laws governing the July primary and November general elections contain no such provision although changes may take effect after the November election. I submit that the Voting Rights Act will require this significant change in voting and registration procedures to be first approved by the Attorney General of the United States. I respectfully request the . . . elimination (tions of) any requirement that a voter show his social security card or give his social security number as a prerequisite to voting on July 14, until such requirement actually becomes law and until the State Board of Elections and local electoral boards give full and com-
complete disclosure of such facts to the electorate by appropriate publicity. Your prompt advice and opinion will be greatly appreciated."

The Senate Journal reflects that you cast an affirmative vote in the passage of H.B. 125, now enacted as Chapter 462 of the 1970 Acts of Assembly. You are aware, therefore, that one of the requirements the new Act places upon the State Board of Elections is to establish on or before October 1, 1973, a Central Registration Roster of all registered voters in the Commonwealth. To facilitate and enable such a roster to be established, one of the requirements on registration application forms is that a "social security number, if any, or other identification number, be obtained."

In an effort to commence the task placed upon them, the State Board of Elections, by memorandum to all general registrars, dated June 26, 1970, a copy of which I attach, suggested that the securing of social security numbers be obtained. A similar memorandum was forwarded to all secretaries of electoral boards. You will note that a voter need not give his social security number as a prerequisite to voting. As the memorandum states, the social security numbers are being "secured on a voluntary basis and if a voter objects to furnishing his number it definitely (will) have no bearing on his eligibility to vote."

Chapter 462 which as stated requires the Central Registration Roster, was approved and enacted on April 3, 1970, but does not become effective until December 1, 1970. However, "(t)here is nothing in the Act to indicate any intention on the part of the legislature to require the board to wait until the law would inevitably become effective before signifying approval of its terms, and (I) perceive no reason or principal which would require such a course." Burks v. Commonwealth, 126 Va. 763, 767, 101 S.E. 230 (1919).

The evident purpose of the legislature was that a Central Registration Roster be established on or before October 1, 1973. This requirement necessitates the securing of social security numbers for all registered voters in the Commonwealth. I am of the opinion that this task may properly be commenced by the State Board at the July primary in the manner which they have done.

Your assertion that Chapter 462 of the 1970 Acts of Assembly would, under the Voting Rights Act of 1965 require approval by the Attorney General of the United States, appears to be correct. Following adjournment of the General Assembly this office did submit to the Honorable John N. Mitchell, Attorney General of the United States, pursuant to Section 5 of the Voting Rights Act, the chapter in question. By letter dated June 26, 1970, the Attorney General of the United States informed this office that no objection would be interposed to this enactment. Chapter 462, therefore, has been approved as being in compliance with the Voting Rights Act.

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ELECTIONS—Charter of City of Hampton—Portion establishing time for election of officers which differs from general law is unconstitutional.

ELECTIONS—Time for Holding Election Does Not Apply to "Organization and Government of a City."

ELECTIONS—City Officers—Terms of.

CHARTERS—If in Conflict With General Law, Charter Prevails if Enacted Pursuant to Section 117 of Constitution.

THE HONORABLE HUNTER B. ANDREWS
Member, The Senate

November 23, 1970

I am in receipt of your inquiries on behalf of yourself and the Honorable John D. Gray and the Honorable Richard M. Bagley, members of the House
of Delegates from the City of Hampton, as to the applicability, to the City of Hampton, of a recent ruling of this office to the Honorable Richard D. Guy, Member of the House of Delegates from Virginia Beach, dated September 17, 1970. Enclosed for your information is a copy of that ruling.

I am of the opinion that, for reasons set forth below, the Guy opinion is not directly applicable to the City of Hampton but that the same result will be reached. That is, the city sergeant, commissioner of revenue, Commonwealth's attorney and city treasurer of the City of Hampton should be elected in the general election of 1973.

Pertinent to your inquiry and the Guy opinion is § 24.1-86 of the Code of Virginia (1950), as amended, which reads as follows:

"The qualified voters of the various counties shall elect a sheriff, an attorney for the Commonwealth, a treasurer, and a commissioner of the revenue at the general election in November, nineteen hundred and seventy-one, and every four years thereafter.

"The qualified voters of the various cities shall elect a city sergeant, an attorney for the Commonwealth, a treasurer, a commissioner of the revenue, and such other elective city officers not otherwise provided for by law or charter, at the general election in November, nineteen hundred and seventy-three, and every four years thereafter.

"Such officers shall hold office for a term of four years from the first day of January next succeeding their election."

In Virginia Beach the officers in question were elected in 1967 for terms of four years. This office ruled that § 24.1-86 which requires city officers to be elected in 1973 was not in conflict with §§ 119 and 120 of the Virginia Constitution. These sections read in part:

"§ 119. In every city, so long as it has a corporation court, or a separate circuit court, there shall be elected, for a term of four years, by the qualified voters of such city, one attorney for the Commonwealth, who shall also, in those cities having a separate circuit court, be the attorney for the Commonwealth for such circuit court.

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

"§ 120. In every city there shall be elected, by the qualified voters thereof, one city treasurer, for a term of four years; one city sergeant, for a term of four years, whose duties shall be prescribed by law..."

The reason § 24.1-86 was not in conflict with these sections was because it still retained the term of the offices listed at four years and did not extend the terms to a six year period. Section 33 of the Constitution provides that such officers remain in office until their successors qualify.

But the Charter of the City of Virginia Beach regarding election of city officers reads:

"§ 21.02. Election of Constitutional Officers. The offices of clerk of the circuit court, attorney for the Commonwealth, commissioner of revenue, city treasurer and city sergeant shall be elective and filled in accordance with the provisions of the Constitution of the Commonwealth and in accordance with the provisions of general law."

As you can see this Charter provision is not in conflict with general law and would be controlled by the second paragraph of § 24.1-86.

You advise that the pertinent provisions of the Charter of the City of Hampton, § 14.08, Chapter 9, 1952 Acts of Assembly, Extra Session, read:
"The city sergeant, attorney for the Commonwealth, commissioner of the revenue and treasurer of the City of Hampton shall be elected in the manner and for the terms provided by general laws affecting cities of the first class, except that they shall be elected at the times provided by general law for the election of county sheriffs, county commissioners of the revenue, county treasurers and county attorneys for the Commonwealth respectively."

This Charter provision is in conflict with the general law and appears to be controlled by the first paragraph of § 24.1-86 requiring elections in 1971. Where a charter provision is in conflict with provisions of general law, the former prevails if enacted pursuant to the provisions of § 117 of the Constitution of Virginia which allows the General Assembly to enact special legislation for the "organization and government of cities and towns." Pierce v. Dennis, 205 Va. 478 (1964).

When such special legislation has no bearing on the "organization and government" of cities and towns, then § 63 of the Constitution would be applicable which provides:

"The General Assembly shall not enact any local, special or private law in the following cases:

* * *

"(11) For conducting elections or designating the places of voting."

I am of the opinion that the time for holding an election does not apply to the organization and government of a city. See opinion of this office to the Honorable Leroy S. Bendheim, Member of the Senate, dated March 17, 1965, found in the Report of the Attorney General (1964-1965), at page 104; also opinion to the Honorable J. C. Kyle, Secretary of Galax Electoral Board, dated April 26, 1956, found in the Report of the Attorney General (1955-1956), at page 62, copies of which I enclose. Further, I am aware of the case of Town of Narrows v. Board of Supervisors of Giles County, et al., 128 Va. 572 (1920), but find it distinguishable.

Consequently, that portion of the Hampton City Charter establishing the time for election of officers which differs from the general law is, pursuant to § 63, unconstitutional. Paragraph 2 of § 24.1-86 would control the time when city officers are to be elected—1973. The Guy opinion to this extent is applicable.

ELECTIONS—Charter of City of Harrisonburg—Portion of § 24.1-90 establishing time for councilmanic election prevails over City Charter.

ELECTIONS—Charter of City of Harrisonburg—Prevails over general law as to date elected officials take office.

ELECTIONS—Councilmen—Terms of.

THE HONORABLE DON E. EARMAN
Member, House of Delegates

I am in receipt of your letter of December 28, 1970, regarding Chapter II, § 4, of the Harrisonburg City Charter which reads:

"The Council shall consist of five (5) members who shall be elected at large and who shall hold office for a term of four (4) years from the first day of September next following the date of their election and until their successors have been duly elected and qualified, provided that at the first municipal election under this charter, which shall be held at the second Tuesday in June, 1952, the five persons elected as councilmen thereat shall hold office as follows, to-wit: The
three (3) candidates receiving the highest number of votes at said election shall hold office for four (4) years each and the two (2) candidates receiving the next highest number of votes at said election shall hold office for only two (2) years each. In the year 1954 and every second year thereafter a municipal election for the election of councilmen shall be held on the second Tuesday in June."

You inquire:

"In view of Section 24.1-90 of the Code of Virginia, as amended, . . . providing for city elections on the first Tuesday in May and taking office on the first day of July following, I would like your opinion as to what status those councilmen elected for four (4) year terms to expire in September shall have."

Sections 63 and 117 of the Virginia Constitution are applicable to your inquiry. I am enclosing herewith a copy of an opinion of this office to the Honorable Hunter B. Andrews, Member, The Senate, dated November 23, 1970, which discusses the relationship of §§ 63 (11) and 117 of the Virginia Constitution specifically with regard to the time of holding an election. There has been no major change in § 63 (11) by the revised Constitution. Consequently that portion of § 24.1-90 which requires a councilmanic election on the first Tuesday in May would prevail over that portion of the City Charter, in conflict, requiring councilmanic elections on the second Tuesday in June.

Of course also in conflict with § 24.1-90 is that portion of the City Charter requiring those individuals elected to take office on the first day of September next following their election, while general law requires those individuals elected to take office on the first day of July. But in this regard I am of the opinion that the Charter provision would prevail.

A law which "touches upon . . . the holding of public office" is one for the organization and government of a city within the meaning of § 117. See Pierce v. Dennis, 205 Va. 478, 138 S.E.2d 6 (1964); also opinion of this office to the Honorable Bernard Levin, Member, House of Delegates, dated August 28, 1967, found in the Report of the Attorney General (1967-1968) at page 44, a copy of which I enclose.

The terms of councilmen now holding office would therefore expire in September when their successors, elected in May, take office in accordance with the terms of the Charter.

ELECTIONS—Councilman—Residency redefined to require both domicile and place of abode.

ELECTIONS—Councilman—Not "qualified elector" unless he has place of abode in city.

The Honorable Benjamin H. Woodbridge, Jr.
Member, House of Delegates

January 8, 1971

I am in receipt of your letter of December 22, 1970, regarding a "member of the Fredericksburg City Council who commenced serving his present four year term of office on September 1, 1968, resides in Stafford County, Virginia. Under the applicable provision of the Fredericksburg City Charter, the only requisite for qualification as a Councilman was that the candidate be 'a qualified elector'. This gentleman is registered to vote in the City of Fredericksburg and, therefore, was qualified to serve under the Charter."

You point out that § 24.1-1 (11) of the Code of Virginia (1950), as amended, has redefined residency to require both domicile and a place of
abode and thus raise the following questions relating to the councilman, each of which will be answered seriatim:

"1. Assuming that this councilman has met all the requirements of the City Charter, is there any provision in the new election law which would make him ineligible to complete his present term of office?"

Answer: No.

"2. If he has not established a residency in the City of Fredericksburg, when his term of office expires, would he be eligible for re-election if he is nothing more than a qualified voter in the City?"

Answer: No. Section 24.1-41 requires that in order to be eligible to vote a citizen must be a resident of the county, city or town in which he offers to vote. Residency, as you point out, requires both domicile and a place of abode. Unless the councilman in question has a place of abode in Fredericksburg he would not be eligible to vote in the City and thus would not, in my opinion, be a "qualified elector" within the meaning of the City Charter.

ELECTIONS—Date Incumbent Must Declare Whether He Wants Primary for Nomination Again.

ELECTIONS—Declaration Whether Incumbent Wants Primary for Nomination Again Should Be in Writing.

ELECTIONS—If Party Calls for Primary, Incumbent May Not Veto.

November 10, 1970

THE HONORABLE L. STANLEY HARDAY
Executive Secretary, State Board of Elections

I am in receipt of your letter of October 7, 1970, wherein you enclose certain inquiries pertaining to § 24.1-172 of the Code of Virginia (1950), as amended, the relevant portion thereof reading:

"Each party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committee, except that no party which at the immediately preceding election for a particular office nominated its candidate for such office by a primary, and such nominee was elected at the general election, shall choose to nominate a candidate for the next election for such office by any method other than by a primary, without the consent of the incumbent."

You specifically inquire "at what date an incumbent, who had been heretofore nominated by his party by a primary, and elected at a general election, has to declare whether he wants a primary for nomination again."

Section 24.1-176 requires that a political party within the State must notify the State Board of Elections whether it has adopted the primary method of nominating candidates. Such notification must be made "not more than one hundred and ten days and not less than ninety days before the date set for the primaries."

I am of the opinion that an incumbent must declare that he will require a primary again within sufficient time to enable the party to comply with the requirements of § 24.1-176. Though there is no formal procedure as to how such incumbent must make his declaration known, I am of the opinion that it must be made in some unambiguous and recordable manner. It should therefore be done in writing rather than verbally.
Lastly you inquire if the party can "act to call a primary and then have the incumbent veto the act?" This question should be answered in the negative. Section 24.1-172 gives an incumbent power to veto any method for nominating candidates other than a primary. Such incumbent has no authority to veto the primary method of selecting candidates.

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**ELECTIONS—Definition of "Political Party" for Appointment of Officers of Election—Independent candidate would not be a "party" candidate.**

**ELECTIONS—Officers of Election—Representation in appointing should be given to parties casting highest and next highest number of votes at preceding general election.**

January 21, 1971

THE HONORABLE J. MERCER WHITE, JR.
County Attorney of Henrico County

I am in receipt of your letter of January 19, 1971, regarding §§ 24.1-32 and 24.1-105 of the Code of Virginia (1950), as amended. Section 24.1-105 provides that the electoral board of each county and city must, during the first seven days of February each year, appoint three individuals as officers of election whose term of office commences the first day of March following the appointment. Section 24.1-32, as pertinent to your inquiry, provides that "[i]n appointing the officers of election, representation shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes."

You ask for my opinion as to the general makeup for the officers of election since an independent was elected at the last general election. Political party is defined by § 24.1-1 (7) as:

"'Party' or 'political party' shall mean an organization or affiliation of citizens of the Commonwealth which, at the last preceding statewide general election, polled at least ten percent of the total vote cast for the office filled in that election by the voters of the Commonwealth at large. Such organization or affiliation of citizens shall also have a State central committee and a duly elected chairman which have continually been in existence and holding office for the six months preceding the filing of a nominee;"

An independent candidate would not be a 'party' candidate. Representation in appointing officers of election should still, therefore, be given to the parties casting the highest and next highest number of votes at the November 1970 general election. Though representation must be given to both parties, there is no requirement that a majority of the election officers be of the party which cast the highest number of votes. See opinion of this office to the Honorable John N. Dalton, Member, House of Delegates, dated June 16, 1970, found in the Report of the Attorney General (1969-1970), at page 119, copy of which I enclose.

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**ELECTIONS—Democratic Party Plan Committeeman Election Conducted Under State Primary Laws; Petition Necessary.**

February 10, 1971

THE HONORABLE JOHN B. JAMES, Chairman
Electoral Board of Virginia Beach

I am in receipt of your letter of February 3, 1971, which reads:

"Under Section 24.1-185 of the Code of Virginia, regarding the necessity of a petition to accompany the declaration of a candidate
for any office, a certain number of qualified voters must sign such petitions.

"I have been asked, and would appreciate your opinion, if such petitions, signed by the required number of qualified voters, will be needed in connection with the declaration of candidates for the office of Committeeman, on a local level, under the State Democratic Party Plan."

Section 1 of the Democratic Party Plan provides that when an election of committeemen is by primary it is to be conducted under the State primary laws. Such section reads as follows:

"1. The Democratic voters of each county and city shall elect a Democratic committee prior to December 31, 1971, and prior to December 31st of every second year thereafter. The existing committee shall determine the basis of representation on said committee; provided, however, that each precinct shall be represented on the committee to be elected by at least one full-voting member of said committee who shall be at the time of his election a resident of said precinct. Whenever the election of said committeemen is by some other method than a primary election conducted under the State primary laws, then in such case notice of the time, place and method for the election of said committeemen shall be given by posting the same at each precinct in said county or city and/or by publication in a newspaper of general circulation therein at least ten days prior to the time for such election."

In view of the above I am of the opinion that your inquiry should be answered in the affirmative.

ELECTIONS—District Court Order Postponed Primary Date.

ELECTIONS—Filing Deadlines for Legislative Districts Not Affected.

ELECTIONS—Disposition of Printed Primary Ballots Dated June 8, 1971; Absentee Ballots.

MRS. JOAN S. MAHAN, Secretary
State Board of Elections

May 28, 1971

I am in receipt of your letter of May 26, 1971, wherein you raise various questions and request my opinion on how the election laws have been affected by the Order entered in the reapportionment cases on May 24, 1971, by the United States District Court for the Eastern District of Virginia and how you should administer the election laws under such Order.

First, it should be emphasized that the ruling of the Court did not declare invalid any portion of Virginia's reapportionment legislation. The Court found that it had no jurisdiction to approve or disapprove the ruling of the Attorney General of the United States dated May 7, 1971, objecting to certain portions of the redistricting Acts. The Court therefore held that, until the issues raised by the ruling of the Attorney General of the United States were settled, it had no justiciable issue in regard to any other portions of the reapportionment legislation.

As reflected by the above, the Court by its Order has merely stated that the June 8th primary will be held on September 14th. The ruling of the Attorney General of the United States has been held to be timely and implementation of legislative redistricting plans in those areas covered by the objection is barred. Once redistricting plans for the areas affected are reinstated, the nominating processes for these areas would begin anew,
pending of course any objection by the Attorney General under the Voting Rights Act. This opinion, therefore, deals with those legislative districts not affected by the ruling of the Attorney General. Though a new procedure must be followed in the areas affected, I am of the opinion that any administration by you of the Court's Order as to the unaffected areas should not involve the administration of any new procedures.

In order to be eligible to have one's name printed on the ballot as a candidate for office in the general election in November, one must either file as an independent candidate or become a party nominee either through the primary method or in some other manner such as by convention or mass meeting.

As for independent candidates, § 24.1-166 of the Code of Virginia (1950), as amended, provides for the method of their filing as a candidate. In view of the Court's Order, I am of the opinion that such candidates may file the required notice and petition no later than the time fixed for the closing of the polls of the primary which has now been postponed until September 14th. Such independents may file at any time, unless they intend to be a candidate for boards of supervisors, in which case they may file a declaration any time within thirty days preceding the second Tuesday in September. See § 24.1-172.

Regarding those candidates who intend to become nominees by the primary method, the action of the Court, as indicated, merely postponed the primary date; it did not extend the time for filing notices of candidacy and consequently only those individuals who filed for the primary by the deadline of April 9, 1971, may be placed on the primary ballot. Those individuals who have been declared the party nominees in accordance with § 24.1-175 would remain the nominees.

Conventions or mass meetings at which nominees were chosen that were held prior to the injunction would, in my opinion, be valid since they were lawful when held and such validity has not been disturbed by any Court Order. Conventions or mass meetings for nominating candidates, to be convened subsequent to the May 24th injunction, must be held not more than thirty days prior to the primary which has now been postponed to September 14th. Those conventions for which such a call has already been issued may be convened and recessed to a date definite within the thirty days prior to September 14th in order to avoid the necessity of a new call.

The foregoing determination would of course be limited to election districts that remain unchanged. If any election districts are subsequently changed, either by action of the General Assembly or Court Order, new nominating processes and qualification of candidates would be required.

I believe that, in light of these conclusions, your questions may now be answered seriatim:

"(1) What effect does the postponement of the primary date have on the nominations made by convention or mass meetings held prior to May 24, 1971?"

Answer: None.

"(2) What effect does the postponement of the primary date have on nominations of candidates who have been declared the nominees of the party in accordance with Section 24.1-175?"

Answer: None.

"(3) When should conventions or mass meetings, that were not held prior to May 24, 1971, for the purpose of nominating candidates for any office to be voted on at the general election on November 2, 1971, be held?"

Answer: None.
Answer: Within thirty days of September 14, though conventions previously called may be convened and recessed until such period.

“(4) May a person other than a candidate for a party nomination or party nominee who intends to be a candidate for any office to be voted on November 2, 1971, give such notice up until 7:00 P. M. of September 14, 1971?”

Answer: Yes, provided candidates for boards of supervisors must file within the thirty days preceding September 14th.

“(5) Will September 14, 1971, now be considered the regular primary date for this year?”

Answer: Yes.

“(6) May this office in 1971 accept certifications by party chairmen of candidates nominated by any method any time through September 24, 1971, as provided by Sections 24.1-166 and 24.1-169 of the Code?”

Answer: Yes; provided, however, that the nomination of a candidate, by means other than primary, between May 24th and thirty days prior to September 14th may not be properly certified since the nominating process would clearly not have concluded within thirty days prior to the September 14th primary.

Your last two questions deal with the problem of primary ballots which have been printed and in some cases voted by absentee ballot. The Court in its Order gave no direction as to how to treat such ballots. I am of the opinion that the most effective way to deal with these problems would be in the manner indicated by your questions, each of which would therefore be answered in the affirmative. Such questions were as follows:

“(7) Should the printed primary ballots dated June 8, 1971, be sent to the clerk of the court of record wherein deeds are recorded of the counties and cities within the Commonwealth for deposit in a secure place in his office, where they shall be safely kept for twelve months and then destroyed by the clerk in accordance with Section 24.1-144?

“(8) Should the absentee ballots that have been marked and returned to the local electoral boards also be sent to the clerk of the court’s office unopened for safekeeping in accordance with Section 24.1-144, and the applications held by the secretary of the electoral board for reprocessing within forty days before September 14, 1971, pursuant to Section 24.1-228 as amended?”

ELECTIONS—Election Official Must Be Qualified Voter for All Elections During Term of Office—Person under twenty-one could not be appointed.

ELECTIONS—Person Under Twenty-one May Serve in Specific Federal Election Where Appointed Officer Failed to Attend Election.

February 12, 1971

THE HONORABLE JOHN N. DALTON
Member, House of Delegates

I am in receipt of your letter of January 26, 1971, which reads:

“I would appreciate your opinion concerning whether a person 18, 19 or 20 years of age who has qualified as a voter in a Federal Election in Virginia may serve as an election official at one of our pre-
cincts in the Commonwealth. Please let me know if you feel that such a person could serve as an election official in a Federal Election but not as an election official in a State Election.

Section 24.1-105 of the Code of Virginia (1950), as amended, is applicable to your inquiry and reads in pertinent part as follows:

"It shall be the duty of the electoral board of each city and county, at their regular meeting in the first seven days of the month of February each year, to appoint not less than three competent citizens, being qualified voters, whose terms of office shall begin on the first of March following their appointment, who shall constitute the officers of election for all elections to be held in their respective election districts for the term of one year or until their successors are appointed."

I am of the opinion that the citizens appointed as officers of election must be qualified voters for all elections that could possibly occur during their terms of office. Due to the possibility of special elections to fill vacancies, this naturally would mean both federal and state elections. Your first question is therefore answered in the negative.

Although election officials are appointed for terms and not for a specific election, a situation could arise as contemplated by § 24.1-108 where an officer fails to attend an election. If this occurs in a federal election then I am of the opinion an individual below age twenty-one, who is a qualified voter, may be appointed as an officer of election for that specific election.

ELECTIONS—Executive Secretary Form of Government—Offices of treasurer and commissioner of revenue should not appear on ballot.

CONSTITUTION—Revision Will Not Prevent Adoption of County Executive Form of Government.

TREASURERS—Executive Secretary Form of Government—Office of should not appear on ballot.

COMMISSIONERS OF REVENUE—Executive Secretary Form of Government—Office of should not appear on ballot.

THE HONORABLE PAUL B. EBERT
Commonwealth’s Attorney of Prince William County

December 9, 1970

I am in receipt of your inquiry of November 20, 1970, which reads as follows:

"At the recent November election, the County of Prince William adopted the executive secretary form of government in accordance with Sections 15.1-588 to 15.1-621, 1950 Code of Virginia, as amended, which is to take effect January 1, 1972 and does not provide for a treasurer or commissioner of revenue. As you know, the Constitution of the State of Virginia was changed by referendum of the people to take effect July 1, 1971. Article VII, Section 4 of the Constitution provides that every county shall have a treasurer and commissioner of revenue, excepting those counties which have already adopted forms of government not requiring such officers or counties that would hold an election for the same prior to the effective date of the new Constitution.

"Please give me your opinion indicating whether or not the County of Prince William should have the offices of treasurer and commissioner of revenue appear on the ballot in November of 1971."
Article VII of the new Constitution of Virginia is entitled “Local Government.” Section 4 of such article entitled “County and city officers” is pertinent to your inquiry and reads:

“There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act. Regular elections for such officers shall be held on Tuesday after the first Monday in November. Such officers shall take office on the first day of the following January unless otherwise provided by law and shall hold their respective offices for the term of four years, except that the clerk shall hold office for eight years. The General Assembly may provide for county or city officers or methods of their selection, including permission for two or more units of government to share the officers required by this section, without regard to the provisions of this section, either (1) by general law to become effective in any county or city when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon in each such county or city, or (2) by special act upon the request, made after such an election, of each county or city affected. No such law shall reduce the term of any person holding an office at the time the election is held. A county or city not required to have or to elect such officers prior to the effective date of this Constitution shall not be so required by this section. The General Assembly may provide by general law or special act for additional officers and for the terms of their office.” (Emphasis supplied.)

The language of Section 4 as emphasized above clearly provides that the General Assembly without regard for the provisions of the section may provide for various county officers and the methods of their selection, thus providing for varying forms of county organization as presently allowed in Section 110 of the Virginia Constitution.

The last sentence of the third paragraph of Section 4 (a county or city not required to have or to elect such officers prior to the effective date of this Constitution shall not be so required by this section) merely prevents application of the section to those counties which have abolished one or more officers under the present Constitution and to those cities of the second class which do not have a court, Commonwealth’s attorney or court clerk. It would not be applicable to your inquiry nor would it prevent the adoption of the county executive form of government and thus the abolition of the offices of treasurer and commissioner of the revenue to be effective subsequent to the effective date of the new Constitution.

I am therefore of the opinion that your inquiry should be answered in the negative; the offices of treasurer and commissioner of revenue should not appear on the ballot in November of 1971.

**ELECTIONS—Fair Elections Practices Act Applies to Write-in Candidate Who Seeks Office.**

**ELECTIONS—Write-in Candidate Who Seeks Office Must Appoint Campaign Treasurer.**

**ELECTIONS—Write-in Candidate Elected but Did Not Seek Office, Not Subject to All Provisions of Fair Elections Practices Act; Need Not Appoint Campaign Treasurer.**

ELECTIONS—Fair Elections Practices Act Violations Prosecuted by Commonwealth's Attorney of Local Jurisdiction.

FAIR ELECTIONS PRACTICES ACT—Violations Prosecuted by Commonwealth's Attorney of Local Jurisdiction.

April 12, 1971

THE HONORABLE C. ALTON LINDSAY, SR.
Secretary, City of Hampton Electoral Board

I am in receipt of your letter of March 29, 1971, wherein you inquire if an individual who conducts a campaign as a write-in candidate is subject to the Fair Election Practices Act, Chapter 9, Title 24.1 of the Code of Virginia (1950), as amended, §§ 24.1-251 et seq.

The provisions of the Fair Election Practices Act are applicable to all elections held in the Commonwealth (except Congressional elections which are governed by 2 U.S.C. § 246) and impose certain duties upon candidates in the elections. The word "candidate" is not itself defined in the election law except that it includes "a person who, by reason of receiving the nomination for election to an office of a political party, is referred to as a 'nominee'." Though "candidate" generally denotes the person voted for at an election, this is but a secondary meaning. Primarily "candidate" means one who seeks an office of honor. See 6 Words and Phrases, p. 62.

Upon a review of the Fair Election Practices Act, I am of the opinion that it does apply to a write-in candidate who seeks an office within the primary meaning of the word "candidate."

Even though there is no time limit as to when a write-in candidate must qualify, he must still appoint a campaign treasurer in order to fulfill the remaining requirements of the Act, though I would point out that the requirements of § 24.1-253 are not applicable to any election held prior to June 1, 1971. See § 24.1-253 (d).

An individual who does not become a candidate in that he does not seek or offer for office but nevertheless is elected on a write-in basis would not be subject to all the provisions of the Fair Election Practices Act and thus would not appoint a campaign treasurer. Though not subject to all of the provisions of the Act, such individual would still, in my opinion, have to comply with the provisions of § 24.1-260 which reads:

“No person shall be permitted to qualify for any office under the laws of this Commonwealth, or enter upon the duties thereof, or receive any salary or emoluments therefrom until he shall have filed the statements provided for in § 24.1-257 (1) and (2); and no officer authorized by the laws of this Commonwealth to issue certificates of election shall issue a certificate of election to any person claiming to be elected to any such office, until copies of such statements as aforesaid shall have been made and filed under oath, by such person with such officer.”

Lastly, you point out that violation of the Fair Election Practices Act is a misdemeanor and inquire as to the responsibility in such cases of the local Board. Responsibility for the prosecution of misdemeanors would lie with the Commonwealth's Attorney of the local jurisdiction.

ELECTIONS—Fair Elections Practices Act of Virginia—Valid exercise of police power.

June 14, 1971

THE HONORABLE LAWRENCE D. WILDER
Member, Senate of Virginia
REPORT OF THE ATTORNEY GENERAL

This is in response to your letter of June 1, 1971, in which you inquire as to the constitutionality of the Fair Election Practices Act of Virginia. More specifically, the statute as found in Chapter 9 of the Election Laws, § 24.1-251 through § 24.1-261 of the Code of Virginia (1950) as amended. As you know, the statute requires that a candidate for public office make a disclosure to the State Board of Elections of all moneys received or disbursed in relation to his candidacy.

Upon researching this issue, it becomes clear that matters pertaining to election of candidates for public office are proper subjects for legislative regulation within constitutional limitations.

Similar statutes to the Fair Election Practices Act have been challenged and upheld in other jurisdictions. See Annot., 69 A.L.R. 377 (1930). Under the criteria set forth by these authorities, I am of the opinion that the Fair Elections Practices Act meets the requisites of a constitutionally valid exercise of the police power of the Commonwealth.

ELECTIONS—Filing Date for Candidate for Town Office for May 1971 Election Under 1971 Amendment to § 24.1-166.


March 4, 1971

THE HONORABLE DUNCAN C. GIBB
Member, House of Delegates


Section 24.1-166, which was effective December 1, 1970, provided that a candidate for office, which would include a candidate for a town office (See § 24.1-91), must file a notice of candidacy "... at least sixty days before a general election held in May, ...". As you know § 24.1-90 requires that elections for mayor and councilmen of a town shall take place on the first Tuesday in May. Sixty days prior to such election would be March 5, 1971.

Additionally with the notice of candidacy, § 24.1-168, effective December 1, 1970, required that a petition be filed. Such petition must be signed by the number of qualified voters equal to at least one percent [but not less than fifty such signatures] of the number of voters registered within the election district as of the first day of January of the year preceding the year in which such petition is filed.

As you indicate in your letter, certain of these provisions of law have been amended by Senate Bill No. 53 which did become effective by the Governor's signature on March 1, 1971. The pertinent changes contained in Senate Bill No. 53 are that § 24.1-166 now requires a notice of candidacy be filed by the first Tuesday in March for a general election to be held in May, rather than sixty days before such election. Additionally, § 24.1-168 requires that a petition be filed containing signatures of one hundred twenty-five registered voters, provided that candidates in a town having less than one thousand registered voters are not required to file any petition.

You request my opinion as to whether the filing date for the May 1971 election would be March 2nd or March 5th, and further request that I comment on the petition requirements for such election.

I am of the opinion that pertinent to your inquiry is 42 U.S.C. 1973 (c) (Section 5 of the Voting Rights Act of 1965). Such section requires in part that "Whenever a State or political subdivision [covered by the Voting Rights Act] ... shall enact or seek to administer any voting qualification or prerequisite to voting, ... different from that in force or effect on November 1, 1964 ... such qualification [or] prerequisite, ... may be en-
forced . . . [only] if the qualification [or] prerequisite, . . . has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, . . .”.

The provisions enacted by Senate Bill No. 53 were submitted to the Attorney General on March 2nd. The sixty day period within which an objection may be interposed has obviously not yet elapsed. Consequently, I am of the opinion that the provisions of §§ 24.1-166 and 24.1-168, as effective December 1, 1970, would control filing requirements for the town elections to be held in May. This would mean that any candidate desiring to offer for election must file his notice of candidacy with the clerk of court by March 5th, together with a petition containing the signatures of the required one percent of voters but not less than fifty signatures.

ELECTIONS—Filing Deadline for Candidates of Legislative Districts Pending Approval of Reapportionment Under Voting Rights Act.

REDISTRICTING—Filing Deadline for Candidates of Legislative Districts Pending Approval of Reapportionment Under Voting Rights Act.

March 29, 1971

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

I am in receipt of your inquiry regarding, inter alia, whether candidates for the November 1971 General Assembly election may file for the June primary notwithstanding that by the filing deadline of April 9th the Attorney General of the United States, acting under the provisions of the Voting Rights Act of 1965, will not have indicated if he has objections to the Virginia reapportionment plans, nor will the 60 day period for interposing such objections have expired.

The reapportionment Acts, passed by the 1971 session of the General Assembly, became law upon the Governor’s signature and took effect immediately in accordance with the provisions of Art. II, Sec. 6, of the revised Constitution of Virginia. The question remains, in light of the provisions of the Voting Rights Act of 1965 to which Virginia is subject, as to when such Acts may be implemented.

Pertinent to this question is Sec. 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973 (c), which states:

“Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: Provided, That such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, . . .”
You will note from this language that the purpose of the Act is to insure that no person shall be denied the right to vote for failure to comply with any qualification, prerequisite, standard, practice or procedure unless the same shall first have been submitted to the Attorney General without objection subsequently being interposed or a declaratory judgment secured that the change does not have the effect of denying or abridging the right to vote on account of race or color.

The first date on which implementation of the reapportionment Acts could possibly affect any person's right to vote would be the primary election date of June 8, 1971.

All other practices and procedures including filing of candidacies for such primary are in conformity with the provisions of the election laws of Virginia, Title 24.1 of the Code, which became effective December 1, 1970, and have been submitted to the Attorney General, who interposed no objection.

Consequently I am of the opinion that individuals may, pursuant to the provisions of the election laws presently being administered, file as candidates for the newly created districts between March 25, 1971, and April 9, 1971, notwithstanding that the new districts have not yet been implemented, as long as they can be implemented by the date of the primary. There can be no doubt that, in the absence of interposition by the Attorney General, such implementation is possible since the sixty day period provided by Sec. 5 of the Voting Rights Act of 1965 will expire on May 1, 1971.

Since Art. II, Sec. 6, of the revised Constitution requires reapportionment of the General Assembly in 1971, previously existing legislative districts have no validity with respect to the November general election of this year nor to any legislative primary conducted in connection therewith.

**ELECTIONS—Filing Fee Not Refunded to Unopposed Candidate.**

**COUNTIES—No Authority to Repay Filing Fees; Disbursements Only Made Upon Specific Statutory Authorization.**

**THE HONORABLE GEORGE M. WEEMS**

Treasurer of Hanover County

I am in receipt of your letter of April 22, 1971, regarding whether those individuals who have filed as candidates in the June primary for nomination to seats in the General Assembly and nomination to various local offices in the county of Hanover may receive repayment of the filing fees required by § 24.1-199 of the Code of Virginia (1950), as amended, since they are unopposed.

Section 24.1-199 provides that filing fees paid by candidates for the General Assembly of Virginia are paid to the treasurer of the "candidate's county or city, and where the candidate's district is composed of more than one county or city the fee must be equally divided among the counties and cities in the district, and paid to the respective treasurers by the candidate." These fees are credited to the "State Primary Fee Fund." Filing fees for candidates for local office are paid to the county or city treasurer and "placed to the credit of the fund of the county or city out of which the expenses of the primary were paid by the county or city."

The only authority for repayment of the filing fee is in the event a prospective candidate pays the fee and then does not become a candidate. Section 24.1-199 has specifically removed the former provisions found in § 24-401 allowing a refund of the filing fee to a candidate if he is not opposed. Consequently, an individual upon becoming a candidate may not have his filing fee refunded. See former opinion to the Honorable Millard C. Rappleyea, Sr., Secretary, Fairfax County Electoral Board, dated January 11, 1971,

Additionally I am of the opinion that the county or city has no authority to voluntarily repay the filing fees in question. As this office has ruled on numerous occasions, disbursements of funds from a county or city treasurer can only be made upon specific statutory authorization. Since the provision for refund of a filing fee has been specifically removed, the county or city no longer has any authorization for repayment of the same.

ELECTIONS—Forms—State Electoral Board may furnish forms it is required only to prescribe.

ELECTIONS—Forms—State Electoral Board required to furnish general registrar applications for absentee ballots, but not required to furnish other forms.

THE HONORABLE L. STANLEY HARDAY, Executive Secretary
State Board of Elections

Your correspondence of July 31, 1970, inquires as follows:

"Will the State Board of Elections be required not only to prescribe but also furnish to the 96 counties and 38 cities all of the forms to be used in registering persons, making transfers, applying for absentee ballots and reporting campaign contributions and expenditures under the 'Fair Elections Practices Act'? Your attention is directed to Sections 24.1-22, 24.1-27, 24.1-48, 24.1-228 and 24.1-258 of the Code."

I have reviewed the pertinent Sections to which you directed my attention. Each requires the Board to: “prepare appropriate forms for records for the registration, transfer, and identification of voters, which shall be used throughout the Commonwealth,” (§ 24.1-22); “prescribe and require the use of a standard form or forms to register for elections to register to vote throughout the Commonwealth,” (§ 24.1-27); to prescribe forms for application for official absentee ballots, (§ 24.1-228). It should be noted in the latter case that the local Electoral Board is required to furnish to the general registrar the applications for the absentee ballots.

Of the other sections which you directed my attention to, § 24.1-258 prescribes the form to be used for candidates to report campaign contributions and expenditures, and § 24.1-48 provides that an individual registering to vote shall make application only upon the form or forms prescribed by the State Board of Elections. This would, of course, be the forms the Board must prepare pursuant to § 24.1-22 and/or § 24.1-27. Therefore, the Board may, in order to promote the uniformity of voting practices reflected by Title 24.1, furnish the above forms, which it is required to prescribe, and may, in fact, require the use of such standard form [see § 24.1-27 (1)].

Nowhere, however, do I find a duty upon the Board to furnish the forms they are required to prescribe. Your inquiry is therefore answered in the negative.

ELECTIONS—General—Ballots—Question as to sale of beer not to be placed on general ballot.

ELECTIONS—Advisory Referendums—Specific legislative authority required.

THE HONORABLE L. DAVID LINDAUFER
Secretary, Portsmouth Electoral Board
This is in response to your letter of September 11, 1970, which reads in part as follows:

"The City Council of Portsmouth on the 25th day of August, 1970, voted four to two to place on the ballot for the General Election of November 3, 1970, the following question.

"Shall the Sunday sale of beer be allowed in the City of Portsmouth?"

The question has been raised and possible legal action has been indicated against the Portsmouth Electoral Board if we place this question on the ballot since it is alleged that a referendum such as this can be called for only by petition of at least thirty percent of the voters.

"I herewith request that you furnish me your opinion as to the legality of the action of the Portsmouth City Council and whether or not the Portsmouth Electoral Board should place this question on the ballot on November 3, 1970."

In my opinion this question should not be placed on the ballot. The Council of the City of Portsmouth has the power under § 4-97 of the Code of Virginia (1950), as amended, "to adopt ordinances effective in such city . . . prohibiting the sale of beer and wine, or either beer or wine, between the hours of twelve o'clock post meridian of each Saturday and six o'clock ante meridian of each Monday, or fixing hours within said period during which wine and beer, or either, may be sold, and prescribing fines and other penalties for violations of such ordinances. . . ."

I am not aware of any statute that confers upon the Council of the City of Portsmouth, or upon the governing body of any city, the power to hold an advisory referendum upon such question.

In former opinions, this office has expressed the view that the governing body of a county could not hold an advisory referendum in the absence of specific legislative authority (Report of the Attorney General, 1949-1950, page 12), and that the governing body of a city may not hold such a referendum unless authorized by the city charter or by general law (Report of the Attorney General, 1959-1960, page 156). Copies of these opinions are enclosed.

Section 4-96 of the Code is as follows:

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

In view of the foregoing language, it would seem that no provision of the charter of the City of Portsmouth could lawfully authorize an advisory referendum on this question.

ELECTIONS—Incompatibility of Office; Registrar May Not Be Secretary of Electoral Board.

PUBLIC OFFICERS—Incompatibility—Registrar may not be secretary of electoral board.

REGISTRAR—May Not Be Secretary of Electoral Board.
I am in receipt of your inquiry of March 1, 1971, questioning whether the secretary of the electoral board and the general registrar may be one and the same person.

Section 24.1-43 of the Code of Virginia (1950), as amended, provides for the appointment and qualification of registrars. Such section provides in pertinent part:

"...Such general registrar shall not hold any other office, by election or appointment, during his term; provided, however, with the consent of the electoral board, other duties not inconsistent with law may be undertaken by the general registrar, provided such other duties do not conflict with his duties as general registrar. General registrars shall not serve as officers of election. The electoral board shall fill any vacancy that may occur in the office of general registrar."

Additionally, § 24.1-44 provides that "[t]he appointment or election of a general registrar to any other office shall vacate the office of general registrar."

In view of the above provisions, I am of the opinion that the offices of secretary of the electoral board and registrar would be incompatible and thus the same person may not hold the two offices.

ELECTIONS—Justice of Peace—One elected from each magisterial district; additional justices may be appointed by court.

JUSTICE OF PEACE—One Elected From Each Magisterial District; Additional Justices May Be Appointed by Court.

I am in receipt of your inquiry of January 13, 1971, inquiring if under the new election law a justice of the peace in Franklin County who lives in the Northwest Magisterial District should run in the upcoming November general election as a justice of the peace from such district.

Section 24.1-89 provides that:

"In each magisterial district of each county there shall be elected by the qualified voters thereof at the general election in November, in the year nineteen hundred and seventy-one, and every four years thereafter, one justice of the peace who shall hold office for a term of four years."

I am therefore of the opinion that your inquiry is answered in the affirmative. Such section allows only one justice of the peace to be elected from each magisterial district. Additional justices of the peace may be appointed by the court as necessary pursuant to the provisions contained in Title 39.1 of the Code.

ELECTIONS—Justice of Peace Not Constitutional Officer; Primary for Nomination of Candidates Held on Second Tuesday in September.

JUSTICE OF PEACE—Not Constitutional Officer; Primary for Nomination of Candidates Held on Second Tuesday in September.
I am in receipt of your letter of March 12, 1971, wherein you inquire when primaries are to be held for nominations of justices of the peace.

Chapter 119 of the 1971 Acts of Assembly amended § 24.1-174 of the Code of Virginia (1950) as follows:

“(b) In the year nineteen hundred seventy-one, primaries for the nomination of candidates for election to the General Assembly and all constitutional offices except membership on boards of supervisors shall be held on the second Tuesday in June. Primaries for the nomination of all other candidates for election to office in the general election in November, including membership on boards of supervisors, shall be held on the second Tuesday in September. Both the primary election in June and the primary election in September shall be paid for by the treasurer of the county or city in which such elections are held.”

Justices of the peace are not constitutional officers. Consequently, in view of the above language, primaries for the nomination of candidates to such offices would be held on the second Tuesday in September which would be September 14, 1971.

I am in receipt of your inquiry of January 11, 1971, which reads:

“Does the list required in Chapter 462, Section 24.1-46 (4), of the Code of Virginia refer to a list of all the registered voters, or to a list of the newly registered voters?”

I am of the opinion that the language contained in the section which you inquire about does refer to a list of all registered voters in the jurisdiction and not merely to those individuals who are newly registered since the effective date, December 1, 1970, of the Act.

I am in receipt of your letter of January 28, 1971, wherein you refer to my opinion to the Honorable Herbert H. Bateman, Senator from Newport News, dated January 11, 1971, construing the provisions of § 24.1-172 of the Code of Virginia (1950), as amended, which reads in pertinent part:

“Each party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committee, except that no party which at the immediately preceding election for a particular office nominated its
candidate for such office by a primary, and such nominee was elected at the general election, shall choose to nominate a candidate for the next election for such office by any method other than by a primary, without the consent of the incumbent."

You request that I advise you as to the applicability of the language in question to the situation which may arise in the City of Norfolk due to reapportionment where there will be a reduction of the number of delegates from seven to six with a floater delegate. The six individuals who would be candidates for reelection in the City of Norfolk would be running in the same geographical boundaries as previously held.

I am of the opinion that such individuals would be incumbents entitled to veto any method of choosing candidates other than by a primary, if in fact the individuals were previously nominated by primary. The proposed floater delegate would not, in my opinion, be an incumbent and thus the provisions of § 24.1-172 would not be applicable.

ELECTIONS—Office of—Employee of school board may not serve as.

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

This is in response to your letter dated May 6, 1971, in which you inquired as to whether a school cafeteria employee in Prince William County might serve as an officer of election in that county after July 1, 1971.

It is my opinion that these positions are incompatible. Section 24.1-33 of the Code of Virginia (1950), as amended, effective July 1, 1971, provides:

"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or an officer of election."

The cafeteria employee is employed by the Prince William County School Board and is clearly, therefore, within the ambit of the statute. As a result, a school cafeteria employee would not be allowed to serve as an officer of election.

ELECTIONS—Officials at Precincts in Primary Must Be Regular Officers of Election.

ELECTIONS—Each Primary Candidate Authorized to Have a Representative Present When Ballots Taken from Box and Returns Made Up.

ELECTIONS—Regular Officers of Election Serve in All Elections, Including Primaries.

THE HONORABLE DONNELL P. DAVIS
Member, Virginia Beach Electoral Board

I am in receipt of your letter of March 4, 1971, wherein you inquire:

"In the Democratic Primary Election upcoming this summer, must all of the election officials at the various precincts be members of the Democratic Party or may they be the regular officers of the election that our Board appointed at our regular meeting the first week in February just past?"
Previously § 24-353 of the Code of Virginia (1950), as amended, provided that primaries were to be held by three election judges appointed by the electoral board from members of the party participating in the primary election. This provision was deleted in the recodification and I am unable to find any other provision of law authorizing the appointment of officers of election other than those regularly appointed pursuant to the provisions of §§ 24.1-105 and 24.1-106.

Consequently, upon a review of the applicable statutes under both the prior election law and the recodification in present Title 24.1, I concur in your conclusion that "... in all elections, including primaries, those officers of the election... appointed to serve the full year will serve in primaries as well as general elections, ... ".

Such officers of election should determine in accordance with § 24.1-136 the vote of the primary election as soon as the polls close. Each primary candidate is authorized to have a representative present when the ballots are taken from the box and the returns are made up. See § 24.1-137.

ELECTIONS—Party Committeemen Do Not Hold Public Office; Not Necessary to Appoint Treasurer.

ELECTIONS—Candidate Whose Nomination Made by Convention Appoints Treasurer after Nomination.

ELECTIONS—How City Justices of Peace Elected.

JUSTICE OF PEACE—How Elected.

March 18, 1971

THE HONORABLE ROBERT H. WALDO
Commissioner of the Revenue for the City of Chesapeake

I am in receipt of your letter of March 12, 1971, wherein you set forth three questions regarding the election laws, Title 24.1 of the Code of Virginia (1950), as amended. Your questions will be answered seriatim:

Question: "1. Is it necessary for a candidate for membership on the Democratic Committee to have a treasurer appointed as described for Constitutional and State Officers, etc. ?"

Answer: No. Section 24.1-253 which requires the appointment of a campaign treasurer applies to any "... candidate for nomination for, or election to, any office in the Commonwealth. ... " Party committeemen do not hold a public office in the Commonwealth. See opinion to the Honorable J. Hamilton Hening, Clerk, Circuit Court of the City of Hopewell, dated August 11, 1969, found in Report of the Attorney General (1969-1970), p. 121, wherein this office has previously so ruled.

Question: "2. Does a candidate for office, when the nomination is made by convention, have to appoint a campaign treasurer before such nomination?"

Answer: No. Section 24.1-253 (a) states:

"Each candidate for nomination for, or election to, any office in the Commonwealth upon or before, and as a condition precedent to, qualifying as such candidate shall appoint one campaign treasurer and shall file the name and address of the campaign treasurer with the electoral board where he resides and the State Board of Elections. Every treasurer so appointed shall accept such appointment, in writing, prior to filing thereof."
Such section would apply to independent candidates as well as a candidate for a party nomination (which would be the primary method) or a party nominee (which would be the convention method). Appointment of a campaign treasurer by a party nominee selected by the convention method must be made upon or before the chairman of the party qualifies such candidate by certifying his name in accordance with the provisions of §§ 24.1-166 and 24.1-169.

**Question:** "3. How are City Justices' of the Peace elected?"

**Answer:** I am enclosing an opinion of this office to the Honorable Russell L. Davis, Member of the House of Delegates, dated February 12, 1971, and found in Report of the Attorney General (1970-1971), p., relating to election and appointment of justices of the peace in counties. Election or appointment of justices of the peace for cities would be controlled by the provisions of Title 39.1 of the Code and the City Charter as modified by Title 39.1, more specifically, § 39.1-6 which reads:

"In every county and in every city the appointing court shall appoint only as many justices of the peace as are necessary for the effective administration of justice, provided that if the charter of any city provides for the appointment of justices of the peace by the judge or judges of courts of record, or for the appointment or election of justices of the peace by the city council, such justices of the peace shall continue to be appointed in the same manner as they were prior to the enactment of this article. This section shall not apply to any city or county wherein justices are appointed pursuant to the provisions of § 19.1-32.1 of the Code."

**ELECTIONS—Petition Must Be Filed by Candidate for Any Office; Signed by One Percent of Voters, Not Less Than Fifty.**

**ELECTIONS—Petition of Candidate in Town Having Less Than Fifty Voters; Blank Ballot Issued for Write-in Election.**

**ELECTIONS—Amendments (1971) Not Effective Until Approved by Attorney General of United States.**

**March 19, 1971**

Mrs. Eleanor W. Talley, Secretary
Fluvanna County Electoral Board

I am in receipt of your letter of March 8, 1971, concerning requirement of petitions for candidates for mayor and town councilmen. You indicate that in the Town of Columbia there are only approximately thirty registered voters. Section 24.1-168 of the Code of Virginia (1950), as amended, requires that a candidate for any office in the Commonwealth, other than a party nominee, must with his notice of candidacy as required by § 24.1-166, file a petition. The petition required by this section is for a candidate for any office, and thus would be applicable to candidates for town offices.

The petition must be signed by a number of qualified voters equal to at least one percent of the number of registered voters within the district as of the first day of January of the year preceding the year in which such petition must be filed, not to contain less than fifty such signatures. These provisions have been amended by Chapter 119 of the 1971 Acts of Assembly to provide that candidates for the governing body of any county, city or town shall file a petition signed by one hundred twenty-five voters; candidates for any other local office shall file a petition signed by fifty voters. However, the General Assembly in view of the number of situations that could arise where, as in the Town of Columbia, there are not fifty registered voters,
provided further that: "[a] candidate for office in a town which has less than
one thousand registered voters shall not be required to file a petition under
this section." Though this legislation did have an emergency clause, it is
not yet effective due to the requirement that it must be submitted to the
Attorney General of the United States for prior approval under the 1965
Voting Rights Act. Consequently for the town elections to be held in May
of 1971, the one percent or fifty signature requirement must be met in order
for a candidate to have his name printed on the ballot.
If, as in the case of the Town of Columbia, such requirement cannot or
has not been met, then a blank ballot should be issued allowing for a write-in
election as provided by § 24.1-129.

ELECTIONS—Petition; Signatures Witnessed by Voter Not Qualified for
District May Not Be Considered. April 14, 1971

The Honorable Joan S. Mahan, Secretary
State Board of Elections

I am in receipt of your inquiry of April 14, 1971, wherein you ask my
opinion as to the validity of a petition filed pursuant to § 24.1-185 of the
Code of Virginia (1950), as amended, which does contain the signatures of
qualified voters of the election district but whose signatures were witnessed
by an individual who is not a qualified voter within the area for which the
signatures were obtained.

Section 24.1-185 reads:

"The name of a candidate for any office shall not be printed upon
any official ballot used at any primary unless he shall file with his
declaration of candidacy a petition therefor signed by a number of
qualified voters equal to at least one per centum of the number of
voters registered within the election district as of the first day of
January of the year preceding the year in which such petition must
be filed, which petition shall contain not less than fifty such signa-
tures, except that in the case of candidates for the United States
Congress, or for Governor, Lieutenant Governor or Attorney General
such petition shall be signed by one-half of one per centum of such
voters. Each signature to the petition shall have been witnessed by
a person who is a qualified voter within the area for which signatures
being obtained and whose affidavit to that effect shall be attached to
the petition, and alongside each signature shall be the residence ad-
dress of such person."

If the signatures to the petition have been witnessed by an individual not
a qualified voter for the election district, then I am of the opinion the signa-
tures so witnessed may not be considered in determining whether the candi-
date has filed the requisite number of signatures, i.e., one per centum of the
number of voters registered within the election district as of the first day
of January of the year preceding the year in which such petition must be

ELECTIONS—Political Party Using Electoral Machinery of Commonwealth
Governed by § 24.1-180.

ELECTIONS—Candidates for Party Committees Governed by § 24.1-198;
Fee for Primary Expenses.

ELECTIONS—Unopposed Candidate for Party Committee; Name Would
Not Appear on Ballot.
ELECTIONS—Candidate for Democratic Executive Committee Does Not Have to Appoint Treasurer.

ELECTIONS—Candidates for Democratic Executive Committee Must Have Necessary Signatures.

ELECTIONS—When Primary Method of Nomination Chosen, All Provisions of Primary Laws Applicable.

ELECTIONS—Requirement of Campaign Treasurer Applicable Only to Those Seeking Office in Commonwealth.

FEES—Candidates for Party Committees Governed by § 24.1-198; Fee for Primary Expenses.

March 31, 1971

THE HONORABLE C. B. COVINGTON, JR.
Treasurer, City of Newport News

I am in receipt of your inquiry of March 26, 1971, wherein you raise several questions concerning the nomination of committeemen at the upcoming Democratic primary. Your questions will be answered seriatim:

Question No. 1. "Section 24.1-253 requires every candidate to appoint a treasurer of his campaign. Question: Does a candidate from the Democratic Executive Committee have to appoint a treasurer?"

Answer: No. See previous ruling of this office to the Honorable Robert H. Waldo, Commissioner of the Revenue for the City of Chesapeake, dated March 18, 1971, copy of which I enclose.

Question No. 2. "Section 24.1-198 states that where there is no salary or fee attached to the office, the fee for primary expenses shall be $5.00. Section 24.1-180 says that no fee will be charged. Which of these sections applies to a person seeking election to the Democratic Executive Committee? Does he or does he not pay the $5.00 fee?"

Answer: Section 24.1-180 of the Code of Virginia (1950), as amended, reads as follows:

"When a political party holds an election to select the members of such party committee and such election is held at the same time and in the same places as a primary election, no fee or charge shall be made or required of such political party for making use of the electoral machinery."

This section relates to any charges made or required of a political party for using the Commonwealth's electoral machinery. It does not apply to a fee to be charged a candidate for position of committeeman. However, § 24.1-198 which is applicable to candidates, expressly states:

"If there is no salary or fee attached to the office the fee for primary expenses shall be five dollars. This provision includes candidates for party committees in § 24.1-180."

A candidate for election to the position of committeeman would therefore have to pay a five dollar filing fee.

Question No. 3. "If only one candidate or a member of the Democratic Committee files and has no opposition for his particular office or precinct, does his name have to appear on the ballot since this is an election, not a primary, as defined in Section 24.1-175?"

Answer: No, his name would not appear on the ballot if he is unopposed. Section 24.1-1 (5) (b) defines primary as follows:
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"'Primary' or 'Primary Election' means an election held for the purpose of nominating candidates as nominees of political parties for election to offices, and for the purpose of electing persons as members of the committees of political parties;"

A primary as indicated does include an election for members of committees of political parties. Section 24.1-175 states that when only one candidate announces for a particular office, which in my opinion would include the office of committeeman, the person filing such declaration shall not have his name printed on the ballot for the primary.

Question No. 4. "Section 24.1-185 states that the name of a candidate for any office shall not be printed upon any official ballot unless he has the necessary signatures. Do persons running for the Democratic Executive Committee need such signatures?"

Answer: Yes. See previous ruling of this office to the Honorable John B. James, Chairman, Electoral Board of Virginia Beach, dated February 10, 1971, copy of which I enclose.

As indicated in the James opinion, once the primary method of nomination is chosen, then all provisions of the primary laws become applicable. The requirements of a campaign treasurer discussed in the Waldo opinion, in addition to being applicable only to those seeking office in the Commonwealth, are not contained in Article 5, Chapter 7, of Title 24.1 relating to Primary Elections.

ELECTIONS—Precincts Need Not Contain 500 Registered Voters—May not create precinct of less than 500 to avoid use of voting machines.

THE HONORABLE JOAN S. MAHAN, Secretary
State Board of Elections

May 5, 1971

I am in receipt of your letter of April 29, 1971, forwarding an inquiry regarding § 24.1-203 of the Code of Virginia (1950), as amended, the last sentence of the second paragraph of which reads as follows:

"No county shall divide or create precincts or election districts so that resulting precincts or election districts will contain less than five hundred registered voters, in order to avoid the requirements of this section."

The question raised on which you ask my opinion is:

"Does this mean that boards of supervisors, when they begin redistricting after July 1, must make sure there are at least five hundred voters in every precinct which must of necessity be newly created?"

Section 24.1-203 provides, within the time limits prescribed, for the mandatory use of voting machines by every county and city in the Commonwealth. The governing bodies of all cities and counties having optional forms of government must acquire voting machines for all precincts within such counties prior to October 1, 1972. All other counties must acquire voting machines for all precincts within the county containing five hundred or more registered voters prior to October 1, 1976. There is no requirement that precincts in such counties containing less than five hundred registered voters must be supplied with voting machines. However, the prohibition, as quoted above, limits a county from creating a precinct of less than five hundred voters in order to avoid the requirements of the use of voting machines. This limitation is applicable only when a county is attempting
to avoid the requirements of § 24.1-203. There is no requirement that every precinct in a county must contain at least five hundred voters. The limitation as to number of voters in a precinct is that they shall be not less than one hundred nor more than five thousand, as prescribed by § 24.1-37 which reads:

"The governing body of a county shall establish for each district, or for the county at large if there be no districts, as many election districts or precincts as it may deem necessary and a polling place in each district or precinct. Such districts or precincts shall be established so that there shall be not less than one hundred nor more than five thousand qualified voters per district or precinct as of the time such districts or precincts are established. The governing body shall prescribe and cause to be published the boundaries of the districts or precincts. It may alter the boundaries of such election district or precinct, and rearrange, increase, or diminish the number thereof, and change the polling places or establish others therein, not to exceed, however, one polling place for each election district or precinct.

"In the event that any precinct contain a number of qualified voters in excess of five thousand, the governing body of the county shall within six months proceed to alter or rearrange the precinct boundaries in order that such precinct shall no longer contain in excess of five thousand qualified voters. The mere failure to comply with the requirement of this paragraph shall not invalidate any election.

"The election districts or precincts in any county shall not be divided or created so that resulting election districts or precincts have less than five hundred registered voters in order to avoid the requirements of the use of voting machines set forth in § 24.1-203."

Your inquiry is answered in the negative.

ELECTIONS—Primary for Specific Office Not to Be Held When Candidate Is Unopposed—Such individual's name shall not appear on ballot.

ELECTIONS—Filing Fee Not Refunded to Unopposed Candidate.

THE HONORABLE MILLARD C. RAPPLEYEA, SR.
Secretary, Fairfax County Electoral Board

January 11, 1971

I am in receipt of your inquiry regarding § 24.1-172 of the Code of Virginia (1950), as amended, more specifically the second paragraph thereof which reads:

"Each party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committee, except that no party which at the immediately preceding election for a particular office nominated its candidate for such office by a primary, and such nominee was elected at the general election, shall choose to nominate a candidate for the next election for such office by any method other than by a primary, without the consent of the incumbent."

I am enclosing an opinion of this office to the Honorable Herbert H. Bateman, Member, The Senate, dated January 11, 1971, which I believe explains in detail the above quoted language, and is responsive to your inquiry.

You additionally inquire if an "office does not have a contest, say Sheriff, can the incumbent or otherwise lone candidate be declared the candidate, left off the ballot and have his filing fee returned?"
Section 24.1-175 specifically states that a primary for a specific office is not to be held when only one person declares his candidacy, and such individual's name shall not appear on the ballot for the primary. Additionally, § 24.1-199 specifically removed the former provision allowing a refund of the filing fee to a candidate if he is not opposed.

**ELECTIONS—Proper Depository for Poll Books and Ballots After Election**

—Either Chancery Court or Hustings Court, Part II, as directed by local electoral board.

**ELECTIONS—Richmond Electoral Board Should Notify Clerk to Which Court Returns Are to Be Made.**

January 7, 1971

MRS. IVA R. PURDY, Clerk
Hustings Court, Part II, City of Richmond

MR. E. E. WARRINER, Clerk
Chancery Court, City of Richmond

I am in receipt of your recent letter concerning § 24.1-143 of the Code of Virginia (1950), as amended, which reads as follows:

"After ascertaining [on election night] the votes in the manner aforesaid, the officers, before they adjourn, shall put under cover the poll books, seal the same, and direct them to the clerk of the court of record wherein deeds are recorded of the county or city in which the election is held; and the poll books thus sealed and directed, together with the used ballots strung or counted ballot envelope aforesaid enclosed and sealed, and the unused, defaced, spoiled and set aside ballots properly accounted for, shall be conveyed by one of the officers to be determined by lot, if they cannot otherwise agree, to the clerk of court to whom they are directed by noon on the day following the election, there to remain for the use of the persons who may be lawfully entitled to inspect the same." (Emphasis added.)

As you point out, § 17-161 provides that deeds for the City of Richmond, north of the James River, must be recorded in the Chancery Court of the City of Richmond, while § 17-154 provides that deeds for the City of Richmond, south of the James River, must be recorded in Hustings Court of the City of Richmond, Part Two.

You inquire as to the proper court in the City of Richmond for the election officials to return the poll books and ballots as required by § 24.1-143.

Section 24.1-143 provides a proper depository until the local electoral board meets to canvass the vote as required by § 24.1-146.

I am of the opinion that it would be proper for the officers of election mentioned in § 24.1-143 to deposit the poll books and ballots with the Clerk of either Chancery Court or Hustings Court, Part II, as they may be directed by the local electoral board. Ideally, of course, all ballots should be in a single place. The electoral board should therefore notify the clerks which office the returns are to be made to, in order that such clerk, if necessary, may fulfill the duties required by § 24.1-146.

Due to the applicability of this ruling to the local electoral board I am forwarding a copy of the same to Mrs. Katharine Moses, Secretary of the Richmond Electoral Board.

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**ELECTIONS—Registrar—County officials previously residing in county, now part of annexed area of City of Richmond, may retain office.**
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Voting—Residence—County officer deemed to be resident of magisterial district wherein homesite was before annexation by City of Richmond.

ELECTIONS—Registrar—May be reappointed though residing in area annexed by City of Richmond.

COUNTIES—Registrar—County officer within meaning of § 15.1-995.

February 4, 1971

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

I am in receipt of your letter of January 20, 1971, in which you ask my opinion whether the Electoral Board of the County of Chesterfield may reappoint the present General Registrar of the County even though such individual now resides in the recently annexed portion of the City of Richmond. You call to my attention § 15.1-995 of the Code of Virginia (1950), as amended, which reads:

"Any county officer or judge of a county court of any county who resides in the county or in any town therein, and has an established home therein, which homesite has become or hereafter becomes a part of a city since such officer's election or appointment, shall not vacate his office by reason of his residence in such city, but shall continue to hold such office so long as he shall be successively elected or appointed to the office held by him at the time of such transition. Any such officer shall for such purposes be deemed to be a resident of the magisterial district wherein the homesite before becoming a part of a city was. The provisions of this Section shall not be applicable to members of the school board of such county, who shall be governed by § 22-68."

Section 24.1-43 of the Code requires that the General Registrar be a qualified voter of the jurisdiction for which he is appointed. I am enclosing herein copies of previous opinions of this office pertinent to your inquiry, to the Honorable H. Benjamin Vincent, Commonwealth's Attorney for Greensville County, dated May 22, 1968, found in the Report of the Attorney General (1967-1968), at page 108, and to the Honorable Raymond R. Robrecht, Commonwealth's Attorney for Roanoke County, dated March 18, 1968, found in the Report of the Attorney General (1967-1968), at page 105. As you see from the Vincent opinion, this office has previously ruled that it is within the intent of § 15.1-995 that a county officer falling within the provisions of the statute is deemed to be a resident of the county for voting purposes. A General Registrar would be, as indicated in the Robrecht opinion, a county officer and thus within the meaning of the statute.

Consequently, in view of the above, I am of the opinion that your inquiry is answered in the affirmative. The present registrar may be reappointed notwithstanding the fact that such individual resides in the annexed area.

ELECTIONS—Registrar and Members of Electoral Board May Not Hold Appointive Office of Profit or Emolument With Federal, State or Local Government.

REGISTRAR—May Not Hold Appointive Office of Profit or Emolument With Federal, State or Local Government.

ELECTIONS—Prohibition of Article II, Section 8, as to Appointive Officers Applicable Only to Offices of Profit or Emolument.
March 18, 1971

THE HONORABLE FRANK A. HÖSS, JR., Secretary
Prince William County Electoral Board

I am in receipt of your letter of March 11, 1971, regarding Article II, Section 8 of the revised Constitution of Virginia which reads in pertinent part:

"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or officer of election."

You inquire regarding those offices not elective and question whether the above language means any office under such governments or only offices of profit or emolument.

I am of the opinion that it would be the latter.

ELECTIONS—Registrar for County Required to Prepare Voter List for Town and Its Newly Annexed Areas.

REGISTRAR—Of County Annexed Must Furnish List of Registered Voters Affected by Annexation.

ANNEXATION—Registrar for County Required to Prepare Voter List for Town and Its Newly Annexed Areas.

March 30, 1971

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

I am in receipt of your letter of March 29, 1971, which reads in pertinent part:

"Mrs. Helen Garrett is the duly appointed General Registrar of Prince Edward County, including the Town of Farmville. The Town of Farmville is a separate precinct and her books have been prepared for this voting precinct. Effective January 1, 1971, the Town of Farmville annexed additional land, a portion of which came from the County of Prince Edward and a portion of which came from the County of Cumberland. It would be appreciated if you would advise whether the Registrar of Prince Edward County has any responsibility to prepare voters list and registrations for the Town of Farmville for those residents of the town residing in the County of Cumberland or whether the same should be prepared by the Registrar of Cumberland County."

Section 24.1-93 of the Code of Virginia (1950), as amended, would be applicable to your inquiry and reads as follows:

"The electoral board and registrar of the county within which a town, or the greater part thereof, is situated has control of the election process and the duty to carry out the applicable provisions of this title concerning towns. Five days' notice of the time and place or places of such election shall be given by the secretary of the electoral board to the qualified voters of the town. Such notice shall be written or printed and posted at three or more public places within the town, or published once in a newspaper of general circulation in the town. The cost of all such elections shall be borne by the governing body of the town."
The General Registrar for Prince Edward County would therefore be required to prepare the voters list for the Town of Farmville and its newly annexed areas. Section 24.1-46 would make it incumbent, however, upon the General Registrar of the County of Cumberland to furnish to the Registrar for Prince Edward County the list of registered voters affected by the annexation. The provisions of this section are contained in § 24.1-46 (10) and read as follows:

"In addition to the other duties provided by law, it shall be the duty of the general registrar to:

* * *

"(10) In the event that through annexation, merger or similar means an area in which registered voters reside becomes a part of another election district, county or city, furnish to the appropriate general registrar lists of registered voters so affected. Such registered voters shall be placed on the registration books of the new election district, county or city, so notified by mail, and stricken from the registration books of the general registrar so transferring them."

I am enclosing for your information a copy of an opinion of this office to the Honorable E. Eugene Gunter, County Attorney of Frederick County, dated March 24, 1971, regarding payment of costs in the transfer of registered voters.

ELECTIONS—Registrar Prohibited from Holding Elective Office During His Term.

ELECTIONS—Recodification of Election Laws—Registrar no longer prohibited from running for office at next election after his term expires.

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates

I am in receipt of your letter of February 17, 1971, wherein you inquire if, in the recodification of the election laws, Title 24 of the Code of Virginia (1950), as amended, there has been any change in eligibility of a registrar to hold an elective office.

Section 24-53 previously provided that "[t]he acceptance of any other office either elective or appointive by [a] registrar, except that of precinct judge of election, during his term of office shall, ipso facto, vacate the office of registrar." Additionally, § 24-66 prohibited a registrar's eligibility "to an office to be filled by election by the people at the election to be held next after he has so acted as registrar; . . ."

Section 24.1-44 has now replaced § 24-53 and prohibits a registrar from being appointed or elected to any other office even that of precinct judge, providing in pertinent part that: "[t]he appointment or election of a general registrar to any other office shall vacate the office of general registrar."

Section 24.1-43 which recodified § 24-66 now prohibits a general registrar "to be eligible for or hold an office to be filled by election solely by the qualified voters of his jurisdiction at any election during his term." This would mean of course that even if a registrar vacated his office prior to his term expiring, that he would be ineligible for the remainder of that term to offer for any office to be filled by election of the voters of his jurisdiction. No longer, however, is a registrar prohibited from running for an office to be filled at the next election after his term expires as was previously prohibited.
ELECTIONS—Registrar’s Office; Localities Determine Location of.
ELECTIONS—Registrar’s Office; Must Be Accessible by the Public.
ELECTIONS—Registration Days and Places.

February 16, 1971

THE HONORABLE CHARLES L. McCORMICK, III
Commonwealth’s Attorney of South Boston

I am in receipt of your recent letter forwarding inquiries from the City of South Boston regarding the appointment and duties of a general registrar.

Section 24.1-43 of the Code of Virginia (1950), as amended, provides for the appointment of a general registrar and requires the governing body to “furnish the general registrar with suitable public office space, adequately furnished, located within the county or city, and with postage, stationery and office supplies as may be necessary.” You question “whether the words suitable public office space mean office space within a public building, in which case public would mean municipally owned building, or whether by public office space [is meant] an office that would be in a place of business open to the public.”

Title 24 of the Code, prior to being recodified, also provided for general registrars for cities and counties. See §§ 24-52, 24-52.1, 24-57, 24-64 and 24-118.1. The provisions regarding office space were different from those that now exist in § 24.1-43. Governing bodies of counties had to furnish the registrars “with a suitable office” while certain cities were required by § 24-61 to “furnish the general registrar a suitable office in the city hall, or other municipal building, of such city.” These provisions are now combined and currently reflected in § 24.1-43 as quoted above, leaving to the various localities the option to provide suitable office space either in a municipal building or in an office accessible by the public.

You next inquire with reference to the days a registrar must sit. Section 24.1-49 contains the provisions for registration days and places, setting up a minimum number of days and leaving additional times for registration to the discretion of the electoral board. This section should be followed and reads:

“Each general registrar in this Commonwealth shall, thirty days before the day fixed by law for every regular primary election and every general election which will be held in his jurisdiction, hold a regular registration day and such additional days, other than the regular registration days, for the registration of qualified voters, which shall be not less than one day each month, and such other additional registration days and places for registration as may be ordered by the electoral board.

“The general registrar shall give notice of the time and place at which he will sit for regular registration days at least ten days before each day. In the case of provision for other times and places for registration, the general registrar may publish a notice annually containing the schedule of such times and places for registration for the following year or comply with the notice provisions for the regular registration days. Such notices shall be printed and either posted at ten or more public places in the jurisdiction or published once in a newspaper of general circulation therein.”

ELECTIONS—Registrars—May be appointed later if local board fails to appoint in May.

REGISTRARS—Appointment—May be made later if local electoral board fails to do so in May.
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August 28, 1970

THE HONORABLE L. STANLEY HARDAWAY, Executive Secretary
State Board of Elections

I am in receipt of your letter of August 5, 1970, in which you request an opinion regarding the following:

"If an electoral board fails to appoint a precinct registrar pursuant to Section 24-52 of the Code in the month of May, can this appointment be made at a later date or will the present registrar continue to serve?"

Pursuant to §24-52 of the Code of Virginia (1950), as amended, a local electoral board appoints, in the month of May, a registrar for each electoral district in their jurisdiction. Section 24-53 provides that such registrar is appointed for a two year term and holds his office until a successor is duly appointed and qualified.

If the electoral board fails to make an appointment of a registrar, in accordance with §24-52, there is no prohibition against making the appointment at a later date. Until a subsequent registrar is duly appointed and qualified, the present registrar should continue in office.


ELECTIONS—Write-In Candidates—List may not be posted at polls by election officials.

THE HONORABLE RODERICK ST. MARTIN
Member, Scott County Electoral Board

June 30, 1971

This is in response to your recent letter in which you inquire as to the application of §24.1-257(1) and (2) of the Code of Virginia (1950), as amended, to the town election held on May 4, 1971.

Your first question concerned whether a candidate, having appointed a campaign treasurer pursuant to §24.1-253, must comply with §§24.1-257 and 24.1-258, inasmuch as §24.1-253 was amended to apply only to those primaries or general elections held after June 1, 1971. This amendment, Senate Bill No. 121, was approved on March 30, 1971, and, as emergency legislation, took effect immediately upon passage. The amendment relieved candidates in May 4th elections from meeting the provisions of the statute.

Sections 24.1-257 and 24.1-258 deal with the responsibilities of a treasurer once designated in accord with §24.1-253. It is my opinion, consequently, that no compliance with §§24.1-257 and 24.1-258 was necessary by candidates in primaries or general elections prior to June 1, 1971. This would be the case even if a candidate had designated a campaign treasurer for an election prior to June 1, 1971. No subsequent failure to comply with §§24.1-257 and 24.1-258 should disqualify such a candidate.

The second question you posed concerned whether a candidate in a May 4th election would be ineligible as a result of a failure to have the filed report, required by §24.1-257(1), sworn to as shown by §24.1-258. As stated above, I am of the opinion that the provisions of §§24.1-257 and 24.1-258 need not be complied with in an election held prior to June 1, 1971. It follows that a candidate in a May 4th election should not be declared ineligible for a failure to abide by these statutes prior to June 1, 1971.

The third issue presented in your letter concerned the validity of write-in-votes cast. I quote from your letter:
“Suppose that for the office of Town Councilman there were fewer candidates on the ballot than could actually be elected to fill the Town Council; suppose then that the Judges and Clerk serving in the Town election posted at the polls a list of certain persons who would serve as Councilmen, if elected by write-in vote. Then, assume that certain persons included on the list posted at the polls were elected by write-in vote to the office of Councilman to the exclusion of certain other persons receiving write-in votes who were not included in the list posted by the Judges and Clerk at the polling place. The question is, would such action by the Judges and Clerk have any bearing on the validity of the election . . . and if so, who would have standing to complain?”

With regard to the first part of your question, I am of the opinion that the posting at the polls of a list of potential write-in candidates by election officials is an unauthorized assistance by those officers. (§ 24.1-132 outlines the circumstances in which an officer of election may assist a qualified voter in preparing his ballot.) The provisions concerning notice of candidacy in local elections and the validity of write-in ballots are found in §§ 24.1-91 and 24.1-217, respectively. Neither statute is sufficiently broad to authorize the action described above. Furthermore, § 24.1-101 sets forth the responsibilities of election officials to maintain the polling place free of sample ballots, tickets or other campaign material which attempt to influence any person in casting his vote. The action of election officials described above has, in my opinion, breached the spirit, if not the letter, of this statute.

As to which parties might have standing to contest the election, § 24.1-240 provides, in part:

“Any contest of any election to any office shall be initiated only by a written complaint of one or more of the unsuccessful candidates for election thereto.”

It is my opinion that, for the purposes of this statute, “candidate” would include both those persons who had filed and those who received any write-in ballots. To hold otherwise would serve to preclude the raising of a legitimate election procedure grievance by a party who has a direct interest in the election outcome. Any parties who received votes, therefore, might contest the election pursuant to § 24.1-240.

ELECTIONS—Residence—For purposes of voting.

ELECTIONS—Term Residence Used in Statute as a Prerequisite to Vote Is Synonymous With Domicile.

ELECTIONS—Students—Cannot be regarded as either gaining or losing a residence merely by reason of his sojourn in any institution of learning.

September 23, 1970

MRS. LEONARD HOTINGER, Secretary
Rockbridge County Electoral Board

I am in receipt of your inquiry of September 18, 1970, requesting an opinion of this office relative to Section 24 of the Constitution of Virginia and the right of students at Washington and Lee University to register and vote in Rockbridge County. You set forth the following factual circumstances relative to requests by students to register and vote:

“1. Students 21 years of age living on campus.
“2. Students 21 years of age living off campus in Rockbridge County.
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“3. Married and unmarried students in the School of Law who have established homes in Rockbridge Co. for the three years duration of their graduate work, but who are here for the purpose of an education.”

Qualifications for voters are set forth in Section 18 of the Virginia Constitution. In addition to citizenship, age, and state and local residency requirements as to length of time, a citizen must be a resident of the county or city and precinct in which he offers to vote. I am enclosing herewith previous rulings of this office to the Honorable R. C. Sullivan, City Treasurer of Alexandria, dated September 22, 1954, found in the Report of the Attorney General (1954-1955), at page 101, and to Mr. W. M. Fleet, Judge of Elections of West Point, dated December 2, 1947, found in the Report of the Attorney General (1947-1948), at page 77, discussing domiciliary intent, which, as this office has previously ruled, is synonymous with the word residence. The establishment of a domicile is dependent upon the facts in each particular case: whether a person intends to establish a permanent residence.

Section 24 of the Virginia Constitution is not in conflict nor does it alter the above rulings. Section 24 states that a student in any institution of learning cannot be regarded as having either gained or lost a residence merely by reason of his location or sojourn in such institution. Likewise, a student at Washington and Lee would not be estopped from establishing a domicile in Rockbridge County merely because he was in attendance at the University. Evans v. Cornman, 398 U.S. 419. As stated above, domicile is dependent on the facts in each particular case, whether the home one establishes is intended for all practical purposes to be permanent.

Students living on campus would not be presumed to be domiciled in Rockbridge County unless, of course, that was the residence prior to moving on campus. Registration of students living off campus would be dependent on domiciliary intent as described above. Students living off campus who intend to reside in the county merely during the period of their education would not pursuant to Section 24 be deemed to have gained residency, since they are residing at the location by reason of the “sojourn in such institution.”

ELECTIONS—Residence—Residents on Federal property may register who otherwise comply with State requirements. July 16, 1970

THE HONORABLE LESLIE C. CURDTS
General Registrar, City of Norfolk

This is in reply to your letter of June 22, 1970, which reads as follows:

“In view of the recent Supreme Court decision regarding registering voters living on Federal Property, may we now register all such persons claiming legal residence in Virginia? May we transfer voters already registered to addresses on Federal Property?”

I am of the opinion that your inquiry is answered in the affirmative provided the persons are otherwise qualified voters.

ELECTIONS—Residence—Residents on Federal property may register who otherwise comply with State requirements. July 16, 1970

THE HONORABLE L. STANLEY HARDAWAY
Executive Secretary, State Board of Elections

Pursuant to your request of June 25, 1970, I have reviewed the effect the decision of Evans v. Cornman will have upon the registration and voting
laws of Virginia, specifically with regard to persons living or residing on governmental or military reservations.

In *Evans* the Court upheld the authority of the State to require that all applicants for voting actually fulfill bona fide residence requirements. The Court did overturn what it considered the technicality of government property and stated that if individuals are in fact residents with the intention of making the State their home indefinitely, then they as all other qualified residents would have a right to an equal opportunity for political representation. Some of the criteria for determining voting residency of individuals residing on governmental property are that such persons would be subject to State criminal, unemployment, and workmen's compensation laws, to State income, sales, and gasoline taxes, and whose children attend local schools.

It appears that the *Evans* decision in reality grants the right to vote to residents of Federal reservations or enclaves who, but for the fact that they reside on government property, are otherwise in full compliance with the registration requirements of Virginia. I would presume that the magisterial district wherein the governmental property lies would be the proper place for registration for such individuals.

The *Evans* decision does not, however, void the provisions of Section 24 of the Constitution of Virginia, that "No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city, or town thereof by reason of being stationed therein; . . .".

ELECTIONS—Results of Elections Must Be Canvassed by Electoral Board
—Commissioners previously appointed not responsible after statute amended effective December 1, 1970.

February 22, 1971

THE HONORABLE J. MERCER WHITE, JR.

County Attorney of Henrico County

I am in receipt of your inquiry of February 16, 1971, regarding the canvass of returns and ascertainment of results of the special election to be held in Henrico on the 23rd day of February on the question of removing the present Courthouse to another location.

As you point out, § 24-200 of the Code of Virginia (1950), as amended, required that five judges of election, appointed by the electoral board, would be designated commissioners. These commissioners were, under §§ 24-271 and 24-272, charged with the duty of meeting on the second day after election in order to ascertain the results of such election. Section 24.1-146, effective December 1, 1970, and which reads:

"Each electoral board shall meet at the clerk's office of the county or city for which they are appointed at or before noon of the second day, Sunday excepted, after any election held therein, and proceed to open the several returns which shall have been made at that office. The board shall ascertain from the returns the persons who have received the greatest number of votes in the county or city for the several offices to be filled at the election. The result as so ascertained shall be reduced to writing and signed by a majority of the board and attested by the secretary and shall be annexed to the abstract of votes cast at such election, as provided for in § 24.1-150."

now removes the responsibility of ascertaining the results from the commissioners and places such responsibility upon the electoral board. In Henrico the term of the commissioners appointed under § 24-200 expires on the first day of March 1971.

You inquire, in view of the fact that the election in question is prior to March 1st, who must canvass and ascertain the results of the election, and
whether or not the commissioners and/or electoral board, depending on my response to your question, may together ascertain the results.

The commissioners, appointed pursuant to § 24-200 are charged only with the statutory responsibilities placed upon them. Since, effective December 1, 1970, they are no longer charged with the duty of canvassing election returns, such duty now being upon the electoral board, I am of the opinion that the electoral board should canvass the results of the February 23rd election.

Section 24.1-143 requires that after an election all ballots must, by noon of the following day, be conveyed to the clerk of the court wherein deeds are recorded “there to remain for the use of the persons who may be lawfully entitled to inspect the same.” In view of the provisions of § 24.1-146, I am of the opinion that only the electoral board and not the commissioners previously appointed should ascertain and canvass the results of the election in question.

ELECTIONS—Right of Incumbent to Insist Upon Primary in Single Member Districts.

ELECTIONS—Right of Candidate to Insist Upon Primary Where Different Offices Are Involved.

March 19, 1971

THE HONORABLE DUNCAN C. GIBB
Member, House of Delegates

I am in receipt of your letter of March 8, 1971, regarding § 24.1-172 of the Code of Virginia (1950), as amended by Chapter 119 of the 1971 Acts of Assembly. The pertinent provisions of such statute read as follows:

“Each party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committee, except that no party which at the immediately preceding election for a particular office nominated its candidate for such office by a primary, or such candidate filed for a primary but was not opposed, and such nominee was elected at the general election, shall choose to nominate a candidate for the next election for such office by any method other than by a primary, without the consent of all incumbents for such office. For the purposes of this section, any officeholder who offers for reelection to the same office shall be deemed an incumbent notwithstanding that the district which he represents differs in part from that for which he offers for election.” (Emphasis added.)

As you point out, the amendment to the above now reads “without the consent of all incumbents for such office” instead of “the incumbent for such office.”

Your inquiries are:

“Assuming that there are several incumbent Supervisors elected from several magisterial districts, then would it be necessary for all of the incumbents to consent in order for the election to be by some other method or could there be different methods in different districts?

“I, also, have the same question concerning the local county offices, such as Constitutional Officers and Justices of Peace. If one Constitutional Officer would not consent, would it be necessary to hold a primary for all? Likewise, if a Justice of Peace from one magisterial district did not consent, would it be necessary to have a primary for the offices of the Justices of Peace in all districts?”
REPORT OF THE ATTORNEY GENERAL

I am enclosing herein a copy of an opinion to the Honorable Herbert H. Bateman, Member, The Senate, dated January 11, 1971, and found in the Report of the Attorney General (1970-1971), p. 125, wherein this office previously construed the language which has now been amended. The amendment to § 24.1-172 does change the Bateman opinion as it relates, in so far as pertinent to your inquiry, to multi-member seats.

However, where there is only one incumbent for an office in a single member district, then the right to insist upon a primary inures only to the incumbent in such district and does not affect different offices in the same district or any office in a different district.

Consequently, your questions are answered in the negative; there can be different methods for different offices whether or not in different districts.

ELECTIONS—Secretary of Electoral Board May Resign to Become Eligible Candidate for City Council.

CANDIDATES—Secretary of Electoral Board May Resign to Become Eligible Candidate for City Council.

THE HONORABLE CHARLES L. MCCORMICK, III
Commonwealth's Attorney for City of South Boston

March 5, 1971

I am in receipt of your letter of March 3, 1971, wherein you state that the secretary of the electoral board for the City of South Boston has filed notice of his candidacy for council of that city and has resigned from the electoral board. You inquire whether, under the above circumstances, he can now be certified by the clerk as an eligible candidate for election. It is my understanding that the individual in question was appointed to the local electoral board for the remainder of a three year term which would expire on March 31, 1971. The councilmanic election will be held the first Tuesday in May, 1971.

I am enclosing herewith a previous opinion of this office to the Honorable Ford C. Quillen, Member of the House of Delegates, dated February 23, 1971, which discusses the recent changes in Virginia law regarding the eligibility of registrars to offer for an elective office. As you can see from the opinion, a registrar may not offer or hold an office to be filled by election solely by the qualified voters of his jurisdiction at any election during his term. I am unable to find any similar prohibition with regard to members of a local electoral board.

Therefore, I am of the opinion that your inquiry is answered in the affirmative.

ELECTIONS—Signatures—Illiterate's mark qualifies.

THE HONORABLE L. STANLEY HARDAY
Executive Secretary
State Board of Elections

August 6, 1970

I am in receipt of your inquiry of July 27, 1970, which reads:

"Some question has arisen with regards to Code Sections 24.1-48, 24.1-55, 24.1-228 (1) and (3) of Chapter 462 of the Acts of the 1970 General Assembly providing that an applicant personally sign his name when making application to register or to vote by absentee ballot. The question at hand is whether an 'X' or 'mark' subscribed by an illiterate will fulfill the signature requirements of the revised law."

I am of the opinion that your question should be answered in the affirmative. The Election Law Study Commission in its report to the Governor
and General Assembly of Virginia, House Document No. 14 of the 1970 General Assembly, specifically noted in its comments relative to Section 24.1-48, (Application for Registration) "that it is the intention of the Commission that an 'X' (mark) may constitute a signature." This same provision would also be applicable to Section 24.1-55 (Voter whose name erroneously deleted from books) and Section 24.1-228 (1) and (3) (Application for absentee ballots).

ELECTIONS—Social Security Number—If voter refuses to give, Board may obtain from Tax Department.

ELECTIONS—Social Security Number—Must be provided on application to register.

ELECTIONS—Social Security Number—Voter must provide.

REGISTRAR—Social Security Number—May refuse application to register if applicant refuses to provide.

I am in receipt of your letter of August 3, 1970, relative to the duty assigned the Board "of obtaining Social Security numbers of the registered voters in Virginia for identification purposes... in setting up a Central Registration Roster System."

Article 2, Chapter 2, Title 24.1 of the Code of Virginia (1950), as amended, requires that the State Board of Elections establish on or before October 1, 1973, a central registration roster for all voters registered in the Commonwealth. In order to efficiently adopt this system to a computer, social security numbers, if any, or other identification numbers must be obtained.

You inquire: (1) if a registered voter refuses to give his social security number does the Board have the authority "to obtain [the same] from the Tax Department or some other source and attach it to the official records?"; (2) if an individual refuses to provide his social security number on the application to register "will his application be honored and valid, or will the registrar have the right to refuse the application?"

Your first inquiry is answered in the affirmative. If a registered voter refuses to provide his social security number, then it may be obtained from any department of the Commonwealth. Section 24.1-27 (4) specifically states that `[a]ll departments of the Commonwealth shall cooperate with the State Board of Elections in procuring and exchanging statistical identification information for the purpose of establishing the Central Registration Roster System."

In reply to your second inquiry, I am of the opinion that an individual must provide his social security number on the application to register. If he fails to provide the same, his application may be refused. Section 24.1-22 provides:

"The Board of Electors shall prepare appropriate forms or records for the registration, transfer, and identification of voters which shall be used throughout the Commonwealth. The forms for registration and transfer shall require sufficient information to allow for maintenance of the required registration system and records.

"The form of the application to register shall require the applicant to provide under oath the following information: Full name, including the maiden name of a woman, if married; age; date and place of birth; marital status; occupation; social security number, if any or
other identification number; whether the applicant is presently a United States citizen; address and place of abode and length of residence in the Commonwealth, the county or city, and the precinct; place and time of any previous registrations to vote; and whether the applicant has ever been adjudicated to be mentally incompetent or convicted of a disqualifying crime, and if so, under what circumstances the applicant's right to vote has been restored." (Emphasis added.)

Further, § 24.1-48 provides that each applicant to register "shall provide the information necessary to complete the application to register. . . ." Only those citizens who apply to be registered "in the manner required by law" may be registered. See § 24.1-47.

ELECTIONS—Social Security Number—Refusal to give disqualifies applicant from voting.

June 29, 1971

The Honorable Zac. T. Walker, Jr., Registrar
City of South Boston

This is in reply to your letter of May 26, 1971, in which you inquire as to the provisions of § 24.1-22 of the Code of Virginia (1950), as amended, which stipulates that the form of the application to register shall require the applicant to provide under oath, among other items, his social security number, if any, or other identification number. You indicated that you had had one applicant and one qualified voter to refuse to give his social security number. You ask if:

". . . this refusal on the part of the applicant or qualified voter disqualify him or her from participating in City, County, and State elections?"

In response to your two-part question, it is my opinion that a failure by a voter, validly registered, to provide, upon request, his social security number does not disqualify him from exercising his elective franchise. The provisions of § 24.1-22 apply only to an "applicant" for registration. As to the effect of the refusal of an applicant to provide his social security number, the question you pose is identical to that raised in August 1970, by Mr. L. Stanley Hardaway, Executive Secretary of the State Board of Elections. My reply to Mr. Hardaway, dated September 17, 1970, stated in part as follows:

". . . I am of the opinion that an individual must provide his social security number on the application to register. If he fails to provide same, his application may be refused.

Further, § 24.1-48 provides that each applicant to register 'shall provide the information necessary to complete the application to register. . . .' Only those citizens who apply to be registered 'in the manner required by law' may be registered. See Section 24.1-47."

Consistent with the above opinion, failure to provide social security number, or other numerical identification, would result in disqualification of the applicant.

ELECTIONS—Statement of Contributions and Expenditures—Filing.

June 29, 1971

The Honorable Joan S. Mahan, Secretary
State Board of Elections
This is in response to your letter of May 18, 1971, in which you inquire as to the interpretation of § 24.1-260 of the Code of Virginia in the following contexts:

"Question 1: Does Section 24.1-260, last three lines, 'until copies of such statements as aforesaid shall have been made and filed under oath, by such person with such officer' also include filing same statements with the State Board of Elections as required by Section 24.1-257 before certificate may be issued?"

As you are aware, § 24.1-257 requires that a report or statement of contributions and expenditures be filed with both the electoral board where the candidate resides and the State Board of Elections. In light of this dual filing necessary under § 24.1-257, it is significant that § 24.1-260 stipulates that only when copies of "such statements" are filed under oath with an officer authorized to issue certificates of election may that officer issue such a certificate. It is my opinion that the plural term "statements" refers to both the filing with the local electoral board as well as the State Board of Elections; and, therefore, filing with the State Board must be accomplished before a certificate may be issued.

"Question 2: Does statement of Section 24.1-257 have to be filed on the 7th day preceding any election, (see page 3 of Election Laws Study Commission Report, next to last paragraph,) as recommended by Commission, or is statute complied with if report is filed together with statement (2) of Section 24.1-257 before a person qualifies for any office (as we have previously discussed)?"

The language of the statute stipulates that a report or statement of contributions and expenditures should be filed preceding and following an election. This provision is supported by the Report of the Election Laws Study Commission (1969) in their statement of general policy: "... a more realistic approach to the problem appeared to be to require full and complete disclosure of all contributions and all expenditures in the campaign prior to the election day." Commission Report, p. 3.

Statutory provisions relating to pre-election and post-election reports by candidates of campaign expenditures and contributions are mandatory as to filing, but directory as to the time of filing. See Annot., 103 A.L.R. 1424 (1963). Section 24.1-257 provides: first, that the electorate might ascertain before the election what influences, if any, are being exerted on a given candidate; and, second, that one or the other or both required reports might reflect evidence of corrupt practices which would support annulment of an election upon a contest.

I am of the opinion that § 24.1-257 is mandatory, insofar as it provides for the filing by all candidates of a statement of contributions and expenditures (as prescribed in § 24.1-258) both before and after the election, because, until he does so, the successful candidate cannot obtain a certificate of election, qualify, or receive the emoluments of his office. However, the provision as to the pre-election filing having to be accomplished on or before the seventh day preceding any election is directory in nature.

In the event of failure to file the pre-election report stipulated in § 24.1-257, the election would be subject to contest by one or more of the unsuccessful candidates, as provided by § 24.1-240. Should the election be declared invalid, a vacancy in that office would be created and filled pursuant to § 24.1-76.

Should no contest be offered, it is my opinion that when the statutory time limitation placed on an election contest (§ 24.1-241) expires, those officials authorized to issue a certificate of election must do so, even though the candidate in question had not complied with the pre-election disclosure provision of § 24.1-257.
"Question 3: In your opinion under the new statutes, does 'qualify for office' continue to mean 'by taking the oath on or before the day on which his term of office begins,' as stated in an opinion by a previous Attorney General to the Honorable Walther B. Fidler (See Report of the Attorney General 1962-63, p. 286)?"

Section 24.1-260 provides, in part, that "no person shall be permitted to qualify for any office under the laws of this Commonwealth, or enter upon the duties thereof . . ." unless he has complied with the provisions of § 24.1-257(1) and (2). It is my opinion that the meaning extended to the term "qualify" in this statute is consistent with that given the same term used in a different statute in the opinion you refer to. See Report of the Attorney General (1962-1963), p. 286. Consequently, qualification of an elected official is accomplished by his taking the oath on or before the day on which his term of office begins.

"Question 4: When a person is declared nominee of a party, does he have to file the required report seven days before the primary, or can it be included in the report required seven days before or thirty days after general election in November?"

Section 24.1-251 extends the provisions of the Fair Elections Practices Act (Chapter 9 of the Election Laws) to "... all elections held within the Commonwealth except any election for members of the United States Congress." In defining terms used in Title 24.1, § 24.1-1 breaks down the term "elections" to include general elections, primary elections and special elections. I am of the opinion, consistent with my response to Question 2, that § 24.1-257 must be complied with in either primary or general elections.

ELECTIONS—Student May Establish Legal Residence at Place Where School Located.

ELECTIONS—Student Must Have Domicile and Place of Abode Under New Residency Requirements.

ELECTIONS—Domicile Does Not Mean Intent to Remain Permanently in a Place.

ELECTIONS—Domicile of Husband Does Not for Voting Purposes Fix Domicile of Wife.

March 30, 1971

THE HONORABLE JACK N. KEGLEY
Registrar of Voters for Albemarle County

I am in receipt of your letter of March 8, 1971, wherein you refer to my previous opinion to you under date of January 12, 1971, and also the amendment newly adopted to § 24.1-1 (11) of the Code of Virginia (1950), which reads:

"No 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."

You inquire as to the eligibility of students to now register and further if it is proper for you to require them to sign a statement regarding domicile, a copy of which you enclosed.

The new language to § 24.1-1 (11) is identical to that formerly found in § 24-20. It does not prohibit a student from registering to vote where he attends school but merely is an aid to the registrar in determining those eligible for registration as required by § 24.1-47. As previously ruled by
this office, whether a student is entitled to claim the locality at which he
attends school as his place of residence is a fact which the registrar must
pass upon. A student at an institution may of his own volition establish
his legal residence at the place wherein the institution he is attending is
located. See opinion of this office to the Honorable George W. Kemper,
Clerk of the Circuit Court for the City of Harrisonburg, dated April 2,
124, a copy of which I am enclosing.

In summary, the previous opinions of this office to you as well as the
opinion to Mrs. Leonard Hotinger dated September 23, 1970, do not vary
in great respect. The only provisions of residency requirement laws which
have changed in the Commonwealth are that in addition to domicile an
individual must now have a place of abode.

Regarding the form which you enclosed, I am of the opinion that it
misconstrues the meaning of domicile. Domicile does not mean an intent to
always remain permanently in a place. It means the present intent to re-
main. As previously quoted in my letter to you of January 12, 1971:

"To acquire a domicile of choice, the intent must be to make one's
home forthwith at the place in which the domicile is to be acquired.
It is sufficient if the intended stay is of sufficient permanence to make
the place in question 'home,' although there may be a probability or
even a certainty that the home will subsequently be changed."

