OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1972 to June 30, 1973

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1973
Letter of Transmittal

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

July 1, 1973

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.

As in my previous letters to you accompanying this report, I believe it will again be helpful to go beyond the presentation of official opinions of this office in order that you may fully understand the scope of the work performed in the past fiscal year by the Attorney General and his staff. Therefore, I offer the following brief summary.

The continued growth of State governmental services since 1970 has necessitated expansion of the staff and working facilities of the Office of Attorney General. During the past fiscal year, I found it necessary to increase the size of my staff and extend its functional responsibilities. As of June 30, 1973, my staff included 35 assistant attorneys general, 3 deputy attorneys general, 2 administrative assistants, 31 legal secretaries, 1 file clerk and 1 receptionist. Fifteen of the assistant attorneys general are quartered with me in the Supreme Court Building; the remaining 20 have offices elsewhere.

While it was not deemed necessary during fiscal 1973 to acquire additional office space, the ever increasing workload on the Office of Attorney General will require such space in the future. The Criminal Division, for example, was relocated in the Life of Virginia Building in Richmond in 1971. Similar steps must now be taken to alleviate the critical space shortage which has developed in the Supreme Court Building.

During 1973-1974, it will be necessary to assign two assistant attorneys general to offices with the Department of Welfare and Institutions. In addition, the requirements of the amended Virginia Fair Housing Act will necessitate assignment of an additional assistant attorney general to assist in its administration. Again, space limitations demand that these members of my staff be given an office in the State Office Building, rather than in the Supreme Court Building.

The burden of litigation is still increasing and so are the requests for official opinions. During this last year, some 632 such requests were received and answered. That the Office of Attorney General has been able to discharge these official responsibilities efficiently with a budget small by comparison with those of other states is, I believe, a credit to my staff and, I trust, a source of some gratification to the people of the Commonwealth.

CONSUMER PROTECTION

The Division of Consumer Counsel within my Office maintained its excellent record of service to citizens of the Commonwealth in the past fiscal year. In
November, 1972, the Supreme Court of Virginia affirmed the decision of the State Corporation Commission requiring the Chesapeake and Potomac Telephone Company of Virginia to refund more than $4,000,000 to its customers. This was the culmination of a proceeding instituted by my Office before the Commission, and I am pleased that our efforts defending the Commission's decision were successful.

In January, 1973, members of my staff went before the United States Supreme Court to defend the position of the State Corporation Commission in the Pentagon telephone rate case. The Supreme Court agreed with our contention that the SCC has jurisdiction over the rates which the United States government must pay for telephone service provided by the Chesapeake and Potomac Telephone Company to federal installations in Virginia. Consequently Virginia customers of C & P will not be unfairly subsidizing the Department of Defense.

My Office also appeared in September, 1972, in hearings before the Corporation Commission on Chesapeake and Potomac's request for a rate increase amounting to about $36,000,000. The case was continued until June, 1973. At that time, we appeared again, presenting expert testimony with the goal of establishing precedent favorable to the public interest. No decision has been rendered in the case as of this date.

Another rate case of major importance in which my Office appeared was the request by Appalachian Power Company in December, 1972, for a $12,000,000 increase in rates. After our brief was filed, the Company requested that the Commission make no decision in the case but postpone it indefinitely. The Commission, with the concurrence of my Office, ordered the matter continued with no increase granted.

The Division of Consumer Counsel has continued in the past fiscal year to aid many citizens who appealed to it for assistance in matters relating to insurance companies, banks and other regulated enterprises, residential real estate transactions, and the interpretation of consumer related statutes. The Division gave its support to legislation passed at the 1973 Session of the General Assembly dealing with such matters as authority of the State Corporation Commission to award refunds to consumers in instances of "company made" utility rates. My Office also supported legislation to correct defects in the 1972 Act providing for the competitive pricing of insurance rates.

The Division of Consumer Counsel, responding to the requirements of § 2.1-133.1(b), recommended several remedial bills for consumer protection including the following which were enacted into law:

An Act relating to individual civil actions for damages as the result of deceptive trade practices. Under this new statute, a person may bring an individual action for damages and collect either his damages or $100, whichever is greater. Should the plaintiff be successful, he may be awarded reasonable attorney's fees. This Act should enable a person to seek redress in instances of commercial fraud which involve small amounts which have been impractical to sue for in the past because of the disproportionate cost of legal proceedings compared to actual damages.

A second Act, proposed and supported by the Division of Consumer Counsel, requires that used cars sold by dealers must be inspected prior to their sale. Should the used vehicle not pass inspection, the dealer is required to give the prospective purchaser notice of such failure.

And another significant action of the General Assembly which had full support of the Division, was to direct that a study be undertaken to determine the need for State regulation of auto mechanics and auto repair shops.

ENVIRONMENTAL PROTECTION

Since 1970, I have endeavored to see to it that the Office of Attorney General provides all necessary legal services pertaining to environmental matters. The approach has been preventive in nature, anticipating legal problems before they occur, and maintaining the closest working relationship possible with State agencies and institutions. The three assistant attorneys general in my Environmental Sec-
tion have acquired an in-depth knowledge of the technology involved in pollution control and the conservation of natural resources.

This special knowledge has proved to be of great benefit to State agencies in handling pollution matters. At present, members of the Environmental Section conduct agenda review sessions with agency staffs prior to board meetings. The practice has eliminated many problems and has contributed to streamlining of meetings. In addition, my Office's environmental specialists serve as counsel to the Virginia Advisory Legislative Council on matters pertaining to environmental reorganization.

One member of the Environmental Section of my Office is presently working with the Southern Interstate Nuclear Board (SINB), a 17 state compact, to analyze and define the role of states in the development and regulation of nuclear materials. I should also point out that in the past fiscal year, we were successful in defending the State's position in the case known as Commonwealth v. Forbes, in which the issue was protection of state-owned bottom lands in the Norfolk area. As to legislation, members of my staff contributed significantly to the drafting of the 1973 Erosion and Sediment Control Law and the Environmental Coordination Act.

PUBLIC EDUCATION

In the field of public education, I am pleased to report that the Commonwealth's position in the landmark case known as Bradley v. School Board of Richmond was upheld when the United States Supreme Court declined to reverse the decision of the Court of Appeals for the Fourth Circuit. At the time of my last annual report to you, the Court of Appeals had ruled in favor of the State Board of Education, represented by my office, and the Boards of Supervisors and School Boards of Chesterfield and Henrico Counties. The case involved an effort by the City of Richmond to consolidate its public schools with those of the two counties in order to achieve a racial balance.

The District Court had ordered Richmond's plan put into effect, thereby directing the massive busing of students across jurisdictional boundary lines. On behalf of the State Board of Education, and in concert with the defendant counties, my office appealed the decision to the Fourth Circuit where the lower court was reversed. That decision was appealed by the plaintiffs and, by an evenly divided court, the Supreme Court affirmed. The plaintiffs have now filed a Petition for Rehearing with the Supreme Court.

Two cases of extreme significance to higher education in the Commonwealth are pending before the Supreme Court of Virginia. Both seek writs of mandamus from the Court to require that the Comptroller disburse funds under the Tuition Assistance Acts (Chapters 2 and 106) enacted by the 1973 General Assembly. The validity of these Acts, which provide for loans to Virginia students attending certain institutions of higher learning in the Commonwealth, is being questioned under both the United States and Virginia Constitutions.

The General Assembly took significant action in 1973, by implementing the Standards of Quality for public education, required under the Revised Constitution of 1971. My Office cooperated extensively with the Education Committees of the House and Senate and the House Appropriations Committee in preparing the necessary legislation. The authorization of a "quality supplement" to enable localities to meet the Standards of Quality gives Virginia a constitutionally valid system of school financing.

SOCIAL SERVICES

During the past fiscal year, assistant attorneys general assigned to those agencies which provide social services to the people of the Commonwealth have been extremely active. A major project was to review the State's plan for submission to the United States Department of Labor so that Virginia may assume enforcement of her occupational safety and health laws. Pending approval of new State legislation and the plan itself, federal inspectors have pre-empted the authority
of State inspectors, but with a much smaller force of personnel. My Office assisted with drafting of the needed legislation and has urged the Department of Labor to give speedy approval to the State plan so that the Commonwealth may resume enforcement of her own regulations.

Extensive revisions to the Medical Practice Act were made by the General Assembly in 1973. The amendments were drafted by members of my staff for the State Board of Medical Examiners. As ultimately passed by the legislature, the Act provides for the establishment of regulations for "physicians" assistants," similar to those established in 1972 for "dental assistants."

A member of my staff serves as staff consultant to a committee of the Virginia Advisory Legislative Council which is now studying professions and occupations. The committee is making an exhaustive review of all State laws relating to professions and occupations to determine whether they protect the public interest effectively. Its report will make recommendations as to what, if any, additional regulation is required.

In the area of general welfare, assistant attorneys general assigned to this section have coordinated Virginia's legal effort relating to the "quality control" regulations proposed by HEW. Those regulations could have cost the Commonwealth as much as $15,000,000, had they been promulgated. The regulations that were eventually promulgated are considerably less oppressive.

I might also point out that, under 1973 legislation, the various localities have been made liable for reimbursement of payments to ineligible recipients and overpayments to eligible recipients of assistance. It is hoped that this legislation will serve to reduce markedly such unauthorized payments. At the same time, my Office is cooperating with the Department of Welfare and Institutions and the Virginia Advisory Legislative Council in the current study of public assistance. I trust I will be able to report next year that the Department of Health, Education and Welfare has approved Virginia's proposal for extensive welfare reform.

DIVISION OF CRIMINAL LITIGATION

The Deputy Attorney General and the six attorneys comprising the Criminal Litigation Section handled an increasing number of appellate cases in the past fiscal year, briefing and arguing some 49 criminal and habeas corpus cases in the Supreme Court of Virginia, five habeas corpus cases in the United States Court of Appeals for the Fourth Circuit and preparing 17 other appellate briefs in cases not yet argued. The number of habeas corpus cases filed and actually tried declined during this fiscal year, but the complexity of the cases filed caused no diminution of the work load in handling this particular type of litigation. There was an increase in the number of cases brought by prisoners complaining about conditions in the penal system.

During the past fiscal year it was necessary to assign one Assistant Attorney General to handle the problems of the Division of Youth Services of the Department of Welfare and Institutions. The passage of the electronic surveillance bill by the 1973 General Assembly required the assignment of an assistant to prepare the necessary procedural guidelines for Commonwealth's Attorneys and the Department of State Police in carrying out the mandate of the General Assembly. An increasing number of extradition hearings were held by the Deputy Attorney General who serves as the extradition office for the Commonwealth.

The efforts of the Technical Assistance Unit in rendering assistance to Commonwealth's Attorneys throughout the State have been the subject of many letters of commendation. These two lawyers prepared several hundred memoranda of law which have been found to be most helpful in the prosecution of criminal cases. Moreover, approximately 8,000 copies of the Virginia Peace Officer are mailed each month to all law enforcement officers in Virginia. The Virginia Prosecutor is received monthly by all Commonwealth's Attorneys and all judges. In addition, copies of all decisions of the Supreme Court of Virginia in the field of criminal law are mailed within 48 hours after they are announced to all Commonwealth's Attorneys and judges in the State. This service has greatly improved the administration of justice in Virginia.
Lastly, for the third successive year an institute for Commonwealth’s Attorneys lasting three days was sponsored by the Attorney General and some 150 prosecutors and assistants attended. It was the largest gathering of prosecutors ever held in Virginia; another such institute is planned for the spring of 1974.

IN OTHER AREAS

A great deal of other legal work and litigation has been performed by members of my staff in the year that has elapsed since my last report.

Assistant attorneys general and special assistants assigned to the Department of Highways supervised and, on occasion, participated in the trial of 1,241 right-of-way condemnation cases. They also reviewed the legal aspects of the Department’s acquisition of $41,000,000 in right-of-way properties.

Following my decision to reduce the number of private counsel retained to handle highway matters, staff attorneys have been employed for the Department in each highway district. In six months, they have examined a total of 445 titles, and have closed 152 real estate transactions by deed. My preliminary reports indicate that the Commonwealth has already saved more than $24,000 through the activities of these title attorneys and even greater savings can be expected in the forthcoming fiscal year.

Most importantly, assistant attorneys general assigned to the Department of Highways, have settled or compromised 151 property damage claims, recovering for the Commonwealth the amount of $104,241.

In regard to other litigation on behalf of the Commonwealth, this Office has carried a particularly heavy load in the past 12 months. In one case, now pending on appeal, we successfully defended the right of the Commonwealth to construct a reception and diagnostic center for the Division of Corrections in Louisa County. In addition, my staff successfully opposed Pennsylvania’s motion to have the United States Supreme Court consider the validity of Virginia’s liquor affirmation policy.

A most important case was brought to a successful conclusion when the Supreme Court of the United States upheld the right of the General Assembly to redistrict itself, rather than have that redistricting ordered and designed by the federal courts.

Finally, I am pleased to say that the suit I instituted against the District of Columbia in the Lorton Reformatory matter has achieved positive results. The rash of escapes from that federal institution, which prompted my action, has diminished sharply due to improved security measures. This Office is presently conferring with counsel for the District in order to ensure that additional corrective action is taken.

The foregoing constitutes a brief summation of the work of this Office during the past year. This letter of transmittal deals only with certain highlights which reflect the quantity of work undertaken on behalf of Virginia and her citizens. It does, however, give some insight into the quality of the legal representation afforded the Commonwealth during the 1972-1973 fiscal year.

Respectfully submitted,

ANDREW P. MILLER
Attorney General
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<td>§J. Lindsay Almond, Jr.</td>
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<td>**Kenneth C. Patty</td>
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<td>A. S. Harrison, Jr.</td>
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<td>Robert Y. Button</td>
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<td>Andrew P. Miller</td>
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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.
CASES DECIDED IN THE SUPREME COURT OF VIRGINIA


Boggs, Dr. G. Vernon v. State Board of Dental Examiners. From Circuit Court, Page County. Appeal from order affirming disciplinary action taken by the State Board of Dentistry. Modified and remanded.


Brown, Allison v. Supreme Court of Virginia. Application for admission to Supreme Court of Virginia. Denied.


Burton, Turner N. Director, etc., et al. v. Accountants Society of Virginia, et al. Appeal by State Board of Accountancy from decision of the Circuit Court of the City of Richmond which allowed noncertified persons to hold themselves out to the public as “accountants.” Affirmed.

Caldwell, Emmett v. Commonwealth. From Circuit Court, Montgomery County. Appeal from a conviction of a felony—larceny by false pretenses. Issues: (a) sufficiency of the evidence, (b) introduction of prior misconduct not amounting to a felony. Reversed and remanded.

Chavis, Howard Brantley v. Superintendent, etc. From Circuit Court, Henrico County. Appeal from denial and dismissal of petition for a writ of habeas corpus. Appeal dismissed due to death of petitioner.


REPORT OF THE ATTORNEY GENERAL

From Circuit Court, City of Richmond. Motion for judgment. Writ of error denied.


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


Foodtown, Inc. v. Lowe & State Highway Commissioner. From Circuit Court, Hanover County. Decision in favor of Commonwealth.


Healy, Barbara v. Commonwealth. From Circuit Court, James City County. Appeal from a conviction of a felony—embezzlement of public funds. Issues: (a) sufficiency of the evidence, (b) improper indictment. Affirmed.


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. Reversed and remanded for resentencing.


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 guardian ad litem at juvenile proceeding in 1949. Reversed.


Launohr, Colie Lee v. Commonwealth. From Corporation Court, City of Alex-
andria. Appeal from a conviction of a felony—murder. Issues: (a) error in granting an instruction, (b) sufficiency of the evidence. Reversed.


Manns, Spencer v. Commonwealth. From Hustings Court, City of Roanoke. Appeal from convictions of contributing to the delinquency of a minor. Constitution does not require jury trials in courts not of record. Affirmed.


McIntosh, Avery Kenneth v. Commonwealth. From Circuit Court, Campbell County. Appeal from conviction of felony—driving after being adjudged habitual offender. Affirmed.


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. Appeal upheld.


Riley, Bobby Garland v. Commonwealth. From Circuit Court, City of Waynesboro. Appeal from conviction of a felony—possession of a sawed-off shotgun. Issues: (a) constitutionality of the shotgun statute, (b) sufficiency of the evidence, (c) introduction of prior acts of misconduct not amounting to a conviction of a felony. Reversed and remanded.


Smith, Richard v. Commonwealth. From Corporation Court, City of Lynchburg. Appeal from conviction of involuntary manslaughter. Admissibility of testimony relating to speed; instructions; closing argument. Affirmed.


Spear, James v. Commonwealth. From Circuit Court, Nottoway County. Appeal from conviction of murder in the second degree. Admission of photographs into evidence, testimony of police officer regarding condition of scene of crime, admission of victim’s arrest record, admission of evidence of prior altercations between defendant and victim, prejudicial actions of trial judge, refusal to grant instructions regarding self-defense and sufficiency of the evidence. Reversed and remanded.


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


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

Titus, Roger v. Supreme Court of Virginia. Application for admission to Supreme Court of Virginia. Denied.


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. Affirmed.


Whyte Construction Company v. Commonwealth. From Circuit Court, City of Richmond. Writ of error denied.

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.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Buck, George F. v. Slayton. From Corporation Court, City of Norfolk. Belated appeal from a conviction of a felony—possession of heroin. Issues: (a) the trial court erred in refusing to grant a motion to strike the Commonwealth's evidence, (b) the petitioner asserts that he was ineffectively represented by counsel.

Carwile, C. T., Merriman Motors, Incorporated, and Jack Miller v. Basil E. Roebuck and Commissioner, Division of Motor Vehicles; Roebuck, Basil E. v. C. T. Carwile, Merrimac Motors, Incorporated, Jack Miller and Commissioner, Division of Motor Vehicles (to be heard together). From Circuit Court, City of Hampton. Civil—Date of transfer of ownership.


Commonwealth of Virginia v. Research Analysis Corporation. From Circuit Court, Fairfax County. Appeal of application for correction of tax assessment.

Commonwealth of Virginia ex rel. Marine Resources Commission v. William R. Forbes and Hazel W. Forbes. From Circuit Court, City of Norfolk. Bill of Complaint for injunctive relief. On appeal, judgment for defendant was reversed by Supreme Court and remanded to lower court for further proceedings.

Deagle, Thomas Elliott v. Commonwealth. From Circuit Court, York County. Appeal from a conviction of a felony—statutory burglary and grand larceny. Issues: (a) whether the trial court erred in deleting portion of an invalid sentence.

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

Ely, Albert L. v. Vern L. Hill, Commissioner, etc. From Circuit Court, City of Richmond. Appeal from court's decision to deny petition for injunction.

Everett, Elsie Poole v. Commonwealth. From Circuit Court, Dinwiddie County. Appeal from conviction for unlawful cohabitation. Sufficiency of evidence.


Golden Skillet Corporation v. Commonwealth of Virginia. From Hustings Court, City of Richmond. Appeal of application for correction of assessment of sales tax.


Lewis, Nelson James v. Commonwealth. From Corporation Court, City of Charlottesville. Appeal from conviction of breaking and entering and two charges of grand larceny. Double jeopardy attaching from juvenile proceedings.

Lugar, Gregory Blanton v. Commonwealth. From Hustings Court, City of Richmond. Appeal from conviction for possession of narcotics. Search and seizure; sufficiency of the evidence.


Mitchell, Lewis A. v. Virginia State Parole Board and Addison E. Slayton. From Corporation Court, City of Portsmouth. Appeal from a habeas corpus denial. Issues: (a) the judgment of the court in denying the petition for writ of habeas corpus was contrary to the law and evidence, (b) the court erred in
finding there was sufficient evidence for the Parole Board to believe that the petitioner has committed a felony and that he was in possession of firearms thus revoking his parole, (c) petitioner was denied due process of law in that his revocation hearing did not sufficiently comply with the Fourteenth Amendment, (d) Virginia's probation and parole procedures are not in compliance with Virginia law or fundamental rights bestowed by the Constitution of the United States, (e) *Morrissey v. Brewer* should be applied retroactively.

*Parker, Van Columbus v. Slayton.* From Circuit Court, Goochland County. Appeal from a denial of a petition for a writ of *habeas corpus*. Issues: (a) the effect of the trial court's disallowance of the defendant's witnesses at his criminal trial violated his right to due process of law, (b) petitioner did not receive effective assistance of counsel.


*Smith, Clarence Milton v. Superintendent, Virginia State Penitentiary.* From Circuit Court, City of Suffolk. Appeal from denial of a petition for writ of *habeas corpus*. Jurisdiction to consider the validity of fully served sentences.

*Squire, Stephen Earl v. Commonwealth.* From Corporation Court, City of Charlottesville. Appeal from conviction of disorderly conduct. Jurisdiction.


*Virginia Electric and Power Company v. Commonwealth of Virginia.* Application for a declaratory judgment. On appeal and has not been argued.

*Virginia National Bank v. Commonwealth of Virginia* (State Tax Commissioner). From Circuit Court, City of Norfolk. Appeal of application for correction of erroneous assessment.


*Williams, Clarence, Jr. v. Commonwealth.* From Hustings Court, City of Richmond. Appeal from conviction for first degree murder. Correctness of instruction on felony murder.

*Wilson, Hubert Nathaniel v. Superintendent, Virginia State Penitentiary.* From Hustings Court, City of Richmond. Appeal from denial of a petition for writ of *habeas corpus*. Construction of agreement on detainers.


*Woodard, Dennis Ray v. Commonwealth.* From Circuit Court, City of Chesapeake. Appeal from conviction of possession and distribution of controlled drug. Was conviction had in violation of statute because three terms of court had passed before trial.


*Wright, Clarence Leroy v. Commonwealth.* From Circuit Court, Dinwiddie County. Appeal from conviction of unlawful cohabitation. Sufficiency of evidence.
CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Almond, Charles A. L. v. Slaton. Petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Issues: (a) whether detention in isolation for three months and eight days rendered the petitioner's plea of guilty at his criminal trial involuntary, (b) whether the State's failure to provide the petitioner with a preliminary hearing violated a constitutional guarantee, (c) whether a plea bargain rendered the petitioner's plea involuntary, (d) ineffective assistance of counsel, (e) whether a pending petition for writ of habeas corpus precludes a direct appeal to the Supreme Court of the state. Petition denied.


Bruce, Robert Lee, Sr. v. Virginia. From an order of the Supreme Court of Virginia dismissing the petition for writ of habeas corpus. Certiorari denied.


Hargrove, George v. Slaton. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Issues: (a) whether counsel's failure to advise the petitioner of his right to appeal his criminal conviction amounted to ineffective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States, (b) does the Constitution require that a parolee be credited with the time spent on parole. Petition denied.


Jones, Harold Lee v. Oliver. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Issues: (a) whether an indigent prisoner has a constitutional right to a trial transcript. Petition denied.


McBride, David Thomas v. Commonwealth. Petition for a writ of certiorari from Supreme Court of Virginia. Appeal from conviction of distribution of controlled drugs. Probable cause for arrest and search and seizure. Constitutionality of
unitary trial system in Virginia. Procedure in handling questions propounded by the jury. Certiorari denied.


Moon, William Alvin v. Slayton. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Issues: (a) whether pretrial lineups conducted pursuant to the petitioner's criminal trial violated his Fourteenth Amendment to the Constitution of the United States, (b) sufficiency of the evidence. Petition denied.


Rexrode, Harry Virgil v. Commonwealth. From Supreme Court of Virginia. Violation of § 46.1-387.8 of operating vehicle after adjudged an habitual offender. Dismissed.


Saunders, Stuart, Jr. v. Slayton. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Issues: (a) exhaustion of state remedies, (b) whether the failure to provide a juvenile counsel at his certification hearing amounted to harmless error, (c) whether the constitution of the United States requires that the State of Virginia give the petitioner a more specific statement of reasons for his certification than the Virginia statutes, (d) whether admissions before the juvenile court may be used in the criminal adult court, (e) whether the petitioner's sentence of eighty years was unconstitutionally excessive, (f) whether a juvenile certification hearing may consider a prior juvenile delinquency proceeding where the petitioner was not represented by counsel, (g) ineffective assistance of counsel, (h) whether false information presented to the sentencing judge violated the petitioner's right to due process of law. Petition denied.

School Board of the City of Richmond v. State Board of Education. Appeal from the Court of Appeals for the Fourth Circuit. Concerned attempt by the City to consolidate school divisions of Chesterfield, Henrico and Richmond. Judgment for the defendants affirmed.


Slayton, Addison E. Jr. v. James C. Hammer. 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. Certiorari granted and judgment of the United States Court of Appeals for the Fourth Circuit reversed.


Stover, James David v. Virginia. Appeal from the Supreme Court of Virginia.
Enhancement of sentence on retrial before a jury. Appeal dismissed for want of a substantial Federal question.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Smith, Michael v. Virginia. Petition for writ of certiorari to judgment of Supreme Court of Virginia. Denial of preliminary hearing; validity of search of automobile.


CASES DECIDED OR PENDING IN THE UNITED STATES COURTS OF APPEALS


REPORT OF THE ATTORNEY GENERAL


Jones, Harold Lee v. R. M. Oliver. Appeal from District Court granting petition for writ of habeas corpus. Issues: (a) whether an indigent prisoner has a constitutional right to a trial transcript. Reversed. Rehearing denied.

Kibert, L. P. v. Slayton. Appeal from an order of the District Court granting a petition for writ of habeas corpus. Issues: (a) whether the Constitution of the United States and the Virginia statutory scheme requires that evidence be presented by the Commonwealth upon the guilty plea of the defendant, (b) whether there has been exhaustion of State court remedies. Pending.


Saunders, Stuart, Jr., v. Cox. Appeal from District Court denying petition for writ of habeas corpus. Issues: (a) exhaustion of State remedies, (b) Does the Constitution require that the State of Virginia provide a juvenile certified to an adult court more specific statement of reasons than the Virginia statute requires, (c) ineffective assistance of counsel, (d) is a juvenile certified to an adult court entitled to counsel at the certification hearing, (e) does a sentence of eighty years for armed robbery amount to cruel and unusual punishment, (f) may a juvenile be certified upon a constitutionally defective confession and may the circuit court take into consideration that confession, (g) may a juvenile be certified to an adult court based upon prior findings of juvenile delinquency where the juvenile was not represented by counsel, (h) the use of false information by the sentencing judge constitute denial of due process of law. Affirmed.


Stanley, John Plummer v. Cox, No. 71-1365; Stanley, John Plummer v. Cox, No. 71-1366; Stanley, John Plummer v. Slayton, No. 72-1584. Consolidated appeals from District Court granting petitions for writ of habeas corpus in 1965 and 1966 and denying a petition for writ of habeas corpus in 1964. Issues: (a) exhaustion of State court remedies, (b) whether evidence of pretrial confrontations may be introduced at trial pursuant to the Fourteenth Amendment of the Constitution, (c) whether the in-court identification by witnesses was sufficiently tainted by out-of-court confrontations to violate the Fourteenth Amendment of the Constitution. Pending.


CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


seeking damages for the alleged negligence of defendants arising from the collapse of Skyline Plaza Building at Baileys Crossroads, Virginia. Pending.


Commonwealth v. Automatic Fire Alarm Company. Antitrust cases in regard to fire and burglar alarm systems. Pending.


Commonwealth of Kentucky ex rel. Hancock v. Ruckelshaus. United States District Court, Western District of Kentucky. Action to compel federal facilities to comply with Kentucky's pollution control permitting requirements. Virginia filed amicus brief on behalf of complainant. Pending.


Doe, Jane, etc., et al. v. William L. Lukhard, et al. Class action seeking an injunction against enforcement of State policy denying public assistance to an unborn child and mother until after the actual birth of the child. Pending.

Duffy, James P. v. Old Dominion University. Suit sought injunction of State court proceedings. Dismissed.


Elmore, Russell George, Jr. v. Vern L. Hill and W. H. Brillheart. Suspension of operating and registration privileges pursuant to § 46.1-449. License revocation sustained and civil damages dismissed.


attending school. Order entered declaring Virginia law and regulations to be preempted by the Social Security Act and enjoining further enforcement of the law and regulations in conflict with the Social Security Act; retroactive payments ordered to all applicants improperly denied such aid. Rehearing on retroactivity pending.


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. Settled.


Houston, Charles v. William L. Lukhard, Director, etc. Civil Rights action seeking retroactive payments of public assistance alleged to be improperly denied. Pending.


Johnson, Paul H. v. Old Dominion University Board of Visitors. Suit seeks reinstatement of teacher. 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 sixteen who are not enrolled in school or vocational training. Injunction granted against named plaintiffs, judgment for plaintiffs, class action denied.


Moshier, Bryon v. The Rector and Visitors of Old Dominion University. Suit seeks reinstatement of teacher. Pending.


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


United States of America v. Sara Blum, et al. Action to reduce to judgment the federal income tax liability assessed against the defendant taxpayer, foreclose the federal liens arising by virtue of such assessments, and obtain a deficiency judgment against the defendant. The Virginia State Bar is a judgment creditor in this action. Pending.


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


The Alexandria Hospital, et al. v. Richard K. Cronin, et al. Corporation Court,
REPORT OF THE ATTORNEY GENERAL

City of Alexandria. Bill for declaratory judgment. Certain funds to be used as security for loan for purpose of financing addition to hospital. Settled.


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

Balderson, Anna Mae v. Medical College of Virginia, Virginia Commonwealth University. Circuit Court, City of Richmond. Motion for judgment in the sum of $500,000 for medical malpractice. Pending.


Barnette, Lillie Baker, etc. v. William L. Lukhard, Director. Circuit Court, Russell County. Appeal from a decision of the Department of Welfare and Institutions denying application for renewal of license for a home for the aged. Pending.


Berard v. Old Dominion University. Law and Chancery Court, City of Norfolk. Suit sought recovery for personal injury. Dismissed.


Blue Ridge Nursing Home v. Blue Cross, et al. Law and Equity Court, City of Richmond. Claim against Department of Welfare and Institutions, three local welfare departments and Blue Cross, fiscal intermediary, over disputed Medicaid payments. Pending.


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, Frank v. Ernest H. Joy, M.D., et al. Corporation Court, City of
Chesapeake. Motion for judgment for declaratory judgment on rules and regulations. Pleading and memorandum filed and argued.

**College Cue Club, Inc. v. Virginia A.B.C. Board.** Circuit Court, City of Richmond. (Two cases.) Appeal from orders suspending A.B.C. licenses. Affirmed.

**Commercial Savings and Banks v. Andrew P. Miller.** Corporation Court, City of Winchester. Trustee sought aid and guidance in construction of will. Favorable construction granted.

**Commission of Game and Inland Fisheries v. L. L. Irving.** Circuit Court, City of Richmond. Suit on contract; judgment for Commission.


**Commonwealth Metals, Limited v. Virginia Port Authority.** Circuit Court, City of Portsmouth. Unlawful entry on Commonwealth's leasehold. Settled.

**Commonwealth of Virginia v. Bestline Products, Inc.** Circuit Court, City of Richmond. Engaged in compliance investigation. Pending.

**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 v. District of Columbia.** Circuit Court, Fairfax County. Nuisance action involving Lorton Reformatory. Pending.


**Commonwealth of Virginia v. Rhea F. Moore, Jr.** Circuit Court, City of Richmond. Petition for declaratory judgment. Whether clerk's fees apply to condemnation petitions. Pending.

**Commonwealth of Virginia and State Hospital Board v. Schiff Rehabilitation Project, Inc.** Circuit Court, City of Fredericksburg. Motion to vacate injunction. Pending.

**Commonwealth of Virginia, ex rel. v. Parties Unknown (United Benefit Fire Insurance Company.)** Circuit Court, City of Richmond. Bill of complaint. Re release of statutory deposit now held by State Treasurer. Pending.

**Commonwealth of Virginia, ex rel. Board of Medical Examiners v. Mary Maurice B. Allen.** Law and Equity Court, City of Richmond. Action to enjoin an unlicensed individual from engaging in the illegal practice of medicine. Pending.

**Commonwealth of Virginia, ex rel. Board of Medical Examiners v. Louise Leland Clark.** Law and Equity Court, City of Richmond. Action to enjoin a licensed physician from aiding and abetting the illegal practice of medicine by an unlicensed individual and from practicing in connection with a commercial establishment and advertising such practice. Pending.

**Commonwealth of Virginia, ex rel. David B. Ayres, Comptroller v. E.C.P.I. of Albemarle County, Inc. and United States Fidelity and Guaranty Company.** Circuit Court, City of Richmond. Action to recover proceeds of proprietary school's bond. Pending.


**Commonwealth of Virginia, ex rel. David B. Ayres, Comptroller v. E.C.P.I. of Western Virginia, Inc. and United States Fidelity and Guaranty Company.** Circuit Court, City of Richmond. Action to recover proceeds of proprietary school's bond. Pending.

**Commonwealth of Virginia, ex rel. State Board of Medical Examiners v. Allen Metabolic and Genetic Institute, Inc.** Law and Equity Court, City of Richmond. Action to enjoin alleged fraudulent activity and unlawful practice of medicine. Pending.

**Commonwealth of Virginia, ex rel. State Water Control Board v. The Board of Supervisors, Fairfax County of Virginia, et al.** Circuit Court, Fairfax County. Bill of complaint for injunctive relief. Consent decree entered. Periodic reports required to be filed and reviewed. Pending.


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 Apple Commission v. Patrick County Fruit Growers Cooperative, Inc. Circuit Court, City of Richmond. Motion for judgment for taxes due. Pending.


Ely, Hiram B. v. William L. Lukhard. Law and Equity Court, City of Richmond. Constitutionality of construction of Reception and Medical Center. Pending.


Farmer v. Virginia Commonwealth University. Circuit Court, City of Richmond. Plaintiff seeks damages for alleged tortuous conduct. 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.


First & Merchants National Bank v. United Virginia Bank. Chancery Court, City of Richmond. Bill of complaint. Whether or not charitable remainder unitrust has been created. Pending.


Garrett Home for the Aged v. William Lukhard, Director, Department of Welfare and Institutions. Corporation Court, City of Lynchburg. Appeal from denial of license renewal to operate home for the aged. Pending.

George, Ruth M. v. Kurt T. Schmidt, et al. Circuit Court, James City County. Motion for judgment for $1,000,000 for medical malpractice. Pending.


Greenfeld, Sidney and Charlotte v. State Tax Commissioner. Circuit Court, Fairfax County. Motion for judgment. Whether taxes disallowed as credit erroneous. Pending.

Hansen, John S., Board of Medical Examiners, et al. Circuit Court, City of Richmond. Appeal of action of Board of Medical Examiners in denying licensure by reciprocity. Pending.


Koslow, Herbert R. v. State Board of Pharmacy. Circuit Court, Fairfax County. Appealed from action of the State Board of Pharmacy refusing to issue license on basis of reciprocity. Pending.


Lankford, Louise M. v. Medical College of Virginia, Virginia Commonwealth University. Circuit Court, City of Richmond. Motion for judgment for medical malpractice. Pleadings filed. Pending.


Lewis, D. W. v. Virginia Department of Labor and Industry. Circuit Court, City of Richmond. Declaratory judgment seeking to prevent Director of Department of Labor and Industry from issuing license to operate as an employment agency. Pending.

Lindsay, Dennis, et al. v. Dr. J. W. Carney and Riverside Hospital. Circuit Court, City of Newport News. Motion for judgment for mutilation of dead body. Pleadings filed and argued. Pending.

Lukhard, William L. v. Tidewater Homes, Inc. Circuit Court, City of Norfolk. Action to enjoin a home for the aged from operating without a license. Temporary injunction issued. Permanent injunction pending.


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


Ohrstrom, Estate of Elizabeth J. Circuit Court, Fauquier County. Exceptions by Administrator on probate tax. Denied.

Old Dominion University v. Termpapers Unlimited, Inc. Law and Chancery Court, City of Norfolk. University sought injunction against sale of termpapers. Injunction awarded.

P. H. D. Services, Inc. v. Virginia Collection Agency Board. Corporation Court, City of Norfolk. Appeal from decision of Virginia Collection Agency Board revoking a license to operate as a collection agency. Pending.


Redman, David E., Administrator of 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.


Rose, Steve M. v. F. Thomas Chapman. Circuit Court, City of Virginia Beach. Action against employee of the Virginia Beach Health Department dismissed for failure of plaintiff to prosecute.


State Board of Examiners in Optometry v. Universal Service Agency. Circuit Court, City of Richmond. Injunction to prevent sale of eyeglasses by out-of-State unlicensed agency. Pending.


State Water Control Board of the Commonwealth of Virginia, In the Matter of Certificate issued by the, to the Virginia Electric and Power Company, dated


Thrasher, Samuel H., Sr., et al v. Commonwealth of Virginia. Corporation Court, City of Chesapeake. Pleading filed and argued. Injunction denied.

Topping, Douglas F. v. Virginia Real Estate Commission. Circuit Court, City of Chesapeake. Appeal from an order of the Virginia Real Estate Commission suspending for a period of ninety days a license to practice as a real estate salesman. Pending.

The Tuberculosis Foundation of Virginia, Inc. v. Andrew P. Miller, Attorney General, et al. Law and Chancery Court, City of Roanoke. Petition to modify the uses to which various funds held by Foundation can be applied. Pending.

Tyson’s Inn, Inc. v. Virginia A.B.C. Board. Circuit Court, City of Richmond. Appeal from order suspending A.B.C. license. Affirmed.


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.

Virginia Trust Company v. The Richmond Foundation and Andrew P. Miller.
REPORT OF THE ATTORNEY GENERAL

Chancery Court, City of Richmond. Bill of complaint. To reform agreement for distribution of income of trust estate. Pending.


Wilson, Myrtle 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.


CASES TRIED OR PENDING BEFORE THE STATE CORPORATION COMMISSION

Appalachian Power Company. Increase in electric rates. Pending.


Campbell, Danny Darrell. Rule for registration fees violation pursuant to § 56-304.1. Dismissed.

Commonwealth Gas Distribution Corporation. Application for determination of appropriate rates, charges, rules and regulations for interruptible service. By order of October 25, 1972, the tariffs were ordered changed to provide a more reasonable scheme of rates for this group of customers. There was no increase involved.


County Utilities Corporation. Application for revision of rates. By order of August 21, 1972, Commission denied the increase totally and disallowed a life insurance expense of $3,100,000 for rate making in the future.

Credit Life Insurance and Credit Accident and Sickness Insurance. Adoption of rules and regulations. Pending.

Dale Service Corporation. For revision of its rates. Closed.

Delmarva Power and Light Company. Increase in rates. By order of November 6, 1972, the Commission approved the application as filed with only minor changes in the filed tariff.

Graninger Sewerage Service, Incorporated. Inadequate service. Show cause why it should not be required to render adequate service. Closed.

Greenwood's Transfer & Storage Co. Rule for registration fees violation pursuant to §56-304.1. Fine assessed.

Jenkins, Frank W. Rule for registration fees violation pursuant to § 56-304.1. Fine assessed.

Kempsville Utilities Corporation. Revision of rates. By order of August 21, 1972, the applicant was granted an increase less than what was requested.

Kennedy, John R. t/a Kennedy Trucking Company. Rule for registration fees violation pursuant to § 56-304.1. Closed.

Lee Telephone Company. Increase in rates. By order of December 7, 1972, the Commission granted an increase or an 8% rate of return.

Middle Atlantic Conference. Increase in rates on all motor routes between points in Virginia. Increase granted substantially as requested.

Norfolk and Carolina Telephone Company of Virginia. Increase in rates. Pending.


Potomac Electric Power Company. Application for increased rates. By order of December 4, 1972, the application was approved with only minor changes in the filed tariff.


R & J Water Company, Inc. For an increase in its rates. Pending.


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.

Turnage Leasing Company, Inc. Rule for registration fees violation pursuant to § 56-304.1. Settled out of court—full fee paid to Division of Motor Vehicles.


Virginia Electric and Power Company. Application for an increase in rates and charges for gas service. Pending.


Washington Gas Light Company. Amendment to its purchase gas adjustment factor. The fuel adjustment clause was approved and the allocation basis was approved as well.

Wolford, Guy W. Rule for registration fees violation pursuant to § 56-304.1. Dismissed.

Young, Boykin t/a Young's Trucking & Hauling. Rule for registration fees violation pursuant to § 56-304.1. Fine assessed.

CASES BEFORE FEDERAL AGENCIES


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


Bowers, George Hubert, III v. Vern L. Hill, Commissioner. Law and Chancery Court, City of Norfolk. Petition for Appeal from revocation of operating privilege, pursuant to § 46.1-419. Commissioner's action affirmed.


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

Camper, Beulah Louise v. Vern L. Hill, Commissioner. Circuit Court, Scott


Craig, John W. v. Commissioner, Division of Motor Vehicles. Law and Equity Court, City of Richmond. Petition for Declaratory Judgment. Suspension of operator's license pursuant to § 46.1-442. Stay entered. Pending.


Goad, Gurnie Ray v. Verne L. Hill. Circuit Court, Campbell County. Petition from suspension of driving privileges under § 46.1-167.4. Pending.


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


Buck, David G. v. VEC and Ford Motor Company. Corporation Court, City of Norfolk. Pending.


Crenshaw, Pearl E. v. Craddock Terry Shoe Corp. and VEC. Circuit Court, Halifax County. Pending.


Green, Margaret D. v. VEC. Circuit Court, Warren County. Dismissed.

Greenburg, David J. v. VEC. Corporation Court, City of Alexandria. Pending.

Hankla, Harry Lee v. VEC and Norfolk Naval Shipyard. Hustings Court, City of Portsmouth. Pending.

Klimko, Denis v. VEC and Singer Friden Division. Circuit Court, Arlington County. Pending.

Koutoniuk, Filimon D. v. VEC. Circuit Court, Chesterfield County. Pending.

Mary Baldwin College v. VEC. Circuit Court, City of Richmond. Pending.


Morgan, Donald S. v. Newlon’s Transfer & Storage Co. and VEC. Circuit Court, Arlington County. Affirmed.


Neuton Bus Service, Inc. v. VEC. Circuit Court, City of Richmond. Reversed.


Pillis, Edward J. v. VEC and Teddy Dee’s Restaurant. Hustings Court, City of Richmond. Pending.


Teates, Warren G., t/a Tastee Freez v. VEC and Dorothy Kerkhoff. Circuit Court, Frederick County. Pending.
Taylor, Charles A. v. VEC. Circuit Court, Pulaski County. Pending.
Thorne, Clayton v. VEC. Circuit Court, City of Richmond. Affirmed.
Todd, George G. v. VEC. Hustings Court, City of Roanoke. Affirmed.
Trompeter, Max v. VEC and Hercules, Inc. Circuit Court, Pulaski County. Pending.
Turisi, Anges L. v. VEC and Frank R. Jelleff's. Circuit Court, Fairfax County. Affirmed.
Zosso, Thanh-Trieu T. v. VEC and Quality Motel Central. Circuit Court, Arlington County. Pending.

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

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Commissioner v. Trivett. Circuit Court, Dickenson County. Eminent domain. Motion to dismiss. Pending.
Commonwealth of Virginia, ex rel. Department of Highways v. Hardwood Lumber Corp. of Virginia. Law and Equity Court, City of Richmond. Injunction sought by Commonwealth. Granted and subsequently dissolved.


James v. State Highway Commissioner. Circuit Court, Culpeper County. Motion to dismiss. Pending.


Powell, Mr. & Mrs. W. R. v. Virginia Department of Highways. Circuit Court, Mecklenburg County. Motion to dismiss. Drainage claim. Pending.


Quinn, H. W. v. Commonwealth of Virginia, Department of Highways. Circuit Court, City of Norfolk. Motion to dismiss. Closed.


Seventeen, Inc. v. City of Chesapeake, et al. Circuit Court, City of Chesapeake. Motion to dismiss. Motion granted. Closed.

Southside Oil Company v. Virginia Department of Highways. Circuit Court, Nottoway County. Motion to dismiss inverse condemnation. Pending.

Snyder, Bennie v. Comptroller. Circuit Court, City of Richmond. Claim on three defaulted contracts. Motion to dismiss. Closed.


State Highway Commissioner v. Forest Edward Ervine. Circuit Court, City of Richmond. Motion for judgment. Full payment received. Closed.


State Highway Commissioner v. Repass Ferns. Circuit Court, Prince Edward County. Violation of family graveyard rights. Appeal to be filed when statement of facts agreed to between attorneys. Pending.


State Highway Commissioner v. Thomas, Bernard L. Circuit Court, Patrick County. Injunction granted to prevent ponding water on right of way.

State Highway Commissioner v. William Dale Harvey. Circuit Court, Nelson County.Filed and argued exceptions to award of $33,874.64, when State's evidence was $600.00. Award set aside. New trial ordered.


VEPCO v. State Highway Commissioner. Circuit Court, Spotsylvania County. Appeal from resolution of Board of Supervisors denying abandonment of road. Closed.

Virginia Stone & Construction Corporation v. Douglas B. Fugate. Circuit Court,
City of Richmond. Claim against Highway Department arising out of construction project. Closed.


Willingham v. State Highway Commissioner. Circuit Court, Fauquier County. Plaintiff contests amount of additive under relocation assistance offered. Pending.


Woodward v. State Highway Commissioner. Circuit Court, City of Virginia Beach. Inverse condemnation. Pending.

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

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Millard Franklin Greer
Lakey Lee Holt
Donald W. Gaddis
Roy C. Marsee
Troy Lee Tackett
Dennis Marvin Fontenot
Forrest Turner
Steve Sanders
William T. Meyers
Charles Lewis Poore
Mitchell G. Cochran
Edgar Wendell Welborn
Jimmy Rodgers
Gary Lee Galloway
Raymond F. Winters
Fulton E. Lewis
William Rody Cummings
Alexander W. Steubing
James Douglas Emerson
ABORTION—Conscience Clause—May be enacted under Supreme Court guidelines.

HOSPITALS—Abortion—Conscience clause may be enacted under Supreme Court guidelines.

May 22, 1973

THE HONORABLE THOMAS R. MCNAMARA
Member, Senate of Virginia

I am in receipt of your recent letter wherein you make inquiry as to the holdings in Roe v. Wade, 409 U.S. 817, 41 L.W. 4213, and Doe v. Bolton, 409 U.S. 909, 41 L.W. 4233, two cases which deal with the constitutionality of abortion laws and decided by the United States Supreme Court on January 22, 1973.

Specifically, your inquiry reads as follows:

"Can you let me have your view as to the constitutionality of a conscience clause for a hospital and individual physicians, in the light of the recent Supreme Court decisions."

The Supreme Court, in the case of Doe v. Bolton, 409 U.S. 909, 41 L.W. 4233, made specific reference to the conscience clause in the Georgia law. The Court made the following observation at page 17 of its opinion:

"... And the hospital itself is otherwise fully protected. Under § 26-1202(e) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26-1202(e) affords adequate protection to the hospital and little more is provided by the committee prescribed by § 26-1202(b) (5)."

In light of the above commentary by the Supreme Court, I would conclude that the Court considered the conscience clause of the Georgia law constitutionally permissible. Therefore, in my opinion, Virginia can enact an abortion statute which contains a constitutionally permissible conscience clause. Parenthetically, my Office prepared an abortion statute that contained such a conscience clause and the proposed legislation was introduced in the 1973 Session of the General Assembly. However, this proposed statute which, in my opinion, would have provided adequate protection to hospitals and medical personnel who object to abortion on moral, ethical, or religious grounds was rejected twice by the House of Delegates.

ABORTION—Constitutionality of Virginia Law in Light of United States Supreme Court Decisions in Texas and Georgia Cases.

March 1, 1973

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates
I am in receipt of your recent letter concerning the Virginia abortion statutes. Specifically, you make the following inquiry:

"In light of the recent Supreme Court cases brought against the States of Georgia and Texas concerning abortions and miscarriages, I would appreciate very much your official opinion as to the constitutionality of the present Virginia laws on abortion."

On January 22, 1973, the United States Supreme Court handed down decisions in the cases of Roe v. Wade, ..., U.S. ..., 41 L.W. 4213, and Doe v. Bolton, ..., U.S. ..., 41 L.W. 4233, both cases relating to the abortion statutes of the States of Texas and Georgia, respectively. The majority opinion was written by Mr. Justice Blackmun with the concurrence of six justices; Justices White and Rehnquist dissented. Thereafter, on February 16, Georgia and Texas petitioned the Court for a rehearing of the above cases. Also, this Office on behalf of the Commonwealth of Virginia filed an amicus curiae brief on February 16 in support of the petitions for rehearing. On February 26, the Supreme Court denied the petitions for rehearing. The rulings of the Court will be dealt with separately.

In the case of Roe v. Wade, the Texas case, the Supreme Court dealt with a statute, Arts. 1191-1194 and 1196 of the Texas Penal Code, which was very similar to the Virginia statutes prior to the 1970 amendments. That is, the statute in question authorized an abortion only where it was medically advisable "for the purpose of saving the life of the mother". In holding the statute violative of the Due Process Clause of the Fourteenth Amendment, the Court stated, at page 47 of its opinion:

"With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at page 34, that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible State regulation in this area or requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less—than—hospital status; as to the licensing of the facility; and the like.

"This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with the patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

Furthermore, the Court in dealing with the interests of the State in the third trimester of pregnancy held, at page 48:

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother."
Thus, the *Roe v. Wade* decision can be summarized as follows:

1. For the stage of pregnancy prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the patient and the medical judgment of the pregnant woman's attending physician and that decision must be free of interference by the State;

2. For the stage of pregnancy subsequent to approximately the end of the first trimester, the State, in promoting and protecting the interests of the woman, may regulate the abortion procedure in ways that are reasonably related to maternal health; and

3. For the stage of pregnancy subsequent to viability, that being the third trimester, the State, in promoting and protecting its interests in the potentiality of human life, may regulate and even proscribe abortion except where it is necessary to preserve the life or health of the mother.

Therefore, in my opinion, with the exception of the requirement that the procedure be performed by a physician, §§ 18.1-62.1, 18.1-62.2, and 18.1-62.3 are unconstitutional and unenforceable as they relate to the first trimester of pregnancy. Thus, abortion in the first twelve weeks of gestation is a matter which is solely between the patient and her physician and the State cannot constitutionally impose any regulation or stipulation concerning the same. With respect to the second trimester of pregnancy, requirements that the procedure be performed by a physician in a facility licensed by the State Health Department would, in my opinion, be within the valid constitutional exercise of legislative action as would the statistical reporting of all fetal deaths pursuant to Chapter 18.1 of Title 32 of the Code.

With respect to the *Doe v. Bolton* decision, the United States Supreme Court considered a Georgia abortion statute which is strikingly similar to the present Virginia statute in its requirements. The Georgia statute, as well as those of thirteen other states, including Virginia, were patterned after the American Law Institute's Model Penal Code, § 230.3. Consequently, the decision in *Doe v. Bolton* relates directly to the substantive and procedural requirements found in §§ 18.1-62 through 18.1-62.3 of the Code of Virginia.

First, with respect to a residency requirement, which is set forth in § 18.1-62.1(a), the court concluded, at page 19:

"Nevertheless, we do not uphold the constitutionality of the residence requirement. It is not based on any policy of preserving State-supported facilities for Georgia residents, for the bar also applies to private hospitals and to privately retained physicians. There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade (citations omitted) so must it protect persons who enter Georgia seeking the medical services that are available there. (citations omitted). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve."

It is, therefore, obvious that the 120 day residency requirement found in § 18.1-62.1(a) is unconstitutional in light of *Doe v. Bolton*.

Also, § 18.1-62.1(b) of the Code requires that the abortion procedure be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals. In addressing itself to the constitutionality of such a requirement, the Court said, at page 14:

"We hold that the JCAH accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not 'based on differences that are reasonably related to the
purposes of the Act in which it is found.'" Morey v. Doud, 354 U.S. 457, at 465 (1957).

As a consequence, the requirement that such procedure be performed only in a hospital accredited by The Joint Committee on Accreditation of Hospitals is invalid.

Also, with respect to § 18.1-62.1(b), the requirement that the procedure be performed in a hospital is overbroad in view of the fact that its application would include the first trimester of pregnancy. Thus, the above referred to section is unconstitutional and unenforceable. The result is that the decision rests with the physician as to where he wishes to perform the procedure.

Next, § 18.1-62.1(d) of the Code presently requires the written consent of a majority of the Hospital Abortion Review Board prior to the performance of an abortion in a Virginia hospital. In dealing with this particular aspect of the Georgia statute, the Court held, at page 17:

"... Viewing the Georgia statute as a whole, we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant...

"We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State." Doe, page 17.

Therefore, the requirement of consent by Hospital Abortion Review Boards is no longer constitutionally permissible and their creation pursuant to § 18.1-62.2 is not necessary.

Furthermore, in accord with the Court's decision, the affidavit requirements of § 18.1-62.1(c) are unenforceable; however, the consent provisions of § 18.1-62.1 (e) were not invalidated by the decision.

In conclusion, I would refer to the Court's observation, at page 21, where the Court stated:

"We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court."

Under the Supremacy Clause, Article VI of the United States Constitution, Virginia must likewise give full recognition to the judgment so rendered.

ABORTION—Mentally Competent Unmarried Woman Eighteen Years of Age or Older, Legally Competent to Consent to Abortion.

MINOR—Person Under Eighteen Years of Age.

September 6, 1972

The Honorable Joseph M. Kuczko
Commonwealth's Attorney for the County of Wise and City of Norton

This is in reply to your letter of August 15, 1972, which reads as follows:

"Can a pregnant female over the age of 18 consent to an abortion without her parents consent? She is unmarried and meets the conditions set forth in § 18.1-62.1."

Section 18.1-62.1(e) of the Code of Virginia (1950), as amended, sets forth
the type of consent required of a woman seeking an abortion. That section reads in pertinent part as follows:

"Written consent is given by the woman if legally competent to give such consent, and if there is substantial medical likelihood that the child will be born with an irremediable and incapacitating mental or physical defect, the written consent of the husband shall be required if the woman and husband are living together as man and wife. Provided, however, if the said woman shall be an infant or incompetent as adjudicated by any court of competent jurisdiction, then only after permission is given in writing by a parent, or if married by her husband, guardian or person standing in loco parentis to said infant or incompetent."

Section 18.1-62.1 of the Code was amended effective July 1, 1972, as part of Chapter 823 of the Acts of Assembly, 1972, which provided that the age of majority shall be eighteen in areas of the law that require consent or permission. In addition, Chapter 824 of the Acts of Assembly, 1972, added a new section to the Code, § 1-13.42 which reads in pertinent part as follows:

"(a) Unless a different ruling appears from the context:

"(1) the words 'infant,' 'child,' 'minor,' 'juvenile,' or any combination thereof shall be construed to mean a person under eighteen years of age."

Therefore, in the context of § 18.1-62.1 of the Code, a mentally competent unmarried woman eighteen years of age or older is legally competent to give her consent for abortion, and the permission of her parents would not be required.

ADOPTION—Consent of Unwed Father in Entrustment or Custody Proceedings; Forms of Notice Required.

COURTS—Adoption—Consent of unwed father in entrustment or custody proceedings; forms of notice required.

March 14, 1973

THE HONORABLE CHARLES L. MCCORMICK, III, Judge
Second Regional Juvenile and Domestic Relations Court

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

"I am advised that you have recently ruled that Sections 63.1-56 and 63.1-204 of the Code of Virginia, as amended, have been superseded by federal court rulings and are therefore void to the extent that they deny the putative father of an illegitimate child the right to notice of an entrustment or custody proceeding which would have the effect of depriving the father of his paternal rights to said child.

I have no trouble with the effect of this ruling as it pertains to putative fathers who are known and within reach of a court summons, as they can be brought into court and given an opportunity to be heard. However, where the mother does not know the name and/or the whereabouts of the father or will not divulge such information, or where the father is without the jurisdiction of a court summons, I am at a loss to know how to proceed. It has been suggested that an order of publication might be required in such a case but it appears to me that such would defeat the confidentiality of the whole proceeding.

May I have your advice as to how best to proceed in these matters?"

For your initial information concerning Stanley v. Illinois, 405 U.S. 645 (1972),
and Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan, 405 U.S. 1051 (1972), I refer you to my letter of August 8, 1972, to the Honorable Herbert A. Krueger, a copy of which is attached. Stanley held that, as a matter of due process, the father of a child born out of wedlock is entitled to a hearing on his fitness in any custody proceeding involving his child. Although implicit in the right to a hearing is the requirement that timely notice of the hearing be provided, Stanley did not speak directly to the question of the type of notice that might be required in such proceedings. By way of a footnote, Justice White did point to the Illinois statutes governing procedures in juvenile cases which provided for the methods of giving notice there. In Rothstein, the lower court had held that an unwed father had no parental rights and no right to notice in an adoption proceeding for his child. The Supreme Court merely vacated this lower court judgment and remanded the case for further consideration in light of Stanley. Therefore, neither case offers us any guidelines on when notice must be given an unwed father and what kind of notice applies to the different factual situations presented to the courts.

Before answering your questions, it is important to note that due process only requires that which is reasonable under the particular circumstances. It is equally important to point out that there are a number of sometimes conflicting interests to be balanced in child custody and adoption proceedings. One is the mother's right to privacy in any action involving her illegitimate child and a concern that mothers are not discouraged from giving up their children for adoption where circumstances would demand it in the best interests of the child. Another new factor now is the right of the father to establish his fitness to retain custody of his child. A third is the interest of the adoptive parents that any adoption of a child cannot later be frustrated to the detriment of the child's welfare. The fourth and paramount concern under Virginia law is that the best interests of the child be enhanced. All of these factors must be considered together in any proceeding which we are discussing here.

Turning to your specific questions, one thing is clear from the decisions dealing with the rights of unwed fathers. Where the identity of the putative father is known or reasonably ascertainable, not only from the information supplied by the mother but from all the information available to the court, the father must be notified like any other party. In this case, the father may be served personally or by some substituted form of notice in his own name, as provided in § 16.1-167 of the Code of Virginia (1950), as amended, or in accordance with Chapter 4, of Title 8, of the Code. If his whereabouts are unknown, or he is known to be residing outside the state, he may be served by registered mail with return receipt to his last known address or by an order of publication if service by mail cannot be utilized, framing the order of publication in the name of the father so as to preserve the confidentiality of the proceeding as much as possible. I also note that § 16.1-172 of the Code allows a judge to dispense with notice in custody proceedings where he certifies on the record that "diligent efforts have been made to locate and notify the parent or parents without avail." However, the judge who utilizes this section should be cautious and it should not be utilized unless there is a strong countervailing interest concerned which takes precedence over a father's constitutional right to notice.

Not every case of termination of parental rights without notice is invalid, however. A distinction may be drawn between situations where the father's identity is known and where his identity is not known. All of the cases to date involve fathers whose identity is known and who acknowledge paternity of the child. Although Justice White in the Stanley case did not limit his language to such fathers, Stanley himself had lived with the children and their mother intermittently for some eighteen years and contributed to their support during that time. Justice White, in his holding in that case, identifies the private interest to be protected.
as "that of a man in the children he has sired and raised." 405 U.S. at 651
(Emphasis added.) He asserts that "Stanley's interest in retaining custody of his
children is cognizable and substantial." 405 U.S. at 652. (Emphasis added.)
Rothstein also involved a father who was known and acknowledged his paternity.
The argument of the dissenting chief justice in the lower court sets forth the
distinction between known and unknown fathers and is particularly persuasive in
light of the Supreme Court's reversal of the majority opinion in that case. There,
Judge Hallows asserted that the Wisconsin statutes in question relating to adoption
and requiring only the consent of the mother "are unconstitutional when applied
to a known father of a child born out of wedlock...." 178 N.W. 2d 56, at 65.
(Emphasis added.) Again, he stated:

"If the natural father is known he should be given notice of termination
of parental rights. The mother should be required to disclose the identity
of the father of the child, if she knows; and if the circumstances are such
that she does not know, then the case is one which the law cannot do very
much about." Id., at 67.

Based upon the above language and the facts of these cases, it is my conclusion
that a court is required to give notice of custody, entrustment or adoption pro-
ceedings only to an unwed father whose identity is known, or whose identity is
reasonably ascertainable, through whatever information is available to the court.
On the other hand, if the identity of a putative father is not known or reasonably
ascertainable, no notice to him is required. Where it is impossible to learn the
identity of a parent, as in the case of abandonment, the court can proceed
to terminate the parents' rights without notice and consent. In this situation, the
judge should certify on the record that the identity of the father is not known,
supported by such affidavits and other evidence as he may deem appropriate.
Where the mother refuses to reveal the identity of the father and no other in-
formation concerning his identity is available to the court, the court may consider
that the father's identity is not known and proceed without notice to him.

Two additional points should be noted here. First, if a putative father is con-
sulted prior to court proceedings and executes an affidavit either acknowledging
or denying his paternity but waiving any further notice of custody, entrustment or
adoption proceedings, then a court may rely on such an affidavit and dispense
with further notice to him. Second, as a possible alternative and further protective
device where either parent's identity is unknown, a court might consider the
feasibility of appointing a guardian ad litem for that parent to protect his or her
rights in any proceeding involving the child.

AIR POLLUTION—Open Burning of Leaves—When prohibited.

The Honorable Oliver D. Rudy
Commonwealth's Attorney for Chesterfield County

November 1, 1972

This is in reply to your letter of October 18, 1972, soliciting clarification of my
opinion of September 11, 1972, addressed to the Honorable William R. Meyer,
Executive Director of the State Air Pollution Control Board. The opinion to
which you refer relates to the application of Section 4.01.01 of the Regulations
for the Control and Abatement of Air Pollution to the open burning of leaves.

Specifically, you pose the following question:

"Suppose a county furnishes no leaf pick up service but merely has a
once-a-month refuse pick up which would not include the pick up of
leaves; suppose further that the county has no authority to require private
refuse collectors to pick up leaves.

"In such a situation would the citizens in that county be prohibited from burning the leaves which have accumulated on their property?"

With regard to the latter supposition, I am advised that in view of the terms of § 15.1-28.1 of the Code of Virginia (1950), as amended, relating to the regulation of garbage and refuse pickup and disposal services, it will be satisfactory to you if I assume that the County has no intention of requiring private refuse collectors to pick up leaves.

The factual situation of your inquiry is similar to that of "County A" in my opinion of September 11, 1972:

"COUNTY A: Refuse pickup provided once per month by county. Leaves in bags or cans are removed. County has two trucks only. Few citizens are using system because of use of private contractors. No special leaf pickup is provided and no local ordinance banning open burning."

Applying my construction of Section 4.01.01 of the Board's regulations to this factual situation produced the following opinion:

"COUNTY A: Open burning of leaves would be prohibited, as both public and private collection service is available. The prohibition of the regulation is not conditioned upon any frequency of the service."

If the facts relating to County A were changed to accommodate your supposition or if County A chose to discontinue collection of leaves as part of its monthly refuse pickup service, the result would not, in my opinion, affect the application of the open burning regulation. I reach this conclusion because, although the county may have no intention of requiring private refuse collectors to remove leaves as part of their service, such collectors may offer this service of their own volition. Obviously, the open burning prohibition would apply only when and where this service is available.

ALCOHOLIC BEVERAGE CONTROL LAWS—Appropriation of Net Profits to Localities to Be Distributed at End of Fiscal Year.

January 26, 1973

THE HONORABLE EDWARD E. LANZ
Member, House of Delegates

This is in response to your letter of January 24, 1973, which is as follows:

"Will you advise me what responsibilities or obligations are imposed on the State of Virginia to distribute funds collected as referred to in § 4-22 of the Code of Virginia to localities, including the time when an occurrence on which such funds must be distributed to the various localities.

"Assuming the aforesaid funds are not distributed as required by § 4-22 of the Virginia Code within the time for such distribution, what remedies do localities have to enforce their rights?

"Will you advise whether a lien, prior claim, or other security attaches on behalf of the localities to any funds collected as referred to in § 4-22 and, more specifically, the localities' share. I also request your opinion as to the time when such lien, prior claim or security attaches.

"I would appreciate your expanding your opinion to cover all questions raised by this inquiry.

"This is a matter of vital interest to localities, and I would be most grateful for your opinion at the earliest possible date."
Section 4-22 of the Code of Virginia (1950), as amended, is rather lengthy, and I shall set out only such part of it as seems necessary for the purposes of this opinion. The statute contains the following, among other provisions:

"The net profits derived under the provisions of this chapter shall, after deducting therefrom such sums as may be allowed the Board by the Governor for the creation of a reserve fund not exceeding the sum of two million five hundred thousand dollars in connection with the administration of this chapter and to provide for the depreciation on the buildings, plant and equipment owned, held or operated by the Board and such sums as may be allowed by the Governor during the fiscal years ending on June thirtieth, nineteen hundred sixty-two, June thirtieth, nineteen hundred sixty-three, June thirtieth, nineteen hundred sixty-four and June thirtieth, nineteen hundred sixty-five, not to exceed five hundred thousand dollars in each such year, and not to exceed seven hundred fifty thousand dollars for each of two succeeding fiscal years beginning July first, nineteen hundred sixty-eight, for the creation of a special reserve fund to be accumulated and expended for acquiring, constructing and equipping a central warehouse, at a total cost not to exceed three million five hundred thousand dollars for plans, acquisition or construction and equipment, be transferred by the Comptroller to the general fund of the State treasury quarterly, within fifty days after the close of each quarter. When such moneys so transferred by the Comptroller to the general fund of the State treasury shall during any fiscal year exceed the sum of seven hundred fifty thousand dollars, two thirds of all moneys in excess of seven hundred fifty thousand dollars so transferred and so paid into the general fund of the State treasury during such fiscal year shall be apportioned by the Comptroller and distributed by warrants of the Comptroller drawn on the Treasurer of Virginia to the several counties, cities and towns of the Commonwealth, on the basis of the population of the respective counties, cities and towns, according to the last preceding United States census, for which purpose such portion of the moneys is hereby appropriated;..."

