OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1971 to June 30, 1972

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1972
Letter of Transmittal

July 1, 1972

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

My dear Governor Holton:


Pursuant to the statute, 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.

To fully understand the scope of the work of this office in the past fiscal year, it is necessary to go beyond the official opinions printed in this volume of the Annual Report. Therefore, the following brief summary will, I trust, prove useful.

As I suggested to you in the Letter of Transmittal which accompanied the 1970-1971 Annual Report of the Attorney General, the growth of State governmental services in recent years has required expansion of the work of my office. It was again imperative, in fiscal 1971-1972, to increase the number of personnel employed in this office and expand its functions.

As of June 30, 1972, my staff included 33 assistant attorneys general, 2 administrative assistants, 15 legal secretaries, 1 file clerk and 1 receptionist. Fourteen of the assistant attorneys general were quartered in my offices in the State Supreme Court Building; the remaining 19 had offices in the agencies they represent.

Because of the additional space requirements of the Supreme Court, it was essential for me to acquire additional office space in the vicinity of the State Capitol. Accordingly, in November, 1971, the Criminal Division of the Office of Attorney General was relocated on the 5th floor of the Life of Virginia Building, 901 East Broad Street, in Richmond. Here, the Deputy Attorney General in charge of the Criminal Division, the Division's 5 assistant attorneys general and 4 legal secretaries are now quartered. Here too, the 2 assistant attorneys general and 1 legal secretary who constitute the Technical Assistance Unit (to be referred to later in this communication) have office space.

Despite the addition of personnel and the acquisition of more office space, I anticipate that further expansion of the Office of Attorney General will be indicated. The burden of litigation is obviously increasing, as are the requests for official opinions. I might point out that the Office of Attorney General in Virginia is small by comparison with those of other states, and its budget is extremely modest when consideration is given to existing work load.

It is appropriate at this point to report to you a summation of the work of my office in the past fiscal year.

CONSUMER PROTECTION

The Division of Consumer Counsel within the Office of Attorney General was fully occupied in this second year of its existence. While utility rate
cases before the State Corporation Commission received most of the public's attention, the Division was active in many areas of consumer protection.

Following an order of the Supreme Court of Virginia early in fiscal 1971-1972 reversing a Chesapeake and Potomac Telephone Company rate increase, the case was remanded to the Commission. My office was subsequently successful in obtaining a writ of mandamus from the Supreme Court to force the telephone company to stop collecting rates which the Court had ruled void. This office then argued that the money collected through the voided rate increase should be refunded to individual customers. The Commission ordered the company to make the refund. The company determined to appeal that order, and the appeal is to be heard in October, 1972.

In September, 1971, C & P went before the State Corporation Commission to ask for a $51,000,000 increase in its rates. My office opposed this increase as excessive. The company was eventually granted $33,000,000. It was as a result of this rate hearing that the Department of Defense declined to pay the rates imposed on its major Virginia facility, the Pentagon. The Department contended Virginia had no jurisdiction over the Pentagon and that the new C & P rates should not apply to telephones installed there. My office and counsel for the telephone company appeared before a three-judge federal court to insist that the Department make payment. I am pleased to say that our position was upheld by that court.

The Virginia Electric and Power Company moved the State Corporation Commission in April, 1972, for a rate increase of approximately $80,000,000. The Division of Consumer Counsel, acting in the consumers' interest, opposed this demand as unwarranted. The Commission agreed and VEPCO was granted a rate increase of about $41,000,000.

For the first time, the Virginia consumer was represented before the Federal Power Commission when in June, 1972, members of my staff appeared to ask for greater allocations of natural gas for the Commonwealth in a time of a critical shortage of natural gas.

In addition to its activity as an intervenor before regulatory agencies, the Division initiated proceedings before the State Corporation Commission to improve protection of consumers' interests in the conduct of the business of title insurers and household goods carriers. Also, the Division aided a large number of consumers who appealed to it for help in matters relating to insurance companies, banks and other regulated enterprises, residential real estate transactions and interpretations of consumer-related statutes.

The consumer fraud section of the Division of Consumer Counsel achieved significant success in the year just past. In one case, Bestline Products, Incorporated, agreed in a court order to return over $150,000 to Virginians who had put money into its pyramid promotion scheme. A second case involving a pyramid promotion scheme (Dare To Be Great, Inc.) is still pending in the courts.

Successful action was also taken against the promoter of a home chinchilla raising scheme and against a New Jersey automobile leasing franchisor. In the latter case, over $15,000 has now been returned to Virginia citizens through a consent decree.

Finally, the Division of Consumer Counsel drafted and supported legislation in the consumer interest at the 1972 Session of the General Assembly. One of the most innovative bills was that which was designed to prohibit tampering with automobile odometers. The General Assembly also enacted a statute requiring the State Corporation Commission to review the rates of certain public utilities on an annual basis. Hopefully, the 1973 Session will act favorably on a second resolution calling for a study of SCC procedures and practices.

Two study resolutions, drafted and supported by the Division of Consumer Counsel, also were approved by the General Assembly. One called for a
study of Virginia antitrust laws. The other directed that a study be made of closing costs on real property. Both studies are currently underway.

ENVIRONMENTAL PROTECTION

The role of the Office of Attorney General in providing legal services relative to environmental matters has been vigorous. The function has been to anticipate legal problems, to work closely with staff members of State agencies and institutions and to press for action in specific areas of responsibility. The three assistant attorneys general assigned to the Environmental Section have not hesitated to recommend and pursue legal action in the courts when indicated.

Our active "preventive medicine" approach has meant acquiring an in-depth knowledge of much of the technology involved in pollution control and conservation of natural resources. This has been accomplished through attendance at seminars and institutes. In addition, we have helped establish environmental courses in the law schools of the State and have created a summer intern program for law students.

During the year, the environmental staff participated in the preparation of a number of legislative measures, including the State's new strip mining and wetlands laws and a measure calling for an in-depth analysis of the need for reorganization of Virginia's environmental agencies. My staff also engaged in successful negotiations regarding the establishment of a program for the prevention of the release of untreated sewage into the Potomac River by the District of Columbia and participated in other abatement proceedings against major municipalities and authorities located in the Commonwealth. As a result, costly and protracted litigation was avoided.

The continuing discharge of raw sewage into the waters of Hampton Roads by Navy and merchant vessels brought action in the early summer by this office. Both the Navy and the Environmental Protection Agency were requested to take prompt measures to halt the pollution of Virginia waters by compliance with State regulations.

The Office of Attorney General entered the Northern States Power case, intervening in this landmark litigation to determine the rights of states to control the discharge of radioactive wastes from operations of nuclear power plants. An amicus brief was also filed in the Supreme Court of the United States in the American Waterways litigation, a significant case involving water pollution. At the present time, we are continuing participating in a suit brought against the major automobile manufacturers of the nation to require installation of anti-pollution devices on cars.

PUBLIC EDUCATION

The most significant case involving public education during the fiscal year just concluded was Bradley v. School Board of the City of Richmond. This case involved the Richmond City School Board's effort to consolidate Richmond City Schools with those of Henrico and Chesterfield Counties. The consolidation was opposed by the State Board of Education and the State Superintendent of Public Instruction. The Office of Attorney General represented the Board and the Superintendent in the ensuing litigation. The case was tried in August and September, 1971. In January, 1972, the United States District Court for the Eastern District of Virginia ruled in favor of consolidation.

My office, and counsel representing the school boards of Henrico and Chesterfield Counties, sought and obtained a stay of the District Judge's order. The case was appealed to the Court of Appeals for the Fourth Circuit. In June, 1972, that Court sustained our appeal and, at this writing, the school systems of the City of Richmond and Henrico and Chesterfield Counties remain separate entities. I anticipate that plaintiffs will appeal the reversal of the District Court's decision to the Supreme Court of the United States in the forthcoming fiscal year.
My office was successful in defending the right of Madison College to carry out certain disciplinary procedures implemented following a student demonstration on campus in April, 1970. After an adverse decision in the United States District Court for the Eastern District of Virginia, the Court of Appeals for the Fourth Circuit reversed that decision and in December, 1971, the United States Supreme Court denied a petition seeking review of the decision of the Court of Appeals.

Two cases of great significance to higher education in the Commonwealth are pending at this writing. In the first, we have obtained a temporary injunction to halt the sale of prepared term papers to students at Old Dominion University. In the second, we are seeking a writ of mandamus from the Supreme Court of Virginia to require the Comptroller to disburse funds under the Tuition Assistance Acts passed by the General Assembly in 1972. The constitutionality of the Acts, which would provide loans to Virginia students attending higher educational institutions in the Commonwealth, is the issue in this case.

Following a precedent established by this office in 1970, I invited the administrators of Virginia colleges and universities to attend an Attorney General's Conference on College Law. At this meeting, held in July, 1971, members of my staff discussed with these officials the most recent changes in statutory law affecting higher education and recommended guidelines relating to the handling of student and faculty problems.

SOCIAL SERVICES

This office brought to a successful conclusion in the past fiscal year a case of international significance to the medical profession. Known as Tucker v. Medical College of Virginia, et al., this lawsuit grew out of a heart transplant operation performed at the Medical College of Virginia. The central issue in the case, instituted by the family of the individual whose heart was used in the transplant, was a determination of the legal meaning of death. The Richmond Law and Equity Court found for the defendants—including the Medical College and medical personnel represented by the Office of Attorney General.

Another area of concern is the effort consistently made by the Commonwealth on behalf of visually handicapped persons. A case in point during the fiscal year just concluded was Commonwealth of Virginia, Virginia Commission for the Visually Handicapped v. General Services Administration. This involved an appeal to the Board of Contract Appeals concerning an interpretation of the Randolph-Sheppard Act. The Act ensures benefits to blind vending stand operators by permitting them to manage stands on Federal property. When GSA refused to permit such an operation in a new federal building in which a cafeteria was located, my office appealed the decision. On June 12, 1972, the Board ruled in favor of the Commonwealth.

Threatened decertification of Virginia's participation in the National Shellfish program, and resulting economic loss to Virginia shellfishermen, was a subject for firm action by my office in 1971-1972. The Food and Drug Administration contended that Virginia's program did not meet minimal requirements and notified the State that certification would be denied. This would have prevented Virginia shellfish producers from shipping their products in interstate commerce. Our appeal, coupled with corrective action, brought a re-evaluation by FDA and removal of the threat of decertification.

Nine months of effort by this office resulted in savings of some $2,000,000 to the Commonwealth in a controversy over Medicaid. In March, 1972, the Department of Health, Education and Welfare withdrew its audit exception concerning alleged overpayments in the Virginia Medical Assistance Program. At issue was the interpretation of HEW regulations. After months of negotiation, HEW withdrew its claim, agreeing that the
Commonwealth should not be required to repay the $2,000,000. My staff also helped to avert another audit exception of approximately $13,000,000 involving skilled nursing care under Medicaid.

In the field of legislation, much time was spent in preparation of Virginia's new Dental Practices Act. This Act was approved by the 1972 General Assembly. Administrative regulations to implement the Act were also drawn by this office. At this writing, my staff is drafting a Medical Practices Act for presentation to the 1973 Session of the General Assembly. In the critical area of drug rehabilitation, we have continued to work in close liaison with the Division of Drug Abuse Control to facilitate the development of their rehabilitative programs.

IN OTHER AREAS

A significant amount of litigation and other legal work was performed by my office in addition to previously mentioned activities. A complete revision of the regulations of the State Alcoholic Beverage Control Board was supervised by the assistant attorney general assigned to the Board. Assistant attorneys general assigned to the State Highway Department reviewed and, on occasion, participated in the trial of 1,296 right-of-way condemnation proceedings. These assistants supervised and reviewed the Department's acquisition of $37,000,000 in right-of-way properties. My staff also played a major role in drafting a revised Relocation Assistance Act, a measure which promises to eliminate inequities and hardship when real property is acquired for public purposes.

Amendments to drunk driving legislation were prepared with assistance from my office. The assistant attorney general assigned to the Division of Motor Vehicles worked with legislative committees to revise the implied consent law so that the criterion for the blood alcohol test was lowered from .15 to .10 per cent. The Act which authorized use of the breath test in Virginia was enacted with similar staff involvement.

The Criminal Division expanded its work in the past fiscal year. With a grant of funds from the Division of Justice and Crime Prevention, a Technical Assistance Unit was established which provides research and other services to the law enforcement community. The TAU publishes two monthly newsletters, one for commonwealth's attorneys and the other for Virginia's 8,000 police officers and sheriff's deputies. Each newsletter provides current information on developments in criminal law and procedure, including opinions of the Attorney General. The TAU also provides immediate distribution of criminal decisions of the Supreme Court of Virginia to commonwealth's attorneys and judges of courts of record within 48 hours after they have been handed down. As further assistance to commonwealth's attorneys, the TAU holds a seminar once yearly in which all commonwealth's attorneys and their assistants can be brought up to date on recent developments in the criminal justice field.

The foregoing is only a summation of the work of this office in the past fiscal year. Obviously, it touches only 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 the 1971-1972 fiscal year.

Respectfully submitted,
ANDREW P. MILLER
Attorney General
<table>
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<tr>
<th>Name</th>
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<th>Official Title</th>
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<td>Andrew P. Miller</td>
<td>Washington County</td>
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### ATTORNEYS GENERAL OF VIRGINIA

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*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.***
Alexander, Howard, et al. v. Commonwealth. From Hustings Court, City of Portsmouth. Appeal from finding that magazines were obscene. No jury required under § 18.1-236.3; standard to be applied to obscenity. Affirmed.


Boggs, Clarence W. v. Commonwealth. From Circuit Court, Cumberland County. Appeal from conviction of misdemeanor—refusal to take blood test. Affirmed.


City of Staunton v. Aldhizer. From Circuit Court, City of Staunton. Condemnation. Reversed and remanded.


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. Affirmed.


Commonwealth of Virginia, Department of Mental Hygiene and Hospitals v. Shepard, et al. From Circuit Court, Fairfax County. Suit of mother to support incompetent adult son. Judgment for Commonwealth.


Ferguson, Raymond Earl v. Commonwealth. From Hustings Court, City of Richmond. Evidence, use of regiscope photograph for purposes of identification in a criminal prosecution. Affirmed.


Grant, Haywood Nacconus, Jr. v. Commonwealth. From Circuit Court, Fauquier County. Appeals from convictions for felonious shooting and attempted rape. Criminal procedure—presence of accused during communications between judge and jury. Reversed and remanded.

Green, Alvin Wallace v. Commonwealth. From Circuit Court, Arlington County. Sufficiency of the evidence in maintaining a lottery. Reversed.


REPORT OF THE ATTORNEY GENERAL


Hern, Joe Julian v. James D. Coz, Superintendent, etc. From Circuit Court, Hanover County. Appeal from dismissal of habeas corpus petition. Habeas corpus—guilty plea; effective counsel; burden of proof. Affirmed.


Kaiser, Joseph John, Jr. v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction for reckless driving. No objection at trial; increased sentence on appeal from court not of record to court of record; sufficiency of calibration. Affirmed.

Kavadias, Gabriel v. State Board of Pharmacy. From Corporation Court, City of Norfolk. Order reversing the action of the State Board of Pharmacy. Affirmed.


Law, Leon Alfred v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction of misdemeanor—driving under the influence. Affirmed.


REPORT OF THE ATTORNEY GENERAL


Lovelace, Owen v. Commonwealth. From Circuit Court, City of Lynchburg. Appeal from a conviction of contributing to the delinquency of a minor. ISSUE: Sufficiency of the evidence. Submitted on brief. The Court reconsidered granting the petition for a writ of error and dismissed.


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

McMillon, Lonnie v. Commonwealth. From Circuit Court, City of Williamsburg and James City County. Appeal from conviction for possession of heroin and other narcotic drugs. Reversed.


Morris, Richard Gordon v. C. C. Peyton, Superintendent, etc. From Corporation Court, City of Charlottesville. Appeal from dismissal of habeas corpus petition on grounds of mootness. Reversed and remanded.


Olsen v. Commonwealth. From Circuit Court, Fairfax County. Appeal from conviction of felony—possession of marijuana and other dangerous drugs. Reversed.

Portsmouth, City of v. Aubrey G. Sweet, Sr. From Circuit Court, City of Portsmouth. Condemnation. Writ of error denied.

Price, Bobby v. Commonwealth. From Corporation Court, City of Danville. Appeal from conviction of exhibiting obscene motion picture. Sufficiency of the evidence; prosecutor argument; community standard; instruction; need for expert testimony on community standard; sufficiency of indictment. Affirmed.

Rae, Billie C. v. Law and Equity Court of the City of Richmond. Original action. Petition for writ of mandamus. Denied.

Rice, Herman Clarence, Jr. v. Commonwealth. From Circuit Court, City of Williamsburg and County of James City. Appeal from conviction of second degree murder. Continuance to member of General Assembly. Reversed and remanded.

REPORT OF THE ATTORNEY GENERAL

Ryder, In Re Richard R. From Circuit Court, Chesterfield County. Petition for appeal on behalf of the Third District Committee of the Virginia State Bar of the order of the court dismissing petition for an injunction and reprimand. Appeal denied.


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

Shiflett, Ernest v. Commonwealth. From Corporation Court, City of Charlottesville. Appeal from conviction of robbery. Harmless error; unrelated testimony; failure to raise issues at trial; prosecutor argument. Affirmed.


Skinner, Nicholas Lee v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from convictions of rape and abduction. Results of lie detector test not admissible; hair samples admissible; statements of defendant, though not confession, properly admitted; statement taken in absence of counsel after counsel retained admissible. Affirmed.

Smith, Bertha v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of conspiracy to manufacture, distribute, etc., narcotics. Failure to prove conspiracy. Reversed and remanded.


Snead, Helen Mae v. Commonwealth. From Circuit Court, Botetourt County. Appeal from conviction of trespass. Sufficiency of the evidence; common law trespass. Reversed and remanded.


State Highway Commissioner v. South Norfolk Redevelopment & Housing Authority. From Circuit Court, City of Norfolk. Condemnation. Writ of error denied.


Sun Oil and Wallace Tew v. Fugate. From Circuit Court, Fairfax County. Injunction. Writ of error denied.


Virginia Public School Authority v. Walter W. Craigie, Jr., State Treasurer. Petition for writ of mandamus. (Transfer of funds by Treasurer to Virginia Public School Authority.) Settled.


Walker, Lawrence v. Commonwealth. From Hustings Court, City of Newport News. Appeal from convictions of sale of narcotics. Instruction on burden of defendant to show exceptions to drug act; evidence showing penalty of co-defendant inadmissible. Reversed and remanded.


Watts, Ronald Herbert v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of robbery. Indictment of juvenile after disposition of charges by Juvenile Court. Affirmed.

Williams, Bernard Marice v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of sale of narcotics to minors. Inadmissible to show age of infant from public record unless events are within personal knowledge of recorder. Reversed and remanded.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Abell, Edwin R. v. Diane Mae Abell. From Circuit Court, City of Roanoke. Appeal from dismissal of divorce case for nonpayment of costs. Amicus curiae brief filed on behalf of Virginia.


Bacci, Herbert Glen v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction of unlawful wounding. Improper verdict.


Boggs, Dr. G. Vernon v. State Board of Dental Examiners. From Circuit Court, Page County. Petition for appeal of order sustaining action of the State Board of Dental Examiners suspending license to practice dentistry.

Bullard, Joseph Ronald v. A. E. Slayton, Jr., Superintendent, etc. From Hustings Court, City of Richmond. Appeal from dismissal of petition for writ of habeas corpus on allegation of denial of appeal.


Chavis, Howard Brantley v. A. E. Slayton, Jr., Superintendent, etc. From Circuit Court, Henrico County. Appeal from dismissal of petition for writ of habeas corpus alleging denial of appeal.


Commonwealth of Virginia v. John Wesley Williams. From Corporation Court, City of Alexandria. Civil—sufficiency of abstracts.

Commonwealth of Virginia, Department of Highways v. Richard Outland Britton. From Circuit Court, City of Richmond. Claim for property damage and overhead costs.


Dale Wagner Chevrolet, Inc. v. Commonwealth. From Circuit Court, Alleghany County. Civil case—ownership of 1971 Chevrolet pickup truck at the time it was seized.

Drewry, Macon Glen v. Commonwealth. From Circuit Court, City of Newport News. Appeal from a conviction of a felony—armed robbery.
**Griffith, Ernest H. v. Commonwealth.** From Circuit Court, Arlington County. Sufficiency of the evidence to convict for burglary.  
**Huggins, Elly Joe v. Commonwealth.** From Corporation Court, City of Newport News. Appeal from conviction of first degree murder. Constitutionality of death penalty, admissibility of pretrial confessions, pretrial publicity, disqualification of jurors, refusal to instruct on procedures for release of insane persons from State institutions, and refusal to grant instruction on model penal code definition of insanity.  
**Jones, Phillip v. Commonwealth.** From Circuit Court, City of Richmond. Appeal from adjudication as four-time recidivist. Validity of prior conviction where defendant apparently was not represented by counsel at juvenile proceeding in 1949.  
**Lewis, Richard Warren v. Commonwealth.** From Hustings Court, City of Richmond. Appeal from conviction of forgery and uttering. Sufficiency of the evidence.  
**Manns, Spencer, Jr. v. Commonwealth.** From Hustings Court, City of Roanoke. Appeal from conviction of contributing to delinquency of minor. Constitutionality of trying defendant in court not of record without jury.  
**McIntosh, Avery Kenneth v. Commonwealth.** From Circuit Court, Campbell County. Appeal from conviction of felony—driving after being adjudged habitual offender.  
**McNeill, Jackie Lee v. Commonwealth.** From Circuit Court, Warren County. Appeal from conviction of possession of narcotics with intent to distribute. Search warrant affidavit.  
**Minor, Lillian v. Commonwealth.** From Circuit Court, Prince William County. Felony.  
**Mitchell, Karl David v. Commonwealth.** From Circuit Court, Fairfax County. Sufficiency of the evidence, robbery.  
**Nero, Raymond v. Commonwealth.** From Hustings Court, City of Richmond. Appeal from conviction of armed robbery. Line-up identification and photographic identification.  
**Northern Virginia Hospital Corporation and Doctors Hospital Pharmacy, Inc. v. Department of Taxation.** From Circuit Court, Arlington County. Appeal of application for correction of assessment of sales and use tax.  
**Northern Virginia Properties v. Rayner V. Snead.** Original petition for prohibition against condemnation.  
REPORT OF THE ATTORNEY GENERAL


Rinkov, Irving Richard v. Commonwealth. From Circuit Court, City of Virginia Beach. Conviction of uttering worthless checks.

Sharp, Dennis Joe v. Commonwealth. From Circuit Court, Fairfax County. Appeal from conviction of possession of marijuana with intent to distribute. Validity of statutory presumption.


State Highway Commissioner v. W. M. Howard. From Circuit Court, Culpeper County. Petition for writ of error.

State Highway Commissioner of Virginia v. Clyde E. Dofflemyer. From Circuit Court, Page County. Landowner appealing award of commissioners in condemnation proceeding.


Tenth District Committee of the Virginia State Bar v. Norman Baum. From Corporation Court, City of Alexandria. Appeal from order dismissing petition for disbarment.

Thomas, Robert Christopher v. Commonwealth. From Circuit Court, Mathews County. Sufficiency of the evidence, burglary.

Weatherman, James Curtis v. Commonwealth. From Circuit Court, Henry County. Appeal from convictions for armed robbery and malicious wounding. Refusal to grant instructions on service of time in penitentiary for these offenses prior to retrial.

Whitlock, Richard Clifton, Jr. v. A. E. Slayton, Jr. From Circuit Court, Hanover County. Appeal from denial of habeas corpus. Speedy trial.


Wood, George, Jr. v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of possessing marijuana with intent to distribute. Constitutionality of statute, entrapment, sufficiency of evidence, sufficiency of indictment, admissibility of evidence and degree of offense.
REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Brown, George, Jr. v. C. C. Peyton. Appeal from an order of the United States Court of Appeals for the Fourth Circuit affirming the order of the United States District Court for the Western District of Virginia dismissing the petition for a writ of habeas corpus. Certiorari denied.


Hawkins, Don C. v. Virginia. Petition for writ of certiorari to judgment of Supreme Court of Virginia. Counsel at pre-arrest lineup. Certiorari denied.


Midgett, Cuthbert M. v. J. D. Cox. Appeal from United States Court of Appeals for the Fourth Circuit affirming revocation of parole. Dismissed from docket for mootness.


Slayton, A. E. v. Lawrence Furman Smith. Petition by prison superintendent to review Circuit Court's setting aside of prisoner's conviction on grounds of incapacity of trial judge. Petition granted and summarily reversed.


State of Washington, et al. v. General Motors Corporation, et al. Filing of motion by complainant States for leave to file complaint against defendant companies in regard to antitrust violations in connection with development and installation of antipollution devices for motor vehicle use. Motion denied by Court.

Sword, Lewis H. v. James W. Fox. Appeal from the Court of Appeals for the Fourth Circuit. Concerned disciplinary action taken against several students at Madison College. Court refused to grant petition for writ of certiorari.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Callahan, Mathew Mack v. A. E. Slayton, Jr., Superintendent, etc. Petition for writ of certiorari from denial of petition for writ of habeas corpus. Whether petitioner was denied his right to appeal by his fear of receiving a harsher punishment on a retrial if the appeal were successful.


Slayton, A. E., Jr., Superintendent, etc. v. James C. Hamner. Petition for writ of certiorari from granting of petition for writ of habeas corpus. Whether Pearce v. North Carolina is applicable and a jury may give an enhanced sentence on a retrial after the conviction has previously been set aside.

Superintendent, etc. v. Lewis E. Terry. Petition for writ of certiorari from United States Court of Appeals for the Fourth Circuit granting petition for writ of habeas corpus. Greater sentence on retrial de novo by jury.


CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


Bradley, Carolyn, et al. v. School Board for the City of Richmond, et al. Suit sought desegregation of Richmond public schools and consolidation of the school system of the City of Richmond with those of Henrico and Chesterfield Counties. Relief sought was ordered by District Court for the Eastern District of Virginia.


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.

Commonwealth of Virginia v. Food and Drug Administration; HEW Office of Commissioner, FDA; National Shellfish Sanitation Program evaluation, Washington, D. C.; argued, decision pending.


Duffy, James P. v. Old Dominion University. Suit for injunction. Injunction denied.


Fairfax County-Wide Citizens Association v. Fugate. Discrimination in providing of municipal services. Dismissed.
Hayes, Larry Robert v. Arthur Colona. Civil action filed against highway employee who was in pursuit of performance of his official duties. Motion to Dismiss filed by Commonwealth. Pending.
Lawson, Virginia, et al. v. Otis L. Brown, Director, etc., et al. Action questioning the validity of State Welfare statute terminating assistance to children over the age of 16 who are not enrolled in school or vocational training. Pending.
Lupo v. Superintendent, Central State Hospital. Civil Rights Action. Dismissed on motion of Central State Hospital.
Penn Central Transportation Company, In the matter of. Bankruptcy proceedings. Pending.
Pollard v. Blalock. (False Imprisonment Allegation.) Dismissed.
Rakes, Robert B. v. S. Bernard Coleman, Judge, et al. Sought declarative relief relating to commitment of alcoholics pursuant to § 18.1-200.1. Issue
dismissed as moot following action of Supreme Court of Virginia in Hancock v. Brown, but pending yet on unrelated issue.


Scherer, Helmuth v. The Honorable Percy Thornton, Jr., et al. Civil Action # 308-71-A. Action under the Civil Rights Act against Judge of the Circuit Court of the County of Fairfax. Consent Order dismissing this defendant.

Scruggs, Timothy Lindberg v. State Highway Department. Wage Earner proceeding. Seeking discharge for damage to bridge claim.


Sink, Posey Jacob, Jr. v. The Virginia Division of Motor Vehicles, Vern L. Hill, et al. Wilful material false statement to obtain an operator’s license. Commissioner’s action sustained.

Sitwell, Mrs. H. C. v. S. A. Burnette. Suit seeks reinstatement of faculty member. Pending.


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


to be used as security for loan for purpose of financing addition to hospital. Pending.


Bakanas, In Re Estate of Victor E. Circuit Court, Fairfax County. Petition for relief from taxes. Pending.


Blue Ridge Nursing Home, Inc. v. Blue Cross, Inc., et al. Circuit Court, City of Richmond. Action against several defendants involving payment of medicaid to a nursing home for services rendered to welfare recipient.

Board of Supervisors of Hanover County v. Warren W. Brandt. Circuit Court, Hanover County. Concerned sale of real estate for tax purposes. Dismissed on motion.

Bowie, William v. State Board of Pharmacy. Circuit Court, City of Richmond. Appeal from the action of the Board of Pharmacy revoking license to practice pharmacy. Order entered sustaining action of the Board of Pharmacy.


City of Roanoke v. State Water Control Board. Circuit Court, City of Roanoke. Appeal from Board decision to impose moratorium on sewer connections. Judgment for Water Control Board.

City of Roanoke v. State Water Control Board. Circuit Court, City of Roanoke. Appeal from Board decision to impose moratorium on sewer connections. Pending.

City of Salem v. State Water Control Board. Circuit Court, City of Salem. Appeal from Board decision to impose moratorium on sewer connections. Pending.

Cogliandro v. State Board of Health. Circuit Court, City of Chesapeake. Suit to compel issuing of septic tank permits. All pretrial motions argued. Pending.


Commonwealth v. Edward J. Pillis. Law and Equity Court, City of Richmond. Appealed by defendant from judgment of the Civil Court of the City of Richmond. 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 ex rel. State Water Control Board v. Henry County Public Service Authority. Circuit Court, City of Richmond. Permanent injunction obtained against improper operation of sewage treatment facilities.


Commonwealth of Virginia ex rel., Virginia Department of Agriculture and Commerce v. Sam White, t/a Sam White & Son. Circuit Court, City of Richmond. Motion for Judgment for debt. Pending.


Commonwealth of Virginia, ex rel, Virginia State Bar v. Frank Sellers. Circuit Court, City of Richmond. To enjoin the defendant from unauthorized practice of law. Pending.


Coulter, Dr. Jeffrey v. State Board of Dental Examiners, et al. Circuit Court, Arlington County. Action to require the defendants to issue a license to practice dentistry. Consent order dismissing the claim.


Drug Fair of Virginia, Inc. v. Virginia A.B.C. Board. Circuit Court, City of Richmond. Appeal from order suspending A.B.C. license. Remanded to Board.

Dure, Mary M. and Mary Margaret Dure Hudgins v. David B. Ayers, Jr., Comptroller, Circuit Court, City of Richmond. Petition for escheated funds. Pending.


Farmers & Merchants State Bank, etc. v. Everett V. Adair, et al. (Comptroller). Circuit Court, Spotsylvania County. Bill of Complaint. Property to be sold and proceeds used for liens in order of priority. Pending.


Flourney, Seaborn J., Receiver, etc. v. Mutual Bankers Insurance Company (Treasurer). Circuit Court, City of Norfolk. Bill of Complaint. Securities deposited by Insurance Company turned over to receiver.


Franklin, Committee for Wright v. Commissioner, Department of Mental Hygiene and Hospitals. Circuit Court, City of Waynesboro. Answer filed. Petition for sale of land. Pending.


Glassman Construction Company v. Department of Community Colleges. Circuit Court, City of Richmond. Concerned claim for additional payment in construction case. Settled.


Gravely, Doris A. v. Hiram W. Davis, M.D., et al. Circuit Court, Dinwiddie County. Pleadings filed and court has ruled on the jurisdictional question and case transferred to the Circuit Court of the City of Richmond. Pending.

Greater Tidewater Fair Association, Inc. v. Commonwealth. Circuit Court, City of Virginia Beach. Motion for judgment. A claim that license tax erroneously collected by local commissioner of revenue. Pending.


Koslow, Herbert R. v. State Board of Pharmacy. Circuit Court, Fairfax County. Appeal from action of the State Board of Pharmacy denying the issuance of a license to practice pharmacy. Pending.


Lawhorne, Julia v. University of Virginia Hospital. Circuit Court, Albemarle County. Concerned claim against employees of the University Hospital. Dismissed.


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


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. Settled. Closed.

Nachman, P. M. In re. Circuit Court, Spotsylvania County. Application for correction of erroneous assessment of the Virginia State sales tax. Pending.

Old Dominion University v. James P. Duffy. Law and Chancery Court, City of Norfolk. University seeks injunction against sale of term papers. Pending.


Redman, David E., Administrator of the Estate of David E. Redman, Jr., deceased v. Fairfax County Water Authority and State Water Control Board. Circuit Court, Fairfax County. Wrongful death action. Dismissed as to Water Control Board.


Seventh District Committee of the Virginia State Bar v. E. Eugene Gunter. Corporation Court, City of Winchester. Petition for injunction and reprimand against attorney for unprofessional conduct. Decree entered granting injunction and reprimand.


State Air Pollution Control Board v. W.O. Lewis. Circuit Court, City of Richmond. Board sought injunction of open burning. Complaint dismissed.
State Board of Examiners in Optometry v. Universal Service Agency. Circuit Court, City of Richmond. Injunction to prevent sale of eyeglasses, etc., by out-of-state unlicensed agency. Pending.


Third District Committee of the Virginia State Bar v. George E. Allen. Law and Equity Court, City of Richmond. Petition for reprimand and injunction against attorney for improper publication of autobiography. Petition denied.


Virginia Real Estate Commission v. Harry Davis. Law and Equity Court, City of Richmond. Appeal from Order of the Virginia Real Estate Commission revoking license to practice as a real estate salesman. Dismissed for failure to prosecute the appeal.

Virginia Real Estate Commission v. Aubrey Kincheloe. Circuit Court, City of Richmond. Petition by the Virginia Real Estate Commission for sanctions or failure to obey summons. Dismissed upon consent of both parties.


Virginia Trust Company v. Andrew P. Miller, et al. Circuit Court, Henrico County. Bill of Complaint. Whether under will all taxes are to be deducted from residuary before computing share. Pending.


Wilson, Myrtie McElroy, etc. v. Doris T. Wilson, etc., et al. Circuit Court, Westmoreland County. Bill for sale of lands of infants. Pending.


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


Aetna Casualty and Surety Company. Revision of automobile bodily injury and property damage liability insurance rates and automobile medical payments insurance rates. By order of May 24, 1972, Commission granted partial increase.


Attorney General of Virginia. Application for the institution of a proceeding to determine the reasonableness of title insurance rates, and for other purposes. Pending.


Bluefield Valley Water Works Company. Increase in rates. Full increase granted.

The Chesapeake and Potomac Telephone Company of Virginia. Increase in rates and charges. Refund of void rates. Appealed to the Supreme Court of Virginia. The Commission granted a partial increase. (This case was taken to Federal District Court by the United States claiming the S.C.C. had no jurisdiction over telephone service to the United States. U. S. v. S. C. C.)


Columbia Gas of Virginia, Inc. Revision of rates. Full increase granted.


County Utilities Corporation. Application for revision of rates. Increase granted less than requested by order of Commission.


Delmarva Power & Light Company. Increase in rates. Increase granted less than requested.

Dorsey Express, Inc. Refund motor fuel road taxes. Closed.

Duty, Arvil, t/a Duty Coal Co. Refund of motor fuel road taxes. Pending.

Eastern Shore Gas Co. of Virginia, Inc. Increase in rates. Commission granted increase in full.


Graninger Sewerage Service, Inc. Show cause why it should not be required to render adequate service (continued from November 22, 1971). Closed.

Insurance Rating Board. Revision of automobile bodily injury and property damage liability insurance rates and automobile medical payments and insurance rates. Application granted substantially as requested by order of the Commission of July 6, 1971.


Lemon, James E., operating as Greenridge Water Company. Increase in rates. Full increase not granted.

McQuail's, Inc. Refund motor fuel road taxes. Pending.

Mutual Insurance Rating Bureau. Revision of automobile bodily injury and property damage liability insurance rates and automobile medical payments insurance rates. Only five per cent (5%) of increase granted.


Portsmouth Gas Company. Revision of rates. Partial increase granted. Appealed to the Supreme Court of Virginia.

The Potomac Edison Company of Virginia. For an increase in electric rates. Pending.

Reston Airconditioning Company. Application for an increase in rates. Pending.

Revision of Property and Casualty Insurance Ratemaking Process, etc. Closed.


Roanoke Gas Company. Application for an increase in rates. Pending.

Shell Oil Company. Refund of motor fuel road taxes. Pending.

Southern Telephone Company. Increase in rates. Increase granted by Commission.


Suffolk Gas Corporation. Increase in rates. By order of January 13, 1972, the Company was awarded $35,000.


Tidewater Water Company. Revision of rates. By order of Commission of August 1, 1972, request was substantially reduced and company was ordered to provide metered service to its customers.

United Inter Mountain Telephone Company. Revision of rates and charges. Case undecided.

Virginia Automobile Insurance Plan. Proposed revision of automobile bodily injury and property damage liability insurance rates and premiums for applicants assigned by the Plan. By order of January 26, 1972, Commission granted an increase of 21.1% for bodily injury liability and 4.1% for property damage liability.

Virginia Electric and Power Company. Increase in rates of $80,000.00. By order of the Commission of June 28, 1972, the Company was granted an increase of $41,193,000.


Virginia Telephone & Telegraph Company. Increase in rates. Commission granted increase.

Washington Gas Light. Application for increased rates. Company was granted an increase of $5,406,000.

CASES BEFORE FEDERAL AGENCIES

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


Burton, Clarence Godber. Corporation Court, City of Lynchburg. Petition of Appeal from suspension of driving privileges under § 46.1-430. Pending.


Ferguson, Hugh Robert. Circuit Court, Roanoke County. Petition from suspension of operating privilege pursuant to § 46.1-430. Commissioner's action reversed.

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


Pearce, Catherine R. v. Allstate Insurance Company and Honorable Vern L. Hill, Division of Motor Vehicles. Circuit Court, Fairfax County (1972). Bill of Complaint from suspension of driving and registration privileges pursuant to § 46.1-167.4 and 46.1-449. Pending.
Pugh, Thomas E. v. Commonwealth. Corporation Court, City of Charlottesville. Petition from suspension pursuant to § 46.1-429 (a). Dismissed.


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


Wallingsford, Emory David v. Commissioner, etc. Circuit Court, Fairfax County. Appeal from suspension of operating and registration privileges pursuant to § 46.1-449. Dismissed.


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

Commissioner v. Trivett. Circuit Court, Dickenson County. Motion to Dismiss condemnation proceedings. Pending.
Hawks, Flora L. v. Fugate. Circuit Court, Carroll County. Inverse condemnation versus Motion to Dismiss. Pending.


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.


Neighborhood Theaters, Inc. v. Virginia Department of Highways. Hustings Court, City of Richmond. Motion to enjoin condemnation proceedings. Motion denied.


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. Pending.


State Highway Commissioner v. Charles L. Fake, also Springview Development Corp. Circuit Court, Page County. Argued exceptions to commissioners' award wherein landowner filed statements of commissioners that they did not understand testimony of State's appraiser in one case. Exceptions overruled.

State Highway Commissioner v. Repass Fears. Circuit Court, Prince Edward County. Counsel with attorney on condemnation proceeding wherein State removed family graveyard to residue lands, yet value of cemetery included in commissioners' award. Appeal to be filed when statement of facts agreed to between attorneys.


State Highway Commissioner v. H. Lynn Moore. Circuit Court, Augusta County. Met on Afton Mountain with contractor's representative. Highway Department experts, landowner, his attorney, water rights owners and their attorneys; negotiated settlement on new passage for water pipe under 1-64.

State Highway Commissioner v. C. S. Shepherd Heirs. Circuit Court, Alleghany County. Attended by Highway personnel, met with landowner and his attorney on site, negotiated settlement for land highway built on prior to filing of certificate. Settlement approved.

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.


Umberger v. Johnson. Circuit Court, Wythe County. Argued Motion to Quash. Pending.


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

REPORT OF THE ATTORNEY GENERAL


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

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<td>Willie Fleming</td>
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OPINIONS

ADOPTION—Child Placing Agency—When license not required.

June 8, 1972

THE HONORABLE OWEN B. PICKETT
Member, House of Delegates

This is in response to your request for my opinion concerning a construction of § 63.1-195 of the Code of Virginia and a further clarification of my opinion on that Code section rendered to the Honorable Thomas W. Moss, Jr., and dated August 13, 1971.

That opinion held that attorneys, physicians, or other persons, who because of their professional relationship become engaged in acting as intermediaries for the placement of children in foster homes, were required by § 63.1-195 of the Code to be licensed as a “child placing agency”. You ask:

“Is a licensed practicing attorney, who represents clients desiring to adopt a child, considered to be an intermediary under Virginia Code Section 63.1-195, and therefore required to obtain an additional license as set forth in the Code before preparing a petition for adoption and consent form for execution by the natural parent(s), and to advise concerning the execution thereof?”

In my opinion, such activities on the part of the attorney do not make the attorney an intermediary in any sense of the word and, therefore, he would not be required under § 63.1-195 of the Code to obtain a license as a “child placing agency.” Generally, he does not even enter the picture until the child has been placed into the foster home. He is then requested by the parent to take the necessary steps to secure the order of adoption. It is when the attorney or other person actually secures the placement of the child into the foster home on behalf of either the natural parents or potentially adoptive parents that he comes within the purview of the statute.

You also ask:

“. . . where, the natural parents . . . have, through some third person (which third person is not the attorney nor anyone acting for the attorney nor with his advice), placed a newborn child with other persons who intend to adopt the child and the natural parent(s) do not wish to know the identity of the adopting parents, and the adopting parents do not wish to know the identity of the natural parent(s), may a licensed practicing attorney retained only after such arrangements have been made, accept custody of the infant child from the hospital of birth and deliver the child to the prospective adoptive parents, and, thereafter, in due time, obtain a consent to adoption from the natural parent(s), etc.?”

It is my opinion that when the attorney acts in such a manner he is not the intermediary securing the placement of the child. Again, the “third person” is the “intermediary” for the placement of the child. The attorney in this instance is acting merely as a mechanism for the physical delivery of the child from one place to another.

With the idea that it may be of some help to you, I am enclosing a copy of the aforementioned opinion to the Honorable Thomas W. Moss, Jr.

ADOPTION—Lay Intermediaries Securing Placement of Children for Adoption Must Be Licensed Where No Interlocutory Order of Adoption Secured Prior to Placement.

(1)
CHILDREN—Child Placing Agencies—Lay intermediaries securing placement of children must be licensed.

August 13, 1971

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

This is in response to your request for my opinion dated July 14, 1971. On December 3, 1970, you requested my opinion concerning a construction of § 63.1-195 of the Code of Virginia (1950), as amended. You asked whether attorneys or physicians or other persons who, because of their professional relationships, came in contact with families who desire to adopt children and who arranged such adoptions were required to be licensed under § 63.1-195 of the Code as "child placing agencies". I had indicated that, when a child was thus placed "for adoption", this would not constitute placement in a "foster home" and the person acting as an intermediary in securing this placement would not be required to be licensed as a "child placing agency". See Report of the Attorney General (1970-1971), p. 3, dated December 28, 1970, to the Honorable Thomas W. Moss, Jr.; Va. Code Ann. § 63.1-195 (1950), as amended.

Subsequently, you asked for a clarification of that opinion and asked whether it applied to the situation where children are placed by the intermediary without any prior order of adoption having been entered. In my opinion, the statute does not exempt these persons from licensure. Section 63.1-195 of the Code defines a "foster home" to mean:

"... 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;"

Therefore, unless an order of adoption has been entered, the home into which the child is placed is a "foster home" and anyone involved in acting as an intermediary in securing such placement would fall within the definition of a "child placing agency" pursuant to § 63.1-195 of the Code. My previous opinion was based upon an assumption of facts which contemplated the entry of an interlocutory order of adoption prior to the actual placement of the child in the home. In this latter instance, the person acting as the intermediary would not be required to be licensed as a "child placing agency".

AGRICULTURE AND COMMERCE—Virginia Farm Loan Revolving Account—Purposes for which funds in account may be used.

December 9, 1971

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

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

"As Commissioner of the Department of Agriculture and Commerce, I have received from the Secretary of Agriculture of the United States and am in charge of the assets of the former Virginia Rural Rehabilitation Corporation and the income and proceeds therefrom. See sections 3.1-23 to 3.1-27, Code of Virginia, 1950.

"These assets presently total approximately $1,250,000 and are credited to an account in the State Treasury known as the 'Virginia Farm Loan Revolving Account.' Briefly stated, the assets may be expended by me, in my official capacity, for such rural rehabilitation purposes as the U. S. Secretary of Agriculture or his delegate approves from time to time—Sec. 3.1-25."

"At the present time nearly all of the funds are invested in loans to farmers insured by the United States of America acting through the Farmers Home Administration of the U. S. Department of
Agriculture. However, I am now giving serious consideration to using part of the funds to meet other rural rehabilitation needs in our State. One approach would be to make direct loans to low income farm people and I intend to make some loans of that kind. However, since I plan to allot only about $250,000 to new rural rehabilitation purposes initially, and since the financial needs of our low income farm families who cannot get credit elsewhere at reasonable rates and terms exceed that amount many times over, I should like to make these funds go as far as possible. To accomplish that objective I want to insure loans made by local banks or other parties if that is legally permissible.

"As a loan insurance or guaranty reserve fund I could, if necessary, pledge all or part of approximately $1,000,000 now invested in the above mentioned loans which are insured under the Consolidated Farmers Home Administration Act of 1961, as amended (7 U.S.C. 1921 et seq.)."

"The loans which I am considering insuring would be made to low income Virginia farmers for purposes such as:

1. Making farm improvements
2. Purchasing livestock and farm equipment
3. Engaging in FFA, 4-H Club and similar projects

* * *

"It has long been the practice in various States to use funds of this nature in making direct loans for the purposes numbered 1, 2 and 3 above. The question is whether I have the authority to insure or guarantee such loans made by other parties. The Farmers Home Administration would approve such an insurance or guaranty program under Public Law 499, 81st Congress (40 U.S.C. 440), so the question appears to be solely one of State Law. I am not aware of any Virginia statutes that specifically authorize me to carry out such insurance or guaranty programs.

"I am also considering the use of some of the rural rehabilitation assets as a basis for establishing and conducting a fire and related hazard insurance program to afford low income Virginia farmers a source of such coverage when they cannot obtain it from established insurance companies. Again, I am not aware of any specific legislative authorization for such a fire insurance program, but it occurred to me that the program might be conducted under the general insurance laws of Virginia. In this connection, the following statutes might be pertinent: Secs. 3.1-25, 38.1-85 and 86, and the reserve collateral, or surety bond provisions of Secs. 38.1-32 and 38.1-108 et seq."

Section 3.1-23 of the Code of Virginia (1950), as amended, reads as follows:

"§ 3.1-23. Commissioner designated to apply for and receive trust assets held by United States.—The Commissioner of Agriculture and Immigration of the Commonwealth of Virginia is hereby designated as the Commonwealth official to make application to and receive from the Secretary of Agriculture of the United States, or any other proper federal official, pursuant and subject to the provisions of Public Law 499, 81st Congress, approved May three, nineteen hundred fifty, the trust assets, either funds or property, held by the United States as trustee in behalf of the Virginia Rural Rehabilitation Corporation."

In order to comprehend the nature of the authority and origin of the assets referred to in § 3.1-23, it is necessary to review the history of the trust funds. The original appropriation was made by the United States Congress pursuant to the Federal Emergency Relief Act of 1933, 48 Stat.
55 (1933), and which was ultimately transferred for administration to the Virginia Rural Rehabilitation Corporation, a nonprofit entity organized under the general corporation laws of Virginia for the express purpose of receiving and administering the funds. However, on February 29, 1936, the corporation entered into an “Agreement of Transfer” (amended November 26, 1936) with the Resettlement Administration which was, in effect, a trust agreement transferring the assets of the corporation back to an agency of the Federal government for the purpose of carrying on the rural rehabilitation program in Virginia. In 1950, Congress enacted the “Rural Rehabilitation Corporation Trust Liquidation Act,” 64 Stat. 98 (1950), which directed the Secretary of Agriculture to take action necessary to liquidate the trusts under the transfer agreements with the several state rural rehabilitation corporations, and authorized the Secretary to negotiate with responsible officials to that end. The Act further provided that the application from the states for return of the trust assets would contain a covenant that the returned assets, and the income therefrom, would be used only for such rural rehabilitation purposes permissible under the corporation’s charter as may be, from time to time, agreed upon by the applicant and the Secretary. Sections 3.1-23 to 3.1-27 of the Code were enacted to authorize the Commissioner of Agriculture to apply for and receive the trust funds under the 1950 liquidation act and, pursuant thereto, the Commissioner entered into a transfer agreement with the Federal government dated May 6, 1952. Other such agreements were executed in 1957, 1962, 1967 and 1969. Through this entire period, however, the Federal government continued to administer the assets. On January 21, 1970, the Commonwealth of Virginia, by the Commissioner of Agriculture and Commerce, and the United States of America, by the Administrator of the Farmers Home Administration, entered into a Liquidation Agreement (amended November 15, 1971) which transferred the trust assets to the Commonwealth for administration.

Section 3.1-25 of the Code reads, in part, as follows:

“§ 3.1-25. Virginia Farm Loan Revolving Account.—Notwithstanding any other provisions of law, funds and the proceeds of the trust assets . . . shall be paid to and received by the Commissioner of Agriculture and Immigration and by him paid into the State treasury for credit to an account to be known as the ‘Virginia Farm Loan Revolving Account.’ The entire amount so received, together with any moneys appropriated for such purposes, is hereby appropriated out of the Virginia Farm Loan Revolving Account for expenditure by the Commissioner of Agriculture and Immigration for such of the rural rehabilitation purposes permissible under the charter of the now dissolved Virginia Rural Rehabilitation Corporation, as may from time to time be agreed upon by the Commissioner of Agriculture and Immigration and the Secretary of Agriculture of the United States, subject to the applicable provisions of said Public Law 499 [64 Stat. 98], . . .”

The object of the Virginia Rural Rehabilitation Corporation was to “rehabilitate individuals and families as self-sustaining human beings by enabling them to secure subsistence and gainful employment from the soil, from coordinate and affiliated industries and enterprises and otherwise, . . .” Certificate of Incorporation, III (A). This object was to be accomplished through making loans and giving “financial assistance and other aid in any manner to any suitable person or persons to enable them to labor upon, use, lease, purchase, own and acquire title in land, and in improvements thereon, farm equipment, livestock, etc., . . .” Id. III (B). “Financial assistance” included the authority to “lend or advance money to, extend financial assistance to, accept bills of exchange, endorse the notes and guarantee the obligations of individuals, firms, corporations, and/or others with or without collateral security of any kind whatsoever . . .
and to satisfy and cancel such indebtedness so held on any conditions; . . .” *Id. III (G). (Emphasis supplied.)

In the same connection, the aforementioned Liquidation Agreement, as amended, between the Commissioner and the Administrator of the Farmers Home Administration, states in paragraph 5 (B) that the following rural rehabilitation purposes are agreed upon:

“B. Making or participating in making direct loans or grants, or insuring or guaranteeing in whole or in part loans made by other parties to low-income farm families . . . to enable or assist them in:

* * *

“(2) Purchasing livestock, poultry, fur-bearing and other farm animals, fish, bees, farm machinery and equipment or interest therein, purchasing . . . farm supplies, paying cash rent, purchasing essential home equipment and furnishings, and meeting family subsistence needs.” (Emphasis supplied.)

In paragraph 5 (C) of the Liquidation Agreement, as amended, this further purpose is agreed upon by the parties:

“C. Making or participating in making direct loans or grants, or insuring or guaranteeing in whole or in part loans made by other parties to boys and girls who are members of low-income farm families for engaging in Future Farmers of America, Future Home-makers of America, 4-H Club, . . . and similar programs and projects, so long as they involve farming or farm related activities; . . .” (Emphasis supplied.)

From the foregoing, it is my opinion that the Commissioner of Agriculture and Commerce may insure or guarantee, through utilization of funds from the Virginia Farm Loan Revolving Account, loans made to low-income Virginia farmers for making farm improvements, purchasing livestock and farm equipment, and engaging in FFA, 4-H Club and similar projects.

In Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968), the Virginia Supreme Court held the Virginia Industrial Building Authority Act (Acts of Assembly 1966, ch. 689, p. 1172), which appropriated state money for private industrial purposes to include the establishment of a loan guaranty fund, unconstitutional as violative of the credit clause contained in Section 185 of the Constitution of Virginia (Article X, Section 10, of the revised Constitution). The credit clause prohibits the credit of the Commonwealth to be directly or indirectly, or under any devise or pretense whatsoever, granted to, or in aid of, any person, association, or corporation. The Court, in Button v. Day supra, found that the guaranteeing of private industrial loans violated this section in that the debts were to be guaranteed by the Authority and to be discharged with state money from the guaranty fund upon default; furthermore, that any benefit to the state was merely incidental and that the real benefit of the act inured to private interests. The proposal to guarantee loans by pledging credit from the Virginia Farm Loan Revolving Account does not appear, however, to violate the credit clause of the State Constitution in that the funds pledged as credit in this instance are not state funds but, instead, Federal funds for rural rehabilitation uses in this state.

In like fashion, the cost of administering the proposed guarantee project will ostensibly not contravene Article X, Section 8, of the Virginia Constitution as a nongovernmental expenditure of state funds. Both Public Law 499 (64 Stat. 98) and paragraph 5 (I) of the Liquidation Agreement (amended November 15, 1971) provide that the Federally derived funds of the Virginia Farm Loan Revolving Account shall be used for the administration of the financial assistance programs, although the personnel administering such programs may be officers or employees of the Commonwealth.
In regard to the consideration of using some rural rehabilitation assets as a basis for establishing and conducting a fire and related hazard insurance program, I am of the opinion that such would exceed the authority granted under § 3.1-25 and the Charter of the new dissolved Virginia Rural Rehabilitation Corporation. While the aforesaid Charter authorizes the conduct of loaning money to, and guaranteeing the loans of, low-income farm families and other appropriate persons or organizations, the authority to conduct the business of insurance is not contained therein. It is a general principle of law that administrative agencies and their officers may validly act only within the authority statutorily conferred upon them, either expressly or by necessary implication. Sydnor Pump and Well Company v. Taylor, 201 Va. 311, 316, 110 S.E.2d 525 (1959); 67 C.J.S. Officers § 102 (1950). I am unable to conclude that the general provisions which allow rendering of financial assistance and authorization to enter into and perform contracts of every kind, which are provided for in III (B), (G) and (H) of the Charter, may be extended to supply the requisite express or implied authority to engage in the business of insurance.

ALCOHOLIC BEVERAGE CONTROL LAWS—Advisory Referendum—No authority for board of supervisors to call.

BOARDS OF SUPERVISORS—Advisory Referendum—No authority to call.

September 8, 1971

THE HONORABLE C. WILLIAM CLEATON
Member, House of Delegates

This is in reply to your letter of September 3, 1971, in which you request my opinion on the following question:

“I had a question and a request for a ruling from you by one of the members of the Board of Supervisors in my county. In Mecklenburg County our Board of Supervisors by a resolution passed, banned the sale of beer on Sunday. This was about ten or twelve year ago. They now, by the request of some people in the county, want to rescind this so that they can sell beer on Sunday but there is a tremendous opposition.

“They had a public hearing this past Monday night at the courthouse. There resulted a check on the vote, six of the supervisors would vote to keep this ban on the sale of beer on Sunday and two of the supervisors would vote to rescind it. The large gathering at the public hearing proposed to resolve the difference by holding a referendum to decide whether the people want it or not. The question now is I would like for you to give me the ruling whether or not the county has a right to hold a referendum to decide this.”

In my opinion the Board of Supervisors is not authorized to conduct an advisory referendum on this question.

The Board of Supervisors of Mecklenburg County has the power under § 4-97 of the Code of Virginia (1950), as amended, “... to adopt ordinances effective in that portion of such county not embraced within the corporate limits of any city or incorporated town ... 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 the power upon the governing body of a county to conduct an advisory referendum on such question. In a previous opinion 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 nor use the election machinery for that purpose. (See Report of the Attorney General (1949-1950), p. 12, copy of which is enclosed.)

ALCOHOLIC BEVERAGE CONTROL LAWS—Confiscated Whiskey—Distribution to State-supported institutions for medicinal purposes.

July 2, 1971

THE HONORABLE MACK I. SHANHOLTZ, M.D.
Commissioner, Department of Health

I am in receipt of your recent letter wherein you requested an opinion as to whether or not § 4-55 of the Code of Virginia (1950), as amended, authorizes the distribution of confiscated whiskey by the Alcoholic Beverage Control Board to institutions in the State which need the alcohol for medicinal purposes, when such institutions do not receive tax support on a continuing basis but do admit patients who receive medical care pursuant to programs which are supported by State or local tax funds.

As you know, § 4-55 (c) of the Code of Virginia (1950), as amended, reads in pertinent part as follows:

"... It (the Board) may give the same for medicinal purposes to institutions in this State supported either in whole or in part by public funds."

In my opinion, an institution which does not receive any public funds for direct financial support, but only admits patients who receive care pursuant to programs supported in whole or in part by public funds, does not come within the purview and meaning of § 4-55(c) of the Code. The statute expressly states that the institution must be supported by public funds, not the patient care program. The fact that the institution in question may administer a program which is supported by public funds for the benefit of the patient is of no moment in determining whether or not the institution is supported by public funds.

Programs such as Medicaid are intended to benefit the eligible persons who are in need of care. Though the program which is financed by public funds may have an indirect beneficial effect on institutions in this State, such indirect benefit would not support the proposition that the facility is supported "in part" with public funds. I am, therefore, of the opinion that § 4-55 of the Code of Virginia does not authorize the Board to distribute confiscated whiskey to institutions unless the institution itself is supported in whole or in part by public funds.

ALCOHOLIC BEVERAGE CONTROL LAWS—Distribution of Funds—Apportionment to localities; corrections in census figures.

COUNTIES, CITIES AND TOWNS—Distribution of Funds Under Alcoholic Beverage Control Laws—Corrections in census figures.

April 10, 1972

THE HONORABLE DAVID B. AYRES, JR.
State Comptroller

This is in response to your letter of March 27, 1972, which is as follows:

“Section 4-22 of the Code of Virginia provides that the net profits of the Virginia Alcoholic Beverage Control Board shall be apportioned and distributed ‘... on the basis of the population of the respective counties, cities and towns, according to the last preceding United States Census . . .’ Section 4-24 contains a similar provision for
distribution of the State tax on wines to the counties and cities.

"There have been instances in the past where the Bureau of the Census has discovered several errors in population counts of certain localities. I am informed that it has been the policy of this office that any corrections made by the Bureau of the Census with respect to any locality would not be recognized unless the official census for the State as a whole was similarly adjusted by the Bureau of the Census.

"I am of the opinion that this policy produces a disproportionate impact upon those localities that may have been underenumerated. Because of our concern for those localities whose distributive shares are adversely affected by these underenumerations, we are considering a change in our policy.

"In view of the provisions of Section 4-22 of the Code of Virginia, would it be proper for this office to make distribution to the several counties, cities and towns on the basis of the population of each county, city or town, as corrected by certification of the Bureau of the Census, whether or not the Bureau similarly adjusts the official census for the State as a whole?"

In my opinion your question must be answered in the negative.

The mathematical ratio used in making the apportionment authorized by § 4-22 is based on the relationship of the population of the locality to that of the entire State. The population figures authorized to be used are those "... according to the last preceding United States Census. . . ." If corrections are made to population figures for a locality, and no corresponding change is made in the official figures for the State as a whole, it will become mathematically impossible to correctly make the apportionment provided for. Unless the Bureau of Census certifies corrections to both figures, no adjustments can be made.

In an opinion given the Honorable Henry G. Gilmer, Comptroller, dated August 21, 1952, copy of which is enclosed, this office ruled that adjustments could not be made in situations of this kind.

__________________________

ALCOHOLIC BEVERAGE CONTROL LAWS—Elections—Government liquor stores required to close.

August 25, 1971

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

This is in response to your letter of August 19, 1971, which is as follows:

"I have been requested by the General Registrar in Arlington County to inquire of you whether or not alcoholic beverages can be sold in that portion of Arlington County in which there will be no primary election.

"It appears that only a portion of the County will be involved in the September 14th Primary elections. She has apparently been advised by the ABC Board that the decision to stay open or closed is up to the Electoral Board. If that is the case, please advise whether or not this prerogative applies only to those affected precincts in the County, or whether it would be County-wide."

Section 4-19 of the Code of Virginia (1950), as amended, is, in part, as follows:

"When government stores closed.—No sale or delivery of alcoholic beverages shall be made at any government store, nor shall any such store be kept open for the sale of alcoholic beverages:

* * *
In my opinion a primary election is an "election" within the meaning of the foregoing section, and, therefore, government stores should be closed in the county on that day. No exception is made in the statute in cases where some of the election districts in a jurisdiction are not involved in a particular election. It is not a function of the Electoral Board to decide when government stores should be closed.

ALCOHOLIC BEVERAGE CONTROL LAWS—Grocery Stores Licensed to Retail Off-premises Wine and Beer; Standards for Are Not Necessarily Unconstitutional.

March 22, 1972

THE HONORABLE WARREN J. DAVIS
Member, House of Delegates

This is in response to your letter of March 11, 1972 which reads, in part, as follows:

"I would appreciate very much having an opinion from your office concerning the interpretation of Section 50(a)(1) of the Code as it relates to obtaining a license to sell wine off premises. A great number of my constituents who are in the grocery business in the Northern Virginia area have questioned me concerning this, and I am enclosing a memorandum which pretty well outlines the areas in question."

It appears from the memorandum enclosed with your letter that you intended to refer to § 50(a)(1) of the Regulations of the Alcoholic Beverage Control Board rather than to § 50(a)(1) of the Code of Virginia. Regulation § 50(a)(1) is as follows:

"(a) As provided for in Section 4-25 retail off-premises wine and beer licenses may be granted by the Board to persons for the following types of establishments, subject to revocation as provided in Section 4-37:

1. Grocery stores, which shall mean establishments provided with adequate inventory, shelving and storage facilities where in consideration of payment, substantial amounts of general supplies for the table, including fresh, frozen or cured meats and fresh or frozen vegetables, or both, and other articles of household use are habitually furnished to persons."

The types of licenses that the ABC Board may issue are to be found in § 4-25 of the Code of Virginia (1950), as amended. An off-premises wine and beer license is authorized by § 4-25(j) and an off-premises beer license is authorized by § 4-25(l). Neither of these subsections defines the type of establishment qualifying for the license, and apparently § 50 of the Regulations of the Board is designed to supply eligibility qualifications.

Section 50(b)(1) of the Regulations of the Board is as follows:

"(b) As provided for in Section 4-25, retail off-premises beer licenses may be granted by the Board to persons for the following types of establishments subject to revocation as provided in Section 4-37:

1. Grocery stores, which shall mean establishments provided with adequate inventory, shelving and storage facilities where, in consideration of payment, substantial amounts of general supplies for the table and other articles of household use are habitually furnished to persons."
It appears from comparison that if a grocery store desires the off-premises wine and beer privilege, it must, in addition to meeting the standards required for an off-premises beer license, have included in its inventory and sales of general supplies "fresh, frozen or cured meats and fresh or frozen vegetables, or both . . ." I am advised that this requirement disqualifies a number of smaller stores, particularly when construed along with the word "substantial." The regulation also defines "substantial" and indicates that inventory and sales volume are among the factors to be considered. While not a part of the regulation, the Board, I am advised, has adopted certain audit guidelines pertaining to grocery stores as follows: the inventory and monthly sales volume should not be less than $2000.00 each, if the wine and beer off-premises license is desired, nor less than $1000.00 each if only the off-premises beer license is applied for. In addition, the inventory and monthly sales volume of fresh, frozen or cured meats and fresh or frozen vegetables should not be less than $400.00 each, when this requirement is applicable.

The memorandum enclosed with your letter indicates the opinion that the additional requirements for the off-premises wine and beer license are arbitrary and therefore constitute an unconstitutional classification. In my view, this conclusion is probably incorrect.

When the Alcoholic Beverage Control Act was passed, there was submitted to the General Assembly of Virginia in January, 1934, as Senate Document No. 5, a report of the Liquor Control Committee, which report contained the following:

"We are convinced that temperance will be measurably prompted by the encouragement of the drinking of light fermented beverages, such as beers and wines, and the discouragement of the use of distilled liquors of high alcoholic content. Therefore, a plan of liquor control should make wines and beers more easily obtainable by, and hard liquors less available to, the consumer."

Wine has a higher alcoholic content than beer, and pursuing the temperance thought, I can see where it might be considered desirable to make beer more readily available to the consumer than wine. Indeed, this thought seems to have been implicit in the thinking of the General Assembly for the eligibility requirements for the privilege of selling wine are more stringent than those pertaining to beer, as will be apparent from analysis of § 4-25 of the Code.

The field of intoxicating liquors is somewhat unique—no man has a right to engage in business of selling liquor. It is at most a privilege that the State may deny completely or permit upon limited conditions. Due Process and Equal Protection arguments in this field have several times been rejected by the Supreme Court of the United States. In one of the more recent cases New York's "price warranty" law was upheld against Due Process and Equal Protection arguments that the statute arbitrarily discriminated among various segments of the liquor industry. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), reh. den., 384 U.S. 967.

Various classifying factors are familiar in this field. For example, seating capacity, and a requirement that gross receipts from the sale of alcoholic beverages be exceeded by other sales, are among the classification factors determining eligibility for a mixed beverage restaurant license under § 4-98.2 of the Code.

I conclude that a classification of grocery stores that has the effect of limiting the number of wine outlets based on volume of business is not necessarily unconstitutional.

ALCOHOLIC BEVERAGE CONTROL LAWS—Licenses—Limitations—May not be issued to appointive official nor to partnership of which he is a member.
THE HONORABLE J. WARREN WHITE, JR.
Member, House of Delegates

This is in response to your letter of October 12, 1971, which is, in part, as follows:

"... Virginia Code Section 4.98.17 provides that:

"'No license provided for in this Chapter (A.B.C.) shall be issued to any elective or appointive official of the United States or of this State or any political subdivision thereof.'

"Request is hereby made for your opinion as to whether or not Virginia Code Section 4-98.17, hereinabove set forth, precludes the issuance of an alcoholic beverage license to a limited partnership, one of the general partners of which is an appointed member of a State Board.

"If it is your opinion that issuance of an alcoholic beverage license is prohibited in such circumstances, request is hereby made for your further opinion as to whether or not said section precludes the issuance of an alcoholic beverage license to a limited partnership, one of the limited partners of which is an appointed member of a State Board."

The prohibition of § 4-98.17 pertains to mixed beverage licenses that the Alcoholic Beverage Control Board is authorized to issue under Chapter 1.1 of Title 4 of the Code. In my opinion this prohibition is applicable to both of the situations you mention.

From the part of your letter not quoted, it appears that the specific State Board you have reference to is the Board of Conservation and Economic Development. It is provided in § 10-3 of the Code that the Governor shall appoint, subject to confirmation by the General Assembly, twelve members of the Board of Conservation and Economic Development, which is a part of one of the administrative departments of the State government. I think it is clear that a member of this Board is an appointive official of the State within the meaning of § 4-98.17 of the Code.

No person has an inherent right to sell alcoholic beverages—it is not one of the privileges or immunities of citizenship. Crowley v. Christensen, 137 U.S. 86 (1890). A State may absolutely prohibit the sale of intoxicants, or it may permit a limited traffic under definitely prescribed conditions. Ziffrin v. Reeves, 308 U.S. 132 (1939). A license to sell intoxicants is not a property right, but a privilege, a matter of legislative grace only, and it is within the province of the General Assembly to make reasonable restrictions as to the classes of persons eligible for licenses. 45 Am. Jur. 2d. § 147. Thus, in Marcus v. State, 411 P. 2d, 539 (Okla. 1966) an Oklahoma constitutional provision prohibiting the State of Oklahoma, or any political subdivision thereof, or any board, commission, agent or employee thereof, from engaging in any phase of the alcoholic beverage business was sustained as against the contention that it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In that case, a city councilman was held to be a public officer, an agent of the municipal corporation, and accordingly ineligible for a license.

I conclude that a member of the State Board of Conservation and Economic Development is not eligible as an individual to obtain a mixed beverage license under Chapter 1.1 of Title 4 of the Code of Virginia. I think it also follows that all members of a partnership, whether it be a limited partnership or a general partnership, must meet the eligibility requirements. To hold otherwise would allow an ineligible individual to circumvent the law by a partnership arrangement.
REPORT OF THE ATTORNEY GENERAL

ALCOHOLIC BEVERAGE CONTROL LAWS—Special Natural Wine—Sale subject to approval of ABC Board.

October 7, 1971

THE HONORABLE WILLIAM B. HOPKINS
Member, Senate of Virginia

This is in response to your letter of September 28, 1971, which reads in part as follows:

“One of my constituents has informed me that Virginia is the only state in the country that does not presently allow the sale of so-called flavored wines.

“It is my information that there is some question as to whether under the ABC Act, specifically Section 4-2(26), and regulations promulgated thereunder, specifically Section 12(b), the sale of such wines in the commonwealth is legal.

“I am informed that certain members of the staff of the ABC Board have indicated that such wines may not be sold under Section 4-2(26) containing the definition of ‘wine’ unless amended to specifically allow the addition of certain special flavorings.

“For these reasons I respectfully request your opinion on the following question: Can wines with added natural flavors (special natural wines) be legally sold in the Commonwealth of Virginia?”

My conclusion is that all “special natural wines” are not necessarily precluded from sale in Virginia, but that the approval of the Virginia Alcoholic Beverage Control Board must be obtained in each instance as to the sale of a particular brand.

You have referred to § 4-2(26) of the Code of Virginia (1950), as amended, which defines wine as follows:

“‘Wine’ shall mean any beverage obtained by the fermentation of the natural sugar contents of fruits or other agricultural products containing sugar, including honey and milk, either with or without additional sugar, and containing more than three and two-tenths per centum of alcohol by weight.”

When an ingredient is added that is not included in the statutory definition, strictly speaking the end product is wine plus something else. However, I do not think that § 4-2(26) necessarily should be construed so strictly as to prohibit in all cases the sale of wine to which “something else” not included in the statute has been added. As I am sure you know, there are many federal regulations pertaining to wine. You have used the term “special natural wines,” and I find the following definition of this term in 26 C.F.R. 240.45:

“‘Special natural wine’ shall mean a product, such as vermouth, made pursuant to an approved formula in accordance with the provisions of section 5386, I.R.C. and Subpart S of this part.”

The Subpart S referred to is found in 26 C.F.R. 240.440 and is as follows:

“Materials. Special natural wine is a flavored wine made on bonded wine cellar premises from a base of natural wine. The flavoring added may include herbs, spices, fruit juices, natural aromatics, natural essences, or other natural flavorings, in such quantities or proportions that the resulting product derives a distinctive flavor from their use, and may be distinguished from natural wine not so treated. Fruit juices may not be used to give to one natural wine the flavor of another, but may be used together with herbs, spices, etc., to produce a wine having a distinctive flavor. In addition to flavoring material, caramel may be added for coloring, and pure
Report of the Attorney General

Dry sugar, liquid sugar, invert sugar syrup, or water, may be added to the extent permitted by §§ 240.443 and 240.444. If effervescent special natural wine is to be produced, either naturally or by artificial carbonation, the requirements of Subpart W of this part, as well as the requirements of this subpart, must be followed.

It is thus clear that "special natural wine" is both well known in the industry and a subject of federal regulations which permit additives not embraced in the Virginia statutory definition.

You have also referred to § 12 of the regulations of the A.B.C. Board. This regulation is too lengthy to be set out in full in this opinion. It will be noted that this regulation requires wine sold in this State to be in compliance with certain federal regulations, and also requires that the approval of the A.B.C. Board be first obtained. The Board has indicated in this regulation that its approval will be withheld in certain enumerated cases, but I think it clear that the enumerated cases would not necessarily proscribe all wines which meet the federal definition of "special natural wines."

In conclusion, while I do not think the law prohibits the sale of all "special natural wines" in Virginia, this conclusion is subject to the qualification that the approval of the A.B.C. Board must be first obtained as to any particular brand of wine, as the Board has broad discretionary powers in this respect. In particular you might refer to § 4-7 of the Code, which section not only authorizes the Board to sell, but also charges it with the responsibility of controlling, the sale of alcoholic beverages (which term includes wine), and to § 4-25(g), which indicates that the licenses of wholesale wine distributors authorize them "to acquire and receive deliveries and shipments of wine from the Board. . . ."

ANNEXATION—County Required to Redistrict Itself; Governing Body to Fix Effective Date.
REDISTRICTING—Vacates Existing Positions on Board of Supervisors and School Board.
JUSTICE OF PEACE—One Elected from Each Magisterial District of County; Office Vacated by Redistricting.
ELECTIONS—Redistricting—New Board of Supervisors may not be elected or appointed prior to effective date of.
COUNTIES—Redistricting—Effect on School Board and Board of Supervisors.
BOARD OF SUPERVISORS—Redistricting—Effect on School.
SCHOOLS—Redistricting—Effect on School Board.

May 5, 1972

The Honorable James F. Andrews
Commonwealth's Attorney for Dinwiddie County

In your letter of recent date, you point out that, due to recent expansion of the City of Petersburg through annexation, Dinwiddie County is required to redistrict itself by § 15.1-571.1 of the Code of Virginia (as amended). With regard to this redistricting, you inquire:

1) When must it become effective?
2) On its effective date, does the redistricting create vacancies on the Board of Supervisors, the school board, and in the office of justice of the peace, and if so, how are those vacancies to be filled?
3) May the new Board be elected or appointed prior to the effective date of redistricting with their terms to begin after the effective date?
I shall answer these questions *seriatim*.

As you point out in your letter, § 15.1-37.5 provided that the decennial redistricting required by that section was to become effective on December 31, 1971. Although no provision is made for the effective date of future decennial redistricting, this problem may be corrected by the General Assembly prior to 1981. Additionally, the 1972 session of the General Assembly amended § 15.1-788 of the Code to provide that as to counties having the urban county form of government, where district boundaries change and reapportionment is required, such reapportionment shall become effective on December 31 of the year in which it occurs. There is at this time, however, no such provision for counties having other forms of government, such as Dinwiddie County. It is my opinion, therefore, that the reapportionment ordinance like any other ordinance for which there is no statutory exception must become effective in accordance with the provisions of § 15.1-504, which provides in pertinent part:

"After the enactment of such ordinance by the governing body, such ordinance shall become effective upon adoption or upon a date fixed by the governing body."

This section would permit the governing body of the county to fix a date other than the date of adoption, and in this case it is my opinion that December 31, 1972, would not be an unreasonable date if so fixed.

As to the second question, however, it is clear that regardless of the effective date fixed, on that date the existing positions on both the Board of Supervisors and the school board become vacant by force of law as to any districts whose boundaries are changed by the redistricting, regardless of the number of current supervisors and school board members who reside in any newly described or created district. (As to those districts, if any, whose boundaries remain unchanged, no vacancy would exist; however, in view of the necessity to provide equal numerical representation among the several districts it is unlikely that any one district could remain unaltered without being under-represented.) This is in accord with my opinion dated June 3, 1971, to the Honorable Robert E. Brown, Commonwealth's Attorney for King George County, found in the Report of the Attorney General (1970-1971), at p. 87, which is referred to in your letter. Although the abovementioned amendment to § 15.1-788 provided a means for filling such vacancies, that section applies only to the urban county form of government, which as stated does not apply to Dinwiddie County. Therefore, the vacancies on the Board of Supervisors occasioned by reapportionment must be filled in accordance with the provisions of § 24.1-76. Assuming the reapportionment to become effective on December 31, 1972, the judge of the Circuit Court of Dinwiddie County would have to appoint persons to fill these vacancies until the next ensuing general election in November of 1973, at which time all seats so appointed would be filled by general election for the remainder of the unexpired terms of the members elected in 1971. The vacancies on the school board would be filled as detailed in the opinion previously cited.

As to the office of justice of the peace, you will note that § 24.1-89 of the Code requires that one justice of the peace be elected from each magisterial district of each county, reflecting the legislature's apparent intention to provide equal numerical representation for elected justices of the peace and to insure that such justices would be reasonably accessible to law enforcement officers in all parts of the county. Therefore, the offices of such elected justices of the peace would be vacated by force of law in the same manner as the above described offices, to be filled in accordance with § 24.1-76. You will note further, however, that since the office of justice of the peace is judicial in character rather than legislative or executive, § 39.1-6 of the Code permits the court to appoint as many additional justices of the peace as are necessary for the effective administration of justice. Since any
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resident of the county regardless of the district of his residence may be so appointed, § 39.1-7, any justices of the peace so appointed would be unaffected by new district boundaries within the county and may continue to serve the balance of their terms. To the extent this opinion is in conflict with the previous opinion of this office to the Honorable Helen C. Loving, Clerk of the Circuit Court of Henrico County, dated August 20, 1969, and found in the Report of the Attorney General, (1969-1970), at p. 120, which is referred to in your letter, the latter opinion is withdrawn.

In view of the foregoing answer to your second question, the third question must obviously be answered in the negative.

ANNEXATION—Legislature May Withdraw or Temporarily Suspend Authority of Annexation Courts.

COUNTIES, CITIES AND TOWNS—Annexation—Legislature may withdraw or temporarily suspend authority of annexation courts.

March 6, 1972

THE HONORABLE ROBERT S. BURRUSS, JR.
Member, Senate of Virginia

In your letter of March 1, 1972, you inquire whether the General Assembly may properly enact House Bill No. 328, which would provide in essence that no annexation suit could be instituted by any city against any county between February 1, 1971, and January 1, 1976, and that any suit so instituted would be stayed. You point out that several annexation suits have been instituted since February 1, 1971, which would be affected by this legislation.

The answer to your inquiry lies in the nature of a municipal corporation, which is defined to be "an investing the people of a place with the local government thereof." 13 M.J., Municipal Corporations, Sec. 2, p. 362. The treatise goes on to state that municipal corporations are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the Constitution.

In the case of Richmond, Fredericksburg & Potomac Railroad Company v. City of Richmond, 145 Va. 225, 133 S.E. 800 (1926), the Supreme Court of Virginia held that municipal corporations are creatures of the state and can exercise no power that is not derived from their creator. The state may grant these powers in whole or in part, conditionally or unconditionally, and may at its pleasure modify or withdraw them, with or without the consent of the citizens, or even against their protest. Municipal corporations have no such inherent right as those recognized by the Constitution as being possessed by individuals. See also, Stephens City v. Zea, 204 Va. 88, 129 S.E.2d 14 (1963).

More recently in Newport News v. Elizabeth City County, 189 Va. 825, 55 S.E.2d 56 (1949), the Supreme Court analyzed the constitutional provision relating to annexation and expansion of cities, which was then contained in Section 126 of the Constitution. That section provided as follows:

"The General Assembly shall provide by general laws for the extension and contraction, from time to time, of the corporate limits of cities and towns; and no special act for such purpose shall be valid."

In discussing this section, the Supreme Court said:

"Section 126, in broad and general terms, empowers the General Assembly to provide by general laws for the extension and contraction of the corporate limits of cities and towns. This is not a self operating section. The mode of the proceedings, the agency therefor,
the conditions and the limitations thereon, are required to be provided by legislative action within constitutional limits. Accordingly, the legislature has proceeded to provide such requirements under the provisions found in [sections of the Code relating to annexation.]

The nature and extent of the proceedings authorized are dependent upon legislative action, within constitutional limitations, and, therefore, the courts have power only to determine whether the legislation is in conflict with constitutional provisions and not whether it is wise or proper.

"The conditions under which cities may annex territory of the counties and the procedure therefor are left entirely to the discretion of the legislature. The Constitution contains no provision which confers upon the judicial department the power or function of ascertaining or determining the necessity for or the expediency of extending the corporate limits of cities, towns or counties. The only power of the courts to allow the expansion or contraction of cities is conferred by legislative action."

The provisions of the 1971 Constitution of Virginia contain in Article VII, Section 2, the following:

"The General Assembly shall provide by general law for the organization, government, powers, change of boundaries, consolidation and dissolution of counties, cities, towns, and regional governments."

Although this provision differs in wording from the language contained in the 1902 Constitution, it is still clear that the legislature has the same authority to provide for conditions of annexation as it formerly had. Since the special annexation courts are themselves a creature of statute enacted pursuant to the General Assembly's authority to provide for boundary changes of city governments, the legislature may withdraw or temporarily suspend the authority of such courts as it sees fit. I, therefore, answer your question in the affirmative.

ANNUITIES—Tax-sheltered Annuity Plan for Employees—May be imposed by governing body as employer.

August 3, 1971

THE HONORABLE GEORGE B. ANDERSON
Member, House of Delegates

I have received your letter of July 28, asking several questions with respect to tax-sheltered annuities offered by our public schools, colleges and hospitals. I shall answer your questions seriatim.

"(1) Where the trustees of a school district adopt and authorize a Tax Shelter Annuity Plan for their employees, can the trustees or school board designate a particular company or companies from which the employees must purchase such annuity or may the individual employee purchase the annuity from any company of his choice? Can they also purchase this contract any time during working year that the employee deems reasonable in each individual case?"

By letter of February 23, 1971, to the Honorable Edward E. Lane, I opined that a local school board may limit the conditions under which it would participate in an annuity program, including a limitation on the number of participating companies. This opinion would apply equally to public colleges and hospitals. A contract may be purchased at any time agreeable to the governing body, the employee and the insurance company.
“(2) If the trustees can designate the company, may they also require an employee, transferring from another district who already has an annuity, to drop his annuity and purchase a new one from the company designated by the trustees or the school board?”

The governing body may not require an employee to drop any annuity. It may, however, refuse to make contributions to annuities other than those approved by it. I understand, however, that where an exclusive annuity is chosen it is customary to require the chosen insurance company to service any qualified annuity already owned by a new employee.

“(3) In instances where the state-supported institution has not yet made available to their employees a Tax Shelter Annuity Program, can the employees be deprived from participating with any company they may choose on original enrollments or subsequent increases not to exceed maximum allowance by the Internal Revenue?”

A tax-sheltered annuity may be purchased only by the employer. I.R.C. § 403(b) (1) (A). No employee may participate in such a program unless his employer takes the affirmative action of purchasing the annuity and making the required contributions of premiums.

APPROPRIATIONS—Community Mental Health and Mental Retardation Services Boards—Section 20 of 1970 Appropriations Act not applicable to.

MENTAL HYGIENE AND HOSPITALS—Appropriations; § 20 of 1970 Appropriations Act Not Applicable to Community Mental Health and Mental Retardation Services Boards.

STATE AGENCIES—Community Mental Health and Mental Retardation Services Boards Are Not.

January 19, 1972

THE HONORABLE WILLIAM S. ALLERTON, Commissioner
Department of Mental Hygiene and Hospitals

I am in receipt of your letter of December 30, 1971, wherein you request an interpretation of a portion of the 1970 Appropriation Act. Specifically, your inquiry reads as follows:

“I am herewith requesting an interpretation as to whether Section 20 of the 1970 Appropriation Act, which regulates the solicitation and acceptance of donations, gifts, and grants . . . is applicable to Community Mental Health and Mental Retardation Services Boards as established under Chapter 10, Title 37.1 of the Code of Virginia.”

First, as is evidenced throughout Chapter 10 of Title 37.1 of the Code, the Community Mental Health and Mental Retardation Services Boards are instrumentalities of the political subdivision or subdivisions of which it is an agency, not the Commonwealth of Virginia. This point is made abundantly clear in § 37.1-198 of the Code which reads in part as follows:

“Any city, county or combination of counties or counties and cities which establishes a community mental health and mental retardation board administering a mental health and mental retardation services program may apply for the assistance as provided in this act. . . .”

Further, § 20 of the 1970 Appropriations Act reads as follows:

“No donations, gifts or grants whether or not entailing commitments as to the expenditure, or subsequent request for appropriation or expenditure, from the general fund of the State treasury shall be solicited or accepted by or on behalf of any State department, in-
stitution or other agency without the prior written approval of the Governor; provided, however, that this requirement shall not apply to donations and gifts to the endowment funds of the institutions of higher education."

As you will note, § 20 of the 1970 Appropriations Act does not refer to agencies or instrumentalities of the political subdivisions of the Commonwealth, but refers only to departments, institutions and agencies of the State.

Therefore, in my opinion, § 20 of the 1970 Appropriations Act would not be applicable to Community Mental Health and Mental Retardation Services Boards since such boards serve as an instrumentality of the political subdivision or subdivisions of which it is an agency and such Board is not a department, institution or agency of the State.

APPROPRIATIONS ACT—Various Sections May Be Amended Without Necessity of Reenactment of All Items in Act.

CONSTITUTION—Amendments—Various sections may be amended without necessity of reenactment of all items in Act. November 10, 1971

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

This is in reply to your letter of October 27, 1971, enclosing a proposed draft in the Budget Bill (Appropriation Act) layout to make amendments less cumbersome when applying Article IV, Section 12, of the Constitution. Article IV, Section 12, of the Constitution 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."

The proposed draft divides the subjects of the Appropriation Act into sections which are separate and distinct.

I am of the opinion that the various sections of the Appropriation Act which you now propose could be amended under the constitutional provision above quoted without the necessity of reenactment of all items in the Act.

ATTORNEYS—Appointed—Fees—Entitled to separate fee when case retried.

FEES—Attorneys—Appointed—Attorney entitled to separate fee upon retrial of case. September 28, 1971

THE HONORABLE A. DOW OWENS
Commonwealth's Attorney for Pulaski County

This is in reply to your letter of recent date in which you seek an opinion relating to the compensation of appointed attorneys in criminal cases. In your letter you advise that court appointed attorneys represented a defendant at trial which resulted in a guilty verdict. Thereafter, upon motion of the defendant, the trial court set aside the verdict and awarded the defendant a new trial. The same attorneys represented the defendant in the new trial. The question you present is whether these attorneys are entitled to a fee for each trial.

This question has not previously been considered by this office; however, in an analogous situation this office ruled that an attorney was entitled
to a fee for representing a defendant at trial which resulted in probation, and another fee for representing the same defendant on a subsequent motion to revoke the probation. See Report of the Attorney General (1962-1963), p. 4, a copy of which is enclosed. Likewise, this office has previously ruled that a court appointed attorney is entitled to a separate fee for each indictment in cases where the attorney represents a defendant charged with multiple indictments. See Report of Attorney General (1969-1970), p. 17, a copy of which is enclosed.

In each of these prior opinions the compensation has borne a reasonable relationship to the work which the attorney performed. I am, therefore, of the opinion that in those situations where a court appointed attorney must try a case on more than one occasion, he is entitled to be compensated for each trial.

In order to aid the Comptroller in making payment, it is suggested that a brief explanation of the situation be made when the fees are certified for payment.

ATTORNEYS—Attorney-Client Relationship—Must exist in real estate transactions.

REAL ESTATE BROKERS—Running and Capping—Real estate brokers using certain clauses in contracts purporting to authorize him to hire the attorney for the purchaser or seller of real property commits crime of "running or capping."

September 28, 1971

THE HONORABLE N. SAMUEL CLIFTON
Executive Director, The Virginia State Bar

This is in response to your recent letter in which you asked my opinion concerning § 54-79 of the Code of Virginia (1950), as amended, as it applies to real estate brokers in their relationships with attorneys. You stated, in pertinent part:

"Specifically, whether selection of an attorney made by a real estate broker to represent a purchaser of real estate under a sales and purchase agreement prepared by the real estate broker is in violation of Virginia Code Section 54-79 when there is no direct contact or communication between the purchaser and the attorney selected.

"The procedures being followed in certain parts of the state are summarized as follows: The services of the attorney are engaged by the real estate broker, who delivers the executed contract of sale to the lawyer's office and requests him to examine title, prepare the necessary instruments and schedule a time for settlement. Reference to the attorney appears in the contract in one of the following forms:

"1. 'Settlement under this contract is to be made at the office of John W. Doe, 123 Main Street, Nomen City, Virginia, who is authorized by the Purchaser to proceed with the examination of title and settlement under the terms of this contract.'

"2. 'Examination of title, conveyancing, notary's fees and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser who hereby authorizes the undersigned agent to order the examination of title.'

"3. 'Settlement is to be made at the office of the settlement attorney searching the title.' (The blank is filled in by the real estate broker.)

"4. 'Purchaser authorizes agent to order title examination for above property for his account.'"
Each of the examples given is a statement that is printed on the contract form utilized by the broker.

Section 54-79 of the Code provides:

"It shall be unlawful for any person to act singly or in concert with others as a runner or capper for an attorney at law."

Section 54-78 of the Code gives the following definitions:

"(a) A 'runner' or 'capper' is any person acting within this State as an agent for an attorney at law in the solicitation of professional employment for such attorney at law.
(b) An 'agent' is one who acts for another with or without compensation at the request, or with the knowledge and acquiescence, of the other in dealing with a third person or persons.
(c) 'Solicitation of professional employment' is the obtaining or attempting to obtain for an attorney at law representation of some other person to render legal services for such other person and whereby such attorney at law will or may receive compensation; provided that neither conduct limited to mere statements of opinion respecting the ability of a lawyer, nor conduct pursuant to a uniform legal aid or lawyer referral plan approved by the Virginia State Bar, shall be deemed the solicitation of professional employment."

(Emphasis supplied.)

In your first example it is my opinion that the printing of an attorney's name in a form contract and so utilizing that attorney to perform legal services constitutes a violation of § 54-79. There can be no doubt that the broker in this case falls within the definition of a "runner or capper" in that he obtained for an attorney representation of a third party. Inasmuch as the attorney receives the contract which forms a basis of his employment, he has knowledge that the broker is acting as an "agent" for him. Therefore, the broker is acting as an agent for the attorney for the purpose of soliciting legal business for the attorney and is, therefore, clearly in violation of § 54-79 of the Code.

In example number 2, it cannot be said that there is a per se violation of § 54-79 in that there is not on the face of the statement itself evidence that the attorney has knowledge or is acquiescing in the broker acting on his behalf. However, where the evidence shows that the broker continuously carries this business to a specific attorney or attorneys, he would quite definitely become the agent of the attorney for the purpose of solicitation of professional employment and would, therefore, be in violation of the statute.

The same reasoning used in the analysis of example number 2 is applicable to example number 3. However, where the client himself makes the choice of the attorney and instructs the broker to fill in blank with his own attorney's name, it would be clear that the broker would not then be acting as an agent for the purpose of solicitation for the attorney.

Example number 4 is precisely the same as example number 2 except that it purports to authorize the agent to act on behalf of the purchaser. Obviously, where this is a printed document which gives the purchaser little or no choice or option in his selection of an attorney, this language amounts to nothing more than a sham. Again, where the broker takes this type contract to a specific attorney or attorneys, he begins to cross the line so as to become the agent of the attorney for the purpose of solicitation of legal business and would, therefore, be in violation of § 54-79.

Nothing in this opinion is to be construed as an interpretation involving the legal ethics of the attorney in accepting business received in this manner as such a discussion is beyond the scope of your request.
ATTORNEYS—Fees to Represent Indigent Prisoner in Seeking Writ of Habeas Corpus—How paid.

October 18, 1971

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

This is in response to your letter of October 6, 1971 in which you inquire as to the authority for the allowance of compensation to an attorney who has been appointed to represent an indigent prisoner seeking a writ of habeas corpus.

Your attention is directed to the provisions of Item 15(c) of Chapter 461, Acts of Assembly (1970) which reads as follows:

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

Language similar to this first appeared in the Appropriation Act of 1962 (Chapter 640, Item 73, Acts of Assembly (1970)).

I am of the opinion that counsel is paid pursuant to this provision of the Appropriation Act.

AUTOMOBILE GRAVEYARDS—Location—Control over.

September 29, 1971

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

This is in reply to your recent letter wherein you state:

"... An automobile junkyard has been established over 500 feet from Secondary Route 648, east of the Town of Tazewell and over 1,000 feet from the nearest primary highway. A group of local residents have sought to have this junkyard closed because it is clearly 'visible' from one or more secondary roads or streets, all of which are more than 500 feet from the junkyard. The Board of Supervisors seeks your opinion as to whether this junkyard is in violation of Subsection C of Section 33.1-348."

Section 33.1-348(c) of the Code of Virginia (1950), as amended, specifically sets out areas wherein junkyards are prohibited from being established after April 4, 1968. Those areas are described as being within 1,000 feet of the nearest edge of the right of way of an interstate or primary highway or within 500 feet of the nearest edge of the right of way of any other highway or city street. The junkyard in question is not within these areas.

I am, therefore, of the opinion that the junkyard in question is not in violation of § 33.1-348(c) of the Code and not prohibited or controllable by that section.

BANKING AND FINANCE—Interest and Charges on Loans—Loans secured by second mortgages on housing consisting of five or more dwelling units.

March 31, 1972

THE HONORABLE THOMAS R. MCNAMARA
Member, Senate of Virginia

I have received your letter of March 20, from which I quote:

"Under § 6.1-330 of the Virginia Code, may a person, corporation,
or similar legal entity charge interest in an amount in excess of that permitted by §§ 6.1-234 and 6.1-234.1 on a loan secured by a second mortgage or deed of trust on residential real estate improved by the construction thereon of housing consisting of five or more family dwelling units?"

Virginia Code § 6.1-330 applies only to, "a loan secured in whole or in part by a mortgage or deed of trust other than a first mortgage or deed of trust, on residential real estate improved by the construction thereon of housing consisting of four or less family dwelling units." I have construed § 6.1-330 to be permissive, rather than prohibitive. See Report of the Attorney General (1970-1971), p. 22. In my opinion, the phrase, "other than a first mortgage or deed of trust," modifies the immediately preceding language and does not in any way affect the applicability of the section to real estate having five or more family dwelling units located thereon. Accordingly, § 6.1-330 does not apply in the situation described by you. In the absence of any other exception, which your facts do not indicate, the interest rate on such a loan would be limited by Virginia Code § 6.1-319 to an annual rate of eight percent simple interest.

BOARDS OF SUPERVISORS—Advisory Referendum—No authority to hold on neighborhood school concept.

September 28, 1971

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

This is in reply to your letter of September 22, 1971, in which you requested my opinion whether an advisory referendum could be held by the Board of Supervisors on the following questions:

"1. Do you favor the neighborhood school concept?
"2. Do you favor an amendment to the United States Constitution forbidding busing of students for the sole purpose of maintaining a racial balance in order to preserve the neighborhood school concept?"

I am not aware of any statute that confers the power upon the governing body of a county to conduct an advisory referendum on such questions. This view is consistent with previous opinions of this office to the effect that the governing body of a county could not hold an advisory referendum in the absence of specific legislative authority nor use the election machinery for that purpose. See Report of the Attorney General (1949-1950), p. 12, copy of which is enclosed. See also opinion to the Honorable C. William Cleaton, Member, House of Delegates, dated September 8, 1971, a copy of which is enclosed.

Should the Board of Supervisors wish to change the law, I suggest that they discuss this matter with Chesterfield County's representatives in the General Assembly.

BOARDS OF SUPERVISORS—Appoints Anew Officers and Employees in Administrative Service of County; Non-administrative Personnel Continue to Hold Office Until Expiration of Terms.

COUNTIES—County Executive Form.


HEALTH—Department May Be Consolidated With Department of Public Welfare; Head of Consolidated Department Must Be on Both Lists of Eligibles.
LIBRARIES—Department of Education Can Be Assigned Responsibility Over.

ORDINANCES—Remains in Effect Despite Change of Governmental Structure to County Executive Form.

PUBLIC WELFARE—Department May Be Consolidated With Department of Health; Head of Consolidated Department Must Be on Both Lists of Eligibles.

SCHOOLS—School Boards—Responsibility for maintenance of school buildings, buses and grounds and construction of new facilities may not be transferred to Department of Public Works.

SCHOOLS—School Boards—Responsibility for providing supplies may not be transferred to Department of Finance.

December 9, 1971

THE HONORABLE PAUL B. EBERT
Commonwealth’s Attorney for Prince William County

This is in reply to your letter of December 6, 1971, in which you advised that Prince William County has approved the adoption of the County Executive form of government to be effective January 1, 1972, and requested my opinion on six questions which have arisen during the planning for the transition. These questions read:

“1. Can the Department of Education be assigned responsibility over public recreation and libraries? Such duties are not traditionally performed by county school boards, but are somewhat related to education. Under the County Executive Form the County School Board, the Division Superintendent and other school personnel do constitute a “department” and I am of the opinion that these activities are appropriate for assignment to the Department of Education by the Board of County Supervisors under the authorization found in the last paragraph of Va. Code § 15.1-604.

“2. Can the maintenance of school buildings, buses and grounds and the construction of new school facilities be transferred to the Department of Public Works and the purchase of necessary school supplies transferred to the Department of Finance? If such transfers are permissible, must the consent of the school board be obtained? While transfers of these functions are specifically authorized by Va. Code § 22-151.1 for counties operating under the County Manager Form, the authorization in Va. Code § 15.1-604 to transfer county functions and activities from one department to another would, in my opinion, permit such a transfer for counties operating under the County Executive Form without the need for a specific statutory provision. It appears arguable that §§ 15.1-604 and 22-82, when construed together, may authorize the Board of County Supervisors, upon the recommendation of the County Executive, to make this change. However, I have concluded that the enumerated duties set out in Va. Code § 22-72 (6) which provides that the School Board has the responsibility for erecting, equipping and maintaining school facilities would require the concurrence of the School Board. This opinion seems to be confirmed by the language in § 22-151.1. But no formal contract for these services would, in my opinion, be required.

“3. May the new Board of County Supervisors appoint the members of the School Board without regard to those presently serving? Va. Code §§ 15.1-609 and 22-80, read in conjunction with Va. Code § 15.1-609.1, would seem to require the reappointment of the old School Board members. But the Board of Supervisors has reapportioned Prince William County effective December 31, 1971 in
accordance with Va. Code § 15.1-37.5 and, as I interpret your opinion dated June 3, 1971, addressed to the Commonwealth's Attorney for King George County, the existing positions on the school board will be vacated by force of law when the new election districts become effective on December 31, 1971. Since the School Board offices will be vacant on January 1, 1972 when the Board of County Supervisors takes office under the County Executive Form, I feel that the Board of County Supervisors may appoint an entirely new School Board regardless of Va. Code § 15.1-609.1.

"4. May the new Board of County Supervisors appoint the non-administrative and advisory personnel who serve on the various boards and commissions of the County such as the Library Board, Planning Commission and Welfare Board without regard to those presently serving in these various capacities? Va. Code § 15.1-598 provides that the Board of County Supervisors may appoint anew all officers and employees in the administrative service of the County, but since these boards and commissions are by their nature non-administrative, I believe that if the boards are continued, the persons presently holding office would continue to hold office until the expiration of the terms to which they were appointed.

"6. Will the March 6, 1969 ordinance entitled 'Merit System of Personnel Administration' under which employees of Prince William County may be dismissed solely on the basis of lack of merit and fitness continue in effect? Although the County will experience a complete change of governmental structure, I see no reason why the general rule that an ordinance remains in effect until repealed does not apply to this ordinance. This ordinance does not appear to be in conflict with Va. Code § 15.1-589 which relates to the removal of officers and employees under the County Executive Form, and I believe that the ordinance will still apply to all officers and employees whose positions are retained after the transition.

I shall answer your questions seriatim:

1. Under the authority of § 15.1-604 of the Code of Virginia (1950), as amended, the Department of Education can be assigned responsibility over public recreation and libraries.

2. Section 22-72 (6) of the Code places the responsibility on the School Board to erect, furnish, equip and maintain the necessary school buildings and appurtenances. Without specific legislative authority, such as is found in § 22-151.1 of the Code, I am of the opinion that the responsibility for the maintenance of school buildings, buses and grounds and the construction of new facilities may not be transferred to the Department of Public Works, nor the responsibility for the providing of supplies be transferred to the Department of Finance.

3. Section 15.1-609.1 of the Code, as amended, provides as follows:

"Notwithstanding the provisions of the preceding sections, in any county which hereafter adopts the county executive form of organization and government under this article, the trustees of the county school boards in office on June twenty-seven, nineteen hundred sixty-six, and those hereafter appointed shall be appointed or re-appointed, as the case may be, for terms of four years each, except
that initial appointments hereunder may be for terms of one to four years, respectively, so as to provide staggered terms for such trustees."

Under this section the new Board of County Supervisors must appoint as members of the School Board the trustees of the county School Board in office prior to December 31, 1971, who would continue to serve de facto until the new board is constituted.

4. Section 15.1-598 of the Code limits the new Board of Supervisors to appointing anew all officers and employees in the administrative service of the County. Therefore, it may not appoint anew non-administrative officers and employees and such persons would continue to hold office until the expiration of the terms to which they were appointed.

5. I am aware of no reason why the ordinance of March 6, 1969, entitled "Merit System of Personnel Administration" would not continue in effect.

6. Section 15.1-604 authorizes the combination of the departments listed under that section. This section also provides that there shall be a Department of Public Welfare and a Department of Health. These departments may be combined for functional purposes, upon recommendation of the county executive, by the Board of Supervisors. The individual appointed to head the combined department should be an "eligible" on both of the lists referred to.

**BOARDS OF SUPERVISORS—Appropriation—To private sectarian schools prohibited.**

July 8, 1971

THE HONORABLE RUSSELL L. DAVIS
Member, House of Delegates

This is in reply to your letter of July 2, 1971, in which you inquire whether the Board of Supervisors of Franklin County may make financial contributions to a private, sectarian junior college.

Section 10 of Article VIII of the revised Constitution of Virginia forbids the appropriation of public funds to any school or institution of learning not owned or exclusively controlled by the State or a political subdivision, except that, subject to limitations imposed by the General Assembly, funds for educational purposes may be expended in furtherance of elementary, secondary, collegiate or graduate education in public and nonsectarian private schools and institutions of learning, and that localities may appropriate funds to nonsectarian schools of manual, industrial or technical training. Since the school in question is both private and sectarian, it does not fall within any of the exceptions set forth above. I am, therefore, of the opinion that the Board of Supervisors may not make financial contributions to such a school.

**BOARDS OF SUPERVISORS—Appropriations—School board budget may not be altered by.**

SCHOOLS—Board of Supervisors May Not Alter School Board Budget—Hospitalization benefits.

SCHOOLS—Hospitalization Benefits, if Included in Budget As Option to Pay Increase, Subject to Income Taxes.

TAXES—Hospitalization Benefits, if Included in Budget As Option to Pay Increase, Subject to Income Taxes.

April 21, 1972

THE HONORABLE JOSEPH M. KUCZKO
Commonwealth's Attorney for Wise County
This is in reply to your letter of April 6, 1972, in which you ask whether the Board of Supervisors may appropriate a 5.5% pay increase for the teachers with the option in each individual teacher to accept a major hospitalization insurance program in lieu of the salary increase.

Section 22-127 of the Code of Virginia (1950), as amended, provides, in part, that "Notwithstanding any other provision of law, the amount appropriated by the governing body for public schools shall relate to its total only or to such major classifications as may be prescribed by the State Board of Education, and such funds shall be expended on order of the school board in accordance with said classifications." This section of the Code restricts governing bodies to approving the entire budget or major categories of expenses as prescribed by the State Board of Education. See opinions of the Attorney General to the Honorable Emory H. Crockett, Commonwealth's Attorney for Lee County, dated May 13, 1968, found in the Report of the Attorney General (1967-1968), at p. 19; and to the Honorable John C. Cowan, Commonwealth's Attorney for King George County, dated April 21, 1972, found in the Report of the Attorney General (1971-1972), at p. ........ Teachers' salaries is a line item and not a major classification of expense prescribed by the State Board of Education. The Board of Supervisors may not in any way alter, amend or restrict the school board's budget proposal for teachers' salaries. Therefore, whether the teachers get a pay increase and/or an option for major hospitalization depends entirely upon the school board and, if the school board budget does not contain an option for hospitalization benefits, the Board of Supervisors is not empowered to place such an option in the appropriation made to the school board.

I am also of the opinion that the hospitalization program, if included in the school board budget as an option in lieu of the 5.5% pay increase, would be subject to federal and state income taxes.

BOARDS OF SUPERVISORS—Authority—May employ professional Fund Raiser to repair Court House.

BOARDS OF SUPERVISORS—Court House—May employ professional Fund Raiser to repair.

August 23, 1971

THE HONORABLE E. C. WESTERMAN, JR. Commonwealth's Attorney for Botetourt County

This is in reply to your recent letter in which you indicate that the Board of Supervisors of Botetourt County desires to employ a professional fund raiser for the purpose of raising funds for the restoration of the Botetourt County Court House which burned. You ask the following questions:

"1. May the Board of Supervisors employ a professional fund raiser for this purpose.

"2. May the Board of Supervisors pay the professional fund raiser be paid directly to the Treasurer of Historic Fincastle, In-
tax fund of the county.

"3. May all funds that are collected by the professional fund raiser be paid directly to the Treasurer of Historic Fincastle, In-
corporated, provided she gives bond with corporate surety."

Section 15.1-257 of the Code requires the governing body of the county to provide a court house with suitable space and facilities to accommodate the various courts of record and officials thereof serving the county. The costs of keeping the same in good order shall be chargeable to the county. I am of the opinion that this section is sufficient authority for the county to employ a professional fund raiser to obtain funds to keep the court
house in good order. I am therefore of the opinion that your questions (1) and (2) are answered in the affirmative.

In answer to your question numbered (3), I am of the opinion that any funds which are collected by the professional fund raiser to restore the court house should be paid directly into the county treasury.

BOARDS OF SUPERVISORS—Authority—May loan money to an authority the governing body created.

THE HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

March 28, 1972

This is in reply to your recent letter in which you ask if § 15.1-511.1 of the Code of Virginia (1950), as amended, authorizes the board of supervisors of a county to loan money to a sanitary authority.

Section 15.1-511.1 of the Code reads:

“The governing body of any county in this State may give, lend or advance in any manner that to it may deem proper funds or other county property, not otherwise specifically allocated or obligated, to any authority created by such governing body pursuant to law.”

Under this provision the board may give, lend or advance money not otherwise specifically allocated or obligated, to a sanitation authority, provided the governing body created the authority. Section 15.1-1241 of the Code authorizes the board as the governing body to create such an authority.

Insofar as the opinion to the Honorable Edward McC. Williams, dated December 16, 1970, may be qualified by this letter, the former is superseded. That opinion is found in Report of the Attorney General (1970-1971), p. 24.

BOARDS OF SUPERVISORS—Authority—May regulate CATV systems—May not grant exclusive licenses unless expressly authorized—Expressly authorized to grant exclusive license to trash collectors—May grant exclusive licenses to persons in business of trash collectors.

COMMUNITY ANTENNA TELEVISION SYSTEMS—Boards of Supervisors May Regulate—Board may not grant exclusive licenses unless expressly authorized to do so.

GARBAGE AND TRASH—Pickup and Disposal of Garbage, Trash or Refuse—County may regulate business of as to service area, number of persons engaged in, rates charged.

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

January 5, 1972

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

“Recently, cable television operators have been inquiring as to the requirements of the County for them to obtain a license to operate in certain areas. The Board of Supervisors of the County of Augusta is inclined to grant licenses to the cable television operators but in doing so, they wish to define the area in which they can operate and also to issue exclusive licenses. We are, of course, aware of Section 15.1-23.1 of the Code which does give the counties the power to license cable television operators and the fact that that section of the Code permits the counties to regulate the operations. Our
question is whether or not the Board of Supervisors, either by ordinance or by regulation can define the area of operation and make that area exclusive as to the licensee."

Section 15.1-23.1 of the Code of Virginia (1950), as amended, to which you refer, provides:

"(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."

This authorizes the board of supervisors, by ordinance, to regulate community antenna television systems. I am of the opinion that under this authority the board may define the area of operation of a system. The authority to license and regulate an activity does not confer the power to grant an exclusive license. 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.

You next state:

"We have a similar question as regards the licensing of collectors of trash in Augusta County. Augusta County has a land-fill operation which was commenced this past summer, and is now formulating plans for the collection of trash suitable for land-fill operations. The County wishes to grant licenses to trash collectors, giving to each of them an exclusive territory and define their respective territories. My question is whether or not the County has the power to do this."

Section 15.1-28.1 of the Code, expressly authorizes the board of supervisors, by ordinance, to delineate the service areas for collectors of trash, to limit the number of persons engaged in this service, and to regulate the rates of charge for such service. The section reads:

"§ 15.1-28.1. The governing body of any county, city or town in this State may, by ordinance, impose license taxes upon and otherwise regulate the services rendered by any business engaged in the pickup and disposal of garbage, trash or refuse, wherein service will be provided to the residents of any such county, city or town. Such regulation may include the delineation of service areas, the limitation of the number of persons engaged in such service in any such service area, and the regulation of rates of charge for such service."

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BOARDS OF SUPERVISORS—Governor May Designate Member as Director of Civil Defense.

May 8, 1972

THE HONORABLE BENJAMIN F. SUTHERLAND
Commonwealth's Attorney for Dickenson County

This is in reply to your letter of recent date in which you ask my opinion whether a member of the board of supervisors may continue to serve as director of civil defense of Dickenson County in view of the provisions of § 15.1-50, Code of Virginia (1950), as amended, and the opinion of this office found in Report of the Attorney General (1970-1971), p. 33.
The cited opinion to which you refer concluded that the board's election of one of its members as local civil defense director would be violative of §15.1-50 of the Code. Section 44-145(3), a general statute, authorizes the Governor, by executive order, to select the local director of civil defense. Should the Governor, by executive order, designate a member of the board as local director of civil defense, he may continue to serve in that capacity. Provided the Governor does not issue an executive order to the contrary, §15.1-50 prohibits a member of the board from serving as civil defense director. This section provides that, if any person while holding the office of supervisor shall be elected to any other office, his qualification in such office shall vacate his office as supervisor.

BOARDS OF SUPERVISORS—Highland County Expressly Authorized to Prohibit Fishing There on Sunday.

COUNTIES—Highland County Expressly Authorized to Prohibit Fishing There on Sunday.

May 19, 1972

THE HONORABLE R. TURNER JONES
Commonwealth's Attorney of Highland County

This will acknowledge receipt of your letter of May 9, 1972, requesting my opinion on whether or not the Board of Supervisors of Highland County has the authority to regulate fishing hours on Sunday. Specifically, your letter states, in part, as follows:

"My question is whether the Board of Supervisors has any authority to regulate the fishing hours on Sunday. In the Opinions of the Attorney General 1933-34, page 23, an opinion was given that the Boards of Supervisors have no power to forbid fishing on Sunday. I would like to inquire whether or not the powers of the Board in this regard have been changed in any way since that opinion."

The opinion to which you refer is, by its express terms, "confined only to counties in which the powers of the boards of supervisors are controlled by the general laws of the State," and does not "undertake to deal with any special powers upon the boards of supervisors in any particular county." Report of the Attorney General (1933-1934), p. 23-24. In this regard, I call your attention to Chapter 12, Acts of Assembly, 1930, which provides as follows:

"Be it enacted by the General Assembly of Virginia, That the boards of supervisors of the counties of Highland, Craig, Rockbridge and Bath be, and are hereby, respectively, authorized and empowered to pass ordinances prohibiting fishing in said counties, or either of them, on Sunday."

Insofar as I am able to ascertain, the foregoing Act of Assembly has not been repealed.

Accordingly, while the principle expressed in the above-cited opinion of this office remains extant as a matter of general law, I am of the opinion that it is not controlling in this case. Pursuant to Chapter 12, Acts of Assembly, 1930, the Board of Supervisors of Highland County is expressly authorized to prohibit fishing in Highland County on Sunday.
BOARDS OF SUPERVISORS—May Appoint Member from Special School District in Addition to Members of County School Board Authorized by § 22-61.

SCHOOLS—School Boards—Representation of special town school districts on county school board.

THE HONORABLE WESCOtt B. NORTHAM
Commonwealth's Attorney for Accomack County

This is in reply to your recent letter in which you inquire whether the board of supervisors has authority to authorize the appointment of two at-large members to the school board in addition to the member from the special school district of Onancock, or whether the member from Onancock constitutes one of the members at-large.

Authorization for the board of supervisors to appoint two at-large members of the school board is contained in § 22-61, Code of Virginia (1950), as amended, which provides that, with the exception of the at-large members, school board members shall be appointed from each district in the county from which a member of the board of supervisors is appointed. Although the 1971 amendment to § 22-61 correlated school districts to election districts, the General Assembly also amended § 22-43 at its 1971 Extra Session to provide that “[S]pecial town school districts which now exist for the purposes of representation on division school boards shall continue.”

I am of the opinion that the effect of the 1971 amendment to § 22-43 was to continue the right of special school districts, for representation purposes, to representation on the county school board and that the member appointed from the special school district is in addition to those members of the county school board authorized by § 22-61. See opinion of the Attorney General to the Honorable E. Garnett Mercer, Jr., Commonwealth's Attorney for Lancaster County, dated September 22, 1971, and found in the Report of the Attorney General (1971-1972), at page 354.

BOARDS OF SUPERVISORS—May Appropriate Public Funds for Creation and Operation of Public Service Authority and Industrial Development Authority.

ORDINANCES—Public Service Authority and Industrial Development Authority; Board of Supervisors May Appropriate Public Funds for Creation and Operation of.

PUBLIC FUNDS—Boards of Supervisors May Appropriate for Creation and Operation of Public Service Authority and Industrial Development Authority.

THE HONORABLE ROBERT L. POWELL
Commonwealth's Attorney of Giles County

I am in receipt of your recent inquiry which reads as follows:

"The Board of Supervisors of Giles County is considering adopting ordinances to create a Public Service Authority, as provided by the Virginia Water and Sewer Authorities Act and an Industrial Development Authority, as provided by the Industrial Development and Revenue Bond Act.

"Can the Board appropriate public funds for the organization or operation of the Authorities?"

Chapter 28 of Title 15.1 of the Code of Virginia (1950), as amended, would be applicable to your inquiry as it relates to the Public Service...
Authority authorized by the Virginia Water and Sewer Authorities Act. Pursuant to § 15.1-1250 (h1) any political subdivision, including a county, [see § 15.1-1240 (e)] which is a member of an authority "may lend, advance or give money to such authority; ...". Additionally, pursuant to § 15.1-1269:

"Each county, municipality and other public body is hereby authorized and empowered:

(a) To convey or lease to any authority created hereunder, with or without consideration, any water system or any facilities for the collection, treatment or disposal of sewage or any right or interest in such facilities or any property appertaining thereto, upon such terms and conditions as the governing body thereof shall determine to be for the best interest of such county, municipality or other public body; ..."

I am therefore of the opinion that the board can appropriate public funds for the organization and operation of a public service authority.

As regards the appropriation of funds by the board to the Industrial Development Authority, Chapter 33 of Title 15.1 would be applicable. The board pursuant to this chapter has authority to appropriate funds for the acquisition of a facility site for an Industrial Development Authority. I refer you to § 15.1-1388 which reads as follows:

"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."

I am therefore of the opinion that the board, which by § 15.1-1374 (b) of the Code is included in the term municipality, may appropriate public funds for the acquisition of a facility site for an Industrial Development Authority. Section 15.1-10.1 of the Code authorizes the county to appropriate funds out of the general levy for industrial development not exceeding a sum of one percentum of its annual revenues, from all sources. The board, therefore, under this section may appropriate public funds for the organization and operation of an Industrial Development Authority.

BOARDS OF SUPERVISORS—Member—Conflict of interest—May not write bond for constitution officers where owns substantial interest in insurance agency.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibits Insurance Agency From Writing Bonds for Constitutional Officers Where Member of Board of Supervisors Has Substantial Financial Interest in Agency.

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

In your recent letter you inquire whether the provisions of the Virginia Conflict of Interests Act would prohibit an insurance agency from writing the bonds for certain constitutional officers where a substantial financial interest in that agency is held by a member of the board of supervisors.

The Virginia Conflict of Interests Act, § 2.1-349 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:
“(a) No officer or employee of any governmental agency shall:

“(1) Be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that any such contract or subcontract is let after competitive bidding or by negotiation shall be irrelevant; . . .”

It is clear from the provisions of this section that in the situation you describe, a conflict of interest would exist were the agency in question to write bonds for the county. Even though the placing of the bond contract is done by the individual constitutional officer, the ultimate decision to approve funds for payment of the premium in each case is made by the Board of Supervisors. Approval of such contracts by the board would therefore make the individual supervisor in question a contractor with his own agency. This conclusion is not affected by the provisions of § 2.1-349(a)(3), which deals with situations in which the officer or employee of a governmental agency may be a purchaser of goods or services from the governmental agency.

BOARDS OF SUPERVISORS—Members—Bonds—Conditions under which schedule bond permitted.

BONDS—Public Officers—Boards of Supervisors—Schedule bond permitted.

January 19, 1972

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

This is in reply to your letter of January 7, 1972, which reads as follows:

“I would appreciate your opinion in the interpretation of Section 15.1-41 dealing with bonds of members of the Board of Supervisors. I am advised that at the previous term of the Board of Supervisors they furnished a ‘schedule bond’, which was one bond, but listed each member of the Board of Supervisors. On their qualification this year they were advised by their bonding company, according to attached letter, that a schedule bond would be improper and it was necessary to have each individual supervisor bonded with corporate surety.

“If a schedule bond can be written the cost to Prince Edward County for all of the supervisors would amount to approximately $99.00, while if individual bonds be written the cost would be $36.00 per supervisor for the four year term or a total of $288.00. “Your advice as to whether or not a schedule bond would be proper in this case would be appreciated.”

Section 15.1-41, Code of Virginia (1950), as amended, reads as follows:

“Every county treasurer, sheriff of a county or a city, county clerk, clerk of a city court, clerk of a circuit court, commissioner of the revenue, superintendent of the poor, county surveyor and supervisor shall, at the time he qualifies, give such bond as is required by § 49-12. The penalty of the bond of each officer shall be determined by the court, judge or clerk before whom he qualifies, within the limits prescribed in § 15.1-42. Subject to the provisions of §§ 15.1-43 and 15.1-45, the board of supervisors of any county or the council of any city or town in this State may pay the costs of the premium of the surety on such bond when the surety is a surety or guaranty company. Notwithstanding the foregoing provisions of this section, no bond shall be required of a member of the governing body of
a county in which such members do not handle county funds if the judge of the circuit court of the county, or if there be more than one, the senior judge, so provides by order entered of record.”

Section 49-12 of the Code reads:

“Every bond required by law to be taken or approved by or given before any court, board or officer, unless otherwise provided, shall be made payable to the Commonwealth of Virginia, with surety deemed sufficient by such court, board or officer. Every such bond required of any person appointed to or undertaking any office, post or trust, and every bond required to be taken of any person by an order or decree of court, unless otherwise provided, shall be with condition for the faithful discharge by him of the duties of his office post or trust. When such bond is required to be taken or approved by or before the Governor, a court or the clerk of a court, it shall be proved or acknowledged before the Governor or court or clerk, as the case may be, and recorded by the Secretary of the Commonwealth in the first case, or by the clerk of the court in the other cases. When the bond is taken under an order or decree in a pending cause a certified copy thereof shall be filed in the cause by the clerk and charged as costs therein, and upon his failure to file such copy, he shall be fined ten dollars. Every such bond shall contain, as to the respective obligors, such a waiver as is provided for in § 34-22. In any such bond the liability of the surety or sureties may be limited to such sum or sums as they may respectively require.”

The faithful performance bond of each member of the board of supervisors must be in an amount to be determined by the court, judge or clerk before whom he qualifies. In order to qualify the member must appear and take the oath of office and present the bond to the clerk for recordation. Provided each member appears before the court, judge or clerk to qualify, with the bond or a copy thereof, then, and only then, would a schedule bond for the members meet the requirements of the aforesaid sections.

BOARDS OF SUPERVISORS—Members—May be U.S. government employee by § 2.1-33(15).

October 14, 1971

THE HONORABLE SAM L. HARDY
Commonwealth's Attorney of Bland County

In your letter of October 8, 1971, you inquire whether an agriculture teacher at Bland County High School, whose salary is paid in part by the Federal government, would be eligible to serve as a member of the Board of Supervisors of Bland County.

I have previously ruled in an opinion to the Honorable Robert E. Brown, Commonwealth's Attorney for King George County, dated July 23, 1971, a copy of which is attached, that § 2.1-33(15) of the Code of Virginia, (1950), as amended, removed any disability of a United States Government employee, who is otherwise eligible, from serving as a member of a county board of supervisors. This opinion would apply equally to an agriculture teacher whose salary is paid in part by the Federal government.

Although it is therefore proper under Virginia law for such an employee to serve on a county board of supervisors, I might point out that the provisions of the Hatch Act might prevent such employee from partisan political activity which would include candidacy for office on behalf of a recognized political party.
BOARDS OF SUPERVISORS—Members—Office vacated upon failure to qualify.

BOARDS OF SUPERVISORS—Members—How vacancies in office filled.

March 2, 1972

The Honorable Sam L. Hardy
Commonwealth's Attorney for Bland County

This is in reply to your recent letter in which you state that three members of the Board of Supervisors of Bland County, William Ray Davis, Charles G. Waddell and Harold F. Morehead, failed to qualify and give bond on or before January 1, 1972, the day their terms began. On January 24, 1972, Judge Vincent L. Sexton, Jr., Judge of the Twenty-second Judicial Circuit, entered an order filling these vacancies until such time as an election may be held by the voters of Bland County. You ask if these appointments were proper.

Section 15.1-38, Code of Virginia (1950), as amended, provides:

"Every county and district officer elected by the people, every city and town officer, unless otherwise provided by law, and every county surveyor and superintendent of the poor appointed for a term shall, on or before the day on which his term of office begins, qualify by taking the oath prescribed by § 49-1 and give the bond, if any, required by law, before the circuit court of the county or corporation court of the city, having jurisdiction in the county, district, town, or city for which he is elected or appointed, or before the judge of the circuit or corporation court of such county or city in vacation, or before the clerk of the circuit or corporation court of such county or city in his office."

Section 15.1-40 provides:

"If any such officer fails to qualify and give bond, as required by the preceding section (§ 15.1-39), on or before the day on which his term begins, his office shall be deemed vacant; provided that if such officer at the time of his election is a member of the armed forces of the United States, in active service in the present war, he may qualify and give bond within sixty days after the end of the war in which he may be serving, or within sixty days after his discharge and return to civil life, whichever may last occur."

From the facts stated it is clear that vacancies existed in the offices of the three members who failed to qualify. Section 24.1-76 of the Code provides for the filling of these vacancies. It reads:

"When a vacancy occurs in any county, city, town or district office and no other provision is made for filling the same, it shall be filled by the resident judges of the courts of record of the county or city in which it occurs. If there be more than one resident judge and a majority of such judges cannot agree, then the senior judge shall make the appointment subject to the approval of other such judge or judges. If there be no resident judges, then the judge of the court of record shall make the appointment. When a vacancy occurs, if there be a deputy in the office, then the chief or senior deputy thereof shall perform all the duties of such office until the qualification of the person appointed to fill the vacancy."

"When any such vacancy shall occur, the court shall issue a writ of election to fill such vacancy. Such election shall be held at the next ensuing general election. The officer so elected shall hold the office for the unexpired term of his regularly elected predecessor in office. The person so appointed to fill the vacancy shall hold office until the qualified voters shall fill the same by election and the per-
son so elected shall have qualified. In the event the vacancy occurs within one hundred twenty days prior to the next ensuing general election, the writ of election shall issue for an election to fill the vacancy at the second ensuing general election.”

A constitutional limitation on the appointive powers of judges is found in Article VI, Section 12, of the Constitution. This reads:

“No judge shall be granted the power to make any appointment of any local governmental official elected by the voters except to fill a vacancy in office pending the next ensuing general election or, if the vacancy occurs within one hundred twenty days prior to such election, pending the second ensuing general election.”

The next ensuing general election in Bland County will be in November, more than one hundred twenty days from January 24, 1972.

In view of the foregoing, I am of the opinion that the vacancies existed and that they were properly filled. The members appointed to fill the vacancies will hold office until the qualified voters shall fill the vacancies in November and the persons so elected have qualified.

BOARDS OF SUPERVISORS—Name of Each Member Voting and How He Voted Must Be Recorded on Final Vote on All Ordinances and Resolutions.

CONSTITUTION—Name of Each Member of Board of Supervisors Voting and How He Voted Must Be Recorded on Final Vote on All Ordinances and Resolutions.

ORDINANCES—Name of Each Member of Board of Supervisors Voting and How He Voted Must Be Recorded on Final Vote on All Ordinances and Resolutions.

February 26, 1972

THE HONORABLE W. L. PERSON, JR.
Commonwealth's Attorney for James City County

I am in receipt of your letter of February 24, 1972, which reads:

“In view of the last sentence of Article 7, Section 7 of the Constitution of Virginia, I would appreciate your opinion as to whether on final vote of the Board of Supervisors on any ordinance or resolution the name of each member voting and how he voted should be recorded.”

Article VII, Section 7, of the revised Constitution of Virginia provides as follows:

“No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body. In case of the veto of such an ordinance or resolution, where the power of veto exists, it shall require for passage thereafter a recorded affirmative vote of two-thirds of all members elected to the governing body.

“On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded.”

The commentaries from the Report of the Commission on Constitutional Revision, in discussing this above provision, especially the second paragraph thereof, stated:

“The second paragraph is new. It requires the recording of names of members of a governing body and how they voted on any final
action taken by the governing body. It is similar to such a provision in section 10 of the proposed Legislative article, applicable to the General Assembly."

In view of the commentaries, I am of the opinion that your inquiry is answered in the affirmative. The name of each member voting and how he voted must be recorded, on final vote, for all ordinances and resolutions, whether passed or not, and not just ordinances or resolutions appropriating money exceeding the sum of $500.00, imposing taxes, or authorizing the borrowing of money.

**BOARDS OF SUPERVISORS—No Authority to Impose Conditions on Recordation of Deeds Not Specified in Code.**

**ORDINANCES—Board of Supervisors Has No Authority to Impose Conditions on Recordation of Deeds Not Specified in Code.**

**CLERKS—Recordation of Deeds; Board of Supervisors May Not Impose Restrictions on.**

April 6, 1972

**THE HONORABLE HERBERT N. MORGAN**
Member, House of Delegates

In your letter of March 21, 1972, you inquire whether the Board of Supervisors of Fairfax County has the authority to enact an ordinance which would impose certain duties on persons preparing deeds for recordation in Fairfax County and on the Clerk of the Circuit Court of Fairfax County with reference to accepting such deeds for recordation and the indexing, copying and filing thereof. The ordinances in question read as follows:

"It shall be the obligation of every person who prepares or supervises the preparation of any deed, mortgage, deed of trust or other instrument affecting title to or any interest in land, which is presented to the Clerk of Courts for Fairfax County for recording to omit or delete from such instrument any provision which purports to restrict or affect on the basis of race, color, religion, ancestry or national origin, the holding, occupancy or transfer of any interest in land; and to omit or delete any such provision from any report or abstract of title prepared or furnished by him (or, with his knowledge, by any business or professional associate of his) and pertaining to any land located in Fairfax County; provided, however, that if any such provision is incorporated by reference to another instrument, the person who prepares or supervises the preparation of the deed, mortgage, deed of trust or other instrument affecting title to or any interest in land shall be responsible for including therein, prior to its being presented to said Clerk for recording, a declaration that if said land is subject to any provision of any other instrument which purports to restrict or affect, on the basis of race, color, religion, ancestry or national origin, the holding, occupancy or transfer thereof, such provision is wholly invalid for any purpose.

"No deed, mortgage, deed of trust or other instrument affecting title to or any interest in land, or any declaration of covenants, shall be presented to the said Clerk for recording unless there is a certification thereon by the person who prepared or supervised the preparation of the instrument that said instrument contains no provision which purports to restrict or affect on the basis of race, color, religion, ancestry or national origin, the holding, occupancy or transfer of any interest in land.

"The said Clerk shall not comply with any request to copy any
deed, mortgage, deed of trust or other instrument affecting title to
or any interest in land, or declaration of covenants, filed or recorded
in his office, unless he imprints on or affixes to such copy a clear
and conspicuous statement that any provision therein which purports
to restrict or affect, on the basis of race, color, religion, ancestry
or national origin, the holding, occupancy or transfer of any interest
in land is wholly invalid for any purpose.

"The said Clerk shall cause to be imprinted on or affixed to every
liber volume in his custody in which instruments relating to the
holding, occupancy or transfer of land are recorded a notice stating
that any provision contained in any instrument therein which pur-
ports to restrict or affect on the basis of race, color, religion, ancestry
or national origin, the holding, occupancy or transfer of any interest
in land is wholly invalid for any purpose.

"These amendments shall be effective on and after May 1, 1972."

Since all of the provisions of this ordinance deal with deeds presented to
the clerk for recordation, the question is whether the county is authorized
by State law to impose conditions on the recordation of deeds which are
not specifically provided for in the Code of Virginia.

Section 15.1-40.1 of the Code of Virginia (1950), as amended, provides
that the duties of clerks shall be prescribed by general law or special act.
This means, of course, that only the General Assembly may fix the general
duties of clerks of court, but it may delegate that authority to local govern-
ments in specific instances.

I call your attention to an opinion of this office rendered to the Honorable
John Alexander, Commonwealth's Attorney for Fauquier County, on Decem-
ber 5, 1968, which is found in the Report of the Attorney General, (1968-
1969), p. 35, a copy of which is attached, in which it was pointed out that
§ 55-106 of the Code requires the clerk to admit to record any writing as
to any person whose name is signed thereto when properly acknowledged,
except when it is otherwise provided. One such exception, as noted in that
opinion, is the adoption of a subdivision ordinance in accordance with the
provisions of Article 7, Chapter 11, of Title 15.1 of the Code.

I find, however, no such exception which would permit a county or city
to impose on its clerk the restrictions contained in your letter. I note further
that even the statutory provisions which become effective after the adoption
of a subdivision ordinance, which are contained in § 15.1-473 of the Code,
provide that although a plat may not be recorded which does not meet the
requirements of the ordinance and of that section, nothing contained therein
is to prevent the recordation of a deed transferring land found on the plat.
It is my opinion, therefore, that Fairfax County does not have the authority
to impose the restrictions on recordation of deeds contained in your letter.

Although the ordinance also purports to impose duties on individuals who
prepare deeds for recordation in Fairfax County, it should be obvious from
the foregoing that such requirements would be unenforceable since the
clerk cannot refuse to accept a deed otherwise in proper form which does
not contain the certification prescribed in the ordinance. As to the ordi-
nance's bar of restrictions in deeds based on race, religion, etc., such re-
strictions even if contained in a deed are, of course, unenforceable as a

BOARDS OF SUPERVISORS—No Authority to Set Retirement Age for
Sheriff's Deputies.

SHERIFFS—Board of Supervisors Has No Control Over Deputies.
REPORT OF THE ATTORNEY GENERAL

April 21, 1972

THE HONORABLE O. S. FOSTER
Sheriff of Roanoke County

This is in reply to your letter of April 5, 1972, in which you ask:

"Does a Board of Supervisors have the authority to set a retirement age for deputies employed under Section 15.1-48?"

Under Article VII, Section 4, of the Virginia Constitution, the sheriff is elected by the people and his term is fixed at four years. Section 15.1-48, Code of Virginia (1950), as amended, is the general statute which authorizes a sheriff to appoint his deputies. I am aware of no statute giving the Board of Supervisors control over your deputies or authorizing the Board to set a retirement age for deputies employed by you. I therefore answer your question in the negative.

BOARDS OF SUPERVISORS—Notice Under § 22-62 Not Necessary in Appointing School Board Member Under § 22-79.3.

COUNTIES—Boards of Supervisors—Notice under § 22-62 not necessary in appointing school board member under § 22-79.3.

SCHOOLS—Boards of Supervisors—Notice under § 22-62 not necessary in appointing school board member under § 22-79.3.

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

I am in receipt of your letter of November 2, 1971, in which you inquire whether a board of supervisors appointing school board members pursuant to § 22-79.3 of the Code of Virginia, must comply with the notice provisions contained in § 22-62 of the Code of Virginia.

Section 22-79.1 of the Code of Virginia provides in part that "notwithstanding the provisions contained in article 2 (§ 22-59, et seq.) of this chapter, county school boards may be selected in the manner provided hereinafter. . . ."

Section 22-79.3 of the Code of Virginia provides that when school board members are selected in the newly authorized manner "appointments of school board members shall be made at public meetings."

Section 22-62 of the Code of Virginia is found in article 2 which was mentioned in § 22-79.1 of the Code and provides in part that "before any appointment is made by the school trustee electoral board it 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."

I am of the opinion that a board of supervisors appointing a school board member pursuant to § 22-79.3 of the Code need not comply with the notice provision contained in § 22-62 of the Code. Section 22-79.1, the first provision in Article 2.1 of Title 22, provides that the procedure for appointing new members shall be "in the manner provided hereinafter." Nowhere in Article 2.1 is reference made to the necessity for giving notice.

The appointment of school board members by a board of supervisors is analogous of appointment of school board members by a city council. Section 22-89 of the Code governing appointments in the latter case does not provide for notice.

Section 22-62 of the Code is limited to appointment made by the school trustee electoral board. It was not expanded when Article 2.1 was enacted.
and it is not applicable to appointments made by city councils pursuant to § 22-89 of the Code.

BOARDS OF SUPERVISORS—Ordinance Prohibiting Carrying Loaded Firearms on Highway—No authority to enact.

COUNTIES, CITIES AND TOWNS—Ordinances Paralleling State Statutes—Authorized only by express legislative grant.

ORDINANCES—Local Paralleling State Statute—Authorized only by express legislative grant.

April 21, 1972

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

You have requested an opinion as to the validity of an ordinance adopted by the Board of King William County. The pertinent portion of the ordinance is set forth below.

"That no person shall have in his or her possession or under his or her control, or have in any vehicle in which he or she may be in charge or have in control, any loaded shot gun, rifle or other firearms, while he, she or said vehicle is upon any public road in King William County, Virginia, or while either is unlawfully upon the land of another, provided that such officers and other persons as shall have special power or authority to enforce the laws of Virginia shall be excepted; and, provided further that such persons who shall be able to show at the time apprehended that his or her possession of the loaded firearms was required or reasonably necessary under the then appearing circumstances, for the protection of his or her person or family from bodily injury or his or her property from serious damage by another shall also be excepted."

Section 18.1-272, Code of Virginia (1950), as amended, prohibits the carrying of loaded firearms under specific conditions on public highways in certain counties. This statute was originally enacted by Chapter 506 of the Acts of Assembly 1950, and was applicable only in counties having a population in excess of 4,000 and not in excess of 4,500. This statute has subsequently been amended and reenacted on four occasions, and in each instance the prohibition has applied to counties having a specific range of population. See Chapter 453, Acts of 1952; Chapter 619, Acts of 1958; Chapter 148, Acts of 1960; Chapter 701, Acts of 1968.

The history of this statute makes it manifest that the legislative intent is to prohibit the carrying of loaded firearms on public highways in certain counties only. The legislature has not deemed it advisable to apply the prohibition to the Commonwealth in general. I am advised that the 1970 census recorded the population of King William County as 7,497. This population figure does not fall within any of the population ranges provided for by § 18.1-272. Section 18.1-272 does not contain any enabling legislation permitting local governing bodies to enact parallel ordinances, and this office has previously ruled that a county may enact ordinances paralleling statutes only where there is express legislative grant of authority to do so. See Report of the Attorney General (1967-1968), p. 195. I am, therefore, of the opinion that the ordinance in question is invalid, insofar as it attempts to regulate firearms on public roads.

For your information, I am enclosing a copy of an opinion to the Honorable Horace T. Morrison, Commonwealth's Attorney for King George
REPORT OF THE ATTORNEY GENERAL


BOARDS OF SUPERVISORS—Referendum to Change Form of County Government—Language to be embodied in question.

COUNTIES—Change in Form of Government—Question to be posed on referendum.

THE HONORABLE EDGAR BACON
Member, House of Delegates

This is in reply to your letter of August 30, 1971, which reads as follows:

"On January 1, 1969, following a referendum held at the election in November, 1968, the County Board Form of Government provided for in Sections 15.1-699 to 15.1-721 of the Code of Virginia became effective in Lee County, Virginia.

"On August 25, 1971, at its regular meeting, the County Board of Supervisors for Lee County passed a resolution requesting a referendum on changing from the County Board Form of county organization and government to the form of organization and government which existed in Lee County prior to January 1, 1969.

"Since Section 15.1-721 was amended by the 1971 Special Session of the Assembly, and since Article VII of the Constitution changed, the posing of the question to be placed on the ballot for the coming election is a matter that is not specifically set forth in the Code as it was prior to the changes. Thus, I would appreciate your advising me the proper form of the question to be placed upon the ballot to accomplish the posing of the proper question to the voters in the referendum to be held on November 2, 1971."

I am of the opinion that the form of the question to be placed upon the ballot in the referendum to be held on November 2, 1971, should read as follows:

"Do you approve changing the organization and government of the county from the County Board Form to the traditional form of county government and organization prescribed by Article VII of the Constitution of Virginia and the general law of the State?  
☐ Yes  
☐ No"

BOARDS OF SUPERVISORS—Salaries—Increases allowable under existing wage controls.

SALARIES—Boards of Supervisors—Increases allowable under existing wage contracts.

THE HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney of Floyd County

In your letter of November 24, 1971, you inquire whether salaries of a member of a county board of supervisors may be increased in accordance with existing wage controls, and, if so, to what extent such increases may be permitted.

At this time, annual increases of 5.5% are permitted by the Pay Board. This 5.5% figure does not apply to each individual employee, however, but
REPORT OF THE ATTORNEY GENERAL

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to the average increase to be granted to an appropriate employee unit. "Appropriate employee unit" is defined as a group composed of all employees in a recognized employee category, such as all teachers in a school system, all laborers on a highway project, etc. In the instance you pose, of course, the appropriate employee unit would be the board of supervisors itself.

I should point out further that any and all fringe benefits such as increased insurance programs or paid vacations must be counted toward the 5.5% standard. This subject obviously has too many possibilities to be detailed here, but should be kept in consideration when planning any salary increase.

BOARDS OF SUPERVISORS—Tie Breaker May Break Any Deadlock at Same Meeting.

BOARDS OF SUPERVISORS—Tie Vote of Board When All Members Not Present, Question Passed By Until First Meeting All Members Present.

BOARDS OF SUPERVISORS—Tie Breaker Notified by Clerk.

BOARDS OF SUPERVISORS—Treasurer Has No Authority to Pay County Bills Unless Authorized by Board.

CLERKS—Tie Breaker Notified by.

COUNTIES—Treasurer Has No Authority to Pay County Bills Unless Authorized by Board of Supervisors.

TREASURERS—No Authority to Pay County Bills Unless Authorized by Board of Supervisors.

February 23, 1972

THE HONORABLE JOHN C. BUCHANAN
Member, The Senate

This is in reply to your letter of February 9, 1972, in which you ask several questions concerning the Board of Supervisors of Dickenson County, which reads in part as follows:

"One member of the Board has been absent because of illness since September, 1971, and is still hospitalized. The Board has been unable to organize because of a two to two division of the four other members.

"An official tie breaker has been appointed but has not been present at a meeting.

"The functioning four members of the Board met on February 4, 1972. The vote was two for and two against a motion to elect one of the members chairman.

"Then one of the members moved for adjournment to some future date. The vote was again two for and two against, after which the meeting broke up without agreement.

"Two of the members have presented a written request to the Clerk of Court, giving five days' notice, for a special called meeting to be held on February 10, 1972, at 9:00 a.m. for the purpose of organizing and for the conduct of all necessary business.

"The questions are:

"(1) Is the meeting of February 4, 1972, still legally in process?

"(2) Can the official tie breaker be called in to break the tie resulting from the February 4, 1972 deadlock, or any deadlock that may occur in a new meeting?

"(3) What procedure is used for calling in the tie breaker in such cases?"
REPORT OF THE ATTORNEY GENERAL

“(4) In case the Board is unable to organize, does the County Treasurer have authority to pay the county bills when due?”

I shall answer your questions seriatim:

(1) The meeting of February 4, 1972, was never legally adjourned. Section 15.1-540 provides that in any case in which there shall be a tie vote of the board upon any question when all the members are not present, the question shall be passed by until the first meeting at which all members are present when it shall again be voted upon. Where there was a tie vote on the question to adjourn, the resolution of that question must be deferred until the next first meeting. In the meantime the meeting of February 4, 1972, was never legally adjourned.

(2) The official tie breaker provided for by § 15.1-540 of the Code may be called in to break the tie resulting from the February 4, 1972, deadlock. The tie breaker may break any deadlock occurring at that same meeting inasmuch as § 15.1-540 provides that after a tie has occurred the tie breaker shall be considered a member of the board for the purpose of counting a quorum for the sole purpose of breaking the tie.

(3) By § 15.1-540 the clerk notifies the tie breaker designated by the Circuit Court of the county.

(4) Unless authorized by the board, the county treasurer has no authority to pay county bills. I refer you to an opinion to the Honorable Charles A. Reid, Treasurer of Greensville County, dated August 25, 1970, and found in the Report of the Attorney General (1970-1971), p. 403, for a discussion of this proposition.

BOARDs OF SUPERVISORS—Vote on Motions—Recording in minutes.

September 2, 1971

THE HONORABLE WILLIAM B. MCCLUNG
Acting Commonwealth's Attorney for Rockbridge County

This is in reply to your letter of August 26, 1971, in which you ask for an interpretation of Section 7, Article VII, of the Constitution of Virginia which reads in part as follows:

"On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded."

Your letter reads in part as follows:

"Whether or not the recorded vote of each individual member of the Board of Supervisors is necessary when a motion is either passed or rejected upon the unanimous action of the members of the Board at their regular meeting after there having been recorded in the Minutes of the Meeting the members that are present.

"The Board takes the position that on unanimous decisions after it has been recorded the members that are present and the members that are absent, that there is no question as to which members voted which way. This would certainly be a time saving device for the meetings rather than have each individual member that is present say that he either voted for or against a particular resolution.

"An example of what I am referring to would be the situation where a resolution was made, seconded, and then unanimously passed by the Board after a voice vote in which all the members responded affirmatively. Thus the record would show that all of those members, including the Chairman, who were present had voted for the particular action.

"Of course, on voice votes where there appeared one member of the Board who votes against a particular resolution, or there is a
majority and minority vote, it would certainly be the duty to have each member cast his vote."

The part of Section 7, Article VII, of the Constitution above quoted is new language. It requires the recording of the names of members of a governing body and how they voted on any final action taken by the governing body.

In applying this provision to your inquiry, I am of the opinion that the recorded vote of each individual member of the board is not necessary when a motion is either passed or rejected upon the unanimous action of the members at their regular meeting after there has been a recording in the minutes of the meeting of the members who are present. In such circumstances the names of the members and how they voted is recorded.

BONDS—Appeal—Must satisfy requirements of §§ 8-465 and 8-477 of the Code.

July 21, 1971

THE HONORABLE LEWIS A. McMURRAN, JR.
Member, House of Delegates

This is in reply to your recent letter in which you requested an interpretation of § 8-480.1 of the Code upon an assumption of the following facts:

"'X' Insurance Company insured 'N' under a regular standard automobile liability insurance policy with a limit of $25,000.00. 'A' brought action against 'N' for injuries sustained in an auto accident, which was defended by 'X' pursuant to its policy and a jury verdict was returned in the amount of $40,000.00. 'X' on behalf of 'N' wishes to appeal to the Supreme Court of Appeals but cannot, under the limits of its policy, post a bond for the principal amount of the judgment."

Your questions were:

"(1) May 'X' under Section 8-480.1 post either an appeal or supersedeas bond limited to the amount of its coverage of $25,000.00 that would have the practical effect of bonds provided for under Sections 8-465 and 8-477?

"(2) If the above is answered in the affirmative, and upon execution of such a bond would the proceedings be stayed against 'X' or against both 'X' and 'N'?

"(3) In what manner would 'X' (who was not a party to the original litigation) get the attention of the trial court—i.e. petition to intervene, etc.?

"(4) Assume that 'N' was unable to post a bond and 'X' posts a bond for its $25,000.00. Would this be a satisfactory bond for the purpose of perfecting an appeal assuming that a Writ of Error was granted?"

"'X' may not post a bond under § 8-480.1 in the amount of $25,000.00 which will fulfill the requirements of the bonds contemplated in § 8-465 and § 8-477. It has long been settled that the right of appeal in Virginia is statutory and the statutory prerequisites must be strictly observed; one of those prerequisites is the filing of bonds satisfying the requirements of §§ 8-465 and 8-477. The Covington Virginian v. Woods, 182 Va. 538 (1944). More fundamentally, the purposes for which § 8-480.1 was designed are opposed to the purposes of §§ 8-465 and 8-477. The latter two sections were enacted with the protection of the respondent or appellee foremost in mind. These bonds are clearly meant to insure that the respondent or appellee will not suffer damages due to an appeal being taken. Section 8-480.1, on the other hand, is designed foremost to protect a debtor of the petitioner
or appellant. By posting a bond pursuant to the provisions of § 8-401.1 the debtor is protected against actions by the respondent until the Supreme Court of Appeals has taken final action on the appeal.

The bond referred to in § 8-480.1 concerns a collateral matter to the appeal; the appeal itself is still governed by the bond requirements of §§ 8-465 and 8-477. Section 8-480.1 is simply a measure to protect the interests of a debtor in situations in which there is, or may be, an appeal; it does not disperse with the jurisdictional requirements of the appeal itself.

Your questions (1) and (4) are answered in the negative in which case your questions (2) and (3) would never arise and are therefore moot.

BONDS—Bail—Exemption of certain companies and agents from licensing.

THE HONORABLE ROBERT F. HORAN, JR.
Commonwealth's Attorney for City of Fairfax

July 7, 1971

This is in reply to your recent letter wherein you inquire concerning the effect of an amendment to § 58-371.2 of the Code of Virginia enacted 1970 Session of the Legislature. You state, in part:

"Prior to the 1970 Amendment, the referenced section exempted guaranty, indemnity, fidelity, and security companies and their agents from the filing provisions of the section unless they were in a city having a population of more than 70,000 and less than 95,000. The 1970 amendment, among other things, appears to remove the exemption of agents and attorneys in fact of guaranty, indemnity, fidelity and security companies entering into bonds for bail in criminal cases. It would be appreciated if you would give me an opinion as to whether or not my understanding is correct and whether at present all licensed agents in the business of providing bail bonds in criminal cases are now required to make the filings set forth in Section 58-371.2 . . ."'

Prior to the 1970 amendment, the portion of § 58-371.2 to which you refer read:

"Nothing in this section shall be construed to apply to guaranty, indemnity, fidelity and security companies doing business in Virginia under the provisions of §§ 38.1-269 to 38.1-657, except that in any city in this State having a population of more than seventy thousand and less than ninety-five thousand, the provisions of this section shall apply to agents and attorneys in fact of guaranty, indemnity, fidelity and security companies entering into bonds for bail, appearances, costs or appeal in such city, except that such company shall not be required to place cash or bonds in escrow with the court as hereinbefore required in other counties and cities."

The 1970 amendment added:

"or in any city in this State having a population of more than one hundred fourteen thousand and less than one hundred twenty thousand."

after the phrase "less than ninety-five thousand" and the portion beginning "the provisions of this section" was made an independent sentence.

It is my opinion that the General Assembly did not intend to change the meaning of this section and likewise did not remove the exemption explicit in this final paragraph of § 58-371.2 of the Code of Virginia, thus continuing the exemption of guaranty, indemnity, fidelity and security com-
panies and their agents from licensing except in the cities where the exemption does not apply.

BONDS—Debts—Interest on notes payable annually; taxes to be levied on principal payments.

THE HONORABLE WESCOFT B. NORTHAM
Commonwealth’s Attorney for Accomack County

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

"On October 15, 1958, the Accomack County School Board borrowed $475,550.00 from the Literary Fund to build a new high school in the Islands Magisterial District. This debt was evidenced by 30 bonds, one in the amount of $14,450.00, and the remaining 29 for $15,900.00, payable on October 15th of each year with the last bond to be paid in 1988. This debt is an obligation of the Islands Magisterial District. To date, 23 bonds have been paid, copy of bond No. 23 being enclosed; and, thus the County is ten years ahead of schedule in the payment of these bonds.

"The Board of Supervisors at its last meeting set the levy for the fiscal year 1971-1972 for the Islands Magisterial District at ten cents per $100.00 valuation which is not sufficient to pay a bond and interest, but will pay the interest.

"In view of Code of Virginia, Section 22-107.3, which provides in part, ‘Taxes on property in the magisterial districts served by such facilities shall be levied by the governing body of the county and collected for the purpose of repaying such loan. . .’ can Accomack County defer paying Bond No. 24 until the due date of October 15, 1982?"

Interest on the notes is payable annually and must be paid in accordance with the terms of the notes. Section 22-107.3, however, does no more than require taxes to be levied to pay the notes, when due. In my opinion, the county need make no principal payments until the next due date of a note, in this case, October 15, 1982.

BONDS—Industrial Development Authority and Revenue Bond Act—Bonds may not be issued by an industrial development authority for the construction of a race track.

THE HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

I have received your recent letter, asking whether the Chesapeake Industrial Development Authority could issue bonds for the construction of a race track and other related facilities.

The Authority was created pursuant to chapter 33 of Title 15.1 of the Code of Virginia. It is empowered to issue bonds, “for any of its purposes.” Va. Code § 15.1-1379. The purposes of the chapter are “to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises to locate in or remain in this Commonwealth and further the use of its agricultural products and natural resources. . .” Va. Code § 15.1-1375. “All bonds issued by the authority shall be payable solely from the revenues and receipts derived from the leasing or sale by the authority of its facilities or any part thereof. . .”
Section 15.1-1374 defines the terms underscored above:

"(d) . . . 'facilities' shall mean any or all medical (including, but not limited to, office and treatment facilities) and industrial facilities, located within or without or partially within or without the municipality creating the authority, now existing or hereafter acquired or constructed by the authority pursuant to the terms of this chapter, together with any or all buildings, improvements, additions, extension, replacements, appurtenances, lands, rights in land, water rights, franchises, machinery, equipment, furnishings, landscaping, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, acquired or constructed by the authority."

"(j) 'Enterprise' shall mean any industry for the manufacturing, processing, assembling, storing, warehousing, distributing, or selling any products of agriculture, mining, or industry and for research and development or scientific laboratories, including, but not limited to, the practice of medicine and all other activities related thereto or for such other businesses as will be in the furtherance of the public purposes of this chapter."

In my opinion a race track is neither a facility nor an enterprise within the above definitions. Bonds may not, in my opinion, be issued by an industrial development authority for the construction of a race track.

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BONDS—Recognizance—Person bonded or officer of the law may be surety.
PUBLIC OFFICERS—Person Bonded or Officer of the Law May Be Surety on Recognizance Bond.

May 8, 1972

THE HONORABLE LURA F. SEXTON
Justice of the Peace

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

"I am a Justice of the Peace in Dickenson County and I would like to have your opinion on a matter that has come up. I was told by several people that it was illegal for a person that was bonded to go on a recognizance bond. To give an example, would it be legal for a person who is an officer of the law and is under bond to go as surety on a recognizance bond."

I have been unable to find any rulings of this Office or any provisions of law which deal specifically with the question which you ask. However, § 58-371.2 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"No person shall be licensed hereunder either as a professional bondsman or agent for any professional bondsman, when such person, or his or her spouse, holds any office as Justice of the Peace, Magistrate, Clerk or Deputy Clerk of any court."