With reference to your inquiry regarding domicile of a student's wife
who is working in Albemarle County, I am enclosing a copy of a previous
opinion of this office to the Honorable Levin Nock Davis, Secretary, State
Board of Elections, dated April 2, 1964, found in the Report of the At-
Although § 24-21 quoted in this opinion has been deleted in the recodifica-
tion of Title 24, there is nothing in Title 24.1 which would indicate that
a married woman may become a resident of Virginia for voting purposes
without first having actually resided in Virginia. The domicile of the
husband does not, for voting purposes, fix the domicile of the wife. See 25

ELECTIONS—Students—Definition of “residence” requires both domicile
and place of abode.

THE HONORABLE JACK N. KEGLEY
Registrar of Voters, Albemarle County

I am in receipt of your letter of December 22, 1970, regarding § 24.1-1
(11) of the Code of Virginia (1950), as amended, which defines “residence”
for all purposes of qualification to vote as requiring both domicile and a
place of abode. Such definition is required by the revised Constitution,
Article II, Section 1. You inquire in pertinent part as follows:

"I would appreciate your opinion as to qualifications to vote here
of students attending the University and their spouses, who live here
all year, who did not live here prior to attending the University, have
no plans for living here after they graduate, and who do not
know where they will live after graduation, but know that they will
not return to the home they had before coming to school here? If
your opinion is that they could not vote here because not domiciled
here, and assuming they are residents of Virginia, could they regis-
ter and vote in the locality in which they formerly lived, if they no
longer have a home or apartment in such locality? The last part of
this question has to do with the not uncommon situation of a Virginia
resident who lived in an apartment, say in Fairfax, but while attend-
ing school here, has no apartment in Fairfax, and quite possibly has no intention of returning to Fairfax."

The case of *Kegley v. Johnson*, 207 Va. 54, 147 S.E.2d 735 (1966), as well as the opinion of this office to Mrs. Leonard Hotinger, Secretary of the Rockbridge Electoral Board, dated September 23, 1970, to which you direct my attention, both concern the effect of § 24 of the Constitution ["No . . . 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."] upon the residency requirements for voting in this Commonwealth. Section 24 has been deleted in the revised Constitution and thus the above authority is not directly applicable.

However, the Commentary of the Commission on Constitutional Revision which proposed such definition is pertinent and reads:

"(6) Definition of residence. Decisions of the Supreme Court of Appeals define 'residence' as domicile. There is considerable flexibility in the concept, since under American law one retains his domicile until he acquires a new one, which need never happen so long as he retains the intention of ultimately returning to his old one. Language stating that residence for voting purposes requires both residence and domicile presents difficulties for two reasons. First, since residence has already been defined judicially to mean precisely the same thing as domicile, the phrase might be construed to be tautological. Second, if residence is construed to mean anything different from domicile, it might be so rigorously construed as to exclude persons temporarily 'residing' elsewhere, as, for example, those absent while upon active service with the armed forces or in college. The language that has been chosen should avoid both difficulties. It requires that in order to be 'resident' in a place for voting purposes, one must be domiciled there and have a place of abode there. Under this provision, one need not have his only or even regular place of abode where he votes, so long as he has a place of abode there and the intent which gives rise to domicile."

As you see from the Commentaries, the purpose of the change was two-fold. First, preventing a tautological construction of residency and domicile thus insuring an individual has some connection with the place in which he votes other than a mere intent to return some day. Second, to insure that residency and domicile are not so strictly construed that an individual temporarily residing elsewhere is disfranchised.

Consequently, any place of abode will meet the Constitutional and statutory requirements. In determining the requisite domiciliary intent, I feel that the following quote from Goodrich, *Conflict of Laws*, 4th edition, p. 43, conforms with the purposes set out in the Commentary above:

"To acquire a domicile of choice, the intent must be to make one's home forthwith at the place in which the domicile is to be acquired. It is sufficient if the intended stay is of sufficient permanence to make the place in question 'home,' although there may be a probability or even a certainty that the home will subsequently be changed."

As this office has always ruled, whether a person is a 'resident' for voting purposes is dependent upon the factual situation of each case. From the situation you present it appears that the students and their spouses would be qualified to vote in Charlottesville.

If numerous problems arise concerning registration of students then, as pointed out by the revisors of the Constitution in deleting the present § 24, if such a provision is deemed desirable, the General Assembly may provide for a like presumption without an express constitutional provision.
ELECTIONS—Term of General Registrar—Four years commencing March 1, 1971.

ELECTIONS—Incumbent May Be Reappointed or New Registrar May Be Appointed.

THE HONORABLE EUGENE A. TRUITT, Chairman
Fairfax City Electoral Board

January 8, 1971


"Each electoral board in the Commonwealth at its regular meeting in the first week in the month of February, nineteen hundred seventy-one, and every four years thereafter, shall appoint a general registrar, who shall be a qualified voter of the jurisdiction for which he is appointed."

and § 24.1-44 reads:

"The term of office of the general registrar shall begin on the first day of March, nineteen hundred seventy-one, and every four years thereafter and shall continue until a successor is duly appointed and qualified. The appointment or election of a general registrar to any other office shall vacate the office of general registrar."

You inquire as follows:

"Our current registrar is in her second year of a four year appointment under the old code. The question is, must she now be appointed to a new four year term or may the Board make a new appointment?"

As you point out, the current registrar is serving a four year term as appointed pursuant to the statutory provisions of § 24-64. In the recodification of Title 24 this section has been deleted. The term of office of the general registrar being statutory only, may be subsequently increased or decreased. The above quoted statutes now being effective, require that a general registrar be appointed for a term of four years beginning on the first day of March, 1971. The registrar to be appointed may be either a new appointment or the present registrar may be reappointed.


COUNTIES—Special Statute Applicable to Counties With County Board Government Prevails Over General Law.

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates

February 23, 1971

I am in receipt of your inquiry of February 17, 1971, wherein you direct my attention to an apparent conflict between § 15.1-719 of the Code of Virginia (1950), as amended, which provides for an appointment of a general registrar for a two-year period for counties under an optional form of government and § 24.1-43 which provides that each electoral board in the Commonwealth shall appoint a general registrar for a term of four years commencing March 1, 1971. You ask my opinion as to which of the above provisions would prevail.

I am of the opinion that the provisions of § 15.1-719 would prevail. Such statute is still effective and has not been repealed by any of the provisions...
of Title 24.1. It is, in effect, a special statute applicable to those counties adopting the county board form of organization and government and is a part of the requirements and procedure that should be complied with. Being specific it would prevail over the general provisions of § 24.1-43.

ELECTIONS—Town—Candidates—Resident of town, but registered in county, not entitled to have name on ballot.

ELECTIONS—Town—Elected council member must change registration from county to town before taking oath of office.

TOWNS—Council—Candidate, resident of town, but registered in county, not entitled to have name on ballot.

TOWNS—Council—Elected member must change registration from county to town before taking oath of office.

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

July 10, 1970

This is in reply to your letter of June 23, 1970, which reads, in part, as follows:

"Section 2 of the charter for the town of Whaleyville, Virginia, found in the Acts of Assembly, 1950, Chapter 526, at page 1023, provides in part that 'the administration and government of the town shall be vested in a council which shall consist of five (5) members, four (4) of whom shall be denominated the councilmen and one (1) to be denominated the mayor, all of whom shall be residents and qualified voters of the town.'"

"Recently Mr. X was elected to the council of the town of Whaleyville. At the time of the election, Mr. X lived in the town of Whaleyville and had lived there for more than one (1) year prior to the election, but he was not registered to vote in the town of Whaleyville. Mr. X, however, was at the time of the town election a qualified voter to vote in all general elections and he was registered as a voter in one of the several precincts located in the unincorporated areas of Nansemond County."

"It would be greatly appreciated if you would give me your opinion as to whether or not Mr. X, having been elected to the town council of Whaleyville, may take his oath of office and assume his duties as a councilman of the town of Whaleyville if he becomes a registered voter in the town of Whaleyville prior to the date on which he takes the oath of office and purports to begin his term as a councilman?"

"Also, it would be appreciated if you would advise me as to whether or not Mr. X was eligible to be elected to the council of the town of Whaleyville since he was not a qualified voter of the town at the time of the election?"

In answer to your questions, I direct your attention to Section 24-132 of the Code of Virginia (1950), as amended, and Section 32 of the Constitution of Virginia.

Section 24-132 is as follows:

"No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election, unless he be a party primary nominee."

In the case you present, Mr. X was an eligible voter in every way except that he was not registered to vote in the town of Whaleyville but
instead registered in a precinct outside of that town. For this reason, he
was not qualified to vote in the town election in which he offered as a
candidate; therefore, under the provisions of Section 24-132 his name
should not have been printed on the ballot for town councilman. I would
emphasize that this statute does not provide that such a person may not
be a candidate but instead states that his name should not be printed on
the ballot.

Section 32 of the Constitution provides, in part, 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, . . ."

It is my opinion, therefore, that although Mr. X was not entitled to have
his name printed on the ballot for the office of town councilman, he will
be entitled to take the oath and serve in that office to which he has been
elected provided that he qualifies as a voter in the town of Whaleyville at
the time he is sworn in as councilman.

I am herewith enclosing a copy of an opinion rendered the Honorable
1959-1960, at 150), in which this Office came to the same conclusion for a
similar situation.

ELECTIONS—Treasurer Must Be Appointed as Condition Precedent to
Qualifying as Candidate for any Office; Candidate’s Name Cannot Be
Printed on Ballot if Treasurer Not Appointed.

ELECTIONS—Blank Ballots—If all candidates fail to appoint treasurers,
blank ballots should be provided for write-in vote.

ELECTIONS—Only a Person Fulfilling Requirements of a Candidate Shall
Have His Name Printed on Ballot.

TOWNS—Treasurer Must Be Appointed as Condition Precedent to Qualify-
ing as Candidate for Any Office.

March 15, 1971

MR. JAMES M. POWELL, SR., Secretary
Electoral Board of Isle of Wight County

I am in receipt of your letter of March 9, 1971, questioning whether the
name of a candidate for town office should be printed on the election ballot
when such person has not filed the name and address of a campaign
treasurer with the electoral board where he resides and the State Board
of Elections as required by § 24.1-253 of the Code of Virginia (1950), as
amended.

It is the duty of each local electoral board to print ballots for the hold-
ing of town elections. However, “[o]nly a person fulfilling the requirements
of a candidate shall have his name printed on the ballots provided for the

Section 24.1-253 requires as “a condition precedent” to qualifying as a
candidate for “any office in the Commonwealth” that a campaign treasurer
must be appointed. Such section reads:

“(a) Each candidate for nomination for, or election to, any office
in the Commonwealth upon or before, and as a condition precedent
to, qualifying as such candidate shall appoint one campaign treas-
urer and shall file the name and address of the campaign treasurer
with the electoral board where he resides and the State Board of
Elections. Every treasurer so appointed shall accept such appoint-
ment, in writing, prior to filing thereof.
"(b) The treasurer for a candidate may appoint a separate assistant treasurer for any county, city or town, which assistant treasurer shall deposit funds, disburse and account for the same in the same manner as herein provided with respect to a treasurer. It shall be the duty of every such assistant treasurer to upon request make a report as prescribed in § 24.1-258 to the treasurer appointing him. The assistant treasurer's report shall be attached to and the total amounts of contributions and expenditures contained therein incorporated into the treasurer's report prescribed in said § 24.1-258 and filed as required by § 24.1-257.

"(c) No person shall act as treasurer or assistant treasurer unless the statement of appointment required in subsection (a) of this section shall be filed. Nothing in this chapter shall prevent the treasurer or assistant treasurer of any candidate from being the treasurer or assistant treasurer of another candidate. A candidate for office or nomination may designate himself as his own treasurer and he shall comply with all the requirements of a treasurer. No person shall be appointed or act as treasurer or assistant treasurer in any election who is not a qualified voter of the Commonwealth."

I am of the opinion that the provisions of the above statute apply to all candidates for any office in the Commonwealth, including candidates for town offices, and if the conditions of the section have not been complied with the name of the candidate should not appear on the ballot.

If all candidates have failed to comply with the above provisions, then a blank ballot should be provided at the election, allowing for a write-in vote as provided by §§ 24.1-129 and 24.1-217.

ELECTIONS—Vacancy—Nomination to fill vacancy can be voted for upon date set for regular primary.

ELECTIONS—Vacancy—Nomination to fill vacancy when regular primary date cannot be utilized must be by other than primary method.

March 23, 1971

THE HONORABLE THEODORE V. MORRISON, JR.
Member, House of Delegates

I am in receipt of your letter of March 11, 1971, wherein you request my "opinion as to whether a political party has the power to nominate by a primary election a candidate for election to be held at the next ensuing general election in November, such November election being necessitated by reason of a vacancy occurring in the office of Clerk of Court as a result of the death of the former Clerk."

Section 24.1-1 (5) of the Code of Virginia (1950), as amended, defines elections as follows:

"(a) 'General election' means any election held in the Commonwealth on the Tuesday after the first Monday in November, or in the case of elections for the governing bodies of cities and towns on the first Tuesday in May, pursuant to chapter 7, article 1 (§ 24.1-95 et seq.) of this title;

"(b) 'Primary' or 'primary election' means an election held for the purpose of nominating candidates as nominees of political parties for election to offices, and for the purpose of electing persons as members of the committees of political parties;

"(c) 'Special election' means any election held pursuant to law other than a general or primary election, provided that a special election may also be held on the day of a general or primary election;"
An election to fill a vacancy is held pursuant to the provisions of §§ 24.1-76 and 24.1-163 when a writ of election is issued by the appropriate officer and, in the case you present, § 24.1-76 requires that such election "be held at the next ensuing general election," provided the vacancy does not occur within one hundred twenty days prior thereto. Such election would be held pursuant to law and thus a special election notwithstanding that it is to be held on the day of the general election.

The question then to be answered is whether a primary election may be used to fill a vacancy to be voted upon at a special election. Primary elections are conducted and governed by the provisions of Article V, Chapter 7, §§ 24.1-170 et seq. While a political party does have the power to provide in any way it sees fit for the nomination of its candidates, it is bound by the laws governing primary elections, if the primary method of nomination is chosen. See opinion of this office to the Honorable Robert A. Maloney, Member, House of Delegates, dated December 16, 1968, and found in the Report of the Attorney General (1968-1969), p. 90; § 24.1-170.

Section 24.1-171 regarding primary elections provides in pertinent part that:

"This article shall not apply to the nominations of presidential electors, nor to the nominations of candidates to fill vacancies unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries."

In view of the fact that the nomination to fill the vacancy of the clerkship can be voted for upon the date set for regular primaries, I am of the opinion that the candidate in question may have his name printed on the primary ballot. The nomination to fill vacancies occurring at a date when the regular primary date could not be utilized would have to be in a manner other than the primary method.

I am enclosing for your information copies of previous opinions of this office wherein the above quoted language of § 24.1-171 has been construed. At the time of rendering these opinions such language was contained in § 226 of the Code of 1919. Enclosed are opinions to: the Honorable Harry L. Nachman, Chairman, Electoral Board of Newport News, dated September 30, 1936, found in the Report of the Attorney General (1936-1937), p. 70; the Honorable James M. Robertson, Member, House of Delegates, dated January 8, 1941, found in the Report of the Attorney General (1940-1941), p. 68; the Honorable Grover C. Alderson, Clerk of Circuit Court of Hopewell, dated September 10, 1941, found in the Report of the Attorney General (1941-1942), p. 58; and, Senator E. Glenn Jordan, dated June 3, 1946, found in the Report of the Attorney General (1945-1946), p. 61.

ELECTIONS—Vacancy in Office of Lieutenant Governor—How party candidates chosen.

LIEUTENANT GOVERNOR—Vacancy in Office of—How party candidates chosen.

June 29, 1971

THE HONORABLE JOAN S. MAHAN, Secretary
State Board of Elections

I am in receipt of your recent inquiry requesting advice as to how party candidates to fill the vacancy created by the death of the Lieutenant Governor may be selected and certified and the procedure to be followed by a person, other than a party nominee, who intends to be a candidate for this office.

In response to your inquiry, I direct your attention to previous opinions of this office, one dated March 23, 1971, to The Honorable Theodore V.
Morrison, Jr., Member, House of Delegates, and one dated May 28, 1971, to Mrs. Joan S. Mahan, Secretary, State Board of Elections, as well as a previous letter to the Honorable Levin Nock Davis, copies of which I enclose. As seen by these rulings, this office, in its opinion to you of May 28, 1971, stated that though filing deadlines for most legislative candidates were not extended by the Court's order dated May 24, 1971, the September primary date for this year should be considered as the regular primary date.

As indicated in the views expressed by this office in the Morrison opinion, if there is a called primary which may be utilized, candidates for nomination to fill the vacancy in the office of Lieutenant Governor may be voted for on such date. However, since a direct primary has not been requested by the duly constituted authorities of any political party for the Commonwealth at large, there being no regularly scheduled election for statewide office in 1971, no primary has been called which may be utilized nor may a primary be called for the sole purpose of filling vacancies. Party nominees for the office of Lieutenant Governor this year may not, therefore, be selected by the primary method.

If a party desires to select a nominee by a method other than the party primary, they must do so according to the provisions of § 24.1-172, the last paragraph of which reads as follows:

"A party selecting a nominee for any office by any method other than by direct primary, shall only do so within the thirty days, and no more, immediately preceding the regular primary date established for purposes of nominating candidates for the office in question. This limitation shall, however, have no effect on nominations either for special elections or pursuant to § 24.1-195."

Though there are no limits as to when nominations for special elections must be made, they should be done, of course, in time for the printing of the ballots.

A candidate who is not the nominee of a political party must declare his candidacy in accordance with the provisions of § 24.1-166 by notifying the State Board in writing, attested by two witnesses, of his intention to become a candidate. Such notice must be signed by the candidate as required by law and filed at least thirty days before the election since this would be a special election. In addition, candidates who are not party nominees must file, along with their notice of candidacy, a petition signed pursuant to § 24.1-168, by one-half of one per centum of the number of voters registered in the State as of January 1, 1971.

As indicated in the enclosed, the election to fill the vacancy will be a special election. Consequently, the name or names of candidates for the office of Lieutenant Governor should appear on an official ballot separate from any other ballot or ballots which may be used in the election of November 2nd. Additionally, although it is a special election, no writ of election need issue from the Governor since the provisions of § 24.1-84 automatically provide for the special election to be held.

The final question raised is whether a person may duly qualify as a candidate for both the office of Lieutenant Governor and a legislative district seat. Also enclosed is an opinion of this office to The Honorable W. H. Lineweaver, Secretary, Electoral Board of Rockingham County, dated May 11, 1950, and found in Report of the Attorney General (1949-1950), p. 100, wherein this office has previously ruled that there are no constitutional or statutory provisions which would prohibit a person, otherwise qualified, from being a candidate for two offices at the same election. Of course, if elected to both, he may only hold one and a vacancy would necessarily be declared in the other.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Voter Disqualified by Conviction of Felony Struck From List by Certificate of Clerk of Court.

ELECTIONS—Disfranchisement of Person Convicted of Felony Is Automatic; No Formal Procedure.

MRS. MARY S. LAW
Registrar of Bath County

May 5, 1971

I am in receipt of your letter of April 28, 1971, wherein you request my opinion as to how individuals convicted of a felony who become disqualified from voting under § 24.1-42 of the Code of Virginia (1950), as amended, may be removed from the lists of registered voters.

Section 24.1-42, as amended by Chapter 205 of the Acts of Assembly of 1971, reads:

"No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. No person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished."

The provisions for removing such individuals from the voter registration lists are contained in § 24.1-46 (12) which states:

"Strike from the list of voters the names of all persons known to him to be disqualified to vote, as provided in the Constitution, unless such disability has been removed as provided by law. The various records concerning such names shall be retained for a period of two years."

There is no requirement that individuals convicted of a felony be "purged" from the voter registration lists nor that the procedure for purging (§§ 24.1-59 - 24.1-62) be followed. Disfranchisement of persons convicted of a felony is and remains automatic; such individuals being struck from the list. See Report of the Commission on Constitutional Revision—Commentaries, p. 106.

Though there is no formal procedure for striking convicted felons from the voter list, I feel that it should generally be done upon certificate of the clerk of a court of competent jurisdiction that such person has been so convicted, provided the person does not produce a certificate from the Governor that his disabilities have been removed. See § 24-94 for previous general provisions for removing such individuals from the voter lists.

THE HONORABLE JOHN B. JAMES, Chairman
Virginia Beach Electoral Board

August 28, 1970

I am in receipt of your letter of August 17, 1970, regarding the arrangement of the Constitutional Amendment questions on voting machines for the November 3rd general election.

Chapter 763 of the 1970 Acts of Assembly provides in part that at the November election "... a ballot shall be furnished each voter which shall have printed thereon the following:

"Proposal No. 1
"Main Body of the Constitution
"Question: Shall the Constitution be generally amended and revised, as agreed to by the General Assembly at its 1969 and 1970 sessions (except for the three proposals separately stated below)?"

The Act then separately sets forth three proposals concerning Lotteries, General Obligation Bonds and Revenue Bonds.

Virginia Beach uses the Automatic voting machine which has been approved by the State Board of Elections in accordance with § 24-291 of the Code of Virginia (1950), as amended. The machines are used "... for voting for all candidates of as many political parties or organizations as may make nominations at any election; for or against as many questions as may be submitted at any election; ..." See § 24-294. I am advised, however, that proposed questions on the Automatic voting machines may not be listed vertically but must, due to the construction of the machines, be listed horizontally. You inquire therefore whether the word "below," as emphasized above, may be changed to "hereafter or something similar."

Your inquiry is answered in the affirmative. Section 24-297 of the Code requires that ballots on machines must be placed to clearly indicate what push knob, key lever, or other device, is to be used to cast a vote. The word "below" is used in a directional sense and could possibly lead to confusion if proposals are listed horizontally. I feel consequently that it would be proper to change such word. It would seem that a change of the word "below" to "to the right" would be a clear indication of the levers to be operated in order to vote upon the proposals in question.

ELECTIONS—Write-in Votes; Misspelling of Name Does Not Invalidate Vote.

ELECTIONS—Write-in Votes; Not Necessary That Voter Place Mark or Check Before Space Provided for Write-in Votes.

April 29, 1971

THE HONORABLE C. ALTON LINDSAY, SR.
Secretary, Hampton Electoral Board

I am in receipt of your letter of April 27, 1971, wherein you state that an individual is conducting a write-in campaign for the upcoming councilmanic election. You ask me to comment as to the validity of any write-in votes cast which may set forth the individual's name in varieties of his given name or initials or set forth the name in a misspelled manner.

Secondly, you state that the City of Hampton uses voting machines and inquire "... if a mark +, x, -, / is required before the write-in name on a voting machine and if yes, is the box ☐ wherein same is to be shown required?"


These opinions with respect to your first inquiry are still applicable. The misspelling of a name should not invalidate a write-in vote otherwise properly cast, nor should the failure to set forth in a write-in vote the full given name of an individual invalidate such vote. If the judges of election or a majority of them are satisfied as to the identity of the person for whom the vote has been cast, it should be counted.

With respect to your second inquiry, I am of the opinion that the enclosed rulings of this office would no longer pertain. Section 24-251 of the Code of Virginia (1950) has been replaced by § 24.1-217 which reads:
REPORT OF THE ATTORNEY GENERAL

"Ballots voted for any person whose name does not appear on the machine as a candidate for office are herein referred to as write-in ballots. When two or more persons are to be elected to the same office, and the machine requires that all write-in ballots voted for that office be written in a single receptacle or device, an elector may vote for one or more persons whose names do not appear upon the machine with or without the names of one or more persons whose names do so appear. With that exception and except for presidential electors, no write-in ballots shall be voted for any person for any office whose name appears on the machine as a candidate for that office; any write-in ballot so voted shall not be counted. A write-in ballot must be cast in its appropriate place on the machine, or it shall be void and not counted.

"No write-in ballot will be counted when it is apparent to the officers of the election that a voter has voted for the same person for the same office more than one time."

A write-in vote should be counted pursuant to the above provisions. It is no longer necessary for the voter to place a mark or check before the name inserted in the space provided for the casting of write-in votes.

EMINENT DOMAIN—Authority to Exercise Power—Federal and State powers complementary.

THE HONORABLE ARTHUR R. GIESEN, JR.
Member, House of Delegates

December 7, 1970

This will acknowledge receipt of your letter of November 16, 1970, wherein you requested an opinion on two questions concerning Virginia Electric & Power Company's Marble Valley Project. You asked first:

"...in answer to an inquiry to Senator Harry F. Byrd, Jr. a letter has been received from the Federal Power Commission... which indicates that since no permit has been granted by the F.P.C., the public utility does not have the right of eminent domain under federal regulations. Does this put the state statutes in conflict with the federal regulations on the federal law?"

According to the provisions of the Federal Power Act (U.S.C. Title 16, §§ 791(a), et seq.), preliminary permits may be issued for the purposes of securing data and maintaining application priority for a federal license. The exercise of federal rights of eminent domain is dependent upon the issuance of a preliminary license. However, it should be noted that the Federal Power Act is not an exclusive law of eminent domain but simply complements state law on the subject. Oakland Club v. South Carolina Public Authority, 110 F.2d 84 (4th Cir. 1940); Burnett v. Central Nebraska Public Power and Irrigation Dist., 147 Neb. 458, 23 N.W.2d 661 (1946). States are not pre-empted nor precluded from granting public service corporations eminent domain powers to be exercised under certain conditions. Section 56-49(1) of the Code of Virginia (1950) empowers a public service corporation:

"... to cause to be made such examination and survey for its proposed line or location of its works as are necessary to the selection of the most advantageous location or route... or, providing additional facilities, and for such purposes, by its officers and servants, to enter upon the lands or waters of any person but subject to responsibility for all damages that are done thereto."
In view of the foregoing, I am of the opinion that your first inquiry should be answered in the negative.

Secondly, you stated that VEPCo's permit application to the Federal Power Commission indicated that VEPCo had already determined that the project was feasible and inquired if that fact would have any influence on VEPCo's use of eminent domain under state statutes.

In a recent opinion to you dated October 22, 1970, it was pointed out that "[t]he fact that an application has been filed with the federal agency only does not render Virginia law inapplicable or reduce the requirements for the content of the required application to the SCC." It was noted in that opinion that such an application must "contain essential facts in sufficient detail to enable the SCC to pass upon the merits of the application. It must be accompanied by such maps, plans and other information as may be necessary to give a clear and full understanding of the proposed scheme of development, and of dams, generating stations, or other major structures . . . ."

Although a determination of feasibility is certainly one purpose of the rights granted by Code Section 56-49(1) those rights are not limited by the statutes to such a determination. Once feasibility has been determined it may still be necessary to conduct tests to determine the manner in which the project should be built and to collect the data that is required to be in the application to the State Corporation Commission. See, Section 62.1-85 of the Code of Virginia (1960), as amended. Therefore, I am of the opinion that your second question must be answered in the negative.

EMINENT DOMAIN — State Institutions — Virginia Institute of Marine Science possesses power.

DR. WILLIAM J. HARGIS, JR., Director
Virginia Institute of Marine Science

August 17, 1970

This will acknowledge receipt of your letter of August 7, 1970, in which you ask if the Virginia Institute of Marine Science, a State-supported institution, possesses the powers of eminent domain as provided in appropriate sections of the Code of Virginia. Section 25-232 of the Code states, in part, as follows:

"If the State Highway Commission or the governing body of any county, for the purpose of opening, constructing, repairing or maintaining a road or any other public purpose authorized by law, or the council of any city or town, the trustees of any school district, the institution for the deaf and blind, the Breaks Interstate Park Commission, hereinafter referred to as Commission, any of the State hospitals, the University of Virginia, the Virginia Military Institute, the Medical College of Virginia, or any other State institution, cannot, because of the incapacity of the owner or inability to agree upon a price or terms, or because the owner cannot with reasonable diligence be found in this State or is unknown, agree on terms of purchase with those entitled to any land, buildings, structures, sand, earth, gravel, water or other material necessary to be taken and used for the purposes of the State Highway Commission, or such county, city, town, or school district, or for any or all purposes of the institution for the deaf and blind, the Commission, such State hospitals, the University of Virginia, the Virginia Military Institute, the Medical College of Virginia, or of any other State institution, it may acquire title to such land or an easement thereover, and title to such sand, earth, gravel, water or other material aforesaid by condemnation under the provisions of chapter 1.1 (§ 25-46.1 et seq.) of this title, and the proceedings in all such cases shall be according to the provisions
of that chapter, so far as they can be applied to the same. . . .”
(Emphasis added.)

In addition, I find that § 23-14 of the Code of Virginia declares certain educational institutions in Virginia to be public bodies and constituted as governmental institutions, among which is the Virginia Institute of Marine Science. Accordingly, I am of the opinion that the Virginia Institute of Marine Science is an institution within the meaning of that term as used in § 25-232 of the Code, and, therefore, enjoys the right of eminent domain to the same extent as the other higher educational institutions mentioned in that section.

FEDERAL SOCIAL SECURITY—Local Employees—All remuneration reported to State Compensation Board included in wages for purposes of employer’s Social Security contributions.

THE HONORABLE R. W. BICKERS, Clerk
Circuit Court of Greene County

I have received your recent letter, asking whether Greene County is liable for the payment of the employer’s share of Social Security taxes on fees and wages collected by you. I understand that the County is paying their share of the tax on your base salary.

For purposes of the Federal Insurance Contributions Act, you are a local employee, not a State employee. Va. Code § 51-111.2 (e) and (f). Greene County participates in the Federal Old Age and Survivors Insurance System under a plan which “provides that all services which constitute employment as defined in § 51-111.2 and are performed in the employ of the political subdivision by any employees thereof shall be covered by the plan.” Va. Code § 51-111.5 (a) (2). The term “employment” includes, “any service performed by an employee of the State, or any political subdivision thereof, for such employer. . . .” Va. Code § 51-111.2 (b). The plan provides for the county to pay an amount equal to the employer’s share of FICA taxes but the county is partially reimbursed by the State for this expense.

The only question, then, is whether your fees and wages constitute “wages” upon which the tax would be based:

“The term ‘wages’ means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that such terms shall not include that part of such remuneration which, even if it were paid for ‘employment’ within the meaning of the Federal Insurance Contributions Act, would not constitute ‘wages’ within the meaning of that act.” Va. Code § 51-111.2 (a).

The fees chargeable by you are generally fixed by statute. See Va. Code §§ 14.1-112 and 14.1-113. Any excess of the amounts collected by you above your authorized expenses and maximum compensation is required to be paid into the State treasury; two-thirds of this excess is returnable to the county. Va. Code § 14.1-140.1. In my opinion any amount required by Virginia Code § 14.1-136 to be reported by you to the State Compensation Board is an emolument of office, includable in the term “wages” for purposes of determining the employer’s required Social Security contribution.

FEES—Bail—Commissioners entitled to single fee in multiple misdemeanor charges.

BAIL—Commissioner—Fee to be charged in multiple misdemeanor cases.
REPORT OF THE ATTORNEY GENERAL

December 18, 1970

THE HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney of Nansemond County

In your letter of December 14, 1970, you inquire whether when a bail is set on several misdemeanor charges in one bail bond under the provisions of § 19.1-122.1 of the Code of Virginia, the bail commissioner should be deemed to have released the accused upon his own recognizance on each of the several charges and be entitled to a $3.00 fee for each such charge.

Section 19.1-122.1 provides as follows:

"Where more than one misdemeanor charge against the same person results from one set of facts or circumstances, the person who admits such person to bail on all of such charges shall require only one bail bond and shall make all such charges returnable to the same time and place. The penalty of such bond shall be based on the most serious of such charges."

Section 19.1-124 provides as follows:

"The fee of the commissioner or Clerk for admitting a person to bail or releasing a person upon his recognizance under § 19.1-110 shall be $3.00. (Emphasis supplied.)"

I am of the opinion that the $3.00 fee allowed by § 19.1-124 is chargeable where either a bail bond is required under § 19.1-122.1 or where in lieu of a bail bond the person is released on his own recognizance under § 19.1-124. Therefore, where a person has several misdemeanor charges against him and is required to obtain one bail bond based on the most serious charge under § 19.1-122.1, he does not have to pay an additional fee of $3.00 for each of the other charges involved since he is not released on his own recognizance on those.

FEES—Clerk—Payment to clerk by probation and parole office for copying criminal records.

June 29, 1971

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

You have solicited my opinion regarding "whether or not the Probation and Parole Office is entitled to copies of one type or another from our criminal files without the payment of the fee" established by § 14.1-112 (10) of the Code of Virginia (1950), as amended, which sets a fee of $1.00 per page payable to clerks of courts of record for making copies of any paper or record for removal from the clerk's office which is not otherwise specifically provided for.

I know of no provision of law exempting the Probation and Parole Office from payment of fees for copies made for it in accordance with § 14.1-112 (10); therefore, it is my opinion that this fee must be paid.

FEES—Clerks—Habeas Corpus—Entitled to $10 when petition filed.

FEES—Clerks—Indigent appeals—Entitled to such as ordered by Supreme Court of Appeals.

FEES—Clerks—Habeas Corpus Appeals—Only entitled to compensation allowed by § 8-468.1.

FEES—Clerks—Transmitting record to federal courts—No compensation allowed except necessary expenses.
FEES—Clerks—Habeas Corpus—Furnishing necessary records to prepare petition carries normal fee.

FEES—Clerks—Habeas Corpus—Only actual expenses allowed for preparing records for appointed attorneys.

FEES—Clerks—Transcripts—No charge if sentence is five years or more.

FEES—Clerks—Copies of indigent records—Entitled to $1 per page when sent to penitentiary or State mental hospitals.

FEES—Clerks—Certification—Mandatory before payment from State treasury.

CRIMINAL PROCEDURE—Indigent Appeals—Clerk's fees—To be such as ordered by Supreme Court of Appeals.

CRIMINAL PROCEDURE—Transcripts—Clerks' fees—No charge if sentence is five years or more.

CRIMINAL PROCEDURE—Copies of Indigents' Records—Clerks' fees—When sent to penitentiary or State mental hospitals charge is $1 per page.

HABEAS CORPUS—Clerks' Fees—Furnishing necessary records to prepare petition carries normal fee.

HABEAS CORPUS—Clerks' Fees—Only actual expenses allowed for preparing records for appointed attorneys.

HABEAS CORPUS—Clerks' Fees—Entitled to $10 when petition filed.

HABEAS CORPUS—Appeals—Clerks' Fees—Only entitled to compensation allowed by § 8-468.1.

HABEAS CORPUS—Transmitting Record to Federal Courts—Clerks' Fees—No compensation allowed except necessary expenses.

August 5, 1970

THE HONORABLE DAVID B. AYRES, JR.
Comptroller

This is in response to your letter of May 28, 1970, wherein you advise that some clerks of courts of record have been requesting payment for services rendered to indigents in various instances. You point out that § 14.1-87 of the Code of Virginia of 1950 provides:

"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."

Accordingly, you inquire "...whether it is proper to pay from the State Treasury, fees to Clerks of Courts of Record in the following instances" (which I shall list and answer seriatim):

"1. A $10.00 fee for services required in Habeas Corpus proceeding—usually stated by Clerks as 'filing Habeas Corpus.' Apparently Section 14.1-112 (20) is the authority used for requesting payment of such fees."

Section 14.1-112 (20) provides that a clerk of a circuit or other court of record shall receive $10.00 for all services required thereunder (in a habeas corpus proceeding). Accordingly, it is proper to pay such $10.00 fees.
"2. Fees allowed for services in certifying or preparing copies of papers and/or records for indigents in appeal cases to the Supreme Court. Sections 14.1-183, 17-30.2, and 19.1-315 are the apparent authority used for requesting payment of such fees."

My answer assumes you are referring to appeals to the Supreme Court of Appeals of Virginia. Section 14.1-183 provides, in part:

"Any person . . . [who is unable to pay fees or costs] may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, . . . from all officers, all needful services and process, without any fees to them therefor, . . . ."

The Supreme Court of Appeals has ruled that § 14.1-183 is not applicable to appeals (Tyler v. Garrison, 120 Va. 697, 91 S.E. 749), and thus, the fees in question are not payable pursuant thereto.

Section 17-30.2 reads, in part:

"In any felony case wherein the judge . . . certifies that the defendant is financially unable to pay his attorney's fees, costs and expenses incident to an appeal, the Supreme Court of Appeals shall order the payment of such attorneys' fees, costs or necessary expenses of such attorneys in an amount deemed reasonable by the court, by the Commonwealth out of the appropriation for criminal charges.

Since indigents have the right to appeal following felony convictions (Cabaniss v. Cunningham, 206 Va. 330, 144 S.E. 2d 911 (1965) ) reasonable fees connected with the preparation of the record in such appeals are payable in accordance with § 17-30.2. In this regard, I am enclosing an opinion rendered on January 28, 1969, by my predecessor to Honorable John H. Powell, Clerk, Circuit Court of Nansemond County, appearing on pages 11 and 12 of the 1968-1969 Report of the Attorney General.

Presumably your question also relates to appeals by indigent prisoners from habeas corpus judgments adverse to them. The Virginia Supreme Court has ruled that an indigent prisoner is not, as a matter of right, entitled to the appointment of counsel for a habeas corpus appeal (Cooper v. Haas, 210 Va. 279, 170 S.E. 2d 5). Because of the distinctions between an appeal from a felony conviction and a habeas corpus appeal as set forth in Cooper, I am of the opinion that § 17-30.2 would not be applicable to habeas corpus appeals.

Section 19.1-315 provides for payment to "[a] sheriff or other officer, . . . to execute process in a criminal case and doing any act in the service thereof, for which no other compensation is provided, . . . .” and further (for payment of fees) "[w]hen in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, . . . .” Since there are specific references to criminal cases, I do not believe that his section provides authority for the payment of fees in habeas corpus appeals.

Section 17-30.1, as amended in 1968, provides for the preparation of three (3) copies of a transcript when "... a sentence of imprisonment for five years or longer is imposed . . . .” and the transcript is "... to be held available by the court for use by the court, the defendant so sentenced or the Commonwealth.” That section further provides for the payment of the transcript out of the appropriation for criminal charges. Thus, there should be no separate charge for transcripts of criminal proceedings governed by § 17-30.1.

Since there are no specific references to fees for habeas corpus appeals, I am of the opinion that the only allowable fees are those set forth in § 8-468.1, which provides:
"Whenever the clerk of a trial court makes up, certifies and transmits an original record pursuant to the rules of the Supreme Court of Appeals, he shall receive compensation for all papers necessary to be copied the sum of three cents for every twenty words so copied, and, in addition thereto, the sum of five dollars. The compensation herein shall be in lieu of all compensation provided in § 14-123 (38)." (Now § 14.1-112.)

"3. Fees allowed for services in preparing and mailing a copy of an indigent's file to U.S. District Courts. Sections 14.1-183 and 19.1-315 are the apparent authority for requesting payment of such fees."

I do not feel that the above referred to code sections provide authority for furnishing certain records to U. S. district courts in federal habeas corpus cases. These records are generally furnished at the request of the Commonwealth, the purpose being to avoid additional trials by determination of matters on the basis of the State records. This is in accordance with Townsend v. Sain, 372 U.S. 299 (1963), and other Supreme Court decisions. Either the original records or certified copies may be forwarded to the district courts, the determining factor being whether the State Court of Record prefers to send copies rather than the original record.

Since there are no provisions for the levying of fees in proceedings wherein records are forwarded from State courts to federal courts, I am of the opinion that fees are not payable. Nevertheless, expenses (such as postage charges) connected with the preparation and transfer of records to the Federal courts are payable in accordance with Acts of Assembly 1968, Chapter 806, Item 92G (Acts of Assembly 1970, Chapter 461, Item 15) which provides for the payment of "... [e]xpendures incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner, including the payment of counsel fees as fixed by the court;... ."

"4. Fees allowed for services in connection with habeas corpus proceedings, such as; certified copy of warrants, indictments, and various orders for the Attorney General, transcript of record and copies of various papers for an indigent defendant, and transcript of record and copies of various papers for an indigent's attorney. Apparently Item 92G, Chapter 806, 1968 Acts of Assembly is the authority used for requesting payment of such fees."

The Supreme Court of Appeals recently ruled that an indigent prisoner is entitled to be furnished with necessary records for filing a petition for a writ of habeas corpus. (McCoy v. Lankford, 210 Va. 264, 170 S.E. 2d 11 (1970)). In McCoy, the Court ruled that generally a prisoner is not entitled to a transcript for purposes of preparing a petition for a writ of habeas corpus, but he is usually entitled to copies of certain court orders. Accordingly, I am of the opinion that normal fees for the furnishing of documents to prisoners (assuming the court of conviction determines that the records are necessary) for the prosecution of a petition for writ of habeas corpus are payable in accordance with Item 92G, Chapter 806, 1968 Acts of Assembly (Item 15, Chapter 461, 1970 Acts of Assembly). Once the petition for a writ of habeas corpus is filed in the court of record, however, and the petitioner is proceeding in forma pauperis, I am of the opinion that fees for the preparation of records to be furnished an appointed attorney are not payable because of the provisions of § 14.1-183. Nevertheless, the actual expense involved in the preparation of records for an indigent's attorney may be payable pursuant to Item 92G, Chapter 806, 1968 Acts of Assembly (Item 15, Chapter 461, 1970 Acts of Assembly). Records furnished to this office would be included as "[e]xpenses incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner, ... ." (Item 15, Chapter 461, 1970 Acts of Assembly) and thus only the cost of the production of such records is payable. Additionally, habeas corpus proceedings involving convictions after the 1968 amendment
to § 17-30.1 became effective should not require any charges for the preparation of transcripts (unless, of course, the sentence imposed is less than five years).

"5. Fees allowed for services in appeal cases for preparing copies of all or parts of an indigent's record and mailing such to him, his attorney, or to the office of the Attorney General. Sections 14.1-183 and 19.1-315 are the apparent authority for requesting payment of such fees."

In accordance with my answer to question 2, § 14.1-183 is not applicable to appeals. Likewise, I do not believe that § 19.1-315 is applicable since there are specific code sections relating to appeals. (Sections 17-30.1 and 17-30.2 for felony appeals and § 8-468.1 for civil appeals.) Also, there would normally be no reason for copies of the records to be prepared for the indigent, his attorney, or this office in appeal cases.

"6. Fees allowed for services in furnishing copies of records of indigent defendants or prisoners to the State Penitentiary or State Mental Hospitals. Sections 14.1-183 and 19.1-315 are the apparent authority for requesting payment of such fees."

Clerks of courts of record are required by § 19.1-228 to furnish the superintendent of the penitentiary a copy of the judgment order when a person is transported to the penitentiary. Section 19.1-228 requires clerks to furnish certain documents to the superintendent of the mental hospital to which the persons accused of crimes are committed.

Section 14.1-112 provides, in part:

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

* * *

"(10) For making out a copy of any paper or record to go out of the office, which is not otherwise specifically provided for, for each page, one dollar."

Accordingly, I believe § 14.1-112 (10) provides authority for payment for the furnishing of the copies required by § 19.1-228. Section 19.1-235 relates to the committing of prisoners after a finding of insanity by a jury or commission, and although it does not specifically refer to records which are forwarded by the court, the statute does provide that "... he shall be committed by the court to the department for the criminal insane at the proper hospital..." and certainly some court order would be required. Accordingly, I believe that the furnishing of a copy of said order to the superintendent of the mental hospital would be payable in accordance with § 14.1-112 (10).

You also inquire as to whether the certification requirements of § 14.1-85 are required before any fees can be paid to a clerk. Section 14.1-85 reads, in part:

"Fees prescribed by law for services of clerks of courts, ... shall be paid out of the State treasury unless now or hereafter otherwise provided by law, when certified as prescribed by § 19.1-317, ... ."

Accordingly, compliance with the certification requirement is mandatory.

FEES—Clerks—Plats—May charge flat minimum or according to lines or courses.

CLERKS—Fees—Plats—May charge flat minimum or according to lines or courses.
I have received your letter of July 17, in which you ask my opinion as to the clerk's fee for recording a Federal Housing Administration deed of trust with a plat attached.

The deed of trust is three and one-half pages, printed in smaller than pica type. The clerk's fee provided by Virginia Code § 14.1-112(2), as amended, for recording it is fourteen dollars. An additional one dollar fee is imposed by § 14.1-112(1).

Because the fee provided by § 14.1-112(3) of the Code was obviously intended to compensate the clerk for hand copying a plat, I construe the phrase, "line or course," to mean any line which would have been copied by hand. I count thirty-six such lines on the plat which you sent me. The fee for recording the plat would be $3.50 under § 14.1-112(3). I understand that, with the advent of photocopying, most clerks now charge only the flat two dollar minimum fee on single lot plats; you may, however, legally charge the larger amount.

FEES—Not Provided for Counsel Appointed In Misdemeanor Cases.

ATTORNEYS—Fee Not Allowed for Appointment in Misdemeanor Cases.
persons in a case of felony, and such reasonable compensation as the judge may prescribe in a case of misdemeanor.”

In reaching a conclusion, I have considered the fact that specific compensation is allowed in instances where counsel is appointed to represent persons charged with felonies, the fact that compensation in misdemeanor cases is made in instances wherein a public defender is appointed, and the express disallowance of fees in certain instances set forth in § 14.1-183. I am accordingly of the opinion that the language of § 19.1-315 is not sufficiently broad to encompass payment of fees for counsel appointed to represent indigents charged with misdemeanors.

FEES—Sheriffs and Sergeants—Service and garnishment proceedings.

SHERIFFS AND SERGEANTS—Fees and Commissions for Service in Garnishment Proceedings.

March 25, 1971

THE HONORABLE LLOYD H. HANSEN
Commonwealth’s Attorney for the City of Hampton

In your letter of March 10, 1971, you inquire whether a City Sergeant may properly collect a commission, pursuant to § 14.1-109 of the Code, on funds collected from a garnishee where the money is paid directly to the City Sergeant by the garnishee.

Section 14.1-109 of the Code of Virginia, (1950), as amended, provides, in pertinent part:

“An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum. . . .”

This section applies in cases where a judgment is rendered against the garnishee and he fails to pay the amount of the judgment, following which an execution is issued against him and collection is made by the officer under said judgment. This situation is referred to in an opinion to the Honorable Rhea F. Moore, Jr., dated March 21, 1969, and found in the Report of the Attorney General, (1968-1969), p. 105, a copy of which is attached hereto. I am of the opinion that in such a case the City Sergeant is entitled to the commission pursuant to § 14.1-109.

In situations, however, where the money is paid by the garnishee directly to the City Sergeant before the return day or before any judgment is obtained against the garnishee, the appropriate Code section is § 8-448, which specifically applies to garnishments. That section reads as follows:

“Any person, summoned under § 8-441, may, before the return day of the summons, deliver and pay to the officer serving it, what he is liable for; and the officer shall give a receipt for, and make return of, what is so paid and delivered.”

In these situations the City Sergeant is entitled to the fees prescribed under § 8-429, which provides for fees to officers receiving money under Chapter 19, Title 8 of the Code which deals with garnishments. He would not be entitled to a commission under § 14.1-109, since no execution would have been issued. This is in accord with the opinion heretofore cited.

FIRE LAWS— Burning Prohibited— Violation of Governor’s Proclamation.

June 8, 1971

THE HONORABLE OLIVER D. RUDY
Commonwealth’s Attorney for Chesterfield County
This will acknowledge receipt of your letter of May 21, 1971, requesting my opinion with respect to the interpretation of a portion of § 27-54.1 of the Code of Virginia (1950), as amended. Your letter states as follows:

"I have a question involving the interpretation of a portion of Section 27-54.1 of the 1950 Code of Virginia, as amended.

"As you know, the Governor of Virginia because of the recent drought condition that existed in the state, issued a proclamation under this section against burning as set forth in this section. In the last sentence of the first paragraph of this section it is provided:

"It shall further be unlawful during such periods for any person to hunt or fish except as hereinafter provided, smoke, burn leaves, grass, brush or debris of any type therein or to ignite or maintain any open fire therein nearer than three hundred feet from any such forest lands, brushlands or fields containing inflammable vegetation or marshland adjoining such forest lands, brushlands, fields or idle or abandoned lands."

"My question is this—in order for someone to be guilty of a violation of burning while the Governor's proclamation was in force, is it necessary for the forest lands and brushlands to contain inflammable vegetation or does this language merely qualify the word “fields” as set forth therein?"

It would appear from the context of the statute that the General Assembly intended to include various types of land cover which, under severe drought conditions, would create extraordinary fire hazards. In this regard the phrase “containing inflammable vegetation” serves to delimit the legislative intent with respect to those fields which may create extraordinary fire hazards depending upon the degree to which they have been cultivated.

Based upon the foregoing, I am of the opinion that the language “containing inflammable vegetation” merely qualifies the word “fields” within the context of § 27-54.1 of the Code.

FORESTS—Reforestation Plan—Contracting landowner liable to Commonwealth for not carrying out plan.

FORESTS—Reforestation Plan—No recourse against non-contracting buyer of land under plan for refusing to implement.

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

This will acknowledge receipt of your letter of July 1, 1970, which states, in part, as follows:

"Quite frequently, a private landowner applies for and receives the approval of the State Forester for a Reforestation Plan (Management Plan) in lieu of leaving seed trees. Following logging and cutting of the timberland tract, the landowner assumes responsibility for required reforestation measures, or the original owner will carry out his stated Reforestation Plan as agreed upon. The Virginia Division of Forestry’s Form 74 (which is a part of the Reforestation Plan) states, ‘that this contract cannot be transferred to any other person or persons without the approval of the State Forester and any prospective purchases or purchasers of the land for which a reforestation plan has been approved by the State Forester. . . . etc.’ However, many landowners apparently do not read the document or their attorneys are unaware of the restrictions imposed upon
the landowner who has not completed an approved reforestation plan on file with the Division of Forestry.

"Further, it is quite likely that many more landowners will request reforestation plans due to increasing stumpage prices. There are also individuals who merely speculate in land purchases and sales who apply for a reforestation plan, who apparently have uncertain intentions as to compliance.

"Our queries are:

"(1) What legal action should the State Forester initiate where the person whose reforestation plan was approved by the State Forester, sells the property before carrying out the terms of the approved reforestation plan?

"(2) What legal action should the State Forester initiate against a landowner who signs the Virginia Division of Forestry Form 74 which reads, 'It is further agreed that this contract cannot be transferred to any other person or persons without the approval of the State Forester and any prospective purchases or purchasers of the land for which a reforestation plan has been approved by the State Forester, as provided in Section 10-83 of the Virginia Code of 1950, as amended'?

"(3) Does the State Forester have a legal action against a purchaser who buys the land and refuses the seller to enter on the land to comply with the terms of the approved Reforestation Plan, or who does not clear the land for the purposes and within the time limits provided in Section 10-82?"

Questions one and two may be answered together. According to the terms of the Reforestation Plan, the landowner-vendor is responsible for implementing the Reforestation Plan unless a valid contractual transfer was approved by the Division of Forestry prior to the time of the land transfer. In the event that land covered by reforestation agreement is conveyed to another party without a valid reforestation contract transfer, and the Reforestation Plan is not carried out, the landowner-vendor is liable to the Commonwealth in a civil suit brought by the Attorney General in the name of the Commonwealth in any court of competent jurisdiction for the failure to carry out the terms of the Reforestation Plan. See § 10-83.01 of the Code of Virginia (1950), as amended.

In reply to your third question, I am of the opinion that the Commonwealth has no recourse against a vendee who has not contracted to carry out the Reforestation Plan, and who refuses to allow implementation of the Plan agreed upon by the landowner-vendor.

GAME AND INLAND FISHERIES—Authority—No authority to dispose of land to town.

April 22, 1971

THE HONORABLE WILLIAM E. FEARS  
Member, Senate of Virginia

This is in response to your letter of April 13, 1971, in which you inquire as to whether or not the Commission of Game and Inland Fisheries can either lease or sell to the Town of Wachapreague a piece of waterfront property for development by the Town of a harbor, dock and wharf.

I have reviewed the applicable provisions of Virginia law and find no provision contained therein which would permit the Commission to sell or lease the property in question to the Town of Wachapreague. An act of the Legislature would, therefore, be necessary for the Commission to sell the property in question. Section 29-11.1, however, could be amended to permit the lease of the property.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—Hunters May Carry Pistol on East Side of the Blue Ridge Mountains.

GAME AND INLAND FISHERIES—Hunters May Not Use Pistol in Hunting Game Birds and Animals on East Side of Blue Ridge Mountains.

March 10, 1971

THE HONORABLE R. P. ZEHLER, JR., Judge
Fluvanna County Court

I am in receipt of your letter of recent date in which you seek an opinion concerning certain provisions of § 29-140, Code of Virginia (1950), as amended.

In your first inquiry you ask whether or not it is unlawful under § 29-140 for a person to carry a pistol or revolver on the east side of the Blue Ridge Mountains while he is hunting with a lawful weapon, such as a shotgun or a rifle. Section 29-140 provides in part that a pistol or revolver may be used to hunt predatory or undesirable species of birds and animals. Such weapons with specified cartridges may also be used to hunt game birds and animals in the counties west of the Blue Ridge Mountains. The use of a pistol or revolver to hunt predatory or undesirable species of birds and animals is not limited to any specific area of the Commonwealth, and I am of the opinion that it is lawful for persons to carry a pistol or revolver on the east side of the Blue Ridge Mountains as long as such weapon is not concealed.

In your second inquiry you ask that if it is lawful for a person to carry a pistol or revolver on the east side of the Blue Ridge Mountains, then is it lawful to use such weapon to kill an animal which has been mortally wounded by a lawful weapon. You specifically speak of a situation where a deer has been wounded and is down, and the hunter uses the revolver to kill the animal much in the same manner as hunters do with a knife. Section 29-140 specifically limits the use of pistols or revolvers in hunting game birds and animals to those counties west of the Blue Ridge Mountains. Hunting, as defined in § 29-131, includes shooting and taking. I am therefore of the opinion that if a pistol or revolver may not be used in any manner to hunt game birds and animals east of the Blue Ridge Mountains.

GAME AND INLAND FISHERIES—Hunting License—Person exempt from regular license under § 29-52(1) not required to purchase special license under § 29-122.

January 25, 1971

THE HONORABLE Cecil E. WRIGHT, Judge
Craig County Court

This is in response to your recent letter in which you inquire if persons exempt from the requirements of obtaining a regular season hunting license pursuant to the provisions of § 29-52(1) of the Code are required to purchase the special license required by § 29-122 of the Code. While § 29-122 of the Code contains no exemptions, I am of the opinion that the persons exempt from buying a regular hunting license need not purchase the special license. The intent of the Legislature in this matter has been clearly indicated in that § 29-123 of the Code requires that the special stamp issued pursuant to § 29-122 be affixed to the back of the regular season hunting license and failure to do so constitutes a misdemeanor. It would be impossible for a person exempt from purchasing a regular hunting license under § 29-52(1) to comply with the provisions of § 29-123.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—Not Authorized to Appoint Federal Enforcement Officers as Special Virginia Game Warden.

January 13, 1971

THE HONORABLE CHESTER F. PHELPS, Executive Director
Commission of Game and Inland Fisheries

This is in reply to your letter of recent date in which you asked the following questions:

“(1) Do the provisions of Section 2.1-30 prohibit the Commission from appointing a federal employee, who is a wage earner on a refuge, as a special Virginia game warden and paying him an hourly rate for assisting our regular wardens during night patrol?
(2) Do the provisions of Section 2.1-30 prohibit the Commission from appointing regular salaried federal enforcement officers as special Virginia game wardens without compensation from the Commission?”

Section 2.1-30 of the Virginia Code provides that no person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia who is in the employment of the government of the United States or who receives from it in any way any emolument whatever. Although certain exceptions to the above stated prohibition are contained in § 2.1-33 of the Virginia Code, it does not appear that the situation you present falls within the scope of any of the exceptions therein enunciated. It is my opinion that a special game warden would occupy an “office of honor or trust” within the meaning of § 2.1-30, regardless of whether any compensation is paid. In light of the foregoing, I am of the opinion that the federal employees you refer to may not be employed as special Virginia game wardens. Accordingly, I answer both of your inquiries in the affirmative.

GAME AND INLAND FISHERIES—Persons Eligible to Purchase a County License.

November 25, 1970

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

This is in reply to your letter of recent date in which you seek an opinion as to whether certain persons who reside on the Naval Weapons Laboratory at Dahlgren, Virginia may purchase county hunting and fishing licenses. You pose four different questions and I shall answer them in the order given.

1. “May persons residing on Naval Weapons Laboratory buy a county license if they are registered to vote?”

My answer to this question is in the affirmative since these persons would fall into the category of persons entitled to purchase a county license under § 29-57 (b), 1950 Code of Virginia.

2. “May spouses and children of registered voters be permitted to buy county licenses?”

3. “May persons living on the Naval Weapons Laboratory and not registered to vote be permitted to buy county licenses?”

4. “May spouses and children of armed forces personnel be permitted to buy county licenses?”

The last three questions being similar have been grouped together for answer.

The fact that a person lives on the Naval Weapons Laboratory, or happens to be the spouse or child of a registered voter or of a person in the armed forces does not qualify one to purchase a county license. However,
such persons would be entitled to purchase a county license if they fall into any of the categories set forth in § 29-57 or qualified under the domiciliary requirements of § 29-58.

GARNISHMENTS—Commissions.

CIVIL PROCEDURE—Garnishments—When commissions paid for collections.

THE HONORABLE RICHARD C. COTTER, Judge
Juvenile and Domestic Relations Court for the Counties of Gloucester, Mathews and Middlesex

May 24, 1971

This is in reply to your letter of May 13, 1971, which reads in part as follows:

“In garnishee proceedings we had one or two instances where the return was made to the Court on or before its return date with a check made payable to the Sheriff of the county. When we have asked the Sheriff to endorse that over to the Court he has insisted on deducting his commissions for collection and the judgment creditor has raised the question whether or not the Sheriff is entitled to those commissions.”

I assume that payment in this case was made directly to the court on or before the return date and that no collection was made by the sheriff. When a garnishee makes payment to the court, no collection is made by the officer and his compensation is limited to the fee allowed for service of process; therefore, he is not entitled to a commission.

This view was taken in a previous opinion of this office to the Honorable Mervin A. Gage, City Sergeant for the City of Hopewell, dated September 5, 1962, and found in Report of the Attorney General (1962-1963), p. 101. I enclose a copy of this opinion.

GARNISHMENTS—Service by Publication When Summons Sued Out From a Trial Justice.

CIVIL PROCEDURE—Service—Constructive service on garnishee when garnishment in trial justice court.

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

February 17, 1971

This is in response to your recent letter in which you raised certain questions concerning Va. Code Ann. § 8-441 (1950), as amended. You stated:

“Section 8-441 as amended seems to prohibit the use of an order of publication on a garnishment where the defendant has not been found and is out of state. This Court and others have issued orders of publication in such cases, assuming that the co-defendant answers that he is holding a sum of money and the defendant is moved over the border to North Carolina, could the defendant be served by an order of publication or would it be necessary for the plaintiff to proceed by attachment against the fund in a separate action?”

In my opinion, the defendant, or judgment debtor in this particular case, could be served by an order of publication. Va. Code Ann. § 8-441 (1950), as amended, after setting out the persons against whom the garnishment may be issued, states:
The prohibition as to service by order of publication refers to service on the garnishee and not the service on the judgment debtor. As you will note, the applicable section states that service shall be made on the debtor and on "such person, or, if he be a nonresident, he shall be proceeded against by publication . . .". The "he" referred to is the garnishee rather than the judgment debtor. The remainder of the sentence defines how the garnishee shall be proceeded against by publication and incorporates the prohibition of proceeding against him where the summons was sued out from a trial justice.

GENERAL ASSEMBLY—Filling of Vacancy in Office of Judge.

JUDGES—Filling of Vacancy.

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

February 18, 1971

You have stated in your letter of February 12, 1971 that a vacancy will be created in the Twenty-ninth Judicial Circuit by the retirement of Judge Quesenbery effective February 28, 1971, and you request my opinion as to whether the General Assembly can elect a qualified person prior to February 28, 1971 to fill the resulting vacancy. The person elected would take office on March 1, 1971.

Section 17-120 of the Code of Virginia of 1950, as amended, states in part:

"Whenever a vacancy occurs in the office of judge his successor shall be elected for the unexpired term and upon qualification shall enter at once upon the discharge of the duties of his office. . . ."

It is my opinion that a vacancy cannot "occur" pursuant to this statute until the judgeship has actually been vacated. Therefore, no successor may be elected prior to this time. The date of actual vacation as you indicate is expected to be February 28, 1971 in this situation.

GENERAL ASSEMBLY—Lobbying—Norfolk Port and Industrial Authority not required to register.

THE HONORABLE WALTER B. MARTIN, JR.
Member, House of Delegates

February 11, 1971

This is in reply to your letter of January 29, 1971, in which you ask my opinion whether the officers, agents and employees of the Norfolk Port and Industrial Authority are exempt from the registration requirements of the provisions of § 30-28.1, et seq. of the Code of Virginia.

Political subdivisions of the Commonwealth and their employees are excepted from the provisions of the Lobbying Act. (Sections 30-28.1 through 30-28.11 of the Code.) This exemption applies only to full-time employees of a political subdivision. The employment of a lobbyist by a political subdivision, however, is prohibited. See § 30-28.1:1.

I am, therefore, of the opinion that officers, agents and employees of the Norfolk Port and Industrial Authority, a political subdivision of the Commonwealth, are exempt from the provisions of the Lobbying Act.
GENERAL ASSEMBLY—Lobbying—State employees not required to register.

LOBBYISTS—Registration—State employees not required to register.

THE HONORABLE CYNTHIA NEWMAN
Secretary of the Commonwealth

This is in reply to your letter of April 6, 1971, in which you inquire whether or not it is necessary for State employees to register as lobbyists.

Section 30-28.1(a), Code of Virginia (1950), as amended, excludes State employees from the provisions of Title 30, Chapter 2.1, of the Code. I am, therefore, of the opinion that State employees are not required to register as lobbyists.

GENERAL ASSEMBLY—Senate Joint Resolution—Lack of legal force and effect.

THE HONORABLE PETER K. BABALAS
Member, Senate of Virginia

This is in reply to your letter of February 17, 1971, which reads in pertinent part as follows:

"The question is, does Senate Joint Resolution No. 12 of February 8, 1946, have any legal force or effect?"

I am of the opinion that your question is answered in the negative. The resolution is not a legislative enactment having the force and effect of law. I attach a copy of an opinion of this office to the Honorable Robert Whitehead, House of Delegates, dated February 14, 1956, found in Report of the Attorney General (1955-1956), p. 194, in which a similar question with respect to a Senate resolution was considered.

GENERAL ASSEMBLY—Session—Extends until adjournment sine die.

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

I am in receipt of your letter of February 12, 1971, which reads as follows:

"Due to the unique nature of this session, it is my understanding that we will not adjourn sine die when the reapportionment and all matters have been concluded, but merely go into recess so that the General Assembly reapportionment plan can be submitted to the Attorney General of the United States. Then we will come back and adjourn sine die.

My specific question is: Is the General Assembly legally still in session even though in recess if it has not adjourned sine die?"

It is my opinion that the General Assembly of Virginia is in session according to the law of this State, even though in recess as described in your letter, until such time as it adjourns sine die.

HEALTH—Consent to Surgical and Medical Treatment of Persons Under Age—Drug addicts.

DRUGS—Drug Addicts—When persons under age may consent to medical treatment.

June 9, 1971

THE HONORABLE F. JOHN KELLY
Executive Director
Council on Narcotics and Drug Abuse Control

This is in reply to your recent letter in which you request my opinion concerning the amended § 32-137 of the Code of Virginia (1950), as amended. As you indicated, House Bill 148, which emergency enactment was passed by the 1971 Special Session of the General Assembly, gave persons under the age of twenty-one years of age the authority to consent to specific surgical and medical treatment. The statute, as you state, reads in pertinent part as follows:

"... Except as otherwise provided in § 18.1-62.1 (2) (e), any person under the age of twenty-one years may consent to medical or health services needed in the care, treatment, or rehabilitation of drug addicts, or required in case of birth control, pregnancy and family planning. . . ."

Specifically, you asked whether the term "drug addicts" excluded persons who were drug users or abusers and as of yet had not become physiologically addicted to the drug substance or substances.

In my opinion, the term "drug addicts" includes drug users and abusers who are not addicted within the technical meaning of that word. Such conclusion is supported by § 37.1-1 (5) which defines "drug addict" to:

"... mean a person who, through use of habit-forming drugs has become dangerous to the public or himself or unable to care for himself or his property or his family. . . ."

It is true that this section is not applicable to Title 32 of the Code. However, this is the only section of which I am aware in which the General Assembly has defined the term "drug addict." In my opinion, it is applicable to the term as used in § 32-137 of the Code. As is readily apparent, the statutory definition of the term "drug addict" does not contemplate physical addiction as contemplated in the classical technical sense of the term. So long as a person uses habit-forming drugs in a manner which constitutes a danger to himself or to the public, he is a drug addict as the term is defined within the meaning of § 32-137 of the Code.

HIGHWAYS—Access Roads to Industrial Sites—Qualification requirements.

February 17, 1971

THE HONORABLE ROBERT C. FITZGERALD
Member, Senate of Virginia

Your recent letter asked for my interpretation of Va. Code Ann. § 33.1-221 (Supp. 1970), and specifically "whether the service-oriented, office-type facility, research and development and warehousing operations are covered by this statute."

The first paragraph of this section creates a specific $1,500,000 fund within the funds available to the State Highway Commission. The second paragraph states:
"This fund shall be expended by the Commission for constructing, reconstructing, maintaining or improving access roads within counties, cities, and towns to industrial sites on which manufacturing, processing or other establishments will be built under firm contract or are already constructed." [Emphasis added.]

This section originated as House Bill No. 404 in the 1956 session of the General Assembly. The relevant wording of the second paragraph was in the bill as originally drafted, and it was not changed during the bill's passage, nor has it been altered by subsequent amendments affecting other portions of this statute. Thus legislative intent must be determined from the original language.

It seems clear that with the exception of a research and development facility wherein a "product" is involved, the type facilities you describe would not qualify had the language been limited to the terms, "manufacturing" and "processing." Even warehousing, frequently a necessary adjunct of manufacturing and processing, would be excluded when separated from the primary activity.

The term, "manufacture" is defined as:

"The process or operation of making wares or any material produced by hand, by machinery or by other agency; anything made from raw materials by the hand, by machinery, or by art." [Blacks, Law Dictionary (4th ed. 1957).1117.]

The term, "process" has a variety of meanings depending upon the context within which the term is being used. The term is defined, *inter alia*, and most in line with this legislation's purpose, as:

"A process involving solely the application of mechanism or mechanical principles; an aggregation of functions; not patentable; considered apart from the mechanism employed or the finished product of manufacture." [Id. at 1370.]

The definitions are imprecise when brought to bear on specific situations. Were the statute to stop at the end of the second paragraph, I think there would be a serious question as to what limits had been set for the Commission. However, the third paragraph states:

"In deciding whether or not to construct or improve any such access road, and in determining the nature of the road to be constructed, the Commission shall base its considerations on the cost thereof in relation to the volume and nature of the traffic to be generated as a result of developing the industrial establishment. No such access road shall be constructed or improved on a privately owned plant site." [Emphasis added.]

Not only does this paragraph supply the Commission with more specific instructions for the use of its discretion, but it also tends to clarify the terms employed in the preceding paragraph. Instead of any establishment whatsoever, the General Assembly indicates by the language in the third paragraph that it was referring to "industrial" establishments.

Thus, it is my considered opinion that to qualify for funds for access roads, under this section of the Code, there must be "manufacturing," "processing," or activities closely allied to, and whose major result may be deemed "manufacturing" or "processing."

HIGHWAYS—State Highway Commission—Control over use for purposes of solicitation.

HIGHWAYS—Control Over for Purposes of Solicitation From Users—State Highway Commission.
THE HONORABLE L. VICTOR McFALL
Commonwealth’s Attorney for Dickenson County

This is in reply to your letter of September 10, 1970, which reads as follows:

“Our Dickenson County Rescue Squad and similar organizations have been soliciting funds on the highways, usually referred to as road blocks, for their operations. A question has arisen as to whether such practice is lawful. I do not know of any statute authorizing or prohibiting this practice, but understand that the State Highway Commission has a regulation which states that ‘no person, firm, or corporation shall use or occupy the right of way of any highway for any purpose, except travel thereon except that such may be authorized by the State Highway Commission.’ In view of this regulation, please advise whether it is lawful for our Rescue Squad and similar organizations to collect funds by soliciting same on the public highways.”

The regulation which you quote is Regulation 7 of the Rules and Regulations of the State Highway Commission adopted under the authority of § 33-12(3) of the Code of Virginia. Section 33-18 of the Code provides that this regulation shall have the force and effect of law and that its violation shall be a misdemeanor.

I am of the opinion that this regulation controls the use of the highways under the jurisdiction of the State Highway Commission and unless authority is granted by the Commission for its use for purposes other than travel, such use would be unlawful. The blocking off of the highway for purposes of solicitation of funds would be a use of the highway for purposes other than travel and would require a permit from the Commission.

HOUSING AUTHORITIES — Charlottesville — Membership — How determined.

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

This is in reply to your letter of October 27, 1970, in which you ask my opinion whether the Mayor of Charlottesville, pursuant to Section 36-11 of the Code of Virginia (1950), as amended, may appoint two additional commissioners to the Redevelopment and Housing Authority of Charlottesville, when the Board initially contained only five members.

Section 36-11 of the Code of Virginia (1950), as amended, provides, in part, as follows:

“When the need for an authority to be activated in a city or county has been determined in the manner prescribed by law, the governing body of the city or county shall appoint not more than seven or less than five persons as commissioners of the authority created for such city or county. The commissioners who are first appointed shall be designated to serve for terms of one, two, three, four and five years, respectively, from the date of their appointment, but thereafter commissioners shall be appointed as aforesaid for a term of office of four years except that all vacancies shall be filled for the unexpired term.”

In view of the absence of any other pertinent code section relative to your inquiry, in my opinion, once the Housing Authority is established, it must function with its originally established membership. Therefore, the mayor may not appoint two additional members to the Commission.
HOUSING AUTHORITIES — Commercial Rental Property — Authority to construct, equip, and rent to private businesses.

HOUSING AUTHORITIES — Bonds — May issue to construct commercial rental property.

THE HONORABLE JOHN D. GRAY
Member, House of Delegates

July 27, 1970

I have received your letter of July 22. You ask whether the Regional Redevelopment and Housing Authority of Hampton and Newport News has the power, with respect to a redevelopment project, to construct and equip industrial buildings and make them available at a fair rental to private businesses. You also ask whether the Authority may issue bonds for this purpose.

The Authority is a regional or consolidated (see Report of the Attorney General, 1964-1965, p. 135) housing authority provided for in Title 36, chapter 1, article 6 of the Code of Virginia. Section 36-46 of the Code incorporates by reference the powers of an article 1 housing authority in defining the powers of a regional housing authority under article 6. Section 36-47 provides that the term, "regional housing authority," shall mean, "consolidated housing authority." Thus, except as may be otherwise provided, a consolidated housing authority possesses all of the powers of a city or county housing authority. I am aware of no statutory exception with respect to the particular powers as to which you inquire.

As to the redevelopment projects the Authority therefore has all of the powers which an article 1 housing authority would have "in connection with undertaking slum clearance and housing projects (including . . . the power . . . to issue bonds and other obligations . . . and to do any and all things necessary to carry our redevelopment projects) . . . ." Va. Code § 36-50. The powers set forth in § 36-19(b) and (d) are, in my opinion, sufficient to permit the construction and leasing which you contemplate.

Section 36-29 of the Code gives the Authority the power to issue bonds, "for any of its corporate purposes." It is my opinion that bonds may be issued to construct and equip buildings pursuant to a redevelopment plan if the Authority determines that such development will help remedy the conditions described by the General Assembly in § 36-48 of the Code.

HOUSING AUTHORITIES — Commissioner — May not serve as substitute judge of municipal court.

PUBLIC OFFICERS—Compatibility—Commissioner of Housing Authority may not serve as substitute judge of municipal court.

THE HONORABLE VON L. PIERSALL, JR.
Commonwealth’s Attorney for the City of Portsmouth

October 21, 1970

This is in reply to your letter of October 7, 1970 in which you requested my opinion whether a commissioner of the Portsmouth Redevelopment and Housing Authority may hold the position of Substitute Judge in the Municipal Court of the City of Portsmouth.

In my opinion the commissioner may not serve as a Substitute Judge of the Municipal Court. Section 36-11 of the Code of Virginia provides in part as follows:

"Except as may be otherwise expressly provided in the charter of a city or town specifically pertaining to such authority, no commissioner of any authority may be an officer or employee of the city or county for which the authority is created."
The City Charter of Portsmouth does not contain any provisions authorizing the commissioner to serve as an officer or employee of the city. Therefore, he is unable to serve in both positions.

HOUSING AUTHORITIES — Consolidated — What governing bodies may form.

April 29, 1971

THE HONORABLE CLIVE L. DUVAL, 2d
Member, House of Delegates

This is in reply to your letter of April 21, 1971, in which you requested my opinion whether § 36-47 of the Code which authorizes the governing body of each of two or more municipalities to create a consolidated housing authority could be construed as permitting a municipality and a county of the State to form such an authority.

Section 36-47 to which you refer defines a municipality as a *city* or *town* in the Commonwealth.

I am, therefore, of the opinion that § 36-47 of the Code does not provide for the creation of a consolidated housing authority between a city and a county of the State.

HOUSING AUTHORITIES — Regional Development — May be created for region without activating authority in each component political subdivision.

HOUSING AUTHORITIES—Regional Development—Regional unit has all powers, duties, and responsibilities of county or city unit.

July 6, 1970

MR. JERRY V. MANUEL
Recreation/Housing Planner
Cumberland Plateau Planning District

This is to acknowledge receipt of your letter of June 29, 1970, in which you refer to my letter of June 18, 1970, in regard to the establishment of a Regional Housing Authority in the Cumberland Plateau Planning District. You pose two questions which will be answered seriatim.

First question: "Is it possible to create a regional housing authority without having previously existing housing authorities in contiguous counties desiring to formulate same?"

By § 31-34 (4) of Michie's Code [now § 36-4, Code of Virginia (1950), as amended] in every political subdivision (which includes counties), a redevelopment and housing authority was created. However, such authority cannot transact any business until activated, which activation depends upon the approval of the qualified voters by an election under § 36-41.1 to determine if there is a need for such authority. If any such authorities have been activated, their property and obligations are transferred to and assumed by the newly created regional housing authority. The housing authority created by § 36-4 ceases to exist upon the creation of the regional housing authority.

As stated in my previous opinion, the regional housing authorities are created under Article 6 of Title 36 of the Code and there does not appear to be any requirement that a referendum be held. Had the legislature intended that a referendum be held, it would not have required the public hearing as set forth in § 36-44 but would have used similar language to that appearing in paragraph two of § 36-47, which section relates to establishment of a housing authority by two or more municipalities.
I am of the opinion that a regional housing authority can be created under § 36-40 without housing authorities in the respective counties being activated pursuant to §§ 36-4 and 36-4.1 of the Code.

Second question: "Would said regional housing authority have all the powers, duties, and responsibilities of a single county or city housing authority? Would they be eligible to negotiate an annual contributions contract with said regional housing authority for the continued support of such public housing as may be constructed?"

This question must be answered in the affirmative.

INDUSTRIAL DEVELOPMENT—Authority Organized Under Title 15.1, Chapter 33, of Code—Where directors must reside.

PUBLIC OFFICERS—Director of Industrial Authority—Residence requirements.

March 18, 1971

THE HONORABLE CHARLES L. MCCORMICK, III
Commonwealth's Attorney for Halifax County

This is in reply to your letter of March 2, 1971, in which you request my opinion whether the members of the board of directors of an industrial development authority organized under Chapter 33 of Title 15.1 of the Code of Virginia (1950), as amended, must reside in the political subdivision creating the authority.

An industrial development authority is a political subdivision of the Commonwealth organized by the governing body of the municipality. Chesapeake Devel. Authority v. Suthers, 208 Va. 51, 155 S.E.2d 326 (1967). A municipality for the purposes of the Industrial Development and Revenue Bond Act is defined as any county or incorporated city or town in the Commonwealth. See § 15.1-1374(b) of the Code. A director of an authority is appointed by the governing body of the municipality under § 15.1-1377 for a fixed term and is required to take the oath of office prescribed by § 49-1 of the Code. Once appointed he is a municipal officer.

Section 15.1-51 of the Code provides that every county officer, with certain exceptions not here germane, 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 or appointed. It further provides that every city or 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 specifically provided by charter. Under the provisions of § 15.1-52 if an officer moves from the county, city or town he thereby vacates his office.

I am therefore of the opinion that the members of the board of directors of the authority must reside in the political subdivision creating the authority.

JUDGES—Compensation—Retroactive increase—Per diem allowances of retired judges recalled to service to be adjusted.

March 29, 1971

THE HONORABLE DAVID B. AYRES, Comptroller
Commonwealth of Virginia

I have received your letter of March 9, in which you ask my interpretation of paragraph 2 of § 1 of chapter 184 of the 1971 Acts of Assembly. The effect of this paragraph is to increase the salary of ninety-nine judges of trial courts of record from $22,000 to $23,000 per year. The increase is effective for the year beginning July 1, 1970.
You first ask how this provision will affect judges who terminated their services prior to the date of enactment of chapter 184. I note that an appropriation of ninety-nine thousand dollars was made, even though two judges had terminated their services prior to the 1971 special session of the General Assembly. I therefore conclude that the appropriation was intended to benefit these judges, as well as those remaining on the bench. In my opinion, the salaries of each of the ninety-nine judgeships should be adjusted as if they had been fixed by the 1970 legislature at $23,000.

You also ask how this retroactive increase will affect the per diem allowances of retired judges as fixed by chapter 575 of the 1970 Acts of Assembly. That chapter provides that the per diem of a retired judge recalled to service shall be an amount which, when added to his retirement benefits, equals the daily compensation of an active judge. In answer to your first question, I concluded that chapter 184 should be treated as retroactive to July 1, 1970. It follows that the per diem allowances of retired judges recalled to service should also be adjusted for service rendered after July 1, 1970.

JUDGES—Courts Not of Record—Judge of another court not of record may be appointed substitute judge.

JUDGES—Courts Not of Record—Appointed substitute judge, even though also judge of another court, entitled to pay for days he sits.

August 18, 1970

THE HONORABLE ROBERT C. GRADY
County Judge
County Court of Orange County

This is in response to your recent letter in which you request my opinion. In your letter you indicate that you were appointed as Substitute Judge of the Culpeper County Court and Culpeper County Juvenile and Domestic Relations Court in October of 1969. Subsequently, on May 21, 1970, you were appointed Judge of the Culpeper County Court and the Culpeper County Juvenile and Domestic Relations Court to be effective July 1, 1970. You further indicated that the Judge of the Culpeper County Court and the Culpeper County Juvenile and Domestic Relations Court resigned that position effective July 1, 1970, but that he had taken his accumulated leave time beginning May 15, 1970, through June 30, 1970, thereby leaving his position unfilled. You stated that:

"On May 22, 1970, I posted the required $5,000 bond with corporate surety and began sitting as Substitute Judge on all cases in the Culpeper County Court and the Culpeper Juvenile and Domestic Relations Court. . . . 

"On or about June 5, 1970, I received a check in the amount of $129.56 for seven (7) days' pay in May, and was advised that day by a telephone call from Mr. Stock of the Office of the Committee of Judges to return the check because I could not be paid as Substitute Judge in the Culpeper County under Section 16.1-24. . . ."

The last sentence of that Section reads: "Any person appointed under this section, other than the judge of another court not of record, shall be compensated for his services in the same manner as substitute judges are compensated by law, and any person from another county or city so designated, shall receive actual expenses as provided by law for judges of courts of record designated to hold Court in other jurisdictions." (Emphasis supplied.)

You indicated that you still hold the position of Judge of the County Court of Orange County, Virginia. You objected to this interpretation and stated your position as follows:
"It seems to me that Section 16.1-24 is not applicable to my situation. Judge Reams did not disqualify himself, but resigned, and is remaining as Judge in charge to use his legal leave time. I believe Section 16.1-21 is applicable in that I was directed to serve as Substitute Judge, and that I should be paid as provided under Section 16.1-50."

And asked my opinion as to whether or not:

"... the Committee of Judges can legally pay me as Substitute Judge of Culpeper County Court and Culpeper County Juvenile and Domestic Relations Court for the time served in May and June of 1970 while I am still serving as Judge of the Orange County Court and the Orange County Juvenile and Domestic Relations Court."

In my opinion your appointment in October of 1969 was valid under Va. Code Ann. § 16.1-20 and from that time forward you were empowered to act as a Substitute Judge of the Culpeper County Court and the Culpeper Juvenile and Domestic Relations Court. When you begin to sit in that court on May 22, 1970, you were sitting as Substitute Judge for that court and not as the Judge of the Orange County Court who was designated to sit in Judge Reams' place instead. At that time, you were acting pursuant to Va. Code Ann. § 16.1-21, as opposed to § 16.1-24 of the Code. You should, therefore, be paid pursuant to § 16.1-50 of the Code which allows you full payment as a Substitute Judge.

The provisions of § 16.1-24 of the Code are inapplicable in this particular situation. This section enumerates certain instances in which a Judge of a Court Not of Record is precluded from sitting. Then § 16.1-24 says:

"When a judge is under any such disability or is for any other cause unable to hold court and there is no other judge or substitute judge of the court qualified, any other judge of a court not of record in the county or city may hear and dispose of the action." (Emphasis supplied.)

This section contemplates a situation where no judge in the particular court is qualified or able to act in a particular situation and the judge of the circuit court of the county finds it necessary to appoint another to act in the place of the judge of the court not of record. It does not apply where that court already has a substitute judge even though that substitute judge be the judge of another court not of record.

I find nothing in § 16.1-20 which deals with the appointment of substitute judges which prohibits the appointing of the judge of one court not of record to serve as a substitute judge in another court.

I would conclude, therefore, that you are entitled to be compensated in accordance with § 16.1-50 of the Code for your service as Substitute Judge in the Culpeper County Court and the Culpeper County Juvenile and Domestic Relations Court from the time you began such service in May of 1970. This section provides that the compensation be on a per diem basis for days on which the substitute judge actually sits.

This section contemplates a situation where no judge in the particular court is qualified or able to act in a particular situation and the judge of the circuit court of the county finds it necessary to appoint another to act in the place of the judge of the court not of record. It does not apply where that court already has a substitute judge even though that substitute judge be the judge of another court not of record.

JUDGES—Courts Not of Record—Substitutes—May be paid when judge disqualified for statutory reason.

THE HONORABLE W. FRANCIS BINFORD, Judge
County Court of Prince George County

July 27, 1970

I am in receipt of your letter of July 2, 1970, in which you raise a question concerning the payment of a substitute judge of a court not of record. Your son has been admitted to the Bar and practices before your court.
Pursuant to a conference with your Circuit Court Judge, you have routinely disqualified yourself from hearing cases in which your son appears as counsel for one of the parties. You ask whether under these circumstances you can properly certify the payroll for the payment of the substitute judge for services he renders in trying your son's cases.

Section 16.1-24 of the Code of Virginia provides:

"If the judge, associate judge or substitute judge of any court not of record:

* * *

"(2) Be interested in the result of any action, otherwise than as resident or taxpayer of the city or county;

"(3) Be related to any party to the action as grandfather, father . . . He shall not take cognizance thereof unless all parties to the action consent thereto in writing."

I am of the opinion that under the aforementioned statute you may properly disqualify yourself and direct a substitute judge to hear the cases in which your son participates. In such a situation you may, of course, properly certify the payroll for the payment of the substitute judge.

July 20, 1970

THE HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

This is in reply to your letter of July 6, 1970, which I quote as follows:

"The following inquiry has been received from a Judge of a County Court:

"'I notice in the amended statutes of Virginia Code Section 37.1-89 provides: "Any justice as defined in Section 37.1-1 who presides over hearings pursuant to the provision of 37.1-67 shall receive a fee of twenty-five dollars." * * * * "Except as hereinafter provided, all expenses incurred, including the fees, attendance and mileage aforesaid, shall be paid by the county or city, etc."

"'Does this mean that after July 1, 1970 county judges who are on salary by the State are entitled in addition thereto to bill the county for $25.00 for conducting a commission for insanity?"

"Section 37.1-89 of the Code of Virginia was amended by Chapter 673 of the Acts of Assembly of 1970 providing for a fee of $25.00 for a justice presiding over a hearing for a person alleged to be mentally ill, as referred to in the above inquiry. Also, it provides that the expenses incident to such hearings shall be paid by the county or city in which the person examined was residing, or if a nonresident of Virginia such expenses shall be paid by the State. The Act further provides that the costs so paid shall be recoverable under certain conditions by the county, city or State from the person who is the subject of the examination or from the person who requested the certification.

"Sections 16.1-51 and 14.1-44 direct that all fees collected by judges, substitute judges and the staff of the county courts for serv-
ices rendered by them, except for a court of a county having a density of population in excess of five thousand per square mile (Arlington County), shall be paid into the State treasury. The salaries of the judges, clerks and staff of the Arlington County Court are paid by the county, and all fees accruing to the court for their services are payable into the county treasury. It therefore appears that such fees as may be collected from the county, city or State by courts for which salaries are paid by the State would not accrue to the judges as additional compensation, but would be fees of office and be payable into the State treasury. Is this conclusion correct?

"Will you also advise me whether a judge of a county court whose salary is paid by the State, who serves as a justice as defined in Section 37.1-1 in conducting a commission for insanity, may tax the $25.00 fee provided by Section 37.1-89 and not bill the county, city or State, and in its stead remit into the State treasury the justice fee when collected from the person who is the subject of the examination or from his estate or from another financially responsible person?"

Insofar as your first question is concerned, the only significant change effected in § 37.1-89 of the Code of Virginia by Chapter 673, Acts of Assembly of 1970, was the substitution of "Any justice as defined in § 37.1-1 who presides over hearings pursuant to the provisions of § 37.1-67" for "Any justice appointed pursuant to the provisions of § 37.1-88." This change made § 37.1-89 applicable to all judges, associate judges and substitute judges of counties and municipal courts and juvenile and domestic relations courts, as well as special justices authorized by § 37.1-88, as set forth under the definition of the term "Justice" in paragraph (11) of § 37.1-1.

It is true that § 37.1-89 provides that any such justice "who presides over hearings pursuant to the provisions of § 37.1-67 shall receive a fee of twenty-five dollars for each hearing." When considered in conjunction with related statutes, however, it becomes eminently clear that the last quoted clause does not necessarily mean that such fee shall become personal compensation for the justice who receives it. This is demonstrated by the fact that essentially the same language was used in § 37.1-89 in respect to fees received by a special justice prior to the 1970 amendment, although such justice would not necessarily retain the fee received. This section, prior to the 1970 amendment, provided that "Any such justice shall receive a fee of twenty-five dollars for any hearing over which he presides pursuant to the provisions of §§ 37.1-66, 37.1-67, 37.1-81 and 37.1-83." Yet, § 37.1-88, which was not amended in 1970, provides that "Special justices shall collect the fees prescribed in this title for such service and shall retain fees unless the governing body of the county or city in which such services are performed shall provide for the payment of an annual salary for such services, in which event such fees shall be collected and paid into the treasury of such county or city." (Emphasis supplied.)

The law in respect to salaries of county court judges and associate judges and the disposition of fees paid to them is found in Article 5, Chapter 1, Title 14.1 of the Code of Virginia. Therein, it is provided in § 14.1-40, that the committee of three circuit judges, established by Chapter 376 of the Acts of Assembly of 1942, and subsequently amended and re-enacted, shall fix the salaries of judges and associate judges of the counties of the State, within the limits and upon the basis prescribed by law. Such limits are set forth in § 14.1-41, except as provided for certain counties in § 14.1-42 and as further provided in § 14.1-42.2, enacted by Chapter 55, Acts of Assembly 1970, which authorizes any county, by ordinance, to increase the salaries of judges and associate judges of its county court, as it may deem proper, provided the increase shall be paid wholly by the county. As you have stated, §§ 14.1-44 and 16.1-51 prescribe that all fees paid to and collected by a judge or substitute judge of a county court, with ex-
ceptions not pertaining to the question now under consideration, shall be
paid into the State treasury, except that in counties having a density of
population in excess of five thousand per square mile, fees collected by
the judge shall be paid to the treasurer of the county.
In view of the foregoing, I am of the opinion that your conclusion is
correct that such fees as may be collected from the county, city or State
by courts for which salaries are paid by the State would not accrue to the
judges as additional compensation but should be paid into the State
treasury. Your other question is answered in the affirmative.

JUSTICE OF PEACE—Acknowledgments—Not authorized to take on deeds
and deeds of trust.

REAL PROPERTY—Deeds and Deeds of Trust—Acknowledgments.

THE HONORABLE DAVID A. LYON, III
Secretary and Treasurer of Association
of Justices of the Peace of Virginia

February 23, 1971

This is in reply to your letter of February 18, 1971, which reads as
follows:

"Section 49-4 of the Code of Virginia provides in part:
"'... Any oath or affidavit required by law, which is not of such
nature that it must be made in court, may be administered by or
made before a justice of the peace and certified by him, unless other-
wise provided. . . .'

"The question: Can a justice of the peace take an acknowledgment
such as that on a deed or deed of trust?"

Your question is answered in the negative.

Section 55-113 of the Code of Virginia (1950), as amended, lists those
persons authorized to take acknowledgments on deeds or deeds of trust.
Justices of the peace at one time were included in this list under § 5205
of the Code of 1936. They no longer appear in § 55-113. I am, therefore, of
the opinion that a justice of the peace is not authorized to take acknowl-
edgments on deeds or deeds of trust.

JUSTICE OF PEACE—Authority to Write Warrants—Extent of.

THE HONORABLE KATHERINE A. JONES
Justice of the Peace for Marshall
Magisterial District, Buckingham County

March 9, 1971

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

"I would like for you to specifically advise me as a Justice of the
Peace if I have the authority to write a warrant against any official
of a county; such as sheriff or deputy sheriff and also against a State
Trooper, etc. without specific authorization from the Common-
wealth's Attorney or the Judge of the lower court. And if I cannot
write a warrant against any of the aforementioned are there any
other exceptions?"

Section 39.1-15, Code of Virginia (1950), as amended, provides in part
as follows:

"A justice of the peace shall have the following powers only:
“(1) To issue process of arrest in accord with the provisions of
§§ 19.1-90 to 19.1-100.1 of the Code:
"(2) To issue search warrants in accord with the provisions of §§ 19.1-83 to 19.1-89 of the Code;"

This section does not limit the persons against whom the process or warrants may be issued. I am, therefore, of the opinion that a justice of the peace has authority to write a warrant against any official of the county, such as a sheriff or deputy sheriff and a State trooper, without special authorization of another to do so. There are limitations on the authority of justices of the peace to issue warrants. I enclose copy of an opinion to the Honorable Harold B. Singleton, Judge, Amherst County Court, dated March 30, 1965, and found in Report of the Attorney General (1964-1965), p. 162, which points out several of these limitations.

JUSTICE OF PEACE—Bonds—May ask for display of deed, and request all grantees to sign bond.

GAME AND INLAND FISHERIES—Fox Hunting Season in Wise County—With dogs only at any time—With guns from third Monday in November through December 31.

DOG LAWS—Fox Hounds in Wise County—Warden may not compel to be penned up at all times unless specific situations exist.

ELECTIONS—Eighteen-Year-Old Vote—If Federal law valid, Virginia must enact constitutional and statutory changes before in effect.

August 7, 1970

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

This is in reply to your letter of June 25, 1970, wherein you asked my opinion on several questions which I shall answer seriatim.

"1. Can a Justice of the Peace ask a person to show their deed when that person is before the Justice of the Peace to make a bond?"

Answer: Yes.

"2. When the property is recorded in the name of the man and his wife, can the Justice of the Peace request that both parties sign the bond?"

Answer: Yes.

"3. Can the supervisor or the game warden make fox hunters keep their dogs up all the time?"

Answer: The use of dogs to hunt foxes is lawful in Virginia. Section 29-212 of the Code of Virginia (1950), as amended, authorizes the Commission of Game and Inland Fisheries to issue permits to owners of foxhounds allowing such owners to permit their foxhounds to run at large at any time, whether or not accompanied by the owner or his agent. In addition, under the common law of Virginia, dogs are permitted to run at large.

There are limitations to the above remarks, however. By statute, in certain cases, dogs may not lawfully be permitted to stray, e.g., livestock killers, diseased dogs, and female dogs in season. Also, under Section 29-194, the governing bodies of counties may prohibit by ordinance the running at large of dogs during such months as they may designate, or may require that dogs be confined or restricted or penned up during such periods.
Therefore, unless the dogs in question are diseased, livestock killers, vicious, or females in season, or unless the dog warden is enforcing a county ordinance enacted pursuant to Section 29-194, he may not make Wise County fox hunters keep their dogs penned up at all times.

“4. Is there any closed season on fox hunting?”

Answer: The laws relative to fox hunting seasons are generally governed by regulations of the Commission of Game and Inland Fisheries and vary widely with each locality. Due to the local nature of these regulations, I shall restrict my answer to fox hunting in Wise County.

Section 29-138 of the Code of Virginia (1950), as amended, reads in part as follows:

* * *

“Fox.—Continuous open season for hunting with dogs only. Foxes may be killed at any time by the owner or tenant of any land when such animals are doing damage to domestic stock or fowl.” (Emphasis added.)

Section 29-125 provides that the Commission of Game and Inland Fisheries may restrict, extend or prohibit in any degree the provisions of law in this State for the hunting of any wild animal. In this regard, the Commission has not promulgated any regulation limiting the application of the aforesaid Section 29-138 as it applies to fox hunting with dogs only in Wise County. The single exception to this statement is found in Regulation 8-12 of the Commission which makes it unlawful to use dogs for the hunting of foxes during deer season in national forests.

Regulation 8-5 of the Commission reads as follows:

“Except as otherwise provided by local legislation and with the specific exceptions provided in the regulations appearing in this Chapter, it shall be lawful to hunt foxes with guns in the counties west of the Blue Ridge Mountains from the third Monday in November through January 31, both dates inclusive.

Therefore, it is lawful to hunt foxes with dogs only throughout the year in Wise County, however, hunting foxes with guns is lawful only from the third Monday in November through December 31 (unless otherwise provided by local legislation).

“5. How soon will eighteen year olds in Virginia be able to register and vote; and, will they have to register thirty days before an election?”

Answer: One of the provisions of the “Voting Rights Act Amendments of 1970” (Public Law 91-285) is that “... no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.” The effective date of this provision was set at January 1, 1971.

In prohibiting the denial of the right to vote to eighteen year old citizens of Virginia, this law is in conflict with Virginia statutes and the Virginia Constitution. At present, there are cases pending in federal courts which are meant to test the constitutionality of this Act. Should the eighteen year old vote provision be upheld, then Virginia will make the necessary statutory and constitutional changes as soon after January 1, 1971 as practical. If said provision is held to be invalid, then eighteen year olds will not be permitted to vote under existing Virginia law.

May 27, 1971

THE HONORABLE DOWNING L. SMITH
Commonwealth's Attorney for Albemarle County

This is in reply to your letter of May 11, 1971 in which you direct my attention to §§ 39.1-1, 15.1-662, 24.1-88, 24.1-89 and former 24-157, Code of Virginia (1950), as amended, and to an opinion of my predecessor in office, found in Report of the Attorney General (1968-1969), p. 133, and pose the following question:

"Am I correct in my opinion that Justices of Peace are not elected in Albemarle County, which is a county having an optional form of Government (County Executive Form)?"

Former § 24-157 provided for the election of one supervisor and three justices of the peace by the qualified voters of each magisterial district. Title 39.1, in § 39.1-6 thereof, provides, in part, that "In every county and in every city the appointing court shall appoint only as many justices of the peace as are necessary for the effective administration of justice." As pointed out in the named opinion, § 24-157 was one of several sections amended and reenacted by Chapter 639, Acts of Assembly of 1968, the same Act which repealed Title 39 and enacted Title 39.1. That opinion further pointed out the legislative history involving § 24-157 and reached the conclusion, in which I concur, that this section was not repealed by § 39.1-1, but that both sections should be applied insofar as this may be reasonably done. The question of whether § 39.1-6 means that the appointing court shall appoint, in addition to those elected under § 24-157, justices of the peace as necessary for the effective administration of justice, was answered in the affirmative.

Subsequent legislation is supportive of this view. In revising, rearranging, amending and recodifying the general laws of Virginia relating to elections, Chapter 462, Acts of Assembly of 1970, repealed Title 24 of the Code of Virginia and added, in lieu thereof, Title 24.1. The reference to the election and term of office for justices of the peace is now found in § 24.1-89, which states as follows:

"In each magisterial district of each county there shall be elected by the qualified voters thereof at the general election in November, in the year nineteen hundred and seventy-one, and every four years thereafter, one justice of the peace who shall hold office for a term of four years."

Section 15.1-662, in referring to officers not affected by the adoption of either the county executive form or the county manager form, provides, in part, that "In any county which adopts either the county executive form or the county manager form there shall be appointed or elected in the manner provided by law not to exceed one justice of the peace in each magisterial district; . . ." Since this language provides that one justice of the peace shall be appointed or elected in the manner provided by law and § 24.1-89 provides that in each magisterial district of each county one such justice "shall be elected by the qualified voters," the two sections are not in conflict.

In view of the foregoing, I conclude that § 24.1-89, quoted above, applies to the County of Albemarle, to the effect that one justice of the peace shall be elected by the qualified voters in each magisterial district. If additional justices are needed for the effective administration of justice, these should be appointed by the appointing Court, as provided in § 39.1-6 and the related sections of Title 39.1.
REPORT OF THE ATTORNEY GENERAL


June 3, 1971

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

This is in reply to your letter of May 21, 1971, in which you request my opinion as to whether justices of the peace should be elected or appointed in Lee County, which is under the County Board form of government provided in § 15.1-720, Code of Virginia (1950), as amended.