In the third paragraph of your letter you ask whether a liens, etc., attaches on behalf of the localities to any funds. The answer to this is in the negative. The General Assembly has made an appropriation of public funds in this section. The statutory language is "... for which purpose such portion of the moneys is hereby appropriated;..."

I am not certain that I understand the questions posed by the first paragraph of your letter. You ask "... what responsibilities ... are imposed on the State ... to distribute funds ... to localities. ..." Section 4-22 makes an appropriation, but I am not aware of any legal compulsion upon the General Assembly to appropriate money to the localities arising out of profits of the Alcoholic Beverage Control Board. In other words, the General Assembly could lawfully repeal § 4-22.

Since an appropriation has been made, however, I assume from the other language in the first paragraph of your letter ["... including the time when an occurrence on which such funds must be distributed to the various localities ..."] that you wish to know when the appropriation is required to be paid.

You will note that the statute requires the Comptroller to transfer the net profits to the general fund "... quarterly, within fifty days after the close of each quarter..." The fifty-day period is provided to allow for necessary auditing to be done each quarter. The audit is performed by the Auditor of Public Accounts in accordance with the duty imposed upon him under § 4-21 of the Code. The statute [§ 4-22] then continues: "When such moneys so transferred to the general fund of the State treasury shall during any fiscal year exceed the sum of
seven hundred fifty thousand dollars, two thirds of all moneys in excess of seven hundred fifty thousand dollars so transferred and so paid into the general fund of the State treasury during such fiscal year shall be apportioned by the Comptroller and distributed by warrants of the Comptroller. . . ." (Emphasis added.)

It is thus apparent that the amount available for distribution is not determinable until after the end of the fiscal year. Upon the completion of the audit within the fifty-day period following the final quarter, the Comptroller is apprised of the final figures and is then in position to proceed with "apportioning" and "distributing." There is no specific time set up in the statute within which the Comptroller shall complete the distribution. I should think he would be entitled to a reasonable time under all of the circumstances to accomplish the duties imposed upon him.

Finally, in the second paragraph of your letter, you ask "... assuming the aforesaid funds are not distributed as required by § 4-22 . . . within the time for such distribution, what remedies do localities have to enforce their rights?"

As I have indicated, an appropriation having been made by the General Assembly, it has by statute imposed duties upon certain public officials to effectuate the legislative will. If there is a failure by a public official to perform his statutory duties, mandamus is usually the most appropriate legal remedy.

ALCOHOLIC BEVERAGE CONTROL LAWS—Conviction May Be Had Under § 4-62 or § 4-73.2, Both of Which Proscribe Purchase or Possession by a Person Under Twenty-one Years of Age.

March 1, 1973

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

This is in reply to your letter of February 23, 1973, which reads in part as follows:

"The Chief of our town police has asked that I make the following inquiry.

"Section 4-62(2) reads in part, 'If any person to whom an alcoholic beverage may not lawfully be sold under this section shall purchase or possess any alcoholic beverage . . ., he shall be guilty of a misdemeanor.'

"Section 4-73.2(c) reads, 'No person shall be convicted under this section unless there was posted in some prominent place in the establishment wherein the purchase was made a sign or notice advising that purchase by persons under the age of twenty-one years of alcoholic beverages containing more than three and two-tenths per centum alcohol by weight is unlawful.'

"Please advise me whether or not § 4-73.2(c) is a restriction or a limitation on § 4-62(2). In other words, where a person under the age of twenty-one and therefore not entitled to possess or purchase alcoholic beverages has in his possession or has purchased alcoholic beverages, can he be convicted of this offense if it cannot be shown that in the place of purchase notices or signs advising that purchases by persons under the age of twenty-one years of alcoholic beverages containing more than three and two-tenths per centum alcohol by weight is unlawful.'

Section 4-62 of the Code of Virginia (1950) was amended by Chapter 686 of the 1970 Acts of Assembly, the bill being approved by the Governor on April 5, 1970. The amendment added the present subsections (2) and (3) of § 4-62 of the Code.
Section 4-73.2 of the Code was enacted by Chapter 762 of the 1968 Acts of Assembly and included the provision now known as subsection (c) which you have quoted. Thus, if there is any irreconcilable conflict between § 4-73.2(c) and § 4-62(2), the latter would control.

In my opinion, however, there is no such conflict. The purchase or possession of alcoholic beverages by a person under twenty-one years of age is made an offense under both sections. The fact that one section permits a defense not available under the other would not seem to affect the validity of either statute.

It is not unusual for an act to violate more than one statute. Under the Rules of Court [See Rules 3A:4 and 3A:7 (a)] the warrant should cite the statute defining the offense. I see no reason why a conviction could not be had under either statute.

ALCOHOLIC BEVERAGE CONTROL LAWS—“Dry” Status Attained in Local Option Election Under Code § 4-45 Presumed to Continue.

December 27, 1972

THE HONORABLE JERRY H. GEISLER
Member, House of Delegates

This is in response to your letter of November 28, 1972, which reads as follows:

“The Town of Hillsville, Virginia, a few weeks ago, voted to ask the Virginia Alcoholic Beverage Control Board to locate a State ABC Store in the Town of Hillsville. Since that time, a question has arisen as to whether or not the Town is legally wet or dry and as to whether a referendum must be held before such a store can be established.

“I hereby respectfully request a written opinion from you on this question.”

Section 4-45 of the Code of Virginia (1950), as amended, permits a local option election to be held by the qualified voters of any county, city or town having the population of 900 or more inhabitants, according to the last United States census, for the purpose of determining, among other things, whether the sale of alcoholic beverages, other than beer by the Virginia Alcoholic Beverage Control Board, should be permitted in such county, city or town. I am advised that a local option election was held in Carroll County on December 29, 1942, as a result of which the county voted "dry." At the time of this election, I understand that the population of Hillsville was less than 900, and the residents thereof were eligible under the statute to vote in the local option election for the county. I am further advised that the population of the Town of Hillsville is now more than 900 according to the 1970 United States census.

I have not found that the Supreme Court of Virginia has ruled on the question you have presented.

In other states the statutes are different for the most part from Virginia's, and the decisions are not always in harmony.

The following statement is found in 48 Am. Jur. 2d, Intoxicating Liquors, § 113:

“With respect to the incorporation or change of status of a municipality located within the confines of a local option unit, some authorities are of the opinion that such incorporation or status does not alter its local option status, while others hold that such a municipality may determine its own local option status.”
To the same effect, see 48 C.J.S., Intoxicating Liquors, § 68.

In Kentucky it was held that where a county attained a “dry” status, and later was annexed to a “wet” city, the annexed portion remained “dry.” Rich-Hills Catering Co. v. Slattery, 448 S.W. 2d 379 (Ky. 1970).

The general rule seems to be that when a status as “wet” or “dry” is attained in an election, the status is presumed to continue until another election is held. It is noted that the residents of Hillsville were eligible to vote in the 1942 election in Carroll County, and that the county voted “dry.” After Hillsville attained the required population of 900, it became a separate local option unit, and entitled to hold its own election (at least after the expiration of the four-year period).

I am of the opinion that the “dry” status acquired by Hillsville in the 1942 election is presumptively still in effect. There appears to be no reason why a new election may not be held.

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**ALCOHOLIC BEVERAGE CONTROL LAWS—Profits Distributed to Localities According to Corrected Census Figures.**

**CENSUS—Alcoholic Beverage Control Board Profits Distributed to Localities According to Corrected Census Figures.**

**CENSUS—Official Revisions Appear in Printed Bulletins or Bound Volumes Issued by Secretary of Commerce.**

August 22, 1972

**The Honorable David B. Ayres, Jr.**

State Comptroller

This is in response to your letter of July 27, 1972.

You have referred me to several letters pertaining to the United States Census of 1970, and on the basis thereof ask my opinion on the following question:

“In view of the provisions of Section 4-22 of the Code of Virginia and the enclosed correspondence, 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?”

One of the letters you referred to was that of Dr. Conrad Taebuer, Associate Director, Bureau of the Census, dated May 2, 1972, in which he indicated that he was sending you a “Summary of Changes by County and Independent City,” and certain revision notes. He stated that the enclosures “... represent all corrections to the counts for the Commonwealth of Virginia as of this date.”

In a subsequent letter to you dated June 28, 1972, Dr. Taebuer stated that the Bureau of the Census used the term “Official” to designate the 1970 Census State population counts which were included in the Bureau’s calculations for reapportionment of Representatives, as transmitted to the President on November 30, 1970. He further stated that the Bureau’s policy has been that if errors are found in any counts as a result of later reviews, they are recognized formally, and that, while the “Official” count for Virginia is 4,648,494, the currently “Revised” count is 4,651,487 as reflected in the material previously sent to you.

Net profits made by the Alcoholic Beverage Control Board are to be distributed to the localities pursuant to § 4-22 of the Code of Virginia (1950), as amended, “... on the basis of the population ... according to the last preceding United States census. ...”

In § 1-13.22 of the Code, the word “population” is required to be construed
REPORT OF THE ATTORNEY GENERAL

"... as shown by the United States census latest preceding the time at which any provision dependent upon population is being applied, or the time as of which it is being construed, . . ."

The 1970 United States census is the latest decennial census. If errors have been discovered in the official figures by the Bureau of the Census, and corrections have been formally made by the Bureau, in my opinion the corrected figures should be used in apportioning Alcoholic Beverage Control profits under § 4-22. It is necessary, however, that the corrections speak as of the date of the original 1970 census and, as I advised you in my letter of April 10, 1972, that the total population of the State be taken into consideration when any figures are corrected. I also think that the corrections should be made in such manner that a court of law could take judicial notice thereof.

Courts will take judicial notice of the results of a census taken under federal authority. Shelton v. Sydnor, 126 Va. 625, 638; 31 A C.J.S., Evidence, § 98. The Secretary of Commerce is empowered to have printed by the Public Printer and to distribute preliminary and other census bulletins and final reports. 13 U.S.C.A. § 7. Courts have taken judicial notice of such bulletins. Ervin v. State, 44 S.W. 2d 380 (Tex. 1931); Excise Board of Washita County v. Lowden, 116 P. 2d 700 (Okl. 1941); 31 C.J.S., Evidence, § 42. I am advised that official revisions appear in printed bulletins or bound volumes issued by the Secretary of Commerce, and I am of the opinion that you might rely upon the latest such bulletin at the time of apportionment of profits under § 4-22 of the Code of Virginia.

ALCOHOLIC BEVERAGE CONTROL LAWS—Requirements for Court Order on Referendum Question on Sale of Mixed Alcoholic Beverages Pursuant to Code § 4-98.12.

The Honorable Charles B. Phillips
Commonwealth's Attorney for the City of Salem

October 5, 1972

This is in reply to your letter of September 26, 1972, in which you ask my opinion on several questions pertaining to a referendum to be conducted under Section 4-98.12 of the Code of Virginia (1950), as amended, relative to the sale of mixed alcoholic beverages.

The above statute provides, among other things, for the entry of a court order requiring the election officials to take the sense of the qualified voters on the question "... at the election held on the day designated by order of such court, which day shall not be later than the next general election following by at least sixty days the entry of such order, . . ."

Your questions are as follows:

"(1) Does the language 'at the election held on the day designated by order of such court, which day shall not be later than the next general election following by at least sixty days the entry of such order, preclude the local option referendum being placed on the ballot of November 7, 1972, because such an order obviously cannot be entered sixty days prior to that date?"

"(2) May a local option referendum be held at any time after November 7, 1972, if the proper steps are taken as prescribed by 4-98.12 and must the election be held at least sixty days subsequent to the entry of the court's order?"

"(3) If the answer to No. (2) is no, how soon after the entry of the
court's order can a local option election be held concerning mixed alcoholic beverages?"

As to your first question, I am of the opinion that the quoted language imposes a restriction on the latest date that the court could select for the referendum. The latest date cannot be "later than the next general election." The general election marking this latest date is identified as being the first one held after sixty days have passed since the order was entered.

The statute also seems to impose a restriction on the earliest date that the court could select. Your attention is invited to the following paragraph in the statute:

"The clerk of the corporation, hustings, or county court of such city or county shall publish notice of such election in a newspaper of general circulation in such city or county once a week for three consecutive weeks prior to such election."

Thus, it seems to me that the court is required to select a date no earlier than one which would permit the required publication, and no later than the general election "following by at least sixty days the entry of such order. . . ."

Accordingly, I am of the opinion that the answer to your first two questions is in the negative, and the answer to the third question would be that the election could be held on the first date after the entry of the court order that would allow completion of the publication requirements.

ALCOHOLIC BEVERAGE CONTROL LAWS—Tax on Mixed Beverage Licensees Constitutional.

January 3, 1973

The Honorable A. L. Philpott
Member, House of Delegates

This is in response to your letter of December 14, 1972, which reads, in part, as follows:

"At a recent hearing of the Commission on Alcoholic Beverage Control, of which I am Chairman, it was disclosed to the Commission that § 4-15.3 of the Code of Virginia may be unconstitutional as discriminatory and a denial of the equal protection of the law.

"This section provides for an additional tax on distilled spirits on each bottle of alcoholic beverages bought for resale by the drink pursuant to the mixed beverage law.

"The question I pose is twofold:"

"(a) Is this section unconstitutional as set out above?"

"(b) If the constitutionality of the section is in doubt, would an amendment treating the additional amounts levied on each bottle as a charge to cover the administration of the mixed beverages law by the Board cure the defect?"

Section 4-15.3 of the Code of Virginia (1950), as amended, reads, in part, as follows:

"On every bottle of alcoholic beverage bought for resale by the drink pursuant to Chapter 1.1 (§ 4-98.1 et seq.) of Title 4 of the Code of Virginia, there is hereby levied, in addition to all other taxes imposed on such beverages, a tax of fifty cents on distilled spirits per quart; forty
cents on distilled spirits per one fifth gallon; twenty-five cents per pint of distilled spirits or less except in amounts of two ounces or less the tax shall be five cents; and ten cents per bottle of wine containing more than fourteen percent of alcohol by volume. . . ."

In my opinion, the foregoing section is constitutional.

The following statement is found in 51 Am. Jur., Taxation, § 33:

"Thus, it is said that an excise tax is a charge imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation; a tax laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges; . . . a direct tax laid upon merchandise or commodities, which may or may not have an ad valorem factor. . . ."

It will be noted that the statute imposes a direct tax on articles bought for resale by the drink pursuant to Chapter 1.1 of Title 4 of the Code of Virginia. The only persons entitled to sell alcoholic beverages by the drink are mixed beverages licensees. Thus, these licensees constitute the class affected by the tax. The tax falls equally upon all members of the particular class and there is no apparent discrimination between members of the class.

The license tax charge upon persons authorized to sell alcoholic beverages by the drink is regulatory in nature. The excise tax provided for by Section 4-15.3 constitutes an additional tax for the privilege of doing business and such taxes are not uncommon.

In Herman v. Mayor and City Council of Baltimore, 55 A. 2d 491 (Md. 1947), the City of Baltimore enacted an ordinance imposing a tax of fifty cents per gallon on all distilled spirits and other alcoholic beverages, except beer and wine, sold or delivered by a manufacturer or wholesaler to any retail dealer in Baltimore city during the year 1947, and a like tax of fifty cents per gallon on such beverages in the hands of retailers on January 1, 1947. The appellant retailer argued that since he was required to pay a tax on his stock in business, including alcoholic beverages, the new tax created double taxation, but this contention was rejected by the Maryland Court. Among other things, the Maryland Court said:

"The tax on retailers, like the tax on manufacturers and wholesalers, is a tax on the privilege of continuing in business. . . . Imposition of both an excise tax on the occupation and an ad valorem tax on property used in the business is not forbidden. (Citing authority) Appellants complained that no privileges are conferred upon them in return for the stamp tax, which is three times as much as the usual property tax. . . . As we have remarked, this tax is an additional tax on the privilege of doing an alcoholic beverage business." (55 A. 2d at 496)

Since I agree with the Maryland Court that an excise tax such as is imposed under § 4-15.3 of the Code of Virginia is constitutional, there is no need to answer your second question.

ANNEXATION—Individual Citizens May Petition Court to Become Parties to Suit, but May Not Veto Proceeding.

July 17, 1972

THE HONORABLE JOSEPH M. KUCZKO
Commonwealth's Attorney for the City of Norton and County of Wise

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

"Under the new annexation laws, if a City and County both agree
upon proposed annexation by the City of a portion of the County's land, can an individual land owner within that area to be annexed stop the annexation by his objection?

"The City of Norton is working with the County regarding proposed annexation and in the event the parties are able to agree, we still need to know where we stand in the event of local individual objection."

Individual citizens are empowered to petition the court hearing annexation proceedings to become parties to the suit and they may be represented by counsel as provided for by § 15.1-1036, Code of Virginia (1950), as amended. However, it is my opinion that the moratorium as enacted by Chapter 712 of the Acts of Assembly of 1972, gives no additional remedies, other than those provided for in § 15.1-1036 of the Code, to individuals opposed to the proposed annexation. While the courts have generally deemed individual citizen objections worthy of consideration in deciding annexation cases, Fairfax County v. Fairfax, 201 Va. 362, 111 S.E. 2d 428 (1959), opposition of county residents is not sufficient to impede annexation where the requisite conditions exist. Norfolk County v. Portsmouth, 186 Va. 1032, 45 S.E. 2d 136 (1947).

Accordingly, it is my opinion that if, in fact, the annexation is agreeable to the City of Norton and Wise County, suit may be brought by the City of Norton seeking such annexation and objecting county residents cannot veto the proceeding although their views will be considered by the court and may or may not be sustained.

APPROPRIATIONS—Virginia Airports Authority May Expend Funds for Study of Airports and Navigational Facilities.

APPROPRIATIONS—Funds of Authority Unexpended at Close of Biennium Revert to General Fund.

July 18, 1972

The Honorable Preston C. Shannon
Vice Chairman, Virginia Airports Authority
State Corporation Commission

This is in reply to your letter of June 20, 1972, in which you ask whether the Virginia Airports Authority may expend funds in its 1970-1972 appropriation for a study involving the planning of airports and navigational facilities.

Section 5.1-58, Code of Virginia (1950), as amended, empowers the Authority to "plan, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, and protect airports and air navigation facilities, within this State . . . ."

An expenditure in aid of the study which is being conducted falls within the enumerated powers of the Authority, in that the Authority is empowered by the above Code section to "plan . . . airports and air navigation facilities, within this State . . . ." I am therefore of the opinion that the Authority may expend funds appropriated to it for this purpose.


In summary, although I am of the opinion that the Authority has the power to expend funds for planning purposes in the manner indicated in your letter
to this office, unless the Authority disbursed its unexpended 1970-1972 appropriation prior to the close of business on June 30, 1972, it may not now disburse such sum for the reason that it has reverted to the general fund.

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**ATTORNEYS—Appointed—Compensation of in cases of violations of ordinances.**

**BONDS—Bail—Payable to jurisdiction adopting ordinance which has been violated.**

**ORDINANCES—Bail Bonds Payable to Jurisdiction That Adopted Ordinance Violated.**

**CRIMINAL PROCEDURE—Recognizances—Payable to jurisdiction adopting ordinance violated.**

March 29, 1973

**The Honorable J. L. Landram, Judge**

Hanover County Court

Juvenile and Domestic Relations Court

This is in reply to your recent letter wherein you asked the following questions:

"(1) Should bail bonds for violations of ordinances run to the Commonwealth, or to the jurisdiction adopting the ordinance?

"(2) If the bail bond taken for appearance on an ordinance violation is payable to the Commonwealth, is forfeiture payable to the Commonwealth or the jurisdiction that adopted the ordinance?

"(3) If the Court has to appoint an attorney in a case involving an ordinance violation, who should pay the bill for the attorney fee, the Commonwealth or the jurisdiction that adopted the ordinance?"

You stated in your letter that "ordinance" referred to therein, was intended to include an ordinance of a county, city, or town.

With regard to your first question, I direct your attention to § 19.1-127, Code of Virginia (1950), as amended, which provides, in part, as follows:

". . . Recognizances in criminal cases where the offense charged is in violation of a county, city or town ordinance, shall be payable to such county, city or town. Every recognizance under this title shall be in such sum as the court or officer requiring it may direct. If it be to answer for a misdemeanor or if required of a witness it shall with or without security as the court or the officer may direct; but in all other cases shall be with security deemed sufficient by the court or officer taking it."

In my opinion, therefore, the answer to your first question is that bail bonds for violations of ordinances are payable to the jurisdiction adopting the ordinance.

In answer to your second question, since bail bonds are payable to the jurisdiction adopting the ordinance in cases of violations thereof, forfeiture of the penalty of such bond runs in favor of such jurisdiction.

In an opinion to the Honorable W. A. Alexander, Judge, County Court of Franklin County, dated September 6, 1972, I reaffirmed earlier opinions to the Honorable J. Randolph Tucker, Jr., Judge of the Hustings Court of the City of Richmond, dated June 13, 1972, and to the Honorable Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, dated April 19, 1971, and found in Report of the Attorney General (1970-1971), page 194, wherein I ruled that § 14.1-183 precluded the payment of fees to appointed counsel in misdemeanor
cases, except as authorized in juvenile proceedings pursuant to § 16.1-173. I enclose herewith a copy of the opinion to the Honorable W. A. Alexander, Judge.

However, in the 1973 Session of the General Assembly, Senate Bill 784 was passed. The bill is now designated as Chapter 316, Acts of Assembly (1973), and was effective on March 15, 1973. I enclose herewith a copy of Chapter 316.

Chapter 316 provides, in pertinent part, as follows:

"§ 19.1-241.11. Counsel appointed to represent the defendant upon such charge [for an offense the penalty for which may constitute confinement in jail] shall be compensated in an amount fixed by each of the courts in which he appears, except in no event shall the payment for services rendered in the proceedings before a court not of record exceed the sum of seventy-five dollars. This provision shall apply to counsel appointed under the provisions of this article, and all counsel appointed to represent indigents on misdemeanor charges or ordinance violations between June twelve, nineteen hundred seventy-two, and the effective date of this act, both inclusive."

Section 14.1-184.1, also a part of Chapter 316, provides for the appointment of an attorney to defend a poor person charged with an offense that may be punishable by confinement in jail and authorizes payment of counsel fees by the Commonwealth, if the Commonwealth has initiated the prosecution, or by the county, city or town, if a county, city or town has initiated the prosecution.

Therefore, in answer to your third question, in my opinion, counsel appointed to represent indigents for ordinance violations on and subsequent to June 12, 1972, should be paid by the Commonwealth, if the Commonwealth has initiated the prosecution, or by the county, city or town, if it has initiated the prosecution.

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ATTORNEY—Indigents—Court appointed—When person charged with a crime where statutory penalty involves confinement.

CRIMINAL PROCEDURE—Indigents—Counsel appointed in cases where person charged with crime involving confinement as punishment.

May 15, 1973

The Honorable Donald H. Sandie, Judge
Municipal Court of the City of Portsmouth

This is in reply to your recent letter wherein you addressed to me three inquiries, the first of which is as follows:

Does § 19.1-241.7, Code of Virginia (1950), as amended, recently passed by the 1973 Session of the General Assembly, require a judge of a court not of record to appoint counsel for indigents in misdemeanor cases, the penalty for which may constitute confinement in jail, even though the judge does not intend to impose a jail penalty?

Section 19.1-241.7 provides, in part, as follows:

"In any case in which a person is charged with an offense, the penalty for which may constitute confinement in jail, and appears for any hearing before any court without being represented by counsel, such court shall, before proceeding with the hearing, appoint an attorney at law to represent him and provide such person legal representation throughout every stage of proceeding against him, except as may otherwise be provided in § 16.1-173.”

(Emphasis supplied.)
I ruled in an opinion to the Honorable Jose R. Davila, Jr., Commonwealth's Attorney for the City of Richmond, dated September 20, 1972, a copy of which is enclosed herewith, that a sentence of a fine resulting from a trial in which an attorney was not appointed and which in no way results in imprisonment of the defendant does not violate *Argersinger, supra*.

Section 19.1-241.7 was enacted, of course, subsequent to the *Argersinger* decision. It, however, clearly appears that the General Assembly intended to require appointment of counsel even in cases when *Argersinger* would not be violated. The word "penalty," as it appears in the section refers to a statutory penalty, and thus, in cases where a person is charged with a crime for which the statutory penalty may constitute confinement, counsel must be appointed. I can find no authority allowing a judge to determine in advance of trial that he will not sentence a defendant to confinement in jail. Therefore, the answer to your first inquiry is in the negative.

Your second inquiry was as follows:

Who is to pay court-appointed attorneys in courts not of record in cases where the Commonwealth has initiated the prosecution and in cases where a city has initiated the prosecution?

Section 19.1-241.11 provides that compensation of counsel appointed to represent misdemeanants shall be fixed by the courts in which the defendant appears. Because the section does not state by whom the compensation is to be paid, it is necessary to look at Chapter 316 of the 1973 Acts as a whole in order to determine the intent of the General Assembly.

Section 14.1-184.1 provides for payment of compensation in cases before a court of record and specifically provides that payment shall be made by the Commonwealth, if the Commonwealth has initiated the prosecution, or by the county, city, or town, if the county, city, or town has initiated the prosecution. A fusing of the two sections seems to clearly indicate the intention of the General Assembly that compensation shall be paid by the Commonwealth, if the Commonwealth has initiated the prosecution, or by the county, city, or town, if the county, city, or town has initiated the prosecution.

Therefore, in my opinion, the answer to your second inquiry is that in courts not of record the Commonwealth is to pay the compensation of court-appointed counsel if it has initiated the prosecution, and that a county, city, or town is to make such payment if it has initiated the prosecution.

Your third inquiry was as follows:

Is it a waiver of the right to counsel if a defendant is recognized or bonded and fails to appear for trial in a misdemeanor case?

In answer to your third inquiry, I have previously ruled in the opinion to the Honorable Jose R. Davila, Jr., Commonwealth's Attorney for the City of Richmond, referred to above, that under *Argersinger, supra*, a person cannot be tried for a misdemeanor in his absence pursuant to the provisions of § 19.1-193 and be sentenced to any term of imprisonment because he would not have had the opportunity to be advised of his right to counsel or to have made a knowing and intelligent waiver of that right, but that if a sentence resulting from such trial is merely one of a fine and does not in any way affect imprisonment of the defendant, *Argersinger* would not be violated.

In answer to your third inquiry, therefore, in my opinion it is not waiver of the right to counsel if a defendant is recognized or bonded and fails to appear for trial in a misdemeanor case, unless in the bail procedure the defendant is informed that he has a right to counsel, that if he fails to appear he may be tried in his absence, and that such failure to appear constitutes waiver to the right of such counsel, unless failure is through no fault of his own. Granting of bail may not be
conditioned upon a defendant's agreeing to the waiver, and it must be kept in mind that the defendant must understand the waiver. If such procedure is adopted, it would be desirable that the defendant be given written notice of his right and be asked to sign the notice so that it could be filed with the other court papers as written evidence of waiver.

ATTORNEYS—Third Year Law Students—May not engage in practice of law.

ATTORNEYS—Licenses—Supreme Court of Virginia may not license those not satisfying the statutory requirements.

June 12, 1973

THE HONORABLE N. SAMUEL CLIFTON
Executive Director
Virginia State Bar

This is in response to your request for my opinion concerning the following question:

"Does the Supreme Court of Virginia have the inherent power to adopt Rules permitting the practice of law under limited conditions by third year law students?"

To set the context for my response to your inquiry, it is necessary to review the statutes which have been enacted by the General Assembly relative to the practice of law in Virginia. These statutes are codified as Chapter 4, Title 54, of the Code of Virginia (1950), as amended. Only those persons who are (1) licensed by the State or (2) duly authorized and practicing law in another jurisdiction may practice law in Virginia. See § 54-42 of the Code. The procedure by which one may obtain a license from the State to practice law has been specified by the General Assembly. See § 54-60, et seq. This procedure establishes, among other requirements, a minimum level of education which the applicant for a license must have achieved. See § 54-62. In addition, the applicant must successfully pass the State Bar Examination before he can be licensed to practice law in Virginia. See § 54-64.

The fundamental concern of these statutes is that only those persons who are qualified in fact shall practice law in Virginia. Horne v. Bridwell, 193 Va. 381 (1952). The purpose of these provisions is to protect the public from those who are lacking in ability, and, as such, the statutes are a valid exercise of the State's police powers. Horne v. Bridwell, supra; Bryce v. Gillespie, 160 Va. 137 (1933); Richmond Ass'n, of Credit Men v. Bar Ass'n., 167 Va. 327 (1937). Accordingly, the General Assembly has made the practice of law without authorization or license from the State punishable as a misdemeanor. See § 54-44.

It must be assumed that the law students to whom you refer in your inquiry are neither licensed nor authorized to practice law in Virginia within the meaning of the foregoing statutes. In this instance, it might be asked if the statutes would permit the practice of law "under limited conditions" by such students. In my opinion, they would not. The practice of law, however limited, would still be the practice of law, and the statutes will permit only those who are duly authorized and practicing law in another jurisdiction and those who have satisfied the requirements for a license from the State to practice law.

In view of the foregoing, your inquiry may be restated as follows:

"Does the Supreme Court of Virginia have the inherent power to, in effect, license the practice of law by persons who cannot satisfy the
statutory requirements for obtaining from the State a license to practice law?"

Since there has been no judicial determination of this question in Virginia, it is necessary to examine the respective powers of the legislature and the judiciary with regard to the practice of law.

The legislative power of the Commonwealth is vested in the General Assembly. See Article IV, Section 1, of the Constitution of Virginia. It has been noted above that legislative regulation of the practice of law is a valid exercise of the State's police powers. *Bryce v. Gillespie*, supra.

The judicial power of the Commonwealth is vested in the Supreme Court and such other courts as the General Assembly may establish. See Article VI, Section 1, of the Constitution of Virginia. It has long been held that the Supreme Court has, by virtue of this Constitutionally-invested judicial power, the inherent, or implied, power to, among other things, punish for contempt, discipline officers of the court, including attorneys, for misconduct, and to enjoin the unauthorized practice of law. *Carter's Case*, 96 Va. 791 (1899); *Fisher's Case*, 33 Va. 619 (1835); *Legal Club v. Light*, 137 Va. 249 (1923); *Norfolk and Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833 (1934); *Richmond Ass'n of Credit Men v. Bar Ass'n*, supra; *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30 (1947). The Supreme Court has the inherent power to do those things that are reasonably necessary for the administration of justice within the scope of the court's jurisdiction. *Shields v. Romaine*, 122 W. Va. 639 (1940). And it has been repeatedly asserted that the existence of the Court's inherent powers does not depend upon statutory authorization. *Legal Club v. Light*, supra; *Norfolk and Portsmouth Bar Ass'n v. Drewry*, supra; *Button v. Day*, 204 Va. 547 (1963).

Despite the foregoing, the Supreme Court has consistently held that it does not have the inherent power to enter a decree, by which an attorney's license is revoked or suspended, which is effective State-wide. Such power must be based on statutory authorization. *Fisher's Case*, supra; *Legal Club v. Light*, supra; *Norfolk and Portsmouth Bar Ass'n v. Drewry*, supra; *Campbell v. Third Dist. Comm.*, 179 Va. 244 (1942). In *Drewry* the Court also found "no sound distinction . . . between the power to admit and the power to remove . . ." attorneys as officers of the Court. From this it would appear that the Court does not have the inherent power to license the practice of law by those persons who cannot satisfy the statutory requirements for receiving such a license.

Even if the Supreme Court had such inherent power, it could be regulated within reasonable limits by the legislature, so long as that power was not abridged or rendered ineffective thereby. *Carter's Case*, supra; *Button v. Day*, supra. In *Carter*, the Court upheld reasonable legislative regulation of the Court's power to punish contempts. In *Button*, the Court held that its Rules must conform to the statutory requirement that legal service for all State agencies, including the Virginia State Bar, must be provided by, or at the request of, the Attorney General. As has been noted above, the statutes regulating the practice of law have been held to be a valid exercise of the State's police powers for the purpose of protecting the public from those who are not qualified in fact to practice law. *Horne v. Bridwell*, supra. Accordingly, it is my opinion that the Supreme Court does not have the power to permit the practice of law by persons who do not meet the requirements established by the General Assembly for obtaining a license to practice law.

AUTOMATED DATA PROCESSING, DIVISION OF—Director—Authority and control over personnel—Limitations of.

November 10, 1972
This is in reply to your recent letter which reads in part:

"Chapter 9.1, Section 2.1-109.4, Paragraph (a), Code of Virginia, reads

'To provide for the efficient and coordinated use in State agencies of automatic data processing techniques, personnel and equipment.'

"Please let me know:

"(1) Does this language confer upon the Director of the Division of Automated Data Processing any operational or administrative control over employees engaged in data processing activities in agencies other than the Division of Automated Data Processing?

"(2) If it does not confer any operational or administrative authority over data processing personnel in agencies of the State Government other than within the Division of Automated Data Processing, what does this language convey?

"(3) Does the Governor have the authority to place, by Executive Order, employees engaged in data processing activities in agencies other than the Division of Automated Data Processing, under the administrative and operational control of the Director of the Division of Automated Data Processing?"

I shall answer your questions seriatim:

(1) Chapter 9.1 of Title 2.1 ($§ 2.1-109.1 through 2.1-109.5 of the Code of Virginia (1950), as amended) created the Division of Automated Data Processing headed by a director appointed by the Governor. Section 2.1-109.4 empowered the director "to provide for the efficient and coordinated use in State agencies of automated data processing techniques, personnel and equipment." You have asked for a construction of the language "to provide for the efficient and coordinated use in State agencies of personnel" and more specifically whether this language confers on the director operational or administrative authority over personnel in State agencies other than those of the Division of Automated Data Processing. I therefore answer your first question in the negative.

(2) The words "provide for" mean to make, procure or furnish for future use, prepare, to supply, to afford, to contribute. Black's Law Dictionary, third edition, p. 1454. As used here "to provide for the efficient and coordinated use in State agencies of personnel," in my opinion means to contribute to the efficient and coordinated use of personnel by recommending the employment and use of such personnel by the agencies since the agencies themselves are authorized to do the hiring, firing and supervising, etc., of their own personnel.

(3) I am of the opinion that § 2.1-115 of the Code, which authorizes the appointing authority to employ and assign duties to its personnel, precludes the Governor from placing employees of these agencies under the supervision of the Director of the Division of Automated Data Processing for "administrative and operational control".
REPORT OF THE ATTORNEY GENERAL

BANKING AND FINANCE—Business Loan to Individual Secured by a Second or Subsequent Deed of Trust on Real Estate Not Within Usury Limitations.

CONFLICT OF LAWS—One Applicable to Special Facts Must Be Treated as Exception to General Statute.

August 2, 1972

THE HONORABLE LEROY S. BENDHEIM
Member, Senate of Virginia

I have received your letter of June 20, 1972, inquiring whether § 6.1-327.1, Code of Virginia (1950), as amended, permits a lender to charge an individual a rate of interest upon certain loans in excess of that permitted by § 6.1-330.

Section 6.1-330 provides, inter alia:

“No person ... shall ... charge ... for a loan secured in whole or in part by a mortgage or deed of trust other than a first mortgage or deed of trust, on residential real estate ... an amount in excess of that permitted by § 6.1-234 and § 6.1-234.1 ...”

Section 6.1-330.1 provides that any contract, note, mortgage or deed of trust made or received in violation of § 6.1-330 shall be null and void and unenforceable by the lender.

Section 6.1-327.1 provides:

“No person shall, by way of defense or otherwise, avail himself of § 6.1-325 or § 6.1-326 to avoid or defeat the payment of any interest which he has contracted to pay when such loan is secured by a mortgage or deed of trust on real estate other than a first mortgage or deed of trust, and the loan was made to an individual or individuals for the acquisition or conduct of a business as sole proprietor or joint venturers and provided the loan is five thousand dollars or more.”

Section 6.1-327.1 was enacted as Chapter 517, Acts of Assembly of 1972. The title to the Act indicates that it provides “... when the legal rate of interest may lawfully be exceeded in certain loans secured by mortgages or deeds of trust on real estate.” The Act does not specifically refer to § 6.1-330.1, but it would be of no effect unless it was intended to restrict the usury limitation imposed by § 6.1-330.1, as that is the only other statute specifically dealing with second or subsequent mortgages or deeds of trust. It is a recognized principle of statutory construction that where two statutes are in apparent conflict, the one applicable to a special or particular state of facts must be treated as an exception to a general statute so comprehensive in its language as to cover all cases within the purview of the language used. *Southern Railway Co. v. Commonwealth*, 124 Va. 36, 56 (1918). It is evident that the General Assembly intended for § 6.1-327.1 to provide an exception to the general rule of § 6.1-330. I am of the opinion, therefore, that where the conditions of § 6.1-327.1 are met, §§ 6.1-330 and 6.1-330.1 have no application. To decide otherwise would be to defeat the manifest intention of the General Assembly as indicated by the title to § 6.1-327.1.

BANKING AND FINANCE—Interest on Revolving Credit Plan—Bank or other creditor entitled to compute interest upon previous balance including prior unpaid interest.

December 14, 1972

THE HONORABLE THOMAS JEFFERSON ROTHROCK
Member, House of Delegates
I have received your recent letter inquiring whether §§ 6.1-320 and 6.1-362, Code of Virginia (1950), as amended, allow a creditor to compound interest by computing it upon the previous month’s principal and interest under a revolving credit or open-end credit plan.

Section 6.1-320 provides, inter alia:

"... any bank may charge a rate not exceeding one per centum per month on daily balances, or on maximum calendar or fiscal monthly balances, under a written contract for revolving credit on any plan which permits an obligor to avail himself of the credit so established. . . ."

Section 6.1-362 provides, effective January 1, 1973:

"Any seller or lender engaged in the extension of credit under an open-end credit or similar plan under which a service charge is imposed upon the cardholder or consumer if the unpaid balance is not paid in full within a period of twenty-five days from billing date, may charge and collect a service charge at a rate not to exceed one and one-half per centum per month, computed at the option of the seller or lender on either (1) the average daily balance for such fiscal month or (2) the balance existing on the last day of such fiscal month. . . ."\n
The quoted statutes establish the maximum rate of interest or service charge permissible under the circumstances. A rate in excess of that provided is usurious and subjects the creditor to the penalties imposed by §§ 6.1-325 and 6.1-326.

The Supreme Court of Virginia has recognized the legality of a contract requiring the compounding of interest. In Blanchard v. Dominion Nat'l. Bank, 130 Va. 633, the Court stated, at 637:

"The court eliminated the compound interest which the commissioner allowed, and this is assigned as cross-error by the bank. While it is true that a debtor may enter into a contract under some circumstances to capitalize overdue interest, and to pay interest thereon, no such contract is shown to exist in this case. Where the principal of the debt is ascertained and there has been a continuing default in the payment of interest, although the contract provides for its payment upon recurring and for specified periods, a court in settling the account, in the absence of a specific agreement to pay lawful interest upon the installments thus in default, will only allow simple interest upon the principal sum due. 46 Am. St. Rep. 190. The decree is without error in this respect."

In Partain v. First Nat'l. Bank, 41 U.S.L.W. 2147 (CA 5 Sept. 13, 1972), the Court held the compound interest charged by a bank under a revolving credit plan to be usurious, but this was because an Alabama statute expressly proscribed the compounding of interest.

In the absence of a Virginia statute expressly prohibiting the compounding of interest, and in view of the Blanchard decision, I am of the opinion that §§ 6.1-320 and 6.1-362 should be construed to allow the inclusion of any unpaid interest or service charge from previous billings within the daily balances or monthly balance upon which the current interest or service charge is computed.

August 8, 1972
THE HONORABLE CLIVE L. DUVAL, 2d
Member, Senate of Virginia

This is in reply to your request for an opinion of this office on the question of whether Section 11, Article I, of the Constitution of Virginia (1971), which provides, in part, "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 . . . ," applies to a bank in Virginia allegedly discriminating on the basis of sex.

The Report of the Commission on Constitutional Revision made the following observations at page 96 with respect to the above-quoted portion of Section 11, Article I:

"The anti-discrimination clause which the Commission proposes adding at the end of Section 11 would perform functions analogous to those of the federal equal protection clause, except that the language proposed for Section 11 is more tightly drafted than the federal provision and therefore is less open-ended in its possibilities of application than is the federal language."

The reference to the less open-ended language of the state provision is, in my opinion, based on the fact that Section 11 enumerates and thus limits the types of discrimination to which it applies, whereas the federal equal protection clause provides generally that "... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV, Section 1, Constitution of the United States.

The only broad reference to Article I, Section 11, in the recorded debates of the framers of the new Virginia Constitution simply noted the comment in the Report of the Commission on Constitutional Revision with reference to that section. (Proceedings and Debates of the Senate of Virginia Pertaining to the Amendment of the Constitution, page 390, remarks of Senator Hopkins.)

From the above discussion, it can be seen that the anti-discrimination clause of the Virginia Constitution is designed to play a role comparable to that of the equal protection clause of the Fourteenth Amendment to the federal Constitution. At the outset, it is important to note that neither provision purports to regulate purely private conduct; the Virginia charter proscribes discrimination by "governmental action," and the federal provision forbids discrimination on the basis of state action. The distinction between state (or governmental) action and private conduct is one that very frequently is not easily determined. However, a number of decisions by the United States Supreme Court have provided guideposts to the making of such a determination. In light of the genesis of the anti-discrimination clause in the Virginia Constitution, I believe it would be useful and appropriate to examine those decisions in attempting to determine whether the proscriptions of that provision apply to any particular set of facts.

In 1883, the United States Supreme Court, in The Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18 (1883), set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the equal protection clause, and private conduct, "however wrongful or discriminatory," against which that clause "erects no shield." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

That dichotomy was reaffirmed in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), and, more recently, in Moose Lodge No. 107 v. Irvis, 92 S.Ct. 1965 (1972). Burton and Irvis are two important "state action" cases which establish important criteria for analyzing the factual situation set forth in your request for an opinion, and therefore will be examined closely in this opinion.

Burton involved a claim that the federal equal protection clause prohibited discrimination by the private operator of a restaurant located in facilities leased
from and maintained by an agency of the State of Delaware. After noting that, "only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance," the Court observed:

"The land and buildings were publicly owned. As an entity, the building was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' (citations omitted) The costs of land acquisition, construction and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services. . . . It can not be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. . . . Neither can it be ignored that . . . profits earned by discrimination not only contribute to, but also are indispensible elements in, the financial success of a governmental agency." 365 U.S. at 723-724.

"[There is state action whenever the] state has so far insinuated itself into a position of interdependence [with the otherwise 'private person whose conduct is said to violate the Fourteenth Amendment] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall within the scope of the Fourteenth Amendment." 365 U.S. at 725.

In the Moose Lodge decision, the United States Supreme Court decided that, where a private club conducts its activities in a privately-owned building without the benefits of public funds, the fact that it is licensed by a state agency to serve liquor does not amount to such state involvement in its discriminatory practices to make those practices come within the scope of the equal protection clause. On the question of "state action" raised in the case, the Court observed:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity received any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate that where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discrimination,' (citation omitted) in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 92 S.Ct. at 1971.

The Court continued:

"The District Court was at pains to point out in its opinion what it considered to be the 'pervasive' nature of the regulation of private clubs of the Pennsylvania Liquor Control Board. . . .

"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club's enterprise." 92 S.Ct. at 1973.

On the basis of the Burton and Moose Lodge decisions, it can be seen that state action which fosters, encourages or makes the state, in effect, a partner in discrimination is forbidden by the Fourteenth Amendment. Likewise, "significant state involvement with invidious discrimination" falls within the scope of that provision, but mere "neutral" regulation by the state, however extensive, cannot of itself cause otherwise private conduct to take on a governmental character, and thus bring down the full weight of the equal protection clause. On the other hand, if the regulation or other manifestation of state activity is of such a nature as to confer an unusual benefit of some kind upon the private entity, state action may well be found.
Applying the test of state action outlined hereinabove, I cannot conclude that the Commonwealth of Virginia is involved in the operation of banks doing business within her borders in the manner and to the extent necessary to cause the provisions of Article I, Section 11, to apply to the operation of such banks. It is true that the banking industry is regulated heavily by the Commonwealth of Virginia. See Title 6.1, §§ 6.1-3, et seq., Code of Virginia (1950), as amended. Such regulation, however, cannot reasonably be said to foster or encourage discrimination on the part of banks or to insinuate the state into a position of interdependence with such banks. Nor, with one exception to be discussed, may it be said that, by virtue of such regulation, the state confers any unusual benefits upon banks such as would cause their operation to fall within the scope of the anti-discrimination clause of the Virginia Constitution. The exception to the preceding observation may be found in § 6.1-13, as amended, which provides:

"Before any bank shall begin business it shall obtain from the State Corporation Commission a certificate of authority authorizing it to do so; and prior to the issuance of such certificate, the Commission shall ascertain: . . . (4) that, in its opinion, there is public need for banking facilities or additional banking facilities, as the case may be, in the community where the bank is proposed to be . . .".

At first reading, it may appear that the "public convenience and necessity" requirement would operate to confer an extraordinary benefit to existing banks by tending to restrict entry into the banking business and thus protect existing facilities from new competition. However, unlike public utilities upon which are conferred state-created outright or quasi-monopolies, banks enjoy no such state-supported monopolistic advantages. The "public convenience and necessity" showing required in order for new banks to obtain a certificate of authority to do business is primarily intended to protect the public interest against undue weakening of the financial integrity of the banking system within any given community. As the Supreme Court of Virginia observed in Security Bank v. Schoolfield Bank, 208 Va. 458 (1968):

"While the adequacy of existing bank facilities may be considered in determining whether public convenience and necessity will be served, this does not preclude the Commission from authorizing [a new branch bank] when there has been a showing of a public need and such authorization will not jeopardize the financial soundness of already existing banks and other financial institutions [of the community in question]. If such were not the case, the statute would tend to deter competition and promote a monopoly. We are satisfied that this could not have been the intent of the legislature." 208 Va. at 462.

That there is a sufficient number of banks in operation in Virginia to engender competition cannot be doubted. The 1971 Annual Report of the Bureau of Banking, State Corporation Commission, revealed that, as of December 31, 1971, there were 144 state banks in operation, together with 357 state bank branch offices. In addition, it should be noted that these facilities compete with 101 national banks in Virginia, and their branches. (1971 Annual Report, Bureau of Banking, p. 7.)

Further evidence that the existing regulatory framework is not designed to give competitive protection to existing banking facilities may be seen in § 6.1-40. That section provides that an applicant for a certificate of authority to commence in the banking business shall not be required to meet the "public convenience and necessity" requirement of § 6.1-13 when "all of the banks located in [the community where the bank is proposed to be located] are owned or controlled (1) by 'bank holding companies' or (2) when all the banks located in such county or city are owned or controlled by 'merged banks' or (3) when all of the banks
located in such county or city are owned or controlled by 'bank holding companies' and 'merged banks'.

In conclusion, while a full and complete record in any given case could conceivably reveal facts to justify a finding of state action in the operation of a particular bank, I cannot find on the facts presented in your letter of inquiry that the doctrine of "state action," as developed in United States Supreme Court decisions, would support the application of the proscriptions of the anti-discrimination clause of the Virginia Constitution to the bank in question. [However, in a proper case, there is no doubt that governmental discrimination by reason of sex is reached under both the Virginia Constitution and the federal equal protection clause (Reed v. Reed, 404 U.S. 71 (1972)).]

In my opinion it cannot be said that the State has fostered, encouraged, enforced or in any way joined in the alleged discrimination of the bank in question, nor has it conferred any unusual benefit upon such bank. For that reason, the bank's alleged conduct, however wrongful or unjust, must be seen as essentially private conduct and therefore beyond the scope of Article I, Section 11, of the Virginia Constitution, as well as the equal protection clause of the Fourteenth Amendment to the federal Constitution.

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BOARDING FEE—Employees of the Commonwealth Boarding Aircraft at Richmond Airport for Travel in the Course of Their Official Duties Are Not Exempt From the Boarding Fee.

January 31, 1973

THE HONORABLE RICHARD N. HARRIS, Director
Division of Justice and Crime Prevention

I have received your recent letter inquiring whether the city of Richmond has the authority to impose an enplaning fee of one dollar upon employees of the Commonwealth boarding aircraft at the Richmond Airport for travel in the course of their official duties.

Section 2.03(1) of the Richmond City Charter provides that the city shall have power to acquire, construct, own, maintain and operate airports and to charge or authorize the charging of compensation for the use of any such airport. The ordinance imposing the fee provides, inter alia:

"Every person boarding a commercial aircraft at Richard Evelyn Byrd International Airport (formerly Byrd Flying Field) whose flight originates or commences at [the airport] shall pay a one dollar board fee... for the purpose of defraying the cost of construction, maintenance and operation of the facilities at the airport."

An exclusion exists for passengers on aircraft owned or operated by a federal, state, local or foreign government, and for certain other passengers with which your inquiry is not concerned. However, there is no exclusion applicable to employees of the United States or any State or political subdivision thereof who board commercial aircraft.

The ordinance does not impose a fee directly upon the Commonwealth. The fee is imposed upon all persons boarding aircraft. The fact that an employee or agent of the Commonwealth is required to pay the fee and that he will be reimbursed therefor out of the State treasury does not affect the power of the city to collect the fee. The fee is analogous to local taxes imposed on transient room rentals and meals. An agent of the Commonwealth is not exempt from such taxes although he is traveling in the course of his official duties and his expenses, including the taxes, will be paid by the Commonwealth.
A similar fee was challenged on the ground that it was prohibited by the commerce clause of the United States Constitution, but it was upheld by the United States Supreme Court in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

Upon consideration of the foregoing, it is my opinion that the city of Richmond can require employees of the Commonwealth to pay the enplaning fee although they are traveling in the course of their official duties and their expenses, including the fee, will be reimbursed by the Commonwealth.

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**BOARDS OF SUPERVISORS—Annual Compensation of Members May Be Set at Different Figures but Within Minimum-Maximum Established by Statute.**

**BOARDS OF SUPERVISORS—No Authority for Member to Decline Portion of His Salary, but Board May Set One Member’s at Minimum and Others at Higher Figure.**

**SALARIES—Annual Compensation of Members of Boards of Supervisors May Be Set at Different Figures but Within Minimum-Maximum Established by Statute.**

May 15, 1973

**THE HONORABLE WILLIAM V. RAWLINGS**

Member, Senate of Virginia

This is in reply to your letter of May 7, 1973, in which you ask my opinion whether a member of a local board of supervisors may decline a portion of his pay where his salary has been set by the board of supervisors under the provisions of § 14.1-46, Code of Virginia (1950), as amended.

Section 14.1-46 of the Code provides that the annual compensation to be allowed each member of the board of supervisors of each county shall be determined by the board and that the compensation shall be not less than the amounts therein established.

The minimum salary established by this section must be tendered to the members. I find no authority for a member to decline a portion thereof. This does not, however, prevent a board from establishing one member’s salary at the minimum set by § 14.1-46 and other members’ salaries at a figure higher but within the minimum-maximum figures established by this section.

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**BOARDS OF SUPERVISORS—Appropriations—Cannot construct road.**

**HIGHWAYS—Boards of Supervisors—Construction of road not within primary or secondary system.**

**BOARDS OF SUPERVISORS—Street to Sanitary District.**

September 14, 1972

**THE HONORABLE ALBERT T. MITCHELL**

Commonwealth’s Attorney for Shenandoah County

This is in reply to your letter of September 7, 1972, in which you ask the following question:

"May a Board of Supervisors expend money from the general funds of the county to build a road over its right of way from a State highway to a
tract of real estate owned by the Board of Supervisors being used for a public sanitary landfill."

The board of supervisors may not spend money from the general fund for the construction of a road not within the primary or secondary road systems. See opinion of this office to the Honorable Kermit L. Racey, Commonwealth's Attorney for Shenandoah County, dated August 1, 1966, found in the Report of the Attorney General (1966-1967), p. 154.

Section 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. Should the road which you describe qualify as a street and be within a sanitary district and be necessary to accommodate the purpose of said district, I am of the opinion that the county may contract the same. See opinion to the Honorable John F. Ewell, Commonwealth's Attorney for Warren County, dated October 22, 1971, a copy of which is enclosed.

BOARDS OF SUPERVISORS—Authority—Cannot appropriate public funds to operate a transportation service.

October 12, 1972

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

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

"I would appreciate your opinion as to whether or not the Board of Supervisors of James City County, Virginia, has the authority to appropriate monies to the Williamsburg-James City County Community Action Agency to aid in their operation of a transportation service in James City County for county residents."

The authority of the Board of Supervisors to appropriate public funds depends upon the existence of statutory authority authorizing the appropriation.

I am unable to find any statute authorizing the Board to appropriate funds to operate a transportation service as is contemplated and, therefore, it cannot aid in the operation of the proposed service.

BOARDS OF SUPERVISORS—Authority—May not require the School Board to contract for insurance from company selected by board.

SCHOOLS—School Boards—May select insurance company to cover employees of board.

January 11, 1973

THE HONORABLE JOHN C. BUCHANAN
Member, Senate of Virginia

I am writing in response to your recent letter in which you request my opinion relating to the authority of a board of supervisors to take certain action concerning an insurance policy covering employees of the school board.

According to the facts set forth in your letter, the school board contracted with an insurance company for hospitalization insurance for teachers and their dependents. Subsequent to entering into the initial contract, the school board contracted with the insurance company to provide hospitalization insurance for the 1972-1973
school year for all employees of the school board. The 1972-1973 school budget provides for such hospitalization insurance coverage and was approved by the board of supervisors. The board of supervisors has now indicated the intention of withdrawing the contract from the insurance company and receiving bids for a policy covering all school employees.

In light of the foregoing facts, you inquire whether the board of supervisors has authority to nullify the contract with the insurance company and enter into a contract with another insurance company for a similar policy for the current school year or some future school year.

In an opinion to the Honorable Edgar Bacon, Member of the House of Delegates, for Dickenson County, dated April 30, 1970, found in Report of the Attorney General (1969-1970), p. 233, a copy of which is enclosed, I had an occasion to rule that a local school board had authority to provide health insurance coverage for teachers which extended to their families. This opinion was predicated upon the constitutional and statutory authority of a school board to establish conditions of employment and to provide for the payment of teachers. The same would be applicable for all employees of a school board.

In an opinion to the Honorable Edgar Bacon, Member of the House of Delegates, found in Report of the Attorney General (1970-1971), p. 25, I ruled that a county board of supervisors does not have the power or authority to employ and fix the compensation for employees retained by the school board for the purpose of performing certain duties. The same would be true for all employees hired by the school board.

For the reasons stated in the two previously mentioned rulings, I am of the opinion that a board of supervisors may not require the school board to enter into an insurance contract with a company designated by the board of supervisors. Assuming the school board's budget includes funds for hospitalization insurance coverage, it is the prerogative of the school board to select the insurance company to provide the desired coverage. The board of supervisors may not nullify the existing contract.

BOARDS OF SUPERVISORS—Authority—Not authorized to appoint a Port Authority or Service District and authorize it to contract a debt in excess of debt limitation within a referendum.

September 19, 1972

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

This is in reply to your recent letter which states in part:

"Accomack County desires to apply to the Economic Development Administration for a Federal grant to be used to bulkhead and improve the harbor at Quinby, Virginia. The United States of America owns a perpetual easement in all lands involved, said easement encompassing the proposed improvements. The total cost of the project would be $358,000.00. The County would be required to fund 20 percent of the total cost, or $71,600.00; while the Federal grant would fund the remaining 80 percent. The size of the County's share would exceed what it is authorized to borrow under Code of Virginia, Section 15.1-545. However, the County does not consider it desirable, at the present time, to have a referendum on the question of contracting the debt for this project.

"My question is: Does the Board of Supervisors have authority to appoint
a Port Authority or Service District and authorize such appointed body to contract such debt without a referendum?"

Section 10(b) of Article VII of the Constitution provides:

"No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt except the classes described in paragraphs (1) and (3) of subsection (a), refunding bonds, and bonds issued, with the consent of the school board and the governing body of the county, by or on behalf of a county or district thereof for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law, unless in the general law authorizing the same provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt."

A referendum is required in cases of indebtedness except where the debt is one of the classes described in paragraphs (1) and (3) of subsection (a), refunding bonds, and bonds issued, with the consent of the school board and the governing body of the county, by or on behalf of a county or district thereof for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law.

I am unable to conclude that the proposed indebtedness of the Port Authority or Service District would come within any of these exceptions. I therefore answer your question in the negative.

BOARD OF SUPERVISORS—Authority to Determine What Land to Procure for Public Buildings and Method of Payment, Without Referendum.

COUNTIES—Debts—County may not borrow or contract a debt for construction of a county office building without a referendum.

REFERENDUM—County May Not Contract a Debt Without a Referendum.

March 29, 1973

The Honorable Clinton Miller
Member, House of Delegates

This is in reply to your letter of March 20, 1973, in which you ask the following question:

"Question: May a governing body of a county contract for the construction and payment from the general fund of such county for such construction of a new Court House facility, including county office space without first submitting such proposal to the people of the county by way of a public referendum on the question of whether or not to so construct and on the question of method of payment for such new facilities?"

The board of supervisors of a county has authority to determine what land it will procure for public buildings of its county. See § 15.1-257, et seq. There is no requirement that the board hold a public referendum on the question of whether to construct a new courthouse facility.
The method of payment for the construction of a new courthouse is also a matter for the board to determine except where the county expects to borrow money or contract a debt for its construction. In such event the approval by referendum of the qualified voters of the county is required. See opinion to the Honorable Otis B. Crowder, Treasurer of Mecklenburg County, dated March 26, 1971, and found in Report of the Attorney General (1970-1971), p. 81. A copy of this opinion is enclosed.

BOARDS OF SUPERVISORS—Authority to Establish, Operate and Determine Type of System of Collection and Disposal of Solid Waste.

COUNTIES—Waste Disposal Plans Subject to Approval by State Board of Health.

The Honorable James Pendleton Baber
Commonwealth's Attorney for Cumberland County

This is in reply to your letter of August 8, 1972, in which you request my opinion whether the Board of Supervisors is authorized to expend tax money on a system of collection and disposal of solid waste which is effective as to only forty percent of the waste material, when a system is available which would be effective as to approximately eighty percent.

Sections 15.1-282 and 15.1-510 of the Code of Virginia (1950), as amended, are sufficient authority for the Board of Supervisors to establish and operate a system of collection and disposal of solid waste and to determine the type of such disposal. However, § 32-9.1 of the Code provides that solid waste disposal plans of counties are subject to approval by the State Board of Health. I am of the opinion, therefore, that the Board may, subject to approval by the State Board of Health, expend funds for a solid waste system and in its discretion determine the type of solid waste disposal system which will be employed.

I call your attention to the provisions of § 15.1-1241 of the Code which authorize the governing body of the county to create a garbage and refuse collection and disposal authority for the purpose of disposing of solid waste. In the event such an authority is established, revenue bonds could be issued to finance the project.

BOARDS OF SUPERVISORS—Community Antenna Television System Owned by Member of; Grant of License, Conflict of Interests.

VIRGINIA CONFLICT OF INTERESTS ACT—Community Antenna Television System Owned by Member of; Grant of License, Violation of Act.

The Honorable David D. Brown
Commonwealth's Attorney for Washington County

This is in response to your letter of February 19, 1973, wherein you inquire whether the Virginia Conflict of Interests Act applies to the issuance of a license, franchise or certificate of public convenience and necessity by a county board of supervisors pursuant to § 15.1-23.1 of the Code of Virginia (1950), as amended, to a community antenna television system owned by a member of the board.

Section 2.1-349(a)(1) of the Code prohibits an officer of a governmental agency from being a contractor with the governmental agency of which he is an
officer. On the assumption that the member of the board in question owns greater than five percent of the business or receives in excess of $5,000.00 annually from the business, the granting of a license, franchise or certificates of public convenience would violate the Act.

BOARDS OF SUPERVISORS—Contracts—May enter into contract which will renew itself from year to year if annual appropriation made therefor.

January 19, 1973

THE HONORABLE J. MADISON MACON, JR.
Commonwealth's Attorney for Charles City County

This is in reply to your recent letter which reads:

"Charles City County has filed an application with HUD for a grant in the amount of approximately $200,000.00 for a neighborhood facility to be located at Charles City Courthouse. The County would put up an additional $100,000.00. I have been asked to write an opinion for the HUD people as to whether Charles City County can so apply through its Board of Supervisors.

"In going over this matter, one of the requirements of HUD is that the County would have to maintain the building and hire a Director of Activities for the building, etc. over a period of twenty years. At the end of the twenty years the building could be used by the County for whatever purposes it saw fit. It has been estimated that the cost of hiring the Director, maintenance personnel and actually maintaining the building would be approximately $15,000.00 during the first year.

"My question is, can the County, through its Board of Supervisors, make such a long term financial obligation. The County is anxious to proceed, and therefore, I ask that you expedite this opinion as much as you can. I call your attention to Section 15.1-185 of Virginia Code as amended, as being one Section that might affect this."

The requirement that the Board of Supervisors contract for a period of twenty years to maintain a building and hire a director estimated to be approximately $15,000.00 a year is a contract in excess of the present term of the Board members. The present Board of Supervisors of Charles City County cannot validly bind future boards to appropriate funds for the purpose contemplated in the proposed agreement. See opinion of this office to the Honorable A. Dunston Johnson, Commonwealth's Attorney for Isle of Wight County, dated November 29, 1961, found in the Report of the Attorney General (1961-1962), p. 141, a copy of which is attached. The Board can, however, enter into a contract which would renew itself from year to year if the Board of Supervisors sees fit to make an annual appropriation for the purpose.

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

COUNTIES—Contracts—Board of Supervisors may not contract to pay money in following fiscal year.

COUNTIES—Debts—County may not contract a debt for county-operated landfill without a referendum.

REFERENDUM—County May Not Contract a Debt Without a Referendum.
March 19, 1973

THE HONORABLE F. CALDWELL BAGLEY  
County Attorney for Prince William County  

This is in reply to your letter of March 5, 1973, which reads as follows:

"Your opinion is requested on the following:

"Is there anything to preclude a County from executing a deed of trust for deferred purchase money for land being acquired for a County operated land fill?

"If so, can Prince William County accept a deed with reservation of a vendor's lien?

"It is the desire of our Board of County Supervisors to pay one-third (1/3) for the land with two equal installments each year thereafter for two years."

A deed of trust for the deferred purchase money for land being acquired for a county-operated landfill is an indebtedness of the county. This is prohibited without the approval by referendum of the qualified voters of the county. See opinion to the Honorable Otis B. Crowder, Treasurer of Mecklenburg County, found in Report of the Attorney General (1970-1971), p. 81. The payment for the land over a period longer than one year is prohibited as being a contract in excess of one year. See opinion to the Honorable L. Victor McFall, Commonwealth's Attorney for Dickenson County, found in Report of the Attorney General (1970-1971), p. 378. Also see opinion to the Honorable Philip P. Burks, County Treasurer of Bedford County, found in Report of the Attorney General (1968-1969), p. 23.

I am therefore of the opinion that the county may not execute a deed of trust for deferred purchase money for land being acquired for a county-operated landfill. This conclusion renders unnecessary an answer to your second question.

BOARDS OF SUPERVISORS—County Prohibited from Charging Fee for Building Permit.

FEES—County Prohibited from Charging Fee for Building Permit.

July 7, 1972

THE HONORABLE DAVID C. Dickey  
Commonwealth’s Attorney for Greene County  

This is in reply to your recent letter in which you requested my opinion whether the Greene County Board of Supervisors may pass an ordinance establishing a graduated series of fees for building permits.

Section 58-766, Code of Virginia (1950), as amended, to which you refer, prohibits the county from charging any fee for a building permit. I therefore answer your question in the negative.

BOARDS OF SUPERVISORS—General Revenue Funds—Use of for construction of livestock show and sales facility—Must be public market before funds may be used.

BOARDS OF SUPERVISORS—Public Market—May construct from general revenue funds.

June 7, 1973
THE HONORABLE RICHARD C. GRIZZARD
Commonwealth's Attorney for Southampton County

This is in reply to your recent letter in which you present the following question:

"Can the Board of Supervisors use General Revenue Funds to construct a Livestock Show and Sales facility that would be used from time to time for auction sale of livestock?"

You stated that the Board intends to construct a livestock show and sale facility. The facility would be a multipurpose building (livestock pen-auction sale area-livestock show center) and would on occasion be used by the Regional Feeder Pig Association as a collection site for sale of pigs. It may be operated by the county as an auction market or leased to an auction market company for use. You also indicated that there were already privately owned auction arenas in the area.

Section 15.1-880, Code of Virginia (1950), as amended, authorizes municipal corporations to provide and operate markets, or to contract with others for supplying such facilities. Section 15.1-522 of the Code vests in the counties the same power and authority as the councils of cities and towns. Assuming that the facility described is a public market and not private enterprise, the county may use general revenue funds to construct it. See Harrison v. Day, 200 Va. 750, 107 S.E. 2d 586 (1959).

BOARDS OF SUPERVISORS—Immunity—Immune from negligent, tortious conduct of its agents.