This section is not directly applicable to the question which you ask, and I can find nothing that would disqualify a person from being a surety on a recognizance bond merely because that person was himself bonded or an officer of the law.

The essential reason for the enactment of the provision quoted from § 58-371.2 was to prevent a conflict of interest which would exist between holding an office which requires an individual to set the amount of bail and
at the same time acting as surety on the bond of the accused. Since such a conflict would not exist in the situation you pose, it would be my opinion that it would be legal for a person who is himself bonded to serve as surety on a recognizance bond. However, I do not believe that it would be proper for an officer of the law to serve as a surety under such circumstances as he would be performing inconsistent functions.

BONDS—The Richmond-Petersburg Turnpike Authority—Resolution adopted by Board valid.

July 30, 1971

THE HONORABLE WILLIAM C. SCHERMERHORN, JR., Chairman
The Richmond-Petersburg Turnpike Authority

I have received your letter of July 21, asking whether the board of directors of the Richmond-Petersburg Turnpike Authority acted legally at its May 26, 1971 meeting in adopting the following resolution:

"RESOLVED That the proposal dated May 26, 1971, from the Virginia Investment Bankers Group to negotiate for the purchase and sale of the bonds of this Authority, be approved and accepted and that the Secretary-Treasurer, in the name of and on behalf of the Authority, be authorized to sign such proposal for the purpose of evidencing the acceptance thereof and deliver the same to Walter W. Craigie, Sr., as Chairman for the Virginia Investment Bankers Group."

The proposal referred to is a memorandum of understanding, the sole obligation of the Authority thereunder being "to negotiate in good faith with the Virginia Bankers for the sale and purchase of [certain proposed] 1971 bonds on the basis of [the Bankers'] offer."

There are presently six members of the board of directors, all of whom were present at the May 26 meeting. The resolution was adopted by a vote of four to two. I must assume that the meeting was duly called and that the By-laws of the Authority would permit such a resolution to be adopted by a four to two vote.

The only objection to the resolution was that there was no prior notice that the proposal would be submitted.

Virginia Code § 33.1-319 incorporates by reference Articles 11 and 11.1 of Chapter 3 of former Title 33 of the Code. Under those Articles the board was authorized, "to make and from time to time amend and repeal by-laws, rules and regulations not inconsistent with law to carry into effect the powers and purposes of the Authority."

Pursuant to this power, the board has adopted By-laws, paragraph 3 of article 3 of which provides:

"It shall not be necessary for the notice of any meeting to specify the purpose thereof or the matters to be considered at such meeting."

As it was not necessary for any notice to specify the subject matter to be considered at a meeting, the objection to the resolution was not, in my opinion, wellfounded. In my opinion, the action taken by the Board in adopting the resolution was valid.

BONDS OR NOTES—Marginal Release—Clerk need not record authorized agent; cannot incur liability for failure to do so.

November 18, 1971

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

I have received your letter of November 10, 1971, from which I quote:
"I have a copy of your opinion to the Honorable Katherine V. Respess, Clerk of Courts for City of Norfolk, dated November 4, 1971, in which you express the opinion that a simple notation made on the back or face of a note or bond and signed by the lien creditor appointing an agent of the lien creditor for the purpose of marginal release was appropriate.

"You further noted that it was not necessary for a Clerk to record the authority of an agent or attorney at law for this purpose.

"What is the liability of the Clerk, if at some future date, this release is challenged and there is nothing of record or on file in the Clerk's Office to support the authority of the agent making the release?"

The law requires the Clerk to faithfully discharge his duties. Section 15.1-42, Va. Code (1950). A Clerk who permits the procedures set forth in my opinion of November 4, 1971, to be utilized for marginal releases incurs no liability if a release is made by one who purports to be an "authorized agent, attorney or attorney in fact" of the creditor, but who, without the Clerk's knowledge, was not authorized to make such release. Since the Clerk need not record the authority of an agent or attorney at law to make the marginal release, he cannot incur liability for failure to do so.

BONDS OR NOTES—Marginal Release—May be made by authorized agent or attorney.

November 4, 1971

THE HONORABLE KATHERINE V. RESPESS
Clerk of Courts, City of Norfolk

I have received your letter of October 20, in which you ask whether the following procedures satisfy the requirements of Virginia Code § 55-66.3 for the marginal release of deeds of trust:

"1. All notes and bonds, whether the same are bearer or non-bearer, be marked 'PAID AND CANCELLED' and signed by the lien creditor; and

"2. Following the aforesaid notation, or at an appropriate place on the face or back of the note or bond, the following provision be placed on such note or bond, whether the same is bearer or non-bearer, and signed by the lien creditor:

'............................................. is hereby appointed agent of the undersigned lien creditor for the purpose of marginally releasing the deed of trust securing this note [bond].'

In my opinion, such a procedure is appropriate. Section 55-66.3 permits the marginal release to be made by, "the creditor or his duly authorized agent, attorney or attorney in fact..." It is not, in my opinion, necessary for a clerk to record the authority of an agent or an attorney-at-law.

CENTRAL CRIMINAL RECORDS EXCHANGE—Reports—Not required for arrest for violation of county or municipal ordinance.

CRIMINAL PROCEDURE—Police Not Required To Fingerprint and Photograph Persons Arrested and Charged With Violation of Municipal Ordinance Except Under Certain Circumstances.

POLICE OFFICERS—Not Required to Report Arrest for Violation of County or Municipal Ordinance to Central Criminal Records Exchange.
REPORT OF THE ATTORNEY GENERAL

October 7, 1971

THE HONORABLE JOHN C. COWAN
Acting Commonwealth’s Attorney for Stafford County

This is in response to your letter of recent date in which you pose several questions concerning the reporting of offenses to the Central Criminal Records Exchange under § 19.1-19.3, and the authority of police officers to fingerprint and photograph persons charged with violation of a county or municipal ordinance. I shall answer your questions seriatum.

"1. Do the police or other appropriate arresting officers, have a duty to make report to the Central Criminal Records Exchange and fingerprint and photograph a person charged with the violation of a county or municipal ordinance?"

The first part of your question dealing with the reporting of violations of county or municipal ordinances to the Central Criminal Records Exchange was the subject of a recent opinion to Colonel H. W. Burgess, Superintendent of the Department of State Police, dated March 31, 1971, a copy of which is enclosed. In that opinion it was ruled that warrants issued for violation of local ordinances need not be reported to the Central Criminal Records Exchange.

In the second part of your question you inquire whether arresting officers have a duty to fingerprint and photograph persons charged with violation of a county or municipal ordinance. The taking of fingerprints and photographs by police authorities is covered by §§ 19.1-19.6, 15.1-135 and 15.1-136 of the Code. Section 19.1-19.6 provides, in part, that fingerprints and photographs may be taken where the person arrested is charged with a felony or any misdemeanor which is to be reported to the Central Criminal Records Exchange. This section would not require the taking of fingerprints and photographs of persons arrested and charged with a violation of a county or municipal ordinance since such arrests need not be reported to the Central Criminal Records Exchange. However, § 15.1-135 provides that in certain jurisdictions, namely, cities having a population of more than 4,000 per square mile, or adjoining a city lying wholly within this State having a population of more than 200,000, or having a population of more than 240,000, the police authorities may take the fingerprints of any person arrested and charged with a misdemeanor, other than under Title 46.1, provided such person is taken into physical custody. Section 15.1-136 provides, in part, that the judge of a county or municipal court may require the duly constituted police officers of the county, city, or town within the territorial jurisdiction of such court to take the fingerprints and photographs of any person who has been arrested and charged with a misdemeanor other than a misdemeanor under Title 46.1.

In view of the foregoing, I am of the opinion that in those jurisdictions listed in § 15.1-135, fingerprints may be taken of persons arrested and charged with violation of a county or municipal ordinance if the person is physically taken into custody; and where the judge of a county or municipal court has acted pursuant to the provisions of § 15.1-136, fingerprints and photographs may be taken of persons arrested and charged with violation of a county or municipal ordinance.

"2. If the above is answered in the affirmative, would such only be the case where the municipal or county ordinance parallels Title 54 and Title 18.1 with the exceptions enumerated therein?"

The answer to this inquiry is set forth above.

"3. If the police or other appropriate arresting authorities do not in any case have the duty to report to the Central Criminal Records Exchange and fingerprint and photograph persons charged with
violations of county and municipal ordinances, do they nevertheless have the right to fingerprint and photograph such persons?"

This question has partially been answered in the answer to question number 1. In cases not covered by §§ 15.1-135 and 15.1-136, I am of the opinion that the taking of fingerprints and photographs of persons arrested and charged with a violation of county or municipal ordinance would be inappropriate.

CHARTERS—Provisions of Apply to Number of Council Members.

POLICE—Norton Police Court Has Limited Jurisdiction under § 16.1-70.

ORDINANCES—Public Notice Required Before Enactment.

May 22, 1972

THE HONORABLE ORBY L. CANTRELL
Member, House of Delegates

This is in reply to your recent letter in which you asked several questions:

(1) If we save the city status for Norton under the new amendment to the Constitution, do we go forward with five members on the council under the Charter of the city or do we use eight members as required by § 15.1-805 of the Code?

(2) Does the Norton City Police Court have authority to issue executions?

(3) Is public notice required before the enactment of any particular ordinance, other than those which specify such either in the City Charter or in the Virginia Code?

(4) Is public notice actually required under § 27-5.1 and, if so, what type of notice and how long should it be published?

(5) What are your recommendations with regard to clearing this vague statute up?

I shall answer your questions seriatum.

(1) If the city status of Norton is saved the provisions of the city charter would apply as to the number of council members elected.

(2) The Norton Police Court provided for by Article 5, Section 5.1, of the Norton City Charter is a court of limited jurisdiction as defined in § 16.1-70 of the Code.

Section 5.1 of the charter provides:

"The Trial Justice of the County of Wise shall continue to be Trial Justice of the city of Norton. The council may by proper ordinance provide for a separate Trial Justice and/or Juvenile and Domestic Relations Court for the trial of civil and criminal cases arising in the city, in which event the council by its ordinances shall make any and all necessary provisions as to the Trial Justice Court and appointment of the Judge therefor not inconsistent with the general laws of this State. Should the council so elect to have a separate Trial Justice Court for said city, then the police justice and Trial Justice Court shall be combined."

The Norton Police Court may use § 19.1-338 of the Code to collect fines in misdemeanor cases tried before it. See opinion to the Honorable Rhea F. Moore, Jr., Clerk, Tazewell County Circuit Court, dated December 20, 1960, and found in Report of the Attorney General (1960-1961), p. 133. A copy of this opinion is enclosed.

(3) The answer to this question is in the negative.

(4) Public notice is required to be given by the city under § 27-5.1. The language "[a]ny such ordinance shall be published as other ordinances are
required to be published” refers to the once a week for two successive
weeks in some newspaper published in the city. This is consistent with the
language in §§ 15.1-504, 15.1-431 and 15.1-493. Section 27-5.1 requires that
the Code be published at length and sets forth the other requirements.

(5) Section 27-5.1 should be amended to specify that “ordinances are to
be published once a week for two successive weeks in some newspaper
published in the city.”

CITIES—Additional Officers—How selected.

CONSTITUTION—Local Government—Selection of additional city officers.

September 14, 1971

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your letter of September 8, 1971, which reads in part
as follows:

“At present, the Charter Change Review Committee for the City
of Alexandria is considering proposals to make the office of the City
Attorney and City Collector appointive. Presently, these two positions
are elective in Alexandria.

“If it develops that the sense of the Committee and Council is
that charter changes making those positions appointive is desirable:
(1) Would you kindly advise me what procedure, in accordance with
Section 4 of Article VII of the Constitution, should be followed to
facilitate the desired charter changes? and (2) Is a referendum
necessary before the General Assembly may consider the proposed
charter changes?”

Section 4 of Article VII of the Constitution insofar as germane to your
question provides:

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

Inasmuch as the two officers are additional officers to the five constitu-
tional officers provided for in the first paragraph of Section 4, I am of
the opinion that the General Assembly may make these charter changes
by special act without the necessity of a referendum being first held on
the subject.

CITIES—Advisory Referendum; No Authority to Call on Changing Method
of Selecting Councilmen.

ELECTIONS—Advisory Referendum; in Absence of Specific Legislative
Authority, Election Machinery May Not Be Used for.

May 17, 1972

THE HONORABLE GEORGE M. WARREN, JR.
Member, Senate of Virginia

This is in reply to your letter of May 10, 1972, in which you requested
my opinion whether the City of Bristol has authority to hold an advisory
referendum on the question of changing the method of selecting the council-
men for the city.

I am not aware of any statute that confers the power upon the city to
conduct an advisory referendum on this question. Neither does the city’s
charter contain such authority. In the absence of a specific legislative auth-
ority to use the election machinery for such purpose, I am of the opinion
that the referendum cannot be held. In previous 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, nor use the election machinery for such purpose. See opinion to the Honorable Robert C. Goad, Commonwealth’s Attorney for Nelson County, dated June 20, 1950, and opinion to the Honorable C. William Cleaton, Member, House of Delegates, dated September 6, 1971, copies of which are enclosed.

CITIES—Authority—To compel removal of nuisance; distasteful odors.

May 12, 1972

THE HONORABLE GLENN B. MCCLANAN
Member, House of Delegates

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

“The Hampton Roads Sanitation District operates certain facilities within the City of Virginia Beach. One of these facilities has been emitting very, very distasteful odors for a substantial period of time, that residents of the area find most undesirable. These residents have been promised relief repeatedly over a period of years, but the expected solution to the problem has not been accomplished.

“Does the City of Virginia Beach, pursuant to the Section of the City Code set forth aforesaid, § 15.1-867 of the Code of Virginia, or any other provision of law known to you, have the authority to seek injunctive relief on behalf of its citizens against the Hampton Roads Sanitation District. . . .?”

Your letter points out that § 15.1-867 of the Code of Virginia (1950), as amended, grants to municipal corporations the power to compel abatement or removal of all nuisances and, if after notice the offender fails to abate or remove the nuisance himself, the municipality may do so and recover the expense thereof from the offender. Accordingly, the City of Virginia Beach promulgated § 23-33 of its city code, which prohibits the creation or maintenance of any public nuisance, prescribes a penalty for conviction thereof and provides that, upon conviction of an offender, the city may abate the nuisance unless the nuisance is immediately abated by the offender himself.

This office has previously ruled that the power conferred by § 15.1-867 is not self-executing but, rather, must be exercised by ordinance. See Report of the Attorney General (1966-1967), p. 29. Resort to injunctive relief by a municipality to abate a public nuisance is afforded by the terms of § 15.1-905 of the Code, as follows:

“A municipal corporation, in addition to the penalty imposed for the violation of any ordinance, may enjoin the continuing violation thereof by proceedings for an injunction brought in any court in the municipal corporation having jurisdiction to grant injunction relief.”

I do not regard application of penal sanctions as a prerequisite to invocation to § 15.1-905 inasmuch as I equate the phrase “in addition to,” as it appears in that section, with the words “also,” “moreover,” and “likewise.” See Words and Phrase, “In addition to.” Furthermore, I am of the opinion that the requirement of a “continuing violation” of an ordinance is met by violative circumstances more or less permanent in nature, as in the factual situation which you describe.

Established pursuant to Chapter 407 of the Acts of Assembly of 1940, the Hampton Roads Sanitation District is continued by virtue of Chapter 66 of the Acts of Assembly of 1960. Under the terms of Chapter 66, the District constitutes a political subdivision of the Commonwealth established as a governmental instrumentality. Although the District has broad powers,
I regard it as standing upon the same footing as, or a coequal of, any other political subdivision of the Commonwealth.

Chapter 66 provides for the repeal in whole or in part of all laws inconsistent with its terms to the extent of the inconsistency, which in my opinion operates to negate statutes granting powers to local governments, to the degree that the power granted is inconsistent with the terms of Chapter 66. The General Assembly, however, cannot be said to have authorized the District to maintain a nuisance. I cannot find inconsistency between the terms of Chapter 66 and those provisions of general law which empower local governments to deal with nuisances, at least insofar as those laws permit proscription of the creation and maintenance of nuisances. Thus, it is my opinion that the City of Virginia Beach may seek injunctive relief against the District, if the odor to which you refer is a public nuisance within the meaning of § 23-33 of the Virginia Beach city code and the District is among the entities to which that code by its terms purports to apply.

CITIES—Charter—Covington—Construction of provision of charter.

The Honorable L. Ray Heironimus
Treasurer of the City of Covington

This is in reply to your letter of February 24, 1972, in which you requested my opinion whether Section 2.01 of the City Charter of Covington empowers the city to create a Committee for the Recruitment of Physicians and to expend funds for carrying out the purposes of such committee.

The Dillon Rule, first suggested in the nineteenth century, requires a narrow interpretation of all powers conferred on local government because they are "delegated powers." This rule is still followed in Virginia, though the Commission on Constitutional Revision recommended that it be discontinued and drafted proposed changes in Article VII, Section 3, of the Constitution to accomplish this. These changes were not adopted.

The General Assembly, by § 15.1-839 of the Code, has authorized the language which appears in Section 2.01 of the City Charter and has adopted other statutes, such as §§ 15.1-510 and 15.1-522, which expand the powers conferred on local government. These statutes have been narrowly construed.

Section 2.01 of the City Charter reads:

"The City shall have and may exercise all powers which are now or may hereafter be conferred upon or delegated to cities under the Constitution and laws of the commonwealth and all other powers pertinent to the conduct of a city government and exercise of which is not expressly prohibited by the said Constitution and laws and which in the opinion of the council are necessary or desirable to promote the general welfare of the city and the safety, health, peace, good order, comfort, convenience and morals of its inhabitants, as fully and completely as though such powers were specifically enumerated in this Charter, and no enumerating of particular powers in this Charter shall be held to be exclusive but shall be held to be in addition to this general grant of powers."

This empowers the city to exercise its police power wherever it is necessary or desirable, in its opinion, to promote the general welfare of the city and the health of its inhabitants. From the facts stated by you, the creation of a Committee for the Recruitment of Physicians would appear to be a proper exercise of that power.

I am, therefore, of the opinion that Section 2.01 of the Charter empowers
the city to establish the Committee for the Recruitment of Physicians. It necessarily follows that you may issue checks to the Committee to carry out its purposes.

CITIES—Charter Provisions Prohibiting Councilmen from Holding Other Offices of Profit Does Not Prevent Member from Serving on Board of Public Welfare Representing Two Political Subdivisions.

CHARTERS—Provisions Prohibiting Councilmen from Holding Other Offices of Profit Does Not Prevent Member from Serving on Board of Public Welfare Representing Two Political Subdivisions.

WELFARE—City Councilman May Serve on Board of Public Welfare Representing Two Political Subdivisions.

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in response to your letter of March 24, 1972, in which you requested my opinion concerning a construction of § 63.1-44 of the Code and Acts of Assembly 1960, Chapter 213, Chapter 4, § 4.1, which is the Charter of the City of Colonial Heights. Section 63.1-44 of the Code relates to the appointment of a city council member to the local board of public welfare representing two or more political subdivisions. The charter references relate to the number and terms of councilmen and include a prohibition against councilmen receiving compensation in excess of that authorized in the charter and further includes the prohibition which states:

"... no member of the council shall during the term for which he was elected and one year thereafter be eligible to hold or be appointed as judge, substitute or associate judge of the municipal court or juvenile and domestic relations court or to any office of profit under the government of the city."

You asked the following questions:

"1. Would a member appointed to said Board, from the Council of Colonial Heights per 63.1-44, as amended, be entitled to compensation and/or expenses as a member of said Board in addition to compensation received as a member of the City Council?

"2. If an affirmative answer is rendered to the question above; in light of the city charter of Colonial Heights, under what section of the Code of Virginia would such authority be given?"

In my opinion, the city council member who was appointed to serve on the board would be entitled to compensation and his expenses as any other member of the local welfare board. As you indicated, § 63.1-44 provides, in pertinent part:

"In cases in which such a board represents a city, a member of the council of such city may be a member of such board, notwithstanding any provision of the charter of any city in force on March four, nineteen hundred seventy-one."

This clearly establishes the right of the city council of Colonial Heights to appoint a member to this particular board notwithstanding the charter provision in § 4.1 of Chapter 4 of Chapter 213 of the 1960 Acts of Assembly which prevents any council member from serving in any office of profit under the government of the city. Section 63.1-44 of the Code contemplates that provisions in Charters such as those of Colonial Heights not prevent a council member from serving on the combined local welfare board. It also
REPORT OF THE ATTORNEY GENERAL

contemplates that such member shall be entitled to the full rights and privileges of all other members of the welfare board.

The further provision of § 4.1 of Chapter 4 of the Charter of Colonial Heights, which prohibits council members from accepting compensation for their services in excess of the charter amount, is not contradictory of this interpretation in that it relates to compensation for the person's service as a city councilman, not for his service in another capacity. Therefore, § 63.1-44 of the Code acts as a qualification upon the provisions of the charter of the City of Colonial Heights in that it does allow the council member to serve on the board and to receive compensation and his expenses for such service.

CITIES—Council—Charter provisions control over general law as to time individuals elected take office—General law controls time elections held.

ELECTIONS—General Law Controls Over City Charter As to Time Elections Held.


December 16, 1971

THE HONORABLE BENHAM M. BLACK
City Attorney for the City of Staunton

I am in receipt of your letter of December 8, 1971, wherein you request my opinion as to when the term of office should begin for members of the Council of the City of Staunton under present § 24.1-90 of the Code of Virginia (1950), as amended, and under § 24.1-90, as amended, effective January 1, 1973. Chapter II, Section 4, of the City Charter, provides that the terms of office for councilmen commence on the first day of September next following their election.

Under either the present § 24.1-90, or the amendment effective in 1973, the City Charter would prevail and, consequently, councilmen would commence their terms on September 1, next following the year of their election. See, opinion of this office to the Honorable Don E. Earman, Member, House of Delegates, dated January 6, 1971, a copy of which I enclose, wherein this office ruled that charter provisions would control over general law as to the time individuals elected take office, but that general law would control as to the time an election would be held. The amendment to § 24.1-90 merely codifies such opinion.

CITIES—Officers—Change in offices under Article VII of the Constitution—Results which follow.

PUBLIC OFFICERS—City officers—Results following change in offices under Article VII of the Constitution.

September 28, 1971

THE HONORABLE J. SAMUEL GLASSCOCK
Member, House of Delegates

This is in reply to your letter of September 17, 1971, which reads in part as follows:

"The City of Suffolk recently lost its Treasurer, Mr. George S. Swain, and this post has now been filled by the appointment of his deputy. In addition the Commissioner of Revenue, Mr. W. T. Myrick, has suffered a stroke and is paralyzed, thereby necessitating that his office be filled by appointment shortly."
"With this combination of circumstances, the Council of the City of Suffolk is considering the initiation of the necessary steps under Section 4 of Article VII of the Constitution of Virginia to attempt to consolidate these two offices and provide for the appointment of the officers and employees by the City as other officers and employees are appointed.

"Assuming that the citizens would approve such a change in a referendum and that the General Assembly would enact either a general law or special act as required by the Constitution; the Council would like to know if the State would continue to pay its fifty percent share of the salaries and expenses and one-third of the cost of equipment for this combined office."

I am of the opinion that, under the present statutes, the State would not be required to pay its fifty percent share of the salaries and expenses and one-third of the cost of equipment for this combined office. I enclose a copy of an opinion on this to the Honorable Sam T. Barfield, Commissioner of the Revenue, dated August 19, 1971, to the same effect.

CITIES—Officers—Elimination of treasurer and commissioner of the revenue—Results which follow.

August 19, 1971

THE HONORABLE SAM T. BARFIELD
Commissioner of the Revenue for the City of Norfolk

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

"No doubt you have seen the action taken by one member of the Newport News City Council with regards to the offices of Treasurer and Commissioner of the Revenue.

"The City of Norfolk is making a study of this action and has asked me to get certain information together.

"If the City eliminates these offices and places their functions under the Director of Finance, is the State required to maintain a local office of Treasurer and Commissioner of the Revenue? If so, is the City required to participate in the salaries of these two offices? If this move is accomplished, will the State still be required to pay one-half of the salaries, including the salary of the Director of Finance?

"I realize that this can only be recommended to the voters in referendum, but I would like to have your opinion of the two questions posed above."

Should the city eliminate the offices of treasurer and commissioner of the revenue, the State will not be required to maintain a local office of treasurer and commissioner of the revenue. Therefore, the city would not be required to participate in those offices. Under the present statutes the State would not be required to pay one-half of the salary of the director of finance should the city eliminate the offices of treasurer and commissioner of the revenue.

CITIES AND COUNTIES—Authority—May adopt rules regarding use of mechanical recording devices by reporters in meetings.

BOARDS OF SUPERVISORS—Authority—May adopt rules regarding use of mechanical recording devices by reporters in meetings.

COUNTIES—Authority—May adopt rules regarding use of mechanical recording devices by reporters in meetings.
THE HONORABLE JOSE R. DAVILA, JR.
Commonwealth's Attorney of the City of Richmond

I am in receipt of your letter of March 31, 1972, wherein you request my opinion on the following questions:

"(1) Can a county board of supervisors, city or council prohibit a news reporter from possessing and/or using a tape recorder in and during a public meeting of any one of the above mentioned bodies?

"(2) Can any of the same bodies, during a public meeting, exclude a news reporter from their meeting if he refuses to refrain from using a tape recorder during said meeting for the purpose of gathering news?"

I am enclosing herein, a previous opinion of this office to the Honorable John S. Hansen, Member, House of Delegates, dated October 11, 1967, and found in the Report of the Attorney General (1967-1968) pp. 45 and 46, which is applicable to your inquiries.

I would point out that though the first question raised does not involve the right to make a statement or give an opinion, which rights are protected by the First Amendment, there is a lateral impact on such rights if the possession and use of tape recorders are prohibited. The fact that meetings must be open to the public gives no vested right to televise, photograph or use recording devices, but any collateral impact on First Amendment rights gives rise to the requirement that the city justify the exercise of the power, that it does have, to enforce and regulate the conduct of its meeting.

I am of the opinion, therefore, that the city council or county board of supervisors, in regulating its public meetings, does have the right to prohibit the use of mechanical recording devices. However, I emphasize that such right may be exercised only upon a clear showing that the use of such devices distracts or disrupts the true deliberative process of the governing body. Unless such a showing can be made, I am of the opinion that council may not prohibit the use of such devices.

In view of the above, there is no need to respond to your second inquiry except to point out that, assuming council can meet the required burden of showing a disruption of its proceedings by the use of a mechanical recording device, then it is within their power to exclude from the meetings anyone who does not comply with their requirements. See the opinion of this office to the Honorable Edward E. Lane, Member, House of Delegates, dated October 30, 1969, a copy of which I enclose.

CITIES AND TOWNS—Councils—Members ineligible to serve in any other office, elective or appointive by council.

THE HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney of Westmoreland County

This is in reply to your letter of August 27, 1971, in which you ask my opinion whether a member of the town council of the Town of Colonial Beach, duly elected, qualified and serving as such, can also serve at the pleasure of the town council as zoning administrator.

Section 15.1-800 of the Code of Virginia (1950), as amended, reads as follows:

"No member of any council shall be eligible during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council, by election or by appointment."
The zoning administrator is appointed by the town council. See § 15.1-491(d) of the Code. In view of the explicit language of § 15.1-800, I am of the opinion that the member of the town council may not serve as zoning administrator, an appointive office of the town.

CITIES AND TOWNS—Interstate Compacts—Providing fire protection—Limited to emergency or unusual fires.

September 8, 1971

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

I am in receipt of your inquiry wherein you ask my opinion whether § 15.1-131 of the Code of Virginia (1950), as amended, would authorize the City of Bristol, Virginia, to enter into a compact with the City of Bristol, Tennessee, "providing for fire protection in one area of both sides of the cities to be provided by a single fire department location." I understand that Bristol, Virginia, would provide fire protection for the east end of Bristol, Virginia-Tennessee, and that Bristol, Tennessee, likewise would provide fire protection for the west end of Bristol, Virginia-Tennessee.

Section 15.1-131, as well as § 27-1, of the Code of Virginia applies to firemen. Both sections, however, refer to emergencies, i.e., unusual fires, and do not contemplate the proposed compact concerning all fires. Therefore, I am of the opinion that the City of Bristol, Virginia, is without authority to enter into the proposed compact.

CIVIL PROCEDURE—Arbitration Agreement—Binding on parties.

August 30, 1971

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

In your letter of August 4, 1971, you ask:

"What effect did the enactment of § 8-503(b) of the Virginia Code have on the pre-1968 law in Virginia as reflected in United States v. Al-Con Development Corp., 271 F.2d 904 (4th Cir. 1958); King v. Beale, 198 Va. 802, 96 S.E.2d 765 (1957); and Big Vein Pocahontas Co. v. Browning, 187 Va. 34, 120 S.E. 247 (1923)?"

The cases to which you refer in your question deal with the effect of an agreement between private parties for arbitration of a controversy existing between them. Those cases hold that, as a general rule, the authority of such arbitrators may be revoked by either party at any time before the award is made, and that the agreement to submit the matter to arbitration is no bar to a suit on the original contract because such an agreement would oust the courts of jurisdiction. The exception to this rule is that the parties may by contract make arbitration a condition precedent to any subsequent suit, and if they do so contract they may not revoke the authority of the arbitrators as stated above.

Section 8-503(b) of the Code of Virginia, which was enacted by the 1968 General Assembly, provides as follows:

"Notwithstanding any other provision of law, the parties may enter into an agreement to arbitrate which will be as binding as any other agreement. If, after entry into such an agreement, either party refuses to cooperate in the appointment of an arbitrator or arbitrators, or if the parties cannot agree upon the arbitrator or arbitrators, then after ten days notice on motion of either party, the court which has jurisdiction of the claim shall act for the party so refusing or
failing to agree in the appointment, then the arbitration shall proceed and be as binding as if both parties had cooperated throughout the proceedings. *Neither party shall have the right to revoke an agreement to arbitrate except on a ground which would be good for revoking or annulling other agreements.* (Emphasis supplied.)

It is my opinion that the effect of the emphasized language of § 8-503(b) on the pre-1968 law is to limit the previously unqualified right of either party to an arbitration agreement to revoke such agreement prior to award. It is clear from the words of the statute that the right to revoke an agreement to arbitrate is to be co-extensive with and limited by the power to revoke any other contract for such grounds as fraud, mistake, incapacity, etc. The fact that by contract arbitration is not made a condition precedent to any subsequent suit is no longer material.

**CIVIL PROCEDURE—Service of Process—On inmates of State mental institutions.**

**MENTALLY ILL—Service of Process—Inmates of State mental institutions.**

December 14, 1971

THE HONORABLE E. P. LANDERS
Sheriff of Nottoway County

This is in reply to your recent letter in which you make the following inquiry:

In cases where legal documents requiring personal service must be served on inmates of severe mental condition at Piedmont State Hospital, would it be proper to make service upon the superintendent of the hospital or some other person in authority, with the notation that the inmate cannot be served in person?

A careful review of Virginia law reveals that there is no specific provision which authorizes service of process upon the superintendent of a mental hospital. Section 8-51, Code of Virginia (1950), as amended, prescribes personal service on the individual where no particular mode of service is otherwise prescribed. If the inmate has been adjudicated insane, a committee must be appointed pursuant to § 37.1-127. In such a case, notice may be served on the committee. In cases where there is no committee appointed and the inmate has not been adjudicated insane or feebleminded, in the absence of an express statutory requirement to the contrary, notice must be personally served on the individual. I am therefore of the opinion that you may not substitute service of process upon the superintendent of Piedmont State Hospital for personal service upon the individual.

**CLERK OF COURT—Judgment Lien Docket Book—Abstract of decree entered in a divorce action must be docketed.**

December 14, 1971

THE HONORABLE H. M. SIZEMORE, Clerk
Circuit Court of Halifax County

I have received your letter of November 29, 1971, wherein you have inquired whether a decree entered in a divorce action for alimony and support payments must be docketed by the clerk in the judgment lien docket book so as to constitute a lien upon the ex-husband's real estate.

Section 8-388, Virginia Code (1950), provides:

"In a decree for alimony or for sums for the maintenance, support
and education of infant children of the parties payable in future installments the court may provide that such payments shall not be a lien on the real estate of the person required to make such payments, or may designate the real estate on which the sum shall be a lien; or subsequently on petition release such lien for alimony or for such sums for the maintenance, support and education of infant children whether heretofore accrued by virtue of any decree entered prior to July first, nineteen hundred fifty, or to accrue thereafter. Such decree shall not be a lien on real estate until and except from the time that an abstract thereof is duly docketed and indexed in the judgment lien docket book in the clerk's office of the city or county wherein deeds conveying real estate are recorded."

In my opinion, the statute clearly requires an abstract of the decree to be docketed in the judgment lien docket book. Black's Law Dictionary, Fourth Edition (1951), defines "abstract" in part as follows:

"Summary or epitome, or that which comprises or concentrates in itself the essential qualities of a larger thing or of several things. Robbins Inv. Co. v. Robbins, 49 Cal.App.2d 446, 122 P.2d 91, 92."

A decree for alimony and support would not, by definition, be an abstract of itself.

Pursuant to § 8-373, Virginia Code (1950), the clerk is required to docket in the judgment lien docket book any judgment for money, including a decree for alimony or support or for both, when requested to do so by "any person interested, on such person delivering to" the clerk "an authenticated abstract" of the decree or judgment. Whether or not the judgment or decree directs the clerk to so docket it is irrelevant. However, in my opinion, an abstract of a decree for alimony and support or for either must be docketed and indexed in the judgment lien docket book, rather than the decree itself, in order for the decree to constitute a lien upon real estate of the person required to make such alimony and/or support payments.

CLERK OF COURT—Judgment Lien Docket Book; Abstract Judgments—Clerk to enter but not required to determine validity of judgments.

JUDGMENTS—Abstract—Clerk to enter but not required to determine validity of judgments.

December 13, 1971

THE HONORABLE KATHERINE V. RESPESS
Clerk of Courts, City of Norfolk

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

"I am enclosing herewith several copies of what is purported to be abstracts of judgments rendered in the Civil Justice Court of the City of Norfolk. The 'Abstracts' as received by me were xeroxed as these copies are.


"My query is, do the enclosed 'Abstracts' meet the requirements of the Code and is it the Clerk's responsibility to search such an abstract as is enclosed to pick up the necessary information for recording on the Judgment Lien Docket Book?

"I might add that the copies that I have enclosed are of the same quality that have been left with me for docketing."

Section 8-377, Virginia Code (1950), provides:

"§ 8-377. How judgments are docketed; executions issued thereon.
In the judgment docket there shall be stated in separate columns the date and amount of the judgment, the time from which it bears interest, the costs, the names of all the parties thereto, the alternative value of any specific property recovered by it, the date and the time of docketing it, the amount and date of any credits thereon, the court in which or the trial justice by whom it was rendered, and when paid off or discharged in whole or in part, the time thereof, and by whom such payment or discharge was made, when there is more than one defendant. And in case of a judgment or decree by confession or in vacation, the clerk shall also enter in such docket the time of day at which the same was confessed, or at which the same was received in his office to be entered of record. There shall also be shown on such book the name of plaintiff's attorney, if any, the date of each execution in the order made, the nature thereof, when returnable, and the officer's return thereon, and it shall be the duty of the clerk of any circuit or city court of a city in which a judgment is confessed or entered in vacation, to certify to the clerk of the corporation court thereof the time of day of such confession, or the time at which the vacation decree was received in his office to be entered, except that in the city of Richmond he shall certify the same to the clerk of the chancery court of such city."

Section 16.1-96, Virginia Code (1950), provides:

"§ 16.1-96. What abstract to contain.—An abstract of a judgment rendered in a court not of record shall contain the information required by § 8-377 for entry in the judgment dockets of courts of record, except that it shall not be necessary to include any information as to executions which have been issued thereon."

The copies of the purported abstracts of judgments which you enclosed denote that they were rendered for amounts due on promissory notes. Since these judgments were rendered in a court not of record, they must contain the information required by § 8-377. These documents do not contain the name of plaintiff's attorney, if any, but do purport to contain all other information required by § 8-377.

In my opinion, you should enter these judgments in the Judgment Lien Docket Book. It is not your responsibility to determine the validity or invalidity of such judgments and their status as liens for the reason that such determinations will be made by the court in the event that a case involving such issues is brought.

I would also advise that, as clerk, you should examine such purported abstracts of judgments to obtain the necessary information for recording in the Judgment Lien Docket Book. Section 16.1-96 requires that abstracts of judgments rendered in a court not of record shall contain the information required by § 8-377, but does not specifically require that such information be shown in a manner most convenient for the clerk to record it in the Judgment Lien Docket Book.

CLERK OF COURT—Notary—Out-of-State notary may sign power of attorney.

Novembe 11, 1971

THE HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County

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

"I have been requested to record a Power of Attorney which is signed by several people, all acknowledged before notaries out of the State of Virginia; some of the notaries have used their seal with
their certificates and some of the notaries failed to use their seal. Should this power of attorney be recorded?"

Virginia Code § 55-118.1 authorizes the acceptance of instruments acknowledged by notaries of other states. Virginia Code § 55-118.2(d) provides that, "The signature and title of the person performing the act are prima facie evidence that he is a person with the designated title and that the signature is genuine." In my opinion, the power of attorney should be admitted to record.

CLERK OF COURT—Recordation—Water Utility Lien Notice and Affidavit may not be recorded as a financing statement.

March 30, 1972

THE HONORABLE R. S. CAMPBELL, Clerk
Circuit Court of Caroline County

I have received your recent letter from which I quote:

"Enclosed is a copy of a document which has been requested to be recorded as a Financing Statement. I have received thirty nine of these instruments along with a check for $39.00 for recording.

"Please advise me at your earliest convenience if I can accept these as Financing Statements, and if not just how can they be recorded."

The instrument, styled WATER UTILITY LIEN Notice and Affidavit, is executed on behalf of a water company and recites that the owner of a building lot is indebted to it in a certain amount for water services; that the lot is subject to a restrictive covenant providing that water service charges shall constitute a first lien against the lot; and that notice of the first lien in the amount set forth is thereby given. The instrument is not signed by the owner of the lot and does not indicate that the alleged debt has been reduced to judgment.

I cannot speak to the validity of the purported lien, for I am unaware of the terms of, and circumstances surrounding, the sale by the subdivider to the original purchaser. This instrument is not, however, a financing statement. It is more in the nature of a lis pendens, although it fails to recite the title of any cause or attachment. Its sole purpose seems to be to fix the amount of an asserted lien which arises, if at all, out of other recorded instruments. I am unaware of any statutory authority for the recordation of such a unilateral assertion. In the absence of authority, you should not admit such an instrument to record. See Report of the Attorney General (1950-1951), p. 293.

CLERKS—Duties Set Forth in § 15.1-532 Are Mandatory and Cannot Be Transferred to Another.

CLERKS—Board of Supervisors May Prescribe Duties in Addition to Those in § 15.1-532.

CLERKS—No Responsibility or Supervision Over Secretary Selected by Board of Supervisors to Handle its Official Mail.

May 1, 1972

THE HONORABLE BERTHA G. ABBOTT, Clerk
Board of Supervisors of Lancaster County

This is in reply to your letter of April 12, 1972, which reads as follows:

"I have been Clerk of the Circuit Court, Clerk for the County and Clerk of the Board of Supervisors for Lancaster County, Virginia since March 1960. I have served as Clerk to the Board of Super-
visors pursuant to Section 15.1-531 and 532 of the Code of Virginia since that time.

"Beginning January 1, 1972, we have a new Board of Supervisors consisting of two new members and one old member. This new Board applied for Federal Funds under Section 5 and Section 6 of the Emergency Employment Act and employed for the use of the board members, a woman qualified to handle stenographic work, but this woman is in no way considered to be an executive secretary.

"The employment of this stenographer was in no way my responsibility nor did I have anything to do with her selection and she performs her duties on another floor of the Courthouse.

"This stenographer handles the official correspondence for the board members and although the by-laws adopted by this new Board of Supervisors provides that the Clerk shall make up the calendar for the board, this duty has now been assigned to the new employee.

"The Superintendent of Lancaster County Public Welfare gives all information to this stenographer's office, the County Agent gives all of his department bills and appropriation sheets, etc., to her. This girl also attends all of the special and regular meetings of the Board and takes the minutes as well as I do. All correspondence is signed by the Chairman of the Board, after being prepared by this girl, and I am only furnished with a copy after the correspondence is typed, signed and mailed.

"In these circumstances I should appreciate your advising me as to the following:

"(1) Can the Board of Supervisors transfer to this Stenographer the duties which are required of me as Clerk of the Board?

"(2) What is my responsibility in connection with the official Board mail which is now being handled by the Secretary?

"(3) Since the Board has employed a Stenographic Secretary to handle its official mail should I as Clerk of the Board assume any responsibility or supervision over this employee?"

Section 15.1-532, Code of Virginia (1950), as amended, sets forth your duties as follows:

"Except as otherwise specifically authorized by law, the county clerk shall be ex officio clerk of the board of supervisors. It shall be his general duty:

"(1) To record in a book to be provided for that purpose the proceedings of the board.

"(2) To make regular entries of all their resolutions and decisions on all questions concerning the raising of money; and within five days after any order for a levy is made, to deliver a copy thereof to each commissioner of the revenue of his county.

"(3) To record the vote of each supervisor on any question submitted to the board, if required by any member present.

"(4) To sign all warrants issued by the board for the payment of money, and to record, in a book provided for the purpose, the reports of the county treasurer of his receipts and disbursements.

"(5) To preserve and file all accounts acted upon by the board, with their actions thereon; and he shall perform such special duties as are required of him by law.

"The board shall by proper resolution prescribe the duties of such clerk which shall be in addition to his duties as prescribed by law."

I shall answer your questions seriatim:
(1) Your duties as set forth in § 15.1-532 are mandatory and cannot be transferred to another.
(2) Under § 15.1-532 you are not required to handle all office Board mail but only that which pertains to your duties as described in paragraphs (1) through (5). Paragraph (5) authorizes the Board to prescribe this as one of your additional duties. You therefore have no responsibility for official mail not falling within your specific duties under this section unless the Board has prescribed otherwise.
(3) Since you are not required to handle all official mail of the Board by § 15.1-532, this could be done by another. Where the Board has selected a secretary to handle its official mail, not falling within your responsibility under § 15.1-532, I am of the opinion that you are not required to assume responsibility or supervision over the secretary.

CLERKS—Marginal Release; Signature Authorizing Agent to Marginally Release Encumbrance Need Not Be Notarized.

June 21, 1972

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

I have received your letter of May 3, 1972, from which I quote:

"I have been shown a copy of your letter of November 4, 1971, to the Honorable Katherine V. Respess. I have such a note which has been presented to me, but the provision referred to in Paragraph two of that letter, while containing what purports to be the signature of the lien creditor, does not contain a notarization of that signature and my question to you is whether or not such a notarization is required before the release satisfied the requirement of Virginia Code Section 55-66.3."

Section 55-66.3, Code of Virginia (1950), as amended, provides in pertinent part:

"When payment or satisfaction is made of a debt secured by a mortgage, deed of trust, vendor's lien, or other lien . . . the lien creditor, unless he shall have delivered a proper release deed, shall cause such full payment or satisfaction . . . to be entered on the margin of the page of the book where such encumbrance is recorded.

"Such entry of payment or satisfaction shall be signed by the creditor or his duly authorized agent, attorney or attorney in fact . . . And when so signed and the signature thereto attested by such clerk . . . the same shall operate as a release of the encumbrance. . . ."

The statute does not expressly require the notarization of the creditor's signature upon the writing authorizing the agent to release the encumbrance. It does require that the agent be "duly authorized." It is my opinion that this merely requires some indication that the person purporting to act as agent has been so authorized and that he is acting within the scope of his agency in signing the writing for purposes of marginal release. As indicated in the opinion to which you refer, it is not necessary for the clerk to record the authority of the agent. I would suggest, however, that the person purporting to be the agent be required by the clerk to affirm his appointment as such prior to the clerk's attestation of his signature.

CLERKS—Probate of Wills—May be probated in county where decedent testator had estate.
REAL PROPERTY—Cemetery Lots Are Estate Under Will Within Meaning of § 64.1-75.

April 10, 1972

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

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

"Please let me solicit your help in solving the following request for probate in this office:

"Several years ago a former resident of Louisa County died testate in the State of Florida, and in his will devised to his wife who survived him one or more cemetery lots which he had acquired while living in Louisa County. He owned no other real estate, either in the Commonwealth of Virginia or in the State of Florida. The will referred to was not probated in Florida, and now that his widow has died in that state a request has been made to probate the said will in Louisa County."

Under § 64.1-75 of the Code of Virginia (1950), as amended, the will may be probated in the Circuit Court of Louisa County. This section gives jurisdiction to the court of the county to probate the will as the county in which the decedent testator had estate. The cemetery lots are estate within the meaning of this section.

CLERKS—Recordation—Not within power of Clerk to determine whether contract in proper form.

DEEDS—Recordation—Not within power of Clerk to determine whether contract in proper form.

May 18, 1972

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

This is in reply to your letter of May 16, 1972, in which you ask my opinion whether it is your duty to record a deed conveying a lot or parcel of land in a subdivision which may not be in compliance with the subdivision ordinance of Amelia County.

This office has previously ruled that it is not within the power of the clerk to determine whether or not an instrument presented for filing is sufficient to meet the requirements of any particular provision of law. Report of Attorney General (1965-1966), p. 41. I am, therefore, of the opinion that if the demand is made of you to record a deed of the type described above, it is your duty to record the same and call to the attention of the person tendering it any defects you think appear on the face of the paper. See Report of the Attorney General (1934-1935), p. 43.

CLERKS—Recordation of Instruments—Uniform Recognition of Acknowledgments Act.

NOTARIES PUBLIC—Certificate—Affixing of date of expiration of term of office—Liability for failure to affix.

July 21, 1971

THE HONORABLE DAVID D. BROWN
Commonwealth's Attorney for Washington County

I have received your letter of July 14, in which you ask:

"Does compliance with the Uniform Recognition of Acknowledg-
ments Act by a notary taking an acknowledgment render it unnecessary for the notary to comply with Section 55-116 of the Code of Virginia, 1950, as amended?"

The Uniform Act sets forth certain short forms of acknowledgment which, "are sufficient for their respective purposes under any law of this State." Virginia Code § 55-118.6. The Act, "shall be so interpreted as to make uniform the laws of those states which enact it." Virginia Code § 55-118.8. Accordingly, I am of the opinion that a clerk should accept for recordation any instrument, otherwise recordable, which is acknowledged pursuant to § 55-118.6, even though the date of the expiration of the notary's term of office is not affixed. See Virginia Code § 55-118, which states that a notary's failure to affix the date of his term of office shall not invalidate his certificate.

The fact that the instrument is recordable without an affixed date of the expiration of the notary's term of office does not, however, affect the duty of a notary within this State to affix the date as required by Virginia Code § 55-116. The Uniform Act applies to the recognition of acknowledgments, not to the duties of the notary. In my opinion a notary who fails to comply with § 55-116 is liable for the penalty prescribed by § 55-118.

CLERKS—Residence—Deputy clerk need not reside in county.

CLERKS—Residence—As to elective office.

CONSTITUTION—Exception in § 15.1-51 for Residence of Deputy Clerks No Longer in Conflict with Revised Constitution.

CLERKS—Deputy—Length of residence necessary for appointment.

PUBLIC OFFICERS—Deputy Clerk—Length of residence necessary.

THE HONORABLE HELEN C. LOVING
Clerk, Henrico Circuit Court

January 18, 1972

I am in receipt of your letter of January 12, 1972, wherein you inquire whether it is necessary, in appointing a deputy clerk to your office, that the individual appointed reside in Henrico County. You direct my attention to § 15.1-51 of the Code of Virginia (1950), as amended.

Such statute reads in pertinent part:

"Every county officer, except deputy clerks of courts of record, shall at the time of his election or appointment, have resided six months next preceding his election or appointment, . . . in the county for which he is elected, or appointed . . ."


As seen from such opinions, this office ruled that the exception to the six months residence requirement for deputy clerks was not authorized by the Virginia Constitution being in conflict with Section 32 thereof. Consequently, such exception has been unenforceable and deputy clerks of courts of record have been required to be residents of the county for which they were appointed.
However, Section 32 of the Virginia Constitution was revised, effective July 1, 1971, and Article II, Section 5, of the revised Virginia Constitution is the pertinent provision applicable to a consideration of § 15.1-51. Such section reads 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, . . ."

Such section is limited to elective offices only; not elective and appointive as was Section 32. Consequently, qualifications for appointive office are left to the Legislative and Executive articles of the Constitution and to the General Assembly.

Under the new Virginia Constitution, the General Assembly is authorized to set qualifications for appointive office and the exception in § 15.1-51 for deputy clerks is, therefore, no longer in conflict with any constitutional provision. I am, thus, of the opinion that in appointing a deputy clerk, the individual appointed need not reside in Henrico County.

Though the above mentioned exception is now valid, I would direct your attention to the also enclosed opinion of this office to the Honorable Eleanor W. Talley, Secretary, Fluvanna County Electoral Board, dated October 6, 1971, wherein this office ruled that the six months requirement is now invalid in view of Article II, Section 5, as to elective office.

COLLEGES AND UNIVERSITIES—Appropriations for Maintenance of James Monroe Law Library.

February 2, 1972

The Honorable Edgar F. Shannon, Jr.
President, University of Virginia

I am writing in response to your letter of January 26, 1972 concerning the James Monroe Law Office-Memorial Library and the amount of financial support which the Commonwealth may provide for its operation and maintenance.

In 1954 the General Assembly enacted Chapter 641, Acts of Assembly, in which the General Assembly approved and accepted a gift of the James Monroe Law Office-Memorial Library as a part of the property of the Commonwealth of Virginia. A portion of that Act provides:

"... provided, however, that such acceptance shall not be deemed to obligate the Commonwealth at any time to financial support of such library to a greater extent than fifteen thousand dollars per annum."

You have asked my opinion whether the Act places a maximum limitation upon the amount of financial support which the Commonwealth may provide to the library. I am of the opinion that the Act does not prohibit the General Assembly from providing financial support in excess of $15,000 per year. The Act merely insures that the General Assembly will not be required to appropriate an amount in excess of $15,000 per year. If the General Assembly determines that a larger amount is required for the preservation of the library and its adequate operation, then there is no legal prohibition against making such an appropriation.

COLLEGES AND UNIVERSITIES—Special Police; Powers and Duties.

POLICE—Appointment of Special Police for Colleges and Universities.
June 7, 1972

The Honorable T. Marshall Hahn, Jr., President
Virginia Polytechnic Institute and State University

This is in reply to your recent request for an opinion regarding several questions which have arisen concerning the appointment of your campus security officers as conservators of the peace and special police under §§ 19.1-28 and 19.1-30, Code of Virginia (1950), as amended. You point out that for a number of years the practice has been for the Judge of the Circuit Court to enter an order appointing the officers under both of the above sections. This requires annual reappointments, as well as renewal of the $1,000 bond on each officer, pursuant to § 19.1-28 of the Code. You indicate that you would like to make such appointments only under § 19.1-30 of the Code, and you raise the following questions concerning such appointment, which I will answer seriatim.

(1) What statutes describe the method of appointment, and the authority of officers appointed, under § 19.1-30 of the Code? That section delegates the powers of "special policemen in counties under the provisions of Article 2 (§ 15-556, et seq.) of Chapter 17 of Title 15. . . ." However, Article 2 of this chapter actually deals with special police in cities and towns while Article 3 deals with special police in counties. This discrepancy is carried forth in the 1964 Replacement Volume of the Code as Articles 2 and 3 of Chapter 3 of Title 15.1, §§ 15.1-137, et seq., and 15.1-144, et seq.

A review of the legislative history of § 19.1-30 of the Code shows that when it was originally codified as § 18-19 of the Code of Virginia (1950), the cross reference to powers and duties was to those vested in constables in counties, without any reference to specific sections of the Code. However, when this section was recodified in 1960 as part of Title 19.1 of the Code, the Code Commission added the cross reference to Article 2 of Chapter 17 of Title 15. It is my opinion that the reference to such Article 2 is a mistake occurring in the process of codification, and that the appropriate reference should be to special policemen of counties, which is now Article 3 (§§ 15.1-144, et seq.) of Chapter 3 of Title 15.1 of the Code. This is consistent with the last sentence of § 19.1-30 which refers to entering into bond before the county clerk of the county for which he is appointed.

(2) Does the dual appointment under §§ 19.1-28 and 19.1-30 of the Code confer any additional authority upon the officers beyond that which they would have if they were appointed only under § 19.1-30?

Since special policemen appointed pursuant to § 19.1-30 have the same powers and duties as are vested in special policemen in counties under the provisions of §§ 15.1-144, et seq., of the Code, and since those powers and duties are for the places mentioned in § 19.1-28 of the Code, dual appointment of a special policeman under both §§ 19.1-28 and 19.1-30 would not confer any additional authority upon such an officer that he would not have if he was appointed only under § 19.1-30.

(3) If the appointment of such a special policeman is made under § 19.1-30, which makes no reference to the length of time of such an appointment, would § 15.1-144 permit a term and bond for a period of up to four years?

Section 19.1-28 of the Code provides that the appointment of a conservator of the peace under that section is to be for a term of one year. Section 19.1-30 of the Code does not specify the length of time of appointment of a special policeman under that section; however, it does specify the amount
of penalty on his bond. Section 15.1-144 provides that the appointment of special policemen in counties shall be for such length of time as the court or judge may designate, not exceeding four years under any one appointment. It is my opinion that because § 19.1-30 of the Code is silent as to the length of any such appointment and does not refer to the provisions of either § 19.1-28 or § 15.1-144 for that purpose, there is no limitation as to the length of an appointment solely under § 19.1-30. The judge, however, may limit such term of appointment, in his discretion, in his order of appointment.

(4) Assuming that it is desirable for the officers so appointed to exercise powers accorded to conservators of the peace, would not the language in § 15.1-144 of the Code conferring upon special police the status of conservator of the peace still render appointment under § 19.1-28 unnecessary?

Section 15.1-144 specifically confers the powers of a conservator of the peace upon special policemen in counties and, therefore, appointment under both §§ 19.1-28 and 19.1-30 would not be necessary in order to give such special policemen the powers of a conservator of the peace.

(5) In the event that it should be determined judicially in the future that appointment under § 19.1-30 of the Code gave to such officers those powers and duties in accord with Article 2, Chapter 3, Title 15.1, rather than under Article 3, Chapter 3, Title 15.1, would this vitiate prior official actions of the officers who perform their duties as if they were controlled by said Article 3?

It is my opinion that by defining the duties of such special policemen as those given to policemen in counties pursuant to Article 3, Chapter 3, Title 15.1, they in fact have no powers or duties which are not also vested in special policemen in cities and towns under Article 2, Chapter 3, Title 15.1. Therefore, the answer to that question is in the negative.

COMMERCIAL CODE-SECURED TRANSACTIONS—Termination Statement—Affidavit to be filed and indexed upon payment of fee.

November 17, 1971

THE HONORABLE H. C. DEJARNETTE, Clerk
Circuit Court of Orange County

I have received your recent letter of November 11, 1971, wherein you inquire whether an affidavit, a copy of which you sent me, constitutes a termination statement under § 8.9-404 of the Code of Virginia, which provides as follows:

“(1) Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. The uniform fee for filing and indexing such an assignment or statement thereof shall be one dollar. If the affected secured party fails to send such a termination statement within ten days after proper demand therefor he shall be liable to the debtor for one hundred dollars, and in addition for any loss caused to the debtor by such failure.

“(2) On presentation to the filing officer of such termination statement he must note it in the index. The filing officer shall remove
from the files, mark ‘terminated’ and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto.

“(3) The uniform fee for filing and indexing a termination statement including sending or delivering the financing statement shall be one dollar.”

The affidavit is signed by the secured party’s Secretary-Treasurer and is notarized. The body of the affidavit reads as follows:

“James E. Click, being first duly sworn, hereby makes oath and affidavit that he is the Secretary-Treasurer of the Maryland and Virginia Milk Producers Association, Inc., the VENDOR named in a certain Financing Statement with Oak Green Farm covering the sale of dairy farm equipment and related parts dated the 24th day of October, 1968, and docketed in Financing Records Book No. — your receipt No. 18365 Dec 5/68 File #1010, page —, of the records of Orange County, Virginia; that the amount of the purchase price therein secured has been paid in full to the above named Vendor, who was, when the said purchase price was so paid, entitled and authorized to receive the same, and that if the purchase price aforesaid was evidenced by a note or notes or other evidence of debt in addition to said Financing Statement the same has or have been marked ‘Paid’ and cancelled; and that the Clerk of the Circuit Court of said County is hereby authorized, directed and requested to mark said Financing Statement satisfied and fully release the lien thereof upon the filing of this affidavit in his office.”

It is clear that this affidavit states that the secured party no longer claims a security interest under the financing statement, the file number of which is identified. In my opinion, it constitutes a termination statement and, upon the payment of the one dollar fee, you should file and index it. As denoted in § 8.9-404, you should mark “terminated” on the financing statement and send or deliver it to the secured party.

COMMISSIONER OF PUBLIC WELFARE—Commissioner Entitled to Adoption Reports Prepared for Court Prior to Entry of Final Order.

ADOPTION—Commissioner Entitled to Adoption Reports Prepared for Court Prior to Entry of Final Order.

REPORTS—Adoptions—Commissioner entitled to adoption reports prepared for court prior to entry of final order.

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in response to your recent letter requesting my opinion concerning the confidentiality of adoption reports made to the court by the Commissioner of Public Welfare as required by § 63.1-223 of the Code of Virginia. As § 63.1-217 of the Code places the responsibility for the administration of Chapter 10 of Title 63.1 of the Code on the Commissioner of Public Welfare, you inquired if the Commissioner could obtain, from the adoption report, information “. . . concerning the circumstances under which the child came to live, and is living, in the same home of the petitioner. . . .”

Chapter 10 of Title 63.1 of the Code defines “child placing agencies” and sets forth the requirements for licensure of such agencies, their inspections and their operations. The chapter also makes it unlawful for
any such "child placing agency" to operate without the appropriate license. Section 63.1-195 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 intermediary for the placement of, any child in a foster home; ..."

Pursuant to the responsibilities placed upon the Commissioner to enforce the provisions of Chapter 10 of Title 63.1, it is appropriate that the Commissioner ascertain whether persons are acting as "child-placing agencies" and are not licensed. It is quite proper, therefore, for the Commissioner to ascertain the manner in which the child came to live in the home with the persons now seeking his adoption. This is supported by the provisions of § 63.1-223 which requires the Commissioner to order a preliminary investigation of the background of the child subsequent to the filing of the petition for adoption. Included in the statutory requirements, the circumstances under which the child came to live and is living with the petitioner is to be investigated. Va. Code Ann. § 63.1-223 (1950), as amended. It is my opinion that it is the clear intention of the Legislature that the Commissioner be supplied with information gathered in this investigation which would enable him to carry out his responsibilities imposed by the Code that he regulate "child placing agencies".

This information, however, would not be available for this purpose after the entry of the final order of adoption as § 63.1-236 of the Code states:

"Upon the entry of a final order of adoption, or other final disposition of the matter, the clerk of the court in which it was entered shall forthwith transmit to the Commissioner all reports made in connection with the case, and the Commissioner shall preserve such reports in a separate file which shall not be open to inspection, or be copied by anyone other than the adopted child, if twenty one years of age, licensed or authorized child placing agencies providing services to the child and the adoptive parents, except upon the order of a court of record entered upon good cause shown."

Once the final order has been entered, therefore, the information contained in these reports must be restricted as provided in this section.

COMMISSIONERS OF REVENUE—Authority; City Council May Not Impose Residency Requirements on Commissioner and His Employees.

PUBLIC OFFICERS—City Council May Not Impose Residency Requirements on Commissioner of Revenue and His Employees.

May 10, 1972

THE HONORABLE W. ROY SMITH
Member, House of Delegates

This is in reply to your letter of April 25, 1972, in which you requested my opinion on the following two questions:

"1. Are rules and regulations promulgated by the City Council of Petersburg governing the conduct of officers and employees of the City applicable to the Commissioner of Revenue and to employees of his office?

"2. Does the City Council of Petersburg have authority to require that conditions of employment such as residency requirements applicable to officers and employees of the City be observed by the Commissioner of Revenue and employees of his office?"

I shall answer your questions seriatim.
Article VII, Section 4, of the Constitution of Virginia provides in part as follows:

“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.”

Article VII, Section 1, of the Constitution provides that a special act means “a law applicable to a county, city, town, or regional government and for enactment shall require an affirmative vote of two-thirds of the members elected to each house of the General Assembly.”

Prior to the inclusion of this language in the present Constitution it was the view of this office that the commissioner of the revenue was a constitutional officer and his duties were prescribed by law under Section 119 of the former Constitution.

Under the new constitutional provisions cited above the duties of the commissioner of the revenue may be fixed by general law or by special act. No general law exists which authorizes the city council of Petersburg to exercise authority over this office. Any special act which would provide such authority must be adopted subsequent to July 1, 1971, the effective date of the Constitution, by a vote of two-thirds of the members elected to each house of the General Assembly. I am aware of no such special act adopted since that time which meets this requirement.

I am, therefore, of the opinion, for the reasons stated above and in the opinion to the Honorable William H. Rosser, Jr., Commissioner of Revenue for City of Petersburg, found in Report of the Attorney General (1969-1970), p. 59, that the answers to both questions posed by you are in the negative.

COMMISSIONERS OF REVENUE—Legal Steps by City Administration to Change Duties of.

CITIES—Legal Steps to Change Duties of Commissioner of Revenue.

COUNTIES, CITIES AND TOWNS—Special Act—Legal steps to change duties of Commissioner of Revenue.

May 10, 1972

THE HONORABLE FRED M. FARLEY
Commissioner of Revenue for the City of Lynchburg

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

“The Jacobs Company, Incorporated of Chicago, Illinois has just completed a tax study for the City of Lynchburg and the City Manager is submitting several recommendations to City Council that pertain directly to the Commissioner of the Revenue’s Office. Is it mandatory that the Commissioner of the Revenue follow these recommendations if favorably passed upon by Council? I am especially interested in No. 21. What are the necessary legal steps that have to be followed before the Commissioner of the Revenue’s duties can be taken over by the City administration?”

Article VII, Section 4, of the Virginia Constitution reads in part as follows:

“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 com-
pensation of such officers shall be prescribed by general law or special act."

Under this provision your duties shall be provided by general law or special act. None of the recommendations shown involve duties of your office provided by general law. A special act is defined in Article VII, Section 1, as a law applicable to a county, city, town, or regional government and for enactment shall require an affirmative vote of two-thirds of the members elected to each house of the General Assembly. I am unable to find any special act adopted to date which established as your duties any of the recommendations.

Therefore, I am of the opinion that you do not have to follow these recommendations if favorably passed upon by the council. The necessary legal steps that must be followed before your duties are changed by the city administration involves the passage by the General Assembly of a special act changing such duties. Before your office can be abolished there must be compliance with the provisions of Article VII, Section 4, which requires, among other things, an election be held.

COMMISSIONERS OF REVENUE—May Perform Real Estate Appraisals on Set Fee Basis for Local Financial Institution; Not Incompatibility of Office or Conflict of Interests; Not Prohibited by Constitution or Code of Virginia.

CONSTITUTION—Commissioner of Revenue Not Prohibited by Constitution or Statutes from Holding Other Employment.

PUBLIC OFFICERS—Incompatibility of Office—Commissioner of Revenue may perform real estate appraisals on set fee basis for local financial institution.

VIRGINIA CONFLICT OF INTERESTS ACT—Commissioner of Revenue May Perform Real Estate Appraisals on Set Fee Basis for Local Financial Institution.

February 9, 1972

THE HONORABLE VICTOR J. SMITH
Commissioner of the Revenue for the City of Harrisonburg

In your letter of January 28, 1972, you inquire whether a Commissioner of the Revenue may properly perform real estate appraisals on a set fee basis for a local financial institution.

A Commissioner of the Revenue is not prohibited by either the Constitution or the Code of Virginia from holding other employment, and since the proposed employment is not with the Commonwealth or an agency or subdivision thereof, no issue of incompatibility of offices is presented by your question. The Virginia Conflict of Interests Act would similarly be inapplicable since the Commissioner of the Revenue would not be contracting in his official capacity with the financial institution by whom he is employed.

Of course, as a constitutional officer, the Commissioner's first duty is to his office and he must insure that his supplemental employment does not interfere with the proper performance of his duties. I am enclosing a copy of an opinion rendered by this office to The Honorable John H. Artrip, Commissioner of the Revenue of Dickenson County, on November 8, 1968, which is found in the Report of the Attorney General, 1968-1969, at p. 41, which indicates that the responsibility for the establishment and maintenance of the working hours of the Commissioner of the Revenue rests with that officer, subject to the concurrence of the State Tax Commissioner.
COMMISSIONERS OF REVENUE—Salary May Be Supplemented for Additional Services; Conflict of Interests Act Not Applicable.

BOARDS OF SUPERVISORS—May Supplement Salary of Commissioner of Revenue for Additional Services; Conflict of Interests Act Not Applicable.

COUNTIES—Board of Supervisors May Supplement Salary of Commissioner of Revenue for Additional Services; Conflict of Interests Act Not Applicable.

VIRGINIA CONFLICT OF INTERESTS ACT—Not Applicable When Salary of Commissioner of Revenue Supplemented for Additional Services.

December 10, 1971

THE HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney of Westmoreland County

In your recent letter you state that the Board of Supervisors of Westmoreland County wishes to retain the county Commissioner of the Revenue to prepare land cards and supervise preparatory work for a general reassessment of real estate in the county. You inquire whether such a contract with the Commissioner of the Revenue would violate the provisions of the Virginia Conflict of Interests Act.

Section 14.1-58 of the Code of Virginia (1950), as amended, dealing with county commissioners of the revenue, provides, in pertinent part:

"... Nothing herein contained shall prevent the governing body of any county from supplementing the salary of the commissioner of the revenue in such county for additional services not required by general law; provided, however, that any such supplemental salary shall be paid wholly by such county."

It is my opinion that the services you describe in your letter are not required of the Commissioner of the Revenue by general law, and therefore the county may supplement the Commissioner's salary in return for these services in accordance with the above-quoted section. If this is done, the Virginia Conflict of Interests Act would not be applicable.

COMMONWEALTH ATTORNEYS—Conflict of Interests Act—Effect upon.

COMMONWEALTH ATTORNEYS—Duties of.

November 18, 1971

THE HONORABLE JOHN ALEXANDER
Commonwealth's Attorney for Fauquier County

This is in reply to your recent letter in which you ask my opinion as to the propriety of the Commonwealth's Attorney representing the local Welfare Board or School Board in view of the repeal of § 15.1-67 of the Code and the substitution therefor of the Virginia Conflict of Interests Act.

Section 15.1-67 of the Code authorized the board of supervisors, board of public welfare, or school board to contract with and pay extra compensation to a Commonwealth's Attorney for representation in matters requiring an attorney. This office construed "representation in matters requiring an attorney" to mean "special services" not within the duties of the Commonwealth's Attorney.

It has been the opinion of this office for many years that it is the duty of a Commonwealth's Attorney to give legal advice and opinions to all public officials and boards of his county. See opinion expressed in letter to the Honorable Robert C. Goad, Commonwealth's Attorney of Nelson County, dated July 26, 1962, and found in Report of the Attorney General (1962-1963), p. 22. This position has been qualified where express statutory
authority existed for the employment and payment of the Commonwealth's Attorney for special services rendered.

Upon repeal of § 15.1-67 by Chapter 463, Acts of Assembly of 1970, the question was posed as to whether the Conflict of Interests Act prohibited the Commonwealth's Attorney from being employed by various local boards. In an opinion of this office to the Honorable Robert C. Goad, Commonwealth's Attorney of Nelson County, dated August 13, 1970, a copy of which is enclosed, it was opined that this Act does not prohibit an attorney for the Commonwealth from being employed as an attorney by various boards, e.g., Board of Public Welfare, School Board, etc., to represent them in matters requiring the services of an attorney not within the duties of the Commonwealth's Attorney.

The repeal of § 15.1-67 removed the blanket authority for the board of supervisors, board of public welfare, or school board to employ the Commonwealth's Attorney for special services rendered these boards. However, specific statutory authority exists in some instances for his employment such as § 22-56.1 of the Code which authorizes his employment to defend school boards and officials.

I am, therefore, of the opinion that the Conflict of Interests Act does not prohibit an attorney for the Commonwealth from being employed as an attorney where specific statutory authority exists for such employment. It is the duty of the Commonwealth's Attorney to give legal advice and opinions to all public officials and boards of his county unless statutory provisions provide to the contrary. I point out, however, that the county is authorized to supplement his salary by § 14.1-11.4 of the Code.

COMMONWEALTH ATTORNEYS—Duties and Compensation in Certain Situations.

July 19, 1971

THE HONORABLE EUGENE GUNTER
Commonwealth's Attorney for Frederick County

This is in reply to your recent letter requesting my opinion on the duties and compensation of the Commonwealth's Attorney and County Attorney. Your letter reads in part as follows:

"1. Respectfully request your opinion on the following questions:

"1. Am I entitled to compensation for my services at attorney on behalf of the County of Frederick in the annexation suit?

"2. Am I entitled to compensation for defending the county's position in reference to the suits brought on a claim of erroneous tax assessment?

"3. Am I entitled to compensation for services rendered to the Frederick County School Board in connection with the securing of loans and the searching and clearing of titles on land to be purchased for school purposes?

"4. Am I entitled to compensation from the Frederick County Welfare Department for services rendered to that department in connection with welfare cases and the placement of children for adoption in similar proceedings?"

Section 15.1-50 of the Code prohibits a commonwealth's attorney from holding any other office, elective or appointive. Therefore, you would not be entitled to any additional compensation for any of these services as County Attorney.

The attorney for the Commonwealth is the legal adviser or counsel for the board of supervisors. Section 15.1-550 of the Code, as amended in 1968, provides in part:

"... The attorney for the Commonwealth shall be available to the board and give his legal opinion when requested."
Furthermore, it has been the opinion of this office for many years that it is the duty of the Commonwealth’s Attorney to give legal advice and opinions to all public officials and boards of his county. See opinion expressed in letter to The Honorable Robert C. Goad, dated July 26, 1962, found in Report of the Attorney General (1962-1963), p. 22.

Section 15.1-67 of the Code of Virginia (formerly § 15-504) authorized additional compensation be paid the Commonwealth’s Attorney for special services performed under your questions (1), (3) and (4). No additional compensation was allowable for services performed under question (2). See opinion to The Honorable Wm. W. McClenny, Commonwealth’s Attorney for Amherst County, found in Report of the Attorney General (1963-1964), p. 48. Section 15.1-67 was repealed by Chapter 463 of the Acts of 1970. Sections 14.1-11.4 of the Code, which authorizes the county to supplement your salary, was enacted by Chapter 153 of the Acts of 1970.

I am therefore of the opinion that your duties as Commonwealth’s Attorney require you to perform the services listed. Section 15.1-507 of the Code authorizes the governing body of a county to employ counsel to assist you in certain cases therein stated. Whether the county supplements your salary under the authority of § 14.1-11.4 is discretionary with the board of supervisors.

COMMONWEALTH ATTORNEYS—For City—Not required to render legal advice to city school board where city has city attorney.

July 26, 1971

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

In your letter of June 10, 1971, you inquire whether it is the duty of the Commonwealth’s Attorney in the City of Alexandria to render legal advice to the City School Board in light of the provisions of the City Charter, which require the City Attorney to be the legal advisor to all Departments and Boards of the City.

In my previous opinion to you dated May 24, 1971, I advised that the Commonwealth’s Attorney of a city has a duty to render legal advice to the City School Board based on the provisions of § 15.1-822 of the Code of Virginia (1950), as amended. That Section makes the Attorney for the Commonwealth in a City subject to the same duties as the Attorney for the Commonwealth in a county. While no code section specifically provides that the Attorney for the Commonwealth in a city is to be relieved of the duties outlined above in cases where a city attorney is employed, § 15.1-9.1:1 does provide that in the event of the appointment of a county attorney, the Attorney for the Commonwealth of any such county is relieved of duty, among others, of advising the governing body. As stated above, § 15.1-822 in effect equates the duties and responsibilities of the Commonwealth’s Attorney of a city with the Commonwealth’s Attorney of a county. Reading these two sections together, therefore, I am of the opinion that in a city such as Alexandria where the City Charter provides for a City Attorney, whose duty it is to advise the governing body and the Departments and Boards of the City, that the Commonwealth’s Attorney of the said City is relieved of those duties as would be the Commonwealth’s Attorney of a county. Since § 11.02 of the Charter of the City of Alexandria provides that the City Attorney shall be the legal advisor to the council, and all Departments and Boards of the City, the Attorney for the Commonwealth of the City of Alexandria is therefore relieved of the duty to render legal advice in those instances.

CONDOMINIUMS—Virginia Real Estate Commission May Investigate and Make Preliminary Reports on Condominium Projects Prior to Recorda-
REPORT OF THE ATTORNEY GENERAL

January 31, 1972

THE HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in response to your recent letter in which you request my opinion concerning Chapter 4.1 of Title 55 of the Code of Virginia relating to horizontal property regimes (condominium projects). You indicated that the Virginia Real Estate Commission has been called upon to make inspections and to issue the preliminary public reports provided for in §§ 55-79.18, 55-79.21 and 55-79.22 of the Code, prior to the recordation of the "master deed" provided for in § 55-79.3. You asked:

"Will you please advise, taking into consideration provisions of Chapter 4.1 of Title 55, if in your opinion the Virginia Real Estate Commission has the authority to issue the report provided for in § 55-79.21 prior to the recordation of the master deed or lease as provided for in § 55-79.3 of the Code."

You indicated that the filing of the questionnaires and requesting the Commission to make the inspection prior to the "master deed" recordation was for the purpose of taking reservations for the units prior to the actual construction of the regime.

Provided that the "notice of intention" required in § 55-79.16 and § 55-79.17 is filed with the Commission, it is my opinion that the Commission may issue a preliminary report as provided in § 55-79.22, even though the "master deed" has not been recorded.

Section 55-79.21 of the Code provides:

"When the Commission makes an examination of any project, it shall make a public report of its findings, which shall contain all material facts reasonably available. A public report shall neither be construed to be an approval nor disapproval of a project. No unit in a condominium project shall be offered for sale until the Commission shall have issued a final or substitute public report thereon, nor shall reservations to purchase be taken until the Commission has issued a preliminary, final or substitute public report."

Section 55-79.22 of the Code provides:

"A preliminary public report may be issued by the Commission upon receipt of a notice of intention filing which is complete except for some particular requirement, or requirements, which is, or are, at the time not fulfilled, but which may reasonably be expected to be completed." (Emphasis supplied.)

This section provides the Commission with the authority to issue a preliminary report only upon receipt of a "notice of intention" and the Commissioner's belief that the missing requirements, in this case the filing of the master deed, may reasonably be expected to be completed. I see no objection to their making the required inspection and filing the preliminary report prior to the recordation of the "master deed". Obviously, the preliminary public report must contain, as one of the essential facts, the absence of the filing of a master deed, and any other pertinent information to place potential buyers on notice of the actual state of affairs of this particular horizontal property regime.

I would call to your attention, however, that the issuance of this preliminary public report would not allow the developer to sell any of the condominium units or bind persons to their purchase until the horizontal property regime has been established by the filing of the master deed.
Section 55-79.3 indicates that no horizontal property regime is established until the master deed has been recorded. Section 55-79.4 provides:

"Once the property is submitted to the horizontal property regime, an apartment in the building or buildings may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and all types of juridic acts . . ."

It is clear that until the recordation of the master deed provided in § 55-79.3 and the establishment of the horizontal property regime has been accomplished, the condominiums are not a proper subject of sale.

Section 55-79.21 contemplates the practice that you described in your letter, i.e., the taking of reservations prior to recordation of the master deed in that it states:

". . . nor shall reservations to purchase be taken until the Commission has issued a preliminary, final or substitute public report.”


However, the taking of reservations creates no obligation to make a final purchase.

Purchasers are protected from final sales in that § 55-79.23 provides:

"The developer shall not enter into a binding contract or agreement for the sale of any unit in a condominium until (a) A true copy of the Commission’s final or substitute public report thereon with all supplementary public reports, if any has been issued, has been given to the prospective purchaser, . . ." (Emphasis supplied.)

Thus, even though the developer may engage in obtaining reservations for the condominium project, no such reservations are binding upon the purchasers until the master deed has been recorded and a final or substitute report by the Commission has been issued.

CONFLICT OF LAWS—Specific Statute Takes Precedence Over General One.

COLLEGES AND UNIVERSITIES—Division of Engineering and Buildings Not Required to Review Utility Easements Granted by Educational Institutions.

STATE INSTITUTIONS—Division of Engineering and Buildings Not Required to Review Utility Easements Granted by Educational Institutions.

June 14, 1972

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

This is in reply to your letter of May 16, 1972, in which you pose the following inquiry:

"The fourth and last paragraph of Section 23-4.1 of the Code of Virginia seems to confer the sole authority of granting easements on the appropriate Boards of Visitors or Trustees of educational institutions, even though the first paragraph of that section includes the language ‘. . . with the approval of the Governor first obtained . . .’ The eighth paragraph of Section 2.1-82.1 provides for the Director of Engineering and Buildings to review all contractual agreements with utilities to include easements and rights-of-way granted by agencies and institutions.

"The question is whether or not easements granted by educational institutions are required by law to be reviewed by the Division of
Title 2.1, Code of Virginia (1950), as amended, deals with the administration of government generally. For example, included in Title 2.1 is a statute providing for conveyance of utility easements by State departments, agencies or institutions generally (§ 2.1-6). Such easements require the approval of the Governor and the Attorney General as to form.

On the other hand, Title 23 of the Code deals solely with educational institutions. Under authority of § 23-4.1, the Boards of Visitors or Trustees of such institutions are empowered in their discretion to grant utility easements on any property owned by them. Although the first paragraph of § 23-4.1 requires the approval of the Governor in order for education institutions to lease, sell or convey their interest in real property, no such approval is necessary for the granting of utility easements provided for in the last paragraph of that statute.

Section 2.1-82.1 to which you refer was amended in 1970 to require the Director to "review" all contractual agreements with utilities to serve State institutions or agencies that require the approval of the Governor as well as all easements and rights-of-way granted by institutions and agencies to public and private utilities. This new provision contained no power of approval by the Director nor did it specify the time when such review must be accomplished. It would be assumed that a mandatory review was contemplated prior to the granting of such easements and rights-of-way by the agency or institution.

In view of these conflicting provisions, it is my opinion that you are not required by § 2.1-82.1 to review utility easements granted by educational institutions under authority of § 23-4.1. The eighth paragraph of § 2.1-82.1 to which you refer deals with State agencies or institutions in general while § 23-4.1 grants certain powers specifically to educational institutions. It is a rule of statutory interpretation that a specific statute takes precedence over a general one, which in this situation would operate to except educational institutions from the particular requirement of § 2.1-82.1 in question.
to have your opinion as to the legal ramifications of the inter-basin transfer of water. If you are in need of any documentation or further information, please feel free to contact me."

As you are probably aware, the uses to which the waters within any particular watercourse may be put are largely governed by the common law pertaining to riparian rights. Generally, only those persons owning property through or along which a watercourse flows are entitled to make use of the waters thereof; but as is true in the case of most rules, exceptions do exist, i.e., the right of the public to navigate upon navigable waters.

In the case of Gordonsville v. Zinn, 129 Va. 542 (1921), the Court had before it the question of whether or not a riparian owner had the right to divert water taken from the riparian property for use on non-riparian property. The factual situation was that the Town of Gordonsville, which had established its prescriptive right to divert a non-navigable watercourse from its riparian property to the non-riparian corporate limits for its water supply, sought to enjoin a similar diversion by an upper riparian owner, who had not established such a prescriptive right, of waters to her non-riparian property. The Court held that the upper riparian owner had no right to divert waters for use on non-riparian property. The Court, at page 558-59, cited Farnham on Waters and Water Rights for the proposition that such diversion to non-riparian land was unlawful.

The ruling of the Court in Gordonsville has been cited with approval on several later occasions by the Supreme Court of Virginia, most notably in Purcellville v. Potts, 179 Va. 514 (1942) and Virginia Hot Springs Co. v. Hoover, 143 Va. 460 (1925). It should be noted at this point that the above cited authorities were concerned with relatively small and apparently non-navigable watercourses. While the Court did rule that a riparian owner could not divert the water to non-riparian property, the lower riparian proprietor had to prove actual or threatened damage to himself in order to prevail. See, 18 Va. L. Rev. 223 at 232 (1932).

It has long been established in Virginia that the correlative rights of riparian proprietors are governed by the reasonable use doctrine of riparian rights. See, Purcellville v. Potts, supra; Hite v. Luray, 175 Va. 218 (1940); Virginia Hot Springs Co. v. Hoover, supra. This doctrine is to the effect that each riparian proprietor has a correlative and equal right to make a reasonable use of the waters flowing through or past his riparian property. Thus it would appear that, for one to prevail against an unlawful diversion, he must rely upon his own right to a reasonable use of the waters and he must show that such right has been injuriously affected. 18 Va. L. Rev., supra at 232. An unlawful diversion alone does not warrant relief.

As noted above, none of the foregoing cases is concerned with navigable watercourses. There is no authority in Virginia of which I am aware that covers the matter of diversion of waters from navigable watercourses. Even though the rights of riparian proprietors in and to navigable waters are subject to certain rights in the public such as navigation, it would seem that the general principles enunciated above are no less applicable in the case of navigable watercourses.

An argument can be made to the effect that the proscription against diversion to non-riparian property does not apply to storm or flood water, inasmuch as the excess flow caused thereby may not be the "natural" flow of the watercourse spoken of by the Court in Hite v. Luray, supra, to which the riparian owner is entitled. If this be the case, the riparian rights vested in the owners of properties abutting the stream would not be impinged upon by the diversion of such excess flow to another basin. However, there are no cases in Virginia on this point, and, in view of the discussion found in 18 Va. L. Rev., supra, this approach may be questionable unless authorized by statute. In this regard, I would call your attention to the provisions of Chapter 8 of Title 62.1 of the Code of Virginia (1950),
as amended, which grants authority to riparian owners to impound, and have the sole and unrestricted use of, the flood waters of non-navigable watercourses so impounded.

Although one does not generally have the right to divert water beyond his riparian property or beyond the watershed, this does not negate the possibility of one acquiring the right to do so by prescription, or by grant of the Commonwealth. See, Hite v. Luray, supra. This would appear to be particularly true with respect to grants by the Commonwealth in relation to its navigable waters. See, Old Dominion Iron & Nail Company v. Chesapeake & Ohio Railway, 116 Va. 166 (1914); Newport News Shipbuilding & Dry Dock Co. v. Jones, 105 Va. 503 (1906); Taylor v. Commonwealth, 102 Va. 759 (1904). See generally, Alvin T. Embrey, Waters of the State (1931).

In view of the foregoing, I am of the opinion that, inasmuch as an inter-basin transfer of water constitutes, by definition, a diversion of water beyond riparian property, any such inter-basin transfer by a riparian owner would be unlawful at common law, although the lower riparian owner is not entitled to relief from such diversion in the absence of injury. In this regard, consideration might be given to the legislative enactment of authority for such transfer as an appropriate course of action. It should be noted that riparian interests in Virginia are considered to be property rights and, therefore, care should be taken not to deprive the owners of vested rights therein without due process of law.

CONSTITUTION—Institution of Learning—Meaning not broadened by revised Constitution.

April 14, 1972

THE HONORABLE PAUL H. BEEASON
Commissioner of the Revenue for Arlington County

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

"I would like your opinion as to an interpretation of Article X, § 6(a) (4) of the revised Constitution as it relates to § 58-12(4).

"In the Report of the Attorney General (Va.) 1968-69, at page 228, it was ruled that educational purposes 'presupposes the existence of a faculty, a student body and prescribed courses of study. An institution of learning must be something like a college under the rule ejusdem generis.'

"Please advise if the ruling of 1968-69 is still applicable under the new Constitution."

In my opinion, the elimination from Section 183(f) of the old Virginia Constitution of the language, "incorporated colleges or other incorporated," was intended to do, and did, no more than remove the requirement that the institution of learning be incorporated. It should not be construed to broaden the meaning of "institution of learning." A narrow construction of the phrase is required by Article X, Section 6(f), of the revised Virginia Constitution.

CONSTITUTION—Requirements of Residence to Hold Office Governed By; Statutes in Conflict Are Invalid.

CONFLICT OF LAWS—Statutes Which Impose Qualifications on Right to Hold Office, Other Than Contemplated By Constitution, Are Invalid.

October 6, 1971

THE HONORABLE ELEANOR W. TALLEY
Secretary, Fluvanna County Electoral Board
In your letter of October 1, 1971, you inquire whether the provisions of § 15.1-51 of the Code of Virginia, (1950), as amended, which require a candidate for Commonwealth's Attorney of a county to be a resident therein for six months prior to the election, are in conflict with the provisions of Article II, Section 5, of the Constitution of Virginia, which sets forth the qualifications to hold elective office.

Section 15.1-51 of the Code of Virginia provides, in pertinent part, as follows:

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

Article II, Section 5, of the 1971 Constitution of Virginia, provides, 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. ..."

Virginia law is clear that statutes which impose qualifications on the right to hold office, other than those contemplated by the Constitution, are invalid. Black v. Trower, 79 Va. 123 (1884); District Road Board v. Spilman, 117 Va. 201, 84 S.E. 103 (1915). The only requirements of residence imposed on the right to hold office by the above-quoted provision of the Constitution are that the person be a resident of the Commonwealth for one year and a resident of his locality for thirty days, as provided in Article II, Section 1, which deals with qualification to vote. Section 15.1-51, which would require the individual to be a resident of his locality for six months, is therefore in conflict with Article II, Section 5, of the Constitution, and is therefore invalid insofar as it would require residence in the county for more than thirty days.

I might point out that § 15.1-51 was consistent with the provisions of Section 32 of the 1902 Constitution of Virginia, which provided, in pertinent part:

"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, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; ..." (Emphasis supplied.)

The last clause of this provision in the old Constitution authorized the additional requirements of residence contained in § 15.1-51. No such clause, however, appears in the 1971 Constitution.

CONSTITUTIONAL LAW—County and City Offices—Methods of selection. COUNTIES—Constitutional Offices—Methods of selection.

THE HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

This is in reply to your letter of July 2, 1971, which reads as follows:

"The City Attorney for the City of Newport News has asked that
I obtain an opinion that pertains to Section 4 of Article 7 of the Virginia Constitution.

"Section 4 provides: 'The General Assembly may provide for County or City officers or methods of their selection, ... without regard to the provision of this section ...'

"Does this section mean that a municipality by Charter provision can do away with the election of constitutional officers (treasurer, sheriff, etc.) and make such officers a department of the City government whereby they might be appointed by City Council or hired by the City Manager?"

Your question is answered in the affirmative provided the City follows the procedure laid down by Section 4 of Article VII of the Constitution.

CONSTITUTIONAL LAW—Motion Pictures; Drive-ins; State May Prohibit Public Displays of Explicit Sexual Activities; Protection of Juveniles. April 14, 1972

THE HONORABLE ADELARD L. BRAULT
Member, Senate of Virginia

I am in receipt of your letter of April 11, 1972, regarding Chapter 421 of the 1972 Acts of Assembly (S. B. 154), which amended § 18.1-236.7(b) of the Code of Virginia (1950), 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 or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way or place of public accommodation of such motion picture by juveniles not admitted to any such premises."

You request my opinion on the constitutionality of the new statute, which will become effective July 1, 1972, in light of the recent decision of the Supreme Court of the United States, handed down on March 20, 1972, in the case of Rabe v. State of Washington.

Rabe was a per curiam decision reversing the conviction of a manager of a local drive-in on an obscenity charge. The Supreme Court of Washington found the movie to be obscene, not in and of itself, but because of the context or location of the exhibition. The Court reversed the conviction on grounds of vagueness since the statute had "not given fair notice that the location of the exhibition was a vital element of the offense."

The Court did not rule unconstitutional, language such as that found in Chapter 421. Furthermore, its ruling upheld the right of a state to prohibit "public displays of scenes depicting explicit sexual activities" and stated additionally that such prohibition involved "no significant countervailing First Amendment considerations."

I am of the opinion that, the Rabe decision notwithstanding, the amendment in question is constitutional, particularly in light of the fact that its purpose is the protection of juveniles. See Gingsburg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968).

CORPORATIONS—Doing Business—Must take some action constituting the transaction of business.

TAXATION—Local License—When corporation is "doing business" so as to be subject to tax.
REPORT OF THE ATTORNEY GENERAL

September 16, 1971

THE HONORABLE SAM T. BARFIELD
Commissioner of Revenue for the City of Norfolk

I have received your recent letter in which you ask whether a "shell" corporation is doing business for license tax purposes merely by virtue of its existence. The license tax to which you refer is a flat fee for the privilege of "doing business."

Even though a corporation may have been formed in anticipation of doing business at a future date, it is not, in my opinion, liable for such a tax until it actually begins business. The phrase, doing business, is "ephemeral and not easily defined." Sikes v. Rexall Drug Co., 176 F.Supp. 33, 35 (1959). Virginia Code § 13.1-53 provides:

"A corporation shall not transact any business or incur any indebtedness, except such as shall be incidental to its organization or to obtaining subscriptions to or payment for its stock, until there shall have been paid in the consideration for the initial issue of stock as stated in the stock statement filed with the Commission as required by this Act."

If the very acts of organization were deemed to be doing business, every new corporation would necessarily violate Virginia Code § 58-251 by beginning business without a license, for the corporation could not purchase a license until after it was created. In my opinion, a corporation does not begin business until it takes some action constituting the transaction of business within the meaning of § 13.1-53.

CORPORATIONS—Nonstock—Tenure limitation of members of board of directors.

May 31, 1972

THE HONORABLE DAVID F. THORNTON
Member, Senate of Virginia

I am in receipt of your inquiry concerning certain provisions of Senate Bill No. 110 as recently enacted by the 1972 Session of the General Assembly. Your specific inquiry concerns an interpretation of § 32-195.5:1 of the Code of Virginia (1950), as amended, as it relates to tenure of members of the board of directors referred to therein.

Specifically, after reciting pertinent portions of the aforesaid statute, your inquiry is posed as follows:

"Does the eight-year term commence when the amendment takes effect on July 1, 1972? Or does the eight-year term limitation include service prior to the effective date of the amendment?"

Section 32-195.5:1 reads in pertinent part as follows:

". . . The tenure of office of no board member, except the chief executive officer, shall be in excess of eight consecutive years; provided, that the tenure of office of board members elected in nineteen hundred seventy-two shall not be in excess of ten consecutive years, and the tenure of office of board members elected in nineteen hundred seventy-three shall not be in excess of nine consecutive years. . . ."

The tenure limitation does not take effect until July 1, 1972 and upon becoming effective it would not, in my opinion, have retrospective application. Therefore, the tenure limitations specified in § 32-195.5:1 would not include service prior to July 1, 1972.
COSTS—Warrant for Refusal to Take Blood Test Taxed as in Misdemeanor Case.

CLERKS—Warrant for Refusal to Take Blood Test Taxed as in Misdemeanor Case.

WARRANTS—Refusal to Take Blood Test; Costs Taxed as in Misdemeanor Cases.

April 5, 1972

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

This is in reply to your letter of March 20, 1972, which I quote, as follows:

"The question has arisen in my office as to whether or not any costs may be taxed against a person who has been found by the Court to have unreasonably refused to submit to a blood test as required by § 18.1-55.1 of the Code.

"When a defendant is found guilty in County Court and pays his fine and costs in County Court, I am informed by the Clerk of County Court that she collects costs on the warrant charging refusal to take a blood test. When there is an appeal taken on such a case of driving drunk and refusal to take a blood test, and the defendant is found guilty of impaired driving, our question above refers to the costs on the warrant for refusing to take a blood test which suspends his license for an additional ninety days.

"Please advise me what, if any, costs are properly taxable in such a case."

The fees for services performed by judges or clerks of courts not of record, in criminal cases, are prescribed in § 14.1-123, Code of Virginia (1950), as amended. Similarly, the fees for services performed by a justice of the peace in such cases, are set forth in § 14.1-128, Code of Virginia (1950), as amended. The proceeding for refusal to take a blood test, in violation of § 18.1-55.1, has been denominated a civil and administrative procedure, rather than criminal. Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969). Paragraph (j) of this section, however, provides that, in case of refusal to take the test, the committing or issuing justice, clerk or assistant clerk shall forthwith issue a warrant, which shall be executed in the same manner as criminal warrants. Further, paragraph (p) of this section, makes the procedure for appeal and trial the same as provided by law for misdemeanors.

In my opinion, therefore, it is proper for the clerk to tax the same costs, as prescribed by law in the case of misdemeanors, upon a finding of guilty on a warrant charging refusal to take a blood test.

COSTS—Witness Allowance—Juvenile and domestic relations courts.

JUVENILE AND DOMESTIC RELATIONS COURTS—Witness Allowance—Authority to pay.

WITNESSES—Fees—Juvenile and domestic relations courts.

FEES—Witness Allowance—Juvenile and domestic relations courts.

July 28, 1971

THE HONORABLE VON L. PIERSALL, JR., Judge
Juvenile and Domestic Relations Court for the City of Portsmouth

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

"Can the Juvenile and Domestic Relations Court of Portsmouth
order re-imbursement of travel expenses for witnesses who appear
in this court which expenses will be repaid out of the State Treas-
ury?"

It is my opinion that § 16.1-171 of the Code governs this inquiry as quoted below:

"The judge may authorize the payment of the fees and mileage provided by law of any witness or person summoned or otherwise required to appear at the hearing of any case coming within the jurisdiction of the court, which sum shall be paid by the State Treas-
urer out of funds appropriated in the general appropriation act for criminal costs."

Thus, the answer to your initial inquiry is clearly in the affirmative.
You next inquire as to whether such payments would be made on a form like the one used in the Hustings Court, a copy of which you attach to your letter. This form is captioned "(FELONY WITNESS)" and is further designated as "Official Form No. 2. 3-1-69-300 Books." It is my opinion that § 19.1-317, et seq., requires that requests from a court not of record for reimbursement be channeled through a court of record. Thus, you should prepare a certificate covering such fees and mileage for witnesses which you will forward to the court of record "before which you qualified." The court of record will then certify these payments to the Comptroller and issue a certificate such as the one to which you refer to the witness who can be paid by the city treasurer.

COUNTIES—Arlington County May Regulate Parking on Streets and Roads in its Secondary Highway System.
COUNTIES—Classification of Residential or Business Parking; Lawful Exercise of Police Power and Constitutional.
COUNTIES—May not Require Different Charge for Parking from Non-residents Than Fee for Residents.

THE HONORABLE GEORGE MASON GREEN, JR.
Member, House of Delegates

This is in reply to your letter of January 27, 1972, in which you request my opinion whether legislation to permit Arlington County to require a different charge for the parking of vehicles of non-residents of the county than for residents would be constitutional. Also, whether it would be constitutional for the county under its police power to zone portions of certain streets for residential parking as opposed to business or office parking. You further ask whether Arlington County now has the authority to enact such a zoning classification.

Section 46.1-252.1 of the Code of Virginia (1950), as amended, authorizes Arlington County to regulate parking on the streets and roads in its secondary highway system. This authority is limited by the following language:

"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, including the right to install and maintain parking meters and to require the deposit therein of a coin of a denomination to be prescribed in such ordinance and to determine the time during which a vehicle may be parked, and may designate the official or officer of the county to put the regulations into effect, including specifically
the right and authority to classify vehicles with reference to parking and to designate the time, place and manner such vehicles may be allowed to park on county owned property; and may delegate to the appropriate administrative official or officials the authority to make and enforce such additional rules and regulations as parking conditions may require and may prescribe penalties for failure to conform thereto." (Emphasis supplied.)

Parking of vehicles on streets is an incident of the right to travel. However, it is a privilege to be exercised with due regard to the primary right of the public to unobstructed passages and, in that sense, the police power of the state or municipality may be invoked for the promotion of the general welfare in the broad sense of furthering the public convenience and public prosperity of the community. 56 Am.Jur.2d, Municipal Corporations, etc., § 442, p. 491.

Thus, construing the above statute in the broad sense, I am of the opinion that the classification of vehicles permitted by the section would extend to enable the county to classify between residential parking as opposed to business or office parking. Assuming that it can be shown that there is a need for such a classification, the need relating directly to easing of congestion in the streets and, thus, having a bearing on public safety in the use of the streets, then I am of the opinion that such a classification would be a lawful exercise of the police power and, consequently, would be constitutional.

I do not feel, however, that the above statute authorizes, nor would, in my opinion, it be constitutional for Arlington County to require a different charge for parking of vehicles from non-residents of the County than the fee charged for residents. The fees extracted for parking meters must have a relationship to defraying the expenses incidental to the regulation of parking. When the charge for the use of the meters is viewed as a tax for the privilege of using parking space, that is, the charge is in reality a revenue measure rather than a charge in keeping with regulatory powers, then the ordinance is invalid. 7 Am.Jur.2d, Automobiles and Highway Traffic, § 238, p. 790; Annotation 83 A.L.R.2d 628, § 2. This seems to be the reason for charging an extra parking fee for non-residents. If it is not viewed as a revenue maker then there still does not appear to be any reasonable basis for the differentiated treatment of non-residents, in charging them a greater fee for parking, than that of residents. Such legislation, therefore, would, in my opinion, not be constitutional.

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COUNTIES—Authority—May not impose taxes on property owners to improve unimproved streets adjoining property.

TAXATION—Counties May Not Impose Taxes on Property Owners to Improve Unimproved Streets Adjoining Property.

May 15, 1972

THE HONORABLE JOHN D. EURE, JR.
Commonwealth’s Attorney for Nansemond County

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

“The Board of Supervisors of Nansemond County, feeling that county taxpayers as a whole should not be forced to bear the burden of improving streets in older subdivisions where new construction is now beginning, adopted Section 7-2 of the Nansemond County Subdivision Ordinance on January 13, 1972. The intent of the Board of Supervisors is for the county to collect $5.00 per front foot before issuing a building permit for construction on a lot facing on an
unimproved street. The funds raised in this manner are to be used
to defray expenses incurred in improving such unimproved streets.

* * *

"I would appreciate your opinion as to whether or not the Code
of Virginia specifically authorizes county governments to impose
taxes or assessments upon property owners for making or improving
unimproved streets which adjoin their property. In addition, and
more specifically, I request your opinion as to whether, or not the
Board of Supervisors of Nansemond County has the authority to
require the owner, builder or other person applying for a building
permit to pay to the County of Nansemond the sum of $5.00 per
front foot of lot before a building permit will be issued for the
construction of a building on a lot adjoining an unimproved street.
And finally I request your opinion as to the legality of Section 7-2
of the Nansemond County Subdivision Ordinance set forth in the
enclosure."

Article X, Section 3, of the Constitution of Virginia provides:

"The General Assembly by general law may authorize any county,
city, town, or regional government to impose taxes or assessments
upon abutting property owners for such local public improvements
as may be designated by the General Assembly; however, such taxes
or assessments shall not be in excess of the peculiar benefits resulting
from the improvements to such abutting property owners."

Local improvements for which abutting property owners may be taxed
or assessed are those found in § 15.1-239, Code of Virginia (1950), as
amended, which reads:

"The governing body of any county, city or town may impose taxes
or assessments upon abutting property owners for making or improv-
ing the walkways upon then existing streets, for improving and
paving then existing alleys, and for either the construction or the
use of sanitary or storm water sewers including curbs and gutters;
however, such taxes or assessments shall not be in excess of the peculiar benefits resulting from the improvements to such abutting
property owners.

"In addition to the foregoing, the governing body of any city
having a population in excess of three hundred thousand may impose
taxes or assessments upon abutting property owners for the con-
struction, replacement or enlargement of sidewalks or storm sewers;
for the construction or installation of canopies or other weather
protective devices; for the installation of lighting in connection with
the foregoing; and for permanent amenities, including, but not limited
to, benches or waste receptacles, provided that such taxes or assess-
ments shall not be in excess of the peculiar benefits resulting from the
improvements to such abutting property owners."

The authority of the board of supervisors to impose taxes or assessments
upon abutting property owners does not extend to improving unimproved
streets which adjoin their property. I therefore answer your first and
second questions in the negative.

You next ask whether Section 7-2 of the Nansemond County subdivision
ordinance which you attached is legal. For the reasons heretofore stated,
I am of the opinion that the provision of the ordinance requiring the pay-
ment of the sum of $5.00 per front foot by the owner, builder, or other
person, for improving unimproved streets is unenforceable. This subdivision
ordinance, however, may be amended so as to conform to § 15.1-239 of the
Code and to include the provisions permitted by § 15.1-466 of the Code.
COUNTIES—Authority; Not Empowered to Establish and Operate Nursing Home for Elderly—Dillon Rule.

DILLON RULE—Requires Narrow Construction of All Powers Conferred on Local Government.

April 21, 1972

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

This is in reply to your letter of April 4, 1972, in which you ask my opinion whether the County of Arlington is empowered to establish and operate a nursing home for the elderly. You also ask whether Arlington County would have the necessary powers to secure funds for establishing and operating the home.

The Dillon Rule requires a narrow construction of all powers conferred on local government, because they are "delegated powers." In applying that rule I am unable to find any express authority empowering the governing body of a county to establish a nursing home for the elderly and to operate the same. I therefore answer your first question in the negative which renders unnecessary an answer to your second question.

COUNTIES—Authority to Employ Additional Staff.

BOARDS OF SUPERVISORS—Authority to Employ Additional Staff.

June 6, 1972

THE HONORABLE M. LANGHORNE KEITH
County Attorney for Fairfax County

This is in reply to your recent letter in which you ask whether § 15.1-779, Code of Virginia (1950), as amended, limits the amount of secretarial help a board member in an urban county executive form of government may have to one secretary.

Section 15.1-779 provides that each board member, in addition to salary and allowances, shall be entitled to the services of a secretary, paid by the county in conformity with existing pay scales, whose duty shall be to perform secretarial services limited exclusively to county business.

While this section makes it mandatory that each member have a secretary paid for by the board, it does not preclude the employment of additional staff if proper appropriation is made by the board for such staff.

COUNTIES—Board of Supervisors Governed by § 15.1-493 in Amending Zoning Ordinance; Must Also Follow § 15.1-504 as Applicable.

ZONING—Public Hearing; Board of Supervisors Must Refer Amendment to Planning Commission for Recommendations Also.

December 29, 1971

THE HONORABLE THOMAS R. NELSON
County Attorney for the County of Augusta

This is in reply to your letter of November 26, 1971, which reads, in part, as follows:

"Augusta County has a zoning ordinance and a zoning map showing the various zoned classifications of properties. From time to time requests are presented to the Board of Supervisors for rezoning of different portions of the County. These requests are considered by the Planning Commission of the County, who make recommendations to the Board of Supervisors on the subject of rezoning."
"The zoning map of the County by the terms of the County zoning ordinance has been made a part of the ordinance, a procedure commonly followed by the other counties, cities and towns.

"Section 15.1-493 appears to prescribe a method by which changes or corrections in the zoning ordinances or amendments thereto may be made.

"Section 15.1-504 sets forth the method by which ordinances may be adopted by the County which does not appear to be the same method as prescribed by Section 15.1-493.

"In amending the zoning map and amending the zoning ordinance, which of the two Sections of the Code mentioned above govern the Board of Supervisors?"

Section 15.1-493, Code of Virginia (1950), as amended, applies specifically to the adoption of zoning ordinances and amendments thereto and must be followed by the board of supervisors.

This section provides in part:

"Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.1-431, after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment; provided, however, that no additional land may be zoned to a different classification than was contained in the public notice without an additional public hearing after notice required by § 15.1-431. Such ordinances shall be enacted in the same manner as all other ordinances."

This section after requiring a public hearing, etc., provides that any ordinance adopting or amending a zoning ordinance shall be enacted in the same manner as all other ordinances. Section 15.1-504 of the Code to which you refer provides the manner for the enactment of all other ordinances.

I am, therefore, of the opinion that the board of supervisors is governed by § 15.1-493 in amending the zoning ordinance and that it must also follow § 15.1-504 in so far as applicable.

You next state:

"The local procedure to amend the zoning map has been by resolution of the Board of Supervisors after proper consideration of the Planning Commission. Can the wording of the County zoning ordinance itself be changed or a Section added to it by resolution of the Board of Supervisors after proper consideration by the Planning Commission?"

Section 15.1-493 provides that no zoning ordinance shall be amended or reenacted unless the governing body has referred it to the local commission for its recommendations. It also provides that before approving and adopting any zoning ordinance or amendments the governing body shall hold at least one public hearing thereon after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment.

In view of this language, I am of the opinion that once the board of supervisors has referred the amendment to the Planning Commission for recommendation it has met the statutory requirements and thereafter may make changes in the amendment so long as a public hearing is held and the other statutory requirements met.

COUNTIES—County Executive Form of Government—Incoming Board of Supervisors must reappoint existing school board members.
COUNTIES—County Executive Form of Government—Terms of members of school board when reappointed by incoming Board of Supervisors.

SCHOOLS—County Executive Form of Government—Incoming Board of Supervisors must reappoint existing school board members.

SCHOOLS—County Executive Form of Government—Terms of members of school board when reappointed by incoming Board of Supervisors.

BOARDS OF SUPERVISORS—County Executive Form of Government—Incoming Board must reappoint existing school board members.

December 30, 1971

THE HONORABLE PAUL B. EBERT
Commonwealth's Attorney of Prince William County

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

"I have been asked to seek a further opinion and clarification of a portion of your opinion to me dated December 9, 1971.

"Your paragraph three (3) concerning the appointment of the school board I feel needs clarification. Specifically, does Section 15.1-609.1 of the 1950 Code of Virginia, as amended, require that the existing school board of Prince William County be reappointed by the incoming Board of Supervisors, and, if so, for what term?"

I am of the opinion that § 15.1-609.1 of the Code of Virginia (1950), as amended, requires the incoming Board of Supervisors to reappoint the existing school board members of Prince William County. The statute provides that the terms of the members shall be four years, except that the initial appointments may be for terms of one to four years, respectively, so as to provide staggered terms. Whether the terms are staggered is discretionary with the Board of Supervisors. Since there are seven members on the school board, should the Board of Supervisors decide to stagger their terms, they should be staggered in accordance with the provisions of § 22-64 of the Code. This provides that if there be more than four members, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years, and the remaining members shall be appointed for the longest term possible, not exceeding four years. Of course, should the Board of Supervisors decide not to stagger the terms, all members shall be appointed for a term of four years.

COUNTIES—Diversion of Waters From Creek in County—No authority to Control.

November 29, 1971

THE HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for Botetourt County

This will acknowledge receipt of your letter of November 11, 1971, wherein you requested my opinion concerning the county's right to control the diversion of waters from a creek located within the county. In your letter you state, in part, as follows:

". . . A municipality which owns a reservoir in our county has diverted water from a creek located in the county through a tunnel driven through a mountain to the reservoir. The municipality is a riparian owner of land on said creek; the county is not.

"Does the county under present law have any rights in the waters of the creek so that it may control or completely prohibit the diver-
sion of the waters from the creek through the tunnel to the reservoir?

"Under present law does the county have the lawful right to maintain a certain level of water in said creek by court action?"

Inasmuch as a county is a creature of statute, its power and authority are limited to that which is granted by statute. In this regard, I am aware of no authority, statutory or otherwise, which would enable the county to control or to prohibit the diversion of water from the creek or to maintain a certain level of water therein by court action. Consequently, I am of the opinion that your questions must be answered in the negative. See Report of the Attorney General (1967-1968), p. 297, a copy of which is enclosed herewith for your convenience.

COUNTIES—Election Districts—May be reduced to one county-wide district.

July 2, 1971

The Honorable Frank D. Harris
Commonwealth's Attorney for Mecklenburg County

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 dated June 28, 1971, 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.

Such a change, however, may not be done by judicial order as the cited statute clearly provides that only the governing body of the county shall have the authority to diminish the number of districts.

COUNTIES—Employees of Are Not Under State Personnel Rules; Vacation Time Set by Local Governing Body.

June 1, 1972

The Honorable Margaret B. Brown, Clerk
Circuit Court of Culpeper County

This is in reply to your letter of May 30, 1972, in which you ask if the law relative to vacations of employees of your office and of the county is retroactive.
Your employees are not under the State Personnel rules which set forth the precise amount of vacation which State employees receive. The amount of vacation time your employees receive is a matter for you to determine. The vacation time allowed employees of the county is set by the local governing body.

COUNTIES—Executive Secretary May Act as Purchasing Agent, Subject to Exceptions Allowed by County.
COUNTIES—Purchasing Agent May Be Employed by.
COUNTIES—Not Required to Contract on Competitive Bids When Not Feasible.

May 19, 1972

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

This is in reply to your letter of May 11, 1972, which reads as follows:

“Gloucester County has appointed an executive secretary pursuant to § 15.1-115 of the 1950 Code of Virginia as amended.
“The governing body desires to contract with a certain individual to maintain the county dump. It is contemplated that his compensation will be on a ‘cost plus’ basis and will exceed $1,000.00 per annum.
“The governing body has not employed a county purchasing agent or designated some official to perform the duties as purchasing agent pursuant to § 15.1-103 of said Code.
“My questions are as follows:
“1. Does § 15.1-117(12) of the Code empower the executive secretary to act as purchasing agent for contractual services?
“2. Does Article 7, Chapter 2, Title 15.1 (County Purchasing Act—§ 15.1-103 et seq.) or any other law compel the governing body in this case to award the contract to the ‘lowest and best bidder’? and does the ‘County Purchasing Act’ apply when an executive secretary has been appointed?
“3. If the answers to questions 1. and 2. are in the affirmative, and the governing body decides that the proposed contract is the only ‘Feasible’ means to maintain the dump, does § 15.1-108 or any other law authorize it to ‘provide otherwise’ than by sealed bids?”

I shall answer your questions seriatim:

(1) Section 15.1-117(12), Code of Virginia (1950), as amended, provides that the executive secretary shall have the general duty to act as purchasing agent for the county and to make all purchases for the county subject to such exception as may be allowed by the governing body. Should the governing body desire to except the procurement of contractual services from the executive secretary, it may do so, and, in such event, the executive secretary is not empowered to contract for these services.

(2) Section 15.1-103 provides that the governing body of every county may employ a county purchasing agent, or designate some official or employee of the county to perform the duties of the purchasing agent. This is a permissive statute whereby the county may employ a county purchasing agent or designate some other official or employee to do the purchasing. Under this section the county may employ an executive secretary and assign the duties of purchasing to him, excepting from him such purchases as the county may direct.

(3) The county is not required to follow § 15.1-108 of the Code and contract for contractual services on competitive bids when it is determined
not feasible to do so. Therefore, the answer to this question is in the affirmative.

COUNTIES—Expenses and Mileage Which May Be Paid by County to Members of Governing Body.

May 15, 1972

THE HONORABLE DAVID D. BROWN
Commonwealth's Attorney for Washington County

This is in reply to your letter of April 28, 1972, in which you ask my opinion on the following question:

"... What expenses, if any, and mileage, if any, may the governing body of Washington County pay its members?"

Section 14.1-5, Code of Virginia (1950), as amended, provides as follows:

"Any person traveling on State business shall be entitled to reimbursement for such of his actual expenses as are necessary and ordinarily incidental to such travel. If conveyance is by public transportation, reimbursement shall be at the actual cost thereof. If conveyance is by private transportation reimbursement shall be at the rate of nine cents per mile. The provisions of this section shall not, however, affect the provisions of § 14.1-19."

Section 14.1-7 applies to reimbursement for expenses as are necessary and ordinarily incidental to travel for board members where no part of the cost is borne by the State. This is limited to the rates provided in § 14.1-5.

I am of the opinion that the members of the governing body of Washington County may be paid mileage at the rate of nine cents per mile and such actual expenses as are necessary and ordinarily incidental to such travel. By Chapter 719 of the 1972 Acts of Assembly which will become effective July 1, 1972, the mileage allowance will be increased to ten cents per mile. This mileage allowance of ten cents will include all costs incident to the maintenance and operation of private conveyance except storage and parking fees, turnpike, tunnel, ferry and bridge tolls. See Chapter 69, 1972 Acts of Assembly (also effective July 1, 1972).

COUNTIES—Fairfax—Ordinance prohibiting deed restrictions—Enforceable.

March 16, 1972

THE HONORABLE HERBERT N. MORGAN
Member, House of Delegates

In your letter of March 7, 1972, you inquire whether an ordinance adopted by the Board of Supervisors of Fairfax County on February 28, 1972, amending the Housing Availability Ordinance found in Chapter 15D of the Fairfax County Code, is constitutionally valid. The amendments in question declare that deed restrictions "which purport to restrict or affect the holding, occupancy or transfer of an interest in land on the basis of race, color, religion, ancestry or national origin" are contrary to public policy and that persons preparing deeds for recording in Fairfax County must certify that such deeds contain no such restrictions.

The Supreme Court of the United States, of course, has ruled that restrictions on the use or ownership of land based on race, color, or national origin may not be enforced in State courts consistently with the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948); Oyama v.
California, 332 U.S. 633, 68 S.Ct. 269 (1948). The Fairfax County ordinances do no more than restate those principles and provide the conditions by which the Constitution's mandate will be enforced in Fairfax County. In my opinion, therefore, the ordinances are valid.

COUNTIES—Funding of Planning District Commission.

PLANNING COMMISSION—District—Funding.

VIRGINIA AREA DEVELOPMENT ACT—Funding of Planning District Commission.

May 10, 1972

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

This will acknowledge receipt of your letter of May 2, 1972, requesting my opinion as to whether or not Sussex County, a member of the Crater Planning District Commission, is legally obligated to provide funds to the Commission to repay monies borrowed by the Commission from a bank.

The pertinent provisions of the Virginia Area Development Act relating to the funding of the Commission by its member governmental subdivisions are found in § 15.1-1413 of the Code of Virginia (1950), as amended. This section provides that "The governing bodies of the governmental subdivisions within a planning district are authorized to appropriate or lend funds to the planning district commission."

The thrust of § 15.1-1413 of the Code is to authorize member governmental subdivisions to make funds available to a planning district commission should such governmental subdivision wish to do so. There are no comparable provisions in the Act, however, which make such funding obligatory upon the member governmental subdivisions. Nor is any such requirement found in the Charter Agreement of the Crater Planning District Commission, a copy of which was forwarded to this office with your letter.

In this regard, it is not contemplated by the Virginia Area Development Act that the member governmental subdivisions shoulder the entire financial burden of Commissions. Rather, it is contemplated that the activities of Commissions be funded by State and federal aid, loans and other grants, including such funds as are made available to them by member governmental subdivisions.

On the basis of the foregoing, I am of the opinion that while Sussex County is authorized to make available to the Crater Planning District Commission such funds as it deems available, it is not legally obligated to do so, nor is it mandatory that the County provide funds to the Commission to repay monies borrowed by the Commission from a bank.

COUNTIES—General Tax Levies—Must be applied to entire county.

TAXATION—General Levy—Must be applied to entire county.

August 31, 1971

THE HONORABLE ROBERT C. OLIVER, JR.
Commonwealth's Attorney for Northampton County

This opinion is in response to your letter of August 11, 1971, in which you inquire whether a proposed levy increase by Northampton County would have to apply to the Town of Cape Charles as well as to the remainder of Northampton County, and whether the proposed levy increase may be accomplished by amendment of the present levy or whether the increase must be delayed until the arrival of the date for setting next year's levy.
Article X, Section 1, of the Constitution of Virginia provides in part that:

"All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. . . ."

For the purposes of the general levy described in your letter, the territorial limits of the authority levying the tax are, of course, the territorial limits of Northampton County, inclusive of the Town of Cape Charles. Although the Town of Cape Charles is a separate school district, for general levies as opposed to levies for school purposes, the Town of Cape Charles is within the jurisdictional taxing authority of Northampton County. Therefore, it would be impermissible to seek to apply the proposed levy in a non-uniform manner so as to exclude the Town of Cape Charles.

Recognizing that the general levy must be applied to the whole of Northampton County including the Town of Cape Charles, the question remaining unanswered is whether an amended levy may be enacted. Section 58-839, Code of Virginia (1950), as amended, provides in part that:

"The board of supervisors or other governing body of each county shall, at their regular meeting in the month of January in each year, or as soon thereafter as practicable not later than a regular or called meeting in June, fix the amount of the county and district levies for the current year. . . ."

Section 58-851.6 of the Code of Virginia empowers a county operating on a fiscal year running from July 1 to June 30 to change the rate of its levy at any time during the fiscal year. Therefore, the County of Northampton may change the levy at this time.

COUNTIES—License Tax on Businesses—No authority to levy on developers of land for subdivision unless a business.

COUNTIES—Sedimentation and Soil Erosion Controls—May regulate under county’s subdivision control ordinance.

THE HONORABLE ROBERT W. ACKERMAN
County Attorney for Stafford County

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

"A number of officials in Stafford County are very interested in enacting an ordinance which would levy a tax on land developers. It is their feeling that developers of land for residential purposes (subdivisions) by their development place a severe strain on services the County must provide, particularly educational services. These officials envision an ordinance which would levy a tax on developers on a per lot basis within a development. The revenue would be used primarily for educational purposes.

"I have found no authority in the Code of Virginia for such an ordinance. In your opinion, is there any statutory authority authorizing counties to enact such an ordinance?"

Section 58-266.1, Code of Virginia (1950), as amended, authorizes counties to levy, assess and collect county license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county with certain exceptions. I am unable to say that the land development operation which you describe is in fact a business as contemplated by this section. Unless the operation can be so classified and brought under this section, I am aware of no other statutory authority for the ordinance.
You further state:

"There is an additional matter upon which I would request your opinion. There are two reservoirs in Stafford County and an ordinance is being prepared to regulate activities on and about the reservoir dealing but not limited to picnicking, boating, fishing, hours which they are open to the public, the use of fires, and other recreational regulations. I have some question about the propriety of one proposed section which is as follows:

"(d) Construction or any other disturbance of the ground cover for a distance of five hundred (500) feet back from the permanent pool is prohibited to prevent erosion of the watershed.

"In your opinion, sir, if the County does not own 500 feet back from the permanent pool would the prohibition on any construction or disturbance of the ground cover constitute a public taking of private property which would require the County to exercise its power of eminent domain or to acquire the property by negotiation and pay for the same. In the event you feel this is a taking which would require compensation, in your opinion would such a restriction for any distance be a reasonable exercise of the County's powers for the reasons set forth in (d) or is there any basis for the County placing restrictions on activity around the reservoir on property now owned by the County to prevent erosion of the watershed and siltation."

In this regard, I enclose herewith a copy of an opinion rendered to the Honorable Downing L. Smith, Commonwealth's Attorney of Albemarle County, dated September 1, 1971, wherein it was ruled that a county may not implement sedimentation and soil erosion controls by means of general ordinances. In light of this opinion, therefore, it is not necessary to address your specific question of whether or not the referenced ordinance would constitute an unlawful taking of private property. With respect to what avenues, if any, may be available to the County to prevent soil erosion and siltation, I refer you to the aforementioned opinion which states that limited regulation of activities causing soil erosion and sedimentation is permissible under a county's subdivision control ordinance.

COUNTIES—Lost Property—Disposition of. PROPERTY—Personal—Lost—Disposition of. August 31, 1971

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

This is in reply to your letter of recent date in which you request an opinion as to the proper disposition of some chain saws now in the possession of the Sheriff's department. These saws were recovered from the bottom of a river by the police after having been advised by an informer that they could be found at that location. One of the saws was recovered directly by the police, and six more were recovered by private individuals who turned them over to the Sheriff's department. All efforts to learn the ownership of these saws have failed.

There appears to be no statutory authority for the disposition of this particular property. The Uniform Disposition of Unclaimed Property Act, Code of Virginia (1950), §§ 55-210.1, et seq., deals only with intangible property or tangible property in safe deposit boxes. Section 15.1-33 provides for the public sale of bicycles which have been in possession of the police or sheriff's department unclaimed for more than 30 days, and § 46.1-3 provides for the sale of abandoned motor vehicles.
Under the common law and case law developed over the years, an important legal distinction has arisen between lost property and abandoned property. The primary distinction between lost and abandoned property is that the former is involuntary and the latter is by intent or desire. Under the circumstances surrounding the recovery of the property in question, it would appear that these chain saws have not been abandoned by their real owner, but were probably stolen; therefore, these chain saws would be lost property rather than abandoned property. As lost property, it is necessary to determine the rights of the finder in order to determine the proper disposition of the property.

The finder of lost property acquires no right of property therein as against the owner; but, as against all other persons, he is entitled to the possession thereof as a quasi-depositary, holding for the owner. As to the chain saw found by the police, the county becomes the finder of this property, and as to the six chain saws which were recovered by private individuals, these persons acquire the status of finder. Therefore, the chain saws recovered by the private individuals should properly be returned to them. If they refuse to accept the possession of these saws, then they can be treated in the same manner as the one saw which was recovered by the police.

Since there is no statutory authority to guide the county as to the disposition of this property, it is my opinion that the county could properly treat this property in the same manner in which governing bodies may sell and dispose of abandoned vehicles under § 46.1-3. As will be noted in § 46.1-3 the property must be held for a period of 60 days before any disposition may be made.

COUNTIES—May Make Donations from Treasury to Volunteer Fire Department Situated Outside County.

PUBLIC FUNDS—County May Make Donations from Treasury to Volunteer Fire Department Situated Outside County.

December 28, 1971

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

This is in reply to your letter of November 24, 1971, which reads as follows:

"May the board of supervisors of a county order the payment of money from its county funds to a Volunteer Fire Department situate outside the county, which Fire Department answers fire calls within the county of the board?"

Section 15.1-25 of the Code authorizes a county to make gifts or donations of money from its treasury to a volunteer fire department situated outside the county. I therefore answer your question in the affirmative.

November 19, 1971

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

I am in receipt of your letter of November 3, 1971, wherein you state that the Culpeper County Health Department is in the process of making plans for a county health building and the local hospital, a private corporation, owning considerable land, has offered to allow the county to build
REPORT OF THE ATTORNEY GENERAL

its health department facility on the hospital grounds in order that it may be convenient for the services and equipment in the hospital. Thereafter, you make the following inquiry:

"Is a county permitted to enter into a 99 year lease with a private corporation and thereafter build a facility owned by the county on the land thereby leased."

Section 15.1-257 of the Code of Virginia (1950), as amended, reads in pertinent part as follows:

"The governing body of every county and city shall provide a court house with suitable space and facilities to accommodate the various courts of record and officials thereof serving the county or city . . . the fee simple of the lands shall be in the county or city, and the governing body of the county or city may purchase so much land, as, with what it has, may be necessary for the purposes enumerated or for any other proper purpose of the county or city . . . ."

In light of the above quoted section, in my opinion, the county would not be permitted to enter into the lease and construction arrangement which you spell out in your inquiry. Therefore, your inquiry must be answered in the negative.

COUNTIES—Recreation Director Is County Employee; Funds to Director Are County Funds and Disbursements by Treasurer; No Authority for Agency Fund for Recreation Director.

PUBLIC FUNDS—Funds to Recreation Director Are County Funds; Disbursements by Treasurer; No Authority for Agency Fund for Director.

THE HONORABLE F. B. HUBER
Treasurer of Campbell County

This is in reply to your letter of December 20, 1971, which reads as follows:

"Campbell County has employed a recreation director and is furnishing him an office and office personnel.

"Recreationally oriented groups over the county will be raising money in various ways to provide funds for recreational purposes that would not be paid for by the county. The recreation director would like for the county to handle these funds through a special or 'agency' fund, expenditures from which would not be subject to appropriation by the Board of Supervisors. It is assumed, of course, that someone, presumably the executive secretary, would approve expenditures made from this fund.

"My question is: Can such an agency fund be set up?"

Section 58-919 of the Code of Virginia (1950), as amended, requires the treasurer to keep a correct account of all moneys received and disbursed by him for the county and exhibit a statement of his accounts and the books containing a list of the warrants drawn upon him by the board of supervisors. See § 58-920 of the Code.

The recreation director is a county employee and his office and office personnel are furnished by the county. Funds coming in to the recreation director should, therefore, be entered by the treasurer as county funds and disbursements from these funds should be upon warrants drawn upon him by the board of supervisors.
I find no authority for setting up an agency fund for the recreation director.

COUNTIES—Soil Erosion and Sedimentation—No authority in county to adopt general ordinance controlling.

SOIL CONSERVATION—Soil Erosion and Sedimentation—County may not adopt general ordinance controlling.

September 1, 1971

THE HONORABLE DOWNING L. SMITH
Commonwealth’s Attorney of Albemarle County

This will acknowledge receipt of your letter of August 9, 1971, wherein you pose certain questions regarding the adoption by Albemarle County of a proposed ordinance drawn to prevent and alleviate the damaging effects of soil erosion and sedimentation in the County of Albemarle and to provide for criminal penalties for violations thereof. In your letter you express concern about the fact that you have been unable to find any statute authorizing legislation by a county to control soil erosion and sedimentation. For the sake of convenience I shall answer your questions in the order in which they are presented.

"1. Does the Board of Supervisors, by general ordinance, have the power to regulate soil erosion and sedimentation within the County?"

In this regard, I invite your attention to the provisions of Chapter 1 of Title 21 of the Code of Virginia (1950), as amended, in regard to the law of Soil Conservation Districts in Virginia. In treating the problems of soil erosion and sedimentation, § 21-2 of the Code states, in part, as follows:

"It is hereby declared as a matter of legislative determination—

"(a) The condition.—That the lands of the State of Virginia are among the basic assets of the State, and that the preservation of these lands is necessary to protect and promote the health, safety and general welfare of its people; that improper land-use practices have caused and have contributed to, and are now causing and contributing to, a progressively more serious erosion of the lands of this State by wind and water. . . ."

[Subsection (b) of § 21-2 of the Code lists the many numerous consequences of soil erosion including, inter alia, silting and sedimentation of stream channels, etc., reduction in productivity or outright ruin of certain lands, deterioration of crops, declining acre yields, loss of soil and water, destruction of fish spawning beds and food supplies, increase in severity and number of floods, damage to property and impoverishment of Virginia’s people].

"(c) The appropriate corrective methods.—That to conserve soil resources and control and prevent soil erosion and prevent floodwater and sediment damages, and further agricultural and nonagricultural phases of the conservation, development, utilization, and disposal of water, it is necessary that the land-use practices contributing to soil wastage and soil erosion be discouraged and discontinued, and appropriate soil conserving land-use practices and works of improvement for flood prevention of agricultural and nonagricultural phases of the conservation development, utilization, and disposal of water be adopted and carried out. . . ."

"(d) Declaration of policy.—That whereas, there is a pressing need for the conservation of soil and water resources in all areas of the State, whether urban, suburban, or rural, and that the benefits of soil
and water conservation practices, programs, and projects, as carried out by the Virginia Soil and Water Conservation Commission and by the soil and water conservation districts, should be available to all such areas; therefore, it is hereby declared to be the policy of the legislature to provide for the conservation of the soil and water resources of this State, and for the control and prevention of soil erosion, and for the prevention of floodwater and sediment damages, and for furthering agricultural and nonagricultural phases of the conservation, development, utilization, and disposal of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this State.”

In order to implement the foregoing provisions, the General Assembly provided in Article 3 of Title 21 of the Code for the creation of soil conservation districts. In establishing such districts, the Virginia Soil and Water Conservation Commission is required by § 21-17 of the Code to make a determination of the need for the district, and once that determination has been made, § 21-20 of the Code requires a determination of whether or not the operation of the district is administratively practicable and feasible. A variety of factors are to be considered in making this determination; however, any judgment is required to be in light of the legislative determination found in § 21-2 of the Code.

Article 5 of Title 21 of the Code sets forth the powers of the various districts and their directors. Specifically, § 21-53 of the Code states that the district shall constitute a political subdivision of the state and a public body corporate and politic with all the powers set forth in Article 5 of Title 21. The districts and directors are empowered by § 21-54 of the Code to conduct certain surveys, investigations and research projects with regard to such things as soil erosion and sedimentation and the measures necessary to prevent and control the same. The power of implementation with respect to prevention and control is expressly granted by § 21-56 of the Code.

In addition to the authority to develop the necessary programs and plans for the control of soil erosion and sedimentation authorized by § 21-61 of the Code, the directors of soil conservation districts are specifically authorized and empowered to formulate and adopt regulations pursuant to § 21-66 of the Code governing the use of land within the district. Section 21-66 of the Code provides as follows:

"The directors of any district shall have authority to formulate regulations governing the use of lands within the district in the interest of conserving soil and water resources and preventing and controlling soil erosion. The provisions contained in this article to develop comprehensive plans and adopt and implement regulations governing the use of nonagricultural lands shall not apply in any county, city or town which has adopted or hereafter adopts subdivision or development control ordinances."

Section 21-77 of the Code provides that such land-use regulations shall have the force and effect of law and be binding upon all occupiers of land within the district. The permissible scope of coverage of the regulations is documented in § 21-79 of the Code. Among other things, regulations may provide for any necessary engineering operations, the observance of particular methods of cultivation, the specification of cropping programs, tillage practices, provisions requiring the retirement of certain land susceptible of a high degree of erosion and "provisions for such other means, measures, operations, and programs as may assist conservation of soil resources and prevent or control soil erosion in the district, having due regard to the
legislative findings set forth in § 21-2." Substantial provisions are made for enforcement of the regulations duly adopted by ordinance of the soil conservation district, including provisions for a board of adjustment found in Article 7 of Title 21 of the Code.

It is quite clear from the foregoing provisions of the Soil Conservation Districts Law that the State has undertaken to provide for the prevention and abatement of soil erosion and sedimentation, and has pre-empted the field, thus precluding, in the absence of express statutory authority to the contrary, the passage of parallel county ordinances. With respect to the doctrine of pre-emption, see the opinion of this office rendered to the Honorable E. L. Kusterer, Executive Secretary, State Registration Board for Contractors, dated April 8, 1957, and found in Report of the Attorney General (1956-1957), p. 61, a copy of which is enclosed for your convenience.

"2. If the answer to question 1 is 'No' does the Board have the power to include such regulations as a part of its County Zoning Ordinance or its County Subdivision Ordinance?"

Even though a county may not, by general ordinance, provide for the regulation of soil erosion and sedimentation, the provisions of § 21-66 of the Code do permit county regulations in certain instances. The pertinent language of § 21-66 of the Code is as follows:

"The provisions contained in this article to develop comprehensive plans and adopt and implement regulations governing the use of nonagricultural lands shall not apply in any county, city or town which has adopted or hereafter adopts subdivision or development control ordinances."

I am of the opinion that the exception to the applicability of the Soil Conservation Districts Law created in the foregoing section of the Code with respect to any county, city, or town having a subdivision or development control ordinance constitutes the necessary authority for a county to regulate soil erosion and sedimentation as a part of its subdivision control provisions. Please note, however, that the exception to the applicability of soil conservation districts land-use regulations is limited to those regulations governing the use of nonagricultural lands. Secondly, inasmuch as the authority granted to counties, cities and towns is expressly limited to provisions under subdivision or development control ordinances, and the general zoning law, found in Chapter 11 of Article 8 of Title 15.1 of the Code, makes no express provision in this regard, I am of the opinion that a county's zoning ordinance would be an improper vehicle for the regulation and control of sedimentation and soil erosion.

In light of the fact that Albemarle County is without authority to enact by general ordinance provisions with regard to sedimentation and soil erosion control, it is not necessary to consider questions three through five presented in your letter concerning specific provisions of the proposed general ordinance.

COUNTIES—Torts—Immune from liability for fire escaping from public dumps.

COUNTIES—Torts—May not voluntarily pay claim arising out of.

July 2, 1971

The Honorable Robert L. Powell
Commonwealth's Attorney for Giles County

This is in reply to your letter of June 22, 1971, which reads as follows:

"Giles County owns a tract of land that is used by the public for solid waste disposal. Periodically the County employs a contractor to
cover the waste and to dig a new trench. Other than that the County
does nothing by way of supervision or maintenance of the area.

"Recently two fires have started in the area. The Division of
Forestry has suppressed the fires and submitted claims to the Board
of Supervisors for payment of suppression costs. Also, an adjoining
landowner has submitted a claim to the Board for damages to young
timber when the fires spread to his land.

"Can the County legally pay either of both of these claims?"

There is no liability on the county resulting from a fire escaping from a
public dump. See opinion of this office to the Honorable S. Page Higgin-
botham, Commonwealth's Attorney for Orange County, dated April 30,
copy of which is enclosed. A county, like the State, enjoys absolute immu-

COUNTIES—Zoning—Not subject to when using property for governmental
purposes.

ORDINANCES—Zoning—County not subject to when using property for
governmental purposes.

ZONING—Ordinances—County not subject to when using property for
governmental purposes.

November 3, 1971

the Honorable Robert W. Ackerman
County Attorney of Stafford County

This is in reply to your letter of October 21, 1971, in which you ask my
opinion whether Stafford County may, considering the absence of a landfill
operation as a permitted use in A-1 Zone and the Zoning of the 33 acres,
use the same for a sanitary landfill.

A state, county, municipality, or other government body using property
for governmental purposes ordinarily is not subject to zoning regulations.
101 C.J.S., Zoning, § 135. See Annotations, 61 A.L.R. 2d 970, and cases
cited therein. The disposition of garbage and rubbish constitutes a govern-
mental function. Nehrbas v. Incorporated Village of Lloyd Harbor, 140
N.E.2d 241 (1957). A landfill operation in connection with a garbage col-
lection and disposal business held to be a governmental function. Kersheke
v. Township of Thomas, 138 N.W.2d 509 (1965).

I am of the opinion, therefore, that the county is exempt from the local
zoning ordinance in its operation of the sanitary landfill.

COUNTIES—Zoning Requirements—Not applicable to State.

STATE AGENCIES—Location of Facilities—Not required to make local
zoning application.

August 10, 1971

the Honorable William F. Parker, Jr.
Member, The Senate of Virginia

This is in reply to your letter of July 27, 1971, supplemented by your
letter of July 30, 1971, which read in part as follows:

"The County of Henrico has in effect a comprehensive zoning
ordinance and has divided the County into various zoning districts, in which uniform regulations and requirements are made.

"I would . . . appreciate your opinion as to whether or not an agency of the State must make application for a zoning change to an appropriate zoning district classification whenever such agency proposes to locate a facility within the County."

It is a well established rule of the old English common law that the sovereign is not bound by any statute unless the same is in express terms made to extend to the sovereign. This common law rule is equally applicable to our State Government, and is founded upon the grounds of public convenience. It is presumed to be the legislative intent to exclude the state from the operation of a statute unless its provisions are made to apply to the state in express words. (25 R.C.L. 783-5.) This rule has been uniformly applied by the courts in cases involving the construction of buildings by the state, or by a state agency, which in law is regarded as the state itself. See, opinion of this office, Report of the Attorney General (1938-1939), p. 180.

Although there appear to be no reported Virginia cases dealing directly with the question raised in your letter, the clear majority rule in other American jurisdictions is that a state agency need not comply with a zoning ordinance of a county when locating a facility within the county, especially when the function to be performed by that facility is governmental in nature and not merely proprietary. For example, in City of Charleston v. Southeastern Const. Co. et al., 134 W. Va. 666, 64 S.E.2d 676 (1950), it was held that: "a building constructed by the State Office Building Commission . . . is a public building and is not subject to the zoning ordinance or the building code of the City of Charleston." Also, "a state, county, municipality, or other governmental body using property for governmental purposes ordinarily is not subject to zoning regulations." 101 C.J.S. Zoning § 135. See Annotation, 61 ALR 2d 970, and cases cited therein.

The case of City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679 (1958), in which the Supreme Court of Appeals decided that the zoning regulations of the county are applicable to the City of Richmond, must be distinguished from the present situation on the facts. The posture of that controversy was such that it was between two substantially equal and separate governmental bodies. The Court pointed to this very fact in its opinion:

"In Virginia, counties and cities are independent of each other politically, governmentally and geographically. Each of them, within its particular boundaries, is a co-equal political subdivision and agency of the State." (Emphasis supplied.)

I do not believe it would be correct to apply the reasoning in that case to the instant situation in which the State itself is the entity planning the construction of a facility within the county.

I am, therefore, of the opinion that an agency of the State is not legally required to make application for a zoning change to an appropriate zoning district classification whenever such agency proposes to locate a facility within a county even though such a policy may be highly desirable as a practical matter.

COUNTIES AND CITIES—Authority; Dillon Rule—No authority in absence of expressed power in political subdivisions to establish a "Cigarette Board."

March 23, 1972

THE HONORABLE DONALD C. STEVENS
County Attorney for Fairfax County
This is in reply to your recent letter in which you ask my opinion whether § 15.1-21 of the Code constitutes adequate authority for the creation by agreement of the governing bodies of Arlington and Fairfax Counties and the Cities of Alexandria and Fairfax, of "a juristic entity which is legally separate and distinct from . . . a political subdivision," for the purpose of collection and disbursement of a tax imposed by such localities.

Section 15.1-21 of the Code authorizes the joint exercise of powers by political subdivisions provided each of the political subdivisions has the power attempted to be exercised. I am advised that the Northern Virginia Cigarette Board was created by resolution of the governing bodies of Arlington and Fairfax Counties and the Cities of Alexandria and Fairfax. Chapter 512 of the Acts of 1970, as amended by Chapter 213 of the Acts of 1971, Extra Session, authorized Fairfax and Arlington Counties to levy a tax on tobacco and tobacco products. I find no express authority in these chapters for these governing bodies to create a Cigarette Board to collect and disburse the tax. This authority would necessarily have to be implied.

The Dillon Rule, first suggested in the nineteenth century, requires a narrow interpretation of all powers conferred on local government because they are "delegated powers." This rule is still followed in Virginia, though the Commission on Constitutional Revision recommended that it be discontinued and drafted proposed changes in Article VII, Section 3, of the Constitution to accomplish this. These changes were not adopted.

In the absence of an expressed power in the political subdivisions concerned to establish a "Cigarette Board," I find no authority for the joint exercise of that authority. Under such circumstances, I find that § 15.1-21 of the Code does not constitute authority for the creation of a "Cigarette Board," a "juristic entity" which is legally separate and distinct from the political subdivisions establishing it.

COUNTIES, CITIES AND TOWNS—Acquisition of Property for Waste Material—County and town may enter joint venture.

COUNTIES, CITIES AND TOWNS—Joint Exercise of Power; Power Must Exist in Each Political Subdivision First.

April 5, 1972

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

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


"I would appreciate your opinion as to whether or not it is legally permissible for the governing body of a county to purchase a dump site jointly with a town located in that county, so that the title is held jointly by both jurisdictions."

Section 15.1-21, Code of Virginia (1950), as amended, which was not discussed in the opinion above cited, authorizes the joint exercise of any power or powers, privileges or authority exercised or capable of exercise by any political subdivision of this State to be exercised and enjoyed jointly with any other political subdivision of the State. The purpose of this section was to allow a more efficient and economical exercise of existing powers rather than grant additional substantive authority or modify existing duties. 44 Virginia Law Review 1216.
The power sought to be exercised in each instance must exist in each of the political subdivisions before the power may be exercised jointly. See opinion to the Honorable Harrison Mann, Member, House of Delegates, dated January 11, 1966, and found in Report of the Attorney General (1965-1966), p. 71. Section 15.1-282 of the Code empowers counties of the State to acquire by lease, gift, purchase or condemnation, land for a dumping place for waste material.

Paragraph 25 of Section 18 of Chapter 44 of the 1937 Acts of Assembly, the charter of the Town of Front Royal, authorizes the town to adopt measures to secure and promote the health, safety and welfare of the inhabitants. This power is sufficient to authorize the town to procure land for public use as a dumping place for waste material.

I am of the opinion, therefore, that under § 15.1-21 the county and town may enter into an agreement for a joint venture of providing a dumping place for waste material. The agreement between these political subdivisions may provide for the joint holding of title to the real property by the jurisdictions. See opinions found in Report of the Attorney General (1966-1967), pp. 86 and 87, to the Honorable C. Harrison Mann, Member, House of Delegates, dated February 10, 1967, and to the Honorable W. L. Person, Jr., Commonwealth’s Attorney for the City of Williamsburg, dated October 6, 1966.

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COUNTIES, CITIES AND TOWNS—Charter from General Assembly Not Necessary for County and All Towns Therein to Merge into City.

CHARTERS—Not Necessary from General Assembly for County and All Towns Therein to Merge into City.

CITIES—Charter from General Assembly Not Necessary for County and All Towns Therein to Merge into City.

COUNTIES—Charter from General Assembly Not Necessary for County and All Towns Therein to Merge into City.

TOWNS—Charter from General Assembly Not Necessary for County and All Towns Therein to Merge into City.

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THE HONORABLE J. SAMUEL GLASSCOCK  
Member, House of Delegates  

This is in reply to your letter of February 1, 1972, which reads as follows:

"I would appreciate having an opinion on the following question:  
"If a county and all the incorporated towns located therein desire to merge into a city and follow the procedure prescribed in Article 4 of Chapter 26 of Title 15.1 (Sections 15.1-1130 through 15.1-1148) of the Code of Virginia, is it still necessary that the charter for this merged city be approved by the General Assembly?"

I am of the opinion that Article 4 of Chapter 26 of Title 15.1 (§§ 15.1-1130 through 15.1-1148) is full authority for the consolidation of the county and all incorporated towns therein into a city, see § 15.1-1148, and that a charter from the General Assembly is not necessary.

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COUNTIES, CITIES AND TOWNS—Ordinances—Erosion control—No effect upon State institutions.

ORDINANCES—No Erosion Control—Effect upon State institutions.

STATE AGENCIES—Ordinances—No erosion control—Effect upon State institutions.
THE HONORABLE EDGAR F. SHANNON, JR.
President, University of Virginia

This is in reply to your letter of March 13, 1972, by which you solicit my opinion regarding the applicability to the University of Virginia and its contractors of the erosion control provisions of the Albemarle County Land Subdivision and Development Ordinance, adopted October 21, 1971.

In an opinion addressed to the Honorable William F. Parkerson, Jr., member of the Senate of Virginia, dated August 10, 1971, it was stated that at common law the sovereign is not subject to statutes which are not by their terms made applicable to the sovereign, and, consequently, an agency of the State government is not subject to the requirements of a local zoning ordinance. The rector and visitors of the University of Virginia are "at all times" subject to the control of the General Assembly, and are constituted as a governmental instrumentality for the dissemination of education. See §§ 23-69 and 23-14, Code of Virginia (1950), as amended. Therefore, I equate the University of Virginia with an "agency of the state" government as that term is used in the Attorney General's opinion of August 10, 1971. In this regard, see Report of the Attorney General (1954-1955), p. 56.

I find no provision in Chapter 11, Article 7, "Land Subdivision and Development", of Title 15.1 of the Code which makes the ordinance in question applicable to the University of Virginia, and, consequently, I am of the opinion that the University of Virginia is not bound to observe the requirements of this ordinance.

COUNTIES, CITIES AND TOWNS—Powers—County has authority to join with town for extension of water and sewer lines.

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

This is in reply to your letter of April 8, 1972, which reads as follows:

"Reference is made to Section 15.1-18, current Code of Virginia, Authority to acquire, lease or sell land for development of business and industry, and to Attorney General's opinion to the writer under date of September 19, 1968.

"Where a county has purchased and now owns real estate under the above authority, and proposes to sell to a prospect for the purposes acquired, may the county join with a town in the county to bear and pay for construction and extension of water and sewer lines from the town to the proposed business land in the county beyond the town limits?"

Section 15.1-18 of the Code of Virginia (1950), as amended, provides:

"The governing body of any town may acquire by gift or purchase, but not by condemnation, land within the town or within three miles thereof for the development thereon of business and industry. No such land shall be so acquired unless and until the council has held a public hearing thereon concerning such proposed acquisition. Any land so acquired may be leased or sold at public or private sale to any person, firm or corporation who will locate thereon any business or manufacturing establishment. This section shall constitute the authority for any town to exercise the powers herein conferred notwithstanding any charter provision to the contrary."

Section 15.1-522, as amended, confers upon counties the same powers and authority as the councils of cities and towns. This office has ruled that the
power and authority must be delegated to the cities and towns under general rather than special law. See opinion of this office to you dated September 19, 1968, found in the Report of the Attorney General (1968-1969), p. 54. By virtue of this section, the county may exercise the authority contained in § 15.1-18, a general law. Section 15.1-21 of the Code authorizes the joint exercise of powers by political subdivisions where the power sought to be exercised is vested in each of the political subdivisions.

I am therefore of the opinion that the county has authority to join with a town in the county to bear and pay for the construction and extension of water and sewer lines from the town to the proposed business land in the county beyond the town limits.

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COUNTY AND CITY TREASURERS—State Tax Collections—State Comptroller may issue a continuing directive for accelerated remission of State funds received by local treasurers.

December 20, 1971

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

I have received your letter of December 10, in which you ask:

"Under Section 58-973 of the Code of Virginia can the State Comptroller require the County and City Treasurers of Virginia to transfer State funds collected by them to the Treasurer of Virginia prior to the tenth of the month following the month the State funds were collected by them unless, and until, in each and every instance he has first called upon each and every Treasurer to do so at least five days prior to the time he wishes such funds transferred?"

Virginia Code § 2.1-198 provides:

"All county and city treasurers and clerks of courts receiving State moneys shall, on or before the tenth day of each month, or oftener if the Comptroller so directs, report to the Comptroller the total of each class of State revenue or State moneys received or collected for the previous calendar month unless otherwise directed, and at the same time pay into the State treasury the total amount so reported thereof received or collected from all sources."

Virginia Code § 58-973 provides:

"Each county and city treasurer shall monthly, or oftener if called upon by the Comptroller, make up a statement of all State revenue collected by him since such treasurer filed with the Comptroller his last preceding report and at the same time pay into the State treasury the amount due without any deduction whatsoever. The Comptroller may call upon any county or city treasurer, at any time he thinks proper, to pay into the State treasury any and all money in his hands belonging to the Commonwealth and such treasurer shall, within five days from the receipt of such call, make the payment. If any treasurer fail to make any statement or payment required by this section, within the time prescribed, such failure shall be deemed a sufficient cause for his removal from office under the provisions of § 15.1-63."

In my opinion § 2.1-198 authorizes the State Comptroller to issue a continuing directive for the accelerated remission by local treasurers of State funds received by them. In order for the penalties of § 58-973 to apply, however, it is necessary for the Comptroller to send a separate notice to
the treasurers for each call. Otherwise, the “five days from the receipt” requirement would be meaningless.

COUNTY ATTORNEY—Advises Board of Supervisors on Ordinances; Defends or Brings Civil Actions in Which Any County Official Is a Party.

LAW ENFORCEMENT OFFICERS—Not Prohibited from Retaining Personal Copies of Inactive Investigative Files.

BOARD OF SUPERVISORS—County Attorney Rather Than Commonwealth's Attorney Advises; Defends or Brings Civil Actions in Which Any County Official Is a Party.

COUNTIES—County Attorney Advises Board of Supervisors on Ordinances; Defends or Brings Civil Actions in Which Any County Official Is a Party.

ORDINANCES—County Attorney Advises Board of Supervisors on.

THE HONORABLE FLOYD CALDWELL BAGLEY
County Attorney for Prince William County

In your recent letter you seek an opinion to the following questions:

"1. Whether under Code 15.1-608, the County Attorney represents the Chief of Police and his Department in all matters not of a criminal nature?
"2. Whether law enforcement officers may retain personal copies of inactive investigative files compiled during officially conducted investigations, and, if so, is it a general practice?"

In answer to your first inquiry, § 15.1-608 provides in pertinent part that "[i]n the event of the appointment of such county attorney, the Commonwealth's attorney shall be relieved of the duties of advising the board of county supervisors, 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, and all such duties shall be performed by the county attorney and he shall be accountable to the board of county supervisors in all such matters."

The above quoted language clearly provides that the county attorney shall be responsible for defending or bringing civil actions in which any county officials shall be a party. The Chief of Police is appointed pursuant to the provisions of § 15.1-598, and would be considered a county official. The provisions of § 15.1-608 would therefore apply to him. This section limits the authority of the county attorney to those matters which are civil, and any matters of criminal nature remain the responsibility of the Commonwealth's attorney. In view of the foregoing, I answer your first inquiry in the affirmative.

I am unable to find any statute which would prohibit law enforcement officers from retaining personal copies of inactive investigative files. This is an administrative matter and should be left to the Chief of Police.

COURTS—Admissibility of Microfilm Copies into Evidence.
COURTS—Admissibility of Computer Printouts into Evidence.
EVIDENCE—Admissibility of Microfilm Records and Computer Printouts.
STATE POLICE—Authority to Microfilm Records and Destroy Originals.
CENTRAL CRIMINAL RECORDS EXCHANGE—Authority to Microfilm Records and Destroy Originals.
STATE POLICE—Admissibility of Records into Evidence.

CENTRAL CRIMINAL RECORDS EXCHANGE—Admissibility of Records into Evidence. December 15, 1971

COLONEL H. W. BURGESS, Superintendent
Virginia State Police

This is in reply to your recent letter in which you request an opinion concerning certain matters. You refer to your plans to install a computerized communications system, and to establish a computerized criminal history file as a part of this system, including the microfilming and other storing of the records of your department, including the Central Criminal Records Exchange. I will answer your questions seriatim.

1. "Do we have authority under existing Virginia statutes to microfilm the records and destroy the originals?"

The answer to this question is in the affirmative. Such authority is pursuant to §§ 2.1-9 and 2.1-10, Code of Virginia (1950), as amended.

2. "Is it mandatory under Virginia law for courts to accept in evidence copies of such microfilmed records if certified by the Superintendent or his designated representative?"

The answer to this question is also in the affirmative. This is pursuant to § 8-268, Code of Virginia (1950), as amended, which states that microphotographs of records made pursuant to §§ 2.1-9 and 2.1-10 of the Code, and copies thereof, if properly authenticated as specified, "shall be admissible as evidence in any court of the Commonwealth." However, § 8-266 of the Code, which relates to the introduction into evidence of copies of certain records or papers, and which refers specifically to the Office of the Central Criminal Records Exchange, does use the phrase, "may be admitted as evidence in lieu of the original." It is possible that this could be interpreted to be discretionary with the court and not to be mandatory. However, it is my opinion that the language of the statute is intended to be mandatory, and further that it does not conflict with the mandatory provisions of § 8-268.

3. "Is it mandatory under Virginia law for courts to accept in evidence machine printouts from a computer or other electronic storage device when certified by the Superintendent or his designated representative?"

There is no statutory authority in Virginia which would allow or permit, let alone require, the use in evidence of machine printouts from a computer or other electronic storage device. Absent such statutory authority, it is my opinion that such evidence would not be admissible.

COURTS—Circuit Court May Not Enforce, by Mandamus, Construction of Building to House Offices Other Than Those Enumerated in §§ 15.1-257 and 15.1-258.

December 13, 1971

THE HONORABLE FRANK D. HARRIS
Commonwealth’s Attorney for Mecklenburg County

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

"In the General Election on November 2nd the voters of Mecklenburg County, Virginia, defeated a bond issue for the county to construct a general office building.