Section 15.1-720 provides that certain officers, including justices of the peace, shall not, except as therein otherwise provided, be affected by the adoption of the county board form. Paragraph (b) thereof provides that justices of the peace "shall be appointed or elected in the manner provided by law." Section 24.1-89, Code of Virginia (1950), as amended, states that, "in each magisterial district of each county there shall be elected by the qualified voters thereof at the general election in November, in the year nineteen hundred and seventy-one, and every four years thereafter, one justice of the peace who shall hold office for a term of four years." This section, enacted by Chapter 462, Acts of Assembly of 1970, contains no exception for counties having the county board form of government.

Accordingly, in my opinion, § 24.1-89, requiring the election of justices of the peace, applies to Lee County. If other justices of the peace be needed, in addition to the one to be elected in each magisterial district, pursuant to § 24.1-89, these should be appointed by the appointing Court in accordance with § 39.1-6, Code of Virginia (1950), as amended. A similar view was expressed in my letter of May 27, 1971, to The Honorable Downing L. Smith, Commonwealth's Attorney for Albemarle County, a copy of which is enclosed for your information.

JUSTICE OF PEACE—May Not Serve if Spouse Is Dog Warden.

February 24, 1971

MRS. MARIE E. JONES
Justice of the Peace, Nansemond County

In your letter of January 15, 1971, you inquire whether you can continue to serve as a Justice of the Peace for Nansemond County as long as your husband serves as a Nansemond County Dog Warden.

Section 39-7 of the Code of Virginia provides, in pertinent part, the following:

"No person whose 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 shall be eligible for appointment or election to the office of Justice of the Peace in any county, city or town in this state . . . This section shall not apply to incumbents of such office who are in office when this section becomes effective."

I am of the opinion, therefore, that this section would not permit you to hold the office of Justice of the Peace if your husband is a dog warden unless you were a Justice of the Peace when § 39-7 became effective on June 26, 1964. This is consistent with an opinion of this office submitted to the Honorable Frederick T. Gray on September 27, 1967, which is found in the Report of the Attorney General, 1967-1968, at page 135, a copy of which is attached hereto.

If you were a Justice of the Peace before June 26, 1964, it would then be permissible for you to continue to hold the office as long as you are elected or appointed to it.
JUSTICE OF PEACE—May Write Criminal Warrants on Complaint Under Oath of Spouse, Law Officer.

PUBLIC OFFICERS—Conflict of Interest—Does not exist where justice of peace who is married to a law enforcement officer is exempt from the operation of prohibition.

THE HONORABLE ROBERT E. GILLETTE
Commonwealth's Attorney of Nansemond County

In your letter of January 8, 1971, you inquire whether the wife of a law enforcement official would be prevented from serving as a justice of the peace by reason of conflict of interest, and if there would be no such prohibition, whether such a justice of the peace would be prohibited from writing any criminal records for her husband as a law officer.

As you point out in your letter, § 39.1-10 of the Code of Virginia provides in pertinent part:

"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 . . . ."

The Section goes on to provide, however:

"This section shall not apply to incumbents of such office who are in office when this section becomes effective."

If the justice of the peace in question is exempt from the operation of this Section by the last quoted clause, it must be presumed that her situation was specifically considered by the Legislature when it exempted persons so situated from the operation of the prohibition. Since the Legislature did not choose to limit her authority in any way, it is my opinion that a justice of the peace would not be prohibited from writing criminal warrants for her husband as a law officer upon his complaint or testimony under oath.

JUSTICE OF PEACE—Residence—May continue to act until end of term after annexation.

ANNEXATION—Justices of the Peace—May continue to act until end of term.

THE HONORABLE DAVID A. LYON, III
Secretary-Treasurer
Association of Justices of the Peace

This is in response to your letter of June 25, 1970, in which you ask:

"If a Justice of the Peace has been duly elected or appointed, how long may he hold office and live in the area that has been annexed to the City? Does Section 15.1-995 and Section 15.1-1053 mean that he can live in the annexed area and remain a Justice of the Peace in a County as long as he continues to be elected or appointed to that office?"

In my opinion, your question is answered in the affirmative. Section 15.1-1053 of the Code, as amended, provides:

"If a county or district officer resides in a territory annexed to a city, such officer may continue in office until the end of the term for which he was elected or appointed. The provisions of § 15.1-995 shall prevail with respect to successive re-elections of such officers re-election." (Emphasis supplied.)
Section 15.1-995 of the Code provides that such officers shall:

"...continue to hold such office so long as he shall be successively elected or appointed to the office held by him at the time of such transition."

These two sections govern the situation in question and clearly indicate that a justice of the peace whose residence has been annexed into a city can function as a justice of the peace in his former county until the end of his term or so long as he was duly elected or appointed to that office.

JUSTICE OF PEACE—Warrant Fees—May not be required before issuing of warrant.

THE HONORABLE PETER M. AXSON, JR.
Commonwealth's Attorney, City of Chesapeake

In your letter of January 18, 1971, you inquire whether a justice of the peace may properly require a citizen to pay his fee in advance before writing a criminal warrant. Section 14.1-128 of the Code of Virginia prescribes the fees to be charged by a justice of the peace in criminal matters. Such fees, with the exception of the fee for admitting persons to bail, are to be paid by the State in accordance with the provisions of § 14.1-85. Section 14.1-128 is not to be construed as authorizing the justice to demand payment of the fee prior to issuing the warrant. I attach a copy of a previous opinion of this office in answer to a similar inquiry to the Honorable M. H. McBryde, which is found in the Report of the Attorney General, 1955-1956 at page 114.

JUVENILE AND DOMESTIC RELATIONS COURTS—Certifying Fugitive Juveniles—Must be charged with felony and at least fifteen.

THE HONORABLE JOHN T. CAMBLOS
Commonwealth's Attorney for the City of Charlottesville

In your letter of July 29, 1970, you inquire whether the 1970 amendment to § 16.1-176 of the Code of Virginia, which states in the next to last sentence “in no case shall any child under the age of fifteen be so certified, nor shall any such child be indicted or tried under the criminal laws of this State” applies to and modifies the remainder of § 16.1-176, and also whether it modifies § 16.1-177.1 and §§ 18.1-78.1 through 18.1-78.5.

It is my opinion that the cited amendment applies only to the sentence which immediately precedes it in § 16.1-176, to-wit:

"If a child fourteen years of age or over is charged with an offense, which, if committed by an adult, could be punishable by confinement in the penitentiary and such child is a fugitive from justice, then the juvenile and domestic relations court may nevertheless certify such child for proper criminal proceedings to the appropriate court as above provided." (Emphasis supplied.)

The purpose of the 1970 amendment was to raise from 14 to 15 the minimum age of a juvenile who could be certified or indicted while a fugitive from justice. Therefore, the amendment does not apply to the remainder of § 16.1-176.

Since § 16.1-177.1 deals only with misdemeanors, this amendment would not apply since the offense charged must be punishable by confinement in
the penitentiary. With regard to the offenses listed in § 18.1-78.1 through 18.1-78.5, this limitation would apply only insofar as the offenses were punishable by confinement in the penitentiary.

JUVENILE AND DOMESTIC RELATIONS—Courts — Operator's license applications—Only judge of court making adjudication, or of court where parent, guardian, spouse, or employer reside, may sign for committed juvenile.

MOTOR VEHICLES—Operator's License Applications—Only judge of court making adjudication, or of court where parent, guardian, spouse, or employer reside, may sign for committed juvenile.

THE HONORABLE EDWARD E. WILLEY
Member, Senate of Virginia

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

"As President of the Automobile Club of Virginia, I have been interested in the Driver Training course the Club is conducting at the Beaumont School for Boys in Powhatan County."

"The Club's Driver Training Department is teaching this course under contract with the Virginia Department of Vocational Rehabilitation."

"We have run into a hitch, and I would like a decision from you to clarify the law. Judge Leslie L. Mason, Jr., of Powhatan, is not sure that he is empowered to sign the application for learner's permit, which is required before these boys can receive the Behind the Wheel instruction. He feels that the Judge in the boys home county should, perhaps, be the one to sign. Mr. Frank Payne, of the Virginia Department of Vocational Rehabilitation, has requested that I obtain a ruling on this from your office."

This concerns minors who are of the age of sixteen years but under the age of eighteen years and is controlled by § 46.1-357 of the Code of Virginia. The pertinent part of this section is as follows:

"... If it appears that such minor has been adjudged not innocent of the offense alleged the Division shall not issue a license without the written approval of the judge of the juvenile and domestic relations court making an adjudication as to such minor or the like approval of a similar court of the county or city in which the parent, guardian, spouse or employer respectively of the child resides."

The fact the minor seeking the license is presently at Beaumont School for Boys in Powhatan County is not a factor. The quoted language from § 46.1-357 requires that written approval must be obtained from the judge of the juvenile and domestic relations court making an adjudication as to such minor or from a like court of the county or city in which the parent, guardian, spouse or employer of the child resides.

In view of the foregoing, it is my opinion that the Judge of the Juvenile and Domestic Relations Court of Powhatan County is not empowered to sign these applications for permit, except in instances in which at least one of the two situations specifically stated in the above quoted portion of § 46.1-357 exists.

JUVENILE AND DOMESTIC RELATIONS COURTS—Judges—Travel expenses.
GOVERNOR—Travel Expense Regulations—Control reimbursement.

October 29, 1970

The Honorable Harold B. Singleton, Judge
Fifth Regional Juvenile and Domestic Relations Court

This is in reply to your letter of October 20, 1970, in which you requested my opinion whether or not the Governor may determine the items of travel expenses to be allowed judges of regional juvenile and domestic relations courts.

Section 16.1-143.3 provides that the salaries of the judges of the regional juvenile and domestic relations courts shall be paid by the State out of the criminal charges. Section 16.1-143.4 provides that the payment of travel expenses of such judges shall be under the rules of the Department of Welfare and Institutions.

Section 14.1-5 of the Code is the general statute authorizing reimbursement for travel expenses for any person traveling on State business. This is amplified by Section 38.a. of Chapter 461, Acts of Assembly of 1970, which provides as follows:

"Reimbursement for the actual cost of travel an official business of the State government is authorized to be paid from appropriated funds. Such reimbursement shall be paid only if the travel and costs have been incurred in accordance with uniform regulations issued by the Governor and with the requirements set forth below."

In view of the restrictive language in Section 38.a. above quoted, I am of the opinion that unless the items of travel expenses for which reimbursement is sought have been incurred in accordance with uniform regulations of the Governor the same may not be paid.

Therefore, I am of the opinion that the Governor may determine the items of travel expenses for which reimbursement may be made to the judges of regional juvenile and domestic relations courts.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Charge of murder or manslaughter by juvenile against juvenile member of family.

May 21, 1971

The Honorable G. Garland Wilson, Judge
Juvenile and Domestic Relations Court for the Counties of Floyd and Montgomery and the City of Radford

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

"On December 31, 1964, the Honorable R. Y. Button rendered an opinion on 'jurisdiction—charge of murder or manslaughter where offense committed by member of the family under 18 years of age.' I would like to know whether you agree with this opinion and would appreciate clarification on the jurisdiction of the Juvenile and Domestic Relations Court in this matter."

That opinion stated that the Juvenile and Domestic Relations Court did not have original or concurrent jurisdiction with the Municipal Court of a county or city to hear all murder or manslaughter cases involving members of the same family. Section 16.1-158 (8), reads as follows:

"(8) All offenses committed by one member of the family against another member of the family, except murder or manslaughter, when the person accused of such murder or manslaughter is fifteen years of age or over and the trial of all criminal warrants in which one
member of the family is complainant against another member of the family; provided, that in prosecution for other felonies over which the court shall have jurisdiction, said jurisdiction shall be limited to that of examining magistrate. The word 'family' as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild;"

I shall attempt as you requested to delineate the jurisdiction of the Juvenile and Domestic Relations Court as provided for under § 16.1-158 (8) of the Code of Virginia (1950) as amended.

The Court has jurisdiction over all offenses committed by one member of the family against another member of the family except in cases of murder or manslaughter when the accused is 15 years of age or over. The court would have jurisdiction in a case of murder or manslaughter in the event the accused is less than 15 years of age. (See § 16.1-158 (4).)

The Court is vested with the jurisdiction for the trial of all criminal warrants when one member of the family is the complainant against another member of the family, when the defendant is a juvenile and, in the case of an adult defendant, when the charge is a misdemeanor. In instances in which the charge is a felony and the accused is an adult, the Court may sit only as an examining magistrate.

Insofar as the opinion referred to earlier in your communication might lead you to believe that the Juvenile Court does not have jurisdiction when a charge of murder or manslaughter is lodged against a juvenile member of the family under the age of 15 years, the same should be disregarded.

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JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Compulsory attendance law.

SCHOOLS—Compulsory Attendance—Jurisdiction—Juvenile and domestic relations courts.

THE HONORABLE LAWRENCE DOUGLAS WILDER
Member, Senate of Virginia

February 11, 1971

I acknowledge receipt of your letter of February 4, 1971, concerning the Compulsory Attendance Article, §§ 22-275.1 et seq., Code of Virginia (1950), as amended. In your letter you note that the Richmond Juvenile and Domestic Relations Court has held unenforceable a provision of the Compulsory Attendance Article. You have asked for my "interpretation of the jurisdiction of courts to decide the constitutional questions raised" in that Court's opinion.

Section 22-275.11, Code of Virginia (1950), as amended, provides:

"If the parent, guardian, or other person having control of the child or children fails, within the specified time, to comply with the law, it shall be the duty of the division superintendent or the chief attendance officer, if there be one, to make complaint in the name of the Commonwealth before the juvenile and domestic relations court."

Section 22-275.21, Code of Virginia (1950), as amended, provides:

"It shall be the duty of the attorneys of the Commonwealth of the several counties and cities to prosecute all cases arising under this article and juvenile and domestic relations courts shall have exclusive original jurisdiction for the trial of such cases."

I am of the opinion that any person charged with a violation of any provision of the Compulsory Attendance Article can be prosecuted only in the juvenile and domestic and relations court of the appropriate county or city. Section 22-275.21, Code of Virginia (1950), as amended, clearly pro-
vides that this court shall have "exclusive original jurisdiction." In a trial held before a judge of a juvenile and domestic relations court pursuant to § 22-275.21 of the Code of Virginia, that judge has authority commensurate with the authority of a judge in a court of record and is empowered to make any ruling which a judge of a court of record might make.

Section 16.1-132, Code of Virginia (1950), as amended, provides for a right of appeal to a court of record for any person convicted in a court not of record. Section 16.1-214 specifically provides for appeals by persons convicted in a juvenile and domestic relations court. Thus, if a parent is convicted in a juvenile and domestic relations court of a violation of the Compulsory Attendance Article, that person has the right to appeal to a court of record. Neither the Constitution of Virginia nor the statutory law provides for an appeal by the Commonwealth.

**JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction of Cohabitation Cases—Depends on status of persons involved.**

**CRIMINAL PROCEDURE—Jurisdiction—Status of persons involved determines in cohabitation cases.**

**The Honorable Harold B. Singleton, Judge**

Fifth Regional Juvenile and Domestic Relations Court for Charlotte County

This is in reply to your letter of July 8, 1970, from which I quote, in part, as follows:

"Section 16.1-158 of the Code of Virginia sets out the jurisdiction of the Juvenile and Domestic Relations Courts of this Commonwealth. Section 9 of said statute reads as follows: 'Any violation of law the effect or tendency of which is to cause or contribute in any way to the disruption of marital relations or a home'.

"Section 18.1-191 provides the punishment for adultery and fornication. Section 18.1-192 describes the punishment for a person or persons conspiring to cause a spouse to commit adultery and Section 18.1-193 sets out and describes the crime and punishment for lewd and lascivious cohabitation.

"The question I wish to ask is this. Does this Court have jurisdiction of cases involving lewd and lascivious cohabitation? — That is persons who are living together without being married."

In regard to the offenses of lewd and lascivious cohabitation, § 18.1-193 of the Code of Virginia states as follows:

"If any persons, not married to each other, lewdly and lasciviously associate and cohabit together, or, whether married or not, be guilty of open and gross lewdness and lasciviousness, they shall be fined not less than fifty nor more than five hundred dollars; and, upon a repetition of the offense, and conviction thereof, they may also be confined in jail not less than six nor more than twelve months."

The pertinent part of § 16.1-158 of the Code of Virginia, with exceptions not presently under consideration, gives the juvenile and domestic relations courts exclusive original jurisdiction over all cases, matters and proceedings involving:

"(8) All offenses committed by one member of the family against another member of the family, except murder or manslaughter, when the person accused of such murder or manslaughter is fifteen years of age or over and the trial of all criminal warrants in which one
member of the family is complainant against another member of the family; provided, that in prosecution for other felonies over which the court shall have jurisdiction, said jurisdiction shall be limited to that of examining magistrate. The word 'family' as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild; and

"(9) Any violation of law the effect or tendency of which is to cause or contribute in any way to the disruption of marital relations or a home."

In my opinion, the determining factor in deciding which court has jurisdiction of a violation under § 18.1-193 would be the status of the persons involved. In the event the crime involved two members of the same family, as defined in paragraph (8) of § 16.1-158, or caused or contributed in any way to the disruption of marital relations or a home, as outlined in paragraph (9) of the same section, the Juvenile and Domestic Relations Court would have jurisdiction. If, on the other hand, a violation of § 18.1-193 involved only persons other than those falling within the purview of either paragraph (8) or paragraph (9) of § 16.1-158, as quoted above, jurisdiction would lie in the County Court.

JUVENILE AND DOMESTIC RELATIONS COURTS—When Jury Terminates.

JUVENILES—Newspaper Publications of Indictment.

December 2, 1970

THE HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

In your letter of November 19, 1970, you inquire whether the Juvenile Court still has jurisdiction over a juvenile who is certified to the grand jury so that it may forbid the publication in newspapers of the name of the juvenile prior to the returning of an indictment by the grand jury.

Section 16.1-176 of the Code of Virginia provides in pertinent part:

"If a child fourteen years of age or over is charged with an offense which, if committed by an adult, could be punishable by confinement in the penitentiary, the court . . . may, in its discretion, retain jurisdiction or certify such child for proper criminal proceedings to the appropriate court of record having criminal jurisdiction of such offenses if committed by an adult;" (Emphasis supplied)

It is my opinion that the effect of a certification pursuant to this section is, therefore, a waiver by the Juvenile Court of its jurisdiction. Of course, in accordance with the provisions of § 16.1-162, the prior proceedings in the Juvenile Court should remain confidential, but the defendant is no longer within the jurisdiction of the Juvenile Court. On the contrary, jurisdiction of his case has been transferred to the court of record, and it then stands on the same footing as would the case of an adult who is certified to the grand jury from a preliminary hearing in Municipal Court. It is then a policy decision on the part of the newspaper whether they will publish the names of persons whose cases are to be presented to the grand jury for indictment.

JUVENILES—Consent to Marry for Children Committed to Local Welfare Department Must Be Given by Judge or Justice Having Jurisdiction.

April 19, 1971

THE HONORABLE E. EUGENE GUNTER
Commonwealth's Attorney
Frederick County
This is in response to your recent letter in which you requested my opinion concerning the construction of § 20-49 of the Code of Virginia (1950), as amended. You stated:

"On occasions, the local court of competent jurisdiction places children in the custody of the Department of Public Welfare of Frederick County as a result of such children being found delinquent, dependent, or neglected under a proper juvenile petition. The Department of Public Welfare for Frederick County, Virginia then places these children in fitting and proper foster homes. Should one of these children wish to marry before he or she reaches the age of personal consent, can the Superintendent of the Department of Public Welfare of Frederick County, Virginia give such consent if she deems it advisable? Or must this consent be given by the Judge or Justice having jurisdiction to control the custody of such child?"

In my opinion, this consent must be given by the judge or justice having jurisdiction to control the custody of such child. I am assuming that the child has been committed under § 16.1-178 (3) of the Code of Virginia (1950), as amended, rather than § 16.1-178 (4). Section 20-49 of the Code provides in part:

"... If any such person under twenty-one years of age be a ward of the State by virtue of having been adjudicated a delinquent, dependent, or neglected child, the consent required by this section shall be given by the judge or justice having jurisdiction to control the custody of such person; or, if such person so adjudicated shall have been committed to the Board of Welfare and Institutions or to any society, association, or institution approved by it for this purpose, such consent shall be given personally by the Commissioner of Public Welfare or by some person thereto authorized by him, or by the principal executive officer of such society, association, or institution, as the case may be, such authorization to be in writing, attested or sworn to as hereinabove provided." (Emphasis supplied.)

The reference to the Board of Welfare and Institutions refers to the State Board of Welfare and Institutions and does not apply to the local Board of Public Welfare. Therefore, when a child has been referred to the local Board of Public Welfare under § 16.1-178 (3) of the Code, consent to a marriage must be given as prescribed in the first clause of the paragraph cited from § 20-49 of the Code, i.e., by "... the judge or justice having jurisdiction to control the custody of such person. ..." It is only when a child has been committed to the State under § 16.1-178 (4) that the consent can be given by another official, that being "the Commissioner of Public Welfare".

JUVENILES—Disclosure of Names—Authority of court to control.

June 7, 1971

THE HONORABLE EDWIN A. HENRY, Judge
Juvenile and Domestic Relations
Court of the City of Norfolk

This is in reply to your letter of May 10, to Mr. Luther Glass, which was forwarded to me, and which reads as follows:

"About three weeks ago there was an unusual, cruel and senseless murder case here in our City. Two young white men working in a service station were killed by a group of three negroes. One of the defendants was a 17 year old negro juvenile and his case is, at this time, pending within the jurisdiction of this Court. Most likely the case will eventually go on to the Grand Jury, but at the present it is here."
"Our local newspapers have seen fit to print the name and address of this boy in about four issues of its paper. Furthermore, on several other occasions they have printed the names of juveniles charged with crime while the case was still within the breast of the Juvenile Court and on other occasions they have even printed pictures of juveniles so charged.

"Judge Martin and I are concerned somewhat about this problem and would be very pleased to have your valued opinion in regard to these matters:"

I shall answer your questions seriatim.

"1. Do you consider this action on the part of our press to be in clear violation of Section 16.1-162 of the State Code?"

Section 16.1-162 establishes a policy of non-disclosure of the names of juveniles unless the Court deems such disclosure to be in the public interest. I am of the opinion that the action of the newspapers in question violates the purpose and intent of the Juvenile and Domestic Relations Court law contained in 16.1-140 of the Code. This section provides that the juvenile courts of the Commonwealth shall in hearing and disposing of cases involving juveniles, proceed upon the theory that the welfare of the child is the paramount concern of the State.

"2. Is this a problem known to you in other metropolitan areas of this Commonwealth and, if so, do you know what action may have been taken in other areas to resolve the problem?"

We are aware that the problem does exist in other areas of the Commonwealth, and the problem is yet to be solved.

"3. If you consider this activity on the part of the newspapers to be a violation of Section 16.1-162 of the State Code, would you consider it feasible and proper for the Court to possibly consider the action as constituting 'Contempt of the Court'?"

The Code of Virginia provides no sanction for violations of § 16.1-162, and in light of this fact, I am of the opinion that contempt, though an adequate remedy, is impermissible under the circumstances presented in your letter.

"4. Do you know of other areas in the state where the Court has instituted a conference between the newspapers or perhaps a legal representative of the newspaper and have been able to resolve this problem in a way reasonably satisfactory to both parties and in general conformity with state law?"

I am not advised of any conferences between representatives of the press and the courts for the purpose of resolving and presenting unauthorized publication of the names of juveniles.

In conclusion, I might suggest that the Juvenile and Domestic Relations Court judges throughout the State adopt rules of court pursuant to § 16.1-154 which provides that judges may adopt and publish rules not in violation of Virginia law, to regulate proceedings before their respective courts and the conduct of officers and employees of the court.

Upon the adoption of rules by the local courts, the same could then be disseminated to the media with the advice that violation of the local rules of court would raise the possibility of contempt proceedings for violations thereof.

JUVENILES—Petition—Sufficiency of supporting facts.

January 19, 1971

THE HONORABLE SAM GARRISON
Commonwealth's Attorney for City of Roanoke
In your letter of December 29, 1970, you inquire what specific facts must be stated in a petition filed in a juvenile case pursuant to § 16.1-165 (6) of the Code of Virginia, which reads as follows in pertinent part:

"The petition may be informal but may be in the following form and shall contain the facts below indicated: . . . (6) statement of the facts which allegedly bring the child within the purview of this law."

You inquire whether the petitioner must swear to facts constituting probable cause to believe that a crime has been committed when the alleged basis for juvenile court jurisdiction is § 16.1-158(1) (i), or whether the statement of facts may consist merely of the conclusory assertion that the juvenile has violated a particular law.

The purpose of the petition, like the purpose of a warrant which would be served on an adult, is to advise the juvenile and his parent or guardian of the nature of the crime with which he is being charged. Accordingly, it is my opinion that the petition should state the specific facts which constitute the elements of the crime charged in the same manner as a warrant. For example, a typical petition might read:

"On the 6th day of January, 1971, the aforesaid juvenile did commit robbery by the presenting of firearms to the person of Richard Rowe at the corner of Broad and Belvidere Streets in the City of Richmond, Virginia, in violation of § 18.1-91 of the Code of Virginia."

The statement of facts need not, however, be equivalent in specificity to the statement of underlying facts constituting probable cause which must be contained in an affidavit filed in support of the issuance of a search warrant.

JUVENILES—Transfer From Juvenile and Domestic Relations Courts—Minimum age for indictment when juvenile is fugitive.

February 17, 1971

THE HONORABLE DABNEY W. WATTS
Commonwealth's Attorney for City of Winchester

This is in reply to your letter of January 27, 1971, wherein you refer to an opinion of the Attorney General of April 10, 1970 to Honorable John T. Camblos, Commonwealth's Attorney for the City of Charlottesville (found in Report of the Attorney General (1969-1970), p. 104), and you refer to the 1970 amendment to § 16.1-176 (a) of the Code of Virginia of 1950, which was added subsequent to the above opinion.

Section 16.1-176 provides for the transfer of juveniles from a Juvenile and Domestic Relations Court to a Court of Record when felony charges are outstanding, and as you state, all references are to children 14 years or over, but in the last part of the statute, the following language appears:

"In no case shall any child under the age of fifteen (emphasis added) be so certified, nor shall any such child be indicted or tried under the criminal laws of this State."

Immediately preceding the above quoted language, there is a reference to juveniles who are fugitives from justice. It is the opinion of this office that the 1970 amendment simply raised the minimum age from 14 to 15 for a juvenile who could be certified or indicted while a fugitive from justice. This problem was considered in a previous opinion to Honorable John T. Camblos, Commonwealth's Attorney for the City of Charlottesville, dated August 10, 1970, and I am enclosing a copy of that opinion for your records.
Accordingly, your question as to whether a child under the age of 15 could be indicted for violations of §§ 18.1-78.1, 18.1-78.3 and 18.1-78.5 is answered affirmatively, unless the juvenile is a fugitive from justice at the time of the indictment.

You also ask if the Juvenile and Domestic Relations Court would have jurisdiction over the offenses if an indictment is precluded, but this question is rendered moot by my above answer and previous opinion.

**JUVENILES—Venue for Trial of Juvenile Is Where Offense Committed, Whether or Not Another Juvenile and Domestic Relations Court Has Previously Assumed Custody of the Child.**

**CRIMINAL PROCEDURE—Venue—Children proceedings in Juvenile and Domestic Relations Courts held where child located when offense in question arose.**

March 9, 1971

**THE HONORABLE H. RATCLIFFE TURNER**

Judge, Juvenile and Domestic Relations Court

County of Henrico

This is in response to your letter of February 16, 1971, in which you request my opinion as to venue of a proceeding against a child who is charged with some violation requiring a hearing by a Juvenile and Domestic Relations Court where another Juvenile and Domestic Relations Court has previously taken jurisdiction over the child by placing him in the custody of the Department of Public Welfare. The act alleged to have been committed, however, is alleged to have been committed outside the jurisdiction of the original court and within the jurisdiction of another juvenile court. The problem arises when the child runs away or becomes an incorrigible or beyond the control of the department or institution in which he has been placed, and a petition is filed making such charges against the child.

In my opinion, § 16.1-160 of the Code of Virginia (1950), as amended, requires that the court in the geographic area where the child committed the particular acts is the proper venue for the proceedings against the child on the charges. The section states:

"The venue of any proceeding concerning any child under this law shall be in the county or city where the child is present at the time the act complained of is committed." (Emphasis supplied.)

This section makes it clear that the determining factor is the presence of the child at the time he commits the acts for which he is being charged, rather than his domicile or the court which may have previously taken jurisdiction over him.

**LABOR—Employment Agencies—Persons required to obtain licenses and bonds prior to engaging in employment agency business.**

January 19, 1971

**THE HONORABLE EDMOND M. BOGGS**

Commissioner, Department of Labor and Industry

This is in reply to your recent letter which requested my opinion as to several questions you posed relating to Chapter 2 of Title 40.1 of the Code of Virginia which relates to the regulation of employment agencies. You asked the following questions:

"1—Does each individual owner, each partner, each officer, and each director need a license?"
In my opinion, each of these individuals must obtain a license. Va. Code Ann. § 40.1-13 (1) states:

“No person shall engage in the employment agency business in the State unless he has first procured a license from the Department. A person shall be engaging in the employment agency business if he is, individually, an employment agency as defined in § 40.1-12, if he is a partner, officer, director or holder of more than twenty percent of the stock of such an employment agency, or if he is employed to direct, operate or manage such an employment agency.”

It is clear that each owner, partner, officer or director is engaging in the employment agency business and, therefore, must procure a license.

“In my opinion, this question must also be answered in the affirmative. Va. Code Ann. § 40.1-13 (8) states:

“No employment agency shall engage in business in this State until first depositing with the Commissioner a bond in the penal sum of five thousand dollars for each location to be operated in this State. . . .”

As § 40.1-13 (1) states that such persons shall be deemed to be engaging in the employment agency business, it must follow that under sub-paragraph 8 of § 40.1-13, he must deposit the bond with the Commissioner prior to becoming so engaged.

“In my opinion, each of these individuals must be bonded for each location and must be licensed for each location. Va. Code Ann. § 40.1-13 (8) states that the bond to be deposited with the Commissioner prior to engaging in the employment agency business shall be “for each location to be operated in this State”. Va. Code Ann. § 40.1-13 (5) states:

“A separate license shall be procured by each applicant for each location at which an employment agency office is established or maintained.” (Emphasis added)

Therefore, each person required to have a license must be bonded and must have a license for each location.

“For the reasons I have stated above, each person engaged in conducting an employment agency must have a license and corporate bond signed by officers? Does a manager need the same?”

LABOR—Failure to Pay Wages—Warrants for violation of § 40.1-29(d).

CRIMINAL PROCEDURE—Warrants Under § 40.1-29(d)—May be issued against president or other principal officer of corporation.
I have received your letter of September 28, 1970, in which you ask whether a criminal warrant under § 40.1-29 (d) of the Code of Virginia (1950), as amended, may be issued against the president or other principal officer of a corporation that has violated this section by not properly paying its employees.

In my opinion, the warrant may be issued against the president, other principal officer of the corporation, or other person found to be in charge of the business and cognizant of the facts constituting the violation. In Crall v. Commonwealth, 103 Va. 855, the Supreme Court of Appeals of Virginia held that the vice-president of a corporation was guilty of a corporation's crime of peddling its good without a license. The vice-president neither sold the goods nor directed its employees to do so without a license. He was, however, found to be in charge of the business and "cognizant of the fact that the subordinate agents of the company were peddling its goods without a license." It is my opinion that this case controls the situation suggested by your letter and overrules a previous opinion of this office which was rendered to you on September 13, 1965 and which is found in the Opinions of the Attorney General 1965-1966, page 167.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION—Law Enforcement Officer—Definition does not include ABC officers.

In your letter of recent date you inquire whether the enforcement officers of the Enforcement Division of the Virginia ABC Board are included in the definition of "Law Enforcement Officer" as defined in § 9-108 of the Code and are thereby required to meet the compulsory training standards. In defining "Law Enforcement Officer," § 9-108 sets forth two criteria. First, the person must be a full time employee of a police department or sheriff's office which is a part of or administered by the state or a political subdivision thereof. The second criteria is that the officer be responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this State.

It is my opinion that the enforcement officers of the Enforcement Division of the ABC Board would be excluded from the definition by virtue of the fact that they are not employees of a police department or sheriff's office. This being so, they would not be required to meet the compulsory training standards set by the commission.

LEGAL HOLIDAYS—Thanksgiving Day—Appointed a legal holiday.

This is in reply to your letter of January 21, 1971, in which you request my opinion whether under § 2.1-21 of the Code of Virginia, as amended by Chapter 682, Acts of Assembly of 1970, the Governor of Virginia could legally appoint November 26, 1970, as a legal holiday.
Section 2.1-21 of the Code, in addition to establishing certain days as legal holidays, provides that any day appointed by the Governor shall be a legal holiday.

I am, therefore, of the opinion that Governor Holton legally appointed November 26, 1970, as a legal holiday.

LIBRARIES—State Library Board—Virginia Personnel Act—Library not an educational institution.

MRS. VIRGINIUS R. SHACKELFORD, JR., Chairman
Virginia State Library Board

I am in receipt of your letter of August 24, 1970, concerning the identification of the Virginia State Library as an educational institution.

In your letter you asked if the Code of Virginia identifies the Virginia State Library as an educational institution so that it might come within provision of § 2.1-116 (8) of the Code of Virginia which exempts employees of educational institutions from the provisions of the Virginia Personnel Act. In § 42.1-1 of the Code of Virginia, the State Library is identified as "the Library agency of the State, the archival agency of the Commonwealth." The Code does not elsewhere identify the State Library as an educational institution.

I refer you to an opinion to Randolph W. Church dated June 26, 1970, concerning the effect of the 1970 recodification of the Library laws into Title 42.1 of the Code of Virginia. I advised Mr. Church in that opinion that the revision of the Library laws did not remove the State librarian from the classified service as established under the Virginia Personnel Act. I am further of the opinion that the State Library is not identified as a State educational institution so that it might come within the exemptions of the State Personnel Act.

LICENSES—Collection Agencies—Existing operators exempt only from investigation fee, not license fee.

LICENSES—Collection Agencies—New applicants must pay investigation fee, and, if approved, license fee.

THE HONORABLE W. L. LEMMON
Member, House of Delegates

This is in response to your letter of July 23, 1970, in which you request an interpretation of § 54-729.10 of the Code of Virginia, as amended. This section under Chapter 17.2 of Title 54 of the Code controls collection agencies. You question whether a person who was engaged in operating a collection agency prior to the effective date of this act is required to remit the fee of $50.00 to obtain a license under the new act. Section 54-729.10, Code of Virginia (1950), as amended, provides, in part, as follows:

"... An applicant for a license who is operating a collection agency on June twenty-sixth, nineteen hundred and seventy, and possesses a business license issued by the Commonwealth of Virginia to that effect, shall be granted a license upon application. Other applicants shall execute a form prescribed by the Board and accompany it with an unrefundable investigation fee of fifty dollars and a verified financial statement."

In my opinion this section does not exempt a person operating a collection agency on June 26, 1970, from payment of the fee of fifty dollars under § 54-729.12, which states:
"Each applicant approved shall at the time of approval pay a fee of fifty dollars to the Board and also a like amount for each branch office." (Emphasis supplied.)

This section provides certain requirements that each and every applicant must meet including these persons engaged in the business on or before June 26, 1970. From these two sections it is clear that the intention of the Legislature was to place the responsibility upon the Board to screen all applicants for licensure and to approve or disapprove each application. If the application is approved, the person is required to pay a license fee of fifty dollars.

As you stated in your letter, § 54-729.10 makes a distinction between persons operating a collection agency on June 26, 1970, from "other applicants" which are required to submit "an unrefundable investigation fee of fifty dollars" with their application for license. This is not a license fee, but an additional charge. Therefore, the new applicant would remit the investigation fee with his application and if his application is approved, he would be required to pay the license fee of fifty dollars, or a total of one hundred dollars for his first license. Of course, if branch offices are involved there is a separate fee for each branch.

LIENS—Liens Abolished Under § 63.1-133.1 Not Applicable to Assistance to Indigents for Health and Medical Assistance.

February 19, 1971

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

This is in response to your recent letter which involves an interpretation of Va. Code Ann. § 63.1-133.1 (1950), as amended. You asked:

"Is it necessary or incumbent for the Clerk or any other person to make any marginal notation or release on these judgments referred to in the above statute?"

In my opinion, it is not necessary for the Clerk to make such notations or releases. Va. Code Ann. § 63.1-133.1 provides:

"No lien or other interest in favor of the State or any of its political subdivisions shall be claimed against, levied or attached to the real or personal property of any applicant for or recipient of public welfare assistance and services as a condition of eligibility therefor or to recover such aid following the death of such applicant or recipient. All such liens perfected and unforeclosed on April six, nineteen hundred seventy, shall be void ab initio and all liens foreclosed prior to April six, nineteen hundred seventy, are hereby validated for all purposes in law and equity."

It is clear that the statute is self-executing and it is not necessary that the Clerk make any notation to release the lien.

You also stated:

"Some years ago it was the policy of the Rockingham Board of Supervisors to record deeds of trust in favor of the County for monies advanced by the County to pay hospital and drug bills inurred by welfare recipients. . . . Does the above referred to statute void these deeds of trust as obviously it does on the judgments?"

I assume that the liens referred to arose from payments made under Chapter 7 of Title 63.1 of the Code providing for the hospitalization and treatment of indigent persons. In my opinion, liens arising from assistance
grants in connection with hospitalization and treatment rendered to such persons under Chapter 7 are not covered by Va Code Ann. § 63.1-133.1 but rather are controlled by Va. Code Ann. § 63.1-140 which provides authority for the locality to collect for hospital treatment and care provided under that chapter. The latter section, 63.1-140 of the Code, was not repealed by § 63.1-133.1 and is not affected by it in that § 63.1-133.1 of the Code applies only to recipients of “public welfare assistance” under Chapter 6 of Title 63.1 of the Code rather than hospitalization and treatment as provided under Chapter 7 of Title 63.1 of the Code. Section 63.1-133.1 does not void the liens created by such deeds of trust.

MARINE RESOURCES COMMISSION—Authority—No control over unassigned or ungranted marshlands.

MARSHLANDS—Unassigned and Ungranted—Lack of authority over.

THE HONORABLE MILTON T. HICKMAN
Commissioner, Marine Resources Commission

March 3, 1971

This will acknowledge receipt of your letter of February 16, 1971, in which you posed the following question:

“What State agency has control and authority to protect unassigned or ungranted marshlands which are above mean low water where it is unattached to highlands?”

My review of the applicable provisions of the law discloses that no State agency has been specifically delegated such control and authority over unassigned or ungranted marshlands by the General Assembly. Until such time as the Legislature may act definitively in this area, consideration might be given by the Governor to the assignment to some State agency, by means of executive order, the responsibility for taking such basic steps as are necessary to protect the interests of the Commonwealth in the integrity of its marshlands.

MARINE RESOURCES COMMISSION—Oyster Ground Lease—Riparian—Assignment of.

OYSTERS—Riparian Ground Lease—Assignment of.

THE HONORABLE MILTON T. HICKMAN, Commissioner
Marine Resources Commission

March 3, 1971

This will acknowledge receipt of your letter of February 16, 1971, in which you posed the following question:

“Can a riparian oyster ground lease be granted within Public Clamming ground which has been set aside by action of the Commission?”

In this regard, § 28.1-162 of the Code of Virginia (1950), as amended, provides as follows:

“Any ground in the waters of this Commonwealth not assigned to anyone for planting or bathing purposes may be, on application of twenty or more citizens to the oyster inspector of the district in which the land lies, laid off and designated as public clamming or scalloping grounds; or the Commission of Fisheries may do so without such petition if in its judgment it is expedient, provided in its
opinion no oyster interests will suffer thereby and the clams or scallops are of sufficient quantity for a person to realize at least two hundred and twenty-five clams or one and one-half dollars per day catching and taking clams or scallops from such ground; and, if laid off, the Commission shall have the metes and bounds of such ground accurately designated by proper and suitable stakes; and also have a plat made of the same, to be recorded in the clerk's office of the county wherein the ground lies, all cost of surveying, platting and recording to be paid by the applicants; and such ground shall be set apart and remain as public clamming or scalloping ground for the common use of the citizens of this State so long as the Commission may deem best, and shall not be assigned to anyone during such period."

While § 28.1-162 of the Code does provide that such ground as is set aside as public clamming ground shall remain as such and shall not thereafter be assigned, this section should be read in conjunction with § 28.1-108 of the Code. This latter provision states, in part, as follows:

"Any owner of land bordering on a body of water in the oyster-growing area of this State whose shore front measures at least one hundred and five feet at the low water mark . . . may make application for planting grounds to the inspector of the district in which the land lies, who shall assign to him such ground wherever such owner may designate in front of his land between his highland property lines extended . . . [S]uch owner shall have the exclusive right to the use thereof for the purpose of planting or gathering oysters and other shellfish." (Emphasis supplied.)

It is clear from the provisions of § 28.1-108 of the Code that any riparian owner meeting the statutory requirements is granted the right to have assigned to him oyster ground appurtenant to his riparian property. Indeed, § 28.1-108 of the Code provides that a riparian right supersedes existing occupation of the oyster-planting grounds.

In addition to the right granted the riparian owner to have assigned to him riparian planting grounds, § 28.1-162 of the Code recognizes that the designation of public clamming ground shall not interfere with existing oyster assignments, and further, that the Marine Resources Commission, upon designating such a public ground upon its own motion, may do so provided that in its opinion no oyster interests will be adversely affected thereby.

Even though § 28.1-162 of the Code does not expressly so state, in view of the right granted the riparian owner by § 28.1-108 of the Code, the proscription of further assignment after the designation of a ground as public clamming ground should be construed to refer to the assignment of general oyster-planting ground leases pursuant to § 28.1-109 of the Code and not to riparian-right assignments under § 28.1-108 of the Code.

Therefore, I am of the opinion that a riparian oyster ground lease (assignment) can be granted in a public clamming ground which has been previously set aside by action of the Commission.

MARINE RESOURCES COMMISSION—Oyster Planting Ground—Assignment—May be made to an estate.

OYSTERS—Planting Grounds—Not assignable to estate where applicant dies before assignment made.

THE HONORABLE MILTON T. HICKMAN, Commissioner
Marine Resources Commission

March 3, 1971
This will acknowledge receipt of your letter of February 16, 1971, in which you posed the following question:

“When an Oyster Planting Ground Application is made in proper form and the Applicant dies before assignment is made of the ground he applied for, what is the status of the Application? Does it become a part of the Estate of the deceased Applicant or does it terminate at the death of the Applicant? The Commission has ruled that an Application for Oyster Planting Ground cannot be made by an Estate because they do not consider an Estate to be an eligible applicant pursuant to Section 28.1-109, Subsection (2). Does this also mean that no assignment can be made to an Estate?”

The general provisions relating to the application for an assignment of oyster planting ground are set forth in § 28.1-109 of the Code of Virginia (1950), as amended. With respect to the eligibility of applicants, subsection (2) thereof provides, in part, as follows:

“Application for assignment of oyster-planting ground may be made by any resident of the State, or any county, municipality, or political subdivision of the State, or by any firm, or corporation chartered under the laws of this State for the purpose of oyster culture and the oyster business provided that at least sixty percent of the stock of any such corporation must be wholly owned by residents of the State of Virginia. Provided further that such firm or corporation employ only resident labor in planting, cultivating, selling and marketing the oysters grown on the ground or land so occupied, and provided its principal place of business for selling and marketing such oysters be maintained within this State . . . .”

In conjunction therewith, § 28.1-121 of the Code defines “resident” as follows:

“No person shall be deemed a resident of this State within the meaning of this chapter who is not a taxpayer in the State, and shall not have maintained his residence therein for one year and actually resided therein for the four months next preceding the time when he makes application for any privileges or licenses granted to residents under this chapter; or unless he be a bona fide purchaser of land in this State and has actually lived within this State for the four months next preceding the time when he makes application for any privileges or licenses granted to residents under this chapter; provided, no restriction as to residence in this section shall prevent any person from obtaining license when required for buying fish or shellfish, or for the shucking of oysters; provided, further that in dredging or scraping private planting grounds on permission of the Commission the restriction as to the residence in this action shall not prohibit the having of non-residents as crew for any boat used in the fish or shellfish industry, if such boat be owned wholly by a resident or residents of Virginia, and also has for its master a resident as defined in this chapter.”

A fair reading of these provisions shows clearly the intention of the General Assembly that the benefits of oyster-planting grounds located within the State shall inure to resident individuals of the State. Eligible applicants are strictly limited, with no provisions being made regarding applications by estates. Indeed, it appears that the Marine Resources Commission has, on prior occasion, ruled that such applications must be in the name of a living individual or individuals.

Analogously, sub-section (12) of § 28.1-109 of the Code in dealing with the duration of oyster leases provides, in part, as follows:
"Upon the death of the renter, testate as to the lease it shall vest in the named beneficiary subject to the rights of creditors, if he be a resident of this state. If the named beneficiary is not a resident he shall have twenty-four months after the date of death to transfer the lease to a qualified holder.

"Upon the death of the renter, intestate as to the lease, the lease shall be vested in the personal representative, if there be one, who shall transfer the lease to a qualified holder within twenty-four months.

"If there be no qualification on the renter's estate within one year of his death, the Commission may within one year thereafter transfer the lease to a qualified holder upon receipt of a transfer duly executed by all of the lawful heirs of the renter both resident and nonresident."

Please note that with respect to the intestate disposition of an oyster lease, the personal representative shall transfer the lease to a qualified holder, and that with respect to testate disposition, a non-resident beneficiary must also transfer to a qualified holder. Similarly, the statute provides that where there is no qualification, the Commission may transfer the lease to a qualified holder.

Based on the foregoing, I am of the opinion that no assignment can be made to an estate. For the same reason, and in view of the fact that a mere application creates no property rights in an applicant, I am also of the opinion that where an applicant dies before assignment is made, the application terminates at his death and does not become a part of his estate.

MARINE RESOURCES COMMISSION—Oyster Planting Ground Leases—May be held by trustee.

OYSTERS—Planting Ground Leases May Be Held by Trustee.

March 8, 1971

THE HONORABLE MILTON T. HICKMAN, Commissioner
Marine Resources Commission

This will acknowledge receipt of your letter of February 16, 1971, in which you posed the following question:

"Can oyster planting ground leases be held by a Trustee after the leaseholder dies? If so, how long?"

In response to your first question, § 28.1-109(12) of the Code of Virginia (1950), as amended, provides, in part, as follows:

"Upon the death of the renter, testate as to the lease, it shall vest in the named beneficiary subject to the rights of creditors, if he be a resident of this State." (Emphasis supplied.)

Specific provision is made for the interest in oyster grounds vesting in the "named beneficiary." In view of the fact that the trust cestui is the owner of the beneficial interest of the trust, it is my opinion that he is the "named beneficiary" within the contemplation of the statute, and it is immaterial that the oyster planting ground lease is formally held in trust. Therefore, if the trust cestui is a resident individual of Virginia, an oyster planting ground lease may be held by a trustee after the leaseholder dies. In this regard, please note that pursuant to § 26-59 of the Code, there must also be a Virginia resident serving as trustee.
In answer to your second question, suffice it to say that, should the provisions of the instrument relating to the duration of the trust be otherwise valid, the duration of the oyster lease being held in trust is governed by the provisions of § 28.1-109(12) of the Code just as any other lease of oyster planting grounds. In this respect, lease assignments generally continue in force for a period of twenty years, the lease being automatically renewable at the end of such time.

MARINE RESOURCES COMMISSION—Riparian Oyster Ground Lease—
May be obtained by subsequent subdivision owners of off-shore land.

OYSTERS—Riparian Oyster Ground Lease—May be obtained by new owners of the shore land.

THE HONORABLE MILTON T. HICKMAN, Commissioner
March 8, 1971

Marine Resources Commission

This will acknowledge receipt of your letter of February 16, 1971, in which you posed the following question:

"This is in reference to an 0.50-acre riparian oyster ground lease which has been assigned to a highland property owner. The highland property to which it was assigned was subsequently subdivided and sold to other owners. The original riparian lies offshore of two (2) parcels of highland property as it is now divided. What happens to the original riparian assignment?"

"Can the afore-mentioned riparian be cancelled and can each landowner obtain a riparian provided all other statutory requirements are met?"

Section 28.1-108 of the Code of Virginia (1950), as amended, states, in part, as follows:

"Any owner of land bordering on a body of water in the oyster-growing area of this State whose shore front measures at least one hundred five feet at the low-water mark, who has not had as much as one-half acre of ground already assigned him on such front, or whose lease has terminated and is not to be renewed, may make application for planting grounds to the inspector for the district in which the land lies, who shall assign to him such ground wherever such owner may designate in front of his land between his highland property lines extended not exceeding in area one-half acre, to be not less than one hundred five feet wide along the shore and beginning at low-water mark, extending out not more than two hundred ten feet, or to the middle of the body of water, or to the middle of the channel, whichever is the shorter distance; the same to be surveyed, plotted, marked, assigned and recorded in all respects as provided for assignments to persons in § 28.1-109 of the Code of Virginia. There shall be no rent due or collected on ground assigned pursuant to this section, and such owner shall have the exclusive right to the use thereof for the purpose of planting or gathering oysters and other shellfish. The assignment made pursuant to this section shall pass with the transfer of the adjacent highland to the subsequent owner of highland and cannot be held separated from said highland."

It is clear that riparian owner meeting the statutory requirements may apply for an assignment of oyster-planting ground under § 28.1-108 of the
Code, whereupon such ground shall be assigned to him wherever he designates in front of his property between his highland property lines extended. In addition, § 28.1-108 of the Code further provides that a riparian right assignment passes with the title to the highland property and cannot be held separated from it.

In light of the foregoing, I am of the opinion that the original assignment to the former owner of the highland property is no longer effective. I am also of the opinion that the current owners of the subdivided lots may each obtain riparian assignments provided all other statutory requirements are met.

MEDICINE—Medical or Health Services—Persons under age of twenty-one may consent to.

MINORS—Medical or Health Services—May consent to.

April 28, 1971

THE HONORABLE MACK I. SHANHOLTZ, M.D.
State Health Commissioner

I am in receipt of your letter of April 28, 1971, wherein you request a formal opinion interpreting § 32-137 of the Code of Virginia (1950), as amended, which inquiry reads as follows:

"Does § 32-137 of the Code permit any minor under twenty-one years of age, without parental consent, to validly consent to medical or health services required or needed in connection with the care and treatment of venereal disease, birth control, pregnancy and family planning?"

Section 32-137 of the Code of Virginia (1950), as amended, reads in pertinent part as follows:

"...(7) Except as otherwise provided in § 18.1-62.1 (e), any person under the age of twenty-one years may consent to medical or health services needed in the care, treatment, or rehabilitation of drug addicts, or required in case of birth control, pregnancy and family planning..."

Therefore, in my opinion, with the exception of abortion, any mentally competent person, regardless of age, marital status, or emancipation can validly consent to any medical, surgical, or health services needed or required in those categories which are enumerated in the statute and the consent of the parent, guardian, or other person standing in loco parentis is unnecessary.

MENTAL HYGIENE AND HOSPITALS — Appropriations — DeJarnette State Sanatorium not eligible for Behavior Modification Program funds.

August 28, 1970

THE HONORABLE ARTHUR R. GIESEN, JR.
Member, House of Delegates

I am in receipt of your letter of August 10, 1970, in which you call my attention to Item 444.5 of Chapter 461 of the 1970 Acts of Assembly, with respect to the $75,000 per year earmarked for "Behavior Modifications Program."

Your request is quoted as follows:
"Would you please rule on the eligibility of DeJarnette State Sanatorium to receive these funds under Item 444.5, which have been provided by the Legislature for a Behavioral Modification Program and for research dealing with this type of treatment."

Section 37.1-53 of the Code of Virginia, as amended, reads as follows:

"The Board shall fix and regulate from time to time, as may be necessary, the rates and charges to be charged for the care and treatment of persons admitted to a sanatorium, including reasonable interest charges on the investment and depreciation on the buildings. Such rates and charges shall be sufficient to provide and maintain in the sanatorium, without any appropriations from the State for the cost of the maintenance and operation of such sanatorium, a standard of care and treatment equal to that of efficient and well managed private sanitoriums."

The portion of this statute which reads "without any appropriations from the State for the cost of the maintenance and operation of such sanatorium," in my opinion, would be applicable in the case at hand, because the use by DeJarnette of those funds appropriated by Item 444.5 of Chapter 461 of the 1970 Acts of Assembly would of itself be the use of an "appropriation from the State" to fund an operation (Behavior Modification Program) at DeJarnette State Sanatorium.

Thus, in applying § 37.1-53 of the Code of Virginia, it is my opinion that DeJarnette State Sanatorium is ineligible to receive those funds appropriated under Item 444.5 of Chapter 461 of the 1970 Acts of Assembly.

MENTAL HYGIENE AND HOSPITALS—Behavior Modification Programs —Eligibility for funds. January 14, 1971

THE HONORABLE WILLIAM S. ALLERTON, Commissioner
Department of Mental Hygiene and Hospitals

I am in receipt of your recent letter of January 5, 1971, concerning Item 444.5 of Chapter 461 of the 1970 Acts of Assembly, with respect to the monies earmarked for "Behavior Modification Program," pursuant to which DeJarnette State Sanatorium has submitted a proposal for funding. In submitting your request for reconsideration of this office's opinion regarding the appropriation item, you supply certain additional information and ask the following question:

"In my view each of these proposals is separate and could be considered individually on its merits. I would be interested, therefore, in learning whether or not the present explanation by Dr. Witt and the fact that the proposals could be considered separately might make a difference in your previously stated opinion in your letter of December 16, 1970."

Two formal opinions, one to Arthur R. Giesen, Jr., Member, House of Delegates, on August 28, 1970, and one to you on December 16, 1970, considered the question of eligibility of DeJarnette State Sanatorium to receive funds under the aforementioned appropriation item and it was concluded that the program, when viewed in its entirety, constituted "operation" expenditures. Therefore, it was determined that Section 37.1-53 of the Code of Virginia (1950), as amended, prohibited DeJarnette State Sanatorium from receiving the funds.

As the requests for opinions were originally submitted, the proposals of DeJarnette State Sanatorium were viewed as an integrated project with
each proposal considered as an inseparable part of the whole. After resubmitting your inquiry, along with detailed information on the individuality of the several proposals, it has been ascertained that portions of the proposed project are, in fact, severable. In view of the above, along with information on direct patient benefits, a reevaluation to determine funding eligibility was undertaken.

It is now my opinion that DeJarnette State Sanatorium is eligible to receive the aforesaid funds appropriated under Item 444.5 of Chapter 461 of the 1970 Acts of Assembly to fund Proposal I (Evaluation of Classroom Techniques on Readmission Rate) and Proposal II (In-Service Training Seminars), both of which are research projects, but is ineligible to receive said funds to finance Proposal III (Behavioral Technician Training), which falls in the category of operational expense.

MENTAL HYGIENE AND HOSPITALS—Behavior Modification Programs

—Use of funds.

December 16, 1970

THE HONORABLE WILLIAM S. ALLERTON, Commissioner
Department of Mental Hygiene and Hospitals

I am in receipt of your letter of December 10, 1970, wherein reference is made to a letter dated July 28, 1970, from Mr. Alfred Ruth, Assistant Commissioner, Administration, concerning allocation of funds from Item 444.5 of Chapter 461 of the 1970 Acts of Assembly, with respect to the funds earmarked for “Behavior Modification Program.” Also, in your letter you enclosed four proposals for Behavior Modification Programs, which programs were submitted to you by Dr. Nancy Whitt, Superintendent of DeJarnette State Sanatorium.

After expressing your views on the proposed Behavior Modification Programs, which would be instituted at DeJarnette State Sanatorium, you pose the following inquiry:

“... whether or not DeJarnette State Sanatorium can be allocated these funds under existing statutes.”

Section 37.1-53 of the Code of Virginia (1950), as amended, reads as follows:

“The Board shall fix and regulate from time to time, as may be necessary, the rates and charges to be charged for the care and treatment of persons admitted to a sanatorium, including reasonable interest charges on the investment and depreciation on the buildings.

“Such rates and charges shall be sufficient to provide and maintain in the sanatorium, without any appropriations from the State for the cost of the maintenance and operation of such sanatorium, a standard of care and treatment equal to that of efficient and well-managed private sanatoriums.”

That portion of Section 37.1-53 which reads “without any appropriations from the State for the cost of the maintenance and operation of such sanatorium,” in my opinion, would be applicable in the case at hand. The utilization by DeJarnette of those funds would of itself be the use of an “appropriation from the State” to fund an operation at DeJarnette State Sanatorium.

Therefore, in view of Section 37.1-53 of the Code of Virginia, it is my opinion that DeJarnette State Sanatorium is ineligible to receive those funds appropriated under Item 444.5 of Chapter 461 of the 1970 Acts of Assembly.

I am enclosing a copy of an opinion of this office in which the identical question presented by you was considered and discussed. It is an opinion dated August 28, 1970 to the Honorable Arthur R. Giesen, Jr., Member, House of Delegates.
MENTALLY ILL—Enforcing Judgment for Support and Maintenance of Patient—Levied on property must be sold at public auction.

MENTALLY ILL—Enforcing Judgment for Support and Maintenance of Patient—Levy and sale controlled by §§ 8-765 through 8-770.

THE HONORABLE ROBERT C. GOAD
Commonwealth’s Attorney for Nelson County

This is in response to your letter of June 12, 1970, in which you state that the Commonwealth of Virginia, Department of Mental Hygiene and Hospitals, obtained an order against the committee of a mentally ill patient in Western State Hospital pursuant to § 37.1-110 of the Code for the support and maintenance of the said patient. You further mentioned that the amounts ordered to be paid are in arrears and that the patient owns property in Nelson County. The Department of Mental Hygiene and Hospitals has requested you to bring proper action to enforce collection of the money ordered paid by the court.

You asked my opinion of the following questions:

"Can the Commonwealth of Virginia, Department of Mental Hygiene and Hospitals, file a Chancery suit in the Circuit Court of Nelson County, Virginia, where the above real estate is located, naming as defendants the Committee and the patient, for the purpose of selling the real estate to enforce collection for this claim, in which suit the matter would be referred to the Commissioner in Chancery to make all necessary accounts, and in general conform to the usual creditors’ suit in Chancery? And if such a Chancery suit is proper under the facts of this situation, could the Court approve a private sale of this real estate, or would the Court have to order the sale at public auction?"

In my opinion, the usual creditor suit in Chancery would not be indicated and the sale of the property would be required to be at public auction as opposed to private sale.

Section 37.1-115 of the Code, as amended, states:

"Any order or judgment rendered by the Court hereunder shall have the same force and effect and shall be enforceable in the same manner and form as any judgment recovered in favor of the Commonwealth."

As you indicated in your letter, the recovery of debts due the Commonwealth is controlled by Chapter 35 of Title 8 of the Code. Section 8-764 of the Code provides that the writ of fieri facias upon such a judgment or order in favor of the Commonwealth shall be issued so as to authorize the sheriff to take and sell the real estate of the debtor. Sections 8-767, 8-768 and 8-769 describe the procedure to be followed by the sheriff in levying on the real property of the person and disposing of it. Section 8-768 of the Code provides that the sale shall be only at public auction. This would preclude a private sale of the real estate in question.

It would be my opinion, therefore, that the proper procedure in this matter would be to have the clerk issue the fieri facias pursuant to § 8-764 of the Code or if the writ has been previously issued that it be reviewed and that the sheriff of the county be directed to levy on the property and sell it pursuant to the provisions of § 8-765 through § 8-770 of the Code.

MENTALLY ILL—When Person Acquitted of Crime by Reason of Insanity May Be Confined in an Institution Outside the Commonwealth.
In your letter of December 17, 1970, you inquire whether a person who is acquitted of crime by reason of insanity and is consequently committed to a mental institution may be confined in an institution outside the State of Virginia due to the fact that the particular treatment needed for the individual is not available in an institution for the criminally insane within the Commonwealth.

The Interstate Compact on Mental Health, which is enacted in statutory form as § 37.1-190 of the Code of Virginia is intended to provide the necessary legal basis for the appropriate care and treatment of the mentally ill, regardless of the residence or citizenship of the patient. It is provided in Article III(b) that

"... any patient may be transferred to an institution in another state, when there are factors based on clinical determinations indicating that the care and treatment of said patient would be facilitated or improved thereby."

Article III(c) provides

"No state shall be obliged to receive any patient pursuant to the provisions of paragraph (b) of this article unless the sending state has given advance notice of its intention to send the patient; furnished all available medical and other pertinent records concerning the patient; given the qualified medical or other appropriate clinical authorities of the receiving state an opportunity to examine the patient if said authorities so wish; and unless the receiving state shall agree to accept the patient."

Article IX of this compact provides, however,

"No provision of this compact except Article V (dealing with escape) shall apply to any person institutionalized while under sentence in a penal or correctional institution or while subject to trial on a criminal charge, or whose institutionalization is due to the commission of an offense for which, in the absence of mental illness or mental deficiency, said person would be subject to incarceration in a penal or correctional institution."

This article would appear to prohibit the use of this Act in the situation you describe. Article XI of the compact provides, however,

"The duly constituted administrative authorities of any two or more party states may enter into supplementary agreements for the provision of any service or facility or for the maintenance of any institution on a joint or cooperative basis whenever the states concerned shall find that such agreements will improve services, facilities, or institutional care and treatment in the fields of mental illness or mental deficiency."

Article XIV provides "this compact shall be liberally construed so as to effectuate the purposes thereof." It is my opinion, therefore, that if the administrative authorities of both states choose to enter into a supplementary agreement in any individual case, they may, in effect, waive the strictures of Article IX and accept a patient who has been acquitted of murder by reason of insanity, if the two authorities feel the circumstances so warrant. The provisions of Article III(c), of course, would have to be complied with, as would the requirements of § 19.1-239 relating to ultimate discharge.
To answer your question specifically, this Act does not provide authority for a court to order a patient confined outside the borders of Virginia, but such a confinement could be arranged as I have outlined by the Compact Administrator of the Department of Mental Hygiene and Hospitals, who is Mr. A. K. Wynne, after the individual was ordered confined in a Virginia institution.

MOTOR VEHICLES—Accident Reports Filed With Division of Motor Vehicles by Investigating Officers—Written reports required by § 46.1-401.

The Honorable Vern L. Hill
Commissioner, Division of Motor Vehicles

December 18, 1970

This is in reply to your letter of December 14, 1970, from which I quote the following:

"The Police Departments for several jurisdictions are submitting reports of motor vehicle accidents as required by Section 46.1-401; however, such reports are made in the form of photostatic copies of the investigating officer's written report or in the form of carbon copies of such reports.

"Does Section 46.1-401 mean that the investigating officer shall file the original copy of his written report with the Division or does it mean that such reports may be made in the form of photostatic copies, carbon copies or in whatever form elected for use by the officer or his department?"

Section 46.1-401 of the Code of Virginia, to which you refer, is as follows:

"Every law enforcement officer who in the course of duty investigates a motor vehicle accident of which report must be made, either at the time of and at the scene of the accident or thereafter and elsewhere, by interviewing participants or witnesses shall, within twenty-four hours after completing the investigation, forward a written report of the accident to the Division."

This section makes it mandatory that any law enforcement officer who in the course of duty investigates a motor vehicle accident of which a report is required shall forward a written report to the Division of Motor Vehicles. Section 46.1-403 requires that the Division prepare and, upon request, supply police departments with "forms for accident reports and other reports required hereunder to be made to the Division appropriate with respect to the persons required to make such reports and the purpose to be served."

The Division of Motor Vehicles is the recognized State repository for such reports. Section 46.1-409 states that "all accident reports made by investigating officers shall be for the confidential use of the Division and of other State agencies for accident prevention purposes." Section 46.1-410 provides that any report of an accident made pursuant to §§ 46.1-400 through 46.1-402, 46.1-404 (2), 46.1-407 and 46.1-408 shall be open to the inspection of any person involved or injured in the accident, or as a result thereof, or his attorney, and that any such person or any insurance carrier reasonably anticipating exposure to civil liability may obtain "a copy of any such report at the expense of such person." The section further states that the Commissioner of the Division of Motor Vehicles shall only be required to furnish "copies of reports required by the provisions of this article to be made directly to the Commissioner." Section 46.1-411 provides that any county or incorporated city or town may by ordinance require the filing of accident reports "or a copy of any report herein required to be filed with the Division."
Interpreting § 46.1-401 individually, as well as in light of the requirements of related sections found in Article 2, Chapter 6, Title 46.1 of the Code of Virginia, it is my opinion that the original written report of the investigating officer, as opposed to a copy or photostatic copy, should be forwarded to the Division.

MOTOR VEHICLES—Analysis of Breath of Person Suspected of Drunk Driving Pursuant to § 18.1-54.1—Negative test does not preclude officer from making the charge.

February 24, 1971

The Honorable J. M. H. Willis, Jr.
Commonwealth's Attorney for the City of Fredericksburg

This is in reply to your letter of February 9, 1971 in which you request my views in regard to an instance in which a driver appeared to be drunk, although the breath test given pursuant to § 18.1-54.1 of the Code of Virginia showed negative.

Citing that part of § 18.1-54.1 (d) which states: "Whenever the breath sample so taken and analyzed indicates that there is alcohol present in the blood of the person from whom the breath was taken, the officer may charge such person . . . .," you pose the following question:

"Does this mean that if the breatholizer shows negative, the officer may not make the charge?"

The purpose of § 18.1-54.1, as expressed in paragraph (e) of this section, is to "permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated the provisions of § 18.1-54." The latter named section, however, is not limited to the use of alcoholic beverages. It also makes it a violation to drive or operate any motor vehicle "while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature." Considering this in light of the clause from § 18.1-54.1 (d), that "the officer may charge such person for the violation of § 18.1-54," which is permissive rather than mandatory, it is my opinion that the breath test is not determinative but only a factor for consideration by the officer. Your question, therefore, is answered in the negative.

MOTOR VEHICLES—Arrest for Violations of Title 46.1 Punishable as a Misdemeanor—More than one offense may be charged on single summons issued under § 46.1-178—How handled on appeal.

CRIMINAL PROCEDURE—Arrest for Violations of Title 46.1 Punishable as a Misdemeanor—More than one offense may be charged on single summons issued under § 46.1-178—How handled on appeal.

December 11, 1970

The Honorable W. E. Edwards, Judge
Frederick County Court

This is in reply to your letter of December 1, 1970, which I quote as follows:

"It has heretofore been the custom of arresting officers in this area to charge more than one unrelated offense on a summons issued pursuant to the Provisions of § 46.1-178, and then have warrants issued for the separate offenses. I note that the wording of this Section refers to 'a violation' and later 'such offense', both in the singular. The form used also relates to 'offense charged' and not offenses charged. I am enclosing copy of a typical summons form as used by one of our officers."
"Is it proper to charge more than one such offense on a single summons? If so, and the accused was tried on the summons, was found guilty on both charges and appealed one, how would the matter be handled? Would the summons remain with this Court to be ultimately filed as required by law, or would it be sent to the Circuit Court on the appeal charge, in which event this Court would have nothing."

Section 46.1-178, to which you refer, provides for the release on summons and written promise to appear of any person arrested for a violation of Title 46.1 of the Code of Virginia punishable as a misdemeanor, with certain exceptions. While it is true that this section refers to "offense" and "violation" in the singular, it contains no prohibition against charging more than one offense in a single summons.

The copy of a typical summons, enclosed with your letter, shows charges and convictions of the offenses of (1) operating a motor vehicle with no Virginia operator's license and (2) failing to drive to the right of the center of the roadway. In my opinion this is permissible and, accordingly, your first question is answered in the affirmative.

In the event of appeal, the papers, including the summons, should be sent to the appellate court, as provided in § 16.1-135, for trial de novo on the charge appealed. Section 16.1-138 provides that all papers in criminal proceedings which are not required to be returned to a court of record shall be properly indexed, filed and preserved in the trial court. You describe a situation in which there are convictions on two or more offenses charged on a single summons and only one such conviction is appealed. In any such case, the summons must be submitted to the appellate court. Insofar as your records are concerned, the matter may be handled by retaining for your files a photo copy of the summons or by maintaining some other type record which will meet the approval of the State Auditor of Public Accounts.

MOTOR VEHICLES—Assessment Fee Under § 14.1-200.1—Chargeable upon conviction for violating county license ordinance.

CRIMINAL PROCEDURE—Assessment Fee Under § 14.1-200.1—Chargeable upon conviction for violating county license ordinance.

THE HONORABLE S. PAGE HIGGINBOTHAM
Commonwealth's Attorney for Orange County

This is in reply to your letter of October 12, 1970 in which you request, on behalf of the Clerk of the County Court of Orange County, my opinion on the following question:

"Should the $5.00 Division of Motor Vehicle fee be assessed as a cost upon conviction of a person failing to purchase or display an Orange County Sticker in violation of an ordinance of the County of Orange?"

It is obvious that your reference to "an Orange County Sticker" relates to a county license for a motor vehicle required by an ordinance adopted pursuant to § 46.1-65 of the Code of Virginia.

Section 14.1-200.1 of the Code of Virginia states, in part, as follows:

"Whenever a person is convicted of a violation of any provision of a State law or local ordinance and such conviction is required to be reported to the Division of Motor Vehicles there shall be added to all other costs, penalties and fines assessed or assessable against the defendant, the sum of five dollars to partially defray the costs of administration of such Division."
The fee required by this section is assessed whenever a person is convicted of a violation of any provision of State law or local ordinance required to be reported to the Division of Motor Vehicles. Section 46.1-413 of the Code requires every county or municipal court or clerk of a court of record to report to the Commissioner, Division of Motor Vehicles, every conviction described in § 46.1-412. The latter includes, in part, "a violation of any ordinance of any county, city or town pertaining to the operator or operation of any motor vehicles except parking regulations." Accordingly, the five dollar fee required by § 14.1-200.1 should be assessed whenever there is a conviction for violation of a local ordinance pertaining to the operator or operation of a motor vehicle except parking regulations. Since the question under consideration pertains to the operation of a motor vehicle and does not involve a violation of parking regulations, it is my opinion that the fee should be assessed and, therefore, your question is answered in the affirmative. A similar view was expressed in each of two opinions found in Report of the Attorney General (1964-1965) pp. 177 and 238.

MOTOR VEHICLES—Authority of County to Adopt Ordinance Imposing License Tax on Owners of Certain Automobiles Pursuant to § 15.1-27.1—May not be imposed on owner or lessee of land unless owner of the automobile.

COUNTIES, CITIES AND TOWNS—Certain Automobiles—Authority to impose license tax under § 15.1-27.1—May not impose on owner or lessee of land, unless owner of automobile.

January 26, 1971

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

This is in reply to your letter of January 7, 1971, which I quote as follows:

"Chesterfield County recently enacted an ordinance pursuant to Section 15.1-27.1, a copy of which I am enclosing. "Some difficulty has been met in enforcing this ordinance, the reason being that ownership is sometimes impossible to determine without settling forth in this ordinance, which I have enclosed, by amendment a definition of 'owner.' "My question is does the authority to enact this ordinance carry with it the right to adopt a definition of the word owner which is contrary to the definition contained in § 46.1-2 of the Code of Virginia? Could a person who has located on property of which he is either the owner or lessee be deemed to be the owner of any automobile which might come under the provision of this ordinance? If not, I would appreciate any suggestion you might have as to how this ordinance could be effectively enforced if the person who owns the property denies ownership of the motor vehicle."

In regard to your first question, there is no definition of the word "owner" in § 46.1-2 of the Code of Virginia. Section 46.1-1 (18) defines the word "owner" as follows:

"A person who holds the legal title of a vehicle or, in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for
the purpose of this title, except that in all such instances when the rent paid by the lessee includes charges for services of any nature or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle and the vehicle shall be subject to such requirements of this title as are applicable to vehicles operated for compensation; provided, however, that a ‘truck lessor’ as hereinafter defined shall be regarded as the owner, and his vehicles shall be subject to such requirements of this title as are applicable to vehicles of private carriers.”

The word “owner” shall have the meaning ascribed to it in the quoted section when used in Title 46.1 for the purpose of that title, except in those instances in which the context clearly indicates a different meaning. Section 15.1-27.1, enacted by Chapter 380 of the Acts of Assembly of 1970, is as follows:

“The governing body of any county, city or town in this State may adopt an ordinance imposing a license tax, in an amount not exceeding ten dollars annually, upon the owners of automobiles which do not display current license plates and which are not exempted from the requirements of displaying such license plates under the provisions of §§ 46.1-42 through 46.1-49 and 46.1-119 and 46.1-120, are not in a public dump, in an ‘automobile graveyard’ as defined in § 33-279.3 or in the possession of a licensed junk dealer or licensed automobile dealer. Nothing in this section shall be applicable to any vehicle being held or stored by or at the direction of any governmental authority, to any vehicle owned by a member of the armed forces on active duty or to any vehicle regularly stored within a structure.”

It will be noted that this section authorizes the governing body of any county, city or town to adopt an ordinance imposing a license tax upon the owners of automobiles which do not display current license plates and which are not exempt from the requirements of displaying such plates under the enumerated provisions of Title 46.1 of the Code of Virginia. In the absence of any context indicating a different intent, it is my opinion that the definition given in § 46.1-1 (18), quoted above, must be followed by Chesterfield County and a contrary definition could not be adopted. Accordingly, your first question is answered in the negative.

Since § 15.1-27.1 is based upon the ownership of automobiles, rather than upon the ownership of land, there would be no way to enforce an ordinance enacted pursuant to this section against the owner or lessee, unless such owner or lessee is the owner of the automobile. Your other question, therefore, is also answered in the negative. My suggestion would be to obtain the motor vehicle identification number and have it checked with the Division of Motor Vehicles to determine ownership.

MOTOR VEHICLES—Automobile Graveyards—Counties may adopt regulatory ordinances.

THE HONORABLE E. EUGENE GUNTER  
County Attorney of Frederick County

January 15, 1971

This is in reply to your letter of December 21, 1970, in which you present the question for my consideration which I quote, as follows:

“Is it possible for Frederick County, Virginia, to enact a local ordinance eliminating or effectively controlling automobile graveyards and the possession of inoperable automobiles in Frederick County?”
The law in regard to taxing and regulating "automobile graveyards" and "junkyards" is found in § 15.1-28 of the Code of Virginia, which I quote, as follows:

"(a) The governing body of each county, city and town 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.

"No such ordinance shall be adopted until after notice of intention to propose the same for adoption shall have been published prior to its adoption once a week for two successive weeks in some newspaper published in such county or city or, if there be no newspaper published therein, then in some newspaper having general circulation in such county or city and no such ordinance shall become effective until it shall have been published in full for two successive weeks in a like newspaper.

"As used in this section the terms 'automobile graveyard' and 'junkyard' shall have the meaning ascribed to them in § 33-279.3.

"(b) Any ordinance adopted by any county, city or town which was enacted in conformity with § 33-279.3 as it existed prior to April four, nineteen hundred sixty-six, is hereby validated."

You will note that this section states that the terms "automobile graveyard" and "automobile junkyard" shall have the meaning ascribed to them in § 33-279.3. Section 33-279.3 has been repealed and replaced by present § 33.1-348 of the Code of Virginia, under which these terms are defined as follows:

"(2) 'Automobile graveyard' shall mean any lot or place which is exposed to the weather and upon which more than five motor vehicles of any kind, incapable of being operated, and which it would not be economically practical to make operative, are placed, located or found.

"(3) 'Junkyard' shall mean an establishment or place of business which is maintained, operated, or used for storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard, and the term shall include garbage dumps and sanitary fills."

The authorization to adopt ordinances imposing license taxes upon and otherwise regulating the maintenance and operation of places commonly known as automobile graveyards and junkyards is applicable to any county in the State. Hence, I shall answer your question in the affirmative.

The State Highway Commissioner has authority under the provisions of § 33.1-348 to screen junk yards in existence on April 4, 1968. That section further provides that thereafter no junk yard shall be established within 1,000 feet of the nearest edge of the right-of-way of any interstate or primary highway or within 500 feet of the nearest edge of the right-of-way of any other highway unless invisible from the road, screened from view, or located in an area zoned for industrial use.

MOTOR VEHICLES—Blood Alcohol Test of Person Arrested for Violation of § 18.1-54 or Similar Ordinance—Shall not be required to sign waiver of liability.

May 4, 1971

THE HONORABLE JUNIE L. BRADSHAW
Member, House of Delegates

This is in reply to your letter of April 28, 1971, from which I quote the following:
“This request is jointly made by the Assistant Commonwealth Attorney in Richmond and myself for your opinion to the following question: Can a person who submits to a blood analysis in a driving-under-the-influence case be required, as a prerequisite, to sign a waiver of liability by the hospital before they will extract the blood?”

The answer to your question is in the negative. This is specifically covered by § 18.1-55.1, Code of Virginia (1950), as amended, from which I quote paragraph (q), as follows:

“No person arrested for a violation of § 18.1-54 or a similar ordinance of any county, city or town shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for herein.”

MOTOR VEHICLES—Blood Alcohol Test Under § 18.1-55.1—Failure to give test under certain conditions prevents conviction—What constitutes reasonable refusal.

March 15, 1971

THE HONORABLE JOHN ALEXANDER
Commonwealth’s Attorney for Fauquier County

This is in reply to your letter of March 1, 1971 requesting my advice on the following, which I quote:

“I am enclosing a ‘Request for Alcoholic Test’ which is used by The Fauquier Hospital with the following inquiry:

‘John Doe is arrested and charged with driving under the influence. The ‘Implied Consent Law’ is fully explained to him by the arresting officer and by the committing magistrate and he agrees to take the test. Doe is thereupon transported to the Hospital Emergency Room and a registered nurse prepares to take the test but requests that he execute the enclosed request form. Doe insists upon taking the test but declines to execute the request form whereupon the nurse refuses to make the test. Doe’s refusal to sign the enclosed request form so substantially interfere with Doe’s right to procure evidence for his own defense as to make it impossible to convict him under the charge of driving while intoxicated, and;

‘Does the refusal of Doe to sign the enclosed request constitute a reasonable refusal to take the blood test?’

The request form which you enclosed, shows the name of the hospital, the date and time. It provides a space for the name of the person who is to withdraw the blood, as well as spaces for the accused and a witness to sign, and is, in fact, a written request by the accused that the blood specimen be withdrawn by the person whose name is inserted in the space provided.

Section 18.1-55.1, Code of Virginia (1950), as amended, which is controlling, states that any person who operates a motor vehicle upon a public highway in this State, shall be deemed thereby to have consented to have a sample of his blood taken for a chemical test to determine its alcoholic content. An unreasonable refusal to do so, after having been advised by the arresting officer of this requirement, constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State. On the other hand, the statute excuses from taking the test one whose refusal is reasonable.

The given facts indicate that the person arrested, after having the law fully explained to him, not only agreed to the test but insisted upon it. He
declined to execute the above mentioned form, however, and for that reason he was refused the test. There is no requirement that an accused sign such a form as a requisite to taking the test. The accused consented to the test and that is all the statute requires. The statute provides for a declaration of refusal but not for a declaration of agreement to take the test. The narrative information covered by the form could have been readily recorded by other means.

In conclusion, it is my opinion that a failure to make the test under such circumstances deprives the accused of the right to evidence which § 18.1-55.1 is designed to provide and your first question is answered in the affirmative. Consistent with this view, my answer to your other question is also in the affirmative.

MOTOR VEHICLES—Blood Test—Advice of counsel alone not reasonable ground for refusal under § 18.1-55.1.

February 10, 1971

THE HONORABLE W. R. SHELTON
Associate Judge of Chesterfield County Court

This is in reply to your letter of February 1, 1971, in which you refer to a situation in which a person arrested for driving under the influence of intoxicants, after being advised of his rights under § 18.1-55.1 of the Code of Virginia and being granted permission to contact his attorney, refused to take the blood test solely on advice of counsel. You request my opinion on the following question:

"Does a defendant's refusal to take a blood test based solely on the advice of counsel constitute an unreasonable refusal in violation of Virginia Code § 18.1-55.1 (c) ?"

Section 18.1-55.1, paragraph (b), provides that any person who operates a motor vehicle upon a public highway in this State "shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof," if such person is arrested for a violation of § 18.1-54 or a similar ordinance of any county, city or town. The same section, under paragraph (m), allows the defendant to present evidence of the basis for his refusal to submit to the taking of a sample of his blood. The court shall determine the reasonableness of such refusal. If such refusal is found to be unreasonable, the court shall suspend the defendant's license "for a period of 90 days for a first offense and for six months for a second or subsequent offense" within one year of the first or other refusal.

In the case of Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969), to which you refer, the defendant claimed a constitutional right to confer with his attorney before consenting to the blood test. In denying the right the Court said the practical effect of such right would be that a decision to refuse the test would not be based upon "reasonableness," as contemplated by the statute, but whether, in the judgment of his attorney, the refusing of the test would best serve the interest of his client in a trial of the criminal charge of drunk driving. The Court concluded that the blood test prescribed by this section is a part of a civil and administrative proceeding and that the defendant had no right to condition his taking the test upon his ability first to consult with counsel.

The clear implication of the above cited case is that the "reasonableness" of the refusal to take the blood test is not established to the satisfaction of the statute solely on the basis of advice of counsel not to take the test. Hence, your question is answered in the affirmative and insofar as a contrary view is expressed in an opinion written prior to the Supreme Court's


June 18, 1971

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

This is in reply to your letter of June 10, 1971 from which I quote the following:

"Assume a case where one has been interdicted from driving for a period of ten years, by a Final Order, pursuant to the Virginia Habitual Offender Statute, Title 46.1, Sec. 387.2, and that while interdicted he is again arrested for driving a motor vehicle while under the influence of alcohol, and is convicted for the latter offense. Would his conviction for drunk driving constitute a bar to a subsequent indictment and trial for the felony of operating a motor vehicle, at the time of said drunk driving offense, while interdicted by the previous Final Order aforesaid? In other words, do you see any possibility of double jeopardy in that each offense mentioned arises from the one act of operating a motor vehicle?"

Section 19.1-259, Code of Virginia (1950), as amended, provides that if the same act be a violation of two or more statutes, conviction under one of such statutes shall be a bar to a prosecution or proceeding under the other or others. The test of whether there are separate acts sustaining several offenses "is whether the same evidence is required to sustain them." Hundley v. Commonwealth, 193 Va. 449, 69 S. E. 2d 336 (1952).

In the instant case, the defendant could have been convicted of driving under the influence of intoxicants without evidence of the felony of violating the habitual offender statute, § 46.1-387.8, and, contrariwise, he could have been convicted of violating § 46.1-387.8 without evidence of his driving under the influence of intoxicants. Hence, there were two separate acts involved, one growing out of driving under the influence and the other growing out of the violation under the "Virginia Habitual Offender Act." Our Supreme Court of Appeals reached a similar conclusion in the recent case of Estes v. Commonwealth, Record No. 7510, decided June 14, 1971, in regard to the offenses of driving under the influence and driving on a suspended license. Accordingly, my answer to both of your questions is in the negative.

MOTOR VEHICLES—Driving Under Influence of Drugs, Intoxicants, etc.—Revocation of permit for three years on second conviction pursuant to § 46.1-421.

April 20, 1971

THE HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

This is in reply to your letter of April 14, 1971, which I quote, as follows:

"My question is this: In January of 1967 the defendant was convicted of driving under the influence under § 18.1-54 of the Code of Virginia, as amended. In April of 1970, he was convicted for driving under the influence again under § 18.1-54."

"Assume a case where one has been interdicted from driving for a period of ten years, by a Final Order, pursuant to the Virginia Habitual Offender Statute, Title 46.1, Sec. 387.2, and that while interdicted he is again arrested for driving a motor vehicle while under the influence of alcohol, and is convicted for the latter offense. Would his conviction for drunk driving constitute a bar to a subsequent indictment and trial for the felony of operating a motor vehicle, at the time of said drunk driving offense, while interdicted by the previous Final Order aforesaid? In other words, do you see any possibility of double jeopardy in that each offense mentioned arises from the one act of operating a motor vehicle?"

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In the instant case, the defendant could have been convicted of driving under the influence of intoxicants without evidence of the felony of violating the habitual offender statute, § 46.1-387.8, and, contrariwise, he could have been convicted of violating § 46.1-387.8 without evidence of his driving under the influence of intoxicants. Hence, there were two separate acts involved, one growing out of driving under the influence and the other growing out of the violation under the "Virginia Habitual Offender Act." Our Supreme Court of Appeals reached a similar conclusion in the recent case of Estes v. Commonwealth, Record No. 7510, decided June 14, 1971, in regard to the offenses of driving under the influence and driving on a suspended license. Accordingly, my answer to both of your questions is in the negative.

MOTOR VEHICLES—Driving Under Influence of Drugs, Intoxicants, etc.—Revocation of permit for three years on second conviction pursuant to § 46.1-421.

April 20, 1971

THE HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

This is in reply to your letter of April 14, 1971, which I quote, as follows:

"My question is this: In January of 1967 the defendant was convicted of driving under the influence under § 18.1-54 of the Code of Virginia, as amended. In April of 1970, he was convicted for driving under the influence again under § 18.1-54."
"The second conviction was not under § 18.1-58 and the criminal warrant did not charge him with a second offense.

"Does the Division of Motor Vehicles have the authority to withhold the defendant’s permit for a period of three years under § 46.1-421, taking into consideration that the second conviction was not prosecuted under the statutory conviction under § 18.1-58?"

The given facts are that defendant was twice convicted of a violation under § 18.1-54, Code of Virginia, (1950), as amended, namely, in January of 1967 and again in April of 1970. The violation resulting in the latter conviction was not charged as a “second offense” in the warrant but, instead, the defendant was charged and convicted as though it were a first offense. This is the basis for your question of whether the Division of Motor Vehicles is authorized to withhold the defendant's permit to drive for a period of three years under § 46.1-421.

The last named section provides, in part, that the “Commissioner shall forthwith revoke and not thereafter reissue for three years the operator’s or chauffeur’s license of any person upon receiving a record of a conviction of such person for a violation of the provisions of § 18.1-54 ... subsequent to a prior conviction for a violation ... of the provisions of § 18.1-54 ... ; provided that the subsequent violation has been committed within ten years from the prior violation.”

It is not essential that the subsequent violation be charged as a “second offense.” This interpretation was expressed in the case of Commonwealth v. Ellett, 174 Va. 403, wherein the same principles were at issue. There the Court differentiates between the penalty set by a court or jury and the action which must be taken by the Commissioner of the Division of Motor Vehicles as a result of a conviction. It is essential only that the subsequent violation has been committed within ten years of the prior violation. If so, no permit shall be issued the person convicted for a period of three years. Accordingly, I shall answer your question in the affirmative.

MOTOR VEHICLES—Driving While License, Permit or Privilege to Drive Suspended—Interpreting paragraph (b) of § 46.1-350.

May 7, 1971

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

This is in reply to your letter of April 21, 1971, which I quote, in part, as follows:

"I would appreciate it if you would give me the benefit of your opinion regarding the application of the provisions of § 46.1-350, Code of Virginia.

"Subsection (b) of this Section provides in part as follows:

"The Court shall not suspend the entire jail sentence in any case, but may in its discretion suspend a portion thereof, provided that this provision, in the discretion of the Court, shall not apply if the operation of the motor vehicle was due to an emergency involving danger to the health or life of any person, or to property; ...

"The second paragraph of Subsection (b) provides that the Court shall suspend or revoke the convicted person's license for the same period for which it had been previously suspended.

"Therefore, my questions regarding this Section are as follows:

"1. If the Court finds that the operation of a vehicle by an individual whose license has been revoked was necessitated by an emer-
ergency, is the Court then precluded from applying the provisions of mandatory revocation? 2. Is the issue of whether the accused person was operating a motor vehicle in an emergency situation, one that can be submitted to a jury on an appeal from a conviction in a Court not of record?"

Your question numbered 1 is answered in the negative. The provision which, in the discretion of the court, shall not apply if the operation of the motor vehicle was due to an emergency involving danger to the health or life of any person, is the one stating "The court shall not suspend the entire jail sentence in any case." This relates to suspension of the jail sentence only and has no reference to revocation of license, which is mandatory.

Your question numbered 2 is also answered in the negative. The issue of whether the accused person was operating a motor vehicle in such an emergency situation as contemplated by the statute is "in the discretion of the court" and must be decided by the court, rather than the jury.

MOTOR VEHICLES—Drunk Driving Cases—Proceedings under § 18.1-55.1—Proof that breath test offered under § 18.1-54.1 not necessary element.

CRIMINAL PROCEDURE—Drunk Driving Cases—Proceedings under § 18.1-55.1—Proof that breath test offered under § 18.1-54.1 not necessary element.

March 5, 1971

THE HONORABLE W. CHARLES POLAND
Commonwealth's Attorney for the City of Waynesboro

This is in reply to your letter of February 16, 1971 in which you state that the police officers in the City of Waynesboro offer the breath test prescribed under § 18.1-54.1, Code of Virginia (1950), as amended, and request my opinion relative to the criminal procedure to be followed in a prosecution for driving under the influence of intoxicants. Specifically, you present the following questions for my consideration:

"1. Does the Commonwealth have to prove that a breath test was offered as a necessary element of its case?
"2. If answer to Question 1 is yes, would the answer to Question 1 be in the affirmative in a case where the accused refuses the test?
"3. If answer to Question 1 and/or Question 2 is yes, is the Commonwealth entitled to an Instruction telling the jury that the law requires that a breath test be offered to the accused but that the results (if any, in the case where the accused has refused the breath test) are inadmissible?"

Your question numbered 1 is answered in the negative. The criminal procedure to be followed in a prosecution for driving under the influence of intoxicants is set forth in § 18.1-55.1, Code of Virginia (1950), as amended. Section 18.1-54.1 provides that nothing in that section shall be construed as limiting in any manner the provisions of § 18.1-55.1. The same question is answered in considerable detail in my letter of February 25, 1971 to the Honorable Richard W. Davis, Judge of the Municipal Court for the City of Radford, a copy of which letter is enclosed.

Having so answered your first question in the negative, I believe no further consideration of your questions numbered 2 and 3 is necessary since they are predicated upon an affirmative answer to the first.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES — Exhaust System — "Cutout," "gutted muffler" or "straight exhaust" illegal—Specific instances referable to Department of State Police.

May 28, 1971

THE HONORABLE DAVID F. THORNTON
Member of the Senate

This is in reply to your letter of May 24, 1971 from which I quote the following:

"I have been told that the interpretation of the Virginia Motor Vehicle inspection laws by the Attorney General's Office of some years ago prohibits exhaust pipes located in front of the rear wheel. "A constituent of mine drives a 1969 Corvette, with side-mounted exhausts. He claims that the factory installed optional equipment on his vehicle has mufflers comparable to automobiles of the year it was manufactured. "He does not understand why his vehicle, with factory installed equipment which has passed inspection for over two years, suddenly cannot now pass inspection. In the earlier days of side mufflers, the pipes were straight exhausts with no baffles or mufflers. However the exhausts on this individual's car contains the proper mufflers."

I know of no interpretation of the Virginia Motor Vehicle inspection laws by this office which "prohibits exhaust pipes located in front of the rear wheel," as suggested in the first paragraph of your letter. The law pertaining to exhaust systems on motor vehicles operated upon the highways is found in §§ 46.1-301 and 46.1-302, Code of Virginia (1950), as amended. Section 46.1-301, in requiring that each motor vehicle operated upon the highway be equipped with an exhaust system of a type installed as standard factory equipment in good working order, states, in part (c), that "Chambered pipes and turbosuperchargers shall not be deemed to be an effective muffling device to prevent excessive or unusual noise," as required by this section. The last reported opinion on the subject is found in Report of the Attorney General (1961-1962), p. 162, which quotes § 46.1-302, as it was at that time. I enclose a copy of that opinion for your convenience, and quote § 46.1-302, in its current form, as follows:

"It shall be unlawful to sell or offer for sale (a) a muffler without interior baffle plates or other effective muffling device or (b) any 'gutted muffler,' 'muffler cutout' or 'straight exhaust.' It shall be unlawful for any person to operate on the highways of this State a motor vehicle equipped with a 'gutted muffler,' 'muffler cutout' or 'straight exhaust.'"

The inspection of motor vehicles and the approval of motor vehicle equipment is under the supervision of the Superintendent of the Department of State Police, as indicated in Article 10, Chapter 4, Title 46.1, Code of Virginia (1950), as amended. The qualities of a particular exhaust system, therefore, such as that of the 1969 Corvette in question, should be referred to the Department of State Police.

MOTOR VEHICLES—Forfeiture Proceedings—No basis for against non-resident uninsured motorist suspended in home state.

MOTOR VEHICLES — Operator's License — Penalties for driving after suspension apply only if original suspension was in Virginia.

July 22, 1970

THE HONORABLE JOHN ROGER THOMPSON
Commonwealth's Attorney for Wythe County
This is in reply to your letter of July 13, 1970, from which I quote the given facts and related queries, as follows:

"Facts: Tipton, a resident of Tennessee and now a member of the U. S. Navy, was involved in an automobile accident in Tennessee in October of 1968 and as a result of operating the non-owned automobile, his privilege to drive in the State of Tennessee was suspended upon his being an uninsured motorist and unable to post proof of financial responsibility. On July 11, 1970, in Wythe County, after relieving his wife at the wheel, he ran through radar at 80 mph on the Interstate Highway and subsequently he was stopped. He did not have a valid operator's license for any state.

"Query No. 1: Should subject be charged under the provisions of § 46.1-351 and should the vehicle be seized under § 46.1-351.1?

"Factual Situation No. 2: The suspension period terminated December 16, 1969, after having been in effect for one year, and at the time of the arrest the subject was eligible to obtain his license and privilege to drive in Tennessee.

"Query No. 2: Would your opinion be different from that as stated above?

"Factual Situation No. 3: Subject's license had been suspended as a result of the motor vehicular accident and not as or from the result of the inability to file or furnish proof of financial responsibility.

"Query No. 3: Would your opinion be any different than from above?"

The answer to your Query No. 1 is in the negative on both counts. Section 46.1-351 of the Code of Virginia relates to suspensions and revocations pursuant to the provisions of Virginia law. This section makes it a crime for a person whose operator's or chauffeur's license or instruction permit has been suspended or revoked or who has been forbidden to drive in this State to drive any motor vehicle in this State during any period wherein the restoration of license or privilege is contingent upon furnishing proof of financial responsibility. The fact that Tipton has been required to file proof of financial responsibility in Tennessee, but not in Virginia, does not place him within the purview of this section. Hence, there is no proper basis for seizing his vehicle under § 46.1-351.1.

Likewise, Factual Situations numbered 2 and 3 fail to place Tipton within §§ 46.1-351 and 46.1-351.1 of the Code of Virginia for the same reasons and, therefore, my opinion in respect to Queries No. 2 and No. 3 would be the same as stated above in reply to Query No. 1.

MOTOR VEHICLES—Habitual Offender—Felony which must be presented for indictment.

CRIMINAL PROCEDURE—Violation of Habitual Offender Act a Felony.

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

In your letter of January 15, 1971, you inquire whether a prosecution under § 46.1-387.8, the section of the motor vehicle code dealing with habitual offenders, should be treated as a felony for which an indictment must be returned.

Section 46.1-387.8 provides in pertinent part:

"Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years. . . ."
Section 18.1-6 provides that such offenses as are punishable with death or confinement in the penitentiary are felonies; and § 19.1-162 provides that:

"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. . . ."

It is my opinion, therefore, that while the Code section 46.1-387.8 does not specifically describe the offense as a felony, it is nevertheless a felony due to the length of punishment provided. Consequently, the case should be presented to the grand jury for indictment.

MOTOR VEHICLES—Habitual Offender Under § 46.1-387.4 Serving Time in State Penitentiary—Proceedings in county in which confined.

February 11, 1971

THE HONORABLE LEONARD F. JONES
Commonwealth's Attorney for Fluvanna County

This is in reply to your letter of February 2, 1971 in reference to proceedings under the "Virginia Habitual Offender Act," §§ 46.1-387.1 through 46.1-387.12 of the Code of Virginia. Specifically, you present the question contained in the following, which I quote:

"I would appreciate your opinion as to whether an inmate of Correctional Field Unit No. 12 'resides' in Fluvanna County within the meaning of Section 46.1-387.4 of the Code of Virginia."

In directing the filing of an information against a person whose record maintained in the office of the Division of Motor Vehicles brings him within the definition of an habitual offender, § 46.1-387.4 states that it shall be in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides. This section was amended by Chapter 724, Acts of Assembly of 1970, to add the following:

"In the event the accused is an inmate of the Virginia State Penitentiary, jurisdiction for the proceedings shall be as provided in § 53-295."

Section 53-295 provides that when convicts are employed upon any work of public or private improvement in any county in the State, criminal proceedings against them may be in the Circuit Court of the County in which the convict is so employed or in the Circuit Court of the City of Richmond. This section must be read in conjunction with § 46.1-387.4 which provides for proceedings against residents in the political subdivision in which they reside and against nonresidents in the City of Richmond. The information furnished with your letter indicates that the person in question comes within the category of resident of this State, rather than nonresident. Hence, applying the amendment, quoted above, from § 46.1-387.4, it is my opinion that in any case such as the one you describe the proceedings should be in the county in which the inmate is confined in such correctional field unit and, therefore, your question is answered in the affirmative.

MOTOR VEHICLES—Inspection—Violations—Only § 46.1-315 carries own penalty; all others controlled by § 46.1-324.

August 4, 1970

THE HONORABLE GEORGE B. DILLARD
Judge of Municipal Court, City of Roanoke
This is in reply to your letter of July 28, 1970, which I quote as follows:

"Title 46 of the Code of Virginia, the motor vehicles code, Chapter 4, Article 10, provides for the inspection of motor vehicles and inspection stations.