SCHOOLS—School Boards—Immune from negligent, tortious conduct of its agents.

November 21, 1972

THE HONORABLE WILLIAM ROSCOE REYNOLDS
Commonwealth's Attorney for Henry County

I am writing in response to your recent inquiry relating to the immunity of a county board of supervisors for the negligent, tortious conduct of its agents. In your letter you ask whether an amendment to § 15.1-506.1 of the Code of Virginia (1950), as amended, or the new Constitution of Virginia changed the law with respect to the immunity of a county board in the circumstances stated above.

Section 15.1-506.1 of the Code authorizes a board of supervisors or a school board to provide liability insurance for its officers and employees to cover negligent acts committed while discharging their duties. There is no provision in the Constitution relating to this matter.

In Crabbe v. School Board and Albrite, 209 Va. 356 (1968), the Supreme Court of Virginia reaffirmed the proposition that a school board, in the absence of a statute imposing liability, is immune from liability for tortious conduct of its employees. A county board of supervisors would benefit from the same immunity.

In Crabbe, the Court considered plaintiff's argument that certain sections in the Code of Virginia waived the governmental immunity of the school board with regard to tort liability. Among those statutes were provisions requiring school bus vehicles to be insured and a waiver of the defense of governmental immunity in an action against the school board for a motor vehicle related injury up to the limits of the insurance policy. The Court held that these statutes did not con-
stitute a waiver of governmental immunity of the school board from liability in a case which did not relate to a motor vehicle accident. In rejecting the plaintiff’s claim the Court also observed that “there [is no] requirement that the School Board shall provide liability insurance covering its other activities or those of its servants, agents or employees.”

In my opinion the authorization in § 15.1-506.1 of the Code to provide liability insurance does not constitute a waiver of governmental immunity. I conclude that the General Assembly can only waive governmental immunity of a county board when it expressly does so by statute. The authorization to provide insurance does not constitute such a waiver.

BOARDS OF SUPERVISORS—Industrial Development—Appropriation of public funds to purchase land for industrial park.

INDUSTRIAL DEVELOPMENT—Authorities—May finance and construct facilities to be leased to private industry.

July 13, 1972

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

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

“Please advise me if a county may properly expend funds to acquire and develop property within the county for an industrial park. The property so acquired to be leased or sold at public or private sale to any person, firm or corporation for the purpose of establishing business or manufacturing establishments.”

I am aware of no provision of Virginia law which authorizes boards of supervisors to appropriate public funds to purchase land within the county for an industrial park. Should the board establish an industrial development authority under § 15.1-1373 through § 15.1-1390, Code of Virginia (1950), as amended, it may give, lend or advance funds to the authority. The authority, under § 15.1-1375, may promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises to locate in or remain in the county. See opinion of this office to the Honorable C. H. Davidson, Jr., Commonwealth’s Attorney for Rockbridge County, dated September 15, 1967, and found in Report of the Attorney General (1967-1968), p. 25. A copy of this opinion is enclosed.

BOARDS OF SUPERVISORS—Lease for Five Years—Board may not bind its successors in office to make future appropriations.

October 2, 1972

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

This in in reply to your letter of September 18, 1972, in which you enclosed a proposed five year lease for space to house the Department of Social Services and requested my opinion whether the board of supervisors of Giles County may execute said lease.

This office has previously ruled that the board of supervisors may not bind their successors in office to make future appropriations. Report of the Attorney
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General (1949-1950), p. 31. The lease contract for five years which you attached would bind future boards and commit them to unappropriated expenditures. A contract entered into in one fiscal year and requiring a payment in the following fiscal year must be made subject to the condition that the board of supervisors appropriate funds during the year in which the payment is to be made. Report of the Attorney General (1970-1971), p. 378.

I am, therefore, of the opinion that the lease should be revised and the terms thereof made subject to the condition that the Board of Supervisors appropriate funds during the year in which payment is to be made.

BOARDS OF SUPERVISORS—Members—If financial interest in transaction before Board, member should disclose interest to governing body and disqualify himself from voting.

September 11, 1972

The Honorable Sam D. Eggleston, Jr.
Commonwealth’s Attorney for Nelson County

This is in response to your letter of August 31, 1972, wherein you inquired if two members of the Board of Supervisors could be permitted to vote upon the repealing of an ordinance prohibiting the sale of beer and wine on Sunday when such members operate business establishments which require beer licenses.

In your letter you referred to § 2.1-352 of the Code of Virginia (1950), as amended. I believe that this section would be controlling inasmuch as the members of the Board of Supervisors would have a financial interest in a transaction with which the Board is concerned. Such members should disclose the interest to the governing body and disqualify themselves from voting or participating in any action with respect to the ordinance in question.

BOARDS OF SUPERVISORS—Motions of—A second after a motion not necessary by § 15.1-540 even though the Board has adopted Robert’s Rules of Order requiring a second.

October 2, 1972

The Honorable John N. Lampros
Commonwealth’s Attorney for Roanoke County

This is in reply to your letter of September 25, 1972, which reads as follows:

“In an Opinion under date of April 11, 1957, a copy of which is attached hereto, the Attorney General has ruled ‘that a motion by a member of the Board of Supervisors does not require a second to the motion prior to its being called for a vote’.


“My inquiry is whether the statute prevails, thereby negating the necessity of a second after any and all motions, even though the Board has adopted Robert’s Rules?’”

In two subsequent opinions to that of April 11, 1957 to the Honorable Charles J. Ross, Clerk, Board of Supervisors of Madison County, found in Report of the Attorney General (1956-1957), p. 35, it was opined that § 15-245 of the
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The provisions of § 15.1-540 of the Code prescribe the methods by which questions submitted to the board of supervisors are determined. These take precedence over any rules adopted on the subject which are in conflict. Therefore, I am of the opinion that this statute prevails, thereby negating the necessity of a second after any and all motions, even though the Board has adopted Robert's Rules of Order.

BOARDS OF SUPERVISORS—No Authority to Direct Method by Which Treasurer Must Collect Delinquent Taxes.

January 19, 1973

THE HONORABLE BENNIE L. FLETCHER, JR.
Treasurer for Arlington County

I have received your recent letter inquiring whether the Arlington County Board has any authority to direct you in the exercise of your responsibilities with regard to the collection of delinquent taxes.

A local treasurer is a constitutional officer elected by the qualified voters of his county or city. Article VII, Section 4, of the revised Constitution of Virginia, provides that the duties of constitutional officers shall be prescribed by general law or special act. Title 58, Chapter 20, of the Code of Virginia (1950), as amended, prescribes generally the duties, powers and responsibilities of local treasurers. Section 58-978, et seq., pertains to delinquent taxes.

A county board has no authority to direct a treasurer as to the particular methods he must utilize to collect delinquent State taxes. See Report of the Attorney General (1951-1952), p. 22. In my opinion, neither is there authority for the board to do so with respect to local taxes; however, I know of nothing to preclude the board from suggesting that the local treasurer adopt one method to the exclusion of others.

The board may require that the treasurer continue his efforts to collect delinquent taxes after the expiration of one year following June thirtieth of the year as to which the delinquent lists speak. § 58-990. But neither this statute nor any other provision of law of which I am aware authorizes a board to direct the method by which the treasurer shall collect delinquent taxes or requires that the treasurer accept the board's advice concerning the method he shall use to collect such taxes. The treasurer is charged by law with the duty to collect the taxes, and he may adopt any method allowed by law which appears to him to be most suitable under the circumstances.

BOARDS OF SUPERVISORS—Ordinances—Regulating marinas—Validity depends upon language used and facts relied upon by the Board in adopting.

ORDINANCES—Regulating Marinas Must Be to Promote Public Health.

June 15, 1973

THE HONORABLE HENRY S. HATHAWAY
Commonwealth's Attorney for Northumberland County

This is in reply to your recent letter in which you state that the Northumberland County Board of Supervisors plans to prepare an ordinance making it a
misdeemeanor to construct, establish, or enlarge any marina or other facility that
would constitute a threat to any seafood, oyster planting or shellfish business.
You ask my opinion on the legality of such an ordinance.

An ordinance, adopted by a county under § 15.1-489, Code of Virginia (1950),
as amended, to be valid must be to promote public health, safety, prosperity,
morals and public welfare. The mere power to enact an ordinance does not carry
with it the right, arbitrarily or capriciously, to deprive a person of the
legitimate use of his property. Board of Supervisors v. Carper, 200 Va. 653, 107
S.E. 2d 390 (1959).

County zoning ordinances will be sustained when they are reasonable and bear
a reasonable relationship to the public health, safety, morals or general welfare.
County zoning ordinances are customarily clothed with a presumption of reason-
ableness and validity. Board of Supervisors v. Carper, supra.

Whether the proposed zoning ordinance will be reasonable and bear a reasonable
relationship to the public health, safety, morals or general welfare must, in each
case, depend upon the facts relied upon by the governing body in adopting it. To
restrict competition or to protect an enterprise which may have been encouraged
by a prior zoning classification is not a proper function of a zoning ordinance.

Section 28.1-3 of the Code confers jurisdiction on the Marine Resources Com-
mision to the fall line of all tidal rivers and streams, over all commercial fishing,
and all marine fish, marine shellfish, and marine organisms below said fill line
on all tidal waters of the Commonwealth. Section 28.1-23 empowers the Commis-
sion to make all regulations as it deems necessary to promote the general welfare
of the seafood industry and to conserve and promote the seafood and marine
resources of the State. Effective July 1, 1974, the county may exercise regulatory
authority over the wetlands within its jurisdiction by adopting an ordinance under
§ 62.1-13.5 of the Code. These facts should be considered by the governing
body in preparing a zoning ordinance regulating marinas or other facilities that
may constitute a threat to the seafood industry. The validity of the ordinance
would depend upon the language used and the facts relied upon by the county
to sustain it.

BOARDS OF SUPERVISORS—Salary of Chairman of Board; Questions of In-
crease in Pay Should Be Directed to Internal Revenue Service.

ECONOMIC STABILIZATION ACT OF 1970—Questions of Increase in Pay
Should Be Directed to Internal Revenue Service.

August 25, 1972

THE HONORABLE FLOYD CALDWELL BAGLEY
County Attorney of Prince William County

In your letter of August 8, 1972, you inquire whether the Board of Supervisors
of Prince William County may, consistent with the provisions of the Economic
Stabilization Act of 1970, as amended, establish a salary for the Chairman of the
Board of Supervisors which is greater by $2500.00 than the salary for the other
members of the Board.

I enclose herewith a copy of an opinion to the Honorable Curtis A. Sumpter,
Commonwealth's Attorney of Floyd County, dated December 6, 1971, which
states that the general pay standard permitting 5\% increases is applicable not
to the individual employee but to the appropriate employee unit. That standard
is still in effect at this time, and is still applicable to State and local governments.
It appears that your case is similar to that of Mr. Sumpter in that the appropriate
employee unit is the entire Board of County Supervisors.

Since your letter did not supply information as to the salaries previously paid to the Board of Supervisors, it is not possible to ascertain whether the $2500.00 increase for the Chairman would be permissible. This may be calculated by taking the sum of the percentage increase for each member of the Board of Supervisors, if any, and dividing that sum by the number of supervisors. This will produce the average annual increase which may not be in excess of 5 1/2%.

Of course, there may be circumstances in which it could be shown that the Chairman of the Board of Supervisors had incurred additional duties which would warrant an increase in pay. May I point out that, since this is a matter of federal law as to which authority to issue opinions and rulings has been expressly delegated to the Internal Revenue Service, you should direct your inquiry as to the specific facts of your situation to the nearest Internal Revenue Service office.

BOARDS OF SUPERVISORS—Tie Vote—Question passed by till next meeting, whether special or regular meeting.

BOARDS OF SUPERVISORS—Authority to Abolish Finance Board; Chairman May Vote Though He Is Ex Officio Member of Finance Board.

August 22, 1972

The Honorable A. T. Sowder
Treasurer of Surry County

This is in reply to your letter of August 18, 1972, which reads as follows:

"Some questions have arisen concerning the Finance Board of Surry County upon which I need an opinion from your office.

"At the present time, the County Finance Board by statute consists of the Chairman of the County Board of Supervisors, a public member appointed by the Judge of the Circuit Court, and myself. An ordinance has been introduced before the Board of Supervisors to abolish the Finance Board and have the Board of Supervisors assume the function of the Finance Board. This ordinance was voted on at the regular meeting of the Board of Supervisors held on August 17, 1972. One member of the five member Board was absent, and the vote was two for and two against. Following the close of the meeting, two members of the Board handed a letter to the Clerk of the Board requesting that a special meeting of the Board be called for Wednesday, August 23, at 8:00 a.m. to take up the ordinance. My two questions are:

"1. May a special meeting of the Board of Supervisors be called to vote on an ordinance on which a tie vote has been had at the regular meeting, or should the matter be deferred until the next regular meeting?

"2. Since the Chairman of the Board of Supervisors is also Chairman of the Finance Board, may he vote on the ordinance abolishing the Finance Board?"

I shall answer your questions seriatim:

1. Section 15.1-540 of the Code of Virginia (1950), as amended, 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 till the next meeting when it shall again be voted even though all members are not present; . . . ." (Italics supplied.)

The term "next meeting" could be a special meeting of the board provided
for by § 15.1-537 or a regular meeting under § 15.1-536. In the absence of language qualifying the type of meeting, I am of the opinion that the vote on the ordinance could be held at a special meeting if that be the next meeting of the board.

2. Section 58-940 of the Code provides that the governing body of the county may, by ordinance duly adopted, abolish the finance board. I find no prohibition against the chairman of the board voting to abolish the finance board of which he is an ex officio member.

BOARDS OF SUPERVISORS—Vacation of Streets—May not require consideration for vacation except fee provided for in § 15.1-482.1.

STREETS—Vacation of by Board of Supervisors—May not require consideration except as provided for by § 15.1-482.1.

September 8, 1972

THE HONORABLE M. LANGHORNE KEITH
County Attorney of Fairfax County

This is in reply to your recent letter in which you ask my opinion whether the Board of Supervisors of Fairfax County has authority to require consideration for the vacation of streets under § 15.1-482 of the Code of Virginia (1950), as amended.

Section 15.1-483 of the Code provides that upon vacation of any street or alley, the fee simple title is vested in the owners of abutting lots free and clear of any rights of the public or other owners of lots shown on the plat. This section retains no right in the county to the land which would authorize the county to require consideration from the property owners or persons requesting the vacation under § 15.1-482 except the Fifty Dollar ($50.00) fee provided for by § 15.1-482.1 of the Code.

I am, therefore, of the opinion that the Board of Supervisors has no authority to require consideration for the vacation of streets under § 15.1-482 of the Code, except as provided in § 15.1-482.1.

BONDS—Bonds of Sanitary District—Must be issued pursuant to requirements of § 21-122 and not § 15.1-185.

COUNTIES—Bonds of Sanitary District—Must be issued pursuant to requirements of § 21-122 and not § 15.1-185.

SANITARY DISTRICTS—Bonds—Must be issued pursuant to requirements of § 21-122 and not § 15.1-185.

April 10, 1973

THE HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County

I have received your letter of April 3, 1973, from which I quote:

"I would like to seek your opinion concerning a situation which has developed. The State Water Control Board has proceeded against the County of Mathews to create a Sanitary District for the Mathews Courthouse area. The District was created and a bond referendum was held on January 25, 1971. A majority of the qualified voters of the Sanitary
The Sanitary District was created pursuant to § 21-112.22, et seq., Code of Virginia (1950), as amended. Section 21-122 provides, inter alia:

"The governing body of any county in which a sanitary district has been or may hereafter be created by general or special law shall have power, subject to the conditions and limitations of this article, to issue bonds of such sanitary district to an amount in the aggregate of not exceeding eighteen per centum of the assessed value of all real estate in the district subject to local taxation, for the purpose of raising the necessary funds to carry into effect any or all of the purposes specified in Article 1 (§ 21-112.22, et seq.) of Chapter 2 of Title 21 of this Code . . . ."

It is my understanding that the eighteen per centum limitation will not be exceeded if the additional bonds are issued. Such bonds, if issued pursuant to the foregoing statute, would constitute a general obligation of the county and payment could be demanded by the bond holders out of the general revenues of the county. See Report of the Attorney General (1959-1960), p. 291. The issuance of bonds pursuant to § 21-122 requires a referendum upon the question of bond issuance among the qualified voters of the sanitary district. §§ 21-123 and 21-124. If the bond issuance is approved by a majority of the qualified voters, the circuit court is required to enter an order directing the governing body of the county to issue the necessary bonds. § 21-125. It is apparent that once the voters have approved an issuance of bonds limited to a specified amount, the limitation cannot be exceeded without an additional referendum, if the county and the sanitary district must rely solely upon §§ 21-122, et seq., for the authority to issue the bonds.

However, this office has recognized that the method of raising capital prescribed by §§ 21-122, et seq., is not exclusive. In an opinion to the Honorable William M. McClenny Commonwealth's Attorney for Amherst County dated August 12, 1959, cited supra, the Attorney General held that a county could borrow money from a bank on behalf of a sanitary district provided the lender was limited to the district's revenues from the facilities being operated for repayment of the loan. Subsequently, by an opinion to the Honorable Robert C. Goad, Commonwealth's Attorney for Nelson County, dated October 1, 1968, and found in Report of the Attorney General (1968-1969), p. 206, my predecessor in office concluded that a sanitary district could borrow an additional sum needed to complete its project without the necessity for a referendum provided the loan was repayable solely from the revenues to be received by the sanitary district from the users of its sewage system. The opinion cited Farquhar v. Board of Supervisors, 196 Va. 54 (1954), which held that a contractual obligation of a sanitary district requiring it to make future payments to a city sanitation authority for the use of a sewage disposal system did not violate the constitutional prohibition against the creation
of a debt found in § 115(a) of the Constitution of Virginia. The prohibition was avoided because of the special fund doctrine, which is that obligations payable solely from a special fund derived from the revenue of the enterprise for which such obligations are issued do not constitute a bond or debt within the meaning of the constitutional provision.

Article VII, Section 10(b), of the revised Virginia Constitution provides, \textit{inter alia}:

"No debt shall be contracted by or on behalf of any county or district thereof . . . except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt except the classes described in paragraphs (1) and (3) of subsection (a) . . . ."

Subsection (a) (3) encompasses "[b]onds . . . the principal and interest on which are payable exclusively from the revenues and receipts of a water system or other specific undertaking or undertakings from which [the county or district] may derive a revenue . . . ."

Section 15.1-185 provides that a county shall have all the powers granted by § 15.1-175 to cities and towns. Section 15.1-175(b) authorizes cities and towns to " . . . contract debts for any project, to borrow money for any project, and to issue its negotiable bonds to pay all or any part of the cost of . . . constructing . . . any project . . . ." Section 15.1-185 also prohibits a county from contracting any bonded debt for any project without obtaining the approval of its qualified voters in a referendum, but debt of the class described in Article VII, Section 10(a) (3), is excluded from this requirement. Accordingly, a county may issue bonds to finance a project without a referendum if the principal and interest thereon are payable exclusively from the revenues and receipts of a specific project.

Section 15.1-185, however, does not specifically authorize the issuance of any debt by or on behalf of a sanitary district. If a county could utilize § 15.1-185 to issue general obligation bonds, the proceeds of which could be used by a sanitary district, § 21-122, \textit{et seq.}, would be unnecessary and the eighteen per centum limitation prescribed by § 21-122, as well as the requirement for a referendum, could be avoided simply by utilizing § 15.1-185 as authority for the issuance of the debt. This result would be contrary to the intention of the General Assembly as indicated by § 21-112, \textit{et seq.}

The fact that the proposed debt would not constitute a general obligation of the county or district does not eliminate the necessity for specific authority to issue the debt. I am unaware of any provision of law other than § 21-122 which authorizes a sanitary district to issue bonds, and accordingly, I am of the opinion that such bonds must be issued pursuant to § 21-122, \textit{et seq.}, and that a sanitary district cannot utilize the provisions of § 15.1-185 to issue such debt. To the extent that the cited opinions conflict with this conclusion, they should no longer be followed.

\textbf{BONDS—Virginia Airports Authority Has Authority to Finance Airport Construction Project by Issuance of Revenue Bonds.}

\textbf{BONDS—Constitutional Debt Limit Not Applicable When Obligations Are to Be Discharged Solely from a Special Fund.}

\textbf{BONDS—Creation of "Open End" Fund Permissible Under § 5.1-61.}

\textbf{BONDS—Revenue Bonds of Virginia Airports Authority Are Tax Exempt.}
REPORT OF THE ATTORNEY GENERAL

BONDS—Virginia Airports Authority May Issue Bonds Without Legislative Approval.

TAXES—Revenue Bonds of Virginia Airports Authority Are Tax Exempt.

VIRGINIA AIRPORTS AUTHORITY—Revenue Bonds May Be Issued to Finance Construction of Airport Projects.

March 30, 1973

THE HONORABLE PAUL W. MANNS
Member, Senate of Virginia

In your letter of March 14, 1973, you request an opinion regarding the legal feasibility of the construction of improvements to Dulles International Airport and Washington National Airport by the Virginia Airports Authority, with financing provided by the issuance of revenue bonds pursuant to Section 5.1-61, Code of Virginia (1950), as amended. You set forth the following facts concerning the contemplated airport project to be undertaken by the VAA:

"... The improvements would consist of building construction, extension of existing buildings, interior improvements of passenger, baggage and freight handling facilities, construction of parking lots, et cetera. The nature of all improvements would be such that they would produce revenues in the form of leases, rents, fees, tolls or franchises by users. The users would be private persons or corporations, Federal or local government agencies, domestic or foreign. The VAA might maintain and operate a facility or merely retain ownership on a lease basis.

"The land on which construction would take place would be the property of the Federal Aviation Administration at either airport. Some construction might occur outside the airport property and might be owned by the Commonwealth or might be purchased by the Authority. Building improvements would be made to buildings owned by the FAA or other private owners. . . ."

You pose seven specific questions pertaining to financing of the proposed project, which questions I will respond to seriatim:

"1. Is the VAA able to provide conventional revenue bond financing for the typical types of projects mentioned in paragraph 2 of this letter?"

I am of the opinion that the VAA does have the authority to finance the construction of the contemplated airport project by the issuance of revenue bonds pursuant to Section 5.1-61, et seq. To reach this legal conclusion, it was necessary first to answer three subordinate questions.

a. Is the contemplated construction project properly within the scope of authority of the VAA?

The legislative delegation of powers to the VAA under Chapter 6 of Title 5.1 of the Code is broad, and in my opinion, indicates clearly that the project described in your letter is properly within the VAA's scope of authority. Section 5.1-56(a) defines the term "airport" as it is used throughout Chapter 6 to mean in part,

"... any area of land or water which is used, or intended for use, for the landing and takeoff of aircraft, any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, easements and together with all airport buildings and facilities located thereon." (Emphasis supplied.)

Furthermore, Section 5.1-58(c) specifically empowers the Authority,

"To plan, establish, develop, construct, enlarge, improve, maintain, equip.
operate, regulate and protect airports . . . within this State . . . including the acquisition, construction, installation, equipment, maintenance, and operation at such airports of buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air travelers, and the purchase and sale of supplies, goods and commodities as an incident to the operation of its airport properties. For such purposes the Authority may, by purchase, gift, devise, lease, condemnation or otherwise, acquire property, real or personal, or any interest therein . . .

The proposed buildings, and the buildings to which improvements are to be made, described in your letter would fall within the statutory definition of "airport" in that they would be, or are, airport buildings and facilities in areas appurtenant to the area for the landing and takeoff of aircraft.

b. Can such a project be undertaken by revenue bond financing?

Section 5.1-61 gives the VAA the power,

". . . to provide for the issuance, at one time or from time to time, of revenue bonds of the Authority for the purpose of paying all or any part of the cost of any one or more airport projects or of any portion or portions thereof."

Having already determined that the contemplated project would constitute an "airport" project under Section 5.1-56(a), the authority to issue bonds for its construction pursuant to Section 5.1-61 is manifest.

The statute provides that the principal of, and the interest on, such bonds shall be payable solely from the revenues collected by the Authority from the operation of the airport project. The types of charges you suggest would be levied—rents, fees, tolls, or franchises—are permissible under Section 5.1-63 as long as they are imposed for the services and facilities furnished by the airport project.

It is important to note that these bonds would not fall within the constitutional limitation on the power to incur indebtedness imposed on the Commonwealth by Article X, Section 9, of the revised Virginia Constitution. If the obligations are secured by the full faith and credit of the State, then the constitutional debt limitation applies. However, the limitations do not apply when the obligations are to be discharged solely from a special fund, as in this case. Button v. Davis, 204 Va. 270, 130 S.E. 459 (1963).

c. Does the fact that the property on which construction will take place is owned by the Federal Government interfere with the legal feasibility of the project?

It is clear the VAA could seek to acquire the needed property by purchase from the Federal Government. Such a procedure is contemplated by Section 5.1-76. Furthermore, under Section 5.1-58 the VAA is specifically empowered to acquire the property needed for an airport project by gift or lease. It is my opinion that the fact that the donor or lessor, as the case may be, would be the United States, or an agency of the United States, would not impair the capacity of the VAA to construct an airport project on such property, with financing provided by revenue bonds.

"2. Could an ‘open end’ fund be established which would permit projects to be financed from time to time without separate issues?"

I am of the opinion that the creation of such an "open end" fund is permissible under the terms of the statute. This conclusion is based primarily on the language of the last sentence of the second full paragraph of Section 5.1-61:

"If the proceeds of the bonds of any issue shall exceed such cost (the cost of the airport project), the surplus shall be deposited to the credit of
the sinking fund for such bonds, or may be applied to the payment of the cost of any additional airport project or projects." (Parenthesis and emphasis supplied.)

"3. What legal conditions, guarantees, etc., would the Authority require?"

In this question you have requested subjective legal advice rather than an objective opinion as to the status of the law. The rendering of such advice would necessitate total familiarity with all of the details of the proposed project and bond issuance. For purposes of this opinion it is sufficient to note that such conditions and guarantees regarding the bond issuance itself can be set forth either in the resolution authorizing the issuance of such bonds, or in the trust agreement which the VAA is empowered to enter with a corporate trustee. Sections 5.1-61 and 5.1-62. The trust agreement may: 1) pledge or assign the revenues to be received, but it cannot convey or mortgage the project itself; 2) provide for protection and limitation of the rights and remedies of bondholders; 3) include covenants setting forth the specific duties of the Authority in relation to the project; 4) set rates and fees to be charged; 5) establish provisions for the custody, safeguarding and application of all moneys; and 6) set limits with respect to the issuance of additional bonds.

"4. Are there changes required in Chapter 6 of Title 5.1 to make such financing possible?"

No statutory changes are necessary, in my opinion, to enable the VAA to undertake the contemplated airport project through bond financing.

"5. Is the VAA able to issue revenue bonds without approval of the General Assembly?"

The VAA is able to issue such bonds, without legislative approval, by virtue of the following provision in Section 5.1-61:

"... Bonds may be issued under the provisions of this Chapter ... without any other proceeding or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by this Chapter."

"6. Is the 6% limit applicable as the law now stands?"

It is my opinion that the 6% maximum interest rate for VAA revenue bonds set by Section 5.1-61 would not apply as long as such bonds were issued before June 30, 1974. This conclusion is based upon Sections 2.1-326.1 and 2.1-326.2 of the Code which take precedence over Section 5.1-61 in regard to the maximum interest rate.

"7. Would such revenue bonds be tax exempt?"

I assume that in the above question you are inquiring whether or not the interest payable to the bondholders would be subject to the Federal Income Tax. Based on the facts presently available, I am of the opinion that interest on these revenue bonds would be exempt from such tax because these bonds, if properly issued, would be obligations of a political subdivision of the State. 26 U.S.C.A. Section 103(a). A final certification of the tax exempt status of these bonds could only be made after the bonds have been prepared and all the terms and conditions of issuance have been set.

BUILDING CODE—Board of State Building Code Review—May grant less than two year extension if local codes are in substantial conformity with State code.
COUNTIES, CITIES AND TOWNS—Building Codes—Board of State Building Code Review may grant less than two year extension if local codes are in substantial conformity with State code.

May 25, 1973

THE HONORABLE CHARLES A. CHRISTOPHERSEN, Director
Division of State Planning and Community Affairs

This is in reply to your letter of May 9, 1973, in which you inquire whether § 36-101 of the Code of Virginia (1950), as amended, mandates that the Board of State Building Code Review, if it concludes that the current local building code is in substantial conformity with the State Code, must grant a two year extension to the local government or whether it may grant an extension for a lesser period of time.

Section 36-101, in pertinent part, provides that, once the Review Board decides that the local code is in substantial conformity with the State Code, “the local code may, with the concurrence of the Review Board remain in effect for two years from the effective day of the State Code for transition to implementation of the State Code.” In speaking of the extension of time, § 36-101 uses the permissive term “may” and, thus, the Review Board is not obligated to grant an extension of time even though it may decide that a local code is in substantial conformity with the State Code. I am of the opinion that the use of the permissive language “may” in § 36-101 permits the Review Board to grant an extension for any period less than two years if, in its discretion, that period of time is necessary for transition to implementation of the State Code.


April 27, 1973

THE HONORABLE CHARLES A. CHRISTOPHERSEN, Director
Division of State Planning and Community Affairs

This is in reply to your letter of April 18, 1973, in which you inquire whether the Board of State Building Code Review can determine that an existing local code is in substantial conformity with the State Code and, if so, whether the Review Board is empowered to grant the two year extension provided in § 36-101 of the Code of Virginia (1950), as amended.

Section 36-101 provides, in part, as follows:

“It is further provided that where, in the opinion of the Review Board, local codes are in substantial conformity with the State Code the local code may, with the concurrence of the Review Board remain in effect for two years from the effective date of the State Code for transition to implementation of the State Code.”

I am of the opinion that the above quoted language vests the determination of substantial conformity in the Board of State Building Code Review and that, once the Review Board has found a local code to be in substantial conformity with the State Code, the Review Board is empowered to grant an extension of time for transition to implementation of the State Code as provided in § 36-101.
CONSTITUTION—General Assembly Candidates; Minimum Age of Twenty-one.

GENERAL ASSEMBLY—Candidates; Minimum Age of Twenty-one.

May 3, 1973

The Honorable Lawrence Douglas Wilder
Member, Senate of Virginia

In your letter of April 30, 1973, you inquire whether the Constitution of Virginia permits a person eighteen years of age to serve in the General Assembly of Virginia, since persons of that age are now qualified to vote.

Article II, Section 5, of the Constitution of Virginia provides, in pertinent part, 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 provided in this Constitution, . . . ." (Emphasis supplied.)

This provision must be read, therefore, in conjunction with the provisions of Article IV, Section 4, which provide, in pertinent part, as follows:

"Any person may be elected to the Senate who, at the time of the election, is twenty-one years of age, is a resident of the senatorial district which he is seeking to represent and is qualified to vote for members of the General Assembly. Any person may be elected to the House of Delegates who, at the time of the election, is twenty-one years of age, is a resident of the House district which he is seeking to represent, and is qualified to vote for members of the General Assembly. . . ." (Emphasis supplied.)

It is my opinion that the effect of these two provisions read together is to establish a minimum age of twenty-one for membership in either House of the General Assembly. There can be no doubt that this result was intended by the General Assembly when it drafted the Constitution, as the age clause was not included in the original draft and was added by the General Assembly to ensure that the minimum age for membership would be twenty-one. See Proceedings And Debates Of The House Of Delegates Pertaining To Amendment Of The Constitution, pages 46-48.

CEMETERIES—Endowment Care Fund—Deposits into fund not required under § 57-35.3 unless lots, etc. sold.

February 1, 1973

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

This is in reply to your letter of January 30, 1973, which reads as follows:

"I would appreciate your giving me your opinion relative to the application of Chapter 3, Article 3.1, Title 57, Sections 57-35.1 through 57-35.10 to cemetery lots given to heads of households without payment of any consideration. I am particularly concerned with whether or not there would have to be any contribution to the perpetual care fund as provided for in Section 57-35.3.

"A local cemetery is contemplating giving one burial space to the head of a household as a part of its heritage program. There would be no
consideration required and the recipient would not have to make any purchases of additional lots. Under such circumstances it would not appear that the statute contemplates any payment into the endowment fund as payment is not required until the sale of a graveyard has been consummated by final payment."

Section 57-35.3 of the Code of Virginia (1950), as amended, reads as follows:

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

This section provides that a deposit of a minimum of ten per centum of the selling price of each lot sold be made in the endowment care fund. Where the lot in the cemetery is given as a gift and no sale of the lot is involved, I am of the opinion that the deposit is not required.

CENTRAL CRIMINAL RECORDS EXCHANGE—Authority to Furnish All Information Submitted by FBI.

CENTRAL CRIMINAL RECORDS EXCHANGE—No Authority to Release Information to Notary Public Investigating for Private Employers.

NOTARIES PUBLIC—Not Entitled to Information from Central Criminal Records Exchange for Investigations for Private Employers.

June 21, 1973

The Honorable H. W. Burgess, Superintendent
Department of State Police

In your recent letter you seek an opinion concerning the release of information from the Central Criminal Records Exchange.

First, you want to know if § 19.1-19.2(b) of the Code permits the Exchange to furnish all arrest data as shown on the FBI reports even though some of the information concerns arrests from out-of-state and Virginia offenses which are not required to be reported to the Exchange.

Section 19.1-19.2(a), provides in part that, "[t]he Exchange shall also receive, record, and file the FBI record of any person as furnished by the Federal Bureau of Investigation." This language clearly states that the Exchange is to record the FBI information as furnished. Therefore, it is my opinion that the Exchange has the authority to furnish all information submitted to it by the Federal Bureau of Investigation.

Second, you want to know if § 19.1-19.2(b) authorizes the Exchange to release records upon the request of a notary public who is a private investigator doing personnel and other investigations for private employers.

Sections 47-1 and 47-2 provide that notaries public shall exercise the powers and functions of conservators of the peace. Section 19.1-20 provides in part that every conservator of the peace shall arrest without a warrant for felonies committed
in his presence, or upon reasonable suspicion of felony, and for breaches of the peace and all misdemeanors of whatever character committed in his presence.

Section 19.1-19.3(a) provides in part that a conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange of those arrests required to be reported. Section 19.1-19.2(b) provides in part that the Exchange shall furnish copies of the records in its files on request from any official or agency required to make reports to it. It would appear that since a notary public, as a conservator of the peace, is required to make reports to the Exchange that he would be entitled to copies of the records of the Exchange. However, § 19.1-19.2(b) further provides that such records shall not be made available to the public. Your inquiry advises that the notary public making the request for the records is doing so in his capacity as a private investigator doing personnel and other investigations for private employers. Since the private employers are not authorized to secure the records of the Exchange, and since the statute specifically states that the records shall not be made available to the public, I am of the opinion that the notary public would not be entitled to the records of the Exchange under these circumstances.

CHARTERS—General Assembly May Provide by Special Act for the Powers of Localities.

CHARTERS—Prevail over General Provisions of Law.

TAXATION—Personal Property; Proration of Tax.

The Honorable Charles Aubrey Callahan
Commissioner of the Revenue for the City of Alexandria

I have received your letter of October 13, 1972, inquiring whether certain provisions of Chapter 492, Acts of Assembly of 1970, are prohibited by Section 63 of the Constitution of Virginia and § 58-834, et seq., Code of Virginia (1950), as amended.

Section 2.05(j) of Chapter 492 amended the City Charter of Alexandria to provide for the assessment of personal property taxes during the year on motor vehicles, boats and trailers which are registered by their owners after January first and for proration of the tax for the balance of the year. Section 63 of the Constitution prohibits the General Assembly from enacting any local, special or private law for the assessment and collection of taxes.

The issue to which your inquiry is addressed has been presented to the Supreme Court of Virginia upon several occasions. The Court discussed the subject at length in Fallon Florist v. City of Roanoke, 190 Va. 564 (1950), and concluded that the provisions of Section 63 were not applicable to the enactment or amendment of charters of municipal corporations because Section 117 authorized special charters conferring rights and powers different from and in addition to those conferred by general statutes. See also Pierce v. Dennis, 205 Va. 478 (1964).

Section 63 continues substantially unchanged in the revised Virginia Constitution as Article IV, Section 14. Section 117 was replaced with Article VII, Section 2, which makes explicit the power of the General Assembly to provide by special act for the powers of localities "... including such powers of legislation, taxation, and assessment as the General Assembly may determine..." (Emphasis supplied.)

In view of the foregoing, it is my opinion that the provisions of the City Charter authorizing prorated taxation of personal property, and enacted pursuant to
Section 117, are not prohibited by Section 63 of the Constitution and take precedence over the general provisions of Title 58 relating to the assessment of such property.

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CHILDREN—Support for Illegitimate Child; Provisions of § 20-61.1 as Amended.

CONSTITUTIONAL LAW—Retrospective or Ex Post Facto Prohibitions Apply Only to Criminal Offenses.

CRIMINAL LAW—Action Under § 20-61.1 Is Not a Criminal Law; Authorizes Court to Enter Judgment for the Support of Illegitimate Child.

DIVORCE—Section 20-61.1 Not Applicable to Support Orders in Divorce Action.

March 23, 1973

THE HONORABLE SAM D. EGGLESTON, JR.
Commonwealth's Attorney for Nelson County

This is in response to your letter in which you requested my opinion with regard to § 20-61.1 of the Code of Virginia as it was amended by the legislature in 1972. Specifically you asked the following questions:

"Question No. 1: Are the provisions of the 1972 amendment applicable only to facts arising after this amendment went into effect, or are they applicable to such a father who was not previously liable for support of his illegitimate children, under the previous law and under previously existing facts, but who would now be liable under the 1972 amendment? In other words, to what extent is the 1972 amendment retrospective, in keeping with the Constitutional prohibition against ex post facto laws?"

"Question No. 2: Will the answer to Question No. 1 be any different if the question of support by such a father arises in a suit for divorce in a court of record; and does Section 20-61.1 as amended in 1972 apply to support orders in a divorce suit in a court of record, and if so, to what extent?"

I will answer your questions in the order in which you have presented them.

In my opinion the provisions of § 20-61.1 are applicable to facts arising prior to the 1972 amendment in determining whether the court should enter an order of support for an illegitimate child.

Section 20-61.1 prior to its amendment in 1972 provided, in pertinent part:

"Whenever in proceedings hereafter under this chapter concerning a child whose parents are not married, a man admits before any court having jurisdiction to try and dispose of the same, that he is the father of the child or the court finds that the man has voluntarily admitted paternity in writing, under oath, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock."

In 1972 the legislature amended § 20-61.1 and authorized a court to enter the judgment for the support, maintenance and education of the child.

"If it be shown by other evidence beyond reasonable doubt that he is the father of the child and that he should be responsible for the support of the child . . . Such other evidence that the man should be responsible for the support of the child shall be limited to evidence of the following:

"(1) That he cohabited openly with the mother during all of the ten
months immediately prior to the time the child was born; or

“(2) That he gave consent to a physician or other person, not including the mother, charged with the responsibility of securing information for the preparation of a birth record that his name be used as the father of the child upon the birth records of the child; or

“(3) That he allowed by a general course of conduct the common use of his surname by the child; or

“(4) That he claimed the child as his child, on any statement, tax return or other document filed and signed by him within a local, State or federal government or any agency thereof.”

There is no total prohibition on retrospective legislation. The legislature possesses the power to enact such legislation if the statute does not have the effect of impairing the obligation of a contract or is not destructive of vested rights. *Hagen v. Hagen*, 205 Va. 791 (1965). In the support of children there are no contractual rights involved nor does the father have a vested right not to pay for his child's support and maintenance. In *McClain v. Commonwealth*, 189 Va. 847 (1949), the court held that retrospective criminal or penal laws that do not deprive a person of some constitutional right to which he was entitled under the law at the time of the offense are beyond the scope of the ex post facto prohibition.

The situation here is analogous to that faced by the Virginia Supreme Court in *Hufman v. Commonwealth*, 210 Va. 530 (1970). In that case a driver's license was revoked under the habitual offender provisions of the Code. In applying the law, the lower court based its action on motor vehicle violation that had occurred prior to the passage of the act. Here the court was called upon to take action against a person's privilege to drive an automobile for acts performed prior to the enactment of the habitual offender legislation. Those same acts, at the time committed, did not carry with them the same consequences as they did subsequent to the legislation. The court held that the prohibition against the enactment of ex post facto laws which are found in both the United States and Virginia Constitutions apply only to criminal offenses. *Hufman v. Commonwealth*, supra. The prohibition against ex post facto laws is infringed only where a law establishes a punishment for an act or acts previously committed which were not at that time punishable. 16 Am. Jur. 2d, Con. law, § 397.

An action under § 20-61.1 of the Code is not a criminal or penal law in that it does not provide for a penalty or a punishment. The statute simply authorizes a court to enter judgment for the support of a child. Obviously, the court is not authorized to enter a judgment for the support of any child which requires payments for a period which antedates the order of the court. All such orders must have prospective effect. The father is not subjected to incarceration or other punishment until he has violated the court's order in failing to provide for the child's support.

The Mississippi Supreme Court was faced with legislation similar to that raised in your letter. A support statute in Mississippi had required that a petition for the support of a child by his father must be filed within one year after the child's birth. The child in the instant case was born twenty-two months prior to the effective date of an amendment to that law. The new law provided that, upon proper proof, a father of an illegitimate child could be required to support his child as if he were a legitimate child and repealed the one year statute of limitations. The question of retroactivity and the constitutional ex post facto prohibition was raised. The Court held that such proceedings were not criminal and that the ex post facto prohibitions did not apply. The Court also held that an act was not retroactive merely because it draws on antecedent facts. *Dunn v. Grisham*, 250 Mis. 74, 157 So. 2d 766 (1963).
I would, therefore, conclude that in a proceeding for the support of an illegitimate child pursuant to § 20-61.1 of the Code, the Court may consider evidence that the father should be responsible for the support of the child as provided in the statute, even though the facts being considered occurred prior to the effective date of the amendments to this section of the Code.

In answer to your second question, I do not believe that § 20-61.1 of the Code is applicable to support orders in a divorce action. The statute specifically relates to "... a child whose parents are not married..." The long standing presumption of legitimacy of children born in wedlock is in no way affected by the amendment to this section.

CITIES—Attorneys—City of Colonial Heights—Construing charter provisions of.

ATTORNEYS—City of Colonial Heights—Construing charter provisions of.

GENERAL ASSEMBLY—Bills Affecting Charter Changes—May be considered by odd-numbered year term.

October 24, 1972

THE HONORABLE ELMON T. GRAY
Member, Senate of Virginia

This is in reply to letters of October 16 and 17, 1972, in which you requested my opinion on several questions involving the City Council of Colonial Heights.

Your questions were:

"QUESTION 1. Does the Colonial Heights City Council have the power to ‘excuse’ the city attorney from his position and appoint legal counsel to perform the city attorney’s duties?"

"QUESTION 2. Does the Colonial Heights City Council have the power to hire legal counsel without such action going through the Department of Law?"

"QUESTION 3. Does this legal counsel have the power to perform the city attorney’s duties?"

"QUESTION 4. If it is legal to hire special counsel to perform the duties of the city attorney, can a non-resident attorney be hired with a 4-3 majority vote of council?"

I shall answer these questions seriatim.

1. Section 10.1 of the City Charter of Colonial Heights provides that there shall be a department of law which shall consist of the city attorney and such assistant city attorneys and the employees as may be provided by ordinance. Section 10.5 of the Charter requires the City to elect a city attorney and Section 20.9 provides that the city attorney shall continue to hold office until his successor is appointed and qualified.

I am of the opinion, therefore, that the City Council may accept the resignation of the city attorney but may not “excuse” him from that office. In the event his office becomes vacant, then the city attorney must serve until his successor has been appointed by the council and has qualified. Therefore, the City Council may not “excuse” the city attorney and may not appoint legal counsel to perform his duties, except by appointment of a new city attorney.

2. I find no authority in the City Charter for the City Council to hire legal counsel to replace the city attorney unless such counsel is appointed city attorney to head the department of law.
3. Any legal counsel hired, whether resident or nonresident, would be unable to perform the city attorney's duties unless he be appointed city attorney.

4. A nonresident attorney may be appointed city attorney under Section 10.5 of the City Charter, that section reads, in part:

"In addition to the other power conferred upon the city by general law, the city council shall have the power to elect or appoint by resolution adopted by not less than five affirmative votes a city attorney who shall not be required to reside in or be a resident of the city at the time of his election or appointment or during the term of his office for which he was elected or appointed."

In view of this explicit language of the charter, I am of the opinion that a nonresident attorney may not be appointed by a 4-3 majority vote of the council and must receive at least five affirmative votes.

You also ask whether the next session of the General Assembly may entertain charter change bills. Article IV, Section 6, of the Constitution of Virginia, revised and effective July 1, 1971, contains no prohibitions against the submission of charter changes during the sessions held during an odd-numbered year. The rules of the Senate and House have established no such restrictions. I am, therefore, of the opinion that bills effecting charter changes may be considered by the General Assembly at its next session.

CITIES—Charter of Alexandria Does Not Permit Councilmen to Hire Staff Assistants.

CHARTERS—City May Obtain Desired Power From General Assembly by Amendment of Its Charter or Enactment of a General Law.

June 19, 1973

THE HONORABLE LEROY S. BENDHEIM
Member, Senate of Virginia

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

"The City Council of the City of Alexandria, Virginia will soon consider a proposal that each councilman be allowed to hire a staff assistant. The details have not been worked out, but the basic concept is to provide each councilman with one or more assistants similar to Administrative Assistants to congressmen. Each councilman would be allowed $10,000 per year from the city budget for this purpose. Each assistant would be hired by and be responsible to his individual councilman and would not be an employee of the city or in any way a participant in the city personnel system, except for the purpose of compensation.

"The City Charter (Acts 1950, Chapter 536, as amended) does not appear to contain any express language giving the City Council the power to carry out the proposal, however, Section 3.02 of the Charter does provide for compensation of the Council.

"I would appreciate your opinion on the following questions:

"Is there any provision in the City Charter of Alexandria that would give the city the power to carry out the proposal?

"Is there any provision of general law that gives the city the power?

"Is there any case law or principle of law that would give the city the power?

"If your answer is no to all the above questions, would it be preferable
for the city to seek the power by amendment to the City charter or general law."

I am unable to find any legal authority for the City Council to implement the proposal in question. I, therefore, answer your three questions in the negative. The City could obtain the desired power from the General Assembly either through amendment of Section 3.04(f) of its charter or by the enactment of a general law.

CITIES—Lynchburg—Charter empowers council to abolish, declare vacant or consolidate any office council has power to fill.

July 10, 1972

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in reply to your letter of June 27, 1972, in which you ask whether the city council of Lynchburg is authorized to abolish the office of city clerk and auditor and place the duties of these offices in an administrative position under the city manager’s office.

Section 38 of the city charter contains the powers of the city. The twenty-eighth subsection of this section empowers the council to abolish, or declare vacant or consolidate, any office which the council has the power to fill by appointment or election. By this subsection the council is empowered to appoint a city auditor. By section 16 of the charter it is directed to elect a city clerk and city auditor.

In view of the language of these provisions of the city charter, I am of the opinion that the city council is empowered to abolish the offices of city clerk and auditor and to consolidate these offices with any other of the offices that the council has the power to fill by election or appointment, or consolidate any such office with any office to which the incumbent is elected by the voters of the city. So long as the actions of the council are within the authority granted by subsection twenty-eight, they are lawful.

CITIES AND COUNTIES—Authority to Create Legal or Administrative Entity to Which Division of Justice and Crime Prevention May Grant Funds and Enforce Conditions of Agreement.

DIVISION OF JUSTICE AND CRIME PREVENTION—Authority of Cities and Counties to Create Legal or Administrative Entity to Which DJCP May Grant Funds and Enforce Conditions of Agreement.

March 7, 1973

THE HONORABLE RICHARD N. HARRIS, Director
Division of Justice and Crime Prevention

This is in reply to your recent letter in which you ask my opinion on the following questions:

"1. Where cities and counties avail themselves of the provisions of Section 15.1-21 and comply therewith, do such agreements result in a legal or administrative entity to which the DJCP may grant funds and enforce the conditions and agreements attached to such grants in the same manner as though the grant were made to a local unit of general government?

"2. If the DJCP may make grants to the entity established by counties..."
and cities in conformance with Section 15.1-21, may such grants be considered as having been made to combinations of units of general local government as contemplated by Section 2.1-64.24 of the Code of Virginia and the Omnibus Crime Control and Safe Streets Act of 1968, as amended?

"3. Provided that the DJCP is empowered to make awards to an entity formed in accordance with Section 15.1-21, may cities or counties forming such entity be held liable, jointly and severally, for any breaches of contracts, conditions or agreements entered into with the DJCP as a result of grant awards from the DJCP?

"4. If the DJCP makes grants to the entity established under Section 15.1-21, or makes grants to be implemented by that entity, may the DJCP require that the grantee of record be one of the cities or counties which are parties to the agreement, making that county or city solely responsible for the grant award and its proper administration?

Section 15.1-21 of the Code of Virginia (1950), as amended, reads:

"(a) Any power or powers, privileges or authority exercised or capable of exercise by any political subdivision of this State may be exercised and enjoyed jointly with any other political subdivision of this State.

"(b) Any two or more political subdivisions may enter into agreements with one another for joint or cooperative action pursuant to the provisions of this section. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating political subdivisions shall be necessary before any such agreement may enter into force.

"(c) Any such agreement shall specify the following:

"(1) Its duration.

"(2) The precise organization, composition and nature of any separate legal or administrative entity created thereby, together with the powers delegated thereto, provided such entity may be legally created.

"(3) Its purpose or purposes.

"(4) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.

"(5) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.

"(6) Any other necessary and proper matters.

"(d) In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall, in addition to items (1), (3), (4), (5) and (6) enumerated in subdivision (c) hereof, contain the following:

"(1) Provision for an administrator or a joint board responsible for administering the joint or cooperative undertaking. In the case of a joint board public agencies party to the agreement shall be represented.

"(2) The manner of acquiring, holding and disposing of real and personal property used in the joint or cooperative undertaking.

"(e) No agreement made pursuant to this section shall relieve any political subdivision of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, said performance may be offered in satisfaction of the obligation or responsibility.
“(f) Any political subdivision entering into an agreement pursuant to this section may appropriate funds and may sell, lease, give, or otherwise supply the administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking by providing such personnel or services therefor as may be within its legal power to furnish.”

I shall answer your questions seriatim:

1. Where cities and counties, each having the authority sought to be exercised jointly, have availed themselves of the provisions of § 15.1-21 and have specified in their agreements the precise organization, composition and nature of any separate legal or administrative entity created thereby, together with the powers delegated thereto, the entity so created may be a legal or administrative entity to which the Division of Justice and Crime Prevention may grant funds and enforce the conditions and agreements attached to such grants in the same manner as though the grant were made to a local unit of general government. The Division should insure that the separate legal or administrative entity is clearly established and that it is empowered to accept the grant of funds and to comply with the conditions of the grant. There could be no grant of power to the entity exceeding that reposing in each of the local governing bodies.

2. Section 2.1-64.24(1) of the Code empowers the Division of Justice and Crime Prevention to make and enter into contracts with units of general local government, or combinations thereof, in the State. I am of the opinion that an entity properly established under § 15.1-21 of the Code is a combination of units of general local government as contemplated by this section.

3. The cities and counties comprising the separate entity would be responsible for breaches of contracts, conditions or agreements entered into with the Division of Justice and Crime Prevention by the entity unless the agreements setting up the entity provide to the contrary.

4. Where the Division of Justice and Crime Prevention makes grants to an entity established under § 15.1-21, or makes grants to be implemented by that entity, it may not require the grantee of record be one of the cities or counties which are parties to the agreement, making such city or county solely responsible for the grant without requiring the other counties or cities be equally responsible.

CITIES AND COUNTIES—Reimbursement—From Division of Justice and Crime Prevention.

JUSTICE AND CRIME PREVENTION, DIVISION OF — Reimbursement to localities.

December 4, 1972

Mr. William L. Lukhard, Director
Department of Welfare and Institutions

This is in reply to your letter of October 31, 1972, wherein you pointed out that the Division of Justice and Crime Prevention has as among its duties that of determining benefits accruing to the Commonwealth and its units of local government in accordance with the provisions of the Omnibus Crime Control and Safe Streets Act, and to receive, administer, and expend funds available to the Division under that Act. You then stated that the Act makes it mandatory that the Division make 75% of all Part C Block Grant Funds awarded to Virginia available to local units of government, and that the Division has been making grants to local units of government for the purpose of establishing juvenile probation departments. You further stated that the Division makes funds available
to local units of government in advance of expenditures of funds by it, and that the grants have been used to compensate juvenile probation officers and stenographic assistants to probation officers.

Referring to §§ 16.1-206 and 16.1-206.1, Code of Virginia (1950), as amended, you asked the following questions:

1. “When a locality receives an award from the Division of Justice and Crime Prevention to compensate probation officers, is such money so awarded and expended for such compensation to be considered as being ‘paid out of the county or city treasury’ and, therefore, subject to the reimbursement provisions of Section 16.1-206 of the Code?

2. When a locality receives an award from the Division of Justice and Crime Prevention to compensate secretarial assistance to probation officers and so expends such funds, is such money to be considered as an expenditure by the county and therefore subject to the reimbursement provisions of Section 16.1-206.1 of the Code?”

The Division of Justice and Crime Prevention, established under §§ 2.1-64.23 through 2.1-64.28, both inclusive, is possessed with the following powers and duties, among others, pursuant to § 2.1-64.24:

“(i) To receive, administer, and expend all funds and other assistance available to the Division for carrying out the purposes of this chapter and the Omnibus Crime Control and Safe Streets Act of 1968 and the Juvenile Delinquency Prevention and Control Act of 1968, and any amendments thereto.”

“(j) To apply for and accept grants from the United States government and agencies and instrumentalities thereof and from any other source in carrying out the purposes of this chapter. To these ends, the Division shall have the power to comply with conditions and execute such agreements as may be necessary.”

Section 16.1-206, presently in effect, provides that probation officers “shall be paid out of the county or city treasury; provided that one-half of such compensation shall be reimbursed to the city or county by the State from funds appropriated to the Department of Welfare and Institutions.” Section 16.1-206.1, presently in effect, provides that one-half of any expenditures, in a case where a county provides separate probation service for its juvenile and domestic relations court “made by such county for secretarial and stenographic assistants to such probation officer or officers shall be reimbursed to such county by the State.”

It is provided in 42 U.S.C.A. § 3731 (1970), as amended, (Supp. I, 1972), in part, as follows:

* * *

“(b) The (Law Enforcement Assistance) Administration is authorized to make grants to states having comprehensive state plans approved by it under this subchapter, for—

* * *

(9) The development and operation of community based delinquent prevention and correctional programs, emphasizing half-way houses and community based rehabilitation centers for initial preconviction of (sic) post conviction referrel (sic) of offenders; expanded probationary programs, including paraprofessional and volunteer participation; and community service centers for the guidance and supervision of potential repeat youthful offenders.” (Emphasis supplied.)

In 42 U.S.C.A. § 3733 (1970), as amended, (Supp. I, 1972), it is provided, in part, as follows:
"The Administration shall make grants under this chapter to a State planning agency if such agency has on file with the Administration an approved comprehensive State plan (not more than one year in age) which conforms with the purposes and requirements of this chapter. . . ."

(Emphasis supplied.)

It is further provided in 42 U.S.C.A. § 3734 (1970), in part, as follows:

"State planning agencies shall receive applications for financial assistance from units of general local government and combinations of such units. When a State planning agency determines that such an application is in accordance with the purposes stated in section 3731 of this title, and is in conformance with any existing statewide comprehensive law enforcement plan, the State planning agency is authorized to disburse funds to the applicant."

In 42 U.S.C.A. §§ 3735 and 3736 (1970), as amended, (Supp. I, 1972), it is provided that when a State fails to file a comprehensive plan in accordance with the provisions therein outlined, the Administration may allocate funds to units of general local government or combinations thereof.

It is clear that from the above-quoted sections that, with the exception of §§ 3735 and 3736, grants are made to the State and not to units of local general government. The Division of Justice and Crime Prevention is clothed with the authority to disburse funds pursuant to § 3734, and obviously has discretion in whether a grant will be made to a general local government unit. The funds, therefore, are State funds and are not to be considered as “paid out of the county or city treasury,” nor as “expenditures made by such county,” as referred to in §§ 16.1-206 and 16.1-206.1.

In my opinion, therefore, a locality is not entitled to reimbursement under the provisions of § 16.1-206 or § 16.1-206.1 because the grants are State funds paid to the locality and are not funds paid out of the locality’s treasury.

CITIES AND TOWNS—City of Colonial Heights—Authority of city council over Department of Recreation and Parks.

February 12, 1973

The Honorable George W. Jones
Member, House of Delegates

This is in reply to your letter of February 6, 1973, in which you ask the following two questions relating to the Department of Recreation and Parks of the City of Colonial Heights. You ask the following two questions:

"1. Is it necessary for the City Council to authorize by Ordinance or Resolution, the authority for a director of its recreational department to levy fees, enrollment memberships, sponsor's fees, etc.

"2. Should such funds collected by a director or other authority be returned to the City Treasurer with appropriate accounting."

I shall answer your questions seriatim:

(1) Section 16.1 of the Charter of the City of Colonial Heights provides for a Department of Recreation and Parks to consist of the director and such other officers and employees, organized in such bureaus, divisions and other units as may be provided by ordinance, or by the orders of the director consistent therewith.

Section 16.1 of the Charter provides that:

“When authorized by the Council and upon such terms and conditions
as it may provide, the Department of Recreation and Parks may lease concessions and other facilities in the public parks and grounds under its jurisdiction, fix and collect charges for the use of its facilities and services, and fix and collect charges for admission to concerts, entertainments and other recreational activities sponsored by it and sell or exchange the surplus products of the city nurseries."

The exercise of authority by the Council is required by this section for the Department of Recreation and Parks and/or its director to fix and collect charges for the use of its facilities.

(2) The Council, under § 16.1, determines how charges are collected and to whom they are paid. Therefore, this is a matter to be determined by the Council.

CITIES, COUNTIES AND TOWNS—Consolidation Agreement of City of Nansemond.

CHARTERS—Consolidation Agreement of City of Nansemond; Special Act Takes Precedence over General Law.

ELECTIONS—Effect of Consolidation Agreement of City of Nansemond; Special Act Takes Precedence over General Law.

The Honorable W. O. Jones
Treasurer of Nansemond County

In your letter of August 17, 1972, you inquire whether the constitutional officers of the new City of Nansemond, who were elected in 1971 prior to that city's incorporation for four-year terms, must run for re-election in 1973 as required by Article X, Section 2, of the Consolidation Agreement adopted in lieu of a charter pursuant to Article 4 of Chapter 26 of Title 15.1 of the Code of Virginia (1950), as amended.

I have previously ruled, in an opinion to the Honorable J. Samuel Glasscock, Member, House of Delegates, dated February 11, 1972, a copy of which is attached, that a consolidation agreement thus adopted is full authority for the consolidation and the necessity for a formal charter is obviated. In effect, the procedure under Article 4 of Chapter 26 is a statutory delegation of the General Assembly's authority to enact a city charter, and a consolidation agreement if adopted through this procedure must be accorded the same weight as would a charter formally adopted by that body. As such, it is a special act for the city and as a special act will take precedence over the provisions of general law.

It is my opinion, therefore, that the constitutional offices of the City of Nansemond must be filled in accordance with Article X, Section 2, of the Consolidation Agreement, which reads as follows:

"Since some constitutional officers come up for election in the counties and cities of the Commonwealth in 1971 and 1973, respectively, it is desirable that the terms of constitutional officers in the City of Nansemond conform to such requirements of law. Accordingly, a sheriff, attorney for the Commonwealth, treasurer and commissioner of revenue shall be filled by election in November, 1973, to take office January 1, 1974, for terms of four years. Thereafter, such offices shall be filled by election for terms of four years. The election of the officers in November, 1973, and their qualification on January 1, 1974, shall terminate the terms of office of their predecessor.

"It is not the intention of the parties to this agreement to shorten the
term of any officer but they are attempting to comply with present state law and in the event the state law is changed to allow the above named constitutional officers to be elected in the year 1975 then the constitutional officers elected in 1971 shall serve until December 31, 1975."

In your letter, you refer to the situation which arose in the Cities of Virginia Beach and Chesapeake following their incorporation on January 1, 1963. The Charter of the City of Virginia Beach (Acts of Assembly of 1962, c. 147) provided in § 21.02:

"The offices of clerks of the courts of record, attorney for the Commonwealth, commissioner of the revenue, city treasurer and city sergeant shall be elective and filled in accordance with the provisions of the Constitution of the Commonwealth and in accordance with the provisions of general law."

The Charter of the City of Chesapeake (Acts of Assembly of 1962, c. 211), on the other hand, provided in its § 21.02:

"The offices of clerks of the courts of record, attorney for the Commonwealth, commissioner of revenue, city treasurer and city sergeant shall be elective and filled in accordance with the provisions of the Constitution and general laws of the Commonwealth, except that the attorney for the Commonwealth, commissioner of revenue, city treasurer and city sergeant elected in November 1963 shall serve for terms of two years so as to conform to the schedule of election of such officers for cities, and thereafter such officers shall be elected for terms of four years."

I am unable to find any opinion of this office involving a question similar to yours with respect to either of these two cities. Regardless of this, however, I am required to rule as aforesaid with respect to the City of Nansemond, since the effect of the consolidation of Nansemond County with the Towns of Whaleyville and Holland was to terminate the existence of those bodies as governmental entities and, with such termination, eliminate by operation of law the constitutional offices thereof. Problems of transition were met by the provisions of Article X, Section 1, of the Consolidation Agreement, which provided for the continuance in office of the Nansemond County officers in lieu of calling a special election. These provisions of the Agreement, adopted by the voters of the three jurisdictions under the statutory procedure, must be controlling. See Walker v. Massie, 202 Va. 886 (1961), where the Supreme Court of Virginia stated in a similar case involving the consolidation of the cities of Newport News and Warwick:

"The power to provide for a complete change in the form of county organization and government includes the power to abolish the old form and all thereunder. The incidental effect may be to oust or deprive the old officers of their offices before the expiration of their terms. When these officers accepted their respective offices they did so with the knowledge that the Constitution had authorized the legislature to provide a method by which the electors of the county might change their form of government and abolish the office to which they had been elected." Citing Lipscomb v. Nuckols, 161 Va. 936 (1934).
REGISTRAR—Compensation of.

REGISTRAR—Number of Days Worked Is Within Sole Discretion of Electoral Board.

March 1, 1973

THE HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

In your letter of February 26, 1973, you inquire whether the governing body of a county may limit or restrict the number of days of work performed by the general registrar, and whether the governing body may refuse to compensate the registrar for services performed at the direction of the electoral board in excess of any such limitation.

Section 24.1-49 of the Code of Virginia (1950), as amended, is responsive to your inquiry. That section provides, in pertinent part, as follows:

"Each general registrar in this Commonwealth shall, thirty days before the day fixed by law for every regular primary election and every general election which will be held in his jurisdiction, hold a regular registration day and such additional days, other than the regular registration days, for the registration of qualified voters, which shall be not less than one day each month, and such other additional registration days and places for registration as may be ordered by the electoral board.

It is clear from this provision that the number of days per week during which the general registrar is to work is within the sole discretion of the electoral board, and the governing body has no authority to impose limits or restrictions on that number either directly or indirectly.

As for the refusal to compensate the registrar for his or her services, § 24.1-43 of the Code provides in part as follows:

"General registrars shall receive as compensation for their services twenty dollars for each day of service or portion thereof. The local governing body may pay such additional compensation as it deems necessary."

While the governing body does have the discretion to increase the salary of the general registrar in accordance with the second sentence, the minimum per diem salary fixed by the first sentence quoted is mandatory and must be paid by the governing body. Should the county fail to pay the aforesaid sum for each day of service or portion thereof, mandamus would lie to compel such payment.

CIVIL DEFENSE—Federal Departments, Agencies or Institutions or Agents Engaged in Are Representatives of State or Political Subdivisions; Not Liable for Injury to Persons or Damage to Property.

August 18, 1972

THE HONORABLE THOMAS P. CREDLE
State Coordinator, Office of Civil Defense

This is in reply to your letter of July 28, 1972, in which you requested my opinion whether the Corps of Engineers or other Federal departments, agencies or institutions while engaged in civil defense activities as described in § 44-145.2 of the Code of Virginia (1950), as amended, are absolved by that section from liability for the death of or any injury to persons, or damage to property.

The Legislature of Virginia in enacting § 44-145.2 of the Code extended the provisions thereof to the State, political subdivisions thereof, other agencies, and
to their agents, employees, or representatives while engaged in civil defense activities.

I am of the opinion that the Corps of Engineers or other Federal departments, agencies or institutions or agents, are representatives of the State or political subdivisions when they are actively engaged in civil defense activities in the State and are therefore absolved of liability for the death of or any injury to persons, or damage to property by § 44-145.2 of the Code.

CIVIL DEFENSE—Local Director—May be member of board of supervisors.

BOARDS OF SUPERVISORS—Member—May be local Civil Defense Director.

January 10, 1973

THE HONORABLE H. WOODROW CROOK, JR.
Commonwealth’s Attorney for Isle of Wight County

This is in response to your recent letter wherein you inquire whether a chairman or other members of a board of supervisors may accept appointment as a local Civil Defense Director.