"I would like to know if our Circuit Court Judge has the authority
to enter an order directing the Board of Supervisors of our county to levy the necessary additional tax for the purpose of constructing the county office building. This building would provide office space for the A.S.C.S. Office; Soil Conservation Service; County Welfare Service; County Extension Service; County Court Offices; Juvenile and Domestic Relations Court Offices; Assistant State Supervisors for State Lunch Program; County Demonstration Agent Extension Services; basement area for storage and future office space and there would be adequate parking to use said building, as well as fixtures and equipment for the offices. The estimated cost is $450,000. "If our Circuit Court Judge does have authority to act as outlined above, kindly advise the provisions under the law under which he would so act."

Section 15.1-257, Code of Virginia (1950), as amended, requires the governing body of the county to provide a courthouse with suitable space and facilities to accommodate the various courts of record and officials thereof serving the county, and, within or without such courthouse, a clerk's office, a jail, and, upon request therefor, suitable space for facilities for the attorney for the Commonwealth to discharge the duties of his office. This duty may be enforced by mandamus. See Manly Mfg. Co. v. Broaddus, 94 Va. 547, 27 S.E. 438.

You state that the building to be constructed is to provide office space for the A.S.C.S. Office; Soil Conservation Service; County Welfare Service; County Extension Service; County Court offices; Juvenile and Domestic Relations Court offices; Assistant State Supervisors for State Lunch Program; County Demonstration Agent Extension Services. In the absence of an affirmative duty on the Board to provide space for these offices, I am of the opinion that the Circuit Court may not enforce, by mandamus, the construction of a building to house them.

COURTS—Hustings Court; Terms Set by Statute.

April 17, 1972

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

This is in reply to your letter of April 14, 1972, which reads as follows:

"I would very much appreciate an opinion from you with regard to your interpretation of § 17-155 of the Code of Virginia, 1950. "Section 17-155 directs that there shall be a term of the Hustings Court for each month of the year except for the months of August and September. We would like to know if this Code section precludes our Court from holding a term during either the month of August or September. It is realized that the July term could possibly be extended, as allowed by the statute, however, we would very much appreciate your interpretation in regard to the question of a separate term for one of those two months."

The July term could be continued from day to day into the next succeeding month. Cluverius v. Commonwealth, 81 Va. 787. The times at which the court shall sit are fixed by § 17-155 of the Code and in order that the court may exercise its jurisdiction, this provision must be observed. 5 Michie's Jurisprudence, Courts, § 6, p. 168.

I am of the opinion that the court is precluded from holding a separate term during either the month of August or September, except as an extension of the July term.
REPORT OF THE ATTORNEY GENERAL

COURTS NOT OF RECORD—Judges—Precluded from offering as counsel in his own court to prosecute claims for debts owed him.

JUDGES—Courts Not of Record—Precluded from appearing in.

July 30, 1971

THE HONORABLE R. BAIRD CABELL, Judge
Municipal Courts, City of Franklin

This is in response to your recent request for my opinion concerning the legality of a judge of a court not of record appearing to prosecute claims on his own behalf in his court. You stated, in pertinent part:

"The undersigned, as Judge of the Municipal Courts of the second class City of Franklin, is also engaged in the part-time practice of law. In the course of this law practice, there have been several residents of the city of Franklin who have become indebted to me in sums of less than $300.00.

By inference, I gather from Section 16.1-24 (1) that I might possibly maintain such actions in my own court, here in Franklin, before one of the substitute judges thereof. On the other hand, Section 15.1-10 forbids me to appear as counsel in cases tried in my own court. If I were to seek to maintain actions at law on such claims as I might have, could I prosecute same on my own behalf, or would I be required to have other counsel to appear for me? Your clarification of this whole cloudy picture would be greatly appreciated."

In my opinion, these cases could be brought in your court. However, it would be required that they be prosecuted by other counsel appearing in your behalf. Section 15.1-10, Code of Virginia, (1950), provides, in part:

"No judge of a court not of record shall appear as counsel in any case, civil or criminal, pending in his court or on appeal or removal therefrom; ... nor shall he accept or receive any claim or evidence of debt for collection when enforcement thereof is within the exclusive original jurisdiction of his court." (Emphasis supplied.)

This section clearly forbids a judge of a court not of record from appearing as counsel to prosecute claims for himself or for other persons that might be tried in his own court. You indicated that § 16.1-24 (1) of the Code, by inference, would allow you to maintain such actions in your own court. With this I agree. However, with the proscription of § 15.1-10, it would be necessary for you to obtain counsel to represent you.

Nothing in this opinion should be construed as a comment on the ethical propriety or impropriety of such practice as this would be a matter within the province of the Virginia State Bar.

CRIMES—Computation of Parole Eligibility Date.

PROBATION AND PAROLE—Crimes—Computation of parole eligibility date.

June 15, 1972

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in reply to your recent letter in which you make the following inquiries:

(1) "When a prisoner escapes, is recaptured, and receives an additional sentence or sentences, may his new parole eligibility date be computed by taking one-fourth of the new sentence or sen-
REPORT OF THE ATTORNEY GENERAL

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sentes and add that amount to the time left to serve before becoming eligible for parole on the old sentence, calculated from the date the prisoner was again taken into custody?

(2) “When a prisoner is paroled, commits a crime while on parole, and is returned to the Division of Corrections with a new sentence, may his new parole eligibility date be computed by taking one-fourth of the new sentence, calculated from the date he was again taken into custody?

(3) “When a prisoner, while confined in the Penitentiary, is convicted of an additional crime before he has become eligible for parole on his original sentence, may his new parole eligibility date be computed by taking one-fourth of the new sentence and add that amount to the parole eligibility date of his original sentence?

(4) “When a prisoner, while confined in the Penitentiary, who is eligible for parole, but has not been paroled, is convicted of an additional crime, may his new parole eligibility date be computed by taking one-fourth of the new sentence and re-compute his parole eligibility date, calculated from the date of his conviction for the new offense?”

Section 53-251, Code of Virginia (1950), as amended, provides in pertinent part:

“(1) Except as herein otherwise provided, every person convicted of a felony, and sentenced and committed under the laws of this Commonwealth to any State correctional institution shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years. In case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment.” (Emphasis added.)

Since the Code provides that the parole eligibility date is computed from a total of consecutive sentences, I am of the opinion that the answer to your first question must be in the negative. If the sentence imposed for the escape is to run consecutively, that sentence must be totaled with the aggregate time imposed and the parole eligibility date calculated from that total.

Similarly, the answer to your second question is also in the negative. Since the prisoner has been paroled and his sentence has not been discharged, additional time imposed for a subsequent crime committed while on parole must be added to the aggregate total of all sentences imposed and the parole eligibility date calculated from that total.

The answer to your third and fourth questions is also in the negative for the same reasons.

CRIMES—Concealed Weapons—Motorcycle chain worn as a belt not concealed weapon.

WEAPONS—Concealed—Motorcycle chain worn as a belt not a concealed weapon.

THE HONORABLE BEVERLY T. FITZPATRICK, Chief Judge Municipal Court of the City of Roanoke

December 20, 1971
I am in receipt of your recent letter in which you request an opinion as to whether or not a motorcycle chain worn by an individual in the nature of a belt around his waist would be considered to be a concealed weapon under § 18.1-269, Code of Virginia (1950), as amended. The pertinent provisions of said section are as follows: "If any person carry about his person, hid from common observation, any pistol, dirk, bowie knife, switchblade knife, razor, slungshot, metal knucks, or any weapon of like kind, he shall upon conviction thereof. . . ." Since the chain belt which you refer to is not one of the listed items, the question therefore is whether such chain belt is "any weapon of like kind."

A weapon has been defined as any instrument which, when used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause death or injury. 56 Am. Jur., Weapons, § 2. Further, since the carrying of concealed weapons is a crime in Virginia, the statute in question is to be construed strictly. The rules of construction applicable to § 18.1-269 of the Code have also been outlined in an earlier opinion to the Honorable Joseph L. Lyle, Jr., Assistant Commonwealth's Attorney for Virginia Beach, dated January 15, 1968, and found in Report of the Attorney General (1967-1968), p. 74, a copy of which is enclosed.

Applying these rules to the present inquiry, it is my opinion that a motorcycle chain worn in the nature of a belt would not be a concealed weapon under § 18.1-269 of the Code. Such an instrument would not appear to be "a weapon of like kind" as specified in the statute, and further would not come within the definition of weapon set forth above. In addition, when such a chain is worn as a belt, in all likelihood it would not be hid from common observation and therefore would not be concealed as required in the statute.

CRIMES—Hitchhiking—Localities limited to offense set forth in § 46.1-234.
MOTOR VEHICLES—Hitchhiking Ordinance of Municipality—Limitations on.
CITIES—Authority to Enact Ordinance Prohibiting Hitchhiking—Limitations on.
ORDINANCES—Conflict With State Law—Traffic regulations.

December 21, 1971

THE HONORABLE EDWARD T. CATON, III
Member, Senate of Virginia

I am in receipt of your letter of December 7, 1971, in which you request an opinion concerning the validity of a proposed municipal ordinance regulating hitchhiking which would be considerably more restrictive than the present § 46.1-234, Code of Virginia (1950), as amended, and other state statutes relating to pedestrians.

The powers of local authorities as to the regulation of traffic are strictly limited by § 46.1-180, Code of Virginia (1950), as amended. In effect, that section restricts the power of a municipality to only adopt ordinances regulating traffic within the municipality which in no way conflict with the provisions of Title 46.1 of the Code. This limitation on powers of local authorities was recently applied in the case of Paige v. Edgar, 210 Va. 54, 168 S.E.2d 103 (1970).

Therefore, it is my opinion that the municipality would not have authority to enact an ordinance which is more restrictive than the present provisions of Title 46.1 of the Code. This conclusion eliminates the need for an answer to your second question concerning the proper penalty for such an ordinance.
CRIMES—Profane, Threatening, etc., Language Over Telephone.
CRIMES—Venue—Profane, threatening, etc., language over telephone.
CRIMES—Jurisdiction—Profane, threatening, etc., language over telephone.
CRIMINAL PROCEDURE—Venue—Profane, threatening, etc., language over telephone.

October 18, 1971

MR. CHARLES E. BODSON
Special Justice, Arlington County Court

I am in receipt of your recent letter in which you request an opinion concerning the applicability of § 18.1-238 of the Code of Virginia to the following situation.

"Is Section 18.1-238, Code of Virginia, applicable only to profane, threatening or indecent language over the telephone in those instances where the originator of the call and the receiver thereof employ telephones located in the State of Virginia?"

In an opinion of the Attorney General to Honorable L. Melvin Giles, Commonwealth's Attorney for Pittsylvania County, dated December 4, 1963 (Opinions of the Attorney General, 1963-1964, page 79), it was stated that where the person making the call and the person receiving the call are located in different counties or jurisdictions within the State, that the individual violating § 18.1-238 could be prosecuted in either county or jurisdiction. This opinion was subsequently followed by an amendment to § 18.1-238 which provided for just such a situation and allowed the venue in such a case to be in either county or jurisdiction within the State.

The same reasoning which was applied in the above opinion of the Attorney General would also be applicable to the situation about which you inquire. The following rule expressed in the case of Hackney v. Commonwealth, 186 Va. 888, 45 S.E.2d 241 (1947) would be applicable to the interstate situation:

"It is a fundamental principle of criminal law that when a person puts in force an agency for the commission of a crime, he, in contemplation of the law, accompanies the agency to the point where it becomes effectual. This principle is applied frequently to determine the venue of a prosecution."

The above principle is the basis for § 19.1-220, § 19.1-221, § 19.1-222, § 19.1-223, of the Code, all of which relate to dual jurisdiction for the prosecution of a crime which is committed in more than one county or State.

It is therefore my opinion that § 18.1-238 of the Code is not applicable only to calls which originate and terminate within the State, but that said section is applicable to the proscribed acts when the calls either originate outside of Virginia and terminate within the State, or where said calls originate within Virginia and terminate outside the State.

CRIMINAL LAW—Appointment of Counsel for Indigents in Misdemeanor Cases; Argersinger Decision.

CRIMINAL PROCEDURE—Appointment of Counsel for Indigents in Misdemeanor Cases; Argersinger Decision.

CONSTITUTIONAL LAW—Appointment of Counsel for Indigents in Misdemeanor Cases; Argersinger Decision.

ATTORNEYS—Appointment of for Indigents in Misdemeanor Cases; Argersinger Decision.
ATTORNEYS—Fee Not Allowed for Appointment in Misdemeanor Cases.

FEES—Not Provided for Counsel Appointed in Misdemeanor Cases.

ATTORNEYS—Waiver—Right to counsel intelligently and knowingly waived by accused; *Argersinger* decision.

WAIVER—Form for Accused to Execute When He Desires to Waive Counsel.

MISDEMEANORS—Appointment of Counsel for Indigents; *Argersinger* Decision.

RIGHT TO COUNSEL—Appointment of Counsel for Indigents; *Argersinger* Decision.

June 13, 1972

THE HONORABLE J. RANDOLPH TUCKER, JR., Judge
Hustings Court of the City of Richmond

In your letter of June 13, 1972, you inquire as to the proper procedure to be followed by courts of record and courts not of record in order to implement the decision of the Supreme Court of the United States in *Argersinger* v. *Hamlin*, — U.S. — (June 12, 1972), which required the appointment of counsel for indigents in misdemeanor cases before any term of confinement provided for by statute as a possible penalty may be imposed.

It is my opinion that this decision must be immediately implemented as to all misdemeanor cases, as well as cases involving violations of local ordinances, which carry a possible term of incarceration and which are scheduled to be tried after June 12, 1972. For new cases arising after that date, the same procedures as are now used for the appointment of counsel in felony cases, which are set forth in §§ 19.1-241.1 through 19.1-241.5 of the Code of Virginia (1950), as amended, may be employed. Cases pending on June 12, 1972, should be continued long enough to enable counsel to be appointed where necessary and to prepare himself for trial. As to those statutes or ordinances which by their terms provide only a fine as a penalty, the *Argersinger* decision is inapplicable.

As to payment of counsel to be appointed in these misdemeanor cases, there is currently no specific provision of general application in Virginia law for their compensation. Furthermore, § 14.1-183 of the Code provides:

"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 the shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party." (Emphasis supplied.)

I have ruled, in an opinion to the Honorable Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, dated April 19, 1971, and found in the Report of the Attorney General (1970-1971), at p. 194, copy of which is attached, that this section precludes the payment of fees to appointed counsel in misdemeanor cases except as authorized in juvenile proceedings pursuant to § 16.1-173 of the Code.

As to those persons currently confined for misdemeanors and ordinance violations who were convicted without counsel present at their trials, the Supreme Court did not specifically rule on the issue of retroactivity of the *Argersinger* decision. There are, however, several other cases now pending before the Supreme Court involving the same issue, and I anticipate that the Court will dispose of them in the very near future based on *Argersinger* v. *Hamlin*. Since these cases involved convictions occurring prior to June 12, 1972, their affirmance by the Supreme Court would indicate that the
Argersinger decision is not to be applied retroactively, while reversal would indicate the contrary.

Until this issue is clarified by the Supreme Court, it is my opinion that the rule is not to be applied retroactively at this time. In the event Argersinger is held to be retroactive, I will request the Division of Corrections to notify each judge of the name of each person held in State facilities for misdemeanor violations, and the judge should then direct that the individual be returned to his court for a determination whether the conviction should be set aside, in accordance with § 8-596 (b) (1) of the Code, and the Commonwealth given the opportunity to retry the individual within a reasonable time. The same procedure should be followed with respect to persons held in local jails and lockups by the sheriffs responsible for those institutions.

Please note that the Argersinger decision specifically provides that misdemeanor trials may proceed without counsel when the right to counsel is intelligently and knowingly waived by the accused. Recognizing that in many cases, especially in traffic courts where the usual penalty is a fine rather than imprisonment, the accused will desire to waive counsel in order to save his own time as well as that of the court, my office has prepared a form, copy of which is attached, to be executed by the accused when he desires to waive counsel. This form, which is designed to insure that the waiver is knowingly and intelligently made, may be duplicated locally until the printed version becomes available.

CRIMINAL LAW—Larceny—Husband may commit larceny of wife's property. Testimony of wife admissible under § 8-288.

EVIDENCE—Testimony of Wife Admissible Under § 8-288 on Offenses Against Wife.

May 11, 1972

THE HONORABLE CARLE F. GERMELMAN, JR., Judge
Seventh Regional Juvenile and Domestic Relations Court

This is in reply to your letter of May 3, 1972 regarding the interpretation of §§ 8-287 and 8-288, Code of Virginia, 1950, as amended, which reads as follows:

"Husband and wife have experienced some marital problems and agree to meet at her business office for a discussion."

"A violent argument occurs. Husband, in a fit of blind rage,"

"(a) deliberately smashed Wife's collection of rare glassware, paid for entirely by her own earnings, and,"

"(b) seized over $100.00 in cash lying on Wife's desk, being money totally owned by her as commissions from real estate sales in her business, stating that he will spend the money on his girl friend, and thereafter flees the office."

"Wife secures warrants against Husband, charging him with (1) unlawful destruction of property not his own, and, (2) Grand Larceny. Husband is arrested at his hotel room in the process of hastily packing his bags."

"Query: At Husband's trial, may Wife testify against him with regard to either or both charges without Husband's express consent?"

My answer to your question is governed by the sections of the Code to which you refer and by an earlier opinion of this Office in which a similar question to that presented by you was considered and discussed. That opinion was to the Honorable Charles B. Earman, Jr., Commonwealth's Attorney for Rockingham County and the City of Harrisonburg, dated April 17, 1959, and may be found in Report of the Attorney General (1958-1959), p. 90, a copy of which is attached hereto. It is my opinion that the wife
may testify with regard to both of these charges without the husband's express consent since these cases constitute "a prosecution for an offense committed by one against the other."

CRIMINAL LAW—Possession of More Than One Illegal Drug—Separate offenses.

DRUGS—Illegal—Separate convictions for possession of more than one.

November 5, 1971

THE HONORABLE ROYSTON JESTER, III
Commonwealth's Attorney for the City of Lynchburg

I am in receipt of your letter of October 15, 1971, wherein you request an opinion as to whether a person who is arrested and found to be in possession of two or more of the proscribed drugs listed in Schedule I of § 54-524.80 of the Code of Virginia could be prosecuted for separate charges of possession for each of the types of drugs found in his possession. You state as an example a person who is found to be in possession of both LSD and marijuana, the possession of one of which is a felony and the other of which is a misdemeanor, and you inquire whether there would be separate charges for possession of the LSD and for the possession of marijuana.

All of the prohibitions and penalties of the Drug Control Act, specifically §§ 54-524.55 and 54-524.101, use the terms "any drug" or "a drug" in stating what constitutes a violation. This would indicate that the possession of each proscribed drug is a separate offense. Further, the possession of marijuana is not a lesser included offense of the possession of some other drug, and each possession depends upon the proof of separate and distinct facts. It has long been held in Virginia that two or more separate criminal offenses may arise out of a single incident or occurrence. Comer v. Commonwealth, 211 Va. 246, 176 S.E.2d 432 (1970).

Therefore, it is my opinion that, in such a situation about which you inquire, said individual could be prosecuted and convicted on a separate charge of possession of each separate type of drug found in his possession, inasmuch as possession of any one specific drug is a separate and distinct offense.

December 21, 1971

THE HONORABLE KENNETH P. ASSBY
Commonwealth's Attorney for Wise County

This is in response to your letter in which you seek an interpretation of § 18.1-41 of the Code, which provides in pertinent part as follows:

"...[I]f any married man seduce and have illicit connection with any unmarried female of previous chaste character, he shall be punished by confinement in the penitentiary. . . ."

The question you pose is "can a man who has obtained a divorce from bed and board pursuant to Section 20-95, which decree has not been made final or merged into a divorce from the bond of matrimony, be convicted of seduction as a married man?"

Sections 20-116 and 20-117 bear directly upon your inquiry. Section 20-116, appearing in the same language in the Code of 1919, provides, in part, that in granting a divorce from bed and board, the court may decree
that the parties be perpetually separated and such decree shall operate upon the personal rights and legal capacities of the parties, as a decree from a divorce from the bond of matrimony. Section 20-117, enacted in 1934, provides that the granting of a divorce from bed and board shall not be a bar to either party obtaining a divorce from the bonds of matrimony on any ground which would justify a divorce from the bonds of matrimony if no divorce from bed and board had been granted.

Section 20-91 (1) provides that a divorce from the bonds of matrimony may be decreed for adultery, and adultery in Virginia can only be committed by a married person. See § 18.1-187.

In order to effectuate the provisions of § 20-117, it is my opinion that the parties to a bed and board decree would have to be considered married. See Gray v. Gray, 181 Va. 262, 24 S.E.2d 44 (1943), and Haskins v. Haskins, 188 Va. 525, 50 S.E.2d 437 (1948), in support of this conclusion.

Although there may be some conflict in the provisions of §§ 20-116 and 20-117, the statutes are in pari materia and should be read and construed together. The provisions contained in the act of latest passage control as indicating the last intention of the legislature. In regard to code sections on the same subject, the general rule is that where the difference of language is irreconcilable, the section last adopted in sequence must prevail. 17 M.J., Statutes, § 40, p. 295.

In view of the foregoing, I answer your inquiry in the affirmative.

CRIMINAL PROCEDURE—Arrest Records—No authority for expungement.

JUDGES—Courts Not of Record—No authority to order arrest records be expunged.

THE HONORABLE JOHN R. NEWHART
Sheriff of the City of Chesapeake

This is in response to your letter of October 7, 1971, from which I quote as follows:

"Is it valid, or does a Judge of a court not of record, have the authority to order the police department to completely expunge the records of an arrest and/or prosecution of an individual, if for instance they feel that the arrest and/or indictment was made without probable cause or even if the matter was dismissed or reduced?"

The question of expunging records of arrest was the subject of a recent opinion to the Honorable Vail W. Pischke, Judge of the Juvenile and Domestic Relations Court of Falls Church dated June 11, 1971, a copy of which is enclosed. In that opinion I ruled that there was no statutory authority or decision of the Supreme Court of Virginia which would authorize the record of a misdemeanant or felon to be expunged. I am not aware of any circumstances which would require me to alter my previous position, and I adhere to my previous opinion.

In view of the foregoing, I answer your inquiry in the negative.

CRIMINAL PROCEDURE—Charge of Adult Committing Offense Against Juvenile Must Be Brought Initially in Juvenile and Domestic Relations Court.

COURTS—Adult May Be Proceeded Against by Grand Jury; Either Court of Record or Court Not of Record May Continue Proceedings.

JUVENILE AND DOMESTIC RELATIONS COURTS—Must Proceed Initially On Charge Against Person for Crime Against Juvenile.
This is in reply to your request for an opinion regarding the construction of § 16.1-158 (7) of the Code of Virginia (1950), as amended, and the applicability of that section to the following questions. You ask whether or not in light of that section:

"(a) An adult who has committed a felony on a juvenile could be presented directly to Hustings Court Grand Jury and tried in Hustings Court;

"(b) If an adult commits a misdemeanor on a juvenile could he be presented directly to the Hustings Court Grand Jury and subsequently tried in the Hustings Court;

"(c) Can an adult who has committed any offense either a misdemeanor or a felony be indicted by a Grand Jury on direct presentation by the Commonwealth's Attorney and, if so, in which court would the proceedings thereafter be held."

As you point out, my answer to your first two questions would be governed by the provisions of § 16.1-158 and especially § 16.1-158 (7). In pertinent part, that section provides as follows:

". . . Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the corporate limits of said city, concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

* * *

"(7) The prosecution and punishment of persons charged with ill-treatment, abuse, abandonment or neglect of children or with any violation of law which causes or tends to cause a child to come within the purview of this law, or with any other offense against a child except murder and manslaughter; provided, that in prosecution for other felonies over which the Court shall have jurisdiction, such jurisdiction shall be limited to that of examining magistrate."

It is, therefore, my opinion that an adult who has committed either a felony or a misdemeanor against a juvenile must be proceeded against initially in the appropriate juvenile and domestic relations court although as to the felony the jurisdiction of the juvenile and domestic relations court "shall be limited to that of examining magistrate."

As to your final question, § 19.1-155 clearly contemplates the initiation of a prosecution for either a felony or a misdemeanor by a grand jury and process will thereafter be awarded under § 19.1-178 or § 19.1-184. As to a felony, the proceedings may thereafter be held in the court of record but under § 16.1-126 the court of record may proceed to try the person for the misdemeanor or certify the presentment, indictment or information for trial to the court not of record. Thus, it is my opinion that an adult may be proceeded against by presentment, indictment or information for either a felony or misdemeanor initially by the grand jury and the court of record would have the discretion to either continue with the misdemeanor prosecution or to certify the proceedings to the court not of record. In a felony prosecution the court of record may proceed to try the case.

CRIMINAL PROCEDURE—Constitution Does Not Require Recording of Misdemeanor Cases—Court of Record has authority to order recording of misdemeanor cases.
COURTS—Constitution Does Not Require Recording of Misdemeanor Cases
—Court of Record has authority to order recording of misdemeanor cases.

January 14, 1972

THE HONORABLE GEORGE F. ABBITT, JR.
Judge, Fifth Judicial Circuit

This is in reply to your recent letter in which you advise that the State Comptroller has declined to approve payments to your Court Reporter for operating the recording machine or transcribing the incidents of a trial where the charge involves a misdemeanor. Your inquiry is as follows:

"I would like to know if there is any way that any misdemeanor can be recorded on our recording machine and if the operator thereof may be compensated."

Section 17-30.1 specifically provides that "[i]n all felony cases, the court or judge trying the case shall by order entered of record provide for the reporting verbatim of the evidence and incidents of trial either by a court reporter or by mechanical or electronic devices approved by the court, and the expense of reporting or recording the trial of criminal cases shall be paid by the Commonwealth out of the appropriation for criminal charges, upon approval of the trial judge..." Section 17-30.1:1 provides in part that "[e]ach judge of a court of record having jurisdiction over criminal proceedings shall be authorized, in all felony cases, to appoint a court reporter to report proceedings or to operate mechanical or electronic devices for recording proceedings... Such reporter shall be paid by the Commonwealth on a per diem or work basis as appropriate out of the appropriation for criminal charges."

These sections deal exclusively with felony cases, and I find no similar statutes relating to cases involving misdemeanors.

The recent case of Mayer v. City of Chicago, — U.S. —, 10 Cr. L. 3003 (December 13, 1971), involved the question of a transcript in a misdemeanor conviction. In Mayer the defendant was convicted on nonfelony charges of disorderly conduct and interference with a police officer, and sentenced to a $250 fine on each offense. Desiring to appeal, he petitioned the trial court for a free transcript to support his grounds of appeal that the evidence was insufficient for conviction, and that misconduct of the prosecutor denied him a fair trial. A court reporter was provided at defendant's trial pursuant to statute and the statute provided that a transcript be furnished to any party who pays the specified fee. The trial court found defendant to be indigent, but refused to furnish a free transcript since an Illinois Supreme Court Rule provided for free transcripts only in felony cases. The Supreme Court reversed the Illinois Court and held the Illinois Supreme Court Rule violated the Fourteenth Amendment. The Supreme Court rested its decision upon the ground that an indigent defendant must be afforded as effective an appeal as the defendant who can pay. The Supreme Court noted that a verbatim transcript was not automatically required if some alternative, such as an agreed statement of facts, would suffice.

It is my opinion that Mayer does not place upon a state a constitutional requirement that all cases involving misdemeanors be recorded. Since there is no Virginia Statute requiring the recording of misdemeanor cases and providing for transcripts upon payment of a fee, I am of the further opinion that Mayer will not have any impact on Virginia. I am enclosing a copy of an opinion to the Honorable E. Garnett Mercer, Jr., Commonwealth's Attorney for Lancaster County, dated September 8, 1971, in which I expressed a similar view concerning the recording of preliminary hearings.

In those misdemeanor cases which a judge of a court of record deems it
essential for the proper administration of justice to make a record of the proceedings, I am of the opinion that the judge may order the case recorded. Expenses incurred in recording such cases would be payable under the provisions of § 19.1-315, which provides in pertinent part, "[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, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service."

CRIMINAL PROCEDURE—Double Jeopardy; Acquittal of Misdemeanor Precludes Indictment for Same Misdemeanor.

JUVENILE—Court Fails to Certify; Double Jeopardy.

April 19, 1972

THE HONORABLE WILLIAM G. DAVIS
Commonwealth's Attorney for Franklin County

This is in response to your recent inquiry in which you asked my opinion regarding two factual situations, with the first stated as follows:

"A & J are arrested for a felony, breaking and entering. A is 19 years of age and J is 17. Both are arrested on regular warrants issued by a Justice of the Peace. Subsequently, a juvenile petition is issued for J. At a joint preliminary hearing, evidence is presented against both A & J. The Court not of record certifies A to the Grand Jury and the juvenile petition is dismissed against J for insufficient evidence. The Court did not make a determination as to whether J would be tried as a juvenile or as an adult. Question: Could the defense of former jeopardy be successfully pleaded by J if the grand jury returned an indictment against him and he was subsequently tried in Circuit Court?"

My opinion as to the factual situation you pose above is governed by § 16.1-176 of the Code of Virginia (1950), as amended, which provides that "in the event the juvenile court does not so certify a child fourteen years of age or over charged with an offense which, if committed by an adult, would be punishable by death or confinement in the Penitentiary for life or a period of twenty years or more, the Commonwealth's Attorney of the city or county, if he deems it to the public interest, may present the case to the grand jury of the proper court of record...." The offense with which J was charged provides for a maximum penalty of twenty years and it is my opinion that the provision of § 16.1-176 quoted above would be applicable to this case and, if the Commonwealth's Attorney gives appropriate notice within three days after final adjudication to the Juvenile and Domestic Relations Court, the grand jury of the locality could then act on the indictment presented to it. However, care should be exercised to insure that the required investigation under § 16.1-175 is held, as you point out that the Juvenile and Domestic Relations Court "did not make a determination as to whether J would be tried as a juvenile or as an adult."

Your second question is set forth below:

"(2) A is tried for a misdemeanor in County Court and the warrant dismissed. If the Commonwealth presents an indictment to the Grand Jury on the same charge, and a true bill is returned, can A successfully plead former jeopardy in the Circuit Court?"

It would be my opinion that A's trial for a misdemeanor in the County Court placed him in jeopardy and he could successfully plead former jeopardy if the Commonwealth subsequently obtained an indictment from the grand jury on the same charge and proceeded to trial. The Code of
Virginia unquestionably provides for indictment for misdemeanors but a review of the appropriate sections reveals that that procedure is contemplated for situations in which the charge is initially brought to the grand jury or is initiated by the grand jury and not where there has been a prior proceeding in a Court Not of Record.

CRIMINAL PROCEDURE—Implied Consent—Refusing blood analysis—Certificate to be certified by committing justice before issuing warrant.

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

This is in reply to your letter of June 23, 1971 from which I quote the facts and question presented, as follows:

"1. Two police officers charge A with driving under the influence of intoxicants.

"2. While transporting A to the office of a Justice of the Peace, he was advised by one of the officers, pursuant to the requirements of Section 18.1-55.1 (b) of the implied consent law.

"3. A becomes very belligerent and hostile toward the officers who have to restrain him with handcuffs.

"4. Before reaching the office of the Justice of the Peace A is again fully advised of his rights under Section 18.1-55.1, but A again refuses to consent to the blood test.

"5. On reaching the office of the Justice of the Peace A continues his belligerent and hostile attitude toward the officers and demands the right to make telephone calls to a number of persons, which the officers and the Justice permit him to do after removing the handcuffs; however, A is unable to reach an attorney because it is Christmas Eve.

"6. A, while in the office of the Justice of the Peace, is again advised of his rights under 18.1-55.1 and again he refuses to have a sample of his blood taken for analysis. During this time the officers request the Justice of the Peace to prepare warrants for driving under the influence and for refusal to take the blood test as well as for reckless driving and leaving the scene of an accident without disclosing his identity.

"7. The Justice of the Peace was continually interrupted while trying to prepare the warrants, by the hostile and belligerent attitude of A. He kept everything in a state of confusion. Finally, after more than two hours since the arrest, having obtained the warrants from the Justice, the officers took A and left the office of the Justice of the Peace without having the Justice complete the written certificate of refusal provided for in paragraph (c) of Section 18.1-55.1 and conveyed A to the Courthouse where an attempt was made to fingerprint A who steadfastly refused to have his fingerprints taken, for which refusal a further warrant was issued. Before A was put into jail he was again advised of his rights under the consent law, but again refused to consent to the taking of a sample of his blood and at this time, after more than three hours, another Justice of the Peace was requested by the officers to complete the written certificate required by paragraph (c) of 18.1-55.1.

"Does the fact that the officers neglected to have the first Justice of the Peace complete the form required by paragraph (c) of said section go to the jurisdiction of the court or preclude the Court from taking jurisdiction to try the case on the charge for refusal to take the blood test?"
It is provided in paragraph (c) of § 18.1-55.1 that if a person arrested for driving under the influence of alcohol refuses to permit the taking of a sample of his blood, after being advised of the requirements of this section by the arresting officer, the latter shall take such person before a committing magistrate. If such person does again so refuse after having been further advised by such magistrate as to the law requiring the blood test and the penalty for refusing and so declares his refusal in writing on the form provided by law or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same.

Paragraph (j) prescribes the contents and format for the form prescribed in paragraph (c) and further states, "If such person refuses or fails to execute such declaration, the committing justice, clerk or assistant clerk shall certify such fact, and that the committing justice, clerk or assistant clerk advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for the revocation of such person's license to drive." It further prescribes that the "committing or issuing justice, clerk or assistant clerk shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood, with violation of this section." Paragraph (k) prescribes that "the executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded by the committing justice, clerk or assistant clerk to the court in which the offense of driving under the influence of intoxicants shall be tried." Paragraphs (l) and (m) refer to the declaration of refusal or certificate under paragraph (k), in prescribing the time for trial of the defendant charged with refusal to submit to the blood test and that such declaration of refusal or certificate shall be prima facie evidence of the defendant's refusal to submit to the test.

In my opinion, the declaration of refusal or the certificate of the committing justice, as the case may be, must be completed before the warrant is issued, since such declaration or certificate serves as the basis for the warrant. In analysing § 18.1-55.1, I find that the procedure to be followed when a person refuses the blood test under this section is explicitly stated. It is noted that the formalities prescribed are clothed in mandatory language and, further, they are not included among the processes enumerated in paragraph (s) as being only procedural in nature and not substantive. There is no provision for a second justice of the peace to complete the certificate at a later time after the warrant has been issued when the committing justice neglected to do so. Accordingly, your question is answered in the affirmative.

CRIMINAL PROCEDURE—Implied Consent—Sequence of trial—Trial on refusal warrant must be subsequent to trial on criminal warrant—But may be on same day.

MOTOR VEHICLES—Implied Consent—Sequence of trial.

December 14, 1971

The Honorable George S. Cummins
Commonwealth's Attorney for Nottoway County

This is in reply to your letter of November 19, 1971, which I quote, as follows:

"In regard to the offense of and trial for unreasonable failure of an allegedly intoxicated motorist to submit to chemical analysis of his blood, Title 18.1, § 55.1 (1) provides in material part as follows: 'When the court receives the declaration of refusal [to permit the taking of a blood sample] . . . the court shall fix a date for the trial
of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.' (Emphasis and [] added.)

"Assuming two separate warrants against the defendant, one charging driving under the influence (18.1-54), and the other charging unreasonable refusal to submit to chemical analysis of his blood (18.1-55.1), does the trial court have jurisdiction in the sense of power to adjudicate, to hear and decide both cases on the same day, or does Title 18.1, § 55.1 (1) mean and require that the charge of unreasonable refusal to submit to blood testing must be tried on a different and subsequent day?

"If in fact the charge under Title 18.1, § 55.1 (1) must be tried on a different and subsequent day, and if in fact the court did adjudicate both charges on the same day, would not any such judgment of the court on the charge under Title 18.1, § 55.1, (1) be a nullity and void, or at least voidable for failure of jurisdiction, as to either the defendant or the Commonwealth?"

Section 18.1-55.1, Code of Virginia (1950), as amended, in paragraph (1) thereof, provides as follows:

"When the court receives the declaration of refusal or certificate referred to in paragraph (k) together with the warrant charging the defendant with refusing to submit to having a sample of his blood taken for the determination of the alcoholic content thereof, the court shall fix a date for the trial of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants." (Emphasis supplied.) The emphasized language is controlling. There is no requirement that the trial for the offense of refusal to submit to the blood test required by § 18.1-55.1 be held on a day subsequent to the criminal trial. This section only requires that such trial for the offense of refusal be held subsequent to the defendant's criminal trial. It is provided in paragraph (i) of this section that: "The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a blood test had been offered the accused be evidence or the subject of comment." When these paragraphs are considered together, the reason for holding the trial on the refusal warrant subsequent to trial on the criminal warrant becomes apparent.

Assuming, therefore, that trial on the warrant charging driving under the influence in violation of § 18.1-54 is completed before trying the warrant charging unreasonable refusal under § 18.1-55.1, both may be tried on the same day and the trial court would have jurisdiction under the facts stated in your first question. In view of my answer to this question, no further consideration of your other question is necessary.

CRIMINAL PROCEDURE—Indictments—Form of.

April 28, 1972

THE HONORABLE JAMES F. ANDREWS
Commonwealth's Attorney for Dinwiddie County

I am in receipt of your recent letter in which you request an opinion as to whether or not indictments must still conclude with the words, "against the peace and dignity of the Commonwealth."

These words were initially required under Section 106 of the Constitution of Virginia, prior to its amendment and revision which became effective July 1, 1971. There is now no constitutional requirement that such language
be included in indictments. Under Rule 3A:7 of the Rules of Criminal Practice and Procedure of the Supreme Court of Virginia which became effective January 1, 1972, an indictment is required to contain a plain, concise, and definite written statement listing four separate matters of information. Said rule further provides that the indictment need not contain a formal commencement or conclusion. The Appendix of Forms, attached to said Rules, includes in Appendix 5 various form indictments for different misdemeanor and felony offenses, none of which include the words referred to above.

Therefore, it is my opinion that indictments no longer need to contain the formal conclusion, "against the peace and dignity of the Commonwealth"; however, said indictments must meet the requirements of Rule 3A:7 referred to above.

CRIMINAL PROCEDURE—Judgment Final After Twenty-one Days.

March 2, 1972

THE HONORABLE GEORGE F. ABBITT, JR., Judge
Fifth Judicial Circuit

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

"Will you please give me the opinion of your office as to whether or not Rule 3A:25 (e) grants unto Circuit Courts the power to suspend a Felony sentence any time whatsoever or is this still limited to the twenty-one days after the final Order is entered in a Felony case. In other words as I understand the law, previously the Court loses all authority over a Felony case after the expiration of twenty-one days from the final Order in such case, (in Misdemeanor cases of course the Court may suspend a sentence at any time before it is heard).

"I would like to know if the above Rule extends and enlarges the power of the Court after final judgement in a Felony case."

My answer to your inquiry is governed by both Rule 3A:25 (e) of the Rules of Criminal Practice and Procedure and Rule 1:1 of the Rules of the Supreme Court of Virginia. The former rule is as follows:

"(e) Suspension; probation. After conviction, whether with or without jury, the court may, unless prohibited by statute, place the accused on probation or suspend his sentence in whole or in part."

Rule 1:1 of the Rules of the Supreme Court of Virginia, effective March 1, 1972, is as follows:

"All final judgments, orders and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified or vacated for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas."

It is my opinion that the provisions of Rule 3A:25 (e) are limited by the language of Rule 1:1 so that upon the expiration of twenty-one days after the date of entry of judgment, no further action may be taken with regard to suspension of the sentence or placing the accused on probation. It thus effects no enlargement of the power of a trial court after final judgment in a felony case as against the previous rules.

CRIMINAL PROCEDURE—Motor Vehicles—Speeding in excess of 75mph—55 mph zone—Instructions to jury.
REPORT OF THE ATTORNEY GENERAL

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

This is in reply to your letter of July 6, 1971, in which you request my opinion as to whether the following instructions are proper to be presented to a jury in a case in which the defendant is charged with operating a motor vehicle on the public highway at a speed in excess of seventy-five miles per hour in a fifty-five miles per hour zone.

"1. The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant operated a motor vehicle on the public highway at a speed of 75 MPH or more you shall find him guilty of reckless driving, unless you find the degree of culpability is slight, in which latter event you may, in your discretion, find him not guilty of reckless driving but guilty of improper driving.

"2. The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant operated a motor vehicle on the public highway at a speed in excess of 55 MPH but less than 75 MPH you shall find him guilty of exceeding the speed limit.

"3. The Court instructs the jury that you may find any one of the following verdicts:

"(a) Guilty of reckless driving.
"(b) Guilty of improper driving.
"(c) Guilty of exceeding the speed limit.
"(d) Not guilty."

In my opinion, the instructions quoted are proper under the stated conditions. Section 46.1-190, Code of Virginia (1950), as amended, states that, "A person shall be guilty of reckless driving who shall: . . . (i) Drive a motor vehicle upon the highways of this State at a speed of twenty or more miles per hour in excess of the applicable maximum speed limits prescribed in § 46.1-193, paragraphs (1) (a) (b) (c) (e) of this title, or in excess of eighty miles per hour regardless of the posted speed limit; . . ." Section 46.1-192.2, Code of Virginia (1950), as amended, makes provision for the lesser finding of "improper driving" where the degree of culpability is slight.

CRIMINAL PROCEDURE—No Requirement That Preliminary Hearing Be Recorded.

CRIMINAL PROCEDURE—Within Judge's Discretion to Have Witness' Testimony at Preliminary Hearing Reduced to Writing.

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

This is in reply to your letter of recent date in which you request my advice as to whether there is a requirement that preliminary hearings be fully reported by court reporters in the county court. You further inquire whether there is any Code section which would authorize the employment of a court reporter for the purpose of reporting the preliminary hearing.

In Roberts v. LaVallee, 389 U.S. 40 (1967), the Supreme Court had before it the question of providing indigents with transcripts of preliminary hearings. In that case, New York had a statute providing that a transcript of the preliminary hearing would be furnished upon the payment of a specified fee. The Supreme Court held that under this statutory scheme,
an indigent’s rights to equal protection were violated when he was denied a free transcript.

There is no statute in Virginia requiring that preliminary hearings be recorded or that transcripts will be provided upon the payment of a fee. Therefore, the question is whether the decision in Roberts is to be read to mean that a state is constitutionally required to provide that transcripts of preliminary hearings be made and to furnish an indigent a free copy of such transcript or whether the constitutional requirement is that if a transcript of a preliminary hearing is provided for by statute, a free copy must be furnished indigents.

It is my opinion that the Roberts decision does not place a constitutional requirement upon the states to record all preliminary hearings. In accord with this view, see Sharber v. Gathright, 295 F.Supp. 386 (W.D. Va. 1969); Williams v. Jasper, 250 So.2d 701 (Ala. 1971); People v. Patterson, 268 N.E.2d 514 (Ill. App. 1971).

In view of the foregoing, it is my opinion that there is no requirement that preliminary hearings be recorded by court reporters or otherwise.

It should be noted that at the preliminary hearing the judge may have the testimony of witnesses reduced to writing pursuant to § 19.1-105. I am, therefore, of the opinion that a court reporter could be employed for this purpose. Expenses incurred under this section would be payable under the provisions of § 19.1-315.

CRIMINAL PROCEDURE—Not Proper for Clerk to Require Defendant to Pay Subpoena Costs in Advance of Conviction.

CLERKS—Not Proper for Clerk to Require Defendant to Pay Subpoena Costs in Advance of Conviction.

COSTS—Not Proper for Clerk to Require Defendant to Pay Subpoena Costs in Advance of Conviction.

February 1, 1972

THE HONORABLE GLENN B. MCCLANAN
Member, House of Delegates

This is in reply to your letter of January 14, 1972, from which I quote as follows:

“It is the present policy of the clerks in the courts of Virginia Beach in criminal cases to require the defendant to pay subpoena cost in advance of trial and if he is acquitted he is not reimbursed for such cost. Does a clerk of court in Virginia have the authority to require a defendant to pay subpoena cost in a criminal trial in advance of conviction?”

Section 19.1-320, Code of Virginia (1950), as amended, requires the Clerk to make up a statement of expenses incident to the prosecution in a criminal case when the accused is convicted. This office has previously ruled that costs are not to be assessed in cases which result in acquittals. See Report of the Attorney General (1968-1969), p. 46. Section 14.1-97 provides in part that fees mentioned in this chapter, which would include the fees for subpoenas, shall be chargeable to the party at whose instance the service is performed. Section 14.1-85 provides in pertinent part that “Fees prescribed by law for services of clerks of courts . . . in all cases of felony, and in every prosecution for a misdemeanor, if not paid by the prosecutor, or in cases of conviction by the defendant, and in cases in which there is no prosecutor and the defendant shall be acquitted, or convicted and unable to pay the cost, shall be paid out of the State treasury. . . .” Although the fees are, by statute, chargeable to the party at whose instance the service is performed, they are ultimately collected under the provisions of § 14.1-85. In view of the foregoing, it is my opinion that the
clerk of a court in Virginia does not have authority to require a defendant to pay subpoena costs in a criminal trial in advance of a conviction.

CRIMINAL PROCEDURE—Police Court of City of Richmond Has No Jurisdiction to Conduct Preliminary Hearings on Offenses Committed by Convicts Outside of Richmond.

PRISONERS—Police Court of City of Richmond Has No Jurisdiction to Conduct Preliminary Hearings on Offenses Committed by Convicts Outside of Richmond.

May 11, 1972

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in reply to your request for my opinion regarding the conduct of preliminary hearings on charges against a convict who commits an offense outside the corporate limits of the City of Richmond if the proceeding on that charge is conducted in the Circuit Court of the City of Richmond. You initially point out that § 53-295 of the Code of Virginia (1950), as amended, provides for concurrent jurisdiction in the Circuit Court of the City of Richmond for the trial of criminal proceedings against convicts who "...are employed upon any work of public or private improvement in any county in the State." You further point out that the Charter of the City of Richmond in § 19.06 defines the territorial jurisdiction of the Police Court of the City of Richmond to "...include the entire area bounded by the corporate limits of the City including the capitol square or any housing or other authority within the City." In addition, you further refer to Rule 3A:5(b) (1) of the Rules of Criminal Practice and Procedure of the Supreme Court of Virginia, which became effective on January 1, 1972, and which provides that if an individual is charged with a felony and arrested before indictment, "...a preliminary hearing shall be conducted by the judge of the court not of record, unless the accused waives the hearing in writing." In the light of these three provisions, you inquire as follows:

"Put more simply, then, the question is does the granting of concurrent jurisdiction to the Circuit Court give jurisdiction by implication to the Police Court of the City of Richmond to conduct preliminary hearings in escape cases where the escape has occurred outside the Corporate Limits of the City of Richmond but has been perpetrated by an inmate assigned to the Division of Corrections?"

My answer to your question must necessarily be in the negative as there is no authority for the granting of jurisdiction by implication to the Police Court of the City of Richmond for the conduct of preliminary hearings in criminal cases against convicts where the offenses were committed outside the geographical limits of the City of Richmond. However, there is no constitutional right to a preliminary hearing and if the convict in question were proceeded against by indictment by the Grand Jury of the Circuit Court of the City of Richmond prior to his arrest then no preliminary hearing would be required either under Rule 3A:5(b) (1) or under § 19.1-163.1 of the Code of Virginia. As to the specific question you ask, however, my answer must be in the negative.

CRIMINAL PROCEDURE—Search Warrant—Search of premises without reasonableness required.

POLICE OFFICERS—Search Warrant—Search without reasonableness required.

July 1, 1971
THE HONORABLE WALTER B. MARTIN, JR.
Member, House of Delegates

This is in reply to your recent letter wherein you inquire concerning the effect of § 19.1-88 of the Code of Virginia of 1950, as amended, pertaining to police officers searching premises without a search warrant. You state, in part:

“I would appreciate your advising me if, in your opinion, a police officer with a warrant for arrest of a named individual, enters into a multi-apartment building, does he violate the provisions of § 19.1-88 of the Code of Virginia if, under the guise of the arrest warrant, but without a search warrant, he forces entry into several of the individual apartments in the building and conducts a search?”

The Supreme Court of Appeals of Virginia, in the cases of Williams v. Peyton, 208 Va. 696, 160 S.E.2d 581 (1968) and Carter v. Commonwealth, 209 Va. 317, 163 S.E.2d 589 (1968), held that the Virginia statutes only prohibit unreasonable searches. In Williams, the Court upheld a warrantless search of the defendant’s premises as being made incident to an arrest. Although the Williams decision is restricted considerably by the case of Chimel v. California, 395 U.S. 752 (1969), there is no indication that the Supreme Court of Appeals of Virginia would alter its statement that § 19.1-88 “... proscribes only an unreasonable search without a warrant” 209 Va. 317, 320.

In the case of Lankford v. Gelston, 364 F.2d 197, (1966) the U.S. Court of Appeals for the Fourth Circuit considered numerous searches made by the Baltimore Police Department in an effort to apprehend two persons who were charged with the murder of a police officer. The facts showed that approximately three hundred premises were searched in an effort to locate the two men charged with murder, and in each instance there was no search warrant, the officers being armed only with arrest warrants. Although the Federal Court of Appeals directed the enjoining of the Baltimore Police Department from conducting searches of premises without more information than an anonymous tip, whether with or without an arrest warrant, the Court refused to consider the question of whether it is necessary to secure a search warrant before searching for a suspect.

As long as the officer’s search meets the reasonableness test, I am of the opinion that he would not be found guilty of a misdemeanor in light of the Supreme Court of Appeals decisions dealing with § 19.1-88 and Lankford v. Gelston. The ultimate determination would, of course, depend upon the particular facts of each case established in a judicial proceeding.

CRIMINAL PROCEDURE—Sentence and Punishment—Restitution may not be part of sentence.

THE HONORABLE GLENN B. MCCLANAN
Member, House of Delegates

This is in response to your recent letter wherein you inquire as follows:

“Upon a conviction under Section 18.1-172 of the Code of Virginia, does a Municipal Court Judge have the authority to order the defendant to make restitution and hold said defendant in contempt if he does not make restitution?”

“Corresponding Section 23-27, City Code of Virginia Beach.”

Section 18.1-172, Code of Virginia (1950), as amended, refers to the destruction, defacing or taking and carrying away of property not his own by some person and provides that any conviction under that Section shall
cause a person to "be guilty of a misdemeanor." The penalty section for the punishment for misdemeanors is Section 18.1-9 which states as follows:

"A misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punished by a fine not exceeding $1,000 or confinement in jail not exceeding twelve (12) months, or both, in the discretion of the jury or of the court trying the case without a jury."

Under the terms of that statute it does not appear that a person may be legally sentenced to make restitution for any acts done in violation of Section 18.1-172 referred to above.

Consequently, it is my opinion that a person may not be sentenced to make restitution and then be held in contempt of court if restitution is not made.

CRIMINAL PROCEDURE—Sentenced to State Convict Road Force; Non-support Payments.

PRISONS—State Convict Road Force; Non-support Payments.

May 3, 1972

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in reply to your recent letter in which you request clarification of an opinion I rendered on November 18, 1971, to you regarding the application of §§ 20-63 and 53-8 of the Code of Virginia (1950), as amended. That opinion determined that payments directed to the wife of a defendant sentenced to the State Convict Road Force for nonsupport could be paid where the prisoner in question was initially admitted to the State Convict Road Force.

You now further inquire as follows:

"It has been recently brought to my attention that on occasion a prisoner will be sentenced to the State Convict Road Force but, as a result of a physical examination conducted prior to admission, will not be admitted to the Road Force. Rather he will be sent to another institution. Thus a prisoner may be sentenced but never 'initially admitted.'

"Under the above circumstances, would payments required by Section 53-8 (b) [Section 20-63 (b)] never begin or does the mandatory language, '... shall be paid...', direct that payments be made, the beginning date therefore becoming the date admitted to another institution in lieu of the State Convict Road Force?"

Section 20-63 (b) of the Code of Virginia provides, in pertinent part, as follows:

"(b) If the prisoner be sentenced to the State convict road force the sum or sums provided for in paragraph (a) shall be paid by the State Treasurer out of the funds appropriated for the payment of criminal costs, and such payments shall begin when such prisoner is admitted to the State convict road force; ..."

My answer to your question is governed by this language from the Code and it is my opinion that the prisoner must be sentenced and actually admitted to the State Convict Road Force before any payments under § 20-63 (a) can be made. My answer to your question is therefore in the negative.
CRIMINAL PROCEDURE—Sentencing—State Convict Road Force—Non-support.

WELFARE AND INSTITUTIONS—Convict Road Force—Payments for non-support—When made.

November 18, 1971

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in reply to your letter of October 28, 1971, in which you refer to an order entered in the Circuit Court of Buchanan County committing an individual upon a conviction for non-support. The defendant was sentenced to "serve twelve (12) months at the Bland County Correctional Farm in lieu of service in the said jail of Buchanan County, and pay the cost of this proceeding." The order further directed that the defendant's wife be paid the sum of $25 for each work week "out of the funds appropriated for the payment of criminal costs."

This situation is governed by § 20-63 of the Code of Virginia which provides, in pertinent part, as follows:

"(b) If the prisoner be sentenced to the State convict road force the sum or sums provided for in paragraph (a) shall be paid by the State Treasurer out of the funds appropriated for the payment of criminal costs, and such payments shall begin when such prisoner is admitted to the State convict road force; . . ."

You initially inquire as to:

"the validity of that portion of the attached order which directs that the funds payable to the defendant's wife be expended from funds appropriated for the payment of criminal costs, in light of the provisions of § 20-63 (b) of the Code of Virginia."

I am advised that the Bland Correctional Farm is not a part of the State Convict Road Force, now known as the Bureau of Correctional Field Units under § 53-100.1 of the Code of Virginia, but that it is a separate and distinct institution. Thus, it does not appear that the prisoner has been sentenced to the State Convict Road Force. It is my opinion that that portion of the order in question which purports to sentence the defendant to "the Bland County Correctional Farm" is not valid insofar as it attempts to sentence him under § 20-63.

You next point out that there are numerous inmates who have been sentenced to the State Convict Road Force for non-support and who, for various reasons were unable to serve their sentences on the road force and who were then transferred to the Virginia State Farm, principally for medical reasons. You ask the following question based on that fact:

"if an inmate, as stated above, is sentenced to the State Convict Road Force but for some reason cannot complete his sentence there and is subsequently transferred to another institution, do payments pursuant to Section 20-63 (b) of the Code of Virginia cease upon such transfer or, in the alternative, do such payments continue despite the fact that he is no longer actually serving on the State convict Road Force?"

As quoted above, § 20-63(b) of the Code of Virginia provides that the payments in question begin when the prisoner is admitted to the State Convict Road Force and the statute does not stipulate that he must continue on the Road Force in order for the payments to continue. Thus, it is my opinion that you have your full authority under § 53-8 of the Code of Virginia to transfer prisoners from any penal institution to another penal institution without such transfer terminating payments under § 20-63(b).
as long as the prisoner in question has been initially admitted to the State Convict Road Force.

CRIMINAL PROCEDURE—Summons in Lieu of Warrant—Section 46.1-178
authorizing summons Not in conflict with Rule 3A:4, Rules of Court, Part Three A.

April 12, 1972

THE HONORABLE M. WILLIAMSON WATTS
Commonwealth’s Attorney for Madison County

This is in reply to your letter of March 24, 1972, which I quote, as follows:

"I direct your attention to Section 46.1-178 of the 1950 Code of Virginia, as amended, and also Rule 3A:4 of the Rules of Criminal Procedure, Part Three A, which became effective January 1, 1972, and ask you if these are in conflict. Our local Court of Record has recently indicated that a person charged with violation of Title 46.1 of the Code of Virginia, as amended, must have been served with a warrant or summons issued by a magistrate before he can be put to trial. I will appreciate your thoughts on this matter."

Rule 3A:4 of the Rules of Court, Part Three A, pertaining to Criminal Practice and Procedures, provides: "If it appears from the complaint that there is probable cause to believe the accused has committed an offense, the magistrate shall issue a warrant for his arrest. The magistrate may issue a summons instead of a warrant in misdemeanor cases where specifically authorized by law." (Emphasis added.)

Section 46.1-178 expressly provides that whenever any person is arrested for a violation of any provision of Title 46.1, Code of Virginia (1950), as amended, "punishable as a misdemeanor the arresting officer shall, except as otherwise provided in § 46.1-179, take the name and address of such person and the license number of his motor vehicle and issue a summons . . ." Section 46.1-179 enumerates the situations in which the arresting officer shall take the person arrested "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, . . ."

Rule 3A:4, cited above, refers to a situation in which a complaint, as outlined in Rule 3A:3, is brought before a magistrate empowered to issue arrest warrants. I find no requirement in such rule that in every violation the arresting officer must bring a complaint before a magistrate. That a warrant is not required in every case is shown by the rule itself, which provides for the issuance of a summons where specifically authorized by law. Consistent with this, is the terminal provision in Rule 3A:5(a)(2), covering arrests without a warrant, "that such trial may be had without the issuance of a warrant where expressly authorized by statute."

Section 19.1-92, Code of Virginia (1950), as amended, states: "Except as provided in § 46.1-178, any process issued against a person charged with a criminal offense shall be in duplicate and the officer serving such process shall leave a copy with the person charged." The Supreme Court of Virginia has ruled that when a summons is issued under § 46.1-178, there is no need for the issuance or service of a formal warrant. Tate v. Lamb, 195 Va. 1005, 81 S.E. 2d 743.

In view of the foregoing, it is my opinion that § 46.1-178 is not in conflict with Rule 3A:4, but constitutes an exception thereto, expressly authorized by statute.

CONFLICT OF LAWS—Conflict Between Rules of Criminal Practice and Procedure and Statute; Latter Controls.

CONSTITUTION—Conflict Between Rules of Criminal Practice and Procedure and Statute; Latter Controls.

May 23, 1972

THE HONORABLE CHARLES R. HAUGH
Commonwealth’s Attorney for Albemarle County

This is in reply to your letter of May 5, 1972, in which you ask that I evaluate my opinion of April 12, 1972, to the Honorable M. Williamson Watts, Commonwealth’s Attorney for Madison County, Virginia, in which I expressed the view that § 46.1-178, Code of Virginia (1950), as amended, is not in conflict with Rule 3A:4, Rules of Criminal Practice and Procedure. In this connection, you refer to subsection (b)(2) of Rule 3A:4, which requires that any summons issued thereunder be signed by a magistrate.

In the above named opinion, as indicated in the second paragraph appearing on page 2 thereof, I construed Rule 3A:4, which includes subsection (b)(2), to apply in any situation in which a complaint is brought before a magistrate, but not to require that an arresting officer bring a complaint before a magistrate in making every arrest for a violation of law. In other words, whenever the rule applies, the warrant or summons must be signed by a magistrate, but there are exceptions in which the rule does not apply.

Section 46.1-178 constitutes such an exception, in which the law does not require the arresting officer to bring a complaint before a magistrate. In fact, under certain stated conditions, this section specifically directs the arresting officer to issue a summons. This is obviously in lieu of bringing a complaint before a magistrate, because the statute states that when the person arrested has so given his written promise to appear the officer shall “forthwith release him from custody.” Hence, the requirements outlined in Rule 3A:4 would have no application in any such instance.

In reaffirming the view expressed in my opinion, cited above, I find no conflict between Rule 3A:4 and § 46.1-178. I might add, however, that if there were such a conflict, I believe it would have to be resolved in favor of the statute. I base this conclusion on Article VI, Section 5, of the revised Constitution of Virginia, which, in reference to “Rules of practice and procedure,” states that “such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.”

CRIMINAL PROCEDURE—Transcripts for Indigents Whose First Trial Results in Hung Jury.

FEES—Payment of Fees of Transcriber for Transcript of Hung Jury Trial.

February 23, 1972

THE HONORABLE S. R. BUXTON, JR., Judge
Hustings Court for the City of Newport News

This is in reply to your letter of February 4, 1972, and your subsequent telephone conversation with Mr. Reno S. Harp, III, of this office, in which you request an opinion concerning the following matter. In a situation where an individual is tried for a felony and is represented by retained counsel, and where the trial results in a hung jury, is the defendant, upon satisfactory proof that he is indigent, entitled to a free copy of the tran-
script of the first trial in preparation for a new trial on the same charge?

Section 17-30.1 of the Code of Virginia (1950), as amended, provides for the recording of the evidence and incidents of trial in felony cases and for the furnishing of transcripts thereof. Under that section, an indigent prisoner is entitled to a free copy of the transcript of his trial for the purposes of an appeal of his conviction. That section does not provide authority for free copies of the transcripts in the situation which you have presented.

The recent case of Britt v. North Carolina, — U.S. — (December 13, 1971), involved the exact situation referred to above. In that case, the petitioner's first trial ended with a hung jury, and the second trial took place a month later which resulted in his conviction. Between the two trials, the petitioner, alleging indigency, filed a motion for a free transcript of the first trial, which petition was denied by the trial court. This denial was upheld by the North Carolina Court of Appeals, and certiorari was denied by the North Carolina Supreme Court.

In Britt, the United States Supreme Court held that, in such a situation, an indigent defendant is entitled to a free copy of the transcript of the first trial; however, under the facts of the Britt case, it affirmed the North Carolina result on the basis that the petitioner had in that situation an adequate alternative in that the same court reporter recorded both trials and would have been more than willing to have provided defendant's counsel with any information or read back to him details of the first trial, if defendant's counsel had asked for them. It seems clear that the Britt case does stand for the proposition that an indigent defendant in preparation for a new trial is entitled to a free copy of the transcript of his first trial which ended in a hung jury, so long as there is no adequate alternative to the recorded transcript.

It is, therefore, my opinion that the answer to your inquiry is that an indigent defendant ordinarily would be entitled to a free copy of the transcript of his first trial and that the judge may order the recording of the trial transcribed and provide a copy to the defendant. The expenses incurred in recording and in preparing the transcript would be payable under the provisions of § 19.1-315 of the Code of Virginia (1950), as amended, which provides in pertinent part: "When in a criminal case an officer or any person renders any other service in that State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service."

CRIMINAL PROCEDURE—Transcripts in Misdemeanor Cases May Be Payable From Criminal Fund.

COURTS—Transcripts in Misdemeanor Cases May Be Payable From Criminal Funds—Court reporter's bill in case not involving crime not payable from criminal fund.

JUVENILES—Court Reporter's Bill in Case Not Involving Crime Not Payable From Criminal Fund.

January 24, 1972

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth's Attorney of the City of Norfolk

This is in reply to your letter in which you make several inquiries concerning the payment of a court reporter for services rendered in connection with cases tried in the Corporation Court of Norfolk. You advise that in one case the defendant, who was charged with a misdemeanor, on his own initiative hired a court reporter, and it became necessary for you as
Commonwealth's Attorney to order a copy of the transcript of the proceedings in order to properly represent the Commonwealth on the defendant's motion to set aside the conviction and grant a new trial. In another instance the Judge of the Circuit Court of the City of Norfolk required the Commonwealth to provide a court reporter to take the testimony in a case involving a juvenile. In both instances the court reporter's bill was certified by the court and forwarded to the State Comptroller for payment. The State Comptroller has declined to approve payment in these cases, and you inquire whether the provisions of § 19.1-315 authorize payment in the situations previously outlined.

Section 19.1-315 provides in pertinent part, "[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, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service." I am of the opinion that in those misdemeanor cases where it is deemed essential for the proper administration of justice that a transcript of the proceedings be available, expenses incident thereto would properly be payable under the above quoted provision of § 19.1-315. Therefore, it is my opinion that the bill from the court reporter for the copy of the transcript in the misdemeanor case would be payable under the provisions of § 19.1-315.

In the second incident referred to in your letter, you have advised me by telephone that the proceeding in the juvenile's case was pursuant to § 16.1-158 (1) (h). This section grants jurisdiction to the Juvenile and Domestic Relations Court in proceedings involving the custody, support, control, or disposition of a child who being required by law or his parents or custodian to attend school is a willful and habitual truant therefrom. In such cases the juvenile is not charged with a crime. Section 19.1-315 is applicable only to criminal cases, and in view of the foregoing, I am of the opinion that the cost for the recording of the proceedings in the juvenile case you have described is not payable under the provisions of § 19.1-315.

It would appear, however, that the court reporter has a pecuniary claim against the Commonwealth and such would be payable under the provisions of §§ 2.1-223.1, et seq.

You further make inquiry as to just what compensation can be paid in criminal cases and to whom. I am unable to provide you with a complete answer, since each new situation which arises must be examined upon its own peculiar facts. However, to provide some guidance for you I am enclosing copies of the following opinions which address themselves to this subject.


CRIMINAL PROCEDURE—Warrants—Amended § 46.1-178(a1)—Arrest—
ing officer may obtain warrant after summons issued, if prior general approval of court granted—Contravenes present § 46.1-178.

WARRANTS—Criminal Procedure—Amended § 46.1-178(a1)—Arresting officer may obtain warrant after summons issued, if prior general approval of court granted—Contravenes present § 46.1-178.

June 9, 1972

THE HONORABLE JAMES I. MOYER, Judge
Roanoke County Court

This is in reply to your letter of May 24, 1972, in which you inquire whether the amendment to § 46.1-178, Code of Virginia (1950), as amended, contravenes my opinion of November 10, 1971, dealing with the propriety of issuing a warrant upon an offense for which a summons has been issued.

The cited opinion, which is found in Report of the Attorney General (1970-1971), p. 112, expresses the view that no warrant should be issued once a summons has been issued pursuant to § 46.1-178. The General Assembly, by Chapter 477, Acts of Assembly of 1972, amended this section, however, by adding the following paragraph:

“(a1) Notwithstanding subsection (a), if prior general approval has been granted for the use of this section by the court having jurisdiction as provided in this title, the arresting officer may appear before a justice of the peace or other issuing authority of the county or city in which the violation occurred and make an oath as to the offense and request the issuance of a warrant at any time prior to the return date of the summons or notice. A warrant for the violation shall then be issued by the justice of the peace or other issuing authority and forwarded forthwith to the court in which said offense is to be tried.”

In my interpretation, this amendment authorizes, but does not direct, that, if prior general approval has been granted by the court having jurisdiction, the arresting officer, after issuing a summons under § 46.1-178, may make an oath as to the offense and request the issuance of a warrant at any time prior to the return date of the summons issued. In other words, if such prior general approval has been given by the court having jurisdiction, the arresting officer then has the power to elect whether or not he shall request the issuance of a warrant. If the court having jurisdiction has not granted prior general approval, however, the arresting officer has no authority to request the issuance of a warrant under the stated conditions. If the court has given such prior approval and the arresting officer does so request that a warrant be issued, it shall be issued by a justice of the peace or other issuing officer and forwarded forthwith to the court in which the offense is to be tried.

To the extent indicated, this amendment, on and after its effective date of July 1, 1972, will contravene § 46.1-178, as it reads prior to such effective date and consequently will contravene the named opinion construing this section prior to this amendment.

CRIMINAL PROCEDURE—Welfare Department May Prosecute Employee Who Aided Recipient of Welfare in Fraudulently Obtaining Funds, As Well as Prosecute Recipient.

STATUTES—Specific Criminal Statute Does Not Supersede General Statute in Absence of Clear Legislative Intent.

WELFARE—Department May Prosecute Employee Who Aided Recipient of Welfare in Fraudulently Obtaining Funds.
REPORT OF THE ATTORNEY GENERAL

WELFARE—Fraudulently Obtained Public Assistance; Criminal Prosecution under § 18.1-118.

June 21, 1972

THE HONORABLE JAMES A. CALES, JR.
Commonwealth's Attorney for the City of Portsmouth

This is in response to your letter of April 11, 1972, in which you ask the following three questions:

"1. Can a person who fraudulently obtains by false pretenses public assistance in excess of $100.00 from the local Department of Welfare be prosecuted under Sec. 18.1-118, or would Sec. 63.1-124 preclude such prosecution?

"2. Does Sec. 63.1-124 preclude felony prosecution of an employee of the local Department of Welfare when that employee aids and abets a recipient of public assistance in fraudulently obtaining funds in excess of $100.00?

"3. Would Sec. 63.1-112 have the same effect on criminal prosecution under any of the grand larceny statutes where the amount received after it became the duty of the recipient to notify the local Board was in excess of $100.00?"

The single issue that runs through your questions is one of when, if ever, a general criminal statute is superseded by a particular criminal statute so as to preclude prosecution under the former. Although I have found no Virginia cases dealing with this issue, I have found cases in other jurisdictions which provide valuable guidance.

Notable among these cases is Hucal v. People, 493 P. 2d 23 (1971), reh. denied, Feb. 14, 1972. In Hucal, the defendant was charged with and convicted of the general crime of theft despite the existence of a Colorado statute dealing with the particular crime of embezzlement of public monies which was more directly related to defendant's alleged acts. In affirming the trial court's conviction under the general criminal statute, the Court noted:

"The argument that a specific statute necessarily precludes prosecution under a general statute has been repudiated too often to warrant an extended discussion. Suffice to say that unless the legislative intent is clearly shown to be otherwise, enactment of a specific criminal statute does not preclude prosecution under a general criminal statute, but rather allows the single criminal transaction to be prosecuted under either statute." 493 P. 2d at 27. (Emphasis supplied.)

See also State v. Covington, 284 A.2d 533 (1971), where the issue was one of whether New Jersey bad check statute superseded the state's general false pretense statute. There the court stated simply that "[t]he issue is one of legislative will," and, finding no legislative intent to the contrary, held that the more particular statute did not supersede the general statute.

The test employed in Hucal and Covington for determining when a general criminal statute is superseded by a particular criminal statute is a derivative of a familiar principle of statutory interpretation; potentially conflicting or overlapping statutes should be construed to stand together if possible and one statute should not be deemed to impliedly repeal another unless there is evidence of clear legislative intent to that effect.

Applying that basic principle, together with the Hucal-Covington derivative, to the instant case, it is my opinion that § 63.1-124 does not supersede § 18.1-118, the general false pretenses statute. First, the statutes are not conflicting; they merely overlap. Secondly, there is no evidence of a clear legislative intent that § 63.1-124 should amend pro tanto § 18.1-118.
Turning then to your specific questions, it is my opinion that:

1. Section 63.1-124 does not preclude criminal prosecution under § 18.1-118.

2. The reasoning used in answering question 1 is equally applicable here. Accordingly, the local department of welfare is not precluded from prosecuting an employee who aids and abets in the commission of a felony.

3. As in 2, supra, § 63.1-124 does not preclude a criminal prosecution under any of the grand larceny statutes.

DATA PROCESSING—Equipment—Purchase of.
PURCHASES AND SUPPLY, DEPARTMENT OF—Purchasing of Electronic Data Processing Equipment. When required.

July 23, 1971

THE HONORABLE T. EDWARD TEMPLE
Commissioner of Administration
Office of the Governor

This is in reply to your letter of recent date in which you ask my opinion whether the use of the term “equipment” in paragraphs (5) and (6) of § 2.1-286 of the Code includes computer equipment.

Paragraphs (5) and (6) of this section read:

“(5) Materials, equipment and supplies needed by the State Highway Commission; provided, however, that this exception may include office stationery and supplies, office equipment, janitorial equipment and supplies, coal and fuel oil for heating purposes only when authorized in writing by the Director;

“(6) Materials, equipment and supplies needed by the Virginia Alcoholic Beverage Control Board; provided, however, that this exception may include office stationery and supplies, office equipment, janitorial equipment and supplies, coal and fuel oil for heating purposes only when authorized in writing by the Director.” (Emphasis supplied.)

I am of the opinion that the term “equipment” does include computer equipment and such equipment needed by the State Highway Commission and the Virginia Alcoholic Control Board does not have to be purchased through the Director of the Department of Purchases and Supply unless directed by the Governor. Before the State Highway Commission and the Virginia Alcoholic Control Board may purchase any electronic data processing equipment they must obtain recommendation from the Director of Automated Data Processing for the purchase along with written approval of the Governor. See Section 32 of Chapter 461 of the 1970 Acts of Assembly.

Therefore, an executive order is required if the Governor desires to place responsibility for purchasing this equipment with the Department of Purchases and Supply.

DEED OF TRUST—Marginal Release—Lien creditor or agent must present canceled note.

August 3, 1971

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

I have received your recent letter in which you ask:
"If a note is endorsed with the following language, "This note is hereby assigned without recourse to John Smith for the purpose of marginal release only,' is this sufficient authority for me to permit John Smith to make a marginal release as noteholder? "Does the language of the assignment also give John Smith the authority to mark the note satisfied?"

Virginia Code § 55-66.3 provides a simple mechanism for the release of a deed of trust. The lien creditor, or his duly authorized agent, attorney or attorney-in-fact, must present the canceled note and cause the payment or satisfaction to be entered in the margin of the deed book. In my opinion of June 28, 1971, to you, I agreed with you that the purported assignment of a paid note does not give the assignee the authority to release a deed of trust. Although the term, lien creditor, includes a successor in interest, I am of the opinion that the only person authorized to release the lien is the person who would be liable for the penalty under § 55-66.3 for failure to do so. He may of course do so through an agent, attorney or attorney-in-fact.

The language quoted by you is not sufficient to make the assignee liable for the penalty under § 55-66.3 nor does it purport to make John Smith an agent or attorney-in-fact for the lien creditor. In my opinion, John Smith may neither mark the note satisfied nor make a marginal release.

DEED OF TRUST—Marginal Release of—Attorney does not have to be qualified to practice in Virginia to be authorized agent.

December 10, 1971

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

I have received your recent letter of November 30, 1971, in which you inquire as to the appropriate procedure for marginal release of deed of trust. You also inquire whether an attorney-at-law who is authorized to make such marginal release must be qualified to practice in Virginia.

Attached hereto please find a copy of my recent opinion, dated November 4, 1971, to the Honorable Katherine V. Respess, which sets forth a procedure for marginal release that satisfies the requirements of § 55-66.3, Virginia Code (1950). You will note that such procedure provides for the lien creditor to mark all notes and bonds "PAID AND CANCELLED" and sign them. Further, following such notation, or at an appropriate place on the face or back of such note or bonds, a provision, signed by the lien creditor, is made for appointing an agent of the lien creditor for the purpose of marginally releasing the deed of trust securing the particular note or bond. Finally, the opinion states that it is unnecessary for the clerk to record the authority of an agent or of an attorney-at-law.

There are various mortgage bankers who are mortgage servicing agents for entities such as the Federal National Mortgage Association. Such servicing agents utilize attorneys-at-law to represent such entities at the clerk's office for the purpose of making a marginal release. Section 55-66.3 allows marginal releases to be made by "duly authorized agent, attorney, or attorney in fact" of the lien creditor. In my opinion, an attorney-at-law would not have to be qualified to practice in Virginia to be a "duly authorized agent" for the purpose of marginal release of deeds of trust. It is sufficient if the attorney-at-law is a "duly authorized agent" of the lien creditor.

DEED OF TRUST—When Exempt from Taxation; Applicable Statutes.
DEED OF TRUST—One Instrument Supplemental to Another.
CLERKS—Proof Required to Record Instrument Without Payment of Recordation Taxes.

TAXATION—Law Contains No Provision for Collecting Recordation Tax After Deed Has Been Recorded.

TAXATION—Recordation Tax — Payment not required on Supplemental Deed of Trust securing same indebtedness.

May 30, 1972

THE HONORABLE EMELINE A. HALL, Clerk
Circuit Court of Northumberland County

I have received your letter of May 22, in which you enclose two deeds of trust, each in the amount of $60,000. One of the deeds of trust is secured by real estate in Northumberland County, the other by real estate in Lancaster County. You also enclose a $60,000 note which states therein that it is secured by the two deeds of trust. I shall answer your questions seriatim:

"1. Should I have refused to record the instrument in Northumberland County because the attorney did not comply with § 58-54 of the Code?"

Deeds of trust are taxed pursuant to Virginia Code § 58-55. No deed of trust should be admitted to record unless the applicable State and local taxes, if any, are paid. As will be indicated below, I construe this particular deed to be exempt from taxation as a supplemental deed of trust; the deed should have been admitted to record.

I am concerned, however, by your statement that the lawyer "advised me that in the meantime I would be responsible for the $60,000 should some other instrument come into my office involving this property." This advice is incorrect. Our law contains no provision for collecting a recordation tax after the deed has been recorded. Pocahontas Consol. Collieries Co. v. Commonwealth, 113 Va. 108 (1912). When in actual doubt as to the applicability of the tax, the clerk must demand payment as a condition to recordation. The lawyer's recourse would be to seek a writ of mandamus or to pay the tax and seek a refund. A clerk acting in good faith should not be intimidated by such scare tactics.

I am unaware of any provision of law with which the lawyer failed to comply, but I do not believe that the information originally given you by him was sufficient for you to determine that the deed was exempt from the tax.

"2. Code § 58-54 is headed 'DEEDS GENERALLY.' Does this include trust deeds as well as deeds? (I have had Attorneys to argue that this section refers to deeds only and not trust deeds since the section is headed 'DEEDS GENERALLY,' although it is stated therein 'no such deeds, instruments or other writing'.)"

Section 58-54 does not apply to deeds of trust. The language quoted by you is found in Virginia Code § 58-54.1; this latter section does not apply to deeds of trust either. Similar language found in Virginia Code § 58-65 does apply to deeds of trust.

"3. Could this deed of trust have been considered a supplemental deed of trust to the one recorded in Lancaster County? (There was nothing recited in the instrument to indicate that it was a supplemental deed of trust to any trust deed that had been previously recorded.)"

This office has opined that a deed of trust may be supplemental to another so as to be exempt under Virginia Code § 58-60, even though the deed of trust did not on its face indicate that it was supplemental to the first. Report of the Attorney General (1947-1948), p. 184. The Virginia
Supreme Court has likewise considered extrinsic evidence in finding one instrument to be supplemental to another. White v. Schwartz, 196 Va. 316 (1954). After reviewing the two deeds of trust and the underlying note, I am of the opinion that the deed of trust recorded with you was supplemental to the deed of trust recorded in Lancaster County.

"4. Had the deed of trust recited that it was a supplemental deed of trust to a prior deed of trust recorded in Lancaster County, what proof should the Clerk require in order to record such instrument without payment of recordation taxes?"

As indicated above, I do not believe that it is necessary for the deed of trust to recite that it is a supplemental deed of trust, although such a recitation would have lessened the need for extrinsic evidence. In most situations it is sufficient that you be given a copy of the earlier deed of trust with an attached clerk's certification that the taxes have been paid. In this instance it was also necessary that you have the deed of trust note.

DEFINITIONS—Substitute Teacher Not One "Regularly Employed."

SCHOOLS—Substitute Teacher—Wife of member of school board may not be employed as; substitute not "regularly employed."

VIRGINIA CONFLICT OF INTERESTS ACT—Substitute Teacher Precluded From Teaching Within School District in Which Her Spouse Is Member of School Board.

August 25, 1971

THE HONORABLE ROBERT L. GILLIAM, III

Commonwealth's Attorney for Westmoreland County

This is in reply to your letter of August 17, 1971, which reads:

"Could you please advise me whether or not under the new conflict of interest law as amended a substitute teacher who is the wife of a member of the local school board and was a substitute teacher prior to his becoming a member of the school board could still be employed as a substitute teacher after her husband's appointment and while he is serving as a member thereof."

The statute to which you refer is § 2.1-349.1 of the Code of Virginia (1950), as amended, which prohibits a local school board from employing a teacher whose spouse is a member of the school board, but which makes exception for teachers who were "regularly employed" by any school board prior to their spouse's taking office on the local board. The question, therefore, is whether a substitute teacher can be said to be "regularly employed."

In ruling upon § 22-206 of the Code, the statutory predecessor of § 2.1-349.1, this office in an opinion to the Honorable Baxley T. Tankard, Attorney for the Commonwealth of Northampton County, dated May 22, 1958, found in the Report of the Attorney General (1957-1958), p. 235, stated the following which is pertinent to your inquiry:

"[T]he phrase 'regularly employed' does not mean continuous employment but it means employment for a regular session as distinguished from employment on a temporary basis, such as employment as a substitute teacher."

Consistent with that ruling, I am of the opinion that a substitute teacher is not regularly employed, but temporarily only, and as a consequence is precluded by § 2.1-349.1 from teaching within a school district in which her spouse is a member of the school board.
DENTISTS—Dentist Utilizing Services of Hygienist Is “Employing” Hygienist Whether Salary Paid by Other Dentist.

February 4, 1972

THE HONORABLE LESTER E. SCHLITZ
Member, House of Delegates

This is in response to your letter of January 25, 1972, in which you request my opinion concerning § 54-200.6 of the Code which limits to one the number of dental hygienists which may be hired by a dentist. You ask if the section is applicable to the following factual situation:

“A dental office building is shared by two dental partnerships who have separate offices, but have connecting doors and some common space. The two dentists in Partnership A retain two hygienists in accordance with Section 54-200.6 of the Code of Virginia which limits to one the number of hygienists which may be hired by each dentist.

“If Partnership B, also consisting of two dentists, retains a hygienist, may Partnership A contract with Partnership B for the use of her services for the patients of Partnership A? Under this arrangement, Partnership A would bill its patients directly and would pay a flat fee to Partnership B.”

In my opinion, the arrangement would fall within the prohibition of § 54-200.6. This section provides:

“No dentist shall employ more than one dental hygienist at one and the same time, . . .” Va. Code Ann. § 54-200.6 (1950), as amended. (Emphasis supplied.)

When Partnership A, consisting of two dentists, utilizes the services of the hygienist of Partnership B, they are employing more than two dental hygienists at one and the same time in violation of the statute.

In the context of this statute, the term “employ” means to procure or retain the services of, to set or keep at work; Arlandson v. Humphrey, 224 Minnesota 49, 27 NW, 2d 819; Holland v. Celebrezze, 223 F. Supp. 347, 349. One is in “employ” when he is subject to direction and control as to the manner of the performance of his duties and in the result to be accomplished. King v. Southwestern Greyhound Lines, 169 F. 2d 497, 498, 499.

“Employ” as so used is not limited to source of wages as the obvious intent of the statute is not to define the economic relationship between dentists and hygienists. Rather its purpose is to control the number of hygienists who may properly be supervised by a dentist so as to afford proper protection to the public. In the factual situation described above, the hygienist is actually working for, receiving instructions from, and is under the supervision and control of Partnership A and is merely paid by Partnership B.

DENTISTS—Prepaid Dental Service Plans Not Controlled and Regulated by § 32-195.3:1.

HEALTH—Prepaid Dental Service Plans Not Controlled and Regulated by § 32-195.3:1.

June 15, 1972

THE HONORABLE THOMAS C. BRADSHAW, D.D.S.
President, Virginia State Board of Dental Examiners

This is in response to your inquiry concerning the interpretation of Senate Bill No. 110 as passed by the 1972 session of the General Assembly. Specifically, your inquiry reads as follows:
“Does Section 32-195.3:1 of Senate Bill 110 authorize the formation of a Prepaid Dental Service Plan or is the operation of such a plan controlled and regulated by other State Laws?”

First, § 32-195.3:1 of the Code of Virginia (1950), as amended, which becomes effective July 1, 1972, reads as follows:

“Any person, any group of persons or any nonstock corporation may conduct directly or through an agent, who may be either an individual or a nonstock corporation, a plan or plans for furnishing prepaid hospital or medical and surgical or related services, except dentistry exclusively, or any combination thereof.”

Upon reading the above quoted statute, together with other pertinent sections of Title 32 of the Code and reviewing the legislative history of this enactment, it is abundantly clear that prepaid dental service plans are not controlled and regulated by § 32-195.3:1 of the Code. Further, Chapter 11 of Title 32, which is entitled “Contracts and Plans for Future Hospitalization, Medical and Surgical Services”, does not, in my opinion, authorize the formation of a prepaid dental service plan, whether or not limited exclusively to dentistry. Therefore, in my opinion, it is clear that Senate Bill No. 110 did not authorize a nonstock corporation operating under the abovementioned chapter to provide prepaid dental services. Specifically, all prepaid dental services can only be provided under statutory authorization found in Chapter 11.1 of Title 32 of the Code of Virginia.

DIPLOMATIC IMMUNITY—From Writ or Process—Extends to members of family of ambassador or public minister.

November 9, 1971

Dr. Warren W. Brandt, President
Virginia Commonwealth University

I am writing with regard to your request that I advise you of the legal status of Miss “X” and her claim of diplomatic immunity when served with several warrants for her arrest.

The principal statute concerning diplomatic immunity is found in 22 U.S.C.A. § 252 which provides:

“Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.”

The necessity of adhering to the foregoing statute is emphasized by 22 U.S.C.A. § 253 which makes it a criminal offense to sue out or execute any writ or process in violation of 22 U.S.C.A. § 252.

Despite the somewhat ambiguous language of 22 U.S.C.A. § 252, it is clear that it applies to criminal prosecutions as well as civil actions. The only issue arising from the face of the statute is whether it extends coverage to families and, in particular, children of diplomatic agents.

The widely cited case of Carrera v. Carrera, 174 F.2d 496 (D.C. Cir. 1948), states:

“It has long been a settled rule of law that foreign diplomatic representatives are exempt from all local processes in the country to which they are accredited. [citation omitted.] The same immunity is not only given to an ambassador himself, but to his subordinates, family and servants as well.”
In “Diplomatic Privileges and Immunities,” 14 International and Comparative Law Quarterly 1265, Professor Wilson writes:

“Even though children of the heads of diplomatic missions may not be entitled to complete inviolability, a general rule of international law would grant them exemption from civil and criminal jurisdiction.”

After citing three post Second World War incidents, Professor Wilson concludes that there is no indication of a deviation from the United States policy that a child of a foreign ambassador or Minister, as a member of the diplomatic household, may not be penalized for traffic and more serious offenses. One of the incidents related by Professor Wilson concerned a Fairfax County driving charge which was withdrawn after the driver, the son of an ambassador, was identified as having diplomatic immunity.

Finally, it should be noted that a leaflet issued by the Department of State, Office of the Chief of Protocol, styled “Immunity of Foreign Officials” provides:

“The immunity of the officer covers all members of his family . . . (such as sons attending colleges, etc., but who are dependent for their support upon the officer and who are members of his household.)”

It is my understanding that a review of the University’s records indicates that Miss “X” is not emancipated and does claim to be a member of the household of her father. A check with Hampton Davis, Assistant Chief of Protocol at the Department of State, verifies that Miss “X’s” father is a diplomatic agent entitled to immunity.

Considering the above mentioned authorities and assuming that Miss “X” is a member of her father’s household, I am of the opinion that Miss “X” is entitled to diplomatic immunity and may not be prosecuted by Virginia authorities for criminal violations unless the immunity is waived.

The foregoing should not be construed to imply that the University may not discipline Miss “X” for violations of its own rules. The concept of diplomatic immunity does not extend to intra-university disciplinary procedures and, accordingly, the University is free to pursue disciplinary action if it deems such action appropriate.

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**DOG FUND—Items Classified as Expenses of Dog Warden.**

**DOG FUND—Salary and Expenses of Dog Warden Limited to Special Dog License Fund; County Does Not Have Authority to Supplement Salary out of General Funds.**

**DOG FUND—Claims Paid in Order of Presentation and Only From Special Dog License Fund.**

November 12, 1971

**THE HONORABLE CATESBY GRAHAM JONES, JR.**

Commonwealth’s Attorney for Gloucester County

This is in reply to your letter of October 25, 1971, which reads as follows:

“Gloucester County’s contemplated budget for the fiscal period ending June 30, 1972 for ‘Protection of livestock and Fowls’ is as follows:

1. Compensation of Dog Warden $3,600.00
2. Advertising (Treasurer) 50.00
3. Insurance (dog warden’s vehicle) 110.00
4. Surety bond premium (dog warden) 10.00
REPORT OF THE ATTORNEY GENERAL

5. Rent of dog pound 150.00
6. Repairs and replacements (dog warden's equipment and pound) 100.00
7. Employer's FICA contribution 188.00
8. Tires and Repairs 140.00
9. Dog Food 180.00
10. Gas, grease and oil 200.00
11. Record books and dog tags (Treasurer) 175.00
12. Stationery, office supplies, etc. (Treasurer) 17.00
13. Ammunition and gas cartridges 80.00
14. Fowl claims 200.00
15. Livestock claims 400.00
16. Rabies treatment 100.00

$5,700.00

"For the fiscal period ending June 30, 1971, the income from dog license taxes amounted to $4,368.25. The increase for the current fiscal period is due largely to the increase of the dog warden's salary.

"The enforcement of the dog laws in Gloucester County is vested in a dog warden pursuant to 29-184.2 of the Virginia Code.

"I note in 29-184.2 that funds collected from these taxes are to be paid into a special fund and that the County shall pay the salaries and expenses of the dog warden from such special fund.

"I would like you to answer the following questions:

"1. Which of the fifteen (15) categories in paragraph one, exclusive of the Dog Warden's salary, are 'expenses' of the dog warden?

"2. Are the salary and expenses of the dog warden limited by the amount in the special fund or can money in the general fund be transferred to this special fund to make up the deficit?

"3. It is provided in 29-202 of the Code that the owner of livestock killed or injured by dogs is entitled to compensation therefor. In 29-209 of the Code, it is provided that claims are to be paid in the order of presentation and only from the special fund. Does this mean that claims are only to be honored as long as the special fund is solvent?"

I shall answer your questions seriatim:

(1) Section 29-209 of the Code provides for the disposition of the special dog license tax fund. This section provides that the county shall pay for control of rabies, treatment of persons for rabies, advertising notices, freight and express or postage, and if the remainder is sufficient, all damages to livestock or poultry, and if the county so desires it may make therefrom the allowance to the game warden (or ex officio game warden) for services. Under this section these items must be paid separately and are not classified as expenses, per se, of the dog warden. Therefore, your items numbered 2, 14, 15 and 16 should not be classified as expenses of the dog warden. Item 7 is also not an expense of the dog warden and should be considered as part of the contribution to the warden. Whether the remaining items are classified as expenses of the dog warden is a matter for the county to determine.

(2) The salary and expenses of the dog warden are limited by § 29-184.2(c) to the special dog license fund. The county does not have authority to supplement the salary of the dog warden out of the general funds.

(3) Section 29-209 provides that claims are to be paid in the order of presentation and only from the special dog license fund. If the funds are insufficient to pay all claims, they shall be filed and paid in order of pre-
sentation out of the first available money coming into the fund. Therefore, claims can be paid only when the fund is solvent.

DOG LAWS—Kennel License and Also Dog License Tax.

DOG LAWS—Limits on Kennel Licenses Established by § 29-184.

DOG LAWS—Kennel Licenses—No authority in city or county to increase amount of kennel license.

ORDINANCES—Dog Warden Ordinance Enacted by Counties.

January 19, 1972

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

This is in reply to your letter of January 13, 1972, which reads as follows:

"Reference is made to Section 29-184.2, current Code of Virginia, providing for the enactment of Dog Warden Ordinances by counties, and especially to the following language in paragraph (c) thereof;

"'In such county the amount of the dog license tax, which in no event shall be more than five dollars per dog, shall be fixed by ordinance adopted by the governing body of such county, and thereafter the tax imposed under § 29-184 shall not apply therein.' [Emphasis supplied.]

"The above cited code section 29-184.2 does not specifically provide for kennel licenses as does section 29-184.

"Information is requested as to whether or not a county operating under a Dog Warden Ordinance as provided under section 29-184.2 may fix the dog license tax at some figure per dog not more than five dollars, and also provide for kennel licenses. If so, what would be the limits on kennel licenses?"


DOG LAWS—Localities May Restrict Activity of Dogs; §§ 29-194 and 29-194.2.

DOG LAWS—Localities May Fix Price of Individual and Kennel Dog Tags Not to Exceed Those Provided by State Law; § 29-194.2.

February 15, 1972

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

This is in reply to your letter of February 9, 1972, in which you requested my opinion on the following:
“Under existing statutes can a locality pass an ordinance to effectively restrict the activity of dogs, fix the price of individual and kennel dog tags, and issue tags without listing the sex of the dog on the tag? If so, how?”

Sections 29-194 and 29-194.2 of the Code authorize localities to restrict the activity of dogs, which restrictions extend to prohibitions against their running at large and authorizing their confinement, restriction or being penned up.

Section 29-194.2 authorizes the locality to fix the price of individual and kennel dog tags, and to issue tags for dogs regardless of sex so long as the fees do not exceed those provided by State law. See opinion to the Honorable G. Hugh Turner, Treasurer of Franklin County, found in Report of the Attorney General (1969-1970), p. 109, a copy of which is attached.

DRUGS—Possession and Distribution—What constitutes.

September 13, 1971

THE HONORABLE RICHARD N. HARRIS, Director
Division of Justice and Crime Prevention

This is in response to your request for my opinion concerning the legality under both state and federal statutes of a certain drug analysis service. Specifically, the program is designed to analyze drugs sent in to determine the chemical composition of the sample. Persons desiring the analysis assign a number to the sample drug and then forward it to the program center by mail. The sample is then forwarded to a laboratory for testing. It is contemplated that the drugs involved would be those listed in schedules I and II as defined in the federal and state statutes, e.g., heroin, LSD, cannabis, cocaine, etc. Results are published, broadcast, and in some cases posted on bulletin boards. None of the persons involved in this sequence are licensed to possess drugs obtained in this manner nor to distribute controlled drugs.

In my opinion, several violations of law, both state and federal, may occur in the above factual situation. Certainly no offenses occur where the substances involved are not controlled substances or drugs within the statutory definitions. The program contemplates, however, that controlled substances or drugs will be the subject of the testing.

Under both state and federal law schedule I drugs, as heroin, LSD and marijuana, may not be possessed or distributed unless specifically registered by both governments. The routine license given physicians and pharmacies does not include the authority to deal with these substances in schedule I, but does include authorization to deal with drugs in other schedules. Such authorization, however, allows the licensee to obtain and distribute these substances only when they are received from licensed sources and when ordered in a prescribed manner. Va. Code Ann. § 54-524.63; 21 U.S.C. 844 (a).

As we follow the sample from beginning to end the following crimes are committed:

First, the originator of the sample has knowledgeable and/or intentional possession of the controlled drug and is, therefore, in violation of § 54-524.101 (c) of the Code of Virginia and 21 U.S.C. 844 (a). The former reads in pertinent part:

“(c) It is unlawful for any person knowingly or intentionally to possess a controlled drug unless such substance was obtained pursuant to a valid prescription or order from a practitioner . . . or except as otherwise authorized by this chapter.”
We have assumed that the sample was not obtained in a legitimate manner.

When the package is mailed the sender falls within the definition of a "distributor" described in § 54-524.2 (b) (11) of the Code of Virginia and in 21 U.S.C. 802 (11), the federal Controlled Substances Act, as one who "delivers" a controlled drug. Since the person is not licensed to distribute, he violates both the federal and state laws which are felonies. Va. Code Ann. § 54-524.101 (a); 21 U.S.C. §§ 828, 841 (a). Federal law also makes it a crime to use a "communication facility" in the commission of a crime. The mails are within the definition of a "communications facility"; therefore, another federal crime is involved. 21 U.S.C. 843 (b).

Upon receipt of the package, the program center obtains possession of the drugs in question and since it is in no way authorized by law to do so, it is in violation of § 54-524.101 (c) of the Code of Virginia and 21 U.S.C. 844 (a) of the federal code, both of which make it unlawful for any person to knowingly or intentionally possess a controlled substance.

As subsequent persons in the program center repeat the sequence in delivering the sample to the laboratory for testing, the same crimes are committed with each of the persons involved in the possession-distribution-possession sequence.

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**DRUGS AND DRUGGISTS—Distinction Between Dispensing Drugs for Long-term Use and Issuing Single Dose.**

** MEDICINE—Ward Personnel, Not Licensed Pharmacists or Physicians, Not Allowed to Dispense Drugs for Long-term Use of Patient Leaving Hospital for Temporary Visit.**

**PHYSICIANS—Exemption from Requirements of Drug Control Act Not Transferable to His Agents and Employees.**

November 9, 1971

THE HONORABLE J. B. CARSON, Secretary-Treasurer
State Board of Pharmacy

I am in receipt of your letter of September 30, 1971, wherein you enclosed a letter from Howard H. Ashbury, M. D., Superintendent, Eastern State Hospital, which states that Eastern State Hospital releases over 3,000 patients for temporary visits of seven days or less each year. The hospital issues drugs, largely tranquilizers, to most of these patients and Dr. Ashbury questions whether ward personnel, who are not licensed pharmacists, may dispense these drugs to these patients under a physician's supervision and orders as they now issue individual doses of medication.

In my opinion, ward personnel who are not licensed pharmacists or physicians, would not be allowed to dispense these drugs to these patients. There is a distinction between the dispensing of drugs for the long-term use of the patient as opposed to the issuing of a single dose. Section 54-524.2 (b) (1) defines "administer" as "... the giving of a dose of a drug to a patient for his immediate need, either by a practitioner or by his authorized agent under the direction of the practitioner." (Emphasis supplied.) Therefore, the statute clearly permits ward personnel, if authorized agents of physicians, to issue a single dose of the medication. However, the issuing of more than one dose for subsequent use falls within the definition of "dispensing" which is defined as "... the issuing of one or more doses of a drug or a device in a suitable container, appropriately labeled, for subsequent administration to or use by a patient." Va. Code Ann. § 54-524.2 (b) (10). (Emphasis supplied.) The only persons allowed to dispense drugs are pharmacists and medical, dental, osteopathic, chiropractic or veterinary practitioners as provided in § 54-524.48, § 54-524.53, § 54-524.55 and § 54-524.67 of the Code. Section 54-524.53 provides that a physician is
exempted from the requirements of the Drug Control Act when he is engaged in administering or supplying to his patients such medicines as he may deem proper. This exemption granted to the physician by the statute is not transferable to the agents and employees of that physician and, therefore, even assuming that the ward personnel mentioned in the factual situation presented are his agents, he could not delegate to them the authority to dispense medication.

DULLES INTERNATIONAL AIRPORT—Jurisdiction of Criminal Matters.
JURISDICTION—Criminal Jurisdiction at Dulles Airport.
FEDERAL PROPERTY—Jurisdiction of Criminal Matters at Dulles Airport.

January 10, 1972

THE HONORABLE DONALD W. DEVINE
Commonwealth’s Attorney for Loudoun County

I am in receipt of your letter of December 20, 1971, in which you raise a question concerning an earlier opinion to you of September 2, 1971, concerning jurisdiction for criminal matters over Dulles International Airport and the access highways leading thereto. You point out that the earlier opinion relied upon § 7.1-17 of the Code of Virginia (1950), as amended, for authority as to the jurisdiction of the aforesaid area. You indicate that you are concerned over the possibility that § 7.1-15 of the Code is applicable instead, since § 7.1-15 uses the phrase, “airplane landing field,” and that this would appear to apply to Dulles Airport.

It is true that a determination of the extent of jurisdiction over territory which has been ceded to the Federal Government is significantly different under § 7.1-15 of the Code than it is under § 7.1-17. The pertinent provision of § 7.1-15, which determines its applicability, is as follows:

“The conditional consent of the Commonwealth of Virginia is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any lands in Virginia, whether under water or not, from any person for sites for customs houses, courthouses, arsenals, forts, naval bases, military or naval airports or airplane landing fields or for any military or naval purposes.”

It is my opinion that the phrase, “airplane landing fields” is to be read in conjunction with the descriptive words, “military or naval airports,” immediately preceding and that the only airplane landing fields covered by § 7.1-15 are those which are for military or naval purposes. Since Dulles International Airport is for civilian rather than military purposes, it is my opinion that § 7.1-17 does apply to Dulles Airport, as specified in my earlier opinion.

DULLES INTERNATIONAL AIRPORT—Jurisdiction Over—For control of traffic and other criminal matters.

September 2, 1971

THE HONORABLE DONALD W. DEVINE
Commonwealth’s Attorney for Loudoun County

This is in reply to your letter of August 9, 1971, in which you asked to be advised as to the jurisdiction for criminal matters over Dulles International Airport between the Federal Government and the State of Virginia.

A thorough inquiry of State officials and agencies verifies the correctness of your statement that there is no formal agreement between the Federal Government and the State of Virginia concerning this jurisdiction.
Jurisdiction of the area comprising Dulles Airport as well as the limited access highway leading thereto was ceded to the United States and accepted in accordance with § 7-21 of the Code of Virginia (now § 7.1-17). Under the provisions of this section, the State of Virginia ceded to the United States the exclusive jurisdiction to regulate traffic over the highways connected with Dulles Airport which are maintained by the United States. The obligation to enforce all traffic regulations, therefore, lies exclusively with the United States Government rather than the State of Virginia on both the airport grounds and the access highway thereto.

As to all other criminal matters, § 7.1-17 of the Code provides that the Commonwealth of Virginia reserves unto herself "exclusive governmental, judicial, executive and legislative powers, and jurisdiction in all civil and criminal matters, except insofar as the same may be in conflict with the jurisdiction and powers of the United States."

It is my opinion that jurisdiction over all traffic matters lies exclusively with the United States Government and that jurisdiction over all other criminal matters, ordinarily of State concern, lies exclusively with the Commonwealth.

ECONOMIC STABILIZATION ACT OF 1970—State and Local Governments Not Exempt From Regulations Governing Pay Increases.

CHARTERS—General Assembly Could Enact Changes Raising Compensation of Mayor and Other Officials Effective at End of Economic Controls Period.

PUBLIC OFFICERS—City Council May Raise Its Own Compensation During Incumbency of Its Members by Charter Amendment by General Assembly.

December 28, 1971

THE HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

In your letter of December 20, 1971, you inquire whether the regulations promulgated pursuant to the Economic Stabilization Act of 1970, as amended, will permit a change in the charter of the City of Hampton raising the compensation of the mayor, city councilmen, and members of other authorities effective July 1, 1972.

State and local governments are not exempt from the regulations governing pay increases which limit the aggregate of annual increases for an appropriate employee unit to 5.5%. Furthermore, there is at this time no exemption for "executive" type positions such as mayors, councilmen, etc. It is my opinion, therefore, that any charter amendment which would increase the compensation of these officials by more than 5.5% could not be implemented at this time without the granting of a specific exception by the Pay Board. This does not mean, however, that such charter changes could not be enacted by the General Assembly, since presumably the economic controls will end at some time in the foreseeable future (such controls are currently effective through April 30, 1973), and the increased compensation could then be fully implemented.

You also inquire whether the City Council could properly raise its own compensation during the incumbency of its members. Since the charter amendments providing for the increased compensation are enacted by the General Assembly rather than by the City Council, it is my opinion that such increased compensation would not be improper.

EDUCATION—Truancy—Jurisdiction over child.
SCHOOLS—Children — Truancy — When juvenile and domestic relations courts have jurisdiction.

JUVENILES—Truancy—Jurisdiction over child.

The Honorable Harold B. Singleton, Judge
Fifth Regional Juvenile and Domestic Relations Court

November 16, 1971

This is in reply to your letter of November 1, 1971, in which you present the following inquiries:

"Under the law as written (22-275.1—22-275.23) the Juvenile and Domestic Relations Courts have exclusive original jurisdiction for the enforcement of the compulsory attendance law.

"It has been the custom to issue warrants against the parents for failing to make the children attend school and to issue petitions against the children who refuse to attend school, charging them with being delinquent by reason of truancy.

"In looking over the law as written, the only thing I can find to charge a child with is 22-275.20 which sets out that any child or children permitted by any parent, guardian, or other person having control thereof, to be habitually absent from school, contrary to the provisions of this of this article, shall be deemed a neglected child, to be disposed of in the manner prescribed by Title 63 (Title 63.1) of the Code.

"We have on occasions committed children to the State Board of Welfare and Institutions for refusing to attend school.

"It seems that we may have been incorrect in doing this and that the child is only dependent and neglected and not delinquent.

"Please advise if we may punish the child who refuses to go to school though his parents have attempted to make him do so, by treating him as a delinquent child and committing him to the State Board of Welfare and Institutions as we do other delinquents."

Section 22-275.20 provides that:

"Any child or children permitted by any parent, guardian, or other person having control thereof, to be habitually absent from school, contrary to the provisions of this article, shall be deemed a neglected child, to be disposed of in the manner prescribed by Title 63.1 of the Code."

In this connection, it appears that the substance of the provisions of Title 63.1, to which reference is made in § 22-275.20 is now embraced in corresponding provisions of the Juvenile and Domestic Relations Court Law. Your specific question appears to relate to a child who refuses to attend school even though his parents have attempted to make him do so. In that event, § 22-275.20 is probably technically not applicable as it refers to instances where the child is permitted by his parent to be habitually absent from school.

It is my opinion that the factual situation you present would be governed by § 16.1-158(1)(h) of the Code of Virginia (1950), as amended, which gives jurisdiction to the Juvenile and Domestic Relations Courts over a child:

"(h) Who being required by law or his parents or custodian to attend school is a willful and habitual truant therefrom; . . ."
in the past have been in accordance with the law and the same procedures could be followed in the future, or any other procedures under § 16.1-178 as long as they were in compliance with the appropriate Code provisions.

EDUCATION, STATE BOARD OF—Standards of Quality—Effective date of.

January 4, 1972

DR. WOODROW W. WILKERSON
Superintendent of Public Instruction
State Department of Education

I am writing in reply to your letter of December 29, 1971, in which you ask when the standards of quality which are prescribed by the Board of Education become applicable.

With regard to standards of quality, Section 2 of Article VIII of the Constitution provides:

"Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly."

In implementing this requirement, the General Assembly enacted § 22-19.1, Code of Virginia (1950), as amended, which provides in part:

"In the odd-numbered years, [the annual report of the Board of Education] shall further contain the standards of quality to be prescribed in the future for the school divisions of the Commonwealth. Such standards of quality, subject to revision by the General Assembly, shall be effective for the school years embraced within the fiscal years for which budget estimates are reported pursuant to § 2.1-54."

Section 2.1-54 of the Code states that on or before September 1 biennially in the odd-numbered years budget requests shall be submitted for the "ensuing biennial period beginning with the first day of July thereafter."

Considering the various provisions stated above, I am of the opinion that the standards of quality prescribed by the Board of Education on August 7, 1971, do not become effective until July 1, 1972, and will first be applicable to school divisions for the 1972-73 school year.

ELECTIONS—Absentee Application and Ballot of Members of Armed Forces on Active Service Outside of Virginia, No Abode Within State.

September 22, 1971

THE HONORABLE JOHN S. MAHAN, Secretary
State Board of Elections

In your recent letter you inquire whether members of the Armed Forces of the United States on active service outside the Commonwealth of Virginia, and their spouses, whose domiciliary intent is to retain Virginia as their home state, but who have no place of abode within the Commonwealth as required by Article II, Section 1, of the 1971 Constitution of Virginia, are eligible to register and vote by absentee application and ballot in Virginia elections.

Section 24.1-48 of the Code of Virginia (1950), as amended, provides in pertinent part:

"Any person otherwise qualified to vote who is on active service as a member of the Armed Forces of the United States, or who is the spouse of any person on active service as a member of the Armed Forces of the United States, and is absent from the city or county
in which he resides due to such active service of the voter, or the active service of the spouse of the voter, shall be allowed to register by absentee application."

It is true that Article II, Section 1, of the Constitution provides that residence requires both domicile and place of abode. In the case of servicemen, however, who are involuntarily absent from their homes while on active duty, this provision cannot be interpreted in such a way as to deprive these otherwise qualified voters of the electoral franchise. It is my opinion, therefore, that servicemen, who had a place of abode in Virginia prior to their assignment to active duty elsewhere, must be deemed to constructively retain that place of abode in the absence of evidence to the contrary in any individual case, regardless of the fact that the serviceman may no longer retain an actual property right in any specific real property. He should be permitted to register as though he still resided at his old place of abode, and should be placed in the precinct where such place of abode is located.

ELECTIONS—Assistant Registrar May Be Appointed An Officer of Election Under § 24.1-45.

REGISTRAR—Assistant Registrar May Be Appointed An Officer of Election Under § 24.1-45.

January 12, 1972

THE HONORABLE JAMES M. YOUNG
Chairman, City of Salem Electoral Board

I am in receipt of your letter of January 10, 1972, wherein you request my opinion whether an individual who is now serving as an assistant registrar may be reappointed for an additional term as an officer of election. You direct my attention to §§ 24.1-33 and 24.1-45 of the Code of Virginia (1950), as amended.

I am enclosing herein, previous opinions of this office relating to the provisions of § 24.1-33. See, opinions to the Honorable William O. Roberts, Jr., City Attorney for the City of Lexington, dated December 8, 1971, to the Honorable R. Turner Jones, Commonwealth's Attorney for Highland County, dated December 28, 1971, and to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated July 7, 1971.

Section 24.1-33 states:

"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."

As ruled in the Jones opinion, such section prohibits an individual from being appointed or placed after July 1, 1971, in a prohibited dual capacity. For example, an officer of election while holding such position may not, after July 1, 1971, become an employee of the county, nor after July 1, 1971, may an employee of the county be appointed as an officer of election.

However, § 24.1-45, which reads:

"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 limitations, qualifications and fulfill the same requirements as the general registrar except that an assistant registrar may be an officer of election. Their compensation shall be fixed and paid by the local governing body."
is a specific exception to § 24.1-33. Consequently, I am of the opinion that an officer of election may be an assistant registrar or contrarily an assistant registrar may be appointed as an officer of election.

Your inquiry is, therefore, answered in the affirmative.

ELECTIONS—Ballot—Appearance of names on.

March 7, 1972

THE HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

I am in receipt of your letter of March 3, 1972, wherein you inquire if candidates for the upcoming councilmanic election should be placed on the ballot in the same order in which they qualify, or should the order of the names, appearing on the ballot, be determined by lot.

Section 24.1-1(5) of the Code of Virginia (1950), as amended, defines elections as "general", "primary" or "special" and provides that elections for governing bodies of cities and towns, held on the first Tuesday in May, are general elections.

Section 24.1-111, to which you refer, provides in pertinent part:

"Except as provided for primary and special elections, the order of the names appearing on the ballot shall be determined as follows: In elections where more than one county or city is involved, the State Board of Elections, and in other elections the local electoral board, shall determine by lot the order of the political parties, and the names of all candidates for a particular office shall appear together in the order determined for their parties. Where there be more than one candidate representing a political party running for an office, the candidates' names shall appear alphabetically in their party groups under the name of the office. For the purpose of this section, independents shall be treated as a class under "Independent" and where there be one or more independent candidates for an office, the class "Independent" shall be deemed a political party. No names of political parties shall appear on the ballot, except in presidential elections under article 2 (§ 24.1-158 et seq.) of this chapter." (Emphasis supplied.)

The selection by lot, provided for by the above, is applicable only in determining the order of political parties independents being treated as a class under "Independents". Since, as you indicate, candidates for the council race do not specify party affiliation, they would all be treated as independents. Thus, there would be only one "party" and, therefore, no need for any determination by lot. The candidates, in my opinion, would appear on the ballot alphabetically.

ELECTIONS—Candidacy—Employee of Extension Service of V.P.I. may be candidate for office on town council.

JUSTICE OF PEACE—May Not Also Serve as Part-time Matron at Jail of Same County She Serves as Justice of Peace.

PUBLIC OFFICERS—Compatibility—Justice of Peace May Not Also Serve as Part-time Matron at Jail of Same County She Serves as Justice of Peace.

February 14, 1972

THE HONORABLE JAMES W. OVERTON
Sheriff of Prince Edward County

In your letter of February 5, 1972, you inquire whether an employee of
the Extension Service of Virginia Polytechnic Institute and State University may be a candidate for office on a town council. I know of no provision of Virginia law which would prevent such candidacy.

You also inquire whether a justice of the peace may also serve as a part-time matron at the county jail of the same county which she serves as justice of the peace. I have previously ruled, in an opinion to the Honorable Quin S. Elson, Judge of the Municipal Court of the City of Fairfax, dated April 30, 1971, and found in the Report of the Attorney General (1970-1971) at p. 317, a copy of which is attached, that a deputy clerk of a municipal court, whose duties include the issuance of process as do those of a justice of the peace, may not simultaneously be employed by the police department since it would be difficult for him to exercise impartial discretion when called on to issue warrants or subpoenas. Obviously the same reasoning would apply to a justice of the peace who might be employed by the sheriff’s department as a part-time matron, and it is therefore my opinion that your inquiry must be answered in the negative.

ELECTIONS—Candidate Can Transfer Voter Registration to New Election District and on Same Day File Declaration of Candidacy to Run As Independent From New District.

ELECTIONS—Domicile for Voting Purposes Must Be Decided Upon Facts in Each Case, and Intention of Applicant.

ELECTIONS—Designation of Treasurer Is A Condition of Qualifying As Candidate; Must Be Filed Prior to Deadline Within Which Candidate Must File.

ELECTIONS—Local Electoral Board Must Determine Whether Candidates Are Qualified to Have Names Printed on Ballots.

September 21, 1971

THE HONORABLE JOSEPH L. DENNY, Secretary
The Electoral Board of Warren County

I am in receipt of your letter of September 10, 1971, wherein you raise four questions which will be answered seriatim:

“Question 1. Can a candidate who has been living in one county election district apply to the registrar to transfer his voter registration to a new county election district, and on the same day can he file a Declaration of Candidacy to run as an independent for county supervisor from the new district?”

Answer: Yes. See previous opinions of this office, copies of which are enclosed, to The Honorable Henry E. Howell, Jr., Member, The Senate, dated March 8, 1971; and two opinions to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated May 6, 1971, and September 14, 1971.

“Question 2. There is some doubt as to whether the above mentioned candidate has established ‘domicile and a place of abode’ in the new district where he is now registered. What criteria can the electoral board use to determine ‘domicile and place of abode’?”

Answer: Enclosed also are copies of opinions of this office to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated July 21, 1971; and The Honorable Frank R. Watkins, General Registrar of City of Suffolk, dated September 20, 1971. Though the question of domicile is basically one of subjective intent, objective criteria such as that outlined in the Mahan ruling of July 21st may be used.

“Question 3. Must a candidate file notice of his campaign treasurer
prior to or not later than his declaration of candidacy with the county electoral board."

Answer: Section 24.1-253 (a) of the Code of Virginia (1950), as amended, 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."

The designation of a treasurer and filing of such designation is a condition of qualifying as a candidate and until the requirements of § 24.1-253 are met one is not qualified and may not have his name printed on the ballot. See § 24.1-167. Though there is no requirement that the designation of treasurer be filed at the same time that a declaration of candidacy is filed, such designation must be filed prior to the deadline within which candidates must file. In the case of independent and primary candidates, it would be the deadline set forth by statute and in the case of a party nominee selected by convention, such designation must be made within the ten day period the party has to certify its nominee. See § 24.1-169.

You additionally have asked that I consider the following question, which I have phrased as follows:

"Question 4. Can the local board question the qualification of a candidate, i.e., if he is truly a resident."

Answer: Yes. As this office has previously ruled, it is the duty of each local electoral board to determine whether candidates are entitled to and qualify to have their names printed on the ballots. See opinion to the Honorable Levin Nock Davis, Secretary, State Board of Elections, dated May 3, 1955, found in the Report of the Attorney General (1954-1955), p. 83, copy of which is enclosed.

ELECTIONS—Candidate for Primary Filed Designation of Treasurer; Not Necessary That New Designation Be Made Upon Candidate's Winning the Nomination.

September 24, 1971

THE HONORABLE HERBERT H. BATEMAN
Member, The Senate

I am in receipt of your letter of September 22, 1971, wherein you indicate you qualified as a candidate for the Democratic primary held on September 14, 1971, and as required by the Fair Elections Practices Act, Chapter 9, Title 24.1 of the Code of Virginia (1950), as amended, designated a campaign treasurer and filed such designation with the appropriate officials. You have now won your party’s nomination, there being no opposition to your candidacy in the primary. You request my opinion whether you are now required to file any new designation of treasurer for the general election campaign.

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 Elec-
tions. Every treasurer so appointed shall accept such appointment, in writing, prior to filing thereof.”

The language “candidate for nomination for . . . any office in the Commonwealth” indicates that individuals seeking their party’s nomination must designate a campaign treasurer, while the language “candidate for . . . election to, any office in the Commonwealth” indicates independent candidates must file a designation of treasurer prior to qualifying.

Once a candidate for nomination for an office in the Commonwealth files his designation of treasurer, there is no requirement that a new designation be made upon such individual’s winning the nomination. Your inquiry is, therefore, answered in the negative.

ELECTIONS—Candidate for Sheriff—Employee of State Board of Education eligible.

August 12, 1971

THE HONORABLE R. PAGE MORTON, Judge
Charlotte County Court

In your letter of July 31, 1971, you inquire whether a person who is employed by the State Board of Education as a fire training specialist, who plans to be an independent candidate for the office of Sheriff in the general election of November 2, 1971, may retain his position with the State Board of Education after he announces his candidacy.

Although federal law (commonly known as the Hatch Act) prohibits federal employees and some state employees from participating in primary elections or otherwise associating themselves with any political party, those prohibitions do not apply where the employee runs in a general election as an independent candidate not aligned with any political party. Furthermore, there are no state laws which would prohibit a state employee from such candidacy although, if elected, the same person could not hold both positions.

I am of the opinion, therefore, that an employee of the State Board of Education may retain his employment if he is an independent candidate for Sheriff or other such office.

ELECTIONS—Candidate May Not Qualify Subsequent to Time Stated in Statute.

September 21, 1971

THE HONORABLE ROBERT BUNDY, Secretary
Russell County Electoral Board

I am in receipt of your letter of September 16, 1971, wherein you state that an independent candidate for the office of Sheriff of Russell County filed on September 14th his notice of candidacy together with a petition containing seventy-five names of qualified voters. Subsequently, on September 15th, he filed an additional petition with enough signatures to total more than the required one hundred twenty-five signatures. The candidate indicates that he was misinformed as to the number of signatures required. You request my opinion whether the candidate’s name should be printed on the ballot for the November 2nd general election.

Sections 24.1-166 and 24.1-168 of the Code of Virginia (1950), as amended, require that independent candidates who desire their names on the ballot must file a notice of candidacy together with the required petition.
Since the position of sheriff is a constitutional office, the number of signatures of qualified voters required by § 24.1-168, to be on the petition, would be one hundred twenty-five.

Independent candidates for constitutional office this year had to file the required notice and petition no later than the time fixed for the closing of the polls of the primary which was held on September 14th. See opinion of this office to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated May 28, 1971, copy of which I enclose. I know of no provision which would allow a candidate to qualify subsequent to the time stated.

It is the duty of each and every candidate to insure that he meets all the qualifications of filing for his candidacy and failure to meet such qualifications may not be passed on to another. Only a person fulfilling all the requirements of a candidate may have his name printed on the ballot. Since the individual in question failed to meet all the requirements of filing, his name shall not be printed on the ballot and your question is therefore answered in the negative.

ELECTIONS—Candidate Must File Notice of Candidacy and Petition Containing Proper Number of Signatures, and Appoint Campaign Treasurer.

The Honorable H. Ronnie Montgomery
Commonwealth's Attorney for Lee County

I am in receipt of your letter of January 7, 1972, which reads:

"I request your interpretation of Section 24.1-91 of the Code of Virginia regarding filing as a candidate for Mayor or Town Council. Is the only requirement to become a candidate that the person give notice of candidacy to the Clerk, or is it also necessary, where they are not party nominated that they obtain fifty signatures signed to a petition?"

As this office has previously ruled, the provisions of § 24.1-168 of the Code of Virginia (1950), as amended, are applicable to candidacies of town councilmen. Section 24.1-168 details specifically the number of signatures required on a petition for membership on the governing body of a town and requires one hundred and twenty-five such signatures unless there are less than one thousand registered voters in a town, in which case no petition is required. Consequently, an individual desiring to be a candidate must not only file the notice of candidacy as required by §§ 24.1-91 and 24.1-166, but must also meet all other applicable provisions of Virginia law, which would include not only the provisions of § 24.1-168 as outlined above, but also the requirement of appointing a campaign treasurer pursuant to the provisions of § 24.1-253.

ELECTIONS—Candidates; Failure to Designate a Treasurer No Longer Grounds for Disqualification.

The Honorable William Ferguson Reid
Member, House of Delegates

I am in receipt of your request of May 26, 1972, regarding:

"... how candidates for the City Council in Hopewell could have their names placed on the ballot contrary to Chapter 9, Section 24.1-253 of the Code of Virginia, as amended; while candidates seeking to be placed on the ballot in the Town Council election at
Waverly, Virginia, were not permitted to have their names printed on the ballot because they failed to comply with Section 24.1-253.

"Also, whether or not the candidates elected in Hopewell, Virginia, who did not comply with Section 24.1-253 are legally elected to the City Council."

Section 24.1-253 (a) of the Code of Virginia, as amended by Chapter 622 of the Acts of Assembly (1972), reads as follows:

"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, provided, however, that the provisions of this section shall not apply to candidates for election to any town office. Every treasurer so appointed shall accept such appointment, in writing, prior to filing thereof."

Such section, prior to the above, which has been effective only since approval on May 23, 1972, by the Attorney General of the United States under the Voting Rights Act, and as in force on the date of the elections in question read as follows:

"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."

As this office has previously ruled in an opinion to the Honorable Joseph L. Denny, Secretary, The Electoral Board of Warren County, dated September 21, 1971, a copy of which is enclosed, a candidate who fails to designate a campaign treasurer should not have his name on the ballot. This, of course, has now been changed to provide that such requirement is not a condition precedent and the candidate is deemed to have appointed himself. See § 24.1-253, as amended by Chapter 620 of the 1972 Acts of Assembly.

Consequently, the provisions in force at the time of election were correctly administered as to the Town of Waverly, but were apparently incorrectly administered as to the City of Hopewell, it being my understanding that all candidates in the city councilmanic race filed designations of treasurer subsequent to the filing deadline.

Such failure would not, however, in my opinion, call into question the results of the election, there being no indication that but for the failure to file designations of treasurer the result would have been different. See opinion of this office to the Honorable Walter B. Fidler, Member, House of Delegates, dated May 25, 1972, copy of which is enclosed. This is especially true since the only alternative, if such failure was questioned prior to the election, would have been a blank ballot. Additionally, I would emphasize that the General Assembly has indicated its intent that failure to designate a treasurer is not, any longer, grounds for disqualification.

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ELECTIONS—Committee Member of Political Party May Serve on Local Electoral Board.

ELECTIONS—Party Committeemen Do Not Hold "Public Office."

ELECTIONS—Up to Candidate What He Does With Balance of Campaign Funds After Election.
REPORT OF THE ATTORNEY GENERAL

PUBLIC OFFICERS—Party Committeemen Do Not Hold “Public Office.”

February 26, 1972

The Honorable John E. KennaHan
Commonwealth’s Attorney for the City of Alexandria

I am in receipt of your letter of February 23, 1972, raising the following two questions relating to the election laws of the Commonwealth, Title 24.1 of the Code of Virginia (1950), as amended:

1] May a member of a City committee of a political party serve on the local Electoral Board of that City?

2] Is a candidate who is running for the legislature and who has made a full accounting of campaign funds as required by law, in addition required to transmit to the political party that supported the candidacy, unspent campaign funds? If not, what may such a candidate do with the unspent funds?

I am unaware, in reply to your first question, of any provision prohibiting a committee member of a local political party from also serving on the local electoral board. In fact, § 24.1-29 requires that representation on the local board be given to each of the two political parties having the highest and next highest number of votes in the preceding gubernatorial election with a majority of the board being from the party who cast the highest number of such votes. Additionally, this office has consistently ruled that party committeemen do not hold “public office”. See, Report of the Attorney General (1969-1970), p. 121; (1962-1963), p. 81; (1956-1957), p. 98; (1954-1955), pp. 88, 44. Consequently, the prohibition of § 24.1-33, that persons holding other offices are ineligible for appointment as members of an electoral board, is not applicable. Your inquiry is, thus, answered in the affirmative.

In reply to your next inquiry, it is entirely up to a candidate what he does with any remaining balance of campaign funds after an election. There is no statute requiring funds be transmitted to the political party that supported the candidacy. The Fair Elections Practices Act, applicable to contributions and expenditures, only requires disclosure of the same, and when no further unpaid obligations remain, no further report is necessary.

ELECTIONS—Conscientious Objector to Military Duty, Serving Alternate Service Obligation in Foreign Country May Register and Vote by Absentee Application and Ballot.

July 7, 1971

The Honorable Joan S. Mahan
Secretary, State Board of Elections

You have inquired of this office whether a conscientious objector to military duty, serving an alternate service obligation in a foreign country, might qualify for absentee registration under Virginia law. The individual who prompted your inquiry is currently classified I-W (conscientious objector performing civilian work contributing to the maintenance of the national health, safety, or interest) and has been assigned a teaching position in a college in Japan as an alternate obligation. 50 U.S.C.A. App. § 456 (j).

As you are aware, Article II, Section 4, of the revised Constitution of Virginia authorizes the General Assembly to “... provide for registration and voting by absentee application and ballot for members of the armed forces of the United States in active service, and their spouses, who are otherwise qualified to vote. . . .” (Emphasis supplied.) Consequently, § 24.1-48 of the Code of Virginia (1950) was amended to provide for the
registration of members of the armed forces, and their spouses, who are absent from the city or county in which they reside, due to their active service.

In response to your question, I am of the opinion that the above constitutional and statutory language would include a person who has been classified I-W and is absent from his residence as a result of fulfilling his obligations under the Selective Service Act. 50 U.S.C.A. App. § 451, et seq.

The conscientious objector classification necessitates a finding that an individual is conscientiously opposed to war in any form, that his opposition is based upon religious training and belief, and that his objection is sincere. Clay v. United States, 39 U.S.L.W. 4873 (U.S. June 28, 1971). Once this classification is made by the local board, the individual may be assigned work “contributing to the maintenance of the national health, safety, or interest,” this done in satisfaction of that individual’s responsibilities within the Selective Service System. 32 C.F.R. §§ 1622.16, 1660.21 (1971 ed.). With respect to the effect of this status upon an individual’s voting rights, I see no justifiable basis for denial of the elective franchise merely because his religious beliefs dictate that he serve the nation in a noncombatant role.

Both the member of the armed forces and the person classified I-W are absent involuntarily from their residence, and both are subject to the provisions of the Selective Service System. It is my opinion, therefore, that a conscientious objector, classified I-W, should be permitted to register, pursuant to § 24.1-48, if otherwise qualified.

ELECTIONS—Councilmen—Terms of.

ELECTIONS—Time Election Held Is Controlled by General Law; Date Individuals Take Office Controlled by Charter Provisions.

CHARTERS—Newly Elected Council Not Installed Until Expiration of Terms of Old Council.

May 31, 1972

THE HONORABLE GEORGE S. ALDHIZER, II
Member, Senate of Virginia

I am in receipt of your letter of May 23, 1972, which reads as follows:

“The Charter of the Town of Timberville, Rockingham County, was amended by the General Assembly at its 1971 Session, inter alia, to stagger the terms of office of council members and to conform to the 1970 changes in the Virginia Election Law with respect to the time of election and installation of councilmen. Section 4 of the town’s charter, effective March 27, 1972, reads as follows:

‘§ 4. The councilmen and the mayor shall be elected by the qualified voters of the town on the first Tuesday in May, nineteen hundred seventy-two, in the manner prescribed by law, and their terms of office shall begin on the first day of July following the date of their election. The three elected councilmen receiving the largest number of votes shall serve a term of four years each. The three other elected councilmen and the mayor shall serve a term of two years each. On the first Tuesday in May, nineteen hundred seventy-four, and every two years thereafter, a mayor shall be elected for a term of two years and three councilmen shall be elected for terms of four years each, in the manner prescribed by law, and their terms of office shall begin on the first day of July following the date of their election. The present mayor and councilmen shall continue in office until the expiration of the terms for which they were respectively elected, and until their
successors take office. The council may elect one of their number vice-mayor to act in the place and stead of the mayor in the latter's absence. The term of office of the vice-mayor, if there be one, shall be the same as that provided for the mayor.' (Emphasis added.)

"The Virginia Election Law provides as follows:

'§ 24.1-73. When officers to enter upon their duties.—All officers chosen at a general election shall, unless heretofore otherwise provided by charter or statute, enter upon the duties of their respective offices on the first day of January next thereafter, except that, notwithstanding any other provision of law, the terms of office of mayors and members of councils of cities and towns shall begin on the first day of July succeeding their election. They shall continue to discharge the duties of their respective offices until their successors shall have qualified.' (Emphasis added.)

"The seven-man town council in Timberville was elected to two-year terms on the second Tuesday of June, 1970, and entered upon the duties of their office on the 1st day of September, 1970, in accordace with old Section 4 of the town charter, and Sections 24-168 and 24-169 of the Virginia Code, in effect prior to the 1970 amendment. Old Section 4 of the town charter read as follows:

'§ 4. The councilmen and the mayor shall be elected by the qualified voters of the town on the second Tuesday in June, nineteen hundred sixty-two, and every two years thereafter, in the manner prescribed by law. The present mayor and councilmen shall continue in office until the expiration of the terms for which they were respectively elected and until their successors take office. The council may elect one of their number vice-mayor to act in the place and stead of the mayor in the latter's absence. The term of office of the vice-mayor, if there be one, shall be the same as that provided for the mayor.' (Emphasis added.)

"The pertinent sections of the old election law read as follows:

'§ 24-168. Mayor and Councilmen.—In every town there shall be elected every two years, on the second Tuesday in June, one elector of the town, who shall be denominated the mayor, and not less than three nor more than nine other electors, who shall be denominated the councilmen of the town. (Emphasis added.)

'§ 24-169. When town officers to qualify.—The persons so elected shall enter upon the duties of their office on the first day of September next succeeding their election, and shall continue in office until their successors are qualified.' (Emphasis added.)

"Two members of the seven-man council were not re-elected at the May elections of this year. The five remaining members, including the mayor, were re-elected. My question is this—may the newly elected council be installed on July 1 in view of the fact that the two-year terms of the old council—particularly the two councilmen who were not re-elected, apparently do not expire until August 31?"

As previously ruled by this office in an opinion to the Honorable Don E. Earman, Member, House of Delegates, dated January 6, 1971, a copy of which I enclose, though the time an election is to be held is controlled by general law, the date individuals take office is controlled by applicable charter provisions.
The pertinent language of the charter provision referred to in your letter is the requirement that, "[t]he present mayor and councilmen shall continue in office until the expiration of the terms for which they were respectively elected ..." which, as you point out, would be the 31st day of August, 1972.

I am of the opinion that though the terms of office of those recently elected begins on the 1st day of July, 1972, that this is merely for the purpose of computing the expiration date of such terms. Such individuals may not qualify for and take office on such date in view of the specific requirement that the present incumbents maintain office until the expiration of the terms for which they were elected, which, as indicated, is August 31, 1972. Construing the charter provisions in this manner avoids a conflict between their terms.

Your inquiry is, therefore, answered in the negative. Those individuals recently elected should not be installed in office until September 1, 1972. Once qualified, they would serve either two or four year terms computed from July 1, 1972.

ELECTIONS—Definition of "General Election."

ELECTIONS—Special Election to Fill Vacancy in Office of City Sheriff May Not Be Conducted on May General Election Date.

ELECTIONS—Special Elections for Vacancies Conducted in May Election Only for Vacancy in Governing Body.

SHERIFFS—Special Election to Fill Vacancy May Not Be Conducted on May General Election Date.

January 24, 1972

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

I am in receipt of your letter of January 21, 1972, regarding the special election in the City of Roanoke to fill the vacancy in the office of City Sheriff, which vacancy occurred on October 1, 1971. You indicate that a councilmanic election will be held in the City on the first Tuesday in May of this year and inquire whether such special election should be held in May or November, 1972.

I assume from your inquiry that the city charter does not provide for the filling of the vacancy in question. This being true, then § 24.1-76 of the Code of Virginia (1950), as amended, would be applicable to your inquiry. Such section provides in pertinent part that:

"When a vacancy occurs in any county, city, town or district office and no other provision is made for filling the same, it shall be filled by the resident judges of the courts of record of the county or city in which it occurs. . . ."

"When any such vacancy shall occur, the court shall issue a writ of election to fill such vacancy. Such election shall be held at the next ensuing general election. The officer so elected shall hold the office for the unexpired term of his regularly elected predecessor in office. The person so appointed to fill the vacancy shall hold office until the qualified voters shall fill the same by election and the person so elected shall have qualified. In the event the vacancy occurs within one hundred twenty days prior to the next ensuing general election, the writ of election shall issue for an election to fill the vacancy at the second ensuing general election." (See also, Article VI, Section 12, of the revised Virginia Constitution.)

Pertinent to your question is the definition of general election. Section 24.1-1(5) (a) defines the same as follows:
"'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;"

The purpose of § 24.1-76, which is a codification of Article VI, Section 12, is to provide for, not only a limitation of the appointive powers of judges, but also "... a manner which would not require unnecessary elections but would require elections only when elections should reasonably be held" at a time when the election machinery would normally be in use. Since the November general elections are any election held on the Tuesday after the first Monday, I am of the opinion that a special election in accordance with § 24.1-76 may be conducted on such date for any office which has a vacancy. However, since the May general elections are restricted to governing bodies of cities and towns I am of the opinion that a special election may be conducted on such date only for vacancies existing in the governing bodies of cities and towns.

Any other construction would require as an example a special election in May not only in a city of the second class but also in the counties which share with such cities constitutional officers such as commonwealth's attorney or sheriff, when a vacancy exists in such office and an election is being conducted only in the city—the election machinery of the county not otherwise being used.

ELECTIONS—Definition of "Residence" for Qualification to Vote Requires Both Domicile and Place of Abode.

ELECTIONS—Students Neither Gain Nor Lose A Residence by Reason of Being A Student.

ELECTIONS—Student, Like Any Other Citizen Who Claims His Domicile Is Changed, Has Burden of Proving the Change.

ELECTIONS—Burden of Proving Change of Domicile Is on Party Alleging It.

September 28, 1971

THE HONORABLE JOAN S. MAHAN, Secretary
State Board of Elections

Your letter of September 10, 1971, requests my opinion as to the proper implementation of the definition of residency contained in § 24.1-1 (11) of the Code of Virginia (1950), as amended, as such statute pertains to students. The definition reads:

"'Residence,' for all purposes of qualification to vote, requires both domicile and a place of abode. 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 [an] institution;"

You will note that the Virginia statute prohibits an elector from gaining a residence merely "... by reason of his ... sojourn in [an] institution." The language in question does not in any manner bar a student from voting in the locality where he attends school. Cf. Michigan statute, MCLA § 168.11 (b): "No elector shall be deemed to have gained or lost a residence ... while a student at any institution of learning. ..."

The Michigan statute placed a rebuttable presumption upon a student that he could not gain a residence while a student. Similar presumptions have previously fallen as evidenced in Carrington v. Rash, 380 U.S. 89, 13 Led.2d 675, 85 S.Ct. 775 (1965), where the Supreme Court struck down the provision of the Texas Constitution which prevented servicemen from
voting in State elections as long as they remained in the service. A per se or presumptive barrier to registering as in the Michigan statute or Texas statute does not exist in this Commonwealth.

Consequently, as this office has previously ruled: "[a]lthough a student is therefore not entitled to be registered at the place where the institution is located, merely by the fact that he is a student there, this does not mean that a student at an institution, who is more than twenty-one years of age [now eighteen years of age] may not of his own volition establish his legal residence at such place." See opinion to the Honorable George W. Kemper, Clerk, Circuit Court for the City of Harrisonburg, dated April 2, 1970, found in the Report of the Attorney General (1969-1970), p. 124, copy of which I enclose.

A student, like any other citizen, who claims his domicile is changed does have the burden of proving the change. Conversely, a registrar who questions domicile of an individual because he is attending an institution of learning in another locality has the burden of proving such change. The burden of proving change of domicile is thus on the party alleging it. *Denton v. Commonwealth*, 192 Va. 565, 573, 66 S.E.2d 490 (1951). But the fact that an individual is a student does not and cannot add any additional requirement in the nature of a rebuttable presumption.

The Virginia Supreme Court has construed the statute in question to nullify "the fact of a student's physical or bodily presence as a step in determining his residence." The fact that an individual is a student is and should be treated as a "neutral factor." *Kegley v. Johnson*, 207 Va. 54, 57, 147 S.E.2d 735 (1966). Thus, ascertainment of residence is from evidence of intent, without the student status weighing either for or against an individual.

Implementing the statute in this manner ensures that students are treated on a par with, and have the same burden to meet, as any other prospective registrant who asserts a change in domicile from one place of abode to another.

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**ELECTIONS—District Officer of County Removes From District; Office Deemed Vacant.**

**BOARDS OF SUPERVISORS—Candidate Must Be Qualified to Vote for Seat He Is Seeking; Removal From District Vacates Office.**

**September 20, 1971**

**THE HONORABLE JOHN ROGER THOMPSON**  
Commonwealth's Attorney for Wythe County

I am in receipt of your letter of September 9, 1971, wherein you request my opinion as to the following:

"The nominated candidate of a political party is presently a resident of his magisterial district and will be, should he become the elected representative, a resident on date of qualification, January 1, 1972. Sometime after January 1, 1972, he plans to remove his residence across the magisterial line into another district by a distance of one-half mile."

You inquire whether such removal by the member would disqualify him from representing his former district.

Section 15.1-51 of the Code of Virginia (1950), as amended, provides that every district officer of a county shall, at the time of his election, reside in the district for which he is elected at least thirty days next preceding his election. See also Article II, Section 5, of the revised Constitution of Virginia which requires that in order to hold the office of county supervisor an individual must be qualified to vote for the seat he is seeking. Section 15.1-52 provides, with certain exceptions not applicable to your inquiry,
that if any officer, required by § 15.1-51 to be a resident at the time of his election, removes from the district, his office shall be deemed vacant.

Your inquiry is therefore answered in the affirmative.

ELECTIONS—Domicile for Voting Purposes Must Be Decided Upon Facts in Each Case and Intention of Applicant.

REGISTRAR—Must Determine Domicile for Voting Purposes.

ELECTIONS—Domicile Once Acquired Subsists Until Change Is Proved; Burden of Proving Change on Party Alleging It.

THE HONORABLE FRANK R. WATKINS
General Registrar of City of Suffolk

I am in receipt of your letter of September 15, 1971, wherein you set forth various factors regarding residence of an individual and ask my opinion whether such individual should now be a registered voter of the county or of the city where he has been previously registered for the past fifty years.

This office has repeatedly said that no hard and fast rule can be laid down regarding domicile of a person for voting purposes and each case must be decided upon the particular surrounding facts and circumstances relating in large part to the intention of the applicant. To determine such intent only from various factors is quite difficult and thus each case must be passed upon by the registrar who not only has the factors at hand but also is confronted by the individual in person, except for servicemen who may register by absentee application.

I would point out that though you must make a determination yourself as to the intent of the individual in question, it is clear that he was once a domiciliary of the city. The presumption is that domicile once acquired subsists until a change is proved and the burden of proving the change is on the party alleging it. Dotson v. Commonwealth, 192 Va. 565, 573, 66 S.E.2d 490 (1951).

ELECTIONS—Durational Residency Requirements Declared Invalid by Supreme Court.

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

I am in receipt of your request for my opinion regarding the effect that the recent ruling of the Supreme Court of the United States in the case of Dunn v. Blumstein, which related to durational residency requirements, has upon Virginia law.

I am of the opinion that the decision has declared invalid, for election purposes, all durational residency requirements. The case affirmed and upheld the right of states to close registration books for a period of time prior to elections (it should be noted that a book closing period is applicable alike to both new and old residents and thus differs from durational residency requirements) and further upheld the right of states to insure, by objective criteria, that applicants for registration are bona fide residents. See § 24.1-1(11) of the Code of Virginia (1950), as recently amended by H.B. 196. The Court, however, emphasized that, once a state has implemented procedures to determine the existence of domicile, "there can be no basis for arguing that any durational residence requirement is also needed."

Consequently, in view of the above, the durational residency requirements
of the Commonwealth, which were six (6) months in the state and thirty (30) days in the precinct, both of which must have been met prior to registration books being closed, are no longer enforceable. The decision, as indicated, does not affect §§ 24.1-49 and 24.1-50, which require registration books to be closed thirty days prior to every regular primary and general election.

I would point out that individuals previously eligible for only temporary registration in a presidential election, under the provisions of Article 1, Chapter 5.1, and who appear in person, may register for all elections and be placed on regular registration books, and not the temporary books required by § 24.1-72.3.

It should be noted, however, that persons other than those set forth in § 24.1-48, i.e., a member on active service of the armed forces of the United States or a spouse of such member, who apply for registration by mail, are still eligible only for temporary registration and may vote only in presidential elections.

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ELECTIONS—Electoral Districts—Voters must be notified if boundaries of election districts or precincts, or location of polling places, changed.


REAPPORTIONMENT—Electoral Districts—Not necessary to notify voters if only name of election district changed; or if magisterial district changed to election district.

July 28, 1971

THE HONORABLE LILLIAN T. SMITH
General Registrar of York County

I am in receipt of your letter of July 19, 1971, relating to the reapportionment of York County. You advise that the York County Board of Supervisors has created five election districts as authorized by § 15.1-571.1 of the Code of Virginia (1950), as amended, and that this has resulted in the creation of eleven voting precincts instead of the nine voting precincts which you formerly had. The reapportionment affects approximately twenty-five hundred (2500) voters who will be voting in new precincts, with the remaining voters not affected so far as change of location of the place of voting is concerned. However, as you point out, though some individuals will not be affected by a change in the voting precinct or polling place, all voters will be voting in election districts as opposed to magisterial districts. You therefore request an opinion from this office, whether you must “notify all voters in York County that the name of their election district has been changed even though the place of voting remains the same.”

Sections 24.1-37 and 24.1-39 are applicable to your inquiry and read in pertinent part as follows:

“§ 24.1-37. 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.”
§ 24.1-39. No change as provided for in § 24.1-36 or 24.1-37 shall be made within sixty days next preceding any general election nor until notice has been published in a newspaper having general circulation in such election district or precinct once a week for two successive weeks. Notice of such change shall be mailed to all registered voters whose election district or precinct is changed, at least fifteen days prior to the next general, special or primary election.

As you will note, § 24.1-39 requires notice of a change must be mailed at least fifteen days prior to the next general, special or primary election, to all registered voters whose election district or precinct is changed. The type of change referred to by § 24.1-39 is set forth in § 24.1-37 as quoted above.

It should be noted that the "election district or precinct" described in these statutes is not the same type of "election district" which is provided for in § 15.1-571.1, which states:

"The governing body of a county may by ordinance provide that the magisterial districts of the county shall remain the same, but that representation on the governing body shall be by election districts, in which event all sections of this Code providing for election of appointment on the basis of magisterial districts shall be construed to provide for election or appointment on the basis of election districts; such election districts shall also constitute school districts as prescribed by § 22-61 of this Code."

This "election district," like the magisterial district, is a political subdivision constituted for the purpose of representation on the local governing body, and may be composed, as § 24.1-1 (4) provides, of more than one "election district or precinct" as these words are used in §§ 24.1-37 and 24.1-39. In these latter two statutes, the words "election district" and "precinct" are synonymous, and describe an area the residents of which are assigned to a particular polling place.

I am of the opinion that the change referred to in § 24.1-39 of which registered voters must be notified is a change in the type of election district or precinct described by § 24.1-37 regarding an alteration of boundaries, either by a rearrangement of the boundary lines or an increase or decrease in the number of election districts or precincts, thereby affecting the boundaries, or any change in a polling place. Therefore, I am of the opinion that no notice need be made as required by § 24.1-39 if only the name of an election district has been changed, or if the magisterial district has been changed to the type of election district described in § 15.1-571.1. However, if either the boundaries of such election districts or precincts as are described in § 24.1-37, or the location of polling places, have been altered in any manner, then notice of such change must be given in accordance with the applicable statutes to those voters who constitute the new election districts or precincts or who are to vote at a new polling place.

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ELECTIONS—Electoral Board May Lend Voting Machine Custodian to Other City Departments for Tasks Not Conflicting With Regular Duties.

PUBLIC OFFICERS—Compatibility—Voting machine custodian, full-time employee of electoral board; may be lent to other city departments for tasks not conflicting with regular duties.

June 15, 1972

The Honorable Joan S. Mahan, Secretary
State Board of Elections

In your letter of June 13, 1972, you raise the following question:

"If the Electoral Board were to choose and appoint a voting
machine custodian, who would be so listed in the job classification records of the City, and who would receive full time compensation from funds allotted to the Electoral Board Division; would it be permissible for him to work in other departments of the City when not actively engaged in working on the voting machines?"

I have previously ruled in an opinion to the Honorable R. Turner Jones, Commonwealth's Attorney for Highland County, dated December 28, 1971, copy of which is attached, that § 24.1-33 of the Code of Virginia (1950), as amended, prohibits an individual from serving in a prohibited dual capacity. Since § 24.1-209 designates the custodian of voting machines as an election officer, it would not be permissible for him to serve in any other official capacity or to be in the employ of any other city department. Under the circumstances you describe, however, it appears that the individual would be a full-time employee of the Electoral Board, which would then lend his services to other city departments for such tasks as would not conflict with his responsibilities under § 24.1-209. Under these circumstances, since the individual would only be performing services for other departments and not serving in an official capacity, or as an employee of those departments, it is my opinion that your question may be answered in the affirmative.

ELECTIONS—Employee of County May Not Be Appointed Deputy Registrar.

REGISTRAR—Assistant Registrars Have Same Limitations and Qualifications as General Registrars.

REGISTRAR—Employee of County May Not Be Appointed Deputy Registrar.

March 3, 1972

THE HONORABLE J. MERCER WHITE, JR.
County Attorney of Henrico County

I am in receipt of your letter of March 2, 1972, which reads as follows:

"In view of § 24.1-33 of the Code of Virginia (1950), as amended, is it permissible for an employee of the County (a librarian) to be appointed as a deputy registrar? This would be for the purpose of taking registrations in various libraries of the County at such times as the library is open generally.

"The aforesaid Code section specifically prohibits such a person being appointed registrar and makes no provision for deputy registrars."

Section 24.1-33 of the Code of Virginia (1950), as amended, which is a codification of Article II, Section 8, of the revised Constitution of Virginia, provides:

"No person, or 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."

Section 24.1-45, which provides 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 limitations, qualifications and fulfill the same require-
ments as the general registrar except that an assistant registrar
may be an officer of election. Their compensation shall be fixed and
paid by the local governing body.”

requires that assistant registrars have the same limitations and qualifica-
tions as general registrars. Consequently, I am of the opinion that the
provisions of § 24.1-33 are applicable to assistant registrars and your in-
quiry is, therefore, answered in the negative.

Enclosed, for your information, are previous rulings of this office relating
to your inquiry to the following: the Honorable William O. Roberts, Jr.,
City Attorney for the City of Lexington, dated December 8, 1971; the
Honorable R. Turner Jones, Commonwealth’s Attorney for Highland
County, dated December 28, 1971; and the Honorable James M. Young,
Chairman of the City of Salem Electoral Board, dated January 12, 1972.

ELECTIONS—Employee Whose Salary Paid by State, Federal or Local
Government Funds Not Eligible for Appointment As Election Official
or Member of Electoral Board After July 1, 1971; May Serve If Pre-
viously Appointed.

THE HONORABLE CHARLES H. ARRINGTON, Secretary
Electoral Board of Dickenson County

I am in receipt of your letter of October 22, 1971, wherein you ask my
opinion as to the following questions:

“Question number one. Is it legal for an employee whose salary is
wholly supported by State and Federal funds eligible to serve as an
official of an election?

“Question number two. Is it legal for an employee whose salary is
wholly supported by city or town government eligible to serve as an
official of an election?

“Question number three. Is it legal for a person who is employed
by the High Sheriff Department of a county as a radio operator and
whose salary is supported by state and county funds, eligible to
serve as a member of the Electoral Board of the county?”

Section 24.1-33 of the Code of Virginia (1950), as amended, which is a
codification of Article II, Section 8, of the Constitution of Virginia, is ap-
plicable to your inquiry and reads as follows:

“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.”

It is clear from the above language that an individual in any of the
three situations outlined in your letter would be ineligible for appointment
as an officer of election. However, the above statute became applicable upon
the effective date of the new Constitution of Virginia—July 1, 1971. Con-
sequently, if an individual in any of the situations outlined was eligible
when appointed, he may now serve, even though as indicated, he will not be
eligible for reappointment. See previous opinion of this office to the Honor-
able Joan S. Mahan, Secretary, State Board of Elections, dated July 7,
1971, a copy of which I enclose.

Appointments of the officers of election are made by the electoral board
during February of each year and the individuals appointed constitute the
officers for all elections held in their respective districts for a term of one year commencing March 1st.

The previous prohibition regarding appointment of officers of elections as set forth in Section 31 of the Constitution of Virginia (1902) was as follows:

“No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar or judge of election.” See § 24.1-105.

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ELECTIONS—General Law Controls Over City Charter As to Time Elections Held.

CONFLICT OF LAWS—Provisions of Two Statutes Irreconcilable; Earlier Must Yield to Latter Expression of the Legislature.


December 23, 1971

THE HONORABLE M. RICE DAY
Secretary of the Electoral Board

I am in receipt of your letter of December 14, 1971, which reads as follows:

“Section 24.1-90 of the Code, as amended at the extra session in 1971, which amendment becomes effective January 1, 1973, requires that any election of the Mayor or Council of any town or city shall take place on the first Tuesday in May and the person so elected to take office on the first day of July thereafter.

“Section 15.1-813, which has been in force and effective for quite some while, requires that the Mayor and Council of the City shall be elected ‘on the second Tuesday in June immediately preceding the expiration of the terms of office of their predecessors and their terms of office shall begin on the first day of September succeeding.’ This section has not recently been amended.

“The City of Franklin has a charter provision, Section 3.01, requiring that its Mayor and Council be elected on the second Tuesday in June and follows Section 3.01.

“Question has arisen whether the charter, Section 15.1-813, or Section 24.1-90 control. Your advice will be greatly appreciated.”

This office has previously ruled that general law prevails over charter provisions regarding the time that an election is to be conducted. See, opinions of this office to the Honorable Don E. Earman, Member, House of Delegates, dated January 6, 1971, and to the Honorable Benham M. Black, City Attorney for the City of Staunton, dated December 16, 1971, copies of which I enclose, as well as the opinion to the Honorable Hunter B. Andrews, Member of the Senate, dated November 23, 1971, referred to in my letter to Mr. Earman.

Thus, though the Charter of the City of Franklin would not control the date of the councilmanic election, your additional inquiry must still be answered regarding which provision of general law, § 15.1-813 or § 24.1-90 of the Code of Virginia (1950), as amended, would control.

Section 15.1-813 requires that city councils be elected on the second
Tuesday in June. Section 24.1-90 requires that such elections be conducted on the first Tuesday in May. I am of the opinion that such provisions are irreconcilable. The former was enacted in the Code of 1919 and followed the constitutional provisions of § 122 of the Virginia Constitution. Section 122, which was mandatory in nature, was revised and similar provisions, permissive in nature, are now contained in Article VII, Section 5, of the revised Constitution of Virginia, which provide when elections are to be held "unless otherwise provided by law." Section 24.1-90 was enacted in conformity with the new constitution and with the express intent to have a uniform date for city and town elections. See, comment to § 24.1-90 in Report of the Election Laws Study Commission, 1970 Session, House Document No. 14, p. 59.