"Sec. 46.1-315 requires inspection of motor vehicles promulgated by rules through the superintendent by proclamation of the government or otherwise. Any owner or operator who fails to submit a motor vehicle, operated on the highways of this state to an inspection, or who fails or refuses to correct, or have corrected any defects in accordance with the requirements of Title 46, any defects found by such inspection to exist shall be guilty of a misdemeanor and shall be punished in accordance with the provisions of Title 46.1-16, which section provides for penalties for violations of the motor vehicles not otherwise provided.

"Sec. 46.1-324—violations of article—provides that any person violating this article shall be punished as provided in said section.

"My query: for a violation of Title 46, Chapter 4, Article 10, which section should be applied, Sec. 46.1-16, or Sec. 46.1-324?"

Both § 46.1-315 and § 46.1-324, to which you refer, are found in Article 10, Chapter 4 of Title 46.1 of the Code of Virginia. Section 46.1-315 contains the requirement for inspection of any motor vehicle, trailer or semitrailer operated upon a highway within this Commonwealth. The essential part of its penalty clause is as follows:

"* * * and any such owner or operator who fails to submit a motor vehicle, trailer or semitrailer operated upon the highways of this State to such inspection or who fails or refuses to correct or have corrected in accordance with the requirements of this title any mechanical defects found by such inspection to exist shall be guilty of a misdemeanor and shall be punished in accordance with the provisions of § 46.1-16 * * *"

It is clear that the quoted passage pertains to any owner or operator of a motor vehicle, trailer or semitrailer who fails to submit to the required inspection or to have any mechanical defect corrected as required by law. This is supported by paragraph (b) of this section, as well as by §§ 46.1-316 and 46.1-317, all of which exempt certain vehicles from the requirements of § 46.1-315. In my opinion, therefore, a violation of § 46.1-315 should be punished under the provisions of § 46.1-16.

Section 46.1-324 prescribes that, "Any person violating this article shall be punished by a fine of not less than $25 nor more than $500 for the first offense and not less than $100 nor more than $1000 for each subsequent offense except as herein otherwise provided." Since this penalty clause refers to any person violating this article (Article 10), except as herein otherwise provided, I am of the opinion that the penalties specified in § 46.1-324 should be applied to a conviction for any violation of this article except a violation of § 46.1-315, which contains its own penalty clause. In other words, the penalties prescribed in § 46.1-324 should be applied in the case of a conviction under any of the sections from § 46.1-318 to § 46.1-326, inclusive.

MOTOR VEHICLES—License to Drive—Age limits for taxicab drivers set by § 46.1-170—Age limits and other requisites for school bus drivers set by §§ 46.1-169, 46.1-370 and 22-276.1.

April 23, 1971

THE HONORABLE DAVID F. THORNTON
Member of the Senate
This is in reply to your letter of April 15, 1971, from which I quote the following:

"I am told by the local taxi cab operators that eighteen year olds are not permitted to drive taxis. On the other hand, I understand that teenagers are permitted to drive school buses. "This seems to be a strange discrepancy of principle. "Could you verify this information for me and cite item in the Code referring to it?"

The age limit for drivers of public passenger-carrying vehicles is set forth in § 46.1-170, Code of Virginia (1950), as amended. This statute is as follows:

"It shall be unlawful for any person whether licensed or not who is under the age of twenty-one years, to drive a motor vehicle while in use as a public passenger-carrying vehicle; provided, however, that any county or city may, by ordinance, provide that any motor vehicle used as a public passenger-carrying vehicle having a capacity of not more than six passengers may be operated by a person between the ages of eighteen and twenty-one years."

The provision that any county or city may, by ordinance, authorize persons between the ages of eighteen and twenty-one years to operate public passenger-carrying vehicles having a capacity of not more than six passengers was added by Chapter 481, Acts of Assembly of 1970. This has reference to the operation of taxicabs and places the matter on a local option basis as to persons between the ages of eighteen and twenty-one years of age. Any such person before operating a taxicab must first obtain a chauffeur's license as required by State law.

The age limit for drivers of school buses is contained in § 46.1-169, Code of Virginia (1950), as amended, which is as follows:

"It shall be unlawful for any person whether licensed or not who is under the age of eighteen years to drive a motor vehicle while in use as a school bus for the transportation of pupils to or from school, provided, however, such school bus may be operated by a person between the ages of sixteen and eighteen years, with the approval of the school board served by such bus."

After stating a minimum age of eighteen years for a person operating a school bus, this section grants authority to local school boards to permit such operation by persons between the ages of sixteen and eighteen years. Section 46.1-370, Code of Virginia (1950), as amended, sets certain qualifications for a school bus driver, however, by requiring that no person shall operate a school bus upon the highway unless such person has had a "reasonable amount of experience in driving motor vehicles, and shall have satisfactorily passed a special examination pertaining to the ability of such person to operate a school bus with safety to the school children thereon and to other persons using the highway." This section also requires that the Division of Motor Vehicles shall adopt rules and regulations to provide for such examination. In addition, § 22-276.1, Code of Virginia (1950), as amended, prescribes a number of requisites for persons employed for the purpose of operating a school bus transporting pupils. These include a physician's certificate that such person is physically and mentally capable, proof that he meets minimal requirements as to binocular vision, that he has a good driving record, that he has good character references and that he is the holder of a first aid certificate.
This is in reply to your letter of April 13, 1971, from which I quote the following:

"I am enclosing herewith copy of a letter which I have this day received from The Honorable David F. Guthrie, Jr., Municipal Judge for the Town of Halifax. You will notice that he is requesting an opinion of your office as to whether the county jailer should purchase a town automobile license for his personal vehicle. The jailer resides in the jail which is located on the courthouse square which is county owned property located wholly within the corporate limits of the Town of Halifax. He parks his vehicle in a space provided for him adjacent to the jail on the courthouse square."

"I am enclosing herewith a copy of the town motor vehicle licensing ordinance and would appreciate your advice as to whether the above set of circumstances would bring the jailer within the terms of this ordinance and require him to purchase the town automobile license."

Article IX, § 13-154 of the Town Ordinance, furnished with your letter, states, in part, as follows:

"There is hereby levied and there shall be collected a license tax for the town from the owner of every motor vehicle or semitrailer, as specified in this section, for the privilege of operating the same upon the streets of the town. The motor vehicles to be covered by this article are as follows:

(a) Motor vehicles, trailers and semitrailers owned by the residents of the town and intended to be operated over the streets of the town."

Section 46.1-65, Code of Virginia (1950), as amended, states, in part, "Except as provided in § 46.1-66 counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers; . . . ." Section 46.1-66 to which the previous section refers, states, in paragraph (b) thereof, that except as provided in § 46.1-65, "no county shall impose any license fee or tax upon a motor vehicle, trailer or semitrailer of an owner resident in an incorporated city or town within the county when such city or town imposes a license fee or tax upon motor vehicles, trailers or semitrailers."

Section 46.1-65 authorizes both a county and a town located therein to impose the license fees, but provides, in paragraph (d) thereof, that an owner resident in such town shall be entitled to a credit on the fee imposed by the county to the extent of the fee paid to the town.

The given facts indicate that the jailer resides in the Town of Halifax. Considering the named statutes in conjunction with the Town Ordinance imposing the license fee, therefore, it is my opinion that the circumstances would bring the private automobile of the jailer under the terms of the Town Ordinance and require him to purchase the automobile license.
November 16, 1970

The Honorable Curtis A. Sumpter
Commonwealth's Attorney for Floyd County

This is in reply to your letter of November 9, 1970, which I quote, as follows:

"Section 46.1-65 (a), current Code of Virginia, provides that '... counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers; provided that no such taxes and license fees shall be assessed or charged by any county upon vehicles of owners who are residents of any town located in such county which constitutes a separate school district approved for operation when such vehicles are already subject to town license fees and taxes.'"

"In 1957, neither the County of Floyd nor the Town of Floyd (an incorporated town but not a separate school district) had such licenses. In that year the Town of Floyd adopted an ordinance foregoing the right to license vehicle owners resident within its limits and permitting the County of Floyd motor vehicle licensing ordinance adopted that same year to be applicable to vehicle owners resident of the Town. Since that year the County motor vehicle licensing ordinance has operated as applicable to motor vehicle owners resident in both the Town and the County.

"Reference is further made to the following language in paragraph (d) of the aforesaid Code section: 'Nothing herein contained shall be construed as depriving any town now imposing such licenses and taxes from increasing the same or as depriving any town not now imposing the same from hereafter doing so, ...'"

"Information is requested as to whether or not the Town of Floyd may now rescind the ordinance adopted in 1957 and adopt a motor vehicle licensing ordinance under the aforesaid Code section applicable to vehicle owners resident within the Town.

"If so, will the County of Floyd be required to cease and discontinue the enforcement of its motor vehicle licensing ordinance within the Town, or, cease and discontinue in so far as same might exceed the tax?"

In response to your first inquiry, the Town of Floyd may now rescind its 1957 Ordinance and adopt a motor vehicle licensing ordinance pursuant to § 46.1-65 of the Code of Virginia. As provided in paragraph (d) of § 46.1-65, quoted in your letter, the fact that a county has a license ordinance does not deprive a town located in such county from adopting a license ordinance. A consistent view is expressed in Report of the Attorney General (1966-1967), p. 186. See, also, Ashland v. Board of Supervisors, 202 Va. 409, 117 S.E.2d 679.

Your other question is answered in the negative. The County may retain its Ordinance and continue to enforce it throughout the County, including the Town of Floyd, provided that any owner shall be entitled to receive a credit on the fees or taxes imposed by the County to the extent of the fees or taxes he has paid to the Town. For instance, if the County imposes a fee of ten dollars and a Town ordinance be adopted imposing a fee of five dollars, then an owner subject to the Town ordinance shall be entitled, upon displaying evidence that he has paid the Town fee, to a credit of five dollars against the County fee. Ten dollars is the maximum fee which may be charged by any county, city or town, under paragraph (a) of § 46.1-65 for an automobile. This is true because of the provision in that section that "The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater than the amount of the license tax imposed at the time of the annual regis-
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tration in 1963 by the State on vehicles of like class." Paragraph (d) provides that the governing bodies of a county and a town in such county, wherein each imposes the license tax, "may provide mutual agreements so that not more than one license tag in addition to the State tag shall be required."

MOTOR VEHICLES—Maximum Speed Limit of 25 M.P.H. in School Zone—Type of signs required by § 46.1-193(f).

October 21, 1970

THE HONORABLE HENRY S. HATHAWAY
Commonwealth’s Attorney for Richmond County

This is in reply to your letter of September 30, 1970, from which I quote the factual situation and the related questions raised, as follows:

"At several schools in Richmond County, the sign used is the standard white speed limit sign, 18" x 24" with the words in black letters 'SPEED LIMIT 25'. This is attached to a round metal pipe. There is another rectangular orange sign with the word 'SCHOOL' in black letters, 9" x 24" approximately 3" above the top of the speed limit sign, at the top of the metal pipe. The bottom of the speed limit sign is approximately 24" from the ground, and the sign is located on the right side of the highways plainly visible to all traffic and so as not to obstruct the highway.

The round metal pipe to which the signs are attached fits into larger pipe that is fixed in the ground so that the sign-pipe may be turned so that it is perpendicular to the highway when in use, and parallel with the highway when not in use. Someone at the school turns the signs so that they face on coming traffic before and after school. There is a device that holds the sign in each position, in fact it has to be lifted to turn it.

The signs are located approximately 50 feet from the driveways to the schools. There are orange signs with the word 'SCHOOL' in black on the right side of the highway approximately 100 yards from the speed limit signs, which are diamond shaped.

There has been some concern by the county judge and the superintendent of schools if this type of sign complies with the statute. They are not fixed blinking signs, are portable signs in that they can be moved (this is not customarily done); but are not tilt-over signs if the words are strictly construed.

The statute limits the speed to 25 m.p.h. between portable signs, tilt-over signs or fixed blinking signs -- plainly visible to vehicular traffic approaching from either direction, etc. It is the custom to place a sign that I have described on each side of the highway, facing traffic approaching each direction. The sign at the end of any speed zone on the left side of the highway for a vehicle passing through the speed zone, with the rear of the sign facing the driver proceeding through the speed zone. The rear of the sign is visible to a driver, but the words 'SPEED LIMIT 25' and 'SCHOOL' are not discernible. This sign, if proper, defines the end of the speed zone.

What I want to know is:

(1) Do the signs as described comply with Section 46.1-193 (f)?

(2) If not, but if plainly visible to motorist, do they establish the speed limit at 25 m.p.h. between the signs?"

The maximum and minimum speed limits for motor vehicles, according to type of vehicle, upon the various highways of this State is prescribed in § 46.1-193 of the Code of Virginia. Paragraph (f) of this section provides for a speed limit of "twenty-five miles per hour between portable signs,
tilt-over signs, or fixed blinking signs placed in or along any highway bearing the word 'school.'”

Any person violating this section shall be guilty of a misdemeanor. Since it is a criminal statute, it must be strictly construed against the Commonwealth.

This statute refers specifically four different times to “portable signs, tilt-over signs, or fixed blinking signs” and makes no reference to any other type of sign. Hence, it is clear that only signs falling into one of the three named types would comply with the requirements of this section. The sign you describe is definitely not a flashing sign, nor is it a tilt-over sign, which, according to information furnished by the Traffic and Planning Division of the State Highway Department, means a specific design operated on hinges, so that it may be opened for use and closed when not in use. Similarly, the Highway Department states that a “portable sign” means a sign constructed on legs or a base so that it may be set in place in the highway and removed when not in use. This is supported by the above named section which provides that, “It shall be the duty of the principal or chief administrative officer of each school . . . to place such portable signs in the highway . . . and remove such signs when their presence is no longer required by this subsection.”

The sign in question is essentially stationary, except that it is designed so that it may be turned toward or away from traffic. While the instructive part of the sign may be so manipulated, it may not be placed “in the highway” as indicated in the statute, since its base is permanently erected on the side of the highway.

In view of the foregoing, I am of the opinion that the described signs do not comply with § 46.1-193 (f), and your question numbered (1) is answered in the negative. Following the same reasoning, your question numbered (2) is likewise answered in the negative, since the school authorities who place the “portable” signs have no authority to do so except in compliance with paragraph (f) of § 46.1-193.

MOTOR VEHICLES—Notice of Suspension or Revocation of License—Certificate of sending by certified mail deemed prima facie evidence of delivery under § 46.1-441.2—Section not mandatory.

October 16, 1970

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

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

“I am writing to ask your interpretation of Section 46.1-442.2 of the 1950 Code of Virginia, as amended, which states, ‘Notice of such suspension or revocation may be sent by certified mail.’

“Questions:

“(1) Does word ‘may’ mean shall?
“(2) If notice was not sent by certified mail, must Commonwealth prove that the accused received the letter of suspension?”

Section 46.1-441.2 of the Code of Virginia, which is no doubt the section you intend to cite, is as follows:

“Whenever it is provided in this title that an operator’s or chauffeur’s license may or shall be suspended or revoked by the Commissioner of the Division of Motor Vehicles, notice of such suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Division by certified mail to the last known address supplied by such operator or chauffeur
and on file at the Division, and the certificate of the Commissioner or someone designated by him for that purpose that such notice or copy has been so sent shall be deemed prima facie evidence that such notice or copy has been sent and delivered to such operator or chauffeur for all purposes involving the application of the provisions of this title, including § 46.1-435."

There is nothing in this section to indicate an intent to preclude sending such notice or copy in some other manner, other than by certified mail, if the Division should elect to do so. For example, such notice or copy may be sent by registered mail with return receipt requested or by regular mail. The former would be quite expensive and the latter would offer no ready reference that the notice or copy was ever received. Likewise, delivery by an officer has proven rather burdensome. If, on the other hand, the notice of suspension or revocation or certified copy of the order of the Commissioner be sent by the Division by certified mail, in accordance with the quoted section, then it shall be deemed prima facie evidence that such notice or copy has been sent and delivered.

In my opinion, the purpose is to authorize a reasonable and legally effective method of delivery by mail of such notices or copies, but I do not construe this section as being mandatory, and your question numbered (1) is answered in the negative.

In regard to your question numbered (2), if the notice or copy was not sent by certified mail in accordance with the above cited section, then the Commonwealth would not have the benefit of the prima facie presumption established by this statute that such notice or copy was sent and delivered. In such event, the Commonwealth must rely upon other proof and this question, therefore, is answered in the affirmative.

MOTOR VEHICLES—Notice of Suspension or Revocation of License—Notice by certified mail to last address supplied by driver constitutes prima facie evidence of delivery—Construing § 46.1-441.2.

March 11, 1971

THE HONORABLE DONALD H. SANDIE, Judge
Municipal Court for the City of Portsmouth

This is in reply to your letter of February 23, 1971 in which you describe the situation of a nonresident serviceman to whom the Division of Motor Vehicles sent, by certified mail, a notice of suspension of license for failure to appear for an examination to determine his fitness to operate a motor vehicle. In this connection, you pose the following questions:

"Under Section 46.1-441.2 Virginia Code, has the defendant 'furnished' the Commissioner of Motor Vehicles with an 'address supplied by such operator' so that the certificate attached to D. M. V. abstract is prima facie evidence of delivery? Should the court determine that this prima facie presumption of delivery has been rebutted should the defendant be found not guilty of driving under a suspended license?"

Section 46.1-441.2, Code of Virginia (1950), as amended, to which you refer, is as follows:

"Whenever it is provided in this title that an operator's or chauffeur's license may or shall be suspended or revoked by the Commissioner of the Division of Motor Vehicles, notice of such suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Division by certified mail to the last known address supplied by such operator or chauffeur and on file at the Division, and the certificate of the Commissioner or
someone designated by him for that purpose that such notice or copy has been so sent shall be deemed prima facie evidence that such notice or copy has been sent and delivered to such operator or chauffeur for all purposes involving the application of the provisions of this title, including § 46.1-435."

It is not a requisite of this section that the defendant furnish the Commissioner of Motor Vehicles, directly, with an address. It is only necessary that the address be the last known address "supplied by such operator or chauffeur and on file at the Division." The address could be supplied to a police officer who arrests such person for a violation of the traffic laws and later transmitted to the Division of Motor Vehicles by means of the abstract of conviction. It would then be "supplied by such operator or chauffeur and on file at the Division," as contemplated by this section. In most instances involving a nonresident, this is the manner in which the address becomes "on file at the Division." Your first question, therefore, is answered in the affirmative.

The statute provides that the certificate of the Commissioner or person designated by him for such purpose, showing that the notice has been sent as therein prescribed, shall be deemed prima facie evidence that such notice has been sent and delivered. Such prima facie evidence is subject to being rebutted. Accordingly, your second question is also answered in the affirmative. See Report of the Attorney General (1969-1970), p. 184.

You further pose the questions contained in the following, which I quote:

"Suppose a Virginia resident possessing a valid Virginia driver's license moves from the address shown on his driver's license and does not notify the D. M. V. of change of address. Does notice mailed (under 46.1-441.2 of the Virginia Code) to old address constitute prima facie evidence of delivery? Does failure of defendant to furnish new address to D. M. V. negate evidence of nondelivery so that he should be convicted in spite of fact that the notice was never received?"

In the event a Virginia resident, possessing a valid Virginia driver's license, moves to a different address and fails to notify the Division of such change of address, then the address last supplied would qualify as the address "on file at the Division," within the meaning of § 46.1-441.2. The mailing of an order by the Division to such address, in accordance with this section, would constitute prima facie evidence of delivery and your question in this regard is answered in the affirmative.

In respect to your other question, I find nothing in the law to indicate that the failure of a defendant to notify the Division of any change of address would deprive him of the right to present evidence in rebuttal of the prima facie presumption of delivery prescribed by this section. Accordingly, this question is answered in the negative.

MOTOR VEHICLES—Parking on Highways Maintained by State Controlled by Highway Commissioner—County may not regulate by ordinance.

COUNTIES—Regulation of Parking of Motor Vehicles—May control by ordinance only if highways maintained by county. March 15, 1971

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

This is in reply to your letter of February 25, 1971, which I quote, in part, as follows:

"As you know, all of the roads in Chesterfield County and at Virginia State College are under the control of the Virginia State High-
way Department. Cities under Section 46.1-252 of the Code of Virginia, as amended, have the right to regulate parking upon the streets and highways and can set up by ordinance parking ticket procedures which allow violators to be given parking tickets and pay them off within a specified period of time after the receipt of same.

"Section 46.1-252.1 would seem to me to prohibit counties from adopting such ordinances and regulations. Consequently, when a parking offense occurs not only on the campus of Virginia State College, but anywhere in the county and there are two ordinances: (1) The vehicle may be towed away. (2) A summons is issued to the defendant and he must appear in the county court. The resulting fine and costs for such a parking violation seems to me to be excessive in relationship to the offense which has been committed.

"Since counties are now empowered to do those things which cities are allowed to do by general law, could Chesterfield County adopt an ordinance providing for parking tickets in areas which have been designated as no parking areas or does 46.1-252.1 restrict this activity on the part of counties?"

Section 46.1-252.1 provides, in pertinent part, that, "The governing body of any county may, by ordinance, provide for the regulation of parking on county owned property, or, in the case of a county which maintains its own system of secondary highways, provide for the regulation of parking on its streets and roads, . . . ." I quite agree with you that the implication of this section is that a county not maintaining its own road system is not authorized to regulate parking on the highways.

Further, § 46.1-252.2, Code of Virginia (1950), as amended, states, in part, that "The State Highway Commissioner may, by regulation, provide for the regulation of parking on any part of the State Highway System, which does not fall within the provisions of §§ 46.1-252 and 46.1-252.1, . . . ." Since the highways in Chesterfield County do not fall within the provisions of either § 46.1-252, which refers only to cities and towns, or § 46.1-252.1, it is clear that the State Highway Commissioner, rather than the County, is authorized to provide for the regulation of parking on such highways. In answer to your specific question, inasmuch as the subject matter is preempted in the enumerated statutes, supra, it is my opinion that Chesterfield County is not empowered to adopt an ordinance providing for parking tickets, pursuant to the general powers granted counties to do things that cities are allowed to do.

Appropriate consideration will be given by this office to your suggestion for possible changes in the law in the next meeting of the Legislature.

MOTOR VEHICLES—Parking Regulations for State Property Within the City of Richmond—Source of regulations—Jurisdiction of traffic court for collecting fines and issuing summonses.

The Honorable Thomas A. Williams, Jr.
Judge of the Traffic Court for the City of Richmond

This is in reply to your letter of recent date, in regard to the matter of enforcing parking regulations on State owned property located within the City of Richmond. In this connection, you present thirteen questions, which I shall quote and consider separately and in order, as follows:

"1. In the case of parking on State property in Richmond other than V. C. U., who has authority to promulgate and enforce regulations?"

ANSWER: The answer is found in § 2.1-94, Code of Virginia (1950), as amended. This section provides that parking in the Capitol Square,
during Sessions of the General Assembly, shall be subject to rules and regu-
lations promulgated jointly by the Speaker of the House of Delegates and
the President of the Senate. During any recess of the General Assembly,
the rules and regulations prescribed by the Director of Engineering and
Buildings shall control. The Director is also authorized to promulgate rules
and regulations in regard to the parking of vehicles on other property
owned by the State and located near the Capitol Square. Such rules and
regulations shall be enforced by the Capitol Police. Any person parking a
vehicle contrary to the rules and regulations authorized by this section shall
be subject to a fine of not less than one dollar nor more than twenty-five
dollars for each offense. The regulations of the Director provide for a fine
and, in addition, removal of the vehicle by towing, under certain circum-
stances.

"2. In the case of parking on V. C. U. property, who has authority
to promulgate and enforce regulations?"

ANSWER: The Board of Visitors of Virginia Commonwealth Univer-
sity, hereinafter referred to as the University, is authorized, pursuant to
§ 23-9.2:3, Code of Virginia (1950), as amended, to provide parking and
traffic rules and regulations on property owned by such institution. These
rules and regulations are enforced by the University Police appointed pur-

"3. What are the penalties for violating such regulations?"

ANSWER: The penalty for a parking violation may be a fine of two dol-
lars, or the vehicle may be towed, impounded and stored at its owner's
expense, or the violator's parking privileges may be suspended.

"4. Is there any different or additional penalty for letting the first
penalty, if any, become delinquent?"

ANSWER: No additional penalty is prescribed for delinquency in pay-
ment of a fine. The University, however, operates on the assumption that, if
the fine is not paid as required, a summons will be issued.

"5. When does the first penalty, if any, become delinquent?"

ANSWER: The penalty becomes delinquent if not paid within seventy-
two hours, as indicated on the citation notice.

"6. What authority is there for towing vehicles?"

ANSWER: The rules and regulations of the University authorize it.

"7. What is the charge and/or penalty for having a towed ve-
hicle?"

ANSWER: In case a vehicle is towed no other ticket is given. The regu-
lations provide that the violator shall pay the towing charges. Hence, the
towing fee is paid to the person or firm performing the towing service and
no fee goes to the State in such instances.

"8. Does the presumption of violation by the registered owner pro-
vided by Va. Code Sec. 46.1-252 apply to vehicles parked in
violation of any such State regulations?"

ANSWER: Section 46.1-252 relates to regulations adopted by the govern-
ning body of any city or town. The University, however, operates on the
assumption that the owner is the violator in such instances.

"9. Are the two types of citations presently used duly authorized?"

ANSWER: I assume you refer to the citations submitted with your let-
ter marked "State Citations." The form notifying the person cited to pay
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the two dollar fine at Police Court is incorrect and it is my understanding that this has been replaced by a form requiring such payment to be made to the Traffic Court for the City of Richmond. This citation should also contain a warning that "Unless you appear as above directed a summons will be issued and additional costs will accrue." The citation used by the Division of Engineering and Buildings contains such a statement and a representative of the University has agreed to include this language when the next parking citation forms are printed.

"10. Are there any procedures or process authorized for the enforcement of penalties for parking violations and, if so, by whom are they to be taken?"

ANSWER: If a ticket is not paid within the required time, it should be handled in the same manner as a parking ticket issued by the City of Richmond. Considering the related State statutes and the rules and regulations adopted according to law in conjunction with the City Charter, it is my opinion that the Richmond Traffic Court has all necessary authority to issue a summons and to enforce collection of such fine, penalty and costs, as in the case of a parking ticket issued by an officer of the City. The police officers having jurisdiction for the respective State owned property may be called upon to cooperate as needed.

"11. Should not this court be supplied with copies of any rules, regulations and penalties not specifically set out in statute, charter or ordinance."

ANSWER: Yes. The Traffic Court is entitled to have copies of all such regulations. In this connection, I enclose a copy of Rules and Regulations Governing State-Owned Parking Lots promulgated by the Director, Division of Engineering and Buildings. The Virginia Commonwealth University is making some revisions and copies of its rules and regulations will be furnished you when received from the printer around June 1, 1971.

Your questions numbered 12 and 13 are dependent upon answers already given to the other questions herein and no further consideration is necessary for these.

MOTOR VEHICLES—Passing Stopped School Bus on Dual Streets—Exception from reckless driving by § 46.1-190(f).

November 10, 1970

THE HONORABLE OVERTON JONES
Highway Safety Commissioner

This is in reply to your letter of November 6, 1970, which I quote, in part, as follows:

"The question has been raised whether amendments enacted by the 1970 Virginia General Assembly to laws relating to motor vehicles stopping for school buses apply to certain city streets as well as to rural highways.

"Subsection (f) of Section 46.1-190 of the Virginia Code provides that motorists shall stop for school buses loading or discharging passengers 'except the driver of a vehicle upon a dual highway, when the roadways are separated by a physical barrier or barriers or an unpaved area, need not stop upon approaching a school bus which is on a roadway so separated from the one on which he is driving or an adjoining service road so separated.'

"Does this exception apply to a city street which is divided, for example, by a slightly raised concrete strip or other barrier intended to prevent vehicles from crossing from one side of the street to the opposite side? Does it apply to a city street which has a grass plot
between the lanes on which traffic travels one way and the lanes on which traffic travels in the opposite direction? (In either instance, the barrier or grass plot does not extend across intersecting streets.)"

Section 46.1-190 of the Code of Virginia enumerates certain acts which shall constitute the offense of reckless driving. Included among such acts, in paragraph (f) of this section, is the failure of the driver of a motor vehicle to stop when approaching a school bus which is stopped on any highway for the purpose of taking on or discharging children. The exception, which you cite, applies to "the driver of a vehicle upon a dual highway, when the roadways are separated by a physical barrier or barriers or an unpaved area."

Your questions must be considered in light of the statutory definitions of "highway" and "roadway." The word "highway," is defined in § 46.1-1(10) of the Code of Virginia, as follows:

"The entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns."

"Roadway" is defined in paragraph (10a) of the same section, as follows:

"That portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the shoulder. A highway may include two or more roadways if divided by a physical barrier or barriers or unpaved area."

In the first instance, it will be observed that the word "highway," by definition, specifically includes the streets of cities and towns. It is further provided in paragraph (10a), quoted above, that a highway may include two or more roadways if divided by a physical barrier or barriers or unpaved area.

The exception under consideration, as quoted from § 46.1-190 (f), refers to the roadways of a dual highway, when separated by "a physical barrier or barriers or an unpaved area." Obviously, the term "barrier" as used in these sections, is not restricted to an absolute obstruction. In my opinion, a raised concrete strip or grass plot separating two roadways of a dual highway would meet the requirements of the exception. Accordingly, both of your questions are answered in the affirmative.

MOTOR VEHICLES—Person Found to be Habitual Offender—If show cause order properly served, claim of lack of personal knowledge not a bar to conviction for violation of finding order.

CRIMINAL PROCEDURE—Motor Vehicles—Person violating habitual offender order—If show cause order properly served, claim of lack of knowledge not a bar to conviction for violating finding order.

November 4, 1970

THE HONORABLE W. BYRON KEELING
Commonwealth's Attorney for Charlotte County

This is in reply to your letter of October 22, 1970 in which you request my advice as to whether lack of personal knowledge to the accused precludes the Commonwealth from convicting him of driving after having been found to be an habitual offender where the attorney for the accused admitted receiving timely notice of such finding.

Before a person may be barred from driving on the highways of this State under the habitual offender statutes, a show cause order must be
entered by the court in which the information is filed. Section 46.1-387.5 of the Code of Virginia prescribes that a copy of the show cause order and a copy of the transcript or abstract of conviction record "shall be served on the person named therein in the manner prescribed by law for the service of notices." It is further prescribed in § 46.1-387.6 that "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 operate a motor vehicle on the highways of the Commonwealth of Virginia and to surrender to the court all licenses or permits to operate a motor vehicle on the highways of this State." Section 46.1-387.7 states that no license shall be issued to an habitual offender for a period of ten years "from the date of the order of the court finding such person to be an habitual offender."

From the foregoing, it will be seen that the statutes require that the show cause order be served on the person named therein in the manner prescribed by law but that the finding of the court be by appropriate order, with no direction as to how or whether it shall be served on the person. Further, from § 46.1-387.7, quoted above, the order is effective from date of the order of the court finding such person to be an habitual offender. While the show cause order must be served on the person in the manner prescribed by law, the statute is silent as to service of the order of the court finding the person to be an habitual offender. Hence assuming that the show cause order was served on him in the manner prescribed by law, it is my opinion that the Commonwealth would not be precluded from a conviction under the given facts.


February 25, 1971

THE HONORABLE RICHARD W. DAVIS, Judge
Municipal Court for the City of Radford

This is in reply to your letter of February 19, 1971 relative to § 18.1-54.1 of the Code of Virginia, providing for a preliminary analysis, by breath test, of the alcoholic content in the blood of any person suspected of violating the provisions of § 18.1-54. You present the questions contained in the passage, which I quote as follows:

"Would you please advise me as to whether the Commonwealth must: (1) show that the breath test was offered the accused and (2) if the breath test was not offered, as to whether the accused's motion to strike has merit. What is meant by 'If such equipment is available?' Suppose the equipment is in the police department, but not with the officer in his patrol car when he stops the accused?"

The named section initially states that: "Any person who is suspected of a violation of § 18.1-54 shall be entitled, if such equipment be available, to have his breath analyzed to determine the probable alcoholic content of his blood." There is no statutory guide to the meaning of the clause "if such equipment be available." Hence, the word "available," as used in this section, should be given its ordinary meaning, i.e., "handy" or "accessible." The statute should not be ignored in any respect and, if the testing equipment is available to a police department, every effort should be made to place the equipment in the hands of the members of the department who may need it. The stated purpose of this statute, as set forth in paragraph (e), is "to permit a preliminary analysis of the alcoholic content of the
blood of a person suspected of having violated the provisions § 18.1-54."

Elsewhere in this section, it is provided in paragraph (c) that a person stopped by a police officer and "suspected by such officer to be guilty of a violation of § 18.1-54, shall have the right to refuse to permit his breath to be so analyzed." Further, paragraph (f) provides that police officers stopping a person suspected of having violated § 18.1-54 shall advise such person of his rights under the provisions of this section. Under § 18.1-54.1 neither the refusal permitted by paragraph (c) nor the results of such breath analysis, if taken, shall be evidence in a prosecution under § 18.1-54.

Considering § 18.1-54.1 in light of the foregoing and its further provision "that nothing in this section shall be construed as limiting in any manner the provisions of § 18.1-55.1," I conclude that the former has no place in a prosecution under the latter. If the failure of an officer to perform as directed under § 18.1-54.1 could vitiate the provisions of § 18.1-55.1, then the last quoted clause would be a nullity. Accordingly, I shall answer your questions numbered (1) and (2) in the negative. Since I have previously herein expressed my views in regard to the meaning of the availability clause, as used in paragraph (a) of this section, I shall assume no further comment is necessary in respect to your other questions.

MOTOR VEHICLES—Racing—Reckless driving—Sections 46.1-191 and 46.1-191.1 pertain to racing on highways only—Section 46.1-190(k) applicable to reckless driving on certain other property open to public.

CRIMINAL PROCEDURE—Race Between Two or More Motor Vehicles—Sections 46.1-191 and 46.1-191.1 apply to racing on highways only—Section 46.1-190(k) includes reckless driving on certain other property open to public.

May 28, 1971

THE HONORABLE DUNCAN C. GIBB
Member, House of Delegates

This is in reply to your letter of May 19, 1971, from which I quote the following:

"We have had a case here in Front Royal in which the operators of two motor vehicles (volkswagons) engaged in a race on the tennis court owned by the Town of Front Royal. Some damage was done to the grass around the tennis court and tire marks were left on the macadam surface.

"It would appear that the drivers of these two motor vehicles could be charged under the provision of Section 46.1-190 (k).

"Do you consider that they could be charged under the provisions of Section 46.1-191 which specifies that the race must be 'on the highways of this State'?

"In addition to the operators of the motor vehicles and other spectators there was a flagman, who acted as a starter for the race. If the operators can be charged under 46.1-191 then it would appear that the flagman could be charged under 46.1-191.1, but if the charge has to be under the first mentioned Section then there is no provision for charging a person who aids and abets in such action.

"If you do not consider that this action took place 'on the highways of this State,' then would it not be advisable to amend that section to cover this type of situation, as I feel that these operators were endangering the lives and property of other persons. Also, to me the flagman should be punished for his participation in this action.

"I would appreciate your opinion as to whether Sections 46.1-191 and 46.1-191.1 apply, and if not, how they should be amended to cover this situation."
"I would also appreciate your suggestion as to how 46.1-190 (k) should be amended to cover aiders and abettors."

In answer to your first question, I do not consider that the drivers of the motor vehicles under the stated conditions could be charged under the provisions of § 46.1-191. That section makes it unlawful for any person to engage in a race between two or more motor vehicles "on the highways." By definition found in § 46.1-1, paragraph (10), the term "highway" means a way or place open to the use of the public "for purposes of vehicular travel." Since § 46.1-191 is a criminal statute, it must be strictly construed and the specific mention of operation "on the highways" precludes its application to operations elsewhere. It follows that the flagman who acted as starter for the race could not be charged under § 46.1-191.1.

In the case of § 46.1-190, which enumerates specific instances of reckless driving, the situation is different, because paragraph (k) thereof denominates it "reckless drivnig" to operate a motor vehicle "upon any driveway or premises of a church, or school, or of any recreational facilities or of any business property open to the public." This statute is broad enough to include a public tennis court and, therefore, a violation under this section could be charged in the instant case on the given facts of driving so as to endanger the life, limb or property of any person.

I agree with you that it would be desirable to have § 46.1-191, pertaining to engaging in a race between two or more motor vehicles, amended to include racing upon church, school, recreational grounds or other such locations mentioned in § 46.1-190 (k). This could be done by inserting the desired additional locations after the word "highways" in the second line of § 46.1-191.

Lastly, you ask my suggestion as to how § 46.1-190 (k) should be amended to cover aiders and abettors. An efficient way to do this would be to add language similar to that used in § 46.1-191.1. This may be in a separate section or it could be in the same section to which it applies.

MOTOR VEHICLES—Radar—Proof of accuracy by means of affidavit.

THE HONORABLE STUART F. HEAD, Judge
County Court of Albemarle County

June 4, 1971

This is in reply to your letter of May 24, 1971, in which you request my opinion in the following, which I quote:

"I have pending before me a case of an accused charged with speeding, based upon a check of his speed by a radar unit. "There were four officers involved; three of them engaged in the setting up of the radar unit before its operation and before taking it out of operation, and the fourth read the meter as the accused's automobile went through the radar beam, and made the arrest; between the periods of check in and checkout. "The arresting officer presented to the court the various affidavits of the three other officers showing the correct reading of their respective speedometers as calibrated by a 'trackmeter', (before stating from the certificate of accuracy of radar as checked by calibrated speedometer, which was also presented), the accuracy of the radar unit as determined by the other three officers.

* * * *

"It is my belief that the Sweeny case 211 Va. 668 would not be applicable here since there is evidence of the accuracy of the speedometers used as shown by the various affidavits referred to above and that the Commonwealth could rest its case at that point, assuming that the officers were in uniform, etc."
The *Sweeney* case was concerned, in the words of the Court, "only with the action of the trial court in admitting into evidence, over the objection of defendant, the 'Department of State Police Certificate of Radar Accuracy Test.'" There was no evidence in the case to prove the accuracy of the speedometer of the motor vehicle, by which the radar set was tested. The certificate showed that the radar was tested by "calibrated speedometer" but the Court reasoned that to say that a speedometer has been "calibrated" is to say it has been tested for accuracy, but this does not necessarily mean that it was found accurate.

The Court stated in the *Sweeney* case that the purpose of § 46.1-198, Code of Virginia (1950), as amended, is "to obviate the necessity of having two troopers testify in every contested speeding case which involves the use of radar." The Court further stated, "It was the intention of the General Assembly to provide, in cases where any question arises as to the calibration or accuracy of any radio microwave or any other electrical device, that such accuracy could be shown by a certificate of the officers who conducted the tests of the device, and who had knowledge of its accuracy."

In the case before you, the affidavits of the three officers show "the correct reading of their respective speedometers as calibrated by a 'track-meter.'" These were the speedometers of the motor vehicles used to test the radar set "before its operation and before taking it out of operation." This is the evidence that was lacking in the *Sweeney* case. In my interpretation, § 46.1-198 authorizes the use of such affidavits.

In addition, § 46.1-193.1, Code of Virginia (1950), as amended, states that in the trial of any person charged with exceeding any maximum speed limit, "the court shall receive as evidence a sworn report of the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by the defendant or the arresting officer at the time of the alleged offense." While this appears to have particular reference to instances in which the speed is determined by means of a speedometer, rather than by radar, the principle is the same. This is especially true in light of the fact that the accuracy of radar is, in turn, determined by means of a motor vehicle speedometer, which has been calibrated and found to be accurate.

MOTOR VEHICLES—Reciprocal Provisions as to Arrest of Nonresidents.

*The Honorable Duncan C. Gibb*

Member, House of Delegates

April 30, 1971

This is in reply to your letter of April 21, 1971 in which you request my comments in regard to the following, which I quote:

"There was an interesting article in yesterday's *Washington Evening Star* to the effect that the District of Columbia lost several million dollars each year from uncollected parking tickets, a good percentage of which were issued to residents of Maryland and Virginia. It was mentioned that these three jurisdictions did not have any reciprocal agreements as to the denial to issue automobile licenses until all fines are paid. I wonder if such an agreement would be helpful to Virginia, and if it would be advisable to enact legislation denying the issuance of automobile licenses until all traffic tickets and/or other fines and Court costs were paid."

There has been a reciprocal agreement between the District of Columbia, Maryland and Virginia since enactment of Chapter 247, Acts of Assembly of 1964. This is embodied in Article 1.1, Chapter 4, Title 46.1, Code of Virginia (1950), as amended, which comprises §§ 46.1-179.1 to 46.1-179.3, inclusive.
One part of this law permits the release of a nonresident who is issued a traffic citation on his personal recognizance that he will comply with the terms of the citation. Another part provides for the suspension of such person's license by his home state if he fails to comply with the citation received in the reciprocating state. In this connection, § 46.1-179.3 states, in paragraph (b) thereof, as follows:

"Upon receipt from the licensing authority of a reciprocating state in which an arrest was made, of a certification of noncompliance with a citation issued in a reciprocating state by a person holding an operator's or chauffeur's license issued by this State, the Commissioner of the Division of Motor Vehicles forthwith shall suspend such person's license. The order of suspension shall indicate the reason for the order, and shall notify the motorist that his license shall remain suspended until he has furnished evidence satisfactory to the Commissioner that he has fully complied with the terms of the citation which was the basis for the suspension order."

Insofar as this State is concerned, I am advised by a representative of the Division of Motor Vehicles that suspensions have been issued pursuant to the quoted section in all cases reported by the reciprocating states. The District of Columbia reported six hundred sixty four cases for the year ending December 31, 1970.

MOTOR VEHICLES—Reckless Driving—Conviction under § 46.1-189 or § 46.1-190 not a bar to conviction under § 46.1-192.1.

CRIMINAL PROCEDURE—Motor Vehicles—Reckless driving—Conviction under § 46.1-189 or § 46.1-190 not a bar to conviction under § 46.1-192.1.

THE HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

January 25, 1971

This is in reply to your letter of January 7, 1971 in which you request my opinion on the following, which I quote:

"‘A’ is charged with a violation of Section 46.1-189 or 46.1-190, Code of Virginia, 1950, as amended; to wit: Reckless Driving and at the same time ‘A’ is charged pursuant to Section 46.1-192.1 with disregarding signal to stop by police officers, which is also made Reckless Driving.

‘Where both charges are involved in the same occurrence, may ‘A’ be prosecuted and convicted of the two offenses, or is prosecution for one offense a bar to prosecution of the other coupled with it?’"

Section 46.1-189 of the Code of Virginia covers the general rule as to the offense of reckless driving. The offense occurs when any person "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." Specific instances of reckless driving are identified in § 46.1-190. Any person who shall engage in a race between two or more motor vehicles on the highways of this State shall be guilty of reckless driving pursuant to § 46.1-191; and § 46.1-191.1 states that any person who aids or abets any such race shall be guilty of a misdemeanor.

The pertinent part of § 46.1-192.1 is as follows:

"Any person who having received a visible or audible signal from any police officer to bring his motor vehicle to a stop, shall operate such motor vehicle in a wilful or wanton disregard of such signal so as to interfere with or endanger the operation of the police
vehicle or endanger other property or person, or who shall increase
his speed and attempt to escape or elude such police officer, shall be
guilty of reckless driving, . . . ."

This section is not dependent upon any act of reckless driving enumerated
in any of the other reckless driving statutes. It is predicated entirely upon
the operation stated in this section by a person who has received a visible
or audible signal from any police officer to bring his motor vehicle to a
stop. The violation described could take place whether or not such officer’s
signal to stop was based on a violation of law.

It follows that the violation contemplated by this section is a separate
act. Since it does constitute a separate act, it does not fall within the ambit
of § 19.1-259 of the Code of Virginia, barring a second conviction if the
same act is a violation of two or more statutes or ordinances. The given
factual situation indicates that “A” had already violated either § 46.1-189
or § 46.1-190 and for that reason the officer gave his signal to stop. “A”
than disobeyed the signal and operated his vehicle in the manner described
in § 46.1-192.1, quoted supra, as reckless driving. Accordingly, it is my
opinion that “A” may be prosecuted and convicted of the two offenses.

MOTOR VEHICLES—Registration and Licensing—Private passenger cars
owned by nonresident father may be operated by student not exceeding
six months under §§ 46.1-131 and 46.1-132.

THE HONORABLE J. B. WYCKOFF
Commonwealth’s Attorney for Amherst County

December 22, 1970

This is in reply to your letter of December 16, 1970, from which I quote
the following:

“I would like your opinion as to the following question: ‘Under
Sections 46.1-131 and 46.1-132, non-resident owners are authorized to
drive their vehicles in Virginia for a period of six months without
obtaining Virginia registration. If the registered owner is the father
of a student who brings the car to Virginia while attending college,
does the statute still apply?’

“I am not unmindful of the report of the Attorney General 1964-65,
page 219 which dealt with students in the State for periods not ex-
ceeding six months who owned their own vehicles.”

Section 46.1-131 of the Code of Virginia limits the privileges extended
to nonresident owners of motor vehicles under §§ 46.1-132, 46.1-134, 46.1-135
and 46.1-137 to residents of other states or countries which grant similar
privileges to residents of this State operating motor vehicles in such other
states or countries.

Section 46.1-132 is as follows:

“A nonresident owner, except as otherwise provided in this article,
owning any passenger car which has been duly registered for the
current calendar year in the state or country of which the owner is
a resident and which at all times when operated in this State has
displayed upon it the license plate or plates issued for such vehicle in
the place of residence of such owner, may operate or permit the
operation of such passenger car within or partly within this State
for a period of six months without registering such passenger car
or paying any fees to this State. But if at the expiration of such
six months such passenger car is still in this State, such owner shall
procure registration and license and shall pay for such license from
the time operation of such vehicle in this State commenced.”
The reciprocity granted extends only to nonresidents. If a person becomes a resident or comes within the terms of § 46.1-1 (16) (b) or (c), so that he is "deemed a resident" for the purposes of Title 46.1 of the Code of Virginia, the grace extended under § 46.1-132 must terminate. The given facts disclose none of the situations included in § 46.1-1 (16) (b) and (c).

Section 46.1-132, quoted above, does not limit actual operation of the vehicle to the nonresident owner. The nonresident owner may operate or permit the operation of such passenger car, under the stated terms of the statute. Accordingly, under the given situation, it is my opinion that the permitted operation extends to the student as well as to the father and, therefore, your question is answered in the affirmative.

MOTOR VEHICLES—Sale for Enforcement of Mechanic's Lien Under § 43-34—Affidavit of compliance meets requirement of section.

The Honorable Kenneth P. Asbury
Commonwealth's Attorney for Wise County

October 23, 1970

This is in reply to your letter of October 6, 1970 in which you ask my opinion as to what evidence of compliance the Division of Motor Vehicles should require before issuing a title for a motor vehicle purchased at a sale conducted in enforcement of a mechanic's lien pursuant to § 43-34 of the Code of Virginia.

Section 43-34 authorizes any person having a lien on personal property under the three proceeding sections (§§ 43-31 to 43-33) to sell such property, or so much thereof as may be necessary, at public auction and apply the proceeds to the satisfaction of the debt. If such property be a motor vehicle required by law to be registered, this section requires the person having such lien to give the owner ten days notice by certified mail of the time and place of the proposed sale and to ascertain from the Division of Motor Vehicles whether the certificate of title shows a lien thereon, and, if so, to give such lienholder like notice and to comply with all other requisites therein set forth. If the value of the motor vehicle is more than six hundred dollars, the person having a lien under this section proceeds by applying to the appropriate court, in which event, any sale effected would be by court order.

In regard to your question, I quote the following passage from this section:

"Whenever a motor vehicle is sold hereunder, the Division of Motor Vehicles shall issue a certificate of title and registration to the purchaser thereof upon his application containing the serial or motor number of the vehicle purchased together with an affidavit of the lien holder that he has complied with the provisions hereof, or by the sheriff or sergeant conducting a sale that he has complied with said order."

The quoted paragraph contains the prerequisites for issuing certificate of title and registration to the purchaser of a motor vehicle sold pursuant to § 43-34 of the Code. The purchaser must make an application to the Division of Motor Vehicles for title, showing the serial or motor number of the vehicle purchased, and accompany this with an affidavit of the lien holder that he has complied with the provisions of this section or, in case of sale by court order, with an affidavit of the sheriff or sergeant conducting the sale that he has complied with the provisions of said order. When these documents are received in proper form, along with the fee or fees required by law, no further evidence of compliance is required and this section authorizes
REPORT OF THE ATTORNEY GENERAL

the Division of Motor Vehicles to issue a certificate of title and registration to the purchaser.

MOTOR VEHICLES—Seizure of Vehicle Under § 46.1-351.1—May be at time of arrest or within thirty days thereafter.

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

This is in reply to your letter of September 24, 1970, in which you allude to the matter of arrests for driving motor vehicles on the highways of this State while the privilege to drive has been revoked or suspended, and present the following for my consideration:

"The usual sequence is as follows: A Trooper arrests a driver for operating a motor vehicle with no valid operators license. The vehicle, often times, being registered in the name of another party. Since this is merely an arrest for driving with no valid operators license, no steps toward seizure of the automobile are taken. Subsequent to the arrest, the report of the Division of Motor Vehicles shows that the subject's operators license is suspended or revoked.

"In light of the language of Code Section 46.1-350 and 46.1-351.1, I pose the following question: May the Trooper proceed, thirty days after the original arrest, to take the necessary steps to seize the automobile under Code Section 46.1-351.1 while obtaining a new warrant and arresting the accused party of operation of a motor vehicle on a suspended operators license or a revoked operators license? Further, if a new warrant is secured, must this warrant be predicated upon a completely new operation of the motor vehicle, or may the warrant be based on the original operation of the motor vehicle as observed by the Trooper?"

The pertinent part of § 46.1-351.1 of the Code of Virginia is as follows:

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

In my opinion, the language "either at the time of arrest or within thirty days after such arrest," inserted by Chapter 366, Acts of Assembly of 1968, was for the purpose of covering such a situation as you describe. In regard to your first question, therefore, the trooper could proceed under § 46.1-351.1 to seize the automobile at any time within thirty days after the original arrest but not after the expiration of this thirty day period.

In regard to your other question, I am of the opinion that the warrant for operating on a revoked or suspended license may be based upon the original operation of the motor vehicle as observed by the trooper. In order to seize the vehicle on the basis of its operation at the time of the initial arrest, however, it would be necessary that the new warrant be issued within thirty days after such arrest. The above cited amendment of § 46.1-351.1 removes the necessity for observing a new or additional operation of the motor vehicle, by authorizing seizure of the vehicle within thirty days of the initial arrest. Prior to this amendment, the vehicle could be seized only at the time of arrest and, often, this did not allow the arrest-
ing officer sufficient time to ascertain the official status of the driver's license to operate motor vehicles.

MOTOR VEHICLES—When Safety Glass Required.

November 10, 1970

COLONEL H. W. BURGESS, Superintendent
Department of State Police

This is in reply to your letter of October 29, 1970, which I quote, in part, as follows:

"Since 1936, Section 46.1-293, subsection (b), of the Code has required safety glass in those motor vehicles registered in this State, and manufactured or assembled after January 1, 1936. During the 1960's, campers were manufactured which are capable of being installed or slipped onto the body of a pickup truck. I am enclosing a brochure, marked attachment #1, which explains these campers. More recently, custom-built enclosures have been manufactured and installed on pickup trucks. This type equipment is shown in attachment #2. Passengers at times occupy both installations while the vehicle is being operated on the highway.

* * *

"I shall appreciate your opinion as to whether this camper and custom-built enclosure, when installed on a pickup truck, constitute a part of the motor vehicle for the purpose of subsection (b)."

In regard to the requirement for the use of safety glass in motor vehicles, paragraph (b) of § 46.1-293 of the Code of Virginia, is as follows:

"It shall be unlawful to operate on any highway any motor vehicle registered in this State, manufactured or assembled after January first, nineteen hundred thirty-six, unless such vehicle be equipped with safety glass approved by the Superintendent, or meets the standards and specifications of the American National Standards Institute, Incorporated, or the regulations of the federal Department of Transportation whenever glass is used in doors, windows, windshields and sideshields."

This section requires that any motor vehicle manufactured or assembled after January first, nineteen hundred thirty-six, be equipped with safety glass whenever glass is used in doors, windows, windshields and sideshields. The purpose of the statute is one of safety, by requiring that all glass used in doors, windows and windshields of any such motor vehicle shall be safety glass. It is manifest that the requirement obtains whether the motor vehicle body is assembled at the time the chassis is manufactured or later. From the moment that the part of the body containing windows or doors is attached to the vehicle it becomes a part of the motor vehicle for the purposes of this section. It is my opinion, therefore, that the camper or custom-built enclosure, when installed on a pickup truck as indicated in the brochures furnished, constitutes a part of the motor vehicle for the purposes of subsection (b) of § 46.1-293.

NEWSPAPERS — Legal Advertisement — Newspaper must meet requirements of § 8-81.

March 4, 1971

THE HONORABLE EDWARD T. CATON, III
Member, Senate of Virginia
This is in reply to your letter of February 26, 1971, in which you ask my opinion whether The Beacon qualifies as a newspaper of general circulation under §§ 15.1-431 and 8-81 of the Code of Virginia (1950), as amended.

Section 15.1-431 of the Code requires that any plan, ordinance or amendment adopted under Chapter 11, Article I of Title 15.1 be published once a week for two successive weeks in some newspaper having general circulation in the county or municipality.

Section 8-81 of the Code reads as follows:

"Whenever there are required by law to be published by any county, city or other municipality or municipal corporation, or by any municipal board or official board, or body, or office, or officials, or by any person or corporation, any ordinances, resolutions, or notices or advertisements of any sort, kind or character by printing and publishing the same in a newspaper, such newspaper must in addition to any qualifications otherwise required by law meet the following qualifications, namely; such newspaper shall be entirely printed in the English language, shall have been entered as second class mail matter under the postal laws and regulations of the United States and shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or have agreed to pay a stated price for a subscription for a definite period of time."

In order for the notice required under § 15.1-431 to be legal it must be printed in a newspaper meeting the requirements of § 8-81. Whether or not The Beacon meets these requirements involves a factual determination.

Assuming the facts to be correct as set forth in the letter from the Vice President of the Virginian-Pilot dated February 23, 1971, I am of the opinion that the newspaper qualifies under §§ 15.1-431 and 8-81 of the Code.

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NOTARIES PUBLIC—Party to a Deed—May not take acknowledgments of other parties to the deed.

May 11, 1971

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

This is in reply to your letter of May 6, 1971, which reads as follows:

"Please advise if a Notary who is a party to a deed can take the acknowledgments of other parties to the same deed."

A notary who is a party to a deed cannot acknowledge the deed before himself, and such acknowledgment would pass no title. Leftwich v. City of Richmond, 100 Va. 164. Therefore, I am of the opinion that a notary who is a party to a deed cannot take the acknowledgments of other parties to the same deed and the deed pass good title to property.

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ORDINANCES—Cities, Towns and Counties—Authorized to adopt, prohibiting impaired driving — No publication requirements for cities and towns—Exceptions.

June 2, 1971

THE HONORABLE E. EUGENE GUNTER
County Attorney of Frederick County

This is in reply to your letter of May 11, 1971, which I quote as follows:

"In an examination of the Code of Virginia, I have found that the adoption of ordinances by Counties is apparently governed by Section 15.1-504 of the Code of Virginia. This section of the Code makes
it quite clear what a county must do in order to properly enact an
ordinance, whether it be a general ordinance or a tax ordinance.
"On the other hand, I have been totally unable to find any specific
statute covering the requirements for the adoption of ordinances by
towns. I do note that cities and towns and counties may prohibit
driving while under influence of intoxicating liquor pursuant to
15.1-132. Please advise me as to whether such authorization under
this statute or under any other statute of the State of Virginia ex-
tends to the point of where cities, towns, and counties may make or-
dinances prohibiting driving while the ability of the driver is im-
paired.
"I note that the ordinance concerning 'automobile graveyards' af-
flicting counties, cities, and towns designated as 15.1-28 requires the
publication of notice for at least two successive weeks in some news-
paper published in such county, city, or town prior to the enactment
of such an ordinance. There may be other ordinances with specific
requirements for publication. It strikes me, however, that there
must be some definite specified requirement for legal notice to the
public prior to the adoption of an ordinance by a town.
"Would you please assist me in this regard and let me have your
opinion concerning whether or not there are any publication require-
ments before the adoption of a town ordinance. If there are, what are
those requirements? Any specific references to State statutes would
be greatly appreciated."

As you have noted, § 15.1-132, Code of Virginia (1950), as amended,
authorizes the governing bodies of cities, towns and counties to make
ordinances prohibiting the driving of motor vehicles while under the in-
fluence of intoxicants or drugs. Likewise, by paragraph (t) of § 18.1-55.1,
Code of Virginia (1950), as amended, they are authorized to adopt ordi-
nances paralleling the provisions of that section. Section 18.1-56.1, Code of
Virginia (1950), as amended, in making it unlawful for a person to drive a
motor vehicle while his ability to drive is impaired by alcohol, states that in
every prosecution under § 18.1-54 of this Code or any similar ordinance of
any county, city or town, the offense shall be deemed to include the offense
punishable under this section. In considering these sections together, it is my
opinion that counties, cities and towns are authorized to adopt ordinances
paralleling § 18.1-56.1 and, therefore, your first inquiry is answered in the
affirmative.

In regard to your other question, § 15.1-13, Code of Virginia (1950), as
amended, authorizes cities and towns to make ordinances and prescribe fines
and other punishment for violation thereof. The powers conferred upon cities
and towns are limited and must conform to § 1-13.17, Code of Virginia
(1950), as amended, which provides that an ordinance must not be incon-
sistent with the Constitutions and laws of the United States and of this
State. Further, cities and towns draw heavily on the powers granted them
by their respective charters, which also contain various guidelines and
limitations. For example, the usual charter authorizes the council, as the
lawmaking body for the city or town, to adopt, by ordinance, such rules as
it may deem proper for the regulation of its proceedings, but prohibits the
council from adopting any major appropriation ordinance or resolution on
the same day on which it is introduced. Charters, generally, contain a re-
quirement for public council meetings, with certain limited exceptions, and
stipulate that citizens may have access to the minutes and records of the
council, at reasonable hours.

It is true that certain statutes, such as § 15.1-28, Code of Virginia
(1950), as amended, pertaining to the adoption of "automobile graveyard"
ordinances by counties, cities and towns, contain publication requirements. I
find no general statute, however, establishing publication requirements as a
prerequisite to the adoption of ordinances by towns or cities, such as those found in § 15.1-504 pertaining to the adoption of ordinances by counties.

ORDINANCES—City May Enforce Local Ordinances on Airport Property Owned Outside of City.

ORDINANCES—City Ordinances not Considered "Laws of Commonwealth."

POLICE—City—May enforce city ordinances on airport property located outside of city.

POLICE—City—May not serve as federal marshal.

March 25, 1971

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

In your letter of March 17, 1971, you ask six questions relating to the police authority of the City of Richmond over the Richard E. Byrd International Airport which is located in the County of Henrico. I shall deal with your questions seriatim.

"1. Do Richmond City policemen have the authority to make arrests for either State laws or City ordinances on the airport property located in Henrico County?"

Section 2.04 of the charter of the City of Richmond, which was enacted by the General Assembly as Chapter 116, Acts of 1948, reads, in pertinent part, as follows:

"In addition to the powers granted by other sections of this charter the city shall have power to adopt ordinances, not in conflict with this charter or prohibited by the general laws of the Commonwealth, for the preservation of the safety, health, peace, good order, comfort, convenience, morals and welfare of its inhabitants, and among such powers, but not in limitation thereof, the city shall have power:

* * *

"(c) To provide for the protection of the city's property, real and personal, the prevention of the pollution of the city's water supply, and the regulation of use of . . . airports and other public property, whether located within or without the city. For the purpose of enforcing such regulations all city property wherever located shall be under the police jurisdiction of the city. Any member of the police force of the city or employee thereof appointed as a special policeman shall have power to make arrests for violation of any ordinance, rule or regulation adopted pursuant to this section and the police court shall have jurisdiction in all cases arising thereunder within the city and the trial justice court of the county wherein the offense occurs shall have jurisdiction of all cases arising thereunder without the city."

In addition to this provision, § 15.1-131.1, Code of Virginia, (1950), as amended, provides:

"The policemen, and any other officer having powers of arrest in any county, city or town, which owns, maintains or operates, in whole or in part, an airport, . . . or any other municipal or county property, beyond the territorial limits of such county, city or town, may lawfully go or may be sent to the property so owned beyond the limits of the county, city or town within which such policeman or
other officer has powers of arrest, for the purpose of protecting such property, keeping order therein, or otherwise enforcing the laws of the Commonwealth, with respect to such property. Nothing in this section shall affect or supersede the power and authority granted to a city by its charter.”

It is my opinion that pursuant to § 2.04(c) of the Charter of the City of Richmond, as cited above, Richmond City policemen have the authority to make arrests for violations of both State laws and City ordinances on the airport property located in Henrico County. Section 2.04(c) specifically provides that the police are to have the power to make arrests for violations of “any ordinance, rule or regulation adopted pursuant to this section.” The section referred to is § 2.04 itself, which grants the city the general power to adopt ordinances. The authority of the policemen to make arrests for violations of State laws is found in § 15.1-131.1, cited above.

“2. May the arresting officer give a summons which is not acceptable procedure in the Henrico County Court, without issuing a warrant as is now done in said Court?”

It is my opinion that the arresting officer is not required in all cases to issue a warrant, unless such warrant is demanded by the defendant. Such a procedure is specifically contemplated by the Code of Virginia. For example, § 16.1-129.1 provides as follows:

“In any case in which a person has been arrested for a misdemeanor by an officer in the discharge of his duty, it shall not be necessary that a warrant be issued for such person, who may be tried without a warrant unless he shall, in person or by counsel, demand that the charges against him be reduced to writing in the form of a warrant.”

In addition, § 46.1-178 of the Code provides for arrests by summons in lieu of a warrant in most traffic cases.

“3. Are the fines and penalties as established by the Council of the City of Richmond enforceable in the Henrico County Court?”

It is my opinion that such fines and penalties would be enforceable in the Henrico County Court. I believe this to be the clear intention of the legislature in enacting § 2.04(c) of the Charter of the City of Richmond. The effect of this charter provision is solely to confer jurisdiction on county courts to enforce ordinances, including fines and penalties therefor, which are established by cities maintaining public property outside of their boundaries, and the fact that the county in which the court sits may have different ordinances or regulations does not limit or affect that jurisdiction.

“4. To whom (the County of Henrico or the City of Richmond) are the fines and penalties allocated?”

It is my opinion that the fines and penalties imposed for the violation of an ordinance of the City of Richmond should be allocated to that city, but that any fines and penalties imposed for violations of State law should be allocated to the County of Henrico. The reason for this is that in cases of State law violations the jurisdiction is not that conferred on the county court under § 2.04(c) of the charter; it is the county court's plenary jurisdiction with the authority to make the arrest granted to the City policeman by § 15.1-131.1. In all cases the costs of court imposed should be allocated to the County of Henrico as compensation for the use of their judicial facilities.

“5. Is a City ordinance, conferred by the legislature, a ‘law of the Commonwealth’ as regards § 15.1-131.1 of the Code of Virginia?”
It is my opinion that a city ordinance, like any municipal ordinance, is not a "law of the Commonwealth" within the meaning of § 15.1-131.1, but I might refer you to my answer to Question 1 to the effect that the policemen of the City of Richmond would, in any event, have the authority to enforce city ordinances on the airport property pursuant to § 2.04(c) of the Charter. Section 15.1-131.1 specifically provides that "nothing in this section shall affect or supersede the power and authority granted to a city by its charter."

"5. May either or both Henrico County policemen or City of Richmond policemen be conferred joint responsibilities and obligations as Federal Marshals? In other words, may a policeman be sworn in as a Federal Marshal also?"

Section 2.1-30 of the Code of Virginia provides, in pertinent 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 . . . ."

This provision represents a general prohibition against any conflict of interest in persons employed by both federal and state governments. While several exceptions to this prohibition are set forth in § 2.1-33, there is no authorization in these exceptions for a policeman to serve as a federal marshal. Accordingly, it is my opinion that a city or county policeman may not simultaneously serve as a federal marshal.

ORDINANCES—Counties—May enact ordinance requiring construction of fence around drive-in theatre.

COUNTIES—Ordinances—May enact ordinance requiring construction of fence around drive-in theatre. December 31, 1970

THE HONORABLE WILLIAM ROSCOE REYNOLDS
Commonwealth’s Attorney for Henry County

I am in receipt of your letter of December 3, 1970, which reads in pertinent part:

"The Henry County Board of Supervisors has recently received complaints from residents who live near Drive-In Theatres in our county. Certain X-rated movies are being shown in these Drive-Ins. Due to the fact that these Drive-Ins do not have fences around them, the movies being shown are capable of being viewed without having to enter the Drive-In Theatre itself. Parents have complained that they are unable to keep their children in the house at all times. Thus, many juveniles have been exposed to these films. Complaint has also been received from police officers and other residents near the theatre that on numerous occasions, people in automobiles are stopping outside the theatre area and watching the movie.

* * *

"My question is this: Could the Henry County Board of Supervisors enact an ordinance requiring the construction of a fence around the Drive-In Theatre, so in effect, to block the screen to those outside the theatre?"
I am of the opinion, for the reasons set forth below that your inquiry may be answered in the affirmative.

Being unaware of the location of the drive-ins as related to the roads in the area, I may only suggest that perhaps § 46.1-553 of the Code of Virginia (1950), as amended, would be applicable to and resolve the problem raised. This section reads as follows:

"It shall be unlawful for any person after July one, nineteen hundred fifty-four, to erect any moving picture screen connected with an outdoor moving picture theatre so that the picture thereon is visible within a distance of thirteen hundred feet or less to motor vehicle drivers on any primary road in this State."

If the above statute is not applicable, then nevertheless I feel that § 15.1-510 prescribing the general powers of counties to adopt measures designed to secure and promote the health, safety and general welfare of the inhabitants would authorize the adoption of the ordinance in question, which ordinance would not be inconsistent with the provisions of general law.

I would emphasize that I reach this determination not because of the films in question or because juveniles are viewing them. Section 18.1-236.7 (b) prohibits a person from selling a juvenile a ticket or admitting a juvenile to premises whereon there is exhibited a motion picture harmful to juveniles. From the facts you have presented, this statute would not be applicable. My conclusion arises from the possible congestion on the roads when individuals in cars slow down or stop to view the films.

I would also call your attention to Chapter 1, Title 48, dealing with the abatement of public nuisances.

ORDINANCES—Proceedings Alleging Violation May Be Initiated by Presentment to Grand Jury.

CRIMINAL PROCEDURE—Grand Jury—May return indictment alleging violation of city ordinance which is punishable as misdemeanor.

THE HONORABLE CHARLES B. PHILLIPS
Commonwealth's Attorney for City of Salem

In your letter of December 30, 1970, you ask.

"May a criminal proceeding alleging a violation of a City ordinance which is punishable as a misdemeanor be initiated by presentment to a Grand Jury or does Section 16.1-124 preclude initiating a criminal proceeding in such manner necessitating that such criminal proceeding be initiated by securing a warrant which would place the jurisdiction for trial in the Municipal Court?"

While it is true that § 16.1-124 of the Code provides that Municipal Courts have exclusive original jurisdiction for the trial of offenses against the ordinances of any city or town, as well as all other misdemeanors occurring within its jurisdiction, it is my opinion that this section is intended to apply to cases which are initiated by the issuance of a warrant. Section 16.1-126 provides

"Notwithstanding the provisions of this chapter, the circuit court of any county, or the corporation court of any city having criminal jurisdiction, shall have jurisdiction to try any person for any misdemeanor for which a presentment or indictment is brought in or for which an information is filed; or such court may certify the presentment, indictment or information for trial to the court not of record
which would otherwise have jurisdiction of the offense; in which event the presentment, indictment or information shall be in lieu of any warrant, petition or other pleading which might otherwise be required by law.”

Since the violation of the city ordinance is punishable as a misdemeanor, it is my opinion that criminal proceedings may be initiated by presentment to the grand jury.

ORDINANCES—Regulating Taxicabs—City may adopt.  
March 17, 1971

THE HONORABLE JACK F. DEPOY
Commonwealth’s Attorney for Rockingham  
County and City of Harrisonburg

This is in reply to your letter of February 18, 1971, which reads in part as follows:

“A certain individual is presently operating a cab service in this area under a cab license for the State of Virginia. He has previously applied for and been denied the privilege of securing a license to operate within the City of Harrisonburg. Under his present license, he wishes to pick up and deliver fares primarily from the Madison College Campus to and from points within the City. The Madison College Campus is bisected by Route 81 and the portion to the East of said route is within the County of Rockingham, while the portion West of said route is within the City of Harrisonburg. All of the buildings and structures used in connection with said college are on the west portion of the campus and there is nothing as of this date on the eastern portion so that by necessity all of his fares would come from and go to that portion of the campus within the City of Harrisonburg.

“My question is, may he under his current license and without a license to operate within the City do so.”

Section 56-291.1, Code of Virginia (1950), as amended, requires a taxicab or other motor vehicles performing a taxicab service outside the corporate limits of incorporated cities and towns to obtain a permit from the State Corporation Commission. This permit or license does not deprive localities of the right of requiring, by ordinance, that taxicabs obtain permits or licenses of public convenience and necessity even though such drivers have already obtained permits in accordance with this section. Baker v. Hodges, 202 Va. 318, 118 S.E. 2d 57 (1960).

Assuming that the City of Harrisonburg has an ordinance requiring taxicabs to obtain permits or licenses before using its streets for the purpose of operating a taxicab business, such ordinance would prevail within the corporate limits of the city. Since you indicate that the individual does not have a permit from the city I am of the opinion that he may not, under his current permit (license) issued by the State Corporation Commission, operate anywhere within the corporate limits of the City of Harrisonburg.

ORDINANCES—Rent Control—Cities not authorized to adopt.  

CITIES—Rent Control—No authority to control.  
October 28, 1970

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

This is in response to your letter of September 11, 1970, in which you indicated that a Landlord-Tenant Relations Committee had been established.
by the City Council of Alexandria and that the committee has developed a number of proposals relating to Landlord-Tenant problems. With regard to these enumerated proposals, you stated:

“Our preliminary research indicates that the above proposals are in the nature of rent control and that there is a split of authority throughout the country as to whether a city can enact rent control measures in the absence of a specific grant of authority from the State Legislature. In Virginia, there seems to be no decided case on point; there appears no enabling legislation in the Code of Virginia or the Alexandria City Charter. However, it is felt by some members of the Committee that in light of Dillon's Rule, Virginia cities (including Alexandria) would not be able to enact any rent control ordinance without any express grant of authority from the General Assembly. Specifically, I would like to find out if you concur in this view or can the City Council enact rental control ordinances under its police power?”

The City of Alexandria possesses only those powers assigned to it by the General Assembly. I find no statute in the Code of Virginia that expressly enables any municipality in the State to enact ordinances for the control of rent. Nor is there any express power in the charter of the city authorizing the adoption of rent control ordinances. I do not believe that under Virginia law the general granting of police power to local political subdivisions under § 15.1-510 of the Code is sufficient to authorize the enactment of an ordinance of this kind. I, therefore, conclude that rent control ordinances cannot be enacted under the general police power of the city.

ORDINANCES — Subdivision — Requires standard street construction — Waiver.

SUBDIVISIONS—Ordinances Requiring Street Construction—Waiver.

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for County of Rockingham and City of Harrisonburg

June 16, 1971

This is in reply to your letter of recent date which reads as follows:

“Rockingham County has in force under its subdivision ordinances a requirement that all streets in subdivisions within the County shall be built to minimum State Highway requirements. In checking with the Highway Department, it is our understanding that these requirements vary from place to place depending on soil conditions, etc.

“A local development company is presently in the process of constructing a number of town houses on a tract of land covered by subdivision ordinances. The developers have asked that the County waive the requirement of using the minimum State Standard and in the alternative they ask that they be permitted to construct the streets in accordance with the minimum standards as required by the City of Harrisonburg for such developments. There is a considerable variance in the road base required by the two minimum standards.

“It is understood by all parties concerned that if the streets are not constructed according to the minimum State Highway standards the Highway Department would not take them into its system so as to maintain them. Considering this, the developers have agreed to post a bond with proper surety to assure that these streets will be maintained in the future.
"The questions posed then are: 1) Whether or not the Board of Supervisors can or should waive this requirement, and 2) should it be permissible for the Board to waive this requirement, what type of surety should be required so as to guarantee the upkeep of these streets in the future?"

Whether or not the Board of Supervisors can waive the requirement depends upon the language of the subdivision ordinance. Ordinances of this type usually provide for variances from the requirements set down. Should the ordinance be silent as to permitting variances, I am of the opinion that it should be applied equally to all. The Board of Supervisors, therefore, should not waive the requirement.

The answer to your second question as to what surety should be required to guarantee the upkeep of the streets by the local developer depends upon the solvency of the company. A written agreement to maintain along with a cash bond to insure compliance would ordinarily be sufficient.

ORDINANCES—Trailer—Valid classification. December 23, 1970

THE HONORABLE JOHN L. JEFFRIES, III
Commonwealth's Attorney for Culpeper County

This is in reply to your letter of December 2, 1970, which reads, in part, as follows:

"On June 2, 1970, the Culpeper County Board of Supervisors passed the following trailer ordinance:

'Trailers may be permitted to be located in agricultural (zoning) districts subject to securing a use permit and meeting the following conditions.
1. Provided with water septic tank and drain field, which must be approved by the Health Dept.
2. Located on a permanent solid foundation with wheels removed.
3. Not detrimental to property values in the area.'

"Please advise me whether the above ordinance, which I have quoted in full, is a valid ordinance."

In your letter to me of July 7, 1970, you asked whether an ordinance which permitted farmers having large tracts of land to place trailers thereon while prohibiting farmers having small tracts of land from doing so would be discriminatory and illegal.

In my answer to you of August 25, 1970, I indicated that a zoning ordinance must rest upon some rational basis or classification and apply alike to all persons or things falling within a designated class. It was further stated that a classification of farmers as set forth in your letter was not based on a rational basis since it did not apply to all farmers (agricultural areas) alike.

Since the language of the actual ordinance which you supplied applies to all agricultural (zoning) districts alike and uniformly, I am of the opinion that the classification is valid.

Conditions 2 and 3 of the ordinance present problems of interpretation and application. It is suggested that they should be reviewed and more appropriate language substituted therefor. The term "trailer" should be defined.
ORDINANCES—Zoning—May not impair vested rights.
ORDINANCES—Nonconforming Use—Limitation on impairment of vested rights.

February 2, 1971

THE HONORABLE B. R. MIDDLETON
Member, House of Delegates

This is in reply to your letter of January 29, 1971, in which you ask if certain language appearing in a proposed zoning ordinance of Virginia Beach is in conflict with the provisions of § 15.1-492 of the Code. This language reads:

“(b) Outdoor advertising structures, billboards, signboards, offsite directional signs, poster panels and signs not in conformity with any lawfully adopted ordinances of the City and not removable at an earlier period under the terms of such ordinances shall be removed by January 1, 1980.”

Section 15.1-492 reads as follows:

“Nothing in this article shall be construed to authorize the impairment of any vested right, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the regulations and restriction 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, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered; and may further provide that no 'nonconforming' building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such 'nonconforming' use.”

There is, of course, a presumption which favors the validity of any zoning ordinance. The Virginia Supreme Court of Appeals has indicated that such ordinances must be sustained if their unreasonableness is debatable. On the other hand, such ordinances are not considered to be retroactive, since the restrictive use on property is designed for futuristic purposes. Zoning restrictions are generally not intended to make unlawful any use of land which was lawful when the ordinance went into effect. Thus, there has arisen the so-called “doctrine of nonconforming use.” This doctrine is generally applied when the land or premises was being used for a legitimate purpose at the time the restrictive ordinance was enacted.

Section 15.1-492, above quoted, which sets forth the conditions applicable to nonconforming uses, provides that such uses may continue so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years. Inasmuch as the proposed provisions in question require the removal of all nonconforming signs by January 1, 1980, it is in conflict with this section.

June 8, 1971

THE HONORABLE WILLIS M. ANDERSON
Member, House of Delegates
This will acknowledge receipt of your letter of May 21, 1971, in which you requested my opinion as to the affect of § 15.1-492 of the Code of Virginia (1950), as amended, upon the validity and enforceability of § 39 of Chapter 4.1, Title 15, of the Code of the City of Roanoke, Virginia. Section 39 of the Roanoke zoning ordinance provides as follows:

"Discontinuance of Open-air Uses. All non-conforming uses not carried on within a building, except those which are incidental and necessary to activities within a building shall be discontinued within five years from date of adoption of this chapter. Uses to be discontinued under this provision shall include outdoor sales areas, storage yards, signs, billboards, and similar uses."

In the recent case of Wilhelm v. Morgan, 208 Va. 398 (1967), the Supreme Court of Appeals of Virginia clearly stated the principles by which the constitutionality of a zoning ordinance is to be measured: while such an ordinance is generally presumed to be a valid exercise of the police power, it must not be clearly unreasonable, arbitrary or capricious; it must bear a reasonable or substantial relation to the public health, safety, morals or general welfare; and if its reasonableness is fearfully debatable, the ordinance must be sustained.

Even though the Supreme Court of Appeals of Virginia has not had occasion to pass upon the specific question of the validity of such "amortization" provisions as are found in § 39 of the Roanoke ordinance, other jurisdictions have considered this question. It appears that, while there may be some divergence of opinion, the great weight of authority, and certainly the recent trend, upholds the validity of the amortization of non-conforming uses. See 22 A.L.R. 3d 1134 (1968); 1 R. ANDERSON, AMERICAN LAW OF ZONING, § 6.65 (1968); 2 E. YOKLEY, ZONING LAW AND PRACTICE, § 16-14 (3d ed. 1965). Amortization provisions have thus generally been upheld where they have been reasonable in their application, the determinative factors being whether the public gain derived from the termination of the nonconforming use outweighs the loss suffered by the landowner and whether the length of time allowed prior to termination of the use is reasonable.

While the better view may be that provisions for amortizing non-conforming uses are reasonable exercises of the police power, it would appear that the General Assembly has precluded the enactment and enforcement of the same in Virginia. In this connection § 15.1-492 of the Code provides as follows:

"Nothing in this article shall be construed to authorize the impairment of any vested right, except 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, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered; and may further provide that no 'nonconforming' building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such 'nonconforming' use."

In this regard, it should be noted that the quoted provisions preclude the impairment of any vested right, which is defined in Bain v. Boykin 180 Va. 259 (1942) at p. 264, "as a right, so fixed, that it is not dependent on any future act, contingency or decision to make it more secure." While § 15.1-492
of the Code does provide that a zoning ordinance may make certain provisions with respect to non-conforming uses, no provision is made among the specifically enumerated areas wherein regulation is permissible for the amortization of non-conforming uses.

As a matter of legislative history, in 1962 § 15.1-492 of the Code supplanted the former § 15-843 of the Code authorizing the councils of cities and towns of the Commonwealth to adopt reasonable regulations for the gradual elimination of uses of land and buildings not then in conformance with zoning regulations and restrictions. It would appear that by the enactment of § 15.1-492 of the Code, prior specific authority for the enactment of amortization provisions was repealed, the inference being that such authority is now denied localities. In support of this view I cite the prior opinion of this office to The Honorable John Alexander, Member, Senate of Virginia, dated August 26, 1964, and found in Report of the Attorney General (1964-1965), p. 360, which seriously questioned the wisdom of a similar amortization provision.

In view of the language of § 15.1-492 of the Code, and in view of the fact that the Charter of the City of Roanoke contains no specific provisions authorizing the implementation of amortization provisions, I am of the opinion that § 39 of Chapter 4.1, Title 15, of the Code of the City of Roanoke, Virginia, is invalid and unenforceable.

ORDINANCES—Zoning—Validity not affected by failure to advertise.

ZONING—Rezoning Validity of Ordinance Not Affected by Failure to Advertise.

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

This is in response to your recent letter of September 18, 1970, in which you enclosed detailed information regarding certain re-zoning actions taken in December of 1966 within Stafford County, Virginia. You then pose the following question:

“The question, then, is simply whether or not the re-zoning action taken by the Board of Supervisors at the public hearing conducted by them on December 14, 1966 is valid.”

Section 15.1-493, paragraph 4, of the Code of Va. (1950), as amended, reads in part as follows:

“The adoption or amendment prior to March first, nineteen hundred sixty-eight of any plan or ordinance under the authority of prior acts shall not be declared invalid by reason of a failure to advertise, give notice or conduct more than one public hearing as may be required by such act or by this chapter, provided a public hearing was conducted by the governing body prior to such adoption or amendment.”

Therefore, in light of the above Code section, in my opinion, the zoning ordinance enacted in December of 1966 by the Stafford County Board of Supervisors is valid, even if proper notice were not given.

In view of the fact that the ordinance would not be declared invalid by reason of a failure to advertise or give notice, therefore, the fact that the property was located in the Falmouth District and not the Hartwood District, as the advertisement stated, would be of no consequence.

PARK AUTHORITIES—Bond Issues—May not appropriate bonds to promote bond referendum.
REPORT OF THE ATTORNEY GENERAL

PARK AUTHORITIES—Bond Issues—May appropriate bonds to promote issuance of its revenue bonds.

PARK AUTHORITIES—Loans—May be made relating to providing park services of facilities.

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

September 18, 1970

This will acknowledge receipt of your letter of August 28, 1970, which states as follows:

"The Capital Region Park Authority was established under . . . Chapter [27] by concurrent resolutions of the participating governing bodies, City of Richmond, Chesterfield and Henrico Counties. By agreement each political subdivision contributed funds on a per capita basis to cover operational expenses of the Authority. In Chesterfield the funds advanced were paid out of the general revenue fund.

"As you probably are aware, it recently came to the attention of the Chesterfield County Board of Supervisors that the Park Authority 'loaned' $9,000 to a 'citizens committee.' This apparently was done to 'cover' or 'underwrite' costs incurred by this citizens committee in its efforts to sell or promote the recent bond referendum. Again, apparently the citizens committee was not successful in raising sufficient contributions from the general public to cover the costs it incurred in this effort.

"The Board of Supervisors has requested that I seek your opinion on whether the Park Authority is authorized under its general grant of power to loan money. Secondly, if the Park Authority does have power to make loans, can it make loans with money granted to it for a specific use such as in this case—for operational expenses? . . ."

In a letter of amplification dated September 8, 1970, you stated, in part:

"The specific question that the Board of Supervisors would like you to answer is whether or not it is proper for an Authority to appropriate money for the promotion of the passage of a bond issue. I understand that informational literature may be prepared but can an Authority expend money to promote the passage of a bond issue?"

The general powers of regional park authorities are set forth in Chapter 27 of Title 15.1 of the Code of Virginia. Specifically, a regional park authority, among other things, may regulate its internal affairs, acquire, purchase, lease, construct, improve, operate, sell or dispose of property or interest acquired for park purposes; it may issue revenue bonds, accept grants from a number of sources, enter into contracts with federal, state or local governments or non-governmental groups in regard to providing for or relating to furnishing park services or facilities. See § 15.1-1232 of the Code of Virginia.

There is no specific power granted to a regional park authority in regard to the lending of park authority funds. However, the Code clearly authorizes such an authority to enter into contracts with associations and groups of individuals providing for or relating to the furnishing of park services or facilities. Furthermore, the park authority is empowered to do all acts and things necessary or convenient to carry out the power conferred by statute. See § 15.1-1232(j), (n), (o). Accordingly I am of the view that a park authority would be empowered to appropriate sums of money to promote the issuance of revenue bonds issued by the authority or to make loans relating to the providing for, or furnishing of, park services or facilities. In my opinion, however, expenditure of funds for the purpose of promoting a bond
issue referendum authorized by a county's board of supervisors would not be properly related to the performance of duties and the execution of the powers of a regional park authority.

PHYSICIANS — Revenue License — Physicians not licensed by Board of Medical Examiners must obtain revenue license if practicing in State.

January 18, 1971

THE HONORABLE W. C. ANDREWS, JR.
Commissioner of the Revenue, City of Newport News

This is in response to your letter of January 14, 1971, in which you requested my opinion concerning a construction of § 58-387.1 of the Code of Virginia. Specifically, you requested whether doctors who were not licensed to practice medicine in the State of Virginia, but who were practicing as interns or residents in local hospitals were required to obtain a revenue license as provided in § 58-387.1. You indicated that one of the arguments against your position requiring such licenses was that these doctors had not yet been licensed by the State Board of Medical Examiners to practice their profession.

In my opinion, all persons practicing medicine in the Commonwealth of Virginia, whether licensed or not, unless excepted by § 58-387.1 of the Code, are required to obtain a revenue license. Section 58-387.1 of the Code provides:

"Except as herein otherwise provided, every practicing medical doctor, in addition to being subject to the regulatory laws of this State relating to the profession of medicine, shall obtain a revenue license. . . . "

"A medical doctor who has practiced medicine regularly prior to January one, nineteen hundred nine, shall not be subject to the provisions of this section; nor shall this section apply to any medical doctor who is an intern in a licensed hospital during the twelve months next following his graduation from medical school, provided such intern engages in no medical practice other than as such intern during such twelve months of internship." (Emphasis supplied.)

This section clearly requires all physicians not exempted to obtain the revenue license. However, you will note interns practicing during the twelve months immediately following graduation from medical school are exempted from the provisions of § 58-387.1. All other physicians practicing either as residents or as interns are required to obtain a license.

PLANNING COMMISSION—District—Compensation of members by governmental subdivisions.

October 22, 1970

MR. CHARLES H. GRAVES, Director
Division of State Planning and Community Affairs

This will acknowledge receipt of your letter of September 24, 1970, in which you ask the following question:

"May members of a planning district commission provide that they be compensated from the budget of the commission instead of allowing governmental subdivisions to do so as authorized in 15.1-1403(c)? The 1968 Virginia Area Development Act contained no provisions which dealt with compensation of PDC members. In 1970, the following amendment was enacted:
15.1-1403(c): The governing body of any governmental subdivision which is a member of the planning district commission may provide for compensation to be paid by it for its commission members except for any full time salaried employees of the subdivision, provided that the amount of such compensation shall not exceed the amount fixed by the planning district commission."

The general powers of a planning district commission, as set out in § 15.1-1404 of the Code of Virginia (1950), as amended, would permit compensation of commission members from its budget. Section 15.1-1403(c) was added to the Virginia Area Development Act by the 1970 General Assembly. Prior to this amendment, there was no specific statutory provision for compensation of planning district commission members. However, the language of the amendment is in permissive terms and provides governmental subdivisions with the option of providing compensation to its commission representatives, "provided that the amount of such compensation does not exceed the amount fixed by the planning district commission."

In view of the foregoing, I am of the opinion that a planning district commission, while it may provide for compensation from its own budget and limit the amount of compensation to be paid, may not, by its own action, preclude such compensation from being made by a governmental subdivision component of the planning district.

PLANNING COMMISSION — District — May seek aid and cooperation of Virginia Department of Purchases and Supply.

PURCHASING — Planning District Commission — May seek aid and cooperation of Virginia Department of Purchases and Supply.

MR. CHARLES H. GRAVES, Director
Division of State Planning and Community Affairs

October 22, 1970

This will acknowledge receipt of your letter of September 24, 1970, in which you ask the following question:

"May a PDC purchase materials and equipment through the Virginia Department of Purchases and Supply?"

There is no specific statutory provision authorizing a planning district commission to purchase through the Director of Purchases and Supply. However, § 15.1-1404 (a) Va. Code Ann. (Supp. 1970) provides that upon its organization a PDC is a "public body corporate and politic" and it is charged with the governmental function of planning for the district that it serves. Section 2.1-288 of the Code provides that:

"... boards of supervisors, or other governing bodies, of political subdivisions, the several counties and the councils of the several cities and towns, and the officers of counties, cities, towns and political subdivisions who are empowered to purchase material, equipment and supplies of any and all kinds for local public use, may, in their discretion, seek the aid and cooperation of the Director of the Department of Purchases and Supply in purchasing such material, equipment and supplies, to the end that, by centralized purchasing, cheaper prices may be obtained."

I am of the opinion that the nature and function of a planning district commission brings it within the purview of this section and entitles it to request and receive the aid and cooperation of the Director of Purchases and Supply provided for therein.
PLANNING COMMISSION—District—Membership commission—Majority must be comprised of elected officials—Elected official may not be replaced by alternate who is not an elected official.

PLANNING COMMISSION—District—Membership—How determined.

October 22, 1970

MR. CHARLES H. GRAVES, Director
Division of State Planning and Community Affairs

This will acknowledge receipt of your letter of September 24, 1970, in which you ask the following questions:

"Section 15.1-1403(b) (a) of the Virginia Area Development Act was amended in 1970 to provide for the appointment of alternate members to a PDC [Planning District Commission]. The new provision states that 'an alternate member may serve in lieu of one of the elected officials of each of the governing bodies of the participating governmental subdivisions. This amendment was proposed (1) to assure that a local government with only one member on a planning district commission could be represented in the event that its single member was unable to attend a meeting, and (2) to lighten the burden of extra duties which make demands upon the time of public officials.

"However, the amendment as written leaves some unanswered questions:

1. May a person who holds no elected office be appointed to serve as the alternate for an elected official?
2. If an alternate is appointed, may he then replace the original members as the 'official' delegate to the PDC?
3. If the number of non-elected alternates which are appointed to a PDC are sufficient to tip the membership balance so that elected officials do not constitute a majority of the members, could this situation be reconciled with Section 15.1-1403(b) (4) of the Act which requires that a majority of PDC members be elected officials of governmental subdivisions?"

1. Section 15.1-1403(b) (4), Code of Virginia (1950), as amended, provides that at least a majority, but not substantially more than a majority of the planning district commission members shall be persons holding elective office in the political subdivisions comprising the district, and that, where the charter agreement, as adopted, so provides, an alternate may serve in lieu of one of the elected officials from a governmental subdivision. There is no statutory outline of, or restriction upon, the qualifications of such an alternate.

However, the statute would permit an alternate to serve only in lieu of one of the elected officials of a governmental subdivision. It would appear that the Legislature, by this qualification, intended to insure representation of a governmental subdivision on the commission by at least one elected official of that subdivision. Therefore, I am of the opinion that where a governmental subdivision has only one elected official on the commission, he may not be replaced by an alternate who is not an elected official.

2. Section 15.1-1403(b) (4), Code of Virginia (1950), as amended, provides that an alternate may "serve in lieu of" an elected official. It does not state that upon appointment an alternate may "then replace" the original elected official planning district delegate. It should be noted that the terms of office of planning district commission members, their method of selection or removal, are matters for charter incorporation as stated in § 15.1-1403(b) (5) of the Code; it would be necessary to review each planning district charter for the specific answer requested in your letter.
3. From the language of § 15.1-1403(b)(4) it appears that the Legislature intended that each political subdivision should be represented on the commission, in part by elected officials in the government of that subdivision, and that such officials should comprise a majority of the commission's membership. Clearly, the number of those serving as commission members who are not elected officials of the participating governmental subdivisions may not equal or exceed the number of those elected official commission delegates. I am of the opinion therefore, that your question must be answered in the negative.

PLANNING COMMISSION—District—Planning district employees may not perform stream cleanup work at direction and as a service of the planning district commission.

October 22, 1970

MR. CHARLES H. GRAVES, Director
Division of State Planning and Community Affairs

This will acknowledge receipt of your letter of September 24, 1970, in which you ask the following question:

"May employees of a PDC do stream cleanup work which involves clearing silt, debris, garbage, and other obstructions from streams?"

In 1968 the General Assembly enacted the Virginia Area Development Act, Chapter 34 of Title 15.1, Code of Virginia (1950), as amended. Article 2 of Chapter 34 deals with planning districts, their composition, organization, duties and purposes. Specifically, § 15.1-1405 of the Code sets out the purpose of a planning district commission:

"It shall be the purpose of the planning district commission to promote the orderly exercise and efficient development of the physical, social and economic elements of the district by planning, and encouraging and assisting governmental subdivisions to plan for the future. It shall not be the duty of the commission to perform the functions necessary to implement the plans and policies established by it or to furnish governmental services to the district." (Emphasis added.)

The phrase "shall not be the duty" does not admit of an interpretation that would allow a planning district commission the privilege of determining whether to perform implementation measures. The phrase must be read in conjunction with the above-cited sentence that precedes it in Section 15.1-1405 of the Code. The Legislature has set forth the purpose of a planning district commission in unequivocal terms: the purpose is to plan, not implement.

Further, the General Assembly has established statutory machinery for furnishing governmental services on a district-wide basis. Article 3 of Chapter 34, Title 15.1 of the Code provides for the creation, organization, powers and duties of a service district. A prerequisite for service district creation is voter approval in referenda conducted simultaneously in each of the governmental subdivisions to be encompassed by the proposed service district. A proposal for service districts to be created without such a referendum was rejected by the General Assembly in 1968. Clearly, the Legislature has manifested its intention that the voters must first approve of a district-wide service mechanism.

Accordingly, I am of the opinion that stream cleanup work performed by planning district employees at the direction, and as a service, of the planning district commission, falls outside the area of proper functions set forth in Section 15.1-1405 of the Code.
PLANNING COMMISSION—District—Powers and purposes of planning district Commission—Shall not perform functions necessary to implement plans or to furnish governmental devices to the planning district.

October 22, 1970

MR. CHARLES H. GRAVES, Director
Division of State Planning and Community Affairs

This will acknowledge receipt of your letter of September 24, 1970, in which you ask the following question:

"May a planning district commission set up a multi-purpose non-profit corporation to carry out service functions. The corporation would be a separate agency from the PDC but would have the same geographic boundaries and would be controlled by the same policy making body. Examples of services which might be offered under such an arrangement could include airports, sewage disposal, solid waste disposal, industrial development, parks, housing, hospitals, rapid transit, water supply distribution, parking, ports, and mosquito control.

"A corporation established along these lines would be an interim arrangement between a planning district commission and a service district, and, if successful, could demonstrate to local government officials and citizens the feasibility and advantages of creating a service district commission."

In 1968 the General Assembly enacted the Virginia Area Development Act, Chapter 34 of Title 15.1, Code of Virginia (1950), as amended. Article 2 of Chapter 34 deals with planning districts, their composition, organization, duties and purposes. Specifically, § 15.1-1405 of the Code sets out the purpose of a planning district commission:

"It shall be the purpose of the planning district commission to promote the orderly exercise and efficient development of the physical, social and economic elements of the district by planning, and encouraging and assisting governmental subdivisions to plan for the future. It shall not be the duty of the commission to perform the functions necessary to implement the plans and policies established by it or to furnish governmental services to the district." (Emphasis added.)

The phrase "shall not be the duty" does not admit of an interpretation that would allow a planning district commission the privilege of determining whether to perform implementation measures. The phrase must be read in conjunction with the above-cited sentence that precedes it in § 15.1-1405 of the Code. The Legislature has set forth the purpose of a planning district commission in unequivocal terms: the purpose is to plan, not implement.

Further, the General Assembly has established statutory machinery for furnishing governmental services on a district-wide basis. Article 3 of Chapter 34, Title 15.1 of the Code provides for the creation, organization, powers and duties of a service district. A prerequisite for service district creation is voter approval in referenda conducted simultaneously in each of the governmental subdivisions to be encompassed by the proposed service district. A proposal for service districts to be created without such a referendum, was rejected by the General Assembly in 1968. Clearly, the Legislature has expressed its intention that the voters must first approve of a district-wide service mechanism.

Creation of a multi-purpose corporation established by a planning district commission to perform service functions, in my view, would circumvent and violate the procedures and safeguards established by Article 3, Chapter 34 of Title 15.1 of the Code. I am of the opinion, therefore, that the proposed
creation of such a corporation as outlined in your letter would not be properly within the scope of the function and purpose of a planning district commission.

PLANNING DISTRICTS—Membership—Charter may provide for alternate to serve in lieu of any one elected official member.

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

September 11, 1970

This is in reply to your letter of September 8, 1970, in which you requested an interpretation of the hereinafter italicized portion of § 15.1-1403 (4) of the Code.

Section 15.1-1403(4) reads as follows:

“The composition of the membership of the planning district commission; provided, however, that at least a majority, but not substantially more than a majority, of its members shall be elected officials of the governing bodies of the governmental subdivisions within the district with each county, city and town of more than three thousand five hundred population having at least one representative, and the other members being qualified voters and residents of the district, who hold no office elected by the people; and provided further, however, should the charter agreement, as adopted, so provide, an alternate may serve in lieu of one of the elected officials of each of the governing bodies of the participating governmental subdivisions.”

(Emphasis supplied.)

I am of the opinion that the italicized portion of the statute provides for one alternate to serve in lieu of any one of the members who is an elected official of the governing body of the participating governmental subdivision within the district.

POLICE OFFICERS—Authority—No authority to orally summon witnesses.

THE HONORABLE DANIEL FAIRFAX O'FLAHERTY
Judge, Alexandria Municipal Court

September 28, 1970

I am in receipt of your letter of September 19, 1970, in which you inquire whether a police officer has authority to summon witnesses orally, and whether witnesses so summoned may be held responsible for their failure to appear.

I am attaching hereto a copy of an opinion rendered to Andre Evans, Commonwealth’s Attorney of Virginia Beach on March 26, 1968, which, while not directly answering your questions, deals with a related matter. That opinion points out that a justice of the peace may recognize material witnesses with or without surety, and of course, that a summons may be issued for their presence at trial. However, the provisions of § 19.1-91 allowing the justice of the peace to direct the police officer to summon witnesses simply means that the justice of the peace may direct the police officer to have subpoenas issued for whatever witnesses he deems material.