I previously ruled in an opinion to the Honorable Benjamin F. Sutherland, Commonwealth’s Attorney for Dickenson County, dated May 8, 1972, that absent executive order by the Governor, pursuant to § 44-145(b) of the Code of Virginia (1950), as amended, the selection of a member of a board of supervisors to serve as local Civil Defense Director would be violative of § 15.1-50. Subsequently, on September 7, 1972, the Governor, pursuant to § 44-145(b), directed that the governing body of the county in selecting a local Civil Defense Director, may choose one of its own members. Based upon the action of the Governor, I am of the opinion that there would be no violation of § 15.1-50.

Additionally, I am of the opinion that there would be no violation of either Chapter 4 (Disabilities to Hold Office Act) or Chapter 22 (Virginia Conflict of Interests Act) of Title 2.1. The Disabilities to Hold Office Act operates with respect to the holding of State and Federal offices. While the local Civil Defense Director receives Federal money, he is a State officer and, therefore, such Act is inapplicable with respect to the office in question.

I am also of the opinion that the Virginia Conflict of Interests Act is inapplicable since § 44-145(b) permits the Governor by executive order to designate those persons or class of persons from whom the civil defense director may be chosen.

CIVIL PROCEDURE—Action of Detinue; Prejudgment Repossession of Personal Property.

CIVIL PROCEDURE—Common Law Action of Replevin Has Been Abolished in Virginia.

October 18, 1972

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

This is in reply to your recent letter in which you requested my opinion as to the constitutionality of certain provisions of Chapter 26, Title 8, §§ 8-586 through 8-595, Code of Virginia (1950), as amended, in light of the decision of the United States Supreme Court in Fuentes v. Shevin, 407 U. S. 67 (1972).
The provisions in question provide procedures for the action of detinue and, especially, prejudgment repossession of personal property by agents of the state upon the application of and for the benefit of a private party.

In the *Fuentes* case, the United States Supreme Court, in a four to three decision, held the prejudgment replevin provisions of Florida and Pennsylvania law to be invalid under the Fourteenth Amendment in that they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor.

Unlike the common law action of replevin, which provided for some form of prior notice or hearing and was used to retrieve property wrongfully taken, prejudgment replevin statutes of most states are commonly used by creditors to seize goods allegedly wrongfully detained by debtors. *Id.* at 79. Both Florida and Pennsylvania permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of *ex parte* application to a court clerk upon the posting of a bond for double the value of the property to be seized. The sheriff, or other public officer, is then required to execute the writ by seizing the property; however, the property is not delivered to the plaintiff for a seventy-two hour period during which time the defendant may post a counter-bond and reclaim possession of the property until a final decision on the merits. See Florida Statutes, §§ 78.01-78.13; Pennsylvania Rules of Civil Procedure, Rules 1073-1077.

Both statutes provide for the issuance of writs ordering state agents to seize a person’s possessions through the replevin process, but neither statute provides for notice to be given to the possessor of the property nor gives the possessor an opportunity to challenge the seizure at any kind of prior hearing. There is no requirement that the applicant for the writ make a convincing showing, before seizure, that the goods have been wrongfully detained. Under the Florida law, the defendant will eventually have an opportunity for a hearing, because it is required that the applicant for the writ of replevin must first initiate a court action for repossession. No such requirement for the initiation of court action for repossession exists under the Pennsylvania law. *Id.*

The issue raised in *Fuentes* was “whether procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another.” *Fuentes* v. *Shevin*, *supra* at 80.

To this basic question, the Court answered in the affirmative. It is fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner and, if the right to notice and a hearing is to serve its full purpose, it must be granted at a time when the deprivation can still be prevented. *Id.* at 80, 81. Furthermore, although the Florida and Pennsylvania statutes do not require a person to wait until a post-seizure hearing and final judgment to recover what has been replevied (i.e., through counter-bond procedures), a temporary, non final deprivation of property is nonetheless a deprivation in the terms of the Fourteenth Amendment. *Id.* at 85: *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

The common law action of replevin has been abolished in Virginia. See § 8-647, Code of Virginia (1950), as amended. In Virginia, if a creditor wishes to invoke State power to recover goods wrongfully detained, he must proceed through an action of detinue. Except for the name given to the action, the actions of detinue in Virginia and of replevin in Florida are utilized to accomplish the same ends through strikingly similar procedure.

In Virginia, as in Florida, a creditor may make an *ex parte* application by affidavit, accompanied by a bond in a value of at least double the estimated value of the property claimed. In the affidavit the creditor must state that he is
entitled to recover the property and that he has good reason to believe one of several conditions exists which may jeopardize the creditor's interest in the property as a probable consequence of the possessor's continued retention. Upon this application, the clerk of the court is required to issue an order directed to the sheriff, or other proper officer, commanding him to seize the property and deliver the same to the plaintiff forthwith. \textit{Id.} §§ 8-586, 8-587. Section 8-588 of the Code provides, as does the Florida statute, that at any time after seizure the defendant in the detinue action may obtain the return of the property pending final court decision in the action upon the posting of a counter-bond in an amount of at least double the estimated value of the property. The Virginia statute further provides, \textit{after} the goods have been seized by the sheriff and reasonable notice to the plaintiff has been given, a hearing may be requested by the defendant to contest whether the seizure provided for in § 8-586 was ordered upon false suggestions or without sufficient cause as stated in the applicant's affidavit. \textit{Id.} § 8-591. Any notice and hearing which may come after the property has been seized is not provided "at a meaningful time". \textit{Fuentes v. Shevin, supra} at 80, 81.

The power of the State to seize goods before a final judgment in order to protect creditors' interests is not totally abridged on due process grounds. Nor is it required that plenary notice and hearing be afforded a possessor, under all circumstances, prior to State action for repossession in a private dispute. Pre-judgment repossession statutes might be constitutionally drawn provided they limit the summary seizure of goods to special situations demanding prompt action in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. Such statutes must not only be narrowly drawn to meet unusual conditions but, apparently, must also involve the participation of a judicial officer or other state official upon whom would devolve the duty to determine whether the applicant is actually able to demonstrate the existence of special circumstances and his entitlement to immediate possession of the property. \textit{Id.} at 93, 96-97. See also \textit{Laprease v. Raymours Furniture Co.}, 315 F. Supp. 716 at 723 (N.D.N.Y. 1970) ; \textit{Rancone v. Appellate Dept. of S. Ct. of Sacramento Co.}, 488 P. 2d 13 at 31 (Cal. 1971).

In contrast with the statutes considered in \textit{Fuentes}, the General Assembly has attempted to restrict the operation of the Virginia prejudgment repossession provisions to certain special circumstances. In this regard, the Virginia statute is more narrowly drawn than the corresponding Florida and Pennsylvania provisions. Section 8-586 reads, in part, as follows:

"§ 8-586. When property to be taken by officer.—Whenever in any action of or warrant in detinue it is made to appear by the affidavit of the plaintiff, his agent or attorney:

"(1) That there is good reason to believe that the defendant is insolvent, so that any recovery against him for the alternate value of the property and for damages and costs will probably prove unavailing;

"(2) That the property, for the recovery of which such action or warrant is brought, will be sold, removed, secreted, or otherwise disposed of by the defendant, so as not to be forthcoming to answer the final judgment of the court or justice respecting the same; or

"(3) That such property will be destroyed or materially damaged or injured by neglect, abuse, or otherwise, if permitted to remain longer in possession of such defendant or other person claiming under him;"

Whether the foregoing "restrictions" on the availability of state action prejudgment repossession is drawn narrow enough to cover truly special situations demanding prompt action, the Virginia provisions nonetheless appear to fall short of providing the necessary procedural due process safeguards. The person desiring prejudgment repossession under the Virginia statute is entitled to have the
There is no requirement that the applicant establish his entitlement thereto by a showing to the satisfaction of a judicial officer or state official; without such a showing the State is required to act "largely in the dark."

There are a few limited and "extraordinary situations" which may justify the postponement of any notice and opportunity to be heard before an outright seizure is permitted. In those rare cases, however, seizure is usually necessary to secure an important governmental or a general public interest, and there is a special need for very prompt action. The utility of the Florida and Pennsylvania replevin provisions and the Virginia detinue provisions are primarily for benefit of private persons—"state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." *Fuentes v. Shevin*, supra at 90-93.

In light of the foregoing clear application of the *Fuentes* decision to the pre-judgment detinue procedures found in Chapter 26 of Title 8 of the Code, I am constrained to opine that such procedures are unconstitutional in that they tend to work a deprivation of property without due process of law through the denial of the right to a prior opportunity to be heard before chattels are taken from the possessor by State action.

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**CIVIL PROCEDURE—Officer Not Required to Determine Legality of Process He Serves.**

**CIVIL PROCEDURE—Service of Warrant; Judgment Voidable, Not Void.**

March 16, 1973

**The Honorable Russell I. Townsend, Jr.**

*Member, Senate of Virginia*

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

"Please be kind enough to provide me with your opinion as to the following matters:

"(1) Is a judgment either void or voidable when entered with respect to a contractual cause of action (assume an open account) brought by warrant in debt or notice of motion for judgment in a court not of record located in the jurisdiction where the contract was made and breached and upon process served on the defendant (single individual) in another jurisdiction where he resides assuming that the defendant made no actual or general appearance. Assume also that the return of the serving officer shows on the face of the warrant in debt or notice of motion for judgment that service of process was obtained on the defendant in a jurisdiction other than the jurisdiction in which the action was brought.

"(2) Is a High Constable or other officer who has the duty of serving process for a court not of record obligated to refuse to serve a warrant or other process with respect to an action brought in a court located outside of his jurisdiction where the action is not an action enumerated in subparagraphs (1), (2), (3) or (4) nor encompassed with the provisions of subparagraph (5) of Section 16.1-76 of the Code of Virginia."

Article 3 of Chapter 6 of Title 16.1 of the Code of Virginia (1950), as amended, sets forth the procedure to be followed in civil cases. Section 16.1-79 provides for actions brought on warrant and § 16.1-81 for actions brought by motion for judgment. In either case service must be as provided for in Chapter 4 (§§ 8-43, *et seq.*) of Title 8. (See §§ 16.1-80 and 16.1-82 of the Code.)
Section 8-47 provides that service shall be executed in the county or city where the action, suit or motion is brought, with certain exceptions.

In the case of Brown v. Chapman, 90 Va. 174, 175, 17 S.E. 855 (1893), the Virginia Supreme Court, under the same facts and statute (§ 8-47), stated that while the process was void, the judgment was not; it was merely voidable. This case has not been overruled, its vintage notwithstanding, it represents a correct conclusion of law. See 44 Va. L. Rev. 656 (1958). I, therefore, am of the opinion that the judgment is voidable and not void.

(2) I am of the view that the high constable or other officer who has the duty of serving process is not obligated to refuse to serve a warrant or other process with respect to an action brought in a court located outside of his jurisdiction. Section 15.1-79 of the Code requires every officer, to whom an order, warrant, or process may be lawfully directed, to execute the same within his county or corporation or upon any bay, river or creek adjoining thereto. As you have pointed out, there are certain exceptions to this requirement which appear in § 16.1-76, subparagraphs (1), (2), (3), and (4). I do not think it is required that the high constable or other officer serving process determine whether or not a process tendered him to be served is, in fact, legal. Consequently, I believe that he should serve the process rather than attempt to make a judicial determination as to its efficacy. Your question (2) is, therefore, answered in the negative.

CLERKS—Appointive Power of Judge in Court Where Vacancy Occurs.

JUDGES—Appointive Power of Judge of Chancery Court to Fill Vacancy in Office of Clerk of Said Court.

ELECTIONS—Clerk of Court; to Fill Remainder of Term.

CONFLICT OF LAWS—Conflict Between City Charter and Constitution of Virginia.

September 5, 1972

THE HONORABLE EDWARD G. KIDD, Clerk
Chancery Court of the City of Richmond

In your letter of September 5, 1972, you inquire as to the scope of the appointive power of the judge of the Chancery Court of the City of Richmond in filling a vacancy in the office of clerk of the said court.

Vacancies in such offices are filled in accordance with § 24.1-76 of the Code of Virginia (1950), as amended, which provides as follows:

"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."

The first paragraph of this section provides for the filling of vacancies by the judges of courts of record unless some other provision is made in a particular case, such as for the filling of vacancies by the City Council. In the case of the City of Richmond, the City Charter provides in § 3.05 (Acts of Assembly of 1948, ch. 116):

"Vacancies in all other elective offices referred to in this section shall be filled for the unexpired portion of the term as follows: in the office of clerk of a court by the court; . . . ."

This is an "other provision" within the meaning of the first sentence of § 24.1-76, the effect of which is to place the appointive power in the court where the vacancy occurs (in this case the Chancery Court) rather than in all of the resident judges of the courts of record.

The second paragraph of § 24.1-76 fixes the time during which the appointee holds office by requiring an election to fill the balance of the term at the next general election, unless the vacancy occurs within 120 days thereof in which case the election is held at the second ensuing general election. This paragraph, which is not affected by the "other provision" language in the first paragraph which relates only to the authority to appoint, is in apparent conflict with the above quoted language of the City Charter providing that the appointee serves for the balance of the unexpired term of his predecessor. This conflict is easily resolved, however, by reference to Article VI, Section 12, of the 1971 Constitution of Virginia, which provides:

"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."

It is clear from this language that the requirements of the second paragraph of § 24.1-76 are applicable to this situation, and on the facts related in your letter it is my opinion that an election to fill the remainder of the term of the former clerk must be held on November 7, 1972, and a writ of election should be issued accordingly.

CLERKS—Cannot Docket Foreign Judgment in Office.

JUDGMENTS—Foreign Judgement Cannot Be Docketed in Virginia.

January 19, 1973

The Honorable R. S. Campbell, Clerk
Circuit Court of Caroline County

I have received your letter of January 9, 1973, inquiring whether you may docket in your office a judgment rendered by a court of the state of North Carolina.

This office has previously stated, by an opinion in which I concur, that judgments rendered by courts of other states cannot be docketed in a clerk's office in Virginia. See Report of the Attorney General (1958-1959), p. 155. The foreign
creditor may bring a Virginia action upon the foreign judgment and obtain a Virginia judgment which can be docketed in your office. See *Aetna Casualty & Surety Co. v. Whalen*, 173 Va. 11; §§ 8-22 and 8-373, *et seq*. The Uniform Enforcement of Foreign Judgments Act allows a foreign judgment to be registered in states which have adopted the Act, but it has not been adopted by Virginia. See Annot., 72 A.L.R. 2d 1255 (1960), and 46 Am. Jur. Judgments §§ 905, 906 and 1214, *et seq*.

Accordingly, in my opinion, a judgment rendered by a North Carolina court cannot be docketed in your office.

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**CLERKS—Circuit Court—Appointment to court of the new city of Suffolk—Residency requirement.**

February 22, 1973

THE HONORABLE JOHN H. POWELL, Clerk
Circuit Court of the City of Nansemond

In your letter of February 15, 1973, you indicate that you intend to retire as Clerk of the Circuit Court of the City of Nansemond on or before December 31, 1973. (At that time, the Cities of Nansemond and Suffolk will merge to form a new City of Suffolk.) You inquire whether an individual who now resides in the existing City of Suffolk could be appointed as a deputy clerk of the City of Nansemond at this time, with the intention that he would succeed you as Clerk upon your retirement, possibly prior to December 31, 1973.

Eligibility of public officers with regard to residence requirements is governed by § 15.1-51 of the Code of Virginia (1950), as amended. That section provides, in pertinent part, as follows:

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

I have previously ruled, in an opinion to the Honorable T. F. Tucker, Clerk, Corporation Court of the City of Danville, dated February 4, 1970, and found in the Report of the Attorney General (1969-1970), at p. 44, a copy of which is enclosed, that deputy clerks are officers within the meaning of this section, and I find nothing in the Charter of the City of Nansemond to exempt such officers from the one-year residency requirement.

It is my opinion, therefore, that an individual who now resides in the City of Suffolk may not be appointed as a deputy clerk of the City of Nansemond, nor may he be appointed as Clerk should you retire before December 31, 1973. This does not mean, however, that the same individual would not be eligible to be appointed Clerk of the new City of Suffolk on or after January 1, 1974, since he will then have been a resident of the area comprising that City for the required year.

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**CLERKS—Circuit Court—Employees and deputies—Vacation and sick leave with pay.**

December 7, 1972

THE HONORABLE CHARLES J. ROSS, Clerk
Circuit Court of Madison County
This is in reply to your letter of recent date in which you ask to be advised whether Chapter 562 of the 1972 Acts of Assembly is effective legislation and requires an employee or deputy of the clerk of the circuit court to be given two weeks vacation with pay and at least seven days sick leave with pay for each year of service.

In my opinion to the Honorable Margaret B. Brown, Clerk of the Circuit Court of Culpeper County, dated June 1, 1972, it was stated that the amount of vacation time and sick leave for her employees were matters for her to determine. This was a correct statement of law in the absence of legislative provisions to the contrary. Chapter 562 of the 1972 Acts of Assembly became effective July 1, 1972, and therefore qualifies my conclusion to Mrs. Brown. This Act requires the county or city in which an employee or deputy of the clerk of the circuit court is employed to provide such employee or deputy two weeks vacation with pay and at least seven days sick leave with pay for each year of service by the employee or deputy.

CLERKS—Circuit Court Bill—Compensation of Clerk of Circuit Court of City of Norfolk.

SALARIES—Clerks Of Court—Maximum Retainable Compensation From All Sources.

The Honorable Hugh L. Stovall, Clerk
Circuit Court of the City of Norfolk

This is in response to your recent letter in which you advise that the present Clerk of the Corporation and Law and Chancery Courts is resigning effective June 30, 1973, and you will then become Clerk of the Circuit Court of the City of Norfolk as established under Chapter 544 of the Acts of Assembly, 1973. Your inquiry specifically focuses upon the question of your compensation as governed by Chapter 544 and by Article 3 of Chapter 2 of Title 14.1 of the Code of Virginia (1950), as amended.

You first indicate that you see nothing in § 17-116.1(c) of the Code that precludes the successor clerk from drawing the compensation of the clerk who resigned until his or her term expires. That provision of the Code clearly points out that a clerk elected or appointed prior to July 1, 1973, would serve “at no less than his compensation immediately before consolidation.” Since, according to your letter, you would appear to be taking office on or after July 1, 1973, this provision would not appear to apply to you.

You next inquire regarding the fact that the resigning clerk has been paid $5,000 in supplemental compensation under § 14.1-119 of the Code, and you inquire as to whether you would be precluded from drawing a similar supplement under § 14.1-143 of the Code. I see nothing in the latter section cited which would preclude your receiving such supplemental compensation and your entitlement to such compensation would be up to the Norfolk City Council. That section, § 14.1-143, further provides that the clerk of a court with two or more regularly appointed or elected judges shall receive an additional $1,000 in compensation for each judge in excess of one, and it would be my opinion that you are entitled to this additional compensation under this provision of the law.

These entitlements would, of course, be subject to the limitations of § 14.1-143 as to maximum retainable compensation “from all sources.”
CLERKS—Common Law Order Book—May be divided into several sections.

September 11, 1972

The Honorable Richard L. Shelton, Clerk
Circuit Court of Hanover County

This is in reply to your letter of August 28, 1972, in which you requested my opinion whether you may divide the Common Law Order Book into two volumes, one of the parts to contain all Common-Law Orders, the other all Criminal Orders.

Section 17-28 of the Code of Virginia (1950), as amended, reads:

"There shall be kept in the office of the clerk of every circuit court, corporation court, court of law and chancery, and court of hustings, having both equity and common-law jurisdiction, two order books, to be known as the common-law order book and the chancery order book, in which shall be recorded, in the common-law order book, all proceedings, orders and judgments of the court in all matters at common law, and in the chancery order book, all decrees and decratal orders of such court, in matters of equity and all matters pertaining to trusts, the appointment and qualification of trustees, committees, administrators, executors and guardians, except when the same are appointed by the clerk of such court, in which event the order appointing such administrators or executors, shall be made by the clerk and by him entered in a certain other book, to be known as the clerk's order book. In any proceeding brought for the condemnation of property, all proceedings, orders, judgments and decrees of the court shall be recorded in the chancery order book of the court. The recordation prior to January one, nineteen hundred and sixty-two of all proceedings, orders, judgments and decrees in such cases, whether entered in the common-law order book or the chancery order book of any court, is hereby declared a valid and proper recordation of the same."

The language of this section is mandatory and requires the clerk to keep one order book to be known as the common-law order book in which shall be recorded all proceedings, orders, and judgments of the court in all matters at common law. In those cases where the jurisdiction of the court depends upon compliance with certain mandatory provisions of law, the court's order, spread upon its order book, must show such compliance or jurisdiction is not obtained. Cunningham v. Smith, 205 Va. 205, 135 S.E. 2d 770 (1964).

In view of the mandatory language requiring the clerk to keep one order book to be known as the common-law order book, I am of the opinion that you may not keep two such books. However, where you determine that the one book may be better kept by dividing it into several sections, I am of the opinion that this is in compliance with the provisions of this section.

CLERKS—Compensation—Must serve as clerk of court having regularly appointed or elected judge.

JUDGES—Courts of Record—Designated judge not regularly appointed or elected within meaning of § 14.1-143.

January 11, 1973

The Honorable Samuel W. Swanson, Clerk
Circuit Court of Pittsylvania County

This is in reply to your letter of December 29, 1972, which reads as follows:

"Section 14.1-143 of the Code states: '... provided, further, that in any
county or any city, any person who serves as clerk of any court of record having two or more regularly appointed or elected judges . . . ' is entitled to additional compensation.

"Does the 'appointed judges' apply to a clerk where there is a designation by the Supreme Court for a one year term and would the clerk be entitled to the additional compensation?"

Section 14.1-143 of the Code of Virginia (1950), as amended, provides that the clerk who serves as clerk of any court of record having two or more regularly appointed or elected judges shall receive an additional thousand dollars for each judge.

In my opinion a designated judge is not a regularly appointed or elected judge within the meaning of this statute and therefore the clerk is not entitled to the additional compensation.

CLERKS—Costs of Appeal to Court of Record—Clerk of court from which appeal is taken should collect sheriff's service fee if notified by clerk to which appeal is taken to do so.

COSTS—Library Fee Paid to Court Not of Record Should Be Collected Again When Case Is Removed or Appealed to Court of Record.

May 17, 1973

THE HONORABLE ALVIN W. FRINKS, Clerk
Corporation and Circuit Court of the City of Alexandria

I have received your recent letter from which I quote:

"Since Code Sections 16.1-107 and 16.1-112 have been amended and Courts Not of Record collect the Writ Tax and Costs as required by Subsection (17) of Code Section 14.1-112, and Rule 3:3 of the Supreme Court only provides for the payment of Writ Tax and Clerk's fees when an action shall be commenced.

"I request your opinion as to when and who should be responsible to collect the costs for the service, that the Clerk of the Court of Record must provide in the second paragraph of Code Section 16.1-112.

"I would also like your opinion for the purpose of clarification on Code Section 42.1-70, on an Appeal or Removal of a civil case from a Court Not of Record, where the Law Library Fee of $1.00 has been assessed. Should the assessment be made again as part of the costs being collected and paid to the Court of Record?"

Section 16.1-107, Code of Virginia (1950), as amended, provides, inter alia:

". . . the party applying for appeal shall, within thirty days from the date of the judgment, pay to the clerk of the court from which the appeal is taken the amount of the writ tax of the court to which the appeal is taken and costs as required by subsection (17) of § 14.1-112."

Section 16.1-112 provides, inter alia:

"When such case [as has been appealed] has been docketed, the clerks of such appellate court shall by writing to be served, as provided in §§ 8-51 through 8-53, or by certified mail, with certified delivery receipt requested, notify the appellee or his attorney that such an appeal has been docketed in his office. . . ."

Section 8-52 provides that any sheriff or sergeant required to do so shall serve
a notice in his county or city, and § 14.1-105 allows a sheriff's fee of one dollar and twenty-five cents for each service made. Section 16.1-112 provides the clerk with an alternative to the sheriff's service, but it does not require the clerk to utilize the certified mail method of service. If the clerk prefers to have all notices of appeal served by the sheriff, the sheriff's fee must be collected from the party which takes the appeal. Since the statutory writ tax and clerk's fee is collected by the clerk of the court from which the appeal is taken, pursuant to § 16.1-107, the preferable practice is for such clerk to collect the service fee at the same time, I am informed that this practice is followed in other courts and works quite satisfactorily. You should, of course, notify the clerk of each court not of record from which appeals are taken to your court that he is requested to collect the service fee and to transmit it to you together with the other amounts collected by him for each appeal. If such clerk inadvertently omits to collect the service fee, then it will be necessary for you to notify the party taking the appeal to pay it directly to you.

With respect to the law library fee, § 42.1-70 provides, *inter alia*:

"Any county, city or town may, through its governing body, assess as part of the costs, incident to each civil action filed in the courts of record and courts not of record located within its boundaries a sum not in excess of one dollar.

"The imposition of such assessment shall be by ordinance of the governing body, which ordinance may provide for different sums in courts of record and courts not of record, and the assessment shall be collected by the clerk of the court in which the action is filed. . . ."

When an action is filed in a court not of record and is subsequently removed or appealed to a court of record pursuant to § 16.1-92, the law library fee should, in my opinion, be collected again since, on appeal, the matter is heard "*de novo*" and, if removed, constitutes a new filing in the court to which it is removed.

CLERKS—Duty to Docket Abstract of Judgment When Requested by Any Interested Party.

July 7, 1972

THE HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

This is in reply to your recent letter in which you ask whether the clerk of the Pittsylvania Circuit Court has a duty to docket an abstract of judgment when requested to do so by any person interested.

Under § 8-373, Code of Virginia (1950), as amended, it is the duty of the clerk to docket such abstract when presented by any interested party. I, therefore, answer your question in the affirmative.

WRIT TAX—Applied to Application for Tax Deed.

June 21, 1973

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

I have received your recent letter from which I quote:
"I would like to be advised as to whether or not your opinion dated July 30, 1971, to the Honorable L. H. Sands, Clerk of Circuit Court of Bland County, would still apply in view of paragraph 24 of Section 14.1-112 of the Code of Virginia as amended. I believe that this Section was amended by the General Assembly in 1972 and after your opinion was rendered.

"I would also like to be advised that if the Clerk's fee for the application is $10.00, should there also be a writ tax of $5.00 on the application as provided for in Section 58-72 of the Code of Virginia as amended.

"I would also like to be advised if you know of any provision for a taxed attorney's fee other than under the provisions of Section 14.1-196 of the Code of Virginia."

The opinion to which you refer stated that an application for a tax deed pursuant to §§ 58-1083 and 58-1092, Code of Virginia (1950), as amended, should be regarded as a chancery suit for purposes of the clerk's fees prescribed by §§ 14.1-112 and 14.1-113. As of the date of the opinion, neither statute prescribed a specific fee for processing an application for a tax deed. Subsequently, § 14.1-112(24) was added which prescribes a ten dollar fee for receiving and processing such application. Accordingly, this statute superseded the previous opinion as of July 1, 1972, its effective date.

The previous opinion did not discuss whether the writ tax imposed by § 58-72 was applicable to an application for a tax deed. Stone v. Caldwell, 99 Va. 492 (1901), cited in the opinion, recognized that an application for a tax deed is of the nature of a suit, because it requires the service of process and judicial action on the part of the court. It is not an ex parte proceeding, but an adversary one. Accordingly, I am of the opinion that the writ tax imposed by § 58-72 is applicable to an application for a tax deed. See generally Report of the Attorney General (1970-1971), p. 396; (1969-1970), p. 296.

With respect to your third question, although § 14.1-196 is the general statute relative to taxed attorney's fees, specific provision for such fees is found in §§ 14.1-122 and 18.1-315. In addition, a court may direct the payment of an attorney's fee by the Commonwealth in certain criminal cases pursuant to §§ 14.1-184 and 14.1-184.1, by a party to a divorce proceeding pursuant to § 20-79, by a party to a support proceeding pursuant to § 20-71.1, by an employer pursuant to § 65.1-101, and by the estate of an infant or insane person pursuant to § 8-88.

CLERKS—Fees—Clerk may not waive the fees authorized by §§ 58-54.1 and 58-65.1.

November 8, 1972

THE HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

I have received your recent letter inquiring whether or not a clerk of court who collects local recordation taxes pursuant to §§ 58-54.1 and 58-65.1, Code of Virginia (1950), as amended, must collect the compensation provided for him by those sections.

Sections 58-54.1 and 58-65.1 state that every clerk "... shall be entitled to compensation for such service in an amount equal to five per centum of the amount so collected. . . ."

The compensation authorized by each statute is payable by the county or city served by the clerk and is includible in the clerk's annual report to the State
Compensation Board pursuant to § 14.1-136. Section 14.1-140.1 provides that the clerk's receipts in excess of his annual allowance and expenses are payable into the State treasury and that subsequently two-thirds of the excess is to be paid by the State Treasurer into the treasury of the political subdivision served by the clerk.

If the clerk waived the fees authorized by §§ 58-54.1 and 58-65.1, the Commonwealth would lose an amount equal to one-third of such fees. Since the Commonwealth has an interest in the fees chargeable for a clerk's services, the clerk is not entitled to waive the fee. See Report of the Attorney General (1950-1951), p. 235.

In consideration of the foregoing, it is my opinion that a clerk must collect the fees authorized by §§ 58-54.1 and 58-65.1.

CLERKS—Female Under Twenty-One May Serve as Deputy Clerk of Juvenile and Domestic Relations Court.

JUVENILE AND DOMESTIC RELATIONS COURTS—Deputy Clerk May Be Under Twenty-One.

CONSTITUTION—Revised Constitution Contains No Requirement as to Age of Appointive Offices.

July 18, 1972

The Honorable Frederick P. Augamp, Judge
Juvenile and Domestic Relations Court

This is in reply to your letter dated June 28, 1972, in which you requested the opinion of this office as to whether "females under the age of twenty-one but over the age of seventeen may serve as deputy clerks with this Court."

Section 16.1-145 of the Code of Virginia (1950), as amended, provides in pertinent part as follows:

"... the judge of the juvenile court of each city ... may, with the approval of the governing body of such city ... appoint such deputy clerks and other employees as may be necessary for the proper conduct of the Court. ..."

The quoted portion of the preceding section constitutes the entirety of State law governing the appointment of deputy clerks to Juvenile and Domestic Relations Courts of cities. Since no restriction as to the age of appointees is contained therein, I am of the opinion that females under the age of twenty-one may serve as deputy clerks with the Juvenile and Domestic Relations Court of Virginia Beach.

The opinion dated August 15, 1955, to the Honorable James R. Duncan, Judge, Civil and Police Court, found in the Report of the Attorney General (1955-1956), at p. 225, which you note in your letter to this office, concluded that females under the age of twenty-one could not serve as deputy clerks of Civil and Police Courts because, in the opinion of the Attorney General, such position was an office within the meaning of what was then Section 32 of the Constitution of Virginia (1902). That section provided that an appointee to such office was required to possess the qualifications for voters.

Since the Constitution of Virginia adopted in 1971 does not preserve the requirements of Section 32 of the old Constitution as to appointive offices, individuals making such appointments need no longer be concerned with whether prospective appointees possess the qualifications of voters. Thus, there is no conflict be-
tween this opinion and the opinion rendered August 15, 1955. Moreover, I might add that this result obtains solely because of the fact that the new Constitution contains no requirement similar to that set forth in Section 32 of the old Constitution, and is not related to the recent statutory changes in the Code establishing a revised age of majority.

CLERKS—Marriage License—Has authority to correct an applicant’s date of birth after marriage of parties.

March 19, 1973

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

I have received your recent letter inquiring whether you have the authority to change the date of birth of one of the parties to whom a marriage license was previously issued upon a request from such party which states that her birth date was unintentionally misstated in the application for such license in 1970. The party requesting the change sent you a copy of her birth certificate indicating her date of birth as April 30, 1938, whereas in the application for the marriage license, she gave her date of birth as April 30, 1937.

Section 20-16, Code of Virginia (1950), as amended, requires the clerk to obtain a statement or affidavit of the information required to complete the marriage record from the parties contemplating marriage. If one of the parties unintentionally gives incorrect information and subsequently discovers the error and desires to have it corrected, it is my opinion that the clerk has the authority to do so. Of course, public records should not be altered without clear and convincing evidence that the information therein is erroneous, but when the veracity of the allegation is substantiated by a birth certificate and no indication of fraud exists, correction of the record is warranted.

CLERKS—Must Personally Sign Summons—Cannot use facsimile stamp.

WARRANTS—Must Be Signed by Person Issuing.

December 8, 1972

THE HONORABLE THOMAS A. WILLIAMS, JR.
Judge, Traffic Court of the City of Richmond

In your recent letter, you advised that § 25-177 of the Richmond City Code of 1968 provides for parking citations and requires response to them within 72 hours. This section also provides that “if the driver does not appear in response to the notice, the clerk of the Traffic Court shall send to the owner of the motor vehicle a summons to appear in the Traffic Court to show cause, if any, why he should not be dealt with according to law.” You further advised that the clerk of the Traffic Court has to issue about 16,000 summonses each year. The question you pose is whether it is necessary that the clerk personally sign each of these summonses.

I have examined the Code of Virginia and Virginia case law and find no authority for a summons to be issued without the signature of the person issuing the same. I have also been advised by the Richmond City Attorney’s Office that there is nothing in the City Code of 1968 which would allow for the issuing of a summons without the signature of the clerk.

In an opinion to the Honorable R. L. Quarles, Judge of the Municipal Court
of Roanoke, dated May 19, 1958, and reported in the Report of the Attorney General (1957-1958), p. 100, it was ruled that a deputy clerk of the Municipal Court could not issue warrants in civil cases by means of a facsimile stamp in the absence of express statutory authorization. See also, Report of the Attorney General (1953-1954), p. 224, wherein it was ruled that a county treasurer could not utilize a facsimile stamp to sign warrants issued by the county in the absence of statutory authority.

In view of the foregoing, it is my opinion that the clerk of the Traffic Court must personally sign each summons, and accordingly I answer your inquiry in the affirmative.

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CLERKS—Recordation—Assignment of contract right not recordable in deed book.

March 26, 1973

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

I have received your recent letter inquiring whether a document presented to you for recordation can be recorded in the deed book. The document assigns "... all of our rights, titles, and interest in and to any profits or proceeds which may be due us from the sale or transfer from any joint venture or any organization or group pertaining to the sale and/or development of that approximate 1,000 acre parcel located in King George County, Virginia, known as Belvedere Beach, or any portion or portions thereof. ..." A bank in Alexandria, Virginia, is the assignee and the assignment is intended as security for a debt owed to the bank by the assignor. The assignor conveyed certain property at Belvedere Beach to a trustee on January 3, 1972, and allegedly has an interest in any profits resulting from the sale or development of the property. The document is dated November 1, 1972, is signed by the assignor, and contains a notarial certificate of acknowledgment.

Section 17-60, Code of Virginia (1950), as amended, provides, in pertinent part:

"... all contracts in reference to real estate, which have been acknowledged as required by law... and all other writings relating to or affecting real estate which are authorized to be recorded, shall, unless otherwise provided, be recorded in a book to be known as the deed book."

Section 17-61 provides, in pertinent part:

"... all other contracts or liens as to personal property... which are by law required or permitted to be recorded... and all other writings relating to or affecting personal property which are authorized to be recorded shall, unless otherwise provided, be recorded in a book to be known as miscellaneous liens; provided, that if a... contract or other writing conveys, relates to or affects, both real and personal property, it shall be recorded in the deed book only, but shall be indexed in the general index book and the book of miscellaneous liens."

The nature of the interest assigned appears to be that of a contract right involving profits arising out of the sale or development of real property. The assignment is not, strictly speaking, a contract in reference to real estate within the purview of § 17-60, nor am I aware of any statutory authorization for its recordation as a writing relating to or affecting real estate or personal property. The assignment can be regarded as a "contract or lien as to personal property" within the purview of § 17-61, but it also falls within the scope of § 8.9-102 of
the Uniform Commercial Code as an assignment of a contract right. Since § 8.9-401, et seq., provides for the filing of a financing statement to perfect a security interest in a contract right created by an assignment, it is my opinion that § 17-61 is inapplicable to the recordation of this assignment. In the absence of the actual facts regarding the specific interest of the assignor, a precise classification of the interest assigned is impossible. However, the assignee should prepare a financing statement which meets the requisite of § 8.9-402 and present it for filing in accordance with § 8.9-401. In the alternative, if the assignee is in disagreement with this conclusion and can find statutory authority for the recordation of this instrument, or can obtain an instrument which clearly comes within the scope of § 17-60 or the quoted proviso of § 17-61, then such instrument may be recorded in the deed book upon payment of the recordation tax imposed by § 58-58.

CLERKS—Recordation of Modification or Release of Support Payments—Clerk may record modification or release of support payments upon authority of judge of juvenile and domestic relations court.

January 16, 1973

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

I have received your recent letter from which I quote:

"In a decree the Judge of a Court of Record directs that a certain sum of money be paid unto a complainant for the care, support and maintenance of infant children (which judgment is duly docketed), and transfers to the Juvenile and Domestic Relations Court all matters pertaining to maintenance, support, care and custody and the enforcement or modification of such decrees pursuant to Section 20-70(c) of the Code of Virginia. Subsequently, the Juvenile and Domestic Relations Court modifies the amount of the support payments or cancels them.

"May the Clerk of a Court of Record record the modification of the support payments or release the judgment upon the Judgment Lien Docket on the authority of the Judge of the Juvenile and Domestic Relations Court?"

Section 20-79(c), Code of Virginia (1950), as amended, provides:

"Provided, that in any suit for divorce or suit for maintenance and support the court may in any decree of divorce a mensa et thoro, decree of divorce a vinculo matrimonii, final decree for maintenance and support, or subsequent decree in such suit, transfer to the juvenile and domestic relations court, or other appropriate court, all matters pertaining to alimony, maintenance, support, care and custody of the child or children for the enforcement of such decrees, or for the modification or revision thereof as the circumstances may require. All proceedings in such juvenile and domestic relations court shall be in conformity with the provisions of chapter 5 (§ 20-61 et seq.) of Title 20 of this Code, and to the same extent as if the proceedings had originated in such court."

The statute authorizes courts of record to refer matters pertaining to alimony, maintenance and support to juvenile and domestic relations courts. Werner v. Commonwealth and Werner, 212 Va. 623 (1972). When such matters have been referred to the juvenile and domestic relations court pursuant to the statute and such court modifies or terminates the support payments, this action proprio vigore supersedes any contrary provision in the decree of the court of record.
If an abstract of the decree of the court of record which has been superseded was duly docketed pursuant to § 8-373, et seq., and it did not provide that the required payments for alimony, support or maintenance should not be a lien on the real estate of the person liable therefor, such decree constitutes a valid lien. See *Morris v. Henry*, 193 Va. 631, 640 (1952), and § 8-388. It is the duty of the clerk to docket the abstract of such decree. See my opinion to the Honorable H. M. Sizemore, Clerk of the Circuit Court of Halifax County, dated December 14, 1971.

Once the juvenile and domestic relations court has modified or terminated the alimony, support or maintenance payments, the person whose liability has been decreased or extinguished thereby is certainly entitled to have such partial or complete exoneration recorded in the clerk's office wherein the abstract of the previous decree was recorded. This office has previously opined that a clerk of a court of record is required to docket an abstract of a judgment for support rendered by a juvenile and domestic relations court. Report of the Attorney General (1970-1971), p. 54. If such a judgment were subsequently modified by the court, it would likewise be the duty of the clerk to record such modification. I can find no reason for concluding otherwise with respect to the modification by a juvenile and domestic relations court of a decree from a court of record when the latter court has made the transfer authorized by § 20-79(c).

Accordingly, it is my opinion that the clerk of a court of record may, under the circumstances heretofore described, record the modification or release of the support payments upon the authority of the judge of the juvenile and domestic relations court.

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**CLERKS—Recordation of Notice of Lien and Agreement of Co-owners—Clerk authorized to docket notices from other states.**

**RECORDATION—Notice of Lien and Agreement of Co-owners—Clerk authorized to docket notices from other states.**

October 25, 1972

**The Honorable Giles W. Goodykoontz, Clerk**

**Circuit Court of the City of Radford**

This is in reply to your letter of September 29, 1972, which reads as follows:

"I am enclosing Xerox copy of 'Notice of Lien' and 'Agreement of Co-owners' I have received from District of Columbia Department of Public Welfare for '... recording or filing.'

"My question is should this be recorded in the Deed Book since the recipient agrees not to sell or encumber any real or personal property without consent of the Welfare Department. The recipient is the owner of real estate in the City of Radford. The instrument refers to the 'Clerk of the Court of Montgomery County, Virginia' which is in error and would have to be corrected before anything could be done with it.

"Also, would § 63.1-133.1 preclude recordation or filing since this is not a Virginia agency."

Under the provisions of § 17-59 of the Code of Virginia (1950), as amended, the Clerk has a duty to record only those documents which are authorized by law to be recorded. Likewise, § 17-60 of the Code states that:

"All deeds, deeds of trust, deeds of release, quitclaim deeds, homestead deeds, grants, transfers and mortgages of real estate, releases of such
mortgages, powers of attorney to convey real estate, leases of real estate, notices of lis pendens and all contracts in reference to real estate, which have been acknowledged as required by law, and certified copies of final judgments or decrees of partition affecting the title or possession of real estate, any part of which is situated in the county or city in which it is sought to be recorded, and all other writings relating to or affecting real estate which are authorized to be recorded, shall, unless otherwise provided, be recorded in the book to be known as the deed book.” (Emphasis added.)

I would conclude that the Agreement of Co-owners which you submitted should be recorded in the deed book under authority of this section as a “contract in reference to real estate.” As you noted, however, this instrument needs to be corrected to show the proper place of recordation as the City of Radford.

Section 17-61 of the Code provides for the recordation of certain liens as follows:

“All deeds, mortgages, deeds of trust, homestead deeds and leases of personal property bills of sale and all other contracts or liens as to personal property not mentioned in §§ 43-27 and 55-88 to 55-90, which are by law required or permitted to be recorded, all mechanics' liens, all other liens not directed to be recorded elsewhere and all other writings relating to or affecting personal property which are authorized to be recorded shall, unless otherwise provided, be recorded in a book to be known as miscellaneous liens; provided, that if a deed, deed of trust, mortgage, contract or other writing conveys, relates to or affects, both real and personal property, it shall be recorded in the deed book only, but shall be indexed in the general index book and the book of miscellaneous liens.”

This section would authorize the recordation of the Notice of Lien which you submitted, providing it is properly acknowledged, as an “other lien not directed to be recorded elsewhere.” Since this lien affects both real and personal property, § 17-61 provides that it shall be recorded in the deed book only, with appropriate indexing as noted. However, I further refer you to § 43-4.1 of the Code which somewhat modifies § 17-61 regarding the place of recordation as follows:

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

In answer to your second question, § 63.1-133.1 would not preclude recordation of these instruments since this is not a Virginia agency.

COLLEGES AND UNIVERSITIES—Application of In-state Tuition Privileges to Female Students; Married Woman May Show Separate Domicile from Husband.

October 20, 1972

THE HONORABLE DOROTHY S. McDIARMID
Member, House of Delegates

In am writing in response to your recent letter concerning the application of in-State tuition privileges to female students.
In your letter you state that a State institution of higher education is requiring the husband's signature as a condition precedent for consideration of a married woman's application for in-State tuition privileges. Conversely the wife's signature is not required on a husband's application. In your letter you also state that the institution assumes that the wife's domicile is the same as her husband's and that neither she nor her children are entitled to in-State tuition privileges if her husband is not a Virginia domiciliary. You question the legality of both practices.

The Common Law concept that the wife takes the domicile of her husband has not been changed by statutory law in the Commonwealth of Virginia. Accordingly, in determining the domicile of a wife, State institutions must adhere to this concept. Nevertheless, I can conceive of no rational basis which would justify requiring the husband's signature in all cases and not requiring that of the wife. There will undoubtedly be occasions, however, when the husband's domicile is in issue and the institution may legitimately require his signature and a statement of his domicile with respect to his wife's application.

The presumption that a wife and children take the domicile of the husband cannot be used as an irrebuttable presumption to preclude a married woman from showing that her domicile is, in fact, separate from her husband's or that a child has established a separate domicile from his father. The presumption can only be considered as a rebuttable one. A married woman or a child must be given the opportunity to show that the presumption is inapplicable, in light of circumstances surrounding the case in question.

COLLEGES AND UNIVERSITIES—Children Recommended by Division of War Veterans Claims Admitted Free of Tuition.

WAR VETERANS CLAIMS, DIVISION OF—Children Recommended by Admitted to Colleges and Universities Free of Tuition.

October 16, 1972

THE HONORABLE HARRY F. CARPER, JR., Director
Division of War Veterans’ Claims

I am writing in response to your letter of October 2, 1972, in which you ask several questions relating to § 23-7.1 of the Code of Virginia (1950), as amended. I will answer your questions seriatim.

In your first question you ask whether State institutions should be reimbursed for providing free tuition to students who come under the provisions of the Code section. Paragraph two of § 23-7.1 of the Code provides that:

“Such children, upon recommendation of the Director of the Division of War Veterans’ Claims shall be admitted to State institutions of secondary or collegiate grade, free of tuition.”

Under this provision, the State institution admitting the student must do so free of tuition. See opinion to the Honorable David D. Moyer, Bursar, University of Virginia, dated September 10, 1962, and found in Report of the Attorney General (1962-1963), p. 240. The Act does not require the Division of War Veterans’ Claims to reimburse State institutions for admitting students free of tuition under this provision. That portion of the first paragraph of the Act providing that sums appropriated for the purpose of carrying into effect the provisions of the Act shall be used for the purpose, among others, of providing for free tuition, relates to the reimbursement of private institutions which eligible students may attend.

In your second question you ask for an interpretation of the age limits imposed
upon participating students. The Act provides that children “not under sixteen and not over twenty-five years of age” shall be eligible for participation providing they meet the other requirements set forth in the Act. You are correct in your assumption that the age bracket runs from the sixteenth birthday until the twenty-sixth birthday. A student is not eligible to participate in the program once he reaches his twenty-sixth birthday regardless of the fact that he was previously participating in the program.

Paragraph 4 of § 23-7.1 of the Code requires that you satisfy yourself of the “attendance and satisfactory progress of such children at such institution. . . .” You ask whether satisfactory progress is being made so long as the school continues the child in enrollment and, further, whether a child may repeat a subject which he has previously failed to pass. Generally, the fact that a student continues to be enrolled in a school is sufficient proof that the institution is of the opinion that the student is making satisfactory progress. This may not be true of all institutions, however. Accordingly, you must ensure that the student is making satisfactory progress from one grade level to the subsequent grade level. The mere fact that a student repeats one subject should not be interpreted as conclusive proof that the student is not making satisfactory progress. If a student fails to progress from one grade level to a higher grade level over the prescribed period, however, his continued enrollment in the school should not be interpreted as fulfilling the “satisfactory progress” requirement of the Act.

Paragraph 1 of the section provides that appropriations shall be used for the “sole purpose of providing for free tuition and institutional charges, general or college fees, or any charges by whatever term referred to, board and room rent and books and supplies. . . .” Paragraph 5 of the Act provides that the maximum amount to be expended on each child shall not exceed the actual amount of the benefits provided for in the Act. Paragraph 5 also provides that the State contribution shall be limited by any federal allowance made for tuition, charges, fees, rent, books and supplies.

In your last question you ask several questions relating to the range of benefits provided for under the Act. It is clear that the student is entitled from the funds made available, to free tuition, all institutional charges or fees, room rent and board and books and supplies. The State contribution for these items shall be lessened by the federal contribution and, when the student goes to a State institution, by the fact that the student is given free tuition at that institution.

COMMISSIONERS OF REVENUE—Authority—Not authorized to correct error in real estate valuation made by board of assessors.

REAL ESTATE—Commissioner of Revenue Not Authorized to Correct Error in Valuation Made by Board of Assessors.

August 7, 1972

The Honorable G. R. C. Stuart
Member, House of Delegates

I have received your recent letter inquiring whether the Commissioner of the Revenue of Washington County can correct the assessed value of a parcel of real estate which was admittedly assessed in excess of its actual value during the 1968 general reassessment. You refer to § 58-1141, Code of Virginia (1950), as amended.

Section 58-1141 provides, in pertinent part:

“Sections 58-1141 to 58-1144 shall also apply to erroneous assessments of real estate if the error sought to be corrected in any case was made by
the commissioner of the revenue or such other official to whom the application is made.” (Emphasis supplied.)

As used in this section, “assessments” has primary reference to the act of levying a tax at the rate set by the Board of Supervisors. See Hoffman v. Augusta County, 206 Va. 799 (1966). Section 58-1142 provides for correction by the commissioner if he “be satisfied that he has erroneously assessed such applicant with any such levy.”

Your question does not involve an erroneous levy due to an error on the part of the commissioner of the revenue, but an erroneous valuation by the assessors during the last general reassessment. Section 58-763 provides that the value of real estate as ascertained at a general reassessment “shall only be changed to allow the addition of the value of improvements . . . except so far as the same are directed to be corrected by a court of competent jurisdiction or by the local board of equalization in the exercise of powers expressly conferred by law.”

It is my opinion that the commissioner of the revenue is not authorized to correct an error in the valuation of real estate made by the board of assessors during the last general reassessment. The opinion of this office to the Honorable H. P. Scott, Clerk of the Circuit Court of Bedford County, dated December 29, 1961, and found in Report of the Attorney General (1961-1962), p. 247, is in accord with this conclusion. Any relief from an error of the board of assessors must now be obtained from the proper court pursuant to § 58-1145, et seq.

COMMISSIONERS OF REVENUE—Duties Placed Upon Commissioner by General Assembly May Not Be Assigned to Any Other Official Except by Special Act from General Assembly.

CHARTERS—Amendments to City Charter Must Be Made Pursuant to Statute.

GENERAL ASSEMBLY—Act of Required to Abolish Office of Commissioner of Revenue or Remove Duties from the Office.

August 21, 1972

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

I have received your letter of July 25, 1972, from which I quote:

“1. Under the present law, may the City of Lynchburg at the present time maintain a position of ‘Revenue Auditor’ separate from that of any position in the Office of the Commissioner of the Revenue, which individual filling this position would be responsible for auditing the books, records, etc. of all local taxpayers; and may this individual make recommendations to the Commissioner of the Revenue concerning assessments, etc. which recommendations could be carried out by the Commissioner of the Revenue?

“2. Could the City of Lynchburg without holding a referendum election but after a public hearing request through its elected City Council that the General Assembly amend the Lynchburg City Charter so as to allow the City to assume the duties of the Commissioner of the Revenue relating to local matters, but excluding State Income Tax, state business licenses and other state levies?”

The duties of the commissioners of the revenue are prescribed in Title 58, Chapter 18, Code of Virginia (1950), as amended. Section 58-859 provides that the commissioner shall obtain from each taxpayer full and complete returns of intangible personal property, individual income, tangible personal property,
machinery and tools and merchants' capital. Section 58-860 grants the commissioner authority to summons taxpayers for the failure to file a return of property or income and to require answers under oath to interrogatories concerning their tax liability. Section 58-874 requires each commissioner to perform certain duties to assure that each taxpayer has properly reported and paid license, intangible personal property, money and income taxes. The commissioner is granted authority thereby to require taxpayers to furnish him "access to their books of account or other papers and records for the purpose of verifying the tax returns of such taxpayers and procuring the information necessary to make a complete assessment [of such taxes]."

The General Assembly has placed the duties mentioned upon the Commissioner of the Revenue for Lynchburg. This precludes the city from assigning them to any other officer. Therefore, I am of the opinion that the answer to your first question must be in the negative, in the absence of a special act from the General Assembly.

With respect to your second question, Article VII, Section 4, of the revised Constitution of Virginia provides, *inter alia*:

"There shall be elected by the qualified voters of each county and city . . . a commissioner of the revenue. The duties and compensation of such officers shall be prescribed by general law or special act.

* * *

"The General Assembly may provide for county or city officers or methods of their selection . . . without regard to the provisions of this section, either (1) by general law to become effective in any county or city [following a local referendum] . . . or (2) by special act upon the request, made after such an election, of each county or city affected. . . ."

Any amendment to the city charter must be made pursuant to the requirements of §§ 15.1-834 or 15.1-835. Section 15.1-834 requires a referendum, and § 15.1-835 allows a public hearing in lieu of a referendum. Subsequent to either proceeding, a municipality may request, through a member of the General Assembly representing it, that the charter be amended.

I am of the opinion that the General Assembly may remove all duties relating to local levies from the office of a commissioner of the revenue under the authority granted in the first section of the above quoted constitutional provisions. A successful election and legislative action pursuant to the second section of the quoted provisions would be required to completely abolish the office.

COMMISSIONERS OF REVENUE—Real Estate Assessment—Commissioner may correct assessment on property found to have less acreage than indicated on deed, if plat is recorded.

January 31, 1973

The Honorable Lyle M. Armentrout
Commissioner of the Revenue for Rockingham County

I have received your recent letter from which I quote:

"Some years ago a local resident purchased a tract of land conveying 355 Acres of land more or less. Of course, we assessed the tax based on this information.

"Subsequently, the land owner had this same tract surveyed by a certified land surveyor that reflected 345 Acres. This plat properly acknowledged has
been recorded. Do I as Commissioner of the Revenue have the authority to amend this to 345 Acres for taxation purposes."

Section 58-1141, et seq., Code of Virginia (1950), as amended, authorizes a commissioner of the revenue to correct erroneous real estate assessments upon application by the taxpayer, if the error sought to be corrected was made by the commissioner and if he is satisfied that the assessment is erroneous.

When a commissioner prepares the land book and assesses a property owner with the tax, he does not value the property because that has been done by the assessors during a general reassessment. The commissioner assesses the taxes upon the property on the basis of the valuation determined in the last general reassessment. If the assessors valued a tract of land on a per acre basis and it subsequently develops that the tract contained less acreage than indicated in the deed, the commissioner's assessment of the taxes on the basis of an incorrect amount of acreage is erroneous. The commissioner must be satisfied that the acreage is incorrect, and cannot correct an assessment upon the basis of an unrecorded plat. See Report of the Attorney General (1965-1966), p. 44. However, if the plat is recorded and the commissioner is satisfied that it is accurate, I am of the opinion that he may exonerate the landowner from the payment of that portion of the taxes erroneously assessed, in accordance with the provisions of § 58-1142, and in preparing subsequent land books he may extend the taxes on the basis of the per acre value ascertained in the general reassessment multiplied by the number of acres indicated by the recorded plat.

COMMISSIONERS OF REVENUE—Real Estate Records; Sufficiency of Proof to Change Maiden Name to Married Name.

REAL ESTATE—Sufficiency of Proof for Commissioner of Revenue to Change Records from Maiden Name to Married Name.

THE HONORABLE JAMES T. EDMUNDS
Member, Senate of Virginia

I have received your letter of December 6, 1972, from which I quote:

"Mrs. Jane Doe's husband dies and she inherits or is devised real estate. Mrs. Jane Doe remarries and is now Mrs. Jane Smith. Mrs. Jane Smith requests the Commissioner of Revenue to adjust the records in Lunenburg county to reflect her new name. The Commissioner of Revenue has no proof of the change of marital status other than the statement of Mrs. Jane Smith.

"1. What authority does the Commissioner of Revenue have to adjust his records without sufficient proof?

"2. What proof is sufficient to justify the Commissioner in changing his records?"

In regard to your first question, the commissioner of the revenue should not adjust his records to reflect a change in the property owner's name due to marriage unless he is satisfied that the owner is married. In an opinion to the Honorable Victor J. Smith, Commissioner of the Revenue for the City of Harrisonburg, dated December 16, 1965, and found in Report of the Attorney General (1965-1966), p. 46, this office indicated that whenever a married woman requested that lands listed in her maiden name be changed to her married name, the commissioner should do so if he was satisfied that she was married. In such a case, the owner's maiden name should be preserved. For example, if the property was con-
veyed to Mary Jones and subsequently she married John Smith, the property
would be shown on the land book as being owned by Mary Jones Smith.

With respect to the proof sufficient to justify a change in the name, the best
evidence is the marriage register in the office of the county clerk, or the official
records maintained by the State Registrar of Vital Statistics. However, in the
discretion of the commissioner of the revenue, an affidavit of the person who owns
the property to the effect that she is married would be satisfactory, as well as any
other reliable evidence that substantiates the fact of marriage.

COMMISSIONERS OF REVENUE—Salary of Employee in Office of May Not
Be Same as or Higher Than That of Commissioner.

SALARIES—Employee in Office of Commissioner of Revenue May Not Be Paid
Same Salary as Commissioner.

May 4, 1973

THE HONORABLE ROSELLA B. CANIPE
Commissioner of the Revenue for Campbell County

This is in reply to your letter of May 2, 1973, in which you requested my
opinion whether the salary of an employee in the office of Commissioner of the
Revenue can be the same or more than the salary of the Commissioner.

There is no statutory restriction on the salary of an employee in the office of the
Commissioner of the Revenue being the same or more than the Commissioner. I
am advised that it is an established policy of the Compensation Board to fix the
salary of the Commissioner of the Revenue at a higher amount than that of
the employees in his office.

I am of the opinion that § 14.1-51 of the Code of Virginia (1950), as amended,
authorizes the Board to establish this policy and, therefore, set the salary of the
Commissioner of the Revenue at a higher figure than that of his employees.

COMMONWEALTH ATTORNEYS—Authority of School Board to Retain to
Perform Legal Work.

COMMONWEALTH ATTORNEYS—Duty to Give Advice to Public Officials;
Authority for Payment of Extra Legal Fees.

March 7, 1973

THE HONORABLE WILLIAM S. KERR
Commonwealth's Attorney for Appomattox County

This is in reply to your recent letter in which you pose several questions
concerning the payment of extra legal fees to the Commonwealth's Attorney.
Your questions are as follows:

1. May the Commonwealth’s Attorney be paid by the County School
Board for the following legal work:
   (a) Negotiation and conferences with the attorneys for the underwriter
and bond attorneys in Richmond.
   (b) Several trips to Washington, D. C., to discuss federal requirements
with U. S. Government Officials.
   (c) Preparation of instruments, documents and letters in connection
with the bond issuance.
(d) Research and general legal advice to the Appomattox County School Board.

2. Whether Section 22-56.1 of the Virginia Code as Amended, authorized the Appomattox County School Board to retain the Commonwealth's Attorney to perform the legal work described in question one.

3. Whether a County Commonwealth's Attorney is required as part of his traditional and statutory duties to represent the County in the acquisition of additional rights of ways over certain County roads for the purpose of conveying the County roads and the additional right of ways so acquired to the Virginia Department of Highways. The purpose of the additional right of way is to provide sufficient road width to meet the Virginia Department of Highways standards. In order to make a proper conveyance from the County to the State, a title examination is required and several deeds have to be prepared, executed and recorded.

4. Would the title examination, deed preparation and other legal work connected with the acquisition of the additional right of way for the County and the subsequent conveyance to the Virginia Department of Highways be within the Commonwealth's Attorney's required duties or would the Commonwealth's Attorney, if so retained by the County, be entitled to additional compensation?

5. Whether the County Commonwealth's Attorney is required to perform the work to convey at public auction three parcels of real estate on which are located old, unused school buildings. The conveyances include title examination, preparation of deeds and other legal work connected with the public sale.

Section 14.1-53 of the Code of Virginia (1950), as amended, provides that the governing body of the county may supplement the salary of the attorney for the Commonwealth for additional services not required by general law. Section 14.1-11.4 also authorizes the county to supplement the salary of the Commonwealth's 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."

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.

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 exist to the contrary. I shall therefore answer your questions seriatim:

1. There is no statutory provision authorizing the Commonwealth's Attorney to receive extra money from the school board for the performance of these items of legal work. Therefore, the answer to this question is in the negative.

2. Section 22-56.1 of the Code would not authorize payment for the legal work itemized in question one. In this connection, I call to your attention an amendment to this section of the Code made by the 1972 General Assembly, effective June 1, 1973, which authorizes school boards to employ attorneys to represent them in any matters and pay them out of funds appropriated to the school boards (House Bill 1800).

3. Section 15.1-285 of the Code, which is a general law, requires that title to real estate purchased by the county for public purposes be examined and approved in writing by a competent and discreet attorney at law designated by the judge of the circuit court for the circuit wherein the real estate is located. Consequently, I am of the opinion that unless the judge of the circuit court appointed the Commonwealth’s Attorney to examine the title the governing body is without authority to pay extra compensation to him for this work. Section 15.1-286, a general statute, requires the Commonwealth’s Attorney to approve the form of a deed to real estate. I am of the opinion therefore that the county is without authority to award extra pay for this work.

4. The title examination, deed preparation and other legal work connected with the acquisition of the additional right of way for the county is within the duties of the Commonwealth’s Attorney and, except as provided in (3) above, he is not entitled to additional compensation therefor.

5. I can find no statutory authority which relieves the Commonwealth’s Attorney from the work of title examination, preparation of deeds and other legal work connected with a public sale of county school board land. Therefore, I am of the opinion that it is within the duty of the Commonwealth’s Attorney. Since no provision exists authorizing his special employment for these purposes, he is not entitled to extra compensation in connection therewith.

COMMONWEALTH ATTORNEYS—City of Portsmouth—Not required to represent local Department of Social Services.

CITY ATTORNEY—Duty—By charter required to represent local Department of Social Services.

March 12, 1973

THE HONORABLE JAMES A. CALES, JR.
Commonwealth’s Attorney for the City of Portsmouth

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

"I am writing to ask your opinion as to whether the Commonwealth's Attorney for the City of Portsmouth or the City Attorney for the City of Portsmouth has the duty of representing the local Department of Social Services. I am enclosing a copy of a letter from Mr. Herbert A. Kreuger, Director, Division of General Welfare, to the Superintendents of Public Welfare, dated December 14, 1972."
“My question is: Did the repeal of Sec. 15.1-67, Chapt. 463 of the 1970 Acts of Assembly restore the duty to the Commonwealth’s Attorney to render legal advice, including representation, to the Portsmouth Department of Social Services, or does Article 7, Sec. 7.03 of the Portsmouth City Charter, Chapt. 471 of the 1970 Acts of Assembly, make the representation of the Department of Social Services the duty of the Portsmouth City Attorney?”

The repeal of § 15.1-67 restored the duty of Commonwealth’s Attorneys to render legal advice, including representation of Departments of Social Services, without extra compensation in the absence of statutory authority to the contrary. In the case of the City of Portsmouth, Article 7, § 7.03, of the Portsmouth City Charter (Chapter 471 of the 1970 Acts of Assembly), provides that the City Attorney shall be the chief legal adviser to all departments, boards, commissions and agencies of the city in all matters affecting the interests of the city. I am of the opinion that this charter provision is controlling and that the representation of the Department of Social Services of the City of Portsmouth is the responsibility of the City Attorney.

COMMONWEALTH ATTORNEYS—Compensation—Representing two cities or a county and a city.

COUNTIES—Commonwealth Attorneys—Representing two cities or a county and a city, compensation.

January 25, 1973

The Honorable Richard C. Grizzard
Commonwealth’s Attorney for Southampton County

In your recent letter, you pointed out the following portion of § 14.1-53, Code of Virginia (1950), as amended:

“Whenever an attorney for the Commonwealth is such for a county and city together, or for two or more cities, the aggregate population of such political subdivisions shall be the population for the purpose of arriving at the classification of such attorney for the Commonwealth under the provisions of this section and such attorney for the Commonwealth shall receive as additional compensation the sum of one thousand dollars.” (Emphasis supplied.)

You then inquired as to whether the above-quoted provision is to be construed as increasing by one thousand dollars the maximum salary of a Commonwealth’s Attorney who represents two cities or a county and a city.

The underlined portion of the above-quoted provisions of § 14.1-53 was added by an amendment in 1966. The language is clear and without limitations or exceptions.

In my opinion, therefore, the maximum salary range of a Commonwealth’s Attorney who represents two cities or a county and a city is increased by the sum of $1000.

COMMONWEALTH ATTORNEYS—Duties—Required to advise County Health Department.

VIRGINIA CONFLICT OF INTERESTS ACT—Commonwealth Attorneys—May not bring civil action against Health Department.

June 15, 1973
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE DANIEL M. CHICHESTER
Commonwealth’s Attorney for Stafford County

This is in reply to your recent letter which reads:

“I would appreciate your opinion pertaining to the duties of the Commonwealth's Attorney. In a county where the County Attorney has been hired by the Board of Supervisors, is the Commonwealth's Attorney the legal advisor of the Health Department in the county? Would it be a conflict of interest for the Commonwealth’s Attorney, representing private citizens, to bring a suit against the Health Department to compel certain acts?”

Section 15.1-9:1 of the Code of Virginia (1950), as amended, provides that in the event of the appointment of a County Attorney, the Commonwealth's Attorney is relieved of the duty of advising the board of 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. All such duties shall be performed by the County Attorney.

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, Commonwealth's Attorney for Nelson County, dated July 26, 1962, and found in the Report of the Attorney General (1962-1963), p. 22. The provisions of § 15.1-9:1 of the Code do not relieve the Commonwealth's Attorney of the duty to advise the Health Department in the County in civil as well as criminal matters.

I am, therefore, of the opinion that it would be improper for the Commonwealth's Attorney to bring a civil action against the Health Department.