In view of the legislative history described above, and in view of standard statutory construction that when two statutes cannot be reasonably interpreted so as to allow both to have force and effect, the earlier must yield to the latter expression of the legislature, 17 M. J. Statutes, § 53, p. 311, I am of the opinion that § 24.1-90 would control.

Councilmanic elections must, in accordance with the provisions of § 24.1-90, be held on the first Tuesday in May, notwithstanding charter provisions or § 15.1-813 to the contrary.

ELECTIONS—Individual "Lawfully Entitled To Inspect" Poll Books and Used Ballots Pursuant to § 24.1-143 Is One Who Has Obtained A Court Order.


November 11, 1971

The Honorable Marvin G. Graham, Clerk
Circuit Court of Pulaski County

I am in receipt of your recent inquiry asking my opinion regarding the application of §§ 24.1-143 and 24.1-144 of the Code of Virginia (1950), as amended, and whether an individual is a "lawfully entitled" person within the meaning of those statutes under the following circumstances:

A losing candidate whose margin is not within one percent for recounts as required by § 24.1-247 (a) states that he has probable cause to believe that a miscalculation has occurred in the ascertainment of the results by the local board (§§ 24.1-146 and 24.1-150) which if true would bring him within the one percent criteria entitling him to petition for a recount. Such individual can demonstrate the possibility of a miscalculation and desires to see the ballots and poll books to prove such possible miscalculation.

This office has previously ruled that an individual "lawfully entitled to inspect" the poll books and used ballots pursuant to § 24.1-143 is one who has obtained a court order. Such previous opinions are hereby reaffirmed. See opinions of this office to the Honorable C. W. Eastman, Clerk, Circuit Court of Middlesex County, dated November 16, 1944, found in the Report of the Attorney General (1944-1945), pp. 54-55; the Honorable Levin Nock Davis, Secretary, State Board of Elections, dated September 18, 1953, found in the Report of the Attorney General (1953-1954), p. 70; and the Honorable Katherine V. Respess, Clerk of Courts, City of Norfolk, dated June 2, 1969, found in the Report of the Attorney General (1968-1969), p. 90, copies of which are enclosed. See also § 24.1-144.

Whether an individual in petitioning the Court for an order allowing inspection of the poll books can demonstrate he is lawfully entitled to such inspection is of course a matter for the Court based upon the factual allegations and evidence presented. I am of the opinion, however, that determining the existence of a miscalculation would be a lawful purpose.
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for inspecting the books, provided the possible existence of such miscalculation can be demonstrated.

ELECTIONS—Individual May Register Subsequent to Declaring as Candidate.

ELECTIONS—Local Electoral Board Must Insure That Candidate Is A Registered Voter Prior to Printing of Ballots.

September 28, 1971

THE HONORABLE STANLEY P. WILCOX, Secretary
Albemarle County Electoral Board

I am in receipt of your letter of September 25, 1971, wherein you set forth the following:

"A) A proposed candidate for 'County Board of Supervisor' was certified to me by a County Party Chairman on September 13th, 1971 as a result of a nominating convention of his party on September 8, 1971.

"B) Said proposed candidate did not register to vote in this County and/or State until September 17, 1971.

"C) Said Party Chairman re-certified said candidate to me on September 24, 1971 referring for authorization to the same nominating convention of September 8, 1971."

You ask my opinion whether the name of the individual in question should appear on the ballot for the general election of November 2nd.


Though an individual may register, assuming he meets all qualifications, at any time prior to the books being closed, the local Electoral Board should insure that a candidate is a registered voter prior to causing the ballots to be printed. See § 24.1-109 of the Code of Virginia (1950), as amended.

ELECTIONS—Interlocutory Order Invalidated Certain Legislative Districts; New Nominating Processes Necessary.

ELECTIONS—Primary Nominee Needs Petition Signed by 250 Registered Voters.

ELECTIONS—Interlocutory Order Invalidated Filing Fees Previously Paid; Refunded to Candidates and New Fees Paid, Divided Equally Among Counties and Cities in Legislative District.

FEES—Divided Equally Among Counties and Cities in Legislative District.

July 7, 1971

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

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

"Will you kindly advise the State Board of Elections how the Interlocutory Order of July 2, 1971, by the three judge District Court of the Eastern District of Virginia will affect the nominating pro-
cesses of candidates for the November 2, 1971, election in the General Assembly districts that have been changed by the court order?"

As indicated previously to you in the ruling of this office dated May 28, 1971, if election districts are changed, either by action of the General Assembly or court order, new nominating processes and qualification of candidates would be required. The Order of the Court has, in effect, declared invalid twenty-six of the fifty-two legislative districts in the House of Delegates and three of the forty legislative districts in the Senate. Since these districts have been declared invalid, I am of the opinion that any previous qualification to run as a candidate for party nomination in these districts would likewise be invalidated. The effect, therefore, is that new nominating processes must commence in accordance with the views outlined in our previous letter to you of May 28th.

Nominating petitions for both independent candidates and primary nominees should be filed and, in doing so, new petitions utilized. I would point out that under § 24.1-185 the petitions for primary nominees must be signed by two hundred fifty (250) registered voters, rather than by one percent of such voters as previously required. In addition, the filing fees previously paid, having been invalidated, should be refunded, and new fees paid. Section 24.1-199 of the Code of Virginia (1950), as amended, provides to whom the fees are paid and, though a candidate for a certain legislative district may be representing only part of a county or city, such part should be treated as a whole for the purpose of dividing the fee equally among the counties and cities in the legislative district.

ELECTIONS—Issue of Special Writ of.
ELECTIONS—Section 24.1-76 of Code Applicable to Calling Special Election to Fill Vacancy on Town Council When Charter Does Not Provide for.
JUDGES—Circuit Judge Issues Writ for Special Election to Fill Vacancy on Town Council.
TOWNS—Circuit Judge Issues Writ for Special Election to Fill Vacancy on Council.
CHARTERS—No Provision for Calling Special Election to Fill Vacancy on Town Council; § 24.1-76 of Code Applicable.

February 24, 1972

I am in receipt of the supplemental material forwarded to this office by letter of February 23, 1972, requesting my opinion regarding the issuance of a special writ of election.

You indicate that a town councilman resigned more than six months prior to the upcoming May election and an individual was appointed to fill the vacancy. You raise the question whether a special election need be called to fill the vacancy since an appointment has been made, and if so, who would be the proper individual to issue the special writ of election.

Section 3.1 of the town charter provides for election of town councilmen every two years, such individuals to serve four year terms and thereby electing, biennially, only part of the council. The term of the individual in question who resigned would normally expire in 1974.

Section 3.3 of the town charter is applicable to your inquiry and reads:

"Vacancies on the town council shall be filled within forty-five days for the unexpired terms by a majority vote of the remaining mem-
bers; provided, that where a vacancy shall occur more than six months prior to a regular town election, such vacancy shall be filled by a majority vote of the remaining members only until a successor shall have been chosen by the qualified electors of the town and shall have qualified as provided by law. In the town election to be held on the second Tuesday in June next following the occurrence of such vacancy, there shall be elected by the qualified electors of the town a member of the council to fill each such vacancy for the unexpired term. The term of office of any councilman so elected shall begin on the first day of September next following his election."

I am of the opinion that Section 3.3 requires an election to fill the vacancy for the unexpired term. The individual appointed by town council would, in accordance with such provision, serve only until September 1, 1972.

Since there is not any provision in the charter for calling such election, § 24.1-76 of the Code of Virginia (1950), as amended, to the extent that it is not preempted by charter provisions, is applicable and the circuit judge would issue the writ of election. Such writ should be issued in accordance with § 24.1-163, at least twenty days prior to the election.

ELECTIONS—Justice of Peace of County; Residence in City.
ELECTIONS—Filing Deadline for Primary.
JUSTICE OF PEACE—Elections; Residence in City; Justice of Peace of County.
JUSTICE OF PEACE—Filing Deadline for Primary.

July 1, 1971

The Honorable R. H. Grizzard
Justice of the Peace, Greensville County

This is in response to your recent letter in which you inquire as to your status with regard to re-election to your office of Justice of the Peace for the Belfield District of Greensville County. You indicate that you are presently a resident of Emporia, and have been since your election to office in 1963. In 1967, when Emporia became a city of the second class, you were re-elected to office in Greensville County. With respect to the upcoming primary, you ask:

"Will I once again be allowed to seek re-election to this office, although I reside within the City limits of Emporia? Can I be appointed to fill one of these posts if not re-elected in the primary?"

As regards your first question, § 15.1-995 of the Code of Virginia, as amended, is applicable. This provision permits any county officer who resides in an established home in the county or in any town therein, whose residence has become a part of a city since such officer's election or appointment, to continue in office "... so long as he shall be successively elected or appointed to the office held by him at the time of such transition."

It is my opinion that you are eligible for re-election inasmuch as you have held office in Greensville County continually, since 1967 when Emporia became a city of second class. This view is consistent, both with the above statute and previous related opinions issued by this office. See Report of the Attorney General (1967-1968), at page 140; (1965-1966), at page 162.

As to the legality of your being appointed to an office in Greensville County should you lose your bid for re-election, I am of the opinion that the statute would authorize your appointment only if that appointment were made prior to the expiration of your present term. Section 15.1-995 stipulates that an official in your circumstance might continue in office only as long as his tenure is successive. Once your official status is terminated,
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you, as a resident of Emporia, are no longer eligible for election or appointment to that same office in Greensville County.

You inquire, lastly, as to the filing deadline for the September 14 primary. Section 24.1-174 (b), as amended by Chapter 119, 1971 Acts of Assembly, is applicable to your inquiry and reads:

“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.”

In accordance with the provisions of §§ 24.1-184 and 24.1-185, candidates for party nominees as Justices of the Peace should file notice of candidacy between July 1st and July 16th together with a petition signed by fifty voters registered within the election district.

**ELECTIONS—Justice of Peace; One Elected from Each Election District Where Magisterial Districts No Longer Used.**

**JUSTICE OF PEACE—One Elected from Each Election District Where Magisterial Districts No Longer Used.**

August 6, 1971

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

I am in receipt of your letter of August 4, 1971, wherein you state that Shenandoah County has established, as allowed by Article 4, Chapter 12, Title 15.1 of the Code of Virginia (1950), as amended, three election districts; the six magisterial districts now in existence no longer will be used as a basis of representation.

The inquiry which you raise is as follows:

“Under Code Section 24.1-89, it is stated that ‘in each magisterial district of each county there shall be elected by the qualified voters thereof at the general election in November, . . . one justice of the peace who shall hold office for a term of four years.’ Under this Code Section, would it be your interpretation that Shenandoah County could elect one justice of the peace from each election district thereof, rather than each magisterial district of the county?”

Section 15.1-571.1 provides that whenever a governing body adopts election districts as the basis of representation then “. . . all sections of [the] Code providing for election or appointment on the basis of magisterial districts shall be construed to provide for election or appointment on the basis of election districts, . . .”.

Your inquiry is answered in the affirmative.

**ELECTIONS—Manner in Which Vacancies in Local Offices Are Filled When No Other Provision in Statute for Filling Same.**

**PUBLIC OFFICERS—Vacancy Occurring During Term for Which Individual Elected; Provisions of Town Charter Applicable; Council Appoints Member for Remainder of Term; Election Not Necessary.**

October 12, 1971
In your letter of October 7, 1971, you inquire how a vacancy on the Chase City Town Council should be filled where that vacancy arises when a member whose term was to begin on September 1, 1971, is appointed to the Mecklenburg County Board of Supervisors prior to that date and is thus precluded by the terms of § 15.1-50 of the Code of Virginia (1950), as amended, from holding both offices simultaneously.

Section 24.1-76 of the Code provides for the manner in which vacancies are to be filled “...in any county, city, town or district office [when] no other provision is made for filling the same. ...” In such a case, the vacancy is to be filled by interim appointment until the next general election.

Section 4 (5) of the Charter of Chase City, Chapter 377 of the Acts of Assembly of 1946, reads as follows:

“(5) Council to be judge of elections, etc.; filling vacancy in council or office of mayor. The council shall be the judge of the election, qualification, and returns of its members; may fine them for disorderly conduct, and, with the concurrence of two-thirds, expel a member. If any person returned be adjudged disqualified, or be expelled, a new election to fill the vacancy shall be held on such day as the council may prescribe. Any vacancy occurring otherwise during the term for which such person was elected shall be filled by the council by the appointment of anyone eligible to such office. A vacancy in the office of mayor shall be filled by the council from the electors of the town, and any member of the council may be eligible to fill such vacancy.”

The question you now request be resolved in further clarification of my previous ruling of September 28, 1971, is whether the provisions of the town charter are applicable to the “vacancy” created by reason of an individual failing to qualify and, if so, whether the “vacancy” was created by disqualification within the meaning of the second sentence above or whether the vacancy occurred “otherwise during the term for which such person was elected” as provided in the third sentence.

It is my opinion that the provisions of the second sentence relating to disqualification is not applicable in this instance. The first sentence makes the council itself the judge of the qualification of its members and their election. Hence the provision for disqualification of a person returned as elected envisions disqualification for such reasons as misconduct or incapacity. In this case, the member who had been appointed to the Board of Supervisors was not adjudged disqualified by the council, nor would council have had ground to do so on that basis alone, since the individual at any time prior to September 1 could have resigned his seat on the Board of Supervisors and taken his place on the Town Council, and have been properly qualified to do so. It is only when he does not take his place on September 1 that the vacancy arises, and such vacancy does not arise from disqualification. It arises merely from the voluntary decision of an individual not to qualify.

The issue then is whether this vacancy has occurred during the term for which such individual was elected, making the provision for appointment by the council of a member to fill the remainder of the term applicable, or whether such a vacancy is not covered by this provision of the charter, making an election necessary under § 24.1-76.

It is my opinion that the provisions of the town charter are applicable. By not assuming his seat on September 1, and by remaining on the Board of Supervisors, the member in question has renounced his right to assume
his position on the Town Council. As stated above, however, until September 1 he retained the right to elect to take his seat on the Town Council. Thus it was not until the term actually began on September 1 that it could be said with certainty that the vacancy existed, and by the same token, the vacancy therefore must be said to have occurred during the term for which the individual was elected.

ELECTIONS—Member of Electoral Board Should Resign Prior to Filing and Qualifying As A Candidate for Elective Office.

November 1, 1971

The Honorable Sol Goodman
Commonwealth's Attorney of Hopewell

I am in receipt of your letter of October 30, 1971, which reads as follows:

“Our local Secretary of the Electoral Board of Hopewell has asked me for advice concerning the relation of his office with the Hopewell councilmantic election to be held in June, 1972.

“He intends to resign his office on November 10th following the general election. The question is, does his office as Secretary of the Electoral Board bar him from being a candidate in the election for Council. The last filing date for that office is December 13, 1971. A brief search of the statutes did not produce any guidelines, and I was of the opinion that he must wait for one (1) year.”

Other than § 24.1-33 of the Code of Virginia (1950), as amended, I know of no prohibition against a member of the local Electoral Board holding elective office during the term for which he was appointed or for an election to be held next after the term ends for which he was appointed. Such prohibitions have been applicable to registrars in the past but were revised under the new election laws. See opinion of this office to the Honorable Ford C. Quillen, Member, House of Delegates, dated February 23, 1971, copy of which I enclose.

Section 24.1-33, the provision applicable to your inquiry, merely prohibits a member of the Electoral Board from holding elective office. While there is no statute setting forth at what point and time a member of the Electoral Board running for elective office must resign, I would feel that it would be incompatible for a member of the Electoral Board to be a candidate for elective office and would thus suggest that the member resign prior to filing and qualifying as a candidate.

ELECTIONS—Number of Signatures on Petition Controlled By Amount Required on Date of Filing.

ELECTIONS—Petitions Valid Though Addresses Not Listed of Persons Signing; Discretion of Board.

ELECTIONS—Affidavit of Individual Circulating Petition; Discretion of Board.

ELECTIONS—Petitions Filed More Than Thirty Days Before Democratic Primary of September 14th.

October 7, 1971

The Honorable Ann B. Hodges, Secretary
Amherst County Electoral Board

This will acknowledge receipt of your letter of October 4, 1971, wherein you raise various questions relating to the Virginia Election Laws, Title 24.1 of the Code of Virginia (1950), as amended, each of which will be treated separately.
Question 1: You inquire whether a petition filed by an independent candidate for the office of Commonwealth's Attorney with the signatures of 108 qualified voters may be accepted. Such petition was filed on March 25, 1971.

Answer: Section 24.1-168 requires that an independent candidate for a constitutional office of any county must, in addition to filing his notice of candidacy as required by § 24.1-166, file a petition signed by 125 qualified voters. The requirement of 125 signatures became applicable by a 1971 amendment effective March 1st. (See Chapter 119 of the 1971 Acts of Assembly.) Such amendment, however, could not be implemented, due to the requirements of the Voting Rights Act of 1965, until May 14, 1971, the date that the Department of Justice gave notification that no objection would be interposed. Consequently, the law effective on the date of filing would control, and such law at that time required petitions signed by one percent 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." You state that the one percent requirement for Amherst County would be 82 signatures. Consequently, the petition with 108 signatures would be valid.

Question 2: You inquire whether the petitions filed may be considered valid since such petitions did not list the addresses of the persons signing.

Answer: Section 24.1-168 requires that an individual candidate, along with his notice of candidacy, must file a petition therefor signed by the number of qualified voters specified "and listing the residence address of each such qualified voter." The purpose of such requirement is to insure that those signing the petitions are in fact qualified voters and the accuracy of the signatures may be checked by the addresses. I am informed that the local electoral board has determined that a sufficient number of signatures are those of qualified voters. In view of this fact, I am of the opinion that though the addresses were not listed, the board in its discretion, as authorized by § 24.1-109, may consider the petitions valid and cause such candidates' names to be printed on the ballots.

Question 3: You additionally ask whether petitions may be considered valid where the individual circulating the petitions made affidavit that he witnessed each signature to the petition but did not make affidavit that he himself was a qualified voter.

Answer: Section 24.1-168 additionally requires that each petition be circulated by an individual who is himself a qualified voter and who witnesses each signature and whose affidavit to that effect must be attached to the petition. I am informed that the local electoral board has determined that each person circulating the petitions was in fact a qualified voter. Consequently, as indicated in my answer to the previous question, the board in its discretion may consider such petitions valid.

Question 4: The last inquiry you raise is whether petitions and filings by several independent candidates for constitutional offices may be accepted since such petitions were filed more than thirty days before the Democratic Primary of September 14, 1971.

Answer: I am of the opinion that such filings may be accepted. See opinion of this office to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated May 28, 1971, copy of which I enclose.

ELECTIONS—Officers of Elections—Compensation for picking up and returning poll books.

ELECTIONS—Poll Books—Compensation to officers of elections for picking up and returning.

October 26, 1971
In your letter of October 21, 1971, you ask whether Augusta County can pay the sum of $20.00 to its officers of election for picking up and returning the poll books and carrying the returns and ballots to and from the polling place as provided by § 24.1-107 of the Code of Virginia, (1950), as amended, where there has been no election in Augusta County since the adoption of this statute and prior to its adoption these officers were paid the sum of $5.00 for those services. The issue, of course, is whether the increased payment would be consistent with the wage-price freeze imposed by the Economic Stabilization Act of 1970.

Section 24.1-107 provides as follows:

"The officers of any election shall receive as compensation for their services the sum of $20.00 for each day's service rendered. The governing body of any county, city or town may increase the compensation herein prescribed for officers of election.

"The officers of election picking up and returning the poll books and carrying the returns and ballots to and from the polling place shall receive from the local governing body compensation for one day and mileage as paid to the members of the General Assembly."

The 1970 amendment to this section, effective December 1, 1970, raised the daily compensation rates from $10.00 to $20.00, and provided in the second paragraph that the duties of picking up and returning the poll books and ballots were to be considered as a day's service rendered, and compensated at that rate. This rate was paid throughout the Commonwealth in elections held in cities and towns in May of 1971 pursuant to § 24.1-90, and thereby became established as the "market price" for the position of an officer of election. When the officers of election for 1971 in Augusta County were appointed in February, in accordance with the terms of § 24.1-105, they were in effect filling positions which did not exist prior to that time, and which may therefore be properly compensated at the market rate which became established as aforesaid.

You also inquire in your supplementary letter of October 22nd how the officers are to be paid in accordance with the terms of the second paragraph of § 24.1-107 since compensation for members of the General Assembly is not defined by statute on a per diem basis. As I have stated above, however, the phrase "compensation for one day" refers to the per diem compensation to be paid to officers of election under the first sentence of § 24.1-107. Only the word "mileage" refers to the rate in effect for members of the General Assembly, and is established by § 14.1-18.1 at nine cents per mile or actual expenses.
primary ballot and you request my opinion whether the name of such candidate should be left on the ballot.

Sections 24.1-195 and 24.1-196 allow for additional candidates to file for a primary subsequent to the filing deadlines when (1) a nominee, declared so pursuant to § 24.1-175 because he has no opposition, dies or withdraws prior to the primary (§ 24.1-195), or (2) an opposed candidate for nomination dies prior to the primary (§ 24.1-196). There is no statutory provision for additional candidates to file when one candidate merely withdraws. Consequently, in the situation you present, the remaining candidate is automatically the party nominee.

It is clear that when only one candidate declares for the nomination to any office his name shall not be printed on the ballot for the primary. See § 24.1-175.

The comments by the Election Law Study Commission in proposing § 24.1-175 stated the purpose:

"... is to make it definite that in a case where there is only one candidate for an office that he can't have his name printed on a primary ballot since he is automatically the party nominee."

Since the individual in question is now automatically the party nominee, I am of the opinion that his name should not appear on the ballot.

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ELECTIONS—Person May Be Candidate for Two Offices at Same Election.
ELECTIONS—Person Elected to Board of Supervisors Must Vacate Office on School Board; § 15.1-50.
ELECTIONS—School Board Member May Seek Office of County Supervisor, But § 22-69 Prohibits County Supervisor from Serving or Being Chosen for School Board.

The Honorable Emeline A. Hall, Clerk
Circuit Court of Northumberland County

This is in response to your letter of July 6, 1971, wherein you inquire as to whether a member of the Northumberland County School Board may become a candidate for nomination to the Northumberland County Board of Supervisors while serving on the School Board.

I know of no constitutional or statutory provision that would prohibit a person who is currently serving in some other county office from seeking election to the office of county supervisor. Similarly, this office has recently ruled, in an opinion to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated June 29, 1971 (a copy of which is enclosed), that a person may be a candidate for two offices at the same election, if otherwise qualified.

While § 22-69 of the Code of Virginia (1950), as amended, prohibits a county supervisor from being chosen or allowed to serve as a member of a county school board, I am of the opinion that the statute does not operate conversely to prohibit a school board member from seeking the office of county supervisor.

Of course, pursuant to § 15.1-50, if the person to whom you make reference were successful in being elected to the Board of Supervisors, he would be required to vacate his position on the School Board, which is an office. Such statute states in pertinent part:

"No person holding the office of county ... supervisor shall hold any other office, elective or appointive, at the same time, ... ." (With exceptions not applicable here.)

Section 15.1-50 goes on to provide:
“If any person shall be elected or appointed to two or more offices except as herein provided, his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, and if any person while holding any of such offices shall be appointed or elected to any other office, his qualification in such office shall thereby vacate any of the above offices he then holds, except as provided above.”

ELECTIONS—Persons Seventeen Years of Age — Participation in State party conventions and November general election.

March 9, 1972

THE HONORABLE ROBERT E. WASHINGTON
Member, House of Delegates

I am in receipt of your letter of March 7, 1972, requesting my opinion regarding persons seventeen years of age participating in the state party conventions, as well as the November general election.

Section 24.1-172 of the Code of Virginia (1950), as amended, states that each party shall have the power to make its own rules and regulations, call conventions, proclaim a platform, ratify a nomination, and perform all functions inherent in such organizations. The question of who may participate in party conventions would, therefore, be controlled by the respective party plans.

Section 24.1-41 is applicable to your next inquiry regarding eligibility of individuals seventeen years of age to register and vote. Any individual who is otherwise qualified and who will be qualified with respect to age to vote at the next general election is permitted to register in advance and also vote in any intervening primary or special election.

By definition, a general election is any election on the Tuesday after the first Monday in November, or an election for a governing body of a city or town on the first Tuesday in May.

If an individual will be eighteen years of age by November 7th, the Tuesday after the first Monday in November, but will not be eighteen years of age prior to May 2nd, the first Tuesday in May, then he may register subsequent to the May general election and vote in any intervening special or primary election. Of course, if the individual lives in a locality that is not conducting a general election in May, he may now be registered, assuming he is otherwise qualified, and will be eighteen by November 7th.

ELECTIONS—Polling Places to Be Used for Special Election for Issuing Bonds of Sanitary District.

May 18, 1972

THE HONORABLE W. L. PERSON, JR.
Commonwealth’s Attorney for the City of Williamsburg

In your letter of May 9, 1972, you ask:

“On June 6, 1972, there will be a special election held for James City County Sanitary District No. 3, James City County, Virginia, as to whether the Board of Supervisors of the County shall contract a debt and issue bonds of the aforesaid Sanitary District. The geographical area of the Sanitary District encompasses portions of three Magisterial Districts (Berkeley, Jamestown, and Powhatan). The regular polling places for two of the Magisterial Districts (Berkeley and Jamestown) fall within the geographical area of the Sanitary District, while the polling place of one (Powhatan) does not.
"In view of the above, I would appreciate your opinion as to whether:

1. The three regular polling places should be used?
2. Only two of the regular polling places falling within the geographical area of the Sanitary District should be used?
3. Only one of the regular polling places should be used as the polling place for the special election?"

The bond election described in your question is provided for by § 21-123 of the Code of Virginia (1950), as amended. Section 21-124 of the Code provides that this election shall be conducted in the manner prescribed by law for the conduct of regular elections, so the answer to your question must be found in the provisions of Title 24.1.

Although a sanitary district established under Chapter 2 of Title 21 of the Code is a separate legal entity from the county in which it is located, § 21-119 provides that nothing in the sanitary district law is to affect the authority, power, or jurisdiction of the county governing body or any of the officers thereof over the area embraced in such district. This applies to the officers of election provided for in § 24.1-105, whose duties under that statute are to conduct all elections to be held in their election districts during their term of office. Since it is therefore the responsibility of these officers to conduct the bond election in their respective districts, it is my opinion that the regular polling places in each election district whose territory is wholly or partly within the sanitary district must be utilized. In the case to which you refer in your letter, this means that all three polling places should be used even though one of them is located outside of the sanitary district itself.

Although this office has previously ruled that the polling place must be located within the election district where the voters reside, see opinion to the Honorable Julius Goodman, Commonwealth's Attorney for Montgomery County, dated January 27, 1959, and found in Report of the Attorney General (1958-1959), at p. 131, the basis for that ruling was that to avoid inconvenience and confusion to the voter the polling place should be located within his precinct. It is not inconsistent with that premise to hold, as I have here, that sanitary district bond elections should be held at the voter's regular polling place, since to establish a separate polling place for this election would doubtless result in the very inconvenience and confusion which is to be avoided. In view of the above cited provisions of §§ 21-119 and 21-124, I do not believe that such inconvenience and confusion was intended by the General Assembly.

In order to properly insure that only those voters who reside in the sanitary district take part in the election, the registrar should provide the officers of election for each precinct a list of those voters registered in such precinct who reside within the boundaries of the sanitary district.

ELECTIONS—Precincts; If Requisite Number of Registered Voters at Time Established, Precinct Lines Need Not Be Altered if Number Subsequently Diminishes.

ELECTIONS—Precincts; Boundaries Must Be Altered if Number of Registered Voters Becomes in Excess of Five Thousand.

ELECTIONS—Precincts; May Be Abandoned if Not More Than Thirty Qualified Voters.

December 10, 1971

THE HONORABLE JOAN S. MAHAN, Secretary
State Board of Elections

I am in receipt of your letter of December 9, 1971, which reads:
Section 24.1-36 of the Code of Virginia (1950), as amended, states:

"The governing body of a city shall establish for each ward, or for the city at large if there be no wards, 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 five hundred nor more than five thousand qualified voters per district or precinct as of the time such districts or precincts are established. The council 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. No such change in any election district or precinct shall be made within sixty days next preceding any general election, nor until notice has been published in a newspaper having general circulation in such election district or precinct once a week for two successive weeks. Notice of such change shall be mailed to all registered voters whose election district or precinct is changed at least fifteen days before the next general, primary or special election.

"In the event that any precinct contain a number of qualified voters in excess of five thousand, the city 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." (Emphasis supplied.)

I am of the opinion that, provided the precincts contain the requisite number of registered voters "as of the time such . . . precincts are established" there is no requirement that a city alter precinct lines if the number of registered voters subsequently diminishes to below five hundred (500). The only duty to alter precinct boundaries is if the number of registered voters in a precinct becomes in excess of the five thousand (5,000) requirement. See also § 24.1-38 which allows a city in its discretion to abandon a precinct if there be not more than thirty (30) qualified voters.

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ELECTIONS—Town Council Has Authority to Determine Whether Elections Are Vitiational.

TOWNS—Council Has Authority to Determine Whether Elections Are Vitiational.

May 25, 1972

THE HONORABLE WALTHER B. FIDLER
Member, House of Delegates

I am in receipt of your letter of May 17, 1972, regarding alleged irregularities in the recent councilmanic election for the Town of Irvington. The
request has been made to vitiate the election on the basis of a campaign pamphlet or card, which does not identify the person responsible therefor, as required by § 24.1-277 of the Code of Virginia (1950), as amended, and which was mailed to numerous voters prior to the election and copies of which were also found in voting booths during the election. You raise four questions in the letter, three of which require a response only if an affirmative response is required to your first question—whether the promulgation and distribution of the card, which card was violative of § 24.1-277, vitiated the election.

Though the requirement of § 24.1-277 is clearly valid, I am of the opinion that its violation cannot be classified of such a flagrant character as to raise a doubt as to how the election would have resulted, and thus does not warrant a rejection of the vote at the election. See 26 Am.Jur.2d Elections, § 277; County Taxpayers Alliance v. Board of Supervisors, 202 Va. 462, 117 S. E.2d 753 (1961).

In view of the negative response to your first inquiry, there is no need to respond to your other questions, except you recently, by letter of May 23, 1972, requested my response to the following:

"Does a town council have the power and authority to determine whether or not its elections are vitiated by undue election procedures and to order a new election?"

Assuming a valid legal basis is found for concluding that, but for undue election procedures, the results would have been different (such a legal basis is, in my opinion, as indicated above, provided by circulation of the card), then I am of the opinion such question should be answered in the affirmative. As to the Town of Irvington, its Charter grants such authority to its Council in the following provision of Article III:

"Section 4. The Council shall be judge of the election, qualification and return of its members; may fine them for disorderly conduct and, with the concurrence of two-thirds, expel a member. If any person returned be adjudged disqualified, or be expelled, a new election to fill the vacancy shall be held on such day as the council prescribes. Any vacancy occurring otherwise during the term for which such person was elected shall be filled by the council by the appointment of anyone eligible to such office. In the event of the failure of the council to fill such vacancy within fifteen days, the Circuit Court of Lancaster County shall make such appointment to fill the vacancy. A vacancy in the office of mayor shall be filled by the council from the electors of the town and any member of the council may be eligible to fill such vacancy (sic)."

ELECTIONS—Provisions of § 24.1-33 Prohibit Individual from Being Appointed to Dual Positions That Would Be Incompatible—Member of electoral board may not be appointed to zoning appeals board.

PUBLIC OFFICERS—Compatibility—Member of electoral board may not be appointed to zoning appeals board.

December 28, 1971

The Honorable R. Turner Jones
Commonwealth's Attorney for Highland County

I am in receipt of your letter of December 15, 1971, wherein you ask my opinion as to the validity of a member of the county electoral board being appointed as a member of the zoning appeals board for the same county.

Section 24.1-33 of the Code of Virginia (1950), as amended, would be applicable to your inquiry. Such provision, which became effective July 1, 1971, states:
". . . 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."

I am of the opinion that the above provision prohibits an individual from being appointed subsequent to July 1, 1971, to any positions that would be incompatible. In other words, an individual may not, after July 1, be appointed or serve in a prohibited dual capacity. This does not mean that an individual placed prior to July 1, 1971, in what is now a declared incompatible position, may not continue to serve. See opinion of this office to Honorable Joan S. Mahan, Secretary, State Board of Elections, dated July 7, 1971, copy of which I enclose.

Your inquiry is, therefore, answered in the negative.

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**ELECTIONS—Provisions of § 24.1-39 Relate to Changes in Polling Places As Well As in Election Districts or Precincts.**

December 28, 1971

The Honorable Andrew J. Ellis, Jr.
County Attorney for Hanover County

I am in receipt of your letter of December 20, 1971, wherein you state that Hanover County proposes to change a polling place in one of the new precincts.

As you indicate, § 24.1-39 of the Code of Virginia (1950), as amended, sets forth the requirements for advertising changes made in accordance with § 24.1-37 and provides:

". . . No change as provided for in § 24.1-36 or 24.1-37 shall be made within sixty days next preceding any general election nor until notice has been published in a newspaper having general circulation in such election district or precinct once a week for two successive weeks. Notice of such change shall be mailed to all registered voters whose election district or precinct is changed, at least fifteen days prior to the next general, special or primary election."

You inquire as follows:

"Is the mailing of the notice to registered voters limited to the situation when the district or precinct lines are changed or would it also apply to the changing of a polling place?"

Section 24.1-37 provides for the establishment in counties of both election district or precincts as well as polling places. Section 24.1-36 is the comparable provision for cities.

I am of the opinion, in reply to your inquiry, that the provisions of § 24.1-39 relate to changes in polling places as well as to changes in election districts or precincts.

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**ELECTIONS—Purges—“Testimony” regarding correctness of purge may be oral or by affidavits or depositions; may not be in form of letter only.**

December 10, 1971

The Honorable Joan S. Mahan, Secretary
State Board of Elections

I am in receipt of your letter of December 9, 1971, which reads:
REPORT OF THE ATTORNEY GENERAL

"Section 24.1-61 of the Code of Virginia requires the registrar, after notifying a person that his name is to be purged from the registration lists, to hear testimony for or against the right of the person to be retained on the registration books. (See also Section 24.1-60). This section further states 'if any voter so challenged fails to appear and defend his rights to be retained on the registration books of the precinct, his name shall be stricken therefrom by the general registrar.' (Emphasis added.)

"Would you kindly advise this Board if a registrar may accept a letter signed by such persons stating their right to remain on the registration books?"

Section 24.1-60 of the Code of Virginia (1950), as amended, requires that a registrar notify an individual, who is being purged, of the time or times which he "will hear testimony produced for or against the right of persons named in the [purge] notice to be retained on the registration books." Section 24.1-61 then provides the manner in which such hearing will be conducted and the consequences of an individual's failing to appear and defend his right to be retained on the registration books.

I am of the opinion that the obligation of an individual on a purge list is to produce "testimony" regarding the correctness of his being purged. Such "testimony" may be either oral or in the form of affidavits or depositions. Black's Law Dictionary, 4th Edition, p. 1646. An individual may therefore "appear" by affidavit, deposition, or in person to present his "testimony" but such appearance may not be in the form of a letter only. Your inquiry is therefore answered in the negative.

ELECTIONS—Qualifications of Individuals Signing, Witnessing and Circulating Petition for Candidate Must Be Judged As of Day Petition Is Filed.

September 23, 1971

THE HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney of Floyd County

I am in receipt of your letter of September 20, 1971, which reads as follows:

"Reference is made to Section 24.1-168, when petition of qualified voters required, current Code of Virginia.

"Therein, with reference to the petition of qualified voters, the following language appears: ' each signature to which has been witnessed by a person who is himself a qualified voter for the office for which he is circulating the petition '. Where the person circulating the petition, at the time of circulating the petition, is not a qualified voter, but thereafter and prior to September 14, 1971, becomes a qualified voter, would such petition be valid or invalid?"

Section 24.1-168 of the Code of Virginia (1950), as amended provides that candidates other than party nominees for elective office must, in order that their names may be printed on the ballot, file a petition signed by a number of qualified voters specified for the various offices, each signature to which has been witnessed by a person who is himself a qualified voter for the office for which he is circulating the petition. A qualified voter is one who meets the requisites of age and residency and is otherwise qualified under the Constitution of Virginia, which would include registration. In other words, a qualified voter is one who, in addition to meeting the age and residency qualifications, is also a registered voter.

This office has previously ruled that the persons signing the petition and the individual circulating the petition must be qualified voters, otherwise the signatures may not be considered valid; or, in the case of a petition
circulated by an individual who is not a qualified voter, the petition itself may not be considered valid. See opinion of this office to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated April 14, 1971, copy of which I enclose.

However, I am of the opinion, as is the general rule, that qualifications of such individuals are to be judged as of the day the petition was filed. See Hall v. Reid, 305 S.W. 2d 923 (Ky. 1957); 25 Am. Jur. 2nd, Elections, § 172. If the individual in the case you present was a qualified voter as of the time that the petition in question was filed, then the petition would, in my opinion, be valid.

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ELECTIONS—Reapportionment Plan for Election Districts Not Yet Approved by Justice Department; Primary Election in Old Precincts.

September 10, 1971

THE HONORABLE WILLIAM R. BLANDFORD
Commonwealth's Attorney of Powhatan County

I am in receipt of your letter of September 8, 1971, which reads:

"The Democratic Primary will be held on September 14th, only for the nomination of a Democratic Candidate for the House of Delegates and the Virginia State Senate. This County has no primary for any legal constitutional officers including Board of Supervisors members. It will elect said local officials during the general election to be held in November.

"The Reapportionment Plan for election districts has been submitted to the Justice Department in Washington and as of today same has not been approved by said Department.

"Under the above facts, can Powhatan County hold the Primary election on September 14th in accordance with the laws existing in the last Primary here in Virginia?"

Article VII, Section 5, of the revised Constitution of Virginia requires that counties in the year 1971 must reapportion the representation in the magisterial or election districts of the county. Such redistricting had to be commenced by July 1, 1971, and is to be effective for representational purposes on December 31, 1971. Thus, any primary or general elections in 1971 for membership on the governing body of a county must be conducted from the rearranged districts. See § 15.1-37.5 of the Code of Virginia (1950), as amended. The rearrangement of magisterial or election districts is, however, subject to the Voting Rights Act of 1965. Perkins v. Matthews, ___ U.S. ____, 27 L. ed. 2d 476 (1971).

Due to the requirements of Section 5 of the Voting Rights Act the changes in redistricting may not be implemented until such change is first submitted to the Attorney General of the United States and no objection is interposed within sixty days of such submission.

Since the county's redistricting plan, though submitted, has not yet been in the hands of the Attorney General the required sixty days, elections may not yet be held in the new districts. As previously indicated, primary or general elections for membership on boards of supervisors must be in this year conducted from the newly arranged districts. Since the primary in question, however, does not relate to the local governing body, there is no need to hold the election in the new districts and, under the Voting Rights Act, voting in the September 14th primary must in fact take place in the old precincts. Your inquiry is therefore answered in the affirmative.

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ELECTIONS—Redistricting; Districts May Be Reduced to One County-wide District; Not Change in Form of County Government.
ELECTIONS—Redistricting; Combination At-large and Single-member District Not Authorized.

REDISTRICTING—Districts May Be Reduced to One County-wide District; Not Change in Form of County Government.

REDISTRICTING—Combination At-large and Single-member District Not Authorized.

July 2, 1971

THE HONORABLE THOMAS B. INGE, JR.
Commonwealth's Attorney for Lunenburg County

I am in receipt of your recent inquiry wherein you requested my advice, whether a county, in redistricting, may establish four election districts, with one member of the Board of Supervisors being elected from each district, as well as allow a fifth individual to be elected from the county at large.

This will confirm my early response to you wherein your inquiry was answered in the negative.

I am enclosing copies of opinions to the Honorable Charles J. Ross, Clerk, Board of Supervisors, dated June 30, 1971, and to the Honorable John Paul Causey, Commonwealth's Attorney for King William County, dated June 28, 1971, which are applicable to your inquiry. As seen from these rulings, a county does have authority to create multi-member districts, as well as establish the number of election districts it will have; diminishing the number of districts to as few as one, if desired, creating in effect at large representation for the county. There is, however, no authority for a county to create election districts and then additionally establish what would commonly be referred to as a floater district, allowing a Supervisor to be elected at large. Such a plan would, in my opinion, constitute a change in the form of county government, which may be done only with specific legislative authorization.

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ELECTIONS—Registrar—May register, in another locality, citizens of his or her election district.

March 16, 1972

THE HONORABLE J. HUME TAYLOR, JR.
Secretary, Norfolk Electoral Board

I am in receipt of your letter of March 8, 1972, wherein you inquire if a registrar can register voters for her locality, but in the geographical confines of another jurisdiction.

An affirmative response to your inquiry is dependent, not upon a lack of prohibition found in the Virginia Election Laws, Title 24.1 of the Code of Virginia (1950), as amended, but upon authorization for such act. I am of the opinion that, within the provisions of §§ 24.1-46(1) and 24.1-47, your inquiry is to be answered in the affirmative.

Section 24.1-43 requires the local governing body to provide, within the locality, a suitable public office.

Section 24.1-46(1) requires the registrar to maintain such office, as well as other offices designated by the electoral board. The provisions of § 24.1-47, which provide who is to be registered, were, in the recodification of Title 24, “made more general to allow latitude in registration systems.” House Document No. 14, 1970 Acts of Assembly, p. 47.

Construed together, a registrar, if authorized by the local electoral board, may register, in another locality, citizens of his or her election district, who shall apply in the manner provided by law. I would emphasize, however, that any place where a registrar sits, must be open and accessible to
the general public, and cannot be closed only to a special group or class of individuals.

ELECTIONS—Registrar Has Authority to Transfer Registered Voter to Another Election District When Voter is Registered in Precinct in Which He No Longer Resides and Has Not Obtained Transfer.

ELECTIONS—Registered Voter Must Notify Registrar of New Address.

ELECTIONS—Distinction Between “Qualified” and “Registered” Voter.

ELECTIONS—If Individual is Registered But Not a Qualified Voter in Precinct, His Signature on Petition May Not Be Counted.

August 17, 1971

THE HONORABLE JOAN S. MAHAN, Secretary
State Board of Elections

This is in reply to your letter of August 10, 1971, inquiring with reference to a registered voter who moves within the county from one precinct to another prior to the registration books closing, but fails to notify the general registrar in writing of his change of address. You ask, "... will he be deprived of his right to vote if he returns to his old precinct where he is registered?"

Section 24.1-46 (8) of the Code of Virginia (1950), as amended, extends to the general registrar the authority to transfer a registered voter from one election district to another, within the registrar's jurisdiction, when the registrar determines that the voter is registered in a precinct in which he no longer resides, and has made no effort to obtain a transfer.

Assuming the general registrar is not aware of the change in residence, § 24.1-52 requires a registered voter, who has moved from one election district to another in the same city or county, to notify the general registrar of his new address, and such notification will suffice for registration in the new election district so long as the voter has lived in that district for the requisite thirty days. Registration of such a voter may be accomplished by this procedure at any time prior to six days preceding an election. See § 24.1-52. (Section 24.1-52 was recently amended to provide such transfer could be made only within thirty days preceding an election. See Chapter 247, 1971 Acts of Assembly. Such amendment, though effective, may not as yet be implemented in light of the restrictions of the 1965 Voting Rights Act. The six day limitation is therefore applicable to the September primary.)

If neither of the above alternatives are utilized, it would appear that the voter in question could not return to vote in the precinct from which he moved over thirty days before. Section 24.1-41 of the Code permits a qualified voter, who has moved from one precinct to another, to vote in the precinct from which he moved only if he moved fewer than thirty days before an election. The clear implication of this provision is that a voter who moves over thirty days before an election must act to satisfy the statutory provisions for registration in the new precinct as described above, or else be unqualified to vote in that election.

The above, I believe, will clarify for you the distinction between a "qualified voter" and a "registered voter." In order to be qualified to vote, an individual must meet all requirements of the Virginia Constitution which basically, as contained in Article II, Sections 1 and 2, are age, residence (including length of residence) and registration. A registered voter is, therefore, not necessarily a "qualified voter."

Lastly, you inquire "under the above circumstances how would a person in this position be considered if he signed a petition in accordance with Section 24.1-185." Section 24.1-185 requires petitions to be signed by "quali-
fled voters.” If an individual is registered in a certain precinct but not a qualified voter, his signature may not be counted.

ELECTIONS—Registrar; Revised Constitution Provides That Employee of Local or State Government May Not Be Appointed after July 1, 1971; May Serve Out Present Term.

CONSTITUTION—Registrar; Employee of Local or State Government May Not Be Appointed after July 1, 1971; May Serve Out Present Term.

July 7, 1971

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

This is in response to your letter of June 30, 1971, in which you inquire as to the effect of Article II, Section 8, of the Constitution of Virginia of 1971, which states in 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.” (Emphasis added.)

Inasmuch as this constitutional provision became effective on July 1, 1971, you ask:

“... if a county, city, town or Commonwealth employee who was appointed before the effective date of the new Constitution may continue to serve until completion of the term as a member of the electoral board or registrar, assistant registrar, or officer of election after July 1, 1971.”

The quoted portion of Article II, Section 8, limits the persons who may be appointed to the named offices after July 1, 1971. I am of the opinion, therefore, that this provision would have no effect on the completion of the terms of those officers who were validly appointed pursuant to provisions of the old Constitution.

ELECTIONS—Registration; Applications May Be Taken During Period Thirty Days Prior to Primary Election and General Election But Names Not Registered or Posted Until Books Are Open Again.

July 20, 1971

THE HONORABLE DONALD C. STEVENS
County Attorney for Fairfax County

I am in receipt of your letter of July 14, 1971, relating to registering those individuals eligible to exercise their franchise rights under the newly adopted Twenty-Sixth Amendment to the Constitution of the United States. In order to make available the maximum opportunity for registration you request my opinion

“regarding the legality of permitting the general registrar and her many assistant registrars to accept registrations during the period of thirty days prior to the September 14, 1971 primary election and the November 2, 1971 general election.

“§ 24.1-50, Code of Virginia, 1950, as amended, clearly prohibits registration during the thirty days immediately preceding an election; is it possible for the registrar or her assistants, to provide the application forms and accept completed applications for registration
during that period, making the additions to the books after the ensuing election?"

Your inquiry is answered in the affirmative. Such practice is consistent with prior rulings of this office, see Report of the Attorney General (1965-1966), p. 113, a copy of which I enclose, as well as the holding of the United States District Court in Rawlings v. Hardaway, affirmed by the United States Court of Appeals for the Fourth Circuit; Misc. No. 662 (June 25, 1970).

As indicated in the Boots opinion, however, though applications may be taken during the period in question, the names of those who qualify may not be registered or posted until after the books are open again.

ELECTIONS—Registration of Military Personnel and Dependents; Each Individual Must Meet All Durational Residency Requirements.

February 16, 1972

THE HONORABLE C. ALTON LINDSAY, SR.
Secretary of the Hampton Electoral Board

I am in receipt of your letter of February 9, 1972, concerning registration of military personnel located in your City. You raise three questions as follows:

"1. Under what conditions can a person in uniform of one of the Military services register to vote in all elections? In only the election of President and Vice-President of the United States?

"2. Under what conditions can a spouse of a person in Military uniform register to vote in all elections? In only the election of President and Vice-President?

"3. Under what conditions can a son or daughter of a person in Military uniform residing in the household of the parent in uniform register to vote in all elections? In only the election of President and Vice-President?"

There is no need to separate my responses to your inquiries between those residing on federal property as opposed to those residing off federal property. The decision of the Supreme Court in Evans v. Cornman, 398 U.S. 419 (1970), discussed in a previous ruling of this office to the Honorable Stanley L. Hardaway, Executive Secretary of the State Board of Elections, dated July 16, 1970, a copy of which I enclose, clearly establishes that those who meet the registration requirements of the State cannot be denied registration merely because they reside on a federal enclave. Similarly, it is not necessary to divide your question as to spouse and dependents. Each individual, whether spouse, dependent, or not, rises or falls on their own merits regarding eligibility to register. The domicile of the husband would control neither the domicile of his wife or child as regards eligibility to become enfranchised.

Therefore, responding to your questions, those individuals who meet all requirements, including durational residency, must register in accordance with the provisions of §§ 24.1-41 and 24.1-47 of the Code of Virginia (1950), as amended. However, a member of the armed services on active service, or his spouse, who is absent from the city, may register by absentee application in accordance with § 24.1-48. These individuals may vote in all elections.
Those individuals who do not meet the six months requirement but have been in the State thirty days or more may vote only in presidential elections in accordance with the special registration provisions of Chapter 5.1 of Title 24. Section 24.1-47 would not be applicable to these individuals. Individuals who have been in the Commonwealth less than thirty days may not vote in any elections.

ELECTIONS—Residency Requirements for Candidates.
CANDIDATES—Residency Requirements.

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

May 11, 1972

I am in receipt of your inquiry of May 8, 1972, regarding residency requirements for candidates.

Section 24.1-167 of the Code of Virginia (1950), as amended, applicable to your inquiry, reads as follows:

"In order to qualify as a candidate for any office of the Commonwealth, or if its governmental units, elective by the people, the candidate must have been a resident of the Commonwealth for one year prior to the commencement of the term of the office for which he offers."

You request my opinion as follows:

"Would you kindly advise if this means the one year immediately prior to the commencement of the term of office?"

The statutory provision quoted above, codified Article II, Section 5, of the revised Virginia Constitution, which provides:

"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 requirement that a person "must have been a resident of the Commonwealth for one year . . .", was added by the General Assembly, such language not having been suggested in the Report of the Commission on Constitutional Revision. See p. 115. See also, Proceedings & Debates of the Senate of Virginia, Pertaining to Amendment of the Constitution, p. 107. It is clear that the General Assembly intended the year requirement of residency to be analogous to the domicile and place of abode requirements that are prerequisites to eligibility to vote. Consequently, I am of the opinion your inquiry should be answered in the affirmative. The period of time is that period immediately prior to the individual taking office (note, it is a prerequisite to holding office, not voting for such office) and not some period of time in the past.

Such durational residency requirements for candidates, as opposed to such a requirement for voting, have been held to be valid. Hadnott v. Amos, 320 F.Supp. 107 (M.D. Ala. 1970).

ELECTIONS—Revised Constitution Limits Appointive Power of Judge to Fill Vacancies Only Until Next General Election.
ELECTIONS—Term of Office Filled at Special Election Continues for Unexpired Term.
ELECTIONS—Appointment of Successor to Deceased Would Be from Original District, Not Redistricted Area.
The Honorable Joseph M. Whitehead  
Commonwealth's Attorney for Pittsylvania County

I am in receipt of your request dated June 28, 1971, for an opinion relative to the following:

"With reference to Section 24.1-76, Code of Virginia, 1950, as amended, where a vacancy occurs in a County office by reason of the death of A, a Supervisor, who was elected to a Board of Supervisors prior to a redistricting of a County and said vacancy occurs more than 120 days prior to the next ensuing General Election and during the term of A's tenure of office, his district is divided by reason of population into two districts, and, a General Election is set more than 120 days from the date of the vacancy."

You raise three questions regarding the above, the first two of which will be considered together.

Question. "1. In making an appointment to fill the vacancy, how long would A's successor be appointed for?"

Question. "2. Is a Writ of Election required when at the next ensuing General Election the office in question will be on the ballot and also attention is called to the fact that if such writ was issued for the unexpired term of A's office, it would be for a period of less than two months and a situation could exist where three people would hold the same office within a period of several months?"

Answer: Article VI, Section 12, of the revised Virginia Constitution has imposed limitations on the appointing powers of judges and reads:

"No judge shall be granted the power to make any appointment of any local governmental official elected by the voters except to fill a vacancy in office pending the next ensuing general election or, if the vacancy occurs within one hundred twenty days prior to such election, pending the second ensuing general election."

Section 24.1-76 of the Code, enacted in 1970, but enacted in light of the provisions of the new Constitution (see Election Law Study Commission Report) is the legislative enactment of Article VI, Section 12, and states:

"When a vacancy occurs in any county, city, town or district office and no other provision is made for filling the same, it shall be filled by the resident judges of the courts of record of the county or city in which it occurs. If there be more than one resident judge and a majority of such judges cannot agree, then the senior judge shall make the appointment subject to the approval of other such judge or judges. If there be no resident judges, then the judge of the court of record shall make the appointment. When a vacancy occurs, if there be a deputy in the office, then the chief or senior deputy thereof shall perform all the duties of such office until the qualification of the person appointed to fill the vacancy.

"When any such vacancy shall occur, the court shall issue a writ of election to fill such vacancy. Such election shall be held at the next ensuing general election. The officer so elected shall hold the office for the unexpired term of his regularly elected predecessor in office. The person so appointed to fill the vacancy shall hold office until the qualified voters shall fill the same by election and the person so elected shall have qualified. In the event the vacancy occurs within one hundred twenty days prior to the next ensuing general election, the writ of election shall issue for an election to fill the vacancy at the second ensuing general election."

In view of the limited powers of judicial appointment, found in the Con-
stitution and enacted into statutory language by § 24.1-76, I am of the opinion in reply to your first question that in making the appointment to fill the vacancy created by the death of A, the court has jurisdiction only to appoint a successor until the next ensuing general election when “the qualified voters shall fill the same by election and the person so elected shall have qualified.” Qualification would be pursuant to § 24.1-75, which reads:

“The term of office of any person chosen at a special election to fill a vacancy in any public office shall commence as soon as he shall qualify and give bond, if bond be required, and continue for the unexpired term of such office.”

The power of appointment of judges being limited, a writ of election as required by § 24.1-76 must issue for the November, 1971, general election, the vacancy occurring more than one hundred twenty days, at which time a special election would be held to fill the remainder of the unexpired term, which would be until January 1, 1972. I am of the opinion that the Virginia Constitution mandates such result notwithstanding that such office will be voted on for the regular four year term and notwithstanding that a situation could exist where three people could consecutively hold the same office within a period of several months. Your second question is therefore answered in the affirmative.

Question. “3. In regards to the appointment of a successor in office, would any one be eligible from the original district from which A was elected or would the successor be required to be from the new district in which A resided at the time of his death?”

Answer: Section 15.1-37.5, enacted by the 1971 Acts of Assembly, Chap. 199, is applicable to your third inquiry. Reapportionment for purposes of representation does not become effective until December 31, 1971. Therefore, the appointment of A’s successor, as well as the special election to fill his vacancy would be from the original district for which A was elected and not from the new district A resided in at the time of his death.

ELECTIONS—School Census—What students included in county census.

SCHOOLS—School Census — What students included in of Montgomery County.

THE HONORABLE WILLIAM J. McGHEE
County Attorney for Montgomery County

October 26, 1971

This is in reply to your letter of October 11, 1971, in which you inquire as to whether or not students at Virginia Polytechnic Institute and State University at Blacksburg, Virginia, should be included in the school census of Montgomery County conducted by the school board every three years.

Section 22-223 Code of Virginia (1950), as amended, provides, in part, as follows:

... a census of all persons having reached their sixth birthday on or before September thirtieth of the school year and who have not reached twenty years of age as of October first of the school year residing within each county or city, shall be taken on forms furnished by the Superintendent of Public Instruction.

In light of the above quoted language, I am of the opinion that only those students who attend Virginia Polytechnic Institute and State University and who reside in Montgomery County should be included in the school census for Montgomery County. All other students attending the institution should be included in the school census for the county or city in which
they reside. Inasmuch as the school census is for the purpose of ascertaining the needs in elementary and secondary education, and does not relate to voting rights, the school board need not inquire into the domiciliary intent of the students.

ELECTIONS—Secretary of Electoral Board—What constitutes “Day of actual service” for payment.

ELECTIONS—Secretary of Electoral Board—What payments authorized in addition to per diem allowance.

July 30, 1971

THE HONORABLE J. D. RAMSEY, JR., Secretary
Charlotte County Electoral Board

This is in reply to your letter of July 19, 1971, in which you inquire as to the compensation authorized by statute to be paid an official serving in your capacity. Inasmuch as § 24.1-31 of the Code of Virginia (1950), as amended, replaced previous statutory provisions on this point and became effective December 1, 1970, you have distinguished, for the purposes of your inquiry, the periods of March 1, 1970, to December 1, 1970, and December 1, 1970, to March 1, 1971.

In regard to the first period, you ask what constitutes a “day of actual service” pursuant to the then applicable § 24-37 which allowed for a per diem compensation of $20.00. This provision authorized payment to members of electoral boards for statutory services rendered, but only to the extent that the member operated within the scope of his statutory duties. See previous opinion of this office to the Honorable Bryan F. Hepler, Chairman of Electoral Board of City of Covington, dated December 4, 1956, found in the Report of the Attorney General (1956-1957), p. 97.

In this regard, you present the following activities, inquiring whether they might warrant compensation as constituting a day of actual service. Having examined the statutes relative to the duties of secretary of an electoral board, I shall answer such inquiries seriatim:

Question: (1) “Regular or called meetings of the Board?”
Answer: Yes.

Question: (2) “Day with the Sheriff delivering ballots and materials on the day prior to Elections?”
Answer: Yes.

Question: (3) “Day of delivering absentee ballots on day of Election?”
Answer: Yes.

Question: (4) “Best part of a day watching seal being placed on ballots?”
Answer: No—see discussion below.

Question: (5) “Best part of a day, after considerable telephone calls, attempting to locate a precinct registrar?”
Answer: No.

You inquire further as to the mileage allowed jurors prior to December 1, 1970. Section 19.1-218 entitles jurors to reimbursement for mileage at the rate of seven cents per mile for each mile of travel by the most direct route, not to exceed four dollars per day.

You properly presume, in my opinion, that the expenses referred to in § 24-38 do not include postage, stationery and minute book as set forth in § 24-40. A telephone bill would be included among the general expense provision of § 24-38 and not the more specific expenses listed in § 24-40.
The compensation for serving in this manner was specified as six dollars. I am of the opinion that this compensation would be in lieu of your per diem allowance, and that the same would be true of the operation of § 24-326, which provides for a witness to the sealing of ballots to receive six dollars.

The presumption, expressed in your letter, that § 24-343, providing for a payment of twenty-five cents to the secretary of the electoral board for each absentee voter application filed, was in addition to the expense provision of § 24-38, is correct.

As to the period December 1, 1970, to March 1, 1971, § 24.1-31 still sets a three hundred dollar yearly limit on the authorized expenses of the secretary of an electoral board.

Each member of the electoral board is now entitled to the same mileage presently being paid members of the General Assembly. Section 14.1-19 stipulates that members of the General Assembly shall receive nine cents per mile "for every mile of necessary travel."

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ELECTIONS—Selection of Democratic Committeemen Governed by Party Plan.

ELECTIONS—Party May Use Electoral Machinery of Commonwealth To Select Democratic Committeemen But Charges Would Be Responsibility of Party At Time Other Than Primary Election.

October 13, 1971

THE HONORABLE FRANK D. HARRIS
Commonwealth's Attorney for Mecklenburg County

I am in receipt of your inquiry of October 9, 1971, regarding how the Democratic Committeemen for the county should now be selected in view of the postponement of the June primary.

Such selection would not be controlled by any applicable state statute. In fact, § 24.1-172 of the Code of Virginia (1950), as amended, expressly leaves with the party "the power to make its own rules and regulations, call conventions . . . for any . . . purpose, and perform all functions inherent in such organizations."

The selection of the committee would thus be in the manner chosen by such committee in accordance with the applicable provisions of the party plan. If the committee desires to use the electoral machinery of the Commonwealth to select its members, it may do so, but the charges for such would be the responsibility of the party since the election would now be at a time other than the time of a primary election. See § 24.1-180.

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ELECTIONS—Seventeen Year Olds; No Discrimination or Denial of Equal Protection in Denying Participation in May Elections to Those Who Will Be Qualified to Vote in November General Election.

ELECTIONS—Who participates in Party Matters Is Within Power of Political Party and Not State Law; Seventeen Year Olds.

March 22, 1972

THE HONORABLE ROBERT E. WASHINGTON
Member, House of Delegates

I am in receipt of your letter of March 17, 1972, wherein you direct my attention to the previous ruling of this office to yourself, dated March 9, 1972, regarding persons seventeen years of age participating in general elections and party matters, and inquire as follows:

"If seventeen year olds qualifying with respect to age prior to the November general election may now register and participate in
party conventions and/or mass meetings in those localities where no May election is being held, and if those seventeen year olds similarly situated in localities having a May election may not so now register and participate in such conventions and/or mass meetings; are not individuals within this group and residing in localities holding a May election being denied participation in such party conventions and/or mass meetings solely by virtue of the place of their residence? It would therefore appear that the law is being applied unequally, and that if this ruling is followed, seventeen year olds who may reach the age of eighteen before the November election and who reside in localities holding a May election are suffering discrimination at the hands of the law. If this is the case, does it not then follow that local registrars should be required to now register under such special provisions as may be proscribed all seventeen year olds who would otherwise be qualified to vote in the November general election, so that they may participate in the nominating process leading up to that general election.

I would again emphasize, as I did in my opinion of March 9th, that the determination, regarding who participates in party matters, is one entirely within the inherent power of the political parties and state law does not attempt to regulate or control the same.

State law does control who may participate in general elections held throughout the Commonwealth and in this connection I am of the opinion that there is no discrimination or denial of equal protection raised by the situation you present. Your inquiry is, therefore, answered in the negative.

ELECTIONS—Student Registration; Residence Requires Both Domicile and Place of Abode; Factors Recognized in Determining.

July 21, 1971

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

This is in reply to your letter of July 14, 1971, wherein you refer to ratification of the Twenty-Sixth Amendment to the United States Constitution, extending the elective franchise in all elections to qualified citizens eighteen years of age or older, and the resulting question of registration of college students. I quote from your letter:

"The main question generated in this regard is where these students will be allowed to register and vote.

"Since the definition of residence, Section 24.1-1(11) of the Code of Virginia ... now reads:

'"Residence" for all purposes of qualification to vote, requires both domicile and a place of abode. 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,'

the registrars would like official guidelines to follow in the registration of students."

As you are aware, this office most recently ruled on this issue in an opinion to the Honorable Jack N. Kegley, Registrar of Albemarle County, dated March 30, 1971. In that letter I made the following statement in regard to the effect of § 24.1-1 (11) of the Code of Virginia (1950), as amended:

"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."

Unfortunately, there can be no definitive formula or official guidelines that registrars might employ in making this complex determination. Residence requires both domicile and a place of abode. As to the former, which is the difficult issue to decide, the Virginia Supreme Court has determined the issue of domicile as applicable in the Commonwealth's election laws. See Kegley v. Johnson, 207 Va. 54, 147 S.E.2d 735 (1966). It is further established that there are three requisites to the acquisition of a new domicile of choice: 1.) physical or bodily presence in the new locality; 2.) an intent to abandon the old domicile; and 3.) a concurrent intent to adopt another domicile in the new location. The first requisite is clearly met when a student enters a given jurisdiction to attend an institution of learning. As to the second and third requisites, the registrar must ascertain the intent of the student, as manifested by his words and actions.

The prospective voter has the burden of satisfying the above domiciliary requirements. The intention to remain in a given jurisdiction only so long as a student, or only because one is a student, is not sufficient. The intention must not be conditioned upon or limited to the duration of the academic course. The intent necessary to constitute a permanent residence, and, hence, the right to register to vote, is the intent to remain in that jurisdiction for an indefinite period. In short, a student obtains no residency merely because he is enrolled, but being a student does not preclude necessarily, his becoming a resident. If the above intention is not demonstrated by the prospective voter, the presumption would control that his previous domicile is valid for voting purposes rather than the location of the institution in which he is enrolled. See Dotson v. Commonwealth, 192 Va. 565, 66 S.E.2d 490 (1951).

Below are some factors which various state courts have recognized in ruling upon the question of a student's domicile and his right to vote. See 98 ALR2d 488 (1964). I offer them not as official guidelines or as a conclusive checklist, but rather to provide some factual considerations, generally reflective of a person's domicile, to assist registrars in ascertaining the requisite intent of a student seeking to vote in the locale in which he is studying. Those factors are as follows:

1.) the student's plans upon graduation—whether residency is for an indefinite period or for the limited purpose of completing his education;
2.) payment of out-of-state tuition rates;
3.) voter registration in another jurisdiction;
4.) address on driver's license;
5.) jurisdiction in which vehicles are licensed and registered;
6.) location of bank accounts;
7.) purchase of insurance policies from local broker;
8.) home ownership or rental;
9.) identification with the community;
10.) custom of returning to parental home during vacations;
11.) degree of freedom from parental control; and
12.) economic self-dependence in the community.

None of the above are absolutely determinative, but might be viewed as indicative of a student's intent. In all instances, the registrar should consider each individual student on the merits of his particular case.

ELECTIONS—Transfer of Registration; Minimum Residence Requirement in Transferee Precinct May Be Anticipated.

September 14, 1971
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE JOAN S. MAHAN, Secretary
State Board of Elections

You recently inquired whether a registered voter in Fairfax County who plans to move to Arlington County on September 15, 1971, may transfer his registration to the latter county in time to cast his ballot there in the November 2nd election. You point out that by the time he will have resided in Arlington County for thirty days in accordance with the requirements of § 24.1-41 of the Code of Virginia (1950), as amended, the registration books will be closed for the November 2nd election as provided in § 24.1-50. You also point out that this voter cannot properly vote in Fairfax County as he will no longer reside there on November 2nd.

This office has ruled that for registration purposes the minimum age requirement is satisfied if the registrant will reach the age of eighteen prior to the election date, but that the minimum residence requirement cannot be so anticipated. This is in accordance with the provisions of § 24.1-41 and Article II, Sections 1 and 2, of the Constitution of Virginia. This prohibition, however, does not apply to citizens of the Commonwealth who have already met the residence requirements in one precinct and are registered to vote therein, and are simply moving their residence from one precinct to another more than thirty days prior to an election, as outlined in your question. To hold otherwise would be to deny the franchise to persons who have already demonstrated that they are qualified to vote under the laws of the Commonwealth.

I am of the opinion, therefore, that for purposes of transfer of registration from one precinct to another, the minimum residence requirement in the transferee precinct may be anticipated.

ELECTIONS—Vacancies on City Council; Law in Effect When Vacancy Occurs Is Controlling.

CHARTERS—City of Chesapeake Charter Provides for Tie Breaker.

CITIES—Vacancies on City Council; Law in Effect When Vacancy Occurs Is Controlling.

February 10, 1972

THE HONORABLE ROBERT E. GIBSON
Member, House of Delegates

This is in reply to your letter of February 9, 1972, in which you state that on February 1, 1972, at a special election, a former city councilman was elected to the State Senate for the Fourteenth Senatorial District.

You ask how the vacancy on the City Council will now be filled.

Section 3.03 of the City Charter provides that the vacancy shall be filled by special election within sixty days and that prior to the special election the Court shall forthwith make an interim appointment to the council. You ask whether this procedure should be followed in this case or whether House Bill No. 169 now before the General Assembly, if passed, should be followed as it provides for a different method for filling vacancies on the City Council.

I am of the opinion that the law in effect when the vacancy occurs is controlling and, therefore, Section 3.03 of the City Charter as now written applies to the present situation until the adoption of House Bill 169. Once that is adopted, then its provisions apply if a vacancy occurs. See § 1930, Sutherland, Statutory Construction.

You next ask whether provisions are made in the City of Chesapeake Charter for a tie breaker. Section 3.08 of the Charter provides:

"So long as the council of the consolidated city shall be fixed at an even number, the judges of the courts of record shall designate one of the commissioners in chancery of such courts as tie breaker
REPORT OF THE ATTORNEY GENERAL

for the council. He shall hold office at the pleasure of the judges of such courts. The tie breaker shall vote only in the case of a tie vote of all members of the council, and the provisions of section 15-245 of the Code as to tie breakers for boards of supervisors shall apply so far as applicable.”

ELECTIONS—Vacancy—Town council—Filled by majority vote of remaining councilmen; special election not authorized.

June 5, 1972

THE HONORABLE RUSSELL M. CARNEAL
Member, House of Delegates

This is in reply to your recent letter of May 2, 1972, in which you request my opinion concerning a vacancy on the Council of the Town of Poquoson. Specifically, you asked whether the vacancy, which occurred by the resignation of the Mayor on April 10, 1972, should be filled by the remaining members of council appointing a qualified person to fill this vacancy for the unexpired term, or whether a special election should be called to fill this vacancy.

The Charter for the Town of Poquoson is set forth in Chapter 238 of the Acts of Assembly of 1952, as amended. At Article III, § 7, thereof, it is provided that the mayor holds a councilmanic position and, as such, his term of office commences on September one and expires in four years.

Article III, § 9, as amended, provides:

‘Vacancies in the office of councilman from whatever cause arising, shall be filled for the unexpired portion of the term by a majority vote of the remaining members of the council, or if the council shall fail to act in sixty days of the occurrence of the vacancy, the appointment shall be made by the Circuit Court of York County or the judge thereof.’

In view of the above language, it is my opinion that the position should be filled by the majority vote of the remaining councilmen and that a special election is not authorized. It should be noted also that unless the above action is taken by the remaining councilmen by June 10, 1972, the appointment may be made by the Circuit Court of York County.

ELECTIONS—Voter May Not Vote in Precinct Where Still Registered After He Has Moved To Another Precinct.

ELECTIONS—Absentee Mail Ballot; Procedures for Challenging.

October 27, 1971

THE HONORABLE PAUL X BOLT
Commonwealth’s Attorney of Grayson County

I am in receipt of your letter of October 21, 1971, which reads as follows:

“Section 24.1-46 subsection (8) of the election law provides for the Registrar upon being informed and determining that a voter is registered in an election precinct in the county where he no longer resides, to notify the voter to obtain a transfer. If the voter fails to request the transfer, then the registrar shall make the transfer.

“If the registrar fails to give the notice to the voter that actually resides in another precinct, may the voter still vote where he is registered?”

I am enclosing a copy of a previous opinion of this office to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated August 17, 1971, which is applicable to your inquiry. As seen from the enclosed, your
The procedures for challenging an absentee mail ballot are set forth in §§ 24.1-133 and 24.1-229 and are basically the same as those outlined in § 24.1-133 upon receipt of the application for an absentee ballot.

ELECTIONS—Voter May Vote Only in Precinct Wherein He Is Qualified Voter—Must be registered and meet residency requirements.

ELECTIONS—Resident in Election District A May Not Be Appointed Official at Polls in Election District B.

ELECTIONS—Resident of Precinct 2 May Be Appointed Official in Precinct 1 in Same Election District.

August 18, 1971

THE HONORABLE WILLIAM R. BLANDFORD
Commonwealth's Attorney of Powhatan County

I am in receipt of your letter of August 12, 1971, wherein you raise four questions, the first two of which are related and will be treated together, as will the last two, as follows:

"Question 1. A voter is a resident of Precinct 2 in Election District A. Can he vote in Precinct 1 in the same election district?

"Question 2. Can said voter vote in any other election district?"

Answer: I am enclosing a copy of an opinion of this office to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated August 17, 1971, which is responsive to your inquiry. As seen from this opinion a voter may cast his vote only in the precinct wherein he is a qualified voter, that is, where he is not only registered but where he also meets the residency requirements of the law. Assuming the voter in your questions "resides" in Precinct 2 as that term is used in the statutes, your inquiries are answered in the negative.

"Question 3. Can a voter residing in election District A be appointed as an official at the polls in Election District B?

"Question 4. Can a voter, a resident of Precinct 2, Election District A, be appointed as an official in Precinct 1 in Election District A?"

Section 24.1-105 of the Code of Virginia (1950), as amended, is applicable to your last inquiries and reads in pertinent part:

"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. The electoral board shall designate one officer as the chief officer of election and one officer as the assistant for each precinct."

This language in § 24.1-105 has not been changed substantially since this office rendered an opinion construing similar language to Mr. Irving A. Clayton, dated November 3, 1932, found in the Report of the Attorney General (1932-1933), at page 61, copy of which I enclose. Election district is defined by statute very broadly and "may be a county, city, town, magisterial district of a county, ward of a city, or precinct or combination of any of these, as may be designated by proper authority or by law, and such other districts as provided for in § 15.1-571.1;". See § 24.1-1 (4). In view
of the previous opinion of this office and the language in § 24.1-105, I am of the opinion your third inquiry should be answered in the negative, while your fourth inquiry is answered in the affirmative.

ELECTIONS—Voting—Person committed but not adjudicated insane may vote.

INSANE AND MENTALLY ILL—Voting—Person committed but not adjudicated insane may vote.

March 7, 1972

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

I am in receipt of your letter of March 6, 1972, wherein you refer to a previous opinion of this office to the Honorable Philip Lee Lotz, Commonwealth's Attorney for Augusta County, dated October 24, 1969, found in the Report of the Attorney General (1969-1970), p. 126, relating to a person voting who has been committed to a mental institution. You request a current interpretation of mental incompetency as it relates to the present Virginia Constitution.

I am of the opinion that the former ruling of this office is still applicable. Article II, Section 1, of the revised Virginia Constitution prescribes the qualifications of voters and provides that:

"As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished."

A person, pursuant to § 37.1-67 of the Code of Virginia (1950), as amended, may be involuntarily committed to a mental institution; a voluntary admission may be made in accordance with § 37.1-65. The voluntary or involuntary admission, however, of a person to a mental hospital does not establish legal incapacity or incompetency. See § 37.1-87. Only an individual adjudged by a court of record to be mentally incompetent would come within the provision of Article II, Section 1, prohibiting qualification to vote; such adjudication is made pursuant to Chapter 4, Title 37.1.

FAIR ELECTIONS PRACTICES ACT—Not Applicable to Candidates for President and Vice President of United States.

FAIR ELECTIONS PRACTICES ACT—Applicable Only to Individuals Seeking Election to an Office in the Commonwealth.

ELECTIONS—Fair Elections Practices Act Not Applicable to Candidates for President and Vice President of United States.

March 28, 1972

THE HONORABLE JOAN S. MAHAN
Secretary, State Board of Elections

I am in receipt of your inquiry of March 24, 1972, which reads as follows:

"Will you kindly advise this office if the Fair Elections Practices Act, Sections 24.1-251 through 24.1-261 applies to candidates for the office of President and Vice President of the United States?"

Section 24.1-251 of the Code of Virginia (1950), as amended, provides that the provisions of the Fair Elections Practices Act "apply to all elections held within the Commonwealth except any election for members of the United States Congress." It is clear, however, from the provisions of § 24.1-253, relating to appointment of campaign treasurers and reports, that the Fair Elections Practices Act, in referring to "all elections", is
referring to all elections "for nomination for or election to, any office in the Commonwealth ..." with only offices held by individuals in Congress, exempted.

Since the Act does apply only to individuals who seek election to an office in the Commonwealth, then I am of the opinion the Act is not applicable to candidates for President and Vice President of the United States, and your inquiry is, therefore, answered in the negative.

FEES—Justice of Peace—Not allowed mailing fee in civil matters.

JUSTICE OF PEACE—Fees—Not allowed mailing fee in civil matters.

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

I am in receipt of your recent letter in which you request an opinion concerning the authority of a justice of the peace to charge a fifty-cent mailing fee when required to mail process to another city or county for service.

The fees to be charged for services of justices of the peace in civil cases are specified in § 14.1-125 of the Code. This section, as amended in 1970, provides for a fee of $3.25 for the issuance of warrants, etc., in civil cases. A justice of the peace is allowed to deduct from that sum a fee of $1.50 for his services and is to remit the remainder to the Court to which such process is returnable. The final sentence of said section, prior to its amendment in 1971, specified that the fees prescribed in this section shall be the only fees charged by justices of the peace in civil cases. The 1971 amendment to said section, effective July 1, 1971, omitted this last sentence; however, the Code Commission note to said section states that this was apparently through inadvertence. This would indicate that there was no intention of the legislature to change the provisions of this section so as to allow any other fees to be collected by a justice of the peace for his services in civil matters.

I am, therefore, of the opinion that the answer to your question would be in the negative, and it is not proper for a justice of the peace to collect such a mailing fee. This is consistent with an earlier opinion of the Attorney General of June 17, 1959, to the Honorable Richard Marshall, Justice of the Peace for the City of Newport News, Opinions of the Attorney General, 1958-1959, page 158.

FEES—May Be Refunded When Candidate Unopposed in Primary.

ELECTIONS—Fee May Be Refunded When Candidate Unopposed in Primary.

THE HONORABLE J. E. COX
Treasurer of Fauquier County

I am in receipt of your letter of September 3, 1971, which reads in part:

"Under the law as amended in the Special Session of 1971 my question is: In the event a candidate is unopposed in the primary is the fee posted for said primary refunded to said candidate?"

Section 24.1-199 of the Code of Virginia (1950), as amended by Chapter 247 of the 1971 Acts of Assembly provides that in the event a primary candidate for any office "who has paid the [primary] fee is not opposed, or in the event a candidate must refile for any reason, the Treasurer shall pay back the fee." This amendment is effective and applicable to any election held after June 1, 1971. The Attorney General of the United States has
advised that no objection to the amendment will be interposed under the Voting Rights Act of 1965 and thus the change may now be implemented.

FEES—Special Justices—Commitment hearings.

MENTAL HYGIENE AND HOSPITALS—Commitment Hearings—Fees and costs.

November 2, 1971

The Honorable Harrison S. Dey, Jr.
Special Justice of Augusta County

I am in receipt of your letter of October 21, 1971, in which you raised the question concerning the collection of fees and costs for hearings held pursuant to § 37.1-67 of the Code of Virginia. You inquire as to whether there is some ambiguity or conflict in the provisions of § 37.1-89 of the Code which requires the collection of fees and costs from the person who either is the subject of said hearing or who has requested said hearing, and that § 37.1-89 provides that the fees and costs are not to be recovered from any person or his estate when no good cause for admission exists. You state that:

"It appears unconscionable that the payment of fees would depend on the outcome of the hearing and that the physician, attorney and special justice would be paid the allowed fees under § 37.1-89 only when a person is committed to a hospital and would not receive such fees if the petition is denied."

Your interpretation of § 37.1-89 is correct as to when the fees are recoverable against the person or his estate; however, the remaining provisions of § 37.1-89 do provide for the payment of said fees and costs to the physician, attorney, and special justice pursuant to any hearings under § 37.1-67.

Therefore, it is my opinion that the physician, attorney, and special justice would be paid the allowed fees pursuant to all said hearings, and their receipt of payment would not depend upon the outcome of the hearing. The only matter that is determined by the outcome of the hearing is whether or not the county or state could then recover back against the individual who is the subject of the hearing or the person requesting the hearing for said fees and costs. Therefore, it is further my opinion that if an individual has in fact paid these fees and it was found that no good cause for admission exists, then the fees and costs should be refunded to that individual and should be instead collected from the county or from the state, depending upon the circumstances, as specified in § 37.1-89.

FIREARMS—Machine Guns—Definition of.

CRIMINAL LAW—Possession of Machine Guns—Definition of machine guns.

November 9, 1971

The Honorable Sam D. Eggleston, Jr.
Commonwealth's Attorney for Nelson County

In your letter of September 27, 1971, you inquire as to whether guns adapted to use cartridges smaller than .30 caliber are defined as machine guns and whether persons can be prosecuted under Article 3 of Chapter 5 of Title 18.1 of the Code of Virginia, commonly known as the “Uniform Machine Gun Act”, in connection with weapons adapted to use cartridges of 7.62 millimeters or smaller.

The definition of “machine gun” under § 18.1-258 (1) of the Code of
Virginia does not exclude weapons of smaller than .30 caliber so that such a weapon would still be a machine gun if it fell within the definition of that section. However, § 18.1-263 of the Code provides that Article 3, Chapter 5, of Title 18.1 shall not prohibit:

"(4) the possession of a machine gun other than one adapted to use cartridges of thirty (thirty one-hundredths inch or seven and sixty-three one hundredths millimeter) or larger caliber, for a purpose manifestly not aggressive or offensive."

Likewise, § 18.1-265 provides that machine guns adapted to use cartridges of .30 or larger caliber shall be registered with the Department of State Police annually. Thus, it is the apparent intention of the legislature to exclude from the provisions of this act any machine gun of a smaller caliber than .30 caliber. Your specific inquiry relates to 7.62 millimeters which when translated to hundredths of an inch would be .29999, and thus smaller than .30 caliber and specifically smaller than 7.63 millimeters and such a weapon would not be covered by the Virginia statute if not used for aggressive or offensive purposes as described in § 18.1-261.

I might refer you, however, to the Federal statutes and specifically to 26 U.S.C. § 5685 and 26 U.S.C. § 5848, both of which define machine guns without referring to the caliber of the cartridge used in the weapon. Thus, although Virginia law may not control these weapons, they would probably be covered by Federal law.

FIREARMS—Ordinance Not Authorized to Prohibit Sale of Hand Guns.

FIREARMS—Reports of Sales Required by § 15.1-524.

LICENSES—Tax on Persons in Business of Selling Pistols and Revolvers to Public.

ORDINANCES—Not Authorized to Prohibit Sale of Hand Guns.

THE HONORABLE ROBERT L. GILLIAM, III
Commonwealth’s Attorney for Westmoreland County

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

"Could you please advise me whether or not Westmoreland County has any authority to enact an ordinance which would prohibit the sale of hand guns to individuals without their first obtaining the prior written approval of the Sheriff of Westmoreland County, Virginia."

Except in counties having a density of population of more than one thousand per square mile, under § 15.1-525 of the Code of Virginia (1950), as amended, there is no present provisions of law that would authorize an ordinance which would prohibit the sale of hand guns to individuals without their first obtaining prior written approval of the sheriff. See opinion to the Honorable William C. Carter, Commonwealth’s Attorney for Cumberland County, dated October 12, 1959, and found in Report of the Attorney General (1959-1960), p. 183.

Your attention is called to § 15.1-523 of the Code which authorizes the governing body of the county to impose a license tax on persons engaged in the business of selling pistols and revolvers to the public. You are further directed to the provisions of § 15.1-524 which requires reports be made of sales of these weapons.

FIREARMS—Populated Areas—Ordinances to prohibit firing of firearms must include all firearms.
REPORT OF THE ATTORNEY GENERAL

ORDINANCES—Firearms—Shooting of in populated area—Must prohibit all firearms.

November 15, 1971

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

This is in reply to your recent letter in which you request my opinion with respect to the following:

"It is provided in 15.1-518 of the 1950 Code of Virginia as amended that the Board of Supervisors may prohibit the shooting of firearms in heavily populated areas. I wonder if this section would permit the Board to prohibit the shooting of certain specified firearms such as rifles without providing against the shooting of other firearms such as shotguns?"

Section 15.1-518 of the Code provides as follows:

"Any county may provide against the shooting of firearms or air-operated or gas-operated weapons in any areas of the county which are in the opinion of the Board of Supervisors so heavily populated as to make such conduct dangerous to the inhabitants thereof."

It is my opinion that any ordinance enacted by the Board of Supervisors under the authority of §15.1-518 of the Code of Virginia must prohibit all firearms and it could not differentiate between rifles and shotguns. I call your attention to an opinion dated October 28, 1964, to The Honorable Donald G. Pendleton, Assistant County Judge of Amherst County, dated October 28, 1964, and found in Report of Attorney General (1964-65), p. 21 in which the opinion was expressed that any ordinance enacted under the authority of this section must "entirely prohibit the shooting of firearms in the area." Consequently, my opinion to you must be in the negative.

GAME AND INLAND FISHERIES—Damage Stamp Fund May Be Used for Conservation of Wildlife; Not for Road Repair or Improvement of Access Trails.

April 27, 1972

THE HONORABLE WILLIAM B. HUFFMAN
Treasurer of Highland County

This will acknowledge receipt of your letter of April 11, 1972, with regard to the Highland County Board of Supervisor's control over the County's Damage Stamp Fund. In your letter you express particular interest in the expenditure of such funds for road repairs, improvement of access trails, and conservation of wildlife.

The statutory provisions governing the maintenance and use of the Damage Stamp Fund to which you refer, are found in Chapter 249, Acts of Assembly, 1970. The pertinent portions thereof are as follows:

"Any surplus remaining in the fund, which surplus has been in the fund more than three years, shall be earmarked for conservation, restoration, protection of wildlife and preventing damage by wildlife to property in said county. . . . "

In view of the foregoing, I am of the opinion that such funds may not be expended for road repair or the improvement of access trails. See Report of the Attorney General (1959-1960), p. 186. Conversely, I am of the opinion that the expenditure of such funds for the conservation of wildlife has express statutory authority and is therefore proper.
GARNISHMENTS—Commissions.

CIVIL PROCEDURE—Garnishments—Commission not paid for collection, only fee for service of process.

FEES—Garnishments; Officer's Compensation Limited to Fee for Service of Process.

COURTS—County Court Collecting on Garnishment; Commission Not Paid, Only Fee for Service of Process.

April 18, 1972

THE HONORABLE THOMAS W. Athey, Judge
County Court of York County

This is in reply to your letter of April 12, 1972, which reads in part as follows:

"I would like your opinion pertaining to Section 14.1-109 of the Code of Virginia relative to collections on garnishments paid direct to the County Court. Section 14.1-109 reads as follows:

"'An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum of the first one hundred dollars of the money paid of proceeds from sale, five per centum on the next four hundred dollars, and two per centum on the residue; except that when such payment or sale is on execution on a forthcoming bond, his commission shall only be half what it would be if the execution were not on such bond.'

"My question is, does the County Court, when collecting funds on a garnishment assess the commission as cited in Section 14.1-109? If so, to whom or to what agency is this amount credited?"

Where the Court collects funds on garnishments, no collection is made by the officer and his compensation is limited to the fee allowed for service of the process. Therefore, you assess no commission under §14.1-109 [formerly §14-120]. See opinion of this office to the Honorable Mervin A. Gage, City Sergeant for the City of Hopewell, dated September 5, 1962, found in the Report of the Attorney General (1962-1963), p. 101.

GARNISHMENTS—Exemptions — Calculated on entire earning and not upon different sources of those earnings.

September 28, 1971

THE HONORABLE HORACE A. Revercomb, JR.
Judge, King George and Stafford County Courts

This is in response to your letter of September 13, 1971, in which you asked my opinion concerning a construction of §34-29 of the Code of Virginia. You stated, in pertinent part:

"Garnishment proceedings have been filed in one of my courts involving the salary of an employee of a county officer. The salary of the employee is set by the State Compensation Board and is paid two-thirds by the Commonwealth of Virginia and one-third by the County."

You asked:

"... [Do] exemptions apply separately to the portion of the salary paid by the State and the portion paid by the County, or should the exemptions apply to the total salary paid by both?"

In my opinion, the exemptions provided in §34-29 of the Code of Virginia
REPORT OF THE ATTORNEY GENERAL

(1950), as amended, applies to the aggregate earnings of the individual and should not be calculated upon each jurisdiction's separate contribution. In determining the exemption, § 34-29(d)(1) of the Code defines "earnings" as "... compensation paid or payable for personal services whether denominated as wages, salary, commission, bonus, or otherwise. . . ." Subsection (a) of § 34-29 provides:

"Except as provided in sub-section (b), the maximum part of the aggregate disposable earnings of an individual for any work week which is subjected to garnishment may not exceed the lesser of the following amounts:" (Emphasis supplied.)

This section then prescribes the exemptions. For pay periods other than a week, the Commissioner of the Department of Labor and Industry prescribes a multiple equivalent to the restriction set forth in § 34-29. However, it should be noted that the language dealing with earnings applies to "aggregate disposable earnings". This clearly indicates that the earnings are not to be divided and considered separately as determined by the sources from which they are paid; rather they are to be considered as a lump sum or "aggregate".

GARNISHMENTS—Salary Subject to—How computed.

July 12, 1971

THE HONORABLE R. BAIRD CABELL
Judge of the Municipal Courts, City of Franklin

This is in response to your letter of June 14, 1971 in which you request my interpretation of § 34-29 of the Code of Virginia (1950), as amended. You stated the following hypothetical case:

"Assume that judgment creditor procures issuance of summons in garnishment against judgment debtor and his employer. There is a pre-existing debt on the part of the judgment debtor to his employer in the amount of $200.00. Judgment debtor has weekly earnings of $100.00 from which there is deducted the sum of $20.00 each week to cover State and Federal income taxes and social security, leaving disposable earnings in the amount of $80.00. The difference between the disposable earnings and $48.00 is $32.00, so the amount that would ordinarily be withheld to satisfy the garnishment would be one-fourth of $80.00, or $20.00.

Judgment debtor's employer, after service of the garnishment upon him, withholds $20.00 per week and applies same to the pre-existing debt owed him by the judgment debtor. He then pays the judgment debtor $60.00 per week and advises the court and the judgment creditor that he has no further liability under the garnishment.

Would this contention be correct? If it is incorrect, what would be the liability of the judgment debtor's employer under the garnishment?"

It would be my opinion that the contention of the employer is without merit. Section 34-29 of the Code of Virginia (1950), as amended, which provides the maximum portion of wages subject to garnishment applies only to "garnishments" which is defined as "... any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." Va. Code Ann. § 34-29 (d) (3) (1950), as amended. An employer withhold monies owed him by an employee is not a legal or equitable procedure within the contemplation of the statute, and therefore, the $20.00 that he withholds would not be counted toward the maximum part of the earnings of the individual which would be subject to
garnishment. The judgment debtor's employer, consequently, would be required to withhold the full $20.00 under the garnishment served upon him.

GENERAL ASSEMBLY—Elected Member May Be Appointed Judge If He Does Not Qualify As Member by Taking Oath of Office.

JUDGES—Elected Member of General Assembly May Be Appointed Judge If He Does Not Qualify As Member by Taking Oath of Office.

PUBLIC OFFICERS—Compatibility of Office; Elected Member of General Assembly May Be Appointed Judge If He Does Not Qualify As Member by Taking Oath of Office.

CONSTITUTION—Eligibility of Member of General Assembly for Appointment As Judge.

January 11, 1972

THE HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

I am in receipt of your letter of January 10, 1972, wherein you request my opinion whether you are eligible for appointment by the General Assembly to a judgeship in a court of record of the Commonwealth. You, of course, are presently a member of the Senate of the General Assembly of Virginia and were recently reelected for a four year term, commencing January 12, 1972.

Article IV, Section 5, of the revised Virginia Constitution, is applicable to your inquiry and reads in pertinent part as follows:

"... No member during the term for which he shall have been elected shall be elected by the General Assembly to any civil office of profit in the Commonwealth."

I enclose herein a previous opinion of this office to the Honorable John S. Battle, Governor of Virginia, dated August 20, 1952, found in Report of the Attorney General (1952-1953), p. 116, which discusses thoroughly the case of Norris v. Gilmer, 183 Va. 367, 32 S.E.2d 88 (1944), relating to eligibility of members of the General Assembly for appointment for judgeships. In both the enclosed opinion and the Norris case, the individuals in question were qualified members of the General Assembly. However, one is not a qualified member of the General Assembly until he takes the oath of office prior to entering upon the performance of his duties, as required by Article II, Section 7. Upon taking such oath the prohibition found in Article IV, Section 5, would become applicable. If you fail to take the oath and thus fail to qualify for office, then I am of the opinion that you would not be a member during the term for which you shall have been elected within the prohibition as found in Article IV, Section 5.

Consequently, in response to your inquiry, I am of the opinion that you are eligible for appointment to a judgeship by the General Assembly of Virginia even though you were reelected for a four year term commencing in January 1972, provided that you do not qualify for such term by taking the required oath of office.

GENERAL ASSEMBLY—Expenses of Members; Travel by Private Transportation Reimbursed by Nine Cents Per Mile Plus Highway and Bridge Tolls; Actual Cost of Public Transportation Reimbursed.

March 20, 1972

THE HONORABLE EDWARD E. WILLEY
President Pro Tempore, Senate of Virginia

I am in receipt of your letter of March 7, 1972, relating to allowances for
members of the General Assembly as set forth in § 14.1-18.1(b) of the Code of Virginia (1950), as amended, which reads as follows:

"The President of the Senate and each member of the General Assembly, including the Speaker of the House of Delegates, shall, during any regular session of the General Assembly or extension thereof, or during any special session of the General Assembly, receive the following allowances for expenses:

(b) Nine cents per mile or actual expenses for all official travel; provided, however, that reimbursement shall be allowed only for one round trip each week between the city of Richmond and such person's home."

You inquire as follows:

"I shall appreciate your opinion as to whether or not 'Nine cents per mile or actual expenses for all official travel' would allow the Clerk of the Senate to prepare vouchers for travel expense such as travel by plane or the cost of the fare charged by the Chesapeake Bay Bridge-Tunnel, when a senator is making a trip to or from the city of Richmond and his home."

I am of the opinion that, if travel is by private transportation, reimbursement is authorized at the rate of nine cents per mile. However, if travel is by public transportation, actual cost thereof may be reimbursed. Such construction is consistent with the existing administrative interpretation relating to travel expenses and with § 14.1-5.

I am also informed that the present administrative practice is that the nine cents mileage allowance does not include highway and bridge tolls, and thus such costs may be reimbursed. See also, § 14.1-9. I am, therefore, of the opinion that fares for such tolls are allowed, in addition to the mileage allowance provided for in § 14.1-18.1(b).

GENERAL ASSEMBLY—Members—No automatic continuance to members of the General Assembly in hearings before District Committees of Virginia State Bar.

ATTORNEYS—Members of General Assembly—No automatic continuance to members of the General Assembly in hearings before District Committees of Virginia State Bar.

July 2, 1971

THE HONORABLE N. SAMUEL CLIFTON
Executive Director, The Virginia State Bar

This is in response to your request for my opinion concerning the applicability of § 30-5 of the Code of Virginia (1950), as amended, to formal hearings before District Committees of the Virginia State Bar. Specifically, you asked:

"... is a District Committee a '... commission or other tribunal having judicial powers or quasi judicial powers or jurisdiction ...', within the purview of Section 30-5 which would entitle a lawyer-defendant to a continuance as a matter of right as prescribed in Section 30-5 where a party is represented by a General Assembly member or other attorney connected with the General Assembly?"

In my opinion, proceedings before the District Committees of the Virginia State Bar are not proceedings before a tribunal exercising judicial or quasi-judicial powers, bringing them within the meaning of § 30-5 of the Code. This section provides that:

"Any party to an action or proceeding in any court, including the
Supreme Court of Appeals of Virginia, commission or other tribunal having judicial or quasi judicial powers or jurisdiction, who is an officer, employee or member of the General Assembly, or employee of the Division of Statutory Research and Drafting, or who has, prior to or during the session of the General Assembly, employed or retained to represent him in such action or proceeding an attorney who is an officer, employee or member of the General Assembly, or employee of the Division of Statutory Research and Drafting, shall be entitled to a continuance as a matter of right during the period beginning thirty days prior to the commencement of the session and ending thirty days after the adjournment thereof;...

The District Committees of the Virginia State Bar which have been established by the Supreme Court of Appeals of Virginia have the power to conduct investigation and hearings into the conduct of attorneys within their jurisdictions. However, the Committee can take no action to discipline the attorney and it has only three options that it may exercise. It may drop the matter, it may petition the Court for an injunction and reprimand or it may petition the Court for disbarment of the attorney. Rules For Integration of The Virginia State Bar, part six, Section IV (13). The committee itself has no power to actually determine any of the rights or privileges of the attorney in question.

The term “judicial power” contemplates the exercise of discretion in determining questions of relative rights in specific cases. Quasi-judicial power has been defined as the power to grant or deny a privilege. Blankenship v. City of Richmond, 188 Va. 97. The District Committees in no way determine the rights or privileges of the attorney, nor do they adjudicate any questions of right between him and other persons. They perform merely an investigative function and would, therefore, not be within the contemplation of § 30-5 of the Code.

GENERAL ASSEMBLY—Members Included in Health Insurance Benefits for State Employees; Not an Increase in Salary.

HEALTH—Insurance—Members of General Assembly included in health insurance benefits.

June 21, 1972

THE HONORABLE JOHN C. BUCHANAN
Member, Senate of Virginia

This is in response to your letter of May 23, 1972, to The Honorable Louise O. Lucas, forwarded by her to this office, in which you posed the following question:

"Does the application of Chapter 803 of the 1972 Acts of Assembly, which provides health insurance benefits for State employees, to members of the General Assembly constitute an increase in salary which may not constitutionally be implemented during the present term of any such member?"

The Act provides an amended § 2.1-20.1 of the Code of Virginia (1950). At subsection (1) thereof, it is provided that "the State [will pay] the cost . . . to the extent of the coverage included in such plan [for State employees]." At subsection (4) thereof, it is provided that "the term 'State employee' includes State employees as defined in paragraph (5) of § 51-111.10 of the Code of Virginia . . . ." The term "State employee," as defined in § 51-111.10, appears to include members of the General Assembly.

Article IV, Section 5, of the Constitution of Virginia (1971) provides as follows:

"The members of the General Assembly shall received such salary
and allowances as may be prescribed by law, but no increase in salary shall take effect for a given member until after the end of the term for which he was elected. No member during the term for which he shall have been elected shall be elected by the General Assembly to any civil office of profit in the Commonwealth."

The principal determination, then, is whether the purchase by the State of health insurance for members of the General Assembly constitutes a salary increase. As an initial observation, it should be recalled that "every act of the legislature is presumed to be constitutional, and ought to be sustained . . ., unless the conflict between the statute and the Constitution be palpable." Fidelity Ins. and C. Co. v. Shenandoah Valley Railroad Co., 81 Va. 1, 5 (1889).

In Unemployment Compensation Commission of Virginia v. Union Life Insurance Company, 184 Va. 54 (1945), the Supreme Court of Virginia defined "salary" as "a fixed annual or periodical payment for services, depending upon the time and not the amount of services rendered." 184 Va. at 60. In the Fidelity Insurance Co. decision, supra, the court noted that "salary" is a "term . . . usually applied to the reward paid to a public officer for the performance of his official duties." 86 Va. at 8.

It should be noted that the constitutional provision in question distinguishes "salary" from "allowances" by providing that "salary and allowances [shall be as] prescribed by law, but no increase in salary shall take effect . . ." (emphasis added). No decisions in Virginia have been found which define "allowance" or contrast it with the term "salary." However, the multitude of decisions in other states dealing with these terms usually contrast the word "allowance" with "salary" on the ground that the former term is variable and uncertain while the term "salary" involves a stated compensation paid on a fixed basis. Some decisions in other states have held the terms to be synonymous; however, in light of the phraseology of Article IV, Section 5, a conclusion that the framers of the Virginia Constitution were using terms which they perceived as synonymous would be impermissible.

In my opinion, the purchase of health insurance by the State for members of the General Assembly is more in the nature of an allowance than in the nature of an increase in salary. The net economic benefit to members of the General Assembly derived from the assumption by the State of the cost of such health insurance is not fixed and certain. The master contract negotiated by the State with the group carrier is subject to annual renegotiation of coverage and rates—a matter not under the control of the General Assembly. The existence of any added economic benefit depends upon whether the purchase of such insurance for members of the General Assembly relieves the individual legislators of any perceived necessity to continue other coverages paid for by themselves. If legislators who presently have coverage under plans other than the current State-sponsored, employee-paid plan choose to continue paying for such coverages after July 1, 1972, then the inclusion of such legislators in the new State-paid plan will produce no added economic benefit for them. On the other hand, even if such legislators discontinue such other coverages after July 1, 1972, the duration of such economic benefit is uncertain, since competitors of the group carrier selected by the State may devise more attractive coverages or premiums than those in the current State plan, thus generating decisions on the part of such legislators to purchase such other coverages in lieu of or in addition to the State-paid coverage.

In addition, it is my opinion that the purchase of health insurance by the State for members of the General Assembly is not in the nature of an increase in the "reward paid to a public officer for the performance of his official duties," as the Fidelity Insurance Co. decision defined the term "salary." Rather, the purchase of such insurance by the State is incidental to the employer-employee relationship, manifesting the State's desire to
protect its own interest by providing its employees protection against financial hardship due to the expense associated with hospitalization.

By purchasing such insurance for legislators, the State has not changed the gross salary of any legislators. Rather, it has created conditions under which the legislators' decisions as to how to spend such salary may or may not be changed.

In other states, increases in allowances for lodging and travel expenses have been held not to come within the constitutional prohibition against increases in salary for members of the legislature during the term for which they have been elected. In re Interrogatories by the Colorado State Senate, 46th General Assembly, Colorado, 168 Colo. 558 (1969); State ex rel. Lyons v. Guy, N.D., 107 N.W. 2d 211 (1961). In a New York decision, it was held that a State administrator was not required to include fringe benefits relating to hospital insurance when calculating salaries of local officials for purposes of establishing the level of State supplements to such salaries. Erie County v. Hoch, 270 N.Y.S. 2d 225 (1966).

In summary, the mere fact of possible economic benefit accruing to members of the General Assembly from the purchase of health insurance for them by the State is insufficient in my mind to overcome (1) the fact that, analytically, such benefit bears a stronger resemblance to an allowance than to a salary increase and does not closely resemble the "reward paid to a public officer for the performance of his official duties;" (2) the persuasiveness of decisions in other states; and (3) the fact that this legislation is presumptively constitutional.

GENERAL ASSEMBLY—Members Not Immune From Civil Process.

January 14, 1972

THE HONORABLE JAMES H. YOUNG, Sheriff
City of Richmond

This is in reply to your letter of December 17, 1971, in which you request an opinion as to whether service of civil processes can be made on members of the General Assembly while the Assembly is in session.

Article IV, Section 9, of the revised Constitution of Virginia provides that members of the General Assembly shall be privileged from arrest in all cases except treason, felony, or breach of the peace, and further that they shall not be subject to arrest under any civil process during the sessions of the General Assembly. This immunity is further set out in §§ 30-6, 30-7, and 30-8, Code of Virginia (1950), as amended. Specifically, § 30-6 of the Code provides as follows:

"During the session of the General Assembly, and for five days before and after the session, a member of the General Assembly, the clerks thereof and their assistants shall be privileged from being taken into custody or imprisoned under any process except as provided in § 30-7; nor shall such persons for such periods of time be subject to process as a witness in any case, civil or criminal."

It would appear clear that these provisions providing for immunity for members of the General Assembly are intended to prohibit such actions being taken so as to prevent said members from being in attendance at the session of the General Assembly. However, the mere service of civil processes on members of the General Assembly would not in any way infringe upon or hinder their duties in the General Assembly. Since the service of such civil processes is not specifically prohibited, it would be my opinion that members of the General Assembly would not be immune from such service of process.

This, of course, would not affect a member of the General Assembly
from exercising his right of immunity from being subpoenaed as a witness in either a civil or a criminal case, in accordance with § 30-6 of the Code.

GOVERNOR—State-owned Vehicles—Control over.
MOTOR VEHICLES—State-owned—Supervision over.

August 20, 1971

THE HONORABLE DOUGLAS B. FUGATE, Commissioner
Department of Highways

This is in reply to your letter of August 10, 1971, which reads as follows:

"Subsequent to recommendations of the Governor's Management Study, and recommendations by Dr. Richard Powers, Implementation Coordinator, and the Central Car Pool Committee, an advisory agency appointed by the Governor, of which I am chairman, the Governor now desires to issue a revised Executive Order carrying out a recommendation that all State-owned passenger type motor vehicles other than those specially equipped for police use be brought under the control of the State Car Pool.

"Section 2.1-47 of the 1950 Code authorizes the Governor to regulate those vehicles 'in the possession of any department, institution or agency thereof, his supervision over which is not forbidden by the Constitution.'

"Since the Governor has delegated to the Central Car Pool Committee responsibility for revising the Executive Order to carry out the recommendations above referred to, your opinion is requested as to what, if any, agencies would be expected from the provisions of this statute."

The Constitution of Virginia contains no language which forbids supervision by the Governor over vehicles "in the possession of any department, institution or agency thereof." I am therefore of the opinion that no agencies of State government are excepted from the provisions of § 2.1-47 of the Code.

HEALTH—Consent to Surgical and Medical Treatment of Eighteen Year Old in Emergency.
MEDICINE—Surgical and Medical Treatment, Eighteen Year Old May Consent to in Emergency.

April 24, 1972

THE HONORABLE VON L. PIERSALL, JR.
Judge, Juvenile and Domestic Relations Court

I am in receipt of your recent letter wherein you make reference to § 32-137 of the Code of Virginia (1950), as amended, and request an interpretation of the same as it applies to the following two inquiries. I will consider and answer your inquiries as posed.

First, your initial inquiry reads as follows:

"... can an 18 year old give consent for surgical or medical treatment in an emergency where such treatment is necessary if his parents cannot be readily located? Must the hospital get consent from the Judge in such cases?"

Section 32-137 of the Code reads in pertinent part as follows:

"Whenever any person who is under twenty-one years of age and who has been separated from the custody of his parent or guardian
is in need of surgical or medical treatment, authority, commensurate with that of a parent in like cases, is conferred, for the purpose of giving consent to such surgical or medical treatment, as follows:

“(5) Any person eighteen years or older who has been separated from the custody of his parent or guardian, and whose custody is not within the control of the courts or institutions hereinabove enumerated, who is in need of surgical or medical treatment may consent to such surgical or medical treatment.

“(6) Any person standing in loco parentis, conservator or custodian for his ward or other charge under disability.

“Whenever the consent of the parent or guardian of any person who is under twenty-one years of age and who is in need of surgical or medical treatment is unobtainable because such parent or guardian is not a resident of this State or his whereabouts is unknown or cannot be consulted with promptness, reasonable under the circumstances, authority, commensurate with that of a parent in like cases, is conferred, for the purpose of giving consent to such surgical or medical treatment, upon judges of juvenile and domestic relations courts.”

As noted in the above quotation, subparagraph (5) of § 32-137 only allows the person eighteen years of age or older to consent to needed surgical or medical treatment if the individual has been separated from the custody of his parent or guardian and the individual is not under the control of the court or enumerated institution. The specific paragraphs of § 32-137 stand independently of each other and, therefore, I am of the opinion that a mentally competent person eighteen years of age or older, if separated from the custody of his parent or guardian, can legally and validly consent to surgical or medical treatment. Therefore, in the absence of a statutory exception, in my opinion, the first part of your first inquiry is answered in the affirmative. Further, with respect to the second portion of your first inquiry, the hospital need not get consent from the judge in such cases.

Your second inquiry reads as follows:

“... can consent be given by someone in whose care the child has been left temporarily by the parents or by someone who has had the child in their residence for a long period of time that has not had custody granted to it by the Court or been appointed a guardian?”

As stated in subparagraph (6), the authority to consent to needed surgical or medical treatment for one under disability, minority or otherwise, is conferred upon the conservator, custodian or person standing in loco parentis to such person. Therefore, in my opinion, there is no legal requirement that such consent be obtained from one who has been formally appointed guardian. Thus, your second inquiry is answered in the affirmative.

HEALTH—Health Service—Salpingectomy.

HEALTH—Salpingectomy—Age at which consent may be given.

October 19, 1971

THE HONORABLE CHARLES L. MCCORMICK, III
Commonwealth's Attorney for Halifax County
and City of South Boston

This is in reply to your letter of October 1, 1971, in which you present the following inquiries:

“(1) May a salpingectomy be performed upon a sixteen 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
and there is no therapeutic reason for performing the operation, if because the girl is carrying her third child she and her parents desire that the operation be performed?

(2) In the event that such surgery is authorized by law, whose consent to the operation would be required?

With respect to your first 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. . . ."

Therefore, in view of the aforementioned Code section, it is my opinion that a salpingectomy, though surgical, is a health service which is used as a means of birth control and would be authorized by the above section.

With respect to your second inquiry, 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 § 32-137 of the Code and the consent of the parent, guardian, or other person standing in loco parentis is unnecessary. See opinion of the Attorney General dated April 28, 1971, to the Honorable Mack I. Shan Holtz, M.D., State Health Commissioner, a copy of which is enclosed.

HEALTH—Regulation of Trailer Camps—What constitutes a trailer camp.

TRAILER CAMPS—Regulation by State Board of Health.

October 20, 1971

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

This is in reply to your letter of October 13, 1971, in which you presented the following factual situation and inquiry which follows:

"In Shenandoah County, we have a landowner who is putting six trailers on permanent concrete foundations on real estate owned by him for the purpose of renting same as rental units. There are no wheels or axles concerned regarding these trailers as they are intended to be erected thereon permanently and totally owned by said landowner. There will be no additional spaces rented to any other trailer or mobile home owners. It will not be open to the public and will be treated more as if they are separate housing units for rental purposes."

Thereafter, you pose the following inquiry:

"Under the above set of circumstances, would such a situation constitute a trailer camp under the definition as set forth in Code Section 35-65 and therefore be subject to the regulation by the State Board of Health?"

Section 35-65 of the Code of Virginia (1950), as amended, reads as follows:

"As used in this article, the term ‘trailer camp’ means any plot of ground upon which is located or which is held out for the location of any camp for any motor vehicle or trailer which is used or is intended to be used for business, living or sleeping purposes and which is, or may be transported from one place to another whether motive power or other means be required."
With respect to determining the applicability of Article 2, Title 35 of the Code, one must look to the intended use of the rental units in question as well as to their physical modifications. In my opinion, the removal of the wheels or axles from a trailer do not, per se, remove such a structure from the application of Article 2 of Title 35 of the Code. The application of the last cited article is one which must be decided on a case by case approach taking into consideration the intended use and alterations of the unit. Therefore, in my opinion, in the factual situation which you posed, there would be a necessity for the application of Section 35-65 and the health regulations adopted pursuant to Section 35-73 of the Code.

HEALTH INSURANCE—State Employees Covered Under Another Employer-paid Accident and Sickness Plan.

May 24, 1972

THE HONORABLE JOHN W. GARBER, Director Division of Personnel

This is in response to your letter of May 19, 1972, in which you request the opinion of this office on certain matters relating to the following language contained in Item 751 of the General Appropriation Act for 1972-74, providing funds for a State employee medical/hospitalization insurance program:

"Any program funded out of this appropriation shall include the following provision: any State employee, as defined in HB 22 (1972), as amended, shall have an option to accept or reject coverage, except that it is the intention of the General Assembly that coverage not be purchased for an employee who has like coverage under another employer-paid contract."

You specifically inquired whether, in light of the above language, State employees covered under other employer-paid plans providing a lower level of benefits than the State plan are eligible for inclusion in the State plan, and whether the answer to that question applies to State employees who are retired from the Armed Services of the United States and, on that basis, covered under the CHAMPUS plan.

The Virginia Supreme Court, in State Farm Mutual Auto Insurance Company v. Brower, 204 Va. 887 (1964), held that the term "coverage," in the insurance context means "protection by insurance policy or inclusion within the scope of a protective or beneficial plan . . ." 204 Va. at 891. In Grossman v. Glen Falls Insurance Company, 211 Va. 195 (1970), the same Court affirmed the holding in Brower and went on to observe that the term "coverage" means more than "mere ownership and possession of a contract of . . . insurance." In doing so, the Court emphasized the relationship by definition between the term coverage and the concept of actual protection.

The use of the term "coverage" in the several sections of which Article 2, Title 38.1, consists reflects the essential meaning ascribed to that term by the Court. The Code speaks of "coverage" in terms of particular types of benefits provided (§§ 38.1-350(6), 38.1-360(1) and 38.1-360(2)); or, that term may be used with respect to specific classes of insured events or conditions (§§ 38.1-349(13) and 38.1-349.2); or, the term "coverage" may be used in a general sense to refer to the entirety of protection afforded under the policy (§§ 38.1-348.2, 38.1-348.4 and 38.1-351).

Webster’s Third New International Dictionary, at page 1310, defines the adjective “like” as follows:

"The same or nearly the same; equal or nearly equal; identical; indistinguishable; similar."

Therefore, it may be seen from the above discussion that the phrase
“like coverage,” in the context of insurance, means the same or nearly the same protection or beneficial provisions in a contract of insurance. If a State employee is covered under another employer-paid accident and sickness insurance policy which does not provide benefits and protective provisions which are the same or nearly the same as those in the State plan, such employee would be eligible for inclusion in the State plan. Likewise, a State employee retired from the Armed Services of the United States and covered under an accident and sickness insurance policy in that capacity would be eligible for inclusion in the State plan if the benefits and protective aspects of the military-related policy are not the same or nearly the same as those in the State plan.

To summarize, the critical determination lies not in whether the State employee is covered under another employer-paid accident and sickness plan, but whether the benefits and protective features of that policy are the same or nearly the same as those of the State plan. If they are not, the employee is eligible for inclusion in the State plan. If they are approximately equal to, or exceed, the benefits of the State plan, the employee would not be eligible for inclusion in such plan. Since this office is advised that the benefits under the CHAMPUS plan are approximately 75% of those in the State plan, persons covered under CHAMPUS are eligible for inclusion in the State plan.

HIGHWAYS—Road Systems in Sanitary Districts—Authority of sanitary district to construct, maintain and improve limited.

SANITARY DISTRICTS—Authority to Construct, Maintain, Improve, Add To, and Operate A Road System—Limited to roads necessary to supply sanitary facilities to the district.

October 22, 1971

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

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

“I have been requested by the Warren County Board of Supervisors to obtain your opinion as to the authority and power of the County to construct, improve, add to and maintain roads within a sanitary district, created under the provisions of Chapter 2 of Title 21 of the Code of Virginia of 1950, as amended.

“The Circuit Court of Warren County has created a sanitary district which is composed solely of the land lying within a subdivision which was platted and placed on record some years ago, prior to the adoption of a subdivision ordinance for Warren County. Although the roads are platted and dedicated to the public, some of the roads are not physically in existence, and all of the roads need considerable improvement to be brought up to the State Highway Department standards before they can be included in the State Highway system. Consideration is now being given to having the construction, maintenance and improvement of these roads being done by the sanitary district.

“I have two questions, as follows:

(1) Do the provisions of Section 21-118.4 (a) permit the sanitary district to construct, maintain, improve, add to and operate a road system in this fashion and

(2) If the answer to question one is in the affirmative, then what method would be proper for the sanitary district to raise the necessary funds to perform these functions.”
Section 21-118.4 of the Code was enacted as Chapter 571, Acts of Assembly of 1962, the title to which reads as follows:

"An Act to amend the Code of Virginia by adding a section numbered 21-118.4, relating to creation of sanitary districts, so as to provide for certain additional powers therefor."

The powers which are enumerated in that Act of Assembly are in addition to those previously conferred by the General Assembly relating to the creation of sanitary districts. Manifestly, the primary function of a sanitary district is to provide sanitary facilities to persons within the district. The powers which have been conferred upon the governing bodies of the several counties must be interpreted in light of the purpose for which they are granted. Obviously, the Legislature did not intend for the counties to enter into a road construction program under the guise of establishing sanitary facilities when the governing bodies were empowered to "construct, reconstruct, maintain, alter, improve, add to, and operate motor vehicle parking lots, water supply, drainage, sewerage, garbage disposal, heat, light, power, gas, sidewalk, curbs, gutters, streets and street name signs and fire fighting systems."

I am of the opinion that § 21-118.4 (a) of the Code empowers the governing body to construct streets, parking lots, sidewalks, etc., within sanitary districts only to the extent necessary to accommodate the purpose of supplying sanitary facilities to said district. Unless the above described road system involves streets, parking lots, sidewalks, etc. within the sanitary district necessary to accommodate the purpose of supplying sanitary facilities to the district, the county is without authority to construct, maintain, improve, add to and operate the system.

The proper method for a county sanitary district to follow to raise necessary funds to construct, maintain, improve, add to and operate streets, parking lots, sidewalks, etc. within the district is to levy and collect on annual tax upon all the property in such sanitary district subject to local taxation. This is provided for by § 21-118 (6) of the Code.

HOSPITAL AUTHORITY—Empowered to Rent Health Department Building to City and County.

May 1, 1972

THE HONORABLE SOL GOODMAN
Commonwealth’s Attorney for the City of Hopewell

I am in receipt of your recent letter wherein you state that the Hopewell Hospital Authority, established pursuant to Chapter 13 of Title 32, is investigating the possibility of building a Health Department Building to be rented to the City of Hopewell and County of Prince George for their health departments. Thereafter, you ask:

"... whether or not an authority would have the right to rent property."

Section 32-251 of the Code of Virginia (1950), as amended, reads as follows:

"An authority shall have power to sell, exchange, transfer, or assign, any property real or personal or any interest therein to any person, firm, corporation, city, county, town or government."

In view of the fact that § 32-251 refers to "any property real or personal or any interest therein" it is, in my opinion, clear that the Hospital Authority is empowered to make the rental referred to in your letter.
REPORT OF THE ATTORNEY GENERAL

HOSPITALS—Community—Included in definition of medical facility under Industrial Development and Revenue Bond Act.

INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT—Medical Facility—Includes Community Hospital.

November 22, 1971

THE HONORABLE JOHN ROGER THOMPSON
Commonwealth's Attorney for Wythe County

This is in reply to your letter of November 2, 1971, in which you ask whether the Wythe County Community Hospital Inc., is considered a "facility" within the meaning of § 15.1-1374(d) of the Industrial Development and Revenue Bond Act (§§ 15.1-1373 through 15.1-1390) which would permit its financing by the Industrial Development Authority of Wythe County.

Section 15.1-1374(d) of the Code reads as follows:

"(d) 'Authority facilities' or 'facilities' shall mean any or all medical (including, but not limited to, office and treatment facilities) and industrial facilities, located within or without or partially within or without the municipality creating the authority, now existing or hereafter acquired or constructed by the authority pursuant to the terms of this chapter, together with any or all buildings, improvements, additions, extension, replacements, appurtenances, lands, rights in land, water rights, franchises, machinery, equipment, furnishings, landscaping, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, acquired or constructed by the authority."

I am of the opinion that the Wythe County Community Hospital, Inc., is a medical facility within this definition. Under § 15.1-1378(d) the Industrial Development Authority of Wythe County is authorized to acquire the facility. Therefore, in my opinion the facility may be financed by the Authority.

HOSPITALS—Hospital Abortion Review Board—Abortion—Composition of membership of board; specialist as defined by abortion act.

ABORTION—Hospital Abortion Review Board—Composition of.

September 8, 1971

THE HONORABLE GEORGE S. ALDHIZER, II
Member, Senate of Virginia

This is in reply to your recent letter wherein you make reference to § 18.1-62.2 of the Code of Virginia (1950), as amended, as it refers to the Hospital Abortion Review Board. Specifically, you request my opinion "... as to whether the physician who is a specialist in obstetrics and gynecology, licensed to practice medicine and surgery, must be a member of the American Board of Obstetrics and Gynecology, in order to qualify as a specialist under the statute, or is it sufficient that one qualified to be a member of said Board may properly serve as a member of the Hospital Abortion Review Board."

Section 18.1-62.2 of the Code of Virginia (1950), as amended, reads in pertinent part as follows:

"... For purposes of this section, the phrase 'specialist in obstetrics and gynecology' shall mean and include any physician who is recognized by the American Board of Obstetrics and Gynecology as certified, eligible, or qualified as these terms are defined by such Board, or one who limits his practice to obstetrics and gynecology. ..."
The above amendment, which was effective September 1, 1971, was enacted by the 1971 Special Session of the General Assembly.

Therefore, in my opinion, a physician who is certified, eligible, or qualified as these terms are defined by the American Board of Obstetrics and Gynecology, or one who limits his practice to obstetrics and gynecology, can properly serve as the specialist member of the Hospital Abortion Review Board.

INDUSTRIAL DEVELOPMENT AUTHORITIES—Authority—May acquire or construct facilities anywhere in the Commonwealth.

INDUSTRIAL DEVELOPMENT AUTHORITIES—Authority — May acquire or construct facilities for selling agriculture products at wholesale or retail.

October 21, 1971

THE HONORABLE WILLIAM H. HODGES
Member, Senate of Virginia

This is in reply to your letter of October 18, 1971, which reads, in part, as follows:

"Your opinion is requested on the scope of authority granted to Industrial Development Authorities which have been created under Title 15.1, Chapter 33, of the Virginia Code of 1950, as amended.

"Inasmuch as Section 15.1-1374(d) defines authority facilities as those, ‘... located within or without or partially within or without the municipality creating the authority ... acquired or constructed by the authority,’ are not such authorities empowered to acquire or construct facilities anywhere in the Commonwealth so long as the criteria of this title and chapter are met? Would this geographical freedom not be in addition to powers to act jointly granted by Section 15.1-1387?"

I am of the opinion that both questions are answered in the affirmative.

"In addition to the above questions, is it not the legislative intent that this chapter also authorizes in Section 15.1-1374 the ‘manufacturing, processing, assembling, storing, warehousing, distributing or selling any products of agriculture ...’ which may include retail sales of agricultural products as well as wholesale?"

In my opinion the term "selling any products of agriculture" includes both selling at wholesale or retail.

INVESTMENTS—Individual or Corporate Fiduciaries—Appropriateness of sale of a call option must be judged by standards set for retaining, selling and managing property.

May 31, 1972

THE HONORABLE JOSEPH A. LEAFE
Member, House of Delegates

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

"A ruling is respectfully requested from you with respect to whether the selling and retaining of options to sell stock, normally referred to as ‘calls’ in the securities industry, is a prudent investment for individual or corporate fiduciaries owning said stocks in accordance with the provisions of § 26-45.1 of the Virginia Code, based on the assumptions set forth below and barring any peculiar or special circumstances in any particular case that would prevent the sale of said stocks."
A fiduciary selling a call on stock which he owns subjects his estate to two risks. First, the estate loses any possible appreciation above the call price. Also, the sale of the call may have the effect of freezing the estate in an investment which, based upon subsequent events but prior to the expiration of the option, prudence would require selling. I am unable to give an opinion as to whether a particular investment is prudent, for this would require detailed knowledge of all the surrounding facts and circumstances. I am of the opinion, however, that the sale of a call option by a fiduciary owning the underlying stock would not per se be imprudent.

I do not, however, consider the sale of a call option to be the acquisition or retention of “every kind of property, real, personal or mixed, and every kind of investment,” within the meaning of the second sentence of § 26-45.1(a). Although the first sentence of § 26-45.1(a) does not prohibit the sale of a call option under appropriate circumstances, nevertheless the second sentence of § 26-45.1(a) does not expressly empower a fiduciary to sell such an option. The appropriateness of the sale of a call option must be judged by the standards set for “retaining, selling and managing property.”

JUDGES—Canons of Judicial Ethics—Prohibits town judge from prosecuting appealed town cases in Circuit Court.

TOWNS—Judges—May not prosecute town cases on appeal to Circuit Court.

March 6, 1972

THE HONORABLE W. J. WILLIAMS, Judge
Town Court of Chase City

This is in response to your recent letter in which you advise that the Commonwealth’s Attorney of Mecklenburg County has recently refrained from prosecuting cases appealed from the Town Court of Chase City to the Circuit Court of Mecklenburg County and that the Town of Chase City has experienced some difficulty since that time in receiving satisfactory prosecution of appeal cases. You inquire as follows:

“I have been asked by Mayor Elam to inquire if it would be proper for a Town Judge to prosecute appealed Town cases in the Circuit Court. Since, the Commonwealth’s Attorney often prosecutes misdemeanors in the County Court and appeal cases in the Circuit Court, we see no reason why a Judge of a Court not of record could not prosecute cases from his Court on appeal in the Circuit Court.”

It would appear that your inquiry is governed by the Canons of Judicial Ethics which states in Canon 24 that “a judge should not accept inconsistent duties . . .” and in Canon 29 it is stated as follows:

“A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.”

It is my opinion that for a judge to appear as an attorney in a court of record on behalf of one of the parties in the appeal of a decision which he himself has rendered as judge in the lower court would be inconsistent with the Canons of Judicial Ethics as he would then become a partisan advocate and not an impartial arbiter. Thus, it is my opinion that such a procedure would be improper and impermissible.

JUDGES—Part-time Judge of Court Not of Record May Practice Law While Drawing State Retirement Benefits.
REPORT OF THE ATTORNEY GENERAL

February 24, 1972

THE HONORABLE W. FRANCIS BINFORD, Judge
Prince George County Court

I have received your recent letter in which you ask:

"I wish you would please advise me if, in your opinion, there is any prohibition of my continuing to practice law after my retirement and still draw the retirement payments due me under Chapter 7, Title 51 of the Code of Virginia."

The first paragraph of Virginia Code § 51-179 provides:

"No former justice or judge of a court or record of the Commonwealth and no former full-time judge of a court not of record of the Commonwealth, who is retired and receiving retirement benefits under the provisions of Chapter 7 (§ 51-160 et seq.) of Title 51 of the Code of Virginia, shall appear as counsel in any case in any court of the Commonwealth."

Section 51-179 does not apply to a part-time judge of a court not of record. I am aware of no other provision of law which would prohibit you from practicing law while drawing State retirement benefits.

JUDGES—Retired Judge Not Prohibited from Serving on Historical Commission.

JUDGES—Constitutional Prohibitions Concerning Holding Office Applicable Only During Continuance in Office.

March 29, 1972

THE HONORABLE WALTER T. MCCARTHY, Judge
Circuit Court of Arlington County

I am in receipt of your letter of March 31, 1972, which reads as follows:

"Will you please advise me of your opinion as to whether or not a judge who has been retired is affected by the provisions of Article VI, Section 11 of the Constitution or of Section 17-3.1 of the Code.

"I have been asked to serve on the Arlington Historical Commission—a Commission appointed by the County Board. Do you know of any provision of law that would prohibit me from serving in this capacity?"

Article VI, Section 11, of the revised Virginia Constitution, codified in § 17-3.1 of the Code of Virginia (1950), as amended, provides:

"No justice or judge of a court of record shall, during his continuance in office, engage in the practice of law within or without the Commonwealth, or seek or accept any nonjudicial elective office, or hold any other office of public trust, or engage in any other incompatible activity."

The prohibitions contained in the Constitution and Code are applicable only during continuance in office. While the prohibition regarding the practice of law is partially carried forward in § 41-179, regarding former justices or judges of courts of record receiving retirement benefits under the provisions of Chapter 7 (§ 51-160, et seq.) of Title 51, I am unaware of any similar prohibition, subsequent to retirement, regarding the holding of an office of public trust. I am, therefore, unaware of any reason why you may not serve on the Arlington Historical Commission, and your inquiry is answered in the negative.
REPORT OF THE ATTORNEY GENERAL

JUDGES—Town Municipal Courts—Not active members of Judicial Conference of Virginia of Courts Not of Record.

COURTS—Construction of Term “Municipal Courts” under § 16.1-218; Judge of a Municipal Court of a Town not Included.

February 25, 1972

THE HONORABLE ADELAARD L. BRAULT
Member, Senate of Virginia

This is in response to your recent letter in which you requested my opinion concerning the construction of § 16.1-218 of the Code of Virginia (1950), as amended, especially with regard to whether the judges of municipal courts of towns are active members of the Judicial Conference of Virginia of Courts Not of Record.

Section 16.1-218 of the Code of Virginia provides in pertinent part:

“There is hereby established a Judicial Conference of Virginia for Courts Not of Record whose active members shall be the active judge and associate judge, or full time assistant judge of every municipal county and juvenile and domestic relations court of the Commonwealth. . . .”

For your purposes, the instant inquiry relates principally to the construction of the term “municipal court” within the context of this section. Section 16.1-5 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

“Whenever the words ‘municipal courts’ appear in this title they shall mean and include all courts in cities heretofore designated as municipal courts, civil courts, civil justice courts, police courts, civil and police courts, traffic courts, and all other city courts not of record however designated except juvenile and domestic relations courts and courts of limited jurisdiction authorized in chapter 5 (§ 16.1-70 et seq.) of this title.”

Section 16.1-70 referred to in the above quoted passage refers to courts of limited jurisdiction as being:

“All existing courts in cities and towns created under former § 16-129, and all similar courts created under the provisions of municipal charters, which courts are presided over by mayors, justices of the peace, police justices or other trial officers however designated and the jurisdiction of which is limited to cases involving violations of city or town ordinances or of cases instituted for the collection of city or town taxes or assessments or other debts due and owing to such city or town, are hereby continued with the same jurisdiction and powers heretofore conferred upon them. . . .”

These three sections mentioned above appear to control the determination as to whether the judge of a municipal court of a town would be included within the term “municipal court” in the meaning of § 16.1-218.

It is my opinion that when § 16.1-5, the definition section, refers to the term “municipal courts” as including only “courts in cities”, that the judge of a municipal court of a town would not be included within the meaning of that term and would therefore not be eligible to serve as an active member of the Judicial Conference of Virginia of Court Not of Record.

JUDGES—Vacancy—Filling by General Assembly.

GENERAL ASSEMBLY—Judges—Filling of vacancy.

January 25, 1972
I am in receipt of your letter of January 25, 1972, which reads:

"I would very much appreciate your rendering an opinion as to the effect of § 17-122 of the Code of Virginia of 1950 as amended as it applies to the following:

"Under § 17-137.7 of the Code of Virginia, the City of Danville is entitled to two judges. Judge A. M. Aiken, one of the two judges, died in December of 1971. The Supreme Court on Monday, the 17th of January, 1972 failed to certify the vacancy and recommended that Danville be put into the thirtieth circuit with Pittsylvania and Franklin counties; and that the Corporation Court of Danville be abolished.

"In your opinion, under § 17-122, may the General Assembly fill the vacancy of the additional judge in Danville, regardless of the fact that the Supreme Court of Virginia failed to certify the vacancy; or is the certification of the Supreme Court under § 17-122 binding on the General Assembly."

I am of the opinion that the certification by the Supreme Court is not binding on the General Assembly and thus they may fill the vacancy in question.

Section 17-122 states:

"When a vacancy occurs in the office of judge of any circuit, corporation or other city court of record, the vacancy shall not be filled until, after investigation, the Supreme Court of Appeals certifies that the filling of the vacancy is or is not necessary. If the court certifies that the filling of the vacancy is not necessary, it shall recommend to the General Assembly the manner of distributing the work of the judge; and the Governor shall not fill the vacancy."

Prior to the 1962 amendment § 17-122 was very clear that:

"In any case in which a vacancy occurs or exists while or when the General Assembly is in session, it may proceed to fill the vacancy without awaiting the report of the Court."

This same concept is explicit in Article VI, Section 1, of the revised Virginia Constitution which provides:

"The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish." (Emphasis added.)

Though the provisions of § 17-122 would be binding as to the executive branch of government, they are procedural recommendations as to the legislative branch and consequently are not binding, since as indicated the establishment of courts, other than the Supreme Court, is solely within the power of the General Assembly.

JUDGES—Vacancy Will Not Exist Until Term Expires or Judge Retires Prior to that Time.

February 8, 1972

THE HONORABLE COLEMAN B. YEATTS
Member, Senate of Virginia

This is in reply to your letter of February 1, 1972, which reads as follows:
"The term of Judge Langhorne Jones, Judge of the Thirtieth Circuit, expires in February 1973. It is my understanding Judge Jones will not be a candidate to succeed himself. 

"Please advise me whether or not the current session of the General Assembly should elect a successor to Judge Jones, or should this be delayed until the session in January 1973."

Article VI, Section 7, of the Constitution provides that the judges of courts of record shall be chosen by vote of a majority of the members elected to each house of the General Assembly for terms of eight years. During any vacancy which may exist while the General Assembly is not in session, the Governor may appoint a successor. See, also, § 17-120 of the Code of Virginia (1950), as amended.

A vacancy will not exist in Judge Jones' case until his term expires or unless he retires prior to that time. Therefore, I am of the opinion that a vacancy does not exist and no action should be taken at this time.

JUDGMENTS—Writ of Scire Facias May Not Be Issued More Than Twenty Years After Judgment Obtained.

WRIT OF SCIRE FACIAS—May Not Be Issued More Than Twenty Years After Judgment Obtained.

JUDGMENTS—Issuance of Executions Does Not Continue Life of Judgment Beyond Twenty Years from its Date.

December 23, 1971

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

This is in reply to your recent letter in which you ask my opinion whether a writ of scire facias may now be issued on a judgment. You state that more than twenty years have elapsed since the judgment was obtained on March 1, 1951; that no writ of scire facias has been issued since the judgment was obtained; that executions were issued on the judgment on March 5, 1951, October 5, 1955, and on July 1, 1957.

I am of the opinion that the issuance of the executions did not have the effect of continuing the life of the judgment beyond the period of twenty years from its date. It would have been necessary to have revived the judgment by scire facias, and this action should have been brought within the twenty-year period. I am therefore of the opinion that a writ of scire facias may not now be issued. See opinion of this office to the Honorable John H. Powell, Clerk, Circuit Court of Nansemond County, dated March 13, 1956, and found in Report of the Attorney General (1955-1956), p. 109, a copy of which is enclosed.

JUSTICE OF PEACE—Annexion as Affecting Authority.

ANNEXATION—Justice of Peace—Effect upon.

December 22, 1971

THE HONORABLE F. L. WYCHE
Commonwealth's Attorney for Prince George County

This is in response to your letter of December 3, 1971, wherein you point out that one of the Justices of the Peace of Prince George County resides and maintains his office in an area of Prince George County which will be annexed to the City of Petersburg at midnight on December 31, 1971. Accordingly, you inquire as follows:

"Will you please advise me whether or not this Justice of the Peace will have the authority on and after January 1, 1972 and
REPORT OF THE ATTORNEY GENERAL

during the term of his office to issue criminal warrants from his office in the City of Petersburg for criminal offenses committed within the boundaries of the County of Prince George."

My answer to your question is governed by my opinion to the Honorable David A. Lyon, III, Justice of the Peace, dated July 7, 1970, which opinion is not yet included in any printed Report of the Attorney General, and a copy of which is attached hereto. In that opinion, I refer to § 15.1-995, Code of Virginia (1950), as amended, which provides, in pertinent part, 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 . . ."

Section 15.1-1053, Code of Virginia (1950), as amended, further provides that:

"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. . . ."

Thus, in keeping with my former opinion, I conclude that the 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 is successively elected or appointed to that office.

JUSTICE OF PEACE—Annexed Territory—Power to issue warrants from home in annexed portion of city for crimes in former county.

December 31, 1971

THE HONORABLE F. L. WYCHE
Commonwealth's Attorney for Prince George County

This is in reply to your letter of December 29, 1971, in which you seek amplification of my opinion of December 22, 1971. You inquire as follows:

"I will, therefore, appreciate your opinion as to whether or not a Justice of the Peace, whose residence has been annexed to a city, can issue warrants at his residence for criminal offenses occurring in the county from which he was annexed."

I advised you in my opinion of December 22, 1971, that said Justice of the Peace can continue to function in that capacity in his former county even though the territory in which he resides was annexed into a city.

Your further inquiry goes to the question of the Justice of the Peace's authority to issue the warrants in question from his residence or office in the annexed territory. Section 39.1-14 of the Code of Virginia (1950), as amended, provides that:

"A justice of the peace shall exercise the powers conferred by this title only in that area which is coterminous with the boundaries of the city, county or town for which he is appointed."

Section 15.1-995 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:
"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."

Section 15.1-1053 of the Code enlarges on this section in the following portion:

"Removal of such officer, during his term of office from any such territory, to another part of the city or town to which it is annexed shall not vacate his office, but residence in any part of such city or town shall during his term of office be deemed residence in the county or district." (Emphasis supplied.)

In accordance with the above-quoted provisions of law, I am of the opinion that under the facts you have stated, the justice of the peace in question whose residence and office are located in a portion of Prince George County annexed into a city may continue to issue warrants for criminal offenses committed in Prince George County from his home and office within the annexed territory.

JUSTICE OF PEACE—Appointment of "Issuing Justice" by Towns.

JUSTICE OF PEACE—Authority of "Issuing Justice" Appointed by Town.

TOWNS—Appointment of "Issuing Justice."

December 17, 1971

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

This is in reply to your recent letter in which you request an opinion concerning the following matters, which will be answered seriatim.

1. Does a town whose charter authorizes it to appoint justices of the peace and whose charter authorizes the establishment of a Municipal Court, have the power to appoint a justice of the peace ("issuing justice") under § 39.1-20, Code of Virginia (1950), as amended, where it has not first established a Municipal Court?

It is my opinion that where the town has not established a Municipal Court and does not have the County Court sitting as the Municipal Court, then an issuing justice appointed under § 39.1-20 would have no authority to act, even though technically the town would have authority to appoint such a justice. However, in the case of the Town of Culpeper, where the County Court of Culpeper County sits as a Municipal Court for the Town of Culpeper, pursuant to the town Charter, then an issuing justice could be appointed pursuant to § 39.1-20, and his authority would have the same limits as the jurisdiction of such Court, pursuant to § 39.1-22 of the Code.

2. Can the justice of the peace issue warrants returnable to the County Court of the County where no Municipal Court has been set up? (See § 39.1-22 and § 39.1-25 of the Code, the former of which reads "... but every warrant so issued [by such issuing justices] shall be made returnable before such [Municipal Court] judge and shall, unless otherwise provided by law, be triable only by him...") But see Chapter 6, Section 1 and Section 3 of the Culpeper Town Code authorizing the establishment of a Municipal Court, but allowing the County Court of Culpeper County to have such jurisdiction within the town as the Municipal Court if it were established.

It is my opinion that an issuing justice appointed pursuant to § 39.1-20 of the Code cannot issue warrants returnable to the County Court, except in those instances where the County Court is sitting as the Municipal Court.
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The jurisdiction of the court in such instances is specified in § 16.1-124 of the Code, pursuant to the town Charter, and the issuing justice would have authority to issue warrants in any case which could properly come before such court under the provisions of § 16.1-124 of the Code.

3. To whom would the issuing justice pay the fines and bonds, which under § 39.1-23 is directed to be paid to "the officer authorized to collect fines imposed by the municipal court judge"?

It is my opinion that where the County Court is sitting as the Municipal Court, as in the case with the Town of Culpeper, the issuing justice pays the bonds to the officer authorized to collect fines imposed by the County Court in its capacity as a Municipal Court. Since a justice of the peace cannot collect fines, there would be no need to specify the person to whom fines would be payable.

4. Would such an issuing justice be permitted to issue warrants on a state warrant (or a county warrant) for a violation of state (or county) law, the violations of which took place: (a) within the boundary of the Town of Culpeper, and (b) in portions of the county not in the Town of Culpeper?

It is my opinion that an issuing justice appointed pursuant to § 39.1-20 of the Code is authorized to issue warrants on violations of state or county laws when such violations take place within the town, insofar as such violations are to be tried by the County Court sitting as the Municipal Court pursuant to the jurisdiction conferred by the town Charter and § 16.1-124 of the Code. He would not have authority to issue warrants on such violations occurring outside of the town limits.

JUSTICE OF PEACE—Appointment or Election by Town Council—Authority to issue warrants.

JUSTICE OF PEACE—Authority of County Justice to Issue Warrants in Town Situated in County.

December 17, 1971

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

This is in reply to your recent letter in which you request an opinion from this office, and our subsequent correspondence relating to the details of that request. In substance, your request relates to the following matters, which will be answered seriatim.

1. Would a justice of the peace appointed by the Altavista Town Council have authority to issue warrants for violations of state law which occur within the town?

A town council has authority to appoint justices of the peace pursuant to § 39.1-20, Code of Virginia (1950), as amended, and also pursuant to § 16.1-75.1, Code of Virginia (1950), as amended. If he is an issuing justice appointed pursuant to § 39.1-20 of the Code, he may issue warrants on any matters that would properly be heard before the municipal court, depending upon the extent of its jurisdiction. Such warrants shall be made returnable before the municipal judge and shall be triable only by him or by his substitute. Since the Municipal Court of the Town of Altavista, pursuant to the town charter, is a court of limited jurisdiction with authority to try only violations of town ordinances, it would follow that such an issuing justice would be authorized to issue warrants only for violations of town ordinances.

However, if the justice of the peace is appointed or elected in conformity with the provisions of § 16.1-75.1 of the Code, he would have the same
authority as a justice of the peace of the county, and therefore would have
authority to issue warrants for violations of state law which occur within
the town. However, such cases would have to be tried before the Campbell
County Court because of the limited jurisdiction of the Municipal Court
of the town.

2. Does the county justice of the peace elected in the magisterial
district in which the town is located have authority to issue warrants
within the town limits?

3. Does any other elected or appointed justice of the peace of the
county have authority to issue warrants for violations of town ordi-
nances?

It is my opinion that these questions are answered in an earlier opinion
of the Attorney General to the Honorable H. Hampton Cliff, Justice of
the Peace for Westmoreland County, dated June 17, 1969, and found in
copy of that opinion for your reference. The effect of that opinion is to
say that a county justice of the peace is authorized to issue warrants for
violations of state law anywhere in the county, including a town located
in such county, but is not authorized to issue warrants for violations of
town ordinances unless he is a justice of the peace for the magisterial
district in which the town is situated.

JUSTICE OF PEACE—Authority to Issue Warrants for Violations of Town
Ordinances; Magisterial Districts.

JUSTICE OF PEACE—Special or Issuing Justices; Appointment for Both
County and Towns.

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

This is in reply to your recent letter in which you request an opinion
concerning certain matters relating to justices of the peace in Montgomery
County. You indicate that some questions have arisen concerning the
proper interpretation of an opinion recently given to the Honorable E.
Bruce Harvey, Commonwealth’s Attorney for Campbell County, dated
December 17, 1971. The effect of that opinion is to say that a county
justice of the peace does have authority to issue warrants for violations
of town ordinances within a town when he is the justice of the peace for
the magisterial district in which the town is situated. You point out that
in two towns in Montgomery County, two or more magisterial districts
meet or converge within the town, and in one instance, in the Town of
Blacksburg, there is an additional magisterial district which is wholly
contained within the limits of the town. Your first question is as follows:

“Does the county Justice of the Peace elected for a magisterial
district which enters the town limits have authority to issue war-
rants for violations of town ordinances occurring anywhere within
the town limits or only within the town limits inside the magisterial
district?”

Based upon the earlier opinion referred to above, the key factor for
determining the jurisdiction of the county justice of the peace in a situ-
ation as you present is the territorial limits of his magisterial district.
Therefore, the authority of such a justice of the peace to issue warrants
for violations of town ordinances would apply only in those portions of
the town which lie within the magisterial district for which said justice of
the peace was appointed.

Your second question is as follows:
The Charter of the Town of Christiansburg provides that the town council "shall have the power to appoint a justice of the peace for such town . . ."
Section 39.1-20 provides that "the council of any town may elect one or more special justices of the peace to be known as issuing justices . . ."
(1) Does the town charter limit the appointment of justices of the peace to one for such town?
(2) Would a charter change be required in order for the town to appoint more than one "special" justice of the peace to be known as issuing justices?

Section 7.08 of the Charter of the Town of Christiansburg authorizes the town council to appoint a justice of the peace for such town, "who shall be clothed with all the powers and authority of other justices of the peace . . ." Therefore, such a justice of the peace appointed pursuant to the town charter would be a justice of the peace with the general powers and duties of county justices of the peace, whereas a special or issuing justice appointed pursuant to § 39.1-20 of the Code of Virginia (1950), as amended, would be limited in his power and authority as set out in said section. It is my opinion that these provisions are not in conflict with each other and that the town can appoint one justice of the peace pursuant to the town charter, and the town council can also appoint special or issuing justices pursuant to § 39.1-20 of the Code.

Your third question is as follows:

If a Justice of the Peace or issuing justices were appointed by the town, would this divest the county Justice of the Peace from his authority to issue warrants for violations of the town ordinances?

The provisions of Title 39.1 of the Code relating to special or issuing justices in towns appointed by the town council does not give them exclusive powers and jurisdiction. Therefore, it is my opinion that the appointment of such justices of the peace by the town council would not divest a county justice of the peace from his authority to issue warrants for violations of the town ordinances within those towns or portions of towns which are located within his magisterial district.

JUSTICE OF PEACE—Bond Schedule Set by County Court—Failure to comply with schedule.
JUSTICE OF PEACE—Accepting Two Bail Bond Fees Where Only One Authorized—Duty to refund.
FEES—Bail Bond Fees of Justice of Peace—Accepting improper fees.
CRIMINAL PROCEDURE—Bail Bond Schedule and Fees—Justice of peace.

March 14, 1972

THE HONORABLE DAVID G. SIMPSON, Judge
County Court of Frederick County

This is in reply to your recent letter in which you request an opinion concerning two questions you raise relating to justices of the peace admitting persons to bail. I will answer your questions seriatim.

"This Court issues to each justice of the peace in the county a bond schedule for various offenses. In the event that a justice of the peace disregards this schedule and takes less than the amount contained in the schedule, may the difference be subtracted from his check issued at the end of each month for his warrant fees?"

Sections 39.1-11 and 39.1-12 of the Code of Virginia (1950), as amended, authorize the Court to exercise general supervisory power over the ad-
ministration of justices of the peace within its jurisdiction and to promul-
gate such reasonable rules and regulations as may be deemed necessary. However, under the provisions of §§ 19.1-110 and 19.1-127 of the Code of Virginia, a justice of the peace who admits a person to bail or accepts recognizances has the authority to set the amount thereof. If the Court subsequently determines that the amount of the bail or recognizance is insuffi-
sient, it has authority under § 19.1-121 of the Code to increase the amount thereof. I can find no statutory authority which would allow the Court to deprive a justice of the peace of the warrant fees he is entitled to under § 14.1-128 of the Code, for taking bail in an amount less than the schedule set out by the Court. Therefore, it is my opinion that this question should be answered in the negative. However, if the Court had entered an order establishing such a bond schedule, the continued refusal by a justice of the peace to obey such schedule would make him liable for possible con-
tempt of Court proceedings.

"Likewise, if a justice of the peace requires more than one bond in violation of Section 19.1-122.1, may that bond fee be subtracted by the Court from his check at the end of the month and a refund of the bond fee be made to the individual involved?"

A justice of the peace is entitled to collect a fee of $3.00 for admitting any person to bail or releasing a person on his own recognizance without security under the provisions of § 14.1-128 of the Code. However, under § 19.1-122.1 of the Code, only one bail bond may be required where more than one misdemeanor charge against the same person results from one set of facts or circumstances. Also, in an earlier opinion of the Attorney General of September 20, 1961, to the Honorable K. H. Weakley, Clerk of Courts of York County (see Report of the Attorney General, 1961-1962, page 137), it was stated that a justice of the peace is not entitled to collect two separate fees where more than one misdemeanor charge was contained within a single warrant. Therefore, it would be my opinion that, in these instances, the justice of the peace would be entitled to only one fee and, if in fact he has collected two fees, the Court may order him to refund one of them to the individual involved. Again, I find no authority which would allow the Court to subtract the excess fees from the warrant fees, etc., paid under § 14.1-128 of the Code.

JUSTICE OF PEACE—Distress Warrants—Authority to issue.

September 8, 1971

THE HONORABLE JAMES B. EARLY
High Constable, City of Portsmouth

This is in reply to your letter of August 27, 1971, which reads as follows:

"Please furnish me with an interpretation of Section 55-230 of the Code of Virginia as to whether it is legal for a Justice of the Peace to write a Distress Warrant, and as to the amount."

Section 55-230 of the Code prior to the 1962 amendment thereof granted the power to justices of the peace to issue distress warrants. The 1962 amendment inserted certain exceptions as to which judges and clerks could and could not issue such warrants. The authority of a justice of the peace to issue distress warrants was not affected by this amendment. Therefore, it is my opinion that a justice of the peace does have the authority to issue a distress warrant. This interpretation of Section 55-230 is consistent with the provisions of § 8-432.1 of the Code which relates to the sale of property levied under a distress warrant and which makes reference to issuances of the distress warrant by justices of the peace.

As to the amount of a distress warrant, it is my opinion that there is no
limitation on the amount. This is consistent with an opinion to the Honorable Major M. Hillard, State Senator, on September 7, 1948, which can be found in Opinions of the Attorney General 1948-1949, page 181, a copy of which is enclosed. This is also consistent with the fact that under § 55-237 of the Code all distress warrants are returnable to courts of record which, of course, have no limit as to jurisdictional amount.

JUSTICE OF PEACE—Hours of Office—Not authorized to set.

January 20, 1972

THE HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of December 29, 1971, in which you request an opinion as to whether a justice of the peace or a magistrate can set hours to admit arrested persons to bail or commit such persons to jail, for instance, 6:00 A.M. to 10:00 P.M. each day, in accordance with the new Rules of Criminal Practice and Procedure and the existing statutes. Section 19.1-98, Code of Virginia (1950), as amended, sets out the duty of an arresting officer to bring a person arrested under a warrant before a court of appropriate jurisdiction. This section has been interpreted by case law to require that an officer cannot hold a prisoner for an "unreasonable" time before making the return of such person before a court or justice of the peace or magistrate. Also, § 19.1-100.1 of the Code requires that a person arrested without a warrant shall be brought "forthwith" before an officer authorized to issue warrants. Under the new Rules of Criminal Practice and Procedure, which became effective January 1, 1972, Rule 3(a):5 requires that a person arrested either with or without a warrant shall be brought before a magistrate "without unnecessary delay."

It is my opinion that under the above requirements, it would not be proper for a justice of the peace or magistrate to limit his duties to only certain hours since the holding of an arrested person by the police for a number of hours until the magistrate or justice of the peace is in his office would be an unnecessary delay.

JUSTICE OF PEACE—Issuance of Subpoena for Witness in Court Not of Record.

COURTS NOT OF RECORD—Issuance of Subpoenas for Witnesses by Justice of the Peace.

WITNESSES—Authority of Justice of the Peace to Issue Subpoena.

February 10, 1972

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

This is in reply to your letter of January 11, 1972, in which you request an opinion as to whether a justice of the peace is prohibited from issuing a subpoena for the attendance of a witness in a criminal proceeding in a court not of record. You point out that the first sentence of Rule 3A:15 of the Rules of Criminal Practice and Procedure which became effective January 1, 1972, provides as follows:

"A subpoena for the attendance of a witness to testify before a court not of record shall be issued by the judge, clerk, or Commonwealth's Attorney."

Section 39.1-15 of the Code of Virginia (1950), as amended, provides that a justice of the peace shall have the same power to issue subpoenas as is conferred upon courts not of record. Therefore, it is my opinion that
Rule 3A:15 is to be read in conjunction with § 39.1-15 of the Code and that a justice of the peace does have the same authority to issue a subpoena for the attendance of a witness to testify before a court not of record that the judge of said court has under Rule 3A:15.

JUSTICE OF PEACE—May Serve on County Park Authority; Duties Not Incompatible.

The Honorable Thomas William Yowell
Justice of the Peace

September 24, 1971

In your letter of September 17, 1971, you inquire whether a justice of the peace may also serve as a member of a county Parks and Recreation Authority.

This office has previously ruled in an opinion to the Honorable Paul Shupe, Secretary and Treasurer, Newport News Justices of the Peace Association, dated December 4, 1969, that a justice of the peace may hold the office of city or town councilman. See Report of the Attorney General (1969-1970), p. 150. I find no provision of Virginia law which would prohibit a justice of the peace from similarly serving on a county park authority, and in my opinion the duties of a member of such authority are not incompatible with those of a justice of the peace. The answer to your question, therefore, is in the affirmative.

JUSTICE OF PEACE—Mayor of Town Ineligible for, if Mayor Charged With Duty of Enforcing Any Ordinance of Town.

Charters—Set Forth Duties of Mayor; Mayor of Town Ineligible for Office of Justice of Peace if Mayor Charged with Duty of Enforcing any Ordinance of Town.

Warrants—Written as Justice of Peace, Not as Mayor.

Bonds—Written as Justice of Peace, Not as Mayor.