While this procedure could certainly be used in the situations you have posed with regard to traffic cases, I can find no authority for the proposition that a police officer may summon witnesses orally, and that witnesses so summoned may be found in contempt if they fail to appear. It is my opinion, therefore, that police officers do not have such authority, and that the proper procedure would be to either have summonses issued for the appearance of the witnesses, or for the witnesses to be recognized for their appearance by a justice of the peace.
REPORT OF THE ATTORNEY GENERAL

POLICE OFFICERS—Chief Law Enforcement Officer—Civil Disorders—Is chief of police or sheriff unless otherwise designated by locality.

COUNTIES, CITIES AND TOWNS—Civil Disorders—Chief Law Enforcement Officer—Is chief of police or sheriff unless otherwise designated by locality.

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

July 20, 1970

This is to acknowledge receipt of your letter of recent date in which you request an opinion defining the phrase “The Chief Law Enforcement Officer” as used in the Code of Virginia, §§ 15.1-514.1 and 44-78.

When § 44-78 was originally enacted, it granted to sheriffs of counties and mayors of cities the authority to call upon the Governor or commanding officers of military units for assistance in quelling civil disorder. The 1968 Legislature rewrote this section, and among other things, deleted sheriffs of counties and mayors of cities and substituted therefor, “the chief law enforcement officer or the governing body of the county or city or town.” It seems apparent that by substituting the phrase “the chief law enforcement officer” the Legislature did not desire to designate any specific person with the authority granted by this section, but rather left this matter to the discretion of each political subdivision.

It is to be noted that § 15.1-514.1 was also written by the 1968 Legislature and the observations concerning § 44-78 would apply equally to § 15.1-514.1. Law enforcement officer is defined by § 9-108, Code of Virginia, as follows:

“As used in this chapter, the term ‘law-enforcement officer’ means any full-time employee of a police department or sheriff’s office which is a part of or administered by the State or any political subdivision thereof and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this State.”

While it is noted that the above definition is for use in Chapter 16, Title 9, it does provide assistance in defining the term “law-enforcement officer” in other sections of the code.

In view of the foregoing, I am of the opinion that each political subdivision of the Commonwealth may designate its chief law enforcement officer by appropriate resolution or ordinance to carry out the responsibilities set forth in §§ 15.1-514.1 and 44-78. However, in the absence of such specific designation, I am of the further opinion that the phrase “the chief law-enforcement officer” as used in §§ 15.1-514.1 and 44-78 refers to the chief of police of cities and towns and sheriffs of counties.

POLICE OFFICERS—Contempt—May be found in contempt for failure to appear on date of traffic summons.


THE HONORABLE VON L. PIERSALL, JR., Judge
Juvenile and Domestic Relations Court

June 16, 1971

In your letter of May 26, 1971, you ask whether the Juvenile and Domestic Relations Court may punish for contempt a police officer who issued a traffic summons for a certain date and then fails to appear in court on that date without a reasonable excuse.
Contempt is defined as any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice. *Potts v. Commonwealth*, 184 Va. 855, 36 S.E. 2d 529 (1946). Even though the police officer is not served with a subpoena in such cases, he is nevertheless aware of his duty to appear in court on the appointed date. If he fails to appear and if his reasons for such failure indicate a deliberate disregard of such duty, it is my opinion that he may be found in contempt of court. Authority for punishment by the Juvenile and Domestic Relations Court is found in § 16.1-26, which provides, in part, as follows:

"A judge of a court not of record shall have the same powers and jurisdiction as a judge of a court of record to punish summarily for contempt, but in no case shall the fine exceed fifty dollars and imprisonment exceed ten days for the same contempt."

POLICE OFFICERS—Special Police—Compensation, residency requirements and jurisdiction.

SHERIFFS AND SERGEANTS—Deputy—Appointment and jurisdiction.

*The Honorable O. S. Foster*
Sheriff of Roanoke County

This is in reply to your recent letter wherein you pose several questions concerning law enforcement personnel, and I will answer your questions seriatim.

"I. For several years County police officers have been appointed under Section 15.1-144, Code of Virginia. Although the State Compensation Board sets the number of paid Deputies, is it not legal for the County to pay the entire salary and for me to request appointment of these officers under Section 15.1-48, Code of Virginia?"

You point out that you have a county police department within your department. Nevertheless, § 15.1-48 provides that appointments of deputies are made by the sheriff, and the deputies "... may discharge any of the official duties of their principal (sheriff) during his continuance in office, ..." Section 15.1-144 provides for the appointment of special policemen by "(t)he Circuit Court of any county, or the judge thereof in vacation, ..." Officers appointed pursuant to § 15.1-144 may be compensated by the county pursuant to § 15.1-146, but deputies appointed pursuant to § 15.1-48 are subject to salaries as set forth in § 14.1-68, et seq. Accordingly, I am of the opinion that the Board of Supervisors is without authority to pay the entire salary for deputy sheriffs which you may appoint pursuant to § 15.1-48.

"II. Section 15.1-145 states that special policemen appointed under Section 15.1-144 'shall reside in the County during their tenure in office.' If officers were appointed under 15.1-48, instead of 15.1-144, would they not be permitted to reside in a City located wholly within the County?"

This question must be answered affirmatively since deputies appointed pursuant to § 15.1-48 are subject to the residency qualification of § 15.1-51 which provides that "(e)very county officer, except deputy clerks of courts of record, shall, at the time of his election or appointment, have resided six months next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county. . . ." (Emphasis added).
III. What civil and criminal authority do deputies appointed under Section 15.1-48 have in Towns and Cities of the first class that are wholly located within the County?

Section 15.1-48, as stated above, provides that deputies may discharge the duties of the Sheriff. Additionally, § 15.1-79 provides, in part:

"Every officer to whom any order, warrant or process may be lawfully directed, shall execute the same within his county or corporation. . . . The word 'county' as hereinbefore used shall embrace any city included within the boundaries of such county, . . . ."

Accordingly, I am of the opinion that this section gives to deputies appointed pursuant to 15.1-48 authority to execute criminal and civil process in a city included within the boundaries of the county.

IV. Would a County Officer, appointed under Section 15.1-144, have authority to stop a violater of the law in a Town in order to establish his identity for later prosecution under his rights as a citizen?

(You subsequently advised by telephone that this question relates to whether a stop of an automobile could be made by an officer appointed pursuant to § 15.1-144 for purposes of establishing the driver's identity).

Since § 15.1-144 provides for appointment of special policemen "... for so much of (a) county as is not embraced within an incorporated town located in the county . . ." and 15.1-152 provides that the jurisdiction and authority of special policemen shall not extend into an incorporated town. I am of the opinion that an officer would not have the authority to make a vehicle stop for purposes of establishing identity in the locality wherein he has no jurisdiction.

V. If the answer to question one is no, would Officers appointed under Section 15.1-144 be permitted to reside in a Town located in the County?

Section 15.1-145 provides, in part:

"Any person appointed as a policeman under the preceding section (§ 15.1-144) shall reside in the County during his tenure of office, but need not be a qualified voter or actual resident of the County at the time of his appointment."

Since the above section makes no allowance for residency in an incorporated town (and such references to towns appear in §§ 15.1-152 and 15.1-151), I am of opinion that persons qualifying as special policemen in accordance with §§ 15.1-144 and 15.1-145 would not be permitted to reside in an incorporated town located within the county during their tenure of office.

POLICE OFFICERS—Special Policemen—Badges and uniforms—May not be worn by private security agencies.

THE HONORABLE IAN M. RODWAY
Assistant Commonwealth's Attorney for Fairfax County

This is in reply to your letter of August 24, 1970, wherein you inquire as to whether private security agencies can wear uniforms and/or badges with the word "Police" thereon in light of § 18.1-312 of the Code of Virginia.

Section 18.1-312 reads, in part:
"No person, not such an officer as is referred to in § 19.1-95, shall wear any such uniform as is designated pursuant to the provisions of such section or wear any insignia or markings containing the seal of the Commonwealth or the insignia of any such officer's uniform, . . ."

The uniform referred to in § 19.1-95 is one "... which will clearly show him to casual observation to be an officer."

Section 15.1-144 provides for appointment of special policemen by the circuit court of a county with the persons so appointed to act as conservators of the peace. Such persons need not be employees of the State, especially when their duties mainly relate to private employment (See § 15.1-147). Nevertheless, these persons must be appointed as special policemen and may be removed by the appointing court pursuant to § 15.1-149.

In light of the provisions of § 15.1-144 et. seq., when considered pursuant to the provisions of § 18.1-312, I am of the opinion that it would be proper for persons employed by private security agencies to wear uniforms and/or badges with the word "Police" showing if those persons have been appointed by the Circuit Court as special policemen. If persons are not so appointed, I am of the opinion that § 18.1-312 prohibits the wearing of such uniforms.

POLICE OFFICERS—Town—No minimum age requirement.

January 7, 1971

THE HONORABLE ARCHIBALD M. AIKEN, JR.
Assistant Commonwealth's Attorney of Loudoun County

This is in response to your letter of December 29, 1970 in which you seek an opinion to the following question:

"Is a person 20 years of age eligible, under Section 32 of the present Virginia Constitution, to hold office as a policeman of an incorporated town?"

Section 32 of the present Constitution provides in part that every person qualified to vote shall be eligible to any office of the state, or in any county, city, town or other subdivision of the state, wherein he resides. It is my opinion that policemen, unlike sheriffs or deputy sheriffs, do not hold office within the meaning of Section 32. I am unaware of any restrictions concerning the minimum age of policemen, and accordingly your question is answered in the affirmative.

Section 32 of the present Constitution may now be found in Article II, Section 5, of the newly adopted Constitution. The provisions of the new Constitution are limited to elective offices, and therefore these provisions will have no effect on this opinion.

POLICE OFFICERS—Town Policeman May Arrest for Violation of State Law.

WARRANTS—May Be Served in County Other Than Issuing County if Properly Endorsed.

CRIMINAL PROCEDURE—Warrants—Service of.

May 19, 1971

THE HONORABLE WILLIAM F. WATKINS, JR.
Commonwealth's Attorney for the City of Farmville

In your letter of May 5, 1971, you ask the following questions, which I shall answer seriatim:
“1. Can a town police officer swear out and serve within the town of his jurisdiction a warrant charging a violation of a state statute where there is no violation of a town ordinance?

“2. Can a sheriff or deputy sheriff or other police officer serve a warrant directed specifically to ‘to the Sheriff of Halifax County’ if the sheriff or police officer serving the warrant is a Sheriff or Police Officer of Prince Edward County?”

The answer to your first question may be found in § 15.1-138 of the Code of Virginia (1950), as amended. That section provides, in pertinent part:

“The officers and privates constituting the police force of cities and towns of the Commonwealth are hereby invested with all the power and authority which formerly belonged to the office of constable at common law in taking cognizance of, and in enforcing the criminal laws of the Commonwealth and the ordinances and regulations of the city or town, respectively, for which they are appointed or elected. And each and every one of such policemen shall use his best endeavors to prevent the commission within the city or town of offenses against the law of the Commonwealth and against the ordinances and regulations of the city or town; shall observe and enforce all such laws, ordinances and regulations; shall detect and arrest offenders against the same; shall preserve the good order of the city or town; and shall secure the inhabitants thereof from violence and the property therein from injury.”

It is my opinion, therefore, that a town police officer may swear out and serve a warrant charging a violation of a state statute although there is no violation of a town ordinance.

The answer to your second question may be found in § 19.1-94 of the Code, which provides, in pertinent part, as follows:

“If a person charged with an offense shall, after or at the time the warrant is issued for his arrest, escape from or out of the county or corporation in which the offense is alleged to have been committed, the officer to whom the warrant is directed may pursue and arrest him anywhere in the State; or any person authorized to issue process under § 19.1-90, of a county or corporation other than that in which the warrant was issued, on being satisfied of the genuineness thereof, may endorse thereon his name and official character, and such endorsement shall operate as a direction of the warrant to an officer of such endorser’s county or corporation.”

It is my opinion, therefore, that in the factual situation posed by your question, a sheriff or police officer of Prince Edward County may serve a warrant directed specifically to the sheriff of Halifax County if the warrant is properly endorsed by one of the officials of Prince Edward County listed in § 19.1-90.

POLICE OFFICERS—Training Standards—Applies to all appointed full-time after July 1, 1968.

July 20, 1970

THE HONORABLE P. P. WOODSON, Director
Law Enforcement Officers, Training Standards Commission

This will acknowledge receipt of your letter of recent date, which reads, in part, as follows:

“There still seems to be some confusion in the minds of some of the Commission members in reference to whether or not the authority to
establish mandatory training standards, as conferred upon the Com-
mission in Section 9-109, Paragraph (2) of the Act, applies to all
full-time law enforcement officers appointed subsequent to July 1,
1968, or whether the mandatory training standards would apply only
to those full-time law enforcement officers appointed subsequent to
the date that the compulsory minimum training standard are estab-
lished."

Section 9-109 (2) provides that the commission shall have the power to
establish compulsory minimum training standards subsequent to employ-
ment as a law enforcement officer and to establish the time required for
completion of such training. It is clear from this language that the compul-
sory minimum training standards may be adopted after a person's employ-
ment as a law enforcement officer.

Section 9-111 provides in part as follows:

"The provisions of this chapter shall not be construed to require
any police officers serving under permanent appointment on July one,
nineteen hundred sixty-eight to meet the training standards provided
for herein, nor shall failure of any such officer to meet such standards
make him ineligible for any promotional examination for which he is
otherwise eligible."

The language as used in § 9-111 is plain and unambiguous and its mean-
ing clear and definite. The statute provides only one exclusion to the training
standards and that exclusion applies to police officers serving under perma-
nent appointment on July 1, 1968.

In view of the foregoing, I am of the opinion that the minimum training
standards adopted by the commission will apply to all law enforcement
officers who do not fall into the category of a police officer serving under
permanent appointment on July 1, 1968, regardless of the date on which the
minimum training standards are approved.

PORTSMOUTH PARKING AUTHORITY ACT—Does Not Specifically Em-
power Police to Enforce Violations of Parking Regulations on Authority
Property.

THE HONORABLE GLENN YATES, JR.
Member, House of Delegates

In your letter of May 26, 1971, you inquire whether the Portsmouth Police
Department has the authority to enforce parking violations on parking lots
controlled by the Portsmouth Parking Authority.

The Portsmouth Parking Authority was created by Chapter 351 of the
Acts of Assembly of 1964 which is designated the "Portsmouth Parking
Authority Act.” Section 6(h) of that Act empowers the Authority . . . "to
establish and revise from time to time regulations in respect of the use,
operation, and occupancy of such parking facilities or part thereof.” The
Act itself does not specify that violations of the regulations established by
the Authority shall be punishable. The City may, however, by appropriate
ordinance, provide a penalty for violation of the regulations established by
the Authority. It is my opinion, therefore, that if such ordinance has been
passed by the City Council, the Portsmouth Police Department would have
the authority to enforce parking violations on Authority property just as
they would enforce any other municipal ordinance.

PRISONERS—Incarceration for Non-payment of Fines—Prohibited where
prisoner serving time solely for fines.
March 5, 1971

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in response to your letter of March 4, 1971, with reference to the effect of the decision of the Supreme Court of the United States of March 2, 1971, in the case of Tate v. Short which deals with the incarceration of prisoners for non-payment of fines. You inquire as to what action, if any, you should take as to those prisoners who are serving time solely as a result of a fine and prisoners who are confined not only for a definite term but who also will have to serve time or are serving time for non-payment of a fine.

I have carefully studied this decision and am of opinion that it is applicable to all prisoners now serving time solely for fines or who are or will be incarcerated as a result of an unpaid fine after serving a definite term. The question as to whether or not such prisoners should be released, however, is one that should be addressed to the Court wherein the punishment was imposed.

With this in mind, I believe it would be appropriate to notify the judge of each court, who imposed the sentence for fine or for a definite term and a fine, of the names of such prisoners now in your charge for such action as the judge may deem appropriate.

A copy of this opinion will be forwarded to all judges in the State as well as Commonwealth’s Attorneys for their information.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION — Architects, Professional Engineers and Land Surveyors—Board may promulgate rules and regulations governing professional assistance.

December 4, 1970

THE HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in response to your request for my opinion as to the authority of the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors to promulgate rules and regulations for architects, engineers and land surveyors governing professional practice. A copy of the proposed rules and regulations was attached to your request.

In my opinion, the proposed rules and regulations are authorized under Va. Code Ann. §§ 54-25 and 54-33 (2) (1950), as amended.

Va. Code Ann. § 54-25 provides:

"The Board may make all necessary rules and regulations not inconsistent with this chapter, . . . and as to all things necessary or expedient for the proper conduct of its examinations and the proper discharge of its duties."

Va. Code Ann. § 54-33 provides:

"The Board may revoke any certificate after thirty days' notice, with grant of hearing to the holder thereof, if proof satisfactory to the Board be presented in any one or more of the following cases:

* * *

"(2) In case the holder of the certificate has been found guilty by the Board, or by a court of record, of any fraud or deceit in his professional practice, or has been convicted of a felony." (Emphasis supplied.)
The proposed rules and regulations are by nature a clarification of the latter section. They cite specific instances or practices considered by the Board to be fraudulent or deceitful practices. I would, therefore, conclude that the regulations are a valid exercise of the power granted the Board by the General Assembly.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION — Barbers — When not required to be registered as barber teachers.

THE HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in response to your letter of November 2, 1970, in which you asked if registered barbers who conduct courses in advanced hair styling for the benefit of registered barbers must themselves take an examination to become licensed as “registered barber teachers.”

Virginia Code Ann. § 54-83.3 states:

“No person shall teach or attempt to teach in a school of barbering in this State without a current certificate of registration as a registered barber teacher.”

Virginia Code Ann. § 54-83.8 (1950), as amended, relates to the conduct of “Schools of Barbering.” However, neither this section nor any other section in the Code defines School of Barbering. In my opinion, the activity you suggest does not constitute operating a school of barbering within the meaning of the statute.

The section of the Code which specifically regulates Schools of Barbering, Virginia Code Ann. § 54-83.8, constantly refers to “Students” and specifically defines such students as those “entering a School of Barbering to learn the occupation to practice as a barber.” Clearly this does not contemplate persons who have learned the occupation and who have qualified to practice as barbers in this State but who are merely taking professional refresher courses and training.

I, therefore, am of the opinion that registered barbers who conduct courses in advanced hair styling in their shops are not conducting schools of barbering and therefore, do not have to take an examination and become licensed as registered barber teachers.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION — Board of Registered Professional Hairdressers—Authority to adopt rules and regulations governing beauty schools.

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in response to your letter of December 23, 1970, in which you requested my opinion as to the authority of the Virginia State Board of Registered Professional Hairdressers to enact certain rules and regulations governing “beauty schools.”

Specifically you asked the following questions:

“I. Does the Board of Registered Professional Hairdressers have the authority to regulate Beauty Schools?”

In my opinion the Board does have such authority for the following reasons:
Section 54-112.6 of the Code of Virginia authorizes the Board to "... make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the performance of its duties. . . ."

Section 54-112.12 (5) (B) of the Code requires that persons desiring to be examined for licensure as a Professional Hairdresser must have completed the required course in cosmetology "... at a school approved by the Board." Since the Board must approve such schools, it is, therefore, quite proper for the Board to enact rules and regulations establishing the standards a school must meet in order to gain the approval of the Board pursuant to this section.

You also asked whether the Board had the authority to regulate the "internal affairs" of a beauty school through its proposals that would require schools to transfer a student's hours of instruction from one school to another and prescribing a limitation on the number of scholarships, discounts, or other such devices that a school might offer. In my opinion, these regulations are a valid exercise of the Board's authority under the reasoning previously given if, in the opinion of the Board, these practices affect the educational quality of these schools to the extent that students would not receive proper education and instruction thereby making it undesirable for the Board to approve the school.

Your next question was whether or not the Board had the authority to regulate beauty schools by requiring each instructor in these schools to complete a Board-approved course in teaching techniques and to obtain a certificate of authorization from the Board to teach prior to instructing in the school. In my opinion, the Board does have the authority to require schools to have such instructors for the same reasons that I have previously stated.

Also questioned was the authority of the Board to "eliminate the right of appeal" of a school by deleting Section C, Subsection 7 (a) (b) of the Rules and Regulations of the Virginia State Board of Registered Professional Hairdressers and replacing same with new subsections. The present sections that you referred to do not grant a right of appeal. Rather, they provide a right to a hearing prior to such revocation or suspension of the Board's accreditation of such school. In my opinion any proposal by the Board to eliminate a provision granting a person a right to an administrative hearing prior to taking action affecting the substantial rights of parties involved would be improper as constituting a denial of due process.

Your final question related to the authority of the Board to approve an instructor course prior to the adoption of the regulations requiring instructors to be certified. In my opinion such action by the Board, though not improper, is conditional upon the requirements of the rules and regulations as they are finally adopted.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Engineers—Unlicensed person may not imply he is professional engineer.

THE HONORABLE FREDERICK T. GRAY
Member, House of Delegates

March 10, 1971

This is in response to your recent letter in which you stated that the Virginia Society of Professional Engineers asked for my views with respect to certain practices which have arisen in the State of Virginia. Specifically, you asked whether the use of the term "engineers" or "engineering" in certain firm names would be prohibited by statute when the firm is not engaged in the practice of engineering as is presently defined in the Code. A specific example that you submitted was "Sanitary Engineering Company, Incorporated", a concern engaged in the repair and installation of septic tanks but not in the practice of engineering.
In my opinion, the use of such titles which incorporate the use of the word "engineers" or "engineering" or words having a similar meaning is prohibited by § 54-27, Code of Virginia (1950), as amended. That section states, in part:

"... It shall be unlawful for any person to practice or to offer to practice the profession of engineering, architecture or land surveying, in this State, ... or otherwise assume, use of advertise any title or description tending to convey the impression that he is a professional engineer, architect or land surveyor, unless such person has been duly registered or is exempted under the provisions of this chapter." (Emphasis supplied.)

In my opinion, that language is sufficiently broad to prohibit the use of the term, "engineering", as stated in the example that you submitted to us because such usage does tend to convey the impression that the person or persons utilizing the term are professional engineers when, in fact, they are not registered as such or exempted under the provisions of this chapter.

I would hasten to point out, however, that not all usages of the term "engineer" or "engineering" or similar terms would be proscribed by § 54-27 of the Code. Only those uses of the term that would imply that the person is a professional engineer are prohibited. Section 54-17.1 (2) (a) states:

"'Professional engineer' shall be deemed to mean a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and experience; and who has complied with the requirements for certification and registration as set forth in § 54-27."

The example which you submitted is in the category referred to in § 54-27 of the Code and would be prohibited.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Hairdressers
—Board may prescribe qualifications for teachers.

June 22, 1971

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your recent letter in which you ask my opinion concerning the authority of the Virginia State Board of Registered Professional Hairdressers to enact certain regulations involving the following:

"... the licensing requirements and qualifications for cosmetology teachers and instructors which is set forth in the rules and regulations of the Virginia State Board of Registered Professional Hairdressers in Section C-4 d., e., and f., ..."

The regulations you question in pertinent part provide:

"d. On or after January 1, 1972, each instructor shall be a holder of a certificate of registration as a Registered Professional Hairdresser and be currently licensed in this State, and, in addition, shall have completed a course in teaching techniques. The minimum requirements of such courses shall comply with the standards prescribed by the State Board of Education for teachers in the fields of Trade and Industrial Education and which shall be approved by the Board.

e. On or before January 1, 1972, each teacher or instructor shall make application to the Board for authorization to teach in an ap-
REPORT OF THE ATTORNEY GENERAL

proved school on application forms provided by the Board. The certificate so issued shall be prominently displayed in the clinic area of the school.

f. Each teacher's certificate shall be renewed annually."

In my opinion, the regulations cited are proper extensions of statutory authority. Sections 54-112.6 of the Code authorizes the Board of Registered Professional Hairdressers to "... make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the performance of its duties, ..." Section 54-112.12 declares the eligibility requirements for persons applying to take the examination for licensure as a registered professional hairdresser. The pertinent part of that statute provides:

"All persons desiring to be examined and who file applications on or after January 1, 1963, shall, in addition to the foregoing, meet one of the following requirements:

B. Completed the required course in cosmetology, which course has been approved by the State Department of Education, at a school approved by the Board." Va. Code Ann. § 54-112.12 (5) (B) (1950), as amended. (Emphasis supplied).

It is clear that the legislature has placed upon the Board the duty of approving schools which its applicants for licensure must attend, and, therefore, the authority to promulgate regulations. A review of the Rules and Regulations of the Board indicates that the section in which the rule in question is found is titled "APPROVED SCHOOLS OF COSMETOLOGY AND BEAUTY CULTURE". The subsection clearly indicates that it is dealing with "teaching staff". It is my opinion that included in the authority to establish the minimum criteria for schools is the authority to prescribe the qualifications for the teaching staff in that school as the teaching staff is the heart and essence of any school. The intent of the statute is to prevent untrained persons from taking the examination and becoming licensed. Regulating the qualifications of the persons providing that training is an attempt to fulfill the aim of the statute and is, consequently, within the authority granted. The regulation appears to be reasonably calculated to achieve that end and is, therefore, not an unwarranted extension of the authority delegated.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Professional Engineers—Sections 54-17.1 and 58-376 apply to engineers of both major and minor branches of profession.

THE HONORABLE C. RUSSELL BURNETTE
Member, House of Delegates

December 15, 1970

This is in response to your letter of November 25, 1970, which was accompanied by two letters from a constituent of yours and which related to a construction of Chapter 3 of Title 54 of the Code of Virginia. Specifically, your letters requested my opinion as to the constitutionality of that section of the Code. Your constituent indicated that Chapter 3 of Title 54 was discriminatory in that it did not provide for the examination and certification of "professional engineers" of the so-called minor branches of the profession, e.g. nuclear, aeronautical, aero-space, geological, etc.

This definition was amended by the General Assembly in its 1970 Session. Va. Code Ann. § 54-17.1 (2) (a) (1950), as amended states:

"(2) (a) "Professional engineer" shall be deemed to mean a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical and engineering sciences and the principles and methods of engineering analysis and
design acquired by engineering education and experience; and who has complied with the requirements for certification and registration as set forth in § 54-27."

A further provision of the Code in Va. Code Ann. § 58-376 (1950), as amended, requires that any person practicing as a "professional engineer" shall obtain a revenue license tax prior to his engaging in the profession. It further states:

"No license hereunder shall be issued to any person desiring to practice engineering in this State unless such person exhibit a certificate or other evidence showing that the applicant is certified to practice as an engineer by the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors."

This section of the Code clearly prohibits a Commissioner of the Revenue from issuing the revenue license to a person who is unable, for any reason, to exhibit the certificate from the State Board. Your constituent indicated that this requirement raised a constitutional issue because engineers of the so-called minor branches of the profession were discriminated against in that the major thrust and emphasis of Chapter 3 of Title 54 was toward the so-called major branches of the profession.

In my opinion, there is no constitutional issue in question in that I find no evidence that the statutes contain discriminatory language which would violate the equal protection clause of the fourteenth amendment to the United States Constitution as all branches of the profession of engineering are included. The equal protection clause does not prohibit reasonable classifications which are considered by the legislators necessary to protect the public. The legislature found that it was necessary to require that engineers be licensed in order to protect the public health and safety. Va. Code Ann. § 54-27 (1950), as amended. I can find nothing in the Code which indicates that the method utilized by the General Assembly to protect the public was in any way unreasonable. Therefore, I must conclude that the statutes cited are constitutional.

March 8, 1971

THE HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in response to your letter of March 1, 1971, in which you request my opinion concerning the statutes regulating the practice of psychology in Virginia. You stated that § 54-102.14 (3), Code of Virginia (1950), as amended, provides certain exemptions from the statutes which regulate the practice of psychology in the State of Virginia. You further stated:

"The question has now been raised as to the possibility that this same exemption might apply to employees of an exempt individual. The actual situation provoking this question involves a licensed Psychiatrist who has psychological tests conducted on his patients by an employee, who is neither a licensed Psychiatrist nor a licensed Psychologist. It is readily understood that the Psychiatrist could per-
form functions in the course of his profession peculiar to the practice of psychology, without being licensed as a Psychologist, but can he employ unlicensed persons to render his service?"

In my opinion, the statute does not exempt unlicensed employees of psychiatrists, lawyers, social workers, etc. from the operation of Chapter 5.1 of Title 54 which regulates the practice of psychology in the Commonwealth of Virginia. As you are aware, § 54-102.14 (3) provides certain exemptions from the operation of the chapter. Specifically, it states:

"Nothing in this chapter shall be construed to regulate or limit: (3) activities in the course of the practice of any other recognized business or profession." (Emphasis supplied.)

In my opinion, "recognized business or profession" means a business or profession that has been recognized by the General Assembly by requiring licensure and is subject to the control of some board established by the General Assembly. Therefore, a licensed physician practicing as a psychiatrist would be exempt from the operation of Chapter 5.1 of Title 54 of the Code. However, the exemption applies only to the "practice" of that recognized business or profession. The term "practice" contemplates a continuous course of conduct in the field for which the person is authorized by law to become engaged, and it is limited to that person alone. Since it is unlawful for any unlicensed person to practice in a recognized business or profession, they are not allowed to practice it and thereby be exempted from the operation of Chapter 5.1 of Title 54. It is fundamental that wherever a person is licensed to perform certain functions, he cannot transfer his authority to his employee to perform these same professional functions. Therefore, the exemption involved in § 54-102.14 (3) of the Code of Virginia does not apply to employees of exempt persons and the employee of the psychiatrist mentioned in your example would be engaged in an unlawful act.


May 17, 1971

THE HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in reply to your letter of April 26, 1971, in which you request my opinion relative to an interpretation of § 54-1 of the Code of Virginia (1950), as amended. Your question relates to your responsibility with regard to examinations given by the Virginia Real Estate Commission of which you are the Secretary. Specifically, you stated, in part:

"In reviewing § 54-1 of the Code, I note that a copy of the examinations given by the Virginia Real Estate Commission shall be filed with the Secretary within ten days after the giving of the examination, which examination shall be accessible to any candidate who took the examination, or his authorized representative.

"Will you please advise if the provisions of this Section of the Code prohibit me as Secretary of the Commission from letting just anyone, regardless of who they might be, from reviewing the examinations administered by the Commission, or do the provisions of this Section of the Code only permit a candidate who took the examination or his authorized representative to review the examination?"
In my opinion, only a person who took the examination or a person authorized by him, may have access to the examination. These examinations are not available to "just anyone, regardless of who they may be."

Section 54-1 of the Code, as it relates to the Virginia Real Estate Commission, provides that within ten days after the examination was last given "anywhere" a copy of the examination would be filed with the Secretary of the Commission and would be accessible "... to any candidate who took the examination or his authorized representative." (Emphasis supplied). The clear language of the statute limits access of these examinations to these particular persons and to no others. As these examinations are professionally prepared for the commission and are used by other states, it would be my opinion that the examination need not be filed and made accessible to candidates except within ten days after the examination was given in this state or in any other state.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—May control sale of condominium property located outside of State.

REAL ESTATE—Condominiums Located Outside State—Real Estate Commission may regulate sale.

October 28, 1970

THE HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in response to your request "... that you advise if the provisions of Chapter 4.1 of Title 55, Code of Virginia, entitled "Horizontal Property," are applicable to property located outside the confines of the State of Virginia . . . ."

In my opinion the provisions of Chapter 4.1 of Title 55, of the Code are applicable to properties located without the State of Virginia. Va. Code Ann. § 55-79.16 provides "Prior to the time when a condominium project is to be offered for sale in this state, the developer shall notify the Commission in writing of his intentions to sell such offerings." (emphasis added). The Commission referred to is the Va. Real Estate Commission. The subsequent sections of the Code provide for the manner of notification, inspection and reporting to be made by the Commission subsequent to its investigation. Va. Code Ann. § 55-79.17, et seq. The language that I have underlined in the citation from § 55-79.17 of the Code indicates that the section applies to sales in this State rather than condominium projects built in this State. Therefore, the provisions of the statute would apply to any offer to sell a condominium project in this State whether the project be located in the State or without the State.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Refusal to grant licenses—Conviction of crimes.

September 29, 1970

THE HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in response to your letter of August 28, 1970, in which you request, on behalf of the Virginia Real Estate Commission, my opinion concerning § 54-750, Code of Virginia, 1950, as amended. You noted that § 54-750 of the Code provides, in part:
§54-750. Qualifications for license.—A license shall be granted only to persons who bear a good reputation for honesty, truthfulness and fair dealing and are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests to the public. No original license shall be issued hereunder to any person:

* * *

“(5) Who has been convicted, within the past five years, in a court of competent jurisdiction of this or any other state, or of the District of Columbia, or of the United States, of forgery, embezzlement, obtaining money under false pretenses, extortion, conspiracy to defraud, bribery, or other like offense or offenses, or pled guilty or nolo contendere to any such offenses, there being no appeal pending therefrom or the time therefore having elapsed.”

You ask:

“In view of the foregoing, may the Virginia Real Estate Commission, after holding a hearing in accordance with § 54-763, refuse to issue a license as a real estate broker or salesman to an applicant who has (within the past five years) been convicted for violation of Virginia Code § 18.1-204 (pandering), a felony.”

In my opinion, the Commission could not refuse to grant a license on the basis of this conviction alone. Section 18.1-204 of the Code (1950), as amended, defines pandering as:

“Any person who:

(1) Takes, harbors, inveigles, entices, persuades or encourages, either by threats or promises, or by any device or scheme takes, or causes to be taken, any female into a bawdy place, or elsewhere against her will, for the purpose of prostitution or unlawful intercourse; or

(2) Takes or detains a female unlawfully against her will with the intent to compel her, by force, threats, persuasions, menace or duress, to marry him or to marry any other person, or to be defiled; or,

(3) Being parent, guardian or any other person having legal charge of the person of a female, consents to her being taken or detained by any person for the purpose of prostitution or sexual intercourse; . . .”

A conviction of this crime would not per se affect a person’s “reputation for honesty, truthfulness and fair dealing . . .” Pandering, as defined by statute, is a crime that is personal in nature as opposed to the crimes of forgery, embezzlement, obtaining money under false pretenses, extortion, or conspiracy to defraud or bribery, which are considered as crimes against property rights. I would, therefore, conclude that pandering is not a crime that is similar in nature to those included in § 54-705(5).

PROFESSIONAL AND OCCUPATIONAL REGISTRATION — Virginia Board of Barber Examiners—Times for conducting examinations.

October 13, 1970

The Honorable M. Caldwell Butler
Member, House of Delegates

This is in response to your letter of September 23, 1970, in which you request my opinion as to the following:
“A valued constituent has failed an examination to be a barber teacher and is now advised by the Board of Barber Examiners that he cannot take the examination again for a period of six months. I would appreciate your opinion as to whether the Board of Barber Examiners can require this waiting period and refuse to give him an examination for which he is otherwise qualified.”

In my opinion, the Virginia Board of Barber Examiners can require the six months waiting period for persons who have failed the examination as a barber teacher. Va. Code Ann. § 54-83.10 (1950), as amended, states in part:

“The Board shall conduct examinations of applications for certificates of registration to practice as registered barber teachers, . . .”

The same section states that the examination shall be conducted no less than four times each year. The power given by this section to “conduct examinations” undoubtedly includes the power to determine how often a particular person could take the same examination. Obviously, the Board has made the determination that this type of restriction is necessary for the proper conduct of the examination and has acted within the discretion granted to it by statute.

PROFESSIONAL CORPORATIONS—Corporate Name—Proper when includes names of members.

PROFESSIONAL CORPORATIONS—License—No conflict where members licensed even though corporation not.

PROFESSIONAL CORPORATIONS—Fee Splitting—Member shares only with other “legal partners.”

PROFESSIONAL CORPORATIONS—Practice—Not prohibited as being “mercantile.”

PROFESSIONAL CORPORATIONS—Listings—In directory by members’ names, not corporate name.

PROFESSIONAL CORPORATIONS—Advertising—Not extend to corporate name on stationery or office sign.

PROFESSIONAL CORPORATIONS—Tax Benefits—Depend upon Internal Revenue Service rulings.

September 9, 1970

DR. FREDERICK U. BAUBLITZ, O. D.
President State Board of Examiners in Optometry

This is in response to your letter of July 9, 1970, in which you request my opinion as to several questions that have arisen with regard to the Virginia Professional Corporation Act, Chapter 7 of Title 13.1 of the Code of Virginia. The questions involved were raised in a letter to Mr. J. W. Doswell from an attorney, William H. Holden, Jr. The first question was whether § 54-388 (2) (g), which proscribes: “The advertising, practicing or attempting to practice optometry under a name other than one’s own name, as set forth on the certificate of registration;” acts to prevent optometrists from joining a professional corporation. You also stated that an example of the name of one such corporation would be as follows: “Samuel J. Cole, O. D., Curtis C. Shockley, O. D., Winston C. May, O. D., Ltd.”

In my opinion, the use of such a title would not be prohibited by § 54-388 (2) (g) of the Code. These persons would still be practicing in the
name under which they are registered. I do not feel that the simple addition of the word "limited" following the name constitutes the practicing of optometry under a name other than the practitioner's own name.

Your second question involved an interpretation of § 54-388 (2) (h) of the Code, which prohibits "the lending, leasing, renting or in any other manner placing his certificate of registration at the disposal or in the service of any person not licensed to practice optometry in this State;".

In my opinion, an optometrist who would work for a professional corporation of optometrists under Chapter 7 of Title 13.1 of the Code would not be in violation of § 54-388 (2) (h) of the Code. Virginia Code Ann. § 13.1-542 (1950), as amended, states:

"It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization from the Commonwealth of Virginia."

In my opinion, this section, states the clear legislative intent that a person, such as the optometrist, who desires to join a professional corporation, should be allowed to do so without jeopardizing his professional status in working for such a corporation. Furthermore, such a person is not working for another person who is not licensed to practice optometry. He is, in essence, working for himself and others similarly licensed through a corporation. Such an interpretation, of course, is strictly limited to the terms and requirements of the Professional Corporations Act.

Your third question revolved around an interpretation of whether or not the language in § 54-388 (2) (i) prohibited optometrists from joining professional corporations. That section prohibits "the splitting or dividing of a fee with any person or persons other than with a duly licensed optometrist, who is a legal partner." In my opinion, the person who joins a professional corporation is splitting fees only with the shareholders of the professional corporation, who, according to § 13.1-549 of the Code must be members of the same profession. Therefore, in this case, the shareholders, or the persons who would ultimately split the fees would be other optometrists. They would also be "legal partners" of the optometrists. In my opinion, the term "legal partner" is not intended to apply strictly to partnership, but is also broad enough to apply to the professional corporation.

Your fourth question involved an interpretation of § 54-397.1 of the Code, which makes it "unlawful for any optometrist to practice his profession as a lessee of any commercial or mercantile establishment. . . ." The term "mercantile" has been defined as "of, pertaining to, or characteristic of, merchants, or the business of merchants; having to do with trade or commerce or the business of buying or selling of merchandise;" Black's Law Dictionary, Fourth Edition. In my opinion, the practice of optometry through a professional corporation does not fit the definition of "mercantile," and therefore, would not be a prohibited act under § 54-397.1 of the Code.

You further requested my opinion as to whether or not the rules and regulations of the Virginia State Board of Examiners in Optometry, § 1 (d) and § 2 (c) would prohibit a professional corporation from listing as such in a telephone or other directory in its corporate name.

Section 1 (d) of the Rules and Regulations provides that:

"Listings in telephone or other directories should be confined to light faced type in the listing sections only, and should be restricted to name, location, and telephone number, and office hours and optometric specialties."

In my opinion, this rule would prohibit the corporate name from being used in the directory listing. The limitation as to name is intended to refer
to the name of the licensed optometrist and not to his corporate identity. Therefore, the use of his name in any other capacity would be prohibited.

Rule 2(c) the Rules and Regulations states:

"No optometrist shall advertise, practice, or attempt to practice under a name other than his own, except as an associate of, or assistant to an optometrist licensed under the laws of the Commonwealth of Virginia."

In my opinion, this section would not prohibit advertising the corporate name on signs, stationery, etc.

I trust that this information will be helpful to you and members of your profession. However, you should be aware that this information and these opinions are not binding upon the Internal Revenue Service and that in the final instance, the optometrist involved must rely on his attorney and the interpretations and rulings of the Internal Revenue Service, as to whether or not they would comply with the requirements of the Service in obtaining the tax benefits of a professional corporation.

PROPERTY AND CONVEYANCES—Delegation of Authority—Authority to make marginal releases, mark notes satisfied or make affidavits of lost notes.

December 22, 1970

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

I have received your letter of November 25, enclosing a Delegation of Authority from Sears, Roebuck and Co. to certain agents. You ask whether the instrument permits the agents, "to make a marginal release, to make a note satisfied or make an affidavit of lost note on behalf of the Company."

The Delegation of Authority permits the agents to execute and deliver on behalf of the company certain specified instruments. These instruments, when recorded, would have the same effect as a marginal release pursuant to Virginia Code § 55-66.3, whether or not the note had been lost. The marginal release is merely a short form of the formal release contemplated by the Delegation of Authority. In my opinion the specific authority granted by the Delegation carries with it the implied authority to make marginal releases, mark notes satisfied or make affidavits of lost notes, all in compliance with § 55-66.3 of the Code. I do not believe that this power would extend to partial releases under Virginia Code § 55-66.4. See Report of the Attorney General (1966-1967), p. 236.

PUBLIC FINANCE ACT—Water Revenue Bonds—Validity of bonds issued prior to July 1, 1971, not affected by 1971 General Assembly session.

June 29, 1971

THE HONORABLE FRANCES L. COX
Treasurer of the City of Fairfax

I have received your recent letter, from which I quote:

"I would appreciate your opinion on whether any new laws have been enacted by the 1971 session of the General Assembly of Virginia which in any way or manner affect the validity of $1,000,000 Water Revenue Bonds, Series 1970, dated December 1, 1970, of the City of Fairfax, Virginia, or the proceedings of the Council of said City relating to the authorization, issuance and sale thereof."
Chapter 224 of the 1971 Acts of Assembly makes certain changes in the Public Finance Act, in conformity to the revised Virginia Constitution. Section 15.1-190.1, as amended, specifically provides, however, for the continuing validity of bonds issued prior to July 1, 1971. I am aware of no other change made to date during the 1971 session of the General Assembly which would affect the validity of the Fairfax County Water Revenue Bonds, Series 1970.

PUBLIC MEETINGS—Executive or Closed Meetings—No notice of public hearing required prior to.

July 15, 1970

The Honorable Frank E. Mann
Member, House of Delegates

This is in reply to your letter of July 7, 1970, in which you request my opinion whether under § 2.1-344(a)(7) "a Notice of Public Hearing is necessary before a topic becomes an item for discussion in a Closed Meeting.”

Section 2.1-344(a)(7) of the Code is as follows:

"(a) Executive or closed meetings may be held only for the following purposes:
* * *

"(7) Discussion of any matter which will be the topic of a public hearing prior to a final decision, provided that notice of every such public hearing shall be published generally in the community not less than ten days prior to such public hearing.” (Emphasis added.)

I am of the opinion that a notice of the public hearing is not necessary before a topic which may be the subject of a hearing is discussed in an executive or closed meeting. The notice must be given after it has been determined to hold the hearing.

PUBLIC OFFICERS—Building Inspector—Qualification required.

TOWNS—Building Inspector—Public officer must qualify.

March 16, 1971

The Honorable G. R. C. Stuart
Member, House of Delegates

This is in reply to your letter of March 4, 1971, which reads as follows:

"It is provided as part of the duly adopted Building Code of the Town of Abingdon as follows: 'There is hereby created the office of Building Inspector for the Town of Abingdon. Such building inspector shall be appointed by the Town Manager, with the approval of the Town Council, and his term of office shall be at the will and pleasure of the Town Manager with the concurrence of the Town Council.’

'The present Building Inspector of the Town was appointed several years ago pursuant to the above provision, but he has never qualified by giving oath before the Circuit Court Clerk. His duties are those normally performed by a Building Inspector in any municipality.

'Please advise me if it is necessary for the Town's building inspector to qualify by giving the oath, and if so whether he could now qualify before the Clerk without being reappointed by the Town Manager with the concurrence of the Town Council.’"
A building inspector is a public officer. 42 Am. Jr. Public Officers § 16. By Section 34 of the Constitution of Virginia public officers elected or appointed are required to take the oath of office. See also § 15.1-38 of the Code of Virginia (1950), as amended.

I am of the opinion that it is necessary for the town's building inspector to qualify by taking the oath. In order to comply with § 15.1-38 I am of the opinion that the oath should be given at the beginning of the term. In this case the building inspector should be reappointed by the town manager, with the concurrence of the town council, before taking the oath.

PUBLIC OFFICERS—Compatability—Commonwealth's attorney may not be appointed county attorney.

VIRGINIA CONFLICT OF INTERESTS ACT—Commonwealth's Attorneys and Local Boards—No prohibition against employment provided disclosure and competitive bidding provisions complied with.

August 13, 1970

THE HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

I believe your inquiry of July 21, 1970, presents two questions for this office's consideration, each of which will be answered seriatim.

Question: May the Board of Supervisors appoint the Commonwealth's Attorney as County Attorney under § 15.1-9.1:1 of the Code of Virginia (1950), as amended?

Answer: No. Section 15.1-9.1:1 allows the governing body of any county to create an office of County Attorney. The law very clearly contemplates that upon the creation of such an office, the Attorney for the Commonwealth is relieved of the duty of “advising the governing body, of drafting or preparing county ordinances and of defending or bringing civil actions in which the county or any of its officials shall be a party.” Additionally, § 15.1-50 clearly states that no person holding the office of Attorney for the Commonwealth may hold any other office, elective or appointive, at the same time, with certain exceptions, none of which would be applicable to your inquiry.

Question: Does the new Conflict of Interests Law prohibit an Attorney for the Commonwealth from being employed as an attorney by various local boards, e.g., Board of Public Welfare, School Board, to represent them in matters requiring the services of an attorney not within the duties of the Commonwealth's Attorney?

Answer: No. Pursuant to § 110 of the Virginia Constitution, an Attorney for the Commonwealth is a separate constitutional officer. His office would be in and of itself a governmental agency as that term is defined in § 2.1-348 (a) of the Virginia Code. Consequently, if he were to enter into any contract with a governmental agency other than the one of which he is an officer, § 2.1-349 (a) (2) of the Code would be applicable.

I would advise pursuant to this section that if any contract were to be entered into by an Attorney for the Commonwealth with another agency of State or local government, that a full written disclosure of the attorney's interest in the contract be made available as a matter of public record in the office of the Attorney for the Commonwealth. Further, full written disclosure of the interest be made to the governmental agency with which the contract is proposed to be made. The contracting agency would then have to find as a matter of public record that the services to be acquired should not in the public interest be acquired through competitive bidding.

In view of my response to the above question, I feel it is unnecessary to consider your other inquiries relative to pending cases in which a Com-
monwealth's Attorney is representing local boards of government pursuant to the provisions of former § 15.1-67 of the Code.

PUBLIC OFFICERS—Compatibility—Deputy clerk of municipal court may not serve as an employee of police department. 

The Honorable Quin S. Elson, Judge 
Municipal Court of Fairfax

In your letter of April 20, 1971, you inquire whether a deputy clerk of the Municipal Court of the City of Fairfax may simultaneously be employed by the police department of the City of Fairfax either in the position of a police officer or as a civilian employee.

The duties of a deputy clerk of a Municipal Court as outlined by §§ 16.1-58 and 16.1-59 of the Code of Virginia, (1950), as amended, include the authority to issue arrests and search warrants, subpoenas for witnesses, and any other processes which could be issued by a Justice of the Peace. As an employee of the police department or as a police officer, it would be difficult for a deputy clerk to exercise the required judicial discretion if confronted by a police officer with a demand for the issuance of legal process. This office has previously ruled that the Clerk of a County Court could not serve as an employee of the County Sheriff. This ruling is found in a letter to the Honorable Alaric R. MacGregor, dated May 28, 1970, which is found in the Report of the Attorney General (1969-1970), at p. 41, a copy of which is enclosed.

I am therefore of the opinion that a deputy clerk of a Municipal Court may not serve as an employee of the police department either as a police officer or as a civilian employee.

PUBLIC OFFICERS—Compatibility—Town mayor may also serve as substitute county judge.

The Honorable J. Segar Gravatt, Judge 
Nottoway County Court

In your letter of March 19, 1971, you inquire whether the mayor of an incorporated town may simultaneously hold the office of substitute county judge in the county in which the town is located.

There are no statutes in the Code of Virginia which would prohibit the same person from holding both positions, and the two offices are not in themselves incompatible. As to the performance of judicial duties in different capacities by a single individual, the Code of Virginia, in § 16.1-20, specifically provides, in pertinent part:

"... The same person may be appointed and serve as the substitute judge of two or more courts not of record. And the judge of a court not of record may be appointed as the substitute judge in an adjoining county or city, and shall be exempt from the residence requirements of § 16.1-12."

Thus it is contemplated that judicial duties may be exercised in courts not of record, which would include a mayor's court, in different jurisdictions by the same person. I am of the opinion, therefore, that the mayor of a town may be appointed to hold the office of substitute county judge while retaining his office as mayor.

PUBLIC OFFICERS—Compatibility of Office—Assistant Commonwealth's Attorney may not also serve as member of Parks Commission.
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE JOHN ALEXANDER
Commonwealth's Attorney for Fauquier County

July 9, 1970

I am in receipt of your inquiry of June 25, 1970, which reads as follows:

"The Assistant Commonwealth Attorney of Fauquier County, who is, in part, compensated by the County for his duties incident to that position has recently been appointed by the Town Council of the Town of Warrenton to serve on a Parks Commission established jointly with Fauquier County pursuant to Section 15.1-273 of the Code of Virginia, 1950, as amended. The Commission consists of five members appointed by the Board of Supervisors of Fauquier County and two members appointed by the Town Council of the Town of Warrenton. No funds have been appropriated by either the County or the Town to compensate any of the members.

"Please advise me as to whether it is a violation of the Virginia Conflict of Interests Act (Acts of Assembly Chapter 463) for the Assistant Commonwealth's Attorney to serve upon this joint Parks Commission."

Your inquiry raises not a question of conflict of interest but a question of compatibility of office which would be controlled by § 15.1-50 of the Code of Virginia (1950), as amended. This section reads in part that "no person holding the office of . . . attorney for the Commonwealth . . . shall hold any other office, elective or appointive, at the same time. . . ." with certain exceptions, none of which appear to be applicable.

It appears that a member of the Commission would be an officer and this office has consistently ruled that the prohibitions applicable to the attorney for the Commonwealth would be applicable also to his deputies and assistants.

I am therefore of the opinion that the assistant in your office may not hold both the position as an assistant Commonwealth's Attorney and a member of the Parks Commission.

PUBLIC OFFICERS — Compatibility of Offices — State Council of Higher Education—University professor may not serve on.

PUBLIC OFFICERS — Compatibility of Offices — State Council of Higher Education—School superintendent may serve on.

THE HONORABLE CYNTHIA NEWMAN
Secretary of the Commonwealth

July 30, 1970

I have your letter of July 6, 1970, concerning the State Council of Higher Education.

In your letter you ask if a faculty member of a private institution of higher education and a superintendent of schools of an independent city in Virginia may serve on the Council.

Section 23-9.3 of the Code of Virginia provides:

"No officer, employee, trustee or member of the governing board of any institution of higher education, no employee of the Commonwealth or member of the General Assembly or member of the State Board of Education shall be eligible for appointment to the Council. . . ."

I am of the opinion that a faculty member of an institution of higher education may not be appointed to the Council. Since the statute does not limit "any institution of higher education" to public institutions, the prohibition must be applied to private institutions as well. However, there is
nothing forbidding the appointment to the Council of a superintendent of schools of an independent city in Virginia. A superintendent is not an employee of the Commonwealth, but rather of a locality. Accordingly, a superintendent may serve on the Council.

PUBLIC SCHOOLS—Teachers' Contracts—When notice of termination may be given.

December 29, 1970

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

I am in receipt of your letter of December 14, 1970, concerning the termination of a teacher's contract.

Section 22-217.4, Code of Virginia (1950), as amended, provides that a teacher who has not achieved continuing contract status must be given written notice of non-renewal of the contract on or before April 15 of each year. The Russell County School Board adopted a personnel policy which provides:

"In the event a teacher is not to be given a contract for the succeeding school year, the Superintendent or his designated representative must notify the teacher in writing not later than March 15, stating the reasons for his decision."

You have asked my opinion as to whether the April 15 date adopted by the Legislature prevails over the March 15 date adopted by the School Board.

You will note that § 22-217.4, Code of Virginia (1950), as amended, provides that written notice of non-renewal must be given "on or before April 15 of each year." (emphasis added). This statute does not preclude a school board from adopting an earlier date on which it must give notice of non-renewal. Accordingly, I am of the opinion that the March 15 date adopted by the school board does not actually conflict with the date adopted by the Legislature. Under the factual situation which you have set forth, the school board should give written notification of non-renewal not later than March 15.

PUBLIC SCHOOLS—Transportation—When school board may provide.

December 29, 1970

THE HONORABLE JAMES E. JARRELL, JR.
Commonwealth's Attorney for Spotsylvania County

I acknowledge receipt of your recent letter concerning the transportation of certain students living in Spotsylvania County. According to your letter there are three children residing in Spotsylvania County who are wards of the local welfare department. These students are presently enrolled in the Fredericksburg New School, a private school for emotionally disturbed children. The school is located in the city of Fredericksburg. If the children were unable to attend the New School, they would be students in the Spotsylvania County school system. It is my understanding that the County does not contribute financially to the running of the school. The County does, however, help pay the children's tuition fees by directly appropriating a sum to the childrens' parents. You have asked my opinion as to whether the Spotsylvania School Board may provide transportation for these students.

Section 22-72.1, Code of Virginia (1950), as amended, provides that "County school boards may provide for the transportation of pupils. . . ." In a letter to Senator Echols, dated December 10, 1970, I gave an opinion concerning the use of buses for extracurricular activities. In that opinion,
I ruled that buses may be used by pupils enrolled in the school system, but that buses could not be used by non-students. I am of the opinion that the same ruling would be applicable here.

To rule otherwise would permit the county school board to furnish large scale transportation for non-sectarian private schools. By § 22-294.1, Code of Virginia (1950), as amended, the school boards were given this authority. However, in 1964 the General Assembly repealed this statute, thereby depriving the school boards of the authority to provide for transportation of students enrolled in private schools.

A program instituted by the Department of Education permits partial reimbursement of transportation costs of handicapped children. This program is limited, however, to students enrolled in public schools and does not include students enrolled in private schools.

Accordingly, I am constrained to believe that the Spotsylvania County School Board may not provide transportation for the three children who are attending the Fredericksburg New School.

PUBLIC SERVICE CORPORATIONS—License to Construct Hydroelectric Dam Required from State Corporation Commission.

STATE CORPORATION COMMISSION—Public Service Corporations—License for construction of hydroelectric dam.

October 22, 1970

THE HONORABLE ARTHUR R. GIESON, JR.
Member, House of Delegates

This will acknowledge receipt of your letter of October 10, 1970, in which you reviewed some of the aspects of the proposed Marble Valley Pumped Storage Project. You noted that the Virginia Electric and Power Company (VEPCo) secured a court order from a state court in order to obtain the right to enter upon private property for purposes of a feasibility study. You asked:

"Can a State Court issue a court order under state statutes to force landowners to give up property rights when the only application for a particular project has been filed with a federal agency? No application has been made to the State Corporation Commission."

In order for a public service corporation to construct in Virginia a hydroelectric dam across a navigable river, it must first obtain a license from both the Federal Power Commission (FPC) and the State Corporation Commission (SCC). Under the Federal Water Power Act (U.S.C.A. Title 16, §§ 791-823), a license must be obtained from the FPC for the construction of a hydroelectric dam on waters over which the federal government has jurisdiction. The case of United States v. Appalachian Electric Power Co. 311 U.S. 377 (1940), held that such a license must be obtained from the FPC even if the project is licensed by the SCC.

Section 62.1-85, Code of Virginia (1950), as amended, specifically provides that before construction may begin on a hydroelectric project, a license must be secured from the SCC. According to the requirements of the Code of Virginia, the application for such a license must contain essential facts in sufficient detail to enable the SCC to pass upon the merits of the application. It must be accompanied "by such maps, plans, and other information as may be necessary to give a clear and full understanding of the proposed scheme of development, and of dams, generating stations, or other major structures. . . ." See, § 62.1-85, Code of Virginia (1950), as amended.

It would appear that the General Assembly contemplated a thorough study of the site and surrounding area of each proposed hydroelectric project prior to the filing of an application with the SCC, for the Legislature,
in § 56-49(1) of the Code, provided that a public service corporation has the power:

"... to cause to be made such examination and surveys for its proposed line or location of its works as are necessary to the selection of the most advantageous location or route... or providing additional facilities, and for such purposes, by its officers and servants, to enter upon the lands or waters of any person but subject to responsibility for all damages that are done thereto."

The fact that an application has been filed with the federal agency only does not render Virginia law inapplicable or reduce the requirements for the content of the required application to the SCC. Apparently, the state court order was secured by the proposed applicant in order to enter upon certain property for purposes of conducting and completing feasibility studies. Without reading the court order to which you refer, or considering the evidence adduced to obtain it, I am of the opinion that § 56-49(1) of the Code is a proper legal basis for issuance of an order by a state court to insure the development of essential facts by a public service corporation for the purpose of filing the required applications with federal and state agencies.

PUBLIC WELFARE—Board—Appointments to.

WELFARE—Local Board of Public Welfare—Term of appointment.

June 14, 1971

The Honorable Virgil H. Goode
Commonwealth's Attorney of Franklin County

This is in response to your request for an opinion on the following:

"Since a Welfare Board member is limited to two terms of office, will a partial term served by appointment be considered as one of the two terms?"

I am assuming by "partial term" you may be referring to a person appointed to fill either the unexpired portion of a term or a full term of less than four years.

It is my opinion, that under the latter, but not the former, of these definitions, a person would be deemed to have served one full term. The Code section involved, § 63.1-39 of the Code of Virginia (1950), as amended, provides:

"The local boards in existence upon October one, nineteen hundred sixty-eight shall continue as heretofore constituted and the members of such boards in office on that date shall continue in office for the remainder of their terms. The members of each such local board first appointed under the provisions of this title shall be appointed initially for terms of from one to four years so as to provide for the balanced overlapping of the terms of the membership thereon and the members of a local board representing more than one county or city shall be appointed initially for such terms, of not less than one nor more than four years, as may be determined by the governing bodies of their respective counties and cities. Subsequent appointments shall be for a term of four years each, except that appointments to fill vacancies shall be for the unexpired terms. No person shall serve more than two consecutive terms of office and the term of office being served on June twenty-eight nineteen hundred sixty-eight, if a full term, shall constitute the first of such terms; provided, however, that this section shall not apply where the officer in charge of a department or division of public welfare of a county or city is..."
constituted the local board. For the purpose of succession, all appointments except those to fill a vacancy created other than by expiration of a term, shall be deemed a full term of office."

It is readily apparent that this section contemplates that the first series of appointments under the 1968 amendments would be for terms of from one to four years. However, the General Assembly does not distinguish between terms for periods of less than four years and four year terms; consequently, an appointment for one of the initial periods of less than four years would be deemed to be a full term.

In the event that a person is appointed to fill an unexpired term on the Board, § 63.1-39 of the Code does not contemplate that this is to be treated as a full term. You will note the last sentence of that section provides:

"For the purpose of succession, all appointments except those to fill a vacancy created other than by expiration of a term, shall be deemed a full term of office."

Therefore, anyone who is appointed to an unexpired term shall not be deemed to serve a full term and would be eligible subsequently to serve two full four year terms, but anyone who is appointed to serve an initial term of less than four years would only be eligible to serve one succeeding term of four years.

PUBLIC WELFARE — Local Records — Not available to welfare rights groups for potential memberships.

PUBLIC RECORDS—Local Welfare Lists—Not available to welfare rights groups for potential memberships.

THE HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

This is in response to your letter of June 23, 1970, in which you ask my opinion as to whether or not two representatives of the National Welfare Rights Organization have a right to secure a list of recipients of public assistance residing in Chesapeake, their names, categories of assistance, and amounts of grants for use in identifying welfare recipients in Chesapeake for potential membership in local welfare rights groups.

Section 63.1-53 of the Code of Virginia of 1950, as amended, provides:

“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 legitimate interest and persons specified hereinafter and in § 63.1-209. The local boards shall allow the Commissioner, the Director of the Virginia Commission for the Visually Handicapped, and duly authorized agents and employees of each, at all times, to have access to the records of the local boards relating to the appropriation, expenditure and distribution of funds for, and other matters concerning assistance and services under this title.

“Except as to the Commissioner, the Director of the Virginia Commission for the Visually Handicapped, and duly authorized agents and employees of each, records shall be made available as aforesaid only on an individual basis and the person, firm or corporation shall name the individual whose record is requested. It shall be unlawful for any person, firm, corporation, or association to use any name or list of names obtained directly or indirectly through access to such records for commercial or political purposes, or to publish the name of any child receiving assistance under the provisions of § 63.1-56 of the Code of Virginia, and any person violating these provisions shall be guilty of a misdemeanor and punished accordingly.”
Under this section the records in question can be disclosed only to persons having a legitimate interest therein. Legitimate interest does not include the use for commercial or political purposes.

While it is not stated that the National Welfare Rights Organization is a political organization and seeks the information for political uses, I gather from the letter to you requesting the information that the reason given by the organizers for obtaining the information is for potential membership in the local welfare rights group.

Unless it can be shown to the satisfaction of the local Board that the use of the information is for noncommercial or nonpolitical purposes, I am of the opinion that access to the records is improper.

RECORDATION—Recording of Instruments—Photostatic copies of signatures not acceptable for recording instruments.

May 24, 1971

THE HONORABLE EDITH H. PAXTON, Clerk
Circuit Court of the City of Staunton

I have received your recent letter enclosing copies of two instruments which have been presented to you for recordation.

The first instrument is a photostatic copy of a power of attorney containing no original signatures. The second instrument is designated a "Certificate Relating to Facsimile Signatures on Powers of Attorney" and is signed by the secretary of the corporation, attested and notarized. You ask whether these instruments may be admitted to record.

For the reasons set forth in my opinion of April 16, 1970, to the Honorable J. Fulton Ayres, Report of the Attorney General (1969-1970), p. 222, the first instrument may not be admitted to record. The photostatic copies of the signatures are not facsimile signatures and are not made so by the attachment of the second instrument. The second instrument could be recorded only as a part of the first and, having found the first not recordable, I am of the opinion that the second instrument should not be admitted to record.

RECORDS—Public—Where kept.

June 9, 1971

THE HONORABLE C. M. GIBSON, Clerk
Circuit Court of the City of Hampton

I am in receipt of your letter of June 4, 1971 regarding the disclosures which must be filed pursuant to the requirements of the Conflict of Interest Act, § 2.1-353 of the Code of Virginia (1950), as amended. You inquire as to where these disclosures, which by law are a matter of public record, should be filed.

Records required by law to be kept as a matter of public record should be kept where they can be inspected by any person interested. See 35 Words and Phrases, Public Record, p. 594. Disclosures should be kept, therefore, in any place accessible to the public during working hours.

REDISTRICTING—Effect on County School Board.

SCHOOLS—School Boards—Effect of redistricting.

June 17, 1971

THE HONORABLE VIRGIL H. GOODE
Commonwealth's Attorney for Franklin County

I am in receipt of your letter of June 10, 1971, concerning the effect of the redistricting of Franklin County on the county school board. In a letter to The Honorable Robert E. Brown, Commonwealth's Attorney for King
George County, dated June 3, 1971, a copy of which you will find enclosed, I had an opportunity to rule on the two questions which you have raised. As you will see from reading that letter, I am of the opinion that the terms of the school board members will be automatically vacated on December 31, 1971, when the redistricting becomes effective for the purposes of representation. Prior to that time, the presently existing magisterial districts will continue to serve as the basis for representation.

REDISTRICTING—Multi-member Districts Permitted When Representation is Proportional to Population.

REDISTRICTING—Students of College, Inmates of Hospital Counted by Census as Local Residents, Counted as Residents of Magisterial or Election District Where Institution Located.

REDISTRICTING—Courts Have Not Set a Permissible Percent Deviation From Average District Population.

March 30, 1971

THE HONORABLE J. B. WYCKOFF
Commonwealth's Attorney of Amherst County

I am in receipt of your letter of March 15, 1971, requesting a response to various questions you have presented regarding redistricting of magisterial districts for Amherst County.

Redistricting of counties must be done in the year 1971 by the boards of supervisors. I am enclosing for your aid a memorandum prepared by the Virginia Association of Counties which deals with local redistricting.

Your questions will be answered seriatim as follows:

Question No. 1: "In the Madison Heights section, a very small area has roughly sixty per cent of the county's population. Could this area, which has a common interest, be one district and have three supervisors elected at large or will it have to be broken down into three small districts?"

Answer: Article VII, § 5, provides for reapportionment of local governing bodies and states:

"The governing body of each county, city, or town shall be elected by the qualified voters of such county, city, or town in the manner provided by law.

"If the members are elected by district, the district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. When members are so elected by district, the governing body of any county, city, or town may, in a manner provided by law, increase or diminish the number, and change the boundaries, of districts, and shall in 1971 and every ten years thereafter, and also whenever the boundaries of such districts are changed, reapportion the representation in the governing body among the districts in a manner provided by law. Whenever the governing body of any such unit shall fail to perform the duties so prescribed in the manner herein directed, a suit shall lie on behalf of any citizen thereof to compel performance by the governing body.

"Unless otherwise provided by law, the governing body of each city or town shall be elected on the second Tuesday in June and take office on the first day of the following September. Unless otherwise provided by law, the governing body of each county shall be elected on the Tuesday after the first Monday in November and take office on the first day of the following January."
In the commentaries to these provisions, the revisors expressly stated:

"Nor does this provision require single-member districts. Multi-member districts are permitted so long as representation is proportional to population."

Additionally, Chapter 199 of the 1971 Acts of Assembly, which implements the provisions of the revised Constitution, permits two or more supervisors to be elected from a single-member district (provided the one man—one vote principle is complied with), stating:

"... Nothing in this section shall preclude the apportionment of more than one member of the governing body of any county, city, or town to a single district or ward."

The Madison Heights section of Amherst, containing sixty per cent of the county population may have three supervisors elected at large.

Question No. 2. "The Lynchburg Training School has slightly over 3500 inmates. So far it appears that these people are included in the Amherst County census total. Should they be included in the total for a district?"

Question No. 3. "The same question applies to Sweet Briar students."

Answer: I am enclosing a copy of an opinion of this office to the Honorable D. L. Parrish, Jr., Clerk, Circuit Court of Goochland County, dated March 31, 1971, which I believe is responsive to your inquiry.

Question No. 4. "What per cent deviation from the average district population (5200) would be permissible?"

Answer: I am also enclosing another opinion to the Honorable D. L. Parrish, Jr. dated March 5, 1971, which again I believe is responsive to your question. The courts have not set a per cent deviation which has been declared permissible.

REDISTRICTING—"One Man, One Vote;" Percent Deviation Should Be From Norm (Total County Population Divided by Number of Proposed Magisterial Districts).

THE HONORABLE D. L. PARRISH, JR.
Clerk, Circuit Court of Goochland County

March 5, 1971

I am in receipt of your inquiry of March 3, 1971, which reads as follows:

"In redistricting a county does a district with the least population have to be within 5% of the district with the largest population, or is it proper to take the total county population figure, divide it by the number of proposed magisterial districts so as to establish an average, and then stay within 5% of that average up or down?"

The Supreme Court of the United States, since the landmark case of Baker v. Carr, has set forth various standards that should be sought in determining "one man, one vote." Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and Wells v. Rockefeller, 394 U.S. 542 (1969), are two of the most recent announcements by the Supreme Court regarding applicable standards. The Court, though announcing standards that must be met, has not set forth a percentage that would be tolerable. What State legislators and local governing bodies must seek is the most equal set of districts possible, rather than attempting to meet a percent deviation that has been established.
I would suggest, however, that any percent deviation be calculated from the norm obtained by taking the total county population and dividing it by the number of proposed magisterial districts.

**REDISTRICTING—Ordinance—Effective date.**

**REDISTRICTING—Ordinance—Effect upon members of school board and local planning commission.**

June 14, 1971

The Honorable Andrew J. Ellis
Commonwealth’s Attorney for Hanover County

I have received your letter of June 9, 1971, requesting my opinion on the effect of the redistricting of Hanover County upon the school board and the planning commission.

I recently had an occasion to render an opinion to the Honorable Robert E. Brown, Commonwealth’s Attorney of King George County, a copy of which you will find enclosed, which relates to several of the questions which you have raised. As you will see from reading that letter, I am of the opinion that the effective date of a redistricting ordinance for the purposes of representation is December 31, 1971. On that date, the terms of the members of a county school board will be vacated automatically, and it will be necessary to appoint an entirely new board with the required staggered terms.

The redistricting will not effect the planning commission, and the members of that board should continue to serve until the expiration of their regular terms. Section 15.1-437, Code of Virginia (1950), as amended, provides that the members shall be residents of the county and shall be freeholders qualified by knowledge and experience to make decisions on questions of community growth and development. There are no other qualifications for membership on the local planning commission. Membership is not tied to district representation.

**REDISTRICTING—Students of College, Inmates of Hospital, Military Personnel Counted by Census as Local Residents, Counted as Residents of Magisterial or Election District Where Institution Located.**

March 31, 1971

The Honorable D. L. Parrish, Jr., Clerk
Circuit Court of Goochland County

I am in receipt of your letter of March 3, 1971, wherein you request my opinion whether in magisterial redistricting the inmates of the Virginia State Farm and the Industrial Farm For Women, both located in Goochland, must be included.

This same problem has arisen, as I am sure you are aware, in every county which has located within its boundaries any prison population, any institution of higher learning, any military reservation, or any hospital of a durational stay, for example, Central State Hospital.

In the case of Burns v. Richardson, 384 U.S. 73, 16 L.ed.2d 376, 86 S.Ct. 1286 (1966), the United States Supreme Court in ruling upon the validity of a Hawaii reapportionment based upon voter registration, stated:

“We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.”

The Court has very carefully in all reapportionment cases made no distinction as to what population basis it was referring to, allowing, as in the Hawaii case, a base of voter population instead of citizen population.
However, as pointed out in *Preisler v. Mayor of City of St. Louis*, 303 F. Supp. 1071 (E.D. Mo. 1969), a base of voter registration or some comparable base is not *per se* a constitutionally permissible basis for apportionment. It is constitutionally acceptable only if the result substantially reflects the result obtainable by the use of another permissible basis, such as total population. The Court in the *Preisler* case went on to state that:

“It cannot be contended seriously that elected officials represent only registered voters. The right to equal representation does not depend upon the extent of a person's political activity or his exercise of political rights.”

While such cases are helpful, in the Commonwealth of Virginia they would not be pertinent. Article II, Section 6 of the revised Virginia Constitution clearly states that in reapportionment:

“Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district.”

This language conforms as nearly as possible with the requirement of Article VII, Section 5, of the revised Constitution that in local political subdivisions when members are elected by districts, the districts “shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district.”

As pointed out in the Commentaries by the revisors of the Constitution, Virginia has consistently reapportioned herself after each federal census and has not in any recent time known a distinct departure from a population basis of representation. The revisors noted that they desired no departure from a population base of reapportionment due to the extensive amount of litigation in other States when they have gone to another base. In Virginia, therefore, total population and no other base must be used as the basis of reapportionment. It is clear by the requirement that all localities reapportion in 1971 that they are to take advantage of the recent decennial census which would be available.

The Supreme Court of Appeals of Virginia in the case of *Wilkins v. Davis*, 205 Va. 803, 808, 139 S.E.2d 849 (1965), in determining reapportionment on the basis of the census and whether deviation from the census to exclude military personnel was permissible, stated as follows:

“There was evidence that the military-related personnel were included in ascertaining that Virginia's population entitled her to ten congressmen. It is noted too that in the Virginia edition of the 1960 census report it is stated:

“'This report presents statistics on the number of inhabitants of the State and its counties or comparable areas.'

“'The extent of presentation of separate statistics for individual States is related, in part, to the Constitutional requirement that census figures serve as the basis for Congressional apportionment. [Art. I, § 2]**”

Consequently, in light of the above authority, I am of the opinion that if a county has located within its boundaries a college, hospital, or any other similar institution, whose inmates or students were counted by the census as local residents, then they must be counted as residents of the magisterial or election district in which such institution is situated.

**REGIONAL PLANNING—Comprehensive Plan—Local governing body may not adopt only part of plan.**
REPORT OF THE ATTORNEY GENERAL

COUNTIES, CITIES AND TOWNS—Regional Planning—Local body may not adopt only part of comprehensive plan.

THE HONORABLE CHARLES H. GRAVES
Director, Division of State Planning and Community Affairs

August 7, 1970

This is in response to your letter of July 30, 1970, in which you request my opinion as to the following:

"May a local governing body adopt the plan which was adopted by a planning district commission, but in its adoption take exception to certain specific items in the plan, which would then not be binding on the local government as set forth in Section 15.1-1407?"

In my opinion, the local governing body cannot amend the plan that is submitted to it by refusing to adopt specific items in the plan. Section 15.1-1406 (c) of the Code, as amended, provides:

"Upon approval of the comprehensive plan, or part thereof, by a planning district commission after such public hearing, it shall be submitted to the governing body of each governmental subdivision within the district for adoption and, upon adoption thereof by the governing bodies of a majority of such governmental subdivisions, the comprehensive plan, or part thereof, shall become effective with respect to all action of a planning district commission." (Emphasis supplied.)

The same section, § 15.1-1406 of the Code, provides in detail, the steps required in preparing the comprehensive plan. All parties have the opportunity to voice objections and make all necessary amendments prior to submission of the plan to the individual governmental units. Therefore, it is the clear intent of the Legislature that when the plan is submitted to the local governmental subdivision, that body must accept or reject the entire plan that is submitted to it. It cannot accept certain provisions and reject others.

SCHOOLS—Board Member—Town resident may not continue to serve on county board after town becomes city.

COUNTIES, CITIES AND TOWNS—Transition of Town to City—Town resident may not continue to serve on county school board.

PUBLIC OFFICERS—School Board Members—Town resident may not continue to serve on county board after town becomes city.

THE HONORABLE H. BENJAMIN VINCENT
Commonwealth's Attorney for Greensville County

July 27, 1970

I am in receipt of your letter of June 8, 1970, wherein you inquire if a former ruling of this office to the Honorable R. B. Stephenson, Jr., Commonwealth's Attorney for Alleghany County, dated March 31, 1953, and found in the Report of the Attorney General (1952-1953), p. 204, a copy of which I am enclosing, would no longer be applicable in view of the recent amendment to § 15.1-995 of the Code of Virginia (1950), as amended.

The circumstances presented in the former ruling of this office and the circumstances which you present in your inquiry involve the situation where members of a County School Board are residents of a Town which subsequently undergoes a transition to a City. Section 15.1-995 (formerly § 15-94.1 referred to in the prior ruling of this office) reads as follows:

"Any county officer or judge of a county court of any county who resides in the county or in any town therein, and has an established
home therein, which homesite has become or hereafter becomes a part of a city since such officer's election or appointment, shall not vacate his office by reason of his residence in such city, but shall continue to hold such office so long as he shall be successively elected or appointed to the office held by him at the time of such transition. Any such officer shall for such purposes be deemed to be a resident of the magisterial district wherein the homesite before becoming a part of a city was. The provisions of this section shall not be applicable to members of the school board of such county, who shall be governed by § 22-68." (Emphasis supplied.)

The 1970 amendment added the last sentence.

Section 22-68 referred to in the 1970 amendment reads as follows:

"Each member of the county board at the time of his election shall be a bona fide resident of the magisterial district or town from which he is elected, and if he shall cease to be a resident of such district or town, his position on the county school board shall be deemed vacant, except in counties where magisterial districts have been abolished, in which case he may be appointed at large, but any member at large must be a bona fide resident of that county and upon his ceasing to be a resident of that county his position on the county school board shall be deemed vacant."

As you are aware, the former opinion of this office was to the effect that then § 15-94.1 being applicable to county officers was also applicable to members of the county school board, such members being officers of the county. Consequently under the former ruling members of the school board residing in a town which subsequently became a city did not vacate the office by reason of residence in the newly-formed city. However, it is clear that the 1970 amendment did overrule this opinion. Your inquiry is therefore answered in the affirmative.

Under the language of § 22-68 a school board member residing in a town which undergoes a transition to a city would in fact cease to be a resident of such county and his position on the school board must be deemed vacant. The vacancy takes place upon the effective date of the transition to a city rather than at the end of the member's existing term. School Board members are not constitutional officers and have no rights to remain in office other than under those provided by statute.

SCHOOLS—Compulsory Attendance—Application of § 22-275.4 of the Code.

DR. WOODROW W. WILKERSON, Superintendent
State Department of Education

I am in receipt of your recent letter in which you request an opinion concerning the construction of § 22-275.4 of the Code of Virginia. In your letter you ask if the school board prior to excusing a child solely on the basis of conscientious objection of the parent must obtain the recommendation of the principal, the superintendent of the schools, and the judge of the Juvenile and Domestic Relations Court.

Prior to an amendment in 1968, § 22-275.4 provided:

"Notwithstanding the provisions of § 22-275.1 of this article the school board shall on recommendation of the principal, the superintendent of schools and the judge of the juvenile and domestic relations court of such county or city . . . excuse from attendance at school any pupil who in their or his judgment cannot benefit from education at such school . . . and provided further that notwithstand-
ing any other provisions of this article, the school board shall excuse from attendance at school any pupil whose parent, guardian or other person having custody of such pupil conscientiously objects to his attendance at such school as is available, when such fact is attested by the sworn statement of such parent, guardian, or other person."

Based on that statute, this office gave an opinion to the Honorable Robert C. Goad, dated February 19, 1963, found in Report of the Attorney General (1962-1963) which provided that:

"... a school board has no discretion with respect to excusing a child once the sworn statement has been made."

In 1968 the statute was substantially amended. In 1970 it was further amended with a minor deletion which is not relevant here. The statute now provides:

"Notwithstanding the provisions of § 22-275.1 of this article the school board shall on recommendation of the principal, the superintendent of schools and the judge of the juvenile and domestic relations court of such county or city, excuse from attendance at school any pupil who in their or his judgment cannot benefit from education at such school, or whose parents conscientiously object thereto, provided no such child shall be so excused unless the written consent of his parents or guardian be given."

I am of the opinion that the school board may not excuse a child whose parents conscientiously object unless such an excuse has been recommended by the principal, the superintendent of schools and the judge of the Juvenile and Domestic Relations Court. Prior to the 1968 amendment such a recommendation was not required. It seems obvious that the 1968 amendment was enacted to change this.

SCHOOLS—Compulsory Attendance—Juvenile and domestic relations courts may enforce.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction Over Compulsory Attendance of Schools.

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth's Attorney for City of Norfolk

October 30, 1970

I am in receipt of your letter of October 16, 1970, concerning the School Board of the City of Norfolk. On August 14, 1970, the United States District Court for the Eastern District of Virginia entered a memorandum-opinion-order in Beckett v. School Bd. of the City of Norfolk. On August 27, 1970, the Court entered its final formal Order in the above-mentioned case. You raised several questions concerning the jurisdiction and authority of the Juvenile and Domestic Relations Court of the City of Norfolk and the School Board of the City of Norfolk to enforce the Virginia Compulsory School Attendance Law (§§ 22-275.1 et seq. of the Code of Virginia).

I have thoroughly reviewed the Orders issued by the United States District Court and find nothing in that Court's Orders which would pre-empt jurisdiction from the Juvenile and Domestic Relations Court of the City of Norfolk with regard to the enforcement of the compulsory attendance laws.

Accordingly, I am of the opinion that the Juvenile and Domestic Relations Court of the City of Norfolk retains full jurisdiction to hear, try and decide any case brought before it concerning the Virginia Compulsory School Attendance Law. The School Board's duty and obligation to enforce the compulsory attendance laws has not been affected by the issuance of any order by the United States District Court. The School Board has stand-
ing to prosecute truancy in the name of the Commonwealth, invoking the authority of the Commonwealth to such ends, as it always has.

SCHOOLS—Compulsory Attendance—Section 22-275.1 construed.

October 14, 1970

DR. WOODROW W. WILKERSON, Superintendent
State Department of Education

I am in receipt of your recent letter in which you request an official opinion on the construction of § 22-275.1 of the Code of Virginia which provides:

“Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the sixth birthday on or before September thirtieth of the school year and have not passed the seventeenth birthday, shall send such child, or children, to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualifications prescribed by the State Board of Education and approved by the division superintendent in a home, and such child, or children, shall regularly attend such school during the period of each year the public schools are in session and for the same number of days and hours per day as in the public schools.”

You asked if the section requires a child taught by a tutor to receive instruction for the same number of days and hours per day as if such child were attending the public schools.

I am of the opinion that the statute requires a child being taught by a tutor to receive regular tutorial instruction for the same number of days and hours per day as instruction is given in the public schools. The ambiguity arises by use of the term “such school” after the clause providing for tutorial instruction “in a home.” I think that it is clear, however, that the term “such school” is used synonymously with tutorial instruction “in a home” and that the statute requires a child receiving tutorial instruction to receive the same amount of instruction as he would have received were he attending public school.


June 17, 1971

THE HONORABLE JOHN C. STEPHENS, JR.
Commonwealth’s Attorney for York County

This is in reply to your recent letter in which you make several inquiries concerning the effect of House Bill 25 passed by the 1971 Special Session of the General Assembly upon the school district of the Town of Poquoson.

I will answer your questions seriatim.

“(1) Is Article VI, Schools, of the Charter of the Town of Poquoson (Acts 1952, Ch. 238, pg. 322, et seq.) superseded by the 1971 action of legislature?”

I am of the opinion that those provisions of Article VI of the Charter of the Town of Poquoson which are in conflict with the provisions of House Bill 25 will be invalid when House Bill 25 becomes effective July 1, 1971. Otherwise, the provisions of Article VI will remain in full force and effect.

“(2) Subsequent to July 1, 1971, will the Town School Board be entitled to appoint one of their members to serve on the York County School Board?”
Section 22-30, Code of Virginia (1950), as amended by House Bill 25 provides that the Town of Poquoson shall no longer be part of the York County School Division. Therefore, the Town of Poquoson is no longer entitled to representation on the York County School Board.

“(3) Is the York County Board of Supervisors required or permitted to lay levies and/or appropriate funds for the separate school division of the Town of Poquoson?”

Section 8(a) of Article VI of the Charter provides that “the county school board shall require the county treasurer to pay over to the town treasurer . . . From the amount derived from the county levy and/or appropriations for school purposes, a sum equal to the pro rata amount from such levy or appropriations derived from the town of Poquoson.” I am of the opinion that Section 8(a) of Article VI has not been affected by House Bill 25, and, therefore, will remain in full force and effect. I am of the further opinion that whenever the Board of Supervisors of York County makes levies and/or appropriations for school purposes, a sum equal to the pro rata amount from such levy or appropriation derived from the Town of Poquoson must be paid over to the Town of Poquoson.

“(4) At present, the Town of Poquoson constitutes in itself a separate magisterial district. If in the event of reapportionment, the present magisterial district (election district) must be expanded to include an area outside the Town limits, how will this effect, if at all, the representation on the York County School Board from the magisterial district (election district) including the Town of Poquoson and its separate school division?”

The county of York has neither the county manager nor the county executive form of government, and, therefore, its school board is selected pursuant to the provisions of Article 2, Chapter 6, of Title 22 of the Code of Virginia (1950), as amended. During the present special session of the legislature, the General Assembly enacted with an emergency provision § 15.1-571.1, Code of Virginia (1950), as amended, which provides that “representation on the governing body [of a county] shall be by election districts . . . such election districts shall also constitute school districts as prescribed by § 22-61 of this Code.” I refer you to the opinion of the Attorney General to The Honorable Robert E. Brown, Commonwealth’s Attorney for King George County, dated June 3, 1971, and found in the Report of the Attorney General (1970-1971), p. 87, for the effective date of an ordinance creating election districts.

In the event the Board of Supervisors of York County passes an ordinance reapportioning the County, and an election district is created which includes not only the Town of Poquoson but also an area outside its corporate limits, I am of the opinion that the trustee electoral board, pursuant to § 22-61 of the Code of Virginia, must select a school board representative from that portion of the election district which is not within the corporate limits of the Town of Poquoson. Those people residing within the corporate limits of the Town of Poquoson shall be represented on the town school board by representatives selected pursuant to § 22-89 of the Code of Virginia.

SCHOOLS—Retroactivity of Retirement Policy.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Faculty Members —Retirement.

March 4, 1971

DR. GRELLLET C. SIMPSON, Chancellor
Mary Washington College
This is in reply to your letter of February 22, 1971, in which you inquire as to whether the retirement policy adopted by the Rector and Visitors of the University of Virginia applies to faculty members who were employed by Mary Washington College prior to its adoption.

As you know, § 51-111.28, Code of Virginia (1950), as amended, permits institutions of higher education to establish and maintain a retirement system for their employees. That section also provides that an employee has the right to select membership in the institution's plan or in the Virginia Supplemental Retirement System. I am advised that the faculty of Mary Washington College, with a few exceptions, participates in the Virginia Supplemental Retirement System. I am further advised that the Rector and Visitors of the University of Virginia passed a resolution setting 70 as the mandatory retirement age for members of the faculty and further providing that upon the initiative of either the Chancellor or the faculty member, any member aged 65 or over may be retired or have his teaching load reduced.

Section 51-111.13, Code of Virginia (1950), as amended, provides as follows:

"Every employee accepting employment shall be deemed to consent and agree to any deductions from his compensation required by this chapter and to all other provisions thereof."

Section 51-111.16(a), Code of Virginia (1950), as amended, provides as follows:

"The General Assembly reserves the right to alter, amend or repeal any provision of this chapter or any application thereof to any person; provided, however, that the amount of benefits which at the time of any such alteration, amendment or repeal shall have accrued to the extent provided under subsection (c) of this section for the members or beneficiaries shall not be affected thereby. . . ."

Section 51-111.54, Code of Virginia (1950), as amended, provides in part as follows:

"Any member who is a State employee or a teacher, both as defined in § 51-111.10, and who attains seventy years of age shall be retired forthwith; provided that the employer may provide for the compulsory retirement of his employees at any age from sixty-five to seventy; . . . ."

In light of the authorities cited above, I am of the opinion that all faculty members who participate in the Virginia Supplemental Retirement System are bound absolutely by the retirement provisions of the Board of Visitors' resolution, regardless of the date they were employed. Furthermore, I am of the opinion that the resolution would be binding on those members of the faculty who subscribe to the Mary Washington College retirement plan, whether they became faculty members before or after the date of the resolution, unless their employment contract provides for a different retirement age, in which event, the terms of the contract would prevail.

SCHOOLS—School Board—Married students—Authority to assign.

THE HONORABLE VON L. PIERSALL, JR.
Commonwealth's Attorney for City of Portsmouth

October 1, 1970

I am in receipt of your recent letter in which you asked if the School Board of the City of Portsmouth has the legal authority to assign pupils who are married to each other to separate schools.
Section 22-218 of the Code of Virginia provides that certain persons must be permitted to attend school free of charge. Section 22-97 of the Code of Virginia gives the city school boards power to make rules for the government of the schools. Of course, all such rules must be reasonable and have a rational connection to some proper objective of the school board.

This office has previously advised that a school board may not arbitrarily exclude married students from school. Nor may the school board arbitrarily exclude married students from participation in all extracurricular activities. Accordingly, it would not be permissible for the school board to rule arbitrarily that married students must be separated by requiring them to attend separate schools. If, however, the school board has examined the problem and determined that the presence of a husband and wife as pupils in the same school will cause a disruption of the educational process, then I am of the opinion that such a rule or regulation would be valid.

SCHOOLS—School Board—Vacancy may be filled before enabling legislation in effect if service not begun before.

COUNTIES—Census—1960 figures apply to enabling legislation until 1970 figures become official.

THE HONORABLE R. H. PETTUS
Member, House of Delegates

I have your letter of July 10, 1970, concerning the Charlotte County School Board.

At its last session the General Assembly amended § 22-61 of the Code of Virginia to authorize the School Trustee Electoral Board of any county having a population of more than thirteen thousand but less than thirteen thousand five hundred to appoint one member at large to the county school board. According to the 1960 census, Charlotte County falls within the designated population figures. Pursuant to the new provision the School Trustee Electoral Board appointed one member at large to the Charlotte County School Board.

This appointment was made prior to the effective date of the new legislation. However, the appointee did not qualify or assume his new position prior to the effective date of the provision. The unofficial figures released for the 1970 census indicate that Charlotte County will not fall within the population figures set forth in the new legislation. You now ask if the appointment is void.

I am of the opinion that the appointment is not void. The School Trustee Electoral Board could properly designate the person to fill the vacancy prior to the actual existence of the vacancy so long as the appointee does not begin service until the vacancy occurs. I am enclosing a copy of an opinion letter to Honorable George Rich, Clerk, House of Delegates, dated March 12, 1970, which may be of interest to you in this regard.

The 1970 census is not yet official and is of no effect until it becomes official. Accordingly, Charlotte County may be classified under the 1960 census as a county falling within the designated population bracket, and so remains until the 1970 census becomes official unless the General Assembly provides otherwise.

SCHOOLS—School Boards—Adoption of regulations for teachers—Must be reasonably related to teachers' fitness and ability to do work.

THE HONORABLE R. PAGE MORTON
Judge, Charlotte County Court
REPORT OF THE ATTORNEY GENERAL

I am in receipt of your recent letter in which you inquire whether a regulation adopted by the Charlotte County School Board may be enforced. The regulation as stated by the Clerk of the School Board provides:

"The question was raised concerning the employing of school personnel who send their children to private schools which have been organized to prevent integration of students. A regulation was adopted by the Board effective for the school year 1971-72 that no public school employee be contracted who sends their children to a private school which has been established to avoid integration."

In determining whether to offer employment to a certain individual, a school board is authorized to consider a number of factors which bear upon that person's fitness or ability to perform the required work. These factors need not be limited to a teacher's classroom conduct. Indeed, the school board would be derelict in its duty if it did not consider all relevant factors.

In considering various factors, the school board is limited to consideration of information which has a reasonable connection to an employee's fitness or ability to work. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the Supreme Court of the United States held:

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

The *Wieman* case, in effect, requires that government imposed conditions on public employment be limited to those for which there is a reasonable relationship between the condition and the applicant's ability to perform the task or fitness for the position. *Wieman* also stands for the proposition that it is impermissible to draft a regulation so that it encompasses a broader class of persons than is reasonably necessary to effectuate the desired goal. Such an indiscriminate classification may be defective, because it is overly broad.

The courts continue to measure employment conditions by both of the standards used in *Wieman*. In *Shelton v. Tucker*, 364 U.S. 491 (1960), the Supreme Court struck down a statute which required each school teacher to disclose every organization to which he belonged within the past five years. Among the reasons given by the Court was that the statute was overly broad. In *Bruns v. Pomerleau*, 319 F. Supp. 58 (Md. 1970), the Court declared unconstitutional the action of a police commissioner who denied employment to an applicant because he was a practicing nudist. The Court held that the commissioner had failed to show that the basis for his ruling was reasonably related to the applicant's fitness or ability to perform his work.

The regulation adopted by the Charlotte County School Board violates both of the concepts enunciated in *Wieman*. It does not appear to relate to a person's ability or fitness to teach which is the primary concern of the School Board. If the regulation is an attempt to eliminate teachers who do not support the public school system, then the regulation is overly broad, as its effect is not limited to the accomplishment of that goal. Accordingly, I am constrained to believe that the resolution is invalid and not enforceable. This is not to suggest that a more narrowly drafted regulation would be unconstitutional. It is clear, however, that a school board may not seek a legitimate purpose by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

SCHOOLS—School Boards—Authority to demolish building. March 31, 1971

THE HONORABLE EDWARD MCC. WILLIAMS
Commonwealth's Attorney for the County of Clarke
This is in reply to your recent letter in which you inquire "as to whether or not the authority vested in the School Board of Clarke County gives them the right to tear down a building situated on school property without the approval of the Court." You have advised me that the building in question is in such disrepair that it cannot be used for school purposes, nor can it be insured. You further advised me that the School Board wishes to use the space for a playground and parking space.

Section 133 of the Constitution of Virginia places the supervision of county schools in the county school board. Furthermore, § 22-147, Code of Virginia (1950), as amended, provides that all school property is vested in the county school board with certain exceptions not applicable to the present situation. Section 22-161, Code of Virginia (1950), as amended, as read in conjunction with § 15.1-262, provides that the school board must obtain approval of the Circuit Court of any sale or exchange of school property. I have been unable, however, to locate any statute which would prohibit a school board from demolishing a building in such utter disrepair as described above without the approval of the Circuit Court. Therefore, I am of the opinion that the School Board may tear down the building without the approval of the Circuit Court.

SCHOOLS—School Boards—Authority to regulate teachers' dress code.

THE HONORABLE G. WOODY STAFFORD
Commonwealth's Attorney for City of Colonial Heights

February 25, 1971

I am writing in reply to your letter of February 18, 1971, in which you set forth the following question:

"Does the policy setting responsibilities for teachers dress code lie with the District School Board or with the Superintendent of Schools?"

This question was raised when the Superintendent of Schools for the City of Colonial Heights refused to follow the recommendation of the Colonial Heights School Board regarding the wearing apparel of female teachers.

Section 22-36, Code of Virginia (1950), as amended, provides:

"The powers and duties of the division superintendents shall be fixed by the State Board."

Nothing in the rules fixed by the State Board specifically authorizes superintendents to adopt dress codes for teachers.

Section 22-97, Code of Virginia (1950), as amended, provides in part as follows:

"The city school board shall have the following powers and duties: "

(1) Rules and Regulations.—To explain, enforce, and observe the school laws, and to make rules for the government of the schools, and for regulating the conduct of pupils going to and returning therefrom."

This provision authorizes the school board to make whatever regulations it deems necessary for both teachers and pupils. Accordingly, I am of the opinion that, pursuant to the authority vested in the Board by this provision, the Board may, in its discretion, adopt dress codes for teachers.
I am writing in response to your recent letter concerning the transportation of a child on a county school bus. In your letter you have posed the following question:

"May a child riding a County school bus to a school in the morning ride, with the written permission of his parents, a different bus in the afternoon to a destination not his home in order to participate in an activity not school related? If the child does take another bus to play sandlot football, for example, is the school liable in any way for any injury he might suffer therefrom?"

Section 22-72.1, Code of Virginia (1950), as amended, provides that:

"County school boards may provide for the transportation of pupils; but nothing herein contained shall be construed as requiring such transportation."

That section does not require that students always be picked up and discharged in front of their homes. Accordingly, I am of the opinion that the school board in the exercise of its discretion may permit a child to ride a different bus in the afternoon to a destination not his home in order to participate in an activity which is not school related.

In answer to your second question, I am of the opinion that no liability would be incurred should the student suffer an injury while participating in the activity which was not school related. This, of course, assumes, that the school board has taken reasonable steps to insure that the student does have the permission of his parents to travel to a destination not his home.

SCHOOLS—School Boards—Member of city council may not serve on school board.

This is in reply to your letter of December 18, 1970, in which you inquire as to whether a member of City Council may also be a member of the City school board.

Section 22-92, Code of Virginia (1950), as amended, provides as follows:

"No state officer, except a notary public, no city officer, no member of council, or any officer thereof, shall during his term of office be chosen or allowed to act as a school trustee; but this provision shall not have the effect of prohibiting a referee in chancery or commissioner in bankruptcy, or member of the board of health, from holding such office."

Section 22-94, Code of Virginia (1950), as amended, provides that the school trustees shall be members of the City School Board.

In light of the foregoing, I am of the opinion that a member of the City Council of Bristol, Virginia, may not be appointed to the Bristol, Virginia, School Board.

SCHOOLS—School Boards—Responsible for providing order at school events.

This is in reply to your letter of January 17, 1971, in which you inquire as to whether a member of City Council may also be a member of the City school board.

Section 22-92, Code of Virginia (1950), as amended, provides as follows:

"No state officer, except a notary public, no city officer, no member of council, or any officer thereof, shall during his term of office be chosen or allowed to act as a school trustee; but this provision shall not have the effect of prohibiting a referee in chancery or commissioner in bankruptcy, or member of the board of health, from holding such office."

Section 22-94, Code of Virginia (1950), as amended, provides that the school trustees shall be members of the City School Board.

In light of the foregoing, I am of the opinion that a member of the City Council of Bristol, Virginia, may not be appointed to the Bristol, Virginia, School Board.
This is in reply to your letter of recent date in which you inquire as follows:

"Our Sheriff’s Department is increasingly asked to provide police protection at certain school events such as athletic contests. This protection is hard to provide in normal working hours. It has been suggested that either an individual school putting on the event or the School Board pay the Deputy Sheriff to police these events. Therefore my question is whether or not it is legal for a school and/or School Board to voluntarily or be required to pay a Deputy Sheriff to police these school events in an official capacity while off of regular duty or if allowed while on regular duty as a supplement to regular pay."

Supervision of the schools is specifically conferred on the School Board by § 133 of the Constitution of Virginia. This responsibility is retained in the new Constitution (Article VIII) which becomes effective July 1, 1971. This language places upon the School Board the responsibility for maintaining order at school events. If the school budget provides money for this purpose, it is my opinion that the School Board could expend money to provide police protection at school events.

Section 14.1-73 of the Code of Virginia, 1950, as amended provides in part that the Compensation Board shall fix the salary of each full time deputy sheriff. A deputy sheriff on regular duty who is assigned to provide the protection at a school event would merely be carrying out his regular duties, and it is my opinion that he would not be entitled to any supplement to his regular pay. I am unaware of any provision which prohibits a deputy sheriff from receiving additional compensation. Therefore, I am of the opinion that with the sheriff’s permission, a deputy sheriff not on regular duty could provide the police protection at school events and could be compensated for this additional work.