COMMONWEALTH ATTORNEYS—Entitlement to Records and Reports.

COMMONWEALTH ATTORNEYS—Claims Before Board of Supervisors—Must determine their legality.

January 22, 1973

THE HONORABLE J. MADISON MACON, JR.
Commonwealth’s Attorney for Charles City County

This is in reply to your letter of January 10, 1973, which reads as follows:

“In an effort to comply with the terms of Virginia Code 15.1-550, is the Commonwealth Attorney entitled to obtain copies of any and all, if necessary, reports, bills, budget appropriations, the budget itself, and any and all financial statements made by the Treasurer, the County Administrator, or any other County Officer; and further, will writ of mandamus lie to compel furnishing the same.”

Section 15.1-550 of the Code of Virginia (1950), as amended, reads as follows:

“No account shall be allowed by the board of supervisors unless the same shall be made out in separate items and the nature of each item specifically stated, and, when no specific fees are allowed by law, the time actually and necessarily devoted to the performance of any service charged in such account shall be verified by affidavit to be filed therewith. The attorney for the Commonwealth shall represent the county before the board, and shall resist the allowance of any claim which is unjust or not before the board in proper form, and upon proper proof, or which for any other
reason ought not to be allowed. And when any claim has been allowed by the board against the county, which, in the opinion of such attorney, is improper or unjust, or from which he shall be required to appeal by any six freeholders of the county, he shall appeal from the decision of the board to the circuit court of the county causing a written notice of such appeal to be served on the clerk of the board and the party in whose favor the claim is allowed within thirty days after the making of such decision. Whenever any claim is allowed by the board which is illegal, the attorney for the Commonwealth, in the name of the county, shall institute proper proceedings in the circuit court of his county within two years from the entry of the order allowing the same, if such amount has already been paid. The attorney for the Commonwealth shall be available to the board and give his legal opinion when requested."

Under this section and § 15.1-506 of the Code, the Commonwealth's Attorney is the legal advisor to the board. In fulfilling his responsibility under § 15.1-550, he must determine the legality of all claims paid by the board. The Commonwealth's Attorney is, therefore, entitled to copies of necessary reports, bills, budget appropriations, the budget itself, and any and all financial statements made by the treasurer, the county administrator or other county official required to determine the legality of such claims.

Section 15.1-550 does not contain an express but an implied duty on the treasurer, county administrator or other county official to deliver these documents to the Commonwealth's Attorney. A duty, to be enforceable by mandamus, must be specific in its nature, and of such character that the court can prescribe a definite act or a series of acts which will constitute a performance of the duty, so that the respondent may know what he is obliged to do, and may do the act required, and the court may know that the act has been performed and may enforce its performance. Lehman v. Morrissett, 162 Va. 463, 174 S.E. 867 (1934).

I am of the opinion that the implied duty on the treasurer, county administrator or other county official is sufficiently specific in its nature and of such character that it will support a writ of mandamus against these officers to supply or have supplied the necessary records or reports.

COMMONWEALTH ATTORNEYS—No Duty to Prosecute Violations of Town Ordinances.

DISTRICT COURT BILL—Commonwealth Attorney Need Not Prosecute Violations of Town Ordinances in General District Court.

ORDINANCES—Commonwealth Attorney of County Need Not Prosecute Violations of Town Ordinances.

TOWNS—Commonwealth Attorney of County Need Not Prosecute Violations of Town Ordinances.

June 25, 1973

The Honorable Robert L. Gilliam, III
Commonwealth's Attorney for Westmoreland County

This will acknowledge receipt of your request dated June 6, 1973, for an official opinion, advising that as of July 1, 1973, the Municipal Court of the Town of Colonial Beach will be abolished and all cases previously tried there will be heard in the General District Court for Westmoreland County, Virginia. You further advise that Colonial Beach employs a Town Attorney and you inquire as to whether it will be your duty as Commonwealth's Attorney for Westmoreland
County to prosecute the cases involving violations of town ordinances in the General District Court or whether that should be the duty of the Town Attorney.

This office has previously expressed the view that there is no duty incumbent upon the attorney for the Commonwealth to prosecute violations of town ordinances in any court (see Report of Attorney General, 1939-1940, pg. 49; Report of Attorney General, 1953-1954, pg. 36; Report of Attorney General, 1960-1961, pg. 44). I concur with these previous opinions in that there appears to be no provision of Chapter 546 of the Acts of Assembly, 1973, commonly referred to as the "District Court Bill", which would change these previous opinions.

COMMONWEALTH ATTORNEYS — When Entitled to Additional Pay for Services Rendered.

VIRGINIA CONFLICT OF INTERESTS ACT—Commonwealth Attorney Not Prohibited from Employment as Attorney Where Specific Statutory Authority Exists.

BOARDS OF SUPERVISORS—No Authority to Compel Commonwealth Attorney and County Clerk to Submit Inventory to Treasurer.

July 28, 1972

The Honorable Lloyd O. Jones
Treasurer of Charles City County

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

"I am asking your opinion in two areas, one of which has three separate parts.

"First Area. Since assuming office as County Treasurer on January 1, 1972, I have been faced with the problem of trying to determine when the Commonwealth's Attorney is entitled to additional pay for services rendered. Our Commonwealth's Attorney drew up options on a tract of land the county was contemplating buying for a county landfill. Neither of these options were used, but the county was billed, and paid, $25 each for them. Was this legitimate?

"The county later bought this land. The Commonwealth's Attorney searched the title and the county was billed, and paid, $150 for this work. Was this legitimate?

"The third question in this area is, did the county proceed in the proper manner in making this purchase? This question is in specific reference to Code Sections 15.1-285 and 15.1-286.

"Second Area. On January 24, 1972, at a regular meeting of the Board of Supervisors, the County Treasurer was authorized to devise and initiate an 'asset accountability program'. For this program it was necessary to ask each officer to submit to the Treasurer an inventory of county assets in his office. The Commonwealth's Attorney and the County Clerk refused to do this. Can the Board of Supervisors compel them to submit this inventory? This question is in specific reference to Code Sections 15.1-163, 15.1-257 and 15.1-556."

I shall answer your questions seriatim:

First Area. Section 14.1-53 of the Code of Virginia (1950), as amended, provides that the governing body of the county may supplement the salary of the attorney for the Commonwealth for additional services not required by general
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."

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 can find no statutory provision which relieves the Commonwealth’s Attorney from the duty of preparing options for the purchase of land by the board or which authorizes his employment for this purpose. I am, therefore, of the opinion that the board was without authority to compensate him for this service.

Section 15.1-285 of the Code, which is a general law, requires that title to real estate purchased by the county for public purposes be examined and approved in writing by a competent and discreet attorney at law designated by the judge of the circuit court for the circuit wherein the real estate is located. Consequently I am of the opinion that unless the judge of the circuit court appointed the Commonwealth’s Attorney to examine the title that the governing body was without authority to pay extra compensation for this work. Section 15.1-286, a general statute, requires the Commonwealth’s Attorney to approve the form of a deed to real estate. I am of the opinion, therefore, that the county was without authority to award extra pay for this work.

Second Area. The Commonwealth’s Attorney and the county clerk are both constitutional officers whose duties are established by general law or special act. They are not State employees, nor are they officers of the county within the provisions of §§ 15.1-163 and 15.1-556. Neither of these sections are applicable to these officers. Section 15.1-257 likewise places no statutory duty on these officers to submit the inventory. I am, therefore, of the opinion that the Board of Super-
visors is without authority to compel these officers to submit the inventory. However, this does not preclude them from voluntarily rendering the inventories of equipment which the board has provided.

COMPATIBILITY OF OFFICES—Member of Board of Supervisors May Not Be Appointed Executive Secretary.

BOARDS OF SUPERVISORS—Member of May Not Be Appointed Executive Secretary.

EXECUTIVE SECRETARY—Member of Board of Supervisors May Not Be.

September 1, 1972

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

This is in reply to your letter of August 18, 1972, in which you requested an opinion of this office as to the interpretation of § 15.1-116(1) and (3) of the Code of Virginia (1950), as amended. You ask whether these sections preclude a member of the board of supervisors from being appointed as executive secretary of the governing body in the case of the absence or disability of the executive secretary.

I am of the opinion that subsection (1) of § 15.1-116 of the Code precludes a member of the board of supervisors from being appointed executive secretary of the governing body whether or not the executive secretary is absent or disabled under subsection (3) of that section.


ECONOMIC STABILIZATION ACT OF 1970—Application—Applicable to salaries fixed by Compensation Board.

October 2, 1972

THE HONORABLE DAVID B. AYRES, JR.
Chairman, Compensation Board

In your letter of September 22, 1972, you state the following:

On June 28, 1972, and June 29, 1972, special three-judge courts in the City of Richmond and in Albemarle County, sitting in review of orders of the Compensation Board pursuant to § 14.1-52 of the Code of Virginia (1950), as amended, entered orders fixing the salary of certain local officers and employees within those respective jurisdictions at amounts higher than those fixed by the Compensation Board. You indicated that the salaries so fixed appeared to be in violation of the regulations imposed by the Pay Board pursuant to the Economic Stabilization Act of 1970, as amended, and that you therefore referred these orders to the Internal Revenue Service for a decision as to whether implementation of the salaries so fixed would be violative of the regulations.

On September 21, 1972, you received a reply from the District Stabilization Manager indicating that the salaries of the personnel involved were governed by the Economic Stabilization controls and that, unless they were exempt under certain regulations enumerated therein, they could not be implemented in the absence of an exception granted by the Pay Board. Your inquiry of this office is
specifically whether the exemptions referred to in the September 21st letter are applicable to these positions and, if not, whether the salaries fixed by the special three-judge courts should be implemented.

The exemptions referred to in the letter from the Internal Revenue Service are as follows:

1) *Section 101.5(a) of the Cost of Living Council Regulations.* Since there is no section numbered 101.5(a), it is assumed that this is a typographical error and refers to section 101.51(a), which is the exemption for firms or local governments with sixty or fewer employees. This exemption does not apply to either the City of Richmond or Albemarle County since both of those local governments have more than sixty employees.

2) *Section 201.11(a) (3) of the Pay Board Regulations.* This is the exemption for "catch-up increases" which applies only where the average annual increase over each of the past three years has been less than seven percent. Applicability of this exemption will of course vary depending on the old position and salary involved. However, it is not possible to tell from the information you have furnished whether this exemption would apply to any of the cases involved. In any event, if it should be applicable the maximum allowable increase would be the difference between the three year average and seven percent, which could then be added to the standard five and one-half percent pay increase.

3) *Section 201.11(a) (4) of the Pay Board Regulations.* This exception relates to allowances made in new contracts or pay practices for cost of living allowances. These adjustments must be justified by a generally accepted escalator formula. Since such practices are not currently in effect in the Commonwealth, this exemption is not applicable.

4) *Section 201.11(a) (5) of the Pay Board Regulations.* This exception relates to qualified merit plans contained in successor employment contracts or successor pay practices. It does not appear from the information furnished with your letter that any merit plans are involved in the salaries in question.

5) *Section 201.11(a) (9) of the Pay Board Regulations.* This is the exemption for low wage employees, and the general rule in this respect is that employees earning an hourly rate of $2.75 or less may receive increases up to that amount without such increases being governed by the five and one-half percent pay standard. Once again it is not possible to determine from the information furnished with your letter whether this exemption may be applicable to any individual salary in question. If it does appear that any of these individuals were earning less than $2.75 per hour, increases up to that amount may be justified. Furthermore, increases beyond $2.75 per hour are justifiable where the total increase is not over five and one-half percent.

It is my opinion, therefore, that the salaries fixed by the special three-judge courts may not be implemented, by the Compensation Board at this time, since to do so would be in violation of federal law in this field which of course is pre-emptive of State law by operation of the Supremacy Clause of the United States Constitution. This is not to say that the orders of the respective courts are not valid; it means only that they may not be implemented as long as the economic controls are in effect. Your figures may show, however, that certain of the individual salaries so fixed may be payable due to the operation of the exceptions which I have detailed above.

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**CONDEMNATION**—Proceedings on Law Side of Court; Fees Applicable; Recordation in Chancery Order Book and Deed Book; Cross Indexed in Common Law Order Book.
This opinion is in response to your letter in which you request the opinion of this office relative to certain procedures and fees applicable under Title 25 of the Code of Virginia (1950), as amended. You ask the following questions:

"First: Am I correct in assuming that when a Condemnation is instituted that I shall file it, prepare a Common Law docket sheet, give the case a law number and place it in the Common Law docket?

"Second: In billing for costs do I now charge a law fee which is based upon the amount of money involved, although I do not at that time know the amount involved, or do I charge the fee that is charged in Chancery cases?

"Third: Do I continue to record all orders in the Chancery Order Book or do I record them in the Common Law Order Book?

"Fourth: At the conclusion of the case do I give it an ended law number and file it with ended law cases or do I give it an ended Chancery number, having already given it a beginning law number, and file it with ended Chancery cases?"

Answering your questions seriatim. I am of the following opinion:

1. Section 25-46.4:1 of the Code states that "[c] ondemnation proceedings shall be on the law side of the court in which the petition is filed." Therefore, condemnations should be filed on the law side of the court and treated as any other law action.

2. Relative to condemnations involving the Commonwealth, I advised the Honorable Rudolph L. Shaver, Clerk of the Circuit Court of Augusta County, in an opinion dated January 30, 1973, that under the present law the clerk’s fee applicable to the filing of a condemnation petition was precluded by Section 14.1-87 of the Code. With regard to condemnations brought by other parties, I advised in that same opinion that "... Section 14.1-112 (17) does not apply because a condemnation petition does not seek a monetary award, as is contemplated by Section 14.1-112 (17). Therefore, the five dollar fee provided by Section 14.1-112 (23) is applicable...".

3. Section 17-28 of the Code states that "[i]n any proceeding brought for the condemnation of property, all proceedings, orders, judgments and decrees of the court shall be recorded in the chancery order book of the court." Although the orders will be recorded in the chancery order book and also in the deed book as set out by Section 25-46.27 of the Code, it would appear that in order to prevent ambiguity it would be advisable to correlate the two order books so that a party searching the case in the future would be referred by the common law order book to the chancery order book to find the recordation.

4. This question is answered by 1 and 3 above.

CONDOMINIUMS—Definition of; Horizontal Property Act.

REAL PROPERTY—Horizontal Property Act; Definition of “Condominium Project.”

March 30, 1973
The Honorable Nathan H. Miller  
Member, House of Delegates

This is in response to your request for my opinion dated March 13, 1973. Your request involves an interpretation of the provisions of Chapter 4.1 of Title 55 of the Code of Virginia relating to “horizontal property.” Specifically, you asked if it was necessary for a developer to comply with the provisions of the Horizontal Property Act in the following factual situation:

“A construction company in Rockingham County is in the process of constructing detached single family units in a cluster arrangement with the general common elements being the real estate surrounding and adjoining each unit, but not the real estate on which each individual unit is located.”

In my opinion, a scheme in which single units which are completely detached from other units where the ownership of the dwelling and the realty upon which it is built remains that of the individual as opposed to the collective owners, is not a “condominium project” which requires compliance with the Horizontal Property Act. Section 55-79.2(d) of the Code of Virginia (1950), as amended, provides:

“'Condominium Project' means a real estate condominium project; a plan or project whereby four or more apartments, rooms, office spaces, or other units existing or proposed whether the unit involves a single structure, attached to or detached from other units, or is in one or more multiple unit structures on contiguous parcels of real estate are offered or proposed to be offered for sale.”

This language appears to include within its definition the scheme stated in your factual situation. However, such a literal interpretation of this section would include practically any development including four or more units.

The legislative intent is to include within the requirements of the Horizontal Property Act, multiple units in either a single structure or in several structures, as for example, a single townhouse apartment containing several independent units or several highrise apartment-type buildings, each unit of which is sold as a separate entity.

This intention can be determined by reference to several other provisions of the Horizontal Property Act. I would refer you to § 55-79.2(c) wherein the term “condominium” is defined as:

“. . . the ownership of a single unit in a multiple unit structure with common elements in a condominium project;” (Emphasis added.)

See also § 55-79.2(h)(1) wherein “common elements” are defined to include:

“The land whether leased or in fee simple, on which the building or buildings stand; . . .” (Emphasis added.)

Section 55-79.6 grants to each apartment owner:

“. . . a common right to share, with other co-owners, in the common elements of the property.”

In the scheme that you have defined, the land upon which each building is constructed is owned solely by each individual owner with no right to share therein by other owners.

I would also call your attention to § 55-79.4 of the Code which deals with the disposition of properties subjected to a Horizontal Property regime. The section provides that any apartment in such building or buildings may be conveyed and disposed of “. . . as if it were sole and entirely independent of the other apart-
ments in the building or buildings of which they form a part. . ." See also Bergin, Virginia's Horizontal Property Acts An Introductory Analysis, 52 Va. L. Rev. 961, 979 (1966), wherein the conclusion stated here is suggested. That conclusion was based upon the statute prior to the amendments in 1972 to § 55-79.2 of the Code, concerning the definition of "condominium project." In my opinion, however, the addition of the language "... whether the unit involves a single structure attached to or detached from other units or is in one or more multiple unit structures . . ." does not alter the meaning of the previous definition wherein the terms used were "... building(s) or structure(s). . ." The conclusion drawn by Bergin should be the same under the present statute.

For these reasons, it is my conclusion that the development scheme outlined in your letter would not be subject to the requirements of the Horizontal Property Act.

CONDOMINIUMS—Real Estate Commission Has No Authority to Require Developer to Deposit Funds from Contract Purchasers in Escrow for Buyer's Protection.

REAL ESTATE—Condominiums—Real Estate Commission has no authority to require developer to deposit funds from contract purchasers in escrow for buyer's protection.

VIRGINIA HORIZONTAL PROPERTY ACT—Condominiums—Real Estate Commission has no authority to require developer to deposit funds from contract purchasers in escrow for buyer's protection.

August 3, 1972

THE HONORABLE HERBERT N. MORGAN
Member, House of Delegates

This is in response to your letter of June 26, 1972, which reads as follows:

"Enclosed is a copy of an agreement which is being used by a local developer for the sale of condominium units. You will note in paragraph 2a that the purchaser is required to make a deposit of 10% to the seller. The agreement contains no restrictions upon the disposition or use of the funds prior to settlement.

"The sellers very often are corporations without assets except a highly mortgaged piece of real estate upon which the units will be built.

"Is it possible that the purchasers can be protected by some regulation from the Real Estate Commission who has the responsibility for reviewing condominium plans. Perhaps they could specify that the contract should contain provisions that the deposits would be retained in separate escrow accounts."

Chapter 4.1 of Title 55 of the Code of Virginia (1950), as amended, known as the Virginia Horizontal Property Act, governs the establishment of horizontal property regimes in the sale of individual units therein. That Act contains no provision for retaining deposits paid by the buyer in a separate escrow account for the buyer's protection.

A review of the statutes involved reveals that the only role of the Real Estate Commission's inspection and issuance of public reports, and the issuance of copies is to assure that purchasers are informed of the facts relating to these schemes prior to any sales by the developer. Likewise, the only enforcement authority which the Commission has under the law is to enjoin a developer who fails to comply with the provisions of §§ 55-79.16 through 55-79.29. These sections
CONFLICT OF LAWS—Fireworks—Statutes in pari materia must be considered together to accomplish apparent legislative intent.

FIREWORKS—Statutes In Pari Materia Must Be Considered Together to Accomplish Apparent Legislative Intent.

April 25, 1973

THE HONORABLE JAMES A. CALES, JR.
Commonwealth's Attorney for the City of Portsmouth

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

"It appears that H. B. 1303 has made legal the sale of certain enumerated fireworks in Sec. 59.1-147 of the Code of Virginia. My question is as follows:

'Since Sec. 59.1-142 of the Code of Virginia prohibits the transportation of fireworks, as well as the sale of fireworks, may those fireworks enumerated by Sec. 59.1-147 be legally transported?'"

Pursuant to the amendments contained in Chapter 12 of the 1973 Acts of Assembly (introduced as H. B. 1303), § 59.1-147 was amended and reenacted as follows:

"§ 59.1-147. (a) This chapter shall not apply to the use or the sale of sparklers, fountains, Pharoah's serpents, caps for pistols, or to pinwheels commonly known as whirligigs or spinning jennies;

"(b) Provided, however, the fireworks listed in paragraph (a) may only be used, ignited or exploded on private property with the consent of the owner of such property." (Emphasis supplied.)

The above cited provision is contained in Chapter 11 of Title 59.1 and stands in pari materia with § 59.1-142. The latter statute embodies the general prohibitions of Chapter 11 relating to fireworks:

"§ 59.1-142. Except as otherwise provided in this chapter, it shall be unlawful for any person, firm or corporation to transport, manufacture, store, sell, offer for sale, expose for sale, or to buy, use, ignite or explode any firecracker, torpedo, skyrocket, or other substance or thing, of whatever form or construction, containing nitrates, chlorates, oxalates, sulphides of lead, barium, antimony, nitroglycerine, phosphorus or any other explosive or inflammable compound or substance, and intended, or commonly known, as fireworks." (Emphasis supplied.)

When the words of an enactment are plain and unambiguous, there is no room for speculation as to what the legislature might reasonably have been expected to enact, and the plain meaning of the words which have been employed by the legislature must be accepted. All rules of statutory construction and interpretation are subservient to the legislative intent, and this intention is to be gathered from the words used, unless a literal interpretation would lead to a manifest absurdity. Kain v. Ashworth, 119 Va. 605, 608 (1916).
A literal reading of § 59.1-147, when taken in conjunction with § 59.1-142, creates a situation whereby the particular fireworks enumerated in § 59.1-147 may be sold in Virginia, and may be used under certain conditions, but those same fireworks may not be transported, stored, offered for sale, exposed for sale, or bought. Such a reading would lead to absurd and unreasonable results and be contrary to the apparent intent of the legislature since a certain amount of transportation and storage is necessarily incidental to any lawful sale; similarly, the offer and exposition for sale and ultimate purchase are necessary incidentals to sale.

"Statutes in pari materia . . . must be considered together, and compared with each other in the construction of their various material provisions. The literal meaning of separate provisions if in apparent conflict with, must yield to a reasonable and fair interpretation to be gathered from the context, the subject matter and the reason and spirit of the law. Penal statutes must be construed strictly in favor of the defendant, not to the extent of defeating the clear intent of the legislature, but so as to resolve favorably to the defendant all reasonable doubts arising from the language used." Buzzard v. Commonwealth, 134 Va. 641, 653 (1922).

In light of the foregoing principles, it is my opinion that §§ 59.1-142 and 59.1-147 must be construed and applied so as to harmonize the statutes in question and to accomplish the apparent legislative intent. I would rule, therefore, that the fireworks described in § 59.1-147 may be sold in this Commonwealth in accordance with the plain meaning of that statute. In addition, these same fireworks may be transported, stored, offered and exposed for sale and bought, in that such acts are necessarily incidental to a lawful sale.

I would further point out that Chapter 12 of the 1973 Acts of Assembly, amending § 59.1-147 so as to permit the sale and conditional use of certain fireworks as above indicated, will not be effective until June 1, 1973.

CONFLICT OF LAWS—Irreconcilable Conflicts in Statutes Passed at Same Session of Legislature; Last Approved by Governor Prevails.

MOTOR VEHICLES—Minimum Age for Instruction Permit; Amendment Omitted Language Regarding Persons Age Fifteen Years Eight Months.

CONSTITUTION—Legislation—Amended statute must be reenacted and published at length.

AMENDMENTS—Irreconcilable Conflicts in Statutes Passed at Same Session of Legislature; Last Approved by Governor Prevails.

MOTOR VEHICLES—Conflict Between Amendments to Code Sections; Uninsured Motor Vehicle Fee—Last amendment approved by Governor prevails.

August 18, 1972

The Honorable Vern L. Hill
Commissioner, Division of Motor Vehicles

This is in reply to your letter of August 7, 1972, from which I quote the following:

"There were several amendments to Sections 46.1-167.1 and 46.1-167.4. One of these amendments (House Bill 273, Chapter 552) raised the uninsured motor vehicle fee from $50 to $100 and statutory fee from $75 to $150. Are we to assume that due to a conflict in language these fees
REPORT OF THE ATTORNEY GENERAL

are to remain at $50 and $75 even though the higher fees were approved by the General Assembly and the Governor?

"When House Bill 378, Chapter 823 was prepared amending Section 46.1-357, apparently subparagraphs (2) and (3) were omitted. These paragraphs contain the authority for the Division to revalidate the license of a minor and to issue instruction permits to persons reaching the age of fifteen years eight months. Should the Division continue these programs, and if so, under what authority?"

Considering first the fees prescribed in §§ 46.1-167.1 and 46.1-167.4, Code of Virginia (1950), as amended, four amendments were enacted by the Acts of Assembly of 1972, pertaining to one or both of these sections. Chapter 552, approved April 7, 1972, increased the uninsured motor vehicle fee required by § 46.1-167.1 from fifty dollars to one hundred dollars and increased the fee required by § 46.1-167.4, to terminate a suspension, from seventy-five dollars to one hundred fifty dollars. Likewise approved on April 7, 1972, was Chapter 609, which did not amend § 46.1-167.4 but retained the fee of fifty dollars in § 46.1-167.1 and made provision in the latter for a prorated fee of "four dollars and seventeen cents for each month of the registration period" for uninsured passenger cars registered effective April 1, 1973, as provided in § 46.1-63(b). The third amendment, embodied in Chapter 638, approved April 8, 1972, amended both §§ 46.1-167.1 and 46.1-167.4, but prescribed the fees of fifty dollars and seventy-five dollars, respectively. While there were no later acts amending § 46.1-167.1, Chapter 729, amending § 46.1-167.4 and prescribing a fee of seventy-five dollars, was approved April 10, 1972.


The last amendment to § 46.1-167.1 was by Chapter 638, which was approved by the Governor April 8, 1972. This prescribes the payment of a fee of fifty dollars at the time of registering an uninsured motor vehicle. The last amendment to § 46.1-167.4 was by Chapter 729, which was approved by the Governor April 10, 1972. This prescribes the payment of a fee of seventy-five dollars after involvement of an uninsured motor vehicle, for which the fee of fifty dollars has not been paid, in a reportable accident. It is my opinion, therefore, that the fees of fifty dollars and seventy-five dollars, respectively, remain applicable under these sections.

Section 46.1-357, Code of Virginia (1950), as amended, prior to the 1972 amendment, contained an introductory paragraph establishing the minimum age for which a person may be issued an operator's or chauffeur's license. It further contained paragraphs (1), (2) and (3). Chapter 823, Acts of Assembly of 1972, amended this section, along with a number of other statutes ranging through several titles of the Code.

This Act purports to amend and reenact § 46.1-357, as amended, and states that this and the other named sections "be amended and reenacted as follows." It is provided in Article IV, Section 12, of the revised Constitution of Virginia that no law shall "be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length." (Emphasis supplied.) When the amendatory act purports to set out the original act or section as amended, all matter in the act or section that is omitted in the amendment is considered repealed. Sutherland, Statutory Construction, Third Edition, § 1932; Somers' Case, 97 Va. 759. Accordingly, it is my opinion that § 46.1-357 stands amended to include only the language published in Chapter

CONFLICT OF LAWS—Section 25-5 of Norfolk City Code Not in Conflict With § 8-836 of Code of Virginia—Landowner’s Appeal Procedure.

April 24, 1973

THE HONORABLE J. WARREN WHITE, JR.
Member, House of Delegates

This is in reply to your recent letter in which you ask whether § 25-5 of the Norfolk City Code is in conflict with § 8-836, et seq., of the Code of Virginia (1950), as amended.

Section 25-5 of the Norfolk City Code reads:

“If any person shall think himself aggrieved by the determination of the director of public works in fixing the lines of any street, or the boundary of any lots, every such person may, within five days after such determination, appeal from the same to the city manager, who shall appoint three disinterested persons (the determination of whom, or a majority of them, shall be final) to settle all matters in dispute within ten days thereafter, and return their award to the city manager, to be recorded, and the said persons shall receive from the director of public works all information which influenced him in said determination from which the appeal was made, and each of the said persons shall receive from the person requiring their services the sum of two dollars for every day they shall attend.” (Emphasis supplied.)

The provisions of this section of the City Code are permissive and allow a person to appeal from a determination of the director of public works in fixing the boundary of any lots. Whether a person elects to appeal to the city manager is discretionary. Should a person not appeal under this section of the City Code, he is not precluded from raising the boundary issue in a court of law under the provisions of § 8-836, et seq., of the Code of Virginia.

Therefore, I am of the opinion that § 25-5 of the Norfolk City Code is not in conflict with § 8-836, et seq., of the Virginia Code and does not preclude a landowner from proceeding under those sections.


LIENS—Blue Cross and Blue Shield Have Authority to Enforce Lien Created by § 32-138 of Code.

SUBROGATION—Blue Cross and Blue Shield Have Authority to Enforce Lien Created by § 32-138 of Code.

June 25, 1973

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

This will acknowledge receipt of your letter in which you posed two questions for my consideration.
Your first question was whether §§ 32-138, 32-140, and 32-142 of the Code of Virginia (1950), as amended, are in conflict with Chapter 28 of the 1973 Acts of Assembly.

Section 32-138 of the Code gives a hospital, physician, and registered nurse in this State a lien for the amount (up to the maximum amounts prescribed in the statute) of a just and reasonable charge for services they render to a person who suffers personal injuries caused by the alleged negligence of another against the person, firm, or corporation whose negligence allegedly caused such injuries, unless the injured person, his personal representative, or a member of his family is paid under the provisions of the Workmen's Compensation Act. Section 32-140 provides that any municipal corporation or any person, firm, or corporation who may pay such charges shall be subrogated to the lien provided for in § 32-138. Section 32-142 requires written notice to the alleged third party tort-feasor or to the attorney for the injured party prior to creation of the lien.

Chapter 28 of the 1973 Acts of Assembly provides in pertinent part as follows:

"Section 38.1-342.2. No contract of insurance providing hospitalization, medical, surgical and similar or related benefits, and no contract or plan for prepayment of future hospitalization, medical, surgical and similar and related benefits, delivered or issued for delivery in this State, shall contain any provision providing for subrogation of a person, corporation, or association paying benefits under such policy, contract, or plan to the rights which the person receiving such benefits may have to recover from a third person for personal injuries for the treatment of which such services were rendered."

This new section of the Code, therefore, prohibits the assured and any person, corporation, or association paying benefits under an insurance contract providing hospitalization, medical, surgical or related benefits, or a contract or plan for prepayment of future hospitalization, medical, surgical and similar and related benefits, from mutually agreeing that such person, corporation, or association shall be subrogated to the rights which the person receiving such benefits may have to recover from a third person for personal injuries for the treatment of which such services were rendered. Since the right of any municipal corporation or any person, firm, or corporation which pays the charges described in § 32-138 of the Code to be subrogated to the lien provided for therein is created by operation of law in § 32-140 of the Code and is independent of any contractual rights of the parties, I am of the opinion that §§ 32-138, 32-140, and 32-142 are not in conflict with Chapter 28 of the 1973 Acts of Assembly.

Your second question was whether, considering Chapter 28 of the 1973 Acts of Assembly, Blue Cross and Blue Shield have the authority to enforce the lien created by § 32-138 of the Code.

As already noted above, § 32-140 allows a firm or corporation which pays reasonable charges for services rendered by hospitals, physicians, and registered nurses in this State to a person suffering from injuries caused by the alleged negligence of another to be subrogated to the lien provided for in § 32-138 of the Code. And § 32-142 provides that "[n]o such lien shall be created or become effective . . . unless and until a written notice . . . shall have been served upon or given to the person, firm or corporation whose negligence is alleged to have caused such injuries or to the attorney for the injured party." Such notice, however, when served upon or given to either party stated in § 32-142, has the effect of making such party liable for the reasonable charges for the services rendered the injured person as provided in § 32-143 of the Code. Finally, § 32-146 reads as follows:

"If suit is instituted by such injured person or his personal representa-
tive, the hospital, physician or nurse may, in lieu of proceeding according to §§ 32-142 to 32-145, file in the court wherein such suit is pending a petition to enforce the lien given hereunder, which petition shall be heard and disposed of in a summary way."

In light of the above provisions of the Code, and in view of the specific language of Chapter 28 of the 1973 Acts of Assembly, I am of the opinion your second question must be answered in the affirmative.


September 28, 1972

THE HONORABLE THOMAS B. INGE, JR.
Commonwealth’s Attorney for Lunenburg County

In your letter of September 22, 1972, you indicated that a duly elected member of the Victoria Town Council decided not to accept his seat, submitted his resignation and never qualified. You inquire whether the proper method for filling the vacancy is found in the terms of §§ 34, 35 and 36 of the Town Charter or in § 24.1-79 of the Code of Virginia (1950), as amended.

I enclose a copy of an opinion to the Honorable Robert F. Horan, Jr., Commonwealth’s Attorney for Fairfax County, dated August 22, 1972, in which I held that in these situations § 24.1-79 takes precedence over town charter provisions. I believe that opinion is dispositive of your inquiry.

Since the vacancy has occurred more than twenty days prior to the November 7 general election, § 24.1-79 in conjunction with § 24.1-163 requires that the special election be held on November 7, 1972.

CONTRACTORS—Builder-developer Must Register as a Contractor in Order to Build or Complete a Home on property He Owned Prior to Sale.

GENERAL CONTRACTORS—Law Regulating.

March 12, 1973

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

This is in response to your request for my opinion concerning the applicability of the Contractor Registration Law to builder-developers who have entered contracts for the sale of property which includes an obligation by the builder-developer to build a home on the property or to complete a home upon which construction has been begun prior to the entering of a contract.

In my opinion these persons must be registered under the provisions of Chapter 7 of Title 54 of the Code.

In previous opinions of this office, it has been held that speculative builder-developers who build and complete improvements upon properties prior to the sale or the execution of the contract, are not required to be registered. See Re-
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Section 54-113(2) of the Code provides, in pertinent part:

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

Given this definition, it is my opinion that so long as a builder contracts to sell a home that has been completed, he does not come within the above definition of a contractor and, therefore, is not required to register as such. However, if the contract provides for the sale of a lot upon which a home is to be constructed by the developer or is for the sale of a home which is only partially completed and the developer obligates himself to complete the home or other improvements, the developer would come within the definition and would be required to be registered. In this situation, the builder-developer is contracting to construct a "... building or structure permanently annexed to real property owned ... by another person ..." under § 54-113(2) of the Code of Virginia. After the contract for the sale of the property has been executed by the parties the builder-developer is no longer the owner of the property. Of course, the value of the contract to be performed by the builder-developer must meet the requirements of the section. That is, he is not required to obtain the license unless the individual project exceeds thirty thousand dollars or the total value of such contracts exceed two hundred thousand dollars annually.

You indicated in your letter that the 1970 Session of the General Assembly rejected the provision of House Bill No. 197 which provided for licensure of "owner-developer" thereby indicating the intention of the legislature to exempt persons from licensure who might be covered by the interpretation placed upon the statute by this opinion. I have reviewed the amendment to which you refer. That provision would have required licensure of any person constructing, etc., buildings on property owned by him. This is readily distinguishable from the holding of this opinion as here the property upon which the building is to be constructed is no longer owned by the builder-developer. Rather, title has passed to and it is owned by the purchaser after the execution of the contract by the parties.

CONTRACTS—Public—County may not make material change in contract so as to constitute radical or substantial departure from original contract.

March 16, 1973

THE HONORABLE A. W. GARNETT
County Attorney for Spotsylvania County

This is in reply to your letter of March 6, 1973, in which you state:

"Would you kindly give me your opinion in connection with the following situation.
In April of 1972, Spotsylvania County advertised for sealed bids for the construction of sewage treatment facilities at Thornburg, Virginia, located in Spotsylvania County. These bids were opened publicly at the Courthouse on May 12, 1972, in accordance with the advertisement. The project was bid in several sections, and my inquiry concerns the low bidder for the sewage treatment plant. By letter dated June, 1972, the County Administrator notified the County's Engineers of acceptance of the low bid, conditionally pending obtaining proper easement for an access road. No formal contract at that time was entered into with the low bidder. Subsequently, the proposed location of the treatment plant was changed, which for engineering reasons resulted in theoretically a lower cost to complete the job. In February, 1973, the low bidder was notified of the location change and requested to execute the contract and proceed with the work. In response, low bidder notified the County that because of inflation he would have to increase his bid, and set forth what his proposed increase would be. By letter of February 16, 1973, the County's Engineers evaluated the increase and stated that in their opinion, although the changed location gave an advantage to the contractor, nevertheless, because of inflation the County should accept the changes proposed by low bidder and execute a contract with him based on the new figures. Even with the increase required by low bidder, his total bid for the treatment plant is still the lowest of the May 12, 1972 bids.

"Under the above state of facts, I respectfully ask your opinion as to whether the awarding of this contract to low bidder at the increased rate and on the substitute location will result in a lawful contract."

Section 11-20 of the Code of Virginia (1950), as amended, provides that the contract shall be let to the lowest responsible bidder for the particular work covered in the bid when the contract is being let for a lump sum. In the factual situation presented by you, the work covered in the proposal has been materially changed by changing the location of facility. The amount of the lowest bid submitted about a year ago likewise has been changed.

A period of over a year has elapsed since the original proposal was made and a material change has now been made in the original proposal, namely the relocation of the proposed facility. There can be no material change so as to constitute a radical or substantial departure from the original contract. 17A C.J.S., Contracts, § 373b.

I am of the opinion that the provisions of § 11-20 of the Code cannot be properly complied with in regard to this bid. In such instance, I am of the opinion that the county may not now legally enter into the contract with the low bidder on the substitute location at the increased rate. The bids should all be rejected and a readvertisement made in accordance with § 11-21 of the Code.

CONTRACTS—Public—Lowest responsible bidder—Meaning of term.

January 4, 1973

THE HONORABLE EDGAR F. SHANNON, JR.
President of the University of Virginia

This is in reply to your recent letter in which you state that a contract to renovate the interior of the Rotunda at the University of Virginia is soon to be awarded. You further state:

"The contract being in excess of $2,500 is clearly within the provisions of Section 11-20. However, the work will require special qualifications on the
part of the contractor. I have been advised that it may be possible to construe the word 'responsible' in the second line of the first paragraph of Section 11-20 so that this word includes not only financial responsibility but also responsibility in terms of the skill to perform the task. In the dictionary sense, 'responsibility' means 'accountability' or 'trustworthiness.' Nevertheless, it seems to me in the context of the sections and in the explained context of the facts to which Section 11-20 should be applied (the renovation of a public building of major historical significance) that 'responsible' should be construed as requiring also a special skill and competence for the task. Under the circumstances, this skill and competence may be unique to a particular contractor."

The bidder to whom a contract for public work is to be awarded, under a provision that such contracts shall be let to the "lowest responsible bidder," is one who is responsible and the lowest in price on the advertised basis. Such a requirement does not compel the authorities to award a public contract to the lowest bidder who is financially responsible or who is able to produce responsible sureties. The term "responsible" as thus used is not limited in its meaning to financial resources and ability. What the public desires is a well-constructed work, for which a lawsuit even against a financially responsible defendant is a poor substitute; and authorizations of this kind are held to invest public authorities with discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract, upon his skill and business judgment, his experience and his facilities for carrying out the contract, his previous conduct under other contracts, and the quality of his previous work—as well as to pass upon his pecuniary ability, and when that discretion is properly exercised, the courts will not interfere.

All matters bearing upon the likelihood that the contract will be promptly and efficiently performed bear upon the question of responsibility of bidders, and may and should be considered in determining who is the lowest responsible bidder. The words "lowest and best bidder" are as comprehensive as "lowest responsible bidder." A decision as to the lowest and best bidder for a supply contract involves a determination of the least expenditure of public funds and a consideration of the quality of the goods proposed to be furnished and the other factors and elements adverted to above.

The principle has been set forth that where plans and specifications for public construction reasonably and necessarily demand the consideration of several factors and no single bid is lowest in all the factors, the public officers may, in their reasonably exercised discretion, decide what weight to give the various factors, and may accept what they deem to be the lowest responsible bid, considering all the factors. 64 Am. Jur. 2d, Public Works and Contracts, § 70.

Much litigation has arisen concerning the construction of these provisions relative to the bidder to whom the contract may or must be let, and to the discretion which may be exercised in awarding contracts. The "lowest" bid may be determined by monetary standards with the dollar as the unit, but this is not so in determining the "best" bid, or the "responsible" bid; that question involves a number of other factors and elements. Taylor v. Arlington County, 189 Va. 472, 53 S.E. 2d 34 (1949).

In Taylor it is stated:

"As noted, the specifications specifically reserved to the county the right to reject any or all proposals and to accept the one that in its judgment best served the interests of the county. Such a reservation is generally held to vest in the authorities a wide discretion as to who is the best as well as the lowest bidder, and this involves inquiry, investigation, comparison, deliberation, and decision, which are quasi-judicial functions, and,
when honestly exercised, may not be reviewed by the courts.' 43 Am. Jur., Public Works and Contracts, section 45, p. 788.

"The right so reserved is at least as broad as the provision that the bid shall be let to the 'lowest and best bidder,' made by section 2725d of the Code, by which appellants claim the Morse Boulger bid should be tested.

"* * * The 'lowest' bid may be determined by monetary standards with the dollar as the unit, but this is not so in determining the "best" bid, or the "responsible" bid; that question involves a number of other factors and elements.' 43 Am. Jur., Public Works and Contracts, section 42, p. 784.

"* * * A decision as to the lowest and best bidder for a supply contract involves a determination of the least expenditure of public funds and a consideration of the quality of the goods proposed to be furnished and the other factors and elements adverted to above." Idem, section 42, p. 785.

"Clearly among the factors so involved are the experience of the bidder in that field, the quality of his previous work and the cost, not alone of constructing what he proposes to build, but of operating it after it is built. 'All else being equal, it is the duty of the public authorities to accept the bid involving the least expenditure of public funds.' Idem, section 44, p. 787.

"When the decision of the authorities is based upon a fair and honest exercise of their discretion, it will not be interfered with by the courts, even if erroneous. Courts do not in such cases substitute their judgment for the judgment of the body to which the decision is confided. Interference by the courts is limited to cases in which the public body has proceeded illegally or acted arbitrarily or fraudulently." (189 Va. 482) (Emphasis supplied.)

It is a widely accepted principal that public authorities, in awarding a public contract, may take into consideration the differences or variations in the quality or character of the materials, articles, or work proposed to be furnished by the respective bidders, under a constitutional or legislative provision requiring that the contract be awarded to the "lowest responsible bidder," the "lowest and best bidder," or a similarly designated bidder, the courts generally taking the position that the terms "lowest responsible bidder," and "lowest and best bidder," or their equivalent, do not mean that the awarding officials are required to let the contract to the lowest money bidder, even though he is financially responsible, but may award the contract to a higher bidder if in their honest judgment the materials, articles, or work which he proposes to furnish are better in quality or more suitable to the intended purpose than the low bidder's.

So also, with respect to different kinds of materials, articles, or work, the view is generally taken that under such a constitutional or legislative provision, the awarding officials may choose between the kinds and let the contract for the kind they honestly believe to be of better quality, or more suitable for the intended purpose, than another or other kinds, even at lower prices, where by the terms of the specifications competition is open to all kinds or more than one kind, provided, of course, the choice is reasonable, and not fraudulent or arbitrary.

Moreover, in the absence of any applicable constitutional or legislative provision, it is generally held that public officials, in awarding public contracts, may take into consideration the differences or variations in the quality or character of the materials, articles, or work proposed to be furnished by the respective bidders. 64 Am. Jur. 2d, Public Works and Contracts, § 71.

In view of the foregoing, I am of the opinion that the term "lowest responsible
"bidder" is not limited in its meaning to financial resources and ability but extends to the skill and competence of the bidder and to the quality of the work intended. Therefore, the Commonwealth of Virginia may take these factors into consideration in awarding contracts.

CONTRACTS—Watershed Improvement District May Let Without Submitting for Public Bids.

WATERSHED IMPROVEMENT DISTRICT—Contracts—May be let without submitting for public bids.

March 16, 1973

THE HONORABLE CARRINGTON WILLIAMS
Member, House of Delegates

This is in reply to your letter of March 8, 1973, in which you state:

"I would appreciate your opinion on whether a Watershed Improvement District created pursuant to Virginia Code Ann. §§ 21-112.1 et seq. (1972 Cum Supp.) is subject to the competitive bidding provisions of § 11-17, Code of Virginia."

A watershed improvement district constitutes a governmental subdivision of this State, and a public body corporate and politic, exercising public powers by § 21-112.11 of the Code of Virginia (1950), as amended.

Section 11-17 of the Code was amended by Chapter 485 of the 1972 Acts of Assembly to provide that whenever a "water, sewer or sanitation authority" shall be a party to a contract for construction work in excess of twenty-five hundred dollars, except in the case of emergency, such contract shall be let only after advertising for bids for such work.

In an opinion to General E. Sclater Montague, General Counsel, Chesapeake Bay Ferry District, dated November 8, 1957, found in the Report of the Attorney General (1957-1958), p. 35, which was rendered prior to the 1972 amendment above quoted, it was the opinion of this office that a political subdivision of the Commonwealth was not included in § 11-17 of the Code and therefore was not required to advertise for bids. The language of § 21-112.11 of the Code defines a watershed improvement district as a governmental subdivision.

The addition of the language "water, sewer or sanitation authority" by the 1972 amendment did not include a watershed improvement district. Nowhere in Title 21.1, Chapter 1, Article 9, of the Code (§§ 21-112.1 through 21-112.21) is the district referred to as a water authority.

I am of the opinion that a watershed improvement district is not subject to the competitive bidding provisions of § 11-17 of the Code of Virginia.

COUNTIES—Appropriation of Public Funds to Charitable Institution or Association—May not make to a city located within the county.

February 12, 1973

THE HONORABLE PHILIP H. MILLER
County Attorney for Augusta County

This is in reply to your letter of February 8, 1973, in which you pose the following question: "Can a county make appropriations of public funds under
Sec. 15.1-24, Code of Virginia, to a charitable institution or association located within the limits of a first class city which first class city is located wholly within the limits of the County?"

I am of the opinion that, under this section, the county may not appropriate funds to a charitable institution or association located wholly within the city. I enclose a copy of an opinion to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, found in Report of the Attorney General (1969-1970), p. 35, in which the same conclusion was reached.

COUNTIES—Authority—Enforcement of building code as to private buildings on federal property.

DULLES AIRPORT—Enforcement of Local Building Codes as to Private Buildings.

September 7, 1972

The Honorable Donald W. Devine
Commonwealth's Attorney for Loudoun County

I am in receipt of your recent letter in which you request an opinion concerning whether or not Loudoun County has authority to enforce its County Building Ordinances, insofar as they apply to buildings constructed on property which is part of Dulles Airport, and where the buildings in question are not owned by the Federal Government but are owned by private individuals and are located on airport property on land leased from the Federal Government.

In two previous opinions to you dated September 2, 1971, and January 10, 1972, it was pointed out that authority as to jurisdiction of Dulles Airport is determined by the provisions of § 7.1-17 of the Code of Virginia (1950), as amended. That section specifically states that the Commonwealth of Virginia has 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. Furthermore, in a letter dated November 14, 1961, addressed to the Honorable J. Lindsay Almond, Jr., Governor of Virginia, Mr. N. E. Halaby, Administrator of the Federal Aviation Agency, accepted the concurrent jurisdiction of the Federal Government and the Commonwealth of Virginia over the lands comprising Dulles Airport in accordance with § 7-21 of the Code of Virginia (now § 7.1-17).

This office is not aware of, and has not been advised of, any statutes or laws of the United States which would confer upon the United States Government exclusive jurisdiction to supervise the construction of buildings at Dulles Airport when such buildings are not owned by the Federal Government. Therefore, it is my opinion that privately owned buildings located on the property of Dulles Airport would be subject to regulation by the County of Loudoun, and would be subject to the Loudoun County Building Ordinances and inspection requirements.

COUNTIES—Authority—No authority to subsidize subdivision developer through use of tax funds.

SUBDIVISIONS—Developers—County may not subsidize.

January 15, 1973

The Honorable Joseph M. Whitehead
Commonwealth's Attorney for Pittsylvania County
This is in reply to your recent letter in which you ask my opinion on the following:

"A proposal has been made to Pittsylvania County by real estate developers in the form of an Ordinance, a copy of which is enclosed herewith, establishing and delineating policy improvements in subdivisions which basically provides reimbursement of expenditures for permanent improvements for clearing, grading, curbs and gutters, street paving, water, storm and sanitary sewer mains and engineering costs, to be reimbursed to the developer from tax revenue received by the County at the rate of 75% of the costs of permanent improvements. Since the County operates under the County Administrator traditional form of County Government and has no County highway or road system as such, the question is whether or not such is constitutional under the existing laws, particularly with reference to the fact that the secondary highway system is owned, maintained and operated by the Commonwealth of Virginia, Department of Highways. Also, in view of the fact that this is in the form of a subsidy to the developer, relative to taxes, would this be legally possible, and if so please cite the enabling legislation permitting such."

While I am of the opinion that an ordinance providing for off-site drainage may be enacted by the county under § 15.1-230, et seq., I am aware of no authority for the county to reimburse a real estate developer for expenditures for permanent improvements to be reimbursed from tax revenues received by the county. This would involve a form of a subsidy to the developer and a tax refund authorization, neither of which are authorized by statute. I am therefore of the opinion that the county is without authority to implement the proposed ordinance.

COUNTIES—Authority to Regulate Recreational Facilities on Sunday.

CRIMES—Authority of County to Prohibit Operation of Recreational Facilities on Sunday.

ORDINANCES—Authority of County to Enact Relating to Operation of Recreational Facilities on Sunday.

SUNDAY CLOSING LAW—Authority of County to Enact Ordinances Prohibiting Operation of Recreational Facilities.

November 14, 1972

The Honorable R. Garnett Bledsoe, Jr.
Commonwealth’s Attorney for Halifax County

This is in reply to your letter of October 11, 1972, wherein you inquired as to whether the Board of Supervisors of Halifax County may validly pass an ordinance prohibiting the Halifax County Fair Association from operating on Sunday. You pointed out that a proviso in § 18.1-358, Code of Virginia (1950), as amended, specifically excludes from application of the section "recreational and amusement facilities." It would appear that the Association operates recreational or amusement facilities.

Section 1-13.17, Code of Virginia (1950), as amended, provides as follows:

"When the council or authorities of any city or town, or any corporation, board, or number of persons are authorized to make ordinances, by-laws, rules, regulations, or orders, it shall be understood that the same must
not be inconsistent with the Constitution and the laws of the United States or of this State."

Section 15.1-510, Code of Virginia (1950), as amended, grants to a county the power to adopt measures as it may deem expedient "to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State." This section, thus, is in harmony with § 1-13.17.

In King v. County of Arlington, 195 Va. 1084, 81 S.E. 2d 587 (1954), the Court quoted with approval the following:

"The mere fact that the State, in the exercise of police power, has made certain regulations does not prohibit a municipality from enacting additional requirements. . . . The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires, creates no conflict therewith, unless the statute limits the requirement of all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance, because of which they cannot coexist and be effective. . . ." (Emphasis supplied.)

Where the State law is silent, an ordinance may be enacted to fill the void; however, local government cannot do what the State has refrained from doing. Allen v. City of Norfolk, 196 Va. 177, 83 S.E. 2d 397 (1954). The proviso in § 18.1-358 specifically excludes recreational and amusement facilities from application of the section. Thus, the section is not silent with regard to these facilities. An ordinance prohibiting these facilities from operating on Sunday would not enlarge upon the provisions of the State statute, but would run counter to the proviso in the State statute and be in conflict therewith.

Therefore, it is my opinion that the Board of Supervisors of Halifax County may not pass an ordinance prohibiting the Halifax County Fair Association from operating on Sunday.

COUNTIES—Bedford County Service Authority May Assume Responsibility for Garbage and Refuse Collection and Disposal; May Contract With Agents.

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

July 7, 1972

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

"The Board of Supervisors of Bedford County has heretofore enacted a 'Garbage, Trash and Rubbish Ordinance,' a copy of which is herewith enclosed. Attached to said Ordinance is the subsequent amendment to include a 'fourth method' of disposing of garbage, trash, etc.

"In 1970, the Bedford County Public Service Authority was created and enclosed is a copy of the Articles of Incorporation of said Authority.

"The governing body of Bedford County implemented the above-mentioned 'fourth method' by establishing a container system with County-wide pick-up, but the same has proved unsatisfactory and the Board has elected to discontinue this service.
"My inquiries are these:

"First: Can the Bedford County Service Authority assume the responsibility of garbage and refuse collection and its disposal in Bedford County?

"Second: Under the pertinent sections of the Virginia Water and Sewer Authorities Act, can the local Authority contract with private individuals and/or corporations to discharge this responsibility and does the Authority in contracting with such private concerns have the power to assign definite areas of the County within prescribed boundaries to such private individuals or corporations? That is to say, can the Authority, by contract, designate a portion or area within the County to a single private concern and thereby preclude any other independent hauler or collector from doing business in said designated or assigned area?"

I shall answer your question seriatim:

First: The Articles of Incorporation of the Bedford County Public Service Authority established under the authority of § 15.1-1241, Code of Virginia (1950), as amended, provides that the purposes of the Authority include the acquisition, construction, operation and maintenance of garbage and refuse collection and disposal systems. It also provides that the Authority shall not undertake any project which will duplicate any existing services provided by the City of Bedford. Since you indicate there will be no duplication, I am of the opinion that the answer to this question is in the affirmative.

Second: Section 15.1-1250(1) of the Code is authority for the local Authority to contract with an agent to discharge its responsibility of garbage and refuse collection, provided such contract shall be subject to such provisions, limitations or conditions as may be contained in the resolution of the Authority authorizing revenue bonds of the Authority or the provisions of any trust agreement securing such bonds. While the Authority is not empowered to assign definite areas of the county within prescribed boundaries to private individuals or corporations, the county may do so under § 15.1-28.1 of the Code.

COUNTIES—Consolidation and Merger—Vote required.

CONSOLIDATIONS AND MERGERS—County and All Incorporated Towns Therein—Separate majority vote of county and towns required.

June 7, 1973

The Honorable Duncan C. Gibb
Member, House of Delegates

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

"A committee with members appointed by the County of Warren and the Town of Front Royal is considering the desirability and feasibility of consolidating or merging into either a single county or a single city. A question which concerns this committee is whether the voters of the Town and the County must vote separately upon the question of merger or consolidation into a single county or a single city and must approve the same. I would appreciate your opinion upon this question."

Section 15.1-1138 requires a majority vote of the town as well as the county. See opinion of this Office to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated January 5, 1972, found in Report of the Attorney General (1971-1972), p. 442.
REPORT OF THE ATTORNEY GENERAL

COUNTIES—County Is Without a Police Force Though Town Within County Has Police Department.

POLICE—County Is Without a Police Force Though Town Within County Has Police Department.

THE HONORABLE WALTER J. AKERS
Sheriff of Floyd County

In your recent letter you seek an interpretation of the recent amendment to § 14.1-70 of the Code of Virginia as it applies to Floyd County.

Section 14.1-70 provides that the Compensation Board shall fix the number of both full-time and part-time deputies appointed by the sheriff of a county or city. The 1973 Session of the Legislature added the following proviso to this section:

"Provided, however, that in any county without a police force, upon the request of the board of supervisors of such county, the number of such uniformed law enforcement deputies shall be fixed at not less than one such deputy for each two thousand population in such county."

You advise that the Town of Floyd has two policemen, and by telephone you further advised that these are the only law enforcement officers in Floyd County other than your deputies and members of the Department of State Police. You desire to know whether the policemen of the Town of Floyd constitute a county police force within the meaning of the amendment to § 14.1-70.

The Legislature has enacted separate and distinct laws dealing with town police forces, see §§ 15.1-137, and 138; and county police forces, see §§ 15.1-156, 157, 158 and 159. Since the Legislature has seen fit to treat county and town police forces differently, it is my opinion that, when § 14.1-70 was amended, the Legislature was concerned with whether a county itself had a police force and was not concerned with town police forces. I am, therefore of the opinion that Floyd County is without a police force within the meaning of § 14.1-70.

COUNTIES—County-owned Securities—A bank acting as custodian of securities owned by a county must secure the deposit.

THE HONORABLE ELIZABETH C. FLIPPO
Treasurer for Spotsylvania County

I have received your recent letter inquiring whether a bank acting through its trust department as custodian of securities owned by a county is required to pledge collateral to secure the county against loss.

Section 58-943.3, Code of Virginia (1950), as amended, provides inter alia:

"... the governing body of any county may by resolution provide that any or all securities owned by the several funds of such county may be held ... by the trust department of a bank ... as custodian thereof in safekeeping for the account of the treasurer.

* * *

"This section shall not be construed to relieve any such governing body from any requirement of law relating to the deposit and investment of county funds, except as herein provided.
"All of the requirements and provisions of this article relating to the bonding of depositories and security to be given upon such bond shall apply mutatis mutandis to each bank and trust company which is a custodian under the provisions of this section..."

In consideration of the foregoing, I am of the opinion that the provisions of § 58-938, et seq., are applicable to securities owned by a county and deposited with a bank as custodian and that the bank must secure the deposit pursuant to §§ 58-944 through 58-947.

COUNTIES—Election Districts—May be reduced to one county-wide district.

ELECTIONS—Election Districts—May be reduced to one county-wide district.

September 18, 1972

THE HONORABLE EVA MAE SCOTT
Member, House of Delegates

This is in reply to your recent letter in which you asked for an official interpretation of the law relative to the procedure for providing an additional member at large to a board of supervisors in a county where the present membership is four elected from election districts and it is desired to change the number to five and elect the fifth member at large.

Under the traditional form of county government, there is no authority for one member of a board of supervisors to be elected at large. If it is desired that all members be elected at large the entire county may be reduced to one county-wide district under § 15.1-37.4 of the Code of Virginia (1950), as amended, and the full membership elected at large. See opinion of this office to the Honorable Charles J. Ross, found in Report of the Attorney General (1970-1971), p. 82, a copy of which is enclosed.

In counties which have adopted the county board form of government under Title 15.1, Chapter 14, Article 5, of the Code (§§ 15.1-697 through 15.1-721) one member of the board of supervisors may be elected at large, the others from magisterial districts. See § 15.1-700.

COUNTIES—Establishment of County Finance Board and its Membership.

August 18, 1972

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

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

"I have recently searched the Code of Virginia in reference to a county having the authority to appoint a Finance Board composed of the chairman of the Board of Supervisors, the Treasurer and a member at large. Nowhere in the Code can I find necessary statutory authority for the chairman of the Board of Supervisors or a member at large to be appointed or that they have any legal standing in fact.

"I would appreciate it if you look into this matter and advise me accordingly."

Section 58-940 of the Code of Virginia (1950), as amended, authorizes the establishment of a county finance board and provides for its membership. That section reads:

...
"For the purposes hereinafter indicated, there shall be for each county of the Commonwealth a county finance board, which shall consist of the chairman of the board of supervisors or other governing body, the treasurer and a citizen of the county of proven integrity and business ability. The chairman of the board of supervisors or other governing body and the county treasurer shall be ex officio members of the county finance board and the citizen member thereof shall be appointed by the circuit court of the county or by the judge thereof in vacation. But in any county adjoining any county having a population of more than five hundred per square mile the county finance board shall consist of the chairman of the board of supervisors or other governing body, the treasurer, the Commonwealth's attorney and a citizen of the county of proven integrity and business ability. And the citizen member thereof shall be appointed by the circuit court of the county or by the judge thereof in vacation. The term of the citizen member of the county finance board now in office shall expire December thirty-first nineteen hundred and forty-nine. Thereafter the term of the appointment of such member shall be four years, but the circuit court of the county, or the judge thereof in vacation, in his discretion, may remove for cause any such member and appoint some other qualified citizen of the county in his stead for the unexpired portion of his term.

"The governing body of any county which has a county finance board established under the provisions of this section may by ordinance duly adopted abolish the finance board, whereupon all authority, powers, and duties of the finance board shall vest in the governing body."

COUNTIES—Neither County Nor Its Planning Commission Authorized to Acquire Land for Re-sale or Lease With Restrictions to Preserve Open-space Areas of County.

REAL PROPERTY—Neither County Nor Its Planning Commission Authorized to Acquire Land for Re-sale or Lease With Restrictions to Preserve Open-space Areas of County.

DILLON'S RULE—Limits Authority of Local Governments to Powers and Functions Statutorily Established.

March 13, 1973

The Honorable Robert F. Ripley, Jr.  
Commonwealth's Attorney for York County

This will acknowledge receipt of your recent letter in which you seek my advice as to whether York County or its Planning Commission may acquire open-space tracts of land in the county and subsequently sell or lease them to private individuals or corporations, with certain restrictions upon use, in order to preserve such lands as open space or natural areas.

The purposes for which counties may acquire real estate are set forth in various sections of Title 15.1 of the Code of Virginia. Sections 15.1-175 and 15.1-185 Code of Virginia (1950), as amended, read together, authorize counties to acquire real estate as a part of any "project" for which revenue bonds may be issued. Section 15.1-257 of the Code authorizes counties to acquire lands for purposes of providing a county courthouse and office space for the Commonwealth's Attorney. Further, §§ 15.1-278 and 15.1-279 authorize counties to acquire lands for establishment and maintenance of public parks and recreational areas. However, each of these statutory authorizations for county acquisition of lands contemplates retention of such lands by the county and continued control and maintenance of such lands.
for county governmental and public uses. In no instance does the Code authorize acquisition of property by counties for purposes of sale or lease to private individuals with restrictions upon use.

Section 15.1-261.1 of the Code authorizes counties to lease to responsible individuals or corporations any surplus land owned by such county. Nevertheless, that section, in my opinion, contemplates leasing of land which was owned or acquired by the county for authorized governmental or public uses, not land acquired specifically for purposes of re-sale or lease.

The apparent purpose of the county in this proposed arrangement might be adequately achieved through appropriate zoning regulations, pursuant to Title 15.1, Chapter 11, of the Code.

Reflecting upon the aforementioned statutory provisions, and the familiar Dillon's Rule, which limits the authority of local governments to those powers and functions statutorily established, I am of the opinion that neither the County nor its Planning Commission is authorized to acquire land for re-sale or lease with restrictions upon use, in order to preserve open-space areas of the county.

COUNTIES—Ordinances—May adopt ordinances broader than those of State Act on same subject.

ORDINANCES—Counties—May adopt ordinances broader than those of State Act on same subject.

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

This is in response to your recent letter wherein you inquire whether the enactment of a proposed ordinance for Arlington County with respect to the disclosure of financial interests of certain local public officials would be within the authority of the County and whether such ordinance would be in conflict with Chapter 22 of Title 2.1 of the Code of Virginia (1950), as amended.

Section 15.1-510 grants to a county the power to adopt measures as it may deem expedient "to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State." This section would permit the enactment of such an ordinance as you describe. The remaining question is whether the County has been preempted from regulating the disclosure of information by its public officials as a result of the passage of the Virginia Conflict of Interests Act.

I enclose for your convenience a copy of an opinion to the Honorable John E. Kennahan, dated July 9, 1971, in which I ruled that local ordinances which hold their public officers to stricter standards than those of the Virginia Conflict of Interests Act would not be deemed in conflict with the Act. Since the disclosure provisions of the proposed ordinance are even broader than those of the State Act, I am of the opinion that the adoption of such ordinance is within the authority of the County.

COUNTIES—Ordinances—Paralleling State law—May not include in ordinance less stringent regulations than appear in statute.

COUNTIES—Ordinances—Paralleling State law—May include more stringent regulations than appear in statute.
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE ROBERT F. RIPLEY, JR.
Commonwealth's Attorney for York County

This is in reply to your letter of February 5, 1973, which reads as follows:

"The York County Board of Supervisors have proposed that the following Ordinance be adopted for our County:

"1. It shall be unlawful for the owner or custodian of any dog in York County to allow such dog to run at large during any month of any year from the date of the enactment of this Ordinance.

"2. For the purpose of this section a dog shall be deemed to run at large while roaming, running or self-hunting off the property of its owner or custodian and not under its owner's or custodian's immediate control.

"3. It shall be the duty of the Game and dog Wardens to enforce the provision of this section and any person who permits his dog to run at large, who after being notified in writing by any land owner, or orally by the Dog Warden, Game Warden or any other officer of the law, shall be deemed to have violated the provisions of this section, and upon conviction thereof shall be fined not less than $5.00 nor more than $25.00 for each violation.

"The above styled ordinance was taken from Section 29-194 of the 1950 Code of Virginia, as amended, with the exception of the underscored portion. Said underscored portion was to a degree copied from Section 29-194 prior to its 1968 amendment, which deleted the requirement of notice.

"My question is whether or not the County may write an Ordinance requiring this type of notice where the State enabling legislation does not so require?"

I am of the opinion that your question is answered in the negative. By Chapter 681 of the Acts of Assembly of 1968, § 29-194 of the Code of Virginia (1950), as amended, was amended by deleting the notice requirement. The County in reinserting this requirement before a conviction can be had under the section, is, in fact, lessening the requirements of the statute.


In adopting the proposed language in paragraph 3 above, however, the County is providing less stringent regulations than appear in the statute. Therefore, the County may not write the ordinance requiring this type of notice where the State enabling legislation does not so require.

COUNTIES—Subdivision Streets—Lot owner may not require county or State Highway Department to construct and maintain a street within a subdivision.