Fees—Under § 14.1-128 for Writing Warrants and Bail Bonds Apply to Fees Allowed Justices of the Peace.

Towns—Justice of the Peace Elected Mayor; Writing of Warrants and Bail Bonds; Fees.

The Honorable C. F. Callis
Justice of the Peace

February 23, 1972

This is in reply to your letter of February 18, 1972, in which you ask if you are elected mayor of the Town of Kenbridge, which has no town court, whether you will write town warrants and bail bonds as a justice of the peace or as mayor; also, to whom the fee would go.

Section 39.1-10, Code of Virginia (1950), as amended, provides that a mayor of a town is ineligible for office as a justice of the peace if the mayor is charged with the duty of enforcing any ordinance of the town. You should determine whether this is the case by reference to the town charter which sets up the duties of the mayor.

Assuming the duties of the mayor, as established, do not involve the enforcement of any town ordinance, you should write warrants and bail bonds as a justice of the peace, not as mayor. The fees provided by § 14.1-128 for writing warrants and bail bonds apply to fees allowed justices of the peace.
JUSTICE OF PEACE—One Elected for Each Magisterial or Election District in County; § 39.1-6 Authorizes Appointment by Court of Only As Many Justices As Are Necessary.

ELECTIONS—Registrar—Officer of law may not serve as registrar or officer of election.

REGISTRAR—Officer of Law May Not Serve As.

December 23, 1971

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

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

"Would like for you to give me your opinion on the following:

(1) Can our Circuit Court Judge M. M. Long appoint as many justices of the peace as he desires. Or do the ones who were elected have to serve our county as in the past?

(2) Can any officer of the law serve as a judge or clerk of an election and can said officer have on his person a pistol in said voting place?"

I shall answer your questions seriatim:

1. Section 24.1-89 of the Code of Virginia (1950), as amended, required that in the November, 1971, election there would be elected one justice of the peace for each magisterial or election district in the county. Such individuals would hold office and serve for a term of four years. In addition to those officers elected, § 39.1-6 authorizes the appointing court to appoint only as many justices of the peace as are necessary for the effective administration of justice.

2. Article II, Section 8, of the Virginia Constitution prohibits an officer of the law from serving as registrar or officer of election. The pertinent portion of this section reads as follows:

"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."

JUSTICE OF PEACE—Retired County Agricultural Extension Agent May Serve As.

August 26, 1971

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

I am in receipt of your letter of August 9, 1971, which reads as follows:

"Information is requested as to whether or not a County Agricultural Extension Agent, now retired under the Virginia Supplemental Retirement System and receiving retirement pay, may serve as a Justice of the Peace."

I am of the opinion your inquiry may be answered in the affirmative. The individual in question would, however, be subject to the provisions of Article II, Section 5, of the Constitution which in pertinent part reads as follows:

"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 pro-
vided in this Constitution, . . . 

and be subject to the provisions of § 39.1-10 of the Code of Virginia (1950),
as amended, which reads as follows:

"No person shall be eligible for election or appointment to the
office of justice of the peace under the provisions of this title if he
or his spouse is a law-enforcement officer or is otherwise charged
with the duty of enforcing any of the laws of this Commonwealth
or any ordinance of any political subdivision thereof, nor shall any
person who is or whose spouse is a clerk, deputy clerk, assistant
clerk, or employee of any such clerk of a court not of record or a
police department or a sheriff's office of a county, city or town be
eligible for election or appointment to the office of justice of the
peace of such county, city or town, nor shall any person who is not
a resident of the county, city or town be eligible for appointment to
the office of justice of the peace of such county, city or town. This
section shall not apply to incumbents of such office who are in office
when this section becomes effective."

Chapter 4 of Title 2.1 of the Code would not be applicable, nor would
the fact that such individual is receiving retirement pay under Title 51 of
the Code have any bearing.

JUSTICE OF PEACE—Town of Residence Becoming City as Affecting
Power to Continue Serving in County.

February 10, 1972

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

This is in response to your recent letter in which you point out that Mr.
Paul W. L. Leftwich was elected a Justice of the Peace for Bedford County
for a four-year term beginning January 1, 1968, and terminating
December 31, 1971. You further advise that subsequent to his election the
Town of Bedford made its transition to a City of the second class and Mr.
Leftwich's residence is located within the Corporate Limits of that City.
Mr. Leftwich was subsequently appointed by the Circuit Court for Bedford
County to a new four-year term beginning January 1, 1972. Accordingly,
you inquire as follows:

"Is Section 15.1-995 of the Code of Virginia applicable to the
office of Justice of the Peace, so as to permit Justice of the Peace
Leftwich to continue to serve Bedford County? It is to be noted also
that Leftwich's homesite is in the City of Bedford, which is wholly
within the boundaries of the County of Bedford."

It is my opinion that § 15.1-995, Code of Virginia (1950), as amended,
is applicable to the office of Justice of the Peace and that section provides,
in pertinent part, 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 ap-
pointed 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."
I have previously had occasion to review this section in connection with the office of Justice of the Peace in opinions to the Honorable David A. Lyon, III, Justice of the Peace, of July 7, 1970, and to the Honorable F. L. Wyche, Commonwealth's Attorney for Prince George County, of December 22 and 31, 1971, which are not yet included in any printed Report of the Attorney General and copies of which are attached hereto. Thus, § 15.1-995 is applicable to the factual situation you present, and it is my opinion that Mr. Leftwich may continue to serve as a Justice of the Peace of Bedford County.

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**JUVENILE AND DOMESTIC RELATIONS COURTS—Advisory “Jury Panel”—No authority to set up.**

The Honorable Beverly B. Bowers, Judge
Ninth Regional Juvenile and Domestic Relations Court

This is in reply to your letter of August 26, 1971, in which you inquire as to whether any statutes or rules of court would prohibit you from setting up an advisory “jury panel” to advise you under the following described circumstances:

"Under the Texas set up youngsters from the community, male and female, all races are picked at random choosing a panel, 5 to 12 in number as 'jurors' to sit on a case and to hear evidence and to advise a proper punishment. The court itself makes a determination of guilt or innocence, except in certain cases where the guilt is very doubtful. The youth panel cannot act in an advisory capacity unless the accused, or a plea of innocent, consents for them to do so, or unless the accused enters a plea of not innocent. The findings and punishment of the youth panel are advisory only, and the judge never loses control of the case. All rules are adhered to."

There is no provision of the Code of Virginia that specifically prohibits the procedure you refer to and Section 16.1-154 empowers the judge of a juvenile and domestic relations court to “adopt and publish rules not in violation of law to regulate proceedings before his court. . . .” Thus, the essential question is whether the procedure described is in violation of law. Chapter 8 of Title 16.1 consistently refers to actions being taken by “the court” or “the judge”, referring to the juvenile and domestic relations court and the judge, associate judge or substitute judge thereof (§ 16.1-141). It is my opinion that the “lay jury panel” you refer to would constitute a delegation of judicial powers of the court even though the findings and punishment of the youth panel are advisory only. Chapter 8 provides for the power of the judge to delegate certain duties or powers to clerks and deputies (§ 16.1-146) and to probation officers (§ 16.1-208). However, there is no statute allowing the judge to delegate the sentencing or adjudicatory functions to any person and, in the absence of such specific authority, I am of the opinion that such a procedure as you describe would not be lawful. This is especially true in light of the somewhat newly defined status accorded juvenile proceedings in *In Re Gault*, 387 U.S. 1 (1967) and *Kent v. United States*, 383 U. S. 541 (1966).

Likewise, I would adhere to the previous opinions of this office holding that § 16.1-162 requires that proceedings be kept private unless a specific exception is made in that section. See Report of the Attorney General (1955-56), page 116; Report of the Attorney General (1956-57), page 149. Although this section has been amended since those opinions were rendered, the amendments do not affect the portions of the section to which the prior opinions relate and I believe they are still controlling.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURTS—Court Receiving Support Payments from Husband May Reimburse Local Welfare Department for Payments Made to Wife and Children Because of Failure to Receive Support.

WELFARE—Court Receiving Support Payments from Husband May Reimburse Local Welfare Department for Payments Made to Wife and Children Because of Failure to Receive Support.

April 18, 1972

THE HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

This is in response to your recent letter in which you asked my opinion concerning the right of the local department of public welfare to receive a reimbursement for payments made to a wife on behalf of children who have been deserted by their father against whom an order of support has been entered. Specifically, you asked:

"Please advise this Court if you know of any law which gives this Court the right to pay sums received from a husband who has been convicted of desertion and non-support under 20-61 of the Code of the Welfare Department which is supporting his deserted and neglected family."

I am of the opinion that when the man does make such payments into the Court, the Court may reimburse the Department of Public Welfare for payments made to his dependents. Section 63.1-110 of the Code which governs the determination of the amount of assistance, provides:

"Under conditions specified by the State Board court-ordered support payments may be disregarded in determining the amount of assistance which any person shall receive; provided, however, that in such event, such payments, when received, shall be counted as refunds with regard to such assistance payments." § 63.1-110 Code of Virginia (1950), as amended. (Emphasis supplied.)

This section reflects the legislative intent that no child be declared ineligible merely because an order of support had been entered. However, where the order has been entered and the father has actually made the payment which duplicates the assistance grant, the department of public welfare is intended to be reimbursed. Where the Court receives that payment on behalf of the wife and children, it may reimburse the welfare department the amounts paid out.

JUVENILE AND DOMESTIC RELATIONS COURTS—Detention Order—Authority to issue.

December 31, 1971

THE HONORABLE RALPH P. ZEHLER, JR., Judge
Eighth Regional Juvenile and Domestic Relations Court

This is in response to your recent letter in which you make certain inquiries relative to §§ 16.1-194, 16.1-195, and 16.1-197 of the Code of Virginia (1950), as amended. Your letter sets forth the following factual context for your questions:

"In the handling of juvenile cases very frequently it is necessary that a juvenile be detained immediately either for his own protection or for the protection of society. Being a regional court judge I am frequently not at the right place at the right time to personally endorse a summons or detention order as required by § 16.1-194(1).

"Consequently, I have entered a written order making each of my
probation officers a deputy clerk, and authorizing the clerk and each
deputy to issue detention orders when and as needed, in their dis-
cretion. Under our rules of court, the juvenile must then be brought
before me within 48 hours for a detention hearing.

"In reviewing the above mentioned code sections, I have some
reservations as to whether or not this practice of authorizing the
clerk and deputy clerks to issue detention orders is permissible. I
would like to have your opinion on this query."

Your questions relate more specifically to the detention orders that would
govern the continued detention of children once they had been taken into
custody under §§ 16.1-194 and 16.1-195, and that stage of the proceedings
is governed by § 16.1-197 of the Code. That section provides that once the
child has been taken into custody, the officer, if it is during the hours that
the juvenile court is open, should take the child to the judge, clerk, or
probation officer. These persons may release the child to the custody of
certain specified persons, or they may order the child detained in such
manner as they determine, subject to further order of the court. If the
child is taken into custody during such hours when the court is not open,
the child may be released to the custody of certain persons upon the
promise of those persons to bring the child to the court at such time as
has been fixed by the rules of the court. Finally, the officer may deliver the
child to a probation officer, welfare worker, or police officer assigned to
juvenile cases. The section goes further to say that in any case where a
child fourteen years of age or over resists when taken into custody or is in
a drunken condition, or if the officer taking custody believes it to be in the
best interest of the child or the public, or it was impractical or inadvisable
to follow the steps set forth earlier in the statute, then the officer, after
obtaining a warrant, may take the child to a juvenile detention home or to
a separate cell of the jail apart from criminals. The statute goes one step
further in providing that immediately upon the child being placed in a
detention home or jail, or as soon thereafter as is reasonably practical,
the officer taking the child into custody, or another officer, should notify
the judge of the juvenile court, its clerk, or probation officer, of such
detention and request that the judge or clerk issue a proper process and
order of commitment therefor.

It would be my opinion that under § 16.1-197, and consistent with the
powers of a clerk or deputy clerk under § 16.1-146, the procedures which
you have outlined in your letter are in accordance with the Code and are
proper.

You ask certain specific questions within the context of the general
discussion set forth above, and I will quote from your letter and answer
those questions together:

"1. It is brought to the attention of the probation officer that one
of his probationers is in violation of his rules of probation; that he
is in such circumstances that his custody should be immediately as-
sumed, and I am not available to sign the detention order. Under
these circumstances, can the probation officer issue a detention order
so that the juvenile may be held in jail or the detention home until
da detention hearing can be had before me as mentioned above?

2. A police officer or responsible citizen files a petition with the
intake office and advises that the custody of the juvenile should be
immediately assumed, either for his own protection or for the pro-
tection of society. I am in another county and am not available to
endorse a detention order, and the clerk or intake officer, or one of
the deputy clerks, signs a detention order authorizing the juvenile
to be taken into immediate custody, to be held for a detention hear-
ing. Can this detention order be properly issued under the above
provisions of the code, or any other applicable sections of the code?

3. Can a clerk or deputy clerk issue a detention order at any
time, assuming that a proper petition has been filed and the court has jurisdiction to act, without the judge first authorizing a detention order to be issued, upon the condition a detention hearing be held before the judge within 48 hours?"

My answer would be in the affirmative as to all these questions consistent with my discussion of the general question above.

**JUVENILE AND DOMESTIC RELATIONS COURTS—Exclusive Jurisdiction to Try Traffic Offenses Committed by Juvenile.**

May 19, 1972

_The Honorable Frank E. Swain_  
Justice of the Peace

This is in response to your letter of May 7, 1972 in which you inquire as follows:

"Can a juvenile, under the age of 18 years who is charged on a traffic violation or violations who holds a valid operator's license either a Virginia one or from any other state be tried in a Municipal Mayor's Court as opposed to a County Court?"

"Heretofore, it has appeared he either had to be tried on a juvenile petition or an arrest warrant only in a County Court. For the benefit of small town police officers where trial is held by a Mayor it would help those police officers to have your ruling on this whereby they would know when issuing a summons as to what would be lawful and proper to direct their summonses to whichever court it would be lawful and necessary to trial the juveniles in."

My answer to your inquiry is governed by the provisions of § 16.1-158(1)(i) and § 16.1-158(4), Code of Virginia (1950), as amended, which provide in pertinent part as follows:

"... Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the corporate limits of said city, concurrent jurisdiction with the Juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

"(1) The custody, support, control or disposition of a child:

* * *

"(i) who violates any State or federal law, or any municipal or county ordinance; provided, however, that in violations of federal law jurisdiction in such cases shall be concurrent and shall be assumed only if waived by the federal court;

* * *

"(4) A minor who is charged with having violated, prior to the time he became eighteen years of age, any State or federal law, municipal or county ordinance, provided that jurisdiction in federal offenses shall be concurrent with federal courts and shall be assumed only if waived by the federal court. Such minor shall be dealt with under the provisions of this law relating to juveniles."

Pursuant to the provisions of these sections of the Code, it is my opinion that any charge arising from a violation of law or any ordinance, including those relating to traffic offenses, must be proceeded on in the appropriate juvenile and domestic relations court under Chapter 8 of Title 16.1 of the Code of Virginia.

**JUVENILE AND DOMESTIC RELATIONS COURTS—Guardian for Child—Appointment of.**
CHILDREN—Guardians for—Appointment of.

THE HONORABLE FLETCHER B. WATSON, Judge
Juvenile and Domestic Relations Court
Counties of Halifax, Mecklenburg and Pittsylvania

This is in reply to your letter of September 9, 1971, in which you request an opinion concerning the applicability of § 16.1-158 (1) and § 31-8 of the Virginia Code. The first question which you raise is as follows:

"May a guardian be appointed pursuant to Section 31-8 under the same circumstances that give jurisdiction to the Juvenile and Domestic Relations Court pursuant to Section 16.1-158 (1)?"

Section 31-8 relates to the appointment of a guardian and the resulting custody of a child in circumstances where the parent or parents of the juvenile have died and it becomes necessary as a part of the settlement of the estate of the parent to appoint a guardian for the purposes of handling the estate and caring for the welfare of the child. The appointment of a guardian and the awarding of custody under § 31-8 would have to be purely under those conditions and circumstances to which Chapter 31 of the Code is directed. It is my opinion, therefore, that a guardian may not be appointed pursuant to § 31-8 under the same conditions that give jurisdiction to the Juvenile and Domestic Relations Court under § 16.1-158 (1). However, it would be my opinion that a Court of Equity or a Court of Chancery in awarding guardianship and custody under § 31-8 would be required to take into consideration the same matters relative to the welfare and interests of the child, etc., that a Juvenile and Domestic Relations Court would have to take into consideration in granting custody under § 16.1-158 (1). This would be consistent with the recent case of Falco v. Grills, 209 Va. 115, 161 S. E. 2d 713 (1968).

The second question you raised is as follows:

"Assuming custody of a child has been granted by the Juvenile and Domestic Relations Court to person A pursuant to Section 16.1-158 (1), may B be subsequently appointed guardian pursuant to Section 31-8 and thereby take custody regardless of the decision of the Juvenile and Domestic Relations Court?"

This question would appear to be controlled by § 16.1-161 of the Code, which grants concurrent jurisdiction to the Juvenile and Domestic Relations Court and the Courts of Record in certain circumstances, which would include those circumstances under which guardianship and custody is granted pursuant to Section 31-8. Further, § 16.1-161 provides that once the Court of Record or Court of Equity has taken jurisdiction, this then divests the Juvenile and Domestic Relations Court of its concurrent jurisdiction. It is my opinion, therefore, that a Court of Record could appoint a guardian pursuant to § 31-8, which would result in said guardian obtaining custody, even though some other person had already been granted custody pursuant to an order of the Juvenile and Domestic Relations Court under § 16.1-158 (1). However, the person previously granted custody under § 16.1-158 (1) would be entitled to appear in the Court of Record in the proceeding pursuant to § 31-8 in order to ask that he be appointed to the guardianship under Chapter 31.

JUVENILE AND DOMESTIC RELATIONS COURTS—Incarceration of Juvenile—Prior consent of judge, clerk or juvenile probation officer required to detain in jail or other adult place of detention.

JUVENILES—Incarceration—Prior consent of judge, clerk or juvenile probation officer required before incarcerating with adults.
REPORT OF THE ATTORNEY GENERAL

December 17, 1971

THE HONORABLE VON L. PIERSALL, JR., Judge
Juvenile and Domestic Relations Court of the City of Portsmouth

This is in response to your recent letter inquiring as to an apparent conflict between §§ 16.1-196 and 16.1-197 of the Code of Virginia (1950), as amended. Your letter quite rightly points out that §§ 16.1-194 and 16.1-195 of the Code of Virginia (1950), as amended, provide that under certain general circumstances, a policeman may take into custody a juvenile fourteen years of age and older and have a warrant of arrest issued without any prior contact with the juvenile court.

You further point out that under § 16.1-197 the police officer taking custody of a child under the age of eighteen may follow several different procedures, one of which provides for the detention of the child in a special place of detention for juveniles, or in a separate cell of the jail apart from criminals. He must contact the judge of the juvenile court, its clerk or probation officer "as soon thereafter as is reasonably practical." However, you point out as follows:

"But my problem is resolving Section 16.1-196 to all this. That section seems to require the prior consent of the judge, clerk, or probation officer before placing the child fourteen years of age or over in a place... entirely separate from adults."

"If this does in fact require the mentioned court officials to be contacted every time a juvenile is placed in a juvenile cell overnight, it is going to be very impractical and indeed may require someone on duty from the Juvenile Court twenty-four hours a day."

Section 16.1-196 provides, in pertinent part, as follows:

"No person known or alleged to be under the age of eighteen years shall be transported or conveyed in a police patrol wagon, or confined in any police station, prison, jail or lockup, or be transported or detained in association with criminals or vicious or dissolute persons; except that a child fourteen years of age or older may, with the consent of the judge, clerk or the juvenile probation officer, be placed in a jail or other place of detention for adults in a room or ward entirely separate from adults."

That section is quite explicit in its requirements with respect to the procedures to be followed for children fourteen years of age or older who are to be incarcerated in a jail or other place of detention for adults. It is my opinion that if separate juvenile detention facilities are unavailable and children fourteen years of age and older have to be placed in a separate section, room, or ward of a jail or other place of detention for adults, it is then necessary that the police officer obtain the prior consent of the juvenile judge, clerk or the juvenile probation officer to do so.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Has jurisdiction over offenses involving the family.

July 7, 1971

THE HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

This is in reply to your letter of June 17, 1971, enclosing an inquiry from the Honorable Turner T. Smith, Attorney for the Town of Manassas. His inquiry includes a copy of § 8-a of the Town Charter for Manassas relating to the Police Justice and is specifically directed as follows:

"Does the Town police court as described in the Town Charter have authority to try juveniles who violate traffic ordinances? Does
it have authority to hear warrants where one member of a family charges another member of the family?

Mr. Smith is quite correct in his conclusion that the police justice of the Town of Manassas presides over a court governed by Sections 16.1-70 through 16.1-75 of the Code of Virginia, as amended, and that this court is consequently a court of limited jurisdiction, and is not "included in the designation 'courts not of record.'"

Section 16.1-158 of the Code of Virginia, as amended, provides for the exclusive jurisdiction of the juvenile and domestic relations courts, including ordinances and offenses involving the family.

Thus, under the provision of § 16.1-158, I am of the opinion that the juvenile and domestic relations court has exclusive original jurisdiction over the cases you enumerate and the police justice cannot act therein.

You further inquire regarding the possibility of an amendment to the Town Charter similar to that of Haymarket, wherein the trial justice of that town has all the power, authority and jurisdiction conferred on judges of juvenile and domestic relations court. I presume you refer to the amendment of the Charter for the Town of Haymarket, by Chapter 76, Acts of Assembly, approved February 21, 1964. It is my opinion that the taking of similar action would be sufficient to expand the jurisdiction of the police justice of the Town of Manassas to cover the cases enumerated in your inquiry where violations of town ordinances are involved. The enactment of such an amendment to the Town Charter would not necessitate any amendment to § 16.1-158 of the Code of Virginia.

JUVENILES—Admissibility of Evidence; Probation Officer's Report—Due process in criminal proceedings.


EVIDENCE—Uniform Rules of Court for Virginia Regional Juvenile and Domestic Relations Courts Conflict With § 16.1-164.

CRIMINAL LAW—Court in Juvenile Cases May Consider Probation Officer's Report During Second Stage of Proceeding.

JUVENILE AND DOMESTIC RELATIONS COURTS—May Consider Probation Officer's Report During Second Stage of Proceeding.

JUVENILES—Custody Proceedings; Probation Officer's Report.

December 14, 1971

THE HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

This is in response to your recent letter in which you inquire as to the constitutionality of § 16.1-164 of the Code of Virginia (1950), as amended, at least insofar as that statute might allow a court in the trial of juvenile cases to consider matters contained in a probation officer's report prior to the completion of the adjudicatory portion of the trial. You point out that § 16.1-164 provides:

"When the court receives reliable information that any child or minor is within the purview of this law or subject to the jurisdiction of the court hereunder, except for a traffic violation or violation of the game and fish law, the court shall require an investigation which may include the physical, mental and social conditions and personality of the child or minor and the facts and circumstances surrounding the violation of the law. The court may then proceed informally and make such adjustment as is practicable without a petition or may authorize a petition to be filed by any person, and if any such person does not file a petition, a probation officer or a police officer
shall file it; but nothing herein shall affect the right of any person to file a petition if he so desires. In case of violation of the traffic laws or the game and fish laws the court may proceed on any summons issued without the filing of a petition. In case of violation of the traffic laws such summons may be issued by the officer investigating the violation in the same manner as provided by law for adults."

Your further point out that this statute conflicts with the Rules of Court adopted by the Juvenile and Domestic Relations Courts of the Commonwealth and it is true that Rule 25 of the Uniform Rules of Court for Virginia Regional Juvenile and Domestic Relations Courts provides that:

"Evidence and testimony will be admitted or denied pursuant to the rules of evidence and procedure as govern a criminal case in a criminal court."

Rule 26 provides that the social study should be made available to the court and counsel at or before the dispositional hearing. Rule 28 further provides as follows:

"At the adjudicatory hearing, only testimony that is competent, material, and relevant to the allegations of the petition shall be admitted into evidence. No testimony that would be inadmissible in a criminal proceeding shall be admitted into evidence."

You then inquire by phrasing the following questions:

"Is Section 16.1-164 unconstitutional?"

"Do I have to have two hearings for children charged with offenses?"

"In custody proceedings where we have a Probation Officer's Report on the homes and on the abilities of the different people who have the custody of the children, do I have to wait until after all evidence is in to read the Probation Officer's Report?"

It is my opinion that your basic question is governed by the decisions of the United States Supreme Court in In Re Gault, 387 U.S. 1 (1967), and In Re Winship, 397 U.S. 358 (1970). In the Gault case the United States Supreme Court basically ruled that the requirements of due process requires that certain fundamental standards be complied with in juvenile proceedings as in a criminal proceeding. The Court pointed out in its decision that:

"No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of 'delinquency' and an order committing Gerald to a state institution for a maximum of six years."

"The recommendations in the Children's Bureau's 'Standards for Juvenile and Family Courts' are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable to civil cases should be admitted into evidence. The New York Family Court Act contains a similar provision." (387 U.S. at 56-57).

This particular portion of the Supreme Court's decision is footnoted, and that footnote refers to the inadmissibility of evidence which amounts to hearsay during the adjudicatory portion of the proceeding (387 U.S. at 57, fn. 98). The court in the later decision of In Re Winship went somewhat further and said:

"Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would
risk destruction of beneficial aspects of the juvenile process. Use of
the reasonable-doubt standard during the adjudicatory hearing will
not disturb New York's policies that a finding that a child has
violated a criminal law does not constitute a criminal conviction,
that such a finding does not deprive the child of his civil rights, and
that juvenile proceedings are confidential. Nor will there be any
effect on the informality, flexibility, or speed of the hearing at which
the factfinding takes place. And the opportunity during the post-
adjudicatory or dispositional hearing for a wide-ranging review of
the child's social history and for his individualized treatment will re-
main unimpaired. Similarly, there will be no effect on the procedures
distinctive to juvenile proceedings that are employed prior to the
adjudicatory hearing.” (397 U.S. at 366-367).

In light of the rulings of the United States Supreme Court in these two
cases, it is my opinion that only evidence which may be legally admissible
during a criminal trial is admissible during the adjudicatory portion of a
juvenile proceeding. In other words, the report contemplated by § 16.1-164
of the Code would not be admissible prior to the dispositional stage of the
hearing, and the admission into evidence of such a report or consideration
of such a report by the juvenile judge prior to that time would be erron-
eous. I do not believe that § 16.1-164 is unconstitutional in its requirement
that such an investigation be conducted, but it would only be unconstitu-
tional if it were so applied as to make the report available to the Court
prior to the dispositional stage of the proceedings. The Rules of Court ap-
pear to be in compliance with the decisions of the United States Supreme
Court in the Gault and Winship cases and § 16.1-164 should be utilized
only within the context of those Rules of Court.

It is further my opinion that it is not absolutely necessary to have two
separate hearings for persons charged with juvenile offenses, but the pro-
cedure should be to utilize a two-stage, or bifurcated, proceeding and the
investigation report could be utilized only during the second stage of the
proceeding after the initial determination was made. Thus, the investiga-
tion report could be utilized in much the same way that a pre-sentence re-
port is utilized in courts of record in criminal cases. The hearings could
be held on the same day, but the case should have two distinct and separate
phases.

You further inquire with regard to the application of such reasoning to
custody proceedings. It is my opinion that the rationale of Gault and Win-
ship is not necessarily applicable to custody proceedings and the probation
officer's report could be considered by you during such a proceeding. How-
ever, it perhaps should be made available to counsel prior to the hearing
so that ample opportunity for cross-examination is afforded.

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JUVENILES—Commitment Under § 19.1-295.1—No funds and facilities
provided for commitment under this section. November 15, 1971

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

This is in reply to your recent letter regarding the application of § 19.1-
295.1 of the Code of Virginia as amended. You inquire as to whether or
not the Commonwealth has funds and facilities available to enable a court
of record to commit to the State Department of Welfare and Institutions
juveniles certified for trial as adults, although they are under the age of
eighteen and certain minors between the ages of eighteen and twenty-one.
The operative portion of that section of the code reads as follows:

“(a) The judge or jury, as the case may be, when fixing punish-
ment in those cases specifically enumerated in subsection (b) of
this section, may, in their discretion, in lieu of imposing any other penalty provided by law, commit persons convicted in such cases for a period of four years, which commitment shall be indeterminate in character. Such person shall be committed to the Department of Welfare and Institutions for initial confinement for a period not to exceed three years, when funds and facilities are provided by the General Assembly. Such confinement shall be followed by at least one year of supervisory parole, conditioned on good behavior, but such parole period shall not, in any case, continue beyond the four-year period."

You specifically inquire as to whether or not the funds and facilities have been provided by the General Assembly within this section. I am advised that they have not and consequently this section is not operative and my answer to your question must be in the negative.

JUVENILES—Counsel—Waiver—Conditions under which waiver possible.

JUVENILES—Counsel—Appointed for child or minor charged with offense for which maximum sentence could include confinement.

October 26, 1971

THE HONORABLE HAROLD E. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

In your recent letter you inquire whether § 16.1-173(a) of the Code would operate to require the appointment of counsel for all juveniles who appear in the Juvenile and Domestic Relations Court provided the maximum sentence does include confinement. You inquire whether the word "minor", defined as a person between the ages of eighteen and twenty-one, also means juvenile within the context of § 16.1-173(c), so that a juvenile could waive counsel.

In answer to the first question, it is my opinion that counsel must be appointed for any child or minor who is charged with an offense for which the maximum sentence could include a sentence of confinement. This is directly mandated by § 16.1-173, and this Section does not contemplate that any evidence be heard in the case before counsel is appointed.

To answer your second question, while a "minor" is considered to be a person between the ages of eighteen and twenty-one, a "juvenile" or "child" is considered to be a person under the age of eighteen. Within the meaning of § 16.1-173(c), however, the provision for the waiver of counsel is intended to apply to any person, whether such person be considered a child, minor or juvenile, with the further provision that any such waiver must be joined in writing by the parents or legal guardian of the person involved. This is also specifically mandated by § 16.1-173(c), which provides, in pertinent part:

"... provided, however, that the minor and his parents, or legal guardian, may jointly agree, in writing, that counsel may be waived."

Your final query asks whether a person between the ages of eighteen and twenty-one, who is charged with an offense over which the juvenile court has jurisdiction, must have an attorney appointed to represent him. Although a minor does not have to have an attorney appointed in every case, regardless of the court or charge, § 16.1-173(a) clearly requires appointment of counsel in any case before a juvenile court where the maximum sentence could include a sentence of confinement. Since this Code Section draws no distinction between confinement in the penitentiary, or confinement in a jail or other local institution, the effect of this Section will be to require the appointment of counsel in most cases which arise in Juvenile Court.
REPORT OF THE ATTORNEY GENERAL

JUVENILES—Indictment by Grand Jury of Children Under Age of Fifteen —May indict unless child a fugitive from justice.

November 10, 1971

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

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

"Whether or not pursuant to Section 16.1-176 (A), Code of Virginia 1950, as amended, a fourteen year old child who is not a fugitive from justice may be certified to the Grand Jury on a charge of murder."

My answer to your question is governed by a previous opinion to the Honorable John T. Camblos, Commonwealth’s Attorney for the City of Charlottesville, dated August 10, 1970, and a subsequent opinion to the Honorable Dabney W. Watts, Commonwealth’s Attorney for the City of Winchester, dated February 17, 1971, copies of which are enclosed here-with for your information and your records.

It is our opinion that the modifying language relating to children under the age of fifteen refers only to the preceding sentence concerning juveniles who are fugitives from justice. Consequently, a fourteen year old child may be indicted by a Grand Jury on a charge of murder unless he is a fugitive from justice at the time of the indictment.

JUVENILES—Records of Fingerprints and Photographs—Kept separate and apart from those of adults.

April 18, 1972

THE HONORABLE VON L. PIERSALL, JR., Judge
Juvenile and Domestic Relations Court

This is in response to your recent inquiry in which you point out that it has long been a rule in the City of Portsmouth that the police could not keep a file of photographs, mug shots, or fingerprints on juveniles and any such photographs or fingerprints were required to be destroyed at the conclusion of a case. You further point out that you have been requested to permit the Youth Bureau of the Portsmouth Police Department to maintain a file of such photographs and fingerprints of juveniles for investigative purposes with these files separated from adult files. You inquire as follows:

"Can the police department keep and maintain, separate from adult records, a file of photographs and fingerprints of juveniles for the purpose of using such photos and fingerprints in investigations of future crimes in the city?"

Your inquiry is governed by § 16.1-163 of the Code of Virginia (1950), as amended, which states, in pertinent part:

"The police departments of the cities of the State, and the police departments or sheriffs of the counties, as the case may be, shall keep separate records as to violations of law committed by juveniles, and the Division of Motor Vehicles shall keep separate records as to violations of motor vehicle law committed by juveniles, and such records shall be withheld from public inspection and shall be exhibited only to persons having a legal interest therein and with the express approval of the judge; . . ."

It is my opinion that it would be proper for a police department to maintain the photograph and fingerprint records referred to so long as those records are kept separate and apart from adult records, and so long as
they "shall be exhibited only to persons having a legal interest therein and with the express approval of the judge."


The Honorable W. Charles Poland
Commonwealth's Attorney for the City of Waynesboro

This is in reply to your letter of July 20, 1971, which reads as follows:

"The City of Waynesboro, jointly with Harrisonburg, Lexington, and Staunton, formed a Regional Juvenile Detention Commission and as such has constructed and staffs a Juvenile Detention facility in the City of Staunton. Each of the political subdivisions has one member on the Commission, together with the Judges of the Juvenile Courts for the Cities of Harrisonburg and Lexington and the Judge of the Juvenile Courts of the Cities of Staunton and Waynesboro, who serves as ex officio member of the Commission.

"Augusta County, Rockingham County, and other jurisdictions have indicated an interest in joining the above Commission, even though they did not participate in the original establishment of the facility. Under the statute, a member having a population of 25,000 or more would have two or more members on the Commission, and immediately upon joining the new members could control the Commission, possibly contrary to the wishes of the original members.

"Section 16.1-202.4 states that the Commission 'shall adopt rules and regulations for its own procedure and government.' Thus, when new members are admitted to an existing Commission, can the existing Commission adopt regulations limiting the new participating political subdivisions to one member and the Judge of the Juvenile Court, even though the new member may have a population of 25,000 or more."

Sections 16.1-202.3 and 16.1-202.4 of the Code, as amended, provide that each political subdivision member of the juvenile detention commission, having a population of less than twenty-five thousand, shall have one member on the Commission along with the judge of the juvenile and domestic relations court as an ex officio member. They further provide the political subdivision members having a population of more than twenty-five thousand shall have not less than two members along with the judge as an ex officio member.

In view of the express language in these statutes establishing the number of members from the political subdivisions, I am of the opinion that the Commission may not change these numbers by rules and regulations.

LABOR—Stranger Picketing Law—Not Unconstitutional per se but unenforceable. February 9, 1972

The Honorable Thomas W. Moss, Jr.
Member, House of Delegates

In your letter of January 28, 1972, you inquire whether paragraph 3 of § 40.1-53 of the Code of Virginia (1950), as amended, is in violation of the Constitution of the United States. That paragraph, the so-called "stranger picketing" statute, reads as follows:

"When a strike or lockout is in progress, no person who is not, or immediately prior to the time of the commencement of any strike or lockout was not, a bona fide employee of the business or industry
being picketed shall participate in any picketing or any picketing activity with respect to such strike or lockout."

As you point out in your letter, I have ruled in an opinion to the Honorable Linwood Holton, Governor of Virginia, dated July 1, 1971, that the above paragraph is unenforceable in the courts of Virginia since it purports to deal with matters pre-empted by the National Labor Relations Act.

In 1941, the United States Supreme Court in the case of A.F.L. v. Swing, 312 U.S. 321, an opinion written by Mr. Justice Frankfurter, held unconstitutional an Illinois court's injunction against peaceful picketing by a trade union where the employer's own employees were not in controversy with him, saying:

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. . . . A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."

This opinion and the opinion of the Court in Thornhill v. Alabama, 310 U.S. 88 (1940), were later characterized by Mr. Justice Frankfurter in International Brotherhood of Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957) as prohibiting blanket prohibitions against picketing. In the Vogt case, however, Mr. Justice Frankfurter, analyzing carefully all of the Court's decisions involving restraints on picketing, held that injunctions against peaceful stranger picketing were constitutionally justifiable where the facts of a particular case disclosed an unlawful objective of the otherwise lawful picketing, for example, to pressure the employer to coerce his employees to join a union against their will. Where such coercion was against the declared policy of the State, said the Court, it could enjoin such conduct consistent with the First and Fourteenth Amendments. Mr. Justice Douglas, dissenting in Vogt, characterized the majority decision as a full circle retreat from the limitations of Thornhill and Swing, saying:

"State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."

It was the Vogt decision which was relied on by the Supreme Court of Virginia in holding the stranger picketing statute to be constitutional in the case of Dougherty v. Commonwealth, 199 Va. 515 (1957). The Court noted that Virginia had an avowed public policy of preventing disorder and coercion, and, furthermore, of insuring that employer and employees in a strike or lockout situation should be left free to resolve their differences without outside pressures. These policies, stated the Court, brought Virginia's statute within the ambit of the Vogt decision.

There has been little occasion since Vogt for the United States Supreme Court to consider these constitutional issues further, due chiefly to its decision shortly after Vogt in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), holding most regulation of picketing and other labor practices to be pre-empted by the National Labor Relations Act. The line of cases was most recently analyzed, however, by Mr. Justice Marshall in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), a case involving the rights of persons to peacefully picket a business enterprise located within a shopping center. Although the stranger picketing issue was not an issue in the case, the Court's review of the cases appeared to recognize as well settled the principle that picketing could be enjoined by the States where it was found either to have been directed at an illegal end or at coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice. The Court did note that A.F.L.
v. Swing, supra, continued to stand for the proposition that picketing of a business enterprise cannot be prohibited on the sole ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business.

It is my opinion, therefore, that the constitutionality of the "stranger picketing" law depends upon its specific application in any given case, based on whether stranger picketing per se is sought to be enjoined as in Swing or whether other valid policies are present as in Dougherty. In view of the now well-established doctrine of preemption, however, I do not believe that cases of either kind are likely to arise.

LABOR UNIONS—Picketing—Section 40.1-53 unenforceable.

The Honorable J. R. Painter
Justice of the Peace

In your recent letter you inquire whether § 40.1-53 of the Code of Virginia (1950), as amended, is still in effect. Your letter specifically referred to Paragraph 3 of that section which would prohibit a person from participating in a picket line while not a regular employee at the time of the strike.

I enclose a copy of an opinion to the Honorable Linwood Holton, Governor of Virginia, dated July 1, 1971, in which I held that Paragraph 3 of § 40.1-53 is unenforceable in the courts of Virginia. I continue to be of that opinion for the reasons stated therein.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION—Minimum Salary for Personnel Completing Training; Compensation Board Participates in Increased Salary; Also Governed by Federal Pay Board.

The Honorable Ford C. Quillen
Member, House of Delegates

In your letter of March 30, 1972, you refer to legislation enacted by the 1972 General Assembly, which set a minimum salary of $7200.00 per year for law enforcement personnel who satisfactorily complete training in a course of study approved by the Law Enforcement Training Standards Commission. You inquire, with regard to personnel who have heretofore completed these training requirements and are now therefore qualified to receive the aforementioned minimum salary, whether the Compensation Board would be required to participate in the increased salary of such qualified personnel and whether the general pay standard promulgated by the Pay Board pursuant to the Economic Stabilization Act would apply to this increase.

Since the minimum salary is now prescribed by State law, the answer to your first question must be in the affirmative, in that the Compensation Board must direct payment out of the State Treasury in accordance with the provisions of §§ 14.1-79 and 14.1-81 of the Code of Virginia, (1950), as amended.

The answer to your second question must also be in the affirmative, since in this instance federal law would take precedence over state law as a matter of supremacy. In many localities this may operate to prohibit the granting of increases to individuals which would bring their salary up to the minimum level, since such increases would be in excess of the 5.5% general pay standard. In these situations, the only increase that may be implemented at this time would be an average increase of 5.5% over the
current average salary of the appropriate employee unit, which in this case would be the average salary of the deputies employed by any given locality. This means in effect that some individuals within the employee unit may receive dollar increases in excess of 5.5% as long as the average for the entire unit does not exceed that figure. I hasten to point out, however, that as soon as the economic controls are removed by the President to the degree that increases up to the $7200.00 minimum are permitted, those increases could be immediately implemented.

Regardless of these factors, I believe that it is most important that Virginia's law enforcement personnel receive the minimum compensation deemed by the General Assembly to be adequate for their services. Accordingly, my office will proceed with the necessary steps to request from the Pay Board an appropriate exception for Virginia's deputy sheriffs.

LIBRARIES—Appointment of Regional Library Boards.

June 15, 1972

THE HONORABLE RANDOLPH W. CHurch
State Librarian

I am writing in reply to your recent letter in which you ask my opinion whether regional library boards are mandatory under § 42.1-37 and § 42.1-38 of the Code of Virginia (1950), as amended, in light of § 42.1-36 of the Code which expressly states that the formation of library boards is not mandatory upon any county, city or town with certain forms of government.

Sections 42.1-33 and 42.1-34 of the Code generally relate to the establishment of a free public library system by the governing body of any city, county or town. Section 42.1-35 of the Code provides that the management and control of a free public library system shall be vested in a board of not less than five members to be chosen by the governing body. In light of § 42.1-39 of the Code which deals with the appointment and powers of a regional library board, it is clear that the provisions of § 42.1-35 should be construed in relation to §§ 42.1-33 and 42.1-34 and that these sections relate to library systems limited to the geographical area of the city, county or town.

Section 42.1-36 of the Code provides that the formation and creation of library boards shall not be considered or construed in any manner as mandatory upon certain cities, towns, or counties “by virtue of this Chapter.”

Sections 42.1-37 and 42.1-38 of the Code relate to the establishment of a regional library system, and § 42.1-39 of the Code, which provides “the members of the board of a regional library system shall be appointed by the respective governing bodies represented,” relates to the creation and powers of regional library boards.

In construing any statute, one must always read it with other Code sections, unless there is a conflict, in which case the more specific provision will prevail. In this instance these sections can be construed together. Because of the general arrangement of the sections of Chapter 2 of Title 42.1, it is obvious that § 42.1-36 only prevents the general mandate of § 42.1-35 from applying to the excepted cities, towns and counties. As stated above, § 42.1-35 relates only to the operation of an independent library system confined to the local geographical unit. In the event that an excepted local unit of government joins in the establishment of a regional library system, then it would no longer fall under § 42.1-36.

In conclusion, I am of the opinion that the creation of library boards generally remains mandatory upon all library systems with the exception that such boards are not required of political subdivisions of the character
described in § 42.1-36 when those governmental units are independent, nonregional public library systems.

LIBRARIES—County Free Libraries—Method of appointment of members.

October 13, 1971

THE HONORABLE R. PAGE MORTON, Judge
Charlotte County Court

I am in receipt of your letter of September 20, 1971, concerning the method of appointing members to the Charlotte County Library Board.

Section 42-9, Code of Virginia (1950), as amended, provided that in a county free library system members of the board of trustees shall be appointed by the judge of the circuit court of such county. In 1970 the General Assembly repealed Title 42 and enacted Title 42.1. Section 42.1-35 of the Code now provides that members of the board shall be appointed by the governing body. As you correctly observe, § 42.1-35 supersedes § 42-9. Your inquire whether the new section refers to existing county free libraries or only to those libraries which will be established in the future.

I am of the opinion that § 42.1-35 of the Code is applicable to all county free libraries regardless of the time at which they were established. There is no indication that the General Assembly intended that the new section be applicable only to those county free library systems which were established after the enactment of the section. Accordingly, I am of the opinion that future appointments to all county free library boards should be made pursuant to the provisions of § 42.1-35 of the Code of Virginia.

LIBRARIES—Regional Library Board—Members may not receive compensation—Necessary expenses paid.

April 11, 1972

THE HONORABLE RANDOLPH W. CHURCH
State Librarian

I am writing in answer to your letter of April 11, 1972, in which you ask whether members of a regional library board may receive compensation rather than the actual travel expenses. The question is raised by the decision of a county board of supervisors to pay library board members “at the rate of $25.00 per meeting up to a maximum of $500 per year in lieu of expenses.”

Section 42.1-39 of the Code of Virginia 1950, as amended, provides in part that “A member [of a regional library board] shall not receive a salary or other compensation for services as a member, but necessary expenses actually incurred shall be paid from the library fund.” This statute prohibits board members from receiving compensation but requires that they be reimbursed for “necessary expenses actually incurred.”

In light of the clear language of § 42.1-39 of the Code, I must answer your question in the negative.

LICENSES—Brokers—Required for auctioneer selling real property.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Brokers—Licenses required for auctioneer selling real property.

REAL ESTATE BROKERS—Licenses—Required of auctioneer selling real property.
The Honorable Turner N. Burton  
Director, Department of Professional and Occupational Registration

This is in response to your recent letter in which you request an interpretation of Chapters 18 and 20 of Title 54 of the Code of Virginia. Specifically, you asked whether an auctioneer licensed under Chapter 20 of Title 54 was authorized to advertise for or sell real property by auction or if he was restricted in the sale of such property by the provisions of Title 18 of Chapter 54 of the Code which governs the sale of real property. You enclosed copies of advertisements by an auction company in which the auctioneer indicated that he had sold real property for a certain price and solicited persons to place their real property with him for sale. This person was not licensed as a real estate broker or a real estate salesman by the Virginia Real Estate Commission, and you asked whether this was a prerequisite to his selling real estate by auction. In my opinion, these practices are prohibited and a person selling real estate by auction, assuming that he is not within the exemptions of § 54-734 of the Code of Virginia (1950), as amended, must obtain a real estate broker's or salesman's license.

Section 54-732 of the Code defines certain acts which require one to obtain a broker's or salesman's license. It states:

"One act for a compensation or valuable consideration of buying or selling real estate of or for another, or offering for another to buy or sell, or exchange real estate, or leasing, or renting, or offering to rent real estate except as specifically excepted in this chapter, shall constitute the person, firm, partnership, co-partnership, association or corporation, performing, offering or attempting to perform any of the acts enumerated herein, a real estate broker or real estate salesman within the meaning of this chapter."

Section 54-749 of the Code provides that it is unlawful for any person to act as a real estate broker as defined in § 54-732 unless he is duly licensed as a real estate broker or a real estate salesman. Obviously, the auctioneer either sells or offers for sale real estate of another person for compensation or valuable consideration and unless exempted elsewhere, is performing those acts reserved for real estate brokers or real estate salesmen. The exemptions are provided for in § 54-734 of the Code and are as follows:

"The provisions of this chapter shall not apply to any person, partnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as and incident to, the management of such property and the investment therein; nor shall the provisions of this chapter apply to persons acting as attorney in fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate, nor shall this chapter be construed to include in any way the service rendered by an attorney at law in the performance of his duties as such attorney at law; nor shall this chapter be held to include, while acting as such, a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to include a trustee acting under a trust agreement, deed of trust, or will or the regular salaried employees thereof."

I find nothing in this enumeration which exempts auctioneers, except where a receiver, trustee in bankruptcy, administrator or executor or person selling under order of any court or trustee under deed of trust, etc.,
is required to sell by auction. However, in the factual situation presented, 
the auctioneer does not fall into one of these categories and is therefore 
not exempted. I am not able to find any exemptions elsewhere in the Code 
which would apply to the auctioneer. 

In a former opinion of this office, it was stated that the Virginia Real 
Estate Commission had not erred in ruling that auctioneers were not within 
the purview of Chapter 18 of Title 54. In so ruling, the Virginia Real 
Estate Commission relied upon § 54-794 of the Code which has been repealed. 
opinion conflicts with this opinion, it is expressly overruled.

LIEUTENANT GOVERNOR—Term of Office—When candidate elected to 
fill office succeeds to office. 

November 2, 1971

THE HONORABLE JOAN S. MAHAN, Secretary 
State Board of Elections 

I am in receipt of your inquiry of November 1, 1971, regarding when the 
candidate elected to fill the vacancy in the office of Lieutenant Governor 
may succeed to such office.

The election to fill the vacancy in the office of Lieutenant Governor is a 
special election, notwithstanding that it was not necessary to issue a writ 
of election and that it is being conducted simultaneously with the general 
election. See previous opinion of this office directed to you on June 29, 
1971, as well as § 24.1-84 of the Code of Virginia (1950), as amended, 
which requires that if “there shall be a general election held during the 
unexpired portion of the term of such Lieutenant Governor, the vacancy 
shall be filled at such general election.”

An individual elected as Lieutenant Governor may take office only after 
the returns are canvassed by the State Board and certificates of election 
issued. In cases of special elections such canvass is conducted the day after 
the returns of the election are received unless such special election was 
conducted at the time fixed for the general election (See § 24.1-155), in 
which case the canvass would be held in accordance with the provisions for 

In the case you present such canvass should be conducted on the fourth 
Monday in November and the candidate certified may qualify promptly 
after such date—November 22, 1971.

LITERARY FUND—Appropriation of Interest for Public School Purposes— 
Not invalidated by revised Constitution—Interest on Literary Fund 
Notes held by Virginia Public School Authority included in Literary 
Fund income. 

April 5, 1972

THE HONORABLE WALTER W. CRAIGIE, JR. 
Treasurer of Virginia 

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

“We would like your official opinion as to the disposition of monies 
collected for interest on Literary Fund loans in funds and amounts 
and for periods as follows:

Virginia Public School Authority

January 1, 1971—June 30, 1971 $1,084,696.97
July 1, 1971—December 31, 1971 $1,394,821.81
Total $2,479,518.78
REPORT OF THE ATTORNEY GENERAL

Literary Fund

<table>
<thead>
<tr>
<th>Period</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 1971—June 30, 1971</td>
<td>$119,163.88</td>
</tr>
<tr>
<td>July 1, 1971—December 31, 1971</td>
<td>$66,805.11</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$185,968.99</strong></td>
</tr>
</tbody>
</table>

“Our question is whether any or all of the above interest should be added to the principal of the Literary Fund or transferred to the appropriation accounts—Item 508 of the 1970 Appropriations Act (Chapter 461). In addition, we should like your opinion as to the application of this interest collected in Virginia Public School Authority and Literary Fund from January 1, 1972 to June 30, 1972, and from July 1, 1972, forward. It is our belief that the estimates of interest payments to the Literary Fund (Item 508) did not include interest from January 1, 1972, to June 30, 1972. The interest collected in the Virginia Public School Authority is transferred to the Literary Fund after the end of each calendar year and the interest collected from January 1, 1971, to June 30, 1971, was held in trust pending the decision of the Supreme Court.”

Item 508 of § 3 of the 1970 Appropriations Act (1970 Acts of Assembly, ch. 461) appropriates, for the biennium ending June 30, 1972:

“Schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned and distributed to each School Board in this State on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment in accordance with the provisions of Section 135 of the Constitution of Virginia; the proceeds from annual interest payments to the Literary Fund, estimated at $2,545,000 the first year, and $2,695,000 the second year. No part of this appropriation shall be paid out of the general fund of the State treasury.”

This appropriation was made pursuant to, but not contingent upon, Section 135 of the then effective Constitution of Virginia:

“The General Assembly shall apply the annual interest on the literary fund...to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment...”

The Constitutional apportionment formula differed from the basic school aid fund distribution formula, under which a far larger amount was appropriated. Under Item 510 of § 3 of the 1970 Appropriations Act, the basic school aid fund distributions were reduced by any amount paid pursuant to Item 508. The practical effect of the Constitutionally required distribution of literary fund income was to help the general fund meet the statutorily required basic school aid fund distribution.

When the revised Virginia Constitution became effective on July 1, 1971, Section 135 was repealed. Instead, a new Article VIII, Section 8, established a new mandate:

“But so long as the principal of the Fund totals as much as eighty million dollars, the General Assembly may set aside all or any part
of additional moneys received into its principal for public school purposes, including the teachers retirement fund."

In *Virginia Public School Authority v. Craigie*, 212 Va. 464 (1971), our Supreme Court held that certain literary fund notes held by the Virginia Public School Authority are to be included in determining the principal of the Literary Fund. On this basis, the principal of the Literary Fund has, at all times since July 1, 1971, exceeded eighty million dollars.

The provision requiring the General Assembly to set apart the interest is not self-implementing. Indeed, because of the proviso, it would not have prohibited the General Assembly from making the Item 508 appropriation in 1971 (the first session in which the General Assembly was empowered to implement the revised Constitution). Admittedly, the General Assembly could not, at its 1970 session, have acted pursuant to authority first given it by the revised Constitution. *Jackson v. Hodges*, 176 Va. 89 (1940). Yet the Item 508 appropriation, was proper when it was made and would have been proper under the revised Constitution. Section 3 of the Schedule of the revised Constitution provides, in part:

"The common and statute law in force at the time this revised Constitution goes into effect, so far as not in conflict therewith, shall remain in force until they expire by their own limitation or are altered or repealed by the General Assembly."

I am of the opinion that the appropriation was not in any way affected by the Constitutional revision.

You also ask whether the income derived by the Virginia Public School Authority upon the literary fund notes held by its income to the Literary Fund. Virginia Code § 22-29.10 provides that "the interest collected by the Authority on account of such obligations shall be deemed to be interest on the Literary Fund subject to the provisions of Article VIII, Section 8, of the Constitution of Virginia and of this chapter. . . ."

In my opinion, an amount representing all of the interest on the literary fund notes should be transferred to the appropriations account.

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**LOBBYISTS—Registration—Each individual must comply with registration, filing and fee requirements.**

**April 13, 1972**

**THE HONORABLE LOUISE JONAS**
Acting Secretary of the Commonwealth

In your letter of April 4, 1972, you inquire whether two or more members of the same law firm may register and qualify as lobbyists on a single fee of $5.00.

Section 30-28.2 of the Code of Virginia (1950), as amended, states clearly:

"No individual shall engage in lobbying until he registers with the Secretary of the Commonwealth and secures an identification card. . . ."

Section 30-28.4 provides:

"(a) Upon the filing of an application in accordance with § 30-28.2, the Secretary of the Commonwealth shall issue to the applicant an identification card, which shall be presented by the lobbyist, if requested, at any time during a legislative session while the lobbyist is in the Capitol, whenever he approaches any member of the General Assembly, or appears before any committee thereof, on a legislative matter."
Finally, § 30-38.7 provides:

"Before the Secretary of the Commonwealth issues an identification card under § 30-28.4, he shall collect $5.00 from the lobbyist as a fee for filing the statement herein required. . . ." 

It is my opinion that the wording and intent of these provisions is to require each individual who may engage in lobbying activities to comply with the registration, filing, and fee requirements of Chapter 2.1 of Title 30, of the Code, regardless of whether two or more such individuals may be members of the same firm.

LOCAL LEVIES—Liens—Cost of removal of weeds by county chargeable to owner; charges may be added to real estate assessment, if unpaid, and collected by county.

April 25, 1972

THE HONORABLE THOMAS R. NELSON
County Attorney for Augusta County

Your letter of March 21 requested advice as to the proper procedure for collection of charges for cutting weeds under an ordinance adopted pursuant to § 15.1-11 of the Code of Virginia. That section permits the governing body of a county, city or town to cut grass and weeds on subdivision property if the owner fails to do so and assess the owner for the cost. The statute provides that the cost of such removal "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. . . ."

The county ordinance enacted pursuant to this section provides that "all expenses incurred by the county by reason of the failure of the owner or occupant to cause such cutting and removal as required by the foregoing provisions of this section shall be collected by levy, distress and sale as are other taxes levied by the county."

These provisions authorize the county to treat the expenses incurred in such weed removal as property taxes. A permissible procedure for collection would be to add the charge, if it remains unpaid during the year the work was performed, to the ensuing year's real estate tax assessment. It would thus appear on the tax ticket for that year and, if not paid, would be collected in the same way as a real estate tax, under chapters 20 and 21 of Title 58.

LOTTERIES—Chance Essential Element—Promotional scheme lacking this element not lottery.

July 20, 1971

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth's Attorney of the City of Norfolk

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

"Will you please render me an opinion as to whether or not a local department store will be violating the lottery law with the following proposed promotional scheme.

"During a specified period of time each customer of the store will receive a 'Lucky Buck' coupon for every dollar he spends in the store. On a specified day and time, an auction will be held for customers having possession of 'Lucky Bucks.' The customer would bid for the merchandise being auctioned, using his 'Lucky Bucks'. The person who owned the highest amount of 'Lucky Bucks' could
naturally be the high bidder, and necessarily many persons holding some 'Lucky Bucks' would receive nothing after the auction is over and all the items designated had been auctioned. The store indicates there would be no extra cost to the customer over and above the cost of the merchandise in receiving a 'Lucky Buck'."

As you are aware, this office has frequently ruled in accordance with the opinion of the Supreme Court of Appeals of Virginia in *Maugh v. Porter*, 157 Va. 415, that a particular activity constitutes a lottery when the element of prize, chance and consideration are present in combination. It is clear that the elements of prize and consideration are present in the scheme you outline and that the critical inquiry presented thereby is whether or not the element of chance exists to the degree necessary to bring the activity in question within the definition of a lottery.

You point out that the merchandise, or prizes, will be auctioned with the customers using their "Lucky Bucks" to bid on the merchandise. Thus, there would appear to be no greater element of chance than in the instance of a merchant giving trading stamps with each purchase with the auction being the main distinction. It is my opinion that the three necessarily constituent elements of a lottery are thus not present in combination and the described promotional scheme would not be in violation of the lottery law.

LOTTERIES—Game of "Skilo" Involves Chance and Therefore a Lottery.

July 20, 1971

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth’s Attorney for the City of Norfolk

I am in receipt of your letter of June 30, 1971, in which you present the following situation and inquiry:

"Will you please render me an opinion as to whether or not the following operation is illegal under the criminal laws in Virginia.

"I believe that this game is sometimes referred to as 'Skilo'. A payment of ten cents is made to participate. A cart with 75 holes in it is pushed down an aisle where participants in turn throw a ball at one of the 75 holes. When the ball goes into the hole a light flashes, indicating that letter/number which has been attributed to any participant who has that designation on his card. When a participant's card is completed by a row being lit either horizontally, vertically, or diagonally he is a winner and receives as a prize a coupon for free games, which he may use to play other games with or may redeem the coupon for cash. The winner of a ten cent play will ordinarily win $4.00 worth of games or may redeem the coupons for $4.00.

"In other words, the game itself is exactly like Bingo, except instead of the numbers being drawn by chance, a participant has the opportunity when it becomes his turn (which will vary depending upon how many participants there are in a particular game) to use his skill in throwing the ball in the hole designating the number he needs to help him complete his card."

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


In the game which you describe both prize and consideration combine. I understand that the opportunity for skill is extremely small since the
holes into which the ball must fall are barely larger than the ball and consequently the ball generally rolls about on the dividers until it runs out of motion and drops into the nearest hole. Should this be the case the element of chance is the dominant element in the determination of a winner.

I am, therefore, of the opinion that the game you describe appears to constitute a lottery under § 18.1-340 of the Code of Virginia as interpreted in Maughs v. Porter, supra, and the previous opinions of this office.

LOTTERIES—Section 18.1-318.1 of the Code Does Not Legalize Raffles or Bingo Games Conducted by Organizations Exempt From Taxation Under Section 501(c)(3) of Internal Revenue Code.

June 14, 1972

Mental Health—Community Mental Health and Mental Retardation Services Board May Hold Title to Land and Facilities in Name of Services Board.

Mental Retardation—Community Mental Health and Mental Retardation Services Board May Hold Title to Land and Facilities in Name of Services Board.

November 9, 1971
"I am requesting clarification as to whether Community Mental Health and Mental Retardation Services Boards which are established under Chapter 10, Revised Title 37.1 of the Statutes of Virginia, can hold title to land and facilities in the Services Board's name."

With respect to the powers and duties of the Community Mental Health and Mental Retardation Services Boards, §37.1-197 of the Code of Virginia (1950), as amended, reads in pertinent part as follows:

"Every community mental health and mental retardation services board shall:

(h) Accept or refuse gifts, donations, bequests or grants of money or property from any source and utilize the same as authorized by the governing body or bodies of the political subdivision or subdivisions of which it is an agency."

In view of the above quoted Code section, in my opinion, the Community Mental Health and Mental Retardation Services Board established pursuant to Chapter 10, Title 37.1 of the Code, is authorized to accept or refuse property and may hold title to the same in the name of the Services Board, which Board acts as an agency of the political subdivision or subdivisions.

MENTAL HYGIENE AND HOSPITALS—Admissions—Examining physician need not execute form in presence of committing judge.

December 21, 1971

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

I am in receipt of your letter of November 26, 1971, wherein you mention that it is has been brought to your attention that the authorities at Southwestern State Hospital, Marion, Virginia, will not accept persons committed pursuant to §19.1-228 of the Code of Virginia (1950), as amended, until Form DMH 1031 (3-67) has been acknowledged by the physician appointed for the purpose before the judge of the committing court. Thereafter, you make the following inquiry:

"Does Section 19.1-228, or any pertinent statute, require that the physician execute and acknowledge the Form in question before the Judge of the committing Court?"

Section 19.1-228 of the Code reads in pertinent part as follows:

"A copy of the complaint or indictment, attested by the clerk, together with the report of the examining commission, including, as far as possible, a personal history, completed by the examining physician, according to the form prescribed by the State Hospital Board shall be delivered with such person..." (Italics supplied.)

In view of the above excerpt, in my opinion there is no statutory requirement that the examining physician execute and acknowledge the form in the presence of the committing judge. Therefore, your inquiry is answered in the negative.

MENTAL HYGIENE AND HOSPITALS—State Hospital Board—Authority to change name of institution.

July 27, 1971

THE HONORABLE ALLEN E. WOLFE
Assistant Commissioner, Administration
Department of Mental Hygiene and Hospitals
REPORT OF THE ATTORNEY GENERAL

This is in reply to your letter of July 14, 1971, wherein you stated that during the decentralization of Central State Hospital at Petersburg, the State Hospital Board deemed it advisable to change the name of Petersburg Training School to Petersburg Training School and Hospital to more appropriately reflect the general purpose of the institution. At that time it was questioned whether or not the State Hospital Board has the authority to make such a change in the name of the institution. In view of the above, you pose the following inquiry:

"We respectfully request your opinion as to whether the State Hospital Board in fact has such authority under the Code of Virginia."

Section 37.1-10 of the Code of Virginia (1950), as amended, reads in pertinent part as follows:

"The Board, in addition to other powers, functions and duties elsewhere conferred and imposed upon it, shall have full supervision, management and control of the State hospitals. . . ."

In light of the above Code section, in my opinion, the State Hospital Board has the authority to change the name of Petersburg Training School to Petersburg Training School and Hospital.

MENTAL HYGIENE AND HOSPITALS—Temporary Detention of Mentally Ill; Detention of Person Mentally Deficient Admitted As Voluntary Patient or Mentally Ill Under Twenty-one Years of Age.

MENTAL HYGIENE AND HOSPITALS—Authority of Superintendent Over Voluntary Patients.

April 12, 1972

The Honorable Francis M. Hoge, Judge
Smyth County Juvenile and Domestic Relations Court

I am in receipt of your recent letter of March 29, 1972, relative to the interpretation of § 37.1-65 of the Code of Virginia (1950), as amended, as it provides for voluntary admission of certain persons to State mental hospitals. Thereafter, you state as follows:

"The first paragraph of § 37.1-65 of the Code of Virginia provides for voluntary admission to the state hospital for any person deemed to be in need of hospitalization 'for mental illness or mental deficiency.'

"The second paragraph gives the superintendent the same control over 'a mentally deficient patient' as he may have over a patient admitted on judicial certification.

"From time to time petitions have been filed by personnel of Southwestern State Hospital for the involuntary commitment of patients who have been previously admitted under the voluntary procedure and I have insisted that no further commitment is necessary or proper particularly in view of the fact that the total cost of $75.00 is chargeable back to the county or city of the patient's residence.

"The difference in the language used in the two paragraphs of § 37.1-65 does raise a question in this respect and it will be appreciated if your office would clarify appropriate procedure."

Section 37.1-65 of the Code reads as follows:

"Any hospital may admit as a patient any person requesting admission who, having been examined by a physician on the staff of such hospital, is deemed to be in need of hospitalization for mental
illness or mental deficiency. Any such person under twenty-one years of age may be admitted on the request of the parent or any person standing in loco parentis to such infant.

"The superintendent shall have the same control over a mentally deficient patient or a person under twenty-one years of age admitted voluntarily as he may have over such a patient admitted by judicial certification."

The first paragraph of the above quoted Code section refers to "mentally ill or mentally deficient" persons and it also states that any person under twenty-one years of age may be admitted on the request of the parent. However, the second paragraph of the section limits the authority of the superintendent to retain such voluntarily admitted patient on an involuntary basis, unless such patient is "mentally deficient" or under twenty-one years of age. The mentally ill patient over twenty-one years of age who voluntarily admits himself to a state hospital is free to withdraw his consent to hospitalization at will.

Thus, in my opinion, voluntarily admitted patients under twenty-one years of age, regardless of diagnosis, and voluntarily admitted mentally deficient patients may be involuntarily detained in the hospital. Further, a person who requests admission voluntarily and is admitted on such status as needing hospitalization because of mental illness cannot, in the absence of appropriate proceedings, be involuntarily detained once he effectively withdraws his consent to hospitalization. In such case, the superintendent would not have statutory control over the twenty-one year old mentally ill patient, unless involuntary commitment procedures were followed.

MENTALLY ILL—Detention in Jail—How and where may be detained.

July 6, 1971

THE HONORABLE DONALD C. CROUNSE
Associate Judge, Fairfax County Court

This is in reply to your recent letter in which you submitted the following questions for my opinion:

"(1) Can a justice, as designated by Section 37.1-1 of the Code of Virginia, order a person alleged to be mentally ill confined in a jail, or other places of confinement for criminals, prior to a hearing under the provisions of Section 37.1-67 of the Code of Virginia?

(2) If your answer to the above question is affirmative, then the next question is: Can he be detained without recognizance bond for his appearance before the court at the hearing."

With respect to your first inquiry, I refer you to §37.1-74 of the Code of Virginia (1950), as amended, which reads as follows:

"In no case shall any sheriff or jailor confine any mentally ill person in a cell or room with prisoners charged with or convicted of crime."

In light of the above code section it is, in my opinion, clear that no one who is mentally ill or alleged to be mentally ill can be lawfully confined in a cell or room with persons charged with or convicted of crime. Such prohibition would apply prior to and subsequent to §37.1-67 certification. Further, §37.1-67 of the Code reads in part as follows:

"... Any justice as defined in §37.1-1, when any person in his county or city is alleged to be mentally ill, upon the verified petition of any responsible person, shall issue forthwith his order requiring the allegedly mentally ill person to be brought before him..."

Reading the last cited section in conjunction with §37.1-74 of the Code, in my opinion, such allegedly mentally ill person must be forthwith brought
before the justice. Such language presupposes that the justice has the authority to authorize a reasonable period of pre-certification detention of the patient. Such conclusion is reinforced by § 37.1-73 of the Code which prohibits and makes unlawful the detention in any jail or other place of confinement for criminals any patient who has been certified mentally ill, except where such detention is specifically authorized by a justice and such action has been communicated to the Commissioner, Department of Mental Hygiene and Hospitals. Therefore, your first question is answered in the affirmative.

Your second inquiry is answered in the affirmative.

MILK AND MILK PRODUCTS—Intramarket Milk Base Qualifies as Personal Property.


MILK AND MILK PRODUCTS—Security Interest in Intramarket Milk Base Transferred to Creditor Remains Subject to Police Power of Virginia State Milk Commission.

MILK AND MILK PRODUCTS—Security Interest in General Intangible (Intramarket Milk Base) Must Be Filed in State Corporation Commission to Perfect Lien.

MILK AND MILK PRODUCTS—Intramarket Milk Base May Be Transferred Only With Approval of State Milk Commission and Only to Intramarket Producers.

RECORDATION—Security Interest in General Intangible (Intramarket Milk Base) Must Be Filed in State Corporation Commission to Perfect Lien.

RECORDATION—To Perfect Lien on Intramarket Milk Base Filing to Be Made in Accordance With § 8.9-401(1)(c).

January 4, 1972

THE HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of November 30, 1971, which reads as follows:

"I would request an opinion on the following:

"A, who is a Dairy Farmer, has an intramarket Milk Base which amount of said Milk Base is determined and set by the Virginia State Milk Commission according to their rules and regulations. A Virginia Milk Base is considered as a personal property asset and can be easily transferred from one dairy man to another. B, a financing company with A, desires to make a loan to A which would be secured by A's Milk Base. All transfer records and transfers are required to be made at the office of the Virginia State Milk Commission in Richmond, Virginia. How can B secure a valid lien on A's Milk Base?

"I would appreciate your further opinion as to whether or not the filing of a financing statement at the local Clerk's Office for the Circuit Court along with a security agreement would be sufficient to secure such a lien."

A Virginia intramarket milk base is the quantity of fluid milk established by the Virginia State Milk Commission for each licensed producer of milk, on an equitable basis with all other licensed producers, for the purpose of apportioning Class I sales made by licensed distributors who are not fully
regulated by a Federal Milk Marketing Order, Regulation No. 2 (22A), Rules and Regulations for the Control, Regulation and Supervision of the Milk Industry in Virginia, as amended. Producers are generally required to deliver an amount of milk at least equal to their base, if produced, and the distributor concerned is generally required to accept such deliveries. The milk must not be rejected by a distributor provided that the milk is merchantable and meets the requirements of the health authorities having jurisdiction. Regulation No. 6. The price for producer milk so delivered and received is set by regulation. Regulation No. 8(6). Although the Virginia State Milk Commission does not specifically acknowledge that intramarket base has any value, it does recognize that such base may be transferred under certain conditions. Regulation No. 5(3) (E). In practice, among producers, this base is regularly sold and transferred for value; therefore, it qualifies as personal property.

Title 8.9 of the Code of Virginia (1950), as amended, provides a comprehensive scheme for the regulation of consensual security interests in personal property in Virginia and applies to any transaction which is intended to create a security interest in personal property, including general intangibles. Section 8.9-102(1)(a). "General intangibles" are any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments. Section 8.9-106. By this definition it is clear that a Virginia intramarket milk base is a general intangible under the Commercial Code.

A security interest in a general intangible may be perfected only by the filing of a financing statement. See §§ 8.9-302, 8.9-303, 8.9-305 and "Official Comment" thereto. The proper place to file in order to perfect a security interest in general intangibles as here involved is in the office of the State Corporation Commission and, in addition, if the debtor has a place of business in only one county or city in this State, also in the office of the clerk of the court in which deeds are admitted to record of such county or city. Section 8.9-401(1)(c).

Although a creditor may be able to obtain and perfect a security interest in a Virginia intramarket milk base, the milk base so secured remains subject to the police power of the Virginia State Milk Commission and the rules and regulations promulgated and enforced pursuant thereto. In this regard, the milk base remains subject to adjustment and diminution (see Regulation No. 5(2)) and, also, cancellation without regard to the secured party (see Regulation No. 5(4)). In addition, while the milk base may be sold or otherwise transferred, such transfer may be accomplished only with the approval of the State Milk Commission and the transfer may be made only to existing intramarket base holding producers or to persons desiring to become new intramarket producers, provided that such persons have met the requirements of the health authorities having jurisdiction. Regulation No. 5(3) (E).

MOTOR VEHICLES—Arrest for Misdemeanor—Release on summons and promise to appear—Initiating action for violating promise to appear under § 46.1-178(c).

July 6, 1971

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

This is in reply to your letter of June 22, 1971, which I quote, as follows:

"Subsection (c) of Section 46.1-178, Code of Virginia, as amended, provides as follows:

"'Any person who willfully violates his written promise to appear, given in accordance with this section, shall be guilty
of a misdemeanor, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.'

"Query: Who should initiate the necessary action to bring the person into court who willfully violates his written promise to appear?"

In the event a person willfully violates his written promise to appear, under the provisions of this section, in my opinion, the court having jurisdiction for trial of the original charges on the misdemeanor may initiate the necessary action to bring such person into court. As an alternative the court may direct the clerk or a police officer to do so. As you know, §§ 16.1-123 and 16.1-124, Code of Virginia (1950), as amended, except as otherwise provided, place exclusive original jurisdiction in the county and municipal courts for the trial of such misdemeanors arising in the respective counties, cities or towns. As an incident to such jurisdiction, the court has the power to set the policy for procedure in his jurisdiction. To this end, the court may direct that any police officer, who issues a summons pursuant to § 46.1-178, shall procure a warrant for the arrest of any person who fails to honor his written promise to appear in court.

MOTOR VEHICLES—Blood Sample—Court of record may designate practical nurse to withdraw blood.

CRIMINAL PROCEDURE—Blood Sample—Court of record may designate practical nurse to withdraw blood.

January 21, 1972

THE HONORABLE D. FRENCH SLAUGHTER, JR.
Member, House of Delegates

This is in reply to your letter of January 13, 1972, in which you ask my advice as to whether or not a court of record has authority under paragraph (d) of § 18.1-55.1, Code of Virginia (1950), as amended, to designate a "licensed practical nurse" to withdraw blood samples.

The pertinent part of the named paragraph states: "Only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a court of record acting upon the recommendation of a licensed physician . . . shall withdraw blood for the purpose of determining the alcoholic content thereof." (Emphasis supplied.)

In my interpretation, this means that a physician, registered professional nurse or graduate laboratory technician may draw the blood without being designated by a court and that, otherwise, a technician or nurse, if designated as indicated in the emphasized language, may perform this act. Chapter 13.1, Title 54, Code of Virginia (1950), as amended, which relates to nurses, does not define the word "nurse," as such, but defines "professional nurse," "registered nurse" or "registered professional nurse" to mean "a person who is licensed under the provisions of this chapter to practice professional nursing . . .," as therein defined. The same section, in paragraph (e), defines the terms "practical nurse" or "licensed practical nurse" to mean "a person who is licensed under the provisions of this chapter to practice practical nursing . . .," as therein defined. When these definitions are considered in conjunction with the above quoted language from § 18.1-55.1, it becomes apparent that the word "nurse," as used in the latter, is sufficiently broad to include a "licensed practical nurse." Accordingly, your question is answered in the affirmative.

MOTOR VEHICLES—Chambered Exhaust System Not Legal for Operation on Highways—Construing § 46.1-301(c).
This is in reply to your letter of July 16, 1971, from which I quote the following:

"The Chevrolet division of General Motors had a limited production of 454 Chevelle automobiles in 1970 equipped with LS-6 engine of ultra-high compression design and a chambered exhaust system. A vehicle purchased May 18, 1970 in good operating order was stopped by a member of the Virginia State Police and the driver was charged with the violation of Section 46.1-301 (c). The only evidence before me is that the car has the original standard factory equipment and is operating substantially as it was when originally purchased. There is also evidence that because of the high compression design, etc., any alteration of the exhaust system will adversely affect the performance of the engine and may be detrimental to it.

"It will be indeed appreciated if you will advise me if under these circumstances you consider it legal to now operate a motor vehicle registered and inspected in this state prior to the effective date of the act."

You refer to subsection (c) of § 46.1-301, Code of Virginia (1950), as amended, which was added by Chapter 266, Acts of Assembly of 1970, and reads as follows:

"(c) Chambered pipes and turbosuperchargers shall not be deemed to be an effective muffling device to prevent excessive or unusual noise as required in subsection (a)."

Subsection (a) of § 46.1-301, in itself, prevents the use upon a highway of a vehicle which fails to have an exhaust system "in good working order and in constant operation to prevent excessive or unusual noise." Subsection (c) makes it clear that chambered pipes and turbosuperchargers shall not be deemed to be an effective muffling device to prevent excessive or unusual noise, as required in subsection (a). There is no exception for vehicles already in use, as, by reference to subsection (a), the law applies equally to any motor vehicle operated upon the highways of this State.

Insofar as inspection is concerned, this is for examining the motor vehicle for the purposes of safety on the highways. As you know, the inspection stations are not operated by officers of the law but by civilians under regulations of the Department of State Police, pursuant to the applicable statutes. The prohibition against excessive noise, including the application of subsection (c) of § 46.1-301, is considered an enforcement problem.

In view of the foregoing, in my opinion, it would be illegal to operate a motor vehicle under the stated conditions. The question you pose, therefore, is answered in the negative.

MOTOR VEHICLES—Common Carriers—Social workers and case aides transporting recipients not considered common carriers and do not need a license as such.

STATE CORPORATION COMMISSION—Common Carriers — Welfare social workers transporting recipients not common carriers and do not need a license as such.

This is in response to your recent letter in which you stated:
"Mr. Thomas Martin, Superintendent of the Tazewell County Department of Social Services, has voiced concern over a threat made by a representative of the State Corporation Commission to bring legal action against a member of his staff, employed in the position of case aide, for transporting persons in violation of licensing laws governing common carriers.

The agency has been told that should the case aide continue to transport clients an injunction would be sought. This, in effect, would restrain the employee in the performance of her job. Case aides do not perform any "for hire" services, but carry out only those functions designated by the agency as required for the better delivery of services. Their duties include transporting welfare applicants and/or recipients to resources needed to meet medical and other needs.

Legal action around a service that has always been considered a normal agency function would have implications that go beyond this particular incident. Social workers have been transporting clients for many years, especially in family and children services. The case aide, as an agency employee, is supplementing services given by the social worker."

By telephone contact, you confirmed that the case aide is not solely hired for the purpose of transporting these persons but it is incidental to their other duties. Further, they are given no separate compensation for this activity. In some instances, the county furnishes the automobile, in others the private automobile is used and in these cases the person is reimbursed for mileage only.

I am able to find nothing in the Code which would require such persons to be licensed under the laws governing common carriers. Section 56-273 (d) of the Code defines "common carrier by motor vehicle" as follows:

"... any person who undertakes, whether directly or by lease or any other arrangement, to transport passengers or property for the general public by motor vehicle for compensation over the highways of the State, whether over regular or irregular routes including such motor vehicle operations of carriers by rail or water and of express or forwarding companies under this chapter." (Emphasis supplied.)

It is obvious that these case aides or case workers do not transport these persons as members of the general public for compensation. Their compensation is for the rendering of social services to welfare recipients and in the case of the case aide as an assistant to the case worker in providing such services. Their passengers are not of the general public. The transporting of applicants and recipients to areas where they may receive social services is merely an adjunct to the duties for which the person is actually compensated. Therefore, these persons do not fall within the ambit of Chapter 12 of Title 56 of the Code of Virginia regulating motor vehicle carriers and do not need to be licensed.

MOTOR VEHICLES—Conviction for Violation of Weight Laws under §§ 46.1-339 and 46.1-341—Liquidated damages prescribed in § 46.1-342.

June 15, 1972

The Honorable David G. Simpson, Judge
County Court of Frederick County

This is in reply to your letter of May 22, 1972, which I quote as follows:

"Where the defendant has been found guilty of exceeding the weight limits as set forth in Section 46.1-339, Code of Virginia, and been fined under Section 46.1-341, does the court have the right or the
power to suspend, for good cause shown, the liquidated damages assessed in Section 46.1-342 (a)?"

In respect to your question, the pertinent language of § 46.1-342 (a), Code of Virginia (1950), as amended, is as follows:

"Upon conviction of any person for violation of any weight limit as provided in this chapter or in any permit issued by the State Highway Commission or local authority pursuant to § 46.1-343 or § 46.1-343.1 of this Code the court shall assess the owner, operator or other person causing the operation of such overweight vehicle liquidated damages . . . Such assessment shall be entered by the court as a judgment for the Commonwealth, the entry of which shall constitute a lien upon the overweight vehicle. Such sums shall be paid into court or collected by the attorney for the Commonwealth and forwarded to the State Treasurer and allocated to the fund appropriated for the construction and maintenance of State highways." (Emphasis added).

It will be noted that upon conviction of any person for violation of any such weight limit the court shall assess liquidated damages as prescribed in this section. Assessment shall be entered as a judgment for the Commonwealth and shall constitute a lien on the overweight vehicle. Such sums shall be paid into court or collected by the attorney for the Commonwealth.

In view of the mandatory language in which this section is clothed, it is my opinion that the statute does not empower a court to waive the liquidated damages. Accordingly, your question is answered in the negative. In answering the closely related question of whether a court is authorized to assess less damages than the statute provides, my predecessor expressed a similar view in an opinion found in Report of the Attorney General (1968-1969), p. 177.

MOTOR VEHICLES—Conviction of Improper Driving under § 46.1-192.2— Section 46.1-423 requiring suspension of license for reckless driving not applicable.

June 8, 1972

THE HONORABLE MARK D. WOODWARD, Judge
County Court of Page County

This is in reply to your letter of May 24, 1972, from which I quote the following:

"Reference is made to your letter of July 21, 1971, (7-37) relative to reducing reckless charges to improper driving charges. I was first aware of this letter yesterday. The sections mentioned are 46.1-190, 46.1-192.2 and 46.1-193.

"Question arises as to whether the provisions of Section 46.1-423 relative to revocation of operator's license for conviction of reckless driving as provided by section 46.1-190 (i) is applicable when a verdict of improper driving is returned."

My letter of July 21, 1971, to which you refer, was written to The Honorable Downing L. Smith, Commonwealth's Attorney for Albemarle County. This covered a different question, namely, the propriety of certain instructions to be presented to a jury, hearing a case in which the defendant was charged with operating a motor vehicle at a speed in excess of seventy-five miles per hour in a fifty-five mile per hour zone.

The essential provision of § 46.1-423, Code of Virginia (1950), as amended, is the requirement that "When any person shall be convicted of reckless driving as provided for in § 46.1-190 (i) of this title then in addition to any other penalties provided by law, except in those cases for which rev-
ocation of licenses is provided in § 46.1-417, the operator's or chauffeur's license of such person shall be suspended by the court or judge for a period of not less than sixty days nor more than six months." Section 46.1-192.2, Code of Virginia (1950), as amended, provides that, upon the trial of any person charged with reckless driving "where the degree of culpability is slight, the court in its discretion may find the accused not guilty of reckless driving but guilty of improper driving and impose a fine not to exceed one hundred dollars."

Since the provision in § 46.1-423 for the suspension of license by the court or judge is based on a conviction of reckless driving, specifically as provided in § 46.1-190 (1), it would not apply to a conviction under § 46.1-192.2. The reason is that the latter requires a finding of not guilty of reckless driving but guilty of improper driving, obviously a lesser offense. Your question, therefore, is answered in the negative.

MOTOR VEHICLES—County Ordinance Regulating Operation Not Expressly Authorized in §§ 46.1-180 to 46.1-185 or 46.1-193—Must be uniform with State law.

COUNTIES—Ordinances Regulating Operation of Motor Vehicles—Must be expressly authorized in §§ 46.1-180 to 46.1-185 or 46.1-193 or uniform with State law.

September 24, 1971

THE HONORABLE DONALD C. STEVENS
County Attorney for Fairfax County

This is in reply to your letter of September 16, 1971, in which you ask my advice as to whether the Board of Supervisors of Fairfax County has the power under § 46.1-180, Code of Virginia (1950), as amended, to enact an ordinance extending the effect of § 46.1-303, Code of Virginia (1950), as amended, as indicated in the copy of the Ordinance furnished.

Section 46.1-303, which relates to the construction of vehicles so as to prevent the escape of their contents on the highways, is as follows:

"No vehicle shall be operated or moved on any highway unless such vehicle is so constructed as to prevent its contents from dropping, sifting, leaking or otherwise escaping therefrom."

For the sake of comparison, I shall quote the ordinance in question, as follows:

"It shall be unlawful for any person to operate a motor vehicle upon any highway when such vehicle contains soil, sand, gravel, ashes, cinders, garbage, trash, tree limbs or prunings, plant clippings, or coal, or any other similar such material, unless such vehicle is both constructed and equipped and operated in a manner effectively to prevent the dropping, leaking or other discharge of any such material upon any highway; such equipment shall specifically include a tightly fitting cover over the load carried in open bodied trucks."

It is true, as you state, that under the theory expressed in King v. County of Arlington, 195 Va. 1084, a county could extend its regulations in an area not pre-empted by the Commonwealth, unless otherwise prohibited. The Legislature, however, has addressed itself specifically to the enactment of ordinances, by boards of supervisors of counties, relating to certain subject matter covered by Title 46.1, Code of Virginia (1950), as amended. I refer to § 15.1-522, Code of Virginia (1950), as amended, which vests the boards of supervisors of counties with the same powers and authority as the councils of cities and towns, as therein indicated, but states "that with the exception of such ordinances as are expressly authorized under
§§ 46.1-180 to 46.1-185 and 46.1-193 no ordinance shall be enacted under authority of this section regulating the equipment, operation, lighting or speed of motor propelled vehicles operated on the public highways of a county, unless the same be uniform with the general laws of this State regulating such equipment, operation, lighting or speed and with the regulations of the State Highway Commission adopted pursuant to such general laws, ...

This section requires that any such ordinance must be expressly authorized under the named statutes or be uniform with the general laws of this State. Since the proposed ordinance is neither expressly authorized nor uniform with the general laws of this State, in my opinion, counties would not be authorized to enact such an ordinance. Your question, therefore, is answered in the negative.

MOTOR VEHICLES—Dealer's License Plates—Permissible use—Not limited to sales or demonstration purposes under § 46.1-115.

March 9, 1972

THE HONORABLE R. RUSSELL MYERS, Judge
Juvenile and Domestic Relations Court

This is in reply to your letter of March 3, 1972, in which you ask my opinion in regard to the factual situation and related questions which I quote as follows:

"Corporation A is a dealer in mobile homes with its principal place of business several miles from the city limits of Bristol, Virginia. The wife of one of the officers of the Corporation regularly uses an automobile with Corporation A's dealer tags on it for personal purposes, and among other things, uses the car to regularly drive back and forth to her place of employment at Corporation B in Bristol, Virginia which Corporation has nothing to do with the sale of cars or mobile homes. She may or may not be an officer of Corporation A. She maintains that the vehicle is for sale to the public, although, if this be the case, it has been 'for sale' over a period of months that she has been driving this car regularly. The car has no 'for sale' sign on it and she makes no effort to sell the car.

"Considering the definition of 'Dealer' and 'Person' set forth in 46.1-1 (12a) and (20) and considering the provisions of Section 46.1-113 and 46.1-115, is the above described use permissible?

"Depending upon your answer to the foregoing question, if you conclude that a dealer under 46.1-115 (a) may designate his wife as an 'authorized representative' despite the fact that she may be a figurehead officer of the Corporation, then may such dealer, for instance, designate his teenage son as an 'authorized representative'?'"

The pertinent part of paragraph (a) of § 46.1-115 is as follows: "Such dealer's license plates may be used on motor vehicles, trailers and semitrailers owned by, or assigned to, duly licensed motor vehicle dealers of this State when operated on the highways of this State by such dealers or their authorized representatives."

Formerly, this section contained the words "for demonstration or sale" at the end of the quoted sentence. This language was deleted by an amendment contained in Chapter 579, Acts of Assembly of 1964. Considering the present language of this statute, especially in light of this deletion, it is my opinion that dealer's license plates are not limited to use for demonstration or sale purposes. Accordingly, I shall answer both of your questions in the affirmative. A similar conclusion is expressed in an opinion found in Report of the Attorney General (1968-1969), p. 172.
MOTOR VEHICLES—Drunk Driving—Person convicted may not drive 
motorized street sweeper until revocation terminated.  

April 13, 1972  

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

This is in reply to your letter of April 7, 1972, which I quote, as follows:  

“May I have your opinion on the following: An employee for the 
Town of Marion was convicted in a county in Virginia of the offense 
of driving an automobile in violation of Section 18.1-54, Code of 
Virginia of 1950, as amended. In addition to other penalties his 
operator’s license was suspended for a period of twelve months.  

“Question—May this man legally operate a motorized vehicle 
[street sweeper] for the Town of Marion, within the scope of his 
employment during the period his operator’s license is revoked?”  

This situation is controlled by § 46.1-350, Code of Virginia (1950), as 
amended, which provides that, except as otherwise provided in § 46.1-352.1, 
no person, resident or nonresident, whose license or privilege to drive a 
motor vehicle has been suspended or revoked pursuant to the provisions 
of Title 46.1 or § 18.1-59 “shall thereafter drive any motor vehicle or any 
self-propelled machinery or equipment on any highway in this State unless 
and until the period of such suspension or revocation shall have termi-
nated.” The exception contained in § 46.1-352.1 permits a person convicted 
of driving under the influence of intoxicants to drive only a “farm tractor” 
within the limits therein specified. 

A farm tractor is defined in § 46.1-1 (7), Code of Virginia (1950), as 
amended, as a motor vehicle designed and used “for drawing plows, mowing 
machines and other farm, agricultural or horticultural machinery and im-
plements.” Since the motorized “street sweeper” is not a “farm tractor,” 
it does not come within the exception found in § 46.1-352.1. Accordingly, 
I shall answer your question in the negative.  

MOTOR VEHICLES—Exception to Speed Limitations—Applicable to am-
bulances only when operated outside of cities and towns.  

June 14, 1972  

THE HONORABLE OVERTON JONES, Chairman  
Virginia Highway Safety Commission  

This is in reply to your letter of June 7, 1972, in which you request my 
interpretation of § 46.1-199, Code of Virginia (1950), as amended, and any 
other applicable provisions of the Code of Virginia relating to the question 
which I quote, as follows:  

“Are ambulances authorized by law to exceed legal speed limits 
in cities and towns of the Commonwealth?”  

Section 46.1-199 provides, in part, that “[t]he speed limitations set forth 
in this chapter shall not apply . . . to ambulances when traveling in emer-
gencies outside the corporate limits of cities and towns.”  

The quoted language of this section, in granting ambulances the exception 
to speed limitations, establishes two requisites, namely, that the am-
bulance must be traveling in an emergency and that it must be traveling outside the corporate limits of cities and towns. Since this statute is in 
derogation of the general statutes controlling the lawful speed limits, it 
must be strictly construed. It offers no exception for an ambulance travel-
ing within the corporate limits of cities and towns. I find no other statute 
authorizing ambulances to exceed the lawful speed limits and, accordingly, 
your question is answered in the negative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Exemption From Registration and License Plates
Under § 46.1-45(b)—Exempts farm tractor drawing mowing machine
within the ten mile limit.

May 16, 1972

THE HONORABLE CHARLES W. GUNN, JR.
Member, House of Delegates

This is in reply to your letter of May 5, 1972, in which you request my
opinion as to whether or not § 46.1-45 (b), Code of Virginia (1950), as
amended, exempts from registration and license plates the farm tractors
and machinery owned and used as set forth in the factual situation, which
I quote as follows:

"The Norfolk and Western Railway Company owns a number of
farm tractors with side mowers. This equipment is used for the pur-
pose of mowing certain sections of its rights of way. The mowed
material is frequently donated to livestock farmers. In order to go
from one right of way section to another, the tractors are driven on
the highways but never a distance in excess of 10 miles."

Section 46.1-45, paragraph (a), exempts certain motor vehicles used for
agricultural or horticultural purposes from the requirement to obtain the
annual registration certificate and license plates when they are operated
over the highways from one point of the owner's land to another. Such op-
eration is limited to a maximum distance not to exceed ten miles between
points. Paragraph (b) of this section states: "The exemptions contained in
this section shall also apply to farm machinery and tractors; provided,
further, that such machinery and tractors may use the highways in going
from one tract of land to another tract of land regardless of whether such
land be owned by the same or different persons." The term "farm tractor"
is defined in § 46.1-1 (7), Code of Virginia (1950), as amended, as "Every
motor vehicle designed and used primarily as a farm, agricultural or horti-
cultural implement for drawing plows, mowing machines and other farm,
agricultural or horticultural machinery and implements."

When the foregoing statutes are considered together, it is my interpre-
tation that a "farm tractor" drawing a mowing machine may be operated
upon the highways from one mowing operation to another within the
stated ten mile limit. It follows that your question is answered in the affirm-
ative.

MOTOR VEHICLES—Habitual Offender—Accused of driving after revoca-
tion—Not tried as misdemeanor under § 46.1-350 but as felony under
§ 46.1-387.8.

CRIMINAL PROCEDURE—Habitual Offender—Accused of driving after
revocation—Not tried as misdemeanor under § 46.1-350 but as felony
under § 46.1-387.8.

February 25, 1972

THE HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County

This is in reply to your letter of February 17, 1972, from which I quote
the following:

"I would appreciate your advice and opinion in regard to the
procedure to be followed in an habitual offender case arising under
Code Section 46.1-387.8.

"Assume that a State Trooper has issued a traffic summons to a
motorist for driving while the motorist's license was suspended or
revoked in violation of 46.1-350. The trooper then contacts the Division
of Motor Vehicles and requests a transcript of the motorist's
record. The transcript is forwarded and it is then ascertained that
the motorist has been adjudicated an habitual offender in accordance
with the Act prior to the latest offense. I desire to be advised
by you as to the procedure to be followed as to the violation of Section
46.1-350 and the felony which has been committed."

Some procedural guidance for such instance is found in the last para-
graph of § 46.1-387.8, which states, in part, "the court before hearing such
charge shall determine whether such person has been held an habitual
offender and by reason of such holding is barred from operating a motor
vehicle on the highways of this State. If the court determines the accused
has been so held, it shall certify the case to the court of record of its juris-
diction for trial."

This office has consistently interpreted this to mean that before a person
charged with driving on a suspended or revoked license is tried on such
offense, the court shall in each case determine whether such person has
been held an habitual offender. The apparent intent of the statute is to
prevent avoidance of the felony prosecution, on the plea of former jeop-
dardy, by reason of trial for the misdemeanor. If it is determined that such
person has been held an habitual offender and by reason of such holding
is barred from operating a motor vehicle on the highways, he shall not be
tried on the charge under § 46.1-350 but the case shall be certified to the
proper court of record.

After the case has been so certified, the procedure should be similar to
that exercised in the case of any other felony. In the recent case of Tripl-
lett v. Commonwealth, Record No. 7812, decided January 17, 1972, the
Supreme Court of Virginia held that a defendant, accused of the felony
of driving during the period he is prohibited from driving under the "Vir-
ginia Habitual Offender Act," who insists upon his statutory rights to a
preliminary hearing and indictment, may not be denied these procedural
requirements, as provided in §§ 19.1-163.1 and 19.1-162, Code of Virginia
(1950), as amended.

MOTOR VEHICLES—Issuing Citation to Resident of Reciprocating State
Upon Arrest for Traffic Violation—Contingent upon his written promise
to appear.

September 10, 1971

THE HONORABLE DAVID A. LYON, III, Secretary-Treasurer
Association of Justices of the Peace of Virginia

This is in reply to your letter of August 21, 1971, from which I quote
the following:

"Section 46.1-179.2 outlines the procedure a police officer must take
in giving a resident of a 'Reciprocating State' a 'Citation' for violat-
ing certain traffic laws of this State. My question is:

"If a resident of a 'Reciprocating State' refuses to sign the
'Citation' when requested by the police officer, does the police
officer proceed then as outlined in Section 46.1-178 (b) for a
Virginia resident?"

Section 46.1-179.2, Code of Virginia (1950), as amended, to which you
refer, authorizes a police officer making an arrest for a traffic violation
to issue an appropriate citation "to any motorist who is a resident of or holds
a license issued by a reciprocating state," with certain exceptions not ap-
plicable to the instant situation. It does this "notwithstanding the provi-
sions of clause (3) of § 46.1-179 of the Code of Virginia." The latter, in
effect, states that any person arrested, who is believed by the arresting of-
fficer to be likely to disregard a summons issued under § 46.1-178, shall be
taken forthwith before the nearest or most accessible judicial officer or
other person qualified to admit to bail, in lieu of issuing the summons as required by § 46.1-178.

The summons authorized by § 46.1-178 contemplates a written promise to appear by the person arrested. A person arrested for a violation of Title 46.1, Code of Virginia (1950), as amended, who refuses to give his written promise to appear, loses his right to be released on a summons. This is true because paragraph (b) of this section provides that a person refusing to give such written promise to appear shall be immediately taken before the nearest or most accessible judicial officer or other person qualified to admit to bail.

The purpose of § 46.1-179.2 is to give a resident of a reciprocating state the same consideration as is given a resident of this State under § 46.1-178. It is not the intent of this statute to permit a resident of a reciprocating state to evade the law of this State by the simple expediency of refusing to sign the summons issued. It is stated in § 46.1-179.2 that the arresting officer shall not “require such motorist to post collateral or bond to secure his appearance for trial, but shall accept such motorist’s personal recognizance that he will comply with the terms of such citation.” Clearly, issuance of the citation, in lieu of requiring collateral or bond, is contingent upon receipt of such person’s personal recognizance that he will comply with the terms of the citation. In my opinion, therefore, if any such person refuses to give his written promise to appear, he should be taken immediately before the nearest or most accessible judicial officer or other person qualified to admit to bail. Accordingly, your question is answered in the affirmative.

MOTOR VEHICLES—License to Drive Revoked for Drunk Driving Conviction—May not drive farm use truck on highway.

January 25, 1972

THE HONORABLE SAM L. HARDY
Commonwealth’s Attorney for Bland County

This is in reply to your letter of January 18, 1972, in which you inquire whether or not a person under a one year’s revocation for driving under the influence of intoxicants has the right to drive a farm use truck on the highways of this State.

In regard to violations of § 18.1-54 or similar county, city or town ordinances, § 18.1-59, Code of Virginia (1950), as amended, provides, in part: “The judgment of conviction . . . shall of itself operate to deprive the person so convicted . . . of the right to drive or operate any such vehicle, conveyance, engine or train in this State for a period of one year from the date of such judgment . . . ”

It is provided in § 46.1-350, Code of Virginia (1950), as amended, that, “except as otherwise provided in §§ 46.1-352.1 and 46.1-387.8, as amended” no person whose operator’s or chauffeur’s license is revoked under Title 46.1 or § 18.1-59 shall operate any motor vehicle or self-propelled machinery or equipment on any highway in this State. The exception contained in § 46.1-352.1 is that a person convicted of driving under the influence of intoxicants may operate a “farm tractor” upon the highways, from one tract of land used for agricultural purposes to another such tract of land, provided the distance between such tracts does not exceed five miles.

The term “farm tractor” is specifically defined in § 46.1-1 (7), Code of Virginia (1950), as amended, to mean: “Every motor vehicle designed and used primarily as a farm, agricultural or horticultural implement for drawing plows, mowing machines and other farm, agricultural or horticultural machinery and implements.” In my opinion, a “farm use truck” is not a vehicle that was designed for the uses indicated in this definition and, therefore, does not come within the exception. It follows that your question must be answered in the negative. In the case of Triplett v. Commonwealth,
Record No. 7812, decided January 17, 1972, the Virginia Supreme Court ruled, in effect, that the term "farm tractor" does not include a "farm use vehicle."

MOTOR VEHICLES—Local Licenses Under § 46.1-65—County ordinance applies to towns therein—Credit on county fees for amount paid towns.

COUNTIES—Motor Vehicle License Fee Under § 46.1-65—Applicable to town within county—Credit on county fee for amount paid town.

TOWNS—Motor Vehicle License Fee Under § 46.1-65—Town and county may impose fees—Credit on county fee for amount paid town located therein.

March 1, 1972

THE HONORABLE GEORGE W. TITUS
Treasurer for Loudoun County

This is in reply to your letter of February 24, 1972, in which you state that the Loudoun County Board of Supervisors has increased the motor vehicle license fees on cars and trucks, from $5.00 to $10.00, and in this connection, you present the following, which I quote:

"The County has seven incorporated towns and they will be selling licenses at a lower or same fee as the County.
"Please advise me if the new County fee pertains to all vehicles in Loudoun County including the towns.
"If your answer is yes, to the above question, it is my understanding that the town residents will receive a credit for the amount paid for the towns."

This is controlled by § 46.1-65, Code of Virginia (1950), as amended, which provides that counties, cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers, under the conditions and with the exceptions therein indicated. This section prohibits a county from assessing or charging such taxes and license fees "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.” Otherwise, a county may enact an ordinance having county-wide application, which would include motor vehicles of owners residing in any town located within such county.

I am advised that there are no towns in Loudoun County constituting separate school districts. In respect to your specific question, therefore, the county license fees would apply throughout the County, including all towns located therein. Since the seven towns located within the County also impose license fees or motor vehicles, however, any resident of any such town is entitled to a credit on the fees imposed by the County, to the extent of the fees paid to such town. A similar view was expressed in two opinions found in Report of the Attorney General (1970-1971), pp. 259 and 260.

MOTOR VEHICLES—Maximum Weight Under § 46.1-339—70,000 pounds for a vehicle or combination—Prosecution under § 46.1-341—Liquidated damages under § 46.1-342.

March 13, 1972

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

This is in reply to your letter of March 4, 1972, from which I quote the following:
"Section 46.1-339, (d) of the Code of Virginia of 1950, as amended, provides that the total gross weight imposed upon the highway by a vehicle or combination shall not exceed the maximum weight given for the respective distance between the first and last axle of the group of axles measured longitudinally to the nearest foot as illustrated in an accompanying table whereby the maximum distance in feet between the extremes of any group of axles is 42 feet and the maximum weight in pounds on any group of axles is 70,000 pounds.

"A note on Page 4 of Size Weight Equipment and Other Requirements for Trucks, Trailers, and Towed Vehicles manual, dated June, 1970 provides in referring to the aforesaid table, 'the above listed weights are the maximum allowed. No group of axles shall carry a weight in excess of the value given in the table on Page 4 corresponding to the distance in feet between the extreme axles of the group, measured longitudinally to the nearest foot nor shall any motor vehicle exceed a gross weight of 70,000 pounds.'

"At the present time in Frederick County there are vehicles using Interstate Route 81 with a combination of axles that the distance in feet between the extremes of any group of said axles is more than 42 feet and the maximum weight is in excess of 70,000 pounds.

"Therefore, an opinion is respectfully requested as to whether the operation of such vehicles on the highways of this state is in violation of the Code of Virginia of 1950, as amended, and if so, under what Section of the Code would offenders be prosecuted."

The distance in feet between the extremes of any group of axles, as set forth in § 46.1-339 (d), to which your refer, pertains to the minimum distance between axle groups, rather than the maximum distance. The fact that there is more than 42 feet between the extremes of any group of axles, therefore, is not a violation, in itself, provided the length of the vehicle is within legal limits, as indicated in § 46.1-330, Code of Virginia (1950), as amended.

Insofar as maximum weight of vehicles is concerned, however, the schedule shown in § 46.1-339 pertains to maximum weight on any group of axles. This maximum is 70,000 pounds for all of the axles located under a vehicle or combination.

Considering your questions in light of the foregoing, if the maximum weight of any vehicle in question, using Interstate Route 81, is found to be in excess of 70,000 pounds and no special permit for excessive weight has been issued, as provided in §§ 46.1-343 through 46.1-344, Code of Virginia (1950), as amended, such operation would be in violation of law, as set forth in § 46.1-339. In the case of such violation, offenders should be prosecuted under § 46.1-341, Code of Virginia (1950), as amended, which makes such violation a misdemeanor, for which the punishment is as provided in § 46.1-16, Code of Virginia (1950), as amended. In addition, upon conviction of any person for violation of any weight limit, as provided in Chapter 4, Title 46.1, Code of Virginia (1950), as amended, the court shall assess the owner, operator or other person causing the operation of the overweight vehicle liquidated damages, as prescribed in § 46.1-342. The latter requires the assessment of liquidated damages on the basis of the "excess weight over the prescribed limit in this chapter."

MOTOR VEHICLES—Motorized Golf Carts Not Exempt From Registration if Operated on a Highway.

May 12, 1972

THE HONORABLE WILLIAM H. FULLER, III
Commonwealth's Attorney for the City of Danville
This is in reply to your letter of April 28, 1972, in which you request my opinion on the question of whether or not motorized golf carts must be registered before they may be operated upon a public street in crossing from one hole to another, where portions of a golf course are located on both sides of the street.

A motor vehicle is defined in § 46.1-1 (15), Code of Virginia (1950), as amended, with exception not applicable in this instance, as "Every vehicle as herein defined which is self-propelled or designed for self-propulsion ..." A reading of this section in conjunction with related statutes leaves no doubt that a motorized golf cart is a motor vehicle for the purposes of Title 46.1, Code of Virginia (1950), as amended.

Such vehicle does not fall within any of the exceptions found in § 46.1-41, Code of Virginia (1950), as amended, which requires every person owning a motor vehicle intended to be operated upon any highway to obtain registration and a certificate of title from the Division of Motor Vehicles "before the same is so operated." I find no other statute which would exempt it and, therefore, your question is answered in the affirmative.

MOTOR VEHICLES—Operator’s License Suspensions—Sections 46.1-197 and 46.1-419 not in conflict—Section 46.1-190(i) applies only where speed is forty-five miles per hour or more, as indicated in § 46.1-193(1) (a), (b), (c), (e).

May 15, 1972

THE HONORABLE NORVELL A. LAPSLEY, Judge
Municipal Court of the City of Harrisonburg

This is in reply to your letter of May 4, 1972, from which I quote the following:

"In reviewing the statutes in the motor vehicle section of the Code of Virginia I find what appears to be a conflict between Sections 46.1-197 and 46.1-419.

"46.1-197 deals with the suspension of licenses where speed limits are exceeded by more than 5 miles per hour. This section has in it, however, the words, 'nothing contained in this section shall apply to speed violations which occur in cities or towns. Nor shall the provisions of this section apply in any case unless the applicable legal speed limit is 45 miles per hour or more.'

"It appears to me that this language would govern any speeding conviction in this court since this is an independent city and there are no speed limits in Harrisonburg of more than 45 m.p.h. When one reads Section 46.1-419, however, it appears that the Division of Motor Vehicles could revoke the license of any person convicted of two speeding violations be they within a city or town or on the open highway.

"It also is of some concern to me to know whether or not the provisions of 46.1-190 (i) read in conjunction with 46.1-423 apply to violations within the corporate limits of an independent city such as Harrisonburg."

Section 46.1-197 is directed to the judge or jury trying certain cases involving violations of the lawful speed limit. This section provides, essentially, that when a person is convicted for a second or subsequent time, within the period of one year, of violating any law of this State which designates the maximum speed limit for the operation of motor vehicles and the judge or jury finds in each case that the speed limit was exceeded by more than five miles per hour, the operator’s license shall be suspended for sixty days. Its apparent purpose is to require an immediate court suspension of the driver's license of any person convicted twice within the
period of one year of violating the lawful speed limit, if such violations occurred under the stated conditions.

As you state, however, this section also contains the following clauses: “Nothing contained in this section shall apply to speed violations which occur in cities and towns. Nor shall the provisions of this section apply in any case unless the applicable legal speed limit is forty-five miles per hour or more.” It is my opinion, therefore, that this statute has no application in the City of Harrisonburg, because of the first of the quoted clauses, which specifically excludes its application in cities or towns. Also, in any case, its application is excluded unless the applicable legal speed limit is forty-five miles per hour or more.

Section 46.1-419 requires the Division of Motor Vehicles to suspend the license of any person convicted of two or more speeding violations, if such offenses were committed within a period of twelve consecutive months. This statute has statewide application. In any case in which the court or jury has suspended the license under §46.1-197 and the license has been surrendered to the court, any suspension of the Division pursuant to §46.1-419 on the same offenses would run concurrently with the court suspension. The reason for this is that the requirement contained in §46.1-411, Code of Virginia (1950), as amended, which states that the period of suspension shall be counted from the date the license is surrendered to the court or to the Division. When viewed in this light, there is no actual conflict, although there may be some duplication, between §§46.1-197 and 46.1-419.

In regard to whether the provisions of §46.1-190 (i), read in conjunction with §46.1-423, apply to violations within the corporate limits of an independent city, such as Harrisonburg, this would depend upon whether the speed limits bring it within any of the classifications enumerated in paragraphs (1) (a), (b), (c) or (e) of §46.1-193, Code of Virginia (1950), as amended. The latter apply only when the maximum legal speed limit for a particular class of vehicles is forty-five miles per hour or more and constitute the only specific instances of reckless driving to which §46.1-190 (i) refers, except that speed in excess of eighty miles per hour is denominated reckless driving, regardless of the posted speed limit.

Since you state there are no speed limits of more than forty-five miles per hour in the City of Harrisonburg, I am of the opinion that the provisions of §46.1-190 (i) would not apply to paragraphs (a) or (b) of §46.1-193 (1), which are applicable only to speed limits of fifty-five, sixty and sixty-five miles per hour. In any part of the City in which the speed limit is forty-five miles per hour, however, the provisions of §46.1-190 (i) would apply to paragraphs (c) and (e) of §46.1-193 (1) in regard to trucks, tractors, etc., and vehicles operated under special permit, for which the applicable speed limit is forty-five miles per hour. As previously indicated, that part of §46.1-190 (i) making it reckless driving to operate a motor vehicle at a speed in excess of eighty miles per hour applies to any vehicle anywhere, regardless of the posted speed limit.

MOTOR VEHICLES—Reckless Driving—Excess speed of 20 miles over 55 mile posted limit constitutes specific instance under §46.1-190 (i)—Charge for violation of 25 mile school zone determined under §46.1-189—Construing §46.1-193 (b).

March 21, 1972

THE HONORABLE ROBERT F. RIPLEY, JR.
Commonwealth’s Attorney for York County

This is in reply to your letter of March 16, 1972, from which I quote the following: “We have a non-limited access highway in York County, specifically, Route 17, that is posted at a speed limit of 60 miles an hour
REPORT OF THE ATTORNEY GENERAL

for a period of approximately five miles from Yorktown, Virginia, to Seaford Road. At approximately Seaford Road the posted speed limit is reduced to 55 miles per hour.

"The question has arisen with the Virginia State Police in my jurisdiction as to whether or not a vehicle traveling on this non-limited access highway in the portion marked 55 miles per hour is in violation of § 46.1-190 of the 1950 Code of Virginia, as amended, sub-paragraph (i) which states in part 'a person shall be guilty of reckless driving who shall ... drive a motor vehicle upon the highway at a speed of twenty miles or more miles per hour in excess of the applicable maximum speed limits prescribed in § 46.1-193, paragraph (1) (b)' Section 46.1-193, paragraph (1) (b) states that the maximum speed limit on highways in this state shall be ... 60 miles per hour on non-limited access highways having four or more lanes. As I have said, Route 17 is in fact a non-limited access highway having four or more lanes. Therefore, my question is whether or not a driver of a motor vehicle who is proceeding at 76 miles an hour on Route 17, a non-limited access highway, where it is plainly marked 55 miles per hour is in fact guilty of reckless driving or whether or not the driver is guilty of speeding?

"Route 17 in York County is a 60 mile an hour highway, except for this portion that is plainly posted as a reduced speed zone and then is in fact posted 55 miles per hour for the balance of the length of the highway into the City of Newport News. My question is predicated upon the assumption that there is absolutely no act other than speed involved which would indicate reckless driving.

"This question that I have presented would also arise in a situation where a driver is operating a motor vehicle in a posted 25 mile an hour reduced speed zone on Route 17 where a school is located. Where the driver actually drives his vehicle through this posted reduced speed zone at 60 miles an hour, the question again arises whether or not this accused individual is to be charged with speeding or reckless driving."

The applicable part of § 46.1-190 is as follows:

"A person shall be guilty of reckless driving who shall:

* * *

(i) Drive a motor vehicle upon the highways of this State at a speed of twenty or more miles per hour in excess of the applicable maximum speed limits prescribed in § 46.1-193, paragraphs (1) (a) (b) (c) (e) of this title, or in excess of eighty miles per hour regardless of the posted speed limit."

Section 46.1-193 sets the maximum and minimum speed limits on the various types of highways. Appropos to your first question, I shall quote excerpts from § 46.1-193 which show the maximum speed limits set forth in paragraphs (b) and (c) thereof, as follows:

"(b) Sixty miles per hour on nonlimited access highways having four or more lanes, if the vehicle is a passenger motor vehicle ...; and fifty-five miles per hour on such highways if the vehicle is a truck ... provided that for such highways such speed has been prescribed by the State Highway Commissioner or other authority having jurisdiction over highways; after an engineering and traffic investigation." (Emphasis added.)

"(c) Fifty-five miles per hour on highways not included in (a) or (b) if the vehicle is a passenger motor vehicle ...; and forty-five miles per hour on such highways if the vehicle is a truck ..."

It is to be noted from the language contained in paragraph (b), as emphasized above, that the maximum speed limit on nonlimited access high-
ways is sixty miles per hour, provided such speed has been prescribed by the State Highway Commissioner or other authority having jurisdiction over highways. In order for a highway to be included in paragraph (b), a necessary statutory requirement is that the maximum speed limit of sixty miles per hour has been authoratively prescribed. In my interpretation, if such maximum speed limit has not been so prescribed, then the fifty-five miles per hour maximum would apply, as indicated in paragraph (c), for highways not included in (a) or (b).

The part of § 46.1-190 quoted above makes it reckless driving to drive a motor vehicle twenty or more miles per hour in excess of the maximum speed limit set forth in paragraph (c), as well as in paragraphs (a), (b) or (e). It is my opinion, therefore, that proceeding at seventy-six miles an hour, at a location at which the maximum posted speed limit is fifty-five miles an hour, would constitute reckless driving and your first question is answered in the affirmative.

Your other question relates to driving through a twenty-five miles an hour reduced speed zone, on Route 17, where a school is located. The speed limit for any such location is prescribed in paragraph (f) of § 46.1-193. Paragraph (f) is not enumerated among the specific instances in which a speed of twenty miles an hour or more in excess of the posted speed limit constitutes reckless driving under § 46.1-190. Consequently, § 46.1-189, Code of Virginia (1950), as amended, would apply in determining whether a violation of such posted speed limit should be charged as reckless driving. This section, which contains the general rule, states:

"Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person shall be guilty of reckless driving; provided that the driving of a motor vehicle in violation of any speed limit provision of § 46.1-193 shall not of itself constitute ground for prosecution for reckless driving under this section."

The terminal provision of § 46.1-189 specifically states that a violation of any speed limit provision of § 46.1-193, in itself, shall not constitute grounds for prosecution for reckless driving. On the other hand, driving at a speed or in a manner so as to endanger life, limb or property of any person, regardless of the speed limit, shall constitute the crime of reckless driving. In my opinion, therefore, the determination as to whether a charge of reckless driving should be made because of the act of speeding sixty miles an hour through a twenty-five miles an hour school zone must be based on whether such act, in the given instance, endangers life, limb or property, rather than on the fact that the posted speed limit was exceeded by more than twenty miles per hour.

MOTOR VEHICLES—Registration—Exemption under § 46.1-45(i) applicable only to farm vehicles on return trips from market.

July 20, 1971

THE HONORABLE WALther B. FIDLER
Member, House of Delegates


You will note that this opinion, in which I concur, makes no mention of an exemption for farmers. Subsequent to the opinion, however, Chapter 192, Acts of Assembly of 1970 amended § 46.1-45 by adding paragraph (i). This amendment applies "on any return trip made from any marketplace
as provided herein, when the motor vehicle is used to transport back to the farm ordinary and essential food and other products for home and farm use, or when the motor vehicle is used for carrying supplies to the farm." In my opinion, this language applies to farmers operating their vehicles on return trips under the conditions of this section only. It does not include dealers or others engaged in the business of supplying materials to farmers.

MOTOR VEHICLES—School Buses—Owned by church and private school as one entity—May be used for purpose of transporting children to church services—If used for transporting adults, warning lights and identifying lettering must be covered.

SCHOOLS—Transportation—Difference in bus used for transporting school children and for transporting persons or commodities other than school personnel or children.

January 31, 1972

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

This is in reply to your letter of January 10, 1972, regarding the operation of school buses and other buses painted yellow by a church and school operated as one entity. You pose several questions, which I shall quote and answer in the order presented, as follows:

"First: Does Section 22-280.1 of the Code of Virginia have any applicability in the face of Section 46.1-169.1 and 46.1-287.1 so as to require the covering of the lettering and lights on the fully equipped school buses that are operated on Sundays to transport both adults and children to and from religious services?"

My answer to this question is in the affirmative. Neither § 46.1-169.1 nor § 46.1-287.1 authorizes the transportation of adults and § 22-280.1 applies to any Virginia school bus operated on the public highways "for the purpose of transporting persons or commodities other than school personnel or school children." So long as "the lettered identification and school bus traffic warning lights on the front and rear of such bus are covered with some opaque detachable material," as provided in § 22-280.1, however, I believe any such bus could be used for the purpose stated in your question.

A review of the history of laws pertaining to school buses, shows an expanding legislative intent to shield all children, whether attending public, private or parochial school, with additional safe guards in their transportation to and from school. This intent was carried an additional step in § 46.1-287.1. This section refers to buses for which "any private individual, corporation or civic, charitable or eleemosynary organization" may contract to hire "for the purpose of transporting children to or from school, camp or any other place." While this section refers only to vehicles for which any such person or organization may contract to hire, Chapter 521, Acts of Assembly of 1970, amended § 46.1-169.1 to include "the purposes specified in § 46.1-287.1." In view of this amendment, it is my opinion that § 46.1-169.1, authorizes the use of a school bus, owned by any such person or organization, as well as one under contract, for the purpose of "transporting children to or from school, camp or any other place." It follows, that the fully equipped school buses, to which you refer, may be operated on Sundays for the purpose of transporting children to or from religious services.

"Second: Does Section 46.1-169.1 prohibit those buses that are not fully equipped and marked from being yellow in color? These would be the buses in the category represented by the enclosed photographs."
This question is answered in the affirmative. Section 46.1-169.1 prohibits the operation, on the highways of this State, of a motor vehicle having a seating capacity of more than fifteen persons if it be yellow in color, unless such vehicle is used in transporting students who attend public, private or parochial school, or for the purposes specified in § 46.1-287.1, and meets the requirements for motor vehicles used in the transportation of pupils in the public schools. Such requirements include the equipment and markings specified for a school bus in §§ 46.1-1 (37) and 46.1-287, Code of Virginia (1950), as amended.

"Third: Does Section 46.1-287.1 permit the operation of fully equipped and marked school buses for the purpose of providing transportation to and from religious services? If the answer to this is in the affirmative, should such operation be pursuant to Chapter 4 of Title 46.1, which fully prescribes the rules and regulations for the operation of school buses? Would this Section also limit the use of these fully equipped buses to the transportation of children only?"

As indicated in my answer to your "First" question, § 46.1-287.1 permits the operation of fully equipped and marked school buses, hired under the conditions therein stated, for the purpose of transporting children to and from religious services. This section requires that if such motor vehicles are used for such purpose, they shall be equipped and operated in the same manner as are regular school buses pursuant to the provisions of Chapter 4 (§ 46.1-168 et seq.) of Title 46.1. The language used indicates a mandatory intent, both as to equipment and operation. The same requirements are found in §§ 46.1-286.1 and 46.1-287, the latter stating that a person operating such bus who fails to use such warning devices in the operation of the vehicle shall be guilty of a misdemeanor. The use of fully equipped school buses is authorized for children only and, therefore, your other question is answered in the affirmative.

MOTOR VEHICLES—Service or Wrecking Cranes—When registration with State Corporation Commission and "For Hire" license required.

The Honorable F. Taft Jones, Jr.
Justice of the Peace

This is in reply to your letter of October 4, 1971, from which I quote the factual situation and questions presented, as follows:

"A owns a service station which offers wrecker, or towing, and repair services. His wrecker answers emergency road calls for interstate and local motorists. Once A's wrecker answers a call, one of the following three courses of action is taken in regard to the disabled vehicle, according to instructions given to the driver of the wrecker:

1. It is towed to A's station where it is repaired.
2. It is towed to A's station where it remains unrepaired and is later towed away to some other garage or location by A's or some other business's wrecker.
3. It is towed to another garage or location.

Regardless of which of the above courses of action is taken, A charges a towing fee.

"Relying upon Section 46.1-163, Code of Virginia, 1950, A registered his wrecker with the Division of Motor Vehicles as a private motor vehicle, paid the proper fees, and was issued private vehicle license plates.

"Subsequently, A was advised by the State Corporation Commission that in its opinion A's wrecker was a vehicle operated for
compensation and that by virtue of Section 56-304, Code of Virginia, 1950, A must secure from the Commission a warrant and classification plate identifying his wrecker as a vehicle for hire.

"Question No. 1: Is A's wrecker a vehicle for hire for the purposes of Code Section 56-304?

"Question No. 2: If the answer to Question No. 1 is yes, must A purchase for hire license plates from the Division of Motor Vehicles for his wrecker?"

Section 56-304, Code of Virginia (1950), as amended, to which you refer, states, in part: "No person shall operate or cause to be operated for compensation on any highway in this State any self-propelled motor vehicle that is required by law to display license plates issued by the Division of Motor Vehicles unless there has been issued by the Commission to the owner or the operator of the vehicle a warrant or an exemption card and classification plate for each vehicle so operated." Section 46.1-1 (35), Code of Virginia (1950), as amended, states: "The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semi-trailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly, but such terms shall not be construed to mean a 'truck lessor' as defined herein."

In determining the registration and license fees for motor vehicles used for service or wrecking cranes, § 46.1-163, Code of Virginia (1950), as amended, states that "such motor vehicles, when used in connection with the business of any person engaged in selling motor vehicles or repairing the same, shall be treated as other similar private motor vehicles and not as motor vehicles operated for compensation or for hire." (Emphasis supplied). As indicated by the emphasized language, the service or wrecking crane is to be treated as a private motor vehicle when used in connection with the business of the person engaged in selling or repairing motor vehicles. If such vehicle is used for other purposes for compensation, the exception does not apply and "for hire" registration and licenses are required. A similar view was expressed in an opinion to the Honorable M. Watkins Booth, Commonwealth's Attorney of Dinwiddie County, dated January 24, 1964, and found in Report of the Attorney General (1963-1964), p. 220.

The given facts show that A's "wrecker" is used for towing vehicles to other garages or locations, as well as to his own garage. In any instance, A charges a towing fee. Since the use of the "wrecker" is not confined to A's business of repairing, I shall answer both of your questions in the affirmative.

MOTOR VEHICLES—Suspension of Operator's License and Registration—Construing effect of U.S. Supreme Court's decision in case of Bell v. Burson, 29 L.Ed. 2d 90, on §§ 46.1-449 and 46.1-167.4, respectively.

July 22, 1971

THE HONORABLE VERN L. HILL, Commissioner
Division of Motor Vehicles

This is in reply to your letter of July 12, 1971, in which you request my interpretation of the effects of the decision of the United States Supreme Court in the case of Bell v. Burson, 29 L. Ed. 2d 90, decided May 24, 1971, on §§ 46.1-167 and 46.1-449, Code of Virginia (1950), as amended. Specifically, you pose the questions which I shall quote and consider separately and in the order presented, as follows:
“1. Is the finding of fact referenced in Section 46.1-449 to be conducted under the same rules as a formal hearing which is outlined in Sections 46.1-433, 46.1-434 and 46.1-435?”

This question is answered in the negative, except as to § 46.1-435, which applies to any such order or decision of the Commissioner. The other sections cited have reference to hearings conducted pursuant to §§ 46.1-430 and 46.1-436, Code of Virginia (1950), as amended. Section 46.1-449 provides its own method to make a finding of fact, which is contained in the provision which I quote as follows:

“... provided that the Commissioner shall dispense with the foregoing requirements on the part of any operator or chauffeur whom he finds to be free from any blame for such accident, and it shall be his duty to make a finding of fact when so requested by any person affected and for this purpose he shall consider the report of the investigating officer, if any, the accident reports and any affidavits of persons having knowledge of the facts.”

“2. Is the Division of Motor Vehicles required to hold a formal hearing prior to issuing an order of suspension based on possible liability for damages as outlined in Section 46.1-449?”

This question is answered in the negative. The Commissioner is required “to make a finding of fact when so requested by any person affected,” as stated in § 46.1-449.

“3. If the citizen desires a hearing in person, must the Division of Motor Vehicles hold these hearings in the county or city where the citizen resides as required in Section 46.1-432?”

The answer is in the negative. Section 46.1-432, Code of Virginia (1950), as amended, has reference to hearings conducted pursuant to §§ 46.1-430 and 46.1-436. It does not relate to § 46.1-449.

“4. If the order of suspension requires a citizen to ask for a hearing within ten days and the citizen does not reply to the order in any manner, can the order be placed into effect at the end of the ten day period?”

The answer is in the affirmative. In the Bell case, supra, the Court said “due process requires that when a State seeks to terminate an interest such as that here involved (suspension of license and registration), it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.” In my opinion, such ten days notice is sufficient to meet the requirements of due process indicated by the Court.

“5. Section 46.1-449 requires the Division to suspend not more than ninety days after receipt of the accident report. If the suspension order is not produced until eighty-five days after receipt of an accident report, can we still give the citizen ten days in which to ask for a hearing since this would mean the order would become effective after the ninetieth day had elapsed?”

This section states, in part, “Not less than thirty or more than ninety days after receipt by him of the report or notice of an accident which has resulted in bodily injury or death, or in damage to the property of any person to the extent of fifty dollars or more, the Commissioner shall forthwith suspend the driving license and all registration certificates and plates of any person operating any motor vehicle in any manner involved in the accident...” This language requires the Commissioner to take the stated action during the interim between the expiration of the thirtieth and the ninetieth days after he receives the stated report or notice. The
suspension shall be forthwith. The word "forthwith" means with due diligence under all the circumstances and does not in all cases mean instantaneously. It has a relative meaning and has been construed by the courts to mean within a reasonable time under the circumstances of the case. 2B M.J. Automobiles § 80; see, also, Black's Law Dictionary, Fourth Edition, p. 782. Hence, the Commissioner's action must be within the ninety day period prescribed by the statute, although the effective date of the suspension may be within a reasonable time thereafter, i.e., ten days. Accordingly, this question is answered in the affirmative.

"6. If the citizen requests a hearing but cannot appear prior to the ninetieth day after receipt of the accident report, can the Division of Motor Vehicles hold the order in abeyance until the hearing can be held since this would also mean the order would become effective after the ninetieth day had elapsed?"

My answer is in the affirmative, for the same reasons expressed in my answer to question numbered 5.

By your reference to "§ 46.1-167," which pertains to an unrelated matter, you obviously intended to cite § 46.1-167.4, Code of Virginia (1950), as amended, which relates to the suspension of an operator's license and registration because of such person's operation of an "uninsured motor vehicle." Under certain circumstances. The latter section was considered along with § 46.1-449, in our evaluation of the effects of the Bell case, as previously communicated to you on an informal basis. As there stated, the requirements of paragraph (2) of § 46.1-167.4, insofar as they relate to a resident of Virginia operating a motor vehicle not registered in this State, are unconstitutional under the ruling in the Bell case. An appropriate amendment has been prepared and placed in line for the earliest possible consideration by the General Assembly. The remainder of § 46.1-167.4, which pertains to the owner of an "uninsured motor vehicle," as defined in § 46.1-167.2, Code of Virginia (1950), as amended, subject to registration in this State, is unaffected by the Court's decision in the Bell case, since the suspension is not based on liability but on the owner's failure to pay the "uninsured motor vehicle" registration fee, as required by § 46.1-167.1, Code of Virginia (1950), as amended.

MOTOR VEHICLES—Unlawful to Display "School Bus" Sign on Vehicle Unless It Qualifies as "School Bus" Under § 46.1-1(37).

October 7, 1971

THE HONORABLE JAMES A. CALES, JR.,
Assistant Commonwealth's Attorney for the City of Portsmouth

This is in reply to your letter of September 22, 1971, in which you request my opinion "concerning the legality of buses owned by the Community Motor Bus Company bearing a sign with the words 'School Bus' when they are being used to transport children to and from school." You further state "these buses do not meet all of the requirements necessary to be, in fact, a school bus under the law," and you furnish photographs indicating that these buses are of the regular commercial type.

Paragraph (37) of § 46.1-1, Code of Virginia (1950), as amended, defines "School bus" as follows:

"Any motor vehicle, except commercial bus, station wagon, automobile or truck, which is designed and used primarily for the transportation of pupils to and from public, private or parochial schools, which is painted yellow with the words 'School Bus, Stop, State Law' in black letters of specified size on front and rear, and which is equipped with warning devices prescribed in § 46.1-287."
REPORT OF THE ATTORNEY GENERAL

Section 46.1-287, Code of Virginia (1950), as amended, to which the quoted paragraph refers, requires that every bus used for the principal purpose of transporting school children be equipped with a warning device of such type as may be prescribed by the State Board after consultation with the Superintendent of State Police. This statute requires that such warning device "shall indicate when such bus is stopped, is about to stop, and when it is taking on or discharging children." It further prescribes how the warning device shall be used and states: "Any person operating such bus who fails or refuses to equip such vehicle being driven by him with such equipment, or who fails to use such warning devices in the operation of such vehicle shall be guilty of a misdemeanor, . . ."

Section 46.1-286.1, Code of Virginia (1950), as amended, prescribes the paint and lettering which must be used on a school bus and requires that any such bus "shall be equipped with warning devices prescribed in § 46.1-287." This section further states: "Only school buses, as defined in § 46.1-1 (37), may be painted yellow, identified by words above and equipped with the specified warning devices." It is also noted that paragraph (f) of § 46.1-190, Code of Virginia (1950), as amended, which denominates it a specific instance of reckless driving to pass a school bus stopped on a highway or school driveway for the purpose of taking on or discharging children, ends with the following: "Only school buses as defined in § 46.1-1 (37) which are painted yellow and equipped with the required lettering and warning devices shall be identified as school buses."

In view of the foregoing, I am of the opinion that the use of the sign showing the words "School Bus," under the given conditions, is unlawful.

MOTOR VEHICLES—Use of License Plates from Another Vehicle in Certain Circumstances—Substitute vehicle must be owned by garage operator or dealer.

September 16, 1971

THE HONORABLE M. CALDWELL BUTLER
Member, House of Delegates

This is in reply to your letter of September 7, 1971, in which, in relation to § 46.1-110.1, Code of Virginia (1950), as amended, you present the following, which I quote:

"I would appreciate your opinion as to whether the owner-lessor of a motor vehicle is entitled to remove license plates from such a vehicle and use them upon another vehicle of which he is also the owner, which is to be used as a temporary replacement for the leased vehicle pending repair of the first vehicle in owner's shop."

Section 46.1-110.1 is as follows:

"The owner of a motor vehicle to which license plates have been assigned by the Division of Motor Vehicles may remove such plates from such motor vehicle and use them upon another motor vehicle owned by a person operating a garage or owned by a motor vehicle dealer provided such use does not extend for more than five days and provided such use is limited to the time during which the first motor vehicle is being repaired or while such second motor vehicle is loaned to him for demonstration, as provided by § 46.1-110."

This section provides that the owner of a motor vehicle to which license plates have been assigned by the Division of Motor Vehicles may remove such plates and use them temporarily upon another motor vehicle owned by a person operating a garage or owned by a motor vehicle dealer, as indicated. The reference in this section to § 46.1-110 makes the requirements of the latter section applicable to this section. A similar view was expressed in an opinion reported in Report of the Attorney General (1960-
Neither section, however, authorizes the use of license plates, assigned to one motor vehicle, upon another motor vehicle owned by the same person, under the stated circumstances. These sections are in derogation of the general registration laws and must be strictly construed. Your question, therefore, is answered in the negative.

MOTOR VEHICLES—“Virginia Habitual Offender Act”—Service of process by order of publication—Paid from appropriation for criminal charges and taxed as cost.

December 14, 1971

THE HONORABLE JAMES A. CALES, JR.
Commonwealth's Attorney for the City of Portsmouth

This is in reply to your letter of November 23, 1971, in which you inquire who pays the bill for publication in the newspapers, in the event service is obtained by order of publication, under the “Virginia Habitual Offender Act.”

Such expense should be paid from the appropriation for criminal charges and taxed as cost, if the defendant is found to be an habitual offender, as indicated in § 46.1-387.5, Code of Virginia (1950), as amended, from which I quote the following:

“In the event such service is by publication, the cost for same shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court as provided in § 19.1-317 and shall be taxed against the defendant as a part of the cost of such proceeding if the defendant is found to be an habitual offender.”

This language was added by Chapter 724, Acts of Assembly of 1970.

MOTOR VEHICLES—Virginia Operator's License—Exemption of spouses of persons in the armed forces under § 46.1-354.1—Not applicable if spouse registers a motor vehicle giving an address within this State.

September 15, 1971

THE HONORABLE DANIEL FAIRFAX O'FLAHERTY
Judge of the Municipal Court for the City of Alexandria

This is in reply to your letter of August 31, 1971, in which you request my interpretation of § 46.1-354.1, Code of Virginia (1950), as amended, as to whether a Virginia operator's license is required for a civilian spouse of a member of the armed forces under the following facts:

1. Armed Forces member's civilian spouse with out-of-state operator's license operating motor vehicle registration in the name of Armed Force member or in Virginia to off post address.

2. Armed Forces member's civilian spouse with out-of-state operator's license operating motor vehicle registration in name of civilian spouse in Virginia to off post address.

The named statute is as follows:

“A spouse of a person in the armed services of the United States who has been licensed as an operator under a law requiring the licensing of operators in his or her home state or country and who has in his or her immediate possession a valid operator's license issued to him or her in his or her home state or country shall be permitted without examination or license under this chapter to drive a motor vehicle upon the highways in this State.”

Section 46.1-354.1, being an exemption from the license requirements, must be strictly construed. Clearly, this section applies only to “nonresi-
dent” spouses who operate motor vehicles in this State. This is shown by the language “in his or her home state or country.” The obvious intent of the Legislature was to extend the indicated courtesy to the nonresident spouse of a person in the armed services of the United States, so long as such spouse maintains his or her nonresident status under the motor vehicle laws of this State. Before this statute was enacted, by Chapter 269, Acts of Assembly of 1970, the nonresident spouse of a person serving in the armed forces in this State received no special consideration under the law, since the Soldiers’ and Sailors’ Civil Relief Act has no application to civilian spouses. Section 46.1-354.1, in effect, places any such spouse in a position parallel to that of the nonresident service person, insofar as a license to operate a motor vehicle is concerned.

This, like other statutes, must be considered in light of related statutes. In the case of Prillaman v. Commonwealth, 199 Va. 401, our Supreme Court, citing 50 Am. Jur., Statutes, § 350, stated “Statutes which have the same general or common purpose or are parts of the same general plan are also ordinarily considered as in pari materia.” Section 46.1-1, Code of Virginia (1950), as amended, in defining the term “Nonresident,” provides in subsection (16), paragraph (c), that a person who has registered a motor vehicle, listing an “address within this State” in the application for registration, shall be deemed a resident for the purposes of Title 46.1, Code of Virginia (1950), as amended. This office has consistently interpreted this to include any nonresident serving in the armed services of the United States who registers his motor vehicle, giving an address within this State.

Applying a similar interpretation of § 46.1-354.1 to the factual situations set forth in your letter, as quoted above, it is my opinion, that, under the situation described in paragraph numbered 1, the civilian spouse could operate a motor vehicle on the license issued by the home state, as indicated in § 46.1-354.1. This is true because the motor vehicle was registered in the name of the person in the armed forces, rather than in the name of the spouse. Hence, § 46.1-1 (16), (c), does not apply to the spouse. The facts described in paragraph numbered 2, however, would require the spouse to obtain a Virginia operator’s license, since registering the vehicle in the name of the spouse at an “off post address” in Virginia would be an address “within this State” and the spouse must be “deemed a resident” under § 46.1-1 (16), (c).

NATIONAL GUARD—Retirement—Grade at which officers retired.

July 23, 1971

BRIGADIER GENERAL WILLIAM J. McCADDIN
The Adjutant General

This is in reply to your letter of July 15, 1971, in which you requested my opinion concerning the application of § 44-119 of the Code to an individual requesting retirement thereunder.

Your letter reads in part as follows:

"The point in questions is—an individual was previously qualified under the then existing Section 44-119 to request promotion to the grade of Brigadier General in the Virginia Militia Unorganized. However, this individual did not do so. Now an inquiry has been received concerning promotion under 44-119, but the individual is not qualified under the current law for promotion to Brigadier General. The individual is qualified for promotion to the grade of Captain since the highest grade held by him in State service was 1st Lieutenant. The highest grade held by the individual in State and Federal service was Colonel. However, the current law (passed in 1958) mentions State service only."
"Request your advice as to whether individual concerned may now be promoted under the old law."

The pertinent part of § 44-119 reads:

"Officers who have served honorably and efficiently in the Virginia national guard or the Virginia militia shall be commissioned on the retired list of the Virginia militia, unorganized, in their respective grade, or the highest grade held by them in the military service of the State, except that officers who have to their credit fifteen years or more of service may, upon written application, be retired with commission of the next higher grade to the highest grade held by them in the military service of the Commonwealth of Virginia." (Emphasis supplied.)

The officer requesting to be placed on the retired list of the Virginia militia at this time is subject to the language of this section as presently written and not what it was prior to the 1968 amendment. Therefore, he cannot be placed on the retired list in the grade of Brigadier General but may be placed thereon in the grade of Captain in accordance with the present provisions of § 44-119.

NURSES—Activities Performed by Nurses, Graduate Laboratory Technicians and Other Persons.

May 2, 1972

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

This is in response to your recent letter wherein you quote a portion of § 54-276.4 of the Code of Virginia (1950), as amended, as follows:

"... The scope of the usual professional activities of registered professional nurses and graduate laboratory technicians shall be deemed to include the taking of blood by means of venipunctures, the giving of intravenous infusions and intravenous injections, and the insertion of Levin tubes, provided these acts are performed under the orders of a person licensed to practice medicine."

Thereafter, you make the following inquiry:

"... does this section constitute a prohibition against these activities being performed by anyone else other than a registered professional nurse or graduate laboratory technician."

In response to your inquiry, I refer you to § 54-276.4 of the Code which reads in pertinent part as follows:

"Nothing in this chapter shall be construed to apply to or interfere with nurses, registered midwives, or masseurs who publicly represent themselves as such, within the scope of their usual professional activities, nor to any other persons in the lawful conduct of their particular professions or businesses under State law, while actually engaged in such profession or business."

The professional activities of registered professional nurses and graduate laboratory technicians include these activities specified in the section referred to, but such enumeration of professional activities is not all inclusive. Likewise, such enumeration of professional activities as may be performed by a registered professional nurse or a graduate laboratory technician, in my opinion, does not prohibit the performance of those activities by other persons in the lawful conduct of their particular profession.
or business which is sanctioned by State law. Therefore, your inquiry is answered in the negative.

OBSCENITY—Ordinance Lacks Definiteness.

ORDINANCES—Obscenity Definition Lacks Clarity.

CONSTITUTION—Interpretation As to Constitutionality Should Be Made By Court of Competent Jurisdiction.

December 16, 1971

THE HONORABLE EDWARD T. CATON, III
Member, Senate of Virginia

I am in receipt of your recent letter which reads:

"Your opinion is requested as to the validity of the italicized portion of the following Virginia Beach city ordinance:

'Sec. 23-34. Obscenity, etc.—Nudity; dress not becoming to sex; indecent exposure; indecent or lewd behavior. Any person who is found in any public place in a state of nudity or in dress not becoming his sex, or in any indecent exposure of his person, or who is guilty of any indecent or lewd behavior shall be guilty of a misdemeanor.'

"This does not seem to parallel state law (§ 18.1-227 et seq.) A similar municipal ordinance of the City of Yonkers, New York, prohibiting appearing upon a public street 'in any other than customary street attire,' was held invalid in N. Y. v. O'Gorman, 274 N. Y. 284, 8 N. E. 2d 862 (1937)."

I am of the opinion that the case to which you refer would be controlling to your inquiry. The requirement of definiteness in a criminal statute has been strengthened over the years since the 1937 ruling and the phraseology which you emphasize appears to lack such requirement. I would point out, however, that any interpretation as to unconstitutionality should, in the final determination, be made by a court of competent jurisdiction.

ORDINANCES—Affirmative Vote of Majority of Councilmen Required to Adopt Ordinance.

ORDINANCES—Zoning Ordinance Considered and Not Adopted Precludes Reconsideration Within One Year.

ZONING—Ordinance Considered and Not Adopted Precludes Reconsideration Within One Year.

April 17, 1972

THE HONORABLE ALEXANDER B. MCMURTRIE
Member, House of Delegates

This is in reply to your letter of April 12, 1972, enclosing a letter from Mr. Herman P. Armstrong, City Attorney, requesting an opinion as follows:

"This is in response to the request of a majority of Colonial Heights City Council to be advised by the Attorney General of Virginia as to the finality of certain action taken by City Council on Ordinance No. 72-3 to rezone a tract of land within the City, a copy of said ordinance is attached."
"On February 28, 1972, the City Planning Commission following a duly advertised public hearing recommended to City Council the adoption of Ordinance No. 72-3, a copy of these minutes are attached. On February 29, 1972, Ordinance No. 72-3 received its first reading by City Council following a duly advertised public hearing. City Council is composed of seven members and four members of Council were present at the special meeting held on February 29, 1972, constituting a quorum. Three members of Council voted for the adoption of the ordinance on its first reading and one member voted against adoption, a copy of these minutes are attached.

"The charter of the City provides that an affirmative vote of a majority of the members elected to the council shall be necessary to adopt any ordinance. The charter of the City and rules of procedure adopted by Council provide that no ordinance shall be passed until it has been read at two meetings not less than six days apart, one of which shall be a regular meeting. Section 18(b) (2) of the Rules of Procedure provides, in pertinent part, that the Council may reject any ordinance on first reading without a hearing thereon by a vote of a majority of the elected members. A copy of the rules of procedure adopted by Council is attached.

"Section 26-34 (4) of the Colonial Heights Zoning Ordinance of 1968, reads as follows:

"'No application for a change of zoning of any lot, parcel or portion thereof, shall be considered by the City Council within one (1) year of the final action of the City Council upon a prior application covering any of the same described land.' (Emphasis supplied.)

"Council would like to be advised whether the action taken on Ordinance 72-3 at the special meeting held February 29, 1972 is deemed final action so as to prevent Council reconsidering the adoption of said ordinance in light of the provisions of Section 20-34 (4) of the Colonial Heights Zoning Ordinance."

Proceedings at the special meeting held February 29, 1972, were controlled by Section 5 of City Resolution No. 70-52 which reads:

"Quorum and Voting.—A majority of all the members of the Council shall constitute a quorum to do business, but a smaller number may adjourn from time to time. In the absence of a quorum, the Mayor, shall, at the instance of any three (3) members present, compel the attendance of absent members in such manner and under such penalties as may hereafter be prescribed by ordinance. Unless otherwise provided by law, Council shall act only by the affirmative vote of a majority of all the members elected to the City Council." (Emphasis supplied.)

Under this section, unless otherwise provided by law, an affirmative vote of a majority of the members elected was required. I am aware of no provision of law to the contrary and, therefore, am of the opinion that an affirmative vote of a majority of the members elected was required to adopt Ordinance No. 72-3. The vote on this ordinance was a final action.

You next ask whether Section 26-34(4) of the Colonial Heights zoning ordinance of 1968 precludes an application for a change in zoning to be again reconsidered within one year of a rejection.

Section 26-34(4) of the zoning ordinance reads:

"No application for a change of zoning of any lot, parcel or portion thereof, shall be considered by the City Council within one (1) year of the final action of the City Council upon a prior application covering any of the same described land."
I am of the opinion that Zoning Ordinance No. 72-3 having been considered, and not adopted, precludes reconsideration for a period of one year from February 29, 1972.

ORDINANCES—City Council Must Abide By Its Ordinances Until Repealed or Amended.

ANNEXATION—Decree Should Be Interpreted By Court That Entered It.

ANNEXATION—City Required Under Court Order to Provide Sewer Service When Conditions of Annexation Order Met.

SUBDIVISIONS—Definition of.

April 17, 1972

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in reply to your recent letter in which you asked my opinion on the following questions:

"1. Does the City Council of Colonial Heights have the authority to act contrary to the subdivision ordinance without either repealing or amending the ordinance in question? i.e., Can the City Council authorize the city to bear the cost of sewer mains and lines in a subdivision when the ordinance provides that all cost will be borne by the developer?

"2. Is the city of Colonial Heights obligated to provide sewer service, mains and lines, into a subdivision under the annexation decree of 1953 in light of subdivision ordinance # 64-28?

"3. Does the division of a tract of land into two separate parcels, (the Comstock property), constitute the creation of a subdivision under the definition of a subdivision in subdivision ordinance # 64-28?

"4. If an affirmative answer is rendered to question # 2; would subdivision developers, who have developed subdivisions at their own cost under subdivision ordinance # 64-28 after its enactment, be entitled to recover the cost of sewer mains and lines and/or water mains and lines from the city of Colonial Heights for such expenditures made?"

I shall answer your questions seriatim:

(1) The city council is required to abide by its ordinances until the same are repealed or amended, which would include any subdivision ordinance requiring the developer to bear the cost of sewer mains and lines, unless ordered by a court to do otherwise.

(2) The annexation decree of 1953 should be interpreted by the court that entered it. This decree was the subject of an opinion of this office rendered to the Honorable Junie L. Bradshaw, Member, House of Delegates, dated September 15, 1971. In that opinion it was pointed out that whether the city was obligated to extend sewerage and water facilities in a subdivision depended on the facts which may exist at a given time (today) under the language of Section 7 which reads:

"... the Court doth not at this time require any capital improvements to be made in the territory hereby annexed; but said City shall thereafter as conditions may require and the finances of the City will permit make such improvements in the territory hereby annexed, including grade railroad crossings, water and sewer mains and lines in property which may be subdivided into streets and lots for building purposes, when houses or buildings shall be erected thereon. Provided further that said City shall after the completion
of said improvements in the territory now embraced in said City, make such capital outlays necessary and essential to meet the needs of the annexed area in order to bring the same up to the standards equal to that of the remainder of said City."

These facts are:
(1) Conditions require.
(2) Finances of the city permit.
(3) Houses have been built in the area.

Wherever these conditions included in the annexation order are met, the city would be required, under the order, to provide sewer service, mains and lines, into the subdivision, notwithstanding Subdivision Ordinance No. 64-28.

(3) A subdivision under Ordinance No. 64-28 is defined thusly:

"SUBDIVISION: The word 'subdivision' shall mean a division, subdivision or resubdivision of a lot, tract or parcel of land situated wholly or partly within the corporate limits of the city into three or more lots, tracts or parcels of land for the purpose, whether immediate or in the future, of transferring ownership of any one or more of such lots, tracts or parcels of land, or for the purpose of the erection of buildings or other structures on any one or more of such lots, tracts or parcels of land. The word 'subdivision' shall not include a division of land for agricultural purposes in parcels of one acre or more, the average width of which is not less than one hundred fifty feet, when such division: (1) Does not require the opening of any new street or the use of any new public easement of access; (2) does not obstruct or is not likely to obstruct natural drainage; (3) does not adversely affect or is not likely to adversely affect the establishment of any expressway, major street, primary highway or toll road; or, (4) does not adversely affect the execution or development of any plat or subdivision approved by the commission or otherwise adversely affect the orderly subdivision of contiguous property; and (5) provided that such parcel or parcels shall front on an existing road or street."

The "Comstock Property" would be included in this definition if it is divided into three or more lots, tracts or parcels.

(4) Until the facts required by the annexation order occur, there is no duty on the city to construct these facilities. Therefore, the developers heretofore developing areas, before the city has a duty to construct, would have no right to recover any costs expended on these projects.

ORDINANCES—Civil Sanctions Constitute Matters Reserved for Consideration by General Assembly.

ORDINANCES—County Authorized by § 15.1-505 to Establish Penalties for Violation of Ordinance Adopted Under § 15.1-510.

ORDINANCES—Landlord-Tenant Ordinance.

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

This is in reply to your letter of November 30, 1971, which reads as follows:

"We are enclosing a copy of a proposed Landlord-Tenant Ordinance recommended by the Citizens' Advisory Tenant-Landlord Committee which attempts control of certain actions of landlords by prescribing both civil and criminal remedies to aggrieved tenants.
REPORT OF THE ATTORNEY GENERAL

"Would you be kind enough to render an opinion on the authority of the County Board to pass such an ordinance:

1) with respect to the civil sanction and
2) with respect to the criminal sanctions

"Your assistance in this matter is greatly appreciated."

The civil sanctions to which you refer appear in paragraph (C) and (D) of the ordinance. Both of these relate to civil remedies which are beyond the county's power to adopt. Paragraph (C) establishes a rule of evidence by providing a rebuttable presumption and (D) provides tenants with a cause of action for damages. These provisions constitute matters reserved for consideration by the General Assembly.

The criminal sanctions to which you refer appear in paragraph (E) and read:

"All violations of this ordinance shall be misdemeanors and shall, upon conviction, be punished by a fine of not less than twenty-five dollars ($25.00) nor more than three hundred dollars ($300.00), or by imprisonment in the County jail for a period of not more than thirty (30) days, or both, for each offense, and each day of violation may constitute a separate offense."

Section 15.1-505 of the Code authorizes a county to establish penalties for the violation of an ordinance such as the one proposed adopted, pursuant to § 15.1-510, to secure and promote the health, safety and general welfare of its inhabitants. The punishments set forth above in paragraph (E) do not exceed those authorized in this section. Therefore, these penalties represent a valid exercise of the county's police power.

ORDINANCES—Local Paralleling State Statute—Authorized only by express legislative grant.

COUNTIES—Authority — County may not adopt ordinance prohibiting carrying firearms on public highway.

COUNTIES, CITIES AND TOWNS—Ordinances Paralleling State Statutes—Authorized only by express legislative grant.

BOARDS OF SUPERVISORS—Ordinance Prohibiting Carrying Loaded Firearms on Highway—No authority to enact.

FIREARMS—County Has No Authority to Adopt Ordinance Prohibiting Carrying Firearms on Public Highway.

ORDINANCES—No authority for County to Adopt Ordinance Prohibiting Carrying Firearms on Public Highway.

April 26, 1972

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

This is in response to your recent inquiry in which you state as follows:

"An effort is being made by some citizens of this county to have an ordinance enacted in substantially the following language and in the interest of maintaining safety upon the local highways during hunting season, to-wit:

"'It shall be unlawful to carry a loaded shotgun or rifle in a vehicle upon the roads and highways (primary or secondary) within the County of Nottoway, State of Virginia.'

'I interpret Amendment II of the United States Constitution to guarantee that '... the right of the people to keep and bear arms, shall not be infringed.'

"
"In your opinion, would an ordinance along the lines proposed be constitutional?"

It would be my opinion that there would be no constitutional infirmities in the enactment of such an ordinance, as you are not infringing upon the right of the people to keep and bear arms, but only upon the right of the people to carry loaded arms in certain places or locations. However, the most basic question is whether Nottoway County would have the authority under § 18.1-272 of the Code of Virginia (1950), as amended, to enact such an ordinance. Section 18.1-272 prohibits the carrying of loaded firearms under specific conditions on public highways in certain counties. This statute was originally enacted by Chapter 506 of the Acts of Assembly, 1950, and was applicable only in counties having a population in excess of 4,000 and not in excess of 4,500. This statute has subsequently been amended and reenacted on four occasions, and in each instance, the prohibition is applied to counties having a specific range of population. See Chapter 453, Acts of 1952; Chapter 619, Acts of 1958; Chapter 148, Acts of 1960; Chapter 701, Acts of 1968.