I call to your attention § 14.1-11.4 of the Code which provides that the governing body may supplement the compensation of sheriffs and their deputies.

SCHOOLS—School Boards—Temporary loans.

THE HONORABLE GEORGE A. PRUNER
Commonwealth’s Attorney for the County of Russell

May 12, 1971

This is in reply to your recent letter in which you make the following inquiry:

"Russell County School Board proposes to borrow $100,000.00 at this time and apply the same on construction costs of the Honaker High School gymnasium, pursuant to Sections 22-120 and 15.1-545 of the Code of Virginia, the money to be repaid on December 11, 1971. The School Board passed a resolution on April 5, 1971, and the Board of Supervisors of Russell County likewise on the same day approved the borrowing of the money. . . . The Board of Supervisors has not laid its levy for 1971 and it probably will be the month of May before the levy is laid. . . . The School Board has kindly asked me to request of you a legal opinion as to the legality of the proposed loan. . . ."

Unquestionably, the school board may negotiate temporary loans under the authority of § 22-120, Code of Virginia (1950), as amended, for the purpose of paying construction costs. However, § 22-120 is restricted by the provisions of § 15.1-545, Code of Virginia (1950), as amended, and § 15.1-546, Code of Virginia (1950), as amended. See, Report of the Attorney General (1966-1967), p. 251. Section 15.1-545 provides in part that the
board of supervisors is authorized to borrow "a sum of money not to exceed one half of the amount reasonably anticipated to be produced by the county levy laid in such county for the year in which the loan is negotiated." Although the Russell County Board of Supervisors has not laid the county levy for the fiscal year 1971, they have laid the county levy for the fiscal year 1970, and this is the year in which the school board wishes to negotiate its loan. I am of the opinion, therefore, that such a loan would be permissible if the school board complies with the other provisions of §§ 22-120, 15.1-545 and 15.1-546, Code of Virginia (1950), as amended.

SCHOOLS—School Boards—Temporary loans—Meaning of cash appropriation.

THE HONORABLE WILLIAM R. BLANDFORD
Commonwealth’s Attorney for Powhatan County

This is in reply to your letter of June 23, 1971, in which you inquire whether federal and state appropriations and county appropriations for debt services and retirement of temporary loans constitute part of the cash appropriations contemplated by § 22-120, Code of Virginia (1950), as amended.

Section 22-120 of the Code provides in part as follows:

"... The school board of any county or the school board of any city, which may find it necessary to make a temporary loan, or loans, is hereby authorized to borrow a sum, or sums, of money not to exceed in the aggregate one half of the amount produced by the county school levy laid in such county or city for the year in which such money is so borrowed, or one half of the amount of the cash appropriation made for schools in such county or city for the preceding year. ..."

I am of the opinion that the term "cash appropriation" as used in § 22-120 of the Code means the entire county appropriation for schools, including appropriations for debt services and retirement of temporary loans, but excluding any appropriation from a county school levy. However, "cash appropriation" would not include federal or state appropriations. See opinion of the Attorney General to The Honorable Albert M. Shelton, Commonwealth’s Attorney for Scott County, dated September 24, 1970.

You advised that the total cash appropriation for the schools for the preceding year by the County was $669,840.00. This includes both appropriations for debt services and retirement of temporary loans. I am of the opinion that should the School Board of Powhatan County desire to negotiate a temporary loan, it may borrow one half of the $669,840.00 cash appropriation.

SCHOOLS—School Bonds—Leasing real estate from a private land developer.

THE HONORABLE DONALD W. DEVINE
Commonwealth’s Attorney for Loudoun County

I am in receipt of your letter of September 14, 1970, in which you asked: "may a county school board validly lease from a private land development corporation, real estate upon which has been constructed a school at the expense of the private corporation, which school is suitable in design for public school use?"

Section 22-161 of the Code of Virginia provides that: “the school board shall have the same power to sell or exchange and convey the real and
personal school property of the county as the governing body of the county
has with reference to the power of sale, exchange and conveyance of other
county property under § 15.1-262, provided that, in addition thereto, the
school board shall have power to lease, either as lessor or lessee, such
property. . . .

Section 15.1-262 of the Code of Virginia provides that "... no sale or
exchange of such property shall be made without the approval and ratifica-
tion of such sale and exchange by an order of the circuit court of the
county or by the judge thereof in vacation, entered of record. . . ."

In accordance with the Code provisions, I am of opinion that a county
school board may validly lease from a private corporation real estate upon
which has been constructed a school suitable in design for public use. The
school board must, however, comply with § 15.1-262 of the Code of Virginia
and obtain the approval and ratification of the circuit court of the county.

The opinion mentioned in your request found at 1955-1956 opinions of the
Attorney General page 175 and addressed to Robert S. Wahab, Jr., is dis-
tinguishable. In that case the county school board wished to expend public
funds for capital improvements on buildings which were to be leased by the
county or school board from the United States government. In your
case the expenditure of public funds for capital improvement is not con-
templated.

SCHOOLS—School Property—Conveyance of for nominal consideration pro-
hibited.

THE HONORABLE OLNEY W. EDWARDS
Member, House of Delegates

This is in reply to your letter of January 12, 1971, in which you inquire
as to whether the School Board of Dickenson County has the power to sell
certain school property which is no longer used for school purposes for a
price of $1.00.

Section 22-161, Code of Virginia (1950), as amended, provides in part
as follows:

"The school board shall have the same power to sell or exchange
and convey the real and personal school property of the county as
the governing body of the county has with reference to the power
of sale, exchange and conveyance of other county property under
§ 15.1-262, . . . ."

Section 15.1-262, Code of Virginia (1950), as amended, provides in part
as follows:

"The governing body of the county shall have the power to sell,
at public or private sale, or exchange and convey the corporate
property of the county; . . . provided, that no sale or exchange
of such property shall be made without the approval and ratification
of such sale and exchange by an order of the circuit court of the
county or by the judge thereof in vacation. . . ."

Property devoted to public use, such as school property, can only be dis-
posed of pursuant to authority conferred by the Legislature. Generally,
disposition must be for the benefit of the school district concerned, and
consistent with good business judgment and sound business principles. See,
nominal consideration would not seem to meet these requirements, but
would be tantamount to a gift. See, Report of the Attorney General (1946-
amended, do not give the school board the power to make a gift of school
property.
REPORT OF THE ATTORNEY GENERAL

In light of the foregoing, I am of the opinion that your question must be answered in the negative.

SCHOOLS—Tax-Sheltered Annuities.

THE HONORABLE EDWARD E. LANE
Member, House of Delegates

February 23, 1971

This is in reply to your recent letter in which you inquire as follows:

"Does a school board in the State of Virginia have the right to limit the number of companies authorized to sell tax-sheltered annuities under Section 403B of the Internal Revenue Code to school teachers or employees of the board or to deny to an employee the right to designate the company from which the annuity will be purchased?"

I must assume that the decision to limit the number of insurance companies will be for business reasons and that the selection of the participating insurance company or companies will be made on the basis of the informed judgment of the school board.

I am unaware of any law which would compel a school board to participate in a tax-sheltered annuity program. Inasmuch as such participation on the part of the school board is entirely voluntary, I am of the opinion that the school board, in its discretion, may determine on what terms and to what extent it will participate in an annuity program. Consistent with this determination would be the right to limit the number of participating companies, thereby limiting the right of the employee to designate the company from which the annuity will be purchased. In the absence of a clear showing of abuse of discretion, I must answer your question in the affirmative.

SCHOOLS—Teachers—Issuing contracts of employment.

THE HONORABLE E. W. CHITTUM, Superintendent
Chesapeake Public Schools

December 7, 1970

This is in reply to your recent letter in which you inquire as follows:

"1. Is it legal for a school board to issue contracts to teachers before appropriations or approval has been made for same by city council?
"2. What personal liability would there be to school authorities for salary payments involving the contracts, the school board knowing that the budget had not been approved by city council?"

Section 22-120, Code of Virginia (1950), as amended, provides in part as follows:

"... No county or city school board shall expend, or contract to expend, in any fiscal year, any sum of money in excess of the funds available for school purposes for that fiscal year, without the consent of the tax levying body. Any member of a county or city school board, or any division superintendent, or other school officer violating, or causing to be violated, or voting to violate, any provision of this section shall be guilty of malfeasance in office and shall be removed from office by the circuit court of the county, or corporation court of the city, upon proper proof of such violation."

In light of the foregoing, I am of the opinion that a school board may not legally issue contracts to teachers unless sufficient funds have been appropriated to meet such contracts by the tax levying body or the tax levying body has consented to such contracts. In the event that a school
board issues such contracts without sufficient funds being available, the individual members shall be guilty of malfeasance in office and shall be removed from office.

SCHOOLS—Teachers’ Contracts—Notice of nonrenewal—When required.

December 7, 1970

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

I am in receipt of your recent letter in which you set forth the following factual situation and inquiries:

"In accordance with Chapter 4 of Title 15.1 of the Code of Virginia of 1950, the County School Board of Gloucester County submitted to the Board of Supervisors of that County before April 1 an estimate of the amount of money deemed to be needed during the ensuing fiscal year ending June 30, 1971. Several of the teachers employed by the School Board were under the standard professional personnel contract on a twelve months basis ending June 30, 1970, and it was the intention of the School Board to reemploy these teachers under a similar contract. The budget as prepared by the School Board was reduced by the Board of Supervisors in practically all categories even though the amount in the instructional category was more than that appropriated in the previous year, and because of this lack of funds a contract was tendered to them on a ten months basis commencing August 23, 1970 and ending June 30, 1971. The notice in the second sentence of paragraph one of Section 22-217.4 was not given before April 15 for the reason above cited. On May 15, 1970, the School Board sent a contract on a ten months basis to the several teachers in question who contended that they should have had notice of non-renewal of the exact twelve months contract prior to April 15 and claimed renewal on that basis.

"I would like to inquire under such circumstances the following:

"1. Are teachers entitled to renewal of a contract in the exact terms of the previous contract as to length of work period and salary if notice of non-renewal is not given prior to April 15th of each year?

"2. Is the County School Board required to renew a contract on a twelve months basis if the Board of Supervisors has not appropriated sufficient funds as the School Board requested?"

Section 22-217.4, Code of Virginia (1950), as amended, provides in part as follows:

"If a teacher who has not achieved continuing contract status receives notice of re-employment, he must accept or reject in writing within fifteen days of receipt of such notice. Written notice of non-renewal of the contract must be given by the school board on or before April 15 of each year."

Subparagraph 9 of § 22-72, Code of Virginia (1950), as amended, provides as follows:

"The school board shall have the following powers and duties:

"(9) In general, to incur costs and expenses, but only the costs and expenses of such items which are provided for in its estimate submitted to the tax levying body without the consent of the tax levying body."

Furthermore, § 22-120, Code of Virginia (1950), as amended, provides in part as follows:
"No county or city school board shall expend, or contract to expend, in any fiscal year, any sum of money in excess of funds available for school purposes for that fiscal year, without the consent of the tax levying body."

In light of the foregoing, I am of the opinion that teachers who have not achieved continuing contract status must be notified of the non-renewal of their contract by the school board on or before April 15 of each year. Should the school board fail to give this notice on or before the 15th of April, such teachers are entitled to a contract identical to that which they received the previous year, unless the tax levying body has failed to appropriate sufficient funds to meet the payments under such contract or has refused consent to the school board entering into such contract. In no instance is the school board required to renew a contract which would require it to expend funds in the excess of those appropriated by the tax levying body without the consent of that tax levying body.

SCHOOLS—Teaching Scholarships—Subject to action by General Assembly.

THE HONORABLE DAVID F. THORNTON
Member, Senate of Virginia

February 18, 1971

I acknowledge receipt of your letter of February 11, 1971, in which you state as follows:

"Following the passage of the revised Constitution last November, it now seems feasible for Virginia students attending sectarian colleges in Virginia to become eligible for the State teaching scholarships administered by the State Board of Education. "I would like to request an opinion from you on the suggested procedure: Can expansion of this program be administered through a change of regulations by the Board of Education, or does it require legislation by the General Assembly?"

You are correct in your observation that the new Constitution authorizes the expansion of the student aid program. Section 11 of Article VIII provides in part:

"The General Assembly may provide for loans to students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education."

Section 11 specifically states that "the General Assembly may provide." This provision requires affirmative legislative action by the General Assembly before appropriations may be used in the manner permitted by the Section. The program presently administered by the State Board of Education may not be expanded to include students attending sectarian schools without the specific authorization of the General Assembly. Only the General Assembly is authorized to provide for such expansion.

SCHOOLS—Temporary Loan to County School Board—Federal and State funds not considered "cash appropriation made for schools."

THE HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

September 24, 1970

I have received your letter of September 14, in which you ask:
“May the Scott County School Board pursuant to Virginia Code 22-120 borrow $1,030,000.00, which is less than one-half total appropriations for school budget but more than one-half of the total local revenue raised for school purposes, excluding local sales tax returns?”

Virginia Code § 22-120 limits the amount of such temporary borrowing to, “one-half of the amount produced by the county [sic, “or city”] school levy laid in such county or city for the year in which such money is so borrowed, or one-half of the amount of the cash appropriation made for schools in such county or city for the preceding year.” This limitation has been construed as being the greater of the two amounts. Opinions of the Attorney General (1963-1964), p. 272. As Scott County does not have a school levy, its limitation is measured by last year’s cash appropriation for schools.

The State and federal governments provide a large portion of the funds for the operation of local schools. Local funds may be provided by school levies (Va. Code § 22-126) and local appropriations (Va. Code § 22-127). It is clear that the first of the alternative limitations of § 22-120 corresponds directly to local fund raising efforts under § 22-126. In my opinion, the second of the limitations was intended to correspond to local fund raising efforts under § 22-127.

My conclusions in this regard are reinforced by the strict construction called for by the highly punitive provisions of § 22-120:

“No school board in any county or city shall borrow any money in any manner for any purpose without express authority of law. Any loan negotiated in violation of this section shall be void. . . . Any member of a county or city school board, or any division superintendent, or other school officer violating, or causing to be violated, or voting to violate, any provision of this section, shall be guilty of malfeasance in office and shall be removed from office by the circuit court of the county, or corporation court of the city, upon proper proof of such violation.”

In my opinion the Scott County School Board may not borrow, pursuant to Virginia Code § 22-120, more than one-half of the local cash appropriation made for schools last year. State sales tax collections remitted to the county pursuant to Virginia Code § 58-441.48 should not be considered local revenue raised for school purposes. The proceeds of local sales and use taxes levied pursuant to Virginia Code §§ 58-441.49 and 58-441.49:1, if appropriated to the school board, would of course be treated as any other local cash appropriation made for schools.

SCHOOLS—Transportation—Extracurricular activities.

The Honorable M. Patton Echols, Jr.
Member, Senate of Virginia

December 10, 1970

I am writing in response to your letter of November 17, 1970, concerning the use of public school buses for extracurricular activities. In your letter you ask if the Arlington County public schools may use Arlington County school buses to transport spectators to and from extracurricular school activities when such activities occur after the regular school hours and outside of Arlington County. You have further asked whether non-students may be accommodated on buses and whether the passenger use of buses may be fixed on a fee basis.

Section 22-72.1, Code of Virginia (1950), as amended, provides that “County school boards may provide for the transportation of pupils. . . .”
This office has continually interpreted this statute as permitting County school boards to authorize the use by their schools of school buses for extracurricular activities so long as the activities are school connected or a part of the local school program. No charge may be made for transportation provided by a school board pursuant to this provision. All costs must be paid for from public funds.

Persons who are not students or staff members of the school to which the activity is connected should not be permitted to avail themselves of the transportation. If it is necessary that chaperones accompany the students, however, then adults may be accommodated on the buses for that purpose.

Transportation provided for permissible activities by the Arlington County School Board would not be limited to activities occurring in Arlington County. Nor would such transportation be limited to activities taking place during the regular school hours.

Your letter also asks whether a separate accounting of extracurricular bus use must be kept and whether there may be reimbursement of gasoline tax paid for such usage. I can find no statutes which require that a separate accounting be kept. I call your attention, however, to § 22-276, Code of Virginia (1950), as amended, which provides that:

"The State Board may make all needful rules and regulations not inconsistent with law relating to the construction, design, operation, equipment, and color of school buses. . . ."

If the State Board of Education, in the lawful exercise of its discretion, deems it necessary to keep a separate accounting, then such an accounting must be kept.

With regard to the refund of gasoline tax, § 58-715, Code of Virginia (1950), as amended, provides in part:

"Any person who shall buy, in quantities of five gallons or more at any one time, any motor fuel for the purpose of operating or propelling . . . (3) buses owned and operated by a county or the school board thereof while being used to transport children to and from public schools . . . shall . . . be reimbursed and repaid the amount of such tax or taxes paid by such person."

Section 58-716, Code of Virginia (1950), as amended, sets forth the procedure for obtaining a refund. I am of the opinion that § 58-715, Code of Virginia (1950), as amended, should be read so that it is consistent with § 22-72.1, Code of Virginia (1950), as amended. Since the latter statute is interpreted as providing for the use of buses for extracurricular school activities, the former statute should be interpreted to provide for a gasoline tax refund when the buses are so used. It would be inconsistent with the intent of the General Assembly to interpret the language "to and from public schools" to limit the refund to only those occasions when the buses are being used on regular routes to transport pupils to and from their schools for classroom instruction. The refund should be permitted whenever the buses are being used pursuant to § 22-72.1, Code of Virginia (1950), as amended.

SCHOOLS—Tuition—Reduced charges—Residency and domiciliary requirements.

THE HONORABLE O. BEVERLEY ROLLER
Member, House of Delegates

I am writing in reply to your letter of April 2, 1971, concerning residency requirements for reduced tuition privileges at State universities and colleges. Section 23-7 of the Code of Virginia provides:
"No person shall be entitled to the admission privileges, or the reduced tuition charges, or any other privileges accorded by law only to residents or citizens of Virginia, in the State institutions of higher learning unless such person has been domiciled in, and is and has been an actual bona fide resident of Virginia for a period of at least one year prior to the commencement of the term, semester or quarter for which any such privilege or reduced tuition charge is sought, provided that the governing boards of such institutions may require longer periods of residence and may set up additional requirements for admitting students."

This statute was last amended in 1962. As you will note, it requires residence and domicile in the State for a period of at least one year prior to the school semester for which the reduced tuition charge is sought. A reduction in the length of residency from one year to six months referred to by Mr. Talaber in his letter is probably a reference to § 24.1-41 of the Code of Virginia which sets forth residency requirements for voters.

If Mr. Talaber meets the residency and domiciliary requirements, then he is entitled to reduced tuition rates. Since his wife's residency in Virginia did not begin until June 1, 1970, she is not entitled to reduced tuition rates at this time.

SCHOOLS—Tuition—When reduced fees for State residents applicable.

August 19, 1970

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

I am in receipt of your letter of August 13, 1970, in which you request an opinion on the requirements to establish residency in the Commonwealth for the purpose of obtaining reduced in-State tuition rates at State colleges and universities.

Section 23-7 of the Code of Virginia provides that a person shall be entitled to reduced tuition rates when "... such person has been domiciled in, and is and has been an actual bona fide resident of Virginia for a period of at least one year prior to the commencement of the term, semester or quarter for which any such privilege or reduced tuition charge is sought. ..." The Code provision also authorizes governing boards of State colleges and universities to require longer periods of residence. This office has consistently interpreted the Code provision as requiring a person to live in Virginia for at least one year prior to the school term and during that year maintain a continuing intention to remain indefinitely in Virginia.

SHERIFFS—Eligibility—Sheriff and deputies must be eligible to vote.

September 24, 1970

THE HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

This is in reply to your letter of July 21, 1970, in which you ask if military personnel residing on a military base should be considered as residents of the area when the area is redistricted pursuant to statute.

Should military personnel meet all of the residency requirements of the State the mere fact that they reside physically on a military reservation does not preclude them from being residents of the area. See, William Evans, et al. v. Tillye Cormman, et al., 90 S.Ct. 1752 (1970).
POLICE OFFICERS—Eligibility—No restrictions as to age.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS—Definitions—State fire marshals not within definition.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS—Definitions—Park police and institutional police qualify according to duties.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS—Definitions—Sheriffs and deputies primarily engaged in administration, jail, court, and process serving, do not qualify.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS—Time Limitations—Commission has power to establish for completing minimum training.

September 8, 1970

THE HONORABLE P. P. WOODSON, Director
Law Enforcement Officers Training Standards Commission

This is in reply to your recent letters requesting opinions concerning the scope and applicability of §§ 9-108 and 9-109, Code of Virginia, 1950, as amended. I will answer your questions in the order submitted; however, I will join together those questions which relate to the same subject matter.

1. Your first question reads in part as follows:

"Please inform me whether or not a person between the ages of 18 and 21 could be legally appointed and sworn as a full-time law enforcement officer of a police department or sheriff's office. . . ."

Sheriffs are constitutional officers of the various counties and their office is provided for by Section 110 of the Virginia Constitution. For a person to be eligible to hold any office in a county, he must be eligible to vote. This eligibility requirement is set forth in Section 32 of the Constitution. Therefore, under present law a person must be twenty-one years of age to hold the office of sheriff. My predecessors have previously held that a deputy of an officer must possess the same qualifications as the principal. (See attached copy of Opinion to the Honorable W. E. Newman dated September 7, 1965, and found in the Annual Report of the Attorney General—1965-1966 at page 260.) Therefore, I am of the opinion that a deputy sheriff must be at least twenty-one years of age.

Police officers, unlike sheriffs, are not provided for in the Constitution. They are not elected nor do they hold any office in the jurisdiction they serve. I am unaware of any restrictions concerning the minimum age of police officers, and consequently, it is my opinion that police officers may be less than twenty-one years of age.

2. Your next several questions concern the definition of law enforcement officer as set forth in § 9-108 of the Code of Virginia. Your questions may be summarized as follows:

"Please inform me whether state fire marshals; park policemen of a municipal government or a political sub-division of the state; institutional policemen at state mental hospitals; sheriffs and deputy sheriffs who are primarily engaged in jail operations, court work, and legal processes are included in the definition of law enforcement officer as defined in § 9-108 of the Code of Virginia and are required to meet the compulsory training standards."

As used in the chapter dealing with Law Enforcement Officers Training Standards Commission, the term "law enforcement officer" means any full-time employee of a police department or sheriff's office which is a part of or administered by the State or any political sub-division thereof and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this State. Applying this definition to your questions, I am of the following opinions:
(A) State fire marshals would not come within the definition as they are not employees of a police department or sheriff's office.
(B) The duties of park policemen and policemen at state mental hospitals are difficult to define and may vary in the different localities. Therefore, cases involving such personnel will have to be examined on an individual basis and a determination made as to each factual situation. If such personnel are full-time members of a police department and whose duties encompass the prevention and detection of crime and enforcement of the penal, traffic or highway laws of this State, then they would come within the definition. If on the other hand these personnel are not full-time employees of a police department or their duties are administrative as opposed to the enforcement of the penal, traffic or highway laws of the State, then they would not be included in the definition.
(C) Sheriffs and deputy sheriffs who are primarily engaged in jail operations, court work, and legal processes would not fall within the definition since their duties are more administrative in nature and they would not be responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this State.

All persons who fall within the definition of law enforcement officer as defined in § 9-108 would be subject to the mandatory training standards.

3. Your last question reads in part as follows:

"Does the Commission have the power to establish the time required for completion of training relative to minimum training standards that will be established by the Commission?"

Section 9-109(2) gives the Commission the power to establish compulsory minimum training standards and to establish the time required for completion of such training. In view of this language, I am of the opinion that the Commission can establish the time required for the completion of such training, regardless of the date upon which the Commission establishes the minimum training standards.

SHERIFFS—Not Subject to Provisions of Law Enforcement Officers Training Standards.

POLICE OFFICERS—Chief of Police—May be subject to Law Enforcement Officers Training Standards.

June 30, 1971

THE HONORABLE C. W. WOODSON, JR., Director
Law Enforcement Officers Training Standards Commission

This is in reply to your letter of June 10, 1971, in which you request an opinion on the following questions:

1. Does a sheriff who is elected after July 1, 1971 come under the provisions of the Law Enforcement Officers Training Standards Commission Act?

Article VII, Section 4, of the Virginia Constitution provides, among other things, for the election of a sheriff by the qualified voters of each county and city. Article II, Section 5, of the Constitution provides that the only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year and be qualified to vote for that office, except as otherwise provided in the Constitution. It is my opinion that a sheriff, regardless of when he is elected, need only meet the
2. Does a chief of police appointed after July 1, 1971 come under the Act?

Section 9-111 of the Code, amended by Chapter 108, Acts of Assembly 1971, Special Session, contains a Grandfather Clause which provides that the provisions of Title 9, Chapter 16, shall not apply to any Virginia law enforcement officers serving under permanent appointment on July 1, 1971. Therefore, if the chief of police was under permanent appointment as a law enforcement officer on July 1, 1971, the provisions of the Act would not apply to him. On the other hand, if the chief of police was not under a permanent appointment as a law enforcement officer on July 1, 1971, then the provisions of the Act would apply.

SHERIFFS AND SERGEANTS—Deputies Must Possess Same Qualifications—Must reside in jurisdiction where appointed.

THE HONORABLE RAYMOND C. PACE
City Sergeant, City of Charlottesville

December 15, 1970

This is in response to your letter of December 10, 1970, which reads in part as follows:

“I have an opportunity to hire on a part-time basis, a man who was a full time deputy in Albemarle County and resides in Albemarle County, would it be legal for me to hire this man?”

The Office of City Sergeant is provided for in Section 120 of the Constitution of Virginia. Section 32 of the Virginia Constitution provides in part that for a person to be eligible to any office he must reside in the jurisdiction for which he is elected. This Office has held on numerous occasions that a deputy must possess the same qualifications as his principal. Therefore, since the Constitution requires that the City Sergeant be a resident of the jurisdiction in which he is elected, then his deputies must also be residents of the same jurisdiction.

This conclusion finds further support in the statutes of Virginia. Section 15.1-48 of the Code provides that the City Sergeant may appoint deputies, who may discharge any of the official duties of the City Sergeant during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law. This section further provides that before entering upon the duties of his office, the deputy shall take and prescribe the oath now provided for county officers. The language in this section leaves no doubt that a deputy city sergeant would be a city officer. Section 15.1-51 of the Code provides where officers shall reside. This section reads in part 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.”

I have examined the charter of the City of Charlottesville and find that it makes no exception to the residency requirements of city officers. The language of these Code Sections makes it clear that a deputy city sergeant must be a resident of the city for which he is appointed to serve. This is in accord with the views found in Reports of the Attorney General (1954-
1955), p. 211. I am enclosing a copy of this opinion for your information. Please note that §§ 15-485 and 15-487 referred to in that opinion are now §§ 15.1-48 and 15.1-51 respectively.

For the above stated reasons, I am of the opinion that the person you mention is not eligible for appointment as deputy city sergeant of Charlottesville.

SHERIFFS AND SERGEANTS—Deputy City Sergeant—Vacates office when moved from city.

SHERIFFS AND SERGEANTS—Jailor—Not required to meet residency requirements.

The Honorable Mervin A. Gage
City Sergeant of Hopewell

June 16, 1971

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

“I have an employee working in this office as a jailor and he is also sworn in as a Deputy City Sergeant. At the time I hired this man he was living in the City of Hopewell. Since then he has moved into the County of Prince George.

“I would like your opinion as to whether this man is eligible to continue in my employment in the City of Hopewell, and still live in the County.”

Section 15.1-52 of the Code provides in part that if a City officer is required by § 15.1-51 to be a resident of the City at the time of his election and thereafter removes himself from the City, his office shall be deemed vacant. Under the provisions of § 15.1-51 a City Sergeant is required at the time of his election to have resided one year next preceding his election in the City unless otherwise specifically provided by charter. I have examined the charter of the City of Hopewell and find no exceptions to the residency requirement for the office of City Sergeant. This office has previously ruled that a deputy must meet the same qualifications for office as his principal. See Report of the Attorney General, (1969-1970), p. 238. Since the City Sergeant of Hopewell is required to meet the residency requirement of § 15.1-51, it necessarily follows that your deputies are likewise subject to the same requirement. Therefore, the provisions of § 15.1-52 would apply to your employee in his capacity as a Deputy City Sergeant. In view of the foregoing, it is my opinion that since your employee, who is sworn in as the Deputy City Sergeant, has removed himself from the City of Hopewell, his office is vacant under the provisions of § 15.1-52. Therefore he can no longer act in the capacity of Deputy City Sergeant for the City of Hopewell.

Your letter further indicates that this employee is also hired by you in the capacity of jailer. A jailer is not an officer of the city and is not required to meet the residency qualifications set forth in section 15.1-51. Consequently, the provisions of § 15.1-52 would not be applicable. Therefore, I am of the further opinion that the employee described in your letter may continue working for you as jailer, even though he has removed himself from the City of Hopewell.

SHERIFFS AND SERGEANTS—Jail Occupancy—Control over.

December 8, 1970

The Honorable K. E. Kerkhoff
Sheriff, Page County

This is in response to your recent inquiry which reads as follows:
"Page County recently built a new jail which included an apartment to be used as living quarters for the jailer. At the regular Board of Supervisors' meeting on October 12, 1970, the Board ordered that the living quarters be left vacant.

"I respectfully request an opinion as to whether I, as Sheriff, have the responsibility to determine if a jailer, or which jailer, may move into these quarters. I would also like to know if I could move into these quarters myself, if no jailer were available."

The County Board of Supervisors is required by the provisions of § 15.1-257 of the Code to provide a jail. Section 53-168 of the Code provides that the Sheriff is the keeper of the jail. He is the legal custodian of those who are lawfully confined in it. (Watts v. Commonwealth, 99 Va. 872, 39 S.E. 706 (1970).) This office has previously ruled that the employees of the Sheriff are not subject to the jurisdiction of the Board of Supervisors and the Board cannot, for example, prescribe the manner in which the jailers are to work. (Report of Attorney General, 1948-49, page 214.) In addition, it has previously been the opinion of this office that the actual operation of the jail is the responsibility of the City Sergeant or the Sheriff. (Report of Attorney General, 1942-43, page 107.) I am advised that the jailer's quarters are located within the jail building itself, which is devoted exclusively to the use of the Sheriff's Department. It is my understanding that the purpose of having such quarters is for the use of the jailer under the direction of the sheriff.

I am, therefore, of opinion that the question of the occupancy of the jailer's quarters involves the operation of the jail and consequently lies solely within your jurisdiction. I am further of opinion that the Board of Supervisors is without authority to direct that the jailer's quarters not be occupied.

SHERIFFS AND SERGEANTS—Service Fees for Traffic Summonses Not Required to Be Paid in Advance.


THE HONORABLE THOMAS A. WILLIAMS, JR., Judge
Traffic Court, City of Richmond

December 14, 1970

This is in reply to your letter of December 1, 1970 in which you request an opinion as to whether it is necessary that a service fee be paid in advance of the time summonses from your Court are served by officers in other jurisdictions.

I have previously forwarded to you a copy of an opinion to the Honorable Charles B. English, Attorney General's Report 1967-1968, page 251, which concluded that the provisions of § 15.1-79 of the Code required officers to execute summonses from the Traffic Court of the City of Richmond. That opinion went on to say that the serving officer is entitled to a fee for this service; however, it left unanswered the question of whether the fee was to be paid in advance.

Section 14.1-69 of the Code sets forth the provisions for fees and mileage allowances to sheriffs and sergeants. This section provides that sheriffs and sergeants shall continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter. This section further provides that fees occurring in connection with any criminal matter as are collected by the Clerk of the Court shall
be paid into the treasury of the county or city for which the sheriff or sergeant, on account of whose services such fees are collected, is elected or appointed. The provisions of § 14.1-169 also bear on the question you have raised. This section provides in part that no officer shall be compelled to perform any service unless his fees, if demanded, be paid or tendered or otherwise satisfactorily secured him, except in criminal cases, cases in which the person suing is indigent, or unless performance of such services be directed by a court.

In view of the language in the above mentioned sections, and the nature of the jurisdiction of your court, it is my opinion that service fees for the service of summonses from your court need not be paid in advance, and if such fees are collected, that they be distributed in accordance with the provisions of § 14.1-69 of the Code.

SHERIFFS AND SERGEANTS—Warrants for violation of § 18.1-108 of the Code—By whom may be obtained.

October 8, 1970

THE HONORABLE KERMIT E. ALLMAN
City Sergeant for City of Roanoke

I am in receipt of your letter of recent date wherein you advise that as a result of a civil judgment your office executed a fieri facias and levied upon a 1961 Ford station wagon. You further advised that when you went to seize and sell the said station wagon, it was not available, and you understand that the defendant removed the vehicle from the State. Your letter refers to § 18.1-108, Code of Virginia, 1950, as amended, which makes it a criminal offense to remove goods which have been levied upon with intent to defeat the levy. The question you pose is upon whom is the burden for obtaining a criminal warrant under § 18.1-108, your office or the civil plaintiff.

I am not aware of any statute which places a burden on any particular person to obtain a criminal warrant. As you have pointed out in your letter, § 18.1-108 does not place the burden upon any particular person to obtain the warrant under that section. I am of the opinion that it would be proper for either your office or the civil plaintiff to obtain a criminal warrant under § 18.1-108 under the circumstances you have described.

STATE AGENCIES—Appropriations—May make inquiry on request for disbursement bearing reasonable relationship to use of bonds.

APPROPRIATIONS—State Agencies—May make inquiry on request for disbursement bearing reasonable relationship to use of bonds.

August 26, 1970

THE HONORABLE JAMES W. MOODY, JR.
Executive Director
Virginia Historic Landmarks Commission

This will acknowledge receipt of your letter of August 12, 1970, which states as follows:

“In accordance with Section 49 of the Appropriations Act of 1970, this Commission has taken a more rigid position than that taken in the past in examining carefully the purpose for which State appropriations to non-state agencies are to be used. This has caused some unhappiness, and the question has been raised whether a state agency can withhold appropriated state funds until such time as it understands fully and sympathetically how the money is to be used.”
Section 49, chapter 461 of the Acts of the Assembly of 1970 states, in part: "Requests for disbursements from appropriations shall be submitted through the listed State agency, which shall make such inquiry as it deems proper concerning the use of funds." As long as the inquiry bears a reasonable relationship to the use of state funds, I am of the opinion that your question should be answered in the affirmative.

STATE LIBRARY—Distribution of State and Federal Funds.

The Honorable Randolph W. Church
State Librarian

I am writing in reply to your letter of May 27, 1971, in which you ask:

"whether the State Library Board could incorporate in its regulations or contracts for allotting State and Federal library aid to the localities a requirement that such localities should, in order to receive grants, assure the State Library Board that local appropriations for these libraries in the fiscal year for which the grant is to be made would not be reduced below the local appropriations made for the prior fiscal year, and that such local appropriations budgeted for the current fiscal year would likewise not be reduced."

The purpose of such an assurance would be to prevent the State and federal subsidies from replacing local appropriations.

Section 42.1-1, Code of Virginia (1950), as amended, vests in the Virginia State Library the power and duty “... (8) To administer and distribute State and federal library funds in accordance with law and its own regulations to the city, county, town and regional libraries of the Commonwealth; ...” Section 42.1-52 of the Code provides that “The Board [which directs the State Library] shall establish standards under which library systems and libraries shall be eligible for State aid. ...” Section 42.1-51 of the Code provides that “The obligations of the various library systems and libraries receiving State aid shall consist in establishing and maintaining an organization as approved by the Board; ...” Finally, § 42.1-57 of the Code of Virginia authorizes the State Library Board to accept grants of federal funds for libraries and “... to allocate such funds to public libraries under any plan approved by the Board and the appropriate federal authorities. ...”

I am of the opinion that the statutes cited in the foregoing paragraph vest in the State Library Board ample authority to devise standards which the various library systems and libraries receiving State and federal aid must meet before becoming eligible to receive such aid. The standards might appropriately include a requirement that local appropriations not be reduced below the local appropriations made for the prior fiscal year, and that such local appropriations budgeted for the current fiscal year would not be reduced. Accordingly, I am of the opinion that the State Library Board is authorized to incorporate in its regulations or contracts a requirement similar to the one suggested in your letter.

STATE POLICE—Federal Fair Credit Reporting Act—Extent to which controlled by when making background information checks.

Colonel H. W. Burgess, Superintendent
Department of State Police

This is in reply to your letter of June 15, 1971, which reads as follows:
For many years, this Department has conducted a complete background investigation on all applicants to determine their suitability for employment. This background investigation includes credit checks with banks, merchants, individuals, credit bureaus, a neighborhood investigation and checking school, medical, police, military and employment records. We are also called upon to perform this function for law enforcement agencies from other states.

When the investigation is conducted in connection with prospective employees for this Department, the information is reviewed and filed. When it is being conducted for another agency, a copy of the complete file is furnished to the requesting agency. Our files are frequently reviewed by bona fide, prospective employers; and we frequently furnish information from these files in response to mail inquiries from prospective employers.

The recently enacted Federal Fair Credit Reporting Act, photocopy enclosed, has raised a number of questions.

I shall answer your questions seriatim:

"1. What information, if any, are we required to furnish a rejected applicant on demand?"

When the Department of State Police rejects an applicant for employment with the Department, and in the course of its investigation of the applicant has secured a consumer report, as defined by § 603(d), from a consumer reporting agency, as defined in § 603(f), the Department must follow the provisions of § 615(a) and advise the rejected applicant. If, however, the Department does not secure a report as noted above, the applicant need only be advised that his application for employment has been rejected.

"2. Are we required to furnish any information to a rejected applicant in the absence of a request?"

The answer to this inquiry is contained in my response to question 1.

"3. When we furnish information to another agency from our files, what is our obligation, if any, to the individual on whom the information is furnished?"

In this particular situation, the Department is assembling or has assembled information with reference to a prospective employee for another law enforcement agency or a prospective employer seeks information with reference to an employee or ex-employee of the Department. Under these circumstances, I am of the opinion that the Department of State Police is a consumer reporting agency as defined by § 603(f), in that a consumer report, as defined by § 603(d), has been prepared or made available to a third party on a cooperative non-profit basis. Under these circumstances, therefore, the provisions of § 609 with reference to disclosure to consumer, § 610 dealing with conditions of disclosure to consumers, § 611 with reference to procedure in cases of disputed accuracy, § 612 with reference to charges for certain disclosures, and § 613 concerning public record information for employment purposes, are applicable and must be complied with by the Department.

"4. When the information contained in our files was accumulated at the request of another agency, what obligation, if any, would we have to the individual?"

The answer to this question is contained in my response to question 3.

STERILIZATION—Therapeutic, Eugenic, Contraceptive, Distinguished—
Minor consent and/or parental consent—Sections 37.1-171, 32-423 and 32-137 necessary applications—Birth control measure.
The Honorable Dabney W. Watts  
Commonwealth's Attorney for the City of Winchester

I am in receipt of your letter of June 1, 1971, wherein you pose two inquiries relative to the sexual sterilization of a minor. Your inquiries are stated as follows:

(1) "May a salpingectomy be performed upon a 16 year old girl who is not afflicted with recurrent mental illness or with mental deficiency and is not a patient in an institution for the mentally ill, if because of impaired renal function further pregnancy would threaten and possibly terminate her life?"

(2) "In the event that Section 37.1-171 of the Code would permit such surgery, who would be the person giving consent to such an operation—the parents or the Court?"

Your first inquiry is answered in the affirmative. Sections 32-424 and 37.1-156 through 37.1-170 of the Code are eugenic sterilization statutes and only apply to persons afflicted with an hereditary form of mental illness that is recurrent or with mental deficiency. The above cited sections are inapplicable with respect to therapeutic sterilizations. Such conclusion is supported by § 37.1-171 of the Code which specifically reads in pertinent part as follows:

"Nothing in this chapter shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State... which treatment may incidentally involve the nullification or destruction of the reproductive functions."

Since the sterilization procedure appears to be both therapeutic and contraceptive in nature, as distinguished from eugenic or purely contraceptive, the procedural requirements of §§ 32-423 and 32-425 of the Code need not be followed. Such conclusion is dictated by § 32-427 of the Code which states:

"Nothing in this chapter shall be deemed to affect the provisions of § 37-246 (§ 37.1-171) of the Code of Virginia."

Therefore, in my opinion, the sterilization operation described in your inquiry would appear to be therapeutic and would fall within the purview of § 37.1-171 of the Code. Parenthetically, it might be noted that whether or not a sterilization operation is eugenic or contraceptive and/or therapeutic is a medical determination to be made by a physician.

With respect to your second inquiry, I refer you to § 32-137 of the Code of Virginia (1950), as amended, which was amended by the 1971 Special Session of the General Assembly and reads in pertinent part as follows:

"... Except as otherwise provided in § 18.1-62.1 (2) (e), any person under the age of twenty-one years may consent to medical or health services... required in case of birth control, pregnancy, and family planning..."

Thus, pursuant to the above Code section, in my opinion, the individual in question could, without parental consent, legally and validly consent to a contraceptive sterilization as authorized by § 32-423. In such event, the procedural requirements of Title 32 must be followed. It appears from your inquiry, however, that the proposed procedure would be both therapeutic and contraceptive in nature being intended to preserve the health and life of the individual in question. Therefore, in my opinion, when the procedure is both therapeutic and contraceptive, the mentally competent minor's consent would be sufficient and additional parental or Court consent would not be necessary.
REPORT OF THE ATTORNEY GENERAL

SUNDAY CLOSING LAW—Sales of Fish for Home Aquariums and Related Equipment or Supplies; Sales of Coins and Stamps as Collectors’ Items.

June 28, 1971

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth’s Attorney of the City of Norfolk

In a recent letter, you solicited my opinion regarding whether or not the sale on Sunday of tropical fish and other fish suitable for a home aquarium, fish aquariums and related equipment, as well as fish food is violative of § 18.1-358 of the Code of Virginia of 1950, as amended. You also ask whether or not the sale on Sunday of coins and stamps as collectors’ items is violative of the statute in question.

As you know, § 18.1-358 prohibits any person from engaging in work, labor or business or to employ others to engage in work, labor or business on Sunday except in household or other work of necessity or charity. The statute formerly specified that the exemption for works of necessity or charity shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, certain enumerated items of personal property. In 1964, the General Assembly deleted the words “or charity” from that portion of the statute relating to the enumerated classes of items which cannot be sold on Sunday notwithstanding the exemption relating to works of necessity or charity.

As you point out, the enumerated list of items includes “pets, pet equipment or supplies.” Webster’s Third New International Dictionary defines pet as “a domesticated animal kept for pleasure rather than utility.” In my opinion, fish suitable for home aquariums should be considered as pets, and, consequently, their sale, together with the sale of aquariums and related equipment on Sunday cannot be a work of necessity. I am not at all convinced, however, that fish food is “pet equipment or supplies”, but nevertheless, it would still be incumbent upon the seller to satisfy the trier of fact that the selling of fish food is a work of necessity. It should also be remembered that in view of the 1964 amendment, above referred to, the items in question might be sold under the exemption for works of charity, but, as with the exemption provided for works of necessity, it would be incumbent upon the seller to come forward with evidence satisfactory to the trier of fact that the seller did indeed engage in the sale as a work of charity.

With regard to the selling of coins and stamps as collectors’ items, I find no language in the list of enumerated items which otherwise prohibits the sale on Sunday of these items if such sale can be justified as a work of necessity. While it seems doubtful that the seller could carry this burden, nevertheless, the Virginia Supreme Court of Appeals has made it clear that this question is one for the trier of fact, applying the standard articulated by the Virginia Supreme Court of Appeals in such cases as Francisco v. Commonwealth, 180 Va. 371 (1942), which, of course, does not necessarily result in a uniform application of the law. If sales of coins and stamps as collectors’ items are consumated on Sunday as works of charity then, again, the seller must come forward with evidence satisfactory to the trier of fact.

TAXATION—Admission Taxes—When school sponsored events may be tax exempt.

November 30, 1970

THE HONORABLE RICHARD D. GUY
Member, House of Delegates

I have received your recent letter asking whether the City of Virginia Beach may exempt from its admissions tax, “admissions to high school football games and other school sponsored events.”
A locality is bound to follow state classification if it desires to impose a license tax. *Hill v. Richmond*, 181 Va. 744 (1943). The General Assembly has classified admissions in Virginia Code § 58-404.1, as follows:

"In accordance with the provisions of § 168 of the Constitution of Virginia, events to which admission is charged shall be divided into the following classes for the purposes of taxation:

"a. Admissions charged for attendance at any event, the gross receipts of which go wholly to charitable purpose or purposes."

"b. All other admissions."

I construe an admissions tax to be a tax upon the persons attending an event and not a tax upon the sponsoring organization. This is contrary to the view expressed in an opinion to Honorable Ernest P. Gates, Report of the Attorney General (1963-1964), p. 223. Nevertheless, the classification of § 58-404.1 is, in my opinion, a reasonable one.

I am of the opinion that admissions to high school football games and other school sponsored events may be exempted only if Virginia Beach exempts all admissions falling within § 58-404.1(a) and if such school sponsored events in fact fall within that category.

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**TAXATION—Assessments—May be charged and collected on real estate tax tickets.**

August 7, 1970

**THE HONORABLE M. A. FIREBAUGH**

Treasurer of the City of Harrisonburg

The City of Harrisonburg has adopted ordinances requiring certain assessments and charges to be collected as taxes. By your letter of July 23, you ask whether these assessments and charges may be charged on real estate tax tickets and collected as taxes are collected under Virginia Code § 58-965.

I am of the opinion that such a procedure would be proper.

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**TAXATION—Bankruptcy—Sale of delinquent lands.**

October 5, 1970

**THE HONORABLE A. C. WILLIAMSON**

Treasurer of Botetourt County

I have received your letter of September 30, in which you ask:

"Is there anything in the code which provides for the elimination of a tract of land from being advertised [pursuant to Virginia Code § 58-1029] if the owner of said tract is under Chapter 13 of the Bankruptcy Act?"

The Bankruptcy Court may, under § 614 of the Bankruptcy Act, enjoin you from proceeding with the sale of the property. In the absence of such an injunction, however, you should continue to take all steps necessary for the enforcement of the County's lien.

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**TAXATION—Classification of Real Estate for Purposes of Use Value Assessment—Locality may not restrict definition of property falling within any one class; may have control over property to be given relief.**

June 23, 1971

**THE HONORABLE M. PATTON ECHOLS, JR.**

Member, Senate of Virginia
I have received your letter of June 12, from which I quote:

"This law [1971 Acts of Assembly, ch. 172] requires any county which uses it to make special classifications for all four categories, namely, agricultural, horticultural, forest and open space (see § 58-769.6).

"§ 58-769.5 defines open space in various ways, one of them being 'or assisting in the shaping of the character, direction, and timing of community development'.

"Would it be permissible for a county to adopt an open space definition that would use only that portion of (d) rather than all of it in view of the requirement that such ordinance shall provide for ... all four classes of real estate?"

Virginia Code § 58-769.5(d) provides:

"Real estate devoted to open space use shall mean real estate when so used as to be provided or preserved for park or recreational purposes, conservation of land or other natural resources, floodways, historic or scenic purposes, or assisting in the shaping of the character, direction, and timing of community development, under uniform standards prescribed by the Director of the Commission of Outdoor Recreation pursuant to the authority set out in § 58-769.12, and the local ordinance." (Emphasis supplied.)

The clear intent of the General Assembly in enacting chapter 172 was to require the same standards to be used wherever a local use value tax ordinance is adopted. Indeed, as you point out in your letter, a locality may not pass an ordinance unless it gives tax relief to all four classes of property. In my opinion, a locality could not restrict the definition of property falling within any one class. To the extent, however, that the uniform standards to be prescribed by the Director of the Commission of Outdoor Recreation require compliance with local land use plans, the locality may have some control over the property which will be given relief.

You also ask:

"A secondary and related question is whether or not the reference in § 58-769.5(d) which mentions the 'standards prescribed by the director of the Commission of Outdoor Recreation' applies to the entire subsection (d) or whether it applies only to 'assisting in the shaping of the character, etc.'"

Had the General Assembly intended the standards to apply only to the phrase, "assisting ... development," there should have been no comma following the last word of the phrase. I construe the standards to apply to the entire subsection (d).

TAXATION—Clerk’s Fee and Writ Tax—Section 58-72 applicable to filing of petition.

February 1, 1971

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

I have received your recent letter enclosing copies of a petition and an answer in a suit to satisfy a judgment of the Circuit Court of Buchanan County. The judgment in question awarded alimony and child support and the husband and wife, having become reconciled, sued their minor children to release the husband's estate from the lien created thereby. You ask my opinion as to the correct amount of writ tax and clerk's fee to be charged on the filing of the petition.

In my opinion this is not merely the satisfaction of a judgment, but a
new cause for which a clerk's fee of $25.00 is provided by Virginia Code § 14.1-113. For the same reason, the $5.00 writ tax imposed by Virginia Code § 58-72 applies.

TAXATION—Confidential Information—Board of Supervisors may not permit a third party to examine completed applications for revision of real property assessments.

March 1, 1971

THE HONORABLE DONALD C. STEVENS
County Attorney for Fairfax County

I have received your letter of February 12, enclosing a Fairfax County form entitled, "Application for Revision of Real Property Assessment." The form contains questions asking for such information as the owner's claimed fair market value of the property, how this value was arrived at, the date and cost of construction and the amount of fire insurance carried.

You ask whether Virginia Code § 58-46 would prohibit the Supervisor of Assessments from showing the completed applications to a third party.

This office has previously ruled that a board of supervisors was prohibited by § 58-46 from examining personal property tax returns. Report of the Attorney General (1963-1964), p. 17. The information contained in a completed application would be of a much more confidential nature than that contained on a personal property return. In my opinion the Board of Supervisors may not permit a third party to examine the completed applications, except upon written order of the Governor.

TAXATION—County Budget—Power of county to levy taxes for creation of a reserve for capital improvements.

COUNTIES—Budget—May levy taxes for creation of a reserve for capital improvement.

June 29, 1971

THE HONORABLE ERNEST W. GOODRICH
Commonwealth's Attorney for Surry County

I have received your letter of June 9, in which you ask:

"May the Supervisors budget for capital outlay a specific sum of money not intended to be expended during the current tax year and thus build up a surplus of tax funds for later capital improvements, and, based on such budget, levy the tax?"

A county budget is for "informative and fiscal planning purposes only." Va. Code § 15.1-161. A capital improvements reserve would not, in my opinion, be inappropriate in such a budget. Taxes may be levied, however, only in such amounts, "as may be necessary to defray the county charges and expenses and all other necessary charges incident to or arising from the execution of [the board's] lawful authority." Va. Code § 15.1-544.

If the amount accumulated is unreasonable with respect to the foreseeable needs of the county, the accumulation would, in my opinion, be improper. Otherwise, I am aware of no restriction on the power of a county to levy taxes for the creation of a reserve for capital improvements.

TAXATION—County Courts—What fees to be collected by localities and State.

November 23, 1970

THE HONORABLE CHAS. F. P. CRAWLEY, Judge
County Court of Appomattox County
I have received your letter of October 21, from which I quote:

"It is my recollection that your office some years ago ruled that warrants obtained from this office for the collection of State taxes were cost free insofar as the state was concerned.

"We now have the question that the Town of Appomattox is requesting warrants for town taxes and also the County is contemplating doing the same thing.

* * *

"Would you please be so kind as to give me your opinion on this question?"

I believe that the ruling to which you refer is that addressed to the Honorable J. Gordon Bennett, dated July 10, 1956, and found at Report of the Attorney General (1956-1957), p. 75. A later opinion to Mr. Bennett deals with localities as well as with the State. That opinion, with which I am in accord, is found at Report of the Attorney General (1960-1961), p. 83, and may be summarized as follows:

   a. State warrants. The fee is collectible from the State at the time the warrant is served unless it is required to be paid back into the State treasury, in which event the fee need not be paid. In either event, the tax is chargeable against the defendant as costs if the judgment is in favor of the State.
   b. Local warrants. The fee is neither collectible from the locality nor chargeable against the defendant.

2. The twenty-five cent filing fee prescribed by Virginia Code § 16.1-115. This fee is imposed on the State and on the localities and is recoverable from the defendant if a judgment is rendered against him.

   a. State warrants. The fee is not collectible from the State.
   b. Local warrants. The fee is not collectible from the county or city for which the sheriff, sergeant or deputy is elected or appointed. It is collectible from other localities. If, and only if, the fee is collectible from the locality, it may be recovered from the defendant as costs in a judgment against him.

TAXATION—County Treasurers—Charged with power and duty of collecting tax.

March 30, 1971

THE HONORABLE ALBERT M. SHELTON
Commonwealth's Attorney for Scott County

I have received your recent letter in which you ask whether a county treasurer may refuse to initiate criminal proceedings against persons failing to pay a county utility consumer tax. The ordinance imposing the tax provides that failure to pay is a misdemeanor and further provides that the county treasurer is charged with the "power and duty" of collecting the tax.

Although counties have no general power to enact criminal ordinances, Virginia Code § 15.1-505 provides:

"The governing body of any county may prescribe fines and other punishment for violations of ordinances, which shall be enforced by proceedings before a judge of the county court in like manner and with like right of appeal as if such violations were misdemeanors. Such fines, however, shall in no case exceed three hundred dollars
and if imprisonment in the county jail be prescribed in any case such imprisonment shall not exceed thirty days."

Section 15.1-505 is a necessary power if the county ordinances are to have any meaning. It is highly inappropriate for a county treasurer to condone blatant violations of an ordinance which he is charged with the duty of enforcing. Nevertheless, as the initiation of criminal prosecutions is necessarily a matter of judgment, I am unable to hold that the failure of a county treasurer to issue criminal warrants would be a sufficient ground for his ouster pursuant to article 3 of chapter 20 of Title 58 of the Code.

While I am of the opinion that a county treasurer may not properly make a general statement to the effect that he will ignore a valid method of collecting a county tax, I am aware of no means by which he could be required to initiate a particular criminal proceeding.

TAXATION—Deeds—Applies to those conveying land to State for highway purposes.

HIGHWAYS—Deeds—Tax applies to those conveying land for.

DEEDS—Highways—Tax applies to those conveying land for.

CLERKS—Fees—Confessed Judgments—Controlled by § 8-365.

FEES—Clerk—Confessed Judgments—Controlled by § 8-365.

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

July 17, 1970

I have received your letter of July 10, in which you ask whether the tax imposed by Virginia Code § 58-54.1 applies to deeds conveying land to the Commonwealth for highway purposes.

The only exemptions from the tax imposed by § 58-54.1 are those contained in the section itself and those which are constitutionally required. Conveyances to the Commonwealth are not specifically exempted. Since the tax is conceptually upon the grantor, no exemption may be implied by the fact that the Commonwealth is grantee. In my opinion, the tax imposed by § 58-54.1 applies to deeds conveying land from a private person to the Commonwealth.

You also ask whether the Clerk's fees on confessions of judgment are determined by § 8-365 of the Code or by § 14.1-112(17). In my opinion, the specific language of § 8-365 controls.

TAXATION—Deeds—Exemptions—Section 58-61 controls both §§ 58-54 and 58-54.1.

ESTATE—Inventory—Not an account.

FEES—Clerks—Minimum for recording inventory is $7 plus $1 for clerk's certificate.

THE HONORABLE JAMES F. TOBEEY, Clerk
Circuit Court of the City of Salem

August 7, 1970

I have received your letter of July 28.

You ask whether § 58-61 of the Virginia Code exempts certain deeds from the recordation tax imposed by § 58-54 as well as from that imposed by § 58-54.1. I am of the opinion that § 58-61 applies to both § 58-54 and
§ 58-54.1. The same question was asked by the Honorable Rhea F. Moore, Jr., Clerk of the Circuit Court of Tazewell County. I am enclosing here-with a copy of my letter of June 11, 1970, to Mr. Moore.

You also ask whether an estate inventory is a fiduciary account under Virginia Code § 14.1-112. Reference to chapter 2 of Title 26 of the Code, entitled “Inventories and Accounts,” discloses that the General Assembly does not consider an inventory to be an account. The minimum fee for recording an inventory is therefore $7.00 plus $1.00 for the clerk’s cer-tificate.

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TAXATION—Deeds—No exemption for gift from parents to daughter and husband.

TAXATION—Exemption—None on deed of gift from parents to daughter and husband.

TAXATION—Forfeiture—Should be paid to county.

COUNTIES—Tax Forfeiture—Should be paid to county, as Commonwealth hold for benefit to county.

August 7, 1970

THE HONORABLE H. P. SCOTT, Clerk
Circuit Court of Bedford County

I have received your letter of August 4, in which you ask whether a tax is imposed upon the recordation of a deed of gift from husband and wife to a daughter and her husband. I am of the opinion such a transfer does not come within the exemptions provided by § 58-61 of the Code and is therefore subject to the tax imposed by § 58-54.1. I explained this answer in more detail in a June 18, 1970, letter to the Honorable Betsy W. Jordan, Clerk of the Circuit Court of the City of Waynesboro, a copy of which is enclosed.

You also ask whether the forfeiture provided by § 58-1090 of the Code should be paid over to the county or to the Commonwealth. As the Commonwealth holds title to the property only “for the benefit of the county” (Va. Code § 58-1067), I am of the opinion that the forfeiture should be paid over to the county.

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TAXATION—Exemptions—Moose Lodge exempt where purpose is benevolent or charitable.

July 30, 1970

THE HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

I have received your letter of July 22, in which you ask whether the Moose Lodges in Virginia are exempt from property taxation.

Any exemption would be pursuant to Section 183(f) of the Virginia Constitution and the corresponding provisions of § 58-12(6) of the Code.

The Moose Lodges do not contract or promise to pay death, sickness or accident benefits. Their purposes are set forth in their articles of incorpora-tion as follows:

“The purpose or purposes for which the corporation is organized are: to unite its membership in the bonds of fraternal benevolence and charity; to assist their members and their families in time of need; to render particular service to orphan children, aged members and their wives; and to further the mutual welfare of its members and their families. All the purposes set forth are to be carried out not for a profit, it being an eleemosynary corporation.

“The corporation is a local lodge subject to and under the juris-diction and control of the laws of the regulation of lodges in the
Loyal Order of Moose and is subject to the constitution and general laws of the Supreme Lodge of the World, Loyal Order of Moose, not in conflict with the purposes set forth herein or the Laws of Virginia.

"The purpose of the corporation is purely benevolent and exclusively charitable."

In my opinion a Moose Lodge so organized and so operated comes within the provisions of Section 183(f) and § 58-12(6). Buildings with the land they actually occupy and the furniture and furnishings belonging to it and used exclusively for lodge purposes or meeting rooms by it, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes are exempt from local property taxes.

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TAXATION—Exemptions—Real estate of Woodmen of the World not exempt.

THE HONORABLE BILLY K. MUSE
Commissioner of the Revenue for Roanoke County

I have received your letter of September 16, from which I quote:

"The Trustees of Maple Camp 66, Woodmen of the World, own real estate in Roanoke County on which they have constructed a new building. A portion of this building will be used solely for a lodge hall, and a portion solely for their insurance offices.

"This organization is protesting taxation of any kind on this property. It is our opinion that the lodge hall should be exempt from taxation but that the portion of the building used for their insurance offices should be taxed."

"Will you please give us a ruling as to whether or not this property is taxable fully, partially or not at all."

Section 183(f) of the Virginia Constitution permits exemption only of property "used exclusively for lodge purposes or meeting rooms" by a benevolent or charitable association. Clearly the insurance offices of the association are not exempt.

Section 183 goes further, however, and provides:

"Nothing contained in this section shall be construed to exempt from taxation the property of any person, firm, association, or corporation, who shall, expressly or impliedly, directly or indirectly, contract or promise to pay a sum of money or other benefit, on account of death, sickness, or accident to any of its members or other person."

I have obtained from the State Corporation Commission a copy of the articles of incorporation of the Woodmen of the World Life Insurance Society, article II of which provides:

"This corporation is a Fraternal Benefit Society, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. It has and shall continue to have a lodge system with ritualistic form of work and representative form of government. It shall have perpetual succession unless these Articles of Incorporation are surrendered, or the Society consolidated, merged or dissolved under such plan and in such manner as authorized by law. It has and shall continue to have authority to provide for a supreme representative governing body to be known as the 'Sovereign Camp' which shall have all authority to provide for the organization of local camps and head camps and prescribe the laws, rules and regulations for their government."
If, as it appears, Maple Camp 66 is affiliated with the Woodmen of the World Life Insurance Society, its property is entitled to no exemption whatsoever.

TAXATION—Exemptions—Real estate owned by Henry County Baptist Association; residence for ordained minister. November 24, 1970

THE HONORABLE D. B. HANEL
Commissioner of the Revenue for the City of Martinsville

I have received your letter of November 6, from which I quote:

"We need an opinion on the tax status of church related property. For instance, the Henry County Baptist Association has bought a home for the use of its Missions Superintendent. No rent is charged him.

"This same group has purchased fifty acres in Patrick County for the recreational and inspirational use of its members and kindred groups. Is this taxable or non-taxable?"

Section 183(b) of the Virginia Constitution exempts from taxation:

"Buildings with land they actually occupy, and the furniture and furnishings therein and endowment funds lawfully owned and held by churches for 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 Hustings Court of the City of Richmond has held that only one minister of any church or religious body may have his residence exempted under Section 183(b). As this case is now on appeal before the Virginia Supreme Court of Appeals, it would be inappropriate for me to express my views on this point at this time.

The Henry County Baptist Association is a religious body. If its missions superintendent is an ordained minister having a mission church under his care, he is a minister whose residence is exempt under Section 183(b) unless the Association is claiming exempt status for another minister.

There is no exemption for land except for that used in connection with a building. I am of the opinion that the fifty-acre parcel is taxable.

TAXATION—Exemptions—S.P.C.A. subject to property taxation. October 27, 1970

THE HONORABLE JEROME S. HOWARD, JR.
Commissioner of Revenue for the City of Roanoke

I have received your letter of October 12, asking whether the Roanoke Valley S.P.C.A. is exempt from local property taxes.

The only possible grounds for exemption would be as a community club or association under Virginia Code § 58-12(5). That paragraph must be construed by reference to the language of Section 183(e) of the Virginia Constitution: "... parks or playgrounds held by trustees for the perpetual use of the general public." Even under the most liberal interpretation of Section 183 and § 58-12, I am constrained to hold that the Roanoke Valley S.P.C.A. is subject to local property taxes.

TAXATION—Exemptions—What property of volunteer fire departments and volunteer rescue squads exempt from taxation; liable for excise taxes.
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE DUNCAN C. GIBB
Member, House of Delegates

April 8, 1971

I have received your letter of March 30, from which I quote:

"HB 166, which was enacted at this Special Session, provides "property owned by volunteer fire departments or volunteer rescue squads and used by them exclusively for the benefit of the general public without charge is hereby determined to be a charitable use of such property and is exempt from taxation, State and local, including inheritance taxes'.

"I understand that most fire departments and rescue squads charge a nominal fee for some of their services, such as the use of the ambulance. In view of the underscored wording of this new law would the charging of such a nominal charge cause the departments or squads to forfeit their exemption. If so, would this exemption be forfeited if a charge was not made, but a donation was solicited? If so, do you have any suggestions as to the method by which these organizations could recover part of their cost, but not lose their exemption under this bill."

House Bill 166 (1971 Acts of Assembly, ch. 187) creates a new § 58-12.2 of the Code, designating certain property of volunteer fire departments and volunteer rescue squads as charitable within Section 6(a)(6) of Article X of the revised Virginia Constitution. Section 6(f) of Article X provides that, "Exemptions of property from taxation as . . . authorized hereby shall be strictly construed . . . ." A condition to the exemption provided by § 58-12.2 is that the property be used for the benefit of the general public without charge. I must therefore conclude that the imposition of a service charge is fatal to the exempt status of any property used in the performance of the service. A donation could certainly be solicited without affecting the exempt status of such property, but the performance of services must not be made contingent upon the donation.

You also ask:

"Are the sales tax and the vehicle titling tax included in the exemption under the above mentioned bill?"

Neither the Virginia Retail Sales and Use Tax nor the Virginia Motor Vehicle Sales and Use Tax is a tax upon property. They are excise taxes, for which volunteer fire departments and volunteer rescue squads are liable.

TAXATION—Exemptions—What property owned by incorporated institutions of learning is tax exempt.

THE HONORABLE SAM T. BARFIELD
Commissioner of Revenue for the City of Norfolk.

June 1, 1971

I have received your letter of May 25, from which I quote:

"There are presently thirty-nine private schools in the City of Norfolk and better than twenty of these have joined themselves to a church and declared themselves to be non-profit, thereby escaping real estate and personal property taxes. Recently, one of our larger private schools, which had been a substantial taxpayer, was deeded to a church and immediately became tax exempt. They simply change their by-laws to read non-profit. Although their tuitions have been increased and they are operating at the same level they did when they were generating a profit. I cannot believe that Section #58-12 of the State Code intended that such would be the case."
"Will you kindly let me have the advantage of your thinking and any guidance you can give me as to the direction I might take in resolving this ever growing problem?"

Section 183(d) of the Virginia Constitution exempts from taxation, "Property owned by . . . incorporated institutions of learning, not conducted for profit . . .," and primarily used for literary, scientific or educational purposes. This exemption is continued after July 1, 1971, by Article X, § 6(a) (4) of the revised Constitution.

Church affiliation has no bearing on the taxation or exemption of schools. The General Assembly has the power under Article X, § 6(c) to restrict this exemption but has not done so. The problem is not within the power of a commissioner of the revenue to resolve.

TAXATION—Exemptions—What property used for educational purposes not taxable.

November 18, 1970

THE HONORABLE D. B. HANEL
Commissioner of the Revenue for the City of Martinsville

I have received your letter of November 6, from which I quote:

"We need an opinion as to whether private school property owned by and for the use of the school and personnel is taxable for real estate taxes. One piece of property is ten miles from the school and furnished for use of the school director."

Section 183 of the Virginia Constitution provides:

"Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

* * *

"(d) Property owned by . . . incorporated institutions of learning, not conducted for profit . . . But this provision shall apply only to property primarily used for literary, scientific or educational purpose or purposes incidental thereto. It shall not apply to industrial schools which sell their product to other than their own employees or students."

* * *

The school referred to by you must be incorporated, must not be conducted for profit and must not be an industrial school selling its products to the public, if there is to be any exemption. If these criteria are met, it then becomes necessary to determine whether the specific property is "used for literary, scientific or educational purpose or purposes incidental thereto."

Lots being made available for faculty housing were held to serve an educational purpose in *Hanover County v. Trustees*, 203 Va. 613 (1962). That case also held exempt a two-family apartment being rented to faculty members, apparently without consideration of the explicit language of Virginia Code § 58-14. I do not believe that contiguity is required in order for the property to be exempt, but proximity may certainly be taken into account in determining the existence of an educational purpose.

The property should be considered taxable unless it is shown to your satisfaction that it is an integral part of the educational purposes of the school. This is necessarily a question of fact.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Insurance Agents—License tax may not be imposed on agents of licensed insurance companies.

THE HONORABLE VICTOR J. SMITH
Commissioner of Revenue for the City of Harrisonburg

I have received your recent letter, from which I quote:

"Section 58-500 in substance prohibits the taxation or licensing of insurance companies by localities as defined by that section. There are in the City of Harrisonburg a number of insurance agencies which are either individually owned, are partnerships or corporations. These firms handle life insurance, casualty insurance of various types and provide bonding service, etc. They usually represent a number of insurance companies and are not limited to one particular insurance firm.

"My question is: Can a locality adopt an ordinance to license these locally owned agencies on a gross receipts basis or on any other basis; or are the localities prohibited from such by virtue of the above quoted section of the State Code?"

Virginia Code § 58-500 prohibits localities from levying license taxes on insurance companies, "which as to licenses shall be construed to include their agents. . ." Chapter 7 of Title 38.1 of the Code of Virginia requires that each insurance agent be separately licensed by the State for each company he represents. The Code recognizes nonresident brokers and surplus lines brokers but the fee splitting provisions of Virginia Code §§ 38.1-287, 38.1-287.1 and 38.1-289 effectively preclude all persons, other than resident agents of licensed insurance companies, from doing an insurance brokerage business in this State. I therefore assume that the agencies referred to by you are agents of licensed insurance companies. You may not, in my opinion, impose a license tax on the business of these agents.

TAXATION—Itinerant Merchants' License Tax—Local license tax applicable.

THE HONORABLE I. L. HARDING
Commissioner of the Revenue for Halifax County

I have received your letter of September 17, from which I quote:

"Under Sections 58-381, 54-809 and 54-824, we have issued an itinerant merchant license to the above named corporation.

"Please inform this office whether or not the license so issued would permit the licensee to operate in another political subdivision in the Commonwealth other than Halifax County. That is to say within the month for which the license is issued or would the corporation be required to obtain a license in each of the political subdivisions in which it operated. I will appreciate a reply regarding this."

Virginia Code § 58-381 clearly provides that the State tax imposed thereby, "shall not be in lieu of merchants' licenses on purchases or county, city or town license taxes or levies." The State no longer imposes a merchants' license tax on purchases. The taxpayer referred to by you remains liable for the payment of any applicable local tax before it may operate in any other political subdivision.

TAXATION—Levy—Annual basis.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Collection in Installments—Need not be equal.

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

February 4, 1971

I have received your letter of January 25, from which I quote:

"I am writing to inquire whether it would be permissible for a county to fix one levy for the first 6 months of a year and another levy for the second 6 months of a year. Section 58-839 of the 1950 Code of Virginia, as amended, provides that the Board of Supervisors of a county shall 'fix the amount of the county and district levies for the current year, shall order the levy on all property within the county segregated by law for local taxation. . . .' This Code section provides that said levies shall be fixed not later than a regular or called meeting in June of the year in question. I am not aware of any Code provisions which would prohibit a Board of Supervisors from setting said levies at, for example, x amount for the first 6 months of the year and x plus y amount for the second 6 months of the year provided this was done not later than a regular or called meeting in June of the year in question."

Real estate taxes are levied on an annual basis. Where the taxes are collected in installments pursuant to Virginia Code § 58-847, there is no requirement that the installments be equal. The second installment may be greater than the first if the ordinance so provides.

TAXATION—License—Highway contractor subject to county license tax.

THE HONORABLE THOMAS R. NELSON
County Attorney for Augusta County

January 12, 1971

I have received your letter of January 6, from which I quote:

"In 1964 under the State Enabling Legislation § 58-302.1 a contractor's licensing ordinance was adopted which ordinance, defined contractors, as shown by a photo copy of the section of the Augusta County code of Laws, enclosed with this letter.

"Recently, a highway building contractor refused to pay the license tax because the County ordinance fails to include the word highways of the enclosed. The question is whether or not the definition of contractor in the County ordinance is sufficient to include a highway building contractor and he can be required to pay the tax."

Virginia Code § 58-297 defines a contractor so as to include a person who accepts "contracts to do any paving, curbing or other work on sidewalks, streets, alleys or highway . . . ." The underscored language is omitted from the ordinance.

An ordinance imposing a tax is strictly construed in favor of the taxpayer. Hotel Richmond Corp. v. Commonwealth, 118 Va. 607 (1916). Normally some importance would be attached to the omission from the ordinance of the statutory language. The County, however, is without power to deviate from the State classification. Hill v. Richmond, 181 Va. 744 (1943). It must therefore be presumed that the term, "streets," as used in the ordinance encompasses alleys and highways.

I am of the opinion that the highway contractor is subject to the County license tax.
TAXATION—Licenses—Antique show and sale by nonprofit organization not subject to license.

June 1, 1971

THE HONORABLE JOE H. GROSECLOSE
Commissioner of the Revenue for Smyth County

I have received your letter of May 25, asking whether a post of the Veterans of Foreign Wars may be licensed under Virginia Code § 58-381.1 for a show and sale of “antiques, coins, guns, knives, etc.”

Section 58-381.1 permits certain nonprofit organizations to sponsor “an antique show and sale” once a year for a thirty-dollar license tax. Persons selling only at such a show are not required to purchase licenses under § 58-381 of the Code.

In my opinion, a license may properly be issued under § 58-381.1 for such a show and sale. The license would extend, however, only to that portion of the show and sale which deals with antiques. Persons selling non-antique items would be required to secure itinerant vendors’ licenses under § 58-381.

TAXATION—Licenses—Wholesale merchant—Separate county licenses required for a wholesaler/retailer merchant.

March 26, 1971

THE HONORABLE ALICE JANE CHILDS
Commissioner of Revenue for Fauquier County

I have received your recent letter, from which I quote:

“At present we have a wholesaler duly licensed and operating a wholesale business within the corporate limits of the Town of Warrenton.

“Said wholesaler is also offering for sale to his customers certain merchandise at what he terms discount prices, and is collecting and remitting Sales Tax for said purchases.

“We take the position that these sales to the ultimate consumer constitute selling at retail by the wholesaler and therefore that portion of the above mentioned business should be licensed as retail.

“We would like to know if in your opinion the above described business operation would be classified as Retail Merchant.”

In Hill v. Richmond, 181 Va. 744 (1943) and in Norfolk v. Griffin Bros., 120 Va. 524 (1917), our Supreme Court of Appeals held that a city may not divide a business into two parts and tax each part separately, particularly where the business had already been classified for purposes of State taxation. The businesses of a wholesale merchant and of a retail merchant are separate and distinct, however, and have been separately taxed by the State.

The State wholesale and retail merchants license taxes were repealed in 1966, but it is clear that the State would have treated the business operations described by you pursuant to now repealed Virginia Code § 58-336.

“Any person, firm or corporation which is both a wholesale merchant and a retail merchant, as defined in the two preceding articles, is hereby required to obtain both classes of licenses; provided, however that any retail merchant who desires to do a wholesale business also may elect to do such wholesale business under his retailer’s license by paying license taxes under such articles as a retailer on both his retail business and his wholesale business; but this proviso shall not apply to any retail merchant the greater part of whose business at the licensed place during the next preceding year was wholesale, nor to a beginner the greater part of whose
business it is estimated will be wholesale for the period covered by the license."

In my opinion, separate county licenses should be required for each of the businesses of the wholesaler/retailer.

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**TAXATION—Lien on Wages—Authorized, within limits, for local taxes.**

**GARNISHMENTS—Local Taxes—Authorized within limits.**

August 5, 1970

THE HONORABLE G. HUGH TURNER
Treasurer of Franklin County

I have received your letter of July 25, in which you ask whether the County of Franklin may use Virginia Form 814 to create a lien on the wages of a local taxpayer.

Section 58-1010 of the Code provides for the creation of a lien for State or local taxes. Form 814 is designed for State purposes but may be modified for use for local taxes.

The General Assembly has amended Virginia Code § 34-29, effective October 1, 1970, to limit the amount of wages subject to garnishment. The term, "garnishment," is broadly defined by § 34-29(d)(3) so as to include a procedure under § 58-1010. An exception is provided for State and federal, but not local, taxes. As to local taxes, § 34-29 limits, but does not vitiate, § 58-1010.

In my opinion, the county may continue to use Form 814, as modified, if you will amend the Form to provide:

NOW THEREFORE, notice of such taxes is hereby given to you and demand made for payment thereof pursuant to Section 58-1010 of the Code of Virginia, or for so much thereof as may be in your hands on account of such estate or indebtedness, subject to the limitations of Section 34-29 of the Code of Virginia.

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**TAXATION—Local Levies—Section 34-29 does not apply to the collection of local tax pursuant to § 58-1010.**

June 17, 1971

THE HONORABLE F. B. HUBER
Treasurer of Campbell County

I have received your recent letter, in which you ask my opinion as to the effect of Virginia Code § 34-3 upon the garnishment restrictions in Virginia Code § 34-29.

By letter of August 5, 1970, I advised the Honorable G. Hugh Turner, Treasurer of Franklin County, that § 34-29 limited the collection of local taxes by use of Virginia Code § 58-1010. Section 34-3, to which you refer, provides in part, "The exemption under §§ 34-26, 34-27, 34-29 and 64-121 (64.1-127) shall not extend to distress for State, county or corporation taxes or levies . . . ."

It is my opinion that § 34-3 controls and that § 34-29 does not apply to the collection of local taxes pursuant to § 58-1010.

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**TAXATION—Local License Tax—Does not apply to manufacturer selling at wholesale at place of manufacture; manufacturer subject to tax if sells at retail.**

June 29, 1971

THE HONORABLE CHARLES A. CALLAHAN
Commissioner of Revenue for the City of Alexandria
I have received your recent letter in which you ask whether Virginia Code § 58-266.1 invalidates, in whole or in part, section 20-81 of the Alexandria City Code. Your ordinance provides:

"Every person engaging in, conducting or operating any one or more of the following businesses in the city shall pay for the privilege an annual license tax of $25.00:"

* * *

"The license tax imposed under this section is intended for the privilege of manufacturing and processing and not intended as a license tax for the privilege of selling."

Section 58-266.1(4) clearly prohibits any local license tax, including a flat fee, for "the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture . . . ." I am of the opinion that the prohibition would extend to a tax such as that of Alexandria, notwithstanding the fact that your ordinance does not extend to the selling activities of manufacturers. If, however, a manufacturer sells at retail or at another place of business within your city, it would not come within the prohibition of § 58-266.1(4) and the tax imposed by your ordinance would apply. See the enclosed opinion dated December 15, 1970, to the Honorable William H. Rosser, Jr.

TAXATION—Local License Tax—Manufacturer subject to tax if sells at retail.

The Honorable William H. Rosser, Jr.
Commissioner of Revenue for City of Petersburg

December 15, 1970

I have received your letter of November 24, enclosing a copy of a recently enacted Petersburg license tax ordinance. The ordinance imposes a tax on certain businesses, some of which may be classified as manufacturers, which operate and sell, "other than at wholesale," from a place of business within the city. The tax is graduated on the basis of the, "total gross receipts of such business . . . ." You ask whether the City may validly impose such a tax.

Section 58-266.1(4) of the Code of Virginia provides:

"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; provided, that any city, town or county which imposed such a tax prior to January first, nineteen hundred sixty-four may continue it until January first, nineteen hundred sixty-nine at the same or reduced rates."

The Petersburg ordinance does not impose a tax on the privilege of selling at wholesale. No manufacturer is subject to the ordinance unless he sells at retail. I construe the words, "such business," in the ordinance to refer back to the language, "who operate and sell, other than at wholesale . . . ." The tax base therefore includes only the gross receipts from retail sales.

I am of the opinion that the Petersburg ordinance is valid.

TAXATION—Local Property—Industrial-Agricultural Exposition not exempt.
The Honorable Thomas R. Nelson  
County Attorney for Augusta County  

I have received your recent letter, asking whether the Augusta Agricultural-Industrial Exposition, Inc., is exempt from local property taxes.  
Virginia Code § 58-12(5) exempts from local property taxation, "property, whether real or personal, owned by any community club or association or its trustees, when said property is used or operated exclusively for general and community purposes and not for profit." This provision must be construed as a legislative interpretation of Section 183(e) of the Virginia Constitution. See Report of the Attorney General (1965-1966), p. 277. I have carefully reviewed the Exposition's articles of incorporation, as amended, and am unable to hold, even under the General Assembly's liberal interpretation, that the property of the Exposition is exempt as "parks or playgrounds held by trustees for the perpetual use of the general public."

TAXATION—Member of Armed Forces—Personal property used in trade or business taxable.

The Honorable Alice Jane Childs  
Commissioner of the Revenue for Fauquier County  

I have received your recent letter, from which I quote:  

"A Colonel in the Air Force bought a farm in this county in 1963 and has been living here since that time. He claims exemption, however, from personal property taxes under the Soldiers' and Sailors' Civil Relief Act.  
"He operates a business of raising Arabian horses for sale. I am under the impression that all property used in a trade or business is subject to local taxation. Am I correct in this assumption?  
"In checking the State Registration Automobile List, I also find that there are four automobiles and two trucks listed for this gentleman. Four of these vehicles are owned jointly with his wife. I would like to know if she could be taxed on the one-half interest owned by her since she is not here under military orders."

The Soldiers' and Sailors' Civil Relief Act specifically permits the taxation of personal property used in a trade or business by a member of the armed forces. 50 USCA § 574. You are correct in assuming such property to be subject to local taxation. Jointly owned motor vehicles are subject to the full tax on their entire value. Report of the Attorney General (1960-1961), p. 301.  

You also ask whether airplanes kept in the county by servicemen not stationed in the county are subject to the personal property tax. Only the home state of the serviceman may impose a tax on his personal property. United States v. Arlington County, 326 F.2d 929.

TAXATION—Motor Vehicle Use—Imposed on current market value if owned six months or more.

Motor Vehicles—Taxation—Use—Imposed on current market value if owned six months or more.

The Honorable M. Patton Echols, Jr.  
Member, Senate of Virginia  

July 1, 1970
I have received your letter of June 24, in which you ask whether there is any basis, other than original purchase price, upon which to impose the motor vehicle use tax upon persons moving to Virginia.

Section 58-685.12(b) of the Virginia Code, as amended by the 1970 General Assembly, provides that the tax shall be imposed on the current market value of the automobile if it has been owned for six months or more.

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TAXATION—Payment of Tax Without Penalty or Interest—Application of § 58-4.1.
December 23, 1970

THE HONORABLE W. BYRON KEELING
Commonwealth's Attorney for Charlotte County

I have received your letter of December 17, asking whether taxes, otherwise payable on December 5, may be paid without penalty or interest on Monday, December 7, if the local treasurer's office is open for half a day Saturday, December 5.

Section 58-4.1 of the Virginia Code clearly states that a tax due on a Saturday may be paid without penalty or interest on the next succeeding business day. I am of the opinion that this provision applies irrespective of whether the local treasurer's office is open on Saturday. In my opinion the taxes referred to by you are payable without interest or penalty on Monday, December 7.

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TAXATION—Penalties—Taxpayer subject to penalty on failure to pay tax on time.
March 31, 1971

THE HONORABLE DONALD W. TURNER
Treasurer of Henry County

I have received your recent letter from which I quote:

"The personnel in the office of the County Treasurer incorrectly addressed and mailed a tax statement to a property owner. The property owner did not receive the statement, nor, did he ask for one before the penalty date. However, after the penalty had been applied, the property owner claims that he is not subject to the penalty because he did not receive a tax statement prior to the date of the penalty being attached.

"I am aware of the opinion dated April 28, 1961, to the Honorable G. M. Weems, Treasurer of Hanover County. The situation described there differs slightly here, as in that situation, it was ruled that the penalty would be incurred by the taxpayer.

"Would the penalty be incurred by the taxpayer in the situation described to you in this letter?"

The opinion to which you refer, found at Report of the Attorney General (1960-1961), p. 303, was a determination that the penalty imposed by Virginia Code § 58-963 is incurred upon the failure of a taxpayer to pay State or local levies by December 5, "regardless of whether a bill has been mailed to or received by the individual in question." The failure of the taxing authorities properly to bill a tax does not relieve a taxpayer of his obligation to pay the tax on time.

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TAXATION—Personal Property Assessment—Payment due as assessed.
February 1, 1971

THE HONORABLE ALICE JANE CHILDS
Commissioner of Revenue for Fauquier County
I have received your letter of January 20, from which I quote:

“For the past three years a taxpayer has been assessed for personal property under Section 58-838 because he refuses to answer questions with regard to his assessments. It has come to my attention that he has now paid to the treasurer an amount that he claims is due and not the amount of tax shown on the tax bill. Is it permissible for one to make a partial payment and declare it as the full amount due without having a corrected bill, an exoneration, or a court order?"

I am aware of no authority whereby a treasurer could accept partial payment of an assessed personal property tax in full payment of the tax. If, as you indicate, any error was caused by the failure of the taxpayer to furnish a list of his property to you, not even a court can change the assessment. Va. Code § 58-1148.

TAXATION—Poll Tax—Remains in full force and effect until repealed by General Assembly.

TAXATION—Poll Tax—Repeal of Constitution section deletes requirement that it be levied.

THE HONORABLE BENJAMIN H. WOODBRIDGE
Member, House of Delegates

I have received your letter of September 14, from which I quote:

“The Treasurer of Stafford County, Virginia has made inquiry of me regarding the proposed constitutional amendments with respect to the poll tax. Essentially, his question that if all references to the poll tax, as a prerequisite to voting, are deleted from the Virginia Constitution will this also repeal Section 173 of the Constitution which authorizes the General Assembly to levy a capitation tax? Phrased another way, my question is, assuming passage of the constitutional amendment, will all poll and capitation taxes be repealed since the Constitution will no longer provide the authorization for the General Assembly to levy such a tax?”

The Commonwealth of Virginia is a sovereign State, having all powers of taxation which are not expressly denied to it by its Constitution or the federal Constitution. The repeal of Section 173 merely deletes the constitutional requirement that a capitation tax be levied. The deletion will therefore empower the General Assembly to repeal the tax. Until such repeal, the tax will remain in full force and effect.

TAXATION—Property Owned by Robert E. Lee Memorial Foundation—No limitation on amount of real estate owned and exempted from taxation.

THE HONORABLE JOHN P. BEALE
Commissioner of Revenue for Westmoreland County

I have received your letter of February 25, asking whether there is any limitation on the amount of property which may be owned by Robert E. Lee Memorial Foundation, Incorporated, and be exempt from local real estate taxation.

The Robert E. Lee Memorial Foundation is exempted from property taxation by Virginia Code § 58-12(7), under the authority of Section
183(g) of the Virginia Constitution. I am aware of no statutory limitation on the amount of real estate which may be owned by the Foundation and exempted from taxation. I cannot, however, construe the statutory exemption to extend to land not falling within the Foundation's purposes:

"The Corporation is organized to acquire the estate known as 'Stratford Hall' in Westmoreland County, Virginia, the birthplace and boyhood home of Robert E. Lee, and to continue to restore, preserve, furnish and maintain it as a national shrine in perpetual memory of Robert E. Lee, and, under suitable regulations, to open the said estate, with its library, relics, buildings, gardens and grounds to the inspection of visitors, and the use, benefit and enjoyment of the public."

Any land not related to "Stratford Hall" would, in my opinion, be taxable.

TAXATION—Public Service Corporations—Assessment of tangible personal property.

November 27, 1970

The Honorable Thelma M. Hensley
Commissioner of the Revenue for Prince William County

I have received your letter of November 17, from which I quote:

"In 1966 the personal property rate in Prince William County was $5.65 and the real estate rate was $3.60. In 1970, both rates were $7.00.

"Under Section 58-514.2 of the Code of Virginia, may the Commissioner of the Revenue in 1970 assess the personal property, other than automobiles and trucks, at the current $7.00 rate."

Your question relates to Virginia Code § 58-514.2 which deals only with the taxation of public service corporation property. The current personal property tax rates generally apply to all tangible personal property within given classifications. However, § 58-514.2 places a ceiling on the tax rate on property (other than automobiles and trucks, which are not dealt with in this opinion) owned by public service corporations. That ceiling is the higher of:

1. The current real estate tax rate; or
2. The 1966 personal property tax rate.

The proviso of § 58-514.2 removes, over a twenty-year period, the right of the locality to continue taxing public service corporation personal property at its 1966 rates. The proviso does not affect the right of the locality to tax all public service corporation property at its current real estate tax rate.

In my opinion, you should extend the tax on the tangible personal property, other than automobiles and trucks, of public service corporations at the current $7.00 rate.

TAXATION—Public Service Corporations—Assessment of tangible personal property.

March 26, 1971

The Honorable Charles A. Callahan
Commissioner of the Revenue for the City of Alexandria

I have received your recent letter in which you state that, as a result of the Supreme Court of Appeals decision in Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550 (1970), you must re-
classify certain public service corporation property. You ask how this will affect your procedure under Virginia Code § 58-514.2.

The general rule of § 58-514.2 is that all public service corporation property, other than automobiles and trucks, is to be taxed at real property rates. The impact of this rule on Virginia localities was lessened by an exception, the effect of which is gradually to implement the general rule over a period of twenty years.

The holding in the Transco case was not purely prospective. Property held to be real estate by that decision should be treated as having always been real estate. Nevertheless, the exception under § 58-514.2 is not for tangible personal property but for "any class of property taxed as personal property by any taxing district before January one, nineteen hundred sixty-six. . ." (Emphasis supplied.) The subsequent reference in the statute to "such tangible personal property" requires me to construe this language to mean any class of property validly taxed as personal property.

In my opinion, any properties declared by the Court to be real estate should be first added to the other real estate and the balance of the property, correctly listed as tangible personal property, should be treated as personalty, both in 1966 and in 1971. The twenty-five percent reduction required by § 58-514.2 for the year 1971 should be computed as a percentage of that property, other than automobiles and trucks, validly taxed as tangible personal property in 1966.

TAXATION—Public Service Corporations—County license tax may be imposed on water, heat, light and power; not on telephone or telegraph.

December 23, 1970

THE HONORABLE JOSHUA PRETLOW
County Attorney for Nansemond County

I have received your letter of December 2, in which you ask whether Nansemond County may levy a one-half of one per cent gross receipts tax upon water, heat, light and power companies.

Virginia Code § 58-606 would appear to forbid such a tax but that section is, in my opinion, overridden by the explicit language of § 58-603(2) of the Code:

"Any city or town may impose a license tax upon such corporation for the privilege of doing business therein, which shall not exceed one half of one per centum of the gross receipts of such business accruing to such corporation from such business in such city or town;"

The power granted cities and towns by § 58-603(2) is extended to counties by Virginia Code § 15.1-522. I am, therefore, of the opinion that tax being considered by the County is proper as to water, heat, light and power companies.

You also ask whether the County may impose a similar tax upon telephone and telegraph companies. I am aware of no general grant of power which would permit all cities to impose such a tax. I am therefore of the opinion that § 15.1-522 is inapplicable to gross receipts taxes on telephone and telegraph companies and that the County may not impose such a tax. See Va. Code § 58-266.1(1); see also Board of Supervisors v. Corbett, 206 Va. 167 (1965).

TAXATION—Public Service Corporations—What property is taxable.

October 12, 1970

THE HONORABLE JOHN H. ARTRIP
Commissioner of the Revenue for Dickenson County
REPORT OF THE ATTORNEY GENERAL

I have received your letter of October 6, from which I quote:

"I have received from the State Corporation Commission, pursuant to Chapter 12, Title 58 of the Code of Virginia, a statement showing the assessed value of the property of certain public service corporations. As listed in this statement, Big Caney Water Corporation will be required to pay $2,400.00 in 1970 taxes, and I am of the opinion that this amount will be increased in the year of 1971. Big Caney is a public service corporation, limited in its articles of incorporation by this provision: 'No dividend shall be declared or paid on the capital stock of the corporation, and no part of the income of the corporation shall be distributed to its stockholders, members, directors or officers.'

"On August 3, 1970, the State Corporation Commission approved a water rate schedule for Big Caney, which is admittedly high due to certain fixed expenditures and fewer water users than originally anticipated. Needless to say, the water users are very much concerned with having these rates lowered. Since the corporation cannot declare or pay dividends, any reduction in expenditures is passed on to the users by reducing the rates. Therefore, it would appear that the property of the corporation is used and operated exclusively for general and community purposes and not for profit.

"Please advise whether the property of Big Caney Water Corporation is exempt from taxation under Code Section 58-12, Paragraph 5, or any other law. Also, does the Board of Supervisors of Dickenson County and/or I have the authority to relieve Big Caney Water Corporation of this tax?"

The practical effect of your question is whether a part of the cost of running the County government must be spread among the water users or if that cost may be passed on to other taxpayers of the County.

The Big Caney Water Corporation is not, in my opinion, a community club or association within the meaning of Virginia Code § 58-12(5). I further question whether the provision of the articles of incorporation of a stock corporation would prevent earnings from being accumulated and later distributed after amendment of the articles. I have been informed by the State Corporation Commission that the rate schedule for the Big Caney Water Corporation includes a profit factor.

It is my opinion that the property of the Big Caney Water Corporation is required by Section 168 of the Virginia Constitution to be taxed and that the Board of Supervisors and Commissioner of Revenue are without authority to grant relief from the tax.

TAXATION—Real Estate—Commissioner of the Revenue may not prepare second land book after first book has been delivered to treasurer.

April 2, 1971

THE HONORABLE D. B. HANEL
Commissioner of Revenue for the City of Martinsville

I have received your letter of March 26, from which I quote:

"We need an opinion concerning our land book and the tax rate. Effective January 1, 1972, we will collect real estate taxes on a semi-annual basis. Our City is on a fiscal year July 1st to July 1st. The tax rate is not established until the budget is prepared and then we are given the tax rate, generally about July 1st. We realize that the land book must be prepared the first part of the year in preparation for collections in April and May."
"The question that arises is whether the tax rate established July 1st and applied for the second half of the year by means of a second land book be allowed to be retroactive for the first half of the year. Heretofore we have printed only one land book and this was after the tax rate was set and the tax was collected in the fall."

I am of the opinion that the use of a second, retroactive, land book would be prohibited by Virginia Code § 58-807. May I also point out that the Treasurer is not permitted to collect real estate taxes before the tax rate is fixed. See the opinion to the Honorable Robert C. Fitzgerald, found at Report of the Attorney General (1958-1959), p. 298.

TAXATION—Real Estate Assessments—Board of Supervisors may provide necessary assistance to Board of Assessors through contract at county’s expense; Board of Assessors responsible for final decision.

COUNTIES—Contracts—Board of Supervisors may not contract to pay money in following fiscal year.

March 15, 1971

THE HONORABLE L. VICTOR McFALL
Commonwealth’s Attorney for Dickenson County

I have received your letter of March 5, from which I quote:

“Dickenson County is scheduled for a general reassessment in the year 1972. In this regard please advise whether the Board of Supervisors has the authority to enter into a contract in 1971 with a consulting firm of appraisers to assist the Board of Assessors in making this reassessment. The proposed contract is for a sum certain, a portion of which may be paid in the fiscal year ending July 31, 1972, and in the fiscal year beginning August 1, 1972.”

The Board of Assessors is appointed by the Circuit Court. See Va. Code § 58-787. The compensation of its members is fixed by the Board of Supervisors and paid out of the county treasury. See Va. Code § 58-788. In my opinion the Board of Supervisors has the authority to provide, at the county’s expense, such assistance as may be necessary to enable the Board of Assessors to perform their duties. This assistance may include the hiring of a consulting firm of appraisers but the Board of Assessors must make all final decisions.

You are of course aware that any contract entered into in one fiscal year and requiring a payment in the following fiscal year must be made subject to the condition that the Board of Supervisors appropriate funds during the year in which the payment is to be made.

TAXATION—Reassessment—Extensions—Relate back to prior December 31.

TAXATION—Rate Change—Permitted after July 1, even though installment already paid.

August 3, 1970

THE HONORABLE D. B. HANEL
Commissioner of the Revenue for the City of Martinsville

I have received your letter of July 30. You say that the City of Martinsville wishes to collect its 1971 real property taxes in installments and ask whether it may extend its June installment on the basis of its January 1, 1970, land book with an adjustment to be made for the 1970 reassessment in the December installment.

Martinsville is required to have a general reassessment in 1970. Va. Code § 58-776. The reassessment is required to be completed by December 31,
1970. Va. Code § 58-792. Work completed under judicial extensions of time relates back to December 31 under well established Virginia practice. It is therefore my opinion that the city’s 1971 real estate taxes are required to be extended on the basis of the 1970 reassessment.

This office has previously ruled that a tax may not be collected until the tax rate and the assessed values are definitely fixed. Report of the Attorney General (1958-1959), p. 298. Section 58-851.6, however, would specifically authorize the city to change the tax rate after July 1, even though an installment had already been paid.

TAXATION—Recordation—Deed conveying property from a liquidating corporation to stockholders taxable.

December 8, 1970

THE HONORABLE ALVIN W. FRINKS, Clerk
Corporation and Circuit Courts of the City of Alexandria

I have received your letter of December 2, in which you ask whether the taxes provided by §§ 58-54 and 58-65.1 are imposed on the recordation of a deed conveying property from a liquidating corporation to its stockholders.

The taxes are imposed on “every deed, except a deed exempt from taxation by law, which is admitted to record. . . .” I am aware of no exemption for liquidating dividends and am of the opinion that the taxes provided by §§ 58-54 and 58-65.1 should be imposed on the fair market value of the property conveyed.

I also call to your attention the tax imposed by Virginia Code § 58-54.1. As you are aware, this tax was adopted coincident with the repeal of § 4361 of the Federal Internal Revenue Code of 1954 and is intended to continue the repealed federal tax as a State tax. Realty transferred in liquidation was deemed realty sold for the purposes of the federal tax if liabilities of the liquidating corporation were satisfied or assumed by the stockholders. In a special ruling, dated October 23, 1942, and found at 1968 CCH Federal Excise Tax Reports ¶ 3319.16, the Internal Revenue Service set forth the method of computing the federal tax on a liquidating dividend. I agree with the special ruling and I have applied it to Virginia Code § 58-54.1 in the balance of this letter.

No § 58-54.1 tax is imposed upon liquidating dividends, as such. If, however, a stockholder assumes the liabilities of a liquidating corporation, such assumption will be deemed consideration for assets in an equal amount. If a liquidating corporation is indebted to its stockholders, the satisfaction of such debt by the liquidation will be deemed consideration for assets in an equal amount.

Assets distributed to stockholders in liquidation of a corporation are treated as sold to the extent of liabilities assumed or satisfied. Unless specific assets are clearly allocated to the assumption and satisfaction of such liabilities, the liabilities will be treated as consideration for a proportionate part of each asset distributed.

Each prior secured debt should be allocated to its collateral property and apportioned among such property in proportion to fair market value. To the extent that such prior secured debt is secured by real estate, no recordation tax is imposed by § 58-54.1 on the recordation of the collateral property. If the only debts owing the stockholders were secured before, and for other reasons than, the liquidation and no unsecured liabilities are assumed by the stockholders, no § 58-54.1 tax is imposed on the recordation of the property distributed in liquidation.