HIGHWAYS—Authority of Lot Owner to Require County or State Highway Department to Construct and Maintain a Street Within a Subdivision.

SUBDIVISIONS—Streets—Lot owner may not require county or State Highway Department to construct and maintain a street within a subdivision.

May 10, 1973

THE HONORABLE PHILIP H. MILLER
County Attorney for Augusta County
REPORT OF THE ATTORNEY GENERAL

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

"On June 28, 1972, the Board of Supervisors of Augusta County passed a zoning ordinance creating a new residential district known as "A-6 Residential District". This new rural classification was created to provide for rural housing on lots of 5 acres or more.

"This ordinance provides, in part, for access to the lots in each subdivision by 50-foot private rights-of-way and in pertinent part states as follows:

'12. Streets: In A-6 Residential Districts all lots shall:
1. Front on a public street; or
2. Front on a private right of way or easement at least fifty (50) feet in width as evidenced by a duly recorded document and/or deed covenant which shall specify that no request will be made to have the lot served by a public street unless and until the street has been designated and constructed at no cost to the County or the Virginia Department of Highways, to the then current standards for streets. Said document shall also specify the provisions for the construction, maintenance and upkeep of all private streets.'

"The question posed is: Can a lot owner in an A-6 subdivision require the County or the State Highway Department to construct and maintain the streets within the subdivision, regardless of paragraph 12, cited above? The County does require that the plat cite, on its face, the statements contained in Paragraph 12."

Section 33.1-13, Code of Virginia (1950), as amended, places plenary power for constructing, improving and maintaining roads embraced in the systems of State highways in the State Highway Commissioner. Section 33.1-69 of the Code vests control, supervision, management and jurisdiction over county roads (with exception to those counties utilizing their election to withdraw entirely from the secondary system under the terms of Chapter 415 of the Acts of Assembly of 1932) in the Department of Highways and the State Highway Commissioner. Sections 33.1-40 through 33.1-45 provide that it is discretionary with the State Highway Commissioner whether to construct and/or maintain streets in subdivisions.

I am aware of no authority whereby a lot owner in any subdivision may require a county or the State Highway Department to construct and maintain a street within a subdivision. I therefore, answer your question in the negative.

COUNTIES—Tax Revenue—May not set aside and use specified tax revenues for reimbursement of costs of constructing water line.

TAXATION—General Tax Revenues—May not be set aside and used in manner not provided in statute.

COUNTIES—Budgets—Must be prepared on annual basis.

BOARDS OF SUPERVISORS—Contracts—In excess of one year prohibited.

March 7, 1973

THE HONORABLE W. BYRON KEELING
Commonwealth's Attorney for Charlotte County

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

"Mr. James D. Ramsey, Jr., a member of the Board of Supervisors of
Charlotte County, has asked me for an opinion as to the legality of the following proposal and I quote his letter.

"The proposal I presented to the Board of Supervisors several months ago regarding repayment of the cost of water lines to the towns that would provide water for industry is as follows:

"When a municipality constructs a water line outside the corporate limits of said municipality for industrial purposes, that the actual initial cost of said line be repaid to the town by the county on the following basis—ie.: one half of all taxes collected from all industry connected to said line be repaid to the town until the original actual cost be reimbursed in its entirety.

"The line is to be installed to town specifications, and remain the property of said town. The town will maintain same and make other connections as it deems proper. Only taxes of industry will be involved in the pay back."

"I would appreciate it if you would advise if the County has the authority to use the taxes in the manner as set forth above."

I find no statutory authority for the County to set aside and use specified tax revenues for reimbursement for the costs of construction of a water line. In the absence of such authority I am of the opinion that these revenues may not be used in the manner proposed.

Chapter 4 of Title 15.1 of the Code of Virginia (1950), as amended, specifies that budgets for the localities be prepared on a fiscal year basis. Section 15.1-162 of the Code expressly provides that no money shall be paid out or become available for expenditures until the governing body has first made an annual semi-annual, quarterly or monthly appropriation for such contemplated expenditure.

To agree to use tax revenues annually for the purpose of reimbursement until the original cost has been paid back would involve a contract in excess of one year which is prohibited. See opinion to the Honorable J. Madison Macon, Jr., Commonwealth's Attorney for Charles City County, dated January 19, 1973, a copy of which is enclosed. This however does not preclude the county from entering into an agreement each year for payment to the town of part of the cost of the line, provided appropriations therefor are made. Section 15.1-205 of the Code authorizes counties, cities and towns, through their respective governing bodies, to enter into such contracts and agreements as may be proper for the acquisition construction maintenance and operation of any project. "Project" is defined in § 15.1-304 to include water supplies and water works.

COUNTIES, CITIES AND TOWNS—Authority—May not appropriate funds to Salvation Army since sectarian organization.

RELIGIOUS ORGANIZATIONS—Salvation Army—Sectarian organization.

June 15, 1973

The Honorable James E. Durant
Treasurer of the City of Falls Church

This is in reply to your recent letter in which you requested my opinion whether the City of Falls Church may donate money to the building of a Salvation Army facility.

Article IV, Section 16, of the Virginia Constitution prohibits the appropriation of public funds to any sectarian society. This section reads:

"The General Assembly shall not make any appropriation of public
funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may however make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties cities or towns to make such appropriations to any charitable institution or association."

The Salvation Army is a religious body. See opinion to the Honorable Victor J. Smith, Commissioner of the Revenue of the City of Harrisonburg, found in Report of the Attorney General (1967-1968) p. 266. It is a sectarian institution. See Bennett v. City of La Grange, 112 S.E. 482, 485, 153 Ga. 428 (1922), 22 A.L.R. 1312.

Section 15.1-24, Code of Virginia (1950), as amended, authorizes cities to make appropriations of public funds, of personal property or of any real property to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society.

Section 63.1-219 of the Code to which you refer authorizes the governing bodies of the several cities and counties to appropriate to incorporated charitable organizations sums of money for the maintenance and care of dependent children. While this section does not limit the appropriation to non-sectarian institutions, Article IV, Section 16 of the Constitution imposes such a restriction. I am of the opinion that the Salvation Army is a sectarian organization. The City of Falls Church is, therefore, prohibited from donating money to it to erect a building for the care and maintenance of dependent children.

COUNTIES, CITIES AND TOWNS—Joint Exercise of Powers—Ownership of property.

January 10, 1973

THE HONORABLE EUGENE T. JENSEN
Executive Director, State Water Control Board

This will acknowledge receipt of the recent letter from your office requesting my advice as follows:

"... I am requesting legal advice concerning the incorporation of a non-profit organization.

Because of continued deterioration of the water quality in the Occoquan Reservoir, ... the State Water Control Board established a Waste Treatment and Water Quality Management Policy for the Occoquan Watershed, Under Attachment C of the Policy, a subcommittee was formed and given the responsibility of developing a water quality monitoring program for the Occoquan Reservoir and its tributary streams. ... Of course, the operation and maintenance of such a program requires the purchase of considerable amounts of equipment and a sizeable yearly budget. The cost of the monitoring program approximately $160,000 per year, is shared by the water supply users and the sewage dischargers in the Occoquan Basin. Thus, the Fairfax County Water Authority supplies 50 percent of the funds and the remainder is split between the counties of Fairfax; Prince William, which includes the towns of Manassas and Manassas Park; Fauquier, which includes the town of Warrenton;
and Loudoun. The financial contributions are collected by the State Water Control Board and the funds are transferred to the Virginia Polytechnic Institute and State University where the Monitoring Program is administered through the Research Division under the direction of the Subcommittee Chairman, Dr. Clifford W. Randall of the Department of Civil Engineering . . . it is the desire of the State Water Control Board to have the Watershed Monitoring Subcommittee incorporated as a non-profit organization so that ownership may pass to it. Please provide us with legal advice concerning the feasibility of such an incorporation and details on how the Subcommittee can be incorporated if such a move is possible . . .”

As I understand the situation, as set forth in your letter, the equipment necessary for carrying out the Water Quality Monitoring Program will be purchased from funds contributed by the various governmental entities in the Occoquan Watershed, these being Loudoun County, Fairfax County, Fauquier County, Prince William County, and Fairfax County Water Authority, and the towns of Warrenton, Manassas and Manassas Park. Joint ownership of the equipment among the various funding governmental entities would, if legally possible, avoid the necessity of creating any additional legal entity in which to vest title to the equipment. In this regard, § 15.1-21(a), Code of Virginia (1930), as amended, provides that political subdivisions may exercise jointly any powers or authorities that each may exercise individually. Since counties, towns, and cities may acquire and hold property individually, several counties, towns, and cities may jointly acquire and hold property pursuant to § 15.1-21(a) of the Code. Section 15.1-21(b) of the Code authorizes two or more subdivisions to enter into agreements for joint cooperative action, and § 15.1-21(d)(2) clearly anticipates joint acquisition of property by political subdivisions acting jointly pursuant to agreement without the creation of separate legal entities in which to vest title to such acquired property.

Further, § 15.1-1250(1) authorizes public water authorities to enter into such agreement as the authority may determine are necessary or incidental to the performance of its authorized duties. Thus, the participation of the Fairfax County Water Authority in the monitoring program and the joint acquisition of property pursuant thereto is in my opinion entirely proper.

Joint ownership of the equipment necessary for the monitoring program would avoid the administrative and legal intricacies of the creation and incorporation of a separate legal entity. Accordingly I am of the opinion that title to any equipment purchased from the funds contributed for the maintenance of the water quality monitoring program by the aforementioned governmental bodies may be held jointly pursuant to an agreement by the contributing governmental entities, and that such joint ownership is the least complex and most desirable mode of ownership. Your attention is directed to § 15.1-21(c) which sets forth specific requirements for agreements between local governments for joint exercise of powers. Furthermore, some formal action by each agreeing governmental body, either by ordinance or resolution, is required by § 15.1-21(b) in order that the agreement enter into force.

COUNTIES, CITIES AND TOWNS—Local Ordinances Must Be in Compliance With State Laws; Amendment of State Law.

ORDINANCES—County May Enforce State Law Without Copying Law Into Form of Local Ordinance.

August 14, 1972
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE DUNCAN C. GIBB
Member, House of Delegates

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

"When a County, City or Town adopts an ordinance similar to, and under authority of, a state statute is it necessary for the ordinance to be amended if the State statute is amended. For example, if a town adopts an ordinance similar to Section 18.1-57 is it necessary for the town to amend this ordinance to comply with the amendment of the statute which we made effective July 1st?

"If you are of the opinion that it is necessary for the local ordinance to be amended each time that the State statute is amended is there some way that we could eliminate this necessity as it is an expense to the locality.

"I understand that some Courts hold that it is necessary for the localities to adopt ordinances similar to Section 18.1-57 and 18.1-59. This seems to be a needless expense and that these two statutes apply regardless of whether the locality adopts similar ordinances. Is there some way in which we could make it absolutely certain that it is not necessary for the locality to adopt ordinances similar to these two statutes? I feel certain that there are many, many, other statutes in the same category."

Section 1-13.17 of the Code of Virginia (1950), as amended, reads in part:

"When the council or authorities of any city or town . . . are authorized to make ordinances . . . , it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this State."

Therefore, in answer to your first question, I am of the opinion that any local ordinance, in order to be valid, must be in compliance with any State law. If, by virtue of a legislative amendment, a State law conflicts with a local ordinance, it is my opinion that, upon the effective date of the amended State law, the ordinance would be null and void unless it had been amended to eliminate the conflict. However, unless the two provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of a lack of uniformity of detail. See, King v. County of Arlington, 195 Va. 1084, 1091 (1954). If the local ordinance simply parallels or enlarges upon an act of the State legislature, both can stand.

With regard to your second question concerning a method of eliminating the necessity of amending local ordinances to comply with amended State laws, I refer you to § 15.1-13 of the Code, which authorizes cities and towns to make ordinances and prescribe fines and other punishment for violations thereof. This is not a mandate, but merely an authorization to exercise concurrent legislative jurisdiction with the State, assuming that the State has similar jurisdiction. If the locality chooses to exercise this authority, it must conform to the requirements of § 1-13.17 of the Code. One alternative to such action is simply to enforce the State law on the subject within the jurisdiction. If the State law is adequate, I see no compelling reason why the locality must copy the law into the form of an ordinance. Another alternative is to adopt a particular portion of the Code by reference. This method is expressly authorized in § 46.1-188 of the Code, which allows adoption by reference of appropriate provisions of the motor vehicle laws in local ordinances.

COUNTIES, CITIES AND TOWNS—Mandatory Solid Waste Disposal Facil-
ities—County cannot require a town within its limits to pay a percentage of capital outlay and operating costs.

January 11, 1973

THE HONORABLE NATHAN H. MILLER
Member, House of Delegates

I have received your letter of January 3, 1973, requesting an opinion whether Rockingham County could require the towns within the county to pay a percentage of the capital outlay and operating costs of a landfill for the disposal of solid waste. I understand that the landfill is being developed pursuant to § 32-9.1 of the Code of Virginia.

That section requires every county, city and town to submit a plan for solid waste disposal. The last two sentences provide as follows:

"Each county's plan must include the facilities to be used by all towns located therein. Any combination of cities, counties and towns may submit a regional plan in lieu of an individual plan."

As you stated in your letter, all towns within the boundaries of a county are parts of that county. A county may, in providing a service which is not required by law, exclude the citizens of the town. See Report of the Attorney General (1968-1969), p. 53. However, as the landfill referred to in your letter is required for the entire county, it is my opinion that the county cannot require the Town of Bridgewater to pay a percentage of the capital outlay and operating costs.


PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Contractors, When Subject to Regulation by County Ordinance; Electrical Contractor.

CONTRACTORS—When Subject to Regulation by County Ordinance; Electrical Contractor.

August 2, 1972

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

This is in reply to your recent letter in which you cite § 54-129 and § 54-145.2 of the Code of Virginia and request my opinion as follows:

"If a person passes the [State] examination and is qualified by the Commonwealth of Virginia under 54-129 of the Code [as a master electrician], does that pre-empt the right of Chesterfield County to require that same person to pass the County examination for journeyman electricians?"

Section 54-129, Code of Virginia (1950), as amended, provides:

"It shall be unlawful for any person to engage in, or offer to engage in, general contracting or subcontracting in this State, unless he has been duly licensed and issued a certificate of registration under the provisions of this chapter; however, the issuance of such certificate shall not entitle the holder to engage in any activity for which a special license is required by law, except as provided in § 54-145.2." (Emphasis supplied.)

Section 54-145.2 provides, in part:

"The governing Code of every county, city or town shall have the power
and authority to adopt ordinances not inconsistent with the provisions of this chapter, requiring every person who engages in, or offers to engage in, the business of home improvement, electrical plumbing or heating or air conditioning contracting or the business of constructing single or multi-family dwellings in such county, city or town, to obtain a license from such county, city or town, except, however, such contractor examined and currently registered under the provisions of § 54-129.” (Emphasis supplied.)

Section 54-113(2) defines the “general contractor” or “subcontractor” subject to the provisions of Chapter 7 as any contractor who undertakes a contract, the amount of which exceeds $30,000, or who undertakes a series of contracts, the sum of the amounts of which exceed $200,000 per year.

Considering these provisions as a whole, it is my judgment that the only class of contractor subject to regulation by county ordinance are those contractors who do not fall within the definition of § 54-113(2), i.e., those who do not undertake a contract exceeding $30,000 or those who do not undertake a series of contracts exceeding $200,000 per year. This opinion is in accordance with other recent opinions of this office. See Reports of the Attorney General (1964-65), p. 163; (1961-62), p. 144.

To the extent, therefore, that §§ 14-34—14-46 of the County Code of Chesterfield purports to apply to contractors holding electrical contractor certificates pursuant to § 54-129, the ordinance is of no effect and is unenforceable.

COUNTIES, CITIES AND TOWNS—Real Estate—May be jointly acquired by county and town for public parking.

REAL ESTATE—Counties, Cities and Towns—May acquire jointly for public parking.

May 25, 1973

THE HONORABLE JOHN ALEXANDER
Commonwealth’s Attorney for Fauquier County

This is in reply to your recent letter in which you asked my opinion whether the County of Fauquier and the Town of Warrenton have authority to take title to real estate jointly for purposes of providing public parking “for both the users of the County Courthouse building and other townspersons desiring to use the same.”

Section 15.1-21 Code of Virginia (1950), as amended, 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 (1958).

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 15.1-14 of the Code authorizes towns to provide off-street automobile parking facilities and open the same to the public, with or without charge. Section 15.1-522 confers upon counties the same powers as cities and towns provided no powers or authority conferred shall be exercised within the corporate
limits of any incorporated town except by agreement with the town council. Section 15.1-257 pertaining to courthouse property provides that any portion of property owned by a county and located within a city or town, and not actually occupied by the courthouse, Clerk's Office, or jail, may be sold or exchanged and conveyed to a city or town to be used for street or other public purposes and that the governing body of the county may purchase so much land as, with what it has, may be necessary for any other proper purpose of the county.

I am of the opinion, therefore, that under § 15.1-21 of the Code the county and town may enter into an agreement for a joint venture of providing public parking for the users of the courthouse building. The agreement between these political subdivisions may provide for the joint holding of title to the real property. 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.

COUNTIES, CITIES AND TOWNS—Regional Water Authority—No authority to join while member of existing authority.

EMINENT DOMAIN—Political Subdivisions—Property may not be acquired without consent of governing body.

WATER AND SEWERAGE AUTHORITY—Regional Water Authority—County has no authority to join while member of existing authority.

May 9, 1973

THE HONORABLE WOODROW CROOK
Commonwealth's Attorney for Isle of Wight County

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

"The County of Isle of Wight is a member of a Water Authority consisting of the County of Isle of Wight, the incorporated Town of Smithfield, and the incorporated Town of Windsor which was created September 6, 1966 under and pursuant to Chapter 28, Title 15.1, Code of Virginia (1950), as amended.

"Now, the County of Isle of Wight is considering joining a regional water authority with other counties and cities under Title 15.1, Chapter 28 of the Code of Virginia. However, § 15.1-1215 of the Code states that no governing body which shall have created an authority or joined with other governing bodies in the creation of an authority shall thereafter create or join with any other governing body in the creation of an authority if the authority would duplicate the services being performed in whole or in part of the areas then being served by the pre-existing authorities.

"Would you please give me your opinion as to whether the County of Isle of Wight is prevented from joining a regional authority under § 15.1-1251 of the Code when it is already a member of a previously created authority.

"Also, I would like to have your opinion concerning the interpretation and construction of § 15.1-1250 paragraph (f) of the Code which provides as follows:

" '(f) To acquire purchase, lease as lessee, construct, reconstruct,
improve, extend, operate and maintain any water system, or sewer system, or sewage disposal system, or a garbage and refuse collection and disposal system or any combination of such systems within, or partly within and partly without one or more of the political subdivision or subdivisions by action of whose governing body or governing bodies the authority was created, or who may hereafter (after February twenty-seventh, nineteen hundred sixty-two), join such authority; and to acquire by gift, purchase or the exercise of the right of eminent domain lands or rights in land or water rights in connection therewith, within, without, or partly within and partly without one or more of the political subdivision or subdivisions by action of whose governing body or governing bodies the authority was created, or who may hereafter (after February twenty-seventh, nineteen hundred sixty-two), join such authority; and to sell, lease as lessor, transfer or dispose of all or any part of any property, real, personal or mixed, or interest therein at any time acquired by it; provided, that in the exercise of the right of eminent domain the provisions of § 25.233 shall apply. In addition, the authority in any county or city to which §§ 15.1-335 and 15.1-340 are applicable shall have the same power of eminent domain and shall follow the same procedure therefor as provided in §§ 15.1-335 and 15.1-340 of the Code of Virginia; and provided, further, that no property or any interest or estate therein owned by any county, city, town or other political subdivision of the State shall be acquired by the exercise of the power of eminent domain without the consent of the governing body of such county, city, town or political subdivision; and except as otherwise herein provided, each authority is hereby vested with the same authority to exercise the power of eminent domain as is vested in the State Highway Commissioner of Virginia;’” (Emphasis supplied.)

Your first question is whether the county of Isle of Wight is prevented by § 15.1-1251 of the Code from joining a regional authority when it is already a member of a previously created authority. The answer to this question is in the affirmative where the authority to be joined would duplicate the services being performed in whole or in part by the authority of which the county is already a member.

You next ask for an interpretation of the following language found in § 15.1-1250(f) of the Code:

“. . . and provided, further, that no property or any interest or estate therein owned by any county, city, town or other political subdivision of the State shall be acquired by the exercise of the power of eminent domain without the consent of the governing body of such county, city, town or political subdivision. . . .”

I am of the opinion that this language prohibits the exercise of the power of eminent domain for the acquisition by an authority of land owned by any county, city, or town without the consent of the governing body of the county, city or town in which the land lies.

COURTS—Circuit—Authority relating to destruction of controlled substances seized in connection with violations of Drug Control Act.

CRIMINAL PROCEDURE—Destruction of Controlled Substances by Circuit Courts.
DRUGS—Authority of Courts to Dispose of.

May 25, 1973

The Honorable Richard A. Turner
Clerk, Hustings Court of the City of Richmond

This is in reply to your recent letter wherein you pointed out that § 54-524.101:5, Code of Virginia (1950), as amended, recently passed by the 1973 Session of the General Assembly, which contains an emergency clause, directs itself to the circuit court of any city or county. The section, as you pointed out, relates to destruction of controlled substances seized in connection with violations of Article 8, Chapter 15.1, Title 54, the Drug Control Act. You inquired as to whether the section, in referring to the circuit court of any county or city, can be deemed to include the Hustings Court of the City of Richmond.

The section is clear, and no language is contained therein which could be interpreted to include the Hustings Court of the City of Richmond. Therefore, in my opinion, the answer to your inquiry is in the negative.

It is to be pointed out that Chapter 544, Acts of Assembly (1973), will become effective on July 1, 1973. Section 17.1-116.1(b) therein contained designates the Hustings Court of the City of Richmond, Part I, as a portion of Division I, of what will be the Circuit Court for the Thirteenth Circuit. Therefore, on and subsequent to July 1, 1973, your Court, having been renamed, will fall within the provisions of § 54-524.101:5. There is no statutory prohibition against your Court retaining controlled substances until July 1, 1973, when the Court may then follow the procedures of § 54-524.101:5.

It is to be pointed out that § 54-524.78, also relating to disposal of seized drugs, remains in effect.


COURTS—Municipal Courts—Abolished but court allowed to continue to exist until incumbent trial officer completes term of office or vacancy occurs.

COURTS—Limited Jurisdiction—Abolished but allowed to exist until incumbent trial officer completes term of office or vacancy occurs.

COURTS—Not of Record—As of January 1, 1973, all courts below circuit and corporation courts except those specifically excluded.

COURTS—Municipal Court of Fairfax—A court of general civil, criminal jurisdiction.

DISTRICT COURT BILL—Courts—Establishment of various courts.

May 10, 1973

The Honorable Donald C. Crounse
Associate Judge, Fairfax County Court

This is in reply to your recent request for an opinion concerning the interpretation of Chapter 546 of the Acts of Assembly, 1973, insofar as it relates to the transition from county, city and town courts to the district court system. Your letter raises a number of questions and I will attempt to deal with those questions in the order that you raise them.

Your first question is stated as follows:

"An apparent conflict arises when one seeks to determine the status of
judges of courts of limited jurisdiction, under Chapter 5, Title 16.1 (Sec. 16.1-70 et seq) after July 1, 1973. It would appear clear that municipal or other courts of towns, and courts of limited jurisdiction are abolished July 1, 1973 (Sec. 16.1-70.1). Jurisdiction of the municipal and other courts of towns passes to the County General District Court on July 1, 1973. Courts of limited jurisdiction, however, would continue until the incumbent trial officer’s term expires. Therefore, it would appear that the jurisdiction of these courts of limited jurisdiction continue, and do not pass to the County General District Court. What then is the status of these respective judges?”

Section 16.1-69.8 is on point and that section as enacted is set forth below:

“§ 16.1-69.8. Existing courts continued and redesignated; exception.—The present system of courts not of record is continued as follows on and after July one, nineteen-hundred seventy-three:

“(a) The county court in each county shall continue as the general district court of such county with the same powers and with territorial jurisdiction over such county and over any city within the county for which a municipal court with general civil or criminal jurisdiction or separate general district court has not been established.

“(b) The municipal court or courts in each city, excluding courts of limited jurisdiction established pursuant to Chapter 5 (§ 16.1-70 et seq.) of Title 16.1 and juvenile and domestic relations courts shall continue as the general district court of the city with the same powers and territorial jurisdiction over such city; provided that in the case of more than one such municipal court in operation in any city, all such courts shall be merged on July one, nineteen-hundred seventy-three and their powers and territorial jurisdiction merged in the general district court.

“(c) The juvenile and domestic relations court of each county and city shall continue as the juvenile and domestic relations district court of the county or city with the same powers and territorial jurisdiction as here-tofore provided.

“(d) The municipal court of any town and/or other court of any town having general civil and criminal jurisdiction however called shall be abolished and all jurisdiction and power conferred upon any such court shall pass to and be exercised by the district courts having jurisdiction over the county wherein the town is located.”

The other relevant section of Chapter 546 is § 16.1-70.1 which is located under the headings of “CHAPTER 5.” and “COURTS OF LIMITED JURISDICTION.” That section states as follows:

“§ 16.1-70.1. Abolition of courts of limited jurisdiction.—The courts of limited jurisdiction continued or authorized pursuant to this chapter and in operation June thirty, nineteen hundred seventy-three, are hereby abolished, provided that any such court shall continue in operation until the incumbent trial officer completes his term of office or a vacancy shall occur. No court of limited jurisdiction shall be established on or after July one, nineteen hundred seventy-three.

“All jurisdiction and power conferred upon any such court in any city or town shall pass to and be exercised by the district courts having jurisdiction over such city or town.”

These two sections of Chapter 546 must be read together in order to effectuate the legislative intent. Section 16.1-69.5, which is the definition section of Chapter 546, does not define the term “municipal courts” except to state that it “shall be
deemed to refer to general district courts” and there is no definition whatsoever in Chapter 546 of the term “courts of limited jurisdiction.” Repealed § 16.1-5 of the Code of Virginia (1950), as amended, defined the term “municipal courts” to 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.”

Repealed § 16.1-70 similarly defined “courts of limited jurisdiction” as including existing courts in cities and towns created under prior § 16-129 and similar courts “created under the provisions of municipal charters . . . 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 . . .” That section went further to point out that unless “otherwise specially provided such police court shall not be included in the designation ‘courts not of record’ as used in this title.” Section 16.1-70 was contained in “CHAPTER 5,” and titled “COURTS OF LIMITED JURISDICTION.” Thus, I conclude that the use of the terms “municipal courts” and “courts of limited jurisdiction” must be used in the same context as they are presently or have been previously defined in the Code.

It is my opinion that Chapter 546 abolishes courts of limited jurisdiction but allows the courts to continue to exist until the incumbent trial officer completes his term of office or a vacancy occurs in that position at which time the court would cease to exist and the jurisdiction of the court would pass to the general district court of the county in which the town of the court of limited jurisdiction is located. Thus, the judges of the courts of limited jurisdiction would continue to sit as judges of those courts until their term expired or a vacancy occurred at which time the court would cease to exist and a new trial officer or police justice could not be appointed. This would apply to the town courts of Haymarket, Dumfries, Manassas, Manassas Park, Quantico and Occoquan which appear to be courts of limited jurisdiction under § 16.1-70. Vienna, however, appears to have a municipal town court as referred to in § 16.1-69.8(d) as the court there has general criminal and civil jurisdiction (See Acts of Assembly 1964, Chapter 432). Herndon also appears to have a court with general criminal traffic jurisdiction but its town court has no general civil jurisdiction so it does not seem to fall under any category described in § 16.1-69.8 (See Acts of Assembly, 1968, Chapter 646). However, it would appear to be the intention of the General Assembly to treat this court like a § 16.1-69.8(d) court and both the municipal town court of Vienna and the municipal town court of Herndon would pass out of existence and their jurisdiction and powers would pass to the district courts.

Your next question is as follows:

“In the case of a municipal, or other town court judge, Sec. 16.1-69.9 is relied upon as authority for the town judge to continue in office as a judge of the General District Court of the County. The key phrase in Section 16.1-69.9 is ‘Courts not of Record in office in January 1, 1973’. What then is a Court not of Record on January 1, 1973?’

It is my opinion that this term should be construed as applying to “all courts in the Commonwealth below the jurisdictional level of the circuit and corporation courts” except courts of limited jurisdiction which are specifically excluded from this designation (See repealed §§ 16.1-5 and 16.1-7). A judge of a court of limited jurisdiction would therefore continue only in that role and would not be assignable by the chief district judge to courts within the district.
Finally, you inquire as to whether the Municipal Court of the City of Fairfax is a court of limited jurisdiction or whether it is a court covered by § 16.1-69.8 (b) of Chapter 546 which will continue in existence as a general district court of the city with the same powers and territorial jurisdiction over such city. The appropriate authority for the status of the Municipal Court of the City of Fairfax is the city charter. That charter was initially adopted at the 1962 Session of the General Assembly (Chapter 468, Acts of Assembly, 1962). Section 10.5 of that charter establishes the jurisdiction of that court and similar jurisdiction has been retained in subsequent amendments to the charter. The most recent relevant charter amendment appears to have taken place in 1966 and § 11.5 of the charter is of direct interest to this inquiry:

“§ 11.5 Jurisdiction.—The jurisdiction of the Municipal Judge shall be as follows: (a) such Municipal Judge shall be a conservator of the peace within the corporate limits of the City of Fairfax and for one mile beyond said limits, and within the City limits shall have exclusive original jurisdiction for the trial of all offenses against the ordinances of the City, provided that the City shall have the right of appeal to the Circuit Court of Fairfax County from any decision of the Municipal Judge affecting its revenue; he shall have concurrent jurisdiction with the Circuit Court of Fairfax County in all cases of the violation of the revenue laws of both State and City, and the laws regulating the manufacture, use, sale, offering for sale, transportation, keeping for sale and giving away ardent spirits. He shall possess all the jurisdiction and exercise all the powers and authorities in criminal cases of a county judge for a county and except where it is otherwise specifically provided by law, shall have exclusive original jurisdiction for the trial of all misdemeanor cases occurring within the corporate limits of the City.” (Chapter 319, Acts of Assembly, 1966).

Thus, it appears that the Municipal Court for the City of Fairfax has a much broader jurisdictional base than courts of limited jurisdiction under § 16.1-70 and appears to be “a municipal court with general civil or criminal jurisdiction” within the meaning of § 16.1-69.8 (a) and the Municipal Court of the City of Fairfax would appear to be a Court under § 16.1-69.8(b) which would continue in existence after July 1, 1973, as the General District Court of the City.

COURTS—District Court—Surety Bond of Judges, Clerks and Other Employees.
BONDS—Surety Bond of Judges, Clerks and Other Employees of District Court.
DISTRICT COURT BILL—Surety Bond of Judges, Clerks and Other Employees.
CLERKS—Surety Bond; District Court.
JUDGES—Surety Bond; District Court.

June 22, 1973

The Honorable Joseph S. James
Auditor of Public Accounts

This is in reply to your recent request for an opinion concerning the effect of §§ 16.1-69.18 and 16.1-69.41 of the Code of Virginia (1950), as amended, which were both enacted in Chapter 546 of the Acts of Assembly, 1973, commonly referred to as the “District Court Bill”. These provisions deal specifically with the requirements for the posting of surety bonds by the Judge, Clerk, Deputy Clerk, or other officers or employees of District Courts who handle or are accountable for funds within the custody of the Court. Your inquiries are set forth seriatim.
Your first question is as follows:

"1) Will a judge or other court officer continuing to serve after June 30, 1973, under his present appointment, be required to give a new $3000 bond or will his existing $2000 minimum bond for each court served by him be sufficient until the end of his term?"

This question is somewhat double-pronged and my answer is necessarily predicated upon the nature of the judge's appointment. If the judge or other court officer will be serving after June 30, 1973, in essentially the same capacity as prior to that date under § 16.1-69.9 of the Code, then in my opinion he should not be required to give a new $3000 bond and his existing bond will be sufficient until the end of his term. However, if he has accepted a new appointment which changes the character of his service, for example, if he is presently a part-time judge and accepts an appointment as a full-time judge, then he is essentially entering upon the performance of new duties and a bond of sufficient penalty under § 16.1-69.18 or 16.1-69.41 of the Code would have to be given.

Your second question is as follows:

"2) Should it be held that beginning July 1, 1973 the minimum surety bond of $3000 must be provided, may such be done by an endorsement to the original bond without cancelling the old bond and obtaining new coverage?"

It is my opinion that in those instances where a judge is presently serving under an existing bond and a higher new minimum amount is required, this bond may be provided by an endorsement to the original bond if the terms of that bond are in compliance with §§ 16.1-69.18 and 16.1-69.41 of the Code.

Your third question is multifaceted and is as follows:

"3) The District Court legislation provides that a judge will serve in any courts within his appointed district. Will a single bond for not less than $3000 for the judge of the District Court meet the requirements of § 16.1-69.18 for all of the courts included in his district as set out in § 16.1-69.6 or will separate bonds be required for each court in the district in which the judge serves? If it is held that only one bond is required, will it be necessary to file a copy of the bond with the Clerk of the Appellate Court for each of the counties or cities of the district served by the judge?"

The first aspect of your question may be answered in the affirmative as a single bond for not less than $3000 will be sufficient. Section 16.1-69.18 provides that "a judge and clerk of a district court shall enter into bond before the clerk of a circuit court to which appeals from his court lie." (Emphasis supplied.) It is my opinion that this language provides that the bond be entered into only before one of the circuit courts to which an appeal may lie and not before each circuit court. It will only be necessary to file a copy of the bond with "such appellate court" and not with each of the appellate courts although it might be the better practice to file a copy of the bond with the clerk of each appellate court despite the fact that this practice would not be required by law.

Your fourth question is set forth below:

"4) Does the legislation permit a judge of one District Court to serve temporarily as a judge or substitute in another district, and if so, will a separate bond be required for his services in that court?"

Section 16.1-69.35(a) provides for the temporary assignment of a district judge to another district and in such circumstance, it is my opinion that it is not necessary for the judge serving in such a temporary capacity to enter into a separate bond.
Your fifth question is as follows:

"5) Assuming that a judge may be designated a general District Court judge and a Juvenile and Domestic Relations District Court judge, will separate bonds be required or would one bond of $3000 suffice when a new term of office is commenced?"

My answer to your fifth question is necessarily predicated upon my answer to your first question and would be somewhat dependent upon whether the judge is continuing in his present capacity or is assuming a different role. However, in accordance with my opinion of January 14, 1958, to the Honorable J. Gordon Bennett, Auditor of Public Accounts, found in Report of the Attorney General (1957-1958), at page 73, when new terms of office are commenced or a judge is assuming new roles, separate bonds would be required for the General District Court and the Juvenile and Domestic Relations District Court or a single bond in the total amount of $6,000.

Your final question is as follows:

"6) Will coverage under a blanket bond be permitted after July 1, 1973 or will specific bonds be required for the judges and personnel of the City Courts Not of Record which now become District Courts?"

It is my opinion that a blanket bond would be permitted after July 1, 1973, so long as the provisions of that bond are in compliance with §§ 16.1-69.18 and 16.1-69.41 of the Code.

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COURTS—District Court of City of Fairfax May Sit in Fairfax County Courthouse Within City.

DISTRICT COURT BILL—District Court of City of Fairfax May Sit in Fairfax County Courthouse Within City.

June 21, 1973

THE HONORABLE QUIN S. ELSON, Judge
Municipal Court, City of Fairfax

This is in response to your recent inquiry regarding the effect of Chapter 546, Acts of Assembly, 1973, commonly referred to as the "District Court Bill" upon the future operation of the Municipal Court of the City of Fairfax. As your request acknowledges, I have previously ruled in my opinion of May 10, 1973, to the Honorable Donald C. Crounse, Associate Judge of the Fairfax County Court, that the Municipal Court of the City of Fairfax is not a court of limited jurisdiction and will continue in existence after July 1, 1973, as the General District Court for the City of Fairfax. I will deal with your specific inquiries one at a time.

You first inquire as follows:

"1. Can the General District Court for the County of Fairfax located within the City of Fairfax in the Fairfax County Courthouse be designated by the Chief Judge of the 19th Judicial District Court system as the physical place for the hearing of civil cases arising within the City of Fairfax?"

It is my opinion that, § 16.1-69.35(c) of the Code of Virginia (1950), as amended, gives the Chief Judge of the 19th District, encompassing the Cities of Falls Church and Fairfax and the Counties of Fairfax and Prince William, the power to designate the Fairfax County Courthouse located within the limits of the City of Fairfax as the physical place for the hearing of civil cases arising within the City of Fairfax.
Your next question is as follows:

"2. Can the Chief Judge of the 19th Judicial District Court system designate one of the General District Court Judges of the County of Fairfax (part of the 19th Judicial District) as an appropriate Judge to hear the civil cases arising within the City of Fairfax?"

It is my opinion that under § 16.1-69.35 (b) of the Code, if the Chief Judge establishes special divisions of the General District Court, in this case a civil division, he may assign a judge of the General District Court to serve such division. However, if such a division is not established then the question of assignment of a judge to handle civil cases within the City of Fairfax General District Court would be up to the Committee on District Courts under § 16.1-69.33 of the Code as set forth in Chapter 547 of the Acts of Assembly 1973 at least insofar as the case load may warrant the creation of a new full-time judgeship and the determination of a judge to serve in that position. If neither of these provisions is applicable under the specific facts of your situation, then it would appear that the judge of the City of Fairfax General District Court would have to sit to hear civil cases and in that instance my reply to your second question would be in the negative.

Your third question is set forth below:

"3. Can the General District Juvenile Court for the County of Fairfax located within the City of Fairfax in the Fairfax County Courthouse be designated as a physical place for the hearing of juvenile cases arising within the City of Fairfax, by the Chief Judge of the 19th General Juvenile District Court system?"

My answer to your third question is identical to my answer to your first question and would therefore likewise be in the affirmative.

Your fourth question is set forth below:

"4. Can the Chief Judge of the 19th Judicial Juvenile District Court system designate one of the Fairfax County Juvenile District Court Judges as an appropriate Judge to hear the Juvenile cases arising within the City of Fairfax?"

My answer to this question is somewhat different than to your second question as the Juvenile and Domestic Relations District Court obviously is not a division within the contemplation of § 16.1-69.33 (b) and the only statutorily authorized alternatives in this situation would appear to be either the designation of a full-time Juvenile and Domestic Relations District Court Judge by the Committee on District Courts under Chapter 547 or the determination by that Committee as to whether the Judge of the City of Fairfax General District Court will likewise be designated to serve as the Juvenile and Domestic Relations District Court Judge as well. At a later point in your request, you inquire as to whether a General District Court Judge may also serve as a Juvenile and Domestic Relations District Court Judge and I have previously ruled in my opinions to the Honorable Donald H. Sandie, Judge of the Municipal Court of the City of Portsmouth of May 10, 1973, and to the Honorable Donald G. Pendleton, Member of the House of Delegates of June 18, 1973, copies of which are attached hereto, that a Judge may serve both courts although this would be contingent on the Committee on District Courts designating the judge to serve in both capacities.

You finally inquire as to whether the City of Fairfax could continue contracting with the County of Fairfax for the provision of civil and juvenile and domestic relations courts. Although there is nothing within the specific terms of Chapter 546 to prevent such a contractual relationship, it is my opinion that such an arrangement is contrary to the obvious intent of that law in establishing a compre-
hensive new court system with the number of judges depended upon the case load of the courts and such legislative intent would appear to preclude contractual provision of judicial services. Under § 16.1-69.47 the City of Fairfax could supplement the salaries of its district court judge or judges subject to the limitations of that section.

COURTS—Records—Indigent’s right to free copies of court records does not include a transcript merely to comb it for flaws.

RECORDS—Court—Indigent Prisoners—No right to free copy merely to comb it for flaws.

April 13, 1973

The Honorable E. Bruce Harvey
Commonwealth’s Attorney for Campbell County

This is in reply to your letter of March 15, 1973, in which you make the following inquiry:

Are indigent inmates entitled to a transcript (of criminal trial) as a matter of course and at state expense in order that attorneys appointed pursuant to § 53-21.2, Code of Virginia (1950), as amended, may assist them in any legal matters relating to their incarceration?

Although there have been two prior opinions of the Attorney General to the Honorable John Wingo Knowles, Judge, Circuit Court of the City of Richmond, dated March 25, 1964, and found in Report of the Attorney General (1963-1964), p. 91, and to the Honorable James Fulton Ayres, Clerk, Circuit Court of Accomack County, dated October 10, 1968, and found in Report of the Attorney General (1968-1969), p. 74, respectively, the question has been decided by the Supreme Court of Virginia in the case of McCoy v. Lankford, 210 Va. 264, 170 S.E.2d 11 (1969).

It is my opinion, therefore, that an indigent prisoner is not entitled to a free copy of his trial transcript in order merely to comb it for possible flaws. An indigent prisoner would, however, be entitled without cost to certified copies of the arrest warrants, indictment and the order of conviction at his criminal trial. See McCoy v. Lankford, supra, p. 267. In addition, transcripts of felony trials in which the sentence was five years or more must be prepared by operation of § 17-30(b) Code of Virginia (1950), as amended, and would thereby be available for counsel’s inspection.

COURTS—Trial Justice Court of Town of Smithfield Is Court of Limited Jurisdiction.

DISTRICT COURT BILL—Trial Justice Court of Town of Smithfield Is Court of Limited Jurisdiction.

June 21, 1973

The Honorable Robert B. Edwards, Judge
County Court of Isle of Wight County

This will acknowledge receipt of your recent request for an official opinion with regard to the status of the Trial Justice Court of the Town of Smithfield, as referred to in § 33, Chapter 548 of the Acts of Assembly, 1952. You refer to
my opinion of May 1, 1973, to the Honorable Donald G. Crounse, Associate Judge of the County Court of Fairfax County, and inquire as to whether the Trial Justice Court of the Town of Smithfield is a court of limited jurisdiction within the meaning of § 16.1-70.1 of the Code of Virginia (1950), as amended.

The charter of the Town of Smithfield provides for the jurisdiction of the Trial Justice Court to encompass violations of town ordinances and such other jurisdiction as may "be conferred upon trial justices by the laws of the State of Virginia." Thus, it is clear that the Trial Justice Court of the Town of Smithfield is a court of limited jurisdiction under § 16.1-70.1.

COURTS NOT OF RECORD—Jurisdictional Amount—May not issue distress warrant for an amount exceeding three thousand dollars.

WARRANTS—Distress—Courts not of record—Jurisdictional amount.

January 11, 1973

THE HONORABLE JAMES P. BRICE
Judge of the Municipal Court of the City of Roanoke

This is in reply to your recent letter which reads:

"This is a query regarding the jurisdictional amount of courts not of record in civil cases. Does a court not of record have jurisdiction to issue a distress warrant for an amount in dispute exceeding $3000 in a case in which distress is being sought according to Sections 55-230 and 55-231 as authorized by Paragraph 4 of Section 16.1-77?"

Section 16.1-77(1) of the Code of Virginia (1950), as amended, limits the jurisdiction of courts not of record of claims not in excess of three thousand dollars, exclusive of interest and attorneys fees. Subsection (4) of § 16.1-77 confers upon courts not of record all jurisdiction, power and authority over any civil action or proceeding conferred upon any trial justice, civil justice, civil and police justice, or police justice under or by virtue of any provisions of the Code of Virginia. Sections 55-230 and 55-231 to which you refer excludes from a civil justice court or civil and police justice court or a justice of the peace the authority to issue distress warrants under those sections for distraint of rent.

I am of the opinion that § 16.1-77(4) of the Code does not empower a court not of record to issue a distress warrant for an amount exceeding three thousand dollars in a case in which distress is being sought according to §§ 55-230 and 55-231 of the Code.

CRIMES—Principals—Drunk Driving—Owner riding as a passenger in his motor vehicle who allows a person under the influence of intoxicants to drive may be guilty as a principal.

MOTOR VEHICLES—Drunk Driving—Owner riding as a passenger in his motor vehicle who allows a person under the influence of intoxicants to drive may be guilty as a principal.

November 28, 1972

THE HONORABLE RICHARD W. DAVIS, Judge
Radford Municipal Court

This is in reply to your letter of recent date, from which I quote the following:

"The owner of a motor vehicle, upon leaving a party and feeling that
he had consumed too much alcoholic beverages, requested another to drive his motor vehicle home. The driver was subsequently stopped and charged with driving under the influence and the arresting officer, upon learning that the owner was a passenger in the automobile, also charged the owner with operating a motor vehicle while under the influence of intoxicants.

"Nicolls v. Commonwealth, 212 Va. 257, 184 S.E. 2d 9 (1971), states that in order to be convicted under § 18.1-54, the operator of a motor vehicle is defined as, 'Every person who drives or is in actual physical control of a motor vehicle.'

"My question is: Can the owner who is a passenger in the automobile at the time the driver is arrested for operating under the influence also be charged with the same offense?"

I find nothing in the statutes related to driving under the influence of intoxicants covering the point raised in your question. These statutes refer only to one who drives or operates a motor vehicle. I do not believe, however, that the definition of "operator," found in § 46.1-1(17), Code of Virginia (1950), as amended, and quoted with approval in the Nichols case, to which you refer, controls in the situation under consideration.

That case involved the direct act of operating a motor vehicle. The question you now raise has reference to the propriety of charging an accomplice. Every person who is present lending countenance, aiding or abetting another in the commission of an offense is liable to the same punishment as if he had actually committed the offense. In misdemeanor cases there are no accessories but all participants in the crime are principals. Spradlin v. Commonwealth, 195 Va. 523 (1954). Further, it has been said that this is true in statutory misdemeanors, whether or not the aiders and abettors are referred to in the statute. 22 C.J.S., Criminal Law, § 81. In my opinion, an owner in control of his motor vehicle who allows a person under the influence of intoxicants to drive may be guilty as a principal. Accordingly, I shall answer your question in the affirmative.

A similar view was expressed in an opinion found in Report of the Attorney General (1961-1962), p. 61, in regard to a charge of reckless driving, copy enclosed.
Chapter 463 of the Acts of Assembly of 1973 and provides for an exemption from the prohibitions of § 18.1-340 as to the conducting of lotteries, raffles, etc. I will answer your two questions seriatim.

Your first question concerns the operation of bingo games by a charitable association operating under a lodge system which consists of a grand lodge and a series of subordinate lodges. Your particular question is whether one of the subordinate lodges would be prohibited from conducting bingo games where a portion of the proceeds therefrom is contributed to the grand lodge as a charitable donation. Subsection (b) (2) (iii) of § 18.1-340, a copy of which is enclosed, would indicate that the organization about which you inquire is eligible to conduct bingo games. The statute does not specify how the proceeds of such a bingo game are to be used, other than to prohibit any part of the gross receipts derived from such activity to inure directly or indirectly to the benefit of any private shareholder, member, agent or employee of the organization. Therefore, it is my opinion that these proceeds could be donated to the grand lodge as a contribution from the subordinate lodge, as long as the grand lodge is also an organization that falls within the exemption to § 18.1-340.

Your second question concerns whether or not a regular paid employee of the lodge is prohibited from conducting the game in question. Section 18.1-340 specifically provides that any organization which is allowed to conduct such a bingo game shall not enter into a contract with any person whatsoever for the purpose of organizing, managing or conducting bingo games or raffles. However, it also provides that the organization may delegate the authority or duty of organizing, managing or conducting bingo games only to a natural person or persons who are bona fide members of such organization. This question also involves the manner in which the proceeds from the operation of the bingo game are used, insofar as the provision referred to above prohibits any of the gross receipts derived from such activity to go to any individual member, agent or employee of the organization. Therefore, it is my opinion that if the regular paid employee of the lodge is also a bona fide member of the organization, and if his salary as a paid employee is in no way affected by the receipts derived from the operation of the bingo game, and if he receives no other compensation in any way for managing or conducting the bingo game, then he would not be prohibited from doing so.

CRIMES AND OFFENSES—Bingo Games—Advertising.
LOTTERIES—Authorized Bingo Games—Advertising.
BINGO—Advertising Games.

June 4, 1973

The Honorable Benjamin H. Woodbridge, Jr.
Member, House of Delegates

This is in reply to your recent letter in which you request an opinion concerning the legality of advertising bingo games which are conducted by certain exempt organizations under the 1973 amendments to § 18.1-340 of the Code of Virginia (1950), as amended, which are contained in Chapter 463, Acts of Assembly, 1973, and which allow certain organizations to conduct bingo games. Your question specifically concerns whether an organization properly conducting a bingo game could advertise the game in a newspaper of general circulation in the community and further advertise such games by circular or radio.

The legislation referred to above particularly prohibits an organization properly conducting a bingo game to “place or permit to be placed on the premises, or
within 100 yards of the premises, where such bingo game is to be conducted, any sign or signs advertising such bingo game." There is no further restriction on the advertising of such bingo games in the 1973 amendments. Furthermore, there are no other provisions in the Code of Virginia prohibiting the advertising of bingo games or other games of chance or lotteries. Therefore, it is my opinion that advertising of such bingo games could be done in the manner about which you inquire so long as it is not done on the premises or within one hundred yards of the premises where the bingo game is conducted.

CRIMINAL LAW—Drug Control—Destruction of drugs used as evidence in criminal proceeding.

DRUGS—Destruction of Seized Drugs Used as Evidence and Procedure for Destruction under § 54-524.78.

October 3, 1972

THE HONORABLE WILLARD M. ROBINSON, JR.
Commonwealth's Attorney for the City of Newport News

This is in response to your letter requesting an opinion concerning the disposition of narcotics being held by the various clerk's offices after being introduced as evidence in criminal trials. You point to the fact that this is a serious problem due to the quantity of drugs accumulating in these offices and the need for uniform procedures throughout the state in disposing of these drugs, and you then pose several inquiries, as follows:

"I would appreciate your opinion as to at what stage in a criminal conviction can the drugs themselves be destroyed.

"Assuming an appeal has been denied or the appeal time has run, would the destruction of the physical evidence have any bearing on any writs of habeas corpus thereafter filed?

"Do you have an opinion as to who is the proper person to destroy the drugs and a procedure to be followed in the destruction of same?"

I will answer your last question first as this situation is governed by § 54-524.78 of the Code of Virginia (1950), as amended. That section provides that when drugs illegally possessed come into the custody of a peace officer, the drug shall be forfeited and disposed of in the following manner:

"(a) Except as in this section otherwise provided, the court or magistrate having jurisdiction shall order such drugs forfeited and destroyed. A record of the place where such drugs were seized, of the kinds and quantities of drugs so destroyed and of the time, place, and manner of destruction, shall be kept, and a return under oath, reporting such destruction, shall be made to the court or magistrate and at the Board by the officer who destroyed them.

"(b) Upon written application by the State Board of Pharmacy the court or magistrate by whom the forfeiture of drugs has been decreed may order the delivery of any of them, except heroin, to the Board, for distribution or destruction, as hereinafter provided.

"(c) Upon application by any hospital within this State, not operated for private gain, the Board may in its discretion deliver any drugs that have come into its custody by authority of this section to the applicant for medicinal use.

"(d) The Board shall keep a full and complete record of all drugs
received and of all drugs disposed of, showing the exact kinds, quantities, and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered, and destroyed; and the dates of the receipt, disposal, or destruction."

Thus, the procedure for the ultimate disposition of the drugs has been set forth in some detail by the General Assembly and your question in that regard can be answered by appropriate reference to § 54-524.78.

Your other questions relate to the stage in the criminal proceeding when the drugs can be destroyed. I can find no specific authorities which would give a definitive answer on this point. If the defendant has been convicted and the judgment of the Court has been appealed and a writ of error refused and a petition for a writ of certiorari denied or an appeal has not been applied for within the time specified by the Rules of the Supreme Court of Virginia or the Code of Virginia, the likelihood of any further proceeding which would require reintroduction of the drugs would be rather remote. The defendant might seek to utilize various post-conviction remedies including habeas corpus to attack his conviction, but he would not be entitled to a new trial unless the writ of habeas corpus were granted and the Commonwealth ordered to re-try the defendant or release him.

Naturally, there is no way in which the finality of a criminal judgment of conviction can be assured and the possibility of retrial would always exist in varying degrees.

It would be my opinion that the best procedure would be to retain the certificate of the chemist performing the chemical analysis as provided for in § 54-524.77, Code of Virginia (1950), as amended, and that a small sample of the drug in question which is representative of the entire quantity be retained. The rest of the drugs may be destroyed pursuant to § 54-524.78 as soon as the petition for a writ of error or certiorari has been denied or as soon as the appellate period has passed.

In most of the cases, this procedure would be unnecessary but as a conservative precaution it might be well advised.

CRIMINAL LAW—Writ Taxes on Suits Required by § 58-71 Applicable to Habeas Corpus Proceedings Initiated in Supreme Court of Virginia.

HABEAS CORPUS—Writ Taxes on Suits Required by § 58-71 Applicable to Proceedings Initiated in Supreme Court of Virginia.

TAXATION—Writ Taxes on Suits Required by § 58-71 Applicable to Habeas Corpus Proceedings Initiated in Supreme Court of Virginia.

CONFLICT OF LAWS—No Conflict Between § 14.1-112(20) and § 58-71.

August 25, 1972

The Honorable Howard G. Turner
Clerk, Supreme Court of Virginia

This is in reply to your letter of August 7, 1972, in which you request a ruling on the amount of fees and tax, if any, to be charged by your office under the conditions set forth in the paragraph which I quote, as follows:

"Specifically, we would like to know whether the petitioner, in a habeas corpus proceeding initiated under the original jurisdiction of this Court, should be required to pay the $5.00 tax set out under Code, § 58-71, as amended, in addition to the $10.00 charged for fees and services required under Code, § 14.1-112(20)."
In my interpretation, such habeas corpus proceeding falls within the definition of a suit. According to Black's Law Dictionary, Fourth Edition, the word "suit" is "A generic term, of comprehensive signification, and applies to any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity."

Section 58-71, Code of Virginia (1950), as amended, states, in part, that "When any original suit . . . or other action, except a suit in chancery, is commenced in a court of record, . . . there shall be a tax thereon of five dollars; . . ." None of the exceptions found in this section refer to a habeas corpus proceeding. On the contrary, it is my opinion that § 58-71 is sufficiently broad to impose the tax on such a proceeding. The fees required under § 14.1-112(20), or other sections of Title 14.1, Code of Virginia (1950), as amended, do not act to exclude the taxes imposed under § 58-71. Your question, therefore, is answered in the affirmative.

CRIMINAL PROCEDURE—Appointed Attorneys (§ 53-21.2) Not Required to Represent Inmates at Intraprison Disciplinary Hearings.

ATTORNEYS—Appointed Pursuant to § 53-21.2 Not Required to Represent Inmates at Intraprison Disciplinary Hearings.

April 30, 1973

THE HONORABLE PAUL B. EBER
Commonwealth's Attorney for Prince William County

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

"Are attorneys appointed pursuant to § 53.21.2, Code of Virginia (1950), as amended, required to assist inmates in intraprinson disciplinary actions?"

Attorneys appointed pursuant to § 53-21.2, Code of Virginia (1950), as amended, are only required to advise inmates of pending legal problems. It was not the intention of the legislature that these attorneys would actually represent inmates in court. In addition, intraprinson disciplinary hearings are administrative in nature and counsel is not required to be appointed.

It is my opinion, therefore, that the answer to your question must be in the negative.

CRIMINAL PROCEDURE—Arrest Procedures for Violations of Motor Vehicle Laws.

POLICE OFFICERS—Arresting Officer's Name May Be Typed on Summons.

MOTOR VEHICLES—Operation of Vehicle on Out-of-State License After Suspension in Virginia.

POLICE OFFICERS—Arresting Officer May Not Release Individual Under Warrant; Guilty of Misconduct or Malfeasance if He Does.

POLICE OFFICERS—Carrying Concealed Weapon When Not on Duty.

WEAPONS—Police Officers Off Duty Carrying Concealed.
WARRANTS—Issuance of; Arresting Officer May not Release Individual Under.

July 26, 1972

The Honorable C. F. Callis
Justice of the Peace for Lunenburg County

This is in reply to your recent letter in which you request an opinion concerning certain matters which I will answer seriatim.

1. You request an interpretation of House Bill 500 enacted by the 1972 Session of the General Assembly of Virginia and which became effective July 1, 1972.

House Bill 500, which is also Chapter 477 of the Acts of Assembly of 1972, amended § 46.1-178 of the Code of Virginia (1950), as amended, concerning arrest procedures for violations of the motor vehicle laws. A copy of said bill is enclosed for your use. The amendment to § 46.1-178 added a new subsection (a1) which reads as follows:

"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."

This amendment provides for an additional manner in which a warrant can be issued after a summons had already been given in addition to those situations set forth in §46.1-179 of the Code. In a previous opinion to the Honorable Lawrence R. Ambrogi, Acting Commonwealth's Attorney for Frederick County, dated November 10, 1970, and found in Report of the Attorney General (1970-1971), page 112, it was stated that it would be improper to issue a warrant when a traffic summons had already been issued by a law enforcement officer pursuant to § 46.1-178 of the Code. Therefore, this amendment to § 46.1-178 overrules the effect of that earlier opinion and allows for both a warrant and a summons to be issued if prior general approval therefor has been granted by the court having jurisdiction.

2. Is it legal for an arresting officer issuing a summons to have his name typed on the summons and not actually have his written signature on the summons?

The issuance of summonses by arresting officers is authorized in § 46.1-178 of the Code and also in § 19.1-146 of the Code, which was enacted by the 1972 Session of the General Assembly. I can find nothing in either of these sections or anywhere else in the Code which would require that the arresting officer actually sign his name to the summons by way of written signature. Therefore, it is my opinion that his name may appear on said summons in typewritten form.

3. You point out that in an earlier opinion of the Attorney General to yourself dated November 2, 1967, found in Report of the Attorney General (1967-1968), page 137, it was stated that a police officer did not have authority to release a person on a summons instructing him to be in court on a certain date after a warrant of arrest has been written and been served upon that person by the officer. You point out that despite this opinion you find that some officers are still releasing persons served with a warrant, advising them to be in court on a certain date.

Section 19.1-98 of the Code of Virginia (1950), as amended, requires an officer arresting a person under a warrant to bring such person before and return
the warrant to a court of appropriate jurisdiction. Therefore, an arresting officer
serving a warrant on an individual does not have authority to subsequently release
him on a summons, and any officer who releases said individual advising him to
be in court on a certain date and does not properly bring him before a magistrate
or judge would be guilty of misconduct or malfeasance. However, it should be
pointed out that § 19.1-109 of the Code provides for an arresting officer to admit
a person to bail under certain circumstances. Said section also provides that if
the officer without sufficient cause fails to take such bail and make a return
thereof, he shall forfeit twenty dollars.

4. Your next question asks whether a person who has lost his privilege to
operate a motor vehicle in Virginia and then moves to another state and secures
an operators license in that state, and then returns on a visit to Virginia after
his time of suspension or revocation has run out, can legally operate a motor
vehicle in this State.

Under § 46.1-350 of the Code of Virginia (1950), as amended, no person,
resident or non-resident, whose operators license or privilege to drive a motor
vehicle has been suspended or revoked in Virginia shall drive any motor vehicle
on any highway in the State unless and until the period of such suspension or
revocation shall have terminated. Section 46.1-355 of the Code provides that a
non-resident who has been duly licensed as an operator under the laws of his
home state or country and who has in his immediate possession either a
valid operator's or chauffeur's license issued to him shall be permitted without
examination or license to drive a motor vehicle upon the highways of this State.
Therefore, it is my opinion that, once the period of suspension or revocation
in Virginia has expired, a non-resident who is properly licensed in his home
state could legally operate a vehicle on the highways of Virginia under his home
state license.

The only exception to this would be if he has not furnished the necessary
proof of financial responsibility under § 46.1-351 of the Code after his period
of suspension or revocation has expired. This position is in accord with an earlier
opinion of this office rendered to the Honorable Paul X Bolt, Commonwealth's
Attorney for Grayson County, dated April 28, 1969, found in Report of the
Attorney General (1968-1969), page 167, a copy of which is enclosed.

5. You inquire as to the legality of an off-duty officer carrying a concealed
weapon when he is out of his jurisdiction and when he is not on official business.

Section 18.1-269 of the Code of Virginia (1950), as amended, prohibits the
carrying of concealed weapons. That section also has an exception which says
that it shall not apply to certain law enforcement officers, etc., while in the
discharge of their official duty. Therefore, it is my opinion that such persons
would not be allowed to carry a concealed weapon when they are not on duty
and when they are not on official business.

CRIMINAL PROCEDURE—Bail—To continue through appellate stages.

BAIL—Conditioned upon Appearance in Court—To continue through appellate
stages.

September 12, 1972

THE HONORABLE EDITH H. PAXTON
Clerk, Circuit Court of the City of Staunton

This is in reply to your recent letter in which you request an opinion con-
cerning a possible conflict between § 19.1-111.1 of the Code of Virginia (1950),
as amended, which was recently enacted at the 1972 Session of the General
Assembly, and § 19.1-110(a) of the Code. You point out that under § 19.1-110(a) where a person is charged with a misdemeanor and is admitted to bail by a justice of the peace, the justice of the peace sets bail in a reasonable amount, "to secure the appearance of such person before the applicable court not of record." Therefore, a bail bond conditioned as specified in that section would appear not to have any effect following the disposition of such case in the court not of record.

However, § 19.1-111.1 specifies that:

"Any person admitted to bail by a judge or clerk of a court not of record or by a justice of the peace shall not be required to be admitted to bail in any subsequent proceeding arising out of the initial arrest unless the court having jurisdiction of such subsequent proceeding deems the initial amount of bail or security taken inadequate."

This would appear to indicate that the bond is to continue through a possible appeal to a court of record from a conviction for a misdemeanor in a court not of record even though bond under § 19.1-110 is not conditioned beyond the court not of record.

It is my opinion that this possible conflict is covered fully by § 19.1-128 of the Code which applies to the condition of both a personal recognizance bond and a surety bond, and which reads in pertinent part as follows:

"The condition, when it is taken of a person charged with a criminal offense, shall be that he appear before the court or judge before whom the proceedings on such charge will be at such time or times as may be prescribed by the court or officer taking it, and at any time or times to which the proceedings may be continued or further heard, and before any court or judge thereafter having or holding any proceedings in connection with the charge, to answer for the offense with which he is charged. . . . The recognizance shall remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court."

This section was previously interpreted in an opinion of the Attorney General to the Honorable A. A. Rucker, Judge, Bedford County Court, dated April 13, 1971, and found in Report of the Attorney General (1970-1971), page 103, to apply to the disposition of an appeal from a municipal or county court to a court of record. Therefore, §§ 19.1-110 and 19.1-111.1 must be read in conjunction with § 19.1-128, and the condition on any bond should be in accordance with the provisions of § 19.1-128. This would allow the bond to continue in effect after a conviction in a court not of record if the defendant appeals his case to a court of record.

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CRIMINAL PROCEDURE—Breath Test Certificate Prescribed in § 18.1-55.1—
When attested by person authorized to conduct the breath test may be acknowledged before any of the officers named in § 49-4.

February 14, 1973

The Honorable James A. Cales, Jr.
Commonwealth's Attorney for the City of Portsmouth

This is in reply to your letter of January 29, 1973, in which you refer to the breath test certificate, as provided for in § 18.1-55.1, Code of Virginia (1950), as amended, and present the question which I quote as follows:

"May the certificate by the officers be presented for attestation by a
Justice of the Peace or any other officer qualified to administer an oath, as well as a Notary Public?"

Paragraph (rl) of § 18.1-55.1 provides, in part, that "The certificate, as provided for in this section, when duly attested by the authorized individual conducting the breath test, shall be admissible in any court in any criminal proceeding as evidence of the alcoholic content of the blood of the accused."

Section 39.1-15, Code of Virginia (1950), as amended, which enumerates the powers of a justice of the peace, includes the power to administer oaths. Section 49-4, Code of Virginia (1950), as amended, relating to justices and other officers who may administer oaths and take affidavits, states, in part, "Any oath or affidavit required by law, which is not of such nature that it must be made in court, may be administered by or made before a justice of the peace and certified by him, unless otherwise provided, a notary, . . . or a court or clerk of a court or deputy clerk of a court, . . . ."

The attestation in question is not of such nature that it must be made in court. The only statutory requirement is that the certificate be "duly attested by the authorized individual conducting the breath test." Otherwise, no particular manner of attestation is prescribed for the named certificate. Accordingly, it is my opinion that the certificate may be acknowledged before any of the officers specified in § 49-4. Your question, therefore, is answered in the affirmative.

CRIMINAL PROCEDURE—Cruelty to Animals.

ANIMALS—Abandoned or Neglected—Statute providing for hearing of owner and disposition of such animal civil and not penal.

May 24, 1973

The Honorable Herbert N. Morgan
Member, House of Delegates

This is in reply to your recent letter wherein you inquired as to whether § 18.1-223, Code of Virginia (1950), as amended, should be considered as a criminal matter or as a civil matter.

Briefly stated, the section provides for the taking charge of any abandoned or neglected animal and the petitioning of a judge of a court not of record for a hearing to determine whether the owner, if known, is able to adequately provide for such animal and is a fit person to own such animal. The section further provides that if the owner is adjudged by the court unable to adequately provide for such animal or to not be a fit person to own such animal, the court shall order the animal to be sold or destroyed, and if sold, that the proceeds shall be applied to the costs of sale, then to expenses for the care and provision of such animal, and the remainder, if any, shall be paid over to the owner, if found, or to the State Literary Fund.