The history of this statute makes it manifest that the legislative intent is to prohibit the carrying of loaded firearms on public highways in certain counties. I am advised that the 1970 census recorded the population of Nottoway County as 14,260. This population figure does not fall within any of the population ranges provided for by § 18.1-272. Section 18.1-272 does not contain any enabling legislation permitting local governing bodies to enact parallel ordinances, and this office has previously ruled that a county may enact ordinances paralleling statutes only where there is express legislative grant of authority to do so. See Report of the Attorney General (1967-1968), page 195. I am, therefore, of the opinion that the ordinance proposed would not be valid insofar as it attempts to regulate firearms on public roads.

For your information, I am enclosing a copy of a recent opinion to The Honorable Robert R. Gwathmey, III, Member of the House of Delegates, dated April 21, 1972, and a copy of an opinion to The Honorable Horace T. Morrison, Commonwealth's Attorney for King George County, dated January 4, 1956, and found in Report of the Attorney General (1956-1957), page 35, both expressing similar views.

ORDINANCES—Overly Broad and Therefore Unconstitutional.

BOARDS OF SUPERVISORS—May Regulate or Control Display of Political Campaign Material in County Office Buildings So Long As First Amendment Rights Not Unconstitutionally Contravened.

CONSTITUTION—Amendments—Board of Supervisors may regulate or control display of political campaign material in county office buildings so long as First Amendment rights not unconstitutionally contravened.

December 13, 1971

THE HONORABLE ESTEN O. RUDOLPH, JR.
Commissioner of Revenue of Frederick County

This is in reply to your letter of November 16, 1971, in which you ask my opinion on the constitutionality of an ordinance of the Board of Supervisors of Frederick County which reads:

"BE IT RESOLVED, That the Board of Supervisors of Frederick County, Virginia oppose the display and distribution of political campaign material and literature in any and all Frederick County office buildings.

"THEREFORE, BE IT FURTHER RESOLVED, That in the future no political campaign material of any type be displayed or
distributed in any building or office owned, leased, or operated by Frederick County, Virginia, or its agents."

The right to the possession of county property is vested in the board of supervisors of the county. *Manly Man. Co. v. Broaddus*, 94 Va. 547, 27 S.E. 438. The judges have control over the courthouse building. *Dawley v. City of Norfolk, Virginia*, 189 F.Supp. 642. With the exception of the courthouse building, the board of supervisors may regulate or control the display or distribution of political campaign material in the county office buildings so long as the authorizing ordinance does not unconstitutionally contravene First Amendment rights.

Certain political activity may be controlled or even prohibited. For example § 1502, commonly referred to as the Hatch Act, prohibits certain State or local employees from taking an active part in political management or political campaigns. In *Adderley v. Florida*, 385 U.S. 39 (1966), the Supreme Court upheld convictions of persons who were demonstrating on jail house property in violation of Florida law.

States and localities are not given unbridled discretion in controlling the exercise of First Amendment rights, however. In *Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503 (1969), the Supreme Court declared unconstitutional a regulation which prohibited students from wearing armbands in protest of the Viet Nam conflict because the school district was unable to show that the prohibited conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the schools."

The Frederick County ordinance could easily be construed to prohibit the very conduct which the *Tinker* Court ruled constitutional. Accordingly, I am constrained to believe from the facts before me that the ordinance is overly broad and therefore unconstitutional.


January 5, 1972

THE HONORABLE JOHN W. GARBER
Director of Personnel

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

"On May 19 of this year the Division of Personnel was designated to work with the Division of State Planning and Community Affairs to administer the Intergovernmental Personnel Act of 1970, PL 91-648. Sections 203(a) (2) and 303(c) (2) of the Act provide for the development of a Statewide plan for State and local units of government pursuant to State law.

"An opinion of the Office of the Attorney General is required as to whether there exists in Title 15.1, Chapters 34 and 35 of the Acts of the General Assembly or in other State law or official interpretations of State law, the elements required by Sections 203(a) (2) and 303(c) (2) of PL 91-648 that would enable the Division of Personnel and the Division of State Planning and Community Affairs to develop a Statewide plan with the approach detailed in Sections 203(a) (2) and 303(c) (2) of PL 91-648."

Sections 203(a) (2) and 303(c) (2) of PL 91-648 to which you refer are identical and read:

"(2) after the State concerned has a statewide plan which has been developed by an appropriate State agency designated or established pursuant to State law which provides such agency with adequate authority, administrative organization, and staffing to de-
velop and administer such a statewide plan, and to provide technical assistance and other appropriate support in carrying out the local components of the plan, and which provides procedures insure adequate involvement of officials of affected local governments in the development and administration of such a statewide plan, unless the local government concerned has special, unique, or urgent problems which are not met by the approved statewide plan and for which it submits an application for funds to be distributed under section 506(a)."}

You ask if there exists in Title 15.1, Chapters 34 and 35, of the Code of Virginia, or any other state law authority that would enable the Division of Personnel and the Division of State Planning and Community Affairs to develop a statewide plan as described.

Section 2.1-113 of the Code of Virginia (1950), as amended, provides that the Governor shall be the Chief Personnel Officer of the Commonwealth and shall appoint a deputy personnel officer to be known as the Director of Personnel, who shall exercise such powers and perform such duties as may be delegated to him by the Governor. The Governor is authorized to employ such other competent personnel assistants and employees as he may require to carry out the provisions of the Virginia Personnel Act. Under Section 202(b)(1) of Public Law 91-648, grants are available where the Governor of the State has designated a state office that will have primary authority and responsibility for the development and administration of the approved program at the State level.

By letter of May 19, 1971, a copy of which you enclosed, the U.S. Civil Service Commission was advised that Governor Holton has officially designated the Division of Personnel as the State office to administer the Act. The Division of Personnel is, therefore, an appropriate State agency established pursuant to State Law. This Division has been given adequate authority to administer the plan and to establish the necessary administrative organization and staff to accomplish this.

PHYSICIANS—May Dispense Drugs for Convenience of His Patients Without Obtaining Pharmacy Permit.

PHYSICIANS—Exemption from Requirements of Drug Control Act Not Transferable to His Agents and Employees.

DRUGS—Only Persons Licensed as Pharmacists or Physicians May Dispense.

November 9, 1971

THE HONORABLE J. B. CARSON
Secretary-Treasurer
State Board of Pharmacy

This is in response to your recent letter in which you asked my opinion concerning the requirements for a pharmacy permit for physicians dispensing drugs in a student health service program. You stated:

"At a State Institution, a student health service is provided to the students at a flat fee and is controlled and operated by physicians who supply drugs to students only at no charge other than the original fee, the medication being given to assure that the student will receive the medication. The drugs which are ordered and stored by the physicians, are dispensed by the physicians and by non-physician, non-pharmacist personnel in an operation which is independent of any pharmacy.

"We respectfully request your opinion on the following questions: "1. Would the dispensing of drugs in the operation described above require the obtaining of a pharmacy permit?"
2. May persons, other than physicians, not licensed as pharmacists dispense the drugs?

In my opinion, the physicians dispensing in the manner which you described would be exempt from obtaining a pharmacy permit. Section 54-524.53 of the Code provides:

“This chapter shall not be construed to interfere with any legally qualified practitioner of medicine... who is not the proprietor of a store for the dispensing or retailing of drugs, or who is not in the employ of such proprietor, in the compounding of his own prescriptions or the purchase and possession of such drugs and medicines as he may require, or to prevent him from administering or supplying to his patients such medicines as he may deem proper, or from making a charge for such medicines as are not sold to his patients for his own convenience or for the purpose of supplementing his income, ...” (Emphasis supplied.)

In the factual situation that you presented, these physicians would be supplying the drugs to their own patients for the convenience of the patient and not for the purpose of providing income to the physician nor for his convenience. They would fall within the statutory exemption and would not be required to obtain a pharmacy permit.

You also asked if persons other than physicians who worked in these programs could dispense drugs. I would assume that the persons you referred to are the agents of the physician and could administer drugs pursuant to § 54-524.2 of the Code, but this opinion will be limited to the “dispensing” of drugs. However, I am not able to find anything in § 54-524.53 of the Code which would allow the physician to delegate his exemption to dispense drugs to persons unlicensed to practice pharmacy, whether they be his agents or otherwise. The obvious intent of the section is to allow flexibility and freedom to the physician engaged in the practice of medicine to properly serve his patient. It is a recognition that providing the patient with drugs is a part of the practice of medicine. However, as we stated in a former opinion, a person licensed to practice a recognized business or profession is not allowed to transfer his authority to his employees to perform those professional functions. See Opinion of the Attorney General to The Honorable Turner N. Burton, Director, Department of Professional and Occupational Registration dated March 8, 1971, copy of which is enclosed herewith. Therefore, any persons other than physicians who would be engaged in the “dispensing” of drugs would be in violation of the Drug Control Act which prohibits the dispensing of controlled drugs unless so authorized by licensure as a pharmacist or under the exemption stated herein.

PLANNING AND ZONING COMMISSION—Special Meetings; Requirements for Calling.

SPECIAL MEETINGS—Requirements for Calling; Planning and Zoning Commission.

December 9, 1971

THE HONORABLE H. BENJAMIN VINCENT
Commonwealth’s Attorney for Greensville County

This is in reply to your letter of November 23, 1971, which reads as follows:

“I have been directed to secure from you an opinion as to the validity of a special meeting recently held by the Greensville County Planning and Zoning Commission.
"Greensville County has a Planning and Zoning Commission which is comprised of seven members including a chairman and vice-chairman. Greensville County has appointed an agent, who is not a member of the Commission, to supervise, carry out and enforce the subdivision ordinance of the County. The agent meets with the Planning and Zoning Commission but does not have a vote and is not a member of the Board.

"A local group applied to the Board of Supervisors of Greensville County for approval of a housing project they intended to construct in Greensville County. The Board referred the matter to the Planning and Zoning Commission for their consideration. The local group requested the County agent to call a special meeting of the Greensville County Planning and Zoning Commission for the purpose of hearing their request. The agent notified the members of the Commission that a special meeting would be held on 18 November for the purpose of considering the local group's project. Four of the members of the Commission appeared for the meeting neither of whom were the chairman or the vice-chairman. The local group explained their project and the Commission members present voted to approve it. The agent was present at the meeting.

"The inquiry is whether or not the special meeting called by the County Agent, rather than by one of its members, is valid and whether or not if it is valid, can the meeting be held without its chairman or vice-chairman."

Section 15.1-439 of the Code of Virginia (1950), as amended, is dispositive of your question and provides, in part, as follows:

"Special meetings of the commission may be called by the chairman or by two members upon written request to the secretary. The secretary shall mail to all members, at least five days in advance of a special meeting, a written notice fixing the time and place of the meeting and the purpose thereof.

"Written notice of a special meeting is not required if the time of the special meeting has been fixed at a regular meeting, or if all members are present at the special meeting or file a written waiver of notice."

Under the facts stated in your letter, none of the foregoing requirements were met. In my opinion, therefore, the meeting was not a valid meeting. This conclusion renders unnecessary an answer to your second question.

PLANNING COMMISSION—Member not Answerable in Private Action Resulting from His Vote.

PUBLIC OFFICERS—Liability of Member of Planning District Commission; Not Answerable in Private Action Resulting from His Vote.

June 26, 1972

The Honorable Robert H. Kirby, Director
Division of State Planning and Community Affairs

This will acknowledge receipt of your recent correspondence requesting my opinion on the following:

"Can a member of a planning district commission be held personally liable under law for acts on his part arising directly out of his participation in planning district commission activities, such acts to include those performed as an officer or member of the commission and those performed as a chairman or member of a committee of the commission?"
By subsequent conversation, you have advised that your inquiry is specifically directed to the question of whether or not an individual planning district commission member would be answerable in a private action instituted as a result of his vote on a matter under consideration by the planning district commission.

It is generally stated that an administrative or public officer, acting within his jurisdiction, cannot be held personally liable in a civil action instituted as a result of the exercise of his official duties. See 2 Am. Jur. 2d, Administrative Law, § 799 (1962); 67 C.J.S., Officers, § 125 (1950). This rule is founded in public policy and is designed to ensure vigorous and effective administration of the law. See Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950); 2 Am. Jur. 2d, supra, § 800. The following language found in Papagianakis, supra at page 260, is illustrative of the view generally taken by the courts:

"The rule of responsibility of a public officer, as held by the courts, is said to be that, if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an erroneous performance, is regarded as an injury to the public, and not as one to the individual. It is to be redressed in some form of public prosecution, and not by a private person who conceives himself specially injured."

It does not appear that the Supreme Court of Virginia has addressed itself to your specific inquiry. The Court has, however, in Allen v. Commonwealth, 83 Va. 94 (1887), an action by the Commonwealth against the auditor of public accounts, stated that public officers are not liable to actions based upon the performance of acts requiring the exercise of judgment and discretion. Id. at 97. In this regard, though, the Court pointed out that, in order to claim immunity, such officers must act within the scope of their authority and without malice or corruption; otherwise a private action would lie. Cf. Sawyer v. Corse, 17 Gratt. (58 Va.) 230 (1867).

Based upon the foregoing, I am of the opinion that a member of a planning district commission, in the absence of circumstances bringing him within the above-noted exceptions, would not be answerable in a private action instituted as a result of his vote on a matter under consideration by the commission.

POLICE—Out-of-state Police Officers May Carry Concealed Weapons in Virginia Only If on Duty or on Official Business.

The Honorable Jose R. Davila, Jr.
Commonwealth's Attorney of the City of Richmond

This will acknowledge receipt of your letter of March 23, 1972, in which you posed the following question:

"I wish to know whether out-of-state police officers may carry their sidearms concealed in Virginia whether they are on duty or off duty."

In this regard, § 18.1-269, Code of Virginia (1950), as amended, provides as follows:

"§ 18.1-269. Carrying concealed weapons; when lawful to carry.—If any person carry about his person, hid from common observation, any pistol, dirk, bowie knife, switchblade knife, razor, slungshot, metal knucks, or any weapon of like kind, he shall upon conviction thereof be fined not less than twenty dollars nor more than five hundred dollars and, in the discretion of the jury or the court trying the case without a jury, may, in addition thereto, be committed to
jail for not more than twelve months, and such pistol, dirk, bowie knife, switchblade knife, razor, slungshot, metal knucks, or weapon of like kind, shall, by order of the court be forfeited to the Commonwealth and may be seized by an officer as forfeited, and such as may be needed for police officers and conservators of the peace shall be devoted to that purpose, and the remainder shall be destroyed by the officer having them in charge.

"This section shall not apply to any police officers, sergeants, sheriffs, officers or guards of the penitentiary or other institutions or camps of the State corrections system, conservators of the peace other than notaries public, or to carriers of United States mail in the rural districts, or to any collecting officer while in the discharge of his official duty.

"Any circuit or corporation court, upon a written application and satisfactory proof of the good character and necessity of the applicant to carry concealed weapons, may grant permission so to do for one year. The order granting such permission shall be entered in the law order book of such court."


Chapter 701 of the Acts of Assembly of 1968 amends Chapter 506 of the Acts of Assembly of 1950 and supersedes the previous Acts. It provides that the prohibitions contained therein shall apply to counties having a population in excess of 3,500, but not in excess of 4,000, to counties having a population in excess of 4,500, but not in excess of 4,700, to counties having a population in excess of 21,200, but not in excess of 21,300, to counties having a population of more than 13,000, but less than 14,000, and to counties having a population in excess of 12,300, but not in excess of 12,700.

The exemption for peace officers contained in paragraph 2 of § 18.1-269 of the Code is practically universal in its application in similar statutes in other states. The decisions are in conflict, however, on whether a peace officer may carry a weapon outside his territorial jurisdiction. Most statutes, as observed, expressly except peace officers from the application of the restrictions on carrying a concealed weapon. The majority review appears to be that the exception is applicable to a peace officer who is on official business outside his territorial jurisdiction. (73 ALR 847) I am, therefore, of the opinion that an out-of-state police officer may carry his sidearms concealed in Virginia only if he is on duty or on official business.

POLICE—Private—May not wear official State seal.

SEAL OF VIRGINIA—Private Police—No authority to wear in badge.

November 17, 1971

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

This is in reply to your letter of October 28, 1971, in which you make the following inquiry:

"May a police officer appointed pursuant to Section 56-277.1 of the Code of Virginia as amended have the Seal of the Commonwealth of Virginia inscribed upon his badge of office?"

Section 56-277.1 authorizing the appointment of police agents by courts of record having criminal jurisdiction must be read in conjunction with § 7.1-31.1 making it unlawful for anyone to utilize the seal of the Commonwealth.
wealth for non-governmental purposes unless such use is specifically authorized by law. The appointment of police officers for the purpose of maintaining law and order on motor carriers at the request of the president of a company is not a governmental function. I am, therefore, of the opinion that such police officers may not have the seal of the Commonwealth of Virginia inscribed upon his badge of office.

PÓLICE OFFICERS—Authority—Power of arrest when sent into another jurisdiction in event of emergency.

September 8, 1971

THE HONORABLE ROBERT F. HORAN, JR.
Commonwealth's Attorney for Fairfax County

This is in reply to your letter of August 24, 1971, in which you seek an opinion as to whether police officers who are sent beyond the territorial limits of their jurisdiction under the provisions of § 15.1-131 have the power of arrest in the jurisdiction into which they are sent.

The purpose of § 15.1-131 is to enable governing bodies to enter into reciprocal agreements to establish and carry into effect a plan to provide mutual aid through the furnishing of police and other employees for the enforcement of laws relating to the use or sale of controlled drugs or during emergencies resulting from the existence of a state of war, internal disorder, or other emergency.

As you point out, § 15.1-131 appears to be silent as to the specific nature of the police powers of Virginia officers going into another Virginia jurisdiction. However, this section must be read in conjunction with § 15.1-159.7 which authorizes governing bodies whose boundaries are contiguous to enter into contracts or mutual aid agreements for their mutual protection, defense, and the maintenance of peace and good order through the use of their joint police forces. Section 15.1-159.7 specifically provides that "(a)ny police officer, regular or auxiliary, while performing his duty under such contract shall have the same authority in any county, city or town as he has within the county, city, or town where he was appointed.

It is my opinion that where mutual aid agreements exist between governing bodies whose boundaries are contiguous, the police officers have the same authority in each jurisdiction, including the power of arrest.

I am further of the opinion that where mutual aid agreements exist between governing bodies whose boundaries are not contiguous, the police officers must be sworn in as law enforcement officers of each jurisdiction in order to have the power of arrest in such jurisdictions.

PÓLICE OFFICERS—Should Proceed by Warrant and Not Summons When Unable to Arrest Traffic Violator at Scene.

CRIMINAL PROCEDURE—Should Proceed by Warrant and Not Summons When Unable to Arrest Traffic Violator at Scene.

February 1, 1972

THE HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your recent letter in which you request an opinion concerning the proper procedure to be followed by police officers who are unable to issue a summons for a traffic violation at the scene because the alleged offender has been removed to a hospital. I quote from your letter as follows:

"The custom has been for the officer to obtain a warrant and then issue a summons to the alleged offender on the basis of the warrant,
rather than apprehending the individual and taking him into custody. Is this procedure proper and legal and reference is hereby made to your Opinion dated March 5, 1970, to the Hon. Robert C. Goad, Commonwealth's Attorney for Nelson County.”

In my opinion to the Honorable Robert C. Goad, to which you refer and which may be found in Report of the Attorney General (1969-1970), p. 194, I opined that when a warrant was issued for a violation of Title 46.1 the officer was bound by the warrant and not by the provisions of § 46.1-178. This opinion was based upon the fact that the officer was not apprehending the alleged offender for a violation of the Motor Vehicle laws, but was acting pursuant to a valid warrant, issued by a proper officer, directing him to apprehend the named individual. In an opinion to the Honorable John Alexander, Commonwealth's Attorney of Fauquier County, dated November 23, 1971, I expressed the opinion that in cases where an arrest is not made at the scene for a traffic violation the better practice was to proceed by way of a warrant. I am enclosing a copy of this opinion for your information.

I am unable to find any authority which would allow an officer who has obtained a warrant to issue a summons based on the warrant. Once the warrant has been issued then the officer should proceed to execute the warrant in the manner prescribed by law. In view of the foregoing, I am of the opinion that the procedure you have outlined is improper.

POLICE OFFICERS—Special Police Employed by Virginia Ports Authority
—Arrest authority extends to one mile beyond property of VPA.

VIRGINIA PORT AUTHORITY—Police Jurisdiction—Authority to arrest extends to territory not exceeding one mile of VPA property.

August 30, 1971

THE HONORABLE JAMES A. CALES, JR.
Assistant Commonwealth's Attorney for the City of Portsmouth

I am in receipt of your letter of August 16, 1971, which raises a question concerning the jurisdictional limits on policemen employed by the Portsmouth Marine Terminal. The problem as raised by counsel for the Virginia Port Authority is as follows:

“The Virginia Port Authority, by virtue of its enabling legislation (§ 62.1-135, paragraphs k and l), employs terminal police to patrol the Portsmouth Marine Terminal. A question arises as to whether the one-mile territorial limit imposed on policemen, as a result of judicial interpretation of Code Section 15.1-138, is applicable to the Virginia Port Authority Terminal Police.

I should like your opinion on the legality of an arrest made by one of our policemen off VPA premises for crimes or violations made on VPA premises should such an arrest take place within one mile of VPA property.”

The policemen in question derive their authority from § 62.1-135 of the Code of Virginia which authorizes the Virginia Port Authority to appoint and employ special policemen to enforce within the area under the control of the authority the rules and regulations adopted by the authority and the laws of the Commonwealth. Said Code section states that these policemen shall have the powers vested in police officers under § 15.1-138 and 52-8 of the Code of Virginia. Section 15.1-138 specifies the powers and duties of police officers employed by cities and towns in the Commonwealth. In the case of Banks v. Bradley, 192 Va. 598, 66 S.E. 2d 526 (1951), the Virginia Supreme Court of Appeals held that police officers of cities and towns acting pursuant to their authority under § 15.1-138 are limited in
the scope of their authority to a territory not exceeding one-mile outside the limits of the city or town of which they serve.

In as much as the police officers employed by the Virginia Port Authority are entitled to the same powers and duties as police officers in cities and towns it is my opinion that they would also be subject to the same one-mile limitation, and that an arrest made within one-mile of the VPA property for an offense occurring on VPA property would be a valid arrest.

Further, there is an exception to this limitation which extends the jurisdiction of a police officer to make arrests when he is in "close pursuit" under the conditions specified in § 19.1-94 of the Code. It is my opinion that this section would apply to the policemen in question as well.

POLICE OFFICERS—Training—May secure compulsory minimum training prior to employment.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION—Law Enforcement Officers—May secure compulsory minimum training prior to employment.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION—Director—Authorized to approve training schools.

October 20, 1971

THE HONORABLE C. W. WOODSON, JR., Director
Law Enforcement Officers Training Standards Commission

This is in reply to your letter of recent date in which you advise that the Department of Defense provides a basic police training program which prepares members of the Armed Forces to become law enforcement officers upon their discharge. Two such schools are operated in Virginia, one being located at Fort Belvoir and the other located at Fort Eustis. You further advised that these programs are conducted under the auspices of the International Association of Chiefs of Police, Inc., and that they are desirous of having these schools approved by the Commission. You make several inquiries which I shall answer seriatim:

"1. Do I have the authority to approve the two schools in Virginia, provided the basic curriculum meets or exceeds our standards?"

Section 9-109(5), Code of Virginia (1950), as amended, provides, in part, that the Law Enforcement Officers Training Standards Commission has the authority to "approve institutions ... for school operation by or for the State ... for the specific purpose of training law-enforcement officers ..." Rule 6.0 (a) promulgated by the Commission specifically provides that the Director may approve schools which provide the required minimum training as established by the Commission.

In light of the foregoing, it is my opinion that you have the authority to approve the two schools mentioned. Therefore, I answer your first inquiry in the affirmative.

"2. If a member of the Armed Forces successfully completes the training and within one year is employed as a permanent law enforcement officer by the State or any of its political subdivisions, does he have to attend another basic school subsequent to employment? (Provided, however, that he completes 40 hours of field training subsequent to employment)."

Section 9-109 (2) of the Code provides, in part, that the Commission has the power to establish compulsory minimum training standards subsequent to employment as a law enforcement officer and to establish the time required for completion of such training. I do not interpret this section as requiring the minimum training be attained only after employment. Rather,
I interpret this section to mean that all law enforcement officers must meet certain training requirements, and those who do not possess the requisite training when employed must secure such within the time prescribed. It would seem apparent that a person who has met the minimum training standards prior to employment would be qualified on the date of his employment.

The underlying purpose of the statutes establishing the Commission is to insure that all Virginia law enforcement officers meet at least a minimum standard of training. The fact that a person has secured the minimum training prior to employment would not be in derogation of the intent of the statutes. In most instances it would seem preferable for persons to be qualified prior to employment. This would obviate the necessity of the officer being unavailable for duty while securing the required training.

Concerning the time period you mentioned in your inquiry, it is my opinion that this is an administrative matter which I am advised has been left to your discretion by the Commission.

It is my opinion that if a member of the Armed Forces successfully completes the required training prior to his employment, it is not necessary that he attend another basic school subsequent to his employment. Therefore, I answer your second inquiry in the negative.

POLICE OFFICERS—Warrants—May secure a warrant for traffic violations when arrest not made at scene.

November 23, 1971

THE HONORABLE JOHN ALEXANDER
Commonwealth's Attorney of Fauquier County

This is in reply to your letter of November 4, 1971, in which you refer to my opinion of November 20, 1970, to the Honorable Lawrence R. Ambrogi, in which I ruled that it would be improper to issue a warrant in cases where a traffic summons had previously been issued pursuant to § 46.1-178 of the Code. I quote from your letter as follows:

"A question has arisen here where a defendant is arrested for a traffic violation and charged with such violation together with no operator's license and subsequently, it is learned through the DMV check that the defendant was driving on a revoked or suspended permit, would it not be proper in those circumstances to issue a warrant rather than a summons. I can also conceive of circumstances such as where a police officer is off-duty or is on foot patrol and observes a traffic violation but is unable to apprehend the violator at that time, would it not be proper for him to have a warrant issued rather than resort to the issuance of a summons."

This office has previously ruled that an officer who stops a person for a traffic violation and fails to arrest the person at that time is not precluded from obtaining a warrant at a later time and making an arrest thereunder. See Report of the Attorney General (1961-1962), pp. 3-4. Likewise, this office has ruled that where a warrant for a traffic violation is issued upon the oath of a private citizen or a police officer, the arresting office is bound by the warrant and not the provisions of § 46.1-178. See Report of the Attorney General (1969-1970), pp. 194-195. I am enclosing a copy of each of these opinions for your information.

In view of these prior opinions, it is my opinion that the better practice is to proceed by way of a warrant in those cases where the arrest is not made at the scene. Accordingly, I answer your questions in the affirmative.
PRISONERS—Good Conduct Allowance for Persons Committing Misdemeanors While Awaiting Trial.

May 23, 1972

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in reply to your recent letter in which you make the following inquiry:

"When a person is being held in a county jail awaiting trial for an alleged felony, and he escapes from that jail prior to being tried or convicted of any offense, upon his being recaptured, tried and convicted of the felony charge on which he was originally being held, is that person eligible for good conduct allowance on the sentence which he receives upon the felony conviction?"

Section 53-213, Code of Virginia (1950), as amended, provides in pertinent part:

"Every person . . . convicted of a felony . . . and confined in any part of the Division of Corrections shall, for every twenty days he is or has been held in confinement after sentence, either in jail awaiting removal to the Division of Corrections or in any part of the Division of Corrections to which he has been or is sent to serve the sentence imposed upon him, without violating any jail or prison rule or regulation, be allowed a credit of ten days upon his total term of confinement to which he has been or is sentenced in addition to the time he actually serves or has served, except that no prisoner who is convicted of a felony committed while in jail awaiting removal to the Division of Corrections or in any part of the Division of Corrections shall be eligible for any such credit."

(Ephasis added.)

The good conduct allowance is not allowed if the prisoner commits a felony while awaiting removal to the penal institutions. Since escape from jail prior to sentence in the absence of force or violence or setting fire to the jail is deemed a misdemeanor by § 18.1-290, Code of Virginia (1950), as amended, and not a felony, the prisoner would be entitled to the good conduct allowance. In addition, if the offense were a felony, but committed prior to sentencing, the prisoner would likewise be entitled to the good conduct allowance for time spent after his sentencing because only then is he awaiting removal to the penal institutions. The answer to your question, therefore, is in the affirmative.

PROBATION AND PAROLE—Copies Furnished—Payment may not be made from criminal charges.

August 3, 1971

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

You have recently inquired as to whether "payment to the Clerk for copies furnished" to the Probation and Parole Office "in accordance with Title 14.1-112(10) of the 1950 Code of Virginia, as amended, can be made from the sum allocated in the State Budget for Criminal Charges." This inquiry is in amplification of my opinion to you of June 29, 1971, wherein I stated that I knew "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)."

Chapter 461, Item 15, of the Acts of Assembly of 1970, p. 684, provides the funds for criminal charges and, in pertinent part, limits expenditures
to expenses incident to the arrest and prosecution of persons charged with the violation of state laws. The papers furnished the Probation and Parole Office would not be incident to the arrest and prosecution of persons charged with the violation of state laws and I can find no other provisions authorizing the payment of state funds for this purpose. I must, therefore, answer your inquiry in the negative.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Barbers —
Shop license require where barbering conducted, for profit, in home or residence.

July 2, 1971

THE HONORABLE GRADY W. DALTON
Member, The House of Delegates

This is in response to your letter of May 13, 1971, in which you request my opinion concerning § 54-83.2 (b), the Code of Virginia (1950), as amended. You asked the following questions:

"1. Is a one chair shop located either in the business or residential section, and within the corporate boundary of a town such as Richlands, with a population in excess of five thousand, required by law to have a shop license?

"2. Would a one-man barber shop operated by a barber in a room or back porch of his home, located within said corporate boundary, be required to obtain a shop license?"

Each question will be answered in the order in which you propounded them. Section 54-83.3 of the Code provides in pertinent part:

"... It shall be unlawful to operate a barbershop in this State unless it is at all times under the direct supervision and management of a registered barber, and has been issued a barbershop permit; ..."

A barbershop is defined in § 54-83.2 (b) of the Code as follows:

"(b) 'Barbershop'.—Any establishment or place of business within which the practice of barbering is engaged in or carried on by one or more barbers. Provided, however, any person engaged in the practice of barbering on or before July one, nineteen hundred sixty-six in any establishment or place of business within which the practice of barbering on or before July one, nineteen hundred sixty-six issued a certificate as a registered barber without examination, provided such person files an application with the Board on or before January one, nineteen hundred sixty-seven. Provided, further, one-barber shops shall be excepted from this chapter in towns of five hundred population or less and rural areas in counties with a population of one hundred persons per square mile or less.'"

You stated that Richlands is a town of about five thousand population. Therefore, the answer to your first question would be in the affirmative in that the shop would be located within the corporate boundaries of a town having a population in excess of five hundred persons and therefore, would not be within the exception provided in § 54-83.2 (b).

Your second question would also be answered in the affirmative. This question raises the issue of whether a person operating as a barber in his home would be within the definition of "barbership" which requires that it be "an establishment or place of business within which the practice of barbering is engaged..." § 54-83.2 (b) Code of Virginia, (1950), as amended.

It would be my opinion that where the person provides an area or a location, whether it be a retail store or home, to which the public is ex-
pressly or impliedly invited for the purpose of transacting business, he is maintaining a "place of business". Therefore, where a barber opens his home or a portion of his home for the purpose of inviting the members of the public to transact business with him, he is within the meaning of the statute, operating a barbershop and would, consequently be required to obtain a shop license.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Board of Medical Examiners—Seat on Board from particular congressional district not vacated by congressional redistricting which results in member living in different district.

July 6, 1971

THE HONORABLE JAMES B. HUTT, JR., M.D.
President, State Board of Medical Examiners

This is in response to your recent request for my opinion concerning the effect of the new Congressional Redistricting Act upon the composition of the State Board of Medical Examiners. You have indicated that as a result of the redistricting certain members of the Board now find themselves in the same district as other members of the Board. You asked if their original seats were thereby vacated and if new appointments are necessary.

In my opinion the positions on the Board are not vacated as the result of this redistricting and, therefore, reappointments are not necessary at this time. As you are aware, the Code requires that the Board shall consist of ten medical physicians appointed from each congressional district, plus six appointees from the State at large representing other schools of medicine. Section 54-287 of the Code of Virginia (1950), as amended. The Code further provides:

"If any medical physician member of the Board ceases to reside in the district from which he was appointed, his office shall be deemed vacant."

The statutory scheme also contemplates that the terms of appointment shall be for periods of five years and the limitation on reappointments is that none shall be appointed to serve for more than two successive terms. Sections 54-283 and 54-285, Code of Virginia (1950), as amended. It is obvious that the General Assembly has provided a scheme consciously designed which would promote continuity of service on the Board by persons gaining experience within that time of service and, therefore, provide for experienced persons on the Board on a continuous basis. If the terms were to be changed with each congressional redistricting, the legislative intent would be thwarted. If the General Assembly had intended this result, it would have provided for terms and reappointments consistent with the decennial congressional redistricting.

Following the principles of statutory construction requiring that, where possible, each section of the Code is to be read so as not to conflict with the obvious intent of other sections of the Code, I conclude that § 54-287 of the Code must be interpreted to refer to a voluntary removal from the district by the physician appointed from that congressional district rather than removal by congressional redistricting when his place of residence remains unchanged.

For representational purposes the new congressional districts come into existence on January 3, 1973. Therefore, appointments after that date must be in accordance with § 54-282 of the Code in that each medical appointee must represent one of the ten newly defined congressional districts. Appointments prior to that date must be from the old districts. This does not preclude the Governor, in the interim, from appointing persons from the newly created congressional districts so that upon the
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effective date the Board will most accurately reflect the representation contemplated by statute provided that the appointee resides in both the new and the old districts.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Engineers—
May prepare subdivision plats if incidental to an engineering project—
Board of Supervisors is not authorized to reject such plats on ground that plat was prepared by an engineer.

PLATS—Engineers—May prepare subdivision plats if incidental to an engineering project—Board of Supervisors is not authorized to reject such plats on ground that plat was prepared by an engineer.

January 27, 1972

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

This is in response to your recent letter requesting my opinion concerning the activities of a “certified professional engineer” in the preparation of subdivision plats and their acceptance by a particular county board of supervisors.

You stated as follows:

“This engineer has been involved in the planning, design and construction of the entire subdivision and development, including the roads, utilities, sewage pumping stations, creek dredging, harbor and dock construction, swimming pools, a golf course and all other facilities requiring engineering and design. He has also prepared and signed plats of survey showing the division of the tract into residential lots and the location of roads, as well as the location of the various other improvements.”

You asked the following questions:

1. In your opinion, is the participation of this engineer in the subdivision project as outlined above, such that he is exempt under Section 54-37 of the Code because his activities are “incidental to an engineering project”?
2. Does the Board of Supervisors of the County in which this project is located have the right to refuse to approve for recordation the subdivision plat prepared by this engineer solely on the basis that the certificate thereon is that of a “Certified Professional Engineer” rather than a “Certified Land Surveyor”?

Your questions will be answered in the order in which they were presented.

I am of the opinion that the preparation of a subdivision plat indicating the size, location, shape, etc. of individual lots is not normally incidental to an engineering project and therefore within the exemption provisions of § 54-37 of the Code. As you are aware, persons engaging in “land surveying” or “professional engineering” are required to obtain a license. Va. Code Ann. § 54-27 (1950) as amended. However, § 54-37 provides:

“The following shall be exempted from the provisions of this chapter:

2. Practice of architecture and land surveying by a certified professional engineer when such practice is incidental to an engineering project.” Va. Code Ann. § 54-37 (2) (1950).

Obviously, it may be necessary and incidental for the engineer to plan, plat and profile streets, alleyways, water and sewer lines, location of transmission lines for electric and telephone service, etc. in connection with
certain projects as where the engineer is to design sewage, transportation or communications systems. The layout of individual lots, their sizes, boundaries, and shapes would therefore be incidental to these functions and would constitute an exemption as provided in § 54-37 (2). This is not to say that surveying work is incidental to each engineering project as, for example, where the only engineering work involves the building of a bridge which has no relationship to the determination of the location of lots, and therefore have an effect on their sizes and shapes, etc. The determination of whether the work is incidental to the engineering project is a question of fact to be determined in each case; the general rule being that survey work is not incidental to an engineering project.

In answer to your second question concerning approval by the board of supervisors of the subdivision plat, I am of the opinion that the "Board of Supervisors" would be required to accept a plat prepared by a "Certified Professional Engineer". Section 15.1-476 provides:

"Every subdivision plat which is intended for recording shall be prepared by the professional engineer or land surveyor ..." Va. Code Ann. § 15.1-476 (1950) as amended.

The statute unequivocably authorizes certified professional engineers to prepare subdivision plats and does not allow the Board of Supervisors any discretion in its acceptance of such plats on the basis that it was prepared by a "certified professional engineer" rather than a "certified land surveyor". The obvious intention is to allow recordation of those plats prepared by certified professional engineers pursuant to the exemption of § 54-37 (2), i.e., where its preparation is incidental to an engineering project. It does not authorize engineers to prepare plats that are not incidental to an engineering project. The Board would be authorized to reject plats drawn by engineers not incidental to an engineering project.

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PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Pharmacy—Unprofessional conduct.

July 28, 1971

THE HONORABLE GEORGE E. ALLEN, JR.
Member, House of Delegates

This is in response to your recent letter requesting my opinion concerning the application of § 54-524.35 of the Code of Virginia (1950), as amended, as it applies to a prescription drug program sponsored by the Virginia State AFL-CIO. In the program, the AFL-CIO would enter into contracts with participating pharmacies in Virginia, providing for the issuance of discounts from the regularly established retail prescription drug prices to AFL-CIO members. As a part of the program, the Union would communicate the fact, through various advertising and promotional techniques, including flyers and posters, that the discount was available with the names and locations of the participating pharmacies. You asked whether such a program would be in violation of Virginia law.

In my opinion, such a plan would be in violation of Virginia law, specifically § 54-524.35 (4) of the Code which provides:

"Any pharmacist shall be considered guilty of unprofessional conduct who ... publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription." (Emphasis supplied.)

The terms "publishing, advertising or promoting" in this context, means a communication, whether direct or indirect, which has the effect of draw-
ing attention to a pharmacy's price discounts or credit terms and, in addition, is made for the purpose of inducing persons to utilize the services of these pharmacies. The plan suggested would, without doubt, fall within this definition.

I see no provision of the Code which would prevent the AFL-CIO from entering into such contracts and pharmacists from issuing discounts. As you are aware, the State is not permitted to prohibit the issuance of discounts. Nonetheless, the State is allowed to prohibit advertising of prescription prices which the statute does in §54-524.35, whether the advertising be direct or indirect. *Patterson Drug Company v. Kingery, et al.*, 305 F. Supp. 821 (W.D. VA 1969). In my opinion, the program contemplated here would be an "indirect" method of advertising by the pharmacists which is proscribed by the statute.

I am further of the opinion, however, that the Union could advise its members, rather than the public generally, of the existence of the contracts in question if such communication is undertaken purely as a matter of information and not for the purpose of inducing any of the members to avail themselves of these benefits. The statute in question deals with the professional conduct of pharmacists. For this reason, the pharmacists who enter into such contracts have the responsibility for assuring that its provisions are not transgressed.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—State Board of Examiners for Nursing Home Administrators—Board has no statutory authority to require continuing education as a condition for licensure renewal.

November 17, 1971

THE HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in response to your request for an opinion which was dated October 29, 1971. You stated that the State Board of Examiners for Nursing Home Administrators was considering the advisability of promulgating rules and regulations requiring a continuing educational program as a prerequisite for the renewal of licenses of nursing home administrators. You asked if, in my opinion, the Board has the authority to adopt such rules and regulations.

In my opinion, the Board does not have such authority. Section 54-905 of the Code provides:

"The Board shall promulgate rules and regulations, not inconsistent with other laws, to carry out the purposes of this chapter and to promote the safety and insure proper attention and service to and care of chronically ill and infirm aged patients in nursing homes."

Various sections of the Code seem to indicate that the Board does have authority to require continuing education as a prerequisite for licensure renewal. Specifically, the general policy section declares it to be public policy of the State to provide for the following:

"... development, establishment and enforcement of basic standards for the training, experience and education of individuals acting as administrators of nursing homes; ..." *Va. Code Ann.* § 54-899.

Furthermore, the duties and functions prescribed for the Board in § 54-909 include the development of standards which must be met by persons to receive a license as an administrator; the development of techniques to determine these standards, and further, to revoke and suspend licenses "... in any case where the person holding any such license is determined
substantially to have failed to conform to the requirements of such licenses; ...

"Va. Code Ann. § 54-909 (1) (2) (3). However, these indications by the Legislature that continuing education requirements may be established are negated by § 54-912 of the Code, which indicates that each license expires on the last day of the calendar year for which it was issued and provides the method for renewing the license. It specifically states:

"... Renewals shall be granted as a matter of course unless the Board finds, after notice and hearing, that the applicant has acted or failed to act in such a manner as would constitute grounds for suspension, revocation or denial of a license." (Emphasis supplied.)

In my opinion, this is a clear statutory mandate prohibiting the Board from adopting a continuing education requirement for the renewal of licenses.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Virginia Collection Agency Board—Licenses—Board may require new application for licenses applied for after renewal application date.

January 20, 1972

THE HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in response to your recent letter in which you requested my opinion concerning a construction of § 54-729.16 of the Code of Virginia, and sub-paragraph B of § VII of the Rules and Regulations of the Virginia Collection Agency Board. You asked:

"In your opinion, does Section VII B of the Board's Rules, go beyond the provisions of § 54-729.16 of the Code in that this Section of the Code does not provide any penalty in the event the licensee submits his renewal application after December 1 of each year; however, Section VII B of the Rules provides that in the event the licensee fails to submit a renewal application prior to 5:00 p.m. on December 1, such renewal shall be considered as an initial or new license application and, further, the licensee shall be required to pay an investigation fee the same as an original applicant for licensure as a collection agency."

In my opinion, the Board's rule is not an over-extension of administrative authority. Section 54-729.16 of the Code provides:

"All licenses and certificates shall expire on December thirty-one following the date of issuance unless renewed as provided in this section prior to December thirty-one.

"Each licensee shall, if he desires to have a license renewed, make application to the Board for renewal on or before December one of each year and shall, with his application, furnish the surety bond required or furnish evidence of its continuation, and pay a renewal fee of fifty dollars for the main office and fifty dollars for each branch office. Upon renewal of a license, the Board shall issue to the licensee a new certificate."

Rule VII B provides:

"Every renewal application received by the Director after 5:00 p.m. on December 1, shall be considered as an initial or new license application. Such applications will not be considered by the Board until an investigation fee has been paid and subsequent investigation has been made pursuant to the requirements of initial agency license applicants. Minor clerical errors or deficiencies in meeting bonding requirements in applications received by the December 1 deadline, and corrections made to remove such errors or deficiencies
after December 1, shall not subject a license renewal applicant to reinvestigation, or fees for original application.”

In my opinion, Rule VII B of the Collection Agency Board does not provide a penalty for failure to renew a license prior to December 1 but merely is an administrative interpretation that if the license is not renewed as provided and within the proper time, the license “expires.” The term “expires” as used in the statute means that the license has lapsed or is no longer in existence. Therefore, the Board is correct in treating applications submitted after the time prescribed by statute as an application for a new license.

PUBLIC OFFICERS—Compatibility—Employee of United States may serve as member of county board of supervisors.

July 23, 1971

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

This is in reply to your letter of July 15, 1971, in which you ask whether § 2.1-33(15) of the Code removed the disability of a United States government employee, otherwise eligible, from serving as a member of the King George County Board of Supervisors.

In my opinion this section removed the disability and the United States government employee mentioned by you, if otherwise eligible, may serve as a member of the King George County Board of Supervisors.

PUBLIC OFFICERS—Deputy Sheriff—Residency requirement.

SHERIFFS—Deputies—Residency requirement.

November 24, 1971

THE HONORABLE STORIA RIFE
Sheriff of Buchanan County

In your letter of November 18, 1971, you inquire as to the length of time a person must reside in a county in order to be appointed deputy sheriff.

Section 15.1-51 of the Code of Virginia (1950), as amended, provides in pertinent part:

“... Every county officer, except deputy clerks of courts of record, shall, at the time of his election or appointment, have resided six months next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county, ...”

Although I have ruled in an opinion to the Honorable Eleanor W. Talley, Secretary of the Fluvanna County Electoral Board, dated October 6, 1971, a copy of which is attached, that Article II, Section 5, of the Virginia Constitution invalidates the aforesaid section insofar as it would require residence in the county for more than thirty days in the case of a candidate for the office of commonwealth’s attorney, that section of the Constitution does not affect the residence requirement for deputy sheriffs, as they are appointed officers and are not elective by the people. It is my opinion, therefore, that in order to assume the duties of a deputy sheriff, the appointee must have resided in the county for six months at the time he takes his oath of office.
PUBLIC SERVICE AUTHORITIES—Where Door-to-door Waste Material Service Is Not Contracted for or Is Refused, Mandatory Charges Cannot Be Made.

March 23, 1972

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

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

"The Giles County Public Service Authority proposes to open a sanitary landfill for solid waste disposal, and to collect the waste through the County by placing containers at various locations in the thinly populated areas for residents to deposit their trash. Regular door-to-door collections will be made in the densely populated areas, particularly in the towns, where service has been rendered for many years. The Authority has requested that I seek your opinion on the following questions:

1) Can the Authority make a mandatory charge on real estate owners or tenants in the County and Towns after the service is begun, even though there may not be door-to-door service in many areas, and even though the owners of real estate and/or the tenants who do have waste material refuse to use the service rendered by the Authority?

2) If so, is any action required by the Board of Supervisors of Giles County?"

Section 15.1-1241 of the Code of Virginia (1950), as amended, authorizes the county to establish a sewage disposal authority involving a system including a sanitary land fill for the purpose of disposing of solid waste.

An authority established under § 15.1-1241 is authorized to fix, charge and collect rates, fees and charges for the use of or for the services furnished by any such system in the manner and to the extent provided by § 15.1-1250(i), which reads as follows:

"To fix, charge and collect rates, fees and charges for the use of or for the services furnished by any system operated by the authority. Such rates, fees, rents and charges may be charged to and collected from any person contracting for the same, or from the owner or lessee or tenant, or some or all of them, who uses or occupies any real estate which is served by any such system; and in the case of a sewer system or sewage disposal system such real estate from or on which originates, sewage or industrial wastes, or either, which have entered the sewer or sewage disposal system; and the owner or lessee or tenant of any such real estate shall pay such rates, fees, rents and charges to the authority, or its agents, at the time when and place where the same may be due and payable;" (Emphasis supplied.)

Where door-to-door service is not contracted for or not provided or where service is refused, I am of the opinion that mandatory charges on real estate owners or tenants cannot be made. This answer renders unnecessary an answer to your second question.

PUBLIC SERVICE CORPORATIONS—Free Service to City Permitted.

July 14, 1971

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

I acknowledge receipt of your request for opinion dated July 2, 1971, referring to me the following problem:
"§ 56-8.1 was amended or enacted at the 1971 session of the General Assembly, adopted, and is to become effective on July 1st. This section relates to free services to Members of the General Assembly and others by utility companies. For a great number of years the Home Telephone Company of Virginia, and now the Continental Telephone Company, has furnished the Town of Franklin, now the City of Franklin, with five free telephones for use by such employees of the city as the city desired in its sole discretion. The Town, now City, had placed these five telephones with five of its employees who are on twenty-four hour call, 365 days a year. Some of these are the City Manager, Chief of Police, head of the Public Works Department, head of the Electrical Department, and one other.

Since these 'phone services were furnished to the City and not to designated individuals, does § 56-8.1 apply to prohibit the furnishing of these five free telephones? I would appreciate your early reply as to this question since the effective date of the statute is July 1st and the City of Franklin and its officials, as well as the Telephone officials, want to comply with all applicable statutory requirements."

The facts of your letter are that certain telephone service is provided to the city by the telephone company at no charge. The company has no voice as to how the city then uses this service. The act of providing the service to the city and the use the city makes of it are not matters covered by § 56-8.1 of the Code of Virginia (1950), as amended. The service is given to the city, rather than to any of its officers, and, of course, should be used by the city solely in furtherance of municipal business.

PUBLIC WELFARE—Board—Appointments to.

March 3, 1972

THE HONORABLE HAROLD M. HAWKINS
Commonwealth's Attorney for Clarke County

This is in response to your recent letter in which you requested my opinion concerning the eligibility of a member of the present three-member Board of Public Welfare to serve on a newly expanded five-member Board of Public Welfare. You indicated this member is presently serving his second full term of four years on the Board, this term to expire on June 30, 1973. You asked if, upon increasing the Welfare Board to five members, this member could be appointed to fill one of the vacancies created by the increase, either for a term of up to four years or in any case could he be appointed for a term longer than his remaining term on the Board.

In my opinion, this new member can serve no longer than his remaining term. Section 63.1-39 of the Code provides as follows:

"... No person shall serve more than two consecutive terms of office. . . ."

In the situation you presented, this member of the Board has served one full term and will complete a second full term on June 30, 1973. He will, therefore, have served two consecutive terms of office, whether he cuts his present term short by resignation or continues to serve the remainder. Consequently he is not now eligible for appointment to another term.

PURCHASING—Department of Purchases and Supply—Definition of word "purchase"—Includes lease purchases and options to purchase.

September 27, 1971

THE HONORABLE B. P. ALSOP, JR., Director
Department of Purchases and Supply
This is in reply to your letter of September 9, 1971, which reads as follows:

"Section 2.1-273 of the Code of Virginia directs that the purchase of 'all materials, equipment and supplies of every description,' with the exceptions of Sections 2.1-286 and 2.1-287, the whole or a part of the cost whereof is to be paid out of the State Treasury, shall be made through the Director of the Department of Purchases and Supply.

"The Code makes references to the lease of real property, but appears to be silent on the procedure for the lease of equipment.

"We respectfully request a formal ruling on the following question:

"'Is, or at what point in time is, the contract for the lease, lease purchase, or for the continuous use of equipment tantamount to a purchase and subject to the authority of Section 2.1-273 of the Code of Virginia?'"

Section 2.1-273 of the Code reads as follows:

"Except as the Director of the Department of Purchases and Supply shall direct and authorize otherwise, every department, division, institution, officer and agency of the State, hereinafter called the using agency, shall purchase through the Director of the Department of Purchases and Supply all materials, equipment and supplies of every description, the whole or a part of the costs whereof is to be paid out of the State treasury; it shall be the duty of the Director to make such purchases in conformity with this chapter." (Emphasis supplied.)

The definition of the word "purchase," in common usage, as a verb, as appears by Dr. Webster, is to buy, to obtain property by paying an equivalent in money. Yoyt v. Van Alstyne, N.Y., 15 Barb. 508, 572. See also Hamilton v. Gray, 31 A. 315, 316, 67 Vt. 233, 48 Am. St. Rep. 811.


Generally, purchase means to acquire something by one's own act or agreement for a price. Shaw v. Dreyfus, C.A.N.Y., 172 F.2d 140, 142.

The word "purchase" has two significations: a popular but restricted one and a legal but enlarged one; a "purchase" in the popular acceptance of the term is the transfer of property from one person to another by his voluntary act and agreement founded on a valuable consideration; the legal or enlarged definition includes every mode of acquisition known to law, except that which an heir, on the death of an ancestor, becomes substituted in his place as owner by act of law. Shepard Paint Co. v. Board of Trustees of Franklin County Veterans Memorial, 100 N.E.2d 248, 251, 88 Ohio App. 319.

There can be no "sale" unless there is a "purchase" and there can be no "purchase" unless there is a "sale." Butler v. Thomson, 92 U.S. 412, 23 L. Ed. 684.

In a true "purchase" the purchaser takes control, not the seller. Farris v. Glen Alden Corp., Pa., 48 Luz.L.Reg. 197.

Since a purchase involves a sale, it must be determined whether a lease is a sale and, therefore, comes within the definition of a purchase.

A "lease" is similar to a "sale," as there are three absolutely necessary essentials common to both: the thing, the price, and the consent. Chaney v. Whitney, La.App., 107 So.2d 471, 476.

The difference between a "sale" and "lease" or "license" is that, in the case of a "sale," owner parts with ownership of thing or of some property right in it, and conveys such property right to another, whereas, in the case of a "lease" or "license," owner retains ownership of property, but permits

All leases are not sales but some are. A lease-purchase agreement is a sale. *Collector of Revenue v. F. & H. Equipment Co.*, La.App. 119 So.2d 631, 635.

An option to lease is a sale. See *Holtz v. Babcock*, 389 P.2d 869, 884, 143 Mont. 341.

Therefore, while certain leases involve sales and come within the term "purchase," others do not. Those involving sales are lease-purchase agreements and options to purchase agreements. Each lease must be reviewed to determine whether or not it involves a purchase.

PURCHASING—Department of Purchases and Supply May Make Available to Localities or Subdivisions the Services and Supplies of Central Warehouse.

COUNTIES—Department of Purchases and Supply May Make Available to Localities or Subdivisions the Services and Supplies of Central Warehouse.

SUBDIVISIONS—Department of Purchases and Supply May Make Available to Localities or Subdivisions the Services and Supplies of Central Warehouse.

February 1, 1972

**THE HONORABLE WILLIAM F. PARKERSON, JR.**

Member, Senate of Virginia

This is in reply to your letter of January 24, 1972, which reads:

"I need an interpretation of the last paragraph of Code Section 2.1-288 beginning 'upon request of . . .'.

"When read with the last of this code section, does this paragraph authorize the Department of Purchases and Supply to purchase on its own account various commodities (that is, without any advance request from a locality) and thereafter sell the same to localities or subdivisions according to specific orders from such localities or subdivisions?

"As I read this code section, it seems to me that this last paragraph merely authorizes the department to use its warehouse and storage facilities on a temporary basis (and when it does not interfere with the services it renders state agencies) to store merchandise which has been purchased for a locality on a specific bid basis as outlined in the first paragraph of the code section. However, I understand that the department has been purchasing and maintaining a running inventory of merchandise on its own account, which inventory it then sells from time to time to subdivisions or localities, as if and when they may choose to order. In other words, instead of serving as a purchasing agent for counties, etc., with only incidental use of its warehouse facilities being involved, the department is . . . as to counties and subdivisions . . . acting as a regular wholesaler."

The paragraph about which you inquire reads:

"Upon request of the governing body of any county, city, town, other political subdivision or educational television entity, or any duly authorized officer thereof, the Director may make available to any such county, city, town, other political subdivision or educational television entity the facilities of the central warehouse maintained by the Department; provided, however, that the furnishing of any such services or supplies shall not limit or impair any services or
supplies normally rendered any department, division, institution or agency of the State.

"The Virginia Advisory Council on Educational Television shall furnish to the Department of Purchases and Supply a list of educational television entities in Virginia for the purposes of this section."

This paragraph permits the Director of the Department of Purchases and Supply, upon request of the governing body of any county, city, town, other political subdivision or educational television entity, or any duly authorized officer thereof, to make available the facilities of the central warehouse maintained by the Department, provided the furnishing of services and supplies from the warehouse does not impair any services or supplies normally rendered any department, division, institution or agency of the State.

The word "facilities" is generally regarded as a widely inclusive term, embracing everything which aids or makes easier the performance of the activities involved in the business of a person or corporation. *Hartford Electric Light Co. v. Federal Power Commission*, C.C.A., 131 F.2d 953, 960, 961.

The facilities of the central warehouse are stated in the above quoted paragraph to include services and supplies. The Department stocks supplies in the central warehouse which are available for distribution to any department, division, institution or agency of the State. It is from these same supplies that requests from local governing bodies and their authorized officers are filled.

Therefore, I am of the opinion that upon request of the governing body of any county, city, town, other political subdivision or educational television entity, or any duly authorized agent thereof, the Director may make available the services and supplies of the central warehouse.

REAL PROPERTY—Acquisition—Application of Uniform Relocation Assistance and Real Property Acquisition Policies Act.

September 16, 1971

THE HONORABLE DONALD G. PENDLETON  
Member, House of Delegates

This will acknowledge receipt of your letter of August 26, 1971, with regard to the application of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) to the Buffalo River Watershed Project. In your letter and our subsequent telephone conversation of September 7, 1971, you stated such salient facts as the following: (1) in connection with the soil erosion control and water impoundment project, the necessary real estate consisting of twenty-four parcels of land has been under option to the County of Amherst since 1968-69 and prior to the enactment of Public Law 91-646 on January 2, 1971; (2) the options expire December 31, 1971; (3) the project was initiated in 1966 and received the approval of both state and federal authorities, the latter in 1966 or 1967; (4) the land is to be acquired by the County of Amherst in accordance with a bond referendum held in 1969; (5) the total purchase price of the land will be covered by the proceeds of the bond issue, there being no federal or state contributions for land acquisition; (6) as a result of successful negotiations, no condemnation proceedings are necessary, the land needed already being under option; (7) only six of the twenty-four parcels of land contain dwelling houses, four of which are occupied by tenant farmers whom the land owners have agreed to relocate at their own expense; (8) federal funds for the overall project have been included in the fiscal year 1971, although at this time you are uncertain as to the status of the appropriation bill. With this back-
ground, you request my advice with respect to whether or not the County of Amherst may proceed with the purchase of the land currently under option without regard to the requirements of Public Law 91-646.

As you are already apprised, the Act requires that a state agency receiving federal financial assistance on any program or project shall give assurances of compliance with the Act in connection with the program or project where such will result in the displacement of any person, or the acquisition of real property, on or after the effective date of the Act. "State agency" is broadly defined to include any department, agency or instrumentality of a state or a political subdivision thereof, and the effective date of the Act is stated to be the date of its enactment, January 2, 1971.

Very briefly, with respect to displacement, the state agency generally must give assurances that certain relocation payments, assistance and services will be provided displaced persons and that replacement housing will be available. With respect to land acquisition where no displacement is involved, the state agency must give the required assurances that certain procedures will be employed in the purchase of the land, that certain litigation and incidental expenses incurred by the seller will be picked up by the state agency, and that certain "uneconomic remnants" will be purchased by the state agency in connection with the purchase of the primary land sought.

It would appear that in the case of the Buffalo River Watershed Project, federal financial assistance will be utilized, although not directly for the acquisition of the land itself. In addition, the actual acquisition of the land, and its concomitant displacement of the current occupants, will occur after January 2, 1971, the effective date of the Act.

In light of the foregoing, I am of the opinion that the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 is applicable to the Buffalo River Watershed Project. However, § 221 of the Act provides that until July 1, 1972, state agencies need comply with the Act only to the extent to which they are authorized by existing state law. Thereafter, federal funds will be available only upon full compliance.

REAPPORTIONMENT—School Board Vacated By.

REDISTRICTING—Changes in Election Districts—Effects upon magisterial districts and school board.

SCHOOLS—Board; Length of Term of Members Appointed at Large Must Comply With §§ 22-62 and 22-64.

December 13, 1971

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

I am writing in reply to your letter of December 6, 1971, concerning the effect of the redistricting of Brunswick County upon that county's school board.

I am advised that, in redistricting, Brunswick County devised five election districts and that the lines of the election districts do not correspond with the lines of the magisterial districts which previously served as the basis for representation. The redistricting will be effective for purpose of representation on December 31, 1971.

In an opinion to the Honorable Robert E. Brown, Commonwealth's Attorney of King George County, dated June 3, 1971, a copy of which is enclosed, I ruled that a similar reapportionment vacated the school board and that new members should be elected within sixty days prior to December 31, 1971. The same ruling is required in this case.
In making the appointment, the school trustee electoral board must comply with the notice requirements of § 22-62 of the Code of Virginia (1950), as amended.

The last question contained in your letter refers to the length of the term of members appointed at large. All terms must be determined in accordance with § 22-64 of the Code with the exception that the term should be for one-half year less than that provided in the statute. This will allow the terms to expire on June 30 of the appropriate year.

RECORDATION—Deeds—Short form acknowledgment is valid in Virginia whether taken in or outside of Virginia.

June 16, 1972

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

I am in receipt of your letter of May 12, 1972, inquiring whether § 55-118.6, Code of Virginia (1950), as amended, which is part of the Uniform Recognition of Acknowledgments Act, authorizes statutory short forms of acknowledgment taken in this State for use in this State. You indicate that a local title attorney is of the opinion that the short form acknowledgment is valid in this State only if taken in another state and that the form of acknowledgment provided for by § 55-113 is necessary when the acknowledgment is taken and used upon deeds recorded in Virginia.

A uniform act is designed, of course, to make uniform the laws of the several states. Section 55-118.6 provides in part that "The forms of acknowledgment set forth in this section may be used and are sufficient for their respective purposes under any law of this State. . . . The authorization of the forms in this section does not preclude the use of other forms." The latter sentence seems to negate any suggestion that the short form is invalid if taken in Virginia for use in Virginia. To the contrary, it was apparently inserted to negate any suggestion that it superseded or invalidated other forms of acknowledgment. Furthermore, in enacting this uniform act, it is extremely unlikely that the legislature would have intended that short form acknowledgments taken outside Virginia would be valid for use in Virginia and yet require a more detailed acknowledgment for instruments executed and recorded in Virginia.

I am of the opinion, therefore, that the short form acknowledgments authorized by § 55-118.6 are valid in Virginia whether taken here or in another state. Of course the previously authorized acknowledgment set forth in § 55-113 continues to be valid.

RECORDATION—Deeds of Trust or Mortgages—Covenants do not cause amount secured by deed of trust to be unascertainable.

May 22, 1972

The Honorable Edward E. Lane
Member, House of Delegates

I have received your letter of May 15, in which you ask:

"If a deed of trust secured an indebtedness or note which principal indebtedness is described in principal amount of dollars and further provides that the noteholder may advance additional funds to cure defaults in ancillary covenants under § 55-59 of the Code of Virginia or under the deed of trust, such as the covenant as to pay taxes when due, maintaining insurance, and to maintain the improvements in good repair, does the fact that these amounts are unknown at the time the deed of trust is put on record, render this a case in
which the amount which may be secured under the deed of trust is not ascertainable within the meaning of a new § 58-55 as amended?"

Prior to the adoption of Chapter 186 of the 1972 Acts of Assembly, the tax on the recordation of a deed of trust was determined by "the amount of bonds or other obligations secured thereby." Section 58-55, as amended by Chapter 186, now provides that the tax shall be based upon the fair market value of the property conveyed if the amount to be secured is unascertainable. This new provision covers such situations as a revolving line of credit deed of trust under which the amount of bonds or other obligations could theoretically over the life of the deed of trust, although not at any one moment of time, be infinite.

Provisions similar to those described by you have long been common in deeds of trust and have never been considered to increase the amount of bonds, or other obligations which may be secured thereby. In my opinion, such provisions do not cause the amount of bonds or other obligations to be unascertainable.

RECORDATION TAX—Property Settlement Prior to Divorce—Tax is determined and payable at time of recordation.

June 5, 1972

THE HONORABLE RICHARD W. ELLIOTT
Member, House of Delegates

I have received your letter of May 25, in which you ask, with respect to Virginia Code § 58-57, as amended by Chapter 250 of the 1972 Acts of Assembly:

"Is the 50 cents per deed tax applicable where there is a property settlement agreement between husband and wife, with a divorce proceeding pending, and the husband and wife who presently have title as tenants by the entireties agree to convey the real estate to the husband along with the husband assuming the lien of a deed of trust heretofore assumed by both parties?"

A recordation tax is payable at the time of recordation, Pocahontas Consol. Collieries Co. v. Commonwealth, 113 Va. 108 (1912), and must be determined as of that time. There is no provision of law which would entitle the clerk to make an additional assessment if the divorce proceeding were not carried through. The clerk must impose the tax on the basis of the facts at the time of recordation. If, as I understand the facts, there is no court decree, the transfer will be subject to the tax imposed by Virginia Code § 58-54.

REDISTRICTING—Effect on Terms of Members of Local Board of Public Welfare.

WELFARE—Redistricting; Effect on Terms of Members of Local Board of Public Welfare.

BOARDS OF SUPERVISORS—Redistricting; Effect on Terms of Members of Local Board of Public Welfare.

March 27, 1972

THE HONORABLE TEDDY BAILEY
Clerk, Dickenson County Circuit Court

This is in response to your recent letter in which you asked my opinion concerning the effect of redistricting upon the terms of members of the local board of public welfare. You asked:
"Would the terms of the members automatically be vacated as of the final date of the order? If so, would it be necessary to appoint or reappoint the entire Board as provided by Section 63.1-40?"

By telephone you indicated that the Board is composed of five members who are not appointed according to magisterial districts.

I am of the opinion that the terms of these members of the Board of Public Welfare would be unchanged by the redistricting and they should continue to serve their terms until they have been completed. Section 63.1-40 of the Code provides:

"The local board shall consist of five members unless the governing body of the county, by resolution adopted either before or after the effective date of this title, provides that the board shall be limited to three members or that the board shall consist of one member residing in each magisterial district."

The statute provides for three alternatives and it appears that your Board of Supervisors has chosen to have its five members come from the county at large as opposed to adopting a policy that they be appointed from particular magisterial districts. Therefore, it is of no consequence that the county has been redistricted. If, in fact, the Board of Public Welfare were appointed by magisterial district, it would be my opinion that their terms would be vacated on the effective date of the redistricting and the Board of Supervisors would be required to appoint a new Board of Public Welfare. Such is not the case with Dickenson County, however, and the present board may continue to serve out the terms to which they were appointed.

REDISTRICTING—Election Districts—Effect on representation of County School Board.

July 8, 1971

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

I am writing in response to your recent letter concerning representation on the School Board of Sussex County under a proposed redistricting plan for Sussex County.

The redistricting plan was devised pursuant to Chapter 1.1 of Title 15.1, Code of Virginia (1950), as amended. The plan provides for five election districts with four districts having one representative and one district having two representatives on the county board of supervisors. You have asked whether the one district having two members on the board of supervisors is entitled to one or two representatives on the county school board. Section 15.1-571.1 of the Code of Virginia provides that "... election districts shall also constitute school districts as prescribed by § 22-61 of this Code."

Section 22-61 of the Code of Virginia as amended by Chapter 225, Acts of Assembly, 1971, provides in part that:

"Except as otherwise provided by law, the county school board shall consist of one member from each district in the county from which a member of the board of supervisors is elected, each school board member to be appointed by the school trustee electoral board. In addition to the members selected by districts, the governing body may authorize the school trustee electoral board to appoint no more than two members from the county at large."

That the General Assembly intended to authorize local multimember districts for governing bodies of a county is made clear by § 15.1-37.4 of the Code of Virginia which provides "... nothing in this section shall preclude the apportionment of more than one member of the governing body
of any county . . . to a single district . . . " Thus, it is permissible, under appropriate circumstances, for one election district to have two or more representatives on the board of supervisors.

There is, however, no corresponding multimember provision for county school boards. Section 22-61 of the Code states that the "board shall consist of one member from each district in the county from which a member of the board of supervisors is elected . . . ." While § 22-61 of the Code may be open to interpretation when construed with § 15.1-37.4 of the Code, any room for construction is removed by Article 2.1 of Title 22 of the Code of Virginia.

Article 2.1 of Title 22 provides for an alternate method of appointing a county school board. The Article authorizes a county, under appropriate circumstances, to have its board of supervisors, rather than its school trustee electoral board, appoint members to the county school board. In all other respects the county school board remains the same.

Section 22-79.1 which is included in Article 2.1 of Title 22 of the Code provides in part " . . . the school board shall consist of a number equal to the number of magisterial districts, one of whom shall reside in each magisterial district." This language clarifies any ambiguity in § 22-61 of the Code and compels an interpretation of § 22-61 which limits election district representation on the school board to one member for each election district.

Accordingly, I am of the opinion that there should be five members on the Sussex County School Board, one of whom must reside in each election district. Of course, the Board of Supervisors may elect to authorize the school trustee electoral board to appoint one to two additional members to the board to be chosen from the county at large.

REDISTRICTING—Publication of Change in Precincts Prior to Enactment; Republication After Enactment.

ELECTIONS—Publication of Change in Precincts; Sixty Day Limitation of § 24.1-39 Applicable Only to General Elections.

July 20, 1971

THE HONORABLE CHARLES L. McCORMICK, III
Commonwealth's Attorney of Halifax County

This is in reply to your letter of July 9, 1971, in which you inquire as to the application of §§ 24.1-37 and 24.1-39 of the Code of Virginia (1950), as amended, in regard to a recent rearrangement of the voting precincts of Halifax County to conform to a new redistricting plan. You indicate that the ordinance enacted by the County Board of Supervisors, which instituted the change in precincts, was duly publicized once a week for two successive weeks prior to enactment, and that no alteration was made in the proposed ordinance upon final passage.

Your first question concerns " . . . whether the language of Section 24.1-37 would now require that the boundaries and polling places of the new election precincts be republished or whether the aforesaid publication would suffice to meet the requirements of this section." You ask further whether a "republication," if required, must be accomplished a certain number of days prior to any primary or general election.

As you are aware, § 24.1-37 authorizes the governing body of a county to rearrange boundaries of election districts or precincts, but requires that the same body " . . . shall prescribe and cause to be published the boundaries of the districts or precincts."

A separate provision, § 24.1-39, stipulates, in part, that:

"No change as provided for in § 24.1-36 or 24.1-37 shall be made within sixty days next preceding any general election nor until
REPORT OF THE ATTORNEY GENERAL

notice has been published in a newspaper having general circulation in such election district or precinct once a week for two successive weeks.” (Emphasis added.)

These two provisions are separate and distinct. The first, § 24.1-37, necessitates publication of precinct or district boundary alterations once accomplished; and, the second, § 24.1-39, requires notice of proposed boundary alterations before any changes are made. It is my opinion, therefore, that the required publication by a county’s governing body when changes are made in precinct or district boundaries pursuant to § 24.1-37, is not satisfied by the publicity required to be given proposed changes in such boundaries, by § 24.1-39, prior to enactment.

In response to the second part of your question, § 24.1-39 also states that:

“Notice of such change [in precinct or district boundaries] shall be mailed to all registered voters whose election district or precinct is changed, at least fifteen days prior to the next general, special or primary election.”

Inasmuch as § 24.1-37 has no specific time limitation upon the publishing of the altered boundaries, I am of the opinion that a joint reading of these statutory provisions would require the county’s governing body to publish the necessary information at least fifteen days prior to the next general, special or primary election.

The final question you pose concerns the provision in § 24.1-39 which prohibits any change in voting districts or precincts within sixty days next preceding any general election. I quote from your letter:

“My question here is whether any such change could be made within sixty days next preceding a primary election since we have a Democratic primary election scheduled for September 14 and it would not be possible to advertise the proposed change and have it enacted prior to the sixty day period before the primary.”

It is dispositive that the first sentence in § 24.1-39 makes reference only to general elections with respect to the sixty days limitation, whereas the second sentence provides for notice to affected voters of any change fifteen days prior to either a general, special or primary election. It is my opinion, consequently, that the sixty day limitation found in § 24.1-39 is applicable only to general elections.

REDISTRICTING—School Boards—Effect upon.

SCHOOLS—School Boards—Reconstitution of board where county redistricted.

THE HONORABLE WILLIAM B. MCCLUNG
Acting Commonwealth’s Attorney for Rockbridge County

September 21, 1971

I am writing in reply to your letter concerning the effect of the redistricting of Rockbridge County upon the School Board of that County.

I am advised that in redistricting the County, the Board of Supervisors has retained the use of Magisterial Districts for purposes of representation on the Board of Supervisors rather than adopt the authorized method of representation by election district. In redistricting the County, the Board of Supervisors retained the same number of Magisterial Districts and all School Board members will reside in the districts which they are presently representing. You inquire whether it is necessary that the School Board be vacated and new members be reappointed within sixty days prior to January 1, 1972.
I am of the opinion that it will be necessary to vacate the present School Board and reappoint new members within sixty days prior to January 1, 1972. I am enclosing a copy of an opinion to the Honorable Robert E. Brown, Commonwealth's Attorney of King George County, which concerns this problem. While the changes in Rockbridge County are undoubtedly minimal compared to the changes in other counties, there has been, nevertheless, a redistricting to account for population shifts in the various districts. Because the County has been redistricted into what are, in effect, new Magisterial Districts, I am of the opinion that it will be necessary to reconstitute the School Board.

REDISTRICTING—School Boards—Terms of members affected by.
SCHOOLS—School Boards—Terms of members as result of redistricting.

November 5, 1971

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

I am writing in reply to your recent letter concerning the redistricting of Campbell County by the Board of Supervisors. In redistricting the County, the Board altered the boundaries of two of the magisterial districts in order to form three new magisterial districts. Three old districts remain unchanged. You inquire whether this redistricting requires the Board of Supervisors to vacate the entire School Board or only those positions held by the representatives of the two altered magisterial districts.

I am of the opinion that only representatives of the districts which were affected by redistricting must vacate their positions. Representatives of districts which continue unchanged are not required to vacate their positions. The need for vacating a presently existing board is to insure that all of the people are equally represented. Accordingly, where several of the districts continue unchanged, there is no need for changing the representation of those districts since the populations of those districts are already equally represented.

The terms of the members of the new board should be determined pursuant to § 22-64 of the Code of Virginia (1950), as amended. The terms should be for one-half year less than the normal terms, however, so that they will expire on June 30 of the appropriate year.

REFERENDUM—Voter Approval Not Required for Bonds Issued With Consent of School Board and Governing Body for Construction of New School.

CONSTITUTION—Referendum—Voter approval not required for bonds issued with consent of school board and governing body of county for construction of new school.

January 21, 1972

THE HONORABLE ERIC LEE SISLER
Commonwealth's Attorney of Rockbridge County

This is in reply to your recent letter in which you requested my opinion as to the legality of now holding a referendum in Rockbridge County on the question of proceeding with the construction for a new high school.

You state that the following action has already been taken:

"On the 13th day of September, 1971, the Rockbridge County School Board adopted certain resolutions pertaining to the development and construction of a new Comprehensive Senior High School and directed the Superintendent of Schools to present the same to
the Rockbridge County Board of Supervisors, a copy of said resolutions being attached hereto and marked as Exhibit 'A'.

"That same afternoon the resolutions above recited were presented to the Board of Supervisors and following discussion thereon the Board of Supervisors gave its approval to appropriate in excess of Three and One-half Million Dollars for the construction and design of a new comprehensive high school, a copy of said motion extracted from the minutes being attached hereto and marked as Exhibit 'B'.

"Pursuant to this action by the Board of Supervisors, W. Hermann Lee, Superintendent of Rockbridge County Public Schools, and G. T. Umbarger, Executive Secretary to the Rockbridge County Board of Supervisors, executed a letter and forwarded the same to the Honorable Walter Craigie, Treasurer, Commonwealth of Virginia, enclosing certain exhibits, including the resolution submitted to the Board of Supervisors by the County School Board, applying to the Virginia Public School Authority for a loan in the amount of Three Million Five Hundred Thousand Dollars ($3,500,000.00), a copy of said letter being attached hereto and marked as Exhibit 'C'.

"In response thereto the Honorable Walter W. Craigie, Jr., drafted a letter indicating receipt and acknowledgment of the request advising that Virginia Public School Authority Bonds would most likely be sold in January or February of 1972, a copy of said letter being attached hereto and marked as Exhibit 'D'. To date no further communication has been received from Mr. Craigie's office.

"On November 8, 1971, the Board of Supervisors as then constituted, at the request of the Rockbridge County School Board, appropriated the sum of Fifty Thousand Dollars ($50,000.00) to be transferred from the excess of their general revenue fund to the school operating fund, the same to be expended for initial professional and architectural services.

"On November 2, 1971, the voters of Rockbridge County elected five new supervisors, none of whom had ever served on the Board previously thereto. At their initial organizational meeting which was held on Monday, January 10, 1972, one member of the Board expressed the opinion that prior to proceeding any further with the construction or plans for the new high school that a County wide referendum be held to solicit the opinion of the populus. After further discussion a motion was made and carried by a 3-2 vote, the motion directing me as Commonwealth's Attorney to solicit an opinion from your office relative to the legality of such a referendum."

Section 15.1-185 of the Code of Virginia (1950), as amended, provides that voter approval by a majority vote of the qualified voters of the county is not required for bonds issued, with the consent of the school board and the governing body of the county, for capital projects for school purposes and sold to the Virginia Public School Authority, a State agency prescribed by law. See § 22-29.6. This language appears also as Article VII, Section 10(b), of the Virginia Constitution.

Since § 15.1-186 of the Code, as amended by the 1971 General Assembly, relieves the county of the need for voter approval, only the first part of that section is applicable in the present situation. That portion reads:

"Whenever the governing body of any county shall determine that it is advisable to contract a debt and issue general obligation bonds of the county to finance any project, it shall adopt a resolution (herein sometimes called the 'initial resolution') setting forth:

"(a) In brief and general terms the purpose or purposes for which the bonds are to be issued, and

"(b) The maximum amount of such bonds and, if bonds are to be issued for more than one purpose, the maximum amount for each
REPORT OF THE ATTORNEY GENERAL

purpose; provided, however, that with respect to bonds for school purposes a statement of the maximum amount of each separate purpose is not required, and provided, further, that with respect to bonds for the purchase of land for diversified public purposes, a statement of the maximum amount of each separate purpose is not required."

In view of the foregoing, I am of the opinion that voter approval is not required in the situation set forth by you and that no expressed authority exists for the holding of a referendum on the question posed.

REGISTRAR—Appointment Invalid Where Registrar Previously Employed as Secretary to Chief of Police.

REGISTRAR—De Facto Officer Though Appointment Invalid.

PUBLIC OFFICERS—De Facto Officer Can Be Removed Only by Writ of Quo Warranto.

PUBLIC OFFICERS—Acts Performed by De Facto Officer Are Legally Valid Against Collateral Attack.

PUBLIC OFFICERS—If Public Agency Refuses to Pay De Facto Officer, No Cause of Action Can Be Maintained—Compensation may be voluntarily paid if there is no de jure claimant to office.

PUBLIC OFFICERS—De Facto Officer Should Be Replaced by One Qualified to Hold the Office.

December 8, 1971

THE HONORABLE WILLIAM O. ROBERTS, JR.
City Attorney for the City of Lexington

I am in receipt of your recent inquiry on behalf of the Electoral Board of the City of Lexington, which Board is entitled to opinions of this office, regarding the validity of the appointment of the new General Registrar. The individual in question, prior to her appointment, was employed by the City as Secretary to the Chief of Police.

Section 24.1-33 of the Code of Virginia (1950), as amended, is applicable to your inquiry and reads:

"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." (Emphasis supplied.)

Such provision stems from the identical language found in Article II, Section 8, of the revised Constitution of Virginia, and does, in my opinion, prohibit the appointment of the individual in question as registrar. The provisions of § 24.1-43, which allow the registrar, with the consent of the electoral board, to undertake other duties, which do not conflict with the duties of the office of registrar, may not be construed as authorizing the appointment.

I am in agreement with you that the individual in question, though her appointment is invalid, would be a de facto officer, and thus any person relying on the purported authority of the registrar, would be considered validly registered, or to have validly cast an absentee ballot. The following propositions which you assert are, in my opinion, correct:

(a) A de facto officer can be removed from office only by a writ of quo warranto brought by the Attorney General or the Common-
wealth's Attorney, or by some person with color of title to the office.

(b) Acts performed by a de facto officer are legally valid as against any form of collateral attack. McCraw v. Williams, 33 Gratt. (74 Va.) 510 at 514 (1880). Therefore, any person registered by said de facto registrar would be legally registered, unless disqualified for some other reason. All absentee ballots processed by said registrar would be legally valid.

(c) If the public agency refuses to pay a de facto officer, no cause of action can be maintained. Norris v. Gilmer, 183 Va. 367, 370 (1944).

(d) Compensation may, however, be voluntarily paid a de facto officer who may keep the amount received if valuable services were, in fact, rendered, and there is no de jure claimant to the office.

I would point out, however, with regard to paragraph (a), that when the public or third persons have knowledge that an individual acting or pretending to act is not the officer de jure then the reason of the rule for de jure officers ceases and the rule itself for validating such act does not apply. The individual in question should, therefore, be replaced by someone qualified to hold the office in question.

RESIDENCE—Deputy Clerk of Court Need Not Be Resident of City or Citizen of Commonwealth.

CLERKS—Deputy Clerk of Court Need Not Be Resident of City or Citizen of Commonwealth.

CONSTITUTION—Revised; Deputy Clerk of Court Need Not Be Resident of City or Citizen of Commonwealth.

February 15, 1972

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

I am in receipt of your letter of February 10, 1972, directing my attention to the previous opinion of this office to the Honorable Helen C. Loving, Clerk, Henrico Circuit Court, dated January 18, 1972, wherein it was ruled that the exception contained in § 15.1-51 of the Code of Virginia (1950), as amended, which allows deputy clerks to be appointed who are residents of counties other than the one for which they are appointed, was now valid under the revised Constitution of Virginia. I enclose for your information a copy of that ruling.

In view of the above ruling you go on to state:

"As you know, the City of Danville is located right on the North Carolina line, with only a few hundred yards separating the city limits and the state line. Seven years ago, one of my deputy clerks moved just across the line into North Carolina and this forced me to remove her as a deputy clerk and give her a classification as secretary. In light of your opinion to Mrs. Loving, is there any prohibition against my re-appointing this employee as a deputy clerk?"

In light of the exception for deputy clerks set forth in § 15.1-51, there is no requirement, to my knowledge, concerning residency for such appointive office, nor any requirement that an individual be a citizen of the Commonwealth. Consequently, I am of the opinion that there is not any prohibition against your reappointing the individual in question as a deputy clerk.
REPORT OF THE ATTORNEY GENERAL

RETIREMENT SYSTEM—Juristic Entities—Criteria used to determine.

July 12, 1971

The Honorable Boyd F. Collier, Director
Virginia Supplemental Retirement System

I have received your recent letter, asking whether the Northern Virginia Cigarette Board, the Manassas District Nursing Home and the Rockbridge Area Social Service Department Board are juristic entities, such that Social Security coverage can be granted their employees pursuant to § 218 of the Social Security Act and Title 51, chapter 3.1 of the Code of Virginia.

The criteria used by the Social Security Administration in determining whether an organization is a juristic entity which may be a State instrumentality within the definition of § 218(b)(2) of the Social Security Act are whether the organization may:

1. sue and be sued in its own name;
2. hold and convey real and personal property;
3. enter into contracts; and
4. hire, supervise and discharge its own employees.

The Northern Virginia Cigarette Board was created by resolution of the governing bodies of several localities pursuant to Virginia Code § 15.1-21. The enabling legislation would permit those localities to create a juristic entity, with all of the powers as to which you inquire or to provide, "alternatively, for administration by an administrator or joint board." Bell, Annual Survey of Virginia Law, Municipal Corporations, 44 Va.L.Rev. 1208, 1215 (1958). The resolutions creating the Board, however, give no power to bring suit, to hold property (other than tax receipt), to enter into contracts (other than for the performance of services for the member jurisdictions), or to hire its own employees (other than an administrator and an auditor). Those powers which the Board does possess are merely delegated powers. In my opinion the Northern Virginia Cigarette Board is not a juristic entity but is a joint undertaking by the member jurisdictions. The employees of the Board are employees of the participating localities for all purposes of Virginia law.

The Manassas District Nursing Home was established pursuant to § 63.1-184 of the Code of Virginia. Section 63.1-188 of the Code specifically provides: "The several counties and cities establishing the district home shall pay for the same in proportion to their respective populations and shall hold and own the same in the same proportion." The costs of maintaining the home are paid by the member jurisdictions, "in proportion to the number of inmates from the several counties and cities." Va. Code § 63.1-190. There is, therefore, no reason for the Board of the Home to be given power to hold real property. The Board may clearly be sued, Va. Code § 63.1-193, and may, in my opinion, sue in its own name. It may hire, supervise and discharge its own employees. Va. Code § 63.1-189. It may, in my opinion, enter into any contracts which may be necessary to conduct the affairs of the Home. In my opinion the Manassas District Nursing Home is a juristic entity within the criteria set forth above.

The Rockbridge Area Social Service Department Board was established pursuant to Virginia Code § 63.1-44 as a merger of the local welfare boards of Rockbridge County and Lexington and Buena Vista. In my opinion, the Board occupies the same status as local welfare boards created pursuant to Virginia Code § 63.1-38. I am aware of many suits which have been brought against local welfare boards and am of the opinion that a joint board would likewise be subject to suit. The Board may receive and disburse private funds. Va. Code § 63.1-50. In my opinion, the Rockbridge Area Social Service Department Board is a juristic entity within the criteria set forth above.
SANITARY DISTRICTS—Composition of—Town may join.
TOWNS—Sanitary Districts—Town may join.

August 20, 1971

THE HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

This is in reply to your recent letter in which you requested my opinion on the following question:

"Would you please advise me as to whether or not, in your opinion, a town may join a Sanitary District for the purpose of supplying sewer and water, and, more particularly, whether such action is constitutional."

Section 21-113 of the Code, as amended by the 1970 General Assembly, permits the inclusion of a town in a sanitary district. This section reads in part as follows:

"With the approval of the board of supervisors of a county and the council of any town therein, such town or any part thereof may be included within a sanitary district created or enlarged under the provisions of this chapter."

I am, therefore, of the opinion that a town may join a sanitary district under the conditions set forth above.

I also find no constitutional infirmity in the language of this statute.

SCHOOLS—Appointment of County School Board Members.

June 5, 1972

THE HONORABLE HENRY S. HATHAWAY
Commonwealth's Attorney for Northumberland County

I am writing in response to your letter of May 12, 1972, in which you ask my opinion of the meaning of a portion of § 22-61 of the Code of Virginia (1950), as amended.

That portion of the section which is in question provides: "In addition to the members selected by districts, the governing body may authorize the School Trustee Electoral Board to appoint no more than two members from the county at large." You have asked whether it is mandatory that the School Trustee Electoral Board appoint two members at large when authorized to do so by the governing body.

The sentence in question uses the word "authorize." As used in the context of the sentence, the authorization merely empowers the School Trustee Electoral Board to perform a discretionary act. There is no compulsion upon the board to appoint the additional members at large despite the governing body's authorization to do so.

SCHOOLS—Budget Estimates—Board of Supervisors may appropriate lump sum or designate major categories; may not fund or refuse individual line items.

SCHOOLS—Authority—May not switch funds from one major classification to another; may switch funds within major classifications.

SCHOOLS—Local Board—Limitations on Board of Supervisors to alter budget estimates.

BOARDS OF SUPERVISORS—Appropriations—Schools—Limitations on reducing specific items.
REPORT OF THE ATTORNEY GENERAL

April 21, 1972

THE HONORABLE JOHN C. COWAN
Commonwealth’s Attorney for King George County

This is in reply to your letter of April 6, 1972, in which you ask the following questions:

“(1) May the Board of Supervisors fund individual items in the School Budget while refusing to fund others, (2) may the Board of Supervisors fund in general categories such as administration, instruction, transportation, etc., (3) if the Board of Supervisors may fund by category, can the School Board thereafter switch funds from one category to another and can they switch funds around within the categories in which the appropriation was made.”

Section 22-127 of the Code of Virginia (1950), as amended, provides, in part, that “Notwithstanding any other provisions of law, the amount appropriated by the governing body for public schools shall relate to its total only or to such major classifications as may be prescribed by the State Board of Education, and such funds shall be expended on order of the school board in accordance with said classifications.”

This office has previously ruled that the effect of § 22-127 is to restrict the appropriation for school purposes to either a lump sum appropriation or one designating the sums appropriated under the major categories of expenses as prescribed by the State Board of Education. See opinion of the Attorney General to the Honorable Emory H. Crockett, Commonwealth’s Attorney for Lee County, dated May 13, 1968, and found in the Report of the Attorney General (1967-1968), at p. 19. I am of the opinion, therefore, that the Board of Supervisors may not fund individual line items in the school board budget while refusing to fund others, nor may it alter individual line items, either by way of an increase or a reduction. It may, however, fund by major classification and may increase or decrease the appropriations for the major classifications.

With regard to your third inquiry, I am unable to find any authority for the school board to switch funds from one major classification to another. On the contrary, § 22-127 specifically states that the school board shall expend its funds “in accordance with said classifications.” There is no prohibition, however, to the switching of funds within major classifications. I am of the opinion, therefore, that while a school board may not switch funds from one major classification to another, it may switch funds within major classifications.

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April 24, 1972

THE HONORABLE IRENE L. PANCOAST, Judge
Juvenile and Domestic Relations Court

I am writing in reply to your letter of April 20, 1972, in which you ask whether a child born on February 21, 1956, is within the scope of § 22-275.1 of the Code of Virginia 1950, as amended, which requires children who “have not passed the seventeenth birthday” to attend school unless otherwise exempted.

It is clear that a logical interpretation of the language within the context of § 22-275.1 of the Code compels an interpretation that a person who has “not passed the seventeenth birthday” is a person who is less than seventeen years of age. Since the child in question is less than seventeen years old, he is within the scope of the Act.
SCHOOLS—Search of dormitory rooms—Conditions under which may be conducted.

August 3, 1971

THE HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

This is in reply to your recent letter in which you make two inquiries, the first of which is as follows:

"Can the administration of a college give law enforcement officers permission to search dormitories and dormitory rooms for the purpose of finding contraband or in the investigation of offenses occurring within the county?"

There appear to be no cases in Virginia dealing with the specific question you ask. However, I am of the opinion that where a search for the purposes set forth in your inquiry is to be conducted by or for law enforcement officers, the provisions of Article I, Section 10, of the Virginia Constitution, the Fourth and Fourteenth Amendments to the United States Constitution and Sections 19.1-83 through 19.1-89 of the Code of Virginia are applicable and any such search should be in accordance with those provisions and the court decisions applying them. Thus, I must answer your question in the negative insofar as it implies that "permission" would obviate the necessity for complying with constitutional, statutory or decision law mandates.

You next inquire as to the right of appeal of a person tried, convicted and sentenced in a court of record, with the sentence having been suspended and the person placed on probation under the following circumstances.

"Subsequently, for a cause shown and after a proper hearing, the court revoked the suspended sentence and ordered the convict to serve the term. Counsel have been noting appeals from such a decision. It seems to me that although there is no doubt that a person in a court not of record, whose suspension was revoked has a right of appeal to the Circuit Court, there is nothing contained in the Code regarding a right of appeal from the judgment revoking probation and forcing the execution of a sentence where there has been a complete hearing and a final judgment rendered in the initial trial. We cite, of course, Section 53-275."

It is my opinion that the cases of Fuller v. Commonwealth, 189 Va. 327 (1949) and Slayton v. Commonwealth, 185 Va. 357 (1946), as well as Opinions of Attorney General, (1950-1951), page 174, govern your inquiry. The appeal from the conviction must be taken within the appropriate time allowed by the Rule of the Supreme Court after the sentence has been adjudged. If, thereafter, a suspension of the sentence is revoked, then an appeal can only be taken from the action of the court revoking suspension and, apparently, reversal would be "only upon a clear showing of abuse of . . . discretion . . ." (Slayton v. Commonwealth, 185 Va. at 367).

SCHOOLS—Effect of Redistricting Upon School Boards Under County Board Form of Government.

REDISTRICTING—Effect on County School Boards.

February 14, 1972

THE HONORABLE H. RONNIE MONTGOMERY
Commonwealth's Attorney for Lee County

This is in reply to your recent letter concerning the effect upon the school board of the 1971 redistricting of Lee County from five magisterial districts to six election districts.
Section 22-61, Code of Virginia (1950), as amended, provides that members of the county school board shall be appointed from each district from which a member of the board of supervisors is elected. Since Lee County has the County Board form of government, however, appointments of school board members in Lee County are made pursuant to § 15.1-708 of the Code rather than § 22-61. Section 15.1-708 provides for the appointment of not less than two nor more than six school board members from the county at large.

I am of the opinion that, since the Lee County School Board is not appointed pursuant to § 22-61, the 1971 redistricting of the County has no effect on the membership of the school board.

SCHOOLS—Grant From State Agency to Student Attending Private Sectarian College Prohibited.

SCHOOLS—State Agency May Not Make Grant to Student Attending Private Sectarian College.

The Honorable David F. Thornton
Member, The Senate

December 28, 1971

This is in reply to your recent letter in which you made the following inquiry: "Does any part of the revised Constitution or the Code of Virginia now prohibit a grant from the Department of Vocational Rehabilitation to a student attending a church-related college in Virginia?" For the reasons stated below, I must answer your question in the affirmative.

Section 16 of Article I of the Constitution of Virginia (1971) and the First Amendment to the Constitution of the United States prohibit the Commonwealth from making any law respecting an establishment of religion. The Supreme Court of the United States has been called upon to decide complex and far reaching questions concerning the Establishment Clause of the First Amendment to the United States Constitution. Some of these decisions have broadened the type and extent of aid that the state and federal governments may give to church-sponsored activities, e.g., Bradfield v. Roberts, 175 U.S. 291 (1899) (construction grant to Roman Catholic hospital); Everson v. Board of Education, 330 U.S. 1 (1947) (bus transportation for parochial school children); Board of Education v. Allen, 392 U.S. 236 (1968) (secular textbooks for parochial school children); Waltz v. Tax Commission, 397 U.S. 664 (1970) (tax exemption for church property); and Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants for sectarian institutions of higher education); while others have refused to uphold state aid on the basis that it constituted substantial state involvement with religious groups and activities, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971) (purchase of secular educational services from nonpublic schools and reimbursement to nonpublic schools for teachers’ salaries, textbooks, and instructional materials); and DiCenso v. Robinson, 403 U.S. 602 (1971) (salary supplement for teachers in nonpublic schools).

Because of certain constitutional provisions peculiar to the Constitution of Virginia, it is unnecessary for me, however, to answer your question in the context of the Establishment Clause.

Section 10 of Article VIII of the revised Constitution of Virginia forbids the appropriation of public funds to any school or institution of learning not owned or exclusively controlled by the State or a political subdivision, except that, subject to limitations imposed by the General Assembly, funds for educational purposes may be expended in furtherance of elementary, secondary, collegiate or graduate education in public and nonsectarian private schools and institutions of learning. This section is commonly referred to as the "tuition grant" section of the Constitution.

Prior to 1956, Section 141 of the Constitution of Virginia provided that "no appropriation of public funds shall be made to any school or institution
of learning not owned or exclusively controlled by the State or some political subdivision thereof," with two provisos or exceptions which are not relevant to this inquiry. The paramount purpose of Section 141 was "to aid and maintain the public free school system and to guard against any diversion of public school funds from that purpose." _Almond v. Day_, 197 Va. 418, 425 (1955).

In 1954, the General Assembly passed an Act providing for the payment of "tuition, institutional fees, board, room rent, books and supplies" for the orphans of soldiers, sailors and marines from Virginia. Acts of Assembly 1954, ch. 708, p. 970. The Supreme Court of Appeals of Virginia in the case of _Almond v. Day_, supra, held that, regardless of whether the payments were made to the parents or the school, the Act constituted an appropriation for the benefit of nonpublic schools and thus contravened Section 141. _Almond v. Day_, supra, at 426-27. The Court also held that since the Act permitted appropriations to sectarian schools, it violated Sections 16, 58 and 67 of the Constitution of Virginia and the First and Fourteenth Amendments to the United States Constitution. _Id._ at 428.

In response to the decision in _Almond v. Day_, a Constitutional Convention was held in 1956 at which time Section 141 was amended to its present form to allow appropriations to private nonsectarian schools. Thereafter, the General Assembly enacted tuition grant statutes pursuant to the revised Section 141; however, in 1969 a three-judge United States District Court declared unconstitutional all tuition grants except those for the benefit of "retarded, defective or otherwise unfortunate children." _Griffin v. State Board of Education_, 296 F.Supp. 1178, 1183 (E.D. Va. 1969).

Prior to the 1971 revision of the Constitution of Virginia, the Commission on Constitutional Revision, "[s]ensitive to Virginia's strong tradition of both religious freedom, and separation of church and state," recommended that the prohibition against appropriations to private sectarian schools be retained and that Section 141 not be revised. Report of the Commission on Constitutional Revision, p. 272 (1969). After long and thorough debates, the General Assembly accepted the Commission's recommendation. _Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution 1969 Extra Session and 1970 Regular Session_, passim. Of paramount importance to the Senate was the separation of church and state. _Id._ at 247, 263.

Although your inquiry concerns a grant to a student, it would be considered an appropriation to the school. _Almond v. Day_, supra, at 428. Since the school in question is church-related, such a grant would be prohibited by Section 10 of Article VIII of the revised Constitution. See opinion of the Attorney General to the Honorable Russell L. Davis, Member, House of Delegates, dated July 8, 1971, found in the Report of the Attorney General (1971-1972), at p. —.

Section 11 of Article VIII permits the General Assembly to provide for loans to students attending nonprofit institutions of higher education whose primary purpose is not to provide religious training or theological education. This section would obviously allow loans to students attending sectarian private colleges and universities unless the primary purpose of the college or university is to provide religious training or theological education. This section is a "modest" effort "to extend to students in private institutions, whether church-related or not, loan programs available to students in public or private nonsectarian colleges in Virginia." Report of the Commission on Constitutional Revision, p. 273. The section was drafted in "very precise language." _Id._ The commonly accepted meaning of the word "loans" as it appears in Section 11 is "a transaction creating the customary relation of borrower and lender, in which the money is borrowed for a fixed time, and the borrower promises to repay the amount borrowed at a stated time in the future, with interest at a fixed rate." _Almond v. Day_, 197 Va. 782, 790, 791 (1956). See also _Zoby v. United States_, 364 F.2d 216, 219 (4th Cir. 1966). A "grant," however, connotes a gift. _Webster's New In-
INTERNATIONAL DICTIONARY (2nd Ed.), p. 1089. Since your inquiry concerns a "grant" rather than a "loan," Section 11 of Article VIII is inapplicable.

SCHOOLS—Privileged Communications — Communications of guidance counselors and teachers not privileged.

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates

This is in reply to your recent letter in which you inquire whether guidance counselors and other teachers in Virginia are protected by Virginia's statutes concerning privileged communication.

There are several statutes in the Code of Virginia concerning privileged communications; however, there is no statute in the Code of Virginia which would make a communication between a guidance counselor or teacher and a student privileged. As you may recall, a bill was introduced at the 1970 regular session of the General Assembly which would have had the effect of making such communications privileged, but it was subsequently defeated.

SCHOOLS—Retroactive Pay for Teachers; Salaries Frozen Under Economic Stabilization Act of 1970; Determination Made by Internal Revenue Service.

DR. WOODROW W. WILKERSON
Superintendent of Public Instruction
Department of Education

In your letter of December 23, 1971, you inquire whether teachers and other school employees in the Commonwealth of Virginia can properly be compensated in accordance with their 1971-72 contracts where the effect of such compensation would be to provide for retroactive payment of salaries frozen pursuant to the Economic Stabilization Act of 1970.

On December 22, 1971, the President signed into law the Economic Stabilization Act Amendments of 1971. That legislation amended the 1970 Act to provide, in § 203(c):

"(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

"(A) such increases were provided for by law or contract prior to August 15, 1971; and
“(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.”

These subsections have the effect of providing for retroactive pay, as described in your letter, under two alternative circumstances: either (1) where the contracted increase is not unreasonably inconsistent with the standards for wage and salary increases issued under the economic stabilization program, or (2) where taxes have been raised, appropriations made, or funds otherwise provided to cover such increases. It is my opinion that Virginia’s teachers and school personnel qualify for retroactive pay under both criteria (although it is necessary to qualify only under either one) and steps should be taken to provide for such payments as soon as possible.

I might add that both subsections quoted above refer to determinations by the President that the proper criteria are met, and the authority to make these determinations has been delegated by the President to the Internal Revenue Service. Individual school boards should immediately notify their local IRS office of the specific facts relating to their personnel contracts so that this determination may be made without delay.

SCHOOLS—School Board—Effect of county reapportionment on.

THE HONORABLE JAMES CLOPTON KNIBB
Commonwealth’s Attorney for Goochland County

I am in receipt of your letter of November 16, 1971, concerning the appointment of the School Board of Goochland County.

In your letter you state that a referendum was recently held in the County pursuant to § 22-79.4 of the Code of Virginia (1950), as amended, in which the voters decided in favor of having the governing body appoint the members of the School Board. I am advised that the Circuit Court of Goochland County has not yet entered of record the results of the referendum as required by § 22-79.4.

Section 22-79.3 of the Code of Virginia provides that “Members [of the School Board] in office at the time of the referendum shall complete their terms and their successors shall be appointed by the governing body.”

Goochland has also been recently redistricted. Presently Goochland’s members of the Board of Supervisors are chosen from three magisterial districts. Under the redistricting, effective December 31, 1971, for purposes of representation, the County will have five election districts as the basis for representation.

In your letter you ask when the new School Board should be appointed. As you know, the redistricting of the County will vacate the presently existing School Board as a matter of law on December 31, 1971. I have previously ruled in an opinion to the Honorable Robert E. Brown, Commonwealth’s Attorney for King George County, dated June 3, 1971, a copy of which is enclosed, that the new Board should be appointed within sixty days prior to December 31, 1971, in order to follow the requirements of § 22-64 of the Code of Virginia as closely as possible.

Because the Circuit Court has not yet entered of record the results of the referendum, the procedure required by § 22-79.4 of the Code has not been completed and the School Trustee Electoral Board is still charged with the duty of making appointments to the School Board. The School Trustee Electoral Board will only be abolished when the referendum procedure is complete.

The new appointees should be given staggered terms as provided for in § 22-64 of the Code. The terms should be for one-half year less than the time provided for in the statute, however, so that the terms will expire on June 30 of the appropriate year.
SCHOOLS—School Board—Effect of county reapportionment on.

December 2, 1971

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

I am writing in reply to your letter of November 22, 1971, in which you inquire of the effect on the School Board of Highland County of the reapportionment of that County.

Prior to reapportionment, Highland County had three magisterial districts as the basis for representation. When the County reapportioned, it changed to three election districts as the basis for representation. The boundary lines of the three election districts correspond directly with those of the old magisterial districts so that, in effect, reapportionment only changed the name of the unit of representation.

I am of the opinion that where reapportionment does not involve a changing of the boundary lines of the districts of representation the reapportionment will not have the effect of vacating the School Board. Accordingly, the members of the Highland County School Board should continue serving their terms without interruption. Enclosed you will find a copy of an opinion to the Honorable E. Bruce Harvey, Commonwealth's Attorney for the County of Campbell, dated November 5, 1971, in which I answered a similar question.

SCHOOLS—School Board—Effect of county redistricting and change in the form of government.

February 23, 1972

THE HONORABLE DUDLEY J. EMICK, JR.
Member, House of Delegates

I am in receipt of your letter of February 7, 1972, relating to the appointment of the members of the School Board of Alleghany County.

Alleghany County was redistricted in the summer of 1971. This redistricting became effective for purposes of representation on December 31, 1971. The members of the Board of Supervisors who were elected in the November elections and took office on January 1, 1972, represent the redistricted magisterial districts.

Also in the November election, the electorate of Alleghany County approved by referendum a change in the method of appointment of school board members. The change allows the Board of Supervisors to appoint members of the School Board. Previously, members were appointed by the School Trustee Electoral Board.

On December 28, 1971, after the change became effective, the old board of supervisors appointed the school board for staggered terms over the succeeding four years. You have asked whether the reappointments are valid.

On June 3, 1971, I rendered an opinion to the Honorable Robert E. Brown, Commonwealth's Attorney for King George County, Report of the Attorney General (1970-1971), p. 87, a copy of which is enclosed, in which I advised that the redistricting of a county has the effect of vacating by force of law the positions on the school board as of December 31, 1971, when the redistricting becomes effective for purposes of representation. In the same opinion I advised that the procedure for making appointments outlined in § 22-64 of the Code of Virginia (1950), as amended, should be followed as closely as practicable and that the appointments to the school board should be made within sixty (60) days prior to December 31, 1971. See, also, opinion to the Honorable James Clopton Knibb, Commonwealth's Attorney for Goochland County, dated December 2, 1971, a copy of which is enclosed. The terms should be for one half year less than the normal, however, so that they will expire on June 30 of the appropriate year.
Accordingly, as you can see from the foregoing, I am of the opinion that the procedure followed by the Board of Supervisors in appointing the school board prior to December 31, 1971, was the only course of action which was available to it. Therefore, I am of the opinion that those appointments were made in accordance with law and are valid, with the provision that the terms expire on June 30 of the appropriate year rather than December 31.

SCHOOLS—School Board—Legal counsel—No authority to retain counsel on permanent basis.

March 11, 1972

THE HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney for Westmoreland County

This is in reply to your letter of February 28, 1972, which reads as follows:

"Could you please advise me whether or not a local county school board has the authority to retain counsel on a permanent basis to advise and render legal assistance to the school board on a daily basis, attend all meetings and generally act as a full time legal advisor to the school board.

"I am familiar with Section 22-56.1 which provides authority for the employment of counsel for local school board to defend particular legal proceedings but do not feel that this covers the situation outlined above."

The local county school board has no statutory authority to retain counsel on a permanent basis to advise and render legal assistance to the school board on a daily basis, attend all meetings and generally act as a full time legal advisor to the school board. It is the duty of the Commonwealth's Attorney to give legal advice and opinions to all public officials and boards of the county, unless statutory provisions provide to the contrary.

SCHOOLS—School Board—Members—Effect of county redistricting on.
REDISTRICTING—School Board Members—Effect upon.

December 8, 1971

THE HONORABLE ROBERT L. GILLIAM, III
Commonwealth's Attorney for Westmoreland County

I am writing in reply to your letter of November 19, 1971, concerning the School Board of Westmoreland County.

In March of 1971, Westmoreland County redistricted and in doing so increased the number of magisterial districts from three to five. As a result of the redistricting, the School Trustee Electoral Board appointed two additional persons to the School Board.

At a latter date, the Board of Supervisors redistricted pursuant to § 15.1-571.1 of the Code of Virginia (1950), as amended, and adopted five election districts as the basis of representation. The five election districts have the same boundaries as the five magisterial districts. This second reapportionment will be effective for purposes of representation on December 31, 1971.

With the two redistrictings in mind, you ask whether the terms of the members of the School Board will be vacated on December 31, 1971, as a result of the redistrictings.

I am of the opinion that the School Board should have been vacated after the initial reapportionment in March of 1971. See opinion to the
REPORT OF THE ATTORNEY GENERAL

Honorable Robert E. Brown, Commonwealth's Attorney for King George County, dated June 3, 1971, a copy of which is enclosed. Accordingly, the positions of the original three members of the Board should be vacated and new appointments made as soon as possible in compliance with § 22-62 of the Code of Virginia. Any actions of the School Board during the interval between the first redistricting and the time when the new appointments are effective are valid because the three original members are entitled to recognition until their successors are properly appointed.

The second redistricting will have no effect on the School Board since it only concerned a change in terminology and not a change in the boundary lines of any of the districts. See opinion to the Honorable R. Turner Jones, Commonwealth's Attorney for Highland County, dated December 2, 1971, a copy of which is enclosed. Thus the two new members of the Board may continue to serve their terms without interruption.

SCHOOLS—School Board's Authorization to Retain Special Counsel in Condemnation Proceedings.

COMMONWEALTH ATTORNEYS—Duties — Not required to represent School Board in all matters—Condemnation.

June 19, 1972

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

I am writing in reply to your letter of June 9, 1972, in which you inquire whether a county school board may retain the services of an attorney other than the Commonwealth's Attorney to represent it in condemnation proceedings for the acquisition of land for a new high school.

Section 22-149 of the Code of Virginia (1950), as amended, authorizes the school board to condemn land for school purposes. Thus, there is no question as to the school board's authority to undertake such legal proceedings.

Section 22-150 of the Code provides that the title to real estate purchased by a school board "shall be examined and approved in writing by a competent and discreet attorney at law, who shall be designated by the judge of the circuit court for the circuit wherein the real estate is located . . . ." As shown by an opinion to The Honorable Robert C. Goad, Commonwealth's Attorney for Nelson County, dated September 11, 1951, (See, Report of the Attorney General 1951-1952, page 142), a copy of which is enclosed, § 22-150 is applicable to condemnation proceedings initiated by the school board.

As is made clear by § 22-150 of the Code, it is not the obligation of the Commonwealth's Attorney to assist the school board in all matters relating to the acquisition of real property. Moreover, § 22-56.1 of the Code makes it clear that the Commonwealth's Attorney is not required to represent the school board in all judicial proceedings.

Reading the aforementioned statutes broadly, for they are remedial statutes and such statutes should be so read, I am of the opinion that the school board has authority to retain the services of an attorney other than the Commonwealth's Attorney to represent it in condemnation proceedings brought by it for the acquisition of real property. The General Assembly could not have intended that the Commonwealth's Attorney bring such suits on behalf of the school board and then have the results verified by another attorney. Presumably, the school board will request the judge of the appropriate circuit court to appoint the lawyer retained by it for purposes of satisfying § 22-150 of the Code.
SCHOOLS—School Board May Not Purchase Insurance for Pupils.

September 24, 1971

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

This is in reply to your recent letter in which you make the following inquiry: "Does the School Board have authority to purchase accident insurance policies on all students when the cost of such policies has been included in the budget and approved by the Board of Supervisors of the County?"

Section 22-285 of the Code of Virginia (1950), as amended, requires public liability and property damage insurance coverage when school pupils or personnel are transported at public expense to or from any public school supported in whole or in part by State funds. I find no authority, however, for the School Board providing insurance for school children in addition to that required by Section 22-285; therefore, I shall answer your question in the negative. See opinion of the Attorney General to the Honorable James M. Bevins, Division Superintendent for Buchanan County, dated June 30, 1967, and found in Report of the Attorney General (1966-1967), p. 262.

SCHOOLS—School Board Members—Appointment of.

July 19, 1971

THE HONORABLE JOHN PAUL CAUSEY
Commonwealth's Attorney for King William County

I am in receipt of your letter of July 6, 1971, in which you state that for the purpose of representation on the Board of Supervisors of King William County, there have been established five election districts. One of these election districts consists exclusively of a portion of the Town of West Point, and another of the election districts consists of the remaining area in the Town of West Point, plus an area in the county beyond the corporate limits. You then ask several questions which I will consider seriatim.

"1. Am I correct in my conclusion that the School Trustee Electoral Board for King William County continues in existence without change?"

Section 22-60, Code of Virginia (1950), as amended, which creates the school trustee electoral boards, has not been altered or amended by the revised Constitution of Virginia or the statutes passed by the General Assembly at the 1971 Extra Session. Therefore, your conclusion is correct.

"2. Can a member of the King William County School Board be appointed from an election district which is wholly within another school division?"

Since the County of King William has neither the county manager nor the county executive form of government, 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 1971 Extra Session, the General Assembly enacted, with an emergency provision, § 15.1-571.1 of the Code of Virginia, 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." Section 22-30 of the Code was also amended to provide that the Town of West Point shall no longer be part of the King William County school division. Therefore, the Town of West Point is no longer entitled to representation on the King William County school board. See opinion of
the Attorney General to The Honorable John C. Stephens, Jr., Commonwealth's Attorney for York County, dated June 17, 1971, and found in the Report of the Attorney General (1970-1971), p. ——. I am of the opinion that since the Town of West Point constitutes a separate school division, a resident of the election district which is wholly within the Town of West Point may not be appointed to the school board for King William County. With regard to that election district which includes not only a portion of the Town of West Point, but also an area outside its corporate limits, I am of the opinion that the King William County trustee electoral board, pursuant to § 22-61 of the Code, must select a school board representative from that portion of the election district which is not within the corporate limits of the Town of West Point. See, opinion of the Attorney General to The Honorable John C. Stephens, Jr., supra.

"3. Can a member of the County School Board reside in another school division?"

I am of the opinion that a member of the county school board must be a resident of an election district which is within the boundaries of the county school division, and that individuals residing outside of that particular school division may not be appointed to the school board of that division.

SCHOOLS—School Board, with Consent of Board of Supervisors, May Borrow Money on Temporary Basis from Bank for School Construction.

SCHOOLS—Literary Fund Loans.

BOARDS OF SUPERVISORS—School Board, with Consent of Board of Supervisors, May Borrow Money on Temporary Basis from Bank for School Construction.

April 21, 1972

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

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

"The School Board of Prince Edward County is in the process of constructing additional school facilities and has arranged with the Literary Fund of the State for a loan of $600,000.00 for the construction of certain improvements. This, of course, has been approved by the Board of Supervisors of Prince Edward County. It is anticipated that only $200,000.00 may be immediately available for construction and that the construction may be completed prior to the time the remaining $400,000.00 is available from the Literary Fund. The School Board and/or Board of Supervisors in order to expedite construction has requested my opinion as to whether or not it could secure loans from local banking institutions in anticipation of the Literary Fund loan. They feel that the local bank loans would be at an interest rate fairly competitive to the Literary Fund loan and that the Literary Fund loan would be available within one year.

"I have examined Section 15.1-223 which appears to allow the borrowing of money in anticipation of bond issues, however, I have not found a section allowing the borrowing in anticipation of Literary Fund loans.

"It would be appreciated if you would furnish an opinion as to whether the Board of Supervisors or School Board could borrow from local banks in anticipation of receipt of Literary Fund loan as set forth above."

I am, therefore, of the opinion that the school board, with the consent of the board of supervisors, may borrow money on a temporary basis from local banks for the purposes of constructing additional school facilities.

SCHOOLS—School Boards — Appointment to School Board of Bedford County.

The Honorable H. P. Scott
Clerk of Bedford County Circuit Court

I am in receipt of your letter of October 14, 1971, relating to appointments to the School Board of Bedford County. In your letter you inquire whether the new appointments made necessary by the redistricting of Bedford County should be made for terms expiring June 30 or for terms expiring on December 31.

I am of the opinion that the appointments which become effective January 1, 1972, should expire on June 30 of the appropriate year. This will enable the members of the Board to continue serving terms which comply with the requirement of § 22-64 of the Code of Virginia (1950), as amended, that terms expire on June 30.

In your letter you also request my opinion of the appropriate method of staggering the terms. There are seven members on the Board. Pursuant to § 22-64 of the Code, one member should be given a term of one-half year, two members should be given terms of one and one-half years, two members should be given terms of two and one-half years and two members should be given terms of three and one-half years.

SCHOOLS—School Boards—Authority to establish dress code for students.

The Honorable E. C. Westerman, Jr.
Commonwealth’s Attorney for Botetourt County

This letter is in reply to your inquiry of August 17, 1971, on behalf of the Botetourt County School Board, in which you seek to determine the extent of the Board’s lawful authority to establish a dress code for students, including authority to establish regulations for hair length.

It is clearly within the board’s lawful authority to establish a dress code such as you describe. County school boards are specifically authorized by § 22-72(2), Code of Virginia (1950), as amended, “to make local regulations for the conduct of the schools and for proper discipline of the students. . . .” The more difficult question is what limits does the United States Constitution place on the types of regulations which may be passed pursuant to this authority.

The answer is not well defined, due to the fact that the courts are split as to what standards should apply. Accordingly, the courts have reviewed each case separately, closely examining its facts, and it is upon the development of these facts that the decision in each case turns. Generally speaking, dress and hair code regulations are constitutionally adequate if they reasonably relate to the educational goals of the school and attempt to prohibit only those types of activities which disrupt the normal operation.
of school or school programs. More specifically, such disruptive activities include the wearing of dress or hair styles which present health problems, physically obstruct or endanger the student involved or other students, disrupt classes, distract students or faculty, or interfere with the educational process. See Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), and cases cited therein at 218.

One must be aware, however, that a school board's determination as to the reasonableness of its attempt to avoid disruption is considerably more vulnerable when the regulation is applied to dress or hair styles which a court finds represent "symbolic speech." An example of "symbolic speech" is the wearing of black armbands to protest the war in Vietnam. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969).

In the event that the School Board decides to exercise its authority and promulgate dress and hair regulations, the board should take care to draft clear and specific regulations, making certain that such regulations are made known to students, parents and teachers prior to enforcement. Finally, any contemplated disciplinary proceedings connected with enforcement of the regulations should, of course, be set up so as to guarantee due process to disciplined students. Jackson v. Dorrier, 424 F.2d 213, 217-218.

It may be helpful to you to have the benefit of looking at my opinion rendered to The Honorable Harold B. Singleton on April 16, 1970, concerning questions similar to yours. A copy of that opinion is enclosed.

SCHOOLS—School Boards—Authority to require suppliers to be equal opportunity employers.

February 16, 1972

THE HONORABLE CLIVE L. DUVAL, 2d
Member, Senate of Virginia

I am writing in answer to your recent letter in which you ask whether a county school board may establish a policy of giving preference in contractual matters to those sellers who verify that they are Equal Opportunity Employers. Such a policy would be contained in regulations adopted by the school board.

Section 7 of Article VIII of the Constitution vests the supervision of schools in each school division in a school board. Among the powers and duties given county school boards, in § 22-72 of the Code of Virginia, is the power and duty "to provide for the erecting, furnishing, and equipping of necessary school buildings and appurtenances and the maintenance thereof." Other sections in Title 22 also serve to reinforce the constitutional provision giving wide authority to local school boards in the governance of local schools.

Included in Section 11 of Article I of the Constitution is an anti-discrimination clause which provides that:

"the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged. . . ."

This clause unmistakably establishes the policy of the Commonwealth and no provisions set forth elsewhere in the Constitution qualify its language.

I am of the opinion that there is no prohibition against the school board's adoption of the Equal Opportunity Employer policy. The promulgation of such a regulation would be entirely consistent with the policy of our Commonwealth as set forth in the Bill of Rights. The General Assembly has legislated extensively in the areas of labor relations, employment practices, civil rights and public contracts. It has not, however, preempted the field to the point where it would be improper for a political subdivision
or an agency thereof to adopt a regulation which is designed to further the anti-discrimination policy enunciated to our Constitution. See King v. County of Arlington, 195 Va. 1084 (1954).

SCHOOLS — School Boards — Continuing Teacher contracts; probationary period.

THE HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

I am in receipt of your letter of June 9, 1972, in which you ask my opinion on two questions relating to the continuing contract provisions of the Code of Virginia (1950), as amended.

Section 22-217.3 of the Code provides in pertinent part: "A probationary term of service for three years in the same county or city school division shall be required before a teacher is issued a continuing contract. ..."

Section 22-217.4 of the Code provides in pertinent part as follows: "Teachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service. ..."

In light of these statutes, you have asked the following two questions:

"Question One: ... may a school board place a teacher on an additional year of probation beyond the three-year probationary period required by law. ...?"

"Question Two: May a school board for just cause continue to extend the three-year probationary period, year-by-year, indefinitely?"

The statutes quoted above clearly require the school board employing a teacher who has completed the three year probationary requirement to give that teacher a continuing contract during the teacher's good behavior and competent service. The use of the word "shall" in § 22-217.4 of the Code imposes a mandatory requirement upon the school board and divests the board of any discretion in the matter. Therefore, a school board may not place a teacher on probationary status beyond the required three years providing the teacher maintains good behavior and competent service.

If the board finds that a teacher does not maintain good behavior or competent service, however, then it may place a teacher on probation for any of the reasons set forth in § 22-217.5 of the Code. Of course, before placing a teacher on probation for any of the reasons set forth in § 22-217.5, the school board must comply with the notice and hearing requirements of §§ 22-217.6, 22-217.7 and 22-217.8 of the Code of Virginia.

SCHOOLS — School Boards — County school personnel have no authority to block secondary road through school property.

SCHOOLS — School Boards — Tractor with mowing attachment exempt from registration and licensing requirements when using highways from one school to another.

SCHOOLS — School Boards — Authority to provide liability insurance from public funds for school board members and employees against liability as employees of school board.

THE HONORABLE WILLIAM T. KING
Commonwealth's Attorney for Richmond County

I am writing in response to your recent letter containing several questions relating to the School Board of Richmond County.
The first question concerns a road which has been taken into the State Highway System. The road serves only as a driveway through school property and is used for school purposes. You ask whether school personnel have authority to block the road during certain hours and to enforce school rules on the road. You also ask whether the State trespass laws apply to the road.

Section 33.1-68 of the Code of Virginia, 1950, as amended, provides that the road in question is a part of the secondary system of State highways. Section 33.1-69 of the Code provides that the control and supervision of the secondary system of the State highways shall be vested in the Department of Highways. That section further provides that the boards of supervisors and other governing bodies of the several counties shall have no control over the roads constituting the secondary system of State highways.

Accordingly, I am of the opinion that Richmond County school personnel have no authority to block the road. Nor do the school personnel have authority to prescribe rules for use of the road. Of course, they may enforce school rules on school children who may happen to be on the road.

The trespass laws of the Commonwealth do not apply to public streets and highways. Just recently in Johnson v. Commonwealth, 212 Va. 579, (1972), the Supreme Court of Virginia held that the trespass statutes apply "to publicly owned property other than thoroughfares."

The next question raised in your letter relates to whether a school board tractor with a mowing attachment is exempt under § 46.1-45 of the Code from registration and licensing requirements when using the highways to go from one school to another to mow the school grounds. Section 46.1-1(7) defines "farm tractor" as every motor vehicle designed and used primarily as a... horticultural implement for drawing... mowing machines..." Assuming that the tractor in question is used only for the purposes set forth in § 46.1-1(7), then § 46.1-45(b) will exempt it from the annual registration certificate and license plate requirements.

The last question in your letter inquires whether the school board may purchase liability insurance from public funds to insure the individual school board members against personal liability arising out of their acts as employees of the school board. I recently had the occasion to issue an opinion to the Honorable L. Victor McFall, 1969-1970 Opinions of the Attorney General, p. 233, a copy of which is attached, advising that school boards have authority to provide health insurance coverage for teachers as a fringe benefit. Similarly, I am of the opinion that a school board has authority to provide its employees personal liability insurance such as outlined above. The board also has authority to provide such insurance for its individual members.

SCHOOLS—School Boards—Effect of redistricting on.

July 14, 1971

THE HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

I have received your letter of June 18, 1971, concerning the effect upon the Amherst County School Board of the redistricting of that County. The Board of Supervisors appoints school board members in Amherst County as authorized by Article 2.1 of Chapter 6 of Title 22 of the Code of Virginia which provides for an alternative method of appointing school board members. Section 22-79.1, Code of Virginia (1950), as amended, which is included in Article 2.1 provides that "... the school board shall consist of a number equal to the number of magisterial districts, one of whom shall reside in each magisterial district."

The failure of the General Assembly to rewrite § 22-79.1 to insert "election districts" in addition to "magisterial districts" at the outset raises
a question of the geographical area of representation. Section 15.1-571.1 of the Code, which authorizes the establishment of election districts, provides in part that "such election districts shall also constitute school districts as prescribed by § 22-61 of this Code." During its current session, the General Assembly rewrote § 22-61 of the Code of Virginia which relates to county school boards generally to provide in part that "Except as otherwise provided by law, the county school board shall consist of one member from each district in the county from which a member of the board of supervisors is elected. . . ." The applicable portion of § 22-61 of the Code formerly provided "The county school board shall consist of one member from each school district in the county. . . ." "School districts" as used in the foregoing sentence formerly corresponded with magisterial districts.

Considering the statutory history related above, I am of the opinion that a consistent interpretation requires that § 22-79.1 be construed to require representation by either election districts or magisterial districts, whichever is the basis for representation on the board of supervisors.

Several of your remaining questions are discussed in an opinion which I issued on June 3, 1971, to The Honorable Robert E. Brown, a copy of which is attached. As you will see from reading that opinion, because the election districts will not become effective for representational purposes until December 31, 1971, the present members of the school board should serve until that time. At that time their positions should be vacated by the board of supervisors.

Successors should be appointed by the board of supervisors at a public meeting prior to December 31st so that the new members can take office when the existing board is vacated. While no time limits are included in § 22-79.3 of the Code, the board of supervisors should comply with the requirement contained in § 22-64 of the Code of Virginia which provides that successors should be appointed within sixty days prior to the time when they take office.

Finally, you ask:

"(3) In the event that two persons under the redistricting plan live in the same election district, do they continue to serve on the Board or is a selection necessary as between them?"

It is not necessary for the board of supervisors to reappoint current members of the school board to the new school board. When two current members live in the same election district, it would be impossible to reappoint each as a representative of that district, and the board must select which of the two, if either, it will reappoint.

SCHOOLS—School Boards—Effect on membership as result of reapportionment.

November 17, 1971

THE HONORABLE WILLIAM R. BLANDFORD
Commonwealth's Attorney for Powhatan County

I am writing in reply to your letter of November 9, 1971, in which you ask several questions relating to the effect of the reapportionment of Powhatan County on that County's School Board.

Powhatan County presently has three magisterial districts with a supervisor representing each district. Effective January 1, 1972, the County will have three election districts with one district being represented by one supervisor and two districts being represented by two supervisors for a total of five supervisors.

In your letter you inquire whether the School Trustee Electoral Board must elect five School Board members to begin service on January 1, 1972.
On July 8, 1971, I had an occasion to answer similar questions in an opinion letter to the Honorable E. Carter Nettles, Jr., a copy of which is enclosed. By reading that letter you will see that I am of the opinion that the School Board of Powhatan County should have three members, one of whom must reside in each election district.

Upon authorization of the Board of Supervisors pursuant to § 22-61 of the Code of Virginia, the School Trustee Electoral Board may appoint one or two additional persons to the School Board. These additional members will serve in an at large capacity representing the entire County and not a single district of the County.

The new School Board should be appointed by December 31, 1971, so that there will be continuation of that Board. Appointments should be made pursuant to § 22-61 of the Code and terms should be selected according to the provisions of § 22-64 of the Code of Virginia. The terms should be for one half year less than the normal, however, so that they will expire on June 30 of the appropriate year.

SCHOOLS—School Boards—Employment By Same System Not Prohibited Where Member Resigned Prior to Completion of Appointed Term.

December 8, 1971

THE HONORABLE ROYSTON JESTER, III
Commonwealth’s Attorney for the City of Lynchburg

I am in receipt of your letter of November 22, 1971, wherein you state that a member of the local school board resigned her position two years prior to the completion of her appointed term. You inquire if there is any state statute prohibiting the employment of such individual “... by the system in which he or she served as a member of the Board of Education, and, if so, what the period of prohibition is?”

There are various provisions in Virginia law prohibiting appointments such as you inquire about, for members of municipal councils (§ 15.1-800—“No member of any council shall be eligible during his tenure of office as such member or for one year thereafter, to any office to be filled by the council . . .”) or members of the General Assembly (Article IV, Section 5, of the revised Virginia Constitution—“No member during the term for which he shall have been elected shall be elected by the General Assembly to any civil office of profit in the Commonwealth.”). I am, however, unaware of any comparable provision for school board members. Your inquiry is, therefore, answered in the negative.

SCHOOLS—School Boards—Expulsion and suspension of students.

October 18, 1971

THE HONORABLE CARLE F. GERMELMAN, JR., Judge
Juvenile and Domestic Relations Court

I am in receipt of your letter in which you make several inquiries which I shall answer seriatim.

1. Is it mandatory that the matter of expulsion be presented to the School Board, i.e., does that body alone have the final authority to suspend or expel?

Section 22-231 of the Code of Virginia (1950), as amended, provides that “It shall be the duty of the school board to suspend or expel pupils when the welfare and efficiency of the schools make it necessary.” In light
of the quoted language, I am of the opinion that only the school board may expel pupils.

2. If the answer to #1 is affirmative, do the parents have a right to reasonable notice of the matter, including the date and time of the School Board's hearing of the case; do they have a right to attend the School Board hearing and present matters in their child's behalf; and do they have a right to appear before the Board with an attorney employed to assist them?

I am of the opinion that the parents are entitled to reasonable notice of the school board hearing, including the date and time, and that one or both of the parents may appear at the hearing as an advisor for the child. I am also of the opinion that if the circumstances warrant, the parents may also present relevant matters to the school board on behalf of their child. I do not think, however, that the parents have a right to employ an attorney to act as an advisor at the hearing on behalf of their child.

This is not to say, however, that the school board may not, in its sound discretion, allow the pupils to be represented by an attorney and determine the extent and manner in which the attorney may participate in the hearing. Furthermore, I am of the opinion that the principal or teacher, as the case may be, should not be represented by an attorney unless the school board allows the pupil to be so represented, in which event, the principal or teacher would be entitled to legal representation to the same extent and in the same manner.

3. During the regular school year of 1970-1971, Johnny was repeatedly disciplined by school authorities for misconduct. Though a constant problem, he was not suspended or expelled.

Does the principal have the authority to deny Johnny's admittance to school? Does the School Board, under the facts stated above, have the authority to deny Johnny's admittance to school? If the School Board does have the authority, must the matter be submitted to the School Board for action, with timely notice of the hearing to parents, privileges of parents to attend, etc.?

Inasmuch, as the denial of admittance to school is the same as an expulsion, I am of the opinion that the sole authority to deny a pupil's admittance to school rests in the local school board and not in the principal. See opinion of the Attorney General to The Honorable Sterling M. Harrison, Commonwealth's Attorney for Loudoun County, dated August 17, 1956, and found in the Report of the Attorney General (1956-1957), p. 229. In such a situation the pupil and parents would have the same rights outlined in paragraph two above.

4. Johnny has a history of school misconduct. With the latest incident, the school principal suspends Johnny from school as a disciplinary action and submits a letter to his parents regarding the matter. The letter recites the misconduct in question, states that Johnny has been suspended and will not be readmitted unless and until Johnny, his parents and the principal have a conference at the school regarding the matter. The letter directs the parents to call for an appointment with the principal.

At the time of this action, the matter has not been presented to the School Board. The Board will convene for its regular monthly meeting some four weeks after Johnny's parents receive the letter.

Under the provisions of § 22-230 of the Code, are the principal's actions legally proper? Is the principal empowered to effect an indefinite, conditional suspension, the condition being a conference with the parents at school which, if held, will probably result in Johnny's return to school and the matter never being brought before the School Board for action?
Section 22-230, Code of Virginia (1950), as amended, provides:

The principal, or the teacher where there is no principal, may, for sufficient cause, suspend pupils from attending the school until the case is decided by the School Board, which shall be with as little delay as possible, provided that in such cases of suspension the principal or teacher shall report the facts in writing at once to the division superintendent and the parents or the guardian of the child suspended.

Under the factual situation set forth above, it would be necessary for the principal to send a written statement of the facts to the division superintendent for the suspension to meet the statutory requirements. There is no doubt that a principal may suspend a pupil for a fixed period of time subject to review by the school board. See opinion of the Attorney General to the Honorable Samuel H. Allen, Commonwealth's Attorney for Lunenburg County, dated March 5, 1957, and found in the Report of the Attorney General (1956-1957), p. 230. I am also of the opinion that a principal may suspend a child upon condition that the child and his parents meet with the principal to talk over the matter. Should the school board meet during the period, it would, of course, have the power to review the actions of the principal and it may affirm the suspension or it may order that the suspension be terminated prior to the time fixed by the principal and that the pupil be permitted to attend school.

SCHOOLS—School Boards—Manner of selection.

THE HONORABLE O. BEVERLEY ROLLER
Member, House of Delegates

I am in receipt of your letter of July 17, 1971, in which you request that I identify the exact steps which must be taken to cause a referendum to be held to determine whether the members of the county school board should be appointed by the school trustee electoral board of the governing body of the county.

In 1970 the General Assembly enacted Article 2.1 of Chapter 6 of Title 22 of the Code of Virginia (1950), as amended, which establishes an “Alternate Method of Appointing County Board.” This Article includes §§ 22-79.1 through 22-79.6 of the Code, a copy of which is enclosed.

The method for changing the manner in which school board members are selected is found, generally, in § 22-79.4 of the Code of Virginia. The steps required are as follows:

1. A petition must be filed with the circuit court of the county, or judge thereof in vacation, signed by a number of qualified voters in the county equal to twenty-five percentum of the number of votes cast in the county in the preceding presidential election, asking that a referendum be held on the question of changing the method of selection of members of the county school board.

2. Upon receipt of such a petition, the court or judge thereof in vacation, shall, by order entered of record, require the regular election officials on the day fixed in such order, which may be the date of a general election, but shall not be less than thirty nor more than sixty days after the filing of the petition, to open the polls and take the sense of the qualified voters of the county on the question submitted as provided in § 22-79.4 of the Code.

3. The clerk of the county shall cause a notice of such referendum to be published in some newspaper published or having a general circulation in the county, once a week for three successive weeks prior
to such referendum, and post a copy of such notice during the same
time at the front door of the courthouse of the county.

4. The regular election officials of the county, at the time designated
in the order, shall open the polls at the various voting places in the
county and conduct the referendum in such manner as is provided
by law for other elections, insofar as the same is applicable.

5. The ballots shall be counted, returns made, and canvassed as in
other elections, and the results certified by the commissioners of
election to the circuit court, or the judge thereof in vacation, and
the court or judge shall enter of record the results of such referen-
dum.

6. Following the referendum, the school trustee electoral board of
the county shall be abolished if the majority of votes cast shall be
for the proposition; if the majority of votes cast shall be against
the proposition, then the school trustee electoral board shall be re-
tained.

It should be noted that § 22-79.6 of the Code prohibits any referendum
from being held on the same question for at least four years from the date
of holding the prior referendum.

SCHOOLS—School Boards—Members—Qualifications of.

December 23, 1971

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

I am writing in reply to your recent letter in which you ask several
questions concerning qualifications of members of the School Board of
Alexandria.

In your letter you first ask whether the City Council may appoint a
person under the age of 21 years to serve on the School Board. I am of the
opinion that a person under the age of 21 years may be appointed to the
School Board. Section 22-90 of the Code of Virginia (1950), as amended,
the statute relating to qualification of school board members, sets forth
only residency requirements. Section 23 of the Constitution of 1902, now
found as Section 5 of Article II of the Constitution, concerning qualifica-
tions of officers generally, was amended in the new Constitution so that it
is applicable only to officers elected by the people. Accordingly, there is no
legal reason why a minor cannot be appointed to the school board.

The next question asks whether there would be any doubt about the
validity of any action of the School Board because a minor is serving on
the Board. There is very little law on this subject. See generally 43 C.J.S.
Infants § 24.

The general contractual principle governing infants provides that an in-
fant’s contract is voidable, not void, and subject to be affirmed or dis-
affirmed by the infant after his arrival at age. This principle was designed
for the protection of infants and their property.

In serving as a city school board member, an infant is not concerned
with his property but with the property of another that is the city and
the city has consented to the infant’s action. Accordingly, service on a
school board is analogous to service as an agent with the city as principal
and the member as agent.

Cases hold and Restatement (Second) Agency § 21 provides, that “the
power of a person to affect another who has consented to an action by him
on the other’s account is limited only by the agent’s physical or mental
ability to act. . . . Thus, an infant, a married woman, or a person other-
wise so incompetent that he cannot bind himself by a contract can bind one
who appoints him to make a contract for him.” From the foregoing it is
clear that an infant may act as an agent for another and bind his principal. Accordingly, where a minor serves in a similar manner as a member of a school board his incapacity as it relates to his own contracts will not affect the validity of a school board contract.

You next inquire of the validity of a possible city charter amendment making it mandatory that one or more members of the School Board possess certain qualifications relating to age or education. As examples you suggest that one Board member must be a high school student, one must be over fifty years of age and one must possess an advanced educational degree. I am of the opinion that any classification such as suggested above is valid so long as the classification bears a rational relationship to the achievement to the School Board's duties and is reasonably designed to effectuate those duties. Of course, a classification may only be used where the members are chosen at large or, in the alternative, where the classification applies equally to all districts.

Finally, you ask if the City Council may appoint a minor to serve as a School Board member without the right to vote. I do not believe that such representation may be permitted consistent with the Constitution and Code of Virginia. Section 7 of Article VIII of the Constitution vests the supervision of schools in each school division in a school board. The various sections of Article 4 of Title 22 of the Code of Virginia relating to "Boards of Cities and Towns" contemplate that all board members shall be treated equally, each possessing the right to vote. A member of a school board assumes the obligation of supervising the schools in his division. Such an obligation can only be discharged by allowing the member the right to vote on all matters which come before the board.

SCHOOLS—School Boards—Popular election—General Assembly may provide for.

SCHOOLS—School Boards—No authority to tax real estate and other subjects.

October 20, 1971

The Honorable Omer L. Hirst
Member, The Senate

This is in reply to your written request of this date requesting my opinion on the following:

"Is it constitutionally possible for the General Assembly to provide for the popular election of School Boards and to confer on them the power to tax real estate and other subjects and to appropriate the proceeds of such taxes for educational purposes?"

I am of the opinion that the General Assembly could provide for the popular election of the members of School Boards under Section 7 of Article VIII of the Constitution. This provides:

"Section 7. School boards. The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

However, once the General Assembly had provided for this manner of selecting the School Boards, it would not be able to confer upon them the power to tax real estate and other subjects and to appropriate the proceeds of such taxes for educational purposes. This power is reserved to the governing bodies of the counties, cities and towns by Section 7 of Article VII of the Constitution, which reads:
"Section 7. Procedures. No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body. In case of the veto of such an ordinance or resolution, where the power of veto exists, it shall require for passage thereafter a recorded affirmative vote of two-thirds of all members elected to the governing body.

"On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded."

SCHOOLS—School Boards—Term of members under § 22-64.

July 30, 1971

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

I am in receipt of your letter of July 9, 1971, in which you inquire when the terms will expire of the members of the school board who are appointed within sixty days prior to December 31, 1971. These appointments are made necessary by the redistricting of Amelia County which will become effective for purposes of representation on December 31, 1971.

Section 22-64, Code of Virginia (1950), as amended, which deals with terms on the county school boards, provides for staggered terms expiring on June 30 of each appropriate year. I am of the opinion that for the purpose of determining the duration of a term, the new appointees, insofar as possible, should be treated as if they are completing the unfulfilled terms of their predecessors. In the event that the number of election districts does not correspond to the number of magisterial districts, the terms should be determined as set forth in § 22-64 of the Code, less six months so that the terms will expire on June 30.

Accordingly, the terms of the new members should expire on June 30 of the appropriate year, and the maximum term should be for three and one-half years. This will enable the school trustee electoral board to continue adhering to the requirements of § 22-64 of the Code so that in subsequent years, appointments will be made within sixty days prior to June 30.

SCHOOLS—School Boards—Vacated upon redistricting.

SCHOOLS—School Boards — Representation on board for special town school district.

September 22, 1971

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

I am writing in reply to your letter of September 2, 1971, regarding redistricting of the County of Lancaster. In your letter you inquire whether the new school board which will be appointed within sixty days prior to December 31, 1971, "will and should include a member of the Town of Kilmarnock."

The Town of Kilmarnock is constituted a special town school district for purposes of representation on the School Board of Lancaster County. Because of the redistricting of Lancaster County, it will be necessary to vacate the present school board and reappoint a new board which will take office on January 1, 1972.
The redistricting of Lancaster County will not affect the Town of Kilmarnock for purposes of representation on the School Board. The Town of Kilmarnock should continue to be represented as it has been in the past.

Because the School Board of Lancaster County will be vacated, it will be necessary to reappoint a representative from the Town of Kilmarnock to serve on the new board. It is permissible for the present representative from the Town of Kilmarnock to be reappointed but this is not required.

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SCHOOLS—School Bonds—Loans from literary fund.

July 30, 1971

THE HONORABLE WILLIAM T. ROBEY, III
Commonwealth's Attorney for the City of Buena Vista

At the request of The Honorable J. G. Blount, Jr., I am glad to furnish you an opinion with respect to the question presented in your letter of June 25, 1971, to Mr. Blount, which letter reads in part as follows:

"In regard to the application of the School Board of the City of Buena Vista for a loan from the Literary Fund, the question has been raised on certain supplementary statements and application forms as to whether or not it is essential for the City of Buena Vista to have a Referendum approving the issuance of bonds or other evidences of debt in order to consummate a loan with said Literary Fund."

Section 22-107, Code of Virginia (1950), as amended, provides in part that the school boards of counties, cities and towns are authorized to borrow money belonging to the Literary Fund. Section 2.214, Charter of the City of Buena Vista, found in Acts of Assembly, 1952 Session, provides in part that any bonded indebtedness shall be by referendum passed by a majority of the qualified voters. Section 6.3 of the Charter provides that the School Board of Buena Vista shall have all the powers of school boards under the Constitution and the laws, and that nothing in the Charter shall negate any of the powers granted to a school board under the Constitution and laws of the State.

Although § 2.214 of the Charter would appear to limit a loan from the Literary Fund secured by bonds to those loans voted upon and approved by the qualified voters of the City of Buena Vista, § 6.3 expressly negates any provision of the Charter which would in any way limit the power of the school board under the Constitution and laws of the State to borrow money. It is clear that § 22-107 of the Code of Virginia permits a school board to borrow money from the Literary Fund without a referendum of the qualified voters of the political subdivision served by the school division. See, Board of Supervisors v. Cox, 155 Va. 687 (1931). I am of the opinion, therefore, that a referendum of the qualified voters of the City of Buena Vista is not required before the school board borrows money from the Literary Fund.

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SCHOOLS—School Trustee Electoral Board—Authority to appoint members at large.

June 13, 1972

THE HONORABLE JOHN C. COWAN
Commonwealth’s Attorney for King George County

I am writing in response to your recent letter in which you inquire whether the School Trustee Electoral Board may appoint at large members when authorized to do so at any time during the calendar year.
Section 22-61, Code of Virginia (1950), as amended, provides in pertinent part that "the governing body may authorize the school trustee electoral board to appoint no more than two members from the county at large." Your question is raised by § 22-64 of the Code which provides in pertinent part that "[w]ithin sixty days prior to the first day of July in each and every year thereafter, the school trustee electoral board of each county, shall appoint for terms of four years beginning the first day of July next following their appointment, successors to the members of the county school boards. . . ."

I am of the opinion that the provisions of § 22-64 quoted above do not act as a limitation upon the authority of the School Trustee Electoral Board to appoint members at large when authorized to do so. That portion of § 22-64 of the Code with which you are concerned was designed to insure that successors to present members of the school board are appointed in an orderly fashion. It does not concern itself with the timing of the appointment of additional or at large members of the school board. Accordingly, I am of the opinion that the School Trustee Electoral Board may appoint members at large at any time during the year when authorized to do so pursuant to § 22-61 of the Code.

In the event that the School Trustee Electoral Board does appoint a member at large to begin service at some time other than July 1, his term of office would be four years less the interval between July 1 and the time when he takes office. Thus, if a member at large takes office on January 1, his term will be for three and one half years and his successor must be appointed as all other successors are to take office on July 1 of the appropriate year.

SCHOOLS—School Trustee Electoral Board; Authority to Hire Clerk.

June 7, 1972

THE HONORABLE WOODROW W. WILKERSON
Superintendent of Public Instruction
State Department of Education

I am writing in response to your letter of May 18, 1972, concerning § 22-60 in the Code of Virginia which was amended by Chapter 665, Acts of Assembly of 1972.

In your letter you first ask whether it is permissible for a member of a school trustee electoral board to serve as clerk of the electoral board without receiving additional compensation. Later in your letter you ask whether it is permissible for the school trustee electoral board to employ a person to serve as clerk of the board and to reimburse this person from public funds.

The last sentence of § 22-60 of the Code provides as follows:

"No person employed by, or paid from, public school funds in whole or in part shall be eligible to serve on or as clerk of such trustee electoral board."

This sentence must be given its normal meaning and must be read in conjunction with the other provisions of the section.

I am of the opinion that it is permissible for a member of the school trustee electoral board to serve as clerk of the board without receiving additional compensation and that it is permissible for the board to employ a person, not a member of the board, to serve as clerk of the board and to reimburse him from public funds.
This is in reply to your recent letter in which you inquire as to the authority of a division superintendent to charge a fee of Five ($5.00) Dollars for each automobile driven to school by students who use the school parking lot.

A division superintendent derives his powers and duties from two sources. First, the superintendent has such powers and duties as may be fixed by the State Board of Education. See § 22-36, Code of Virginia (1950), as amended. After a thorough review, I have been unable to find any State Board regulation which would give a division superintendent the authority to impose a fee such as that under immediate consideration.

The second source of a division superintendent's authority arises from his position as an agent of the local school board. He is expected to assist the school board in fulfillment of its duties. Since you have indicated that the local school board was without knowledge of the fee in question, it is obvious that the Division Superintendent was not acting as an agent of the board when he levied the fee.

In light of the foregoing, it appears that the Division Superintendent was without authority to levy the fee. Furthermore, it would appear that the express authority to regulate the students' conduct in this regard lies in the sound discretion of the local school board. See opinion of the Attorney General to the Honorable G. Woody Stafford, Commonwealth's Attorney for the City of Colonial Heights dated February 25, 1971, and found in the Report of the Attorney General (1970-1971), p. ___.

SCHOOLS—Teachers—Contracts of employment—Granting of increases.

In your letter of November 15, 1971, you inquire whether local school systems may proceed to honor the salary terms of teacher contracts as of November 13, 1971, the date on which the wage-price freeze imposed pursuant to the Economic Stabilization Act of 1970 expired. You also inquire whether such salary terms may be honored retroactively to August 15, 1971, and whether future increases are limited to a maximum of 5.5%.

In the statement of policies governing pay adjustments adopted by the Pay Board on November 8, 1971, that Board states:

"Existing contracts and pay practices previously set forth will be allowed to operate according to their terms except that specific contracts or pay practices are subject to review, when challenged by a party at interest or by five or more members of the Board, to determine whether any increase is unreasonably inconsistent with the criteria established by this board."

The President's Executive Order of October 15, 1971, stated that the provisions of the economic stabilization program which have been in force since August 15, 1971, would continue until specifically modified by the Pay Board. It is my opinion that the above quoted statement by the Pay Board is such a modification, and that pursuant to the foregoing teacher contracts are "existing contracts" which may "operate according to their terms" immediately as of November 14, 1971. Local school systems, therefore, should make arrangements to pay the full monthly installments.
called for in 1971-72 teacher contracts, with the month of November pro-rated from November 14, 1971.

The issue of retroactivity of teacher salaries and other wages during the freeze period has not been conclusively determined by the Pay Board at this time, although the policy statement referred to above states that the Board may approve retroactive payments where prices were raised in anticipation of wage increases scheduled to occur during the freeze. These provisions may be applicable to teacher contracts in localities where taxes were raised demonstrably to anticipate increases in teacher salaries. As you know, however, the retroactivity issue is pending before the Court of Law and Chancery of the City of Norfolk in the case of Hailey v. Thomas, which seeks to determine whether teacher contracts were in effect prior to August 15, 1971, and I fully expect that the decision in that case will have statewide application.

Finally, as to future increases, the Pay Board's policy statement makes clear that the general pay standard of 5.5% will be applicable to new labor agreements or pay practices. It is further stated, however, that the Pay Board will consider ongoing pay practices and the equitable position of the employees involved, and since teachers can negotiate salary increases only in the spring of each year it may be that this circumstance will warrant different consideration at the appropriate time. I am sure that more specific information in this regard can be expected from the Pay Board well in advance of the time for salary negotiations.

SCHOOLS—Teachers—Salaries—Increases allowed.
SALARIES—Teachers—Increases allowed.

November 16, 1971

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

In your letter of November 16, 1971, you inquire whether the Department of Community Colleges may proceed to honor the salary terms of preexisting faculty and staff contracts as of November 13, 1971, the date on which the wage-price freeze imposed pursuant to the Economic Stabilization Act of 1970 expired. You also inquire whether such salary terms may be honored retroactively to August 15, 1971.

In the statement of policies governing pay adjustments adopted by the Pay Board on November 8, 1971, that Board states:

"Existing contracts and pay practices previously set forth will be allowed to operate according to their terms except that specific contracts or pay practices are subject to review, when challenged by a party at interest or by five or more members of the Board, to determine whether any increase is unreasonably inconsistent with the criteria established by this board."

The President's Executive Order of October 15, 1971, stated that the provisions of the economic stabilization program which have been in force since August 15, 1971, would continue until specifically modified by the Pay Board. It is my opinion that the above quoted statement by the Pay Board is such a modification, and that, pursuant to the foregoing, staff and faculty contracts are "existing contracts" which may "operate according to their terms" immediately as of November 14, 1971. The Department, therefore, should make arrangements to pay the full monthly installments called for in 1971-72 contracts, with the month of November pro-rated from November 14, 1971.

The issue of retroactive payment of salary increases scheduled during the freeze period has not been conclusively determined by the Pay Board
at this time. As you may know, the retroactivity issue is pending before the Court of Law and Chancery of the City of Norfolk in the case of Hailey v. Thomas which seeks to determine whether public school teacher contracts were in effect prior to August 15, 1971. Considering the facts outlined in your letter, it would appear that the principle enunciated in that case will be applicable to faculty and staff of the Department of Community Colleges.

SCHOOLS—Virginia Compulsory Attendance Law; Duty of Division Superintendent of Schools Under.

VIRGINIA COMPULSORY ATTENDANCE LAW—Division Superintendent of Schools Has Duty to Assure That Child Is Receiving Education.

June 6, 1972

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

This is in reply to your recent letter in which you make the following inquiries: (1) Does the school board have an affirmative duty to see that each and every child within the age limits and not otherwise excusable from school receives an education by one of the alternative methods prescribed by § 22-275.1, Code of Virginia (1950), as amended; (2) Under what condition, if any, does the school board have a right to excuse a student from attendance at public school; and (3) What guidelines should be used by the school board with reference to the qualifications of any private, denominational or parochial school, or tutor or other teacher in the home, in excusing a child from the attendance at public school?

The Virginia Compulsory Attendance law is contained in §§ 22-275.1 through 22-275.25 of the Code of Virginia (1950), as amended. The duty of seeing that all school age children not otherwise excused from attending school receive an education either at a public school or by means of one of the alternative methods set forth in § 22-275.1 falls upon the division superintendent of schools. Section 22-275.9 provides that within 10 days after the opening of school the principal shall submit to the division superintendent a list of all those children not enrolled in school who are subject to the Compulsory Attendance Law. The principal shall also submit a list of the names and addresses of the parents or guardians of those children.

Section 22-275.10 places the duty upon the division superintendent of schools, or the attendance officer, to investigate all cases of non-enrollment, and when no valid reason is found therefore, to notify the parent or guardian of such non-enrolled child to require the attendance of such child at school within three days from the date of such notice. If the parent or guardian fails to comply with such notice, § 22-275.11 provides that the division superintendent, or the attendance officer, shall make a complaint in the name of the Commonwealth before the Juvenile and Domestic Relations Court. It appears that if a parent or guardian, in response to a notice issued pursuant to § 22-275.10, replies that his child is receiving instruction under one of the alternative methods prescribed by § 22-275.1, it would be the duty of the division superintendent of schools to satisfy himself that such child is in fact receiving an education under one of the alternative methods.

The school board may excuse school age children from attending public school in two instances. Section 22-275.4 provides that the school board shall excuse from attendance at public school any child on recommendation of the principal, the superintendent of schools and the judge of the juvenile and domestic relations court after a finding by those individuals that such pupil cannot benefit from education at school. Section 22-275.4 also provides that the school board shall excuse the attendance of those school age
children whose parents conscientiously object to their attendance at school. Section 22-275.4:1 provides that the school board may, on the recommendation of the juvenile and domestic relations court, excuse any school age child from attendance at school who in the judgment of such court cannot benefit from education at such school.