All unsecured debt, assumed or satisfied, should be apportioned among the net equity balances, determined at fair market value, of all of the corporate assets. The § 58-54.1 tax rate is then applied to the amount of unsecured debt apportioned to the real property to be recorded.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Deed conveying property on liquidation of subsidiary corporation.

TAXATION—Recordation—Deed of trust given by industrial development authority not taxable. January 12, 1971

THE HONORABLE J. E. CROCKETT, Clerk
Circuit Court of Wythe County

I have received your letter of January 7, asking my opinion as to the State and local taxes payable upon the recordation of two certain instruments.

The first instrument is a deed conveying property on the liquidation of a subsidiary corporation. The full value of the distributed real estate is subject to the taxes imposed by §§ 58-54 and 58-65.1 of the Virginia Code. The tax imposed by § 58-54.1 of the Code should be applied to the recordation of the deed if liabilities of the liquidating corporation were assumed or satisfied by the parent corporation. For the method of computing the § 58-54.1 tax liability, I refer you to the enclosed opinion of December 8, 1970 to the Honorable Alvin W. Frinks.

The second instrument is a deed of trust given by an industrial development authority organized under chapter 33 of Title 15.1 of the Virginia Code. In an opinion dated April 22, 1970, to the Honorable George E. Holt, Jr., I held such a deed of trust to be exempt from both State and local recordation taxes.

TAXATION—Recordation—Deed from father to child exempt. July 1, 1970

THE HONORABLE BETSY N. JORDAN, Clerk
Circuit Court of City of Waynesboro

I have received your letter of June 23, in which you ask whether a recordation tax is imposed upon a transfer from father to child, where the wife joins in the deed merely to release her inchoate dower.

In my opinion such a transfer is exempt under Virginia Code § 58-61, as amended.

TAXATION—Recordation—Deed to land and standing timber taxable when simultaneously conveyed. March 12, 1971

THE HONORABLE M. H. TURNBULL, Clerk
Circuit Court of Brunswick County

I have received your letter of February 25, enclosing two deeds, both dated December 22, 1970, and recorded on January 30, 1971. One of the deeds conveys certain real estate and the other the growing trees thereon, both to the same grantee.

You ask whether you should refund the recordation tax paid on the timber deed.

The conveyance of title to trees to be severed within a reasonable time is a conveyance of personal property, not subject to the recordation tax. See the enclosed opinion to the Honorable J. Fulton Ayres, Clerk of Circuit Court of Accomack County, dated September 1, 1970. The requirement of severance found in the timber deed enclosed in your letter is meaningless since the title to the underlying land was simultaneously conveyed. For this reason, I am of the opinion that your assessment of the tax on the recordation of the timber deed was proper and that you should not refund the tax.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Exemption—Supplemental conditional assignment of rentals exempt. January 12, 1971

THE HONORABLE SHELBY J. MARSHALL, Clerk
Circuit Court of Albemarle County

I have received your letter of January 7, in which you ask whether a tax is imposed on the recordation of a certain “Conditional Assignment of Rentals.”

The instrument is by its terms supplemental to a previously recorded deed of trust and has the effect of further securing the debt secured thereby. Such an instrument is, in my opinion, made exempt from recordation tax by Virginia Code § 58-60. See Report of the Attorney General (1961-1962), p. 262.

TAXATION—Recordation—Exemptions—Deeds of gift from husband and wife, wife to husband, or parent to child. September 29, 1970

THE HONORABLE H. C. DEJARNETTE, Clerk
Circuit Court of Orange County

I have received your letter of August 12, in which you ask whether certain examples correctly reflect my opinions to Honorable Rhea F. Moore, Jr. and Honorable Betsy N. Jordan, dated June 11, 1970, and June 18, 1970, respectively.

Your conclusions are correct as interpretations of those opinions:

1. Husband—½ undivided interest to wife or vice versa—no tax.
2. Husband to husband and wife jointly (without right of survivorship)—taxable full value (par. 2-18 June letter).
3. Husband to husband and wife jointly with right of survivorship—taxable full value (same as number 2).
4. Father to son—no tax.
5. Father to son and daughter-in-law (jointly with or without survivorship)—full tax.
6. Father to son and daughter—full tax.
7. Father and mother (property owned jointly with or without survivorship) to son—full tax.
8. Father and mother (property owned jointly with or without survivorship) to anybody—full tax.
9. Father—½ undivided interest to son—no tax.
10. Mother—½ undivided interest to son—no tax.

“In other words, that ‘parent’ does not mean ‘parents’ and ‘child’ does not include ‘children’ as used in the statute.”

TAXATION—Recordation—Extension and modification agreement—Taxable on full amount. March 1, 1971

THE HONORABLE H. C. DEJARNETTE, Clerk
Circuit Court of Orange County

I have received your letter of February 10, from which I quote:

“Enclosed is a copy of an instrument entitled ‘Extension And Modification Agreement,’ purporting to alter the terms of payment of a certain indebtedness secured by a previously recorded Deed of Trust and Note; also altered was the interest rate and as stated in the third unnumbered paragraph ‘has been requested to lend an additional amount of money, extend the maturity date, modify the
interest rate and terms of repayment of the aforesaid Deed of
Trust."

"Does this create a new obligation, taxable at the full value of
$6,785.00 or should I obtain a certificate or statement showing the
difference between the present indebtedness and the lowest balance
ever due on the original debt and tax only the difference?"

In my opinion this instrument is taxable on the full amount which may

TAXATION—Recordation—Gifts between certain family members.

THE HONORABLE JAMES F. TOSEY, Clerk
Circuit Court of the City of Salem

March 11, 1971

I have received your recent letter with respect to the recordation tax on
conveyances from parents to children. You specifically refer to my letter
to the Honorable Betsy N. Jordan, Clerk of Circuit Court for the City of
Waynesboro, dated June 18, 1970, and found in Report of the Attorney

The conclusion in that letter was required by the existence of tenancies,
rather than by the existence of two or more parties as grantors or grantees.
This result has been changed, effective July 1, 1971, by the enactment of
Senate Bill No. 77 of the 1971 General Assembly.

TAXATION—Recordation—Gifts between certain family members.

THE HONORABLE HARRY G. PENLEY, Clerk
Circuit Court of Scott County

March 31, 1971

I have received your letter of March 25, 1971, asking whether a deed of
gift conveying property from a parent to a child is made taxable by the
fact that the other parent joins in the deed for the purpose of releasing
his inchoate marital rights.

In my opinion, such a deed is made exempt from recordation taxes by
Virginia Code § 58-61, subject only to the additional tax prescribed therein
on the difference between the full amount of actual value at the time of the
transfer and the amount on which the tax was paid when the property was
originally acquired by the parent.

TAXATION—Recordation—Only deeds pertaining to real estate being
within county recorded with clerk's office.

THE HONORABLE MACK T. DANIELS, Clerk
Circuit Court of Chesterfield County

June 29, 1971

I have received your recent letter, from which I quote:

"In light of the ruling by the annexation court this past June 5,
1971, I wish to have your opinion as to whether this office is required
to record deeds to real estate which is, by annexation order, now
in the City of Richmond, and which deed has already been recorded
in Hustings Court Part II of the City of Richmond."

The only deeds which should be recorded in your office are those pertain-
ing to real estate. "any part of which is situated in [Chesterfield County]."
Va. Code § 17-60. Real estate lying within the annexed area is no longer a part of Chesterfield County and deeds pertaining thereto should not be accepted by you for recordation.

TAXATION—Recordation—Parents conveying property from tenancy.

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

I have received your recent letter from which I quote:

"The question I desire to know is whether or not additional recordation tax shall be required for admitting to record a deed from parents to a child or child to parents where the consideration is $1.00 and the further consideration of the love and affection the parents have for the child provided the tax is already paid on the original deed to the property?"

The tax imposed by Virginia Code § 58-54.1 applies only to "realty sold" and would not apply to a deed of gift. The recordation is subject to the tax imposed by Virginia Code § 58-54, unless exempted by Virginia Code § 58-61. The statement of a nominal consideration, where none was in fact paid, does not affect the applicability of § 58-61.

A deed which purports to convey the interest of a tenancy to a third party is not exempt under § 58-61; the deed may, however, separately convey the interest of each parent to the child and be exempt. A deed which purports to convey property from a child to his parents, as co-tenants or as joint tenants, is not exempt under § 58-61; the deed may, however, convey a one-half undivided interest to each parent and be exempt.

The exemption under § 58-61 is limited in all cases by the proviso requiring a tax to be imposed on any increase in value since the time of the recordation of the original deed to the grantor. If the grantor did not take by deed, i.e. if the property was inherited, the full tax applies.

TAXATION—Recordation—Partition deed exempted must be one deed; separate deeds to accomplish partition renders both deeds taxable.

THE HONORABLE EMELINE A. HALL, Clerk
Circuit Court of Northumberland County

I have received your recent letter enclosing a court decree and two special commissioner's deeds executed pursuant thereto. You ask whether the tax imposed by Virginia Code § 58-54 is applicable to the recordation of these deeds.

In an opinion dated January 24, 1946, to the Honorable H. M. Walker, Clerk of the Circuit Court of Northumberland County, this office ruled that a partition deed exempted by Virginia Code § 58-57 must be one deed of partition, that the execution of separate deeds to accomplish the partition rendered both deeds taxable. This opinion appears justified under the definition of partition deed found in Black's Law Dictionary (4th ed. 1951):

"A species of primary or original conveyance between two or more joint tenants, coparceners, or tenants in common, by which they divide the lands so held among them in severalty, each taking a distinct part."
In my opinion neither of the deeds enclosed in your letter constitutes a partition deed. Each of the deeds is taxable under § 58-54.

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**TAXATION—Recordation—**
Section 58-54.1 applies only to realty sold; affidavit of grantor or grantee that there was no consideration may be accepted.

October 2, 1970

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

I have received your letter of September 28, from which I quote:

"I am experiencing difficulty with members of families presenting deeds for recordation wherein there is stated 'for and in consideration of $10.00 and other good and valuable consideration', and it is stated to me that the property was not sold, no money was involved and the property conveyed to him, her or them 'for love and affection'.

"I understand your interpretations of Section 58-61, but my problem is with Section 58-54.1. Would the execution of an affidavit by the grantor(s) or grantee(s) preclude me from charging this tax?"

Section 58-54.1 applies only to realty sold. The recited language creates a presumption that the property was sold. This presumption may be overcome by evidence satisfactory to you. In the absence of unusual circumstances, you may accept the affidavit of the grantor or grantee that there was no consideration.

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**TAXATION—Recordation—**
Supplemental lease—Based on aggregate rentals.

July 1, 1970

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

I have received your letter of June 11.

The Industrial Development Authority of the Town of Culpeper has leased certain property to Seaboard Allied Milling Corporation. The property was unimproved at the time of the lease but has subsequently been improved by the authority. The original lease was recorded and a tax, based on the value of the property at the date of lease, was paid.

Additional improvements were desired and the parties entered into a supplemental lease calling for rental payments which, although substantial, are less than the value of the improved property.

You have asked whether there is a recordation tax on the supplemental lease.

In my opinion a tax is imposed by Virginia Code § 58-58 upon the aggregate rentals to be paid under the supplemental lease.

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**TAXATION—Recordation—**
Tax imposed on value of real property in release of dower interest.

September 2, 1970

**THE HONORABLE KATHERINE V. RESPRESS, Clerk**
**Corporation Court of the City of Norfolk Part Two**

I have received your letter of August 7, in which you ask whether a tax is imposed on the recordation of a release, for consideration, of a widow's dower interest in her deceased husband's real property.

Upon her election the widow's, theretofore inchoate dower ripened into a vested life estate in one-third of the real property as to which her hus-
band was seized. Va. Code §§ 64.1-19 and 64.1-30. The release to which you refer was in consideration of certain payments by the estate of the husband and by the principal beneficiary under his will. In my opinion this constitutes a sale and the recordation of the agreement is subject to the taxes imposed by §§ 58-54 and 58-54.1 of the Code of Virginia.

The amounts of the taxes will be determined by the value of the dower interest or the consideration paid, whichever is greater. It appears that the term, dower interest, has been used in the agreement to include not only the widow's rights to real property but also her statutory share in her husband's personality. (See Va. Code § 64.1-16). In such event you should consider only the real property and a proportionate part of the consideration paid.

TAXATION—Recordation—Tax on supplemental lease based upon the actual value of property or amount of rentals.

December 22, 1970

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

I have received your letter of December 10, asking, with respect to the transaction more fully described in my letter of July 1 to you, whether the tax should be imposed on the basis of the aggregate rentals to be paid under the supplemental lease or upon the value of the property included in the supplemental lease but not in the original lease.

The supplemental lease covers all of the property including that covered by the original lease. Section 58-58 of the Virginia Code limits the tax imposed thereby to the “actual value of the property at the date of lease.” I am unable to construe this language as excluding property covered by an existing lease if the property is also covered by the supplemental lease to be recorded. If, as you indicate, the value of the covered property exceeds the aggregate rentals payable under the supplemental lease, the recordation tax would be computed upon the latter amount.

TAXATION—Recordation—Transfer of real estate from a trust is subject to tax.

April 7, 1971

THE HONORABLE ALVIN W. FRINKS
Clerk of Courts, City of Alexandria

I have received your letter of April 2, enclosing two deeds: one conveying a certain lot from third parties to a woman as trustee for her daughter; and another subsequently conveying the lot from the woman, as trustee, to her daughter. You ask whether the second deed is exempt from recordation taxes as a transfer from parent to child.

The mother held title to the lot not as a parent, but as a trustee. In my opinion, a transfer of real estate from a trust is subject to the recordation tax imposed by Virginia Code § 58-54, irrespective of any relationship between the trustee and the transferee.

TAXATION—Recordation—Value of building and land considered in computing recordation taxes.

March 1, 1971

THE HONORABLE D. L. PARRISH, JR., Clerk
Circuit Court of Goochland County

I have received your letter of February 24, in which you state that the purchaser of a parcel of land erected a building thereon before the sale.
Apparently the purchaser is a corporation owned by the seller. You ask whether the value of the building should be included in determining the actual value of the property conveyed for recordation tax purposes.

When a taxpayer ignores the formalities of legal title, he does so at his own risk. In my opinion the building, as well as the land, was conveyed and its value must be considered in computing the recordation taxes.

TAXATION—Recordation Tax—An agreement not construed as power of attorney and not related to real property is not recordable.

September 28, 1970

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

I have received your letter of September 9, enclosing a copy of an agency agreement which has been submitted to you for recordation. You ask if the agreement is recordable.

The agreement may not, in my opinion, be construed as a power of attorney. It does not relate to real property. I am aware of no provision of the Code which permits or requires such an agreement to be recorded and am therefore of the opinion that it may not be recorded. See Report of the Attorney General (1950-1951), p. 293.

TAXATION—Relief—No exemption for property taxed by town and county.

TOWNS—Taxation—No exemption for property also taxed by county.

COUNTIES—Taxation—No exemption on town property taxed by both authorities.

BOARDS OF SUPERVISORS—No Authority—To grant relief for property taxed by county and town.

September 2, 1970

THE HONORABLE E. EUGENE GUNTER
County Attorney for Frederick County

I have received your letter of August 5. You say that residents of the Town of Middletown, an incorporated town, are subject to both county and town taxes upon real and personal property. It has been suggested that this constitutes double taxation and that Frederick County should render some form of tax relief to the citizens of Middletown. You ask whether such relief may be granted.

Taxation of the same property by the Town and the County is no more double taxation than taxation of the same income by the State and federal governments. Section 168 of the Virginia Constitution requires that all taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax..." This requirement forbids exemption from county taxes of property located in a town. Campbell v. Bryant, 104 Va. 509 (1905).

I am of the opinion that Frederick County may not relieve the citizens of Middletown of their duty to pay taxes on property located in the town.

TAXATION—Rescue Squads—Property not exempt.

RESCUE SQUADS—Taxation—Property not exempt.

August 28, 1970

THE HONORABLE FREDERICK T. GRAY
Member, House of Delegates
I have received your letter of August 10, in which you ask whether property of the Forest View Volunteer Rescue Squad is exempt from taxation.

This office has previously ruled that § 58-12(9) of the Code of Virginia is not sanctioned by Section 183 of our Constitution. See Opinions of the Attorney General (1958-1959), p. 282. I believe that the 1959 opinion correctly states the law and am of the opinion that property of the rescue squad is taxable.

TAXATION—Retail Sales and Use Tax—Retail sales tax imposed on vendor, use tax on purchaser; vendor relieved when given exemption certificate.

May 24, 1971

The Honorable Herbert H. Bateman
Member, Senate of Virginia

I have received your letter of May 19, in which you ask:

"Does the Sales and Use Tax statute permit the Commonwealth, through the Department of Taxation, to seek to recover unpaid sales or use taxes from the vendee or user and, if such authority exists, is the Commonwealth required to first seek recovery of the unpaid taxes from the seller or supplier having a statutory duty to have remitted the taxes on sales to non-exempt buyers or users."

The retail sales tax is imposed on the vendor by Virginia Code § 58-441.4. The use tax is imposed on the purchaser by Virginia Code § 58-441.5. These taxes are complementary; double taxation is forbidden by § 58-441.5(d), which provides:

"A transaction taxed under § 58-441.4 shall not also be taxed under this section, nor shall the same transaction be taxed more than once under either section."

Although Virginia Code § 58-441.18 clearly makes a vendor liable for any tax which he fails to pass on to his customer, that section does not, in my opinion, affect the liability of the purchaser for payment of the use tax. Virginia Code § 58-441.17(b), however, explicitly relieves a vendor from the tax if he is given an exemption certificate by the purchaser.

In my opinion, the Department of Taxation may not assess the tax against a vendor who has accepted an exemption certificate in good faith. In such a case, the Department must proceed only against the purchaser. In all other instances, the Department may proceed either against the vendor for payment of the sales tax or against the purchaser for payment of the use tax. I am aware of nothing which would require the Department to proceed against one party rather than the other.

TAXATION—Sale of Delinquent Lands—Clerk not required to draft deed.

March 1, 1971

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

I have received your letter of February 10, from which I quote:

"I note that Section 58-1091 provides that the person shall obtain from the Clerk of the Circuit Court in the county or corporation in which the real estate is situated, a deed conveying the same, in which shall be set forth all the circumstances in the Clerk's Office relating to the purchase, sale, etc."
“My question is this. In your opinion does this impose a duty upon the Clerk to actually draw the deed which he has to execute, and if your answer is in the affirmative, is there any fee which the Clerk can charge for writing and executing such a deed?”

Section 58-1092 of the Code provides a fee of one dollar for the execution of the deed and further provides that the court may compel the clerk to execute the deed. I am of the opinion that § 58-1091 does not require the clerk to draft the deed.

TAXATION—Sales and Use Tax—Applicable to textbooks sold by concessionnaire at VMI.

THE HONORABLE CHARLES W. GUNN, JR.
Member, House of Delegates

I have received your letter of October 28, in which you ask whether textbooks sold to Virginia Military Institute cadets by a commission concessionnaire are subject to the retail sales tax.

Virginia Code § 58-441.6(1) exempts from the tax, “. . . school textbooks sold by a college or other institution of learning, not conducted for profit, for use of students attending such institution of learning.” The concessionnaire is not an institution of learning and sales made by him do not fall within the exemption. I am aware of no other provision under which exemption could be claimed.

I am therefore of the opinion that the sales of textbooks by the concessionnaire are subject to the tax.

TAXATION—Sales and Use Tax—Bad check—President of corporation may be charged.

CRIMINAL PROCEDURE—Venue—Lies in locality of business office of president of corporation which gives bad check for sales and use tax.

THE HONORABLE E. C. WESTERMAN, JR.
Commonwealth’s Attorney for Botetourt County

I have received your letter of July 22, in which you ask whether a criminal warrant may be taken under Virginia Code § 58-441.35 against the president of a corporation who signs a bad check tendered in payment of the corporation's sales tax liability. I assume that the requisite notice was given the corporation, to the attention of the president.

In Crall v. Commonwealth, 103 Va. 855 (1905), our Supreme Court of Appeals held that the vice president of a corporation was guilty of the corporation’s crime of peddling its goods without a license. The vice president neither sold goods nor directed its employees to do so without a license. He was found to be in charge of the business and “cognizant of the fact that the subordinate agents of the company were peddling its goods without license.” By signing the check and failing to cause the corporation to make good the check, the president of the corporation to which you refer knowingly permitted the corporation to commit a crime, for which he may be held liable.

You also ask my opinion as to the proper venue for such an action. In my opinion, the offense is committed by the failure of the corporation to make good the check. Section 58-441.35 is clearly distinguishable from §§ 6.1-115 and 6.1-117, which were found in Cook v. Commonwealth, 178 Va. 251 (1941) to define a similar offense as the making of the bad check. Venue would therefore lie in the county or city in which is found the business office of the president.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Sales and Use Tax—Criminal liability of corporate officer.

THE HONORABLE WILLIAM H. FULLER III
Commonwealth's Attorney for the City of Danville

I have received your recent letter in which you ask whether you should prosecute the secretary/treasurer of a corporation for violation of § 58-441.18 of the Code of Virginia. That section provides in part:

"Any dealer who shall neglect, fail, or refuse to collect such tax upon each and every taxable sale, distribution, lease, or storage of tangible personal property made by him, his agents, or employees shall be liable for and pay the tax himself, and such dealer shall not thereafter be entitled to sue for or recover in this State any part of the purchase price or rental from the purchaser until such tax is paid. Moreover, any dealer who shall neglect, fail or refuse to pay or collect the tax herein provided, either by himself or through his agents or employees, shall be guilty of a misdemeanor."

In my opinion, you may prosecute the secretary/treasurer if, and only if, you believe that you can prove:
1. That the secretary/treasurer was personally negligent or was aware of the corporation's failure or refusal to pay or collect the tax; and,
2. That the secretary/treasurer had sufficient control over that portion of the business dealing with the payment and collection of the tax to prevent the corporation from violating § 58-441.18.

TAXATION—Sales and Use Tax—Department of Highways—Subject to.

HIGHWAYS—Taxation—Sales and use tax—Assessed on gross sales if selling at a profit.

THE HONORABLE DOUGLAS B. FUGATE
Commissioner, Department of Highways

I have received your letter of July 3, from which I quote:

"The Department of Taxation has determined that the four percent (4%) sales tax is applicable to certain sales made by the Virginia Department of Highways. These include the sale of approximately 50,000 county maps at $0.10 per copy each year. In addition, money is collected for reproductions of plans, BW prints, road and bridge specifications, road design standards, enlarged county maps and the Virginia Manual of Uniform Traffic Control Devices. Most of these items are reproduced from drawings, designs, etc. as part of the work factor of the Department.

"There is no difficulty with the sale of items on which the tax may be passed to the purchaser. However, if the tax to be assessed against the Department is to be based on the gross amount resulting from all sales, a problem arises with regard to the sale of items on which the Department can collect no tax from the purchaser, e.g., county maps at $0.10 each.

"Accordingly, I would appreciate your opinion on two questions:
1. Is the Department of Highways obligated to collect and pay the sales tax on the sales tax of these items?
2. If so, on what basis will the tax be assessed?"

The General Assembly subjected the State to the Virginia Retail Sales and Use Tax Act by defining a person for purposes of the Act as including, "any . . . body politic or political subdivision, whether public or pri-
vate, or quasi-public . . .” Va. Code § 58-441.2(a). The State is exempted by § 58-441.6(p) from payment of the tax on purchases for its use or consumption. I am aware of no exclusion or exemption of the State from any other provision of the Act. Every person who “[s]ells at retail, or who offers for sale at retail . . . tangible personal property . . .” is a dealer, from whom the tax is collectible. Va. Code § 58-441.12(c). Section 58-441.18 of the Code reemphasizes this duty by providing:

“Notwithstanding any exemption from taxes which any dealer now or hereafter may enjoy under the Constitution or laws of this or any other state, or of the United States, such dealer shall collect such tax from the purchaser, consumer, or lessee and shall pay the same over to the Commissioner as herein provided.”

It is therefore my opinion that the Department of Highways is obligated to collect and pay the sales or use tax on the sale of the items mentioned by you.

The basis upon which the tax will be assessed depends upon whether the tax is a use tax or a sales tax. To be liable for the sales tax, which would be based upon gross sales, the Department of Highways must be “engaged in the business of selling at retail . . . tangible personal property in this State,” Va. Code § 58-441.4. “Business” is defined by § 58-441.3(i) to include, “any activity engaged in by any person . . . with the object of gain, benefit or advantage, either direct or indirect.” It would normally be presumed that a State agency does not operate for “gain, benefit or advantage.” If, however, the price at which you sell such property includes a markup above cost, it is my opinion that the Department of Highways is engaged in business and the tax will be computed upon gross sales. If no attempt is made to realize a profit on the sales, I am of the opinion that the Department is liable only for the collection of the use tax upon each sale subject to the tax under § 58-441.51.

TAXATION—Sales and Use Tax—Localities authorized to increase additional one percent sales tax may be limited in number.

February 16, 1971

THE HONORABLE WALTER B. MARTIN, JR.
Member, House of Delegates

I have received your letter of February 16, from which I quote:

“It would be appreciated if you would furnish me with an opinion as soon as possible as to the legality of placing in a bill giving localities permissive right to impose an additional one percent sales tax, a paragraph making it applicable only to Norfolk, Portsmouth and Richmond.”

You refer, of course, to special legislation for the assessment and collection of taxes, ordinarily forbidden by Section 14 (5) of Article IV of the revised Virginia Constitution. Section 2 of Article VII of the Constitution specifically provides:

“The General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine. . . .”

For enactment, a special act must receive an affirmative vote of two-thirds of the members elected to each house of the General Assembly.

In my opinion a bill such as you suggest could be legally adopted by the requisite vote of the General Assembly.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Sales and Use Tax—Release of information on retail sales restricted.

December 22, 1970

THE HONORABLE GEORGE N. MCMATH
Member, House of Delegates

I have received your recent letter asking whether the Department of Taxation should release to incorporated towns the retail sales reported by merchants located in those towns.

Virginia Code § 58-441.43 prohibits the Department of Taxation from releasing the information requested by you. The Department collects the locally levied sales and use taxes and, in my opinion, may properly disclose this information to cities and counties in fulfilling its obligation to account for those taxes. See Va. Code §§ 58-441.49 and 58-441.49:1. The counties may in turn disclose the information to “any incorporated town constituting a special school district and operated as a special school district under a town school board of three members appointed by the town council.” See Va. Code §§ 58-441.49(g) and 58-441.49:1(g).

In my opinion, the need of towns for the sales information for the computation of retail merchants license taxes is not, except in specific cases sanctioned by court order, sufficient to override the secrecy provisions of § 58-441.43.

TAXATION—Sales and Use Tax—Sale of drugs to physician by pharmacy subject to.

January 19, 1971

THE HONORABLE EDWARD E. WILLEY
Member, Senate of Virginia

By your recent letter you asked my opinion as to the imposition of the Virginia Retail Sales and Use Tax on drugs sold to a physician for his professional use. This question is answered by § 1-65(b) of the Virginia Retail Sales and Use Tax Rules and Regulations, which provides:

“Physicians, dentists, and hospitals are considered to be the users or consumers of medicines and drugs which they purchase for use in administering treatment to their patients; therefore, sales thereof to physicians, dentists and profit hospitals for such use are subject to the tax, and this is true notwithstanding such medicines and drugs may be of the type usually sold only on a prescription of a physician or dentist. If a physician or dentist should, in fact, regularly engage in the business of making outright sales of medicines or drugs to his patients or to other consumer customers, such sales are exempt from the tax provided such medicines or drugs are sold on written prescription of the physician or dentist, or another physician or dentist, and a record is made of each such sale and kept, along with the written prescription, as a part of the seller’s permanent records. A physician-seller or a dentist-seller is not encouraged to register as a dealer unless his sales are substantial. If a hospital maintains a pharmacy from which sales of drugs and medicines are made to individuals or to patients for their use after they leave the hospital, such sales are exempt from tax provided they are made on written prescription of a physician or dentist and a record of the sale and the prescription is kept in the manner described in paragraph (a) above. An entry on a patient’s medical record card or hospital chart of medicines or drugs for such patient does not meet the requirements of a written prescription.”

This regulation has recently been approved by the Circuit Court of Arlington County in the case of Northern Virginia Doctors Hospital Corp. v. Department of Taxation, in an opinion from which I quote:
"It is further contended that the regulations defining prescriptions, declaring that hospitals are primarily engaged in the business of selling services, and requiring hospitals (unless non-profit) to pay the sales tax to its vendor for tangible personal property used or consumed in the operation of the hospital are void as contravening § 58-441.6(s), Code, and discriminatory against patients who are hospitalized. With respect to the first point, the regulations do not contravene the legislative purpose of the statute, nor do they arbitrarily or unreasonably limit its effect, but appear to contain reasonable declarations of policy, definitions and limitations to guard against and prevent abuses in the allowance of an exemption to a revenue statute. To exempt the sales here in question would be inconsistent with the provisions of subsection (t) of § 58-441.6, Code. The regulations are inconsistent with neither subsections (s) or (t) of this statute, but clarify any apparent inconsistency between the two and define the area sought to be covered by each of the exemptions. The second contention, viz., that the regulations discriminate against hospitalized patients, is without merit. Under the evidence in this case, the transactions are not sales by the Pharmacy to the patient by prescription. The patient is not the taxpayer."

While this particular case dealt with hospitals and your question relates to physicians, I believe that the same principles are applicable and am of the opinion that a pharmacy must collect the sales tax when it sells drugs to a physician for his use in rendering services to his patients.

TAXATION—Sales and Use Tax—Sales tax applicable to sales made by outsiders to Indians and sales made off reservation; Indians required to collect use tax from outside purchasers.

April 7, 1971

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

I have received your recent letter in which you ask whether the Virginia Retail Sales and Use Tax applies to American Indians residing on reservations in Virginia. The sales tax is a tax on the vendor. Va. Code § 58-441.4. Our long standing Indian policy requires that the sales tax not be imposed on Indians for transactions taking place on their reservations. See the opinion to the Honorable B. C. Garrett, Jr., dated January 30, 1970, and found at Report of the Attorney General (1969-1970), p. 277. This exemption, however, brings the use tax imposed by Virginia Code § 58-441.5 into effect. Virginia Code § 58-441.18 provides, in part:

"Notwithstanding any exemption from taxes which any dealer now or hereafter may enjoy under the Constitution or laws of this or any other state, or of the United States, such dealer shall collect such tax from the purchaser, consumer, or lessee and shall pay the same over to the Commissioner as herein provided."

As the use tax is imposed on the purchaser/consumer, sales made by Indians to Indians on their reservation are wholly exempt from the Virginia Retail Sales and Use Tax. Sales made by outsiders to Indians and all sales made off the reservation are subject to the sales tax. Indians selling to outsiders on the reservation are required to collect the use tax from their purchasers.

TAXATION—Sales and Use Tax; Tobacco Products—City may not levy a sales and use tax on tobacco products other than cigarettes.
I have received your recent letter in which you ask whether the City of Virginia Beach may impose a tax upon the sale or use of tobacco products, as defined in Virginia Code § 58-757.18(6).

The term, tobacco product, is defined by § 58-757.18(6) as including, "little cigars, cheroots, stogies, cigars, and cigarettes." Virginia Code § 58-757.27 provides, in part, "No provision of this chapter shall be construed to deprive counties, cities and towns of the right to levy taxes upon the sale or use of tobacco or tobacco products." (Emphasis supplied.) Virginia Code § 58-441.49(a) prohibits "local general sales and use" taxes and "local general retail sales and use" taxes, but excepts, "local excise taxes on cigarettes, . . . to the extent authorized by law . . . ." (Emphasis supplied.)

Neither § 58-757.27 nor § 58-441.49(a) authorizes tobacco or cigarette sales and use taxes. These sections merely prevent other provisions of law from restricting Virginia Beach's broad charter powers. Section 58-757.27 does not affect the restriction imposed by § 58-441.49(a) for the latter section was enacted after the former and the former is expressly limited to chapter 14.2 of Title 58.

Normal rules of statutory construction would lead to the conclusion that the exception (i.e., local excise taxes on cigarettes) would otherwise be included in the broader term (i.e., local general sales and use taxes or local general retail sales and use taxes). See Richmond v. Fary, 210 Va. 338, 341 (1969). This construction is supported by the designations in the captions of articles 1 ("Sales Tax") and 2 ("Use Tax") of chapter 14.2 of Title 58, which impose the State taxes on tobacco products.

The exception to the § 58-441.49(a) prohibition is only for local excise taxes on cigarettes and does not include any tax on other tobacco products. This provision was a part of 1966 House Bill No. 222 which, as introduced, provided a broad exception for "local excise taxes on selected commodities, services or subjects . . . ." The bill was amended to bring § 58-441.49(a) into its present form. The same session of the General Assembly provided for the expiration, as of the end of August 31, 1966, of the State tax on tobacco products other than cigarettes. 1966 Acts of Assembly, ch. 358. The Virginia Retail Sales and Use Tax became effective September 1, 1966. Va. Code § 58-441.47.

In my opinion, the City of Virginia Beach may not levy a sales and use tax on tobacco products, other than cigarettes.

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I have received your recent letter, in which you ask:

"Can the Commissioner of the Revenue or the Treasurer of any county or city in the state of Virginia legally publish or print in report form the tax assessments and tax levies of any individual or corporation without consent of the taxpayer?"

I understand that the information to be included in such a report would consist only of matters required by law to be entered on the public assessment books and accordingly exempt from the secrecy requirements of Virginia Code § 58-46. I am of the opinion that a Treasurer or Commis-
sioner of the Revenue may publish or print such a report if its preparation does not interfere with the performance of the duties of his office.

TAXATION—Stamp Redemption Store—Falls within purview of Fairfax gross receipts tax.

TAXATION—Gross Receipts—Of stamp redemption store is fair market retail value of merchandise for which stamps turned in.

TAXATION—Local License Tax—To be imposed business must be located within locality.

THE HONORABLE A. HOWELL THOMAS, JR.
Commissioner of the Revenue
City of Fairfax

September 10, 1970

I have received your letter of August 28, in which you state that there is located in your city a premium stamp redemption store. You enclose a copy of the Fairfax City Business Privilege License Tax Ordinance and ask the following questions:

"1. Under the terms of our City Ordinance is a trading stamp redemption store a licensable business in our City?

"2. If so, under what category of business would their license be obtained, and what value would constitute their gross receipts?

"3. Am I correct in assuming that the occupation of selling trading stamps is not licensable under our ordinance so long as it is not conducted from a place of business in our City?"

Section 12-51 of your Ordinance imposes a tax on retail merchants. The tax is based upon gross receipts. The term, gross receipts, is defined in Section 12-1 of the Ordinance as including:

"The gross receipts, irrespective of their source, from any business, profession, trade, occupation, vocation, calling or activity, including cash, credits, fees, commissions, brokerage charges and rentals, and property of any kind, nature or description from either sales made or services rendered at any location . . . ."

The State of Virginia imposes a license tax upon every person "engaged in the business of furnishing or supplying . . . any stamps, coupons, tickets or similar devices . . . ." Va. Code § 58-354.1. The State tax is imposed upon the business of supplying, not that of redeeming, the stamps. Section 58-354.4 of the Code specifically contemplates a local license tax on the redemption of stamps. In my opinion, the business of redeeming stamps is essentially a retail merchant occupation falling within the tax imposed by Section 12-1 of the Fairfax City Ordinance.

The gross receipts of the business are the value of the stamps turned in for merchandise. This value will be presumed to be the fair market value, at retail, of the merchandise.

Virginia Code § 58-354.4 permits a local license tax to be imposed only by a locality in which is located an established place of business. The redemption center provides a sufficient nexus for the imposition of a tax on its activities; in my opinion the required nexus is not present for the purposes of a tax on the business of selling stamps if the stamps are not sold from a place of business in the city.

TAXATION—State Capitation Tax—Imposed upon every resident over twenty-one until § 58-49 is repealed.
REPORT OF THE ATTORNEY GENERAL

February 1, 1971

THE HONORABLE O. BEVERLEY ROLLER
Member, House of Delegates

By your recent letter you say that one of your constituents has asked for a detailed explanation of the present and future status of the State capitation tax.

The capitation tax may no longer be a prerequisite for voting. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). Nevertheless, the tax remains valid as a revenue measure. Shepheard v. Moore, 207 Va. 498 (1966). Section 173 of the present Virginia Constitution requires the General Assembly to levy an annual $1.50 capitation tax and this section is implemented by § 58-49 of the Code. Until § 58-49 is repealed, the State capitation tax is imposed upon every resident over twenty-one and not pensioned by the State for military services.

Section 173 of the Constitution has been deleted, effective July 1, 1971. As of that date the State will no longer be required to levy the tax. The Code Commission has recommended legislation which, if adopted by the 1971 General Assembly, would repeal § 58-49 and other Code provisions referring to the tax. Because the tax is presently assessable as of January 1 of each year, the repeal of § 58-49 would not absolve taxpayers of their 1971 tax liability, for that liability has already been fixed prior to the effective date of the repeal. Senate Bill No. 103 would wholly abate the tax for the year 1971.

TAXATION—State Capitation Tax—Payment not required for candidacy for office.

February 1, 1971

THE HONORABLE J. E. COX
Treasurer of Fauquier County

I have received your recent letter in which you ask:

"Is the State Capitation Tax required to be paid by a candidate in order to qualify to run for a State or local office in 1971?"

As payment of the State Capitation Tax is no longer a prerequisite for voting, I am aware of no reason why payment could be required as a condition to running for State or local office.

TAXATION—Tangible Personal Property—Personal property not owned on January 1 not taxable.

December 23, 1970

THE HONORABLE FRED M. FARLEY
Commissioner of Revenue for City of Lynchburg

I have received your recent letter asking whether the City of Lynchburg may impose a personal property tax on persons who sell their automobiles shortly before January 1 of each year and purchase new cars immediately after that date.

The tax on personal property is fixed as of January 1 of each year. Va. Code § 58-835. I am unable to hold that the City may tax any property not owned on that date. If the taxpayer purchases the car before January 1 and merely waits until after that date to take possession or to bring the car into the City, the tax would apply.

TAXATION—Towns—Delinquent tax records may not be removed from Circuit Court.
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE RICHARD F. GEORGE, Clerk
Circuit Court of Fluvanna County

I have received your letter of October 13, asking whether you may, at the request of the Columbia Town Council, remove the 1963 and 1964 delinquent Columbia tax records from your books.

Virginia Code § 58-1110 provides that delinquent town taxes shall be a lien upon the assessed real estate. The effect of removing the records would be to free the lands from the town lien, if they are acquired by bona fide purchasers. I know of no authority permitting a town council to take this action and am of the opinion that you should not remove the records from your books.

TAXATION—Utility Taxes—May be adopted by board of supervisors by general ordinance.

COUNTIES—Ordinance—Utility taxes—May be adopted under general provisions of § 15.1-504.

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

This is in reply to your letter of February 24, 1971, in which you requested my opinion whether an ordinance levying a tax on purchases of utility services under the statutory authority conferred in §§ 58-587.1 and 58-617.2 of the Code of Virginia (1950), as amended, must be adopted under the general provisions of § 15.1-504 or under the special provisions of that section.

I am of the opinion that the ordinance may be adopted under the general provisions of that section. I enclose copy of an opinion of this office to the Honorable Charles L. McCormick, III, Commonwealth's Attorney for Halifax County, dated April 15, 1970, and found in Report of the Attorney General (1969-1970), p. 295, to this effect.

TAXATION—Writ Tax and Clerk's Fee—Writ tax imposed only on the institution of an adversary proceeding; clerk's fee on proceeding fixed.

THE HONORABLE ELIZABETH W. STOKES, Clerk
Circuit Court of Roanoke County

I have received your letter of September 22, in which you ask my opinion as to the proper amount of the clerk's fee and writ tax payable on the institution of a proceeding to sell or mortgage church property pursuant to Virginia Code § 57-15. You also ask the amount payable on the filing of an application for correction of an erroneous assessment under Virginia Code § 58-1145.

In a letter dated June 9, 1970, to Honorable W. Franklin Gooding, Clerk of the Circuit Court of Fairfax County, I expressed my opinion that a writ tax is imposed only on the institution of an adversary proceeding. Proceedings under § 57-15 are ex parte and no writ tax is payable.


The clerk's fee on the church sale proceeding is fixed by Virginia Code § 14.1-112(23); the fee on tax correction applications, by § 14.1-112(17).
TOWNS—Council—Councilman-elect must meet freeholder requirement of charter.

THE HONORABLE GARNETT S. MOORE
Member, House of Delegates

I am in receipt of your letter of July 16, 1970, requesting an opinion as to whether a councilman-elect who does not own real estate in the Town of Pulaski as required by Town Charter, Chapter 337 of the 1948 Acts of Assembly, can properly qualify and take his seat on Council. Furthermore, you inquire that should litigation ensue, what method should be followed in determining the qualifications of this councilman-elect. It is my understanding that this gentleman did not own real estate in the Town during his candidacy or on the day of the election, nor does he now own real estate in the Town.

The Charter of the Town of Pulaski, § 8, paragraph 2, provides that any person elected to or seeking the office of councilman must be a resident, freeholder and qualified voter of the Town. A freeholder of course is one having title to realty. By including in the Town Charter of 1948 the freehold requirement as an eligibility factor for a prospective Town councilman, the Town of Pulaski retained an earlier provision as found in the Town Charter of 1910. Chapter 242 of the 1910 Acts of Assembly specifically provided:

“No citizen shall be eligible for membership as a councilman unless he is a freeholder.”

In Miller v. Pulaski, 109 Va. 137, 63 S.E. 880 (1909), the Court held that the legislature had the power to amend the charter of a municipal corporation if it pursued the mode provided in Section 117 of the Virginia Constitution. Section 117 permits special legislation for the organization and government of cities and towns. In Town of Narrows v. Giles County, 128 Va. 572, 105 S.E. 82 (1920), where the town charter was at variance with the general law, the Court upheld the power of the legislature to create the differences mentioned provided the charter was enacted in the manner provided by Article IV of the Constitution of Virginia and by the vote required by Section 117 of the Constitution. See also, City of Portsmouth v. Weiss, 145 Va. 94, 133 S.E.2d 781 (1926). Furthermore, in Fallon Florist v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950), the Court stated:

“[t]he state legislature is unrestrained in the enacting and amendment of municipal charters, except for those restraints imposed by § 117.”

In Pierce v. Dennis, 205 Va. 478, 485, 138 S.E.2d 6 (1964), the Court stated:

“Clearly, § 117 gives to the legislature the power to enact, by special act, laws for the organization and government of one city which differ from those enacted for another city, and which it might be powerless, in any event, to enact specially for a county.”

This rationale applies to the presumption of qualifications for prospective officers. Pierce v. Dennis, supra, at 486.

“A law which determines the qualifications and capabilities of potential office-holders, which says who may serve and who may not, and which touches upon the political privilege of the election or appointment to and the holding of public office, is surely a law for the organization and government of the jurisdiction affected thereby.”

Furthermore, Article IV, Section 63 (11) of the Constitution of Virginia is inapplicable in this situation. It provides as follows:
"The General Assembly shall not enact any local, special or private law in the following cases:

* * *

"11. For conducting elections or designating the places of voting."

Qualifications required of a candidate for election are elements of the organization and government of cities as used in Section 117 of the Constitution. Thus as Section 117 is in point, the prohibition of Section 63 (11) applying only to cases not otherwise provided for is not applicable. See the opinion to the Honorable Bernard Levin, Member, House of Delegates [Report of the Attorney General (1967-1968), p. 44 at 45].

For your information, I am enclosing copies of opinions to the Honorable Bernard Levin, Member, House of Delegates, supra; the Honorable E. Ralph James, Member, House of Delegates [Report of the Attorney General (1963-1964), at p. 29]; and the Honorable W. L. Prieur, Jr., Clerk of Courts for Norfolk [Report of the Attorney General (1949-1950), at p. 46], which pertain directly to the issue you raise.

Your inquiry is therefore answered in the negative. The individual in question may not properly qualify and take his seat on Council since he was not a freeholder "when elected to or seeking the office of councilman."

TOWNS—Incorporated—Place for keeping official records—Determined by governing body.

March 23, 1971

The Honorable Jack F. DePoy
Commonwealth’s Attorney for Rockingham County and City of Harrisonburg

This is in reply to your letter of March 9, 1971, in which you ask to be advised as to where the official records of a small incorporated town should be kept.

Section 15.1-844 of the Code of Virginia (1950), as amended, provides as follows:

"A municipal corporation shall provide for the control and management of the affairs of the municipality, and may prescribe and require the adoption and keeping of such books, records, accounts and systems of accounting by the departments, boards, commissions, courts or other agencies of the local government as may be necessary to give full and true accounts of the affairs, resources and revenues of the municipal corporation and the handling, use and disposal thereof."

In view of the language of this section I am of the opinion that the location of the official records of an incorporated town is a matter to be determined by the governing body of the town.

TOWNS—Indebtedness—Limitations on.

December 3, 1970

The Honorable Robert L. Powell
Commonwealth’s Attorney for Giles County

This is in reply to your letter of November 11, 1970, in which you pose the following question:

"Does the Council of a town have the authority to purchase equipment from a manufacturer and obligate the town to a long term debt under a conditional sales contract or lease-purchase agreement?"
Limitations on the indebtedness of towns are found in Section 127 of the Constitution and §§ 15.1-176 and 15.1-177 of the Code of Virginia. The amount of indebtedness by these sections may not exceed eighteen per centum of the assessed valuation of the real estate in a town subject to taxation. Interest bearing obligations are included in determining this limitation.

I am, therefore, of the opinion that the town may not obligate itself to a long time debt under an interest bearing conditional sales contract or lease-purchase agreement which is in excess of the indebtedness limitations.

TOWNS—Industrial Development—Contributions to.

The Honorable Duncan C. Gibb
Member, House of Delegates

This is in reply to your letter of March 17, 1971, requesting my opinion whether towns have authority by §§ 15.1-511.1 and 15.1-1388, Code of Virginia (1950), as amended, to contribute to industrial development under the Industrial Development and Revenue Bond Act (Title 15.1, Chapter 33).

Section 15.1-511.1 of the Code reads as follows:

"The governing body of any county in this State may give, lend or advance in any manner that to it may seem proper funds or other county property, not otherwise specifically allocated or obligated, to any authority created by such governing body pursuant to law."

This section applies only to counties and does not authorize a town to lend or advance funds for industrial development.

A town is, however, included in the definition of a municipality under the Industrial Development and Revenue Bond Act and therefore authorized to exercise the authority granted under § 15.1-1388 of the Code. This section reads:

"Any municipality may acquire a facility site by gift, purchase or lease and may transfer any facility site to an authority by sale, lease or gift. Such transfer may be authorized by a resolution of the governing body of the municipality without submission of the question to the voters and without regard to the requirements, restrictions, limitations or other provisions contained in any other general, special or local law. Such facility sites may be located within or without or partially within or without the municipality creating the authority."

Under this provision the county, which is also included in the definition of a municipality, may exercise the authority granted therein. Therefore, either the county or the town may exercise the authority granted under this section.

I enclose for your information a copy of an opinion dated March 25, 1971, to the Honorable John F. Ewell, Commonwealth's Attorney for Warren County, which relates to your question.

TOWNS—May Designate Executive Secretary Without Charter Amendment.

EXECUTIVE SECRETARY—Town May Designate Without Charter Amendment.

VIRGINIA CONFLICT OF INTERESTS ACT—Employment as Executive Secretary of Emancipated Son of Member of Council Not a Conflict of Interests.
I am in receipt of your letter of December 28, 1970, which reads:

"I have two questions. The Town Council at a special meeting determined to appoint a person to be designated as Executive Secretary at a salary of $7,500.00 per year. The person to be appointed to this position is the emancipated son of one of the members of the Council. In other words, he is married and lives separate and apart from his father and the father abstained from voting on the motion. The Town Charter does not provide for an Executive Secretary, but does provide for a Clerk and Treasurer.

"Question 1: Can the Town designate the person as Executive Secretary without an amendment of the Town Charter.

"Question 2: Does the employment of the son of a member of the Council, although he is emancipated and living separate and apart, constitute a conflict of interest within the present law?"

I am of the opinion that your first inquiry is answered in the affirmative. Sections 15.1-13 and 15.1-797 would grant the Town Council the power to appoint an individual as Executive Secretary without the necessity of amending the town charter. Such statutes in pertinent part read as follows:

"§ 15.1-13. The governing bodies of cities and towns, for the purpose of carrying into effect the enumerated powers conferred upon them may . . . appoint . . . such officers as they may deem proper, define their powers, prescribe their duties and compensation, . . ." (Emphasis added.)

"§ 15.1-797. The council of every city or town of this Commonwealth having in its charter the power to appoint certain municipal officers shall, in addition to such power, have power to appoint such other officers and employees as the council may deem proper. . . ." (Emphasis added.)

Your second question is answered in the negative. See opinion to the Honorable Donald C. Stevens, County Attorney for County of Fairfax, dated July 27, 1970, copy of which is enclosed, wherein this office has previously so ruled.

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TOWNS—Utility Tax—No charter change needed to impose.

TOWNS—Utility Tax—May not be extended to purchasers of oil and coal.

TOWNS—Utility Tax—No limitation on rate.

TOWNS—Utility Tax—Different maximums permissible for residential and business users.

TAXATION—Utility Tax—No town charter change needed to impose.

TAXATION—Utility Tax—May not be extended to purchasers of oil and coal.

TAXATION—Utility Tax—No limitation on rate.

TAXATION—Utility Tax—Different maximums permissible for residential and business users.
I have received your letter of August 24. You ask four questions which I shall answer seriatim.

"(1) In order for the Town of Rocky Mount to impose a utility tax, would there have to be any Charter change?"

Sections 58-587.1 and 58-617.2 of the Virginia Code specifically permit towns to impose certain utility consumers' taxes. I am of the opinion that no change in the Rocky Mount Charter is necessary for it to impose these taxes.

"(2) Can the Town impose a utility tax on the local oil companies and coal company in addition to imposing a tax on the telephone company and power company?"

I am of the opinion that utility consumers' taxes may not be imposed upon purchasers of oil and coal. See the enclosed opinion, dated June 25, 1970, to Honorable Wescott B. Northam, Commonwealth's Attorney for Accomack County.

"(3) Most towns that have a utility tax set a tax rate of 10% for such a tax; however, the Town would like to know if there is any limitation as to the percentage of such a tax."

I am aware of no limitation on the tax rate of a utility consumers' tax.

"(4) If the Town should vote to have a utility tax of say 10%, is it permissible to set a maximum tax to be paid by individual home owners without setting a maximum for business and industry?"

Many Virginia localities adopt different consumer tax maximums for residential and business users. Such a classification is, in my opinion, reasonable.

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TRAILER CAMPS—Regulations by Ordinances—Must conform to constitutional requirements.

ORDINANCES—Counties—Regulating and licensing trailer camps under §§ 35-61 through 35-64.1—Must conform to constitutional requirements.

October 29, 1970

THE HONORABLE ROBERT C. GOAD
Commonwealth’s Attorney for Nelson County

This is in reply to your letter of October 15, 1970, from which I quote the following:

"Enclosed find a copy of the Nelson County Trailer Ordinance, which is scheduled to become effective January 1, 1971.

"I will appreciate very much your opinion as to whether Article 6 of the Ordinance is constitutional and valid. In this connection, the only big objection raised by citizens to the Ordinance is the requirement in Section 2 of Article 4 that a trailer lot shall have not less than 4000 square feet of ground, and that there shall be a minimum distance of 50 feet between each trailer. Can the Board of Supervisors of Nelson County legally require the owners and operators of existing trailer camps to comply with the Ordinance, especially Section 2 of Article 4, after six years from the date the Ordinance is adopted, or, for that matter, at any reasonable time after the Ordinance is adopted, or, should all existing trailer camps be exempted from compliance with the Ordinance in this respect? Should the 'Grandfather clause' as to existing trailer parks be unlimited in time, as long as they are not changed or altered, or can such a clause require compliance within six years, as set forth in Article 6?"
Examination of this Ordinance reveals that it derives its authority from Chapter 6, Title 35 of the Code of Virginia, which includes Articles 1 and 1.1, §§ 35-61 through 35-64.6, relative to the regulation and licensing of "trailers" and "trailer camps."

You raise the question of constitutionality and validity of Article 6 of the Ordinance, especially in relation to its requirement that all existing trailer camps comply with Section 2 of Article 4 thereof. In this connection, I quote from the Ordinance the following:

"ARTICLE 6 EXISTING TRAILERS AND TRAILER CAMPS

"All persons using, maintaining or operating any trailer lot or trailer camp in Nelson County in existence at the time this ordinance is adopted shall fully comply with all of the provisions of this ordinance within the next sixty (60) days after the effective date hereof, with the exceptions, however, that the owners or operators of trailer camps shall have a period of six (6) years immediately after the adoption of this ordinance within which to comply with the provisions of Section 2, 9 and 10 of Article 4 of this ordinance."

"ARTICLE 4, Section 2

"The owner or operator of any such trailer camp shall provide not less than four thousand (4,000) square feet of ground, exclusive of the ground underneath the trailer, for each trailer lot rented. There shall be a minimum distance of fifty (50) feet between each trailer."

It is true that Section 35-62 of the Code authorizes the governing body to prescribe the size of the lots to be used for such trailer camps. The intent of the statute, however, is prospective rather than retrospective. It may be that the lots in some existing trailer camps have utilized all available space. In any such event, the enforcement of a new ordinance requiring a larger lot would, in effect, abrogate the existing contract between owner and lessee, in violation of the "due process" clause of Section 11 of the Virginia Constitution. Further, since Article 5 of the Ordinance makes it a crime to violate any of the provisions of this Ordinance, such Ordinance would amount to an ex post facto law in violation of Section 58 of the Virginia Constitution.

In view of the foregoing, it is my opinion that Article 6 of the Ordinance, in respect to compliance with Section 2 of Article 4 thereof, is unconstitutional and invalid. It follows that all existing trailer camps should be exempted from compliance with the Ordinance in this respect and the "Grandfather clause" should be unlimited as to time.

TREASURER OF VIRGINIA—Investment of Funds of Virginia Supplemental Retirement System—Limitations.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Investment of Funds by Treasurer.

THE HONORABLE WALTER W. CRAIGIE, JR.
Treasurer of Virginia

November 19, 1970

I have received your letter of November 18, in which you ask whether you may invest funds of the Virginia Supplemental Retirement System in shares of beneficial interest of a real estate investment trust (REIT). Your investments must be limited to those set forth in Virginia Code § 51-111.24:

1. Securities permitted for the investment of reserves of domestic life insurance companies;
2. Common and preferred stocks such as fiduciaries may invest in; and
3. Evidences of debt of local school boards.
The shares of an REIT are neither evidences of debt of a school board nor common or preferred stock. The investment may be made only if the shares are securities permitted for the investment of reserves of domestic life insurance companies. I have reviewed chapter 5 of Title 38.1 of the Code and find no authority permitting a domestic insurance company to invest its reserves in shares of an REIT.

I am given further concern that an REIT operating in other states may subject its shareholders to personal liability in those states. Where the REIT is organized under the laws of another state and does not substantially comply with the Virginia Real Estate Investment Trust Act, the limited liability afforded shareholders by Virginia Code § 6.1-350 may not be available in this State. While the proposed method of operation of the trust under consideration will minimize this risk, I believe such an investment of State funds would be inappropriate. Cf. Virginia Code § 38.1-190.

Without reaching the question of whether such an investment constitutes an unlawful delegation of authority, I am of the opinion that funds of the Virginia Supplemental Retirement System may not lawfully be invested in shares of an REIT.

TREASURERS—Checks—Should not sign where knows quorum was not present at meeting when authorized.

TREASURERS—Warrants—Duty to ascertain validity of those presented to him.

TREASURERS—Warrants—Should pay if satisfied is properly signed and sufficient bonds on hand.

SCHOOLS—School Boards—Members whose offices vacated still de facto officers and may function until vacancies filled.

SCHOOLS—School Boards—Quorums—Majority constitutes.

August 25, 1970

TREASURERS—Checks—Should not sign where knows quorum was not present at meeting when authorized.

TREASURERS—Warrants—Duty to ascertain validity of those presented to him.

TREASURERS—Warrants—Should pay if satisfied is properly signed and sufficient bonds on hand.

SCHOOLS—School Boards—Members whose offices vacated still de facto officers and may function until vacancies filled.

SCHOOLS—School Boards—Quorums—Majority constitutes.

August 25, 1970

THE HONORABLE CHARLES A. REID
Treasurer for County of Greensville

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

"The Greensville County School Board is a four member board comprised of one member from each of the four magisterial districts in the county. Two members of the Greensville County School Board were residents of the Town of Emporia on July 31, 1967 on which date the town underwent a transition to a city. Section 15.1-995 permitted these two members to continue serving on the Greensville County School Board until it was amended by the 1970 session of the General Assembly and the new amendment took effect.

"The next regular meeting of the Greensville County School Board is scheduled for Tuesday, August 11, 1970 at which time they normally approve issuance of voucher-checks in payment of operating expenses and payroll expenses. Will you please advise me if two members constitute a legal quorum and can properly authorize payment of the above mentioned expenses. Would you also please advise me whether I as county treasurer should sign checks drawn by the Greensville County School board which is temporarily composed of two members if such checks are presented to me signed by the chairman or vice-chairman and the clerk of the school board."

The two members of the school board whose offices were vacated upon the transition of the town of Emporia to a city are still de facto officers and may perform their duties until their vacancies are filled.
By § 22-51 of the Code a majority of a school board shall constitute a quorum. Since the Greensville County School Board is comprised of four members it would be required that three be present to constitute a quorum to authorize the payment of expenses. Therefore, two members of the board would not constitute a quorum and could not legally authorize the payment of expenses.

The treasurer, knowing that only two members of the board sat, should refuse to sign checks authorized by the board during such meeting.

There is a duty and responsibility upon the County Treasurer to ascertain the validity of county warrants placed before him for his signature or to be paid by him out of county funds. This duty is outlined in §§ 15.1-547 through 15.1-550 of the Code.

If the treasurer is satisfied that the warrant has been properly signed and there are sufficient funds on hand, he should pay the warrant. See opinion of this office dated November 7, 1956, to the Honorable W. A. Howlett, Treasurer of Carroll County, found in Report of the Attorney General (1956-1957), p. 263, and opinion dated October 11, 1960, to Miss Betty Hansel, Treasurer, County of Highland, found in Report of the Attorney General (1960-1961), p. 332.

TREASURERS—Checks—Who may endorse. November 27, 1970

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

I have received your letter of November 18, from which I quote:

"Please give me a written, legal opinion, whether or not any person, firm or corporation has a legal right to endorse a check other than the person, firm or corporation to whom the check is made payable."

I might first call to your attention Virginia Code § 8.3-110 which defines those persons to whom an instrument is payable or who may act as payee. Endorsement of a check by or on behalf of a payee is necessary for negotiation. Va. Code § 8.3-201(3). The endorsement also serves as the receipt of the payee. As Treasurer of the City of Roanoke you should accept only those endorsements purporting to be made by or on behalf of the payee. Virginia Code § 8.3-403(1) provides that:

"A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority."

The official comment to § 8.3-403 makes it clear that you may prove agency by implication or apparent authority.

If you question any endorsement, you should promptly notify the payor bank so that your right to recover from the bank will not be cut off by § 8.4-406 of the Code.


THE HONORABLE J. H. JOHNSON
Treasurer, City of Roanoke

This is in reply to your letter of June 2, 1971, which reads in part as follows:

"Please give me a written legal opinion relating to my responsibilities, as Roanoke City Treasurer, in handling public funds."
"1. Am I personally liable for Roanoke City funds which are collected by some other officer, or person, who is selected by the City Auditor to receive and collect such funds, when City Council has failed by ordinance to make it the duty of such officer or person to collect and receive City funds?

"2. Would my Bonding Company hold me responsible, in case Roanoke City funds were mis-appropriated by an officer, or person, who was selected by the City Auditor to receive such funds, providing those funds were lost or stolen after the time he had received them, and prior to the time he had either delivered them to the City Treasurer in person, or deposited them into a City Bank Fund Account?"

Section 37 of the Roanoke City Charter provides:

"The city treasurer shall be elected at the time, in the manner and for the term provided in section 18 of this Charter. He shall give bond in such sum as the council may prescribe with surety to be approved by the council, conditioned for the faithful discharge of his official duties in relation to the revenue of the city, and of such other official duties as may be imposed upon him by this Charter and the ordinances of the city. He shall collect and receive all city taxes, levies, assessments, license taxes, rents, school funds, fees and all other revenues or moneys accruing to the city, except such as council shall by ordinance make it the duty of some officer or persons to collect, and for that purpose shall be vested with any and all powers which are now or may hereafter be vested in such city treasurer as collector of state taxes. He shall be the custodian of all public money of the city, and all other money coming into his hands as city treasurer. The city treasurer shall keep and preserve such moneys in such banks or trust companies as may be determined by ordinance or by the provisions of any law applicable thereto, and may permit securities pledged by the depositories of city funds to be held in custody by the Federal Reserve Bank of Richmond, Virginia, in accordance with any operating circular or circulars of such bank. He shall perform such other duties, have such powers and be liable to such penalties as are now or may hereafter be prescribed by law or ordinance. For such services the city treasurer shall receive such compensation as the council may from time to time prescribe by ordinance in conformity with general law."

This section of the Charter imposes upon you the duty to collect and receive all city taxes, levies, assessments, license taxes, rents, school funds, fees and all other revenues or moneys accruing to the city except such as council shall by ordinance make it the duty of some other officer or person to collect. The city auditor cannot act for the city council in selecting an officer or person to collect funds. Therefore, should the city auditor exceed his authority and appoint a person to receive funds which are later misappropriated, I am of the opinion that he and not you would be responsible for the loss. This answer renders unnecessary an answer to your second question.

TREASURERS—Funds Received by Private Agencies—Disposition of.

The Honorable A. C. Williamson
Treasurer of Botetourt County

February 1, 1971

I have received your letter of January 15, in which you ask whether funds received by a private agency for the restoration of Botetourt County Court House are required to be turned over to the Treasurer of the County
REPORT OF THE ATTORNEY GENERAL

to be expended for this purpose. You further ask whether amounts held by you in a special account for this purpose may be invested in a regular passbook account.

I am not aware of the provisions of the governing instruments of the organization to which you refer or of the terms, conditions and representations of its solicitations. Normally, such funds would not be turned over to the County Treasurer but they must be used for the purpose for which they were accepted.

It would seem to me altogether appropriate that funds donated to the County for a special purpose be held at interest in a segregated account. I am aware of no reason why this could not be done under authorization by the County Finance Board. See Va. Code § 58-943.2.

TREASURERS—Town of Colonial Beach—Term of office.

TOWNS—Colonial Beach—Term of treasurer. October 21, 1970

THE HONORABLE WALther B. Fidler
Member, House of Delegates

This is in reply to your letter of October 13, 1970, in which you ask my opinion whether the term of the office of the treasurer of the town of Colonial Beach is two or four years.

Under the charter of the town of Colonial Beach, prior to its amendment on April 4, 1970, the term of the treasurer was for a period of two years. On April 4, 1970, under Chapter 488, 1970 Acts of Assembly, which included an emergency clause, the term was made four years.

Since the election of the treasurer was held in June 1970 after the effective date of the charter change, I am of the opinion that the term for which the treasurer was elected is four years.

USURY—Second Mortgage Loans—Maximum interest rate. March 20, 1971

THE HONORABLE STANLEY G. BRYAN
Member, House of Delegates

I have received your recent letter, from which I quote:

"According to the statute, a second-mortgage loan may not exceed 7% add-on interest plus 2% investigation fee. Would this preclude a home owner from taking back a purchase money mortgage for a rate in excess of 7% add-on or for a rate of simple amortized interest of 8, 9 or perhaps even 10%?"

"It would appear a ruling from your office as to the amount allowable as simple or amortized interest would certainly help to clarify the problems encountered in this area. If possible, I would like to request your office to render an opinion as to the maximum amount of simple or amortized interest that a second-mortgage loan may carry without violating the law."

It has long been clear that the Virginia usury laws do not apply to purchase money mortgages, for there is no loan or forbearance of money within the meaning of the statutes. See Graeme v. Adams, 64 Va. (23 Gratt.) 225 (1873).

Except as otherwise provided, § 6.1-319 of the Virginia Code limits to eight percent per annum the amount of simple interest which may be charged on a loan. Section 6.1-330 permits second mortgage loans to bear interest in “an amount [not] in excess of that permitted by § 6.1-294 and
§ 6.1-234.1 . . .” (Emphasis supplied.) Sections 6.1-234 and 6.1-234.1 provide for add-on interest of 7% until July 1, 1972, and 6% on contracts entered into thereafter.

The amount of interest on any loan, whether add-on or simple, is the difference between the amount received by the borrower and the amount repaid by him, less certain authorized fees and costs. The reference in § 6.1-330 is to an amount, rather than to a rate. So long as the amount of interest charged on a simple interest second mortgage loan does not exceed the amount permissible under an equivalent add-on contract, the loan is not, in my opinion, usurious, irrespective of the fact that the note may be expressed in terms of simple interest at a rate exceeding eight percent per annum.

I construe the provision of § 6.1-234 and, by incorporation by reference, of § 6.1-234.1 that loans bearing add-on interest “may be repaid in weekly, monthly or other periodical installments,” to require that such installments must be in equal amounts. Any other construction would make our usury laws meaningless. If a loan bearing simple interest is not repayable in equal periodical installments, including principal and interest, the loan would be so unlike an add-on interest loan as to preclude any comparison between the amounts of interest payable under the different methods; in my opinion § 6.1-330 would not apply in this situation and the maximum interest rate would be eight percent per annum simple interest as provided in § 6.1-319.

VIRGINIA CONFLICT OF INTERESTS ACT Accepting Money—No violation if for services performed within scope of official duties.

August 5, 1970

THE HONORABLE WILLARD M. ROBINSON, JR.
Commonwealth's Attorney for City of Newport News

I am in receipt of your letter of July 9, 1970, wherein you request an opinion under the Virginia Conflict of Interests Act as to the following:

“In the City of Newport News members of my office prosecute all violations of city ordinances in the Municipal Court requiring the participation of a prosecutor. We handle these cases along with our Commonwealth cases in the court. This practice originated to avoid having an assistant city attorney appear in that court. The City Council appropriated $2400 annually under the City Attorney's portion of the budget entitled 'Commonwealth's Attorney—Driving Drunk cases', Account #100.1, a subheading under Salaries. Every month I receive a check in the amount of $200 which I in turn distribute in equal shares to me and all assistants with a much lesser amount going to the secretaries. Initially this was for handling the city driving drunk cases but it has developed into handling all cases that I or the Court feel should be prosecuted in behalf of the City. No deductions are withheld for tax purposes by the city.”

Section 2.1-349 (a) (4) would be applicable to your inquiry. This provision reads as follows:

“Solicit or accept money or other thing of value in addition to compensation, expenses or other remuneration paid him by the governmental agency of which he is an officer or employee for services performed within the scope of his official duties.”

I am of the opinion that the $2400.00 annually received by your office is part of the original remuneration paid for services performed within the scope of your official duties and thus is not “money or other thing of value in addition to” remuneration paid for the services that you perform. Your
inquiry whether the factual situation you set forth would be in violation of the Conflict of Interests Act is answered in the negative.

VIRGINIA CONFLICT OF INTERESTS ACT—Advisory Agencies—Corporation of member of advisory board of community college may submit bids to purchasing agent for Commonwealth but must disclose his financial interest in any transaction; §§ 2.1-352 and 2.1-353.

THE HONORABLE JOHN ROGER THOMPSON
Commonwealth's Attorney for Wythe County

I am in receipt of your letter of August 28, 1970, relative to the Virginia Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended. Your letter reads as follows:

"FACTS: Robert Eley Johnson is the major stockholder of R. P. Johnson, Inc. of Wytheville and Robert Eley Johnson is further a member of the advisory board of the Wytheville Community College. He has received an invitation to submit sealed bids for certain items to the Central Purchasing Agent for the Commonwealth of Virginia at Richmond relative to certain proposed items that are to be purchased for the various state agencies.

"QUERY: Can Mr. Johnson, without infringing upon the prohibitions of Chapter 22, submit sealed bids to the Central Purchasing Agent for the Commonwealth of Virginia as to those items sought for purchase, which items may or may not be utilized by the Wytheville Community College?"

Your inquiry is answered in the affirmative. Section 2.1-349 (a) which prohibits an officer or employee from becoming a contractor or having a material financial interest in any contract with his agency is applicable only to governmental agencies and not to advisory agencies such as the local community college board. See § 23-214 (c). However, § 2.1-352 of the Code would be applicable to the situation where the local community college board is considering a recommendation for perhaps the purchase of additional specified items. This section reads 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."

In addition, § 2.1-353, the section requiring disclosure, would be applicable; disclosure in this case being made to the local Commonwealth's Attorney.

VIRGINIA CONFLICT OF INTERESTS ACT—Agency, Definition—Each department of city government is governmental agency—College is governmental agency.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA CONFLICT OF INTERESTS ACT—City Councilman—Regional jail may buy food from store owned by city councilman.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Requires disclosure.

THE HONORABLE J. M. H. WILLIS, JR.
Commonwealth's Attorney for City of Fredericksburg

I am in receipt of your letter of September 10, 1970, relative to the term "governmental agency" as defined in § 2.1-348 (a) of the Code of Virginia (1950), as amended, the Conflict of Interests Act. You inquire whether the various departments of the City government would be considered individual governmental agencies, or whether the City itself would be the only governmental agency, thus prohibiting a member of one department from entering into a contract with any other agency or department of the City.

I am of the opinion that the former is the proper interpretation to be given to the Act. Each department of City government should be considered a governmental agency as that term is defined. Consequently, in view of the above, the regional jail that you mention in your letter may buy food from a grocery store owned and operated by a member of the City Council. Likewise, the local welfare department may also buy food from the same City Councilman. However, both of these contracts would be subject to the provisions of § 2.1-349 (a) (2).

With reference to the question you raise about whether the City Councilman can consider budget appropriations for the jail and the local welfare board, I enclose herewith a copy of an opinion to the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, dated June 18, 1970, which is dispositive of this question.

Your further question, "whether Mary Washington College of the University of Virginia is a governmental agency within the definition of the conflict of interest law and whether employment by, or contracts with, the College fall within the scope of that law" is answered in the affirmative.

VIRGINIA CONFLICT OF INTERESTS ACT—Attorneys for Land Developers—May serve on county planning commissions and boards of supervisors.

VIRGINIA CONFLICT OF INTERESTS ACT—Official Action—Discussion prior to vote not part of.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Attorneys representing land developers and serving on agency should disclose interest in subdivision plans, and file forms.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Applies to those in office on June 26, 1970, as well as those entering thereafter.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Commonwealth's attorney with school teacher wife should file form.

VIRGINIA CONFLICT OF INTERESTS ACT—Employment Contracts—School board hiring Commonwealth's attorney's wife should find no competitive bidding necessary.

THE HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney for Westmoreland County

I am in receipt of your letter of July 14, 1970, wherein you set forth the following two factual situations:

September 17, 1970

August 6, 1970
1. The Planning Commission of Westmoreland County, Virginia, has as one of its members a local attorney who also represents, in conjunction with his law partner, a large developer of land within Westmoreland County. In the process of this subdivision and development plats from time to time by this developer are submitted to the Planning Commission for its approval or disapproval. When the Planning Commission considers the plats of this particular developer the local attorney takes part in the discussions of the plat and the requirements of the ordinance, gives his opinions and renders advice in the general discussion but abstains from the voting on the approval or disapproval of the plat in question.

2. The Board of Supervisors of Westmoreland County, Virginia, has as a member a local attorney, who is the law partner of the attorney that is a member of the Planning Commission. All plats from the Planning Commission are referred after approval to the Board of Supervisors. When plats of this particular subdivision, the client of both attorneys, are presented to the Board of Supervisors this particular member of the board takes part in the discussions of the plat and normally recommends their approval to the board but does not vote on the motion to approve or disapprove the plats.

Your inquiries are as follows:

1. May these individuals legally be members of their respective agencies?

2. Whether or not they should participate in the discussions and render opinions when the plats of the particular subdivider, their client, are under consideration by their agency.

3. Whether or not their described conduct constitutes a conflict of interest.

4. Whether you have the authority under the conflict of interest legislation to present the disclosure form required by § 2.1-353 to the individuals in question and require their execution of the same.

5. Can disclosure forms be sent out and required to be completed prior to January 1, 1971?

Your inquiries will be answered in the order asked.

(1) The individuals may legally be members of their respective agencies; the provisions of §§ 15.1-50 and 2.1-349 (a) (1), et seq. of the Code of Virginia (1950), as amended, being applicable.

(2) Since the subject matter of the discussions concern the approval of a plat submitted by a developer who is their client it would appear that both individuals may reasonably be expected to know that they would have a material financial interest in a transaction (the approval of the plat) before them. Consequently § 2.1-352 would be applicable. Pursuant to this section each individual should disclose to his governing agency the interest that he has in the transaction and must further disqualify himself from "voting or participating in any official action thereon in behalf of such agency." From your letter it does not appear that the discussion taking place would be part of any "official action" on behalf of such agency. However, I am of the opinion that prior to any participation in the discussion each individual should have disclosed to the governing body the interest that he does have in the transaction they are discussing.

(3) In view of the above I am of the opinion that your third inquiry is answered in the negative, if the provisions of § 2.1-352 are complied with.

(4) Section 2.1-353 is applicable to your fourth inquiry. Pursuant to this section any officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by actions of the governmental or advisory agency of which he is an officer or employee must file the required disclosure form with the attorney for the Commonwealth if he be an officer or employee of an agency of local government. Members of the Planning Commission and Board of Supervisors
would of course be officers of local government. The provisions of this section are intended to reinforce the prohibition of contracts found in §§ 2.1-349 (a) (1) and 2.1-352. Though § 2.1-353 does allow for a subjective determination by an officer or employee of whether a disclosure form should be filed, I am of the opinion that under clear circumstances your fourth inquiry should be answered in the affirmative.

(5) In response to your fifth inquiry, I am enclosing herewith a copy of an opinion of this office to the Honorable D. V. Chapman, Jr., Executive Assistant, Advisory Council on Educational Television, dated July 13, 1970, wherein this office ruled that disclosure forms should be completed and filed not only by those entering upon the exercise of their duties subsequent to the effective date of the Act but also to those who were in service on or after the effective date of the Act, June 26, 1970. Therefore, your fifth inquiry is answered in the affirmative.

In addition to the above, you have inquired as follows:

"3. My wife has signed a teaching contract with the School Board of Westmoreland County for the year 1970-71 and her salary will exceed $5000.00 annually. Should I file a disclosure form since I occupy the position of Commonwealth Attorney of Westmoreland County?"

I am unaware of exactly what disclosure form you are referring to. Disclosure form under § 2.1-353 would be filed only if you felt that the material financial interest that you held in your wife’s contract could be affected by actions of your office. However, in any event, the disclosure required pursuant to § 2.1-349 (a) (2) of the Act should be filed. In accordance with this provision, the disclosure would be filed with the governmental agency of which you are an officer, the Office of Commonwealth’s Attorney, and with the School Board of Westmoreland County, the contracting agency. Additionally, the contracting agency should make a finding that the services of your wife as a teacher are not appropriate to be acquired through competitive bidding.

July 9, 1970

THE HONORABLE J. B. WYCKOFF
Commonwealth’s Attorney for Amherst County

I am in receipt of your letter of June 25, 1970, wherein you state that a Vice-President of one of the local banks in which Town funds are deposited, has been elected to Council and the Chairman of the Board of the same bank has been elected Mayor. You inquire as to the applicability of the Virginia Conflict of Interests Law, Chapter 22 of Title 2.1, Sections 2.1-347 through 2.1-358 of the Code of Virginia (1950), as amended.

In general the Virginia Conflict of Interests Act prohibits totally an officer or employee of a governmental agency from contracting with or having a material financial interest in any contract with such agency. However, the definition of material financial interest specifically exempts
the situation raised in your inquiry. Section 2.1-348 (f) (3) states that: "except for the purposes of Sections 2.1-352 and 2.1-353, employment by, ownership of an interest in, or service on the board of directors of . . . financial institutions . . . shall not be deemed to be a material financial interest. . . ." Consequently the Town Council may continue to deposit funds in the bank in question regardless of the fact that two members of the Council would have a material financial interest in the bank. However, the members of Council would still be subject to the provisions of Sections 2.1-352 and 2.1-353 which are the disclosure requirements of the Act.

Section 2.1-352 reads 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."

Pursuant to this section if a determination was to be made by Town Council whether funds should be deposited in the bank in question, members of the Council should disclose their interest in the bank and disqualify themselves from voting or participating in any official action taken therein.

Section 2.1-353 reads as follows:

"Any officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by actions of the governmental or advisory agency of which he is an officer or employee shall disclose the precise nature and value of such interest. The disclosures shall be made in writing to the Attorney General before entering upon the exercise of his duties as an officer or employee of a State agency and to the attorney for the Commonwealth if he be an officer or employee of an agency of local government; such disclosures shall be made thereafter during the month of January of each succeeding year. All such disclosures shall be a matter of public record."

and reinforces the prohibition of Section 2.1-352 by making public any potential conflict that may arise during the performance of an individual's duties.

I am enclosing for your convenience a summary of the 1970 Virginia Conflict of Interests Act prepared by this office which I trust will aid you in any future application of the Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Commonwealth's Attorney of County May Also Be Town Attorney; Separate Governmental Agencies.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of Town Council [plumber] May Not Contract With Town.

VIRGINIA CONFLICT OF INTERESTS ACT—Mayor of Town May Not Contract With Town.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA CONFLICT OF INTERESTS ACT—Governmental Agency—Definition of.

VIRGINIA CONFLICT OF INTERESTS ACT—Individual May Not Contract With Governmental Agency of Which He Is an Officer.

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

I am in receipt of your letter of September 16, 1970, wherein you set forth three inquiries relative to the Virginia Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended. Your inquiries are as follows:

"1. I am Commonwealth's Attorney for the county of Highland, in which is located the only incorporated town, Monterey. I am also Town Attorney, and several members of the Council feel there might be a conflict of interest in my two positions. Will you please advise.

"2. One of the members of Council is the only local plumber who is familiar with the location of all the sewer and water lines in the town. It is most convenient for the town and less expensive to use the services of this plumber because of his preacquired knowledge, and certain members of the Council have raised the question of conflict of interest.

"3. The Mayor of the town, with the assistance of the local sanitarian, inspects the sewage disposal plant regularly for the benefit of the town, for which he is paid a small salary for services rendered. Would this involve a conflict of interest on the part of the Mayor?"

Section 2.1-349 (a) would be applicable to each situation. Under the provisions of § 2.1-349 (a) (1) an individual may not be a contractor with the governmental agency of which he is an officer or employee. Contracts with governmental agencies other than the agency of which one is an officer or employee are subject to the disclosure and competitive bid requirements of § 2.1-349 (a) (2). Applying these sections to your inquiries, I am of the opinion that § 2.1-349 (a) (2) is applicable to your first inquiry. Section 2.1-349 (a) (1) is applicable to your latter two inquiries.

A governmental agency "shall include any legislative, executive or judicial body, office, department, authority, post, commission, committee, institution or board created by law to exercise some sovereign power or to perform some duty of state or local government, other than purely advisory powers or duties." Consequently, the offices of Commonwealth's Attorney for Highland County and Town Attorney for the Town of Monterey would be separate governmental agencies. Since you are not contracting with your own governmental agency [Commonwealth's Attorney for Highland County], but with another [Town of Monterey], § 2.1-349 (a) (2) is applicable.

In the latter two situations that you set forth it appears that a member of Town Council is in fact entering into another contract with the Town, which is the same governmental agency of which he is an officer. Such contract would be prohibited by § 2.1-349 (a) (1).

VIRGINIA CONFLICT OF INTERESTS ACT—Definition of "Governmental Agency" Does Not Include Federal Agencies.

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

October 28, 1970
I am in receipt of your inquiry of October 19, 1970, relative to the Virginia Conflict of Interests Act. You ask if in my opinion the definition of "governmental agency" would include within its scope federal agencies and positions.

The definition of "government agency" is set forth in § 2.1-348(a) of the Code of Virginia (1950), as amended, and is as follows:

"'Governmental agencies' shall include any legislative, executive or judicial body, office, department, authority, post, commission, committee, institution or board created by law to exercise some sovereign power or to perform some duty of state or local government, other than purely advisory powers or duties." (Emphasis added.)

I am of the opinion that your inquiry is answered in the negative. Such definition includes only state and local agencies and would not include federal agencies.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Must be made by officer who has material financial interest in private firm which may be affected by acts of agency.

PUBLIC OFFICERS—Conflict of Interest—Disclosure must be made where officer has material financial interest in private firm which may be affected by agency.

Mr. William A. Cook, Jr.
Member, Virginia State Board of Accountancy

July 27, 1970

I am in receipt of your letter of July 17, 1970, wherein you state that you hold more than a 5% equity ownership in a partnership practicing public accounting and are a member of the Virginia State Board of Accountancy. You inquire whether it will be necessary for you to complete and file the disclosure form for officers and employees of governmental and advisory agencies.

Section 2.1-353 of the Code of Virginia (1950), as amended, requires that any officer or employee who has a material financial interest (defined as ownership of an interest of 5% or more in a firm, partnership or other business) which he believes or has reason to believe may be substantially affected by actions of the governmental agency of which he is an officer or employee must file a disclosure form of which you inquire.

Chapter 5 of Title 54 of the Code authorizes the Board of Accountancy to regulate the practice of accountancy including also authority for the Board to revoke the certificates of "certified public accountant." In view of the above I am of the opinion that there is substantial ground to believe that actions of your agency could affect the partnership wherein you hold a material financial interest and therefore your inquiry is answered in the affirmative.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required as bar against contracts between officer or employee and own agency; also between officer or employee and another agency.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Requires only that material financial interest exists in contract between officer or employee and another agency.

September 15, 1970

The Honorable Joseph H. Campbell
Commonwealth's Attorney for City of Norfolk
I am in receipt of your letter of July 31, 1970, which reads as follows:

"Would you be good enough to give me an opinion defining precisely what is to be disclosed under Section 3 (a) 2 of the Virginia Conflict of Interests Act.

"My letter to you of June 10, 1970 requested information concerning disclosures by officers of the City. However, your opinion dated June 18, 1970, in response thereto, only considered the disclosure requirements of Section 7 of the Act and I am, therefore, wondering if you see a distinction between the disclosures to be made under Section 7 and those under Section 3(a) 2?"

As this office has previously indicated, the disclosures pursuant to § 7 [§ 2.1-353 of the Code of Virginia (1950), as amended] are required when actions of an officer or employee's own agency may substantially affect a material financial interest one holds. They are intended to reinforce the prohibition of contracts between an officer or employee and his own agency [§ 2.1-349 (a) (1); 3 (a) (1) of the Act] by making public any potential conflict that might arise during the performance of his duties. In like manner, this public disclosure helps enforce § 2.1-352 [§ 6 of the Act] which requires that an officer or employee with a material financial interest in a transaction disqualify himself from participation in that transaction. As previously ruled, if § 7 is applicable, the disclosure must state the "precise nature and value" of the material financial interest involved.

However, the disclosure required by § 3 (a) (2) [§ 2.1-349 (a) (2)] which you inquire about is distinct from the disclosure discussed above. This disclosure is required when an officer or employee enters into a contract, or has a material financial interest in a contract with a governmental agency other than his own. Such disclosure is to be made to both his own and the contracting agency. There is no requirement that the "precise nature and value" be set forth.

Consequently, in view of the above, I am of the opinion that the disclosure requirement of § 3 (a) (2) may be met by stating that a material financial interest is held in the contract involved, i.e., ownership of an interest of 5% or more, or aggregate annual compensation of $5,000.00 or more.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required when officer or employee of agency has reason to believe material financial interest may be affected by actions of his agency.

THE HONORABLE J. WARREN WHITE, JR.
Member, House of Delegates

I am in receipt of your letter of June 26, 1970, which reads in part as follows:

"In Norfolk we have several Commissions which are created by the City Council, and members are appointed by the Council with no compensation; for example, City Planning Commission, Recreation Commission, and so forth. If a member of the Planning Commission, for example, who owns an interest in excess of five percent of his Company, and his Company receives a request to quote on several items from the City Purchasing Agent or some other political sub-division, and these items are not being purchased for the Planning Commission, is he required to file a Disclosure under Section 7 of House Bill No. 387?"

Section 7, now codified as § 2.1-353 of the Code of Virginia (1950), as amended, is intended to reinforce the prohibition found in § 2.1-349 (a)
(1) of contracts between an officer or employee and his own agency, by making public any potential conflict that might arise during the performance of his duties. In like manner, the public disclosure requirements of § 2.1-353 help enforce § 6 of the Act [now § 2.1-352] which as you are aware requires an officer or employee with a material financial interest in any transaction to disqualify himself from participating in any official action involving that transaction. Consequently, the disclosure form you inquire about must be filed by an officer or employee only if he has reason to believe a material financial interest of his may be affected by actions of the governmental or advisory agency of which he is an officer or employee.

From the manner in which your question is stated, it is clear that in your example the actions of the Planning Commission would in no way affect the contracts the member's company is interested in with the other agencies or political subdivisions. Therefore, your inquiry is answered in the negative.

However, you refer to my former ruling to you under date of May 1, 1970, and express the opinion that if an individual complies with § 6 of the Act it is not necessary for him to comply with § 7. As I have indicated, § 7 is a policing method to insure that public disclosures are made and that the requirements of § 6 are met. The factual situation in the former ruling was that a member of the Planning Commission was a major stockholder in a company selling materials to a Redevelopment and Housing Authority. It is very plausible that a situation could arise wherein the City Planning Commission was considering a recommendation that the Redevelopment and Housing Authority should purchase certain materials; perhaps type materials in which the Planning Commission member's company dealt. In such a situation, § 6 would be applicable and the Planning Commission member should disclose that he has a material financial interest in the company that manufactures the materials under consideration for recommended purchasing and the member should also disqualify himself from any official action the Planning Commission would take on its recommendation.

The applicability of § 7 would then arise if prior to entering upon the exercise of his duties, or in January of the year the member in question believed or had reason to believe that during the forthcoming year his agency would be considering a matter which could possibly substantially affect a material financial interest he held. If the individual could not possibly foresee a situation arising wherein actions of his agency would affect the interest he held, then § 7 would not, naturally, apply. However, when the situation did eventually arise, § 6 would still apply.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required where court clerk’s wife employed by school board.

PUBLIC OFFICERS—Conflict of Interest—Disclosure required where court clerk’s wife employed by school board.

VIRGINIA CONFLICT OF INTERESTS ACT—Contracting Agency—Hiring officer’s wife—Must employ by bid or file written statement that bid not in public interest.

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

July 28, 1970

I am in receipt of your letter of July 11, 1970, wherein you inquire if there would be a conflict of interests in the following situation under the Virginia Conflict of Interests Act:

“I serve as Clerk of the Circuit Court of Greensville County and Clerk of the Board of Supervisors of Greensville County. My wife is
employed by the school board as Director of the School of Practical Nursing of the Greensville Memorial Hospital."

I am of the opinion that no conflict of interest would exist if the provisions of § 2.1-349 (a) (2) of the Virginia Code are complied with. This provision is self explanatory and reads as follows:

"§ 2.1-349, (a) No officer or employee of any governmental agency shall:

* * *

"(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any 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 should not be acquired through competitive bidding; or."

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required where supervisor's wife is county court clerk.

PUBLIC OFFICERS—Conflict of Interest—Disclosure required where supervisor's wife is county court clerk.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure and Disqualification—Required if agency's act could affect member's business.

PUBLIC OFFICERS—Conflict of Interest—Disclosure and disqualification—Required if agency's act could affect member's business.

VIRGINIA CONFLICT OF INTERESTS ACT—Officers—None where supervisor's business associate appointed to welfare board.

PUBLIC OFFICERS—Conflict of Interest—None where supervisor's business associate appointed to welfare board.

July 28, 1970

THE HONORABLE JAMES C. TURK
Member, Senate of Virginia

I am in receipt of your inquiry of July 11, 1970, wherein you raise the following questions concerning the Virginia Conflict of Interests Act each of which will be answered seriatim.

1. "Under the new legislation would it be proper for a wife of a member of the Board of Supervisors of a county to be employed as a Clerk or Deputy Clerk of the County Court."

Answer: If the Board of Supervisors does not appoint the Clerk or Deputy Clerk of a County Court then the wife of a member of the Board of Supervisors may be properly employed in such capacity provided the provisions of § 2.1-349 (a) (2) are complied with. Pursuant to this section, the member of the Board of Supervisors would have to give full disclosure to the Board as well as to the County Court of the interest he would have
in his wife's contract of employment and in addition, the contracting agency, in this case the County Court, would as a matter of public record have to make a finding that the services of the wife are, in the public interest, not appropriate for competitive bidding.

2. "Would it be proper for a business associate of a member of the Board of Supervisors to be appointed by the Board of Supervisors as a member of the County Welfare Department?"

I am unaware of any prohibition that would disallow the business associate of a member of the Board of Supervisors to be appointed as a member of the County Welfare Department. However, if the type of business engaged in by the associate and the member of the Board of Supervisors could be affected by any action of the County Welfare Department, then I am of the opinion that the disclosure and disqualification provisions of § 2.1-352 of the Code would be applicable.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure Forms—Need only be filed when material financial interest exists which may be affected by actions of the agency.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure Forms—No specific prohibition against participation in meeting prior to filing.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure Forms—Failure to file—Constitutes malfeasance, with possible criminal sanctions.

July 13, 1970

THE HONORABLE D. V. CHAPMAN, JR.
Executive Assistant
Advisory Council on Educational Television

I am in receipt of your inquiry of July 2, 1970, relative to Section 7 of the Virginia Conflict of Interests Act which has been codified as § 2.1-353 of the Code of Virginia (1950), as amended, and which reads as follows:

"Any officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by actions of the governmental or advisory agency of which he is an officer or employee shall disclose the precise nature and value of such interest. The disclosures shall be made in writing to the Attorney General before entering upon the exercise of his duties as an officer or employee of a state agency and to the Attorney for the Commonwealth if he be an officer or employee of an agency of local government; such disclosures shall be made thereafter during the month of January of each succeeding year. All such disclosures shall be a matter of public record."

Your questions are as follows:

"1. if the members of the Virginia Advisory Council on Educational Television, created under Chapter 16, Title 22 of the Code of Virginia, will be required to execute the disclosure form for a 'Statement of Interests' (copy enclosed);

"2. if the disclosure requirement (before entering office) for new appointees does not apply to existing members of the Council; and

"3. if these members may participate in future meetings of the Council until this information is sent to your office;

"4. if, after the initial report, the annual report (in January) does not rest entirely with the individual member who must determine from year-to-year if such annual report is required."
As pointed out in the summary of the 1970 Virginia Conflict of Interests Act which was forwarded to you, the disclosures required by the above Code section are intended to reinforce the prohibition contained in § 2.1-349 (a) (1) of contracts between an officer or employee and his own agency, by making public any potential conflict that might arise during the performance of their duties. In the same way the public disclosure helps enforce § 2.1-352 of the Act which requires that an officer or employee with a material financial interest in a transaction disqualify himself from participating in that transaction.

The disclosure form you inquire about should be filed in this office by any State officer or employee if such officer or employee has a material financial interest which he believes or has reason to believe may be affected by actions of his governmental or advisory agency. Therefore in response to your first and fourth questions, members of the Virginia Advisory Council on Educational Television need not file the "Statement of Interests" form merely because they are members of the Advisory Council. The form must be filed only by those officers or employees who have a material financial interest which they believe may be affected by actions of their agency.

In response to your second and third questions, I am of the opinion that, though the disclosure form must be made in writing prior to entering upon the exercise of one's duties and thereafter during the month of January of each year, the form, subject to the limitations which I have discussed above, should be filed by any officer or employee who was in service on or before June 26, 1970, the effective date of the Act. There is, however, no specific prohibition that members of agencies not participate in meetings until the required disclosure form is filed.

It should be noted that failure to file the required disclosure form does not relieve an individual in question from the prohibitions as to conduct contained in other sections of the Act. Further, if a disclosure form should be filed and is not, an individual is deemed to be guilty of malfeasance in office. If such failure constitutes a knowing violation of the Act's requirement, the person in question commits a misdemeanor punishable by fine and/or imprisonment and in addition forfeits the office which he then holds.

VIRGINIA CONFLICT OF INTERESTS ACT—Doing Business With Agency—Not prohibited where officer employed by contractor has no authority to procure or let contract.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required where officer employed by contractor.

September 9, 1970

THE HONORABLE RUSSELL M. CARNEAL
Member, House of Delegates

I am in receipt of your letter of August 11, 1970, wherein you set forth the following facts:

"Mr. A. is a member of the City Council, having been elected at the last election. Mr. A. is employed by a corporation which does business with the City of which Mr. A. is a member of the Council. This business is done on the basis of competitive bids and Mr. A. does not own any stock in the corporation nor is he a member of the Board of Directors, nor does he have any management or policy making position with said corporation. He does earn, however, as a salary an amount in excess of $5,000.00 per year."

You inquire as follows:
"1. Is the corporation which employs Mr. A. prohibited from doing business with the City of which Mr. A. is a member of Council?

"2. If the corporation is not prohibited from doing business with the City for which Mr. A. is a member of Council, does Mr. A. have to file with the City a statement to the effect that he is employed by said corporation?"

Section 2.1-349 (a) of the Code of Virginia (1950), as amended, provides, so far as applicable, that an officer or employee of a governmental agency may not be a contractor or have a material financial interest in any contract with the governmental agency of which he is an officer or employee. Contracts with or an interest in a contract with governmental agencies other than the one of which an individual is an officer or employee are permissible, subject to certain disclosure requirements.

However, § 2.1-349 (b) (3), which in my opinion is applicable to your first inquiry, provides that the provisions of paragraphs (1) and (2) of subsection (a), as outlined above, 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; . . ."

Consequently I am of the opinion that your first inquiry is answered in the negative. If Mr. A. has no authority to participate in the procurement or letting of such contract, and his only interest in such contract is by reason of his employment by the firm, the contract is not prohibited.

However, I am of the opinion that your second inquiry should be answered in the affirmative. Though § 2.1-349 is not applicable to Mr. A., he does by reason of his salary in the corporation have a material financial interest in the company, within the meaning of §§ 2.1-352 and 2.1-353. These sections are applicable. Section 2.1-352 reads 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."

Section 2.1-353 enforces the prohibition of the above statute by making public, disclosure of any interest which an officer or employee believes may be substantially affected by actions of the governmental agency of which he is an officer.

In the case you present, such disclosure should be made to the Commonwealth's Attorney prior to entering upon the exercise of one's duties and during January of each succeeding year.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA CONFLICT OF INTERESTS ACT—Employment by Agency—
Under court order wife may remain as teacher if employed as such before husband appointed superintendent.

VIRGINIA CONFLICT OF INTERESTS ACT—Employment by Agency—
Under court order wife may remain as teacher if employed before husband appointed to school board.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required where wife is teacher and husband is member of county school trustee electoral board.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required where wife is teacher and husband is member of board of supervisors.

VIRGINIA CONFLICT OF INTERESTS ACT—Employment by Agency—
Wife may be employed in school where husband is assistant principal if he exercises no direct supervisory or administrative power over her.

August 18, 1970

THE HONORABLE DAVID D. BROWN
Commonwealth’s Attorney for Washington County

I am in receipt of your letter of August 5, 1970, wherein you request my opinion as to the applicability of the Virginia Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, to various situations, each of which will be discussed separately. In each case your question is whether the individual may be employed by the Washington County School Board. The situations are:

Question 1: "The wife of the county superintendent of schools."

Answer: I am enclosing herewith a copy of an opinion of this office to the Honorable William J. Hassan, Commonwealth’s Attorney for Arlington, dated May 28, 1970, wherein this office ruled that § 22-206 of the Virginia Code was repealed by the general repeal provisions of the Act and consequently the wife of a member of the county school board could not be employed in the same school system. Section 22-206 was also applicable to superintendents and consequently the same result would be reached.

However, the Hassan opinion has now been modified by the Order of the Circuit Court of the City of Richmond entered on July 22, 1970, in the case of Virginia Education Association v. Commonwealth, a copy of which I am enclosing. As a result of this Order, § 22-206 is effective. The "direct supervision and/or administrative position" prohibition would not be applicable. The wife of the County Superintendent of Schools may therefore be employed by the Washington County School Board if she had been regularly employed by any school board prior to her husband taking office as Superintendent.

Question 2: "The wife of a member of the county school board."

Answer: The response to the above question would also be applicable to this situation.

Question 3: "The wife of a member of the county school trustee electoral board."

Answer: I am enclosing herewith an opinion of this office to Mr. J. G. Blount, Jr., Assistant Superintendent for Administration and Finance of
the Department of Education, dated June 17, 1970, wherein this office ruled that the wife of a member of the School Trustee Electoral Board could be employed by the County School Board, subject to the disclosure requirements of § 2.1-349 (a) (2). This ruling has not been affected by the Order of the Circuit Court of the City of Richmond.

Question 4: "The wife of a member of the county board of supervisors."

Answer: I am enclosing herewith an opinion of this office to the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, dated June 18, 1970, wherein this office ruled that the wife of a member of the County Board of Supervisors could be employed by the County School Board, subject to the disclosure requirements of § 2.1-349 (a) (2). This opinion also has not been affected by the Order of the Circuit Court of the City of Richmond.

Question 5: "The wife of the principal of a county school as a secretary in the school where her husband is the principal."

Answer: As you are aware, as a result of the Order entered by the Circuit Court of the City of Richmond, husbands and wives may be employed by the same school system "unless one of said persons is employed in a direct supervisory and/or administrative position with such spouse. . . ." As mentioned in my response to your first inquiry, due to the applicability of § 22-206, the above quoted provision is not applicable to school board members and superintendents but is applicable to, among others, principals. The wife of a principal may be employed in the same school system but not in the same school. Consequently, the Conflict of Interests Act would be applicable and prohibit the employment of the wife by the school board in this situation.