In Commonwealth v. Lincoln Automobile, 212 Va. 597, 186 S.E. 2d 279 (1972), the Court stated that § 46.1-351.2, providing for the forfeiture of a vehicle used in violation of motor vehicle sections therein specified, was a proceeding against the property and not against the owner of the property or any other person. The Court then stated that it was a civil proceeding and not a criminal one.

Based on the analysis by the Court of § 46.1-351.2 in Commonwealth, supra, § 18.1-223 appears clearly to be a civil action. While it is true that under the section a person may suffer pecuniary loss, the same is true with respect to § 46.1-351.2. The object of the suit, however, is disposition of the animal and not the punishment of its owner. A separate section, § 18.1-216, does, in fact, provide for punishment of the owner.
Therefore, in my opinion, § 18.1-223 should be considered as a civil action and, procedurally, should be so treated.

CRIMINAL PROCEDURE—Dismissal of One Charge Mandatory if Accused Convicted on Either When Charged for Driving Under Influence and Reckless Driving.

MOTOR VEHICLES—Operating While Under Influence and Reckless Driving—Conviction on one charge requires dismissal of others.

August 9, 1972

THE HONORABLE KEARY R. WILLIAMS
Commonwealth's Attorney for Buchanan County

This is in reply to your letter of July 28, 1972, from which I quote the following:

"A question has arisen in our County Court as a result of a defendant being charged under Virginia Code, 1950, as amended § 18.1-54, 'Driving Automobiles, Engines, Etc., While Intoxicated,' who was also charged under Virginia Code, 1950, as amended, § 46.1-192.1, 'Disregarding Signal To Stop By Police Officer'—Reckless Driving; both charges being made after pursuit by the police officer and the defendant being apprehended.

"The question raised is whether Virginia Code, 1950, as amended, § 19.1-259.1 bars prosecution for Reckless Driving under the previously mentioned § 46.1-192.1, which made disregarding a signal to stop by a police officer reckless driving, after a plea of guilty has been entered or a conviction has been had under Virginia Code, 1950, as amended, § 18.1-54."

Section 19.1-259.1, Code of Virginia (1950), as amended, is as follows:

"Whenever any person is charged with a violation of § 18.1-54 or any similar ordinance of any county, city, or town and reckless driving growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge."

This section applies whenever a person is charged with a violation of § 18.1-54, or similar county, city, or town ordinance and reckless driving. Since it specifies no particular type of reckless driving and contains no exclusion, any act denominated reckless driving under the laws of this State would be sufficient to meet the terms of this statute. It is provided in § 46.1-192.1 that a person, who operates a motor vehicle in a wilful or wanton disregard of such signal after having received a visible or audible signal from a police officer to bring his motor vehicle to a stop, shall be guilty of reckless driving.

In my opinion, therefore, after a final conviction on the violation of § 18.1-54, under the stated facts, § 19.1-259.1 requires that the court shall dismiss the charge of reckless driving in violation of § 46.1-192.1. A consistent conclusion was reached in an opinion found in Report of the Attorney General (1960-1961), p. 97, in respect to the charges of violating § 18.1-54 and operating a motor vehicle in excess of 75 miles per hour, which was made reckless driving by statute.
The Honorable Lloyd H. Hansen
Commonwealth's Attorney for the City of Hampton

This is in reply to your letter of recent date, in which you request my opinion on the questions which I quote as follows:

“1. Is a certified copy of a defendant's driving record from the Division of Motor Vehicles showing a conviction for driving under the influence of intoxicants in a foreign state sufficient to establish a prior conviction under Code Section 18.1-58?

“2. In the event this report is insufficient standing alone, we would appreciate your ruling as to what the prosecution must produce to establish a prior out of state conviction; specifically, must the prosecution produce certified copies of either or both the report from the foreign jurisdiction's department of motor vehicles and/or a certified copy of the conviction report of the foreign jurisdiction?”

In prescribing the penalties for a conviction of driving under the influence of intoxicants in violation of the provisions of § 18.1-54, Code of Virginia (1950), as amended, § 18.1-58 prescribes a greater penalty for a second or subsequent conviction within any period of ten years of a prior conviction. For the purposes of this section a conviction under “the laws of any other state substantially similar to the provisions of §§ 18.1-54 through 18.1-57 of the Code shall be considered a prior conviction.” This means that any conviction in another state will be considered a “prior conviction” for the purposes of this section only if such conviction is under laws substantially similar to §§ 18.1-54, 18.1-55.1 and 18.1-57. Most other states have laws substantially similar to these sections. Some do not.

Section 46.1-34.1, Code of Virginia (1950), as amended, makes a copy of any record certified by the Commissioner, or someone designated by him for that purpose, admissible in evidence in lieu of the original. There is no assurance, however, that every original abstract of conviction for driving under the influence of intoxicants which is submitted to the Division from another state would qualify as a “prior conviction” under § 18.1-58. One of the reasons for this is that the Commissioner of the Division of Motor Vehicles is required by § 46.1-421, Code of Virginia (1950), as amended, to revoke and not thereafter reissue for three years the driver's license of any person convicted for a violation of the provisions of § 18.1-54 subsequent to a prior conviction for the violation of a law “of any other state similar to § 18.1-54.” Again, § 46.1-466, Code of Virginia (1950), as amended, requires the Commissioner to suspend or revoke the license of any resident of this State upon receiving notice of his conviction in any other state “of an offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license granted to him.” Consequently, the Commissioner is required to maintain certain records of convictions from other states regardless of whether any such conviction would qualify as a “prior conviction” under § 18.1-58.

I might add that, under § 18.1-59, Code of Virginia (1950), as amended, a person's right to drive a motor vehicle is revoked for three years on two convictions within any period of ten years for driving under the influence of intoxicants. The law requires such revocation regardless of whether the second or subsequent offense was charged and tried as a second or subsequent offense. The revocation of license would be the same if each of the charges were tried as a first offense. To effect the purpose of increased punishment under § 18.1-58, however, the prior offense must be charged and proven. See Commonwealth v. Ellett, 174 Va. 403 (1939). Since § 18.1-58 is a penalty statute, it must be strictly construed.
against the Commonwealth. I shall answer your first question, therefore, in the negative.

In regard to your other question, it is my opinion that it would be necessary for the prosecution to produce a copy of the abstract of conviction, certified by the Division pursuant to § 46.1-34.1. In addition, the prosecution must show that any conviction from another state, if relied upon as a prior conviction, is from a state which has laws in effect "substantially similar to the provisions of §§ 18.1-54 through 18.1-57."

CRIMINAL PROCEDURE—Fees Not Provided for Counsel Appointed in Misdemeanor Cases and Fees Cannot Be Taxed As Costs.

FEES—Not Provided for Counsel Appointed in Misdemeanor Cases.

FEES—For Appointed Counsel in Misdemeanor Cases Cannot Be taxed as Costs.

ATTORNEYS—Fee Not Allowed for Appointment in Misdemeanor Cases.

September 6, 1972

THE HONORABLE W. A. ALEXANDER, Judge
County Court of Franklin County

This is in reply to your recent letter regarding the effect of the recent decision of the Supreme Court of the United States in Argersinger v. Hamlin, 40 U.S.L.W. 4679 (June 12, 1972), specifically with regard to the question of the compensation of attorneys appointed to represent indigent persons charged with misdemeanors. You further relate that the Bar in your locality met with the Judge of the Circuit Court and passed a resolution providing essentially as follows. Every person charged with a misdemeanor which provided for jail sentence would be given the opportunity to determine whether he requested an attorney or not; if an attorney is requested you would appoint counsel and after the conclusion of the case tax a fee of $35.00 as a part of the costs; and this fee would thereafter be paid to the attorney for his services rendered in the case. You inquire as to whether this procedure would be proper or not.

I would initially refer you to opinions rendered to the Honorable J. Randolph Tucker, Jr., Judge of the Hustings Court of the City of Richmond, dated June 13, 1972, and 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 (1970-71), at page 194, copies of which are attached hereto, and which were previously provided you by my office. Those opinions indicate that § 14.1-183 of the Code of Virginia (1950), as amended, 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.

Section 14.1-183 specifically provides as follows:

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

Section 14.1-201 provides that there cannot be a judgment for costs against the Commonwealth unless otherwise specifically provided. Thus, the operation of those sections of the Code would preclude the utilization of the procedure outlined in
your letter, especially since if the defendant were acquitted no costs could be recovered against the Commonwealth.

CRIMINAL PROCEDURE—Juveniles—Violation of § 18.1-78.1 or § 18.1-78.3—Tried as adult.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—No jurisdiction over juvenile offenders who violate § 18.1-78.1 or § 18.1-78.3.

December 14, 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 inquire as to the procedure to be followed in your court where juveniles over the age of fourteen are charged with violations of §§ 18.1-78.1 and 18.1-78.3 of the Code of Virginia (1950), as amended. You inquire as to whether you may proceed against these individuals as juveniles or whether you must sit solely as an examining magistrate and either dismiss the charges or certify them to the grand jury.

My answer to your request is governed by an earlier opinion of this office to the Honorable John T. Camblos, Commonwealth’s Attorney for the City of Charlottesville, dated April 10, 1970, which may be found in Report of the Attorney General (1969-1970), pages 104-105, a copy of which is enclosed. Consistent with that earlier opinion, it is my opinion that the proceedings in your court would be merely a preliminary hearing, and the individuals in question should not be treated as juveniles. You note in your inquiry that all of the juveniles in the pending case are over the age of fourteen. However, if, in a future case, the juvenile is under the age of fifteen, § 16.1-176(a) of the Code of Virginia (1950), as amended, and the recent case of Lee v. Jones, 212 Va. 792, 188 S.E. 2d 102 (1972), would control over §§ 18.1-78.1 and 18.1-78.3 and the juvenile court would have to retain jurisdiction.

March 2, 1973

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

This is in reply to your letter of recent date, in which you refer to § 46.1-34.1, Code of Virginia (1950), as amended, and pose the questions contained in the passage which I quote, as follows:

“My question is when is this evidence admissible? I refer you to Section 46.1-387.3 (one of the habitual offender statutes) wherein the record described therein is specifically admissible as prima facie evidence.

“I know of no statute similar to 46.1-387.3 conferring general admissibility on records introduced in other traffic cases, i.e., driving on revoked permit, second offense driving under the influence, etc. I would appreciate your
opinion as to whether or not such records are admissible without having a representative of the Division of Motor Vehicles present.”

Section 46.1-34.1, which prescribes the method of certifying copies of records maintained in the Division of Motor Vehicles and provides for their admissibility in evidence, states the following:

“Whenever any record including records maintained by electronic media or by photographic processes or paper in the office of the Division of Motor Vehicles is admissible in evidence, a copy, a machine-produced transcript or a photograph of such record or paper attested by the Commissioner or someone designated by him for that purpose, may be admitted as evidence in lieu of the original.

“Any such copy, transcript, photograph or any certification purporting to be sealed or sealed and signed by the Commissioner or such person designated by him as hereinabove provided may be admitted as evidence without any proof of the seal or signature or of the official character of the person whose name is signed thereto.”

The first paragraph of this section provides that whenever a record maintained in the office of the Division of Motor Vehicles is admissible in evidence, a copy attested in the stated manner may be admitted in evidence, in lieu of the original. The purpose of this part of the statute is to give formal status, as evidence, to a certified copy of any record maintained in the Division without the necessity of presenting the original. It also anticipates that certain records will be maintained only on film, or preserved in electronic devices, making the use of copies or machine-produced transcripts the only practical or, in some instances, the only possible means of presenting the records in evidence.

In specific reference to your first question, any copy of a record maintained in the Division, when attested as prescribed in § 46.1-34.1, is admissible in any judicial proceeding in which the original record may be admitted in evidence. Section 46.1-387.3, to which you direct my attention, provides that transcripts or abstracts of the conviction record maintained in the Division of Motor Vehicles, when certified substantially in the manner provided in § 46.1-34.1, “shall be prima facie evidence that the person named therein was duly convicted . . . of each offense shown by such transcript or abstract.” This is not to be interpreted as an implication that an additional statute is necessary to make a certification under § 46.1-34.1 admissible. The intent of § 46.1-387.3 is to prescribe the method of supplying the evidence in habitual offender cases and to ascribe the weight to be given such evidence.

The second paragraph of § 46.1-34.1 provides that no proof of the seal or signature or of the official character of the person who signs any such copy, transcript, photograph or certification is required. In my opinion, this means that any such copy, transcript, photograph or certification, when attested as prescribed in this section, may be presented in evidence without the necessity of any further identification. Your question as to whether such records are admissible without having a representative of the Division of Motor Vehicles present, therefore, is answered in the affirmative.
You have solicited my opinion as to whether the provisions of § 17-30.1(b) of the Code of Virginia (1950), as amended, apply only to an appeal by an indigent prisoner. Section 17-30.1(b) reads as follows:

"In any felony case wherein a sentence of imprisonment for five years or longer is imposed and ordered to be served, the court shall order three copies of a transcript of the record to be prepared and to be held available by the court for use by the court, the defendant so sentenced or the Commonwealth. The cost of such transcript shall be paid by the Commonwealth out of the appropriation for criminal charges."

I refer you to an opinion given in the Report of the Attorney General (1964-1965), page 80, which says in pertinent part that "Section 17-30.1 is applicable only to an appeal by the indigent prisoner." A prisoner claiming to be indigent must submit an affidavit in forma pauperis and then be adjudged indigent by the court.

It is my opinion that § 17-30.1, as amended in 1968 adding subsection (b), remains applicable only to an appeal by the indigent prisoner.

A non-indigent prisoner must pay the actual cost of the transcript to the clerk, who in turn would then reimburse the criminal fund.

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CRIMINAL PROCEDURE—Trial of Misdemeanors in Absence of Defendant; Waiver of Trial by Jury.

CRIMINAL PROCEDURE—Right to Counsel—Persons charged with misdemeanors; Argersinger.

COURTS—Trial of Misdemeanors in Absence of Defendant; Argersinger.

September 20, 1972

This is in reply to your recent request for an opinion in which you raise the question of whether persons charged with misdemeanors may still be tried in their absence under § 19.1-193 of the Code of Virginia (1950), as amended, in view of the recent decision of the United States Supreme Court in Argersinger v. Hamlin, 32 L. Ed. 2d 530, 92 S. Ct. (June 12, 1972).

The pertinent provisions of § 19.1-193 of the Code are as follows:

"When a person charged with a misdemeanor has been admitted to bail or released upon his own recognizance for his appearance before a court of record having jurisdiction of the case, for a hearing thereon and fails to appear in accordance with the condition of his bail or recognizance, he shall be deemed to have waived trial by a jury and the case may be heard in his absence as upon a plea of not guilty if the bond or recognizance states that nonappearance shall be deemed to constitute a waiver of trial by jury."

This section is codified in Article 2 of Chapter 9 of Title 19.1 which deals with jury trials, and a review of the complete wording of said Article 2 and of the statutory history of this section reveals that the intent of the section is to provide for a waiver of trial by jury by the nonappearance of an individual charged with a misdemeanor when the trial is being conducted in a court of record, where he would otherwise have a right to a jury trial.
Argersinger v. Hamlin, supra, on the other hand, deals solely with the right to representation by counsel of persons charged with misdemeanors. The holding in Argersinger is that no person may be imprisoned for such an offense, unless he was represented by counsel at his trial. However, he may make a knowing and intelligent waiver of his right to counsel.

It is clear that, under the holding in Argersinger, a person could not be tried for a misdemeanor in his absence, pursuant to the provisions of § 19.1-193 of the Code, and be sentenced to any term of imprisonment, since obviously he would not have had an opportunity to be advised of his right to counsel or to make a knowing and intelligent waiver of said right to counsel. On the other hand, if the sentence resulting from such trial were merely one of a fine and did not in any way result in the imprisonment of the defendant, then the holding in Argersinger would not have been violated. There is nothing in Argersinger that would prohibit the trial of a person in his absence under this latter condition.

CRIMINAL PROCEDURE—Warrant Charging Willful Failure to Pay Withholding Tax Is Sufficient.

STATUTE OF LIMITATIONS—One Year Statute Applicable to Warrant Charging Willful Failure to Pay Withholding Tax.

WARRANTS—Charging Willful Failure to Pay Withholding Tax Is Sufficient.

August 3, 1972

The Honorable John N. Lampros
Commonwealth's Attorney for Roanoke County

I have received your letter of June 20, 1972, inquiring whether a criminal warrant for a failure to pay over to the proper collecting officer the employee withholding taxes required by § 58-151.1, et seq., Code of Virginia (1950), as amended, should be written under § 58-151.13 or § 58-151.16. You also inquire as to the applicable statute of limitations.

Section 58-151.13(a) requires every employee to make a return and pay to the proper collecting officer for a county or city the amount of tax required to be withheld. Section 58-151.15 provides that a willful failure to make the return, to withhold the required tax, or to pay it to the proper officer of the locality shall be a misdemeanor.

Since it is only a willful failure to act which is made a crime by § 58-151.15, it is my opinion that a warrant, sufficient to inform the accused of the true nature of the offense, should charge a willful failure to do the specific act required by § 58-151.13. A warrant charging that the accused "did willfully fail to pay to the [insert commissioner of revenue or other appropriate collecting officer of your locality] the withholding tax required to be paid by § 58-151.13, Code of Virginia (1950), as amended," would be sufficient.

The applicable statute of limitations is § 19.1-8 providing that prosecutions shall begin within one year of the date of the offense. Section 58-151.089 provides a five-year limitation, but it is applicable only to officers of corporations and partners of partnerships who make fraudulent returns or statements with the intent to defeat or evade a tax. It cannot be used in the absence of fraud.

CRIMINAL PROCEDURE—Warrants—May include more than one offense.

WARRANTS—Including More Than One Offense in Single Warrant.

October 11, 1972
THE HONORABLE WILLIAM L. HEARTWELL, JR., Commissioner
Virginia Employment Commission

This is in response to your recent request for an opinion concerning the issuance of warrants for violations of § 60.1-129 of the Code of Virginia (1950), as amended. The question you raise is whether a warrant may be issued for the arrest of an individual which contains more than one offense by said individual and where the separate offenses occurred on different dates, or whether it is necessary that a separate warrant be obtained for each offense in such situation.

There is no statutory requirement for either including or excluding more than one offense in a warrant. There have been two prior opinions of the Attorney General relating to this question. In an opinion to the Honorable George F. Abbitt, Jr., Commonwealth's Attorney for Appomattox County, dated April 11, 1952 (Report of the Attorney General (1951-1952), page 172), it was stated that more than one offense could be included in the same warrant if the offenses were of the same nature and were committed on the same day. Cited in this opinion was the case of Hundley v. Commonwealth, 193 Va. 449, 1952) where the Supreme Court of Virginia stated that several misdemeanors may be tried under one warrant. This earlier opinion was written while § 14-137 of the Code was in effect which prohibited justices of the peace from issuing more than one warrant against a number of persons charging them separately with an offense of the same nature and prohibited the collection of more than one fee from issuing more than one warrant of arrest against the same party when such warrants were issued on the same day. That section, however, was repealed in 1956, and there is no similar statutory provision in effect now.

In an opinion to the Honorable William M. McClenny, Judge of the County Court for Amherst County, dated October 9, 1969 (Report of the Attorney General (1969-1970), page 106), it was again stated that there is no legal prohibition against including more than one charge in the same warrant where the charges arise out of the same happening or arrest. Further, that opinion stated that so long as several charges arising out of one arrest are properly particularized, they may be included in the same warrant.

Based upon a thorough review of the statutes of Virginia relating to arrests and issuance of warrants and these earlier opinions, it is my opinion that there is no legal requirement or prohibition requiring separate warrants for separate violations of the same offense. However, it would appear that the better procedure would be to issue separate warrants where the offenses are on separate dates.

DATA PROCESSING SERVICES—Division of Motor Vehicles Provides for State Police and Central Criminal Records Exchange.

STATE AGENCIES—May Enter into Agreements With Each Other to Provide Data Processing Services.

COUNTIES, CITIES AND TOWNS—Division of Automated Data Processing to Provide Services to Political Subdivisions of State.

CENTRAL CRIMINAL RECORDS EXCHANGE—Division of Motor Vehicles May Provide Data Processing Services for.

July 20, 1972

THE HONORABLE RICHARD POWERS
Acting Director, Division of Automated Data Processing

This is in reply to your recent request for an opinion concerning an interpretation
REPORT OF THE ATTORNEY GENERAL

of § 2.1-109.4 of the Code of Virginia (1950), as amended, specifically as it relates to an agreement which has been entered into between the Commissioner of the Division of Motor Vehicles and the Superintendent of the Department of State Police. Under that agreement, the Division of Motor Vehicles provides data processing facilities and services to the Department of State Police and the Central Criminal Records Exchange within the Department of State Police. The questions you asked are as follows:

"1. In view of the above cited section of the Code of Virginia, may the Superintendent, Department of State Police and the Commissioner, Division of Motor Vehicles enter into this agreement? If they may, please explain the purpose and legal structure of paragraphs 2.1-109.4 (a), (b) and (f) as it applies to this Division and the Division of Motor Vehicles.

"2. What legal basis, in view of Chapter 9.1 Code of Virginia, does the Commissioner, Division of Motor Vehicles, have to enter into agreements with other state agencies to perform data processing services for them?

"3. In view of Chapter 9.1 Code of Virginia, what legal basis does the Commissioner of the Division of Motor Vehicles have for providing data processing services to cities, towns and counties?"

Section 2.1-109.4(a) of the Code provides that the Division of Automated Data Processing has the power and duty to provide for the efficient and coordinated use in State agencies of automatic data processing techniques, personnel and equipment. Subsection (b) authorizes the Division of Automated Data Processing to perform data processing services for agencies when so directed by the Governor or the Commissioner of Administration. Subsection (f) allows the Division of Automated Data Processing to make and enter into contracts and agreements necessary and incidental to the performance of its duties and execution of its powers. This section and the remaining provisions of Chapter 9.1 of Title 2.1 of the Code do not appear to establish the Division of Automated Data Processing as the sole agency of the State providing for data processing services. Specifically, subsection (a) of § 2.1-109.4 implies that data processing services may be handled by the various departments and agencies of the State for their own uses, and the responsibility of the Division of Automated Data Processing in these cases is to coordinate these activities so as to achieve their efficient use.

I find nothing in Chapter 9.1 of Title 2.1 of the Code which would prohibit State agencies from entering into agreements with each other for the purpose of providing data processing services. I would direct your attention particularly to § 19.1-19.1:1 of the Code which authorizes the Superintendent of the State Police to enter into agreements with other State agencies for services to be performed by employees of such other State agencies in assisting with the responsibility of the Superintendent of the State Police or for the Central Criminal Records Exchange.

Therefore, it is my opinion that the answer to your first two questions is that the Commissioner of the Division of Motor Vehicles and the Superintendent of the State Police do have authority to enter into the agreement to which your have referred.

Your third question concerns the Division of Motor Vehicles providing data processing services to political subdivisions of the State. Section 2.1-109.4(b) authorizes the Division of Automated Data Processing to provide such services for "agencies" when so directed by the Governor or the Commissioner of Administration. In § 2.1-109.1, "agency" is defined to mean any department, board, commission, or political subdivision of the State. Since subsection (a) of § 2.1-109.4 relating to coordination of data processing services, techniques, personnel and equipment, refers only to use in State agencies, it would appear that the provisions of § 2.1-109.4(b) intend to confer upon the Division of Automated Data Processing
the responsibility for providing services to political subdivisions of the State. I find no authority in the Code that would authorize the Division of Motor Vehicles to provide these services.

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DISTRICT COURT BILL—Designation of Judges by Committee on District Courts.

JUDGES—Designation of Part-time and Full-time Judges by Committee on District Courts.

COURTS—District Courts—Designation of part-time and full-time judges by Committee on District Courts.

June 22, 1973

THE HONORABLE LAWRENCE DOUGLAS WILDER
Member, Senate of Virginia

This is in response to your letter of June 8, 1973, with reference to the Committee on District Courts created by Chapter 547 of the Acts of Assembly, 1973. You first inquire as to the authority of that Committee to appoint judges, and you proceed to quote at length from § 16.1-69.33 of the Code of Virginia (1950), as amended. The portion of § 16.1-69.33 that you quote is from that version of the section contained in Chapter 546 of the Acts of Assembly, 1973, which is to be effective on and after July 1, 1973. However, the counterpart language of § 16.1-69.33 contained in Chapter 547, which was enacted as emergency legislation, reads as follows:

"The Committee is directed to make an initial determination as to the number of full-time judges and those judges who shall serve as full-time judges in each district for the period beginning June one, nineteen hundred seventy-three, and ending February one, nineteen hundred seventy-four."

(Emphasis supplied.)

The above quoted language from § 16.1-69.33 clearly vests in the Committee on District Courts the authority to determine the number of full-time district judges and to further designate those individuals who shall fill the positions established by the Committee.

You further inquire as to whether there are any statutory criteria for the selection of full-time district judges. A careful review of Chapters 546 and 547 reveals that the only explicit statutory criteria are set forth in §§ 16.1-69.15 and 16.1-69.16 which relate solely to the fact that a full-time judge must be licensed to practice law and which establish certain residency requirements. There appear to be no other statutory criteria set forth for the guidance of the Committee on District Courts.

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DISTRICT COURT BILL—Social Services—Transfer of employee benefits.

June 22, 1973

THE HONORABLE WILLIAM L. LUKHARD, Director
Department of Welfare and Institutions

This is in response to your recent request for an opinion with regard to the provisions of Chapter 546 of the Acts of Assembly, 1973, commonly referred to as the "District Court Bill," and especially with regard to the provisions of that bill which relate to the establishment of probation and other social services for
Juvenile and Domestic Relations District Courts. As you point out, that legislation provides that jurisdictions not currently affiliated with the State system may elect to do so and your inquiries relate to the effects of such a transfer upon employees, especially with regard to pay and fringe benefits.

You list certain questions in your letter and I will discuss them individually as follows:

"Would a reduction in salary scale be considered a reduction in pay?"

Section 16.1-206 of the Code of Virginia (1950), as amended, provides that "personnel transferred from local and regional court staffs shall suffer no reduction in pay". There appears to be no other provision which relates to comparability of salary scales and it is clear that the act intends to protect the employee only from a reduction of his present pay. Consequently, it would be my opinion that a reduction in salary scale would not be a prohibited reduction in pay under § 16.1-206.

Your second question is set forth below:

"Are deductions made for employee benefits to be considered as being distinct from compensation in the context of this law?"

"For example, a person suffering loss of equity because the local system under which he was employed paid the entire sum of a fringe benefit as hospitalization, which the State does not."

As pointed out above, § 16.1-206 of the Code guarantees only that there will be no reduction in pay and it provides for the transfer of accrued leave and other Personnel Act benefits under Chapter 10 of Title 2.1 of the Code but there is no mention of other fringe benefits. It should be noted by reference to Chapter 546 in the Acts of Assembly that the bill originally provided for the transfer of accrued insurance and retirement benefits but these provisions of the bill were deleted during the legislative process leaving only the transfer of accrued leave. Thus, these employee benefits are to be considered as being distinct from pay.

Your third question is as follows:

"Provisions of Chapter 10 (Section 2.1-110) do not seem to allow for the transfer of certain employee credits and benefits. In reference to administering the transfer of employee records from local to State administration what adjustments, if any, are allowable to credit employees for local compensation owed them?"

"In the matter of leave, for example, there are certain long-term local employees who operate under a discretionary leave policy and who will come into the State system with no accrued leave. Others will have worked under a local system with a faster accrual rate than exists in our present State system and will have more leave entitled per period of employment than existing State employees."

As I have pointed out above, § 16.1-206 only provides for the transfer of accrued leave and does not allow for any adjustments between varying local programs.

Your final question is as follows:

"Of primary concern is the transfer of retirement benefits. While Section 16.1-206 provides that no local employee transferred shall suffer reduction in compensation, this does not seem consistent with certain provisions of Section 51-111.10:1 as these pertain to the transfer of retirement credit."

"We would appreciate an opinion from your office as to how the transfer of retirement credit from a more favorable local plan might be made to our system without violating the no reduction of compensation..."
clause of Section 16.1-206, considering the provisions of Section 51-111.10:1."

It must be kept clearly in mind that § 16.1-206 does not protect a transferring employee from a reduction in the available fringe benefits or retirement programs but only from a reduction in pay and it provides for the transfer into the State program of all accrued leave and other benefits allowable under Chapter 10 of Title 2.1, Section 51-111.10:1, of course, allows for the transfer of creditable service and the transfer of all funds credited to the account of the employee, whether contributed by the employee or by the locality. However, the Act does not, and it would be difficult to practically attempt to, compensate for differing fringe benefit programs upon the transfer from local systems to the State system. Consequently, the Act only protects the employee from a reduction in pay with no reference to protection of additional benefits which would not fall within the category of pay. Of course, § 51-111.10:1 (b) and (d) specifically provide that social service personnel have the option of continuing in the local retirement system after they are transferred to State employment or electing to go within the State retirement system. These provisions would provide protection for those local employees who are concerned by a possible reduction in retirement benefits upon their transfer.

DOG LAWS—Disposition of Unlicensed Dogs by Dog Wardens—Northumberland County ordinance not authorized.

ORDINANCES—Disposition of Unlicensed Dogs by Dog Wardens—Northumberland County ordinance not authorized.

May 1, 1973

THE HONORABLE HENRY S. HATHAWAY
Commonwealth's Attorney for Northumberland County

This will acknowledge receipt of your recent letter requesting my advice as follows:

"Is an ordinance passed by the Northumberland County Board of Supervisors after proper advertisement, etc., that unlicensed and unclaimed dogs picked up by the Northumberland County dog warden and held five days may be sold by the dog warden and the receipts therefor paid to the Treasurer of Northumberland County by the dog warden a valid ordinance?"

Your letter indicates that the above referred to ordinance, in addition to the foregoing, provides for the establishment and maintenance by the County of impoundment facilities for detention of unlicensed dogs found running at large.

Section 29-194.1, Code of Virginia (1950), as amended, provides:

"The governing body of any county or city may cause to be constructed and maintained a pound or enclosure of a type to be approved by the county or city health department and to require dogs running at large without the tag required by § 29-191 to be confined therein. Such governing body may require that any dog which has been so confined for a period of five days and has not been claimed by the owner thereof shall be destroyed or otherwise disposed of by the game warden of such county or city. . . ."

The provisions of the proposed ordinance of Northumberland County establishing impoundment facilities for unlicensed dogs and requiring their detention there are specifically authorized by § 29-194.1 of the Code.

With regard to the disposition of impounded unlicensed dogs after five days
detention, two statutes are relevant. Section 29-194.1 provides that localities may by ordinance require that such dogs be "destroyed or otherwise disposed of". However, § 29-199 of the Code provides, with more particularity, that:

"It shall be the duty of the game warden to kill any dog of unknown ownership found running at large on which license has not been paid; provided, that the game warden may deliver such dog to any person in his county or city who will pay the required license fee on such dog, with the understanding that should the legal owner thereafter claim the dog and prove his ownership, he may recover such dog by paying to the person to whom it was delivered by the game warden, the amount of the license fee paid by him and a reasonable charge for the keep of the dog while in his possession . . . ."

I am of the opinion that the specific provisions of § 29-199 govern the disposition of unlicensed dogs whether or not the provisions of § 29-194.1 have been adopted by the county. In view of the foregoing, it is my opinion that disposition of unlicensed dogs by dog wardens is limited to humane destruction or delivery to such person as is willing to pay the license fee on such dog, subject to the lawful owner's right of reclamation. Accordingly, I must conclude that the proposed Northumberland County ordinance providing for sale of unlicensed dogs by the dog warden is not authorized by law in Virginia.

DRUGS—Drug Abuse Control Council—Only members specified by statute may designate representatives to serve in their place in determination of quorum and proxy vote.

PUBLIC OFFICERS—Drug Abuse Control Council—Representative of members—Only members specified by statute may designate representatives to serve in their place in determination of quorum and proxy vote.

March 29, 1973

The Honorable F. John Kelly
Director, Division of Drug Abuse Control

This is in reply to your letter of March 2, 1973, in which you raise two questions concerning the authority of the Virginia Drug Abuse Control Council to adopt by-laws permitting representatives of members to be counted in the determination of a quorum and to cast a proxy vote. Specifically your questions are as follows:

"1. Can the Council adopt by-laws permitting representatives of specified members, other than the Attorney General and the Chairman of the Virginia State Crime Commission, to be counted as a member in the determination of a quorum; and can such a representative be empowered to cast a proxy vote.

"2. Can the Council adopt by-laws permitting a representative of the gubernatorial appointee to be counted as a member in the determination of a quorum; and can such a representative cast a proxy vote for the member who was appointed from the state at large."

It is my opinion that only those members of the Council who, by statute, are empowered to designate representatives in their place, may be permitted to send such a representative to be counted in the determination of a quorum and to cast a proxy vote. Section 9-121 of the Code of Virginia (1950), as amended in 1973, sets forth the membership of the Council, only two of whom are empowered under that provision to be represented by a designee, those two being the Attorney General and the Chairman of the Virginia State Crime Commission. By
using such language, the legislature has clearly expressed an intent that only these members specified by statute may be represented on the Council and that such members as are not so empowered by the statute are prohibited from sending a representative in their place. As further authority for such a legislative intent, I direct your attention to § 15.1-1403(4) of the Code dealing with the organization of planning district commissions. There the legislature has specifically empowered such a commission to provide for an alternate to serve in lieu of one of the elected officials designated as members of the Commission. It is, therefore, my conclusion that the Council may not adopt by-laws which would permit representation of members in conflict with the controlling statutory authority.

DRUGS—Optometrists May Not Prescribe or Administer.

PHYSICIANS—Optometrists May Not Prescribe or Administer Drugs.

August 9, 1972

The Honorable George K. Carroll, M.D.
Secretary-Treasurer, Board of Medical Examiners

This is in response to your recent letter in which you ask my opinion whether, under the present Medical Practice Act, optometrists can administer drugs.

Chapter 15.1 of Title 54, Code of Virginia (1950), as amended, entitled “The Drug Control Act,” regulates the use of prescription drugs in this state. Section 54-524.65 of that chapter provides, in part, as follows:

“A practitioner, acting in good faith, and in the course of his professional practice only, may prescribe, on a written prescription or on oral prescription as authorized by § 54-524.67, and administer drugs, or he may cause the same to be administered by a nurse or intern under his direction and supervision. . . .”

Section 54-524.2(27) defines “practitioner” as a “physician, dentist, veterinarian, or other persons licensed in this State to prescribe or administer drugs or devices which are subject to this chapter.” Inasmuch as the profession of optometry is not included among those professions just listed and members of that profession are not otherwise authorized by statute to prescribe or administer drugs, it is my judgment that said members are precluded from so prescribing or administering drugs.

Other provisions of Chapter 15.1 combine to reinforce this judgment. Section 54-524.48, which deals specifically with pharmacies and the retailing of drugs, provides, in part, as follows:

“Except as prescribed in this chapter it shall be unlawful for any person to practice as a pharmacist, or to engage in, carry on, or be employed in the dispensing, or compounding of drugs within this State. . . .” (Emphasis added.)

Section 54-524.53 constitutes the relevant exception to aforementioned sections. This section provides, in part, as follows:

“This chapter shall not be construed to interfere with any legally qualified
practitioner of medicine, dentistry, osteopathy, chiropody (podiatry), or veterinary medicine..."

Again, the profession of optometry is not included among those professions contained in the pertinent exception to §§ 54-524.48 and 54-524.55.

It is my judgment therefore, that Chapter 15.1 prohibits an optometrist from prescribing and administering drugs.

ELECTIONS—Absentee Ballot—Procedure for delivery of ballot to applicant depends upon reason for requiring.

July 19, 1972

THE HONORABLE MARY A. MARSHALL
Member, House of Delegates

In your letter of July 11, 1972, you inquire whether an individual may apply for an absentee ballot in person and have the ballot mailed to him at a later date if the ballot is not printed at the time of his application.

Section 24.1-229 of the Code of Virginia (1950), as amended, describes the procedure for the delivery of the absentee ballot to the applicant. This procedure varies depending upon the reason stated by the applicant, pursuant to § 24.1-227, for requiring an absentee ballot, and may be summarized as follows:

1) Persons who will be absent from their polling place on the day of election for business reasons or on vacation (§ 24.1-227(1)) must apply in person for the absentee ballot (§ 24.1-228(1)) and must be delivered the ballot in person (§ 24.1-229). These persons must not remove the ballot from the office of the registrar or secretary of the electoral board, unless they offer to vote only for electors of President and Vice-President of the United States, in which case they must return the ballot in person or by registered or certified mail before the polls close on election day. There is no provision for mailing the absentee ballot to such persons; however, the 1972 amendment to § 24.1-109 requires electoral boards to have ballots printed forty days prior to any primary or general election in order to fully implement the provisions of §§ 24.1-228 and 24.1-229 as above described. I might point out that the 1972 amendments contained in Chapter 621 of the Acts of Assembly of 1972 do not affect persons in this category.

2) Persons who are on active service in the armed forces or whose employment is outside the United States and their spouses or dependents (§ 24.1-227(2)) may apply by mail (§ 24.1-228(2)) and receive their absentee ballot by mail (§ 24.1-229).

3) Students and their spouses (§ 24.1-227(3)) and ill or physically disabled persons (§ 24.1-227(4)) may make their application either in person or by mail (§ 24.1-228(3)) and may receive their ballot by registered or certified mail (§ 24.1-229) if their application is accompanied by sufficient postage or money to cover the cost of mailing (§ 24.1-228(3)(f)).

ELECTIONS—Absentee Ballot—Quantico Marine Base May Be Used as Voting Residence.

July 10, 1972

THE HONORABLE NANCY P. HAYDON
General Registrar, Prince William County Electoral Board

The following is in response to your inquiry of June 20, 1972, as to whether
military personnel stationed on the Quantico Marine Base may claim same as a voting residence for the purpose of casting an absentee ballot.

As noted in your letter of inquiry, § 24.1-227(2) of the Code of Virginia (1950), as amended, provides that:

> [a]ny duly registered person on active service as a member of the armed forces of the United States, who will be absent on the day of the election from the county or city in which he is entitled to vote may vote by absentee ballot. (Emphasis supplied.)

With respect to entitlement to exercise the franchise, Article II, Section 1, of the Constitution of Virginia, revised and effective July 1, 1971, enumerates the qualifications of all voters to be as follows:

Each voter shall be a citizen of the United States, shall be twenty-one years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this Article. . . .

The residence requirement shall be that each voter shall have been a resident of the Commonwealth. . . . Residence, for all purposes of qualification to vote requires both domicile and place of abode. . . . (Emphasis supplied.)

Section 2 of the same article delimits the conditions requisite for due registration with the proviso:

The General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this Article. . . . (Emphasis supplied.)

Your attention is invited to the opinion of this office submitted to The Honorable Jack N. Kegley, Registrar of Voters, dated January 12, 1971, a copy of which accompanies this correspondence, wherein construction of the term “residence” was accorded analysis pertinent to the instant matter. You will note it was then the opinion of this office regarding the elements of “residence”—domicile and abode—that “one need not have his only or even regular place of abode where he votes, so long as he has a place of abode there and the intent which gives rise to domicile.” Report of the Attorney General, 1970-1971 at 177, quoting from Commentary of the Commission on Constitutional Revision. Further reference to the aforementioned opinion reveals that the ruling of this office was then that the intent necessary to establish domicile “is sufficient if the intended stay is of sufficient permanence to make the place in question ‘home’, although there may be a probability or even a certainty that the home will subsequently be changed.” Id., quoting from Goodrich, Conflict of Laws, 4th ed. at 43.

As has always been the case, whether a person fulfills residency requirements can only be determined on the facts of each situation. It is my opinion, however, that military personnel stationed at Quantico, Virginia, may claim the Quantico Marine Base as their voting residence in order to vote by absentee ballot.

The decision of the United States Supreme Court in Evans v. Cornman, 398 U.S. 419 (1970), to which reference is made in your letter does not bear on the instant matter. Section 24 of the 1902 Constitution of Virginia, which made it impossible for military personnel to gain a voting residence on military station, and which would have presented constitutional problems in the wake of Cornman, supra, has been deleted from the revised Constitution which became effective July 1, 1971.

ELECTIONS—Absentee Ballot—When application must be made in person.

July 6, 1972
The Honorable Mary A. Marshall
Member, House of Delegates

In your letter of June 19, 1972, you inquire whether the amendments to § 24.1-228 of the Code of Virginia (1950), which were enacted by the 1972 General Assembly and are found in Chapter 621 of the Acts of Assembly, will have any effect on existing requirements that applications for absentee ballots be made in person.

Section 24.1-228 sets forth how applications for absentee ballots shall be made. You will note that § 24.1-228(1) requires that applications made by individuals under § 24.1-227(1) [absent while on vacation or business] must be made in person. The 1972 amendments to which you refer do not affect this requirement but provide only that such application must be made not less than three nor more than forty days prior to the election in which the applicant offers to vote. There is no change in the basic requirements as to which persons must appear in person to apply for an absentee ballot and which persons may do so by mail. Of course, the remainder of § 24.1-228 provides for applications by mail from service personnel and their spouses, and other persons who are absent by reason of illness, employment or student status.

ELECTIONS—Authority to Exclude Anyone, including News Reporters, Loitering Within 40 Feet of Entrance of Polling Place or Disturbing Election.


February 16, 1973

The Honorable F. H. Conway, Secretary
Danville Electoral Board

In your letter of February 9, 1973, you inquire whether the officers of election have the authority to exclude news reporters from polling places during an election, and you inquire whether the records of an election are governed by the Virginia Freedom of Information Act.

The Virginia Freedom of Information Act, which is found in § 2.1-340, et seq., of the Code of Virginia (1950), as amended, provides in § 2.1-342(a) as follows:

"Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this State having a personal or legal interest in specified records during the regular office hours of the custodian of such records..."

In accordance with this provision, members of the press as well as the public must be permitted access to the records of the electoral board during the regular office hours of the board. This provision does not apply, however, to the activities of the board during the election itself, since § 24.1-101 of the Code specifically provides otherwise as envisioned by the above-quoted language from § 2.1-342.

Section 24.1-101 provides, in pertinent part, as follows:

"During the receiving and counting of the ballot, it shall be unlawful for any person to loiter or congregate within forty feet of any entrance of any polling place; in any manner to hinder or delay a qualified voter in reaching or leaving a polling place; within such distance to give, tender, or exhibit any ballot, ticket or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote...

"
In addition to this provision, § 24.1-104 provides that if any person conduct himself so as to disturb the election, the officers of the election may cause him to be arrested and committed to jail.

It is my opinion, therefore, that if the officers of election at any polling place determine that any person, including a representative of the news media, is loitering or congregating within forty feet of the entrance of the polling place or is disturbing the election, they may take such steps as are necessary to have the individual removed.

ELECTIONS—Campaign Material—Writings concerning candidates must identify person responsible therefor.

October 25, 1972

THE HONORABLE OWEN B. PICKETT  
Member, House of Delegates

In your letter of October 17, 1972, you assert that campaign letters are being circulated in the Tidewater area without having printed thereon the name of the person or organization responsible for paying for the material and distributing same, and you further assert that certain posters and billboards appearing on behalf of candidates likewise fail to contain the name of the person or organization responsible. You inquire whether materials such as those described would be in violation of State law.

Section 24.1-277 requires that writings concerning candidates for office must identify the persons responsible therefor and provides specifically as follows:

“(1) As used in this section ‘writing’ means any pamphlet, poster, card, circular, book, dodger, flyer, banner, handbill, picture, or any other written, printed or otherwise reproduced statement or advertisement of any class or description, but shall not include editorial comment or news coverage which is sponsored and financed by the news medium publishing or broadcasting it.

“(2) It shall be unlawful for any person to cause any writing other than a television or radio broadcast to appear concerning any candidate for any office elective by the qualified voters unless such writing plainly identifies the person responsible therefor and, where the writing is caused by a candidate, carries the statement ‘by authority of .................................................., (Name) duly designated Treasurer of ...........................................................’; except that a candidate serving as his own treasurer may use the statement ‘by authority of the candidate.’ Where the writing is not caused by a candidate, the person causing the writing shall be identified by full name and address on the writing. It shall be unlawful for any person to cause any radio or television statement to appear unless the advertisement or statement contains information which plainly identifies the person or group responsible therefor.

“(3) It shall be unlawful for any person to use a false or fictitious name or address on any such writing described in the preceding paragraph.

“(4) Any person violating any provision of this section shall be deemed guilty of a misdemeanor.”

You will note that subsection (2) contains different provisions for each of two different situations. The first, where the writing is “caused by a candidate”, is governed by the requirement that the writing contain the name of the candidate's
duly designated treasurer, and would be applicable to the posters and billboards of the type described in your letter. The second situation, where the writing is "not caused by a candidate", requires that the individual responsible therefor identify himself by his full name and address on the writing in question. This requirement would apply to campaign letters of the type you describe. The purpose of both of these requirements, of course, is to insure that regardless of the origin of any campaign materials the person responsible therefor is readily identifiable to the public.

With these principles in mind, you should examine the specific materials referred to in your letter to determine whether they contain the required statements. If in fact these materials do not plainly identify the person responsible therefor, or do not carry the statement indicating that the writing is published under the authority of the candidate's duly designated treasurer, it is my opinion that such materials would be in violation of § 24.1-277 and that the person who has caused the writing to appear may be found guilty of a misdemeanor.

ELECTIONS—Candidate—Employee of city fire department may be candidate for office on city council.

VIRGINIA CONFLICT OF INTERESTS ACT—Agency—Each department of city government is a separate agency.

March 23, 1973

THE HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

This is in response to your recent letter wherein you inquired if a member of the Newport News Fire Department would, as a result of his employment, be prevented from being a candidate for City Council and whether he could remain employed by the City if elected.

With respect to your first question, I enclose for your information a copy of an opinion to the Honorable Edwin P. Daughtrey, Jr., Acting Treasurer, City of Franklin, dated March 8, 1973. My reading of the Newport News City Code and Fire Department regulations, enclosed with your letter, reveals no per se prohibition against seeking political office. Assuming, therefore, that the employee violates none of the sections of the City Code or the regulations and does not permit his running for office to interfere with the performance of his regular duties, I am of the opinion that there would be no prohibition against his seeking the office of a member of the City Council.

With respect to your second inquiry, I have previously ruled in an opinion to the Honorable J. M. H. Willis, Jr., Commonwealth's Attorney for the City of Fredericksburg, dated September 17, 1970, and found in the Report of the Attorney General (1970-1971), p. 409, that for the purposes of § 2.1-348(a) of the Code of Virginia (1950), as amended, each department of City government should be considered an individual governmental agency.

Accordingly, I am of the opinion that as long as service on the Council does not interfere with the employee's regular duties, and the provisions of § 2.1-349(a) (2) are complied with, the member of the City Council may continue to be employed by the Fire Department.

REPORT OF THE ATTORNEY GENERAL


December 20, 1972

The Honorable James T. Edmunds
Member of the Senate

In your letter of December 7, 1972, you inquire whether an opinion of this office to the Honorable Frank D. Harris, Commonwealth's Attorney of Mecklenburg County, dated October 12, 1971, is consistent with certain other opinions, specifically those to the Honorable Robert F. Horan, Commonwealth's Attorney for Fairfax County, dated August 22, 1972; to the Honorable Thomas B. Inge, Jr., Commonwealth's Attorney for Lunenburg County, dated September 28, 1972; and to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated June 24, 1968, and found in the Report of the Attorney General (1967-1968), at page 294.

The subject matter of all of these opinions deals with the filling of a vacancy in a town council in cases where the vacancy occurs after the election but prior to the qualification by the member in question. In the Harris opinion it was held that the provisions of the town charter were controlling over the provisions of § 24.1-76 of the Code of Virginia (1950), as amended, and that therefore the vacancy was to be filled by the remainder of the council for the balance of the unexpired term rather than by the judge of the circuit court until the next ensuing general election. In the Horan and Inge opinions, on the other hand, it was held that such vacancies were to be filled in accordance with the provisions of § 24.1-79, which require a special election to fill the vacancy rather than providing for the filling of such vacancy by appointment, either by the council itself or by the circuit judge. (The Horan opinion notes that the enactment of § 24.1-79 would produce a different result on the facts described in the Harvey opinion, which held that the provisions of the town charter were controlling.)

It is my opinion that the three opinions mentioned above, while apparently conflicting, may be reconciled by reference to the peculiar facts which existed in the Mecklenburg situation. In that case, a member of the Chase City Town Council had been appointed to fill a vacancy on the Mecklenburg County Board of Supervisors after his re-election to the Town Council but prior to his qualification for the new term. On the facts then presented to this office, it was not clear that the individual had formally declined to serve his new term, and the opinion concentrated on the means for filling the vacancy in the old term. Had it been clear beyond question that the councilman in question intended to resign from his new term as well as his incumbency, it would have been appropriate to consider the applicability of § 24.1-79. In order to avoid such a situation in the future, it is my opinion that the governing bodies of towns should obtain for their records a formal declination to serve the new term, as well as a formal resignation of the old office, so that the vacancy cannot arise both "prior to qualifying" as referred to in § 24.1-79 and "during the term for which such person was elected" as is found in the charter provisions. In the absence of such a formal statement, it is not possible to say with certainty that a vacancy will exist until the time for qualification arrives and the individual in question does not appear or otherwise fails to qualify. This was not a problem in either the Inge opinion, where the individual submitted his resignation, or in the Horan opinion where the vacancy occurred by reason of the death of the incumbent mayor prior to his taking office for the new term.

ELECTIONS—City Council May Not Extend Boundaries of Precinct Across Ward or Borough Lines.
CITIES—May Not Extend Boundaries of Election Precinct Across Ward or Borough Lines.

December 20, 1972

THE HONORABLE JOHN B. JAMES, Chairman
Virginia Beach Electoral Board

In your letter of December 12, 1972, you inquire whether the Virginia Beach City Council may properly construct voting precincts, the boundaries of which would extend across borough, or ward, boundary lines. The effect of such an action would be to create a precinct which would lie partly in two boroughs.

Section 24.1-36 of the Code of Virginia provides, in pertinent part, as follows:

"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." (Emphasis supplied.)

It is my opinion that this language is intended by the General Assembly to require that each election district or precinct be wholly contained within a ward or borough, in cities which are divided into wards. Although the City Council may increase or diminish the number of precincts within each ward, it may not extend the boundaries of a precinct across ward or borough lines.

ELECTIONS—City Employees—Right to run for public office—Unless restricted by city charter may seek public office.

March 8, 1973

THE HONORABLE EDWIN P. DAUGHTREY, JR.
Acting Treasurer for the City of Franklin

This is in reply to your letter of March 1, 1973, in which you request whether certain city employees who are interested in running for the Office of Treasurer of the City of Franklin may retain their positions until the time of the election.

There is no statute which prevents a person who is in the employment of a city from running for an elective office. Assuming that there is no prohibition in the charter of the City of Franklin, I am of the opinion that the employees may seek the Office of Treasurer, while remaining employees, as long as this does not interfere with their ability to perform their duties.

ELECTIONS—City of Richmond—Election of city officers—Status under United States District Court order.

January 16, 1973

THE HONORABLE JAMES H. YOUNG
Sheriff of the City of Richmond

In your letter of January 11, 1973, you inquire whether the order entered by the United States District Court for the Eastern District of Virginia on October 12, 1972, in the case of Holt v. City of Richmond, #695-71-R, which enjoins the City from holding any election for city offices until further order of the Court, has the effect of prohibiting the filing of notices of candidacy for the primary which would ordinarily have been conducted for such elections. The above mentioned order, a copy of which is attached to your letter, refers to a similar order of the United States Supreme Court entered on April 24, 1972.
I have previously ruled, in an opinion to the Honorable Joan S. Mahan, Secretary of the State Board of Elections, dated March 29, 1971, and found in the Report of the Attorney General (1970-1971), p. 148, a copy of which is attached, that candidates could file for primary elections notwithstanding the fact that new districts resulting from reapportionment had not yet been approved by the Attorney General of the United States pursuant to the Voting Rights Act of 1965. This was so because the effect of this requirement of the Voting Rights Act was simply to delay implementation of presumptively valid election law changes for an ascertainable period of time.

In the Richmond situation, however, the facts are significantly different. First of all, the Attorney General has in fact interposed an objection to the annexation which took place on January 1, 1970, which has the effect of not only delaying implementation of the election law change indefinitely but of negating the presumption of validity and placing the burden on the City to obtain an exculpatory order. Secondly, the court orders previously referred to have the effect of removing the authority of the City to hold elections, even after the Voting Rights Act requirements are satisfied, until further order of the District Court. In view of the fact that no date for the holding of city-wide elections can be reasonably ascertained at this time due to these factors, it is my opinion that no primary election can be conducted nor can any date for same be set and, therefore, no filing deadline as required by § 24.1-184 of the Code of Virginia (1950), as amended, can be established. Since that section also provides that candidates must file not more than seventy-five days prior to the primary, it is obvious that no candidates may file until the date for the holding of a primary can be established.

ELECTIONS—Domicile of College Students.

ELECTIONS—Registration; Criteria Listed in § 24.1-1(11) Apply Equally to All Applicants for Voter Registration.

August 24, 1972

The Honorable Nancy P. Hayden
General Registrar, Prince William County Electoral Board

In your letter of August 21, 1972, you inquire whether § 24.1-1(11) of the Code of Virginia (1950), as amended, is to be used only in determining the domicile of college students living in dormitories on campus, or whether the criteria set forth in that subsection apply equally to all persons applying for registration to vote.

Section 24.1-1(11), as recently amended in 1972, now provides as follows:

"'Residence,' for all purposes of qualification to vote, requires both domicile and a place of abode. In determining domicile, consideration may be given to the applicant's expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, business pursuits, employment, income sources, residence for income tax purposes, marital status, residence of parents, spouse and children, if any, leasehold, sites of personal and real property owned by the applicant, motor vehicle and other personal property registration, and such other factors as may reasonably be deemed necessary to determine the qualification of an applicant to vote in an election district;"

There is no specific reference in this subsection to college students which would indicate that it was intended to apply exclusively to such persons. Indeed, such a limited application might be unconstitutionally discriminatory if the same criteria were not applied to other applicants on the same basis. Moreover, the
very language of the subsection, which embodies many of the most common indicia of domicile, includes references to "business pursuits", "employment", etc., which are not generally associated solely with college students but are properly applicable to the general population.

It is my opinion, therefore, that the criteria listed in § 24.1-1(11) are to be applied equally to all applicants for voter registration, and must not be limited to college students or any other class of persons.

ELECTIONS—Election Districts—County may create county-wide district.

BOARDS OF SUPERVISORS—Elections—Discretion to increase number of election districts.

COUNTIES—Election Districts—May create county-wide district.

VOTING RIGHTS ACT—Change in Election Districts Must Be Approved by Attorney General of United States.

March 6, 1973

THE HONORABLE JAMES T. EDMUNDS
Member, Senate of Virginia

In your letter of February 28, 1973, you inquire whether § 15.1-571.1 of the Code of Virginia (1950), as amended, would permit the Board of Supervisors of Lunenburg County to designate an election district which would encompass the entire county. You note that there are presently four election districts in the county and that such an action as described above would create a fifth district which would, in effect, provide for a member at large.

I have previously ruled in opinions to the Honorable Charles J. Ross, Clerk, dated June 30, 1971, and found in the Report of the Attorney General (1970-1971), at page 82, that the governing body of a county may provide that the entire county comprise one election district; and I have further ruled in an opinion to the Honorable John Paul Causey, Commonwealth's Attorney for King William County, dated June 28, 1971, and found in the Report of the Attorney General (1970-1971), at page 81, that the governing body of a county may provide for multi-member election districts for the Board of Supervisors. Both of these opinions are enclosed herewith. You will note from the Ross opinion that the governing body has the discretion at any time to increase the number of districts.

It is my opinion, therefore, that a county could provide for the creation of an election district consisting of the county as a whole in addition to the existing districts which are apportioned on the basis of population. Since each citizen in each district will be voting for two supervisors instead of one, or by another method of calculation, each citizen could be said to be voting for one and one-quarter supervisors, the integrity of the "one-man one-vote" principle is still preserved. The effect of such a change, however, would be to change the county's form of government to the county board form described in Article 5 of Chapter 14 of Title 15.1 of the Code, § 15.1-697, et seq., and as such must be approved by a referendum of the county's voters in accordance with § 15.1-698.

May I remind you that any such change must also be approved by the Attorney General of the United States, pursuant to the Voting Rights Act of 1965, before it may be implemented.
ELECTIONS—Establishment of Additional Offices for Registration of Voters.

REGISTRAR—Establishment of Additional Offices for Registration of Voters.

CONFLICT OF LAWS—City Charter of Alexandria in Conflict With Code Regarding Registering Voters; Code Prevails Over Charter.


September 25, 1972

THE HONORABLE BETTY OCKERSHAUSEN
Secretary, Electoral Board of Alexandria

In your letter of September 13, 1972, you inquire whether § 10.03.1 of the Charter of the City of Alexandria, as most recently amended by Chapter 510 of the Acts of Assembly of 1968, is in conflict with §§ 24.1-46 and 24.1-49 of the Code of Virginia (1950), as amended. Both of those sections as well as the section of the City Charter referred to above deal with the establishment of additional offices for the registration of voters.

Section 10.03.1 of the Alexandria City Charter provides as follows:

"It shall be the duty of the general registrar of the city to maintain in the city hall, or other municipal building, of the city, an office wherein all qualified voters of the city may be registered and, in addition, it shall be his duty to maintain one temporary or permanent office, wherein qualified voters of the city may be registered, for each fifty thousand population of the city and for any remaining portion of fifty thousand population in excess of twenty-five thousand according to the last United States census. It shall also be the duty of the general registrar to maintain as many other temporary or permanent offices, wherein qualified voters of the city may be registered, as city council may, in its sole judgment, deem necessary or desirable; provided, however, that such offices shall not be established, located or maintained in any private home. The city shall furnish the general registrar of the city a suitable office in the city hall, or other municipal building and, in addition, shall furnish such registrar with one temporary or permanent office for each fifty thousand population of the city and for any remaining portion of fifty thousand population in excess of twenty-five thousand according to the last United States census. The city shall also furnish such registrar with such other temporary or permanent offices as the city council, in its sole judgment, has deemed necessary or desirable, except that such office shall not be established, located or maintained in any private home."

Section 24.1-46 of the Code provides:

"In addition to the other duties provided by law, it shall be the duty of the General Registrar to:

"(1) Maintain the public office provided by the local governing body and to establish and maintain such additional public offices for the registration of voters as are designated by the Electoral Board."

Section 24.1-49 provides, in pertinent part:

"Each general registrar in this Commonwealth shall, thirty days before the day fixed by law for every regular primary election and every general election which will be held in his jurisdiction, hold a regular registration day and such additional days, other than the regular registration days, for the registration of qualified voters, which shall be not less than one day
REPORT OF THE ATTORNEY GENERAL

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... each month, and such other additional registration of qualified voters, which shall be not less than one day each month, and such other additional registration days and places for registration as may be ordered by the electoral board."

Thus, it would appear that the Code provisions designating the electoral board as the body with authority to fix additional places for voter registration are in conflict with the Alexandria City Charter, which confers sole discretion to fix such additional offices on the City Council. In resolving this conflict reference must be made to the provisions of Article IV, Section 14, of the Constitution of Virginia. That section provides, in pertinent part, as follows:

"The General Assembly shall not enact any local, special, or private law in the following cases:

* * *

"(11) For registering voters, conducting elections, or designating the places of voting."

I note further that the clause "for registering voters" was added to the 1971 Constitution and was not found in Section 63 (11) of the old Constitution of Virginia. It is my opinion, therefore, that the above quoted provision of the Constitution prohibits the General Assembly from authorizing by charter any city to make different provisions from those found in general law for the registering of voters, which of course includes the times and places for such registration. The above quoted sections of the Code of Virginia therefore must take precedence over § 10.03.1 of the Charter of the City of Alexandria.

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ELECTIONS—Local Electoral Board—Secretary may not serve as a custodian of voting machine.

VIRGINIA CONFLICT OF INTERESTS ACT—Secretary of Local Electoral Board—May not serve as a custodian of voting machine.

June 13, 1973

THE HONORABLE JERRY H. GEISLER
Member, House of Delegates

In your letter of June 4, 1973, you inquire whether the secretary of a local electoral board may serve as a custodian of voting machines.

Section 24.1-209 of the Code of Virginia (1950), as amended, which relates to the placing and service of voting machines, provides, in pertinent part, as follows:

"... For the purpose of placing ballots in the frames of the machines, putting it in order, setting, testing, adjusting, and delivering the machine, the electoral board may employ one or more competent persons, to be known as custodians of voting machines..." (Emphasis supplied.)

The Virginia Conflict of Interests Act, § 2.1-347, et seq. of the Code, prohibits any public officer from contracting with his own agency. Section 2.1-349(a)(1). Since the electoral board employs the custodians of voting machines, as quoted above, its members would be precluded from contracting for such employment by that Act, and your inquiry is answered in the negative.

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ELECTIONS—Officers of Elections—Qualifications of time of election—Basis for removal.
THE HONORABLE CLYDE H. ELEY, Secretary
Electoral Board of the City of Franklin

In your letter of September 7, 1972, you inquire whether an officer of election who was appointed for the 1972 year for the City of Franklin, but who has recently moved her residence out of the City, may continue to serve out the balance of her term.

Section 24.1-105 of the Code of Virginia (1950), as amended, providing for the appointment of officers of election, states as follows:

"It shall be the duty of the Electoral Board of each city and county, at their regular meeting in the first seven days of the month of February each year, to appoint not less than three competent citizens, being qualified voters, whose terms of office shall begin on the first of March following their appointment, who shall constitute the officers of election for all elections to be held in their respective election districts for the term of one year or until their successors are appointed. . . ."

This section requires that the officers of election be qualified voters in their jurisdiction at the time of their appointment. It is my opinion, however, that an individual under these circumstances may continue to serve as an officer of election even though he or she may no longer be qualified to vote in that jurisdiction. Should the electoral board conclude that any particular office of election could not properly continue to serve under these circumstances, § 24.1-105 provides for his or her removal:

". . . If any person so appointed is for any reason unable to serve at any election during his term of office, the electoral board may at any time appoint a substitute who shall hold office and serve for the unexpired term. . . ."

Also, § 24.1-34 provides:

"The board may remove from office any registrar or officer of election upon notice, who fails to discharge the duties of his office according to law."

The electoral board, therefore, may in its discretion determine whether a particular officer of election continues to be qualified to serve after he or she is no longer a resident of the City of Franklin. Although this individual may serve out the term for which he or she was appointed, obviously such a person would not be eligible for reappointment in the following year.

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ELECTIONS—Part-time Postal Service Employees May Not Be Reappointed as Election Officials.


THE HONORABLE A. R. DUNNING
Chairman of Clarke County Electoral Board

In your letter of February 12, 1973, you inquire whether part-time employees of the United States Postal Service who have, in the past, served as officers of election, may continue in that capacity. You note that the Postal Service is no
longer a department of the federal government, and the individuals in question work only during vacations and/or sick leaves.

Section 24.1-33 of the Code of Virginia (1950), as amended, provides 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."

Under the provisions of this section, it is quite clear that an employee of the United States Postal Service is prohibited from serving as an officer of election regardless of the fact that he works part-time rather than full-time. Although the Postal Service is no longer a Cabinet Department of the United States Government, it is still an agency of the government and its employees are federal employees. It is my opinion, therefore, that the individuals to which you refer may not be reappointed as election officials.

ELECTIONS—Party Committeeman Must File Petition Signed by Fifty Registered Voters.

April 10, 1973

THE HONORABLE WILLIAM P. ROBINSON, SR.
Member, House of Delegates

In your letter of April 9, 1973, you inquire whether a candidate for the position of committeeman on a local Democratic Committee must file a petition containing the signatures of 50 registered voters, along with his declaration of candidacy.

Section 24.1-168 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"A candidate for the United States Congress, or for Governor, Lieutenant Governor or Attorney General, shall file such petition signed by one half of one per centum of the number of voters registered within the election district as of the first day of January of the year in which such petition must be filed. A candidate for the Senate or House of Delegates of Virginia shall file such petition signed by two hundred fifty such voters; candidates for constitutional offices and for membership on the governing body of any county, city or town shall file such petition signed by one hundred twenty-five such voters, provided, however, that the petition of candidates for membership on the governing body of any county whose voting district contains one thousand or less qualified voters shall contain no less than fifty such signatures. A candidate for office in a town which has less than one thousand registered voters shall not be required to file a petition under this section. All other candidates for office shall file a petition signed by fifty such voters." (Emphasis supplied.)

Also, § 24.1-185 provides as follows:

"The name of a candidate for any office shall not be printed upon any official ballot used at any primary unless he shall file with his declaration of candidacy a petition therefor signed by the number of qualified voters specified below, and listing the residence address of each such qualified voter, 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, and whose affidavit to that effect is attached to the petition. In the case of
candidates for the United States Congress, or for Governor, Lieutenant Governor or Attorney General such petition shall be signed by one half of one per centum of the number of voters registered within the election district as of the first day of January of the year in which such petition must be filed. A candidate for the Senate or House of Delegates of Virginia shall file such petition signed by two hundred and fifty such voters; candidates for constitutional offices and for membership on the governing body of any county, city or town shall file such petition signed by one hundred and twenty-five such voters. A candidate for office in a town which has less than one thousand registered voters shall not be required to file a petition under this section. All other candidates shall file a petition signed by fifty such voters.” (Emphasis supplied.)