Section 22-275.1 provides that in addition to a public school, a school age child may attend a private, denominational or parochial school, or be taught by a tutor or teacher of qualifications prescribed by the State Board of Education and approved by the division superintendent. It is clear that a teacher or tutor must meet the qualifications established by the State Board of Education and must be approved by the division superintendent. I am also of the opinion that a private, denominational or parochial school must be recognized as an elementary and/or secondary school by the Department of Education.

SEAL OF VIRGINIA—Unauthorized Use.

January 7, 1972

THE HONORABLE CYNTHIA NEWMAN
Secretary of the Commonwealth

This is in reply to your letter of January 6, 1972, in which you asked my opinion whether a badge being worn by private security guards which bears a seal of the Commonwealth thereon, is in violation of § 7.1-31.1 of the Code of Virginia (1950), as amended.

Section 7.1-31.1 of the Code, reads:

"The seals of the Commonwealth shall be deemed the property of the State; and no persons shall exhibit, display, or in any manner utilize the seals or any facsimile or representation of the seals of the Commonwealth for nongovernmental purposes unless such use is specifically authorized by law.

"Any person violating the provisions of this section shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days or both."

I find no specific legal authorization for the use of the State seal for this nongovernmental purpose. I, therefore, am of the opinion that its use in this manner is violative of this section of the Code.

SHERIFFS—Administrator of Estate Must Accept Appointment.

December 9, 1971

THE HONORABLE E. P. LANDERS
Sheriff of Nottoway County

This is in reply to your recent letter in which you requested my opinion as to various matters concerning the administration of an estate by a sheriff. You first inquire:

"Does a sheriff have any choice as to whether or not he will accept appointment as administrator of an estate?"

Section 64.1-131 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"If at any time two months elapse without there being an executor or administrator of the estate of a decedent, except during a contest about the decedent's will or during the infancy or absence of the executor, the court, or the clerk thereof, in which or by whose clerk the will was admitted to record or which has jurisdiction to grant
administration on the decedent's estate shall, on the motion of any person, order the sheriff of the county or city to take into his possession the estate of such decedent and administer the same. . . .” (Emphasis added.)

You will note that this section of the Code uses the mandatory word shall and it is therefore my opinion that under the situations contemplated by this section the sheriff must accept appointments as administrator of an estate.

You next inquire as follows:

“In the event a sheriff has been appointed as administrator of one or more estates, and said sheriff's term of office expires and he does not continue in the position of sheriff, would he continue as administrator, or would the responsibility be transferred to the incoming sheriff?”

I am enclosing a copy of an opinion rendered by this office to the Honorable Thomas E. Warriner, Jr., Commonwealth's Attorney for Brunswick County, dated May 8, 1958, and found in Report of the Attorney General (1957-1958), page 257, in which it was stated:

“It is well settled that when the term of office of a sheriff expires he must proceed with the administration until completed, Michie's Jurisprudence, under Title of Executors and Administrators, Vol. 8, Sec. 13, page 154; Tunstall v. Withers et al., 86 Va. 892, at page 895; Dabney's Administrator v. Smith, 32 Va. (5 Leigh) page 13, at page 20.”

It would still be my opinion that the sheriff would continue as administrator of the estates to which he was appointed during his term of office and such administration would not be transferred to the incoming sheriff.

Your third inquiry is as follows:

“Under what conditions does an administrator of an estate collect a fee, or commission for the handling of an estate, and in the case of a sheriff, is this fee, or commission, paid to the County treasurer along with other fees?”

I am enclosing copies of two previous opinions of the Attorney General, one directed to the Honorable Copeland E. Adams, Commissioner of Accounts, Circuit Court of Nottoway County, dated July 30, 1957, and found in Report of the Attorney General (1957-1958), page 255, and to the Honorable Chester J. Stafford, Commonwealth’s Attorney for Giles County, dated May 19, 1958, and found in Report of the Attorney General (1957-1958), page 255, both of which opinions are concerned with the collection of a commission by a sheriff who has served as administrator of an estate under § 64.1-131, Code of Virginia (1950), as amended, and both of which refer to the fact that there is no requirement on the sheriff to make any charge by way of a commission, and yet both also indicate that a sheriff is entitled to a reasonable commission under § 26-30, Code of Virginia (1950), as amended, which provides for a reasonable commission to a fiduciary. However, as has been pointed out in a previous opinion to the Honorable Rudolph L. Shaver, Sheriff of Augusta County, dated August 18, 1950, and found in Report of the Attorney General (1950-1951), page 130, a copy of which is attached hereto, any fee that is earned under § 26-30 of the Code should be handled as other fees collected by a sheriff resulting from performance of the duties of his office, and should, therefore, be paid into the treasury of the county. Therefore, I am of the opinion that the sheriff when serving as the administrator of an estate is entitled to a reasonable fee and such fee should be paid to the county treasurer.
Your last question relates to the proper procedure to be followed in order to withdraw as the administrator of an estate. Section 64.1-131 provides, in pertinent part, as follows:

"The court may, however, at any time afterwards, on reasonable notice to such sheriff or sergeant, revoke such order made by it or its clerk and the court may in a proper case after reasonable notice to the parties in interest permit the sheriff or sergeant to resign and allow any other person to qualify as executor or administrator. . . ."

Thus, it would be appropriate for a motion to be filed by you in the court in which you were qualified as administrator, giving notice to the various heirs or distributees, and such motion might request that your successor in office as the new sheriff be substituted as administrator of the estate for yourself.

SHERIFFS—Deputy Sheriff Must Be Resident of County; May Not Serve Two Different Counties.

SHERIFFS—Deputies Not Authorized to Run Red Lights on Private Vehicle Unless Member of Fire Department, Volunteer Fire Company or Volunteer Rescue Squad.

MOTOR VEHICLES—Equipment With Flashing or Steady Burning Red Lights—Limited to vehicle owned by member of organization authorized to use.

May 19, 1972

THE HONORABLE S. R. ROYALL
Sheriff of Nottoway County

This is in response to your request for an opinion in which you pose six (6) questions. I shall answer your questions seriatum.

"(1) Can a man serve as a part time deputy Sheriff in two different counties?"

Section 15.1-48 of the Code provides that the sheriff of any county may appoint deputies, who may discharge any of the official duties of the sheriff 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 little doubt that a deputy sheriff would be a county officer, and this office has ruled many times that a deputy of an officer is also an officer. See Report of the Attorney General (1969-1970), p. 238. Section 15.1-51 provides where officers shall reside. This section reads in part as follows:

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

The language of this section makes it clear that a deputy sheriff must be a resident of the county for which he is appointed to serve. Therefore, I answer your first inquiry in the negative.

"(2) Can a man live in one county and serve as a part time deputy sheriff in another county?"
For the reasons given in answer to the preceding question, I am of the opinion that a man cannot live in one county and serve as a part time deputy sheriff in another county.

"(3) Can a part time Deputy Sheriff run two red lights on his private owned car, whether he is paid mileage by the county or not?

"(4) Is a part time man (deputy sheriff) allowed to run two red lights on his car to answer a fire call as a volunteer fireman provided he is allowed to have red lights?

"(5) Who has authority to run red lights besides fire trucks, Ambulances and Police Cars?

"(6) Does a full time deputy Sheriff have the authority to run two red lights on his private owned car?"

Since these four questions are all related I will answer them together. Section 46.1-267 of the Code provides that only those vehicles listed in paragraph (a) of § 46.1-226 and paragraph (a) of § 46.1-267 and school buses may be equipped with red emergency lights. Section 46.1-226 (a) provides for police vehicles, fire fighting vehicles, rescue vehicles, and ambulances or rescue or lifesaving vehicles designed or utilized for the principal purposes of supplying resuscitation or emergency relief where human life is endangered. Section 46.1-267 (a) provides that a member of any fire department, volunteer fire company or volunteer rescue squad may equip one vehicle owned by him with a flashing or steady burning red light of a type approved by the Superintendent, for use by him only in answering emergency calls. In view of the provisions of these sections, it is my opinion that a deputy sheriff, either full time or part time, cannot equip a privately owned vehicle with a red light unless he is a member of a fire department, volunteer fire company or volunteer rescue squad. I am of the further opinion that a person who may lawfully equip a privately owned vehicle with a red emergency light, is limited to one flashing or steady burning red light of a type approved by the Superintendent of the State Police.

For your information, I am enclosing a copy of an opinion to the Honorable Sol Goodman, Commonwealth's Attorney for Hopewell, dated July 9, 1968, and found in the Report of the Attorney General (1968-1969), p. 153, which ruled that the vehicle owned by the member of a fire department, volunteer fire company or volunteer rescue squad must be owned by the member and cannot be a vehicle belonging to the member's spouse or parent.

SHERIFFS—New Rules of Supreme Court of Virginia Contemplate Service of Process by Sheriff upon Defendant in Divorce or Annulment.

March 31, 1972

THE HONORABLE A. JOE CANADA, JR.
Member, Senate of Virginia

In your letter of March 24, 1972, you inquire whether Rule 2:9 of the new Rules of the Supreme Court of Virginia, effective March 1, 1972, which expressly prohibits waiver of service of process in divorce or annulment but is silent as to acceptance of service by the defendant in person would permit such personal acceptance at the clerk's office after issuance of the subpoena.

Rule 2:9(a) states clearly:

"Upon the commencement of a suit for divorce or for annulling a marriage process must be served upon the defendant whether the defendant be sui juris, an infant, or an insane person. Service of
process may not be waived; but substituted service may be made in accordance with Code §§ 8-71 through 8-74." (Emphasis supplied.)

It is my opinion that the new Rule does not contemplate anything less than service by the sheriff, and that acceptance of service from the clerk would not be in compliance with the Rule. Of course, this does not mean that, in the interest of saving time, the defendant could not present himself at the sheriff's office and be served in accordance with the Rule.

SHERIFFS—No Authority to Appoint “Special Deputies.”

SHERIFFS—Number of Deputies Appointed, Fixed by Compensation Board.

POLICE—Auxiliary Police Uniform Should Not Resemble that of Sheriff or Police.

CIVIL DEFENSE—No Authority to Appoint Civil Defense Police.

CONSERVATORS OF THE PEACE—Same Powers As Constables at Common Law; Special Police.

COUNTIES—Authority to Appoint Special Police Force.

June 14, 1972

THE HONORABLE JAMES F. ANDREWS
Commonwealth’s Attorney of Dinwiddie County

In your letters you advised that there is presently in existence in Dinwiddie County a group of men known as “special deputies,” who were so designated by the former sheriff, whose term expired on December 31, 1971. These “special deputies” receive no compensation, wear a uniform like that of the sheriff and his regular deputies except for a “special deputy” patch and badge, and are armed. Complaints have been received that these “special deputies” have been stopping motorists and warning them that they would have to appear in court. You seek an opinion concerning the validity of the existence of these “special deputies” and pose seven (7) questions. Your first four questions are all related and will be answered together.

“1. Does Section 15.1-48 (or any other authority) give the sheriff authority to appoint ‘special deputies’?

“2. May ‘special deputies’ be considered as part-time deputies and, therefore, within the power of the sheriff to appoint?

“3. If ‘special deputies’ may be considered part-time deputies within the sheriff’s appointive power, is their number subject to the control of the Compensation Board under Section 14.1-70 in spite of the fact that these ‘special deputies’ are not compensated for their time?

“4. If the answer to #3 is in the negative, is there any restriction on the number who may be appointed by the sheriff?”

A review of the Code of Virginia reveals that there are a number of provisions dealing with law enforcement personnel in counties. Section 15.1-48 is the general statute authorizing a sheriff to appoint deputies to discharge the sheriff’s official duties during his continuance in office. Section 14.1-70 provides that the number of both full-time and part-time deputies appointed by the sheriff shall be fixed by the Compensation Board after receiving the recommendations of the County Board of Supervisors. This section further provides that the actions of the Compensation Board in fixing the number of deputies may be appealed to the Circuit Court of the county.
Section 15.1-144 provides that the circuit court of a county may appoint special policemen for so much of the county as is not embraced within an incorporated town located in the county. Section 15.1-159.2, et seq., provides that the governing body of a county may establish, equip and maintain an auxiliary police force, who may be called into service in time of public emergency and at such time as there are insufficient numbers of regular policemen to preserve the peace, safety and good order of the community. You have advised me that the Board of Supervisors of Dinwiddie County has not adopted an auxiliary police ordinance.

Section 15.1-157 provides that in counties meeting a certain population criteria, the sheriff shall appoint a special police force for the county. Sections 15.1-159 and 15.1-159.1 provide for police departments in counties meeting certain population criteria. I am advised that Dinwiddie County does not meet the population criteria of these sections.

I am unable to find any provision for “special deputies” in any of the above recited sections or in any other section in the Code. Since the Legislature has enacted a number of provisions by which law enforcement personnel may be appointed in the counties, I believe the Legislature has clearly expressed its intention that law enforcement personnel in counties be appointed pursuant to one of these methods.

In view of the foregoing, it is my opinion that there is no authority for a sheriff to appoint “special deputies,” regardless of whether these persons receive compensation. I am of the further opinion that part-time deputies are to be considered deputies and not “special deputies,” and the sheriff is limited to the appointment of that number of full-time and part-time deputies as fixed by the Compensation Board, subject to the right to appeal the Compensation Board's decision to the Circuit Court.

“5. May the uniforms, insignia, etc. of either ‘special police’ (15.1-144 et seq.), ‘auxiliary police’ (15.1-159.2 et seq.), or ‘special deputies’ resemble or be in facsimile of the uniform of the sheriff of the county or of the officers of an adjoining county or city? (Insofar as ‘special police’ are concerned, under Section 15.1-152, is it mandatory that the court prohibit this resemblance?)”

Section 15.1-152 provides that the uniform of special police shall not resemble or be in facsimile of the uniform, badge, insignia or identification of the State Police or that of any sheriff, or member of a police department in such county or an adjoining county or city. This section does not require the Circuit Court to prescribe the type of uniform for special police, but it does appear that the court should prohibit any resemblance between the uniform of special police and those law enforcement organizations listed in the statute.

Section 15.1-159.4 provides that the governing body shall have the authority to prescribe the uniform of auxiliary police. This section does not contain any language relating to the type of uniform as is contained in § 15.1-152. However, it is my opinion that the legislative intent is that the uniform of auxiliary police not be of such design that members of the general public would confuse it with the uniform of members of the sheriff's department or police department. Therefore, it is my opinion that the uniform of auxiliary police should not resemble or be in facsimile of the uniform of the sheriff of the county or the officers of an adjoining county or city.

“6. Under Section 15.1-159, ‘auxiliary police’ have the power of ‘constables at common law.’ How does this differ from the power of ‘special police’ or deputies?”

The word “constable” in medieval history denoted a very high functionary under the king; a leader of the royal arms charged with the conservation of the peace of the nation; “constables” from time immemorial were country peace officers, part of the machinery constituted for keeping the
peace and order in small territorial divisions; a "constable" is by virtue of his office a conservator of the peace, whose duties are similar to those of sheriff. Volume 8A, Words and Phrases; Black's Law Dictionary (4th Edition 1951); 80 C.J.S., Sheriffs and Constables, § 3. See also Muscoe v. Commonwealth, 86 Va. 443 (1890).

Under the provisions of § 15.1-144 special police shall be conservators of the peace in their respective counties. The specific duties of the special police are set forth in § 15.1-153.

Since both constables at common law and special police are conservators of the peace, I am unable to find any distinction in their powers.

"7. Is there any authority for the appointment of 'civil defense police,' and if so, by whom are they appointed, for what terms, what are their powers, and what kind of uniforms may they wear?"

Civil defense is provided for in Chapter 3 of Title 44, §§ 44-141 through 44-146.1. I am unable to find in any of these sections any provision relating to the appointment of "civil defense police." The nearest reference to "civil defense police" appears in § 44-142.1. In that section, the Governor or his duly designated representative is authorized to create and establish mobile reserve battalions. These battalions are to be construed to mean any organization of teams of fire fighters, medical and first aid workers, construction and repair workers, disaster relief workers, police and other reserve and emergency workers which has been approved by the Director of Civil Defense. I am advised by the office of Civil Defense that the Governor has not authorized any mobile reserve battalions, and that the police referred to in the definition of mobile reserve battalions applies to regular police officers. It is my opinion that there is no authority for the appointment of "civil defense police," and I accordingly answer your inquiry in the negative.


SHERIFFS—No Provision for Costs or Damages in Civil Suit, Except Bond.

December 6, 1971

The Honorable C. W. Allison, Jr.
Commonwealth's Attorney for Alleghany County

This is in reply to your letter in which you advise that the Sheriff of Alleghany County is being sued in the United States District Court for allegedly violating a person's civil rights when he sold the person's automobile pursuant to the provisions of § 46.1-351.2 of the Code of Virginia. You ask two questions which I shall answer seriatim:

(1) Is there any provision other than § 15.1-66 of the Code which would provide for legal counsel for a sheriff in a suit of this type?

Section 15.1-66.1 was enacted by the 1970 Legislature, and apparently was enacted in response to situations similar to the one which you have outlined in your letter. I am not aware of any other provision of law which would provide legal counsel for a sheriff, and accordingly I answer your first inquiry in the negative. I would point out, however, that the statute would not prohibit the sheriff from retaining counsel of his own choosing.

(2) Is there any provision respecting costs or damages when such officer is performing a function that is purely statutory and for the benefit of the State?

Section 15.1-41 requires the sheriff to give bond at the time he qualifies for office. This is the only provision I find in the Code which is applicable to your inquiry. The language of the specific bond would have to be reviewed
in order to determine if it would cover the specific matters you have mentioned.

SHERIFFS—Power to Appoint Deputies and Personnel of Office—Exclusive with Sheriff; County Manager or Board of Supervisors have no control over appointments.

THE HONORABLE PAUL B. EBERT
Commonwealth's Attorney for Prince William County

This is in reply to your letter of April 5, 1972, which reads in part as follows:

"The Compensation Board has approved several positions for the Sheriff's Department for this fiscal year. These positions are now vacant. Recently the Prince William County Board of Supervisors adopted a resolution which would purport to prohibit the hiring or firing of any employee in the County without the approval of all members.

"The Sheriff is desirous of filling these vacancies and requests that I submit to you the following question:

"Can the Sheriff hire deputies as approved by the State Compensation Board without the approval of the Board of Supervisors under the circumstances outlined above."

It is my understanding that the County of Prince William has adopted the County Executive form of government, under the provisions of Article 2, Chapter 13, Title 15.1 of the Code of Virginia (1950), as amended. Under § 15.1-614 of this Article, it is provided that "...the sheriff shall be selected in the manner and for the terms, and vacancies in such offices shall be filled, as provided by general law." Under Article VII, Section 4, of the Virginia Constitution, the sheriff is elected by the people and his term is fixed at four years.

Section 15.1-608 of the Code provides that the sheriff's office is within the Department of Law Enforcement, along with the Commonwealth's Attorney. Except with respect to members of the police force appointed by the board of supervisors under § 15.1-598 of the Code, all other persons in this Department are appointed by either the sheriff or Commonwealth's Attorney. Section 15.1-608 further provides that "The Sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law."

Section 15.1-48 is the general statute which authorizes a sheriff to appoint his deputies. Section 15.1-602 sets forth the activities for which the county executive is responsible. The office of the sheriff is not included within the scope of the county executive's duties and responsibilities by this section. Section 15.1-598 of the Code provides that the board of supervisors shall not appoint the sheriff.

Since the board of supervisors has no authority or control over the sheriff's office (except with respect to certain control in connection with compensation), it is obvious that the county executive has no appointing power with respect to this office.

For the reasons set forth herein, it is my opinion that the sheriff has the sole and exclusive appointing power with respect to deputies and personnel within his office and under his supervision. See opinion of this office to the Honorable W. J. Eacho, Sheriff of Henrico County, dated January 16, 1959, found in the Report of the Attorney General (1958-59), p. 269, where a similar conclusion was reached involving a county having a County Manager form of government.
REPORT OF THE ATTORNEY GENERAL

STATE AGENCIES—Real Estate—Disposition of under § 2.1-5 of the Code.

STATE AGENCIES—Arbitration of Disputes—No authority to submit disputes to arbitration.

July 29, 1971

THE HONORABLE W. K. CUNNINGHAM, JR.
Director, Division of Corrections

It is my understanding that the State Board of Welfare and Institutions proposes to enter into an agreement with Henry and Patrick Counties for the construction of jail facilities on land owned by the Commonwealth pursuant to § 53-133.2 of the Code. You have solicited my opinion regarding whether or not the Board has the authority to bind itself to the terms of paragraph 4 (f) of the proposed agreement to sell a portion of the real estate which the Board holds by virtue of § 53-2 of the Code without legislative approval. The paragraph in question is as follows:

"Should either the parties of the first part (Henry and Patrick Counties) jointly or the party of the second part (Board) determine that it is in their best interest to dissolve this said agreement, they shall submit a request for dissolution to all of the other parties to this agreement. Said request shall clearly state the reasons for the dissolution. This request shall then be transmitted by the party or parties making it to arbitrators appointed in conformity with the prior provisions of this section. Said arbitrators shall determine whether or not this agreement is to be dissolved. If dissolution is recommended the parties of the first part shall have the right to buy and the party of the second part will sell the land on which the jail is constructed and such additional land as it is reasonably necessary for its continued operation and use. The cost of this said land may be mutually agreed upon between the parties but if they or any of them cannot agree on the price, the price shall be determined by the above said arbitrators after a fair appraisal."

Section 53-2 of the Code transferred all right, title and interest in any real estate vested in the State Board of Corrections to the Board of Welfare and Institutions at the time that the Code of Virginia of 1950 was adopted. However, I am advised that the real estate involved, upon which is now located Correctional Field Unit #28, was granted to the Commonwealth of Virginia by Horace M. Pedigo and Hazel C. Pedigo, his wife, by deed dated January 27, 1956, of record in the Clerk's Office of the Circuit Court of Henry County in Deed Book 34 at page 380. Since the real estate in question was granted to the Commonwealth, and the Board does not hold title thereto by operation of § 53-2, it is unnecessary under the specific facts of this matter to determine whether or not the Board of Welfare and Institutions may bind itself to sell real estate to which it holds title by operation of § 53-2 without legislative approval.

Section 2.1-5 of the Code, amended in 1970, effective April 5, 1970, is as follows:

"Real estate owned by the Commonwealth and held in possession by an agency of the Commonwealth may be sold to political subdivisions, or public authorities, upon written recommendation of the Director of Engineering and Buildings and with the written approval of the Governor, when it is deemed to be in the public interest."

Therefore, I must advise you that the Board of Welfare and Institutions is without authority to agree to sell this real estate and that any such agreement would be invalid.

Although not encompassed by your question, I feel that I must advise you that the entire procedure for arbitration of disputes set forth in
paragraph 4 of the proposed agreement is invalid. I refer you to an opinion of the Attorney General of November 20, 1952, contained in the Opinions of the Attorney General, 1952-53, page 61, the relative portion of which is as follows:

"The General Assembly of Virginia has prescribed certain methods by which the Commonwealth may be proceeded against in the disputes arising from contracts or the actions of its agents. There is no provision in the law for submitting disputes to arbitration. I am, therefore, of the opinion that no officer or agent of the Commonwealth has authority to enter into contracts on behalf of the Commonwealth which contain a clause agreeing to submit disputes to arbitration, regardless of the identity of the arbitrator. It follows that any such contract would be invalid as to the "arbitration of disputes" clause. . . ."

You further request my opinion, in the event that your question was answered in the negative, "as to how the localities can be assured at this time that the land may be sold to them in the future, should irreconcilable disputes or unforeseen circumstances arise." The Board can give no assurance which would be binding upon the Director of Engineering and Buildings and the Governor; furthermore, the Board must not impair its obligation to fairly advise the Director of Engineering and Buildings and the Governor of circumstances obtaining at the time that such sale may be proposed which would weigh against such a proposal. However, I detect no impropriety in advising the counties involved that there are no circumstances known to the Board at the time that the agreement is entered into which would weigh against sale of the property involved pursuant to § 2.1-5 of the Code, if in fact such is the case.

STATE CORPORATION COMMISSION—Appointment and Removal of Employees and Subordinates Subject to General Law.

STATE CORPORATION COMMISSION—Appointment and Removal of Heads and Assistant Heads of Divisions Not Subject to Provisions of General Law.

STATE CORPORATION COMMISSION—Appointment and Removal of Counsel Is Subject to Provisions of General Law.

April 14, 1972

THE HONORABLE ADELAARD L. BRAULT
Member, Senate of Virginia

I am in receipt of your recent inquiry which reads as follows:

"I have been directed by the Senate General Laws Committee to request your opinion as to which employees of the State Corporation Commission may be subject to legislation enacted by the General Assembly in the area of grievance procedures."

"Specifically, is the General Counsel of the State Corporation Commission and his assistants a head of division and assistant heads of division as contemplated by Article IX, Section 1, of the Virginia Constitution?"

Article IX, Section 1, of the revised Virginia Constitution reads in pertinent part, as relates to employees of the Commission, as follows:

"Its subordinates and employees, and the manner of their appointment and removal, shall be as provided by law, except that its heads of divisions and assistant heads of divisions shall be appointed and subject to removal by the Commission."
The General Assembly cannot legislate, therefore, the manner of appointment and removal of the Commission's heads of divisions and assistant heads of divisions; it can regulate the manner of appointment and removal of the Commission's subordinates and employees.

The issue presented, however, is not which category encompasses the General Counsel but whether the General Counsel is the head of a division. If he is not, then even though he may not necessarily be considered a subordinate or employee, the General Assembly could still legislate regarding the manner of his appointment or removal, there being set forth no limitation on the General Assembly's power in this regard. *Richmond v. Virginia R. etc., Co.*, 141 Va. 69, 126 S.E. 353 (1925).

I am of the opinion that the General Counsel of the Commission is not the head or assistant head of a division and that the General Assembly may, therefore, regulate the manner of his appointment and removal. This is clear, since prior to the 1971 Extra Session the Commission did not have the power to appoint General Counsel, but could do so only with the approval of this office. [§§ 2.1-122, 2.1-123 and 12.1-18 of the Code of Virginia (1950), as amended.] Additionally, I would point out that the Commission on Constitutional Revision indicated that those who would be within the grant of appointing and removing powers to the S.C.C., would be heads and assistant heads of "... the following divisions: Clerk's office, the Bureau of Insurance, the Bureau of Banking, the Transportation Division, the Engineering Division, the Accounting Division, the Securities Division, the Aeronautics Division, the Division of Assessment and Taxation, the Division of Motor Carrier Taxation, and the Fire Marshall's Office." Report of the Commission on Constitutional Revision, Commentary, p. 283.

Your inquiry is, therefore, answered in the negative.

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**STATE CORPORATION COMMISSION—Fire Marshal—Uniform Statewide Building Code; Virginia Fire Hazards Law.**

**UNIFORM STATEWIDE BUILDING CODE—Duties of Chief Fire Marshal Located Within State Corporation Commission.**

**VIRGINIA FIRE HAZARDS LAW—Duties of Chief Fire Marshal Located Within State Corporation Commission.**

**STATE BOARD OF HOUSING—Uniform Statewide Building Code; Virginia Fire Hazards Law.**

May 16, 1972

**The Honorable Stanley C. Walker**

Member, Senate of Virginia

This is in response to your letter of April 7, 1972, in which you asked this office's opinion on the following matter: Does Chapter 829, Acts of Assembly, 1972, relieve the office of the Chief Fire Marshal, located within the State Corporation Commission, of responsibility for the enforcement of rules and regulations promulgated by the Commission pursuant to the Virginia Fire Hazards Law?

Section 3 of the Act provides that the Uniform State-wide Building Code, to be promulgated by the State Board of Housing, "shall prescribe standards to be complied with in the construction of buildings, and the provisions thereof shall be such as to protect the health, safety and welfare of the residents of this State. . . ." The section further provides that "in formulating the Code provisions, the State Board shall have due regard for generally accepted standards as recommended by nationally recognized organizations, including . . . the National Fire Protection Association." Thus, the Act envisions that the Board will promulgate rules and regulations prescribing standards of fire safety and protection to be complied with in the construction of buildings.
Section 2 of the Act provides that the Uniform State-wide Building Code, when promulgated, shall supersede the building codes of the counties, municipalities and state agencies. Section 27-72 of the Code of Virginia (1950) provides generally for the promulgation by the State Corporation Commission of rules and regulations prescribing minimum standards for the protection of life and property from the hazards incident to fire, to be complied with in all buildings used or occupied by ten or more persons. The Commission's regulations constitute requirements to be complied with not only in the construction of a building but also in the use of such building after it is constructed.

Section 7 of the Act provides that existing buildings "shall remain subject to the building regulations in effect" at the time of construction. Therefore, insofar as the Commission's regulations constitute continuing requirements to be complied with by existing buildings, they are not superseded by the Act.

Section 27-66 of the Code created the office of Chief Fire Marshal within the State Corporation Commission. The rules and regulations adopted by the Commission are enforced by the Chief Fire Marshal by virtue of the provisions of § 27-80. As to any building on which construction has not commenced, or for which a building permit has not been issued, by the time of the adoption of the Code, or for which working drawings have not been prepared in the year prior to the adoption of the Code, the Commission's regulations will be superseded. Therefore, as to such new construction occurring after the effective date of the Code, the Chief Fire Marshal will not have an enforcement responsibility, unless the State Board of Housing delegates such responsibility under Section 9 of the Act.

STATE CORPORATION COMMISSION—Majority Vote of Each House of General Assembly Necessary for Election of Members of.

CONSTITUTION—Majority Vote of Each House of General Assembly Necessary for Election of Members of State Corporation Commission.

February 3, 1972

The Honorable George R. Rich
Clerk, House of Delegates

I am in receipt of your letter of February 3, 1972, which reads as follows:

"It would be appreciated if you would render your opinion to this office regarding the manner in which members of the State Corporation Commission should be selected by the General Assembly in accordance with the provisions of Article IX, Section 1 of the Virginia Constitution. Precisely, must they be selected by a majority of each House or would a majority vote of the entire membership be sufficient?"

I am of the opinion that a majority vote of each house is necessary for election of State Corporation Commission members and that a majority vote of what would be the joint houses is not authorized.

Article IX, Section 1, of the revised Virginia Constitution reads in pertinent part as follows:

"There shall be a permanent commission which shall be known as the State Corporation Commission and which shall consist of three members. The General Assembly may, by majority vote of the members elected to each house, increase the size of the Commission to no more than five members. Members of the Commission shall be elected by the General Assembly and shall serve for regular terms of six years."
A bicameral assembly is always presumed to act within the system of checks and balances inherent in such a legislature and a meeting in "joint session", which term has a well recognized meaning, implying the comingling of the two houses acting as one body, is a limited constitutional right. 81 C.J.S. States, Sec. 37.

I would point out that in the previous Constitution, the only instance in which a "joint session" appeared to be authorized was in Sections 91 and 96, which provided for the elections of judges on the Supreme Court of Appeals and on courts of record "by the joint vote of the two houses of the General Assembly."

The Report of the Commission on Constitutional Revision, in commenting on such language and explaining the provisions now found in Article IX, Section 7, stated:

"It also should be noted that the words 'the joint vote of the two houses' which appear in present section 91 [and 96] have been replaced in proposed section 7 with the words 'a majority of the members elected to each house.' The reason for the change is to clarify an ambiguity. The present language is subject to the interpretation that the two houses must vote together and a majority of the total vote would suffice for election. Thus, under this approach, any combination of 71 senators and 51 delegates would be sufficient to elect a justice to the Supreme Court. What is of course meant by the present language, however, —and made explicit by the substituted language—is that a majority in each house vote favorably. Thus, the affirmative vote of 21 senators and 51 delegates is needed for election."


Thus, it is clear from the above, that, in the opinion of the Commission, the former provisions of Sections 91 and 96 did not authorize a "joint session". Though they, in proposing the language for Article IX, Section 1, did not make more explicit the phraseology formerly found in Section 115, that members "shall be elected by the General Assembly", it appears from the above that their intent was that such phrase would not authorize joint sessions but would now require a majority vote of each house.

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STATE EMPLOYEES—Accumulated Sick Leave—Not entitled to upon separation from State service.

July 15, 1971

The Honorable G. R. C. Stuart
Member, House of Delegates

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

"One of my constituents has been working for the state for about twenty years, and has accumulated more than 150 days of sick leave. He has asked me whether, if he should now leave the state service, he would be entitled to compensation for the accumulated sick leave, and if so on what basis. Would you please give me an opinion on this?"

Rule 10.13 of the Rules for the Administration of the Virginia Personnel Act provides that upon separation from State service by resignation, retirement, layoff or removal, any sick leave balance shall lapse. I am of the opinion, therefore, that a State employee upon separation from State service is not entitled to be paid for accumulated sick leave.

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STATE EMPLOYEES—Judges, Clerks and Deputy Clerks of County Courts Not of Record Are State Employees for Purposes of Health Insurance Coverage.

STATE EMPLOYEES—Judges of County Courts Not of Record Are Not State Employees Under Virginia Supplemental Retirement Act; Clerks and Deputy Clerks Are.

JUDGES—Of County Courts Not of Record Are State Employees for Purposes of Health Insurance Coverage but Not Under Virginia Supplemental Retirement Act.

CLERKS—Of County Courts Not of Record Are State Employees for Purposes of Health Insurance Coverage and Virginia Supplemental Retirement Act.

March 31, 1972

THE HONORABLE CHARLOTTE H. HERNDON
Clerk of Hanover County Court

This is in reply to your letter of March 6, 1972, in which you ask: “Are the Judges, Clerks and Deputy Clerks of the County Courts not of record state employees?”

Section 51-111.10(5) of the Code of Virginia (1950), as amended, pertaining to the Virginia Supplemental Retirement Act excludes judges of courts not of record from being State employees but includes employees of county courts, a deputy or employee of any such officer. Therefore, for the purposes of the Virginia Supplemental Retirement Act clerks and deputy clerks of county courts not of record are State employees. Judges of county courts not of record are not State employees under that Act.

Section 2.1-20.1 of the Code authorized the Governor to establish a plan for providing health insurance coverage for State employees and defined State employees for the purposes of that Act to include judges, clerks and deputy clerks of county courts not of record. Therefore, for the purposes of health insurance coverage, judges, clerks and deputy clerks are considered State employees.

STATE EMPLOYEES—Wages—Agency may not withhold wages without authorization.

October 18, 1971

THE HONORABLE PETER K. BABALAS
Member, Senate of Virginia

This is in reply to your letter of October 1, 1971, in which you inquire whether a State institution may withhold an employee’s salary if he does not pay a fine imposed by the institution for improper parking.

Subsection (c) of § 40.1-29 Code of Virginia, (1950), as amended, provides as follows:

“No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee. An employer, upon request of his employee, shall furnish the latter a written statement of the gross wages earned by the employee during any pay period and the amount and purpose of any deductions therefrom.”

In light of the above quoted section, I am of the opinion that the institution may not withhold an employee’s salary if he does not pay a park-
ing fine unless the institution receives a written and signed authorization from the employee permitting it to make such a deduction.

STATE WATER CONTROL BOARD—Pollutant—Sediment may be a pollutant under State Water Control Law.

August 31, 1971

THE HONORABLE A. H. PAESSLER, Executive Secretary
State Water Control Board

This is in reply to your letter of August 2, 1971, in which you state:

"The State Water Control Board hereby requests that the Office of the Attorney General render an opinion on whether sediment may be construed to be a pollutant under the State Water Control Law, Title 62.1, Code of Virginia of 1950, as amended.

"If your answer to this question is in the affirmative, we would appreciate your comments relative to the Board's approach in the matter."

Pollution for the purposes of the State Water Control Law is defined in § 62.1-44.3(6) of the Code of Virginia (1950), as amended, in part, as:

"... such alteration of the physical, chemical or biological properties of any State waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare, or to the health of animals, fish or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses. . . ."

Sediment, or the suspended mineral and organic solids carried to watercourses by erosion and surface runoff, has been estimated to place a volume load upon the nation's streams, lakes and estuaries at least 700 times that of suspended solids from sewage discharge.


Recognized deleterious effects of excessive and unnatural quantities of sediment in watercourses include the reduction of oxygen content needed to assimilate wastes, interference with the life cycles of organisms as by the covering of spawning beds of shellfish with silt, the introduction of pesticides and other materials toxic to aquatic life, the pre-emption of water storage capacities and the necessity of costly dredging, and increased expenses in water purification. In addition, it should be noted that in enacting the Soil Conservation Districts Law, the 1970 General Assembly declared as a matter of legislative determination that "... sediment causes extensive pollution of vital streams, ponds and lakes." Section 21-2 of the Code of Virginia (1950), as amended. I am of the opinion, therefore, that the deposit of excessive and unnatural quantities of sediment in State waters would constitute pollution for the purposes of the State Water Control Law.

The problem of sediment pollution is a cause of increasing concern in the Commonwealth and its serious proportions and effects indicate a pressing need for the development of a comprehensive state sedimentation control abatement of water pollutants from a large number of significant sources,
program. However, the State Water Control Board is responsible for the and the resources of the Board are not unlimited. Section 62.1-44.13 of the Code provides:

“The Board shall make such inspections, conduct such investigations and do such other things as are necessary to carry out the provisions of this chapter, within the limits of appropriation, funds, or personnel which are, or become, available from any source for this purpose.”

In light of the language of this provision, it would appear that any decisions by the Board relating to the regulation of sediment pollution should be made with full consideration of the overall resources and responsibilities of the Board.

Because problems of sedimentation result from uncontrolled erosion and surface runoff, it is widely recognized that effective solutions to this problem depend in large measure upon effective land use planning and control. It is also widely recognized that problems of sedimentation are largely associated with urban and suburban development. Consequently, an effective sedimentation control program by needs must consider population distribution and growth projections; the topography, geology, soil conditions and drainage patterns of water basins; the logistics of integrating control demands with the needs of building, highway and public facilities construction; the need to utilize the ongoing political and administrative processes of local government and the fact that physical drainage characteristics seldom coincide with political boundaries. Considering these needs and the fact that quantifiable relationships between erosion control techniques and stream turbidity and sedimentation standards have not yet been accurately developed, it is apparent that development of an effective sedimentation control program cannot be approached from the perspective of water pollution control alone, but must involve comprehensive planning and the cooperation of a variety of state agencies, particularly those responsible for land use planning and control. In this regard, attention is called to the provisions of Chapter 1 of Title 21 of the Code wherein the General Assembly has established, in part, measures for the control of sedimentation and erosion through the agency of soil and water conservation districts. In addition thereto, inasmuch as the Governor’s Council on the Environment has appointed a special Task Force on Sedimentation and Erosion Control, of which the State Water Control Board is a constituent member, to explore the possibilities of a comprehensive approach to this problem, the State Water Control Board may wish to defer decision on program development in this area until the recommendations of the Task Force are published in the near future.

STATUTES—Headnote Not Actually Part of Statute, Does not Have Force of Law.

MARRIAGE—Male Persons May Marry at Eighteen; Females at Minimum of Sixteen with Consent of Parent.

June 5, 1972

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

This is in reply to your letter of May 3, 1972, in which you requested an interpretation of an amendment adopted by the 1972 General Assembly to § 20-48 of the Code of Virginia (1950), as amended, the first paragraph of which now provides as follows:

“§ 20-48. Minimum age of marriage with consent of parents.—The minimum age at which male persons may marry shall be eighteen.
The minimum age at which female minors may marry with consent of the parent or guardian shall be sixteen."

You specifically inquired whether there is a conflict between the headnote of the section which refers to parental consent, and the first sentence thereof, which makes no reference to parental consent. Exclusive of the caption, the language of the statute is clear, i.e., a male at age eighteen may marry. There is no requirement for parental consent in such case. While the headnote or caption of this section does refer to "marriage with consent of parents," and while the headnote of a section of the Code is often indicative of the legislative intent, it is not actually a part of the statute to which it relates. *Krummert v. Commonwealth*, 186 Va. 581, 43 S.E. 2d 831 (1947).

Prior to the 1972 amendment to § 20-48, the headnote accurately reflected the contents of the section, which then dealt with "the minimum age at which minors may marry, with the consent of the parent or guardian."

The 1972 amendment clearly indicates an intent on the part of the legislature to establish eighteen as the age of majority with respect to the legal capacity of male persons to enter into marriage, without regard to whether parental consent has been given. Although the legislature did not change the caption to reflect the revised content of the section, this is of no moment, since, as indicated, the caption does not have the force of law.

In summary, it is my opinion that § 20-48, as amended, provides that the minimum age at which male persons may marry, with or without parental consent, is eighteen. To the extent that the section caption conflicts with the clear language of the statute, such caption may be ignored since it is not part of the statute.

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**STATUTES—Legislative Intent Resorted to in Construing Language; Members of Board of State Building Code Review.**

**The Honorable B. R. (Bev) Middleton**

Member, House of Delegates

This is in reply to your letter of April 1, 1972, in which you request a ruling as to how House Bill No. 418 (Ch. 829, Acts of 1972) may be implemented.

The portion of the Chapter to which you refer is Article 2, § 12, which reads as follows:

"There is hereby created, in the Office of Housing, the Board of State Building Code Review, consisting of seven members, one of whom shall be the Director of the Division of State Planning and Community Affairs, and four of whom shall be appointed by the Governor. The Governor's appointees shall include one member who is a registered architect, selected from a slate presented by the Virginia Chapter of the American Institute of Architects; one member who is a professional engineer in private practice, selected from a slate presented by the Virginia Society of Professional Engineers; one member who is a residential builder selected from a slate presented by the Home Builders Association of Virginia; one member who is a general contractor selected from a slate presented by the Virginia Branch, Associated General Contractors of America; and one member who has had experience in the field of enforcement of building regulations, selected from a slate presented by the Virginia Building Officials Conference. The four appointive members shall serve at the pleasure of the Governor."

In construing this language, resort must be had to the legislative intent. In this case, you advise that you proposed Senate Amendments in com-
mittee and failed to change the number of members appointed by the Governor from four to six which was intended. A reading of the statute as it was adopted lends itself to that construction.

Therefore, I am of the opinion that in carrying out the legislative intent to have the board comprised of six members appointed by the Governor, that the Governor may now appoint these six members.

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SUBDIVISIONS—Ordinances—County must notify municipality of proposed subdivision ordinance before ordinance effective within two miles of municipality.

COUNTIES, CITIES AND TOWNS—Ordinances—County must notify municipality of proposed subdivision ordinance before ordinance effective within two miles of municipality.

ORDINANCES—Section 15.1-468 Is Mandatory and Must Be Complied With Before Ordinance Effective Within Two Miles of Municipality.

JURISDICTION—Municipal Planning Commission Must Hold Required Public Hearing on Question of County Exercise of Jurisdiction Within Two Mile Area.

PLANNING COMMISSION—Must Hold Required Public Hearing on Question of County Exercise of Jurisdiction Within Two Mile Area.

June 1, 1972

THE HONORABLE LAWRENCE H. HOOVER, JR.
County Attorney for Rockingham County

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

"It has come to my attention the charters of several incorporated towns in Rockingham County have provisions which require the towns to approve plats of subdivisions of real estate, both within the town limits and within the two mile area outside of the corporate limits of the town. These charter provisions predate a subdivision control ordinance enacted by Rockingham County in 1962. Acting in pursuance of this ordinance, Rockingham County has received and acted upon several proposed subdivisions located within the two mile area surrounding these towns.

"The towns in question have never asserted their jurisdiction within this two mile area, although at least one of these towns has a subdivision control ordinance which has been implemented within the corporate limits. It is my understanding that since the county now has a subdivision control ordinance and is actually operating within these two mile areas, these towns are not desirous of asserting their charter jurisdiction.

"Section 15.1-468 of the Code of Virginia, 1950, as amended, says ... that no [subdivision] regulations to be effective in the area of a county subject to municipal jurisdiction shall be finally adopted by such county until the governing body of the municipalities shall have been notified in writing of such proposed regulations, and requested to review and approve or disapprove the same ... ."

"My first question is whether or not this requirement is applicable in the present situation in view of the fact that the municipal jurisdiction involved has never been exercised? If the answer to this question is in the affirmative, and since the section was not complied with when the county subdivision regulations became effective, must the county now attempt to comply to the extent possible with the requirements of this section? A co-lateral question is whether the municipal planning commissions of the towns involved must have a
Section 15.1-467, Code of Virginia (1950), as amended, provides that subdivision regulations adopted by a municipality shall apply within its corporate limits and may apply beyond within certain distances set forth by subsections (a), (b) and (c) of the section. You state that the authority to extend the application of the subdivision regulations was never exercised by the municipalities involved. This authority being permissive, there is no requirement that the municipalities now proceed to exercise it.

Section 15.1-468 of the Code, to which you refer, requires a county to notify a municipality in which a subdivision ordinance is proposed to be effective of the proposed regulations and request a review and approval thereof. Unless this is done the ordinance is not effective. See opinion of this office, Report of the Attorney General (1964-1965), p. 248, a copy of which is enclosed.

I am of the opinion that § 15.1-468 is mandatory and must be complied with before any ordinance of the county will be effective within two miles of the municipality, and that the county should attempt to comply with this section to the extent possible. The municipal planning commissions of the towns involved must likewise comply with § 15.1-468 and hold the required public hearing on the question of the county exercise of jurisdiction within the two mile areas.

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SUBPOENA—Power—Provided Richmond Human Relations Commission by City Charter.

CITIES AND TOWNS—Charter of City of Richmond—Power granted to Richmond Human Relations Commission by November 19, 1971

THE HONORABLE LAWRENCE DOUGLAS WILDER
Member, Senate of Virginia

This is in reply to your letter of November 15, 1971, requesting my opinion on the following questions:

"1. Does § 4.16 of the Charter of the City of Richmond grant subpoena powers to:
   "(a) the council of the City of Richmond?
   (b) boards and commissions whose members are appointed by the Council?
   (c) the Richmond Human Relations Commission?

"2. Does the Richmond Human Relations Commission have the authority, based on § 4.16(c) of the Charter, to conduct investigations and order the attendance of any person as a witness and the production by any person of all relevant books and papers?

"3. If the Richmond Human Relations Commission does not have subpoena powers, can Council under § 4.16 of the Charter grant that Commission this power? If so, how? If not, what must be done to accomplish this?"

The Charter of the City of Richmond granted by Chapter 116, Acts of Assembly 1948, included Section 4.16 which was amended by Chapter 120, Acts of Assembly 1964, and now reads:

"(a) The council, or any committee of members of the council when authorized by the council, shall have power to make such investigations relating to the municipal affairs of the city as it may deem necessary, and shall have power to investigate any or all departments, boards, commissions, offices and agencies of the city govern-
ment, including the school board, and any officer or employee of the city, concerning the performance of their duties and functions and use of property of the city.

"(b) The city manager and the heads of all departments, and all boards and commissions whose members are appointed by the council, the deputy director of finance, the collector of city taxes, the license inspector, the budget officer and the auditor of municipal accounts shall have power to make such investigations in connection with the performance of their duties and functions as they may deem necessary, and shall have power to investigate any officer or employee appointed by them or pursuant to their authority concerning the performance of duty and use of property of the city.

"(c) The council, or any committee of members of the council when authorized by the council, the city manager, the heads of departments, and boards and commissions whose members are appointed by the council, the deputy director of finance, the collector of city taxes, the license inspector, the budget officer and the auditor of municipal accounts, in an investigation held by any of them, may order the attendance of any person as a witness and the production by any person of all relevant books and papers. Any person, having been ordered to attend, or to produce such books and papers, who refuses or fails to obey such order, or who having attended, refuses or fails to answer any question relevant or pertinent to the matter under investigation shall be deemed guilty of a misdemeanor, and upon conviction shall be punishable by a fine not exceeding one hundred dollars or imprisonment in jail not exceeding thirty days, either or both. Every such person shall have the right of appeal to the hustings court of the City of Richmond. The investigating authority shall cause every person who violates the provision of this section to be summoned before the judge of the police court for trial. Witnesses shall be sworn by the person presiding at such investigation, and they shall be liable to prosecution or suit for damages for perjury for any false testimony given at such investigation."

I shall answer your questions seriatim:

1(a). The power of the Council to require the attendance of any person as a witness and the production by any person of all relevant books and papers is derived from § 4.16(a) of the Charter of the City of Richmond:

"The Council... shall have power to make such investigations relating to municipal affairs of the City as it may deem necessary, and shall have power to investigate any and all departments, boards, commissions, offices and agencies of the City government, including the school board, and any officer or employee of the City concerning the performance of their duties and functions and use of property of the City."

This is an express grant of power to the council to make investigations relating to municipal affairs. Subsection (c) of this section grants the power of subpoena for this purpose. Therefore, the answer to your question 1(a) is in the affirmative.

1(b). Subsection (b) of Section 4.16 provides:

"The city manager and the heads of all departments, and all boards and commissions whose members are appointed by the council, the deputy director of finance, the collector of city taxes, the license inspector, the budget officer and the auditor of municipal accounts shall have power to make such investigations in connection with the performance of their duties and functions as they may deem necessary, and shall have power to investigate any officer or employee ap-
pointed by them or pursuant to their authority concerning the performance of duty and use of property of the city.” (Emphasis added.)

The express grant of power to all boards and commissions whose members are appointed by the council extends to investigations in connection with the performance of their duties and functions. Subsection (c) of this section grants the power of subpoena for this purpose. Therefore, the answer to your question 1(b) is in the affirmative.

1(c). Section 4.02(b) of the Charter provides that the Council shall have the power “to create, alter, or abolish departments, bureaus, divisions, boards, commissions, offices and agencies other than those specifically established by the Charter.” (Emphasis added.)

The Human Relations Commission was created by the City by Ordinance No. 68-297-265, § 1. It is codified as Section 2-35 of the Richmond City Code and reads:

“There shall be a human relations commission for the city consisting of fifteen citizens, of which one member shall be appointed by each member of council for a term coincident with his term in the council. Six members shall be appointed by the council as a whole for a term of three years. Of those first appointed, two shall be appointed to serve for a term of one year, two for a term of two years and two for a term of three years.

“Vacancies among the nine members appointed by individual councilmen shall be filled by appointment made by the same councilman or the person appointed to fill his unexpired term or elected to such office. Vacancies in the six members appointed jointly by the council shall be filled by joint appointment of the council. Appointments among the six jointly appointed members to fill expiring terms shall be for a period of three years. The commission may adopt rules of procedure for conducting its affairs and shall elect a chairman and a vice-chairman from its membership and fix the terms such chairman and vice-chairman shall serve.”

The functions and duties of the Commission are set forth in Sections 2-36, 2-37 and 2-38 of the City Code. Under Section 2-35, above quoted, the members of the commission are appointed by the council. Subsection (b) of Section 4.16 empowers the commission to investigate in connection with the performance of its duties and functions. Subsection (c) empowers the commission to use the subpoena for this purpose. I therefore answer your question 1(c) in the affirmative.

2. I am of the opinion that the answer to this question is in the affirmative which renders moot your question numbered 3.

SUITs—Condemnation of Land—When chancery fee and writ tax chargeable.

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

August 16, 1971

I have received your recent letter, in which you ask whether a proceeding under Virginia Code § 33.1-132 should be treated as a regular chancery suit or as a condemnation suit.

A proceeding under § 33.1-132 is brought by individuals whose property is being condemned. It is not, in my opinion, a condemnation suit. You should charge a regular chancery suit fee and a writ tax.
REPORT OF THE ATTORNEY GENERAL

SUNDAY CLOSING LAW—Exemption From Law Where Profits Contributed to Charity.

November 9, 1971

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

This is in reply to your recent letter in which you inquire as to the applicability of the “Sunday Closing Law,” Section 18.1-358 of the Code of Virginia to instances in which a retail establishment stays open on Sunday and all of the profits from its operation are given to charitable organizations. You also ask a number of specific questions which you wish answered if I am of the opinion that the “Sunday Closing Law” does not apply to these transactions.

Section 18.1-358 of the Code of Virginia, which is the operative statute in this field, was amended most recently in 1964 and that amendment has a direct bearing upon my opinion. Prior to the 1964 amendment, the pertinent portion of that statute read as follows:

"On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor or business or to employ others to engage in work, labor or business except in household or other work of necessity or charity. The exemption for works of necessity or charity contained in the preceding sentence shall not be deemed to include selling at retail or wholesale or by auction, or offering or attempting to sell, on Sunday, any of the following: . . ."

The sole amendment in that section of the statute which was made in 1964 was to eliminate the two words “or charity” in the sentence beginning “The exemption for works of necessity or charity . . .” Thus, the General Assembly in 1964 appears to have specifically approved the performance of normally prohibited acts on Sunday if they are performed for charity. Consequently, it is my opinion that the 1964 amendment of Section 18.1-358 of the Code of Virginia changed the law to where it existed prior to the 1960 amendments, and the decision of the Virginia Supreme Court in Williams v. Commonwealth, 179 Va. 741 (1942), is once again controlling and operations of retail or wholesale establishments on Sunday in which the entire profits are given to charity are not in violation of the “Sunday Closing Law.”

You ask other specific questions which I will answer as follows. You inquire as to whether the employees are breaking the law because they are being paid for doing work on Sunday and my answer necessarily flows from the opinion I have expressed above and must be in the negative. You next ask if, assuming that the employee is violating the law, it would make any difference if he gave his money to charity. Since he is not violating the law, there is no need to answer this question or the following question which also refers to the employee giving his money to charity.

Your next two questions ask who is to determine what the profit is for the purpose of determining the charitable gift and what State or local officer would have the authority to determine by interrogation or inspection of the books that the profits actually did go to charity. Since Section 18.1-358 and the following sections pertain to criminal prosecutions, it would be up to the local Commonwealth’s attorney to determine whether a particular person or establishment was in violation of the Code and whether their acts were exempted from the operation of the Code for the reason that their profits were going to charity. You further inquire as to whether particular charities or lists thereof would be eligible and I am of the opinion that there is no hard and fast rule that would govern this answer. Each case would have to be determined on its own facts.
Finally, you ask whether it would make any difference whether the particular business adopted the "charitable contribution" method of staying open on Sunday and thereafter reduced its former usual charitable contributions to nothing. It is my opinion that, insofar as Sections 18.1-358 and 18.1-358.1 of the Code of Virginia are concerned, the acts of the person or corporation in question with regard to their normal charitable contributions would have no relevance to whether they were violating the law.

SUNDAY CLOSING LAW—Selling Merchandise on Sunday—No longer a crime but nuisance to be abated by injunctive relief.

June 1, 1972

THE HONORABLE T. DIX SUTTON
Member, House of Delegates

This is in response to your recent inquiry of March 20, 1972, in which you ask several questions relating to House Bill 772 passed by the 1972 Virginia General Assembly to amend Article 7 of Chapter 7 of Title 18.1 of the Code of Virginia, commonly known as the "Sunday Closing Law". This legislation was approved by the Governor of Virginia on April 10, 1972, as Chapter 727 of the Acts of Assembly for the 1972 Session. I will refer to your questions in the order in which you ask them.

Your first question is as follows:

"1. Is it now a crime to sell merchandise on Sunday? If so, what is the penalty?"

The legal effect of Chapter 727 is to remove from the "Sunday Closing Law" the criminal sanctions previously contained in that law and to substitute therefor injunctive relief as the appropriate remedy for violations of the provisions of the law. Consequently, it is my opinion that it is no longer a crime to sell prohibited merchandise on Sunday and a sale is more in the nature of a nuisance to be abated through injunctive procedures.

Your second question is as follows:

"2. What is the effect of the reference to 'fine or conviction' contained in new section 18.1-358.3?"

The language you refer to is not contained in Chapter 727 in its enacted form. Your third question is set forth below:

"3. If Sunday sales are no longer 'unlawful,' upon what basis can a Commonwealth Attorney obtain an injunction as provided in new Sec. 18.1-358.3?"

Prohibited Sunday business transactions are no longer unlawful but they are prohibited by the Code of Virginia and, as I have pointed out above, they are in the nature of a nuisance which may be abated by proceedings brought by the Commonwealth's Attorney under the authority of § 18.1-358.3, where a complaint is made in a proper case.

Finally, you inquire in the following terms:

"4. Are Sunday sales now a misdemeanor under Sec. 18.1-6?"

It is my opinion that Sunday sales as prohibited by § 18.1-358 of the Code of Virginia (1950), as amended, do not constitute a misdemeanor under § 18.1-6 of the Code. The sole remedy for the performance of prohibited acts would be the injunctive relief provided for in § 18.1-358.3.

TAXATION—Assessment—Taxpayer not relieved of obligation to pay because of failure to receive bill.
THE HONORABLE WM. ROSCOE REYNOLDS
Commonwealth’s Attorney for Henry County

I have received your recent letter with respect to my March 31, 1971, opinion to the Honorable Donald W. Turner. In my opinion to Mr. Turner, I held that a taxpayer is not relieved of his obligation to pay his real estate taxes on time by the failure of the taxing authorities to send a bill in accordance with Virginia Code § 58-960.

You call to my attention the case of Board of Supervisors v. Stanley Bender and Associates, 201 F. Supp. 839 (Va. 1961). In that case a federal court construed Virginia law to mean that the procedures under § 58-960 were necessary for a levy and that a penalty could not be imposed under § 58-963 of the Code where those procedures were not complied with. That opinion is not good law and should not be followed in Virginia. The penalty in question in that case was not imposed pursuant to § 58-963 but pursuant to § 58-1164 of the Code. This latter section clearly places on the taxpayer the burden of timely paying the correct amount of tax and penalizes him for his failure to do so:

“If the commissioner of the revenue of any county or city or the tax-assessing officer of any town ascertain that any person or property subject to local taxation or any local license tax has not been assessed for any tax year of the three years last past or that the same has been assessed at less than the law required for any one or more of such years, or that the levies or taxes for any cause have not been realized, the commissioner of the revenue or other assessing officer shall list and assess the same with levies or taxes at the rate or rates prescribed for that year, adding thereto a penalty of five per centum and interest at the rate of six per centum per annum, which shall be computed upon the taxes and penalty from the fifteenth day of December of the year in which such taxes should have been paid to the date of the assessment; and if the assessment be not paid into the local treasury within thirty days after its date, interest at the rate of six per centum shall accrue thereon from the date of such assessment until payment.” (Italics supplied.)

Virginia Code § 58-961 permits a local treasurer to accept real estate taxes without penalty only before the fifth day of December. While the errors of an assessing officer may so prejudice the rights of a taxpayer as to render an assessment invalid, Richmond v. McKenny, 194 Va. 427 (1952), no local treasurer is empowered by general law to accept without penalty real estate taxes resulting from a valid assessment after the fifth day of December.

In my opinion, the failure of a taxpayer to receive a bill does not so prejudice his rights as to render the assessment invalid. See Report of the Attorney General (1966-1967), p. 280. If the particular circumstances of the taxpayer’s case are such as to render the assessment invalid, the treasurer should not accept payment on the original assessment but should have the commissioner of the revenue make a new assessment of taxes, penalty and interest pursuant to § 58-1164. In no event should a local treasurer, after the fifth day of December of the tax year, accept any real estate taxes without penalty.

This opinion does not apply to penalties imposed by local ordinances adopted pursuant to Virginia Code § 58-847.

TAXATION—Automobiles Kept in City by College Students; Criteria for License Tags.

TAXATION—Personal Property—Taxable situs of automobile of student.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Authority of City to Subject Motor Vehicles of Students to Personal Property Tax.

MOTOR VEHICLES—Taxation of Automobiles Kept in City by College Students.

June 1, 1972

THE HONORABLE J. M. H. WILLIS, JR.
Commonwealth's Attorney for the City of Fredericksburg

I am writing in reply to your recent letter concerning taxation of automobiles being kept in the City of Fredericksburg by Mary Washington College students.

In your first question you ask whether attendance at Mary Washington College can be considered "a gainful occupation" as that term is used in § 46.1-1(16) (b) of the Code of Virginia (1950), as amended, or whether students attending Mary Washington College for a period in excess of six months acquire residence in Fredericksburg for the purpose of § 46.1-1(16) (c) of the Code of Virginia (1950), as amended. I am of the opinion that "gainful occupation" requires some form of employment in which the employee is compensated for his work. Accordingly, a student at Mary Washington College could not be construed to be engaged in "a gainful occupation" by merely attending classes at the College. However, a student who is physically present in Fredericksburg for a period in excess of six months while attending Mary Washington College would be deemed to have resided in the State for purposes of satisfying § 46.1-1(16) (c). It should be noted that the prohibition contained in § 46.1-66(a) (1) of the Code of Virginia (1950), as amended, against a city's imposing a license fee upon a motor vehicle when a similar license fee is imposed by the county, city or town of which the owner is a resident is not applicable to this situation because the student residing in Fredericksburg for a period in excess of six months will be deemed a resident of Fredericksburg for purposes of Title 46.1 of the Code.

The decision contained in the foregoing paragraph will not affect the in-state tuition status of any student attending college. Section 23-7 of the Code which establishes the criteria for determining residency for tuition purposes requires both residency and domicile. Thus, the use of different criteria distinguishes the tuition problem from the situation relating to license tags.

Your final question concerns the authority of Fredericksburg to subject motor vehicles kept by students at the College in Fredericksburg to personal property tax. In an opinion to the Honorable W. A. Parsons, Commonwealth's Attorney for Wythe County, found in Report of the Attorney General (1968-1969), pp. 242-243, my predecessor had occasion to answer the identical question. I am enclosing a copy of that opinion for your convenience.

TAXATION—Changes in Names—Changes may be noted on land book; alterations affecting taxes prohibited.

November 19, 1971

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

I have received your letter of November 10, 1971, from which I quote:

"The question has recently arisen in several of the Clerk's Offices throughout the State as to whether or not the recordation of a duly authenticated copy of a marriage license or a duly authenticated copy of a final decree of divorce showing a change of name of a woman, duly indexed, as provided for in § 55-106.1 of the Code of Virginia, as amended, is sufficient authority for a general assessor
or a commissioner of the revenue to change the name of said person on the assessment books concerning real property."

By the use of the words "assessment books" in your letter, you are obviously referring to the land book authorized by § 58-804, Virginia Code (1950).

Section 58-808 requires the commissioner of the revenue or an assessor, as the case may be, to note such changes as may happen within the county or city in making out the land book. Clearly such a change includes the taxpayer's name. Section 58-807 prohibits any alterations "affecting the taxes or levies of that year" to be made in the land book by the commissioner or assessor after he has delivered a copy of said book to the county or city treasurer. In my opinion, alteration of the land book to reflect a change in the taxpayer's name does not affect the taxes or levies which that taxpayer will pay. The documents which can be recorded pursuant to § 55-106.1 and which denote a change of name of a female taxpayer constitute sufficient authority for the assessing official to change the name of said taxpayer on the land book.

It should be noted that even if the assessing official does not note the change of name in the land book, such omission would not vitiate the tax assessment. See § 58-818; Report of the Attorney General (1950-1951), p. 282.

TAXATION—Classification—Tire recapping business is not a manufacturer.

July 29, 1971

THE HONORABLE D. B. HANEL
Commissioner of the Revenue for the City of Martinsville

I have received your recent letter asking:

"Are tire recapping businesses manufacturers or are they classified as re-processors? Can they be placed in one category by the State and in another category by a City?"

A tire recapping business is not, in my opinion, a manufacturer. Such a business has traditionally been viewed as a repair business. Although a State statutory classification may be binding upon a locality imposing a similar tax, Hill v. Richmond, 181 Va. 744 (1943), a State administrative ruling, "does not necessarily and of its own force bind the City in its tax assessments." Prentice v. Richmond, 197 Va. 724, 730 (1956).

TAXATION—Clerk's Fees and Costs—Application for deed of land should be treated as chancery suit for purpose of determining clerk's fees.

November 10, 1971

THE HONORABLE H. C. DEJARNETTE, Clerk
Circuit Court of Orange County

I have received your recent letter in which you ask whether an application for a deed to land purchased at a treasurer's sale under Virginia Code § 58-1052 should be treated as a chancery suit for the purpose of determining clerk's fees and costs.

By letter of July 30, 1971, I advised the Honorable L. H. Sands that an application pursuant to Virginia Code § 58-1053 should be treated as a chancery suit. That opinion relied on the case of Stone v. Caldwell, 99 Va. 492 (1901) which was based on the statutory requirements for the issuance, service and return of process. The notice requirement of Virginia Code § 58-1053 has been interpreted in conjunction with §§ 8-51 through 8-53 of the Code, Kelly v. Gwatkin, 108 Va. 6 (1908), which also provide for the issuance, service and return of process. In my opinion, an application pur-
suant to Virginia Code § 58-1052 should be treated as a chancery suit for the purpose of determining clerk's fees and costs.

TAXATION—Collection of Local Taxes—State Form 814 may be used for collection of local taxes with certain alterations.

April 4, 1972

THE HONORABLE G. HUGH TURNER
Treasurer of Franklin County

I have received your recent letter in which you ask whether you may use Virginia Form 814-D. of T. for the collection of local taxes under Virginia Code § 58-1010.

Section 58-1010 applies to local as well as State taxes. The Department of Taxation has prepared Form 814 for the collection of State taxes. You may also use this form for local taxes if you strike “Commonwealth of Virginia” and insert “County of Franklin” and strike “State” and insert “county.” You may instead wish to prepare your own local form.

TAXATION—Construction Loan Deeds of Trust—Permanent loan deed not be in amount equal or greater than construction loan; instrument not containing required language at time of recordation does not qualify as construction loan deed of trust.

March 29, 1972

THE HONORABLE ALVIN FRINKS, Clerk
Corporation and Circuit Courts of the City of Alexandria

I have received your recent letter, with reference to the exemption provided construction loan deeds of trust by Virginia Code § 58-55.1.

You ask whether the exemption applies where the permanent loan will be less than the original trust. A literal reading of § 58-55.1 clearly requires that the permanent loan be “in an amount equal to or greater than such construction loan deed of trust or mortgage . . . .” I can only interpret this language to make explicit the intent of the General Assembly to include increased debt, not to exclude reduced debt.

You also ask whether the exemption applies if the trust in question does not state that it was given to secure a loan for real estate construction and, if not, whether the original trust may subsequently be amended to accomplish this result. Section 58-55.1(a) specifically requires that the original instrument state therein “that it is given to secure a loan for real estate construction . . . .” In contrast to this requirement, the recording attorney now advises you:

“At the time when this Deed of Trust was recorded, it was anticipated that the permanent financing would be provided by a purchase of the notes secured by the above Deed of Trust. However, it is now contemplated that a totally new Deed of Trust will be placed upon the property at the time of the permanent financing.”


TAXATION—Conveyance of Land—Deed conveying property from trustee to child taxable.
August 12, 1971

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

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

"Is a conveyance of land by parents to trustees, for the sole benefit of a minor child, exempt from the tax imposed by Section 58-54 under the provisions of the 1971 revision of Section 58-61 when the consideration is for love and affection of the minor child and where the trustees are required to convey title to the child when he becomes 21 years of age? Will there be an exemption under 58-61 when the trustee conveys to the child after the child attains his majority? The only purpose of conveying to trustees is to facilitate transfer of title should the land be sold during the minority of the child."

The 1971 amendment to Virginia Code § 58-61 requires a liberal construction of conveyances between parent and child. An appropriate rule of thumb for applying in such cases is that of Section 2503 (c) of the Internal Revenue Code of 1954. That section requires that the property and the income therefrom:

"(1) may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and
(2) will to the extent not so expended—
(A) pass to the donee on his attaining the age of 21 years, and
(B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514(c)."

The transaction described by you would be exempt if the trust assets may be expended for the benefit of the child during his minority.

Although a trust instrument can be drafted to provide for the automatic vesting of title to the property in the child upon his age 21, I am unaware of any provision which would exempt from the tax imposed by § 58-54 of the Code a deed conveying property from the trustees to the child. See the enclosed opinion dated April 7, 1971, to the Honorable Alvin W. Frinks.

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TAXATION—Costs and Fees—Applicant must compensate officers of court for performance of duties.

July 30, 1971

THE HONORABLE L. H. SANDS, Clerk
Circuit Court of Bland County

This is in reply to your recent letter in which you inquire as to the costs and fees chargeable to an applicant for a tax deed, pursuant to §§ 58-1083 and 58-1092 of the Code of Virginia, as amended.

The Virginia Supreme Court has recognized that an application to purchase delinquent property is analogous to a chancery suit inasmuch as it requires the issuance, service, and return of process, as well as judicial action on the part of the court. See Stone v. Caldwell, 99 Va. 492, 39 S.E. 121 (1901). As a result, the applicant for a tax deed must compensate the officers of the court for their performance of duties incident to the application and pay those costs and fees set forth in §§ 58-1083 and 58-1092. The incidental duties of the clerk to which I refer, and the compensation therefor, are enumerated in §§ 14.1-112 and 14.1-113. In short, an application for a tax deed would be handled, with respect to costs and fees, as a chancery suit.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Deeds of Trust—When deed of trust is exempt from recordation tax.

July 30, 1971

THE HONORABLE LLOYD E. CURRIN, Clerk
Circuit Court of Smyth County

I have received your recent letter in which you ask whether a deed of trust, not stating therein that it is given to secure a loan for real estate construction and not providing that it is payable within three years, may be amended so as to be a "construction loan deed of trust or mortgage" under Virginia Code § 58-55.1. The deed of trust does provide:

"This Deed of Trust may be changed by a supplemental agreement which shall be considered a part of this Deed of Trust and this Deed of Trust may be amended by same."

Section 58-55.1(c) exempts from the recordation tax, a permanent loan deed of trust recorded within three years after a construction loan deed of trust upon which the tax was paid, if the amount secured is not increased. When the first deed of trust was recorded and the tax paid, it was not a construction loan deed of trust. In my opinion, no subsequent amendment can bring it within the terms of § 58-55.1.

TAXATION—Destruction of State Capitation Tax Tickets—When paid tax tickets may be destroyed.

November 10, 1971

THE HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

I have received your recent letter asking when a local treasurer may dispose of State capitation tax bills.

Paid tax tickets may be microfilmed and destroyed after five years with the consent of the governing body. Va. Code § 58-919.1. Virginia Code § 58-27.3 continues the former provisions of § 58-987 of the Code, permitting the destruction of unpaid tickets four years after the certification of the delinquent list, provided that the Auditor of Public Accounts certifies that the tickets are no longer needed. In addition, Chapter 215 of the 1971 Acts of Assembly would relieve the treasurer of any legal obligation with respect to unpaid capitation tax tickets.

TAXATION—Erroneous Assessment—City Council may not authorize a refund.

July 29, 1971

THE HONORABLE CHARLES A. CALLAHAN
Commissioner of Revenue for the City of Alexandria

I have received your letter of July 20, in which you state that the Alexandria assessor's office has, within the five-year statute of limitations, determined that a taxpayer was erroneously assessed in 1967, and has certified the same to the city council. You ask whether the city council may now direct the payment of a refund pursuant to Virginia Code § 58-1142. That section permits a refund only when, "such time be within three years from the thirty-first day of December of the year in which such assessment was made." I am aware of no provision of law which would toll the running of the period of limitations for refunds under § 58-1142 and am of the opinion that council may not now authorize a refund pursuant to that section.
You state that the application to the assessor's office was made in 1970, which would be after the running of the two-year statute of limitations for court action under Virginia Code § 58-1145, so the tolling provisions of Virginia Code § 58-1146 are not applicable. I am not aware of the date of payment of the erroneous tax, but the city council may adopt an ordinance under Virginia Code § 58-1152.1, measuring the three-year statute of limitations by the date of payment rather than the year of assessment.

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TAXATION—Erroneous Assessment Refund—Adoption of ordinance may provide for refund.

July 29, 1971

The Honorable G. Hugh Turner
Treasurer of Franklin County

This is in reply to your recent letter, from which I quote:

"A taxpayer requested a statement for delinquent taxes on a lot in a sub-division. We mailed him the statement for taxes due in this office, along with a statement for the amount of tax due in the County Clerks office on the lot. He mailed in the full amount for the delinquent taxes. One check for the amount due here and another check for the amount due in the Clerks office. Now several months later he finds that he has paid taxes on the wrong lot.

"My question is, how can he be refunded the amount he has paid in error. I know the County Board of Supervisors will have to approve and make the refund, but what I want to know is how to make the correction here in my office and how the Clerk will make his correction."

As the value of the property in question had already been determined and the amount of the taxes fixed, the subsequent informing the taxpayer of the amount of taxes due was not an assessment which could be erroneous. See Hoffman v. County of Augusta, 206 Va. 799 (1966). The only procedure of which I am aware by which this inequity may be remedied is that of Virginia Code § 58-1152.1. If your Board of Supervisors adopts an ordinance pursuant to this section, it may require you to refund the tax erroneously paid. It would seem appropriate for the ordinance to provide administrative procedures for the return of the delinquent property to the delinquent tax list.

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TAXATION—Exempt Property; Service Charge Application—What property is exempt from service charge; all exempt property must be placed on land books; service charge extended upon value.

May 2, 1972

The Honorable David F. Thornton
Member, Senate of Virginia

I have received your letter of April 27, containing a number of questions pertaining to Virginia Code § 58-16.2, as amended by Chapter 770 of the 1972 Acts of Assembly. I shall answer your questions seriatim:

"1. Would all tax exempt property located in the City of Salem have to be assessed and become a part of the divisor of the ratio? In addition to the more common types of tax exempt property we have substantial property belonging to the United States of America, the Commonwealth of Virginia and the County of Roanoke within our corporate limits. Would all of these properties be assessed and be a part of the divisor of the ratio?"
Section 58-16.2 clearly provides that the denominator of the ratio shall be the "assessed fair market value of all the real estate within the county, city or town expressed in hundred dollars, including nontaxable property." All of the properties itemized by you must be assessed and made a part of the denominator of the ratio.

"2. Is all tax exempt property except building and land used exclusively for religious worship or for the residence of the minister now subject to the service charge?"

Section 58-16.2 applies only to real estate which is exempted under § 58-12 of the Code of Virginia. Section 58-12 does not provide an exemption for property belonging to the United States Government or for property which has been exempted by the General Assembly pursuant to Article X, Section 6(a)(6), of the revised Constitution. Such property is not subject to the service charge.

"3. Can the City of Salem impose a service charge against the property of the Veterans Administration Hospital, the Residency Shop of the Virginia Department of Highways, the Roanoke County Courthouse, and all other County owned property, the Roanoke County Public Service Authority, the U. S. Army Reserve Center, etc."

The Veterans Administration Hospital and the U. S. Army Reserve Center would be property owned by the United States and, as noted above, is not subject to the service charge. The other properties itemized by you would be subject to the service charge.

"4. Will all of the property owned by the City of Salem have to be assessed and become a part of the divisor of the ratio?"

Section 58-16.2 would require that all of the property owned by the City of Salem be assessed and become a part of the denominator of the ratio.

"5. The amended bill limits the service charge to 40% of the real estate tax rate. Can the City of Salem simply impose a service charge of 40% of the real estate tax rate, or 30%, or 20%, rather than making the complicated calculations indicated from the Senate bill?"

The forty percent limitation is, in my opinion, a ceiling on the amount of the service charge. If the City of Salem desires to impose a service charge, it must follow the procedure set forth by the statute.

"6. The Bill states that the service charge shall be based on the budgeted expenditures for police and fire protection and for the collection and disposal of refuse. Can the City of Salem include as part of these expenditures a proportionate part of administrative expenses, etc., which could be attributed to these specified services?"

If the city allocates its indirect costs under a recognized system of municipal accounting, any amount allocated to police and fire protection or to the collection and disposal of refuse may be budgeted as such and included in determining the amount of a local service charge. This is an accounting question, not a legal one. Accordingly, I would suggest that you obtain the advice of the Auditor of Public Accounts on this point.

"7. What is the significance of the following: 'The budgeted expenditures for services not provided for certain real estate shall not be applicable to the calculations of the service charge for such real estate... '"

The effect of the language quoted by you is to prohibit the imposition of a service charge for services not actually rendered to a particular piece of property. In other words, an organization which provides for its own refuse
disposal may not be assessed any amount for the collection and disposal of refuse.

"8. When the assessed values of the tax exempt property are published in the land books, will a Board of Equalization have to be appointed to determine appeals from owners of exempt real estate saying that the assessments are too high and that consequently the service charge imposed is too high?"

The service charge permitted by Virginia Code § 58-16.2 is essentially a tax. It is measured by the value of property, rather than by the value of the service rendered. In my opinion, the statute requires that the exempt property be placed upon the land books and the service charge extended upon the value placed thereon. I am further of the opinion that the valuation and the extension of the tax constitute assessments, affording the exempt organization all the administrative and judicial rights and remedies provided for ordinary real estate assessments.

TAXATION—Exemption—Fellowship for racial and economic equality not exempt from real estate and personal property taxes.

June 14, 1972

THE HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

I have received your recent letters inquiring whether the Fellowship for Racial and Economic Equality is entitled to exemption from real estate and personal property taxes. The purposes of this corporation as stated in its Articles of Incorporation are to develop programs that will help meet the problems of prejudice and discrimination by opening up lines of communication and by encouraging participation to assist in seeking scientific solutions to the problems of inequality as they affect various groups in our society and to foster a spirit of understanding, equality and acceptance among people who are individually troubled about relations between ethnic groups.

Tax exemption is provided for by Article X, Section 6, of the Constitution of Virginia. The pertinent provision within Section 6 is as follows:

"(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

"(4) Property owned by public libraries or by institutions of learning not conducted for profit, so long as such property is primarily used for literary, scientific, or educational purposes or purposes incidental thereto. . . ."

Based on the limited factual information which I have available from the corporate charter, it would appear that the Fellowship for Racial and Economic Equality is not an "institution of learning" as the term is used in the constitutional provision set forth above. I have not found any Virginia case law which specifically defines the term "institution of learning"; however, I refer you to the opinion of this office to the Honorable Thomas R. Nelson, County Attorney for Augusta County, dated December 3, 1968, and found in the Report of the Attorney General (1968-1969), p. 228. That opinion indicated that a faculty, a student body and prescribed courses of study were essential attributes of an "institution of learning." Although Richmond v. Day Nursery Ass'n, 207 Va. 561 (1966), held a nursery school to be tax exempt under Section 183(d) of the Constitution of Virginia (which is substantially identical to Article X, Section 6(a) (4), of the revised Virginia Constitution) the facility did provide educational programs by trained educators within a prescribed course of study.
As I am unaware of any other provision of law which would exempt the Fellowship for Racial and Economic Equality from taxation, I am of the opinion that it is a taxable entity.

TAXATION—Exemptions—Masonic Lodge exempt if transferred to a mere title-holding company.

May 31, 1972

THE HONORABLE ADELARD L. BRAULT
Member, Senate of Virginia

I have received your recent letter, in which you ask whether a lodge hall of a Masonic Lodge will retain its exempt status if transferred to a mere title-holding corporation.

By letter of April 20, 1971, to Senator Leslie D. Campbell, Jr., I opined that classes of property exempt prior to July 1, 1971, remain exempt under the grandfather clause of Article X, Section 6(f), of our revised Constitution. Masonic lodges were exempt under Section 183(f) of our old Constitution and retain that exemption under the grandfather clause.

The Virginia Supreme Court has held indirect ownership to be sufficient for exemption under our old Constitution. Citizens Foundation v. Richmond, 207 Va. 174 (1966). Several Virginia localities have accorded exempt treatment to Masonic lodges owned by similar title-holding companies. Applying the rules of construction which were in effect under our old Constitution, I must conclude that the lodge will be exempt if transferred to a mere title-holding company.

TAXATION—Exemptions—What property used for educational purposes not taxable.

July 12, 1971

THE HONORABLE JEROME S. HOWARD, JR.
Commissioner of Revenue for the City of Roanoke

I have received your recent letter, in which you ask:

"I would appreciate having your opinion on whether or not a residence owned by an incorporated institution of learning, which is a non-profit private school pursuant to the definition of Section 58-12 of the Code of Virginia, would qualify for real estate tax exemption when such residence being located approximately one and one half miles from the school campus and used by the school as the rent free living quarters of its headmaster and family."

Article X, Section 6(a) (4) of the revised Virginia Constitution continues the exemption heretofore granted by Section 183(d) of the old Constitution. The exemption will now be strictly construed as to property which was not judicially or administratively held to be exempt before noon, July 1, 1971. Va. Constitution, Art. X, § 6(f). The question remains, however, one of fact. The advice I gave the Honorable D. B. Hanel by letter of November 18, 1970, should, with a more strict construction, remain applicable:

"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.”

TAXATION—Federal Credit Unions—Subject to property taxes.

October 21, 1971

THE HONORABLE SAM T. BARFIELD
Commissioner of the Revenue for the City of Norfolk

I have received your recent letter asking whether the Norfolk Teachers Association Federal Credit Union is exempt from State and local taxes.

Congress has provided that federal credit unions, “shall be exempt from all taxation now or hereafter imposed . . . by any State . . . or local taxing authority . . .” 12 U.S.C., § 1769. An exception to that section permits the taxation of real and personal property, “to the same extent as other similar property is taxed.” In my opinion, federal credit unions are subject only to property taxes.

TAXATION—Interest on Penalties—Locality may collect if no charter or other provision regulating interest or penalty.

June 20, 1972

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

I have received your letter of June 7, 1972, inquiring whether § 58-847, Code of Virginia (1950), as amended, precludes the city of Falls Church from collection of interest upon the penalties imposed for failure to pay taxes by the due date. You indicate that § 58-964 provides for the collection of interest on both the principal amount and penalties.

Section 58-964 provides in part:

“Interest . . . shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid . . . . But this section shall not apply to local levies in any city or town when penalty or interest on such levies is regulated by its charter or by other special provisions of law.”

Section 58-847, as amended in 1971, provides in part:

“. . . Notwithstanding provisions contained in §§ . . . 58-964 . . . the governing body of any county, city or town . . . may provide for payment of interest on delinquent taxes . . . .”

Section 58-964 requires the collection of interest on penalties for the non-payment of local levies by a city or town absent a charter provision upon the subject or “other special provisions of law.” The latter phrase includes city ordinances. Southern Ry. Co. v. City of Danville, 175 Va. 300 (1940).

Section 58-847 enables but does not require the collection of interest on delinquent taxes. It does not expressly prohibit the collection of interest on penalties and does not conflict with § 58-964. It provides an alternate to the penalties and interest otherwise provided for by §§ 58-963 and 58-964.

It is my opinion that § 58-964 requires a city or town to collect interest upon the penalty imposed by § 58-963 (absent some charter provision to the contrary) notwithstanding the provisions of § 58-847. If, however, the city or town relies upon § 58-847 to provide by ordinance for a penalty or interest in excess of that imposed by §§ 58-963 and 58-964, it may not provide for interest upon the penalty.
TAXATION—Judges' Retirement Benefits—When excluded from taxable income.

April 6, 1972

THE HONORABLE EDWARD E. LANE
Member, House of Delegates

I have received your letter of March 17 requesting an opinion on the tax status of pensions paid to retired State judges.

Judges who retired prior to July 1, 1970, receive benefits under the provisions of Chapter 2 of Title 51 (§ 51-3 et seq.) of the Code of Virginia. This chapter contains no provision for exemption of the payments made thereunder from State income tax. Under § 58-78 of the Code (effective during 1971) and § 58-151.013 (effective for 1972 and thereafter) the amount allocable to contributions made by the judge is not subject to tax; the remainder is subject to tax as ordinary income.

Judges who retire subsequent to July 1, 1970, receive benefits under the provisions of the Judicial Retirement Act, Chapter 7 of Title 51 (§ 51-160 et seq.) of the Code of Virginia. As § 51-160 incorporates by reference the provisions of the Virginia Supplemental Retirement Act, all benefits paid under the Judicial Retirement Act are exempt from State taxation under § 51-111.15. This exclusion is continued after conformity to the federal income tax in 1972 by § 58-151.013(c)(3)(A).

Under §§ 402 and 72 of the Internal Revenue Code, the pensions of judges retiring before or after July 1, 1970, are subject to federal tax as ordinary income to the extent that they do not represent contributions by the judge.

In my opinion there should be no differentiation for tax purposes between payments received before July 1, 1970, and those received after that date by a judge who retired prior to that date.

TAXATION—Land Books—What matters to be shown separately.

November 17, 1971

THE HONORABLE CHARLES F. WHITE, JR.
Commissioner of the Revenue for Hanover County

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

"Section 58-805 of the Code of Virginia indicates that there should be a line on the land book for each deed recorded.

"A corporation in the Town of Ashland owns approximately eight lots recorded under five deeds upon which a shopping center has been built and occupies more than one of these lots.

"My question is: Can these lots be combined on one line on the land book? If the answer is yes, would it also apply to similar situations in the county?"

In prescribing matters to be shown separately in the land book in § 58-804 of the Code, subsection (e) thereof provides:

"Whenever a tract of land has been subdivided into lots under any provision of general law and plats thereof have been recorded, each lot in such subdivision shall be assessed and shown separately upon the books." (Emphasis supplied.)

Section 58-805 provides in relevant part:

"In the table of town or city lots the commissioner of the revenue shall enter separately each lot and shall set forth in as many separate columns as may be necessary the name of the person, his residence and estate, as in the table of tracts of land." (Emphasis supplied.)
When the word "shall" appears in a statute, it is generally used in a mandatory sense. Schmidt v. City of Richmond, 206 Va. 211 (1965). The above statutes use mandatory language in requiring that each lot be separately assessed and shown separately in the land book. In my opinion, your first question must be answered in the negative.

TAXATION—License Tax—Agricultural fairs.

March 20, 1972

THE HONORABLE CALVIN W. FOWLER
Member, House of Delegates

I have received your recent letter requesting a construction of Virginia Code § 58-284. That section imposes a license tax of $1,000 per performance upon every "traveling circus, carnival or show giving performances in this State, in the open air or in a tent or tents, in any city or county or in any town or city within such county within fifteen days previous to, or during the week of, or within one week after the time of holding, any agricultural fair in any such city or county in this State . . . ." I shall answer your questions seriatim:

1. "What constitutes agricultural fairs?"
   At issue in State v. Long, 28 N.E. 1038 (Ohio 1891) was a criminal statute prohibiting the sale of intoxicating liquors, "within two miles of the place where any agricultural fair is being held." The court held that the exposition at issue was an "agricultural fair," saying:
   "It is true that the primary, and we may say the etymological, meaning of the work 'fair' simply embraces a market for the buying and selling of such articles as may be exhibited; but it is also true that it is now more generally used to designate an exposition where the industrial products of a people are exhibited as a display of the success, workmanship, and art of the exhibitors, and to obtain such premiums as may be paid by the owners of the fair as a reward of excellence . . . ." Id. at 1039.

   The Virginia statute, however, must be read in the context of the preceding code sections. Virginia Code § 58-278 exempts from such tax "any agricultural fair or the shows exhibited within the grounds of such fair or fairs, during the period of such fair . . . ." Section 58-280 states that § 58-279 shall not be construed to exempt any person "other than a bona fide local association or corporation organized for the principal purpose of holding and which holds legitimate agricultural exhibitions or industrial arts exhibits . . . ." In my opinion, the definition set forth in State v. Long must be qualified for the purposes of § 58-284 by the additional requirement that the fair be held by a bona fide local association or corporation organized for the principal purpose of holding and which holds legitimate agricultural or industrial arts exhibits.

2. "Is more than one agricultural fair permitted within a county or city at the same time?"
   I am aware of nothing which would prohibit two or more agricultural fairs from being held within a county or city at the same time.

3. "How is priority determined as between two agricultural fairs being held at the same time or within fifteen days of each other?"
   In my opinion, it is not necessary for there to be any priority as between agricultural fairs.

4. "Would the $1000 per performance additional license tax and also the $2000 fine be applicable if two agricultural fairs were held within the same
REPORT OF THE ATTORNEY GENERAL

county at the same time or within fifteen days prior to or within one week after another agricultural fair in the same county?"

The last sentence of § 58-284 provides that it shall not apply to "circuses, carnivals or shows inside the grounds of any agricultural fair held in any county or city." Nothing in this section would cause it to apply to one agricultural fair merely because another was being held at the same time. The section would continue to apply to other circuses, carnivals and shows if they operate within the stated time limits of either agricultural fair.

TAXATION—License Tax—Commission merchant.

TAXATION—License Tax—Retail merchant.

THE HONORABLE FRANK M. SLAYTON
Member, House of Delegates

I have received your recent letter in which you ask, on behalf of the City Manager of South Boston, several questions under the following facts:

"A local business firm, who for years has obtained a retail merchant's license, advises that they are now receiving all goods on consignment only and the firm receives only a commission on the merchandise sold. The cost of labor, heat, light, rent, etc., is paid for out of the commission."

Your first ask:

"Would you interpret the conduct of this business as a commission merchant who would pay on gross receipts of commissions only based on the usual and accepted definition of a commission merchant?"

Commission merchants fall within a separate classification for purposes of State taxation. Va. Code § 58-293. This classification is binding on the city of South Boston. Hill v. Richmond, 181 Va. 744 (1943). Prior to the repeal of the State retail merchant's license tax, Virginia Code § 58-338 provided:

"Goods, wares and merchandise not belonging to a merchant which are offered for sale by the merchant or by another person at the merchant's duly licensed place of business shall require such merchant to take out the license of a commission merchant."

In my opinion, the repeal of the State retail merchant's license tax did not affect the State taxation of commission merchants. Accordingly, I am of the opinion that the business described by you should be taxed by the State, and by any locality desiring to impose such a tax, as a commission merchant.

You also ask:

"If the operator of the business obtains only a license as a commission merchant then would not the supplier of the merchandise have to pay a license tax based on total gross receipts as a retail merchant?"

The commission merchant described by you can only sell as an agent of his principal. Through him the principal is engaged in the business of a retail merchant and, unless constitutionally exempt, is subject to the South Boston retail merchant's license tax.

TAXATION—License Tax—Sales made and delivered to customers outside of State excluded.
THE HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

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

"Where a Town imposes a 'business license' on a wholesale bulk gasoline and oil distributor located within the Town, based on a percentage of gross sales, may the Town, in computing the tax, include those sales made and delivered to customers outside of the State of Virginia?

"If the State into which these sales are delivered imposes a tax computed on gross sales in that particular state, does that affect the answer to the above?"

The license tax mentioned in your letter is imposed by the town pursuant to § 58-266.1 of the Code of Virginia. However, it is my opinion that, in computing the tax, sales made and delivered to customers outside of the State of Virginia should be excluded. The United States Supreme Court has held that the inclusion of such sales in the computation of a license tax constitutes an undue burden upon the regulation of interstate commerce. Crew Lerick Co. vs. Pennsylvania, 245 U.S. 292 (1917). In view of the conclusion reached herein, it becomes unnecessary to consider your second question.

TAXATION—Licenses—Business—When taxpayer considered a beginner.

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

I have received your letter of July 13, in which you ask whether an established concern located in the recently annexed area of the City of Richmond may be classified as a "beginner" for city license tax purposes.

Section 37-101 of the Richmond City Code requires that persons beginning a business purchase a license on the basis of estimated receipts and that an adjustment be made at year end. The effect of this method of taxation is to tax the first year of operations on actual receipts for the year, while each subsequent year is taxed on the preceding year's receipts. If receipts are increasing, the tax is proportionately greater on the first year's operation than on those of subsequent years.

Section 37-101 was recently interpreted by the Virginia Supreme Court in Cliff Weil, Inc. v. Richmond, 211 Va. 575 (1971) (The ordinance was referred to in the opinion as § 37-99). The Court determined that the purposes of the ordinance was, "to insure that license taxes will be paid for each year the [taxpayer] is in business." Id. at 577. The Court held that the particular tax in question was based on purchases, "made at the location for which the license is issued. . ." Ibid.

A taxpayer doing business at an established location is not, in my opinion, made a beginner when his business first becomes subject to the jurisdiction of the City of Richmond. Any required tax can be based on actual transactions at that particular location, to the same extent as other comparable businesses which have been within the city limits. If, however, a taxpayer is unable satisfactorily to prove his transactions for the preceding year, I believe that the city would be justified in treating the taxpayer as a beginner.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Licenses—Commission merchants liable for tax.

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

December 21, 1971

I have received your letter of December 9, in which you ask whether a commission merchant licensed under Title 3.1, Chapter 26, Article 2, of the Code of Virginia may also be required to be licensed under Virginia Code § 58-293. The first of these provisions is for regulatory purposes, the only charge being a ten dollar license fee; the second is for revenue purposes, imposing a graduated license tax. In my opinion, a commission merchant required to be licensed under Title 3.1 remains liable to the tax imposed by § 58-293.

TAXATION—Licenses—RNB Farm Loan Corporation, no State statute to prohibit agricultural credit corporations from being licensed; when Production Credit Associates may be exempt from license taxes.

THE HONORABLE VICTOR J. SMITH
Commissioner of the Revenue for the City of Harrisonburg

December 6, 1971

I have received your recent letter of November 30, 1971, from which I quote:

“Approximately two years ago the Rockingham National Bank created a wholly owned subsidiary titled RNB Farm Loan Corporation. This corporation makes agriculture loans only. It is operated by the bank officers on the premises of the main office. One of the bank officers informed me that the corporation obtains their financing from the Federal Production Credit Administration. The corporation has a capital structure of $300,000.00.

“The corporation is chartered by the State Corporation Commission.

“There is a similar lending institution in Harrisonburg called the Production Credit Association which has been operating in Harrisonburg for a number of years. We have not licensed this agency under either state or city licensing statutes because they claim they are an instrumentality of the Federal Government.

“Would your office please check the charters of the two lending institutions mentioned above and let me know whether they should be licensed, and if so, under which state statute or city ordinance; or if their operation is exempt as a federal instrumentality.”

The Articles of Incorporation of the RNB Farm Loan Corporation provide, in part, as to the corporate purposes:

“(b) To obtain money as an agricultural credit corporation pursuant to an act of Congress of March 4, 1923 (42 Stat. 1454) and all amendments thereto. . . .

* * *

“However, this corporation shall not carry on the business of a banking corporation, trust company, insurance corporation, building and loan association, credit union, or industrial loan association.”

Federal law (12 U.S.C.A. § 548) allows state legislatures to impose or authorize its political subdivisions to impose certain license taxes on national banks. However, the RNB Farm Loan Corporation is not a national bank. National banks are chartered by the federal government and are engaged in the banking business. These criteria do not apply to this corporation which is an agricultural credit corporation.
With reference to State licenses, § 58-239, Virginia Code (1950), provides:

"When a license is required to engage in business; may be granted whenever tax imposed.—Whenever a license is specially required by law and whenever the General Assembly shall levy a license tax on any business, employment or profession, it shall be unlawful without a license to engage in such business, employment or profession. In all cases in which such tax is imposed, it shall be lawful to grant a license for the business, employment or profession so taxed."

The General Assembly has not seen fit to levy a State license tax on banks or on agricultural credit corporations.

Section 58-266.1, Virginia Code (1950), authorizes cities, towns, and counties to impose license taxes, regardless whether any license tax has been imposed by the State or not, "on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein," subject to certain limitations not relevant to this opinion. I find no State statute which would prohibit a city, town, or county from requiring a local agricultural credit corporation from being licensed, provided the locality adopts an ordinance which, by its terms, would include local agricultural credit corporations. Although local agricultural credit corporations obtain money from the federal government, via the Farm Credit Administration pursuant to 12 U.S.C.A. § 1401 et seq., there is no federal statute purporting to exempt such corporations. In my opinion, local agricultural credit corporations are not federal instrumentalities.

Production Credit Associations may be exempt from license taxes pursuant to 12 U.S.C.A. § 1138c which provides:

"The Central Bank for Cooperatives, and the Production Credit Associations, and Banks for Cooperatives, organized under this chapter, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks or associations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks or associations, their property, their franchises, capital, reserves surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks or associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the Governor has been retired, or with respect to any bank for cooperatives or its property or income after the stock held in it by the United States has been retired." (Emphasis supplied.)

Production Credit Associations are chartered by the Governor of the Farm Credit Administration, an agency of the United States government. Pursuant to 12 U.S.C.A. § 1131e, the Governor is required, upon the organization of such associations, to hold class A stock therein. The Governor may also purchase class C nonvoting preferred stock. 12 U.S.C.A. § 1131e-1. However, once such class A stock held in a Production Credit Association by the Governor of the Farm Credit Administration has been retired, the exemption from license taxes provided by 12 U.S.C.A. § 1138c does not apply. Montana Live Stock Production Credit Ass'n v. State, 143 Mont. 578, 393 P.2d 50 (1964).
There is no State license tax on a Production Credit Association. In my opinion, a locality could, by ordinance adopted pursuant to § 58-266.1, provide for the licensing of Production Credit Associations after the class A stock held in them by the Governor of the Farm Credit Administration has been retired. An ordinance generally requiring licensing of all businesses in the locality would be sufficient to include agricultural credit corporations and Production Credit Associations, the class A stock of which held by the Governor has been retired.

TAXATION—Local License Tax—Gross receipts tax base does not include federal gasoline tax, State motor fuel tax or retail sales tax, collected by vendor.

THE HONORABLE FRANK M. SLAYTON
Member, House of Delegates

I have received your letter of December 29, with respect to the South Boston merchants' business license tax. That tax is imposed upon gross receipts, which are defined in § 17-1 of the City Code:

"Subject to the conditions, exception, deductions and exemptions set out below, the term 'gross receipts' shall mean the gross receipts 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, without any deduction therefrom on account of cost of the property sold, the cost of materials, labor or services, rentals, royalties, interest or discounts paid or any expense whatsoever, and shall include, in the case of merchants, the amount of the sale price of supplies and goods furnished to or used by the licensee or his family or any person for which no charge is made or for which a charge less than the prevailing sale price is made."

You ask whether the tax base of an oil distributor includes the State motor fuel tax, the federal gasoline tax and the Virginia retail sales tax received by him on the sale of his merchandise.

As the South Boston tax has been imposed at the rate of twenty cents per one hundred dollars of gross receipts since 1964, it is not subject to the limitation of five cents per one hundred dollars of purchases under Virginia Code § 58-441.49(a).

In Straus Beverage Corp. v. Commonwealth, 185 Va. 1055 (1947), the Virginia Supreme Court distinguished between including such taxes in purchases and including them in gross receipts, stating in part:

". . . Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908, holds that in the case of retail sales direct from producer to consumer, it was not proper to assess the sales tax payable by the producer on the federal excise tax collected from the consumer, 'in view of the fact that the federal excise tax and the State sales tax attach at the instant a sale is made,' and, 'the federal tax has not become a part of the sale price, but is a fund, which when collected is payable by the manufacturer to the federal government.' That tax was not money the producer got for what he sold. The tax here is money the defendant paid for the beer he bought." 185 Va. at 1065.

The State motor fuel tax (Va. Code § 58-711) and the federal gasoline tax (26 U.S.C. § 4081) are transactional taxes which may be imposed at several levels. If the tax is paid by the distributor directly to the federal or State government, it is imposed on the sale by the distributor and should
not be included in his gross receipts. If, however, the tax is paid by the distributor as a part of the purchase price of his inventory, the tax was imposed on an earlier transaction and any amount received by the distributor on account of the tax should be included in his gross receipts. The Virginia retail sales tax is imposed on the retail sale (Va. Code § 58-441.4) and collected from the purchaser (Va. Code § 58-441.18); any amount so collected should not be included in a distributor's gross receipts.

TAXATION—Local License Tax—Limitation of power; no county may levy a valid license tax upon the gross receipts of a telephone company.

November 30, 1971

THE HONORABLE RALPH T. CATTERALL
Commissioner, State Corporation Commission

I have received a letter, dated November 15, 1971, and signed by A. Grey Staples, Jr., in which the State Corporation Commission requests my opinion as to the legality of local license taxes upon the gross receipts of telephone companies.

In 1955, the Virginia Supreme Court held that Virginia Code § 58-266.1 permitted localities to impose a license tax upon the gross receipts of telephone companies. *Chesapeake and Potomac Tel. Co. v. Newport News*, 196 Va. 627 (1955). Two years later the Court decided that any such local tax could be passed on to the consumers of the telephone service to the extent that the tax exceeded one-half of one percent of a telephone company's gross receipts. *Newport News v. Chesapeake and Potomac Tel. Co.*, 198 Va. 645 (1957).

The first of these two cases rested upon the city's charter, which conferred on the city board general taxing powers, and upon Virginia Code § 58-266.1, which then provided:

"In addition to the State tax on any license, as hereinbefore and hereafter provided for in this chapter, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same and require a license to be obtained therefor; and in any case in which they see fit they may require from the person licensed a bond, with sureties, in such penalty and with such condition as they may deem proper or make other regulations concerning the same."

In 1964, the following limitation was first added to § 58-266.1:

"(1) No city, town or county shall levy any license tax . . . on any public service corporation except as permitted by other provisions of law. . . ." 1964 Acts of Assembly, Ch. 424.

Virginia Code § 58-603(2) is an example of another provision of law, permitting cities and towns to impose limited local gross receipts taxes upon water or heat, light and power companies. Of course, § 58-587.1 permits most localities to impose taxes upon the consumers of telephone services.

The 1964 amendment also extended § 58-266.1 to counties; theretofore it had applied only to cities and towns. By its express terms, it now applies to all cities, towns and counties. Sections 58-266.2 and 58-266.3 of the Code, which had been the source of power for certain counties to impose license taxes, were retained without change. In 1966, this office stated, "To the extent that § 58-266.2 authorized certain counties coming within the classification therein set forth to levy license taxes, its provisions are no longer necessary." Report of the Attorney General (1965-1966), p. 274. In this respect, it should be noted that §§ 58-266.2 and 58-266.3 permit only those license taxes not "prohibited by general law." Section 58-266.1 applies to
all cities, towns and counties and, as such, is general law which would, except for § 58-266.1(7), control over §§ 58-266.2 and 58-266.3.

As no other provision of our Code permits the imposition of a license tax upon telephone companies, I am of the opinion that no county may levy a valid license tax upon the gross receipts of a telephone company. The only question remaining is whether the general taxing powers accorded cities and towns by their charters constitute, "other provisions of law," within the meaning of § 58-266.1(1). As I have not examined the charter of each city and town in this Commonwealth, this opinion must necessarily apply only to cities and towns having charter powers no more specific than the charter of Newport News. The Newport News chapter was described by the Court in the first of the two cases described above:

"Section 104 of the City Charter authorizes the Council of the City to levy taxes 'annually' by assessments 'on all subjects not withheld from city taxation by the state and such subjects as have been, or may be, segregated to the city by the state, for the purpose of taxation,' * * *,' and 'in such manner as it shall deem expedient (in accordance with the laws of this state, and of the United States); * * *.' Both the method of assessment and the time within the year when the assessment may be made are left to the discretion of the City Council.

"The subsequent section, 105, confers the right to levy taxes upon specific subjects 'and upon all other businesses and pursuits upon which a license tax is levied by the state and such other businesses as may be lawful.'" 196 Va. at 633.

Broad charter provisions occupy a status inferior to specific provisions of our Code. As was said in Richmond v. Valentine, 203 Va. 642 (1962), at 645:

"The argument for the city that it has power to impose license taxes upon all business not specifically exempted by constitution or statute is not correct. The power may be denied by necessary implication as well. Municipal corporations have no powers of taxation unless the power is plainly conferred, and laws conferring such powers must be strictly construed. [Citations omitted.]"

I do not construe the type of provision found in the Newport News charter as being an "other provision of law" within the meaning of § 58-266.1(1). To the extent that such charter provisions confer an independent power to tax, that power is limited by § 58-266.1. In my opinion no city or town may levy a valid license tax upon telephone companies, unless expressly authorized to do so by specific language in its charter.

TAXATION—Local Lodge Hall; Ruritan National, Inc.; Volunteer Fire Department—What property is tax exempt.

November 10, 1971

THE HONORABLE EDWARD A. EBANK
Commissioner of the Revenue for King & Queen County

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

"Enclosed you will find a copy of a letter we received from one of our taxpayers. With reference to this, we would appreciate your opinion as to the ruling of the taxation of such property. It is mentioned in the letter that the Lodge Hall is located on church property. However, our records at the Court House indicate that this land (% ac.) belongs to the Lodge. The Lodge Hall is used exclusively
for Lodge purposes and no revenue is received for the use of the building."

Your letter does not indicate the nature of the lodge in question. In order to be exempt from taxation it must be more than a social club; it must be a "benevolent or charitable association." If this lodge is such an association and does not provide death, sickness or accident benefits, it is exempt under Virginia Code § 58-12(6).

You also ask:

"We would also like to know whether or not real estate and personal property of our local King & Queen Ruritan organization is taxable. No revenue is received for the use of this building either."

Property belonging to local affiliates of Ruritan National, Incorporated is exempt under Virginia Code § 58-12(7).

You also ask:

"Another question of concern is a parcel of land (¼ ac. with building) used exclusively by the Upper King & Queen Volunteer Fire Department. This parcel of land is owned by an individual taxpayer and the building was erected by the Volunteer Fire Department. Is such property taxable to the landowner or exempt from taxation?"

Property owned by an individual is not made exempt merely because it is used by an exempt organization. The building became part of the real estate when it was erected. In my opinion, both the building and the land are subject to local real property taxes.

TAXATION—Manufacturer—Dental laboratory not operated in connection with own dental practice is a manufacturer.

August 17, 1971

THE HONORABLE ALMA LEITCH
Commissioner of the Revenue for the City of Fredericksburg

I have received your recent letter in which you ask whether a dental laboratory should be considered a manufacturer within the meaning of Virginia Code §§ 58-266.1 and 58-412.

In my opinion a dental laboratory, not operated by a dentist in connection with his own dental practice, is a manufacturer within § 58-266.1 and 58-412.

TAXATION—Massanetta Springs, Inc. — Purchases of tangible personal property taxable.

October 26, 1971

THE HONORABLE WILLIAM DUDLEY
Member, House of Delegates

I have received your recent letter in which you ask whether Massanetta Springs, Inc., a nonprofit corporation operated by the Synod of Virginia, Presbyterian Church in the United States, qualifies as an institution of learning so as to exempt its purchases from the Virginia retail sales and use tax under Virginia Code § 58-441.6(t). You have attached a copy of a letter from the Executive Director of this organization who has detailed the activities thereof as follows:

"1. We were chartered by the State of Virginia in 1922 in the field of religion and education.
"2. Our campus is designed as an educational institution. Our students are housed, fed and taught in buildings on the campus. We have eighteen class rooms set up for educational purposes, with blackboards, tables, chairs, and audio-visual equipment. The periods for the schools, workshops and training sessions vary from a one-day school to a two-week school. Each group brings qualified faculty members, many of whom are college and seminary professors, who teach courses of study.

"3. Our parent body, The Synod of Virginia, considers us in the educational field, and we report through the Christian Education Committee.

"4. The rating bureau of Fire Insurance Companies classifies us as a school.

"5. Several agencies of the State of Virginia conduct schools and training courses at Massanetta:
   a. The State Department of Education conducts a Music Camp which is a continuation of the Public School Music Program in the State. The faculty members who attend are teachers in the public school system and receive college credit from Madison College.
   b. The F.B.L.A. and Distributive Education Departments of the State Board of Education hold schools at Massanetta each summer.
   c. The State Board of Health has used our facilities for training sessions, as have the State Mental Hospitals.

"6. The Bible Conference and School for Pastors is a highly specialized program of continuing education for pastors. The following workshops, all taught by college or seminary professors, will be held this summer:
   a. Church Music Workshop
   b. Workshop on Television, Radio and Audio-Visuals
   c. Workshop on Worship
   d. Workshop on Pastoral Counseling

"7. The Women's Training School has courses of study and faculty members, and it issues credit.

"8. All our youth conferences have faculty members and courses of study and are considered training sessions."

Section 58-441.6(t) exempts from the retail sales and use tax the following:

"Tangible personal property for use or consumption by a college or other institution of learning . . . provided such college, institution of learning . . . is not conducted for profit."

The Department of Taxation has promulgated the following rule defining "college or other institution of learning":

"The term 'college or other institution of learning' contemplates the existence of a faculty, a student body and prescribed courses of study. The 'other institution of learning' must be something like a college under a rule of statutory construction generally applicable where general words follow a particular designation." (Virginia Retail Sales and Use Tax Rules and Regulations, § 1-96(a), (July 1, 1969).)

This definition has been approved by the Circuit Court of Arlington County in Girl Scout Council of the Nation's Capital v. State Tax Commissioner (January 8, 1971), (Writ of Error denied).

Based upon the factual situation presented, it is my opinion that Massanetta Springs, Inc., does not qualify as an institution or learning and its purchases of tangible personal property are taxable. This institution provides facilities for educational purposes, but the students and faculty are
primarily associated with other educational institutions or agencies. Massanetta Springs, Inc., does not appear to be an educational institution employing its own faculty, having its own student body, or prescribing required courses of study.

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TAXATION—Microphotographed Tax Tickets—When paid tax tickets may be destroyed.

August 19, 1971

THE HONORABLE ELSA B. ROWE
Treasurer of Northumberland County

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

“In 1969, under Section 58-919.1 of the Code of Virginia, we microphotographed paid tax tickets for the year 1965 and all prior years on file in the treasurer's office and have purchased a film reader for this office.

“Please advise me the latest year that these tickets which have been microphotographed may now be destroyed.”

Section 58-919.1 deals with the destruction of tax tickets. It does not contemplate copying to be done before the year of destruction. Nevertheless, I am of the opinion that copies made before the year of destruction need not be made again in the later year. Section 58-919.1 would permit you to destroy all paid 1965 tax tickets, microphotographed in 1969, in 1971 or thereafter.

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TAXATION—Mobile Homes—County may not impose license tax directly upon owners; mobile homes in classification of their own.

December 21, 1971

THE HONORABLE D. FRENCH SLAUGHTER, JR.
Member, House of Delegates

I have received your letter of December 16, in which you ask whether Culpeper County may impose a license tax upon the owners of trailers or mobile homes.

Virginia Code § 35-64.1 permits the county to impose such a tax upon the operators of trailer camps and trailer parks, as those terms are defined in Virginia Code § 35-64.3, and upon persons who park trailers on individual lots not in trailer parks or camps. Although the county may provide for the “collection” of the tax, it may not, in my opinion, require the tax to be passed on to the owners of trailers, for the tax would then be a local general sales or use tax prohibited by Virginia Code § 58-441.49. I am unaware of any authority which would give Culpeper County the right to impose a license tax directly upon the owners of trailers or mobile homes parked in trailer parks or camps. Accordingly, I am of the opinion that the county may not levy such a tax.

You also ask whether special legislation allowing Culpeper County to impose such a tax would be constitutional. Such legislation was prohibited by Section 63 of the pre-1971 Virginia Constitution. That section is carried over as Article IV, Section 14, of our revised Constitution, but the General Assembly may now provide by special act for a county's powers of legislation, taxation and assessment. Article VII, Section 2, of the revised Constitution of Virginia. Such an act will, however, require an affirmative vote of two-thirds of the members elected to each house of the General Assembly. Article VII, Section 1, of the revised Constitution of Virginia.
You also ask whether mobile homes are taxed as real estate or as tangible personal property. In the enclosed opinion, dated August 2, 1971, to the Honorable John A. Davies, I held that mobile homes are in a classification of their own, separate from either real or personal property, but subject to the limitation that the rate of tax shall not exceed the personal property tax rate.

**TAXATION—Mobile Homes on Permanent Foundations—Remain within classification of § 58-829.3.**

August 2, 1971

**THE HONORABLE JOHN A. B. DAVIES**

Commissioner of the Revenue for Culpeper County

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

"A few years ago the Attorney General's Office ruled that mobile homes or house trailers were tangible personal property. This was a case whether they were on wheels or placed on permanent foundation.

"I would appreciate your opinion on this which will be a help to me in making my assessments."

This office has ruled that mobile homes do not lose their identity as such, merely by having their wheels removed and being placed on permanent solid masonry foundations. See Report of the Attorney General (1967-1968), p. 291.

Article X, Section 1, of the Virginia Constitution empowers the General Assembly to define and classify taxable subjects. Pursuant to this power, the General Assembly has classified mobile homes as a separate subject of taxation, subject only to the qualification, "that the rate of tax shall not exceed that applicable to other classes of tangible personal property." Va. Code § 58-829.3.

The Internal Revenue Service has recently held certain mobile home units to be "real property" within the meaning of I.R.C. § 856. Rev. Rul. 71-220, 1971-19 I.R.B. 58. The application of the criteria laid down by our Supreme Court in *Transcontinental Gas Pipe Line Corp. v. Prince William County*, 210 Va. 550 (1970), would lead to the conclusion that some mobile homes have become real property. Nevertheless, the General Assembly's exercise of its constitutional power to classify renders the real property/personal property distinction irrelevant for property falling within § 58-829.3. The initial question must be whether a particular unit falls within the statute.

In my opinion, a mobile home remains within the classification of § 58-829.3 even though its wheels are removed and it is placed on a permanent foundation. See Report of the Attorney General (1969-1970), p. 293.

**TAXATION—Modular Homes—Not classified as mobile homes; treated as real estate for property tax purposes.**

November 5, 1971

**THE HONORABLE W. KENDALL LIPSCOMB, JR.**

Commonwealth's Attorney for New Kent County

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

"Several modular type homes have recently been erected in New Kent County, as well as in other counties. The popularity of this type of factory constructed home will no doubt increase in the future.

"The modular home to which I am referring is built in a factory and transported on a flat-bedded truck, in two sections, to the con-
struction site where it is placed on the foundation by a crane. The unit has no chassis, no wheels or axles and no device to allow it to be connected directly to a motor vehicle for transporting from one place to another. The interior is finished at the factory similar to a mobile home, including bath, kitchen, carpets, cabinets, wall paneling, etc. Once placed on the foundation on the site, the two sections are connected along the roof and walls, but they can be disconnected and moved by truck if necessary. Once connected and attached to the foundation, it is very difficult to distinguish it from a home constructed completely on the site. However, some of the modular units do have an aluminum siding similar to a mobile home.

"This fairly recent development in the building industry has raised several legal questions under state law and local ordinances. The Board of Supervisors and other County officials have requested that I submit some of these questions to you for your comment:

"1. Prior rulings have held that a trailer or mobile home remains personal property for taxation purposes even after it is attached to a permanent foundation. Should modular homes as I have described above be treated as real estate or personal property for taxation purposes?

"2. New Kent County has a zoning ordinance similar to other counties which restricts trailers and mobile homes to specifically zoned areas and requires conditional use permits. Would these zoning restrictions apply to modular homes?

"3. New Kent County also has a trailer park or mobile home park ordinance which in addition to having many requirements concerning development of a park also imposes a tax of $4.00 per month, payable quarterly, on trailers or mobile homes whether located in a park or on an individual lot. Would these requirements concerning development of a park apply to a subdivision of modular units or would the regular subdivision ordinance apply? Would these modular units be subject to the monthly tax?"

In my opinion, modular homes, as you describe them, are buildings which, after they have been connected and attached to the foundation, must be treated as real estate for property tax purposes. They cannot be classified as mobile homes since they are not "vehicles without motive power" as expressed in § 58-829.3 of the Virginia Code. With reference to property taxation of mobile homes, see my recent opinion of August 2, 1971, attached hereto.

Concerning your second question, the zoning ordinance separately defines modular homes, mobile homes, and travel trailers. Modular homes are not designed for regular transportation on the highways whereas mobile homes and travel trailers can be so designed according to the definitions contained in the ordinance. Therefore, modular homes are not encompassed within the ordinance's provisions applying specifically to mobile homes or travel trailers.

With reference to your last question, trailers and trailer camps are defined in § 35-64.3 of the Code, which definition is also included in the ordinance defining mobile homes and mobile home parks, and modular homes do not fit these definitions of trailers and mobile homes because they are not "vehicles" for use as a conveyance upon highways. The county's authority to impose the license tax of $4.00 per month is contained in § 35-64.1. In my opinion, no authority exists in § 35-64.1 to subject modular homes to the tax. Since the county's ordinance defines a mobile home park to mean land upon which is located two or more mobile homes or which is held out for the location of any such mobile home and since modular homes are not mobile homes, the county's regular subdivision ordinance applies to modular homes, and the mobile home ordinance is inapplicable.
TAXATION—Penalty and Interest on Unpaid Taxes—When charged and collected.

July 21, 1971

THE HONORABLE J. H. JOHNSON
Treasurer, City of Roanoke

I have received your letter of July 16, in which you ask:

"1. Can the Roanoke City Treasurer legally impose a 10% penalty for the nonpayment of 1972 personal property taxes prior to December 6, 1972?"

Chapter 193 of the 1971 Acts of Assembly, effective March 16, 1971, amended Virginia Code § 58-847 to permit localities to, "provide by ordinance penalties for failure to file such returns and for nonpayment in time . . ." The penalty may not exceed the greater of ten percent of the tax due or two dollars. On June 28, 1971, the Roanoke City Council adopted ordinances effective January 1, 1972, imposing a penalty equal to the greater of ten percent of the tax assessable or two dollars. In my opinion, you should assess penalties on personal property taxes in accordance with the ordinances.

You also ask:

"2. Can the Roanoke City Treasurer legally charge and collect interest on unpaid 1972 personal property taxes, including penalties, prior to July 1, 1973?"

Virginia Code § 58-847, as amended, permits localities to "provide for payment of interest on delinquent taxes at a rate not greater than eight percent per annum commencing not earlier than January first of the year next following that for which such taxes are assessed." On June 28, 1971, the Roanoke City Council adopted ordinances imposing interest at the rate of eight percent per annum from January 1, 1972, on delinquent taxes. In my opinion you should charge and collect interest at the rate prescribed by the ordinances. Interest on unpaid 1972 personal property taxes will begin to run on January 1, 1973.

TAXATION—Personal Property—Automobile owned by serviceman domiciled in another state may not be taxed in Virginia.

November 10, 1971

THE HONORABLE RUTH R. ST. CLAIR
Commissioner of Revenue for the City of Radford

I have received your recent letter in which you ask:

"The wife of a serviceman, now stationed in Saigon, resides in the City of Radford. She has in her possession an automobile which is registered in her husband's name. She came to this office and advised that since neither her nor her husband are legal residents of the State of Virginia, they are not subject to personal property tax. Since that time I have been corresponding with her husband, and I submit copies of his letters, one of which states he is making a claim for exemption under the Soldiers' and Sailors' Civil Relief Act. My question is, since his wife has established a residence in this City, is gainfully employed at Radford College, uses this automobile on a regular basis in this City, and enjoys the protection of our Police and Fire Departments, is the assessment of personal property tax lawful?"

The personal property tax in Virginia is based on ownership, not use. See Va. Code § 58-20. The Soldiers' and Sailors' Civil Relief Act precludes
the taxation of personal property belonging to a serviceman by any juris-
diction other than his home state. 50 USC § 574. In my opinion, an auto-
mobile owned by a serviceman domiciled in another state may not be taxed
in Virginia, even though it is used in Virginia by the serviceman's wife.

TAXATION—Personal Property—Conscientious objector performing civil-
ian work under local draft board orders is not exempt under the
Soldiers' and Sailors' Civil Relief Act.

June 27, 1972

THE HONORABLE ORA A. MAUPIN
Commissioner of the Revenue for the City of Charlottesville

I have received your letter of May 1, 1972, from which I quote:

"We have a former graduate student of the University, claiming
the State of Rhode Island as legal residence and who was ordered
by the Rhode Island Local Board Alternate Service to report to the
University Hospital for two years of Civilian Alternate Service in
fulfillment of his status as a Conscientious Objector.

"He is residing within the corporate limits of the city of Char-
lottesville and has a 1970 Toyota automobile valued at eight hundred
and seventy-five dollars, ($875.00).

"My question, does he take the same status as a person stationed
in Charlottesville under the provisions of the Soldier's and Sailor's
Civil Relief Act, Section 514, which exempts them from the payment
of personal property taxes to the City of Charlottesville, providing
they are claiming Rhode Island as state of legal domicile."

The Selective Service Act of 1967, as amended, 50 U.S.C.A. App. § 456,
provides that any person found to be conscientiously opposed to participa-
tion in noncombatant service, in lieu of induction, may be ordered by his
local draft board to perform civilian work contributing to the national
health, safety or interest.

The Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50
U.S.C.A. App. § 510, in indicating the purpose of the Act, states that it
provides for supervision of enforcement of civil liabilities of persons in the military service of the United States. Section 511 defines such persons as
follows:

"(1) The term 'persons in military service' ... as used in this
Act shall include the following persons and no others: All members of
the Army of the United States, the United States Navy, the
Marine Corps, the Coast Guard, and all officers of the Public Health
Service detailed by proper authority for duty either with the Army
or the Navy. The term 'military service,' as used in this Act, shall
signify Federal service on active duty with any branch of service
heretofore referred to or mentioned as well as training or education
under the supervision of the United States preliminary to induction
into the military service."

It readily appears from the above excerpts that a conscientious objector
does not come within the preview of the Soldiers' and Sailors' Civil Relief
Act of 1940, as amended. Accordingly, I am of the opinion that such person
is subject to the same local personal property tax as any other civilian
similarly situated. This is in accord with a previous opinion rendered by
this office concerning exemption of a conscientious objector from the motor
p. 211.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Personal Property—Motor vehicles operated by students taxable by locality in which student resides during school year.

June 22, 1972

THE HONORABLE ROBERT H. WALDO
Commissioner of the Revenue for the City of Chesapeake

I have received your letter of May 18, 1972, inquiring whether a locality may assess its personal property tax against the owner of an automobile operated within its jurisdiction by a student during the school year (September-May) although the student’s permanent residence is located in another locality. You refer to an opinion to the Honorable W. P. Parsons, Commonwealth’s Attorney for Wythe County, dated December 13, 1967, and found in Report of the Attorney General (1967-1968), p. 166. That opinion was written in response to a letter indicating a temporary presence of the student in Charlottesville. The opinion was written to apply to a casual, incidental or temporary sojourn and not to a student in attendance for the full school year. It was superseded by another opinion to the same individual after it became apparent that he had intended to inquire regarding presence for the full school year. See Report of the Attorney General (1968-1969), p. 242. This office remains in accord with the proposition that an automobile operated by a student during the full school year within a jurisdiction wherein he resides while attending school is reportable for personal property tax purposes to that jurisdiction.

The opinion to the Honorable John W. Ferguson, Supervisor of Assessments, County of Fairfax, dated August 14, 1967, and found in Report of the Attorney General (1967-1968), p. 277, is in conflict with this ruling and should no longer be followed.

Section 58-834, Code of Virginia (1950), as amended, which states the situs for taxation of tangible personal property was interpreted in Hogan v. County of Norfolk, 198 Va. 733, 735, 96 S.E.2d 744, 746 (1957), as follows:

“The situs for taxation as used in this statute means something more than simply the place where the property is. It does not mean property which is casually there or incidentally there in the course of transit, but it does not necessarily involve the idea of permanent location like real property. It is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county.”

You will note that § 58-834 was amended during the 1972 session of the General Assembly. For assessment commencing January 1, 1973, the test of situs “...for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked.” Under such test it is also clear that the jurisdiction wherein the automobile is operated during the school year is the proper place for its assessment and taxation.

TAXATION—Personal Property—Taxable situs of boats should be the place where boats are normally docked.

April 10, 1972

THE HONORABLE W. C. ANDREWS, JR.
Commissioner of the Revenue for the City of Newport News

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

“A problem exists between this office and a taxpayer who is a domiciliary resident of the City of Newport News with reference to the age-old question of taxation on a pleasure boat.
"In November of 1970 the taxpayer in question purchased a
pleasure craft at Great Bridge, Virginia, and left for Florida at the
beginning of December, 1970, arriving there the latter part of
December, 1970. For a few months this craft was in Florida waters
on a pleasure basis and left to return to Virginia the latter part of
April, 1971, arriving back in Gloucester County the latter part of
May, 1971.

Upon purchasing this craft, and prior to leaving for Florida, the
owner documented the boat with the U. S. Customs office here in
Newport News, showing his address as Newport News on the docu-
mentation. This office, pursuant to § 58-865, Code of Virginia, upon
examining the Customs records in January of 1971 to ascertain
owners of watercraft for tax purposes, found this documentation
in order and proceeded to place a personal property assessment
on the craft for the year 1971. Since the time of assessment, it has
been learned that the craft, until April, 1971, had not been in
Newport News waters but, at the same time, had not acquired a
situs to any degree of permanency in any other waters or political
subdivision and was on a casual pleasure trip to Florida.

* * *

"I request and would appreciate the opinion of your office as to
whether or not this craft is taxable to the City of Newport News for
the year 1971."

Virginia Code § 58-834 provides that the situs for the assessment and
taxation of tangible personal property generally shall be the locality in
which it was physically located on the first day of the tax year. The State
Corporation Commission, in an opinion adopted by our Supreme Court in
Newport News v. Commissioner, 165 Va. 635 (1936), determined that this
statute does not apply to floating property. Subsequently, Virginia Code
§ 58-834.1 was enacted, providing certain rules for vessels engaged in inter-
state and foreign commerce.

In 1972, the General Assembly amended § 58-834 to provide that the
taxable situs of boats should be the place where they are normally docked.
1972 Acts of Assembly, Ch. 185. In my opinion this Act merely codifies
existing law as to pleasure boats. You state, however, that the boat "had
not acquired a situs to any degree of permanency in any other waters or
political subdivision . . . ." In this event, the boat should be taxed at the
domicile of the owner.

TAXATION—Personal Property Assessment; Automobiles—Constitutional
standards for tax assessments are uniformity and fair market value.

July 30, 1971

THE HONORABLE CHARLES A. CALLAHAN
Commissioner of the Revenue for the City of Alexandria

I have received your recent letter asking my opinion as to the following
personal property assessment procedure:

"Our method of assessing automobiles is to use the wholesale
value, as listed in 'National Automobile Dealers Used Car Guide,'
January edition of current year, imposing the current personal prop-
erty tax rate for that year.

"The 1971 models start in September 1970 and no value for assess-
ment purposes is listed, so we took ninety percent of 'factory A.D.P.
price' listed as our assessed value and imposed our personal property
rate on that assessed value, producing the tax."
The constitutional standards for tax assessments are uniformity and fair market value. Const. of Va., Art. X, §§ 1 and 2. The method used by your office is reasonable and would be presumed valid unless it could be empirically demonstrated that the values produced are not uniform within their classification.

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**TAXATION—Personal Property; Realty—Determination of water meters as personal property subject to examination of facts.**

August 2, 1971

**THE HONORABLE HELEN B. SHARP**
Commissioner of the Revenue for the City of Hopewell

This is in reply to your recent letter in which you inquire as to the status for taxation purposes of meters owned by utility corporations. I quote from your letter:

"Please advise me whether or not I should also change our classification on their meters from tangible personal property to real estate. The 1970 decision [Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550 (1970) ("the Transco case") refers to the court's holding in City of Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1932), and (13) of this opinion seems to indicate that meters should be considered as personal property."

The Transco case recognized that there are three factors to be considered in deciding whether an item of personal property placed upon realty has become realty. Those three tests are: 1) annexation of the property to the realty, 2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and 3) the intention of the parties. 210 Va. 555 (1970). Paramount among these tests is the intention of the party making the annexation.

Applying similar tests, the Court in the Warwick County decision found that water meters were personal property, but the finding is precedent only under the peculiar facts of that case.

Inasmuch as the determination of a corporation's intention in annexing meters to realty is factual in nature, a classification can be made only upon an examination of the facts in light of the tests set forth in the Transco case.

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**TAXATION—Property Tax — Property owned by Boy Scouts and Girl Scouts of America.**

April 20, 1972

**THE HONORABLE LESLIE D. CAMPBELL, JR.**
Member, Senate of Virginia

I have received your letter of April 14, in which you ask:

"In view of Article X, Section 6(a) (6) of the new Constitution, and in view of the provisions of Senate Bill 20 as adopted by the 1972 General Assembly, is property owned by the Boy Scouts and Girl Scouts of America tax exempt?"

In 1956, the General Assembly amended Virginia Code § 58-12 so as to exempt the Boy Scouts of America, Girl Scouts of the United States of America, and their subsidiaries from real estate taxation. 1956 Acts of Assembly, Ch. 478. This office subsequently held that the General Assembly was prohibited by Section 183 of our Constitution from granting that exemption. Report of the Attorney General (1964-1965), p. 326.
This opinion was not always followed, however. Public Views Document 89 of the Commission on Constitutional Revision sets forth some of the conflicting treatment accorded the Boy and Girl Scouts: The Circuit Court of Rockbridge County on September 11, 1964, held such property to be exempt; two county boards of supervisors directed their commissioners of the revenue to exempt such property (I do not imply approval of this practice); at least one other locality refused to grant the exemption.

The Commission on Constitutional Revision recommended that Section 183 of the Constitution be retained in its old basic structure. Report of the Commission on Constitutional Revision (1969), p. 305. One recommended change, however, was that the Constitutional exemption provisions should be strictly construed. The rule of strict construction was intended as a restraint upon "the apparent inclination of the General Assembly to expand the statutory definition of the Constitutional exemptions." Id. at 306. A proviso was added, however, "to protect existing exemptions from the strict construction requirement." The requirement for strict construction and the proviso thereto now constitute Section 6(f) of Article X of our revised Constitution:

"Exemptions of property from taxation as established or authorized hereby shall be strictly construed; provided, however, that all property exempt from taxation on the effective date of this section shall continue to be exempt until otherwise provided by the General Assembly as herein set forth."

The proviso, often referred to as the grandfather clause, was discussed by Senators Bateman and Breeden during the consideration of the revised Constitution:

"Senator Bateman: Senator, on the middle of page 4, Section 6, sub-paragraph (f), it is indicated that all property exempt from taxation on the effective date of this section shall continue to be exempt until otherwise provided by the General Assembly as herein set forth. As I understood your explanation, the purpose of this was to provide a grandfather clause, that all organizations or entities whose property is now exempt would remain exempt under the new Constitution when it was adopted?

"Senator Breeden: That is correct.

"Senator Bateman: We have a situation where under the present Constitution certain named organizations are exempt constitutionally; and we also have a statute which purports to exempt the property of a number of other named organizations. The State Tax Commissioner has ruled that some of these named by statute are not constitutionally exempt because the legislature had no authority to exempt them.

"Would this saving clause apply to all those named in the statute, or only to those presently named in the Constitution, or would it apply to those named in the Constitution and in the statute?

"Senator Breeden: I do not believe the Tax Commissioner's ruling is the test really. It may be effective. But what this says is that if you are now lawfully exempt you continue to be exempt. If you are not lawfully exempt you would have to meet the requirement of the new act.

"Senator Bateman: Then I would take it that the Boy Scouts, who have been declared by the Tax Commissioner not to be lawfully exempt, even though they are referred to specifically in the statutes, would not be saved by this provision, and would have to gain their exemption by further action of the General Assembly by a three-fourths vote of both houses?"
"Senator Breeden: Let us assume that the Tax Commissioner makes an initial ruling that it is now an illegal exemption. Then this provision would not give it legitimacy because it might not have passed by a three-fourths vote. There was no test of that kind at the time, so there would have to be legislation passed to make it qualify.

"Senator Bateman: Either litigation determining that the Tax Commissioner was wrong in his ruling or further legislation?

"Senator Breeden: That is right." Senate Debates on Constitutional Revision, p. 452.

I concur in Senator Breeden's analysis. In Senate Bill 20 [1972 Acts of Assembly, Ch. 667] the General Assembly legislatively interpreted the grandfather clause by amending the introductory language of Virginia Code § 58-12, as follows:

"The following classes of property, exempt from State and local taxation on July 1, 1971, shall continue to be exempt from taxation, State and local, including inheritance taxes, under the rules of statutory construction applicable to this section prior to July 1, 1971:"

Under this construction, the grandfather clause continues those exempt classifications of § 58-12 which were constitutionally permitted prior to July 1, 1971.

Although the strict construction clause imposes a restriction upon the power of the General Assembly, that power was substantially broadened by the adoption of a new Section 6(a) (6) of Article X:

"Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed."

Senate Bill 20 is not a valid exercise of the General Assembly's power under Article X, Section 6(a) (6), for it did not receive the constitutionally required three-fourths vote in the Senate. It has meaning only insofar as it construes the constitutional language. This construction is entitled to great weight, Dean v. Paolicelli, 194 Va. 219, 227 (1952), especially since the General Assembly is empowered to grant the exemptions set forth in § 58-12 (Senate Bill 20 was approved by a vote of 88-0 in the House of Delegates and 29-0 in the Senate).

Thus, the Boy and Girl Scouts are entitled to an exemption only if they were constitutionally exempt under § 58-12 as that section was construed prior to July 1, 1971.

In the light of the opinion of the Circuit Court of Rockbridge County, I have carefully reviewed our earlier opinion that the provision exempting the Boy and Girl Scouts from taxation is unconstitutional. Although the Boy and Girl Scouts have certain religious purposes, I am unable to hold that they are "other similar [to the Y.M.C.A.] religious associations." Under the holding of our Supreme Court in Richmond v. United Givers Fund, 205 Va. 432 (1964), the Boy and Girl Scouts would be considered charitable and benevolent associations, but their exemption would be limited to the property set forth in Section 183 (f) of our pre-1971 Constitution. This exemption continues pursuant to the grandfather clause of Article X, Section 6(a) (6), of our revised Constitution.

You also ask:

"If the new Constitution and Senate Bill 20 now provides an exempt status law for such scout property, would it make any difference whether the property was acquired prior to or subsequent to July 1, 1972, by the Scouts?"
The 1971 Report of the Virginia Code Commission on Revision of the Code of Virginia of 1950, as Amended, to Conform with the Constitution of Virginia Effective July 1, 1971, "assumed that the 'grandfather' clause applies to specific property and not to classes of property." Id. at 33. I believe that Senate Debates and the subsequent enactment of Senate Bill 20, clearly indicate that the intent of the grandfather clause was to continue the constitutionally exempt classifications set forth in § 58-12. It is my opinion that property acquired after July 1, 1971, is exempt under the grandfather clause if it is described in a provision of § 58-12 which was constitutionally valid prior to that date.

TAXATION—Property Tax—Property taxable when city leases property for profit.

November 11, 1971

THE HONORABLE VICTOR J. SMITH
Commissioner of the Revenue for the City of Harrisonburg

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

"Recently the School Board of the City of Harrisonburg purchased a house and lot adjacent to the High School grounds. It is my understanding that the house will be rented until such time as it is either demolished or put to some school use."

"The problem that presents itself is whether such real estate, because it is rented by the School Board, would be taxable to the School Board as income producing property under the provisions of § 58-14 Code of Virginia; or is the property granted tax exemption under the provisions of § 58-12(1)?"

"Inasmuch as the City of Harrisonburg is a tax exempt municipality and the School Board is an instrumentality of the municipality, can the question of taxability or exemption be altered by the provisions of § 58-14?"

Section 58-12(1) of the Virginia Code exempts from taxation the property of a political subdivision of this State. However, § 58-14 provides that such exemption does not apply to any building or land which "shall be leased or shall otherwise be a source of revenue or profit." Leasing of property does not automatically subject it to taxation where the city does not use the property for profit except incidentally. Board of Supervisors v. Norfolk, 153 Va. 768 (1930). However, where a city leases property with a profit motive and the dominant purpose for which the leased property is used is not to promote the health or welfare of the citizens of the city, the property is taxable. Board of Supervisors, supra.

I understand that the School Board has or will lease the house until such time as it is demolished or used for school purposes and that the property will not be used for any governmental purpose while so leased. In my opinion, the leasing of such property for profit causes the same to be subject to property tax pursuant to § 58-14. The fact that the leased property is owned by an instrumentality of the tax levying authority is irrelevant for purposes of applying § 58-14.

TAXATION—Property Tax—Social fraternity house not tax exempt.

August 11, 1971

THE HONORABLE CHARLES F. WHITE, JR.
Commissioner of the Revenue for Hanover County

This is in reply to your recent letter in which you inquire as to the tax exempt status of a social fraternity house owned by the Zeta Lodge Institute.
The purposes of the Zeta Lodge Institute, as set forth in the Certificate of Revival, are to establish and maintain instructional facilities, "to practice charity amongst its members," and "to aid in the fostering and spreading of the teachings of the Christian Religion amongst its members and others."

As you are aware, Article X, Section 6(a) (6), of the Constitution of Virginia (1971) provides that a three-fourths vote of the members of the General Assembly is necessary to classify, and thereby exempt, properties used for religious, charitable or benevolent activities. Section 6(f) further provides that all property exempt from taxation on the effective date of this section shall continue in that status until altered by the General Assembly.

Section 58-12 of the Code of Virginia (1950), as amended, has exempted incorporated institutions of learning, as well as property belonging to any benevolent or charitable association. I am of the opinion that the Zeta Lodge Institute does not properly fall within either of these classifications.

In exempting institutions of learning, § 58-12(4) stipulates that this provision shall apply only to property primarily used for literary, scientific or educational purposes or purposes incidental thereto.

It is my opinion that the property in question is primarily used by undergraduate members of the Zeta Chapter of the Kappa Alpha Order for social purposes, and, as a result, should not enjoy tax exempt status. See Report of the Attorney General (1969-1970), p. 261.

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TAXATION—Property Tax Relief — One-year residency requirement in ordinance not upheld.

December 20, 1971

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

I have received your letter of December 2, from which I quote:

"The Arlington County Board recently adopted an ordinance granting property tax relief to certain elderly owners. It is the opinion of the Board that adoption of this ordinance causes an inequity for elderly tenants. We recognize that Sec. 58-760.1 of the Code does not grant authority for rent relief.

"Attached is a proposed Arlington County Ordinance which would provide rental relief for elderly tenants. The rental relief is defined therein as a category of 'general relief' within public assistance using local only funds; no Commonwealth or Federal funds would be used. The ordinance provides criteria for qualification and determination of the grant award. Our discussions with the Department of Welfare and Institutions indicate that Sec. 63.1-106 of the Code may give Arlington such authority. The section provides in toto:

'Eligibility for general relief. — A person shall be eligible for general relief if such person is in need of public relief.'

"The Arlington County Board, through adoption of such an ordinance, would be determining that those elderly renters who meet the criteria set forth are in need of 'public relief' and that the County Board is willing to provide funds for the total financing of such relief."

The thrust of the rent relief ordinance is an expansion of the elderly homeowners' tax exemption provided for in Article X, Section 6(f), of the Virginia Constitution and implemented by Virginia Code § 58-760.1 and the Arlington homeowners' relief ordinance. It is not, in my opinion, an unconstitutional expansion of the exemption provision, for it merely provides for welfare payments to be made to a class of needy persons. Nor is the classification provided therein unconstitutional, except as noted below.
I am concerned that the one-year residence required for the benefits of the ordinance would be viewed as a restriction upon the right to travel, prohibited by the Equal Protection Clause. In Shapiro v. Thompson, 394 U.S. 618 (1969), the United States Supreme Court struck down a state one-year residency requirement for welfare benefits, saying:

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633.

More recently, this opinion was extended to cases in which no federal welfare funds are involved. Pease v. Hansen, ___ U.S. ___, 40 LW 3238 (November 16, 1971). In the light of these cases, I am unable to opine that the one-year residency requirement provided in your ordinance would be upheld against Constitutional attack.

TAXATION—Property Tax Relief—Ordinance may be drafted to meet certain objectives.

December 20, 1971

The Honorable William B. Hopkins
Member, Senate of Virginia

I have received your letter of December 2, in which you ask:

"Under the existing statutes can a locality pass a law to effectively freeze the real estate tax on the sixty-five year old home owner? If so, how?"

Virginia Code § 58-760.1 provides for the exemption or deferral of taxes on property of certain elderly persons. The exemption or deferral applies only to property owned by persons over sixty-five who meet certain income and net worth requirements. The amount of the exemption or deferral is to be fixed by local ordinance.

An ordinance could, in my opinion, be drafted to meet the objectives stated by you. I would suggest that the amount of the exemption be stated as follows:

The amount of real estate exempt hereunder shall be that amount necessary to cause the real estate taxes upon each such dwelling and land to equal [the sum of] the real estate taxes assessed against the taxpayer therefor at the time such real estate first qualified hereunder [and the real estate taxes properly assessable against all subsequent improvements thereto].

TAXATION—Property Tax Relief for the Elderly—Relief granted upon such conditions as ordinance may prescribe.

TAXATION—Property Tax—Whether or not locality prohibited in requiring inclusion of value of dwelling and land.

September 29, 1971

The Honorable Jerome S. Howard, Jr.
Commissioner of Revenue for the City of Roanoke
I have received your letter of September 10, from which I quote:

"I would appreciate having your opinion as to whether or not such specific net worth restriction [on property tax relief for the elderly] of twenty thousand dollars, including the value of the dwelling and the land, not exceeding one acre would be prohibited by the wording and meaning of Section 58-760.1 of the Code of Virginia."

Virginia Code § 58-760.1(a) (1) expressly permits local ordinances to, "specify lower income or net worth figures," than those set forth in the enabling legislation. The relief is granted only, "upon such conditions . . . as the ordinance may prescribe." Va. Code § 58-760.1(a). Construing these provisions together, I am of the opinion that a local ordinance may properly prescribe any net worth limitation lower than $20,000. The inclusion of the value of the land and building in computing the net worth limitation would necessarily result in a lowering of the limitation. In my opinion, such an approach is permissible.

You also ask, "whether or not a locality would be prohibited by the aforementioned section from requiring the inclusion of the value of the dwelling and the land, not exceeding one acre in the determination of net worth eligibility so long as such net worth restriction does not exceed the statutory restriction provided by Section 58-760.1 of twenty thousand dollars, excluding the value of the dwelling and the land, not exceeding one acre."

I assume that such an ordinance would contain two limitations, the first greater than $20,000 but including the value of the land and building, and the second equal to the statutory $20,000 figure, excluding the value of the dwelling and one acre of land. I would construe the first limitation as a valid condition prescribed by the ordinance and the second as complying with the statutory limitation. Such an ordinance would, in my opinion, be valid.

TAXATION—Public Service Corporations—Local tax on consumers.

September 3, 1971

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

I have received your recent letter, in which you ask:

"Does the County of Albemarle have the right, under Code Section 58-617.2, to impose and collect a tax upon gas sold directly by the City of Charlottesville, without intervention of any public service company, to consumers in Albemarle County?"

The office has on several occasions ruled that a county could not impose a tax on the consumers of services provided by a municipality. See Report of the Attorney General (1968-1969), p. 239. Virginia Code § 58-617.2 was amended in 1971 to permit the imposition of a county utility consumers' tax on customers of municipal electric light, power and gas companies. In my opinion, a municipal utility is a "company" owned by the municipality within the meaning of § 58-617.2. Your question must therefore be answered in the affirmative.

TAXATION—Public Service Corporations—Local taxation of real and tangible personal property.

November 29, 1971

THE HONORABLE TESS HARBLES SAUM
Commissioner of Revenue for the City of Clifton Forge
I have received your letter of November 16, in which you ask how Virginia Code § 58-514.2 applies to public service corporation property when the current real estate tax rate exceeds the 1966 personal property tax rate.

Clifton Forge has a 1971 real estate rate of $3.40 per $100 assessed valuation and a 1971 personal property tax rate of $3.55 per $100 assessed valuation. On January 1, 1966, the Clifton Forge personal property tax rate was $3.25 per $100 assessed valuation. Section 58-514.2 provides:

“Notwithstanding the provisions of §§ 58-518, 58-522, 58-544, 58-551, 58-578, 58-596, 58-602, 58-605 and 58-851 all local taxes on the real estate and tangible personal property referred to in such sections shall be the same rate as is applicable to other real estate in the respective locality, except that with respect to the assessed valuation of any class of property taxed as tangible personal property by any taxing district before January one, nineteen hundred sixty-six, such class of property may continue to be taxed by such taxing district at rates no higher than those levied on other tangible personal property on January one, nineteen hundred sixty-six; provided, however, that on January one, nineteen hundred sixty-seven, one twentieth, and on each subsequent January one for nineteen years an additional one twentieth, of the assessed valuation of such tangible personal property on January one, nineteen hundred sixty-six, shall be taxed at the real estate rate and the remainder may continue to be taxed at the tangible personal property rate as provided above. Thereafter the whole shall be taxed at the real estate rate as provided above. Notwithstanding any of the foregoing provisions, all automobiles and trucks of such corporations shall be taxed at the same rate or rates applicable to other automobiles and trucks in the respective locality.” (Emphasis supplied.)

The general rule of § 58-514.2 is that all property, other than automobiles and trucks, of public service corporations shall be taxed at the current real estate tax rate. Localities are permitted to continue taxing certain property at their 1966 personal property rates, but this exception would apply only where the 1966 personal property tax rates exceed the current real estate tax rates. If the current real estate tax rate exceeds the 1966 personal property tax rate, all public service corporation property, other than automobiles and trucks, should, in my opinion, be taxed at the current real estate tax rate.

The 1971 Clifton Forge taxes on automobiles and trucks should be extended at the rate of $3.55 per $100 assessed valuation. The 1971 Clifton Forge taxes on all other public service corporation property should be extended at the rate of $3.40 per $100 assessed valuation.

**TAXATION—Public Service Corporations; Local Tax on Consumers—Purchasers of certain utilities not subject to unification requirement; limit imposed on amount of tax levied.**

*May 2, 1972*

**The Honorable Charles L. McCormick III**  
Commonwealth's Attorney for Halifax County

I have received your letter of April 28, in which you ask whether the uniformity requirement of Article X, Section 1, of the Virginia Constitution prohibits the Board of Supervisors of Halifax County from fixing different maximum limits for residential and commercial taxpayers under Virginia Code §§ 58-587.1 and 58-617.2.

The uniformity requirement to which you refer continues an identical requirement under Section 168 of our old Constitution. That section has, on a number of occasions, been held to apply only to a direct tax on property.
See Ashland v. Board of Supervisors, 202 Va. 409 (1961). Sections 58-587.1 and 58-617.2 authorize excises upon the purchasers of certain utility services. They are not direct taxes upon property and, in my opinion, are not subject to the uniformity requirement of the Constitution. The classification of residential consumers, as opposed to commercial consumers is, in my opinion, based on a valid distinction between the types of taxpayers.

You also ask whether there is any limit, statutory or otherwise, on the amount of tax which can be levied under §§ 58-587.1 and 58-617.2. Chapter 459 of the 1972 Acts of Assembly, effective July 1, 1972, for the first time imposes limits of twenty percent of revenue upon each of these taxes. Chapter 637 of the 1972 Acts of Assembly limits the base of the tax imposed by § 58-587.1 to that subject to federal communications taxes.

TAXATION—Rate of Levy—Locality has authority to impose different rates on certain tangible personal property.

THE HONORABLE HAROLD HAWKINS
Commonwealth's Attorney for Clarke County

I have received your recent letter inquiring whether § 58-851, Code of Virginia (1950), as amended, enables the governing body of your locality to classify farm livestock separately from the other tangible personal property included in the statute and fix a rate of levy thereon different from that imposed upon such other property.

Section 58-851 provides in part:

"The governing body of any county, city or town may in its discretion classify farm machinery, farm tools, farm livestock, aircraft, riding horses and ponies owned and used for pleasure and not for commercial purposes, or tangible personal property used or employed in a research and development business separately from other tangible personal property and may fix the rate of levy thereon, but the rate shall not be higher than that imposed by it upon other tangible personal property in the county, city or town . . . ."

The statute was amended to provide for separate classification of certain kinds of tangible personality by Chapter 397 of the 1944 Acts of Assembly. The title to that act provided that it amended the statute "... so as to authorize the governing bodies of counties to make certain other classification of certain kinds of property and to impose different rates of levy thereon." Although the statute itself used the word "rate" instead of "rates," the use of the conjunction "or" instead of "and" indicates that the enumerated items need not be classified together but may be classified independently. It follows that the General Assembly intended that each kind of property enumerated could be classified independently of all other property, and a separate rate could be imposed upon each classification, not to exceed that imposed upon other tangible personal property.

As amended in 1944, the statute provided only for separate classification of farm machinery, farm tools or farm livestock. Concededly, the nature of these items would not preclude an inference that it was intended that they may not be classified independently of each other. Subsequent amendments, however, appear to negate any such construction of the statute. Chapter 231 of the 1966 Acts of Assembly added to the enumerated farm property tangible personal property used or employed in a research and development business. Chapter 325 of the 1970 Acts of Assembly added aircraft, riding horses and ponies owned and used for pleasure and not for commercial purposes. These amendments add items of a different nature from that originally enumerated, which does preclude such inference.
Accordingly, I am of the opinion that the Clarke County Board of Supervisors has the authority to classify farm livestock (or any other property included in § 58-851) separately from other tangible personal property (whether or not included in § 58-851) and to fix a rate of levy thereon different from that imposed upon other tangible personal property, including that property enumerated within § 58-851. Said rate, of course, may not exceed that imposed upon other tangible personality not included within the statute.

TAXATION—Real Estate—Deferral of real estate taxes permitted on property within certain classification. August 11, 1971

THE HONORABLE JOHN D. GRAY
Member, House of Delegates

I have received your letter of August 6, in which you ask whether the City of Hampton may defer portions of the real estate taxes of certain persons over age sixty-five.

Article X, Section 6(b), of the Virginia Constitution provides:

"The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local real property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age who are deemed by the General Assembly to be bearing an extraordinary tax burden on said real estate in relation to their income and financial worth."

The 1971 General Assembly enacted a new § 58-760.1 of the Code which permits a locality to defer, as well as to exempt such property from taxation, subject to certain restrictions.

The Virginia Constitution is a restraint on the powers of the General Assembly, rather than a grant of such powers. The Constitutional provision quoted above is an exception to the general rule of Article X, Section 1, that all property shall be taxed. The General Assembly is expressly authorized by Article X, Section 6(b) and (c), to prescribe restrictions and conditions upon the exemption. The power of deferral is, in my opinion, within the larger power of exemption.

In my opinion, the City of Hampton may by ordinance permit the deferral of real estate taxes for taxable years beginning on and after January 1, 1972, on property within the classification established by § 58-760.1.

TAXATION—Real Estate—Locality may not subclassify real estate into improved and unimproved land. November 1, 1971

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

I have received your letter of October 26, in which you ask whether the City of Falls Church may limit its real estate tax to land, with the improvements thereon being nontaxable.

In my opinion, such a tax system would be in violation of the requirement of Article X, Section 1, of the Virginia Constitution that, "All property . . . shall be taxed."
You also ask, "Would it be valid to classify land in two categories, name-ly, improved and unimproved, and place a higher rate of taxation on un-improved land?"

Article X, Section 1, 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 ... The General Assembly may de-fine and classify taxable subjects." Virginia Code § 58-851 authorizes locali-ties to adopt certain specified subclassifications, but it does not permit real estate to be subclassified as suggested by you. In my opinion, a locality must follow the General Assembly's classifications. *Hill v. Richmond*, 181 Va. 744 (1943). Under present State law, the City of Falls Church may not subclassify real estate into improved and unimproved land.

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**TAXATION—Real Estate—**Section 58-19 applies only if certain property legally assessed; airport not taxable, only leasehold interest; when local assessment applied; taxation by one political subdivision of utility property.

**October 28, 1971**

**THE HONORABLE RICHARD C. GRIZZARD**
Commonwealth's Attorney for the City of Franklin

I have received your letter requesting my opinion as to several questions raised by the Honorable J. Edward Moyler, City Attorney for Franklin. I shall answer Mr. Moyler's questions seriatim.