Question 6: "The wife of one of the assistant principals of a county school as a secretary in the school where her husband is an assistant principal."

Answer: My answer to the above question would also be applicable to this situation. However, it is my understanding from various correspondence received in this office that in this case "the husband's duties are those of dean of students, he is not a supervisor of personnel and does not recommend personnel for employment, and the wife's only supervisor in the school is the principal of the school." Under these circumstances I am of the opinion that the husband is not in a direct supervisory and/or administrative position over his wife within the meaning of the Court's Order. Consequently, the wife's employment would not be prohibited. However, I emphasize that this opinion would be changed if the duties and/or position of the husband could in any way influence the salary, position or duties of the wife in the performance of her job.

VIRGINIA CONFLICT OF INTERESTS ACT—Employment by Same School Division of Secretary Whose Husband Is Employed in Administrative Supervisory Capacity.

March 15, 1971

THE HONORABLE C. RUSSELL BURNETTE
Member, House of Delegates

I am in receipt of your letter of March 4, 1971, regarding the amendments to the Conflict of Interests Act, which reads as follows:

"My specific question deals with Sec. 2.1-348 (f)—employment by the same governmental agency, etc. Is there a conflict for a spouse
to be employed as a secretary in the same school division where her husband is employed in an administrative supervisory capacity?"

I am enclosing as requested a copy of the recently enacted amendment to the Conflict of Interests Act. As you can see from the enclosed, § 2.1-348 (f) (4) does not prohibit the employment by the same governmental agency of an officer or employee and spouse "... except when one of such persons is employed in a direct supervisory and/or administrative position with respect to such spouse ... and the annual salary of such subordinate is seventy-five hundred dollars or more." If the spouse in question in your letter does earn an annual salary in excess of seventy-five hundred dollars and her husband is employed in a direct supervisory and/or administrative position with respect to his wife, a conflict would exist, unless exempted by the provisions of § 2.1-348 (f) (5) which are self-explanatory and read:

"The provisions of this act relating to personal service or employment contracts shall not apply to any persons who were regularly employed by the same governmental agency or unit of government on or prior to June 30, 1971, with regard to personal service or employment contracts with such governmental agency or unit of government."

VIRGINIA CONFLICT OF INTERESTS ACT—Employment of Relatives of Superintendent and School Board Members.

April 27, 1971

DR. WOODROW W. WILKERSON
Superintendent of Public Instruction
State Department of Education

This is in reply to your letter of April 1, 1971, concerning House Bill No. 118 which was adopted by the General Assembly during their 1971 Special Session. Your inquiry is as follows:

"Are paragraphs (4) and (5) [of Section 2.1-348, Code of Virginia (1950)] applicable to Section 2.1-349 or can a teacher or other employee be employed by a local school board irrespective of the restrictions cited in paragraphs (4) and (5)?"

In all situations concerning employment of relatives of superintendents of schools and school board members, § 2.1-349.1, Code of Virginia (1950), as amended, will prevail and only the employment of those individuals within the class of relatives set forth in that section would be prohibited. Other provisions of the Conflict of Interests Act regarding employment relationships would not be applicable. In all other situations concerning employment of personnel, such as the employment in the same school of the spouse of the principal, the provisions of §§ 2.1-348 et seq. would be applicable.

VIRGINIA CONFLICT OF INTERESTS ACT—Enforcement of Violations—While school board member with wife as teacher is prohibited by new statute, court has forbidden enforcement.

VIRGINIA CONFLICT OF INTERESTS ACT—Status of Laws—With enforcement of new law prohibited by court, old law, repealed in effect, stands paramount.

VIRGINIA CONFLICT OF INTERESTS ACT—Employment by Agency—If wife employed as teacher before husband appointed to school board, her employment permissible.

August 7, 1970

THE HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County
I am in receipt of your letter of June 29, 1970, which reads as follows:

"The School Board of Mathews County has a member on the board and his wife is employed as a teacher in the school system. The question has arisen concerning this School Board member's status on the Board in view of the new Virginia Conflict of Interest statute.

"Kindly advise me if it would be appropriate for the school board member to still hold his position on the board but not vote on issues concerning his wife's employment with the school system. If this is not possible, then either the board member or his wife would of necessity have to resign."

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 the newly enacted Virginia Conflict of Interests Law in effect repealed Section 22-206 of the Code of Virginia (1950), as amended, which forbids the employment of a teacher in the system wherein the spouse is a member of the School Board, unless such teacher had been regularly employed by the School Board prior to the spouse's appointment. Consequently under the newly enacted Conflict of Interests Law there would be no exception such as that found in Section 22-206 and the relationship of a teacher and spouse who is a member of the School Board would be prohibited.

However, I am enclosing herewith a copy of a recent Order entered by the Circuit Court of the City of Richmond which modifies the ruling of this office in the Hassan matter. As you can see from this Order, the Commonwealth is enjoined from refusing to apply Section 22-206. Consequently, if the wife who is employed as a teacher were regularly employed prior to her spouse being appointed to the School Board of Mathews County, such employment would be permissible.

VIRGINIA CONFLICT OF INTERESTS ACT—Husband and Wife—May be employed in same school system provided one is not in direct supervisory and/or administrative position over other.

VIRGINIA CONFLICT OF INTERESTS ACT—Section 22-206 Remains in Full Force and Effect.

VIRGINIA CONFLICT OF INTERESTS ACT—Wife of School Board Member Employed in School System Prior to Appointment of Her Husband to School Board.

September 23, 1970

Mr. C. B. Chandler, Superintendent
Westmoreland County Public Schools

I am in receipt of your letter of September 2, 1970, regarding the applicability of the Virginia Conflict of Interests Act to the following situations:

"1. A school board member's wife, first employed by the school board prior to the commencement of his term of office, has accepted employment this year.

"2. An elementary school principal and his wife are employed in the same school.

"3. A junior high school principal and his wife are employed in the same school.

"4. An elementary guidance counselor and his wife are employed in the same school."

This office has previously ruled in a letter to the Honorable Herbert T. Williams, III, Commonwealth's Attorney of Dinwiddie County, dated July
6, 1970, that the Virginia Conflict of Interests Act prohibits the employment of a husband and wife in the same school system. However, as I am sure you are aware, this ruling was modified by an Order of the Circuit Court of the City of Richmond and consequently it is no longer entirely applicable. As a result of the Court Order, a husband and wife are allowed to be employed in the same school system, provided one is not in a direct supervisory and/or administrative position with such other spouse. Additionally, the Order of the Court provided that § 22-206 of the Code of Virginia would remain in full force and effect.

Applying the Order to the situations you present, I am of the opinion that situations one and four would not constitute a conflict of interests, and that situations two and three would.

Regarding situations two and three, though a wife of a principal may be employed in the same school system, she may not be employed in the same school since this would be in violation of the “direct supervisory and/or administrative position” prohibition found in the Court Order. This would apply to both elementary and junior high school principals as well as to high school principals.

I am assuming in situation four that the elementary guidance counselor has no supervisory position over his wife and consequently there would not be a conflict of interests.

Regarding situation one, since the Court Order provides that § 22-206 of the Code shall remain in full force and effect, it would not be a conflict of interests for the wife of the school board member to be employed, provided the wife were regularly employed in the school system prior to the appointment of her husband as a member of the school board.

VIRGINIA CONFLICT OF INTERESTS ACT—Husband and Wife—May not be employed in same agency, when one supervises the other.

VIRGINIA CONFLICT OF INTERESTS ACT—Legislator-Attorneys—Obligated to take court appointed cases; no conflict.

VIRGINIA CONFLICT OF INTERESTS ACT—Legislator—Would have interest in contract of partner for lecturing at State-owned college; thus § 2.1-349(a)(2) applicable.

THE HONORABLE GEORGE B. ANDERSON
Member, House of Delegates

I am in receipt of your letter of August 21, 1970, wherein you raise the following questions relative to the Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, which will be answered seriatim:

"1. If a municipality employs and pays a secretary for a State employee and that State employee specifically a Judge of a State Court of Record happens to be the husband of the secretary, would the filing of a disclosure statement satisfy the requirements of the statute or would it constitute a conflict of interest which is absolutely prohibited. (It is noticed that on July 28, 1970, your office ruled that "if the Board of Supervisors does not appoint the Clerk or Deputy Clerk of a County Court then the wife of a member of the Board may be properly employed in such capacity, it occurs that this might be an analogous situation to the one proposed herein.")"

Answer: The Conflict of Interests Act, [§ 2.1-349 (a) (1)]], as modified by the Injunction Order of the Circuit Court of the City of Richmond, prohibits a husband and wife to be employed in the same agency when one is in a direct supervisory and/or administrative position over the other.
This would be true regardless of who employs and pays either the husband or the wife. The opinion to which you refer, to the Honorable James C. Turk, Member of the Senate, dated July 28, 1970, was where the wife of a member of the Board of Supervisors would be employed in a different agency, consequently § 2.1-349 (a) (2) was applicable and not § 2.1-349 (a) (1) which, as indicated, is applicable to your inquiry.

"2. If a member of the Legislature is a practicing Attorney at Law, are his partners or associates prohibited from accepting Court appointed cases for which the State pays the fee."

Answer: No. Section 2.1-348 (c) (1) defines contract as "any agreement to which a government agency is a party." An agreement by its very nature is a wider term than contract, but still signifies a mutual consideration. Black's Law Dictionary, 4th Edition, p. 89. The Court appointed cases to which you refer are ones which attorneys are obligated by their profession to take. I am therefore of the opinion that the acceptance of a Court appointed case is not the type of contract or interest in a contract which is prohibited by the Conflict of Interests Act.

"3. [May] a partner of a member of the Legislature accept compensation for lecturing or teaching at a State owned and operated college."

Answer: Yes. Section 2.1-349 (a) (2) would, however, be applicable and should be followed. The legislator as a member of the law firm would have an interest in a contract entered into with a governmental agency, as that term is defined in the Act, other than the one of which he is an officer.
An officer is prohibited by § 2.1-349 (a) (1) from having a material financial interest in any contract with the government agency of which he is an officer. However, a material financial interest is presumed not to exist if there is ownership of an interest of less than 5% in a firm. I am of the opinion that since the factual situation you present meets such criteria, a material financial interest does not exist.

Additionally, § 2.1-349 (b) (2) provides that part (a) is not applicable "to the publication of official notices."

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest

—Association with financial institution not deemed to be.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Officer affiliated with financial institution must make.

September 14, 1970

MR. JOHN J. WHITT, JR.
Senior Vice President
The Bank of Virginia

I am in receipt of your letter of August 25, 1970, wherein you advise that you are an officer of The Bank of Virginia and are also serving on the Petersburg School Board as a member and Vice Chairman. You inquire as to the applicability of Virginia's Conflict of Interests Act if you "acted as a School Board member on a matter that might involve an account or contract with my bank directly or indirectly."

Section 2.1-348 (f) (3) of the Code of Virginia (1950), as amended, is applicable to your inquiry and in pertinent part provides:

"Except for the purposes of §§ 2.1-352 and 2.1-353, employment by, ownership of an interest in, or service on the board of directors of ... financial institutions ... shall not be deemed to be a material financial interest within the meaning of this chapter" in furnishing of services to governmental agencies.

The prohibitions found in § 2.1-349 [not having an interest in any contract with the governmental agency of which one is an officer] would therefore not be applicable to your situation and the School Board of the City of Petersburg may have an account with your bank.

However, §§ 2.1-352 and 2.1-353 are applicable. The former provides 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."

For the purposes of this section as applied to your inquiry, a material financial interest would be ownership of an interest of 5% or more, or aggregate annual compensation of $5,000 or more from the bank.
Section 2.1-353 is intended to reinforce by means of public disclosure the requirements of § 2.1-352 that an officer or employee with a material financial interest in a transaction not of general application, disqualify himself from participating in that transaction. Pursuant to § 2.1-353 an officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by action of the governmental or advisory agency of which he is an officer or employee shall disclose the precise nature and value of such interest.

The employees and officers of agencies of local government must make such disclosure to the Attorney for the Commonwealth.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Exists where wife of treasurer owns one-third interest in company having low bid to supply fuel oil to courthouse.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required where wife of treasurer owned one-third interest in company having low bid to supply fuel oil to courthouse.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Ownership by wife of officer prohibits contract between company and officer's agency.

September 21, 1970

THE HONORABLE T. BARCLAY ALLISON
Treasurer of Wythe County

I am in receipt of your inquiry of September 14, 1970, wherein you state that you are Treasurer of Wythe County and that your wife owns a one-third interest in the Service Gas Company, Inc., which is the Shell Distributor in Wythe County. You yourself do not own any stock in the corporation. The corporation was the low bidder on a contract to furnish fuel oil for the Wythe County Court House and you inquire as to the applicability of the newly adopted Conflict of Interests Act.

The new Act, codified as Chapter 22 of Title 2.1 of the Code of Virginia (1950), as amended, is now applicable to all local and state officers as well as employees. Pertinent provisions applicable to your inquiry would be §§ 2.1-349 (a) (1) and 2.1-349 (a) (2). I enclose herewith a recent ruling of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, which discusses the distinctions between the two sections.

Though you do not own any stock in the corporation in question, you would have a material financial interest in any contract entered into by the corporation since the same is defined as a personal or pecuniary interest accruing not necessarily to the officer or employee but to his spouse or to any other relative who resides in the same household and is presumed to exist if there is ownership of an interest of 5% or more in the business. See § 2.1-348 (f) (1). Consequently, § 2.1-349 (a) (1) would prohibit the corporation from entering into any contract with the office of Treasurer of Wythe County.

Contracts entered into with any other agency of the county government would be controlled by the provisions of § 2.1-349 (a) (2). I am of the opinion that this would be the provision responsive to your inquiry. The statute is self-explanatory and reads as follows:

"(a) No officer or employee of any governmental agency shall:

* * *

“(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any 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 should not be acquired through competitive bidding; . . . ."

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—None between pharmacist-member of local welfare board and Medicaid program.

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure—Required of pharmacist-member of local welfare board participating in Medicaid program.

September 15, 1970

THE HONORABLE J. MERCER WHITE, JR.
County Attorney of Henrico County

I am in receipt of your letter of August 12, 1970, requesting an opinion of this office regarding the applicability of the Virginia Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, to the following:

A pharmacist who is appointed to the county welfare board and who participates in the Medicaid program.

It is my understanding that reimbursement to pharmacists under Medicaid is pursuant to a written contract with the State Department of Health and not by the local welfare boards as you indicated. Further, there are no local funds involved in Medicaid payments. Nor does the local board determine eligibility of Medicaid recipients or of criteria standards, this being done by the superintendent and Department of Health respectively.

In view of the above, I am of the opinion that a conflict of interests within § 2.1-349 (a) (1) does not exist. The pharmacist enters into contracts with individual patients and not with the local welfare board.

I enclose herewith a former opinion of this office to the Honorable Joseph M. Whitehead, Commonwealth's Attorney for Pittsylvania County, dated June 17, 1970, wherein a like result was reached in an analogous situation concerning a grocer serving on the Board of Supervisors and participating in the food stamp program.

However, due to the contract with the State Department of Health, I am of the opinion that § 2.1-349 (a) (2) would be applicable but does not prohibit the individual in question from serving on the local welfare board. This section reads as follows:

"(a) No officer or employee of any governmental agency shall:

(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any 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 should not be acquired through competitive bidding; . . . ."

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—To exist between relatives, they must live in same household.

PUBLIC OFFICERS—Conflict of Interest—No material financial interest between relatives not members of same household.

THE HONORABLE DONALD C. STEVENS
County Attorney for County of Fairfax

July 27, 1970

I am in receipt of your letter of July 7, 1970, wherein you request my opinion whether a conflict of interest exists when the son of a member of the Board of Supervisors is employed by the County. You state that the son does not reside in the same household with his father. Your inquiries are as follows:

"(1) Does the son’s employment constitute a 'material financial interest' within the meaning of Sections 2.1-352, 353 and 354?"

"(2) In the event the facts constitute a 'material financial interest,' is it such that the supervisor’s budget action, on overall department and county budget, would be of sufficiently general application so that the supervisor need not be disqualified under the provision of Sec. 2.1-352?"

Your first inquiry is answered in the negative. A "material financial interest" includes a "personal and pecuniary interest accruing to an officer or employee . . . or to any other relative who resides in the same household." Since the son is not a "relative who resides in the same household" as the father who is on the Board of Supervisors, a material financial interest does not exist.

In view of the above, response to your second inquiry is unnecessary.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest—Under court order officer or employee and spouse may be employed in same agency unless one is in direct supervisory and/or administrative position over other.

CLERKS—Conflict of Interest—Applies to constitutional officers as well as other governmental employees.

CLERKS—Conflict of Interest—Under court order officers or employee may be employed in same agency unless one is in direct supervisory and/or administrative position over other.

THE HONORABLE JOHN M. RASNICK, JR.
Executive Secretary
Compensation Board

September 9, 1970

I am in receipt of your letter of August 10, 1970, with enclosures, wherein the question is raised as to the applicability of the Virginia Conflict of Interests Act to the practice of "the hiring of members of the Clerk's family as deputies or assisting in any way in the Clerk's Office and they be compensated therefor."

The applicability of the Act is uniform and thus applies equally to all constitutional officers as well as all employees of state and local govern-
ment. The Conflict of Interests Act prohibits an officer or employee of a governmental agency, the definition of which would be inclusive of all constitutional officers, from becoming a contractor or having a material financial interest in any other contract entered into with that agency. A material financial interest includes a personal and pecuniary interest accruing to such officer or to his spouse or to any other relative who resides in the same household.

This office has previously ruled that a husband and wife could not be employed by the same agency. However, this ruling has been modified by the Order of the Circuit Court of the City of Richmond. Consequently an officer or employee and his spouse may now be employed in the same agency provided one is not in a direct supervisory and/or administrative position over the other. If the latter is true, then a conflict of interests would occur.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest Defined.

VIRGINIA CONFLICT OF INTERESTS ACT—Individual May Not Contract With Governmental Agency of Which He Is an Officer or Employee.

VIRGINIA CONFLICT OF INTERESTS ACT—Contracts With Governmental Agencies Other Than the One of Which an Individual Is an Officer or Employee Are Subject to Disclosure and Competitive Bid Requirements.

VIRGINIA CONFLICT OF INTERESTS ACT—May Officers or Employees of City Invest in Corporation.

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

September 24, 1970

I am in receipt of your inquiry of September 15, 1970, with enclosures, wherein you ask if it would be a violation of the Virginia Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, for elected and/or appointed city officials to invest in the Virginia Beach Enterprises, Inc.

The Act would be applicable to such investment in the following manner: If an elected or appointed city officer or city employee obtains ownership of an interest of 5% or more in the corporation in question, or receives an aggregate annual compensation of $5,000 or more from such corporation, he would be deemed to have a material financial interest in such business. Consequently, contracts with the agency of which he is an officer or employee would be prohibited pursuant to the provisions of § 2.1-349 (a) (1).

Contracts with governmental agencies other than the one of which he is an officer or employee would be subject to the disclosure and competitive bid requirements of § 2.1-349 (a) (2).

In addition, if any action of his governmental agency could have an effect on the material financial interest he holds in the corporation, then the provisions of §§ 2.1-352 and 2.1-353 would also be applicable. Ownership of an interest of less than 5% in the corporation or an aggregate annual compensation of less than $5,000, would be deemed not to be a material financial interest and consequently the above mentioned provisions would not have applicability.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of General Assembly May Serve on Board of Directors of Private Country Club Which Holds ABC License; § 2.1-358 Applicable.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA CONFLICT OF INTERESTS ACT—Disclosure Provisions Applicable to Member of General Assembly.

April 13, 1971

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

In reply to your inquiry of April 9, 1971, I know of no prohibition against a member of the Virginia General Assembly serving on the Board of Directors of a private country club which holds an ABC license from the Commonwealth of Virginia.

Of course, the provisions of § 2.1-358 of the Code of Virginia (1950), as amended, would be applicable in this case, as in any case, to conduct of a member of the General Assembly and if the directorship is a paid directorship it must be disclosed on the form provided for members of the General Assembly. This form must be filed during the month of December of each year.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of Public Service Authority May Also Be Member of County Planning Commission.

VIRGINIA CONFLICT OF INTERESTS ACT—Planning Commission Is Advisory Agency; Public Service Authority Is Governmental Agency.

VIRGINIA CONFLICT OF INTERESTS ACT—Contract for Remodeling Building Owned by County.

March 19, 1971

MR. R. N. HORN, Member
Rockbridge County Public Service Authority

I am in receipt of your letter of March 11, 1971, wherein you state that you are a member of the Rockbridge County Public Service Authority and the Rockbridge County Planning Commission. Additionally, your company has been awarded a contract for the remodeling of a building owned by Rockbridge County. You request my opinion as to possible conflict of interests in serving on the two commissions and at the same time your company performing services under the contract awarded.

Provided the duties required for serving on the two commissions do not conflict and are compatible, I know of no prohibition against your serving on the two commissions.

As this office has previously ruled, the planning commission would be an advisory agency, while the public service authority would in my opinion be a governmental agency. The definitions of governmental agency and advisory agency are as follows:

"§ 2.1-348. Definitions.—As used in this chapter:

(a) 'Governmental agency' shall include any legislative, executive or judicial body, office, department, authority, post, commission, committee, institution or board created by law to exercise some sovereign power or to perform some duty of State or local government, other than purely advisory powers or duties.

(b) 'Advisory agency' shall include 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."

I assume that the contract for remodeling the building owned by the county would be with the county or other agency rather than the Public Service Authority. The prohibition of a member of a governmental agency entering into a contract with a governmental agency other than the one of which he is a member is found in § 2.1-349 (a) (2) of the Code of Virginia (1950), as amended, and reads as follows:
“(a) No officer or employee of any governmental agency shall:

“(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence 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; . . .”

The notice provisions required by the above section should be followed. There is not a like prohibition against a member of an advisory agency entering into contracts, but I would point out that the provisions of § 2.1-352 would be applicable to both governmental as well as advisory agencies. Such section reads:

“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.”

VIRGINIA CONFLICT OF INTERESTS ACT—Members of State Board of Health Prohibited From Contracting for Clinician Fees.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of State Board of Health May Donate His Services to Clinic—No pecuniary interest involved.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of State Board of Health May Serve Without Fee on Board of Organization Which Does Business With State Health Department if He Does Not Have a Material Financial Interest in the Organization.

December 17, 1970

THE HONORABLE MACK I. SHANHOLTZ, M. D.
State Health Commissioner

As requested, I am setting forth herewith my opinion regarding the applicability of the Virginia Conflict of Interests Act to the various inquiries you raise. Your inquiries are basically two. The first is:
“Would professional members of the Board of Health who participate in clinic sessions in the local health departments of the State be in conflict with the new law? . . . Almost 2,000 physicians serve as clinicians in the local public health clinics usually on a basis of one clinic per week, each session from two to three hours. Fees vary according to the type of clinic but usually do not exceed $50 per session. All fees are the same for a given clinic within a specific locality but fees do vary throughout the whole State.”

It is my understanding that the local health departments throughout the Commonwealth are an integral part of the State Board of Health. This being true, § 2.1-349 (a) (1) of the Code of Virginia would prohibit members of the Board of Health from contracting for the clinician fees. Such contracts would be prohibited even though fees of various clinics do not vary. There would, of course, be no conflict of interests if the physician were to participate in the clinic session and donate his services, there being no pecuniary interest involved.

From the manner of your question, I felt as though you were perhaps of the opinion that § 2.1-349 (a) (3) which reads as follows:

“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; . . .”

would be applicable. However, such section is only applicable to the sale of goods or services by an agency, for example, the sale of hospital services by the Medical College of Virginia, and is not applicable to your inquiry.

You next inquire:

“If a member of the Board of Health serves without fee on the Board of an organization which does business with the State Health Department, would he be in conflict with the law? An example of this would be service without remuneration on the Board of Directors of Blue Cross-Blue Shield which has a contract to act as fiscal intermediary for the State Medicaid Program.”

If the member of the Board of Health does not have a material financial interest in Blue Cross-Blue Shield, i.e., an interest of 5% or more, or aggregate annual compensation of $5,000 or more, then there is no violation of the Conflict of Interests Law.

VIRGINIA CONFLICT OF INTERESTS ACT—Officer Prohibited From Having Material Financial Interest in any Contract With his Own Agency.

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest in Contracts With Agencies Other Than Officer’s Own Agency Subject to Disclosure Requirements of § 2.1-349 (a) (2).

VIRGINIA CONFLICT OF INTERESTS ACT—Material Financial Interest Presumed Not to Exist Where Ownership Is Less Than 5% in a Firm.

October 28, 1970

THE HONORABLE C. N. KINCHELOE
Treasurer of Prince William County

I am in receipt of your inquiry of October 12, 1970, which reads as follows:
"I am a Director of Peoples National Bank and my salary is less than $1,200.00 a year. My interest as a stockholder is less than one percent of the outstanding stock. Please advise if the above constitutes a conflict of interest with my job as Treasurer of Prince William County."

Insofar as pertinent to your inquiry, the Virginia Conflict of Interests Act prohibits an officer or employee from having a material financial interest in any contract with his own agency. A material financial interest in contracts with agencies other than the one of which an individual is an officer or employee is subject to the disclosure requirements of § 2.1-349 (a) (2) of the Code of Virginia (1950), as amended. It is only contracts wherein an individual has a material financial interest that are prohibited.

Pursuant to § 2.1-348 (f) (2), "ownership of an interest of less than 5% in a firm, partnership or other business or aggregate annual compensation of less than $5,000 from a firm, partnership or other business [is] deemed not to be a material financial interest. . . ."

In view of the above, your inquiry is answered in the negative.

VIRGINIA CONFLICT OF INTERESTS ACT—Officers—Contracts with another governmental agency—Board of Supervisors member must make disclosure as school bus driver.

BOARDS OF SUPERVISORS—Members—Conflict of interest—Must make disclosure if also school bus driver.

SCHOOLS—Bus Drivers—Conflict of interest—Member of Board of Supervisors serving as must make disclosure.

The Honorable John P. Alderman
Commonwealth’s Attorney for Carroll County

I am in receipt of your letter of June 24, 1970, wherein you inquire if a member of the Board of Supervisors while serving as such may also be employed by the School Board of the County as a school bus driver.

Virginia’s new Conflict of Interests Law, Chapter 463 of the 1970 Acts of Assembly [codified in Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, and assigned section numbers 2.1-347 through 2.1-358], a copy of which I am enclosing together with a summary of the new law, would be applicable to your inquiry. I am also enclosing a copy of a ruling of this office to the Honorable Will D. Baugh, Secretary of the Lynchburg City Electoral Board, dated May 25, 1970, to be found in the Report of the Attorney General (1969-1970), p. 305, which explains the distinctions in the new Act between paragraphs 3 (a) (1) and 3 (a) (2).

Under the former paragraph, all contracts with the governmental agency of which one is a member are prohibited, while under the latter paragraph, contracts entered into with governmental agencies other than the one of which an individual is an officer or employee are allowed pursuant to certain requirements.

I am of the opinion that the situation you present would be subject to § 3 (a) (2) of the Conflict of Interests Act since the member of the Board of Supervisors is contracting, regardless of the amount involved, with a governmental agency other than the one of which he is a member. As you see from the new Act, such a contract would be allowed if the County Supervisor gave notice in writing to both the Board of Supervisors and the School Board that he is entering into the contract for school bus driver, and the contracting agency, the School Board, sets forth as a matter of public record that the services being contracted for are not appropriate for competitive bidding or, if they are appropriate, that the contract be let only after competitive bids have been received.
VIRGINIA CONFLICT OF INTERESTS ACT—Principal of School May Serve as City Councilman—Should abstain when governing body considering appointment of school board members.

June 10, 1971

THE HONORABLE LLOYD H. HANSEN
Commonwealth’s Attorney for the City of Hampton

I am in receipt of your letter of May 25, 1971, regarding an individual employed by the School Board of the City of Hampton as principal of one of the local schools and who additionally was elected a member of the City Council for the County of Hampton, and will assume office on July 1st.

Your inquiries, which relate to the applicability of the Virginia Conflict of Interest Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, are as follows:

"... may such individual serve as a member of the City Council whose function, among others, is to appoint members of the Hampton School Board, review and pass on budgetary appropriations for the school salaries as well as his own; at the same time, retain his job as a high school principal in this city?"

Under the provisions of the new Conflict of Interest Act, there is no prohibition which would disallow an employee of the School Board from serving as a member of the governing body. See opinion of this office to the Honorable Ford C. Quillen, Member, House of Delegates, dated July 28, 1970, copy of which I attach. I would point out that though statute law does not prohibit such an individual from holding office, charter provisions of the city, which I have not examined, may contain such a prohibition.

Being able to serve, your question then arises as to the propriety of passing on budgetary appropriations for the School Board. This situation has been previously considered in an opinion to the Honorable Richard C. Grizzard, Commonwealth’s Attorney of Southampton County, mentioned in the Quillen opinion, a copy of which I also enclose. The governing body of the city may not designate particular line items to be dropped from the school budget but is restricted to a lump sum appropriation or one designating the sums appropriated under the major categories of expenses. See 22-127 of the Code of Virginia; Report of the Attorney General (1967-68), pg. 19. The approval of the school budget would, as indicated in the Grizzard opinion, be of general application and consequently not, in my opinion, within the prohibition of § 2.1-352. This section reads:

"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. (1970, c. 463.)"

I am, however, of the opinion that appointment of the members of the School Board, which individual in turn would hire the principal in question, would possibly have a direct bearing on the financial interest such individ-
uual has in his job as principal and thus is within the prohibition of § 2.1-352. The principal-councilman should abstain when the governing body is considering appointment of School Board members.

VIRGINIA CONFLICT OF INTERESTS ACT—Property Lease—Not forbidden if not acting as officer, and public record so states.

The Honorable Herbert T. Williams, III
Commonwealth’s Attorney for Dinwiddie County

July 30, 1970

I am in receipt of your request for an opinion under date of July 24, 1970, relative to the application of the Conflict of Interests Act to the following situation:

“The Mayor-elect of the Town of McKenney, Virginia assumes his official duties as of September 1, 1970. He is a physician practicing general medicine in the Town of McKenney and has maintained his office in the basement of the McKenney Town Hall continuously since January, 1948. He pays to the Town of McKenney the monthly sum of $20.00 per month based on an oral agreement by and between he and the Town Council (1948) that he be allowed to use the Town Hall as an office site as long as he agreed to practice medicine in the Town.”

Section 2.1-349 (b) (1) would be applicable to your inquiry. Pursuant to this provision the prohibition against an officer or employee entering into any contract with the governmental agency of which he is an officer or employee or having a material financial interest in any contract with such governmental agency is not applicable to:

“Section 2.1-349 (b) (1) 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; . . .”

VIRGINIA CONFLICT OF INTERESTS ACT—Question of Conflict Should Be Determined by Commonwealth’s Attorney Who Enforces Act as to Local Officials.

February 22, 1971

The Honorable Donald K. Funkhouser
Member, House of Delegates

I am in receipt of your letter of February 19, 1971, which reads:

“I am requesting an opinion concerning Virginia’s conflict of interest statute. Is it your opinion that a conflict of interest would be suggested if a deputy sheriff and a town police chief set up a firm which provided security services (armed guards for business firms, surveillance of private property and private investigating work) in the same jurisdiction which they serve in their regular capacity as law enforcement officers.”
I am unable to state that such a situation would per se be a conflict of interests. Section 2.1-349 (a) (4) does prohibit an individual from receiving additional remuneration for services which must be performed within the scope of his official duties. Such section reads:

"(a) No officer or employee of any governmental agency shall:

*(4) Solicit or accept money or other thing of value in addition to compensation, expenses or other remuneration paid him by the governmental agency of which he is an officer or employee for services performed within the scope of his official duties."

Whether the services the individuals in question were providing were in any way within the scope of the official duties would have to be ascertained on an individual factual basis. In the question you present, such determination should be made by the Commonwealth's Attorney who enforces the Act as to local officials. I would state that the provision in question should be broadly interpreted in order to effect the required public policy intent.

VIRGINIA CONFLICT OF INTERESTS ACT—Retirement Benefits Constitute Material Financial Interest.

VIRGINIA CONFLICT OF INTERESTS ACT—Section 2.1-349 (b) (3) Applicable to Retired Officers and Employees.

VIRGINIA CONFLICT OF INTERESTS ACT—Section 2.1-352 Applicable to Retired Officers and Employees.

VIRGINIA CONFLICT OF INTERESTS ACT—Retirement Benefits Not Affected by Variations in Profit of Firm; Written Disclosure Not Required.

January 8, 1971

MR. E. B. BOYNTON, Chairman
Air Pollution Control Board

This is in reply to your recent request to confirm our previous information to you regarding the 1970 Virginia Conflict of Interests Act [Chapter 22, Title 2.1, of the Code of Virginia (1950), as amended.] Specifically, you made reference to that section of the Act that provides for a conclusive presumption of a conflict of interest when an individual receives an annual aggregate compensation of $5,000 or more from a firm, partnership, or business. You noted that in the Act there is no differentiation between compensation as earnings and compensation as retirement. You asked:

"Would this presumption apply where $5,000 or more in retirement benefits are received from a firm, where the amount of retirement benefits is in no way affected by variations in profit of the firm after the date of retirement?"

Retirement being deferred income, an individual who received from a firm $5,000 or more in retirement benefits would have a material financial interest in the business as defined in the Virginia Conflict of Interests Act. However, though your stationery lists you as a consultant to the firm about which you inquired, I understand that you are fully retired from the firm. The prohibitions of § 2.1-349 [may not have an interest in any contract with the agency of which he is a member, and an interest in contracts with other agencies are subject to certain disclosures] which incur when an individual has a material financial interest in a business do not apply:
"to officers or employees whose sole interest in a contract or subcontract with a governmental agency is by reason of employment [or, in my opinion, prior employment] by the contracting firm, partnership, or other business, unless such officer or employee participates, or has the authority to participate, in the procurement or the letting of such contract, in which event the provisions of such paragraphs shall be applicable; . . ." § 2.1-349 (b) (3) of the Code of Virginia (1950), as amended. (Emphasis added.)

The disqualification and disclosure provisions of § 2.1-352 which differ from the prohibitions found in § 2.1-349 would, however, be applicable. This section is self-explanatory and reads 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."

The written disclosure required to be made to this office under the provisions of § 2.1-353 would not, perhaps, be applicable. This section requires disclosure when any action by the agency of which an individual is a member could "substantially affect" a material financial interest he holds in a business. If, as you indicate, the retirement benefits could in no way be affected by variations in profit of the firm, then I am of the opinion that the above section [§ 2.1-353] would not be applicable.

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VIRGINIA CONFLICT OF INTERESTS ACT—Schools—Does not exist when members of same household employed, but neither earns more than $5,000.

SCHOOLS—Contracts—Conflict of interest—Exists when members of same household employed and neither earns more than $5,000.

SCHOOLS—Contracts—Conflict of interest—Does not exist when members of same household employed and neither earns more than $5,000.

VIRGINIA CONFLICT OF INTERESTS ACT—Schools—Members of household earning more than $5,000, where two employed, should resign.

SCHOOLS—Contracts—Conflict of interest—Where two members of same household employed, one earning more than $5,000 should resign.

VIRGINIA CONFLICT OF INTERESTS ACT—Penalty—Criminal sanctions only for knowing violation.

THE HONORABLE HERBERT T. WILLIAMS, III
Commonwealth's Attorney for Dinwiddie County

I am in receipt of your inquiry of July 2, 1970, wherein you request a ruling relative to the Conflict of Interests Law, as to the following:
"1. One principal and his wife employed in the same school as principal and teacher, both earning in excess of $5,000. per annum.

"2. Four principals whose wives are employed as school teachers in different and separate schools, all of whom earn in excess of $5,000. per annum.

"3. One husband and wife, both teachers in the same school and both earning in excess of $5,000. per annum.

"4. Two sisters, both employed in the same school, both living in the same household and earning in excess of $5,000. per annum.

"5. Six husband and wife combinations, each combination employed in different schools and each earning in excess of $5,000. per annum.

"6. One school bus garage mechanic and wife employed as teacher, both earning in excess of $5,000. per annum.

"7. One secretary and one school aide husband and wife combination one of whom earns in excess of $5,000. per annum and one of whom earns less than same.

"8. One janitor married to a maid, both employed in same school, each earns less than $5,000. per annum and their aggregate salary exceeds $5,000. per annum.

"9. A husband and wife both employed at school bus drivers earning less than $5,000. per annum each, the aggregate being less than $5,000. per annum."

Your specific inquiries are:

"1. Are any or all of the above families in conflict of interest under the Virginia Conflict of Interest Act and more specifically Section 3 thereof; and

"2. Should one spouse of any or all of the above families terminate their employment with the Dinwiddie County School Board in order to remove any stigma of conflict of interest under the above cited act; and

"3. If they or any of them should fail to do so are they in violation of the Act and subject to the criminal provisions thereof?"

As you are aware, under the Virginia Conflict of Interests Act a distinction is made between an officer or employee contracting with his own governmental agency and an officer or employee contracting with a governmental agency other than the one of which he is an officer or employee. While contracts in the latter situation are allowed pursuant to certain requirements, contracts in the former situation are totally forbidden. Section 2.1-349 (a) (1) forbids an officer or employee from entering into any contract, other than his contract of employment, with the governmental agency of which he is an officer or employee. A material financial interest is 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 insofar as pertinent to your inquiry, if there is an aggregate annual compensation of $5,000 or more. See § 2.1-348 (f) (1). You will note that what is forbidden is the entering into a contract with the same governmental agency of which an individual is an officer or employee. In the situation at bar the governmental agency would be the Dinwiddie County School Board and thus it is immaterial that perhaps the spouse of an individual is not employed in the same school.

Applying the Act to your inquiries I am of the opinion that a conflict of interest does exist in situations 1, 2, 3, 4, 5, and 6. A conflict of interest would also exist in situation 7 in that the employee of the School Board who earned less than $5,000 would have a material financial interest in the spouse's contract that was in excess of $5,000 per annum. The spouse
in situation 7 earning in excess of $5,000 would not have a material financial interest in the other's contract since the same would be presumed not to exist there being an annual compensation of less than $5,000 per annum. See § 2.1-348 (f) (2).

In situations 8 and 9 a conflict of interest would not exist since each contract would be for an amount less than $5,000 per annum. See again § 2.1-348 (f) (2).

Consequently for situations 1 through 6, each of the individuals would have a material financial interest in the other's contract and one should terminate the employment in order to avoid a violation of the Act. In situation 7, a conflict of interest exists only for the individual earning less than $5,000 per annum, consequently that person must resign.

I believe that the above is responsive to your first and second inquiries.

In response to your third inquiry, § 2.1-354 provides criminal penalties for violations of the Act only if an officer or employee knowingly violates any of the provisions of the Act.

I would point out that this office prior to issuing this ruling has fully explored and researched all possibilities in attempting to ascertain if a contra ruling would be possible. However, in view of the clear language of the Act, I am constrained to issue no other ruling except that which has been set forth. I must yield to the terms of a plain and unambiguous statute.

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VIRGINIA CONFLICT OF INTERESTS ACT—Spouses—May not be employed where one will be in direct supervisory and/or administrative position over other.

VIRGINIA CONFLICT OF INTERESTS ACT—Spouses—If one employed before other assumed supervisory and/or administrative position, such employment may continue.

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

September 21, 1970

I am in receipt of your inquiry of August 24, 1970, relative to the applicability of the Virginia Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, to a husband and wife who are employed in the Carroll County school system as Assistant Superintendent of Schools and Teacher's Aide, respectively.

From the facts you submit it is clear that the husband does have supervision over his wife in that it is his duty to recommend to the School Board those individuals to be employed as Teacher's Aides and, further, he handles whatever personnel problems may arise in the employment of such aides.

I am enclosing herewith a synopsis and compilation of opinions of the Attorney General regarding the Virginia Conflict of Interests Act which I believe you have previously received. As indicated therein, husbands and wives may now teach in the same school system, provided one is not in a direct supervisory and/or administrative position over the other. As I have indicated, this proviso does appear to be applicable to the situation you present.

However, as indicated in the synopsis, in the educational field there is one exception to the direct supervisory and/or administrative prohibition. Section 22-206 is now, as a result of the Court Order from the Circuit Court of the City of Richmond, enforceable. Though this section is applicable to school board members and superintendents, we have previously ruled that the provisions applicable to a chief office holder would also be applicable to assistants. Pursuant to this section, a wife of a superintendent (in this case an assistant superintendent) may not be employed in the same school system unless she were previously regularly employed.
by any school board prior to her husband's taking office. You indicate in your letter that the wife in question has been previously employed. If she had been regularly employed prior to her husband's appointment as Assistant Superintendent, then I am of the opinion that, though he is in a direct supervisory and/or administrative position over her wife that, in accordance with the Court Order, such employment would not be violative of the Conflict of Interests Act.

VIRGINIA CONFLICT OF INTERESTS ACT—State Insurance Board Is Governmental, Not Advisory, Agency—See § 2.1-107 (b) (1) Provisions of §§ 2.1-349 (a) (1) and (2) and 2.1-352 applicable to members of Board.

December 7, 1970

THE HONORABLE C. WILLIAM CLEATON
Member, House of Delegates

I am in receipt of your inquiry relative to the Conflict of Interests Act, whether an independent insurance agent may serve as a member of the State Insurance Board created pursuant to § 2.1-108 of the Code of Virginia (1950), as amended.

I am of the opinion that the State Insurance Board is a governmental, not advisory, agency. See § 2.1-107 (b) (1). Consequently, the provisions of § 2.1-349 (a) (1) and (2) are applicable to members of the Board.

Basically, members of the Board should be guided by the last paragraph of § 2.1-108 which reads as follows:

“No member of the Board shall participate, directly or indirectly, in the consideration of the insurance to be effected upon any property when such property is insured by or through an insurance agency in which such member has an interest of whatsoever nature.”

Section 2.1-349 (a) (1) [§ 3 (a) (1) of the Act] prohibits an officer or employee of a governmental agency from contracting with or having a material financial interest in a contract with his own governmental agency. I presume that the State Insurance Board never buys insurance and consequently this section would have no applicability.

Section 2.1-349 (a) (2) [§ 3 (a) (2) of the Act] prohibits an officer or employee of a governmental agency from contracting with or having a material financial interest in contracts with governmental agencies other than the one of which he is a member, unless certain disclosures are made. This section would be applicable to a member of the Insurance Advisory Board. If he has a material financial interest in an insurance company contract with any other governmental agency, then the provisions of § 2.1-349 (a) (2) must be followed.

Further, if such individual has an interest in any transaction, not of general application, in which the Insurance Board is concerned, then § 2.1-352 [§ 6 of the Act] would carry out the principles and prohibitions found in the last paragraph of § 2.1-108 as quoted above, and the individual on the Insurance Board having such interest must disclose it to the Board and disqualify himself from participating in the consideration of any official action thereon.

Finally, if a member of the Board believes that any material financial interest he has in, in this case, insurance companies, may be substantially affected by the actions of the Board, then the disclosure requirement of § 2.1-353 [§ 7 of the Act] must be made to this office.

I am enclosing for your convenience photostatic copy of Chapter 463 of the 1970 Acts of Assembly which contains the sections referred to herein.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA CONFLICT OF INTERESTS ACT—Town May Buy Public Service Corporation of Which Mayor Is President.

CITIES AND TOWNS—Town Council—Town council may appoint member to act in absence of mayor.

THE HONORABLE SAM E. POPE
Member, House of Delegates

I acknowledge receipt of your letter received by this office on April 30, 1971, which reads as follows:

"X Company, a Virginia corporation located in the Town of Windsor, Virginia, a municipal corporation located in Isle of Wight County, owns and operates a water supply and distribution system in said Town. The Town, through its Town Council, is contemplating buying this water system and certain other water systems so that the Town may own and operate a public water system. The Town will have to provide for a bond election to finance the project. It will be necessary for the Town to obtain a purchase option from X Company. The Mayor of the Town, who is also an ex-officio member of the Town Council, is President of and majority stockholder and owner of an interest of 5% and more in X Company.

"We are aware of the provisions of Chapter 22 of Title 2.1 (sections 2.1-347 et seq.) of the Code of Virginia and particularly the provisions of subsection (b) (1) of section 2.1-349 thereof. We will, however, appreciate your opinion as to whether or not:

1. X Company may sell and convey its water system to the Town of Windsor.
2. The Mayor may execute the purchase option and other necessary instruments as Mayor for and on behalf of the Town and its Council upon being authorized by the Council to do so without violating the provision relating to participation contained in subsection (b) (1), supra, and if your answer to this question is in the negative, may the Town Council authorize one of the other members of the Council to execute such option and instruments for the Town and Council since the Town Charter contains no provision for a Vice-Mayor.
3. The Mayor is required to comply with the provisions relating to disclosure contained in Chapter 22, supra."

Section 2.1-348 (f) (3) of the Code of Virginia (1950), as amended, is applicable to your inquiry and reads:

"(3) Except for the purposes of §§ 2.1-352 and 2.1-353, employment by, ownership of an interest in, or service on the board of directors of public service corporations, financial institutions or companies furnishing public utilities to governmental agencies shall not be deemed to be a material financial interest within the meaning of this chapter."

Your questions will be answered in the order which you presented them. 1. It is my opinion that X Company, which I am assuming is a public service corporation, may sell and convey its water system to the Town of Windsor. In such a case your Mayor would be exempted from the prohibitions of § 2.1-349 of the Code of Virginia (1950), as amended, in that he is deemed not to have a "material financial interest" by virtue of § 2.1-348 (f) (3) of the Code. Of course, your Mayor must disqualify himself from voting in any official action on this matter pursuant to § 2.1-352 of the Code of Virginia (1950), as amended.
2. Your Mayor may not execute the purchase option or any other necessary instruments in this transaction on behalf of the Town and its Council regardless of whether the Council so authorizes him. My authority for this statement is that I interpret this to be "official action" as used in § 2.1-352 of the Code. Section 15.1-827 of the Code of Virginia (1950), as amended, authorizes the Town Council to appoint a president pro tempore to preside in the event of the absence of the Mayor. Certainly, therefore, the Council may authorize a member to execute the purchase option and other necessary instruments in his absence.

3. All disclosures required by Chapter 22 of Title 2.1 of the Code of Virginia (1950), as amended, must be made by the Mayor. He must make proper disclosure to the Town Council (§ 2.1-352 of the Code), and the Commonwealth's Attorney for the jurisdiction (§ 2.1-353 of the Code of Virginia (1950), as amended).

VIRGINIA CONFLICT OF INTERESTS ACT—Wife of Member of County Board of Supervisors May Be Employed in Same County by Local School Board.

VIRGINIA CONFLICT OF INTERESTS ACT—Wife of Member of Town Council May Be Substitute Teacher in Town School District.


March 31, 1971
THE HONORABLE G. R. C. STUART
Member, House of Delegates

I am in receipt of your inquiry of March 24, 1971, which reads:

"The Town of Abingdon is a special school district. It has its own school board, which of course employs the faculty, and its operating funds consist in large part of appropriations by the Town Council. Would it be a violation of the Conflict of Interest Act for the wife of a member of the Town Council now to begin substitute teaching in the elementary school operated by the Town special school district? Her total compensation during any year would not exceed $1,000.00."

I am enclosing herein a copy of an opinion of this office to the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, dated June 18, 1970, which I feel is applicable to your inquiry, wherein this office ruled that the wife of a member of a county board of supervisors may be employed in the same county by the local school board.

The requirement of disclosure under § 2.1-349 (a) (2) of the Code of Virginia (1950), as amended, as outlined in the Grizzard opinion would not be applicable to your inquiry for two reasons. First, the compensation would be, as you indicate, less than $5,000.00 and consequently the councilman in question would not have a material financial interest in his wife's contract. Secondly, even if the wife’s salary did exceed $5,000.00, disclosure is not necessary due to the recent amendment to § 2.1-349 (a) (2) which no longer requires disclosure of interest in "a contract of salaried employment."

VIRGINIA CONFLICT OF INTERESTS ACT—Wife of Member of County Board of Supervisors, or of Any County Officer May Be Appointed Registrar—Provisions of § 2.1-352 would apply.
ELECTIONS—Registrar; Wife of Member of County Board of Supervisors, or of Any County Officer May Be Appointed As—Provisions of § 2.1-352 would apply.

REGISTRAR—Wife of Member of County Board of Supervisors, or of Any County Officer May Be Appointed As—Provisions of § 2.1-352 would apply.

March 5, 1971

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

I am in receipt of your letter of February 23, 1971, wherein you inquire, under the Virginia Conflict of Interests Act, whether the wife of a member of the county board of supervisors, or the wife of any county officer, may be appointed as general registrar.

Section 24.1-43 of the Code of Virginia (1950), as amended, provides for the appointment and qualification of registrar. The qualification of a general registrar is that an individual must be a qualified voter of the jurisdiction for which he is appointed. Additionally, such individuals are prohibited from holding any other office, either by election or appointment, during their term. Nor may they serve as officers of election. (See also § 24.1-44.)

Provided that a wife in question does not hold any other office, elective or appointive, and is a qualified voter, I am of the opinion that the wife of a member of the board of supervisors or of any county officer may be appointed general registrar. Upon consideration of the appointment, however, I am of the opinion that the provisions of § 2.1-352 of the Conflict of Interests Act would be applicable to a member of the board of supervisors. Pursuant to this statute the member should disclose his interest in the appointment and disqualify himself from consideration and voting upon the appointment.

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—Action required following meeting.

March 29, 1971

THE HONORABLE PAUL W. MANNS
Member, Senate of Virginia

This is in reply to your letter of March 18, 1971, in which you pose the following question:

"Under the Virginia Freedom of Information Act, which says that 'No resolution, ordinance, rule, contract, regulation or motion, adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership ...,' is it your opinion that action taken at a meeting not announced to the public and at which the public is not represented is valid and shall become effective?"

The language which you quote is found in § 2.1-344 of the Code relating to executive or closed meetings. When such meetings are held for the purposes set forth in (1) through (7) of that section, compliance with (b) and (c) of that section is required. These read:

"(b) No meeting shall become an executive or closed meeting unless there shall have been recorded an affirmative vote to that effect by the public body holding such meeting.

"(c) No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting,
reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion."

Therefore, I am of the opinion that subsection (c) which you quote is applicable only to executive or closed meetings and that the action taken at all other meetings is valid and effective. I am also of the opinion that action taken following an executive or closed meeting is valid where the public body has followed the provisions of subsection (c).

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—May be held to discuss matters which will be topic of public hearing.

March 23, 1971

THE HONORABLE OLIVER D. RUDY
Commonwealth’s Attorney for Chesterfield County

This is in reply to your letter of March 10, 1971, in which you ask my opinion whether the Board of Supervisors may hold an executive session to discuss the county budget which will be the subject of a public hearing prior to its adoption.

Section 15.1-162, Code of Virginia (1950), as amended, requires the board to hold a public hearing on the budget and provides that notice of the hearing shall be given seven days prior thereto.

Section 2.1-344(7) of the Code provides that an executive or closed meeting may be held to discuss any matter which will be the topic of a public hearing prior to a final decision, provided the notice of every public hearing shall be published generally in the community not less than ten days prior to such public hearing.

I am of the opinion that the Board of Supervisors may discuss and plan a budget in executive session so long as said budget is advertised for public hearing not less than ten days prior to such public hearing.

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—May be held to discuss welfare recipient’s grant.

October 1, 1970

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

This is in response to your letter of September 16, 1970, in which you request an interpretation of the Virginia Freedom of Information Act. You stated, in part:

"The clarification sought is whether or not it is proper for a Welfare Board of a political subdivision to hold closed sessions for ‘personnel matters’, as is permitted by the law, and upon completion of discussion of and action on personnel matters to turn the meeting to a discussion of matters which do not fall into the ‘personnel matters’ category, but which are matters of public interest."

"Further, there is some question as to whether any action taken by a Board of County Supervisors on matters not of ‘personnel’ nature in such a closed session would be valid."

Section 2.1-343 of the Code of Virginia, as amended, requires that “all meetings shall be public meetings” unless otherwise excepted. Va. Code Ann. § 2.1-341 (a) defines a meeting as:

“... sitting as a body or entity, or as an informal assemblage of the constituent membership (of the public body) with or without minutes being taken, whether or not votes are cast of any public body.” (Emphasis added.)
In my opinion, the meeting of the local department of welfare is included in this definition of meetings and therefore, its meetings must be public meetings.

With regard to closed meetings, Va. Code Ann. § 2.1-344 provides:

“(a) Executive or closed meetings may be held only for the following purposes:
(1) Discussion or consideration of employment, assignment, appointment, promotion, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body.
(3) The protection of the privacy of individuals and personal matters not related to public business.”

Section 1 applies to and covers what you refer to in your letter as “personnel matters”. In my opinion, § 3 would relate to any discussion and consideration of a particular recipient's assistance grant, application for a grant or other such personal matter.

Since action by the board which relates to assistance and services provided any individual is confidential in nature, it should not be considered and acted upon in open session. Va. Code Ann. § 63.1-253.

In the event the local welfare department determines that a particular subject matter falls into one of these categories and desires that its meeting should be conducted in closed session, the board must follow the requirements of Va. Code Ann. § 2.1-344 (b) which states:

“No meeting shall become an executive or closed meeting unless there shall have been recorded an affirmative vote to that effect by the public body holding such meeting.”

Therefore, if the local welfare department desires to discuss a personnel matter, it must, in open session, have a recorded vote that it will go into executive or closed session.

Once in closed or executive session, no action taken by the particular board, whether it be the local welfare department or any other, is valid unless and until the “public body . . . reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion.” Va. Code Ann. § 2.1-344 (c). Therefore, any action taken by the public body in executive session is invalid until that body has taken its vote in “open meeting.”

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—Purposes for which may be held. April 29, 1971

THE HONORABLE GEORGE N. MCMATH
Member, House of Delegates

This is in reply to your letter of April 14, 1971, which reads as follows:

“I am writing today to ask an opinion relative to the Virginia Freedom of Information Act.

“That Act states that ‘executive or closed meetings may be held only for the following purposes’ and then seven purposes are listed. Once a Board is in executive session, is it your opinion that the Board may legally discuss matters which are not permitted by Section 2.1-344(1-7), or must the Board return to a public session to discuss them?”

I am of the opinion that, once the board is in executive session to discuss any of the matters permitted by § 2.1-344(a)(1) through § 2.1-344(a)(7), it may not discuss other non-related matters but must hold a public meeting for the discussion of such matters.
VIRGINIA FREEDOM OF INFORMATION ACT—Public Body—When subject to the Act.

THE HONORABLE JOHN GALLEHER
Member, Senate of Virginia

This is in reply to your letter of March 25, 1971, which reads as follows:

"I should very much appreciate it if you would let me have your opinion on the following question:
"If a public body forms itself into a committee or a committee of the whole, is that committee or committee of the whole subject to the provisions of the Virginia Freedom of Information Act (2.1-340-6)?"

I am of the opinion that a public body which forms itself into a committee of the whole, which is comprised of its constituent membership, is subject to the Virginia Freedom of Information Act.

I am also of the opinion that a committee comprised of less than the constituent membership of the public body is not subject to the Act if it is excepted therefrom by § 2.1-345, Code of Virginia (1950), as amended. It should be noted, however, that no committee appointed by the governing body of a county, city or town is excepted if the membership of such committee consists wholly of members of the governing body in question.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Board of Trustees—Rights, duties, responsibilities and powers.

THE HONORABLE T. KENNETH MCRAE
Chairman, Board of Trustees
Virginia Supplemental Retirement System

I have received your recent letter, asking my opinion as to the rights, duties and responsibilities of the Board of Trustees of the Virginia Supplemental Retirement System with respect to its ownership of stock in the Richmond, Fredericksburg and Potomac Railroad Corporation.

The Trustees own the stock subject to a repurchase option in favor of the State. Va. Code § 2.1-187. Until the stock is repurchased by the State, all dividends and other payments on account of the stock are to be paid into the Supplemental Retirement System. Va. Code § 2.1-181. The Trustees do not have the right to sell, pledge, encumber or otherwise dispose of the stock. Va. Code § 2.1-187.

Section 51-111.52:3 of the Code gives the Trustees the power to appoint proxies to represent the stock on behalf of the System. Before each annual meeting of the Corporation, the Trustees are required to appoint as many directors of the Corporation as may be proportionate to the System's ownership of capital stock in the Corporation.

The relevant provisions of the Corporation's charter are as follows:

"ARTICLE VI.

"The board of directors of the merged company shall, until changed, as herein or in the charter or by-laws of said company provided, consist of eight directors, but the number may be increased or diminished from time to time as provided for in the charter or by-laws of said company, but at no time shall consist of less than seven directors, including the president. The directors, except the director or directors required by Section 3762 of the Code of Virginia, 1919, to be appointed by the State Corporation Commission, shall be elected annually by the stockholders, at the annual meeting
of the merged company, to be held at such time as may be fixed in
the by-laws, and in the manner provided by the laws of the State 
of Virginia."

* * *

"ARTICLE VII.

"(1) The capital stock of the Company shall be Ten Million Eight 
Hundred Thirty-four Thousand Eight Hundred Dollars ($10,834,800) 
which shall be divided into Guaranteed Stock, Common Stock and 
Dividend Obligations . . . ." * * *

"(3) Each share of Guaranteed Stock of the par value of $25 each 
and each share of Common Stock of the par value of $25 each shall 
entitle the holder thereof to one vote. The Dividend Obligations shall 
have no voting power."

Section 3762 of the 1919 Code of Virginia is § 12-30 of the 1950 Code. 
That section no longer has relevance, for the stock has been disposed of 
by the State (although it is, of course, subject to the repurchase option). 
Section 51-111.52:3 now applies.

My interpretation of § 51-111.52:3 is that capital stock includes all out-
standing guaranteed stock, voting common stock and dividend obligations. 
It is my further opinion that the System's right to vote its common stock is in addition to its power to appoint directors (although, in the absence of 
a cumulative voting provision, the System's minority interest is not suffi-
cient to elect a director).

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Judicial Retire-
ment—Written notice to Governor required.

THE HONORABLE WALTER T. McCARTHY, Judge 
Circuit Court of Arlington County 

November 30, 1970 

I have received your letter of November 23, in which you ask with respect 
to your contemplated retirement, "What length of time is required of the 
otice of the Governor?"

Circuit court judges are elected by the General Assembly (Va. Constitu-
tion, Section 96), commissioned by the Governor (Va. Constitution, Section 
102) and supervised by the Supreme Court of Appeals (Va. Constitution, 
Section 87). Courtesy would seem to require that you notify each of these 
authorities of your resignation.

The only required notice is to the Governor. If you wish to obtain retire-
ment benefits under the Judicial Retirement System (Va. Code, Title 51, 
ch. 7) you must give the Governor at least ninety days' prior written 
otice of your retirement. Va. Code § 51-167(e). If, however, you wish to 
claim the benefits heretofore provided by the Judges' and Commissioners' 
Retirement Fund (Va. Code, Title 51, ch. 2, art. 7, now repealed) and 
guaranteed you by chapter 779, § 3(h) of the 1970 Acts of Assembly, you 
may give the Governor written notice at any time before your retirement 
is to become effective.

WATER AND SEWER AUTHORITIES—Connection Fees—May establish 
reasonable rates for connection.

WATER AND SEWER AUTHORITIES—Required Connection—May be 
established by rules, with concurrence of local governing body.

July 13, 1970 

THE HONORABLE BEVERLEY ROLLER 
Member, House of Delegates
This is in reply to your letter of June 25, 1970, in which you ask the following question:

"Can a County Board of Supervisors adopt an ordinance requiring a resident on a road or street having county sewage facilities to purchase a sewage connection?"

The only authority that I am aware of, which provides that a resident on a road or street having county sewage facilities may be required to purchase such a sewer connection, is to be found in Chapter 28 of Title 15.1 of the Code of Virginia (1950), as amended, entitled "Virginia Water and Sewer Authorities Act."

Section 15.1-1241 of said Act provides that the governing body of a political subdivision may, by ordinance or resolution, create a sewer authority which shall be a public body politic and corporate.

The authorities' power to require a resident to connect with the sewer system and to charge for making the connection, is contained in § 12.1-1261 which reads, in part, as follows:

"Water and sewer connections.—Upon the acquisition or construction of any . . . sewer system under the provisions of this chapter, the owner, tenant, or occupant of each lot or parcel of land which abuts upon a street or other public way containing . . . a sanitary sewer which is a part of or which is served or may be served by such sewer system and upon which a lot or parcel a building shall have been constructed for residential, commercial or industrial use, shall, if so required by the rules and regulations or a resolution of the authority, with concurrence of such local government, municipality, or county that may be involved, connect such building with such . . . sanitary sewer, and shall cease to use . . . any other method for the disposal of sewage, sewage waste or other polluting matter. All such connections shall be made in accordance with rules and regulations which shall be adopted from time to time by the authority, which rules and regulations may provide for a charge for making any such connection in such reasonable amount as the authority may fix and establish." (Emphasis added.)

WATER AND SEWER AUTHORITIES—Rates—SCC review limited to meeting minimum standards.

WATER AND SEWER AUTHORITIES—Sales—Cities may purchase water for resale to consumers.

CITIES—Water—No prohibition against purchasing from Authority at wholesale for resale to consumers of retail.

Mr. Charles H. Graves, Director
Division of State Planning and Community Affairs

September 15, 1970

I am in receipt of your inquiry of July 17, 1970, wherein you ask the following questions:

"(1) Whether under Section 15.1-1239 through Section 15.1-1270, Code of Virginia, 1950, as amended, the City of Norfolk and City of Virginia Beach could purchase water from an authority at wholesale prices and then each sell to respective customers water at a retail price and (2) whether the State Corporation Commission would control the rates charged by the City of Norfolk and the City of Virginia Beach to their respective customers."
Counts and cities are authorized under §§ 15.1-292, et seq. of the Code of Virginia (1950), as amended, to establish water systems. They may also establish a water authority under the provisions of Chapter 28 of Title 15.1, §§ 15.1-1239, et seq. to accomplish the same purpose.

Under § 15.1-1260 of the Code the rates and charges for the use and services of water provided by an authority shall be so fixed and revised as to "provide funds, with other funds available for such purposes, sufficient at all times (a) to pay the cost of maintaining, repairing and operating the system or systems on account of which such bonds are issued, including reserves for such purposes and for replacement and depreciation and necessary extensions, (b) to pay the principal of and the interest on the revenue bonds as the same shall become due and reserves therefor, and (c) to provide a margin of safety for making such payments. The authority shall charge and collect the rates, fees and charges so fixed or revised and such rates, fees and charges shall be subject to the jurisdiction of the State Corporation Commission and to any applicable regulation of the State Corporation Commission or law appertaining thereto."

Turning to your specific inquiries, I am of the opinion that your first question should be answered in the affirmative and the second question answered in the negative.

Other than the qualification that the sale of water, by the Authority, at wholesale prices must provide funds to meet the requirements of § 15.1-1260, I am unaware of any provision that would prohibit a city from buying water at such prices and reselling the same at a retail price.

Once the rates of the Authority are filed with the State Corporation Commission in accordance with the provisions of § 15.1-1242, then they have been subject to the jurisdiction of the State Corporation Commission so as to satisfy the requirements of § 15.1-1260 and there is no further requirement under the latter that rates fixed by the Authority be subject to the approval of the Commission. Myers v. Moore, 204 Va. 409, 412, 131 S.E.2d 414 (1963).

Further, once a city owns water, it alone may fix the price of such water. See, opinion of the Attorney General to the Honorable William T. Graybeal, Attorney for the Commonwealth, found in Report of the Attorney General (1948-1949), p. 26, a copy of which is enclosed.

WATER CONTROL BOARD—Authority—May enforce water quality standards.

Mr. A. H. Paessler, Executive Secretary
State Water Control Board

This will acknowledge receipt of your letter of September 16, 1970, which states, in part, as follows:

"The State Water Control Board has recently adopted water quality standards in accordance with the Administrative Agencies Act and the State Water Control Law. These standards became effective on July 20, 1970. The standards pertaining to interstate waters must be approved by the Secretary of the Interior in accordance with the Federal Water Pollution Control Act of 1965.

"Before an approval will be granted by the Secretary of the Interior we must provide an opinion from you concerning the Board's authority under the amended State Water Control Law to enforce the water quality standards."

In 1946 the General Assembly first enacted legislation relating to matters of water pollution abatement in Virginia. The Water Control Law has been amended and strengthened in subsequent sessions of the Legislature and
now is codified as Chapter 3.1 of Title 62.1 of the Code of Virginia, as amended. In responding to your inquiry it is necessary to review three particular aspects of the Act: (A) State policy; (B) State control; (C) Board powers.

(A) In Section 62.1-44.2 of the Code of Virginia the General Assembly declared:

"... It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) protect existing high quality State waters and restore all other State waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them, (2) safeguard the clean waters of the State from pollution, (3) prevent any increase in pollution, and (4) reduce existing pollution, in order to provide for the health, safety, and welfare of the citizens of the Commonwealth." (Emphasis added.)

(B) Section 62.1-44.4 of the Code states clearly:

"(1) ... The right and control of the State in and over all State waters is hereby expressly reserved and reaffirmed . . . ."

(C) The State Water Control Board was created by the General Assembly as the mechanism by which State policy would be executed. Section 62.1-44.15 of the Code outlines some of the broad powers of the Board. They include, among others, the authority to exercise general supervision and control over the quality of all State waters, to study and investigate all problems concerned with the quality of State waters, to establish quality standards, to conduct scientific experiments, to issue certificates for discharge of sewage, industrial and other wastes, to make investigations and inspections, to insure compliance with Board orders and rules, to adopt rules governing Board procedure, to issue cease and desist orders to owners who are permitting or causing water pollution, to adopt such regulations as it deems necessary to enforce general water quality management programs of the Board, to investigate any large-scale killing of fish, to establish policies and programs for effective area-wide or basin-wide water quality control and management, and to establish requirements for the treatment of sewage, industrial wastes and other wastes that are consistent with the general purposes of the State Water Control Law. In addition, the Board is authorized to enforce its rules, regulations or orders by injunction, mandamus or other appropriate remedy. See § 62.1-44.23 of the Code.

Based upon the foregoing, I am of the opinion that the State Water Control Board is empowered to adopt and enforce the water quality standards to which you refer in your letter.

WATER CONTROL BOARD—Powers to Control Stream Flow Releases—Defined.

February 5, 1971

MR. A. H. PAESSLER, Executive Secretary
State Water Control Board

This will acknowledge receipt of your letter of January 29, 1971, in regard to the powers of the State Water Control Board. The letter states as follows:

"On June 12, 1969 the State Corporation Commission, following hearings, granted the Virginia Electric and Power Company a license to construct a nuclear power station on the North Anna River. The license contained provisions setting forth a minimum release schedule for flows from the impoundment."
"On April 7, 1970 the State Water Control Board convened a hearing in accordance with Section 62.1-27(5) of the State Water Control Law for the purpose of determining if Certificate #1912, issued to the Virginia Electric and Power Company on June 19, 1968, should be amended to incorporate a release schedule which provided for higher minimum releases than those established by the State Corporation Commission.

"By letter of June 25, 1970 Governor Holton designated the State Water Control Board to act as the State agency to certify to Federal licensing agencies, under Section 21(b) of Public Law 91-224, that activities conducted by licensees would be such that there is reasonable assurance that such activities will not cause a contravention of water quality standards.

"At its meeting on November 18, 1970, the State Water Control Board amended Certificate #1912, issued, under the State Water Control Law to the Virginia Electric and Power Company on June 19, 1968, and in addition, directed that the staff issue, in accordance with Section 21(b) of Public Law 91-224, a certificate of assurance certifying that the proposed construction and operation of the North Anna Power Station would not result in contravention of water quality standards. Both of the above certificates contain provisions for higher minimum flow releases than those set forth in the State Corporation Commission's license.

"The State Water Control Board is concerned about present and future jurisdictional disputes between State agencies in matters such as these. If the Board acted improperly, it may wish to reconsider its decision and the Board has requested that we obtain an opinion from you concerning the following:

1. Did the State Water Control Board have the legal authority to act in amending Certificate #1912 issued to the Virginia Electric and Power Company on June 19, 1968 by requiring an average instantaneous flow release schedule greater than the minimum average instantaneous flow release schedule provided in the license to construct issued by the State Corporation Commission on the grounds that these greater releases were necessary to protect the water quality downstream from the North Anna Power Station?

2. Regardless of your findings in 1, above, does the Board have legal authority to issue a certificate of assurance under Section 21(b) of Public Law 91-224 and to incorporate in that certificate a requirement of an average instantaneous flow release schedule greater than the schedule set forth in the license issued by the State Corporation Commission on the grounds that the greater releases are necessary to insure protection of water quality downstream?

"Your early response to our request will be appreciated."

Your questions require the consideration of an apparent discrepancy between the provisions of Chapter 3.1 of Title 62.1 of the Code of Virginia (1950), as amended (Water Control Law) and those of Chapter 7 of Title 62.1 (Water Power Act). The discrepancy takes on added significance in view of the problems associated with increasing total energy consumption by an expanding population and the intensified efforts to improve the quality and purity of the waters of the Commonwealth.

The policy of the State regarding water quality and the purpose of the recently amended State Water Control Law are stated in § 62.1-44.2 of the Code:

"It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) protect existing high quality State waters and restore all other State waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish,
which might reasonably be expected to inhabit them, (2) safeguard the clean waters of the State from pollution, (3) prevent any increase in pollution, and (4) reduce existing pollution, in order to provide for the health, safety, and welfare of the citizens of the Commonwealth."

In addition, § 62.1-44.4 provides that no right exists to continue existing quality degradation of the waters of the State; that the right and control of the State over State waters is expressly reserved and reaffirmed; that those waters whose existing quality is better than established standards will be maintained at that high quality, and that where variances from such are allowed the necessary degree of waste treatment to maintain high water quality will be required wherever physically and economically feasible.

In order to implement the announced policy of the State and the objectives of the Water Control Law, the State Water Control Board is granted broad powers under § 62.1-44.15 of the Code. These powers include, among others, the authority: to exercise general supervision and control over the quality of all State waters, to study and investigate all problems concerned with the quality of State waters, to establish quality standards, to conduct scientific experiments, to issue certificates for discharge of sewage, industrial and other wastes, to make investigations and inspections; also, to insure compliance with Board orders and rules, to adopt rules governing Board procedure, to issue cease and desist orders to owners who are permitting or causing water pollution, to adopt such regulations as it deems necessary to enforce general water quality management programs with the Board, to investigate any large-scale killing of fish, to establish policies and programs for effective area-wide or basin-wide water quality control and management; and to establish requirements for the treatment of sewage and industrial wastes and other wastes that are consistent with the general purposes of the State Water Control Law.

The General Assembly has stated that the conservation and utilization of the otherwise wasted energy to be derived from water resources is also a concern of substantial magnitude. In this regard § 62.1-80 of the Water Power Act declares the policy of the State to be:

"... to encourage the utilization of the water resources in the State to the greatest practicable extent and to control the waters of the State, as herein defined, and also the construction and reconstruction of a dam in any rivers or streams within the State for the generation of hydroelectric energy for use or sale in public service, all as hereinafter provided."

The Water Power Act confers upon the State Corporation Commission jurisdiction over all dams across or in the waters of the State as defined in § 62.1-81 of the Code. See also Vaughn v. VEPCO, Va. ---, S.E.2d (1971). Section 62.1-82 provides that "[t]he control and regulation on the part of the State of the development of the waters of the State shall be paramount, and shall be exercised through the agency of the State Corporation Commission ... ."

Correspondingly, § 62.1-83 of the Code provides, among other things, that no corporation proposing to construct or reconstruct any dam across or in the waters of the State shall undertake the same without first having complied with Chapter 7 of Title 62.1 of the Code. In addition, § 62.1-85 of the Code requires the obtaining of a license from the State Corporation Commission prior to construction, the application for which "shall be accompanied by such maps, plans and other information as may be necessary to give a clear and full understanding of the proposed scheme of development, and of dams, generating stations or other major structures, if any, involved therein."

In granting such licenses, the State Corporation Commission is authorized
by § 62.1-91 of the Code to impose "... such terms and conditions with respect to the character of construction, operation and maintenance of the proposed dam and works as may be reasonably necessary in the opinion of the Commission in the interest of public safety ... " More importantly, this same section authorizes the State Corporation Commission to "... determine what provision, if any, shall be made by the licensee to prevent the unreasonable obstruction of then existing navigation or any unreasonable interference with stream flow." (Emphasis supplied.)

Any apparent discrepancy with respect to the authority of the State Water Control Board and that of the State Corporation Commission in this area is resolved by the language of the statutes themselves. Section 62.1-82 of the Code, as noted above, provides that "[t]he control and regulation on the part of the State of the development of the waters of the State shall be paramount, and shall be exercised through the agency of the State Corporation Commission . . . ." (Emphasis supplied.) "Paramount" is defined by Black's Law Dictionary as "of the highest rank or nature" and as "chief; pre-eminent; supreme" by Webster's New Collegiate Dictionary. See also Commonwealth v. B&O R.R. Co., 12 Va. L. Reg. 302 (1906).

In this regard, it should be noted that a considerable amount of legislation has been enacted in recent years as a result of the increased demands placed upon the State's water resources. Consequently, authority to exercise control over defined—and limited—areas of water uses has been conferred upon a number of special agencies: the State Water Control Board, the Division of Water Resources of the Department of Conservation and Economic Development, the Marine Resources Commission, the State Corporation Commission, the State Department of Health, the Commission of Games and Inland Fisheries, the Virginia Ports Authority, the Potomac River Basin Commission and the Ohio River Valley Water Sanitation Commission.

In the area of State control and regulation of the development of water power projects, however, the authority of the State Corporation Commission is paramount. Indeed, the scope of authority of the State Corporation Commission is expressly made quite broad. In order to achieve the utilization of the waters of the State to the greatest practicable extent, § 62.1-88 of the Code requires that "[b]efore acting upon any application, the Commission shall weigh all the respective advantages and disadvantages from the standpoint of the State as a whole and the people thereof and shall make such investigation as may be appropriate as to the effect of the proposed construction upon any cities, towns and counties and upon the prospective development of other natural resources and the property of others." (Emphasis supplied.)

In this regard, I direct your attention to § 62.1-44.6 of the Water Control Law which states as follows:

"This chapter is intended to supplement existing laws and no part thereof shall be construed to repeal any existing laws specifically enacted for the protection of fish, shellfish and game of the State, except that the administration of any such laws pertaining to the pollution of State waters, as herein defined, shall be in accord with the purpose of this chapter and general policies adopted by the Board." (Emphasis supplied.)

In my opinion the General Assembly has declared its intention that the Water Control Law shall not override certain existing laws; rather the Water Control Law shall supplement and aid existing statutes dealing with the waters of the State.

Therefore, in response to your first question, I am of the opinion that in water power projects the final decision as to flow release schedules is that of the State Corporation Commission. However, the Legislature has directed that the administration of such existing laws affecting or touching upon
pollution of State waters as defined in § 62.1-44.3(6) of the Code shall be in accord with the purpose of the Water Control Law and the policies of the State Water Control Board adopted pursuant thereto. Thus, the State Corporation Commission in acting upon applications for licenses to construct dams in the waters of the State, and, particularly, in imposing restrictions on stream flow, must consider the advice and judgment of the State Water Control Board regarding the effect of the proposed project upon the quality of State waters. An appeal of right to the Virginia Supreme Court from an order of the State Corporation Commission is provided by law.

In the case to which you refer, it appears that the original judgment of the State Water Control Board in regard to stream flow was reflected in the State Corporation Commission's order and license to construct. See State Corporation Commission Order of June 12, 1969, Application of Virginia Electric and Power Company, Case No. 18,669, p. 3. It also appears from your letter that the State Water Control Board has reconsidered its previous determination and, in its judgment, decided that a greater average minimum release flow is necessary in order to protect the quality of State waters downstream from the North Anna Power Station. Therefore, it is my further opinion that while the State Water Control Board did not have the authority unilaterally to amend its Certificate #1912 after the State Corporation Commission license provisions relating to stream flow had been imposed, the revised findings of the State Water Control Board should be considered by the Commission. The proper procedure for accomplishing this is to petition the State Corporation Commission to reopen its proceedings pursuant to its own order that the matter be continued on the docket for such further action as may be taken by the Commission. See State Corporation Commission Order of June 12, 1969, supra.

I am aware that such a procedure, regrettably, could be cumbersome and time-consuming, particularly if appellate proceedings are involved; for that reason reference is made to § 62.1-102 of the Code which states that “[t]he provisions, terms, and conditions of any license may be altered or amended at any time by mutual consent of the licensee [VEPCO] and the Commission . . . .”

In response to your second question, it should be noted that by letter of January 23, 1970, the United States Army Corps of Engineers “determined that the North Anna River is not a navigable water of the United States for administration of navigation laws . . . .” (See copy of letter attached.) Since the terms of § 21(b) of Public Law 91-224 applies only to those discharges into the navigable waters of the United States, the State Water Control Board, in my opinion did not have to act on the application by Virginia Electric and Power Company for a “21(b) Certificate of Assurance.”

With reference to your concern about future jurisdictional disputes arising out of the regulation and control of water power projects, I am of the opinion that the State Water Control Board has the authority and is the proper agency, pursuant to the Water Control Law and the Governor's designation of April 7, 1970, to issue a certificate of assurance under § 21(b) of Public Law 91-224. However, this is not unqualified and requires a brief analysis of Public Law 91-224.

As you are aware, it is the purpose of this statute to insure that federally licensed activities and facilities which may result in, or cause to be made, any discharges into navigable waters comply with applicable water quality standards. Accordingly, the granting of the federal license or permit is contingent upon the appropriate agency, in this case, the State Water Control Board, issuing its certificate of assurance that the proposed activity or facility will not contravene applicable state water quality standards. In considering any request for a 21(b) certificate, Public Law 91-224 provides that the appropriate agency may either (1) issue the certificate, (2) fail or refuse to act on the same within a reasonable period of time,
in which case the requirement of a certificate is deemed to have been waived, or (3) deny the request, in which case no federal license or permit shall be granted the proposed activity or facility.

Although Public Law 91-224 provides for three possible alternatives to be taken by the State Water Control Board, the Board, in considering a 21(b) certificate, is subject to the scope and limitations imposed upon it by the state law that created it. In view of the reasons given in response to your first question, the action of the Board with respect to certificates issued regarding water power projects under § 21(b) cannot be in contradiction of the conditions and terms imposed by the State Corporation Commission in its license to construct and operate such water power projects. Therefore, it is my opinion that the State Water Control Board does not have the authority to issue a certificate of assurance under § 21(b) of Public Law 91-224 incorporating therein a requirement of an average instantaneous flow release schedule greater than the schedule set forth in the license issued by the State Corporation Commission.

Two further observations should be noted: (1) on September 29, 1970, this Office issued an opinion in regard to the general powers of the State Water Control Board; the views expressed therein are not modified by this opinion, which is intended to clarify the procedure by which the powers of the State Water Control Board are exercised in the area of water power development projects; (2) your concern and questions have focused upon the delicate—but crucial—policy problems confronting both corporate and governmental entities: how best to balance and accommodate the growing need for electric power and the necessity for environmental protection and enhancement. These problems are heightened when governmental responsibilities are fragmented, conflicting or in need of clarification. In such cases, it would seem advisable to consider legislation to delineate clear lines of responsibility. In this case, especially, there is a definite need to consider the legislation that would redefine—and perhaps redetermine—more clearly the locus of responsibility for controlling stream flow releases from water power projects where water quality standards of the State are affected.

WELFARE—Lien Against Property—Proper only for hospitalization and treatment of indigents when not "assistance."

WELFARE—Lien Against Property—Not allowed for defined "assistance."

THE HONORABLE DONALD C. STEVENS
County Attorney for Fairfax County

This is in response to your letter of July 22, 1970, in which you asked my opinion as to whether or not § 63.1-133 of the Code of Virginia, 1950, as amended, has the effect of repealing § 63.1-140 of the Code of Virginia, 1950, as amended.

You stated in part:

"Pursuant to § 63.1-140, our local Welfare Department follows the practice of having the aid recipient under Chapter 7 of Title 63.1 execute an assignment subrogating the Welfare Department to any right of recovery which the recipient may have against a third party. The local Welfare Department believes this practice may be contrary to the intent of § 63.1-133.1 . . . ."

In my opinion, I feel that the Welfare Department could continue the practice, as outlined above, and not be in violation of § 63.1-133.1. Section 63.1-133.1 states:

"No lien or other interest in favor of the State or any of its political subdivisions shall be claimed against, levied, or attached to the
real or personal property of any applicant for or recipient of public welfare assistance and services as a condition of eligibility, therefore, or to recover such aid following the death of such applicant or recipient.” (Emphasis added.)

Section 63.1-140 of Chapter 7 of Title 63.1 of the Code states:

“In any case where hospital care and treatment is provided under this chapter, the expense, thereof, shall be collected whenever possible from such person or his estate or the person legally responsible for his care . . . .”

In my opinion, § 63.1-133.1 does not apply to § 63.1-140. Section 63.1-133.1 prohibits the State from claiming liens against recipients of “public welfare assistance.” Section 63.1-86 of the Code, as amended, states:

“Chapter 6 of this Title shall be known as the ‘Virginia Public Welfare and Assistance Law’ . . . .”

Section 63.1-87 (e) defines “assistance” and “public assistance” to:

“mean and include old age assistance, medical assistance for the aged, aid to dependent children, aid to the permanently and totally disabled, aid to the blind and general relief.”

It appears then, that public assistance as referred to in § 63.1-133.1 is limited to these categories only. It does not apply to the provisions of Chapter 7 of Title 63.1 of the Code providing for the “Hospitalization and Treatment of Indigent Persons” so long as the hospitalization and treatment rendered is not one of the categories defined in § 63.1-87 (e).

WELFARE—Recovery of Aid to Blind and Old Age Assistance.

December 30, 1970

THE HONORABLE WILLIAM T. COPPAGE, Director
Virginia Commission for the Visually Handicapped

I am in receipt of your letter of December 17, 1970, wherein you call my attention to Section 63.1-127.1 of the Code of Virginia (1950), as amended, and ask the following questions relative to that code section:

“1. Would the right to recovery, as specified in this Code section, be limited to instances of failure by a legally responsible relative to comply with a court order for support?”

“2. Would authority to initiate recovery proceedings be limited to assistance granted subsequent to April 6, 1970?”

“3. Would authority granted by this Code section be inapplicable if the recipient died intestate?”

“4. If implementation of this Code section is predicated on failure or refusal to comply with a Court Order for support by a legally responsible relative would it be necessary to have the Court Order amended to permit recovery proceedings as authorized under this Code section?”

The answers to your questions are as follows:

(1) No. Section 63.1-127.1, which gives the Board the right of recovery against legatees and devisees—“to the extent of aid extended or to the extent of value of property inherited”—is not predicated upon Court determination of the failure or neglect by those legally responsible for the support of the recipient. Though the Code Section in question does require proof that the legally responsible individual was financially able and neg-
lected or failed in his or her responsibilities pursuant to law, a court order against such legally responsible individuals and non-compliance by them is not a prerequisite to the right of recovery by the Board.

(2) No. Though financially able and legally responsible legatees and devisees who inherited property of recipients before April 6, 1970 could not be divested of their inheritance, financially able and legally responsible legatees and devisees who inherit after that date can be held accountable “to the extent of aid extended or to the extent of value of property inherited”, whether such aid or assistance was extended before or after April 6, 1970.

(3) No. Section 63.1-127.1 was intended to create a right of recovery—though only to the extent of aid extended or to the extent of the value of the property inherited—against the financially able and legally responsible legatees or devisees who inherit property of the recipients. The terms legatee and devisee are used when referring to beneficiaries of personal and real property, respectively, when one dies testate. But, there is no indication that the General Assembly intended these words to be so strictly construed and limited in the statute in question. There is no indication that a distinction between testate and intestate recipients was intended. Therefore, in my opinion, it was the manifest intent of the General Assembly to cover all beneficiaries of property upon the death of the recipient, whether such beneficiary be called a legatee, devisee, distributee or any other term.

(4) In view of the fact that question number (1) was answered in the negative, the question of amending the Court Order is moot.

WELFARE AND INSTITUTIONS—Authority to Conduct On-site Reviews of Facilities Receiving Federal Assistance.

THE HONORABLE OTIS L. BROWN
Director, Department of Welfare and Institutions

This is in response to your letter of January 7, 1971, in which you request my opinion as to the authority of agents of the State Department of Welfare and Institutions to make on-site reviews of facilities in which wards of local boards of public welfare are placed but which are not subject to licensing by this Department, to determine the status of compliance with Title VI of the Federal Civil Rights Act of 1964.

You stated:

“Title VI of the Civil Rights Act of 1964, Section 601, states that ‘no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.’ In order to comply with this provision, this Department has required that each facility in which a child in the custody of a local board is placed sign a statement of compliance . . . to the effect that persons are admitted to the facility and all services within the facility are made available without regard to race, color, or national origin.”

You further stated that many of these facilities are not licensed by your Department. The Office of Civil Rights is now requiring on-site reviews of these facilities to determine compliance with the stated policy of that particular institution.

It is my understanding that the programs in question receive federal assistance either in whole or in part.

Section 63.1-35, Virginia Code Ann., (1950), as amended, states:

“The Commissioner shall cooperate with the federal Department of Health, Education and Welfare and other agencies of the United States and with the local boards of public welfare, in relation to
matters set forth in this title, and in any reasonable manner that may be necessary for this State to qualify for and to receive grants or aid from such federal agencies for public assistance and services in conformity with the provisions of this title, including grants or aid to assist in providing rehabilitation and other services to help individuals to attain or retain capability for self-care or self-support and such services as are likely to prevent or reduce dependency and, in the case of dependent children, to maintain and strengthen family life. The Commissioner shall make such reports in such form and containing information as such agencies of the United States may from time to time require and shall comply with such provisions as such agencies may from time to time find necessary to assure the correctness and verification of such reports."

I feel that this section of the Code gives the Commissioner the authority to conduct these on-site reviews of these institutions if he deems it necessary to qualify for and to receive the federal grants affecting these particular programs. The only qualification on this section is that the cooperation with the federal department be in a "reasonable manner". It would be my opinion that on-site inspections of facilities caring for children in the custody of local boards would not be per se unreasonable and would, therefore, be authorized under § 63.1-35 of the Code.

WELFARE AND INSTITUTIONS—Convict Labor—May not be used to make dental plates for welfare recipients.

PRISONERS—Labor—Restrictions on users of articles made by prisoners.

THE HONORABLE OTIS L. BROWN
Director, Department of Welfare and Institutions

March 24, 1971

This is in response to your letter of March 11, 1971, in which you requested my opinion regarding the construction of Article 3 of Chapter 2 of Title 53 of the Code of Virginia, as amended. You stated:

"The Department now has at Southampton Farm, a branch of this Department, a modern dental laboratory. Since many welfare clients throughout the State need to have dental plates made, paid for out of welfare funds, the proposition has been advanced here that there might be a great saving if the local dentists taking the impressions of these plates could forward the same to us and let us have the plates made at Southampton Farm and return them to dental offices all over the State.

"Will you give me an opinion as to whether or not the provisions of Article 3, above-referenced, are broad enough to permit the practice which has been proposed."

In my opinion, the provisions of Article 3 of Chapter 2 of Title 53 of the Code are not sufficiently broad to permit the practice that you suggest.

Section 53-61 of the Code (1950), as amended, permits the use of convicts "... in the making of articles required by the departments, institutions and agencies of the State which are supported in whole or in part by the State." (Emphasis supplied.)

The articles or goods manufactured under this section may be purchased only as prescribed in § 53-67 of the Code which requires State agencies and departments and permits local agencies and departments to purchase "... all articles required by such departments ...." (Emphasis supplied.)

In my opinion, the prosthetic devices that you describe are not articles required for use or intended to be used by any department, institution or
agency of the State or locality. They are articles and products intended for use by private individuals. The fact that they are paid for by State funds through a State agency does not change the essential character of the articles.

WILLS—Executor—Qualification as executor where named co-executor fails to qualify.

WILLS—Security on Bond—Clerk may require although waived by will.

BONDS—Surety—Clerk may require security upon own motion; kind of property required.

March 11, 1971

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

I have received your letter of February 24, from which I quote:

"1. A and B were named executors of the estate of C whose will allowed A and B to act without surety on their bond. No provision is made in the will for one of the two executors acting alone. B renounces his right to act and A qualifies as executor. Should A be required to have surety on his bond?

"If one of the two executors renounces his right to qualify and the remaining executor qualifies, does he qualify as executor or as administrator c.t.a.?”

Virginia Code § 64.1-116 provides for the appointment of an administrator under a will if “all the executors therein” fail to qualify. In my opinion, A would qualify as executor of the estate of C. See Clarke v. Patterson, 73 N.E. 806 (Ill. 1905). The 1970 amendment to Virginia Code § 64.1-121 permits you to require security upon your own motion even though it is waived by the will. This is necessarily a matter of discretion, in the exercise of which you should consider all of the facts and circumstances. I do not believe that the failure of a co-executor to qualify should, in the absence of other facts, be sufficient to require the qualifying executor to provide security.

You also ask:

"2. In the absence of cash for a bond, should the clerk require that surety own real estate in his own name?”

This again is a matter of discretion. An earlier opinion of this office remains true today:

"I hardly know how to advise you as to what property a personal surety should have. The kind of property that the surety has will necessarily be different in different cases, but the prime consideration of the clerk in accepting the bond should be the financial responsibility of the individual, and he may take into consideration every factor bearing on this point. Specifically answering your question, the statutes do not prescribe the nature of the property that the surety should have.” Report of the Attorney General (1939-1940), p. 27.

WITNESSES—Immunity From Prosecution—Testimony may not be compelled or contracted for.

CRIMINAL PROCEDURE—Immunity From Prosecution—Testimony may not be compelled or contracted for.
COMMONWEALTH ATTORNEYS—May not Contract for Testimony of Witnesses in Return for Immunity From Prosecution.

December 2, 1970

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

In your recent letter, you inquire whether there is any authority precluding a Commonwealth's Attorney from contracting with an accused for immunity from prosecution in consideration of his testifying in behalf of the Commonwealth at the trial of an accomplice.

In a previous opinion dated September 25, 1962, addressed to the Honorable Sol Goodman, it was stated that a Commonwealth's Attorney could not promise immunity to a witness in order that the Fifth Amendment might be dispensed with. I attach a copy of that opinion for your assistance. The case of Temple v. Commonwealth, 75 Va. 892 (1881) would appear to be in accord with this proposition.

I concur in the conclusion reached in that opinion and am of the opinion that no authority exists for you to enter into a contract with an accused for immunity from prosecution in consideration of his testifying in behalf of the Commonwealth at the trial of an accomplice.

There is authority, however, for the granting of immunity with reference to gambling (§ 19.1-266) and with reference to violations of the ABC laws (§ 4-94).

WORKMEN'S COMPENSATION ACT—Medical Reports—To be furnished by attending physician upon request.

WORKMEN'S COMPENSATION ACT—Medical Reports—Not required unless requested of attending physician.

WORKMEN'S COMPENSATION ACT—Medical Reports—Physician may charge for making copy, but not for professional services in preparation of copy.

WORKMEN'S COMPENSATION ACT—Medical Reports—"Injured employee" synonymous with "claimant."

WORKMEN'S COMPENSATION ACT—Medical Reports—Section 65.1-88 applies when coverage denied by employer and insurance carrier, by commissioner, or by full commission and case is in court.

August 21, 1970

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

I am in receipt of your letter of August 5, 1970, in which you call my attention to § 65.1-88.1 of the Code of Virginia (1950), as amended, at the last session of the General Assembly, and which reads as follows:

"Any physician attending an injured employee shall, upon request of injured employee, employer or insurer, furnish a copy of any medical report to the injured employee, employer or insurer."

You have presented several inquiries, which will be stated and considered seriatim.

"Does this new statute require a report to be made up in an instance where the physician would not necessarily be reporting and, if so, is it not proper for him to make a charge for his professional services in the preparation of such report?"

Answer: No, I am of the opinion that § 65.1-88.1 does not require the physician to prepare a medical report but makes it mandatory for an at-
tending physician to furnish a copy of any medical report in existence upon request. This section merely extends accessibility to any medical report. Since § 65.1-88.1 does not of itself require report to be made, the latter portion of your first inquiry is also answered in the negative.

Your next assumption and inquiry is quoted as follows:

"Assuming that a report has been already made and furnished, say to the insurance company, and therefore there is no professional fee involved, my second question is "Can a reasonable charge be made for the expense of copying and for the necessary secretarial expense in furnishing additional copies?"

Yes. I can find no Code section or opinion of the Attorney General which would either allow or deny the physician the right to collect a reasonable charge for the rendering of such service as furnishing a copy of any medical report. Such charge, in my opinion, would be allowable, but subject to the approval and award of the Commission.

Your third problem and query is stated as follows:

"There is a further problem as to the scope of the statute since "injured employee" appears to apply to one who has been admitted or adjudicated to be within the coverage of the Workmen's Compensation Statute. Anyone else would be deemed to be a "claimant" if the insurance carrier has denied coverage or if a member or the full commission has ruled that there is no valid claim."

Answer: The phrase "injured employee" as used in § 65.1-88.1 does not limit itself to those persons who have been admitted or adjudicated to be within the coverage of the Workmen's Compensation Act. As used in § 65.1-88.1, the phrase "injured employee" is synonymous with the term "claimant". The phrase "injured employee" is used throughout the Act when the word "claimant" could have been used synonymously. See § 65.1-54, § 65.1-55, § 65.1-88.

Section 65.1-4 defines "employee" to include "every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer . . . ." Thus, one who is within the § 65.1-4 definition of employee and who receives an injury "arising out of and in the course of the employment", as required by § 65.1-7, would be properly referred to as "an injured employee" as the phrase is used in § 65.1-88.1. Therefore, the word claimant is a term used to describe the "injured employee" when such is seeking compensation under the Act, but is not limited to that definition.

Your last question in three parts is stated as follows:

"Does the statute apply in cases where; (a) coverage has been denied by the employer and insurance carrier, (b) coverage has been denied by a commissioner after hearing, (c) coverage has been denied by the full commission and the employee has taken the case to court?"

Answer: (a) Yes. (b) Yes. (c) Yes. Section 65.1-88 is without limitations. Thus, the section would be applicable at all procedural stages mentioned in your inquiry. It is the manifest intent of the section to abolish physician-patient privileges regarding written medical records as they relate to cases under the Workmen's Compensation Act where coverage and compensation are being sought.

ZONING—County Ordinance—May prohibit operation of motorcycle race track.

COUNTRIES—Zoning Ordinance—May prohibit operation of motorcycle race track.
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE E. EUGENE GUNTER
County Attorney of Frederick County

This is in reply to your letter of December 21, 1970, from which I quote the factual situation and questions presented, as follows:

"It seems that a group of businessmen from the State of Maryland have rented some ground in an agricultural area in the northern part of Frederick County, Virginia for the purpose of racing motorcycles thereon. The Frederick County Board of Supervisors has received a petition containing 170 signatures requesting that the Board enact an Ordinance prohibiting the racing of motorcycles within a specified distance of a residential district or amend the Zoning Ordinance to preclude the racing of motorcycles in such districts.

"The area in which the race track is located is zoned Agricultural. Is there any constitutional reason why the Frederick County Zoning Ordinance cannot be amended to eliminate motorcycle racing in all zoning districts? Secondarily, is there any reason why the Frederick County Zoning Ordinance cannot be amended to eliminate motorcycle racing in areas zoned Agricultural?"

In regard to the Zoning Ordinances generally, § 15.1-486 of the Code of Virginia provides, in part, as follows:

"The governing body of any county or municipality may, by ordinance, divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plane and other specific uses; . . ."

Zoning ordinances have the general purpose of promoting the health, safety or general welfare of the public, as stated in § 15.1-489 of the Code of Virginia. Such ordinances shall be drawn with reasonable consideration for the existing use and character of the property, as well as the suitability of property for various uses, as provided in § 15.1-490. Also, as stated in § 15.1-492, the statutes authorizing zoning ordinances "shall not be construed to authorize the impairment of any vested right," except as therein indicated.

So long as it is in compliance with the above named statutes and the related code sections, I know of no constitutional reason why an ordinance could not prohibit motorcycle racing in any or all zoning districts of a county. The named activity is obviously a commercial enterprise that bears no relation to agricultural uses. In the case of City of Richmond v. County Board, 199 Va. 679, 101 S.E. 2d 641, the City was denied the right to use County lands, zoned for agricultural uses, for the purpose of constructing and locating a city jail thereon. It is equally clear that it would be reasonable to prohibit the locating of a motorcycle race track in or near a residential district, as requested by the petition indicated in your letter. Accordingly, I shall answer both of your questions in the negative.

ZONING—Ordinance—Must rest upon rational basis and apply to all alike within designated class.

ZONING—Ordinance—Allowing mobile homes on large agricultural acreages only not rational basis.
August 25, 1970

THE HONORABLE JOHN L. JEFFRIES, III
Commonwealth's Attorney for Culpeper County

This is in reply to your letter of July 7, 1970, which reads in part as follows:

"At the present time we have restrictions in our county zoning ordinances which for the most part prohibit the introduction of new mobile homes in the county. The question involved is whether or not, in an agricultural area, a provision in the zoning ordinance allowing farmers to place mobile homes on their property for the use of their tenants, under restrictions which by nature would require farms of considerable acreage, be discriminatory against the small farmer or lot owner who would still be prohibited from placing a mobile home on his own property for his own use, and would such discrimination be illegal."

A zoning ordinance must rest upon some rational basis or classification and apply alike to all persons and things falling within a designated class. The classification of agricultural lands for the placing of mobile homes thereon would not appear to be based on a rational basis. It would also apply differently to other property owners. I, therefore, am of the opinion that this classification would be improper.
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