"1. Does Isle of Wight County under § 58-19 of the Code of Virginia of 1950, as amended, or under Section 183 of the Constitu-tion of Virginia, or of any constitutional provision or judicial deci-sion, have the right to tax the City of Franklin for real estate owned by the City lying, situate and being in Isle of Wight County, Virginia and used by the City of Franklin, Virginia as an airport?"

Virginia Code § 58-19 does not authorize the imposition of any tax. It applies only if certain property "shall be legally assessable for taxation by any political subdivision other than the owner. ..." *Norfolk v. Board of Supervisors*, 168 Va. 606 (1937).

A city-owned airport would be legally assessable by a county only if, and to the extent that, it, "shall be leased or otherwise be a source of revenue or profit." Va. Code § 58-14. In *Board of Supervisors v. Norfolk*, 153 Va. 768 (1930), it was held that the leasing of property did not automatically subject the property to taxation if there was no profit motive. In *Newport News v. Warwick County*, 159 Va. 571 (1933), the Court permitted opera-tion, maintenance and replacement expenses to be deducted from gross receipts for the purpose of determining whether a water works was a source of revenue or profit. I understand that all of the revenue derived by the City of Franklin from the airport property is used by the City to operate and maintain the airport facility. Accordingly, I am of the opinion that the airport is not taxable under § 58-14. I am aware of no other pro-vision of law whereunder the airport could be taxed, although any leasehold interests in the property may properly be taxed under Virginia Code § 58-758. See Report of the Attorney General (1965-1966), p. 269.

"2. Is Isle of Wight County under § 58-19 of the Code of Virginia, permitted to tax such land and buildings used in conjunction with the water and electric utilities of the City of Franklin and lying in Isle of Wight County, by taking the appraised value thereof (fair market value), applying it to a percentage factor (the percentage that the gross revenues derived from customers outside the City (even outside of Isle of Wight County) bears to gross revenues
from the whole utility system) and applying the tax rate to the resultant figure (called by Isle of Wight the 'assessed value'); or is it required to first determine the appraised value of such land and buildings lying in Isle of Wight and used in conjunction with the particular utility system of the City of Franklin, then second, take the same percentage thereof (35% in Isle of Wight) that Isle of Wight takes on all real estate (owned by individual corporations, etc.) in the county to reduce the appraised value to the assessed value for tax purposes, then, third, apply to the resultant assessed value a percentage factor (the percentage that the gross revenue derived from customers outside the City bears to gross revenues from the whole utility) and then, fourth, apply the tax to the resultant figure?"

As I understand the question, Mr. Moyler asks whether a local assessment ratio must be applied under § 58-16. Justice Spratley, dissenting in *Norfolk v. Board of Supervisors*, 168 Va. 606 (1937), gave an illustration of the computation under § 58-19, but did not make explicit reference to assessment ratios:

"The tax rate in Nansemond County on real property for 1931 was $1.50 per $100 of assessed valuation. The waterworks property therein located cost over four million dollars. It was assessed at a fair market value of $914,772. In round numbers, the gross receipts of the city from its waterworks system amounted to $872,000. The total revenue received from sources wholly outside of the city, not including the $12,000 from the Virginia Beach pipe line, amounting to $79,000, creating a proportion around 9%. Thus 9% of the assessed value would place the assessment approximately at $82,000, upon which the annual tax would be $1,230." *Id.* at 641.

More recently, however, our Supreme Court has held, in a case where uniformity was not at issue, that a local assessment ratio must be applied to meet the fair market value requirement of the Virginia Constitution. *Fray v. Culpeper*, 212 Va. 148 (1971). In my opinion, any local ratio applied in the assessment of like property (other than public service corporation property to which will have been applied the ratios required by Virginia Code § 58-512.1) in the taxing jurisdiction must be applied under § 58-16.

"3. (A) Under § 58-19 of the Code and cases construing the same, does 'land and buildings' include electric wire, cable and appliances, poles, transformers, etc., used by the city in conjunction with an electric utility system and lying in the county, but located on land not owned by the city and on which there are no easements of record to the city, there being no land shown on the Land Books of said County as owned by the city and used in conjunction with the electric utility system of the city lying in Isle of Wight County?"

"(B) With respect to that part of the water system of the city located in Isle of Wight County, does 'land and buildings' under § 58-19 of the Code mean pipe and fire hydrants even though there are no water line easements of record in Isle of Wight County to the City and no land shown on the Land Books of said County as owned by the City and used in conjunction with that part of the city's water system lying in Isle of Wight County?"

The word, land, as used in §§ 58-14 and 58-16 has been construed to include fixtures attached to the land. *Newport News v. Warwick Co.*, 159 Va. 571 (1932). I believe this to be true if the city owns an easement, irrespective of whether the easement is recorded. If the city does not own an easement the property does not belong to the city and should be taxed to the owner of the land to which it is attached.
The question as to whether specific items are fixtures is necessarily one of fact. *Transcontinental Gas Pipe Line Corporation v. Prince William County*, 210 Va. 550 (1970). One of the most important criteria is the intent of the owner. Fire hydrants and pipe lines would, in my opinion, be fixtures. The wire, cables and transformers would ordinarily be considered personality. Particular emphasis should be placed on the city's practice of replacing the poles and appliances.

"4. Does Code § 58-19 in its reference to the gross revenues of the utility derived from consumers outside of the City mean in Isle of Wight County only, or does it mean those consumers in Isle of Wight County, Southampton County, Nansemond County, or elsewhere, in determining the percentage to be applied?"

Reference to Justice Spratley's illustration, set forth above, in *Norfolk v. Board of Supervisors*, shows that all consumers outside of the city, not just those in Isle of Wight County, should be considered in developing the ratio under § 58-19. This illustration is supported by the clear language of the statute.

"5. Does the new Constitution which became effective July 1st, 1971 and which in Article X, § 6 A-1 exempts property owned by a political subdivision from taxation supersede § 58-19 of the Code and take away the power of a political subdivision to tax land or buildings constituting a part of a public utility owned by a political subdivision and located in the taxing political subdivision?"

Section 183 of the pre-July 1, 1971, Virginia Constitution provided, in part:

"Whenever any building or land, or part thereof, mentioned in this section, and not belonging to the State, shall be leased or shall otherwise be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town."

Section 58-14 is clearly a codification of this Constitutional provision. The revised Virginia Constitution does not contain this compulsory language, but it does continue the right of the General Assembly to "restrict or condition" the exemptions otherwise granted. Va. Const. Art. X, § 6(c). In other words, the Virginia Constitution, while no longer requiring the taxation of property which is the source of revenue or profit, continues to permit the General Assembly to require such property to be taxed. The general exemptions provisions of Article X, Section 6(a), do not, in my opinion, supersede §§ 58-14 and 58-19.

**TAXATION—Real Estate—Tax constitutes a valid lien upon property in hands of Small Business Administration.**

May 31, 1972

_I have received your letter of May 16, from which I quote:_

"On July 7, 1966, by deed of trust a tract of land owned by the Thornburg Manufacturing Company lying in Madison Magisterial District, in Caroline County, Virginia, was conveyed to the U. S. Small Business Administration.

"The real estate taxes assessed as of January 1, 1966, and due by December 5, 1966, remained unpaid. The amount of tax due before December 5, 1966, was $495.00. Shortly after December 5, 1966, a 5% penalty was added making a total of taxes due $519.75."
"On January 5, 1967, the U. S. Small Business Administration paid to the county $259.87 or approximately one-half the total amount of tax and penalty due. A balance of $259.88 was left at that time and we have continued to show this amount plus interest as delinquent to the present day.

"I would like to respectfully request your opinion if the U. S. Small Business Administration would be liable for the remaining balance of taxes against this property."

In Virginia, the local real estate tax is determined as of a moment in time. It is not ratable over the period of a tax year. Therefore, the sale by a taxable owner to an exempt owner after the assessment date does not affect the tax liability for the year. The real estate is subject to the tax lien, even in the hands of the exempt owner.

Nevertheless, when land is acquired by the United States, the selling taxpayer is relieved of the payment of that portion of the current year's taxes attributable to the time during which the property is owned by the United States. Va. Code § 58-818. This section does not, in my opinion, change the general rule that the tax liability accrues on the assessment date; it merely provides equitable relief in a manner consistent with the exemption of the United States from local taxes.

While the Small Business Administration may have been entitled to an abatement of a portion of the tax, it was necessary that some action be taken to correct the assessment during the applicable period of limitation. Now, seven years later, there is no way in which you can abate the assessment. In my opinion, the tax constitutes a valid lien upon the property in the hands of the Small Business Administration.

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**TAXATION—Real Estate and Tangible Personal Property—** Commissioner of revenue has no power to change assessed value of property taxes of public service corporations.

June 19, 1972

The Honorable Tess Harless Saum
Commissioner of the Revenue for the City of Clifton Forge

Your letter of June 9 requested an opinion whether you could change the assessments for real estate and personal property taxes on public service corporations.

Article X, Section 2, of the Constitution provides that a central State agency shall assess the real estate and tangible personal property of public service corporations. Section 58-503.1 of the Code of Virginia designates for that purpose the State Corporation Commission. It is, therefore, my opinion that the commissioner of revenue has no power to change the assessed value of property taxes of public service corporations.

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**TAXATION—Real Estate Assessments—** Time for application for abatement fixed by statute.

October 21, 1971

The Honorable J. H. Ryals
Commissioner of Revenue for the City of Emporia

I have received your recent letter, in which you ask whether Virginia Code §§ 58-811.1 and 58-811.2 would apply to a city which has adopted a July 1 assessment date pursuant to Virginia Code § 58-851.7.

Section 58-811.1 provides for the late assessment of buildings completed during the tax year. By its terms, it would continue to apply to a tax year beginning July 1. The statute is explicit, however, in requiring that the
building be substantially completed before November 1 of the tax year. That date may not, in my opinion, be changed by implication. The penalty dates set forth in the statute may be overridden by local ordinance adopted pursuant to Virginia Code § 58-847.

Section 58-811.2 provides for the abatement of taxes on damaged or destroyed property. The abatement is computed on the basis of the ratio, "which the portion of the year such building was fit for use, occupancy and enjoyment bears to the entire year." In my opinion, the year referred to in the computation of the ratio is, as to a city electing under § 58-851.7, the fiscal year.

Again, however, application for abatement must be made, "within the calendar year in which such building was razed or destroyed or in which such damage was sustained." The time for application is, in my opinion, fixed by statute and is not changed by an election under § 58-851.7.

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**TAXATION—Real Estate Exemption — Property of North Lakes Civic League, Inc.—Not exempt.**

July 16, 1971

THE HONORABLE BILLY K. MUSE
Commissioner of the Revenue for Roanoke County

I have received your letter of July 9th, asking my opinion as to the exempt status of property owned by the North Lakes Civic League, Inc.

The corporation's articles provide for dues paying members. If the use of the facilities is limited to such members, the property could not be considered, "parks or playgrounds . . . for the perpetual use of the general public," even if it were held by trustees as required by Section 183(e) of our pre-amendment Virginia Constitution. The only provisions of our amended Constitution which could permit such an exemption are paragraphs (b) and (f) of Article X, Section 6. The General Assembly has not determined such property to be exempt under paragraph (b). As the property was not constitutionally exempt before the constitutional revision, it is not made exempt by paragraph (f).

In my opinion, property of the North Lakes Civic League, Inc., is not exempt from taxation.

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**TAXATION—Real Estate Tax—When penalty assessed and collected.**

August 4, 1971

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

I have received your letter of July 30, in which you ask:

"1. Can the Roanoke City Treasurer be required to collect the 10% penalty which was levied by a City Ordinance becoming effective July 1, 1971, for the non-payment of the first and second installments of the Roanoke City Real Estate taxes and also the 1971 Personal Property Tax?"

Title VI, chapter 1 of the Roanoke City Code imposes the taxes and penalties referred to by you. Real estate taxes are required by § 3 thereof to be paid annually in four equal installments, on or before March 1, June 1, September 1 and November 1. A five percent penalty has been imposed by § 6 thereof for failure to pay such installments by April 5, June 5, September 5 or December 5, as the case may be. By ordinance number 19742, effective June 28, 1971, the Roanoke City Council amended § 6 to provide, in part:
"(a) Any person who shall fail to pay to the city treasurer on or before April first, June first, September first and December first of each year the quarterly installment of real estate taxes becoming due on or before such dates, respectively, as provided by section 3 of this chapter, . . . shall be assessed by the city treasurer and shall pay, along with such tax, a penalty of ten percent, (10%), of the amount of such unpaid installment of tax, or tax, as the case may be."

A penalty is normally assessed at the time of the failure to pay. It is clear that the ordinance so intended, for interest is imposed by § 6(b), "on the principal of and penalties on all such taxes. . . ." As the penalty, "shall be assessed," the ordinance speaks only to the future. In my opinion, you are required to collect only the five percent penalty on delinquent payments of the first and second installments of the Roanoke City 1971 real estate tax.

The above conclusion is reinforced by the fact that § 6 also imposes an increased penalty on delinquent personal property taxes, due on May 1. Ordinance number 19741, dealing specifically with personal property taxes is not effective until January 1, 1972. In my opinion delinquent 1971 personal property taxes are subject only to the five percent penalty.

You also ask:

"2. Can the Roanoke City Treasurer legally impose a 10% penalty on the third and fourth installments of the 1971 City Real Estate Taxes which was subject to a 5% penalty after September 5 and December 5 under an old ordinance?"

Ordinance number 19742 purports to increase the penalty for all installments of real estate tax becoming delinquent after June 28, 1971. It also changes the last two penalty dates from September 5, 1971, and December 5, 1971, to September 1, 1971, and December 1, 1971, respectively. As Roanoke collects its real estate taxes in installments, the only effects of the 1971 amendment to Virginia Code § 58-847 were (1) to limit the amount of penalty which may be charged and (2) to permit the charging of interest before June 30 of the following year. The increase in penalty was thus permitted before and after the 1971 amendment.

In Bankers' Trust Co. v. Blodgett, 260 U.S. 657 (1923), the United States Supreme Court upheld the imposition of an additional penalty, above that imposed when the tax was due. In this instance, the penalty has been increased before the last two installments have become due. I am aware of nothing which would prohibit such an increase or which would prohibit the changing of the penalty dates (the actual due dates, which precede the penalty dates, were not changed).

In my opinion the Roanoke City Treasurer may not accept payments of the third and fourth quarterly installments of real estate tax after September 1, 1971, or December 1, 1971, as the case may be, without assessing and collecting the ten percent penalty.

TAXATION—Real Estate Tax Relief—Life tenant may qualify as an owner of real estate.

March 6, 1972

THE HONORABLE LEROY S. BENDHEIM
Member, Senate of Virginia

I have received your recent letter, in which you ask:

"Would a life tenant occupying real estate and being solely responsible for the payment of real estate taxes be considered an owner
REPORT OF THE ATTORNEY GENERAL

to the extent necessary to qualify for real estate tax relief under the local option plan adopted by the City of Alexandria pursuant to the enabling statute of the General Assembly?"

The statute to which you refer, Virginia Code § 58-760.1, provides optional local relief for "real estate . . . owned by, and occupied as the sole dwelling of a person or persons not less than sixty-five years of age . . . ." Subsection (b) thereof refers to the head of the household, "owning title or partial title" to the real estate. In Powers v. Richmond, 122 Va. 328 (1918), it was held, at 335:

"The word 'owner' includes any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee."

The holding in Powers has twice since been construed to apply to life tenants. See Banks v. Norfolk County, 191 Va. 463 (1950); Stark v. Norfolk, 183 Va. 282 (1944).

In my opinion, a life tenant may qualify as an owner of real estate under Virginia Code § 58-760.1.

TAXATION—Real Property Relief for the Elderly.

TAXATION—Real Property—Life tenant meeting requirements of § 58-760.1 is exempt.

June 14, 1972

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

I have received your letter of May 19 inquiring whether § 58-760.1, Code of Virginia (1950), as amended, providing for real property tax relief for the elderly, includes an elderly life tenant.

The statute uses the words "owned by," "owners" and "owning title or partial title" to describe those to whom relief may be granted. "Owner" as used in § 58-796 which provides for assessment of real estate taxes, has been interpreted in Stark v. City of Norfolk, 183 Va. 282 (1944), to include a life tenant.

I am therefore of the opinion that a life tenant who meets the requirements of § 58-760.1 qualifies for tax relief.

TAXATION—Recordation—Burial contract subject to.

July 14, 1971

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

I have received your recent letter, enclosing a copy of a "Funeral Agreement" and asking whether it may be recorded in your office.

This agreement is a burial contract, which is required by Virginia Code § 11-24 to be, "filed for docketing with the clerk by whom deeds are admitted to record, as provided by law, of the county or corporation in which the person, firm or corporation undertaking to deliver such personal property or furnish such services has his or its principal place of business in this State . . . ." Any doubt as to the meaning of "docketing" in § 11-24 is resolved by § 11-26 of the Code which provides that a declaration of trust for certain property must be recorded, "in each of the clerk's offices in which said [burial] contract is required to be recorded . . . ." In my opinion the agreement should be admitted to record by you.
You also ask, "If real property is pledged, would the Sellers Tax (Sec. 58-54.1) be applicable?" I presume that you are referring to the possibility that real estate, rather than money, might be the consideration for the contract. If real estate is transferred, the agreement should be taxed under Virginia Code §§ 58-54 and 58-54.1.

TAXATION—Recordation—Deed conveying real estate subject to taxes. August 3, 1971

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

I have received your letter of July 28, in which you ask whether a deed conveying real estate from husband and wife as joint tenants to husband, with no consideration, is taxable.

The deed is dated June 7, 1971. You do not indicate whether it has been recorded. If the deed was recorded before noon July 1, 1971, it was subject to the full amount of taxes under Virginia Code §§ 58-54 and 58-65.1. If the deed was recorded after noon, July 1, 1971, it should have been taxed under those sections only upon any increase in value above the amount on which the tax was paid when the property was acquired by the joint tenants. Va. Code § 58-61, as amended by 1971 Acts of Assembly, Ch. 60. In neither instance is it subject to the taxes imposed by Virginia Code § 58-54.1.

TAXATION—Recordation—Deed from father to son and daughter-in-law, as tenants by the entirety, subject to tax. September 29, 1971

THE HONORABLE ALVIN W. FRINKS, Clerk
Corporation and Circuit Courts of the City of Alexandria

I have received your recent letter, in which you ask whether a deed conveying property, without consideration, from a man to his son and daughter-in-law, as tenants by the entirety, is subject to the recordation tax imposed by Virginia Code § 58-54.1.

Prior to July 1, 1971, such a transfer was fully taxable. See opinion to the Honorable H. C. DeJarnette, Clerk of the Circuit Court of Orange County, dated September 29, 1970, a copy of which is enclosed. Virginia Code § 58-61, which exempts transfers from parent to child, was amended in 1971 to provide that the exemption should be liberally construed. Under such a construction, the interest conveyed to the son is taxed only on the appreciation of the property since the last taxable transfer.

Even under a liberal construction, however, I am unable to hold that a grantor and his daughter-in-law occupy the relationship of parent and child. The interest passing to the daughter-in-law is fully subject to the tax.

I am enclosing a table of factors, computed at five percent, by which you may determine the rights of the older spouse. The factor for the rights of the younger spouse would, of course, be the complement of the ownership factor of the older. The tax on the interest of the daughter-in-law should be computed by multiplying the value of the property by the appropriate factor. The tax on the interest of the son should be computed by multiplying the amount of appreciation in value of the property by his ownership factor.

TAXATION—Recordation—Deed subject to tax. August 31, 1971

THE HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County
This is in reply to your letter of August 16, 1971, from which I quote:

"Three people purchased a lot in their individual names on January 25, 1971 and since that time they have a formed a Corporation. They are now deeding this same tract of land from the individuals to the Corporation. Should this be excluded from State and local tax and if not should the building they have erected since purchasing the land be included in the value?"

I am of the opinion that the deed is subject to the recordation tax under the provisions of §§ 58-54 and 58-54.1 of the Code of Virginia (1950), as amended. See opinion to the Honorable C. W. Smith, Clerk of Circuit Court of Washington County, dated April 28, 1964, a copy of which is enclosed. The tax should be computed in accordance with § 58-54 of the Code on the consideration of the deed or the actual value of the property conveyed, whichever is greater. This would include any buildings on the property.

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**TAXATION—Recordation—Tax computed on face amount of add-on loan.**

September 14, 1971

**THE HONORABLE L. E. ATHEY,** Clerk  
Circuit Court of Prince William County

I have received your letter of September 2, asking how to compute the recordation tax on deeds of trust securing add-on loan notes.

Virginia Code § 58-55 provides that the tax shall be computed, "on the basis of the amount of bonds or other obligations secured thereby." The face amount of an add-on loan note includes both principal and interest, and it is upon this amount that the tax should be computed.

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**TAXATION—Recordation—Tax payable on recordation of option.**

April 4, 1972

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

I have received your recent letter, enclosing a copy of a "FIRST REFUSAL OPTION TO LEASE" for which the total consideration was one dollar. You ask whether a State recordation tax is payable upon the recordation of the option.

Virginia Code § 58-58 provides, in part:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for . . . ."

The State tax upon the recordation of the option is fifteen cents.

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**TAXATION—Recordation—When deed is exempt from tax.**

December 31, 1971

**THE HONORABLE D. L. PARRISH, JR.,** Clerk  
Circuit Court of Goochland County

I have received your recent letter, in which you ask whether a recordation tax is imposed on a deed from a mother to herself and her daughter as joint tenants with right of survivorship.
There is, of course, no tax imposed by Virginia Code § 58-54.1, for there is no property sold. Virginia Code § 58-61 exempts from the taxes imposed by §§ 58-54 and 58-65.1 of the Code, "any deed between parent and child ... [in which] no monetary consideration passes between the parties ... ."

A 1971 amendment to § 58-61 provides:

"This section shall be liberally construed, it being the intent that no tax be assessed upon conveyances between husband and wife, or parent and child, whether the grantor and grantees be either individuals or joint grantors or joint grantees, or whether the estate created is a tenancy by the entireties or for a wife in her separate equitable estate, except such tax as is provided herein."

In my opinion, the deed described by you is exempt from the taxes imposed by §§ 58-54 and 58-65.1, except to the extent that the property has appreciated since the recordation of the deed to the mother.

You also ask:

"I would also like to know if a Justice of the Peace has the authority to acknowledge deeds, this power was removed in 1969 and some contend it has been restored, however, I am unable to find anything in the Code of Va. setting forth this right."

In 1968, Virginia Code § 55-113 was amended to abolish the power of justices of the peace to take acknowledgments. 1968 Acts of Assembly, Ch. 639. The same Act also took away the power to administer oaths, but this latter power was subsequently restored. 1970 Acts of Assembly, Ch. 783. The General Assembly has not restored the power of justices of the peace to take acknowledgments.

TAXATION—Recordation—When transfer of real estate not subject to tax.

November 26, 1971

The Honorable H. Bruce Green, Clerk
Circuit Court of Arlington County

I have received your recent letter of November 19, 1971, together with a letter submitted to you by an attorney involving the following factual situation:

"Corporations A and B together own land in Arlington County, each owning an undivided one-half interest. For their own internal management purposes Corporations A and B (which own other interests in land and other properties located outside Arlington County) wish to form their respective wholly-owned corporate subsidiaries (C and D) and to transfer by deed their interests in the Arlington County land to such subsidiary corporations, solely in exchange for all of the stock of the respective subsidiaries.

"It is therefore proposed that Corporation A will convey, by deed to be tendered for record, its undivided one-half interest in the Arlington land to Corporation C; and similarly Corporation B will convey its undivided interest to Corporation D."

The question posed is whether such transfers of real estate require the imposition of the recordation tax under § 58-54.1, Va. Code (1950), which provides in part:

"In addition to any other tax imposed under this article, there is hereby imposed on each deed, instrument, or writing by which any lands, tenements or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser or purchasers ... a tax . . . ." (Emphasis supplied.)
This tax was adopted to coincide with the repeal of the federal excise tax on real estate conveyances and is intended to continue the repealed federal tax as a State tax. See copy of my opinion of December 8, 1970, attached hereto.

As a prerequisite for the application of the repealed federal tax (26 U.S.C.A. § 4361), there must be a “sale” of real estate. Berry v. Kavanagh, 6th Cir. 137 F.2d 574 (1943). Section 58-54.1 parallels the repealed federal tax and also requires a sale of real estate. A transfer of real estate by a parent corporation to its wholly-owned subsidiary in exchange for stock of the subsidiary or as a contribution to capital, without consideration, does not constitute a sale of that real estate. Such a transaction is not subject to the tax imposed by § 58-54.1.

TAXATION—Recordation; Deed Between Tenants in Common and Limited Partnership Is Taxable.

RECORDATION—Deed Between Tenants in Common and Limited Partnership Is Taxable.

June 15, 1972

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

I have received your recent letter inquiring whether the recordation tax imposed by § 58-54 is applicable to recordation of a deed between several tenants in common as grantors and a limited partnership as grantee. The limited partnership's members are the grantors as limited partners and two other individuals as general partners.

Section 58-54 provides for a tax on every deed, not exempted by law, admitted to record. Therefore, the deed regarding which you inquire is taxable unless exempted by law.

Exemptions from § 58-54 are found in several Code sections; however, none appear applicable to the deed under consideration. Section 58-61 applies only to deeds between husband and wife or parent and child. Section 58-57 applies only to deeds of partition among joint tenants, tenants in common or copartners. A deed of partition is defined as “a species of primary or original conveyance between two or more point tenants, coparceners, or tenants in common, by which they divide the lands so held among them in severality, each taking a distinct part.” Black's Law Dictionary 1276 (4th ed. 1951). This definition excludes a conveyance from individuals to a partnership. A partnership is a legal entity, recognized as such, distinct from its individual partners. The deed under consideration does not divide the land into separate parts, but conveys it to a legal entity, i.e., the limited partnership.

I am of the opinion, therefore, that the deed under consideration is subject to the tax imposed by § 58-54. This is in accord with an opinion rendered by this office to the Honorable C. W. Smith, Clerk of Circuit Court of Washington County, dated April 28, 1964, and found in Report of the Attorney General (1963-1964), p. 44.

TAXATION—Recordation Tax; Consent and Disclaimer Agreement—Record as contract relating to real property.

November 10, 1971

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

I have received your recent letter concerning a Consent and Disclaimer Agreement prepared by the U. S. Department of Agriculture. The agree-
ment purports to give a creditor a security interest in certain fixtures. You ask whether this instrument may be recorded or filed.

The agreement does not set forth all of the information required by Virginia Code § 8.9-402 and does not purport to be a financing statement. It should not, in my opinion, be accepted by you and filed as a financing statement. It may, however, be accepted as a severance agreement and recorded as a contract relating to real property and recorded in the deed book upon payment of the recordation tax imposed by Virginia Code § 58-58.

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TAXATION—Recordation Taxes—A museum is not “an other institution of learning.”

August 12, 1971

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

I have received your letter of August 4, in which you ask whether a deed conveying property, without consideration, to the National Tobacco-Textile Museum is subject to State and local recordation taxes.

Virginia Code § 58-64 exempts from the taxes imposed by §§ 58-54 and 58-55 of the Code, “any deed conveying real estate to an incorporated college or other incorporated institution of learning, not conducted for profit, where such real estate is intended to be used for educational purposes and not as a source of revenue or profit. . . .” The property conveyed is apparently to be used for educational purposes. The museum is a non-profit, non-stock corporation.

Similar language in Virginia Code § 58-441.6(t) has been construed as follows:

“The term ‘college or other institution of learning’ contemplates the existence of a faculty, a student body and prescribed courses of study. The ‘other institution of learning’ must be something like a college under a rule of statutory construction generally applicable where general words follow a particular designation.” Virginia Retail Sales and Use Tax Rules and Regulations, § 1-96(a), (July 1, 1969).

This definition is consistent with the opinion of the Virginia Supreme Court in Richmond v. Southside Day Nursery Ass'n, 207 Va. 561 (1966) and has been approved by the Circuit Court of Arlington County in Girl Scout Council of the Nation’s Capital v. State Tax Commissioner (Jan. 8, 1971) (appeal noted).

In my opinion a museum is not an other institution of learning within the meaning of § 58-64. The State tax imposed by § 58-54 and the local tax permitted by § 58-65.1 should apply. As there was no consideration, the State tax imposed by § 58-54.1 does not apply.

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TAXATION—Recordation Taxes—Deed not subject to tax where there is no consideration.

July 30, 1971

THE HONORABLE WALKER R. CARTER, JR., Clerk
Circuit Court of the City of Roanoke

This is in reply to your recent letter from which I quote as follows:

“Your opinion will be appreciated as to whether or not the additional recordation tax under Section 58-54.1, Code of Virginia, applies to a deed in which two husbands and their respective wives are parties of the first part, all parties of the first part having the same
surname. The party of the second part is a company which company name contains the surname of the parties of the first part."

You indicate further that the consideration specified in the deed was ten dollars and "other good and valuable consideration."

The mere recitation of a nominal consideration does not necessarily mean that consideration has passed so as to make the deed convey "realty sold." If there was no consideration, the deed is not subject to the § 58-54.1 tax. Consideration would, for this purpose, include any liabilities assumed or satisfied, and not secured by a lien on the property conveyed, and any capital stock received by the grantors. See *Orpheum Bldg. Co. v. Anglim*, 127 F.2d 478 (9th Cir. 1942).

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**TAXATION—Retail Sales and Use Tax—Purchase orders exchanged for goods by local merchants subject to tax.**

*August 26, 1971*

**The Honorable Thomas R. Nelson**

County Attorney for Augusta County

This is in reply to your letter of August 17, 1971, in which you inquire as to the applicability of the Virginia Retail Sales and Use Tax Act, §§ 58-441.1, et seq., of the Code of Virginia (1950), as amended. The situation about which you inquire involves the issuance of "purchase orders" by the Augusta County Department of Public Welfare to families in emergency straits to be exchanged for food or clothing by local merchants. You indicate this procedure is temporary, until the recipient can be set up on the permanent welfare roles. The merchant having received a purchase order and sold goods in return, forwards it to the Department of Public Welfare and is reimbursed by check. You ask an opinion as to whether these purchases are exempt from the sales tax.

I am of the opinion that they are subject to the sales tax. Section 1-45 of the Virginia Retail Sales and Use Tax, Rules and Regulations (1969), specifically exempts sales to the Commonwealth or to any political subdivision thereof, but this section contemplates the sale of items to be used or consumed by agents of the Commonwealth or political subdivisions. While in the above transaction the merchants are eventually compensated by Augusta County, still it is the citizens within the emergency welfare status who will use or consume the goods purchased from the merchants.

It is my opinion that § 1-112 is the controlling regulation in this situation:

"Tangible personal property purchased by individuals with government food stamps or similar stamps or vouchers is subject to the tax."

This section is applicable because it contemplates a purchase and use by an individual.

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**TAXATION—Roanoke Valley Citizens Band Radio Club—Property taxable.**

*October 21, 1971*

**The Honorable Billy K. Muse**

Commissioner of Revenue for Roanoke County

I have received your letter of October 15, asking whether property owned by the Roanoke Valley Citizens Band Radio Club should be tax exempt. I am aware of no exemption in our statutes for such an organization. In my opinion, property owned by the club is taxable.
TAXATION—Secrecy of Information—Assessor may permit others to examine non-confidential records.

August 12, 1971

The Honorable John E. Kennaehn
Commonwealth's Attorney for the City of Alexandria

I have received your recent letter, with respect to my opinion of May 12, 1971, to you. You state that the language of Virginia Code § 58-46, "would certainly appear to mean that there is at least authority for the Council to examine public assessment rolls."

I agree. Not only does § 58-46 expressly exempt, "any matters required by law to be entered on any public assessment roll or book," but the entire statute is directed toward the divulging of information. In my opinion, one does not divulge that which is already public knowledge. The matters protected by § 58-46 are matters to which the general public would not otherwise have access. In other words, an assessor's records are not confidential if they do not contain privileged information. It is my understanding that some assessors' offices keep privileged information in separate files apart from their regular records. In such a case, it is not inappropriate for an assessor to permit others to examine his non-confidential records.

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

I have received your letter of July 2, in which you ask whether you may, for the purpose of demonstrating to a taxpayer that his home is assessed on the same basis as others in his neighborhood, "reveal the structural contents and assessment basis of one home to another home owner?"

Virginia Code § 58-46 clearly forbids you to "divulge any information acquired by [you] in respect to the property ... of any person, firm or corporation while in the performance of [your] public duties." Unless the information contained on your assessment cards is obtained solely from public records, I am of the opinion that you may not permit any person, other than the taxpayer whose property the card concerns, to examine any card in your files; nor may you otherwise divulge any such non-public information.

The Honorable Margaret Cowan
Treasurer of Montgomery County

I have received your letter of October 11, 1971, from which I quote:

"The question for which I am seeking an answer is whether a trailer located in this county is taxable to a member of the armed forces who has not lived here for the past 21 months and who claims exemption under the Soldiers and Sailors Relief Act—which Act is not available to our Commonwealth's attorney.

"I quote from a letter from the wife of this soldier:
'My husband and I have been in the army and out of the State of Virginia since January, 1970, and living in Texas all this time. Since we have been in Texas we have been giving
my parents home in Tazewell as our home residence, although we still owned the trailer in Blacksburg."

"They still owned the trailer, located in Blacksburg as of January 1, 1971, and the husband's home state was not given."

Apparently, the serviceman was a domiciliary of Virginia prior to his entry into the United States Army.

The relevant portion of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.A. § 574) provides in part:

"For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. . . . Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders. . . ."

In construing this federal statute, the Court of Appeals for the Fourth Circuit stated in United States v. Arlington County, 326 F.2d 929 (4th Cir. 1964):

"To put the matter in another way, the Act does not say that the serviceman shall not be deemed to have acquired a domicile in the host state because he was there by virtue of military orders—it says he shall not be deemed to have lost his domicile in his 'home' state, and the Act further states that the same condition shall exist with respect to his personality." (Emphasis supplied by Court.)

The federal law does not prevent taxation of personal property by the State of residence or domicile. In your letter, there are no facts shown which would support a loss by the serviceman of his Virginia residence or domicile by reason of his being absent from the State in compliance with military orders.

Therefore, in my opinion, the provisions of the Soldiers' and Sailors' Civil Relief Act do not preclude the imposition of the tangible personal property tax under Chapter 16 of Title 58 of the Code of Virginia on the trailer in question. See Report of the Attorney General (1959-1960), p. 357.

TAXATION—State and Local—Transportation District Act of 1964; common carrier subject to certain taxes.

May 12, 1972

THE HONORABLE OMER L. HIRST
Member, Senate of Virginia

Your letter of April 17 requests an opinion whether the Northern Virginia Transportation Commission ["the Commission"] is exempt from certain State and local taxes, if: (1) it leases its buses to a common carrier, which operates them between points in Northern Virginia and Washington or (2)
it acquires a common carrier for the same purpose, contracting with a third party to manage and operate the carrier for a fixed fee.

The Commission is the governing body of the Northern Virginia Transportation District, a political subdivision of the State which was established by Chapter 630 of the Acts of Assembly of 1964, as amended in Chapter 449 of the Acts of Assembly of 1968. That Act incorporates the provisions of the Transportation District Act of 1964, Chapter 32 of Title 15.1 of the Code of Virginia (§ 15.1-1342 et seq.). Section 15.1-1370 of that Act provides:

"It is hereby found, determined, and declared that the creation of any transportation district hereunder and the carrying out of the corporate purposes of any such transportation district is in all respects for the benefit of the people of this State and is a public purpose and that the transportation district and the commission will be performing an essential governmental function in the exercise of the powers conferred by this chapter. Accordingly, the transportation district shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of any transportation facilities or upon any revenues therefrom and the property and the income derived therefrom shall be exempt from all State, municipal and local taxation."

1. Lease and contract with AB&W Transit Company of Alexandria.

Your letter indicates that the Commission has contracted with AB&W Transit Company ("the carrier"), a certified common carrier, for bus service on specified routes. Under the terms of the contract, the Commission leases its buses to the carrier and is entitled to all receipts; it reimburses the carrier for all expenses of operating the bus service and pays it an additional fee.

Whereas the Commission is providing bus service by contract, it is not, in my opinion, itself operating or maintaining transportation facilities within the meaning of § 15.1-1370. The fact that taxes are part of the reimbursement feature of the contract does not affect this conclusion. The carrier must therefore be treated as a separate entity for purposes of taxation. See United States v. Boyd, 378 U.S. 39 (1964).

State taxes:

a. Fuel taxes: The carrier is subject to fuel taxes under §§ 58-628, 58-711 and 58-744 for its contractual operation as a suburban bus line until July 1, 1972. After that date it will be exempt from these taxes under the amendments to these sections in Chapter 862 of the Acts of Assembly of 1972.

b. License tax on vehicles: The vehicles are owned by the Commission. However, under the terms of § 15.1-1370 the Commission is exempt from property and income tax and from taxes on "its activities in the operation and maintenance of any transportation facilities . . . ." As the license tax is a tax on an activity which is, under the terms of the contract, being operated and maintained by the carrier rather than the Commission, the license taxes should be paid by the carrier.

c. Rolling stock: Section 58-620 imposes a tax on rolling stock of common carriers "habitually used in this State." As the AB&W Company is a common carrier operating the buses, it is subject to the tax.

d. State payroll taxes (Virginia unemployment): The carrier is subject to the Virginia unemployment tax. The Commission is exempt as a political subdivision.

e. Tax on capital: As the tax on capital is a property tax, the Commission is not subject to it on its assets. The carrier, however, is subject to it.
f. Franchise tax: The carrier is subject to the franchise tax levied under § 58-456.
g. Sales tax: The Commission's purchases are exempt from sales tax under § 58-441.6(p), as the District is a political subdivision of the State. Buses leased to and used by the carrier are exempt from the use tax under § 58-441.6(h). Any personal property owned by the Commission and used by the carrier but not directly in the rendition of its public service would not be exempt from the use tax.

Local taxes:
a. Vehicle licenses: See (b) above.
b. Road tax: The carrier is subject to local road taxes under § 58-638.1.
c. The Commission is not subject to tax on any of its real estate. However, any real estate leased to or substantially used by the carrier would be subject to a tax on the carrier based on its rental value, under § 58-758.
d. Utility tax: The carrier is, of course, subject to any local tax imposed on the consumers of utility services. Although such a tax is an excise rather than a tax on property, activities or income, it would not apply to any political subdivisions of the State. Accordingly, the Commission would be exempt from such a tax.
e. Sales tax: See (g) above.
f. Gross receipts tax: The carrier is subject to gross receipts tax on its activities.

2. Acquisition of WV&M Coach Company.

If the Commission merely acquires the stock of the WV&M Coach Company, or acquires its assets and operates the facilities by contract with another carrier, the conclusions as to tax stated above would apply. In order for different treatment to be authorized, the Commission would have to operate the carrier itself. If the carrier were being operated directly by the Commission, it would not be subject to any of the State or local taxes itemized by you.

TAXATION—State Tax on Wines—When town is entitled to participate in the proceeds of State tax on wines.

November 18, 1971

THE HONORABLE F. B. HUBER
Treasurer of Campbell County

I have received your recent letter in which you ask whether the Town of Altavista may qualify to receive a share of the State tax on wines under Virginia Code § 4-24(a).

The Town of Altavista has a separate three-member school board but does not have a separate school system. Virginia Code § 4-24(a) applies only to those towns, "constituting a special school district and operating as a separate school district. . . ." Altavista is not, in my opinion, entitled to participate in the proceeds of the State tax on wines.

TAXATION—The Sacred Heart Academy—Facilities used for educational purposes tax exempt; vacant land unused, subject to taxation.

November 17, 1971

THE HONORABLE TAYLOR L. BARR
Commissioner of the Revenue for the City of Winchester

I have received your recent letter, from which I quote:
"I would appreciate your giving me your opinion as to the validity of the City of Winchester imposing real estate tax on the land and buildings of the Sacred Heart Academy, a Catholic Church Parochial School, or any part thereof.

"The Sacred Heart Academy, a Catholic Church Parochial School, is located at 1713 Amherst Street in the City of Winchester, Virginia. This School was founded in 1957 and prior to January 1, 1971, was located in Frederick County.

"The parcel contains 60.71 acres and houses a School Building and a Convent. The School Building contains 8 class rooms, office, gymnasium, library, kitchen, rest rooms and storage room. (13,072 sq. ft.). The Convent contains a chapel, office, 8 bedrooms, bath, consulting room, 3 parlor rooms, kitchen and dining room. (one and two story—1844 sq. ft.).

"Approximately 180 children attend grades one thru six. Six Teachers and one Non-Teaching Principal are included in the Faculty.

"Other than the ‘Title Fund for Library’ and the ‘Milk Subsidy Funds’ all other expenses are obtained from Church Funds or Tuition. They also provide bus service for their own children.

"Of the total 60.71 acres, approximately 20 acres are used for School, Convent and Recreational purposes."

This office contacted you on November 16, 1971, for additional information. You stated that the Sacred Heart Academy was not incorporated, but did own the property in question. The convent is occupied by nuns who are included in the school's faculty. Further, of the total 60.71 acres referred to in your letter, some 20 acres are in use and the remaining acres lie vacant with no functional use contemplated.

The Virginia Constitution was revised, pursuant to law, and duly ratified by the people on November 3, 1970. The revised Constitution became effective at noon, July 1, 1971.

Article X, Section 6(a) (4), of the revised Virginia Constitution provides for the following exemption from taxation:

"(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

* * *

"(4) Property owned by public libraries or by institutions of learning not conducted for profit, so long as such property is primarily used for literary, scientific, or educational purposes incidental thereto. This provision may also apply to leasehold interests in such property as may be provided by general law."

Article X, Section 6(c), provides that, except as to property of the Commonwealth, the General Assembly may restrict or condition property tax exemptions contained in Article X, Section 6(a) (1)-(6).

Article X, Section 6(f), contains a grandfather clause whereby property exempt from taxation on the effective date of Article X, Section 6, would continue to be exempt until the General Assembly otherwise provided. Section 183 of the former Constitution provided for various property tax exemptions which, except for property of the Commonwealth or its political subdivisions, could be restricted by the General Assembly. Section 183 was construed by the General Assembly by Virginia Code § 58-12. I interpret the grandfather clause of Article X, Section 6(f), as continuing § 58-12 under the limitations of Section 183 of our old Constitution and the liberal rules of construction applied thereto.

Section 183(d) contained a property tax exemption for incorporated institutions of learning. Section 58-12(4) of the Code of Virginia provides a
property tax exemption for incorporated institutions of learning. As noted, Article X, Section 6(f), continues the tax exemptions heretofore authorized by Section 183 and contained in § 58-12 of the Code.

It is clear that the Sacred Heart Academy is an institution of learning. However, since this institution is not incorporated, the question arises whether a tax exemption is justified or whether § 58-12(4) restricts the application of the exemption provided in Article X, Section 6(a)(4). The provisions of Section 183 of the former Constitution concerning property of the Commonwealth or its political subdivisions were held to be self-operative. Commonwealth v. Richmond, 116 Va. 69 (1914). In my opinion, this rule of self-operation also pertains to the exemptions set forth in Article X, Section 6(a)(4), concerning property of institutions of learning, whether incorporated or not. The General Assembly cannot enact restrictive legislation concerning tax exemptions for institutions of learning covered by the revised Constitution prior to the effective date of that Constitution. Jackson v. Hodges, 176 Va. 89 (1940). Therefore, the property of institutions of learning used for the appropriate purposes set forth in Article X, Section 6(a)(4), is exempt from taxation, irrespective of whether the particular institution of learning is incorporated or not.

Based upon the factual situation presented, the recreational facilities which are used as a playground for the students and the school buildings are clearly used for educational purposes and are exempt from property taxation. The convent used as faculty housing and owned by the institution is also exempt from taxation. County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613 (1962).


TAXATION-FINANCE—Powers of County Treasurer; Deposit of Moneys—
Director of Finance can authorize transfer of securities.

November 1, 1971

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

I have received your recent letter in which you inquire whether securities for Arlington County funds on deposit with a bank located in Virginia and held for a Virginia depository bank may be transferred to another bank located without this State, upon your authorization.

Arlington County has an urban form of government provided for in Title 15.1 of the Virginia Code. Section 15.1-766(a) expressly provides that the director of finance of such county government shall have the custody of all county public funds. Section 15.1-766(e) gives that director of finance the powers conferred and duties imposed by general law upon county treasurers.

Section 58-944 provides in part:

"No money received by a county treasurer shall be deposited with any depository of the treasurer's county selected and approved as provided in § 58-943 until such depository shall have given bond with the same conditions as those required for bonds given by State depositories who elect to give bond to protect money deposited with them by the State Treasurer pursuant to the provisions of §§ 2.1-211 to 2.1-214. . . ."

Section 2.1-214 provides that the State Treasurer may authorize a bank within or without the Commonwealth to receive securities from a Virginia depository bank securing deposits of State funds. As noted, § 58-944 states that § 2.1-214 is applicable to county treasurers and § 15.1-766(e) gives
urban county directors of finance the powers and duties of county treasurers.

Therefore, in my opinion, the director of finance of Arlington County can authorize the transfer of the securities held by the Bank of Virginia to another bank located without the Commonwealth. However, I am unable to find any authority which would authorize you to consent to such transfer.

TOWNS—Brookneal Is Legal Entity and Qualifies As a Public Agency.
TOWNS—Brookneal Is Legally Empowered to Provide Type of Planning Assistance Proposed in Application to Federal Aviation Administration for Master Planning Grant.
TOWNS—Brookneal May Contract with United States to Receive and Expend Funds; Must Comply with §§ 5.1-47 and 5.1-48.

February 29, 1972

THE HONORABLE RICHARD W. ELLIOTT
Member, House of Delegates

This is in reply to your letter of February 16, 1972, in which you indicated that the Town of Brookneal plans to make application to the Department of Transportation, Federal Aviation Administration, for a master planning grant. You ask to be advised whether the town, as sponsor of the grant, possesses the powers cited as follows:

"(1) The sponsor is a legal entity and qualifies as a 'public agency.'

(2) The sponsor is legally empowered to provide the type of planning assistance or perform the type of planning work proposed in the application.

(3) The sponsor is empowered to receive and expend Federal funds and to provide or obtain and expend other funds for the purposes stated in para. 103a(2) of FAA Order 5900.1, Planning Grant Program (PGP), 25 September 1970.

(4) The sponsor is empowered to contract with the United States for the purpose of receiving and expending Federal funds."

Your questions are answered seriatim:

1. The Town of Brookneal is a legal entity and qualifies as a public agency.

2. The Town of Brookneal is legally empowered to provide the type of planning assistance or perform the type of planning work proposed in the application pursuant to the authority of Chapter 3, Articles 1 and 2, of Title 5.1 of the Code of Virginia (1950), as amended.


4. The Town of Brookneal may contract with the United States for the purpose of receiving and expending these funds. It, however, must comply with the two conditions set out in §§ 5.1-47 and 5.1-48.

TOWNS—Consolidation Method Under § 15.1-1130 Whereby County and Two Incorporated Towns Therein May Become City.
COUNTIES—Consolidation Method Under § 15.1-1130 Whereby County and Two Incorporated Towns Therein May Become City.
CITIES—Consolidation Method Under § 15.1-1130 Whereby County and Two Incorporated Towns Therein May Become City.
COUNTIES—Constitution Prohibits Special Act (Charter) for Extension or Contraction of Boundaries.

COUNTIES—Charter May Not Be Granted by General Assembly As Special Act Under Article VII, Section 2, by Two-Thirds of Members.

COUNTIES—Consolidation Method Under § 15.1-1130 Requires Majority Vote of Each Town Within County As Well As County.

COUNTIES—Consolidation Charter Would Be Special Act Requiring Two-thirds Vote of General Assembly Under Article VII, Section 1, of Constitution.

January 5, 1972

THE HONORABLE E. BRUCE HARVEY
Commonwealth’s Attorney for Campbell County

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

“Article VII, Section 1 of the Constitution of Virginia (3) substantially states that ‘Town’ means any existing town within one or more counties which has within defined boundaries a population of 1,000 or more. Sections 15.1-910-915 is general law whereby the General Assembly can be requested to grant a new charter. Section 15.1-1130 is general law whereby a county and all incorporated towns located entirely therein may consolidate. My question is, can a county composed of two incorporated towns be granted a charter to become an independent incorporated community (city) under Sections 15.1-910-915 of the Code of Virginia or is the consolidation method under Section 15.1-1130 of the Code the only process?

“Question two, is whether or not a county can proceed under Sections 15.1-910-915 to request a new charter for city status including only that portion of the county that is exclusive of the two incorporated towns within the county?

“Question three, is whether or not a county may be granted a charter by the General Assembly as a Special Act under Article VII, Section 2, by an affirmative vote of two-thirds of the members elected to each House of the General Assembly?

“Question four, concerns procedure under the consolidation method provided by Section 15.1-1130 of the Code. Would the referendum require a majority vote of each of the two towns within the county as well as the county or a majority vote only of the combined county and towns?

“Question five is whether or not if consolidation was approved by the voters, would the charter require only a majority vote of the General Assembly or would the charter be a Special Act requiring a two-thirds vote of the General Assembly?”

I shall answer your questions seriatim:

1. I am of the opinion that the consolidation method under § 15.1-1130 of the Code is the only process by which a county within which is located two incorporated towns may become an independent incorporated community (city).

2. Article VII, Section 2, of the Constitution prohibits a special act (charter) from being adopted which provides for an extension or contraction of boundaries of any county. I therefore answer this question in the negative.

3. For the reasons stated in answer number two above, in light of the factual situation which you describe, I answer this question in the negative.

4. Section 15.1-1138 of the Code requires a majority vote of each of the two towns within the county as well as of the county.
5. The charter would be a special act and require a two-thirds vote of the General Assembly in accordance with Article VII, Section 1, of the Constitution.

TOWNS—Have All Rights of Purchased Water Companies to Operate Water System Within and Without the Town.

TOWNS—May Under Constitution Retain Exclusive Right to Operate Municipal Water System; Under § 15.1-293 Has All Rights of Purchased Water Companies to Operate Water System Without the Town.

COUNTIES, CITIES AND TOWNS—Certificate of Public Convenience and Necessity Not Issued by State Corporation Commission to, but Town Has All Rights of Purchased Water Companies Under Their Certificates.

TOWNS—People Protected by § 15.1-293 from Being Deprived of Water by the Sale of a Water Company to a City or Town.

TOWNS—May Prohibit Operation of Other Water Systems Within Town; Right to Prohibit Such Operations Without Town Depends Upon Authority of Companies Purchased.

TOWNS—One Person or Privately Owned Company, Cooperative or Organization Needs Certificate of Public Convenience and Necessity to Operate Water System Within or Without Town; Without Certificate, Operations Must Involve Less Than Fifty Customers.

TOWNS—May Require That Water Consumers Within and Without Town Convert To and Use Town Water System.

March 2, 1972

The Honorable Sam E. Pope
Member, House of Delegates

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

"The Town of Windsor, a Virginia municipal corporation located in Isle of Wight County, recently acquired the privately owned and operated water systems of Windsor Water Company, Incorporated, Windsor Improvement Corporation and Bracey's Water System. The water system of Windsor Water Company, Incorporated, was operated within and partly without the Town in areas designated in and pursuant to a Certificate of Public Convenience and Necessity issued to said Corporation by the State Corporation Commission in 1969. The Bracey Water System was operated within and partly without the Town, and the water system of Windsor Improvement Corporation was operated entirely within the Town. The Town now operates these water systems as a municipal water system within and partly without the Town and sells water to consumers thereof in those areas.

"The Town is aware of Sections 15.1-292, 15.1-293, 15.1-854, 15.1-875, 56-232 and 56-265.1 of the Virginia Code, but feels they do not adequately answer some of the questions that have arisen. I will, therefore, on behalf of the Town, appreciate your opinion as to whether or not:

"1. The Town has the exclusive right to operate a municipal water system and sell water to consumers thereof within the Town and without the Town in the areas formerly served by those whose systems were acquired by the Town to the exclusion of all others and prohibit others from so doing, or whether it is necessary for the Town to obtain or be issued or granted such exclusive right or authority.
REPORT OF THE ATTORNEY GENERAL

2. The Town has the exclusive right to operate a municipal water system and sell water in the areas within and without the Town formerly served by Windsor Water Company, Incorporated, under its Certificate of Public Convenience and Necessity by virtue of the acquisition of its water system by the Town.

3. The Town may refuse to furnish water to any person or consumer in any area, and refuse to permit a person or private company or organization to operate a water system and sell water within the Town and without the Town in those areas now served by the town or to use the streets and property owned or controlled by the Town for such purposes.

4. The Town may prohibit the operation of a water system or systems and the sale of water by individuals or companies within the Town and without the Town in the areas now served by the Town.

5. One person, or a privately owned company, cooperative or organization, either with or without a Certificate of Public Convenience and Necessity, may operate a water system and sell water in competition with the Town within the Town and without the Town in the areas now served by the Town, either on a metered of flat rate basis, and if an unlimited number of persons may form such company, cooperative or organization for such purposes and perform such services.

6. The Town may require water consumers within and without the Town in the areas now served by the Town to connect to and use the Town water system and purchase water from the Town, or if such consumers may discontinue their water service with the Town and provide their own private water system.”

I shall answer your questions seriatim.

(1) Article VII, Section 8, of the Constitution of Virginia retains authority over the streets, alleys or public grounds of a city or town in the cities and towns. This section does not include counties since in all but two of the counties the State Highway Department has control over the streets in the county.

Section 15.1-292, Code of Virginia (1950), as amended, authorizes the governing body of every county, city or town to acquire or otherwise obtain control of or establish, maintain, operate, extend and enlarge water works within or without the limits of the county, city or town. Section 15.1-293 provides that upon purchase of any water plant operating within territory contiguous to any county, city or town, the county, city or town so purchasing shall have all of the rights, privileges and franchises of the company purchased and the power to operate, maintain and extend the same in all the territory in which the plant or plants so purchased had the right of operation.

Municipalities and counties are not included within the provisions of § 56-265.1(a) of the Code and therefore the State Corporation Commission does not issue a Certificate of Public Convenience and Necessity to counties, cities or towns. Neither does it transfer or assign such certificates already granted to a private water company to a county, city or town upon the purchase of the facility by these governmental bodies.

Section 56-265.3 of the Code prohibits public utility companies having more than fifty customers [§ 56-265.1(b)] from engaging in furnishing public utility services within the State without first having obtained a Certificate of Public Convenience and Necessity. In applications for the furnishing of water or sewerage services within any political subdivision in which there has been created an authority for either or both of such purposes, pursuant to § 15.1-1239, et seq., of the Code, the Commission is prohibited from holding a hearing on the application or issuing a certificate unless
the application has first been approved by the governing body of the political subdivision in which the territory is located.

The Town of Windsor may, therefore, under Article VII, Section 8, of the Constitution, retain exclusive right to operate a municipal water system and sell water to customers thereof within the town. Under § 15.1-293 of the Code, the town has all the rights of the purchased water companies to operate a water system without the town. Assuming that the predecessor water companies had the exclusive rights to operate, then the town may do so; provided, however, that the State Corporation Commission may upon a showing of public convenience and necessity issue a certificate to a public utility as defined in § 56-265.1(b), both within and without the town.

(2) Since the State Corporation Commission does not issue or assign Certificates of Public Convenience and Necessity to counties, cities or towns, the Town of Windsor has no rights under the certificates, per se, heretofore issued to the private water companies purchased by the town. However, under § 15.1-293 of the Code, all the rights of the water companies were reserved by law unto the town. Therefore, under this section the town has all the rights of these companies by virtue of the acquisitions, unless and until a certificate is granted by the State Corporation Commission to a public utility company to operate in the territory.

(3) The purpose of § 15.1-293 of the Code was to protect people and communities previously dependent for water upon a public service company from the calamity of being deprived of water by the sale to a city or town of the properties of such company. Therefore, the town may not refuse to furnish water to any person or consumer in any area, being supplied at the time of the acquisition, nor to all inhabitants within the area which was being supplied, or which was capable of being supplied, by the facilities so acquired. South Norfolk v. Norfolk, 190 Va. 591, 58 S.E.2d 32.

The town may refuse to permit a person or private company or organization to operate a water system and sell water within the town under its authority granted under Article VII, Section 8, of the Constitution. As to the area without the town, the provisions of § 56-265.3 of the Code apply and unless a Certificate of Public Convenience and Necessity is issued to the person or private company they would be unable to operate except companies with less than fifty customers.

(4) The town may prohibit the operation of a water system or systems by individuals or companies within the town. Its right to prohibit such operations without the town depends upon the authority of the water companies purchased and whether §§ 56-265.1(b) and 56-265.3 apply.

(5) With a Certificate of Public Convenience and Necessity one person, or a privately owned company, cooperative, or organization, may operate a water system within or without the town. Without the certificate, the operation would be prohibited except for operations involving less than fifty customers.

(6) Under § 15.1-875 the town may require the connection of premises with facilities provided for furnishing water and may charge and collect compensation for water thus furnished. I am, therefore, of the opinion that the town may require that consumers within and without the town in the areas now served by the town connect to and use the town water system and purchase water from the town.

TOWNS—Limitations on Indebtedness Before Town May Issue Bonds of Indebtedness.

TAXATION—Town's Limitation on Indebtedness.

May 11, 1972

THE HONORABLE DUDLEY J. EMICK, JR.
Member, House of Delegates
This is in reply to your letter of April 25, 1972, in which you request my opinion concerning the amount of money the Town of Buchanan may borrow without the necessity of having a bond issue which requires a referendum.

The limitations on the indebtedness of a town before it may issue bonds of indebtedness is set forth in Article VII, Section 10, of the 1971 Constitution of Virginia. This is set at eighteen per centum of the assessed valuation of the real estate in the town subject to taxation, as shown by the last preceding assessment for taxes.

Certain classes of indebtedness are not included in the eighteen per centum limitation. These are set forth in paragraphs (1), (2), (3) and (4) of Section 10.

**TOWNS—Referendum**—Town must have specific legislative authority before it may hold advisory referendum on dogs running loose.

**DOG LAWS**—Town Must Have Specific Legislative Authority Before It May Hold Advisory Referendum on Dogs Running Loose.

March 31, 1972

**THE HONORABLE WILLIAM G. DAVIS**
Commonwealth's Attorney for Franklin County

This is in reply to your letter of March 29, 1972, in which you ask my opinion whether the Town of Rocky Mount, Virginia, is authorized to hold an advisory referendum on the following question:

"Do you favor an ordinance which would restrain dogs from running loose?"

The town must have specific legislative authority before it may hold an advisory referendum on this subject. I am aware of no statute which confers power upon the town to hold such a referendum. I therefore answer your question in the negative.

**TRAILER CAMPS—Regulation by Ordinances**—County may prohibit in certain areas; may prescribe period license tax effective; may impose tax for last half of year.

**BOARDS OF SUPERVISORS—Authority**—May prohibit trailer camps in certain areas; may prescribe period license tax effective; may impose tax for last half of year.

**ORDINANCES**—Trailer Camps—County may prohibit in certain areas; may prescribe period license tax effective; may impose tax for last half of year.

**LICENSES**—Board of Supervisors May Prescribe Period License Tax Effective; May Impose Tax for Last Half of Year.

**TAXATION**—Board of Supervisors Has Authority to Prescribe Period License Tax on Trailer Camps Effective; May Impose Tax for Last Half of Year.

March 30, 1972

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

This is in reply to your letter of March 23, 1972, which reads as follows:

"Gloucester County is proposing to adopt a trailer regulation ordinance pursuant to Article 1, Chapter 6, of Title 35 of the 1950 Code of Virginia as amended and also an annual license tax ordinance pursuant to § 35-64.5 of said Code."
REPORT OF THE ATTORNEY GENERAL

“In the regulations ordinance, we intend to exclude trailers from the two sanitary districts in our County pursuant to § 35-62, which authorizes the counties to ‘regulate by ordinances the location and operation in the county of trailer camps.’

“In the annual license tax ordinance, we propose an annual license tax of $50.00, which will become effective on July 1, 1972, one half (½) of the tax to be payable on that date. For 1973 and ensuing years, the tax of $50.00 shall be payable on the 1st day of January.

“My questions are:

1. May trailer camps be prohibited in certain areas of the County?
2. Is it permissible to impose the tax for the last half of 1972?”

Your questions are answered seriatim:

1. Section 35-62, Code of Virginia (1950), as amended, authorizes the governing body of the county to regulate, by ordinance, the location and operation of trailer camps. The location of trailer camps is therefore a matter which the General Assembly has delegated to the boards of supervisors. Whether or not this zoning law is a lawful exercise of the police power depends upon its reasonableness. If its reasonableness is fairly debatable, the legislative judgment stands. County of Fairfax, et al. v. L. W. Parker, 186 Va. 675 (1947).

I am therefore of the opinion that trailer camps may be prohibited in certain areas of the county so long as the restriction under the zoning law is reasonable.

2. Section 35-62 authorizes the board of supervisors to prescribe the period for which the license tax on trailer camps shall be effective, which period may be a full year or only part thereof with lower charges for portions of a year than are prescribed for annual licenses. This authority, in my opinion, would permit the imposition of the tax for the last half of 1972.

TREASURERS—Annual Settlement With Boards of Supervisors—Treasurer must comply with statute; penalty for violation.

July 6, 1971

THE HONORABLE F. B. HUBER
Treasurer of Campbell County

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

“Section 58-925 of the Code of Virginia provides for the so-called ‘annual settlement’ of county treasurers with boards of supervisors. In Campbell County we have an Executive Secretary and a Central Accounting Department to which I make daily cash reports. Central Accounting prepares cumulative monthly financial statements of receipts and disbursements and monthly statements of financial condition which are checked with my office prior to submission to the Board of Supervisors.

“In view of the above it would appear that Section 58-925 has little or no relevance and that there is nothing additional the treasurer could do by way of compliance. Under these circumstances is it necessary that I continue to attempt to comply with this statute?”

Virginia Code § 58-932 provides that a local treasurer who fails to comply with any of several provisions of that chapter, including § 58-925, shall be guilty of a misdemeanor. In the light of this quite specific provision, I
am of the opinion that an annual settlement is required even under the circumstances which you describe.

TREASURERS—Collection of Delinquent Real Estate Taxes—Boards of supervisors may appropriate funds for legal assistance to treasurer.

THE HONORABLE J. B. FRAY
Treasurer of Madison County

I have received your recent letter, in which you ask:

"Does our Board of Supervisors have the authority to appropriate funds and pay from the county's General Fund the fees of an attorney for legal assistance to the Treasurer's Office needed in collecting real estate taxes for the tax years of 1969 and 1970?"

Chapter 21 of Title 58 of the Code of Virginia provides three different methods for the sale of delinquent lands. See Va. Code §§ 58-1029, 58-1083 and 58-1101. A fourth method is that provided by Virginia Code § 58-1014. This last procedure does not require that the taxes be first reported on the delinquent lists. Virginia Code §§ 58-762 and 58-1016 specifically authorize the board of supervisors to employ an attorney for the purpose of proceeding under § 58-1014. If the attorney is able to collect the taxes without instituting suit, he may nevertheless be compensated for his services. Va. Code § 58-1020. In my opinion, a board of supervisors may properly appropriate funds to pay an attorney for legal assistance in the collection of local real estate taxes pursuant to § 58-1014.

TREASURERS—Office Hours.

Boards of Supervisors—May Not Prescribe Office Hours for Elected or Appointed Officials.

THE HONORABLE LOUISE CAMBLOS
Treasurer of Wise County

This is in reply to your letter of March 13, 1972, in which you ask my opinion as to your authority to establish and maintain the working hours of your office.

In an opinion dated November 21, 1967, to the Honorable Elsie W. Faris, Treasurer-elect of Fluvanna County, found in Report of the Attorney General (1967-1968), p. 295, it was pointed out that the establishment and maintenance of the working hours of the treasurers of the counties was the responsibility of the officers themselves. A copy of this opinion is enclosed.

I concur in that opinion and it is my opinion that the authority for the establishment and maintenance of the working hours of the Treasurer of Wise County rests with you.

UNEMPLOYMENT COMPENSATION ACT—Trustees in Bankruptcy Are Employers for Purpose of; Liable for Contributions Under Act.

BANKRUPTCY—Trustees in Bankruptcy Are Employers for Purpose of Virginia Unemployment Compensation Act; Liable for Contributions Under Act.

THE HONORABLE M. CALDWELL BUTLER
Member, House of Delegates
This is in response to your letter of December 15, 1971, inquiring if a trustee in bankruptcy with from one to three employees, administering wage earner plans under Chapter XIII of the Bankruptcy Act, is an employer liable for contributions under the Virginia Unemployment Compensation Act.

Section 60.1-13 of the Code of Virginia of 1950, as amended, defines an "Employing unit" as "any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has . . . in its employ one or more individuals performing services for it within the State."

Section 60.1-12 defines "Employer" as "(1) Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks within either the current or preceding calendar year has or had in its employment, four or more individuals, irrespective of whether the same individuals are or were employed in each such day. . . ."

Therefore, since the trustee to whom you refer has less than four employees he is not liable under the Act at the present time.

The 1971 special session of the General Assembly amended the Act, effective January 1, 1972. One of the changes provides that "Employer" means:

"After December thirty-one, nineteen hundred seventy-one, any employing unit which
(a) In any calendar quarter in either the current or preceding calendar year paid for some service in employment wages of fifteen hundred dollars or more; or
(b) For some portion of a day in each of twenty (20) different weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, has or had in its employment at least one individual, irrespective of whether the same individual was in employment in each such day. . . ."

Therefore, such a trustee meeting the requirements of either (a) or (b) would be liable under the Act after December 31, 1971.

I am advised that the Administrative Office of the United States Courts does not consider such a trustee as a Federal employee and he is not covered under the program of Unemployment Compensation for Federal employees.

I fail to see sufficient distinction between Chapter XIII trustees and other trustees in bankruptcy to hold that the former are not employers for the purpose of the Virginia Unemployment Compensation Act.

I am of the opinion, therefore, that trustees under Chapter XIII of the Bankruptcy Act who meet the requirements of either (a) or (b) of § 60.1-12(1) of the Code of Virginia of 1950, as amended, will be liable for contributions under the Virginia Unemployment Compensation Act.

UNITED STATES—Jurisdiction Over Back Bay Wildlife Refuge—May close beach front to vehicular traffic.

October 18, 1971

The Honorable Andre Evans
Commonwealth's Attorney for Virginia Beach

Over a year ago, the authorities responsible for the management of the federally owned Back Bay Wildlife Refuge made it known that they intended to close to public vehicular traffic the Atlantic Ocean Beach fronting the Refuge as a consequence of the increase of such traffic in order to protect the sand dunes adjacent to the beach from degradation. At the time that the federal authorities made their intention known, you advised me that the public has been traveling the ocean front beach for "hundreds of
years” and you inquired as to the legality of closing the beach to vehicles. In response, as noted in my letter to you of June 2, 1970, a broad study of the law relating to public use of such land was initiated under the auspices of this office. Recently, you have advised me that the federal authorities have renewed their intent to close the ocean front to vehicular traffic, and you have requested my opinion as to the legality of the closure.

Back Bay Wildlife Refuge was acquired by right of eminent domain in a suit styled United States of America v. 3776.76 acres of land, more or less, in Princess Anne County, Virginia; Princess Anne Club, a Virginia corporation, Charles S. McVeigh, B. P. Holland, and wife, if any; and all persons known or unknown interested in the subject to be divided or disposed of in this proceeding and whom this proceeding may concern, at Law No. 6378 in the United States District Court for the Eastern District of Virginia, at Norfolk. An order vesting title to this land in the United States was entered on February 25, 1938, and a copy thereof was admitted to record in the Clerk's Office of the Circuit Court of Princess Anne County on March 3, 1938, in Deed Book 191, at page 398. This order clearly indicates that the take encompassed the land on the Atlantic Ocean shore to mean low tide.

It is apparent from the face of the order referred to above that this proceeding was instituted under the authority of 40 U.S.C.A. § 257 and the Migratory Bird Conservation Act, 16 U.S.C.A. § 715, et seq. Section 257 of 40 U.S.C.A. provides, in part, as follows:

“In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so . . . .”

The Secretary of Agriculture was authorized by 16 U.S.C.A. § 715d to purchase or rent areas which he determined to be suitable for use as sanctuaries for migratory birds, subject to the approval of the Migratory Bird Conservation Commission established by 16 U.S.C.A. § 715a. I am advised that the minutes and memoranda of the Commission reflect that the Commission approved the land comprising the Back Bay Wildlife Refuge for acquisition on December 9, 1937.

It has been held that the power under the Migratory Bird Conservation Act to purchase areas approved by the Migratory Bird Conservation Commission for use as a sanctuary, combined with the power granted under 40 U.S.C.A. § 257, authorizing a federal officer to acquire land by condemnation in every case in which the officer has been authorized to procure real estate for public use, confers the power to acquire by condemnation. Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967).

As an additional prerequisite to the acquisition of lands under the Migratory Bird Conservation Act, 16 U.S.C.A. § 715f provides that the state in which the area lies shall have consented by law to the acquisition by the United States of lands in that state, and this provision applies notwithstanding the fact that the land was acquired by condemnation. Swan Lake Hunting Club v. United States, above cited. I find this consent in Chapter 382 of the 1936 Acts of Assembly, which appears without substantial change as § 7.1-17 of the Code of Virginia (1950), as amended, the relevant portion of which is as follows:

“The conditional consent of the Commonwealth of Virginia is hereby given to the acquisition by the United States, or under its authority, by purchase or lease, or in cases where it is appropriate that the United States exercise the power of eminent domain, then by condemnation, of any lands in Virginia from any individual, firm, association or private corporation . . . for the conservation of the
forests or natural resources... for public parks and for any other proper purpose of the government of the United States...."

The order vesting title reflects the requirements of 40 U.S.C.A. § 258a, relating to condemnation proceedings, and I must conclude that the condemnation proceeding conformed to applicable federal law.

Since condemnation obtains for the condemnor title only so good as that held by the condemnee, United States v. Carmack, 329 U.S. 230 (1946), it is necessary to turn to the question of the ownership of the beach at the time that the condemnation proceeding was instituted.

Although it may, perhaps, be maintained that the public obtained a property right in the beach by dedication prior to the institution of the condemnation proceeding, nevertheless, no such right was recognized by judicial process, and, apparently, no such right was asserted in this condemnation proceeding although "all persons known or unknown interested in the subject to be divided or disposed of in this proceeding and whom this proceeding may concern" were made parties defendant. Therefore, I am of the opinion that the United States holds the land in question free of such property right. See United States v. Carmack, supra.

I find several sections pertinent to the proposed federal action in the regulations relating to the National Wildlife Refuge System contained in Title 50 of the Code of Federal Regulations. Vehicular traffic is covered by 50 C.F.R. § 26.14. This section prohibits travel in or use of vehicles within a refuge, "except on public highways and on roads, camp grounds and parking areas designated and posted for travel and public use by the officer in charge." Public uses of a refuge are subject to termination if incompatible with the purposes of the refuge.

"After consideration of all authorized uses, purposes, and other pertinent factors relating to individual areas, all public recreation use or certain types of public recreational uses within individual areas or in portions thereof may be curtailed whenever it is considered that such action is necessary." 50 C.F.R. § 28.17(c).

As to jurisdiction to regulate the Back Bay Wildlife Refuge, the General Assembly provided in the Act of 1936 which authorized acquisition of the land in question that:

"... the Commonwealth of Virginia hereby cedes to the United States the power and jurisdiction to regulate traffic over all highways maintained by the United States thereon, to protect the said lands and all property thereon belonging to the United States from damage, depredation or destruction and to operate and administer the said lands and said property thereon for the purposes for which same shall be acquired by the United States."

Accordingly, after careful consideration of the issues involved, it is my opinion that the federal authorities can legally close the beach front of Back Bay Wildlife Refuge to public vehicular traffic.

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VIRGINIA CONFLICT OF INTERESTS ACT—Board of Supervisors May Pay Secretary of Electoral Board for Services to Commissioner of Revenue, but not for Assisting Registrar in Purging Books.

ELECTIONS—Secretary of Electoral Board May Be Paid by Board of Supervisors for Services to Commissioner of Revenue, but Not for Assisting Registrar in Purging Books.

July 1, 1971

THE HONORABLE A. ERWIN HACKLEY
Commonwealth's Attorney for Page County
REPORT OF THE ATTORNEY GENERAL

I am in receipt of your inquiry regarding whether it is proper for the Board of Supervisors to pay the Secretary of the local Electoral Board (who is also an assessor) for (1) services rendered to the Commissioner of Revenue assessing personal property in a magisterial district in the county, and (2) for services rendered as secretary of the board for time spent in assisting the General Registrar in purging registration books.

The Secretary of the local Electoral Board is an officer of a governmental agency. Though he may not enter into any contract other than his contract of employment with his own agency, contracts with other governmental agencies are allowed pursuant to the provisions of § 2.1-349(a) (2) which reads as follows:

"No officer or employee of any governmental agency shall:
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; or . . . ."

Consequently, the Board of Supervisors may pay the Secretary of the Electoral Board for the services rendered to the Commissioner of the Revenue as an assessor provided the above provisions are followed.

I am, however, of the opinion that the Board would not be authorized to pay the Secretary for the services rendered in assisting the Registrar in a purge of the books. Section 24.1-46(13) provides that it is the duty of the General Registrar to purge the registration books and maintain accurate books of registered voters. In assisting him in these duties, the General Registrar may appoint assistants. Section 24.1-45. However, a member of a local Electoral Board may not be appointed as a General Registrar or as an assistant. See § 24.1-43 and § 24.1-45. Chapter 3 of Title 24.1 sets forth the duties of local Electoral Boards together with the compensation authorized to be paid. Purging of books must be done by the Registrar or his assistants. I am unaware of any authorization allowing compensation to be paid a member of the local Electoral Board, for assisting the Registrar in a purge.

VIRGINIA CONFLICT OF INTERESTS ACT—Commissioner Must Disclose His Interest; Definition of Material Financial Interest.

May 2, 1972

THE HONORABLE A. H. PAESSLER, Executive Secretary
State Water Control Board

This will acknowledge receipt of your letter of April 26, 1972, which states as follows:

"It has come to our attention that a gentleman serving on a commission with which we frequently deal may be violating the State Conflict of Interests Law. As we understand the situation, this gentleman represents clients who must submit plans for sewerage facilities to the commission on which he serves."
"Will you please provide us an opinion as to whether or not activities such as these do, in fact, violate Conflict of Interests Laws?"

Upon our request for further information you have advised that the Commission to which you refer is the Hampton Roads Sanitation District Commission (HRSD).

The Virginia Conflict of Interests Act, § 2.1-352 of the Code of Virginia (1950), as amended, requires that an officer of a governmental agency, which would include a HRSD Commissioner, "... 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 ... 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 ..."

Section 2.1-348(f) (1) defines "material financial interest" as an ownership of an interest of 5% or more in a firm or aggregate annual income of $5,000 or more from such firm. If the definition of "material financial interest" is applicable to the Commissioner, it is my opinion that a conflict of interests would exist within the meaning of the Virginia Conflict of Interests Act if the Commissioner were to fail to disclose his interest to the Commission and abstain from any official consideration or action related to that interest.

In addition to the provisions of § 2.1-352, it should be noted that § 2.1-353 requires:

"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 make written disclosure of the existence 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."

VIRGINIA CONFLICT OF INTERESTS ACT—Compatibility of Office; Employee of Commonwealth's Attorney May Not Be Justice of Peace.

PUBLIC OFFICERS—Compatibility; Employee of Commonwealth's Attorney May Not Be Justice of Peace.

July 8, 1971

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

This is in reply to your letter of July 1, 1971, in which you inquire:

"... would there be any impropriety or conflict of interest in the secretary to a Commonwealth's Attorney qualifying as a Justice of the Peace?"

The question you pose actually concerns compatibility of offices, rather than a potential conflict of interests.

I am of the opinion that § 39.1-10 of the Code of Virginia (1950), as amended, is applicable and would preclude the secretary of a Commonwealth's Attorney from appointment or election to the office of justice of the peace. The pertinent provisions of this statute are as follows:

"No person shall be eligible for election or appointment to the office of justice of the peace ... if he or his spouse is a law-enforce-
ment officer or is otherwise charged with the duty of enforcing any of the laws of this Commonwealth... nor shall any person who is or whose spouse is a clerk, deputy clerk, assistant clerk, or employee of any such clerk of a court not of record or a police department or a sheriff’s office of a county, city or town be eligible for election or appointment to the office of justice of the peace...” (Emphasis added.)

While § 39.1-10 does not specifically make prohibitory reference to the employee of a Commonwealth’s Attorney, the latter is nevertheless “charged with the duty of enforcing” the laws of the Commonwealth, placing his employees in the same category as those enumerated above in the statute.

It is my opinion that, pursuant to § 39.1-10, the position of secretary to a Commonwealth’s Attorney and the office of justice of the peace are incompatible.

VIRGINIA CONFLICT OF INTERESTS ACT—Councilman Is Officer of Radio Station Selling Advertising Time to Promoters of Events at SCOPE; Neither City nor Center Contracts for Advertising.

December 14, 1971

THE HONORABLE WALTER B. MARTIN, JR.
Member, House of Delegates

In your recent letter you inquire whether the Virginia Conflict of Interests Act would apply to a member of the City Council of the City of Norfolk who is also an officer of a radio corporation which broadcasts advertisements for events to be held at the city’s SCOPE Cultural Center. You state that the councilman is a General Manager and Executive Vice-President of a local radio station and is responsible primarily for obtaining advertisements for the station, and that the SCOPE Cultural Center is owned and operated by the City of Norfolk.

The Virginia Conflict of Interests Act, §§ 2.1-347 et seq. of the Code of Virginia (1950), as amended, prohibits an officer of a governmental agency, which would include a city councilman, from having a material financial interest in any contract with a governmental agency of which he is an officer. Section 2.1-348(f)(1) defines “material financial interest” as an ownership of an interest of 5% or more in a firm or aggregate annual income of $5,000 or more from such firm. If either of these definitions are applicable to the councilman’s relationship with the radio station, it is my opinion that a conflict of interest would exist within the meaning of the Virginia Conflict of Interests Act were the Center to purchase advertising from the station in question, since any contract with the SCOPE Cultural Center is in fact a contract with the City of Norfolk.

I am advised, however, that neither the City nor the Center contracts for advertising for events to be held at SCOPE; on the contrary, such advertising is contracted for by the promoter of each event. Under these circumstances, the radio station of which the councilman is an officer is perfectly free to sell advertising time to such promoters, and the Virginia Conflict of Interests Act would not apply.

VIRGINIA CONFLICT OF INTERESTS ACT—County Parks Authority; Member of May Not Be Employed to Manage Swimming Pool Operated by Authority.

January 24, 1972

THE HONORABLE JOHN D. EURE, JR.
Commonwealth’s Attorney for Nansemond County
I am in receipt of your letter of January 20, 1972, regarding the applicability of the Virginia Conflict of Interests Act. You inquire whether a conflict of interests exists if the Nansemond County Parks Authority, which consists of six members, employs one of such members to manage a swimming pool operated by the Authority.

The Nansemond County Board of Supervisors provides the Parks Authority with an operating budget, which the Authority in turn allocates for various capital expenditures, maintenance expenditures and operating expenditures, including the salaries of Park Authority employees.

Section 2.1-349(a)(1) of the Code of Virginia (1950), as amended, is applicable to your inquiry and provides as follows:

"No officer or employee of any governmental agency shall:

"Be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that such contract or subcontract is let after competitive bidding or by negotiation shall be irrelevant;"

In view of the above statute, I am of the opinion that under the facts you present, a conflict of interests would exist if a member of the Authority entered into a contract with such agency for the management of a pool under their control. Your inquiry is, therefore, answered in the affirmative.


VIRGINIA CONFLICT OF INTERESTS ACT—Member of Town Council, President of Bank; Must Disqualify Himself From Participating in Action of Council Relating to Bid on Bonds by Bank.

November 4, 1971

THE HONORABLE SAM E. POPE
Member, House of Delegates

This is in reply to your letter of October 19, 1971, regarding a conflict of interest question raised relating to the bond referendum in the Town of Windsor, which referendum I understand was passed. The inquiry raised concerns whether the Town Council can invite bids and negotiate with a bank for the purchase of such bonds when a member of Council is President, a director of and a stockholder in the bank. I assume such Councilman has a material financial interest in the bank, that is, ownership of an interest of 5% or more, or an annual compensation of $5,000 or more.

The specific inquiries raised are as follows:

"1. The bank of which the member of the Town Council is President and a director of and stockholder in may submit a bid to and negotiate with the Town Council for the purchase of and purchase such bonds.

"2. The member of the Town Council who is President, etc. of such bank must disqualify himself as a member of the Town Council from voting or participating in any official action of the Town Council relating to the submission of a bid and negotiations for and the purchase of such bonds by his bank.

"3. Such councilman is required to comply with the disclosure provisions under sections 2.1-352 and 2.1-353 of said Code."

As indicated above, the Virginia Conflict of Interests Act, Chapter 22, Title 2.1 of the Code of Virginia (1950), as amended, does define a material financial interest as ownership of an interest of 5% or more in a firm or
annual compensation of $5,000 or more from such firm. Section 2.1-349 (a) (1) prohibits an individual having a material financial interest in a firm from entering into any contract or having an interest in any contract with the governmental agency of which he is an officer. However, § 2.1-348 (3) sets forth the following exception to material financial interest:

"(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;"

In view of the above, I consequently am of the opinion that even if the member of Council has a material financial interest in the bank, the Town Council may accept a bid from and negotiate with the bank for the purchase of said bonds. However, as indicated by the exception to material financial interest, the provisions of §§ 2.1-352 and 2.1-353 of the Code would be applicable to the situation you raise, in which case the Councilman would be required to comply with the disclosure provisions and should disqualify himself from voting or participating in any official action of the Town Council relating to the submission of a bid and negotiations for the purchase of such bonds by his bank. Your inquiries are therefore all answered in the affirmative.

VIRGINIA CONFLICT OF INTERESTS ACT—Deputy Clerk, As Agent of Insurance Company, May Submit Bid for Surety Bond for Treasurer; Disclosure Provisions Must Be Followed.

December 6, 1971

THE HONORABLE A. DOW OWENS
Commonwealth's Attorney for Pulaski County

I am in receipt of your letter of November 29, 1971, wherein you inquire whether an individual employed as deputy clerk and whose income is derived solely from fees collected in the clerk's office can, as a duly qualified agent of an insurance company, submit a bid to the Board of Supervisors to write a surety bond for the treasurer of the county.

Section 2.1-349(a) (2) of the Code of Virginia (1950), as amended, does allow an officer or employee of a governmental agency to contract with or have an interest in a contract with any governmental agency other than the one of which he is an officer or employee. Since the deputy clerk in question is not contracting with or having any interest in a contract with the clerk's office the writing of the surety bond would not be prohibited. However the provisions of § 2.1-349(a) (2) must be followed and consequently, "... written disclosure of the existence of the interest of such officer or employee must 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 contracts 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—Employment of Relatives—Sheriff may employ his son, who does not reside with him, as deputy.
THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

In your letter of June 15, 1972, you inquire whether there would be a violation of the Virginia Conflict of Interests Act were a sheriff to employ his son, who does not reside with him, as deputy.

I have previously ruled in an opinion to the Honorable Teddy Bailey, Clerk of the Circuit Court of Dickenson County, dated November 22, 1971, a copy of which is attached, that pursuant to § 2.1-348(f) (4) of the Code of Virginia (1950), as amended, no conflict of interest existed where a member of the local board of welfare employed a relative unless such relative resided in the same household as the member and then only if such relative's annual salary was seventy-five hundred dollars or more. See, also, opinion to the Honorable Donald C. Stevens, County Attorney for Fairfax County [Report of the Attorney General (1970-1971), at p. 430].

Accordingly, I am of the opinion that since the sheriff's son does not reside in the same household, there would be no violation of the Act were he to be employed as a deputy.

VIRGINIA CONFLICT OF INTERESTS ACT—Employment of Relatives in Same Household—When prohibited.

THE HONORABLE TEDDY BAILEY, Clerk
Circuit Court of Dickenson County

I am in receipt of your letter of November 11, 1971, which reads as follows:

"By authority of Section 63.1-40 of the Code of Virginia, a member of the Board of Supervisors can also be a member of the local Board of Public Welfare.

"In your opinion, could a member of the Board of Supervisors, who has a son or a nephew working for the local Department of Public Welfare, serve as a member of the Board of Public Welfare without a conflict of interest."

Section 2.1-348(f) (4) of the Code of Virginia (1950), as amended, is applicable to your inquiry and reads:

"The employment by the same governmental agency of an officer or employee and spouse or any other relative residing in the same household shall not be deemed to create a material financial interest except when one of such persons is employed in a direct supervisory and/or administrative position with respect to such spouse or other relative residing in his household and the annual salary of such subordinate is seventy-five hundred dollars or more; and"

A member of the local board of welfare is in a supervisory capacity over individuals employed by the local department of public welfare. However, a conflict of interest, prohibited by the Act, would not exist in the case you present unless the son or nephew resided in the same household as the supervisor in question and then only if the son or nephew earned an annual salary of seventy-five hundred dollars or more.

VIRGINIA CONFLICT OF INTERESTS ACT—Janitor for School Board May Be Elected to Board of Supervisors; Disclosure Not Necessary for Salaried Employment.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA CONFLICT OF INTERESTS ACT—Compatibility of Office
Questions Not Governed by.

PUBLIC OFFICERS—Compatibility of Office; Member of Board of Supervisors May Not Hold Any Other Office, Elective or Appointive, At Same Time.

PUBLIC OFFICERS—Compatibility of Office Questions Not Governed by Conflict of Interests Act.

THE HONORABLE WM. ROSCOE REYNOLDS
Commonwealth's Attorney of Henry County

October 20, 1971

I am in receipt of your letter of October 16, 1971, wherein you raise two questions regarding the Virginia Conflict of Interests Act, Chapter 22, Title 2.1, of the Code of Virginia (1950), as amended, each of which will be answered separately.

Question No. 1. "Would a Conflict of Interest come into being if a man who had served for numerous years as a janitor for the Henry County School Board should be elected to the Henry County Board of Supervisors? That is, upon his taking office as a Supervisor, could he continue to be an employee of the County School Board, without a Conflict of Interest existing?"

Answer: No conflict would exist. Section 2.1-349 (a) (2) specifically allows, subject to its provisions, an individual who is an officer of one agency (Board of Supervisors) to enter into contracts with other governmental agencies (School Board). In the case you present for consideration, the contract with the other agency, that is the School Board, would be one of salaried employment and thus no disclosure would be necessary in accordance with the provisions of that section. Additionally, any question with regard to a conflict arising upon consideration of the school budget by the governing body has previously been answered in the negative by this office in an analogous situation. See opinions to the Honorable Lloyd H. Hansen, Commonwealth's Attorney for the City of Hampton, dated June 10, 1971, and the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, dated June 18, 1970, copies of which I enclose.

Question No. 2. "Would a Conflict of Interest exist if a man who is presently serving as a member of the county Re-assessment Board should be elected to the Henry County Board of Supervisors? His salary as a member of the Re-assessment Board is set at $25.00 per day by the Board of Supervisors, and his duties would extend beyond January 1, 1972, the time he would take office as a member of the Board of Supervisors."

Answer: The question raised is not one of conflict of interests but rather compatibility of office which would be governed by the provisions of § 15.1-50. Such section provides, with certain exceptions not applicable to your inquiry, that no supervisor may hold any other office, elective or appointive, at the same time. Service on the Re-assessment Board would be an office that would have to be vacated prior to qualification on the county Board of Supervisors, if elected.

VIRGINIA CONFLICT OF INTERESTS ACT—Local Ordinances Superseded by Act When Inconsistent; Stricter Standard Not Inconsistent with Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of Board of Review of Real Estate Assessments with Material Financial Interest in Property Is Disqualified from Participating in Official Action on Behalf of Agency; Disclosure of Such Interest.
THE HONORABLE JOHN E. KENNAHAN
Commonwealth's Attorney for the City of Alexandria

This is in response to your recent letter in which you request an interpretation of the Virginia Conflict of Interests Act, §§ 2.1-347, et seq., of the Code of Virginia (1950), as amended. You pose the following questions, to which I respond.

Question: “1. Back in 1961, the City Council of Alexandria enacted a conflict of interest ordinance. . . . What effect does the Act have on the Alexandria ordinance in light of the legislative intent of the Act expressed in §§ 2.1-347 and 2.1-357? Are any of the provisions of the ordinance in conflict or inconsistent with the provisions of the Act, and if so, which ones?”

Answer: As you have implied in your question, local ordinances are superseded by operation of §§ 2.1-347 and 2.1-357 only insofar as they are inconsistent or conflict with the provisions of the Act. See § 2.1-357 which reads:

“Nothing in this Act shall be construed as repealing or prohibiting any regulations of a governmental agency authorized by law for governing the conduct of the officers or employees of such governmental agency, unless such regulations be in conflict with the provisions of this Act.”

With respect to the conflict of interest ordinances in question, §§ 11-1, et seq. of the Alexandria City Code (1963), I find the following provisions inconsistent with the Virginia Code:

1. Section 11-1 (c) stipulates that no appointee of the City Council shall make investments which create a conflict with his appointive duties. This subsection was not intended to apply “. . . if such investing or holding investments constitutes a minority share and does not create a conflict with his appointive duties.” However, § 2.1-348 (f) of the Code of Virginia is more exacting in defining a "material financial interest” and, therefore, the situations in which a conflict of interest might exist. The standard established by the Virginia statute would apply.

2. Similarly, § 11-2 of the Alexandria Code—which prohibits City Council appointees from voting on any matter in which he, or his principal, has a “financial interest”—is not applicable to a “minority stockholder of a corporation . . .”. Again, § 2.1-348 (f) of the Virginia Code is more definitive as to what constitutes a “material financial interest,” and would, therefore, be applicable.

3. Section 11-8 of the Alexandria Code prohibits paid or salaried City Council appointees from having an interest in any contract entered into by the City with any person. This provision is inconsistent with the Virginia statutes inasmuch as it is uncertain as to the requisites of an illegal financial "interest.” To that extent, this local ordinance is superseded by § 2.1-348 (f) of the Code of Virginia, as indicated above.

4. Section 11-14 of the Alexandria Code provides that failure to comply with the conflict of interest ordinance will justify refusal of appointment or removal from appointed office. However, § 2.1-354 of the Virginia Code provides further that a knowing violation of Title 2.1, Chapter 22, will subject an officer or employee to a misdemeanor conviction.

5. Sections 11-1, et seq., of the Alexandria Code apply only to appointees of the City Council. The Virginia Conflict of Interests Act operates “. . . to establish a single body of law applicable to all State and local government officers and employees. . . .” (Emphasis added.) See §§ 2.1-347, 2.1-348 (d) and (e) of the Code of Virginia. The Virginia Code provisions would, therefore, apply to all public officers and employees in Alexandria.
In my opinion the remaining Alexandria ordinances relating to conflict of interests, §§ 11-1, et seq., of the Alexandria Code, are neither inconsistent nor in conflict with the Virginia Code, and are not superseded.

**Question:** "2. May the City Council enact conflict of interest ordinance provisions relative to the subject matter contained in § 2.1-347 et seq. which are more stringent and exacting than those contained in said Code sections?"

**Answer:** The clear purpose of the General Assembly in enacting the Virginia Conflict of Interests Act was to provide public officers and employees with uniform standards of conduct, and thereby extend to the public a greater degree of protection. I am of the opinion that any local ordinances which might hold public officers and employees to an even stricter standard would not be deemed in conflict or inconsistent with §§ 2.1-347, et seq., but would be in furtherance of the purposes of the Act. See *King v. County of Arlington*, 195 Va. 1084, 81 S.E.2d 587 (1954).

**Question:** "3. Does the Act preclude a member of the Board of Review of Real Estate Assessments, established by City Charter § 4.08 . . . from acting on appeals when he or a member of his immediate family have a material financial interest in the property under review?"

**Answer:** Assuming that the "material financial interest" to which you refer falls within the definition of that term found in § 2.1-348, it is my opinion that a member of the Board of Review of Real Estate Assessments, who has a material financial interest in the property under review, should be disqualified from voting or participating in any official action thereon in behalf of that agency. See § 2.1-352. Furthermore, a disclosure of such an interest should be made to your office, pursuant to § 2.1-353.

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**VIRGINIA CONFLICT OF INTERESTS ACT—Member of Board of Supervisors May Not Serve as County Licensing Agent.**

**August 12, 1971**

**The Honorable John R. Thompson**

Commonwealth’s Attorney for Wythe County

In your letter of July 28, 1971, you ask whether a member of the Board of Supervisors of a county who is a licensing agent for the Division of Motor Vehicles may also serve as licensing agent for the county. The duties of such licensing agent would include the selling of county license tags for motor vehicles on a commission basis.

The Virginia Conflict of Interests Act provides in § 2.1-349 of the Code of Virginia (1950), as amended, that:

"(a) No officer or employee of any governmental agency shall:

"(1) Be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that any such contract or subcontract is let after competitive bidding or by negotiation shall be irrelevant; . . .".

Since the county licensing agent would be in effect a contractor with the county, and would be paid by the county for his services, it is my opinion that the Virginia Conflict of Interests Act would prevent a member of the county Board of Supervisors from serving as the licensing agent.
VIRGINIA CONFLICT OF INTERESTS ACT—No Conflict for Registrar’s Father to Be Candidate in Primary.

ELECTIONS—Registrar Does Not Make Decision Who is Entitled to Vote; Merely Insures that Voters Are Placed on Proper Books.

REGISTRAR—Does Not Make Decision Who is Entitled to Vote; Merely Insures that Voters Are Placed on Proper Books.

PUBLIC OFFICERS—Compatibility—Registrar’s father may run for board of supervisors in primary.

August 9, 1971

THE HONORABLE ANN B. HODGES, Secretary
Amherst County Electoral Board

I am in receipt of your letter of August 3, 1971, wherein you request a ruling regarding whether there is a conflict of interest for the general registrar to be assigning individuals to the proper rearranged election districts when the registrar’s father is a candidate for the board of supervisors in the upcoming Democratic Primary.

Section 24.1-46 (9) of the Code of Virginia (1950), as amended, provides that it is the duty of the general registrar to:

“In the event that election districts are rearranged or a new district created, cause the names of those registered voters residing in the rearranged or new districts to be placed on the books and list for the proper election district and notify such voters by mail of the changes.”

Performance of such duty is of a ministerial nature; the redistricting has been completed by the governing body of the county. It is not a decision of the general registrar who is entitled to vote in such a district, but rather she is required by law to insure that those residing in the newly created districts are placed on the proper books. I do not find this duty to be incompatible with the fact that the general registrar’s father is running for the board of supervisors in the Democratic Primary.

Your inquiry is therefore answered in the negative.

VIRGINIA CONFLICT OF INTERESTS ACT—Not Applicable to Wife of Commissioner of Revenue Employed in Office Many Years Prior to Husband Becoming Commissioner; Exempted by § 2.1-348(f)(5).

VIRGINIA CONFLICT OF INTERESTS ACT—No Prohibition to Paying Annual Remuneration of Seventy-five Hundred Dollars or More, to Wife of Commissioner of Revenue; Exempted by § 2.1-348(f)(5).

February 26, 1972

THE HONORABLE FRANK D. HARRIS
Commonwealth’s Attorney for Mecklenburg County

I am in receipt of your letter of February 21, 1972, which reads:

“I need an interpretation of Section 2.1-348, (F) 5, Code of Virginia of 1950, as amended.

“This provision deals with conflict of interest by persons employed with a governmental agency. In our Commissioner of Revenue’s office we have the wife of our Commissioner of Revenue as an employee. She has been employed in this office for the past nineteen (19) years, and has occupied the same position of employment for this entire time. Her husband has served as Commissioner of Revenue for the past seven (7) years. We want to know if conflict of interest provisions of the law would apply to this employee.”
Sections 2.1-348(f) (4) and (5) are both applicable to your inquiry and read as follows:

(4) "The employment by the same governmental agency of an officer or employee and spouse or any other relative residing in the same household shall not be deemed to create a material financial interest except when one of such persons is employed in a direct supervisory and/or administrative position with respect to such spouse or other relative residing in his household and the annual salary of such subordinate is seventy-five hundred dollars or more; and

(5) "The provisions of this chapter 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 thirty, nineteen hundred seventy-one, with regard to personal service or employment contracts with such governmental agency or unit of government."

I am of the opinion that the provisions of the Virginia Conflict of Interests Act are not applicable to the employee in question since she is exempted by § 2.1-348(f) (5). Further, due to such exemption, there would not be any prohibition to paying an annual remuneration to the wife of seventy-five hundred dollars or more, even if, prior to June 30, 1971, she were earning less than such amount.

VIRGINIA CONFLICT OF INTERESTS ACT—Spouse of Secretary of Local Electoral Board May Be Candidate for General Assembly.

PUBLIC OFFICERS—Incompatibility of Office; Spouse of Secretary of Local Electoral Board May Be Candidate for General Assembly.

ELECTIONS—Spouse of Secretary of Local Electoral Board May Be Candidate for General Assembly.

GENERAL ASSEMBLY—Spouse of Secretary of Local Electoral Board May Be Candidate for. August 31, 1971

THE HONORABLE JOHN N. DALTON
Member, House of Delegates

This will acknowledge receipt of your letter of August 23, 1971, which reads:

"I would appreciate an opinion from you as to whether you believe there is any conflict of interest in a person running for or serving in that state legislature whose spouse is secretary of the local electoral board."

I know of no provision of law which would prohibit an individual from running for or serving in the General Assembly whose spouse is secretary of the local electoral board. The secretary cannot, of course, use the office in any manner to favor the spouse who is a candidate for the General Assembly. As an example, it is the duty of the secretary of the electoral board to receive absentee ballots and, for the most part, such absentee ballots would be the type cast in person by the voter. See Article 7, Chapter 7, of Title 24.1. Under previous rulings by this office, it would further be the duty of the secretary of the electoral board when receiving absentee ballots to assist any educationally handicapped person in the marking of the ballot. Section 24.1-267 deems it a misdemeanor for any person to directly or indirectly advise, counsel or assist any elector as to how he should vote. Such prohibition would be applicable to the secretary of the electoral board as to any candidate running for office, regardless if the candidate is such individual's spouse.
Though, as indicated, there is not a conflict of interest, nor does the fact that the spouse of the secretary of the local board is a candidate make such situation per se incompatible, the individuals involved should take all precautions to insure that their actions are beyond question and reproach.

VIRGINIA CONFLICT OF INTERESTS ACT—Substitute Teacher; “Regularly Employed” Does not Apply to for Exemption from Act.

June 12, 1972

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

This is in reply to your recent letter inquiring whether a substitute teacher who has been substituting on a regular basis can be considered “regularly employed” for purposes of exempting him from the Conflict of Interest Act under § 2.1-349.1, Code of Virginia (1950), as amended.

Section 2.1-349.1 provides, in part, as follows:

“This provision shall not apply within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships.”

I am of the opinion that “regularly employed” as used in § 2.1-349.1 applies only to those persons who are full-time employees and does not apply to those persons who are employed on a temporary or part-time basis. Since substitute teachers are hired on a temporary basis to take the place of a regular full-time teacher, I am of the opinion that a substitute teacher, no matter with what regularity he may teach, may not be considered “regularly employed” for purposes of being exempted from the Conflict of Interests Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Terminal Corporation Operating Norfolk Port Facility Is a Governmental Agency Due to Make-up and Function.

VIRGINIA CONFLICT OF INTERESTS ACT—Directors of Terminal Corporation Operating Norfolk Port Facility Are Subject to.

April 18, 1972

THE HONORABLE E. P. HOLMES
Executive Director, Virginia Port Authority

I am in receipt of your letter of March 1, 1972, which reads in pertinent part as follows:

“In arriving at a unification agreement between the VPA [Virginia Port Authority] and the City of Norfolk to bring that City’s port facility under the VPA, it was agreed that after the VPA takes title to the physical properties comprising the Norfolk International Terminals, a long term lease will be entered into with a non-stock, non-profit corporation to operate the facility...”

“. . . the corporation is to be governed by a seven-man board of directors, four of whom will be appointed by the Board of Commissioners of the VPA, while three will be appointed by the Council of the City of Norfolk. . . .

“My specific inquiries are directed to two points:

1. Whether or not the terminal corporation is a governmental agency within the purview of the Virginia Conflict of Interests Act, and
"2. Whether or not the proposed directors will be subject to the provisions of that Act."

Sections 2.1-348 (a) (b) (d) and (e) of the Code of Virginia (1950), as amended, are applicable to your inquiry in defining the pertinent provisions as follows:

"(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.

"(d) 'Officer' shall include any person appointed or elected to any governmental or advisory agency, and who shall be deemed an officer of such agency, whether or not such person receives compensation or other emolument of office, but as to §§ 2.1-351, 2.1-352 and 2.1-353 shall not include any member of the General Assembly of Virginia.

"(e) 'Employee' shall include all persons employed by any governmental or advisory agency."

I am of the opinion that the corporation would be a governmental agency within the concept of the Virginia Conflict of Interests Act. I reach this conclusion not because the corporation, by simply becoming incorporated, is "created by law" within the meaning of the Act, but because of the makeup and function of the corporation, i.e., to operate and develop public ports now under the auspices of the Virginia Port Authority and the City of Norfolk. The terminal corporation is clearly exercising some sovereign power or function. I, therefore, answer your first inquiry in the affirmative.

Since the corporation is a governmental agency, its directors would be subject to the provisions of the Act. See § 2.1-348(d), which deems any person appointed or elected to office in a governmental agency to be an officer of such agency, whether or not such person receives compensation or other emolument of office.

VIRGINIA CONFLICT OF INTERESTS ACT—Wife of Member of Board of Supervisors May Be Employed as Teacher in County.

SCHOOLS—Conflict of Interests—Wife of member of Board of Supervisors may be employed as teacher in county.

April 28, 1972

THE HONORABLE THOMAS J. SURFACE
Commonwealth’s Attorney of Craig County

I am in receipt of your request for an opinion dated April 24, 1972, regarding whether it is a violation of the Virginia Conflict of Interests Act, Chapter 22, Title 2.1, of the Code of Virginia (1950), as amended, for the wife of a member of the Board of Supervisors to be employed as a teacher in the County. Your inquiry arises, in that the County has now adopted a form of government wherein the Supervisors appoint members of the school board, rather than having a school trustee electoral board appoint such members, as is done under the traditional form of county government.

I am of the opinion that a conflict of interest would not exist. Section 2.1-349(a) (2) permits an individual of a governmental agency to have an interest in a contract with a governmental agency other than the one of which he is a member. Consequently, a member of the Board of Supervisors
is permitted to have an interest in a contract with the school board—specifically, his wife may teach—and I find no exception to this provision that is dependent upon the manner in which a separate governmental agency is appointed.

Since the interest that the Supervisor has is in a contract of salaried employment, there is no need for the normal disclosure requirements provided in § 2.1-349(a)(2).

Lastly, I am of the opinion, that regardless of the manner of appointment of the school board, the provisions of § 2.1-352, concerning disqualification, which comes into question when the Board of Supervisors is considering the school budget, would, as previously ruled, not be applicable. See the opinion of this office to the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, dated June 18, 1970, enclosed herein.

VIRGINIA CONFLICT OF INTERESTS ACT—Wife of Principal May Be Employed As Guidance Counselor in Same School.

December 3, 1971

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

I am in receipt of your letter of November 30, 1971, which reads as follows:

"The Wise County School Board has requested me to obtain from you an official opinion on the following matter:

"The wife of the Principal of the Coeburn High School was employed at the Coeburn High School during the school year of 1970 and 1971. When the rulings came out that a wife could not be employed in the high school where her husband was Principal she was transferred to the Coeburn Elementary School. Beginning in September 1971 she was again assigned to the Coeburn High School as Guidance Counselor where her husband is the Principal.

"In your opinion, under Chapter 22 of the Virginia Conflict of Interest Act, would she be exempted under Section 2.1-348(5) which provides as follows:

"'(5) The provisions of this chapter 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 thirty, nineteen hundred seventy-one, with regard to personal service or employment contracts with such governmental agency or unit of government. (1970, c. 463; 1971, Ex. Sess., c. 176)'"

Section 2.1-348(f)(4) of the Code of Virginia, as amended, provides that employment by the same governmental agency, of an individual and spouse or other relative residing in the same household is not prohibited, unless one of such persons is employed in a direct supervisory and/or administrative position over the other and the annual salary of the subordinate is seventy-five hundred dollars or more. Section 2.1-348(f)(5) states that even if one individual is supervising the other and the annual salary of the subordinate is more than seventy-five hundred dollars there is still not a prohibition if such situation existed prior to June 30, 1971.

It is my opinion that the individual whom you inquire about was "regularly employed" within the meaning of § 2.1-348(f)(5) and consequently your inquiry is answered in the affirmative.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings—Affirmative vote must be recorded to hold.

THE HONORABLE WILLIAM J. McGHEE
County Attorney of Montgomery County

In your letter of October 13, 1971, you ask whether a County Board of Supervisors may assemble at a meeting other than at a regular, adjourned or formally called meeting and at that time go into executive session for one or more of the purposes permitted by § 2.1-344 of the Code of Virginia, and, if so, whether it is necessary to notify the public of such a meeting.

Your inquiry is governed by the provisions of § 2.1-344(b) of the Code of Virginia (1950), as amended. That subsection provides:

“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.”

Pursuant to this subsection, although the Board of Supervisors may choose to hold an executive session at a time and place other than at its regularly scheduled meeting, such meeting may nevertheless not be held unless the Board, in public meeting, records an affirmative vote to hold such executive session. The Board may not informally plan to meet at a time and place other than a formally called meeting, and vote at that time to hold an executive or closed meeting.

If such executive or closed meeting is properly scheduled, the Board is not required by the provisions of § 2.1-343 to publicize information as to the time and place of such meeting, inasmuch as the last mentioned section has reference only to public meetings. Of course, any person who happens to be at the public meeting at which the executive session is scheduled, will be made aware of such schedule when the matter is brought on for a vote, as described above.

VIRGINIA FREEDOM OF INFORMATION ACT—Legislative Interim Study Commissions—Exempt from.

DR. ROY E. McTARNAGHAN, Director
State Council of Higher Education

This opinion is in response to your letter of August 13, 1971, in which you inquire as to the status of the State Council of Higher Education under the Virginia Freedom of Information Act, §§ 2.1-344, et seq., Code of Virginia (1950), as amended, with respect to several resolutions of the General Assembly. Specifically, you seek to determine whether the State Council is required to comply with the Act while performing the functions delegated to it by certain resolutions of recent General Assemblies (1970 Session, Senate Joint Resolution No. 15 and House Joint Resolution No. 48; 1971 Session, Senate Joint Resolution No. 21).

While § 2.1-344 limits the instances in which closed sessions by State or local governmental bodies may be held, § 2.1-345 of the Code exempts from the coverage of § 2.1-344 all “legislative interim study commissions.” Considering the tasks assigned to the Council by the House and Senate resolutions enumerated above, it is clear that the State Council of Higher Education, while performing the assigned tasks, is functioning as a “legislative interim study commission.” The Council's activities in pursuance of their legislatively assigned functions are, accordingly, exempt from the coverage of the Act.
VIRGINIA FREEDOM OF INFORMATION ACT—Notice in Newspaper of General Circulation Should Describe Time, Place and Nature of Public Hearing.

THE HONORABLE GEORGE N. McMATH
Member, House of Delegates

In your letter of September 28, 1971, you inquire as to the meaning of the phraseology "notice" and "published generally" in the Virginia Freedom of Information Act. That Act provides in § 2.1-344 of the Code of Virginia (1950), as amended:

"(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.

The intent of the notice provisions of this section is to insure that the public will be generally aware of its opportunity to be heard on the matter in question. The type of notice and publication envisioned by these provisions is not of a formal nature, but must be governed by a rule of reason depending on the individual case. As a general rule, however, a notice in sufficient detail to describe the time, place and nature of the public hearing which is published in a newspaper of general circulation would comply with the statute. While there may be other ways in which notice and publication could comply, such determinations would have to depend on the facts of the individual case.

VIRGINIA FREEDOM OF INFORMATION ACT—Notice to Individuals of Meetings—Required to be sent separately upon request of individual concerning a specific meeting; Board not required to maintain a mailing list.

VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings Defined.

PUBLIC MEETINGS—Executive or Closed Meetings Defined.

THE HONORABLE JOHN C. COWAN
Commonwealth's Attorney of King George County

I am in receipt of your letter of April 6, 1972, which reads:

"The King George County Board of Supervisors is currently holding closed meetings with the School Board concerning the budget pursuant to Section 2.1-344(7) of the 1950 Code of Virginia as amended. Immediately upon convening of the meeting, the Board will vote to go into closed session and will thereafter take up the business at hand. We have received a request from a citizen of this State pursuant to 2.1-343 that he be notified as to all meetings of the Board. His request includes that he receive notice of these meetings with the School Board which will be closed meetings pursuant to vote taken when the meeting convenes.

"Is the Board required by law to give this individual notice of these closed meetings?"

I am enclosing herein the opinions of this office to the Honorable William J. McGhee, County Attorney of Montgomery County, dated October 18, 1971,
and to the Honorable James E. Baylor, Secretary, Electoral Board, City of Norfolk, dated April 15, 1969, and found in the Report of the Attorney General (1968-1969) p. 261, which are applicable to your inquiry.

As ruled in the McGhee opinion, § 2.1-343 of the Code of Virginia (1950), as amended, which reads:

"Except as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings. Information as to the time and place of each meeting shall be furnished to any citizen of this State who requests such information."

is applicable only to "public meetings", defined as "a meeting at which the public may be present," § 2.1-341(d).

A closed or executive meeting however, cannot be held unless first there is an open meeting wherein an affirmative vote is taken, allowing an executive session to be held. This vote is taken in open session and would, in my opinion, be a public meeting, and one to which § 2.1-343 would be applicable. Consequently, it would be one which a citizen would be entitled to notice as to the time and place of the meeting.

The McGhee opinion raised the factual situation wherein an open meeting was held, an affirmative vote to go into executive session taken, and the executive session was to be held at a later time. Under these circumstances, § 2.1-343 would be inapplicable as to the convening of the closed meeting.

In the factual situation you describe, it is apparent that an open or public meeting is called. I am of the opinion, therefore, that the board is required, by law, to furnish the individual notice of such a meeting, giving him an opportunity to attend, even though the board can immediately vote to go into closed session.

You indicate that the individual in question also requested that he be notified as to all meetings of the board. As ruled in the Baylor opinion, the board is not required to maintain a mailing list, but must give out such information upon request concerning the holding of any public meeting.

VIRGINIA PORT AUTHORITY—May Use Funds Appropriated Under Item 709, Chapter 461, 1970 Acts of Assembly, for Acquisition, Development and Operation of Facilities of Norfolk Port and Industrial Authority.

August 26, 1971

THE HONORABLE J. WARREN WHITE, JR.
Member, House of Delegates

In your letter of August 12, 1971, you inquire whether the Norfolk Port and Industrial Authority may apply for and receive funds appropriated to the Virginia Port Authority by Item Number 709 of Chapter 461 of the Acts of Assembly of 1970. You note that the Norfolk Port and Industrial Authority is not now a part of the Virginia Port Authority, but that on May 7, 1971, the Norfolk Authority entered into an intent agreement to become part of the Virginia Port Authority.

Item 709 of Chapter 461 of the Acts of Assembly of 1970, which is of course the general appropriation act for the 1970-72 biennium, allocated to the Virginia Port Authority for acquisition, development and operation of port facilities the sum of $1,402,000 for the first year of the biennium and $1,321,000 for the second year. In addition, that item stated:

"This appropriation may be utilized by the Virginia Port Authority for operating expenses, debt service and capital outlays, subject to prior written approval by the Governor."
I note further that this item is found under Section 5 of the Appropriation Act, which is intended for miscellaneous and non-recurring items, and is in addition to the appropriation for general operations which is found in Item 229.2 of Chapter 461.

Since the consolidation of the Norfolk Port and Industrial Authority with the Virginia Port Authority is, of course, a non-recurring item, it is my opinion that the Virginia Port Authority may, with the prior written approval of the Governor, use any heretofore unappropriated funds under Item 709 for operating expenses, debt service and capital outlays in connection with their acquisition, development and operation of the facilities of the Norfolk Port and Industrial Authority.

VIRGINIA PORT AUTHORITY—Special Policemen of Authority Have Jurisdiction on Property Under the Control of the Authority.

POLICE OFFICERS—Special Policemen of Authority Have Jurisdiction on Property Under the Control of the Authority.

February 28, 1972

THE HONORABLE JAMES A. CALES, JR.
Commonwealth's Attorney for the City of Portsmouth

This is in reply to your recent letter in which you seek a supplemental opinion concerning the authority of policemen employed by the Virginia Port Authority. In the previous opinion to you, dated August 30, 1971, you were advised that the policemen in question had jurisdiction within the area under the control of the Authority.

In your present request you enclose a letter from the counsel of the Virginia Port Authority in which he states that goods being delivered to the terminal in Portsmouth are being stored upon property not actually owned by the Authority but contiguous to such property. The letter further indicates that this contiguous property is under the control of the Authority.

The question you pose is whether the Virginia Port Authority policemen have jurisdiction to enforce the rules and regulations adopted by the Authority on property not owned by the Authority but under its control.

Paragraph (1) of Section 62.1-135, Code of Virginia (1950), gives the Authority the power to appoint and employ special policemen to enforce within the area under the control of the Authority the rules and regulations adopted by the Authority and the laws of the Commonwealth. Paragraph (1) provides in pertinent part that, "[s]uch policemen ... may issue summons to appear, or arrest on view or on information without warrant as permitted by law ... any person violating, within or upon the project or other property under the control of the Authority, any rule or regulation of the Authority or any law of this Commonwealth pertaining to the regulation and control of highway traffic on any pier or project owned or operated by the Authority."

The provisions of paragraph (1), § 62.1-135, do not limit the jurisdiction of Virginia Port Authority policemen to property actually owned by the Authority, but extends their jurisdiction to property under the control of the Authority. Therefore, it is my opinion that the Virginia Port Authority policemen have jurisdiction on any property which is under the control of the Authority. Accordingly, I answer your inquiry in the affirmative.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Retirement and Health Programs—Benefits not extended to employees of Maritime Terminals, Incorporated.

May 4, 1972
I have received a letter dated April 24, from J. Robert Bray, counsel to the Virginia Port Authority, in which he asks on your behalf whether the employees of Maritime Terminals, Incorporated, are eligible for benefits under the Virginia Supplemental Retirement System and under the new hospitalization program soon to be established for State employees.

Maritime Terminals, Incorporated, is a private, non-stock corporation, governed by a seven-man board of directors, four of whom are appointed by the Board of Commissioners of the Virginia Port Authority, and three of whom are appointed by the City of Norfolk. The corporation was formed under Chapter 2 of Title 3.1 of the Code of Virginia, and it contracts with the Virginia Port Authority to perform certain functions. As previously ruled, by letter to you of April 18, 1972, the corporation for the purposes of the Virginia Conflict of Interests Act, based upon the definitions contained therein, and the broad policy of the Act, is a "governmental agency." Such a holding cannot, however, be construed as a determination that Maritime Terminals, Incorporated, is a State agency for all purposes.

The language and provisions of the various Acts, specifically in the inquiry you raise, the Virginia Retirement System Act and the Hospitalization Program Act must be construed to determine if entities such as Maritime Terminals, Incorporated, are encompassed within their coverage.

The language in § 51-111.10(5) of the Virginia Supplemental Retirement System Act and § 2.1-20.1(4) of the new Hospitalization Program Act (Chapter 803, 1972 Acts of Assembly) provide their own definition of a State employee for the purposes of these Acts.

In both sections of these Acts the definition involves, among others, "any employee of a political subdivision of the Commonwealth." Maritime Terminals, Incorporated, is not a political subdivision of the Commonwealth.

For the purposes of the Virginia Supplemental Retirement System Act and the Hospitalization Program Act, I am of the opinion that the corporation is not a political subdivision of the State, nor are its employees State employees. I am aware of no other provision of law which would extend the benefits of the Retirement System or the new hospitalization program to employees of Maritime Terminals, Incorporated.

VIRGINIA UNEMPLOYMENT COMPENSATION ACT—Definition of "Employment" Not Retroactive to Take Employee [Spouse of Student] from Protection of Act.

June 15, 1972

This is in reply to your recent letter wherein you inquire whether it is legal or constitutional to retroactively apply § 60.1-14 (7) (j) (ii) of the Code of Virginia (1950), as amended.

This section was added by the 1971 Special Session of the General Assembly and became effective January 1, 1972. For the purposes of the Virginia Unemployment Compensation Act, it excludes from the definition of "employment":

"(j) Service performed, in the employ of a school, college or university, if such service is performed . . . (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (1) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university,
and (II) such employment will not be covered by any program of unemployment insurance;” (Emphasis added.)

The employment of the spouse of a student who was interviewed and accepted for employment in May of 1971, would not, in my opinion, be excluded from the protection of the Virginia Unemployment Compensation Act by virtue of the provisions of the statute quoted above. The form letter dated April 7, 1972, enclosed with your inquiry, which advised the employee that she was not covered under the unemployment compensation program, did not so advise her at the time she commenced her employment.

I am of the opinion, therefore, that since the required notice could not have been given, § 60.1-14 (7) (j) (ii), quoted above, is not applicable to the employment of the spouse of a student who began work prior to January 1, 1972.

WATER—State Water Control Board—May consider objections to the use of a portion of James River and the Kanawha Canal.

January 11, 1972

THE HONORABLE A. H. PAESSLER
Executive Secretary, State Water Control Board

This will acknowledge receipt of your letter of December 15, 1971, wherein you requested my opinion concerning the proposal of the City of Richmond to employ a portion of the James River and the Kanawha Canal as a basin for retention and treatment of storm water overflows. After noting that a number of people have requested that the Board hold a public hearing at which public concern could be voiced, your letter states, in part, as follows:

"Objection to the proposal has been raised on the grounds that the historic character of the Canal would be debased, that use of the Canal as a basin would jeopardize the chance of getting State and Federal funds for the restoration and preservation of the Canal, and that such use would cause odor and other aesthetic problems.

The Board directed that a public hearing be convened, the purpose of which will be to receive testimony on whether or not the Board should grant approval under Section 62.1-44.19, Code of Virginia (1950), as amended, for the City of Richmond to employ a portion of the Kanawha Canal for the intended purpose.

The Board further directed the staff to request a formal opinion from you on whether the scope of testimony to be received at that hearing for consideration by the Board should embrace the objections as posed, or be restricted to considerations of water quality. The Board also directed that the staff request that such opinion state what effect, if any, Article XI, Constitution of Virginia, as amended, will have upon the scope of testimony admissible at the hearing in light of the objections that have been raised."

The question you raise relative to the scope of testimony admissible at the hearing necessarily requires an examination of the purview of the Water Control Law. In this regard, § 62.1-44.2 of the Code of Virginia (1950), as amended, provides, in part, as follows:

"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. . . . (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."

Analogously, § 62.1-44.3(6)(c) of the Code defines pollution in terms of any alteration of the properties of State waters that "will or is likely to... render such waters... unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses..." Further in this regard, § 62.1-44.4 of the Code, in proscribing quality degradation of State waters, specifically provides in subsection (2) thereof for the preservation and protection of present and anticipated uses of such waters.

In addition to the statement of policy found in § 62.1-44.2 of the Code, further policy is enunciated in § 62.1-44.5 of the Code, and this, too, is declared in terms of the uses to be made of State waters. This latter section provides, in part, as follows:

"It is hereby declared to be against public policy for any owner who does not have a certificate issued by the Board to... (2) otherwise alter the physical, chemical or biological properties of such State waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses."

It thus is readily apparent that the scope and breadth of the Water Control Law is not limited in its application solely to the physical, chemical and biological properties of State waters as such. Rather, its thrust and purpose is to permit and protect all reasonable public uses of such waters. Water quality per se cannot be viewed in a vacuum, but must be viewed as the means of accomplishing the overall goal of fostering compatible uses of State waters. This conclusion is borne out by § 62.1-44.15(2) of the Code which provides that it is the duty of the Board "to study and investigate all problems concerned with the quality of state waters..." (Emphasis supplied.); and by § 62.1-44.15(3) which requires the Board "to take all appropriate steps to prevent water quality alteration contrary to the public interest or to standards or policies [established pursuant to this section]."

While not controlling, the Board's own interpretation of its organic law and its actions pursuant thereto are entitled to some weight in determining the scope of the Board's authority. In this regard, the Board, pursuant to its directive under § 62.1-44.15(3) of the Code, promulgated Rule 1.01 having general State-wide application which states, in part, as follows:

"All waters within this State shall at all times be free from all substances attributable to sewage, industrial wastes, or other wastes in concentrations or combinations which contravene established standards or interfere directly or indirectly with beneficial uses of such waters..." (Emphasis supplied.)

Rule 1.01 thus embodies the administrative determination that not only is quality water desirable, it is also necessary in order to maximize the beneficial uses of such water.

In considering reasonable and beneficial public uses of State waters, reference must be made to Article XI, Sections 1 and 2, of the revised Constitution of Virginia, which provide as follows:

"(1) To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

(2) In the furtherance of such policy, the General Assembly may
undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states."

Such constitutionally declared policy lends definition to reasonable and beneficial uses. Accordingly, the conservation, utilization and development of the Kanawha Canal should be considered and treated by the Board as a reasonable and beneficial use of State waters. Consideration of "water quality" cannot be so restricted as to preclude matters pertaining to reasonable and beneficial public uses of State waters, including the conservation, utilization and development of the Canal as an historical site.

In light of the foregoing, I am of the opinion that the policy, purpose and language of the Water Control Law, read in conjunction with Article XI of the revised Constitution of Virginia, are sufficiently broad to permit the Board to consider at a hearing the objections to the proposal mentioned in your letter.

WATER—State Water Control Board—Powers of.

November 16, 1971

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

This will acknowledge receipt of your letter of October 28, 1971, in which you made reference to a letter of October 1, 1971, to Mr. A. H. Paessler, Executive Secretary of the State Water Control Board, from Dr. Robert K. Heide of the City of Norfolk. Dr. Hiede's letter, in essence, concludes that effluent discharged from the Hampton Roads Sanitation District Sewage Treatment Plant at Lambert's Point into the Elizabeth River, City of Norfolk, is largely responsible for the growth in the river of "sea lettuce", a bright green seaweed which washes ashore where it decomposes and emits obnoxious odors.

You have asked the following questions:

"1. Under the facts set forth in Dr. Heide's letter do you feel that the effluent being dumped into the Elizabeth River in the City of Norfolk is a violation of Section 62.1-194 of the Code of Virginia 1950 as amended or any other section of the Code of Virginia?"

"2. What legislation would you suggest that could be enacted in the next session of the General Assembly to alleviate the problem, specifically with a view toward strengthening our present anti-pollution laws?"

In regard to both of your questions, it is instructive to review the scope of water pollution control legislation existing in the Commonwealth. Legislation pertaining to the abatement and prevention of water pollution in the Commonwealth was first enacted in 1946. The State Water Control Law, amended periodically thereafter, was strengthened significantly by the 1970 General Assembly and recodified as Chapter 3.1 of Title 62.1 of the Code of
Virginia (1950), as amended. Several features of the Water Control Law merit closer consideration.

Public policy regarding waste discharges into waters of the State is set forth in Code Section 62.1-44.2 as follows:

"... 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."

Further, § 62.1-44.4 of the Code asserts that no right exists to continue existing quality degradation of the waters of the State; that the right and control over State waters is expressly reserved and reaffirmed by the State; that those waters whose existing quality is better than established standards will be maintained at that high quality, and that where variances from such standards are permitted the necessary degree of waste treatment to maintain high water quality will be required wherever physically and economically feasible.

In order to execute the stated policy of the Commonwealth 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 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. Section 62.1-44.23 of the Code further provides that the Board is authorized to enforce its rules, regulations or orders by injunction, mandamus or other appropriate remedies.

Discharge into State waters without a certificate issued by the Board is prohibited. Applications for such discharge, in all cases, must be accompanied by pertinent plans, specifications, maps and such other information as may be deemed necessary by the Board. Public notice of such application shall be given by the applicant. In case of a failure to comply with the requirements of said certificate the Board shall revoke the certificate. See Code §§ 62.1-44.5, 62.1-44.16, 62.1-44.17 and 62.1-44.19. In short, the State Water Control Law clearly reflects the concern of the General Assembly with respect to treatment of waste water discharged into State waters.

While Chapter 3.1 of Title 62.1 of the Code contains the basic regulatory statutes pertaining to the abatement and prevention of water pollution in the Commonwealth, there are several other miscellaneous sections of the Code which are concerned with water pollution, one of which was cited in Dr. Heide's letter. Specific reference is made to Code §§ 62.1-194 (Casting garbage, etc., into waters.), 62.1-194.1 (Obstructing or contaminating State waters.), 62.1-194.2 (Throwing trash, etc., into or obstructing river, creek, stream or swamp.). Except as otherwise permitted by law, these sections
prohibit the obstruction or contamination of State waters through the throwing or otherwise disposing of trash, garbage or other forms of solid wastes or other undesirable materials and substances. It seems clear that these sections were not intended to apply to the discharge of effluent of a municipal sewage treatment plant regulated in accordance with applicable provisions of the State Water Control Law. Accordingly, I am of the opinion that your first question be answered in the negative.

In regard to your second inquiry, I am not aware of the need for major legislative changes in the State Water Control Law as it relates to the problem outlined by Dr. Heide. The recent enforcement activities of the State Water Control Board with respect to pollution problems in Fairfax County, the City of Roanoke and in the Potomac River are ample evidence of the Board's capability to act in order to abate water pollution problems. Dr. Heide's letter has been reviewed and referred by this office to the State Water Control Board for study and appropriate action; I am advised that several meetings and conferences have been scheduled with respect to this particular problem. If Dr. Heide's conclusions can be verified scientifically and the conditions described are violative of water quality standards adopted by the Board, I am of the opinion that the State Water Control Board has ample authority to act. For your information and interest, I am enclosing herewith copies of two recent opinions issued by this office with respect to the powers of the State Water Control Board.

WATER AND SEWER AUTHORITIES—Hampton Roads Sanitation District Authority—May prevent overloading of its sewer lines and sewage treatment plants to insure operation within design capacities.

March 7, 1972

The Honorable A. H. Paessler
Executive Secretary, State Water Control Board

This will acknowledge receipt of your letter of February 10, 1972, requesting my opinion with respect to the authority of the Hampton Roads Sanitation District Commission to prevent overloading of sewer lines and sewage treatment plants owned and operated by it in order to ensure that such facilities do not exceed their designed capacity. Your letter states as follows:

"In recent weeks the State Water Control Board has become increasingly concerned about the general water quality situation in the Hampton Roads area, particularly as it relates to the systems operated by the Hampton Roads Sanitation District. Additional evidence has become available indicating that sewer lines and sewage treatment plants owned and operated by the Hampton Roads Sanitation District are exceeding their design capacity. In our discussions with Hampton Roads Sanitation District personnel, we have been informed by them that Hampton Roads Sanitation District lacks the legal means by which it could take appropriate action to correct the problem.

"Our review of the statutes applying to the Hampton Roads Sanitation District leads us to believe that there is ample authority in its law to prevent overloading of sewer lines and plants, correct over-loadings which have occurred and prevent adding increased loads to lines or plants which are presently overloaded.

"We would like to have your opinion on whether the Hampton Roads Sanitation District, in fact, does have a legal obligation and the necessary authority to operate its sewer lines and sewage treatment works in accordance with applicable laws and regulations and,
especially, to prevent additional loadings to existing sewer lines and plants which already are exceeding design capacity."

In order to respond properly to your request, an analysis is required of the Commission’s enabling legislation which is found in Chapter 66, Acts of Assembly, 1960. While such enabling legislation was amended in 1962 and again in 1964, such amendments are not pertinent to the question presented.

Among other general powers and authority granted to the Commission, the Commission is specifically authorized and empowered by § 10(i):

"to exercise jurisdiction, control and supervision over any sewage disposal system or systems or sewer improvements operated or maintained by the Commission and to make and enforce such rules and regulations for the maintenance and operation of any such sewage disposal system or systems or sewer improvements as may, in the judgment of the Commission, be necessary or desirable for the efficient operation of any such system or improvements and for accomplishing the purposes of this act;"

and, in addition thereto, by § 10(1):

"to restrain, enjoin or otherwise prevent . . . the violation of any provision of this act or of any resolution, rule or regulation adopted pursuant to the powers granted by this act;"

Section 40 of Chapter 66, Acts of Assembly, 1960, provides, in part, as follows:

“No county, city, town or other political subdivision or person or corporation, public or private, shall discharge, or suffer to be discharged, directly or indirectly into any waters within the District any sewage, industrial wastes or other refuse which may or will cause or contribute to pollution of any such waters.

“No county, city, town or other political subdivision or person or corporation, public or private, shall plan, construct or place in service any new sewer improvement in the District which will or may thereafter be served by the Commission’s sewerage system and which will or may thereafter, in the opinion of the Commission, cause overloading of the sewerage system or the entrance into the sewerage system of excessive ground or surface water or other matter or thing which is injurious or deleterious to the sewerage system. In order to carry out the provisions of this paragraph every county, city, town or other political subdivision or person or corporation, public or private, if requested by the Commission to do so, shall furnish to the Commission plans and specifications for such sewer improvements and shall provide access for Commission inspection of all new sewer construction work as it proceeds and of all construction records and materials used. In addition to other powers granted the Commission, it shall have the right to refuse service to any new sewer extension or improvement constructed or operated in violation of this paragraph.”

In addition thereto, § 41 provides that the Commission may take appropriate legal steps to prevent the violation of any provision of its enabling legislation.

Based upon the foregoing provisions of its enabling legislation, I am of the opinion that the Hampton Roads Sanitation District Commission does have the necessary authority to prevent overloading of its sewer lines and sewage treatment plants in order to ensure that the same are operated within their design capacities. I am further of the opinion, in view of the manifest purpose of the above-referenced Act of Assembly and the 1970 amendment to the Water Control Law including authorit:2s within the
definition of "owner", that the Hampton Roads Sanitation District Commission has a legal obligation to operate its sewer lines and sewage treatment works in accordance with applicable laws and regulations.

WATER AND WATERCOURSES—Use of Navigable Streams for Passage.
August 5, 1971

THE HONORABLE DAVID F. THORNTON
Member, Senate of Virginia

This will acknowledge receipt of your recent letter wherein you requested my opinion on the following:

"... whether or not it is legal to pass through property on a boat, canoe, or rowboat even though the property is posted on both sides of the stream."

Generally, where a stream is not in fact navigable the bed of the stream is owned by the riparian owner who is deemed to have the exclusive right of navigation and fishery. Under such circumstances, persons other than the riparian owner have no right to pass upon such waters in boats, canoes or rowboats. See Boerner v. McCallister, 197 Va. 169 (1955); Report of the Attorney General (1953-54), p. 226 (a copy of which is enclosed herewith).

Where a stream is navigable, the general public shares with the riparian owner the right of navigation and fishery. Even though the bed of a navigable stream may be privately owned by virtue of a lawful grant recognized by § 62.1-1 of the Code of Virginia (1950), as amended, the same is nevertheless subject to the public's right of navigation thereon. See generally Taylor v. Commonwealth, 102 Va. 759 (1904); A. EMBREY, WATERS OF THE STATE (1931).

With respect to navigability, the Supreme Court of Virginia has stated in Ewell v. Lambert, 177 Va. 222 (1941), at page 228:

"The question of navigability is one of fact. Its determination must stand on the facts in each case. The test is whether the stream is being used or is susceptible of being used, in its natural and ordinary condition, as a highway for commerce, on which trade and travel are or may be conducted in the customary modes of trade and travel on water." Accord, Boerner v. McCallister, supra, at p. 175.

In light of the foregoing, I am of the opinion that persons other than riparian owners may pass upon a stream through posted property by means of a boat, canoe or rowboat where such stream is in fact navigable; however, where the stream is not in fact navigable, generally no such privilege exists. In either instance, a determination of the navigability of the stream depends upon the facts and circumstances of the particular case in question.

WELFARE—Conditions Under Which Local Board of Public Welfare May Refuse to Consent to Sale of Realty Owned by Recipient.

PROPERTY AND CONVEYANCES—Conditions Under Which Local Board of Public Welfare May Refuse to Consent to Sale of Realty Owned by Recipient.
April 17, 1972

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

This is in response to your letter of March 15, 1972, in which you asked for my opinion concerning § 63.1-131 of the Code. That section states:
REPORT OF THE ATTORNEY GENERAL

"Any recipient of old age assistance or aid to the blind, or any spouse or dependent child of a deceased recipient of such assistance who sells or in any way disposes of his real estate without the consent of the local board or the Board or the Commissioner shall be guilty of a misdemeanor and shall be punished accordingly."

You asked:

"Under the provisions of Section 63.1-131 of the Code, under what circumstances can the local welfare board refuse to give its consent to the sale of real property?"

In my opinion, the legislature intended this statute to perform a dual purpose. First, it was a part of the former law which allowed the department to obtain deeds of trust as a pre-condition to the receipt of public assistance and gave the department a lien on the property of the recipients of such assistance. The statute was designed to assure that a person would not convey his property to defeat those provisions for reimbursement to the department. However, those sections have been repealed and § 63.1-131 no longer serves that purpose.

The statute now serves the purpose of alerting the department of any such liquidations that might amount to a change in condition which would affect the person's eligibility or the amount of his grant. Such information is required to be given under § 63.1-112 and it is my opinion that § 63.1-131 is an adjunct to that section.

The section also functions to curb instances where a recipient might dispose of his property in a manner to increase his dependency upon the State or place him in a position where his loss of assets would make him a permanent charge of the State. In this situation, the Superintendent would be authorized to withhold his consent from the sale.

WELFARE—Eligibility—Mother under the age of sixteen may make application for public assistance for herself and her infant child.

THE HONORABLE VIRGIL H. GOODE
Commonwealth's Attorney for Franklin County

This is in response to your request for my opinion whether a child under the age of 16 years had the right to make application for public assistance for herself and her illegitimate baby. Your stated:

"A young girl's mother is receiving Aid to Dependent Children assistance for her now. The girl, age 15, is pregnant and wishes to make application for herself and for her baby, when it is born. The girl is in elementary school and plans to return to school after the baby is born. All of the family will be living together as one family unit.

"Does a child under 16 years of age have a legal right to make application for assistance for herself and her illegitimate baby?"

It is my opinion that the girl would be a proper person to make application for public assistance for herself and for her child. Section 63.1-107 provides:

"... In the case of aid to dependent children, the application shall be made by the relative with whom the child is living and one application may be made for several children if they reside with the same person."

Assuming that the newborn baby qualifies for aid to dependent children under the provisions of § 63.1-105 of the Code, the mother, even though under the age of 16, would be the relative with whom the child lives and
would, therefore, be an appropriate person to make application for assistance for herself and her child.

I find nothing in the Code which would limit the age of a person making such an application.

Though not mandatory, if the Department is of the opinion that the girl is not capable of properly handling the money, it may, under the provisions of §§ 8-750, 8-750.1 and 8-751 have the money paid into Court for the benefit of the child and allow the Court to see to the proper application of the funds. However, I do not suggest this procedure must be followed merely on account of the applicant's tender age.

Of course, appropriate adjustments in the amount of the grant to the existing family unit would be made to allow for the new grant made to the girl and her child.

WELFARE—Indebtedness—Public assistance not subject to legal process.

November 11, 1971

THE HONORABLE G. M. HANEY
Treasurer of the City of Fredericksburg

I have received your recent letter, asking whether you should issue welfare checks to persons indebted to the City of Fredericksburg.

Virginia Code § 63.1-88 would prohibit you from reducing any welfare check by debts owed the City:

"No public assistance given under this law shall be transferable or assignable, at law or in equity, and none of the money paid or payable as public assistance under this law shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency laws."

WELFARE—Liens—May attach for medical services to welfare recipient.

November 4, 1971

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

In a recent letter you requested my opinion concerning the applicability of § 63.1-133.1 of the Code to the lien for hospital charges provided under § 32-138 of the Code. You stated, in pertinent part:

"Section 32-138 of the Code provides that any hospital, physician or nurse shall have a lien for their reasonable charges for medical attention received by any person sustaining injuries caused by the alleged negligence of another. Section 32-140 provides that the municipal corporation, or any person, firm or corporation, who may pay such charges, shall be subrogated to the lien provided for in Section 32-138."

In your factual situation, the injured person was a welfare recipient injured by the negligent operation of an automobile by another person. The recipient's medical services were paid for by the Essex County Welfare Department and you inquired whether the Department could claim a lien against the proceeds of any recovery by the recipient. You stated that § 63.1-133.1 of the Code eliminated liens in favor of the State or any of its political subdivisions against the property of any recipient of public assistance as a condition of eligibility for such assistance. You asked if under these circumstances the Essex County Welfare Department could assert its lien obtained under § 32-140.

In my opinion, § 63.1-133.1 of the Code is not applicable to the situation you stated. In the question before us, the lien in favor of the Essex County
Welfare Department is obtained through subrogation of the lien of the persons rendering the medical services under § 32-138. That is, by operation of § 32-140, the Essex County Welfare Department steps into the shoes of the persons rendering the medical services and acquires their lien provided under § 32-138 of the Code. This is not a lien claimed or attached as "a condition of eligibility" to receive public assistance which is prohibited by §63.1-133.1 of the Code. Being a lien that arises entirely separate, it is totally without the prohibition of § 63.1-133.1 and is a valid lien upon the proceeds of any recovery made by the injured welfare recipient.

WELFARE—Local Board of Public Welfare—Term of appointment.

PUBLIC WELFARE—Board—Appointments to.

June 7, 1972

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

This is in response to your request for an opinion concerning a construction of §§ 63.1-39 and 63.1-40 of the Code of Virginia. These sections involve a composition of the local Board of Public Welfare and the eligibility for reappointment to such Board. You indicated that § 63.1-39 of the Code stated:

"... no person shall serve more than two consecutive terms of office..."

You further stated that § 63.1-40 provided that:

"... one member of the Board of Welfare must come from the Board of Supervisors."

You further indicated:

"The Board of Supervisors member in Southampton County has served for twenty-five years, and his term expires in June, 1972. I am of the opinion that Section 63.1-39 prohibits his reappointment. I have been told that under Section 63.1-40, a Board of Supervisors member may be reappointed regardless of how many terms he has served.

"The question presented is:

"Can a member of the Board of Supervisors be reappointed to a new term on the Board of Welfare if the member of the Board of Supervisors has previously served two or more consecutive terms as a member of the Board of Welfare. In other words, does Section 63.1-39 of the Code of Virginia also limit the number of terms a member of the Board of Supervisors can serve on the Board of Welfare."

In my opinion, your analysis of § 63.1-39 is correct. The prohibition against service of more than two consecutive terms on the Board of Public Welfare is equally applicable to Board of Supervisors members of the Board of Welfare as to any other member serving on that Board. Section 63.1-39 is explicit in its terms in that it states:

"No person shall serve more than two consecutive terms of office. . . ." (Emphasis supplied.)

I am unable to find anything in § 63.1-40 which negates this specific prohibition. Therefore, the person of whom you speak who has served for well over two terms would be prohibited from serving another term on the Board of Welfare irrespective of his membership on the Board of Supervisors.
REPORT OF THE ATTORNEY GENERAL

WELFARE—Payments—Attachment of sales and use tax revenues to pay.

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

This is in response to your letter of October 12, 1971, requesting my opinion concerning the applicability of § 63.1-122 or § 63.1-123 of the Code of Virginia (1950), as amended. The latter section provides for the distribution and apportionment of sales tax revenues to the localities for the operation and maintenance of public schools. The former section provides a device whereby the Department of Welfare and Institutions can provide the public assistance services required by both federal and State statutes when a locality refuses or is not able to do so and to have the Comptroller reimburse it by withholding that locality's portion of sales tax revenues provided under § 58-441.48 of the Code. However, § 63.1-123 exempts from such withholding funds required by the Constitution to be returned to the locality. You asked whether the Department of Welfare and Institutions had authority to utilize this device. The issue raised is whether these funds are required by the Constitution to be withheld.

This precise question was answered in an opinion of this office to The Honorable Otis L. Brown, Director, Department of Welfare and Institutions, dated March 31, 1970, and it was stated that the Department of Welfare and Institutions did have the authority pursuant to these sections and that sales tax revenues were not required to be withheld by the Constitution. See Report of the Attorney General (1969-1970), page 292.

That opinion was based upon an interpretation of the involved statutory sections and the provisions of the then existing Constitution. As you are aware, our new Constitution became effective July 1, 1971. Therefore, I have reviewed the applicable sections, specifically, Section 1 and Section 2 of Article VIII of the 1971 Constitution. I am able to find nothing in the new Constitution which would change the original opinion and I would therefore hold that the Comptroller has authority under the provisions of § 63.1-123 of the Code to withhold sales tax revenues provided in § 58-441.48 of the Code for reimbursement to the Department of Welfare and Institutions when the latter organization has acted pursuant to the provisions of § 63.1-122 and § 63.1-123 of the Code.

WELFARE AND INSTITUTIONS—Assignments to Work Release Program—May be made to persons confined for non-support.

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

This is in reply to your letter of July 7, 1971, in which you inquire as to the possible assignment of persons confined for non-support under Code Section 20-61, to the Work Release Program authorized by Section 53-38.

You more specifically inquire as follows:

"Does Section 20-61, . . ., preclude the assignment of such persons to the Work Release Program or do Section 53-38 and Section 53-8 allow the Director to make such assignments?"

Section 20-61, refers to "confine...on the State Convict Road Force at hard labor" and Section 20-62 substitutes the phrase "Bureau of Correctional Field Units" for "State Convict Road Force." Section 53-8 authorizes you to transfer "any person . . . convicted of an offense against the laws of the Commonwealth of Virginia . . . from any penal institution in which such person is confined to such other penal institution in the State as is designated" by you, with Section 53-9 including "correctional field unit" in the term "penal institution." Thus, I am of the opinion that Section 20-61
does not preclude assignment to the Work Release Program and that Section 53-8 does allow you to make such an assignment.

Section 19.1-300 gives the court sentencing a defendant under Section 20-16 the authority to provide in the sentence for participation in work release employment. That section also authorizes the court to require the defendant "to pay such portion of his earnings after standard payroll deductions required by law as the court may determine" for several purposes, including "(3) To provide support and maintenance for his dependants;". However, I am of the opinion that you also have the authority to make an assignment to this program.

Your second question follows naturally upon the first:

"If the Director may assign such persons to the Work Release Program, may a condition be imposed requiring the inmate to consent to having a portion of the wages earned sent to his family?"

Section 53-38, in pertinent part, provides as follows:

"Any wages earned shall be paid to the Director, who, after deducting a sum sufficient to defray the prisoner's keep and his pro rata share of the cost of administering and supervising the program shall credit the balance to the convict's account or send it to his family, if the convict so chooses." (Emphasis supplied).

Thus, it appears that unless the convict chooses to have the balance sent to his family, you "shall", or must, credit it to his account. I must therefore reply in the negative to your second question.

"If this is allowed as a condition for assignment to Work Release, would there be any restriction on the percent of net wages which could be sent to the family?"

My answer to your second question obviates the necessity of replying to this inquiry.

Finally, you ask:

"Is it true that the funds normally paid to inmates' families under Section 20-63 (b) of the Code would cease upon his assignment to the Work Release Program?"

Section 20-63 (b) provides, in part, that:

"(b) If the prisoner be sentenced to the State convict road force the sum or sums provided for in paragraph (a) shall be paid by the State Treasurer out of the funds appropriated for the payment of criminal costs, and such payments shall begin when such prisoner is admitted to the State convict road force;"

It is my opinion that this Code section requires such payments to be made and they would not cease upon the inmate's assignment to the Work Release Program. I must answer your final question also in the negative.

WELFARE AND INSTITUTIONS—Paroled Misdemeanant — Placement pending parole revocation hearing.

THE HONORABLE OTIS L. BROWN, Director
Department of Welfare and Institutions

March 14, 1972

This is in reply to your recent letter in which you make the following inquiry:

"This letter is to request your formal opinion with regard to the question of whether or not a misdemeanor who has been paroled
and against whom parole revocation proceedings are pending may be housed and confined in the Virginia State Penitentiary until such time as his revocation hearing may be held?"

Section 53-258, Code of Virginia (1950), as amended, provides:

"The Board may at any time, in its discretion, upon information or a showing of a violation or a probable violation by any parolee of any of the terms or conditions upon which he was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Board. The Director may also at any time, in his discretion, upon information or a showing of a violation or probable violation by any parolee of any of the terms or conditions upon which such parolee was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Director. Each such warrant shall authorize all officers named therein to arrest and return such parolee to actual custody in the penal institution from which he was paroled, or any other institution designated by the Board or the Director, as the case may be." (Emphasis added.)

I am, therefore, of the opinion that the Virginia Probation and Parole Board is vested with the discretion to return parolees to any penal institution, as defined in § 53-9 of the Code, including the Virginia State Penitentiary. I would emphasize, however, that the Virginia State Penitentiary is designed to house persons convicted of a felony. Discretion to house misdemeanants in this facility should be carefully exercised. In the case of youthful offenders, such confinement should be directed only if they can be segregated from the felony population.

You also requested guidance as to whether the Richmond City Jail could be used for the same purpose. Since that facility is within the definition of penal institution as set forth in § 53-9 of the Code, the answer is in the affirmative.

WILLS—Clerk Must Either Accept or Reject Will; Cannot Ignore It.
WILLS—Procedure Under § 64.1-116 If Executor Refuses Executorship.
CLERKS—Must Either Accept or Reject Will; Cannot Ignore It.

April 13, 1972

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

This is in reply to your letter of April 8, 1972, which reads as follows:

"The enclosed is a copy of a will which was offered for probate in this office last week, but since we could find no Virginia statute covering the circumstances surrounding this will I am asking your help in solving this probate problem.

"The 'circumstances' to which I refer are as follows:

"1. Mr. "X", who had formerly resided in Texas and Pennsylvania, died in a Louisa, Va., hospital in February, 1972, after living in Louisa County about six months.

"2. Mr. "X's" estate consisted of a $100.00 stock certificate and a life insurance policy for $2,700.00 which is payable to his estate. He owned no real estate of any kind.

"3. The subscribing witnesses to the will have died and the executor named in the will has renounced his right to qualify as such."
"4. Mr. "Y", the son of the decedent, is a resident of Lousia County and desires to qualify as Administrator, c. t. a., of his father's estate.

"5. Funeral and medical bills approximate the total value of the estate, and, therefore the amount to be distributed or divided among the nine devisees in the will must necessarily be quite small.

"In light of the facts which I have cited I am wondering if the will could be ignored, as far as probate is concerned, and grant the request of the decedent's son to qualify on his father's estate."

A will is presented to the clerk of the court and proof offered of its due execution. The clerk decides, without notice to any other party in interest or hearing any proof other than that offered by the proponent, whether or not the paper offered is the last will and testament of the decedent. He either accepts or rejects the paper and enters the appropriate order in his order book. Harrison on Wills and Administration, Volume 1, Second Edition, § 172(2).

I am of the opinion that, since the will has been presented to you, you cannot ignore the will, but must either accept or reject it as the last will and testament of the decedent. Under § 64.1-116, Code of Virginia (1950), as amended, where the executor refuses the executorship, you may grant administration with the will annexed to the person who would have been entitled to administration if there had been no will.

WILLS—Codicil Must Be Probated at Same Time As Will.

April 28, 1972

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

This is in reply to your letter of April 28, 1972, which reads as follows:

"An attorney recently brought into this office a will and a codicil (both appearing to be duly executed and having testamentary intent) and offered only the will for probate. Should we insist that the codicil be probated at the same time as the will?"

The object of probate of a will is to ascertain, in the manner prescribed by law, whether or not the paper or papers produced is or are the last will and testament of the deceased. Harrison on Wills and Administration, Volume 1, Second Edition, § 168. In order to properly determine this question the codicil already shown to you must be considered at the same time as the will. I am, therefore, of the opinion that you should compel the production of the codicil for probate at the same time as the will.

ZONING—Board of Zoning Appeals—Power to hear and determine matters of appeal.

September 10, 1971

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

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

"I would appreciate it if your Office would give me an opinion regarding the following.

"A property owner in Spotsylvania County has constructed a commercial building, the bulk of which is located in Spotsylvania County, but a small portion of the building lies in the City of Fredericksburg. A determination has been made by the City Building Inspector that the contemplated use of the building is in violation of the applicable City zoning ordinance."
"The property owners wish to take an appeal from the decision of the City Building Inspector to the Board of Zoning Appeals for the purpose of having the Board grant a variance in the application of the ordinance to this building.

"The City Building Inspector is of the opinion that the Board does not have jurisdiction over this question because it would not deal with the variance in the application of the ordinance but rather, in his opinion, a change in the zoning for the area in question.

"It would appear that Section 15.1-495 of the Code applies to this situation and I would appreciate it if you would render an opinion as to whether this Section of the Code empowers our Board to assume jurisdiction and to grant a variance in application of the zoning ordinance."

Section 15.1-495 (formerly § 15-968.9) of the Code is applicable. This section empowers the board of zoning appeals to hear and decide the appeal in question. See opinion to the Honorable W. Garland Wilson, City Attorney for the City of Radford, dated May 6, 1963, and found in Report of the Attorney General (1962-1963), p. 306. A copy of this opinion is enclosed.

ZONING—Variance or Special Use Permit; Reserved to Municipality and Board of Zoning Appeals.

ZONING—School Board Should Apply to Board of Zoning Appeals for Variance or Special Use Permit.

ZONING—Planning Commission Recommends Changes.

ZONING—Board of Zoning Appeals Issues Variance or Special Use Permit.

December 21, 1971

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

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

"I need an opinion as to the following facts.

"The County of Amherst operated an elementary school in a light commercial district for a period of years, but ceased to operate the school in June of 1970. Recently, the County School Board decided to operate its own garage and decided further that it should be located in the old Amherst Elementary School, which is in a light commercial district. The Town of Amherst Zoning Commission requires that garages only be operated in commercial districts and not in light commercial districts. The County School Board applied to the Planning Commission of the Town of Amherst to change the classification from light commercial to commercial. This, of course, was turned down and the Planning Commission recommended a special use permit or a variance but with certain conditions placed on the School Board. The matter came before the Town Council. They have tabled the matter until the December meeting of the Council.

"Questions:

"1. Can the Planning Commission issue a special use permit or variance?

"2. Should not the School Board have applied to the Board of Zoning Appeals for a variance or special use permit?

"3. Is not the Planning Commission strictly to recommend a zoning change?

"4. Is not the Board of Zoning Appeals the one to issue a variance or a special use permit?"
I shall answer your questions seriatim:

1. I am aware of no authority for a planning commission to issue a special use permit or variance. This is reserved to the municipality by § 15.1-491, Code of Virginia (1950), as amended, and to the board of zoning appeals by § 15.1-495(b).

2. The Board of Zoning Appeals was the proper body to entertain the application.

3. The answer to this question is in the affirmative. See §§ 15.1-427 and 15.1-444(e) of the Code.

4. The answer to this question is in the affirmative. See § 15.1-495(b) of the Code.
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## OPINIONS

**ATTORNEY GENERAL OF VIRGINIA**

**1971-1972**

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