This office has previously ruled that party committeemen do not hold a public office in the Commonwealth, and that consequently the State election laws requiring the appointment of campaign treasurers and the like do not apply to their candidacies. See opinion to the Honorable Robert H. Waldo, Commissioner of the Revenue for the City of Chesapeake, dated March 18, 1971, and found in the Report of the Attorney General (1970-1971), p. 155, a copy of which is attached. It is my opinion, therefore, that State law does not require the filing of petitions by candidates for party committeemen and, unless the party plan of the Democratic party requires otherwise, there would be no such requirement.

It does appear, however, that in the past the Democratic party plan incorporated by reference the requirements of State law for the filing of candidacies for party committeemen when such posts were to be filled under the State primary laws. See opinion to the Honorable John B. James, Chairman, Electoral Board of Virginia Beach, dated February 10, 1971, and found in the Report of the Attorney General (1970-1971), p. 140, a copy of which is attached. If the Democratic party plan still incorporates the provisions of the State primary laws in the same fashion, then it would appear that the filing of such petitions is necessary to comply with the party plan. Final interpretation of the current provisions of the plan must be obtained, however, from the Democratic State Chairman or other Democratic officers authorized to give such rulings; interpretations of party plans and regulations, when their meaning is questioned, cannot be provided by this office.

ELECTIONS—Poll Watchers—Control over.

November 10, 1972

THE HONORABLE JAMES M. YOUNG
Chairman, City of Salem Electoral Board

In your letter of October 31, 1972, you inquire whether a ruling of the State Board of Elections to the effect that § 24.1-101 of the Code of Virginia (1950), as amended, does not prohibit each party or independent candidate from having a poll watcher within forty feet of the polling place, is correct.

The specific ruling of the State Board of Elections, which was made at its meeting of April 14, 1971, is as follows:

"It is a unanimous opinion of this Board that § 24.1-101 does not prohibit one representative of each candidate in a primary, or one representative of each party or independent candidate in a general election who is a qualified voter of the precinct from being within the forty foot boundary provided that he be not closer than fifteen feet to any ballot box or voting machine and so long as he does not hinder or delay a qualified voter or give, tender, or exhibit any ballot, ticket, or other campaign material to
any person, or to solicit or in any manner attempt to influence any person in casting his vote."

Section 24.1-101 provides, in pertinent part, as follows:

"During the receiving and counting of the ballots, it shall be unlawful for any person to loiter or congregate within forty feet of any entrance of any polling place; in any manner to hinder or delay a qualified voter in reaching or leaving a polling place; within such distance to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or to solicit or any manner attempt to influence any person in casting his vote."

I am advised by the State Board of Elections that the above quoted opinion was adopted in the interest of legality in all elections in order that a challenge may be interposed by a qualified voter in accordance with § 24.1-133 of the Code. Section 24.1-126 requires that the officer of election, prior to delivery of a ballot to a voter,

"shall make inquiry and then pronounce in an audible voice the full name and current resident's address as stated by the person to whom the ballot is to be delivered, and if his name is found on the registration book, and there be no objection made, the full name and address of the elector shall be checked on the registration book by one of the officers . . ., and correctly numbered and the voter thereupon delivered the ballot." (Emphasis supplied.)

The position adopted by the State Board, to ensure uniformity in election procedures as that Board is directed by statute, is consistent with the intent of the General Assembly in enacting § 24.1-101. The Election Laws Study Commission report to the Governor on December 13, 1969, states the Commission's recommendation that limitation of campaigning be expanded and strengthened so that campaigning may not take place near the door of a polling place. The purpose of the interpretation made by the State Board of Elections, however, would not only be consistent with the limitation on campaigning but would ensure that individuals are present who on sight would know that a putative voter is not whom he represents himself to be and who would interpose a challenge to prevent an unqualified person from receiving a ballot. Not only is a possible challenge of identity by qualified voters within the polling place a deterrent to such a practice, the regulation ensures some meaning to the requirement of announcing the names of electors by the officer of election. If representatives are not present there would be no opportunity for objection as contemplated by the Code when a voter's name is announced, making such practice a futility.

It is my opinion, therefore, that the interpretation of the State Board of Elections is correct and is authorized by the above statutes. This is not to say, however, that the officers of election do not have discretion to control the activities of such poll watchers and, if they are found to be unduly disruptive of the conduct of the election, the officers of election may find it necessary to move them farther away from the polling place than the fifteen feet referred to above.

**ELECTIONS—Procedure for Filling Vacancy in Office of Mayor of Town; Death of Incumbent; Elected but Never Qualified.**

TOWNS—Procedure for Filling Vacancy in Office of Mayor; Death of Incumbent; Elected but Never Qualified.

August 22, 1972
In your letter of August 7, 1972, you inquire as to the proper procedure to be followed for the filling of a vacancy in the office of mayor of the Town of Clifton which has arisen due to the death of the incumbent mayor who was elected in June to take office on September 1, 1972. The question presented is whether a special election should be called pursuant to § 24.1-79 of the Code of Virginia (1950), as amended, or whether the provision of the Town Charter providing for the appointment of a successor by the town council should control.

Section 24.1-79 provides as follows:

“When any person elected at a regular election as a member of the governing body of any county, city, or town shall die or for any reason become unable or decline to serve prior to qualifying as such officer, then the judge or judges of the courts of record, as set forth in § 24.1-76, shall, in lieu of appointing a successor for the term for which such person did not qualify, issue a writ of election as provided in § 24.1-163 to fill such vacancy. The procedure as to such election shall in all respects conform to general law.”

Section 24.1-76 of the Code, however, states in pertinent part:

“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. . . .” (Emphasis supplied.)

In conjunction with this section, § 3(o) of the Charter of the Town of Clifton (see Acts of Assembly of 1964, C. 250) provides that a vacancy in the office of mayor or councilman shall be filled within 30 days by majority vote of the remaining members of council.

Resolution of this question turns on the proper construction of the underlined language of § 24.1-76. (Section 24.1-76 itself does not apply, since both § 24.1-79 and § 3(o) of the Town Charter are “other provisions” for filling the vacancy.) Since § 24.1-79 was enacted to deal with a specific situation, that is, where the elected candidate never qualifies for the office by reason of death or any other reason, it must control over the more general provisions of the Town Charter which are intended, as is § 24.1-76, to deal with vacancies occurring during the term of a duly qualified officer. This is supported by the language of both § 24.1-76 and the Town Charter which refer to the “unexpired term” of a predecessor in office, while § 24.1-79 refers to “the term for which such person did not qualify.” Most significant, however, is the amendment to § 24.1-79 (formerly § 24-147.1) to include town councils within its provisions since the issuance of an opinion by this office to the Honorable E. Bruce Harvey, Commonwealth’s Attorney for Campbell County, dated June 24, 1968, and found in the Report of the Attorney General (1967-1968), p. 294.

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ELECTIONS—Purging of Voter's Name from Voting Rolls; Legal Address in Another State.

REGISTRAR—Purging of Voter's Name from Voting Rolls; Legal Address in Another State.
In your letter of April 30, 1973, you inquire whether a registered voter may have his name removed from the voting rolls by written notice that his legal address is in another state, despite the fact that he has not moved away from the address from which he registered to vote in Prince William County.

Section 24.1-46 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"In addition to the other duties provided by law, it shall be the duty of the general registrar to:

* * *

(13) Purge the registration books pursuant to §§ 24.1-59 through 24.1-62 and maintain accurate books of registered voters. A voter's name may be removed from the registration records pursuant to § 24.1-60 at any time during the year at which the registrar discovers that such person is no longer entitled to be registered in such district, except within sixty days of the general election in November or within thirty days of any other election in such district."

As you know, in order to qualify for registration in Virginia an individual must fulfill the residence requirements contained in § 24.1-1(11) which require both domicile and a place of abode. Although an individual may have more than one place of abode, as in the specific instance you describe of a serviceman who is stationed in Virginia while also owning property in Florida, an individual can have but one domicile. While Virginia law would require an individual to maintain a place of abode in Virginia in order to be domiciled here, this is not necessarily true with respect to the law of Florida or any other state. Accordingly, it is not correct to say that domicile may be changed from one state to another only upon moving physically from one place of abode to another.

In any event, it appears that the voter you describe, who initially took the oath required by Virginia law that he was in fact domiciled in Virginia, now believes that he has made an error and asserts himself to be domiciled in Florida. It is my opinion that the procedures for purging the voter's name from the books provided in § 24.1-60 should be instituted, and if upon such procedure it is determined that the voter's domicile is in Florida or in some state other than Virginia, his name should be purged from the books as provided in § 24.1-46(13). In instituting this procedure at the voter's suggestion, however, it would be appropriate to remind the voter of the nature of the oath to which he subscribed upon his application for registration and warn him of the possible penalties he may incur if he now states that the information given in his application pursuant to that oath was intentionally not truthful.

ELECTIONS—Registrar—Definition of “Actively Soliciting” Registrations.

REGISTRAR—Definition of “Actively Soliciting” Registrations.

April 23, 1973

No registrar shall actively solicit any application for registration. You inquire as to the definition of the phrase "actively solicit", and you pose certain specific hypothetical questions.

It is my opinion that, in prohibiting a registrar from "actively soliciting" registrations, it was the intent of the General Assembly to ensure that the registrar conduct his or her duties in a strictly nonpartisan manner and that in order to avoid any appearance of favoritism by a registrar toward any age group, political party, etc., the registrar should be prohibited from taking actions which could be construed as evidence of such favoritism. With this principal in mind, I will proceed to answer your specific questions seriatim.

1. "Is it 'actively soliciting' for a registrar, during a public speech before a PTA or similar group, to encourage registration?"

Answer—No. It was not intended by the General Assembly to prohibit the registrar from being a good citizen. The registrar should be careful, however, in accepting an invitation to deliver a public speech, that the speech itself is not delivered under such circumstances as would be likely to be construed as political favoritism.

2. "Is it 'actively soliciting' for a registrar to contact the public school administration so as to better schedule registration of students in the schools, anticipating requests she feels will come later at a busier time?"

Answer—No. Here again, the registrar need not construe his or her duties in such a way that will not permit accommodation of the needs of the community he or she serves. The registrar should not, however, schedule such registration in such a way that he or she is available only to students and not to the general public.

3. "Is it 'actively soliciting' for a registrar to make announcements to the news media concerning deadlines for registration, hours and places of registration, etc.?"

Answer—No.

4. "Is it 'actively soliciting' for a registrar to remind a friend at a chance meeting that their 18 year old son or daughter is eligible to register now?"

Answer—No.

5. "Is it 'actively soliciting' for a registrar to ask an individual who enters the office if they wish to register to vote?"

Answer—No. The main function of the registrar's office is to register persons to vote, and the registrar should presume that someone entering her office does so for that purpose.

6. "Is it 'actively soliciting' applications for registration and applications for ballots for a registrar to encourage college students to register in their home cities and vote by absentee ballot?"

Answer—This would depend on the degree and manner of the "encouragement". See the statement of general principle already discussed and the answer to Question 2.

7. "Is it 'actively soliciting' applications for ballots to explain the absentee voting process to groups?"

Answer—No. See answer to Question 1.

8. "Is it 'actively soliciting applications for ballots' for a registrar to
remind her own 18 year old son in college to apply for an absentee
ballot?"
Answer—No.

ELECTIONS—Special Councilmanic Election May Be Held on Same Date as
Democratic Primary.

March 19, 1973

THE HONORABLE HOWARD L. MEREDITH
Secretary, Electoral Board

In your letter of March 14, 1973, you inquire whether the City of Petersburg
may hold a special councilmanic election on June 12, 1973, the same date on
which the Democratic primary election is now scheduled.

There is no prohibition in Virginia law against the conducting of a special
election on the same date as a primary election. It is true that there will be some
residents of the City of Petersburg who will not desire to participate in the
Democratic primary; as to these persons the officers of election should inquire of
each voter prior to his entering the voting booth whether he intends to participate
in the primary and, if not, the portion of the voting machine containing the names
of the primary candidates should be blocked off. As you know, the voting machines
can be programmed in advance for this purpose.

In view of the foregoing, it is not necessary to deal with your alternative inquiry
relating to the conducting of the special election one week after the primary.

ELECTIONS—Town Council; Amendment to Charter Changed Date of Elections.
CHARTERS—Amendment Changed Date of Town Elections.

December 22, 1972

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates

In your letter of December 18, 1972, you pose the following question:
The charter of the Town of Gate City was amended in 1972 (Acts of Assembly
of 1972, Ch. 259) to provide for the election of town councilmen every two years.
At the same session of the General Assembly, § 24.1-90 of the Code of Virginia
(1950) was amended, effective January 1, 1973, to standardize the dates for town
elections. (Acts of Assembly of 1972, Ch. 747.) The last town election in Gate
City was held in 1971, and you inquire whether the next election should be held
in 1973 or 1974.

The controlling provisions are those found in subsection (a) of § 24.1-90 as
effective January 1, 1973. That subsection provides in pertinent part:

"Notwithstanding any other provision of law, general or special, any
election of mayor or councilmen of a city or town whose charter provides
for such elections at two- or four-year intervals shall take place on the
first Tuesday in May of an even-numbered year. In any city or town
whose charter provides for elections of mayor or councilmen, at one- or
three-year intervals, such elections shall take place on the first Tuesday in
May of the years designated by charter."

Although at the time of the 1971 Gate City elections the town charter provided
for one-year terms, it is my opinion that the controlling date for determination of
which of the quoted sentences is applicable must be January 1, 1973, the effective
date of the amendment to § 24.1-90, and that only the charter provisions existing
at that time may be considered for these purposes. Accordingly, it is clear that the
next Gate City town election must be held in an even-numbered year, since the
charter now provides for two-year terms.

Section 24.1-90(b)(1) goes on to provide, *inter alia*, that if a councilman was
elected to a two-year term in either 1971 or 1972, his successor is to be elected in
1974. Although the Gate City councilmen were elected only to one-year terms in
1971, the 1972 amendment to the town charter referred to above had the effect
of making their terms two-year terms. It is my opinion, therefore, that the
provisions of § 24.1-90(b)(1) are applicable to Gate City, and that the next
town election should therefore be held in 1974.

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**ELECTIONS—Town of Vienna—Mayor and Town Council—Town will con-
tinue to hold annual elections—Council members to serve staggered terms.**

*January 17, 1973*

**The Honorable Wyatt B. Durrette, Jr.**
Member, House of Delegates

In your letter of January 15, 1973, you inquire as to the applicability of
§ 24.1-90 of the Code of Virginia (1950), as amended, to the provisions of the
charter of the Town of Vienna. You point out that the Town Charter provides
for staggered two-year terms for the mayor and town council, resulting in an
election for half of the members of the council in one year and the other half
in the following year, and you ask whether these provisions are affected
by the recent amendment to the above section.

Section 24.1-90(a), as amended effective January 1, 1973, provides as follows:

"The qualified voters of each city and town of this Commonwealth shall
elect a mayor, if the same be provided for by charter, and a council, which
shall be the governing body thereof, for their terms provided for by
charter. Notwithstanding any other provision of law, general or special,
any election of mayor or councilmen of a city or town whose charter
provides for such elections of mayor or councilmen, at one- or three-year
intervals, such elections shall take place on the first Tuesday in May of the
years designated by charter. Unless otherwise provided by charter, the
persons so elected shall enter upon the duties of their offices on the first
day of July succeeding their election, and remain in office until their
successors have qualified."

I have recently ruled, in an opinion to the Honorable Ford C. Quillen, Member,
House of Delegates, dated December 22, 1972, a copy of which is enclosed,
that the quoted section must be read with reference to charter provisions as they
exist on January 1, 1973, and that where the town charter as of that date
provided for two-year terms of councilmen, elections for councilmen must be held
in even-numbered years.

In that situation, however, the length of the *term* of the councilmen was the
same as the length of the *interval* between elections, which is of course the
determinative factor stated in the language of § 24.1-90. In Vienna, however, the
interval between elections is one year rather than two, even though the term
of the councilmen elected in each election serve for two-year terms. It is my
opinion, therefore, that the controlling provision for Vienna is the statement in
§ 24.1-90 which provides:
In any city or town whose charter provides for elections of mayor or councilmen, at one- or three-year intervals, such elections shall take place on the first Tuesday in May of the years designated by charter.

This means that Vienna will continue to hold annual elections, as provided by charter, with the town councilmen serving staggered two-year terms. Only in this way can any effect be given to the staggered-term provision of the town charter, since to hold that the length of the term were controlling would be to require Vienna to elect all her councilmen at the same election in even-numbered years. Since all charter provisions should be given effect unless they clearly conflict with supervening provisions of general law, the language of § 24.1-90 does not permit an inference that the General Assembly intended to abolish staggered terms.

ELECTIONS—Voter Registration Lists; Only State Board of Elections May Furnish.

REGISTRAR—Voter Registration Lists; Not Authorized to Furnish.

REGISTRAR—Records Are Public and Open to Inspection by Any Qualified Voter, Though Copies of List May Not Be Furnished.

May 2, 1973

THE HONORABLE ALICE CLARKE LYNCH
General Registrar, City of Richmond

In your recent letter you inquire whether the provisions of § 24.1-23 of the Code of Virginia (1950), as amended, will permit the inspection and/or copying of voter registration lists by the general public and, if so, whether there are any limitations on the persons who may purchase such lists.

Section 24.1-23, as amended by the 1973 Session of the General Assembly, provides, in pertinent part, as follows:

"The State Board of Elections shall provide for the establishment, operation and maintenance of a central record keeping system on or before October one, nineteen hundred seventy-three, for all voters registered in the Commonwealth.

"In order to establish, operate and maintain such system, it shall be the duty of the State Board of Elections to;

"(8) Furnish, at a reasonable price, precinct lists to courts of the Commonwealth and the United States for jury selection purposes and to duly qualified candidates, political party committees or officials thereof, and to no one else.

"(9) Reprint and impose a reasonable charge for the sale of reprints of Title 24.1 of the Code of Virginia or portions thereof, precinct lists, copies of lists of names of persons voting at general elections and any other items required of the Board by law. Receipts from such sales shall be credited to the State Board of Elections for reimbursement of printing expenses."

In your letter you ask several specific questions with regard to the operation of these provisions, and I shall answer your questions seriatim.

"1. Does this mean that only the State Board of Elections can furnish this list or may local registrars furnish it?

Answer: While the Code authorizes the State Board of Elections to furnish
precinct lists in the above-quoted section, there is no corresponding authorization in the provisions dealing with the duties of local registrars. Furthermore, it is my opinion that it was the intent of the General Assembly in providing for a Central Registration Roster that such sales be handled exclusively by the State Board of Elections in order to properly ensure that only those persons authorized to obtain such lists by the statute did obtain them. Accordingly, your question is answered in the negative with regard to local registrars.

"2. Does this mean that politically oriented groups and individual citizens who are neither technically parties or candidates cannot secure such lists?

Answer: Since the above-quoted Code section authorizes only duly qualified candidates, political party committees, or officials thereof to obtain such lists, and specifically directs that no one else shall obtain them, your question is answered in the affirmative. Please see, however, the answer to question 3.

"3. Does the ruling on inspection and/or copying of the list by any qualified voter still apply, if so?

Answer: Although the Code does not authorize persons other than those above enumerated to obtain copies of the precinct lists from the State Board of Elections, the registrar's records are still public records and open to inspection by any qualified voter.

"4. Can a mechanical device be used to copy [the records] and can it be done out of the Registrar's office but in her custody?

"5. Is there any restriction as to the format of the list and the information contained in it?"

Answer: Since I have ruled that the registrar may not furnish lists, see answer to question 1, these questions are moot.

ELECTIONS—Voting—Married women—Use of maiden name—Depends upon whether woman has consistently maintained her maiden name.

June 6, 1973

The Honorable Joan S. Mahan
Secretary, State Board of Elections

In your letter of May 25, 1973, you inquire whether the Constitution and Code of Virginia permit a married woman to register to vote using her maiden name as her full name.

Article II, Section 2, of the Constitution of Virginia provides, in pertinent part, as follows:

"Applications to register shall require the applicant to provide under oath the following information on a standard form: full name, including the maiden name of a woman, if married; . . ." (Emphasis supplied.)

Section 24.1-48 of the Code of Virginia (1950), as amended, which provides for application for registration, does not repeat this language, but it does require the applicant to "provide the information necessary to complete the application" on a form prescribed by the State Board of Elections. The "necessary information" referred to in the statute includes that required by the Constitution.

Under the common law of England a married woman is entitled, but not compelled, to assume her husband's surname as her own. Most American courts faced with the issue have reflected this conclusion in their holdings. See, e.g.,
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Stuart v. Board of Supervisors of Elections for Howard County, 266 Md. 440, 295 A. 2d 223 (1972); State ex rel. Krupa v. Green, 114 Ohio App. 497, 177 N.E. 2d 616 (1961); but see State ex rel. Rago v. Lipsky, 327 Ill. App. 63, 63 N.E. 2d 642 (1945). Indeed, at common law any person could adopt whatever name he pleased if the name was adopted for an honest and nonfraudulent purpose. MacDougall, Married Women’s Common Law Right To Their Own Surnames, 1 Woman’s Rights Law Reporter 2, 4 f.n. 15, Fall/Winter 1972-73.

Section 1-10 of the Code of Virginia provides as follows:

“The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.”

I find no Virginia cases which indicate that the common law has been altered in this regard. The inquiry, therefore, becomes whether the provision of Article II, Section 2, of the Constitution as quoted above amounts to such an alteration. It is my opinion that it does not. The requirement of the Constitution that an application for registration by a married woman contain her maiden name does reflect a presumption that a married woman has, in fact, assumed the surname of her husband. Such a presumption, however, while quite reasonable in view of current custom, is not irrebuttable. If, in fact, a married woman has consistently maintained her maiden name since her marriage, then it is my opinion that she may register to vote in that name, and that the constitutional provision is applicable only to women who do, in fact, change their surnames upon their marriage.

I should add, however, that in view of the almost universal custom of assumption of the husband’s surname, together with the need to protect innocent persons as well as the Commonwealth from possible fraud in the interchangeable use of two (or more) names, it is my opinion that any public use by a married woman of her husband’s surname after her marriage would have the effect of changing her name, as a matter of law, to that of her husband. Following such change, she may obtain a reinstatement of her maiden name only by proceedings in accordance with § 8-577.1 of the Code.

ELECTIONS—Voting—Registered voter who moves his residence to a different precinct after closing of the registration books may vote in his old precinct.

October 30, 1972

THE HONORABLE WM. P. ROBINSON, Sr.
Member, House of Delegates

In your letter of October 24, 1972, you inquire whether a registered voter who moves his residence to a different precinct or jurisdiction after the closing of the registration books may vote in his old precinct.

Article II, Section 1, of the Constitution of Virginia is dispositive of your inquiry. That section provides, in pertinent part, as follows:

“A person who is qualified to vote except for having moved his residence from one precinct to another fewer than thirty days prior to an election may in any such election vote in the precinct from which he has moved.”

This provision is repeated in § 24.1-41 of the Code of Virginia (1950), as amended.

In view of the clear language of this section, your inquiry is answered in the affirmative.
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ELECTORAL BOARD—Same Person May Be Designated to Be Present for Printing of Ballots and Affixing of Seal; Two Duties; Two Compensations.

December 19, 1972

THE HONORABLE H. WOODROW CROOK, JR.
Commonwealth’s Attorney for Isle of Wight County

In your letter of December 13, 1972, you pose the following question:

"The purpose of this letter is to inquire concerning your interpretation of §§ 24.1-115 and 24.1-117 of the 1950 Code of Virginia, as amended.

"Section 24.1-115 provides that the electoral board shall designate a person to be present at the printing of the ballots for which he will receive compensation of $20.00 per day.

"Section 24.1-117 provides that the electoral board shall designate one of its members or some other person to affix the seal of the board to every ballot printed and that he shall be compensated in the amount of $20.00 per day.

"If the same individual is designated by the electoral board pursuant to both Sections of the Code, the ballots are printed and the seal of the board affixed at the same time, on the same day, requiring less than one day’s service, is the individual entitled to $20.00 compensation under each statute or a total of $40.00?"

Section 24.1-115 provides, in pertinent part, as follows:

"It shall be the duty of the electoral board to designate one person to be continuously present in the room in which the ballots are printed from the commencement until the end of the work, and see that the undertakings of the oath are complied with strictly. For the faithful discharge of such duty he shall receive the compensation of twenty dollars per day. Such person before entering upon the performance of such duties shall take an oath that he will faithfully execute the same."

Section 24.1-117 provides, in pertinent part, as follows:

"The electoral board shall designate one of its members or some other person, who shall cause the seal of the board to be affixed in his presence to every ballot printed as provided in this chapter, upon the side reverse from that upon which the names of the candidates appear. The seal shall be affixed on the ballot and may be done either mechanically or manually. Such member of the board or other person designated shall make affidavit that the seal of the electoral board was affixed to the ballots in his presence in the manner prescribed by law, in which affidavit shall be set forth the name of every person taking part in the affixing of the seal; and the affidavit shall be filed with the board and a copy thereof entered upon the minutes of the board. For his services in causing the seal to be affixed to the ballots, the member of the board or other person designated shall receive compensation in the amount of twenty dollars per day."

It seems clear from these sections that two separate and distinct duties are contemplated, one to supervise the printing of the ballots and one to supervise the affixing of the seal of the electoral board. Both of these duties are considered to be sufficiently important that the person or persons performing them is required to take an oath that they will be performed faithfully. While these duties may be performed by two different individuals at different times, nothing in the Code prohibits the performance of both duties on the same day by the same individual where the operation can be more efficiently conducted in that way. This allowance
for efficiency, however, does not detract from the legislative intent to create two distinct statutory duties for which separate compensation is provided, and hence does not contemplate the merging of the two duties into one or the two compensation provisions into one. Your question, therefore, is answered in the affirmative.

Please note, however, that where either or both of these duties are performed by a member of the electoral board, the statutory compensation described above is in lieu of the member's per diem compensation provided for in § 24.1-31. See opinion to the Honorable J. D. Ramsey, Jr., Secretary, Charlotte County Electoral Board, dated July 30, 1971, a copy of which is attached hereto.

ELIZABETH RIVER TUNNEL COMMISSION—Tolls—No reduction for students residing outside Tunnel District.

HIGHWAY COMMISSION—Elizabeth River Tunnel Commission Transferred to—No reduction in tolls for students residing outside Tunnel District.

TOLLS AND TOLL BRIDGES—Free Use by Students—Prohibited on facilities of Elizabeth River Tunnel Commission.

April 25, 1973

THE HONORABLE DOUGLAS B. FUGATE
State Highway Commissioner

This writing is in response to your letter of April 9, 1973, in which you ask if the State Highway Commission will be authorized to offer a reduced fare for passage across the Elizabeth River Tunnel facility to students who reside outside the original boundaries or attend a state supported institution of higher learning outside the original boundaries of the Elizabeth River Tunnel District after the effective date of the legislation which transfers control of the facility to the State Highway Commission.

The covenants of the Elizabeth River Tunnel Commission Trust Indenture dated as of February 1, 1960, prohibit free or reduced fare passage to any student who does not reside and attend a state supported institution of higher learning within the Tunnel District, which in 1960 comprised the area included within the boundaries of Norfolk County (now city of Chesapeake) and within the corporate limits of the cities of Norfolk and Portsmouth, Virginia. In an earlier opinion, my predecessor held that these covenants could not be circumvented by legislation to amend the Elizabeth River Tunnel Commission Act. See Report of the Attorney General (1969-1970), pages 126, 127.

Most recently the legislature, with the approval of the Governor, enacted Chapter 203 of the Acts of Assembly of 1973 which reads, in part, as follows:

"All powers, properties, covenants, obligations and agreements of the Elizabeth River Tunnel District and the Elizabeth River Tunnel Commission are hereby transferred to the State Highway Commission."

Inasmuch as Chapter 203 specifically binds the State Highway Commission to the covenants of the Tunnel Commission, and furthermore, because the restricted reduced fare privilege of the Tunnel Commission covenants can not be extended by way of legislation, I am of the opinion that a reduced fare can not be offered to any student who resides or receives his education beyond the original boundaries of the soon to be dissolved Tunnel District.

EMINENT DOMAIN—Condemnation Power—Must be conferred.
BRISTOL PARKING AUTHORITY ACT—Condemnation Power Not Included in Act.

December 12, 1972

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

This is in reply to your recent letter in which you requested to be advised whether the language of the "Bristol Parking Authority Act", established by Chapter 555 of the 1968 Acts of Assembly, authorizes the Authority to condemn land.

Section 6 of the "Bristol Parking Authority Act" contains the general grant of powers to the Authority and insofar as the authority to acquire property, provides as follows:

"(i) to acquire in the name of the Authority by gift, or purchase, any lands or rights in lands and interest therein, and to acquire such personal property, as it may deem necessary in connection with the construction, reconstruction, improvement, extension, enlargement or operation of any parking facilities;"

I am of the opinion that this language does not give the Parking Authority the power of eminent domain.

The power of eminent domain lies wholly with the legislative branch, but may be delegated by statute. The general rule is that statutes conferring the power of eminent domain ought to be strictly construed against the one exercising the power and in favor of the landowner. A grant of power of eminent domain will never pass by implication. A person claiming the right to exercise the power must be able to point to the statute which confers that right. This authority cannot be implied or inferred by vague or doubtful language. When the matter is doubtful, it must be resolved in favor of the landowner. See 26 Am.Jur.2d, Eminent Domain, §§ 5, 18, 19. Also, 6 M.J., Eminent Domain, §§ 5, 6, 7.

EMINENT DOMAIN—Political Subdivisions—May withhold consent for condemnation of own property even if would not interfere with any essential purpose of political subdivision.

COUNTIES, CITIES AND TOWNS—Eminent Domain—May withhold consent for condemnation of own property even if would not interfere with any essential purpose.

May 17, 1973

THE HONORABLE EDWARD A. NATT
County Attorney for Roanoke County

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

"In the near future, it will be necessary for the Roanoke County Public Service Authority to acquire easements in property within the corporate limits of certain political subdivisions within the area of jurisdiction of said Public Service Authority. It is quite possible that, in addition to easements acquired from private property owners, it will be necessary for the Authority to acquire easements through lands owned by other political subdivisions.

"In light of the provisions of Section 15.1-1250(f) of the Code of Virginia, 1950, as amended, providing that no property owned by a politi-
cal subdivision shall be acquired by an authority by use of the exercise of the power of eminent domain without the consent of the governingbody of such political subdivision, I would respectfully request an opinion from your office as to whether or not such consent may legally be withheld by the governing body of another political subdivision when the acquisition of the easements would not interfere with any of the essential purposes of said political subdivision. If such consent is arbitrarily withheld by the governing body of such political subdivision, would the Public Service Authority be able to compel, through the use of the courts, such conveyance."

Section 15.1-1250(f), Code of Virginia (1950), as amended, provides that no property owned by a political subdivision shall be acquired by an authority by use of the power of eminent domain without the consent of the governing body of such political subdivision. Statutes conferring the power of eminent domain are strictly construed and the authority conferred in such statutes must be strictly observed. Plumer v. Dept. of Conservation, 209 Va. 616, 166 S.E.2d 281 (1969).

I am of the opinion that the express language of § 15.1-1250(f) of the Code is controlling and that consent may be legally withheld by the governing body of a political subdivision notwithstanding the fact that the acquisition of the easement would not interfere with any of the essential purposes of the political subdivision.

EMINENT DOMAIN—Purchase Agreement—Governor has authority to acquire certain property by condemnation or by purchase in cooperation with Virginia Supplemental Retirement System.

May 3, 1973

The Honorable Linwood Holton
Governor of Virginia

I have received your letter of April 20, 1973, from which I quote:

"Under date of October 25, 1972, the Commonwealth entered into an Exchange Agreement and a Construction and Purchase Agreement pursuant to which it would have acquired The Life Insurance Company of Virginia home office building at 910-914 Capitol Street and its parking garage at Seventh and Marshall Streets. Those contracts were the subject of your opinion letter of October 20, 1972. Section 11 of the Exchange Agreement conditions the transaction on receipt by The Life Insurance Company of Virginia from the United States Internal Revenue Service of a ruling that the transaction will constitute an exchange of property within the meaning of Section 1031 of the United States Internal Revenue Code. I am advised that the Company has received a letter from the Internal Revenue Service stating its refusal to provide the ruling required by Section 11 of the Exchange Agreement.

"In the light of acts and resolutions of the General Assembly with regard to these properties, the Commonwealth intends to pursue this acquisition by purchase in the manner contemplated by the enclosed draft of a Purchase Agreement or, in the alternative, by condemnation proceedings. Also enclosed is a draft of a proposed letter transmitting the Purchase Agreement to The Life Insurance Company of Virginia."

"Accordingly, we respectfully request your opinion for the Commonwealth and the Virginia Supplemental Retirement System, respectively, as to their legal capacity and authority to enter into that agreement and
to perform their respective undertakings and obligations thereunder and, in the absence of such an agreement, the legal authority of the Commonwealth to acquire such properties by condemnation."

The agreement enclosed with your letter requires the Virginia Supplemental Retirement System to purchase from the Commonwealth the properties mentioned in your letter upon their acquisition by the Commonwealth from The Life Insurance Company of Virginia, and requires the Company to sell such properties to the Commonwealth at a stated price.

House Joint Resolution No. 163, approved by the General Assembly during its 1972 Session authorized your negotiation for the acquisition by the Virginia Supplemental Retirement System of subject properties pursuant to § 51-111.52:4, Code of Virginia (1950), as amended, contingent upon the approval of the Virginia Public Buildings Commission. The Commission has approved the acquisition at the consideration stated in the proposed agreement. Section 51-111.52:4 authorizes the retirement system to purchase improved real property for the use of agencies of the Commonwealth and to lease such properties to the Commonwealth.

In consideration of the foregoing, it is my opinion that you and the Virginia Supplemental Retirement System have the authority to enter into the proposed contract.

With respect to acquisition by condemnation, Chapter 525 of the Acts of Assembly of 1973 provides, inter alia:

"The Governor, on behalf of the Commonwealth, is hereby authorized to acquire by condemnation proceedings . . . all or any portion of that property located in Richmond, Virginia, and bound as follows:

"[prescribes boundary], and including satellite service facilities which need not necessarily be contiguous to the foregoing described area; provided, however, that prior to the exercise of the authority hereby conferred, the Governor shall receive approval by a majority vote of those members voting in each house of the General Assembly for the acquisition of the specific property to be acquired."

The property at 910-914 Capitol Street is within the prescribed boundary, and the parking garage meets the criteria of a satellite service facility. Senate Joint Resolution No. 140, which was adopted during the 1973 Session of the General Assembly, approves the acquisition of subject properties and thereby satisfies the condition precedent to the exercise of the condemnation authority. Accordingly, it is my opinion that you have the authority to proceed with the acquisition of the aforementioned properties by condemnation in accordance with the provisions of Title 25 or Article 7 of Chapter 1 of Title 33.1 of the Code of Virginia.

ENVIRONMENTAL PROTECTION AGENCIES—Marine Resources Commission Considers Only Direct Physical Effects of Proposed Projects.

COUNTIES, CITIES AND TOWNS—Zoning Vested in Local Governments.

ZONING—Vested in Local Governments of Counties, Cities and Towns.

May 10, 1973

The Honorable James E. Douglas, Jr.
Commissioner, Marine Resources Commission

This will acknowledge receipt of your recent letter in which you request my
advice regarding the interpretation of § 62.1-3, Code of Virginia (1950), as amended, as follows:

"... I would appreciate your opinion regarding an interpretation of Section 62.1-3 and specifically in the fifth paragraph that wording '... and its effect upon adjacent or nearby properties, ...'. The Commission has always regarded its authority as extending to the physical and ecological effects on adjacent properties when such effects are the direct result of the subaqueous encroachment. Are we correct in this assumption? Or, does the aforementioned wording grant unto the Commission the authority to consider all effects on adjacent property including those economic and sociological effects more customarily associated with zoning and land use regulation?...

The Marine Resources Commission is vested under the provisions of § 62.1-3 of the Code with the responsibility for regulation of private use of state-owned bottoms, and to that end is granted authority to issue permits for such uses. The legislature has specifically provided statutory guidelines within § 62.1-3 setting forth the factors deemed appropriate for consideration by the Marine Resources Commission in granting or denying permits as follows:

"... In granting or denying any permit for the use of state-owned bottom lands, the Commission shall be guided in its deliberations by the provisions of § 1 of Article XI of the Constitution of Virginia, and shall consider, among other things, the effect of the proposed project upon other reasonable and permissible uses of State waters and state-owned bottom lands, its effect upon the marine and fisheries resources of the Commonwealth, its effect upon the wetlands of the Commonwealth, and its effect upon adjacent or nearby properties, its anticipated public and private benefits, and, in addition thereto, the Commission shall give due consideration to standards of water quality as established by the State Water Control Board..."

The foregoing language evidences the legislature's concern that the Marine Resources Commission consider primarily the direct and immediate physical impact of proposed projects upon their surroundings. The quality of State waters, other permissible uses of State waters and State bottoms, the fish and shellfish of State waters, and the wetlands of the Commonwealth are all susceptible to direct physical alteration or impact as a result of any permitted activity upon state-owned bottom lands. Similarly, adjacent or nearby properties may be physically altered as a direct result of nearby projects which encroach upon state-owned bottoms, as is the case with the construction of bulkheads, groins, or the placement of landfill upon state-owned bottoms. The most logical interpretation of the statutory direction that the Marine Resources Commission consider the "effect upon adjacent or nearby properties" is, therefore, that consideration should be given to the direct, physical impact of the proposed project upon adjacent or nearby properties.

Regulation of land use and zoning and the consideration of the various factors relevant thereto has traditionally been vested in local governments of counties, cities, and towns. Section 15.1-486 of the Code authorizes local governing bodies of any county or municipality to regulate the use of land. Furthermore, § 15.1-489 establishes the broad goals of local zoning authorities as follows:

"Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent
congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to expedite the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities airports and other public requirements;

Broad land use considerations such as the harmonious use of adjacent properties and the sociological impact of a particular land use upon the surrounding community are matters within the purview of local zoning and planning authorities.

In view of the foregoing, I am of the opinion that the Marine Resources Commission, in granting or denying permits for the use of state-owned bottoms, is authorized by § 62.1-3 to consider only the direct physical effects of proposed projects upon adjacent or nearby properties and is not authorized to consider broad questions of land use policy and planning.

ENVIRONMENTAL REGULATORY AGENCIES—Flood Repair and Clean-up Projects Subject to Regulations and Enforcement Measures of.

May 4, 1973

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

This will acknowledge receipt of your recent letter in which you requested my opinion as follows:

"I would . . . very much appreciate your opinion as to the authority of the State to intervene in the administration of an emergency flood clean-up operation funded by the U.S. Office of Emergency Preparedness and run entirely at the local level, where the project necessarily affects downstream jurisdictions, . . ."

While federally funded flood repair and clean-up projects provide vitally needed assistance to localities affected by natural disasters and related incidents, the Commonwealth has a direct interest and continuing responsibility for the protection of its environment and the natural resources of the Commonwealth through its environmental regulatory agencies, i.e., the Commission of Game and Inland Fisheries, the State Water Control Board, the Virginia Marine Resources Commission and the State Air Pollution Control Board.

Local governments, as well as individuals and corporations, are subject to regulation by such environmental agencies. The State Water Control Law defines "owners", subject to regulation and board enforcement measures, as "the State or any of its political subdivisions". To the extent that localities, in administering flood repair projects, violates State water quality standards, provisions of the Water Control Law, or any Water Control Board regulation, such activity would clearly be subject to regulation or enforcement measures within the authority of the State Water Control Board. Further, any burning activities associated with clean-up operations would be subject to regulations established by the State Air Pollution Control Board.

The Commission of Game and Inland Fisheries would have certain concerns and related responsibilities with respect to such clean-up activities. Any possible damage to streams as a habitat for stream life resulting from such clean-up operations would undoubtedly affect Commission decisions as to the selection of streams to be stocked and land areas to be used as wildlife management areas. More positively, clean-up activities by localities which constitute violations of
State wildlife and fish laws may subject the responsible officials to enforcement under appropriate Code provisions.

Legislative consideration might be given to emergency variances or exceptions to environmental laws and regulations necessitated by flood and disaster clean-up activities; however, the present state of the law requires that such projects be carried out within the existing environmental laws. It should, furthermore, be noted that frequently "emergency clean-up" projects are not undertaken until after considerable delay, long after any emergency exists.

I am, therefore, of the opinion that localities carrying out flood repair and clean-up projects are subject to the lawful regulatory and enforcement authority of the Commonwealth and its environmental agencies responsible for the protection of the environment and natural resources of the Commonwealth.

ESCHEATS—Funds Under Control of Court.

COURTS—Unclaimed Funds—Any unclaimed money remaining under control of any court of this State for five years to be paid into State treasury.

August 11, 1972

THE HONORABLE E. M. GARBER, JR., Judge
Civil and Police Court for the City of Waynesboro

I have received your letter of July 26, 1972, from which I quote:

"During the course of an Audit of the Civil & Police Court records it was noted that we have a considerable number of outstanding checks more than five (5) years old. The State Auditors have suggested that these funds should escheat to the Commonwealth under the provision of Sections 8-746 & 8-747, while the Waynesboro City Auditor is under the opinion that the funds are more properly the property of the City, since the City pays all the expenses of the Court."

Sections 8-746 and 8-747, Code of Virginia (1950), as amended, require that any money that has remained for five years under the control "of any court of this State" without being claimed is to be paid into the State treasury. The phrase "any court of this State" encompasses all courts established under the authority of the Commonwealth. This includes the Civil and Police Court of Waynesboro. Although the court's expenses are paid by the city, its judicial authority is derived from the State.

I am of the opinion that the funds under consideration are properly payable into the State treasury.

ESTATES—Inventory—Must include all property not under the supervision and control of the fiduciary of which he has knowledge—Suggested inventory forms optional and may be supplemented.

August 21, 1972

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

I have received your letter of July 26, 1972, from which I quote:

"Section 26-12 of the Code of Virginia makes it mandatory for every personal representative, guardian, curator or committee to file an in-
ventory with the Commissioner of Accounts, under his oath and in proper form, of all personal and real estate, which is under his supervision and control, and all other property of the estate of which he has knowledge.

"The 1972 General Assembly amended the form permitted by Section 26-12.1, when no appraisers are appointed, deleting Part II for listing of 'other property of the estate of which the fiduciary has knowledge.' There appears to be a conflict in the mandatory provision of Section 26-12 and the suggested form in Section 26-12.1.

"I would appreciate a clarification of this point."

The reporting requirements of § 26-12 are mandatory, but the inventory forms suggested by § 26-12.1 are optional. This is because the former section contains the command "shall" whereas the latter uses the permissive word "may." The fact that the suggested inventory forms fail to contain a space for the personal representative to report, as required by § 26-12, "all other property of the estate of which he has knowledge" does not diminish his duty to do so.

It appears significant that § 26-12.1(a), which suggests the inventory form for use when appraisers are appointed, was not changed by the 1972 General Assembly, yet it does not include a space for "all other property," etc., except to the extent that its appraisal was requested. With the exception of the deletion of the language in the "Certificate of Fiduciary" relating to "all other property," etc., the 1972 amendment merely conforms the suggestions in § 26-12.1(b) to agree with § 26-12.1(a).

Since neither of the forms suggested in subsections (a) and (b) of § 26-12.1 provides space for the personal representative to schedule the other property of the estate which is not under his supervision and control, I am of the opinion that you may add the necessary space to the forms suggested by the statute and you may alter the fiduciary’s certificate to accomplish the result intended by § 26-12.

FEES—Book With Respect to All Fees, Open to Public Inspection.

DEED RECEIPTS BOOK—Newspaper Reporter May Review.


March 5, 1973

THE HONORABLE V. EARL DICKINSON
Member, House of Delegates

This is in response to your letter of February 23, 1973, in which you inquire whether a "newspaper reporter [would] have the right to review the deed receipts book of a county clerk in order to obtain information for publication."

I have previously ruled in an opinion to the Honorable H. P. Scott, Clerk of the Circuit Court of Bedford County, dated May 19, 1964, and found in Report of the Attorney General (1963-1964), p. 46, that § 14-148 [now § 14.1-139] of the Code of Virginia (1950), as amended, requires that a book with respect to all fees be kept and that such book be open to public inspection. Accordingly, I am of the opinion that a newspaper reporter would have the right to review the receipts book.

Additionally, I am of the opinion that § 2.1-342 would require that such records be available to the public, and, therefore, to a newspaper reporter.
REPORT OF THE ATTORNEY GENERAL

FEES—Clerk—No fee upon filing of counterclaim regardless of amount thereof.

TAXATION—Writ Tax—Not applicable to filing of counterclaim regardless of amount thereof.

December 29, 1972

THE HONORABLE JOHN H. POWELL, Clerk
Circuit Court of the City of Nansemond

I have received your letter of December 26, 1972, from which I quote:

"On December 18th, 1972, a case was removed from the Municipal Court of the City of Nansemond to the Circuit Court. The amount involved was $500.00 and I charged the person removing the same the statutory writ tax of $5.00 and statutory clerk's fee of $5.00.

"On December 19th, 1972, the defendant filed a counterclaim in the sum of $5,000.00. Section 14.1-112(17) of the 1950 Code of Virginia, as amended, provides that there shall be no fee charged for the filing of a cross-claim, counterclaim, or setoff in any pending action.

"Please give me your opinion as to whether I should charge an additional clerk's fee in view of the fact that if the original claim had been between $500.00 and $5,000.00 the clerk's fee would have been $15.00.

"Of course the original writ tax of $5.00 would cover the entire amount in the claim and counterclaim unless I am also supposed to collect a writ tax on the counterclaim. I note that Rule 3:8 is silent as to a writ tax and clerk's fee on a counterclaim, but Rule 3:9 specifically says that payment of writ tax and clerk's fees shall not apply to a cross-claim."

Section 14.1-112, Code of Virginia, provides, inter alia:

"(17) In all actions at law the clerk's fee chargeable to the plaintiff shall be five dollars in cases not exceeding five hundred dollars, fifteen dollars in cases not exceeding five thousand dollars . . . to be paid by the plaintiff at the time of instituting the action, this fee to be in lieu of any other fees; provided, however, there shall be no fee charged for the filing of a cross claim, counterclaim, or setoff in any pending action."

It is my opinion that the quoted provision prohibits you from charging any clerk's fee upon the filing of a counterclaim, either to the defendant filing the counterclaim or to the plaintiff in the action in which the counterclaim is filed, notwithstanding the fact that the amount demanded in the defendant's counterclaim is greater than that demanded in the plaintiff's notice of motion for judgment.

With respect to the writ tax, § 58-71 provides, in pertinent part:

"When any original suit . . . or other action . . . is commenced in a court of record and in every case of removal or appeal of a cause from a trial justice's court to a court of record . . . there shall be a tax. . . ."

The reason that Rule 3:9 of the Rules of the Supreme Court of Virginia mentions the writ tax and clerk's fees whereas Rule 3:8 does not is because Rule 3:9 states that a cross-claim is a new action for purposes of the application of the Rules. In the absence of a statement regarding the writ tax and clerk's fees, Rule 3:9 could have been interpreted to allow the collection of a writ tax and a clerk's fee upon the filing of a cross-claim. Rule 3:8, however, does not make a counterclaim a new action, thus there is no necessity for mentioning the writ tax or clerk's fees. A similar situation exists with respect to cross-bills in equity practice under Rules 2:13 and 2:14, and this office has previously opined that a cross-bill is not an original action for purposes of the writ tax. See Report
of the Attorney General (1969-1970), p. 296. This is true whether it is filed against a plaintiff, as is a counterclaim, or against a defendant, as is a cross-claim.

In consideration of the foregoing, it is my opinion that the writ tax does not apply to the filing of a counterclaim in a pending action regardless of the amount demanded in the counterclaim.

FEES—Clerks—Criminal cases—Effect of collecting fee from defendant after charging reduced fee to Commonwealth—Fee in lieu of all other fees—Requirements for payment by Commonwealth.

CLERKS—Fees—Criminal cases.

December 1, 1972

THE HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

I have received your recent letter presenting several questions which I shall answer seriatim.

1. Does § 14.1-112(15) and (16) allow the clerk in criminal cases to collect his full fee from a defendant after he has charged the Commonwealth the reduced fee because he had previously been unable to collect any fee from the defendant?

Section 14.1-112(15) and (16) provides:

“(15) Upon conviction in felony cases the clerk shall charge the defendant twenty dollars in each case, and if not paid by the defendant, or in cases of acquittal, the clerk shall charge the Commonwealth a fee of ten dollars in lieu of all other fees payable by the Commonwealth, the same to be paid out of the treasury of the Commonwealth, when properly certified by the clerk for payment, on the forms prescribed by the Comptroller. No fees shall be chargeable to the Commonwealth where cases are nolle prosequi and not tried.

“(16) Upon conviction in misdemeanor cases the clerk shall charge the defendant ten dollars in each case and if not paid by the defendant, or in cases of acquittal, the clerk shall charge the Commonwealth a fee of five dollars on Commonwealth cases and in cases under local warrants or summons, the clerk shall charge the locality five dollars in each case, to be paid out of the treasuries of the Commonwealth or the locality as the case may be. The fees so charged shall be in lieu of all other fees paid in such cases by the Commonwealth or the locality. No fees shall be chargeable to either the Commonwealth or the locality where cases are nolle prosequi and not tried.”

The statutes do not preclude the clerk's subsequent collection of his full fee from a defendant who has been convicted even though he has previously charged the reduced fee to the Commonwealth. The Commonwealth is not subrogated to the clerk's claim against the defendant, nor does payment of the reduced amount by the Commonwealth operate to discharge the defendant's liability to the clerk. See Report of the Attorney General (1957-1958), p. 134.

2. If the full fee is collected from the defendant pursuant to § 14.1-112(15) or (16) after the reduced amount has been charged to the Commonwealth, should the full amount collected be remitted to the Commonwealth as recovered costs or only the reduced amount?
Section 14.1-100 provides, in pertinent part:

“All costs in a criminal case . . . shall, when collected, be paid by the officer collecting the same to the clerk . . . and shall be paid by such clerks as follows: Such of the costs as have been allowed and paid out of the State treasury shall be paid by such clerk into the State treasury, and such costs as have not been allowed and paid out of the State treasury shall be disbursed by the clerk to the several parties entitled thereto.”

The statute clearly contemplates that only the costs paid out of the State treasury are payable into the State treasury when collected from a defendant. Although the former opinion of this office to the Honorable J. Gordon Bennett, Auditor of Public Accounts, dated June 17, 1958, and cited supra, stated that a justice of the peace who collected a reduced fee from the Commonwealth lost all claim to any part of the full amount later collected from a defendant, the opinion did not involve the interpretation of § 14.1-112(15) and (16), did not refer to § 14.1-100 (then § 14-111), and was solely concerned with a fee for issuing an arrest warrant under § 14-136, which was subsequently repealed. Equity requires that the Commonwealth be reimbursed from the sum recovered to the full extent of the amount allowed to the clerk, but no similar reason exists for requiring the clerk to pay to the Commonwealth a sum in excess of the amount which he previously collected from the Commonwealth. To decide otherwise might operate to discourage a clerk from continuing his collection efforts against a defendant once he had charged the reduced fee to the Commonwealth. Accordingly, I am of the opinion that the clerk is entitled to retain as his fee under § 14.1-112(15) and (16) any amount recovered from a defendant in excess of the amount paid by the Commonwealth.

3. Is the clerk’s fee allowed by § 14.1-112(15) in lieu of the fee allowed by § 14.1-115?

Section 14.1-115 provides:

“For each case of felony tried in his court, to be charged only once, the clerk of such court shall be entitled to the sum of two dollars and fifty cents. But this section shall not apply to the clerk of the Hustings Court of the city of Richmond.”

Prior to the amendment of § 14.1-112(15) by Ch. 627 of the 1972 Acts of Assembly, it provided as follows:

“(15) Upon conviction in felony cases, in lieu of any other fees allowed by this section the clerk shall charge the accused a fee of twenty dollars in each case.” (Emphasis supplied.)

The above quoted provision was not interpreted by this office to preclude the clerk’s collection of the fee allowed by § 14.1-115. See Reports of the Attorney General (1963-1964), p. 38, (1964-1965), p. 44, and (1969-1970), p. 45. However, in my opinion, the 1972 amendments make explicit the General Assembly’s intent to limit the clerk’s fee when paid by the Commonwealth to ten dollars, because the statute now provides such fee is “. . . in lieu of all other fees payable by the Commonwealth. . . .” (Emphasis supplied.)

4. Does § 14.1-85 apply to the reduced fees payable by the Commonwealth under § 14.1-112(15) and (16)?

Section 14.1-85 is a general statute providing when certain fees in criminal cases shall be paid by the Commonwealth. It requires as a condition precedent to payment that the judge certify to the Comptroller that the Auditor of Public Accounts has examined the court records and determined the charge to be proper
and also determined that reasonable effort has been made to collect such costs from the persons liable for their payment.

Section 14.1-112(15) allows the clerk to collect a reduced fee from the Commonwealth "... when properly certified by the clerk for payment, on the forms prescribed by the Comptroller." Since the specific condition precedent to payment is stated in this statute, the general conditions of § 14.1-85 do not apply, and the clerk's certification is sufficient to authorize the payment by the Commonwealth. Although § 14.1-112(16) does not similarly state the condition precedent to payment, if the ten dollar fee allowed by § 14.1-112(15) can be collected without the audit procedure required by § 14.1-85, then a fortiori the five dollar fee allowed by § 14.1-112(16) can be similarly collected. Therefore, it is my opinion that § 14.1-85 has no application to the fees payable by the Commonwealth to the clerk pursuant to § 14.1-112(15) and (16).

FEES—Expert Witnesses—When called by Commonwealth, to be paid from appropriation for criminal charges.

WITNESSES—Expert—When called by Commonwealth, may be paid out of appropriation for criminal charges.

CRIMINAL PROCEDURE—Expert Testimony—Compensation pursuant to § 19.1-315.

October 3, 1972

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

This is in reply to your letter in which you ask how a medical doctor's fee is handled under the following circumstances:

"On a complaint of being raped, the victim is taken to a medical doctor for an examination as to whether there has been a forceful entry. The examination is made and in the preliminary hearing, the doctor is subpoenaed to testify on behalf of the Commonwealth. The doctor submits a statement for his physical examination of the prosecutrix and also a statement for testifying at the preliminary hearing. May the doctor's fee for testifying be considered as court cost and if so, may such cost be taxed against the defendant?"

Regarding the doctor's fee, your attention is called to that part of § 19.1-315 of the Code of Virginia (1950), as amended, which reads as follows:

"When in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service." (Emphasis added.)

As pointed out in an opinion rendered in the Report of the Attorney General (1949-1950), page 80, "This office has frequently held that this provision [now § 19.1-315] is broad enough to permit the employment of a person, such as a fingerprint expert or a physician, to give expert testimony in a criminal case, and to authorize the payment for their services out of the State treasury." Your attention is further called to an opinion rendered in the Report of the Attorney General (1967-1968), page 82, which deals specifically with a rape matter. I am enclosing a copy of that opinion, as well as a copy of a recent opinion rendered on January
24, 1972, to the Honorable Joseph H. Campbell, Commonwealth’s Attorney for the City of Norfolk, which concerns payment for services rendered the State in the trial of criminal cases.

Under the circumstances you relate, the service provided is relative to a preliminary hearing in a court not of record. In such case, § 19.1-319 would also apply in conjunction with § 19.1-315. Section 19.1-319 reads in pertinent part as follows:

“A judge of a court not of record before whom there is any proceeding in a criminal case shall certify to the clerk of the circuit court of his county or the corporation court of his city, and a judge or court before whom there is, in a criminal case, any proceeding preliminary to conviction in another court, upon receiving information of the conviction from the clerk of the court wherein it is, shall certify to such clerk all the expenses incident to such proceedings which are payable out of the State treasury.”

It is my opinion that the services rendered by a medical doctor in circumstances such as you have set out are professional services for which no specific compensation is provided, and that they would come under § 19.1-315 in conjunction with § 19.1-319.

You also ask whether such cost may be taxed against the defendant. Your attention is directed to § 14.1-190 of the Code which reads in part as follows:

“Every witness who qualifies as an expert witness, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may, if requested in its discretion, order without regard to any limitation above set forth, but the same shall be paid by the party in whose behalf he shall testify.” (Emphasis added.)

Inasmuch as § 19.1-315 of the Code mentions service to the State and compensation therefor, and in the case you have stated, the service would be for the State and not for the defendant, it is my opinion that such cost may not be taxed against the defendant.

FEES—Land Use Tax—No fee can be charged for processing use assessment applications.

TAXATION—Application for Taxation on Basis of Use Assessment—No fee may be charged for processing application.

November 27, 1972

The Honorable Donald W. Devine
Commonwealth’s Attorney for Loudoun County

I have received your recent letter inquiring as follows:

“May the Board of Supervisors of a county which has passed the ‘Land Use Tax’ ordinance impose a fee upon the processing of an application for taxation on the basis of a use assessment, and if so, can the amount of such fee be proportional to the acreage involved under the application?”

Section 58-769.4, et seq., Code of Virginia (1950), as amended, provides for the assessment and taxation of real estate on the basis of use instead of fair market value. The public policy promoted by this legislation is indicated in § 58-769.4. Generally, it is to encourage the continuing use of land for agricultural, horticultural, forest and open space use.
A fee imposed by the locality upon applications for use assessment and taxation would often discourage the making of an application, with the result that the use assessment could not occur and the tax burden would continue to operate to encourage conversion of land to uses other than those sought to be promoted.

The General Assembly did not provide for the imposition of a fee for processing use assessment applications although it has provided for fees for other services rendered by commissioners of the revenue (§§ 58-266 and 58-816) and by other public officials (§§ 14.1-103 and 15.1-491(f)).

In the absence of specific statutory authority, it is my opinion that a commissioner of the revenue or other public official is not entitled to collect a fee for processing or investigating use assessment applications and that no fee can be imposed upon such applications by a county board of supervisors.

FEES—Not Provided for Court Appointed Counsel in Misdemeanor Cases; Argersinger case.

ATTORNEYS—Fee Not Allowed for Court Appointed Counsel in Misdemeanor Cases; Argersinger case.

July 27, 1972

THE HONORABLE LINWOOD HOLTEN
Governor of Virginia

In your letter of July 11, 1972, you inquire whether § 19.1-315 of the Code of Virginia (1950), as amended, can be construed to permit the payment out of the State treasury of counsel fees to attorneys appointed by courts to represent indigent persons charged with misdemeanors. You correctly note that my previous 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 page 194, held that such payments were not authorized by § 19.1-315, but you suggest that the decision of the Supreme Court of the United States in Argersinger v. Hamlin, 40 U.S.L.W. 4679 (June 12, 1972), requiring the appointment of counsel for indigents in misdemeanor cases, justifies a re-examination of the opinion to Mr. Rudy.

Analysis of the history of the statutes in question discloses that § 14.1-183, upon which the Rudy opinion was based, can be traced in its present form back to the Revised Code of 1849 (c. 185, § 1). This statute’s language makes it clear that, as far back as 1849, the Virginia legislature intended that court-appointed counsel serve without compensation. Not until 1916 did the General Assembly authorize compensation of court-appointed counsel in felony cases in what is now § 14.1-184 (Acts of 1916, c. 373). It is significant that this section, originally numbered § 3518 in the Code of 1919, was placed adjacent to § 14.1-183 which was then § 3517. This indicates not only that the legislature considered felony cases as deserving a special exception to § 3517 with respect to compensation for counsel, but that § 3517 related to both civil and criminal cases.

These two sections have continued to appear together in the various Code revisions, as §§ 14-180 and 14-181 in the Code of 1950 and as §§ 14.1-183 and 14.1-184 today. The latter section has been amended a number of times to increase the amounts allowable to court-appointed counsel in both capital and non-capital felonies, the most recent increase being in 1968. It is also significant that in 1964, following the decision in Gideon v. Wainwright, 372 U.S. 335 (1963), which required counsel in all felony cases, the General Assembly increased the allowable compensation in capital cases from $150.00 to $250.00 and in non-capital
cases from $50.00 to $100.00. In none of the amendments has the legislature ever seen fit to provide for the compensation of counsel in misdemeanor cases.

The only other statute authorizing payment to court-appointed counsel in trial courts is § 16.1-173(d), which provides for payment to counsel appointed to represent juveniles. That section in its present form did not exist until 1968 (Acts of 1968, c. 581) following the decision in In Re Gault, 387 U.S. 1 (1967), which required the appointment of counsel in cases involving juveniles. Prior to the Gault decision, § 16.1-173 provided only for the appointment of an attorney (or a probation officer) as guardian ad litem if the parent or guardian of the juvenile did not appear at the hearing. Compensation of attorneys serving in this capacity was not authorized until 1966 (Acts of 1966, c. 709).

Section 19.1-315, on the other hand, originally appeared in the Acts of 1877-78 (c. 311) as part of a revised criminal procedure title, where it has remained in virtually identical language through the Codes of 1887 (§ 4083), 1919 (§ 4960) and 1950 (§ 19-291). It is my opinion that the proper interpretation of the second sentence of this section, which you quote in your letter, can be reached only by reading that sentence in context with the entire section, as follows:

"A sheriff or other officer, for traveling out of his county or corporation but within the State to execute process in a criminal case and doing any act in the service thereof, for which no other compensation is provided, shall receive therefor, out of the State treasury, such compensation as the court from which the process issued may certify to be reasonable. When in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service. This section shall not prevent any payment under § 2.1-223.6, which could have been made if this section had not been enacted.

"But the amount of compensation to officers for execution of process outside of the respective counties of such officers shall not exceed the fees or allowances now provided by law for the execution of process within the county including the provision for the allowance of mileage for officers and prisoners within a county. Not more than ten cents per mile shall be allowed for officers using automobiles for travel, irrespective of the number of guards or prisoners conveyed in such automobiles.

"This section shall not be construed to authorize the payment of any additional compensation to a sheriff or other officer who is compensated for his services by a salary exclusively."

I believe it to be clear from the context of this section, keeping in mind that it is placed in Chapter 13 of Title 19.1 which is entitled "Taxation and Allowance of Costs," that the services described in the second sentence of § 19.1-315 are those which are comparable to that described in the first sentence (the "other service" referred to in the second sentence being in addition to a sheriff's traveling out of his county or corporation to execute process as specified in the first) and for which no costs are specifically provided elsewhere in the Code.

I might add that I do not find §§ 19.1-315 and 14.1-183 to be in conflict on this point, as you suggest in your letter. Certainly the location of the latter section in Title 14.1 (Costs, Fees, Salaries and Allowances) does not compel such a conclusion, since as pointed out above the provision for compensation in felony cases, § 14.1-184, is found in that title as well. Indeed, there are instances in felony charges where § 19.1-315 would be applicable to the compensation of counsel, such as where counsel is appointed pursuant to § 19.1-241.1 to be present at a lineup. This office has so ruled in an opinion to the Honorable Calvin W. Berry,
Judge of the Municipal Court of the City of Danville, dated January 14, 1969, and found in the Report of the Attorney General (1968-1969), p. 13, a copy of which is attached. Since there is no statute comparable to § 14.1-184 for misdemeanor cases, however, the incidental provisions of § 19.1-315 cannot be held to operate similarly in such cases in view of the statutory history described hereinabove.

I continue, therefore, to be of the opinion that § 19.1-315 does not authorize payment to court-appointed counsel in misdemeanor cases, for the reasons stated in the Rudy opinion and for the further reason that, since the date of the Rudy opinion, the General Assembly has convened in regular session without making any express provision for such payment and without making any amendment which would affect this matter either to § 19.1-315, to § 14.1-183, to § 14.1-184, or to § 16.1-173(d). The legislature has, however, in its enactment of Chapter 2.1 of Title 19.1 (Acts of 1972, c. 800) providing for the appointment of public defenders, specifically charged such officers in § 19.1-32.4(b) with the duty:

"To represent indigent defendants charged with a crime when such defendants are entitled to be represented by law by court-appointed counsel in a court of record or a court not of record, and to verify the indigent status of such defendants." (Emphasis supplied.)

Most significant is § 19.1-32.5, which provides:

"In counties and cities in which public defenders are appointed, the provisions of §§ 14.1-183 and 14.1-184 shall not apply unless the public defender is unable to represent the defendant or petitioner by reason of conflict of interest or otherwise, in which case the provisions of §§ 14.1-183 and 14.1-184 shall be in full force and effect."

There can be no intelligent conclusion from this language other than that the General Assembly construes §§ 14.1-183 and 14.1-184, not the second sentence of the first paragraph of § 19.1-315, to apply to the question of compensation for court-appointed counsel in misdemeanor and felony cases apart from incidental services. The fact that the Supreme Court of the United States has significantly expanded the number of cases in which counsel must be appointed is not relevant to either my interpretation of Virginia law or my belief that Virginia law may be changed only by the General Assembly. Anticipating that the 1973 Session of the General Assembly will take action in this regard, however, I have suggested in a memorandum to all judges of courts exercising criminal jurisdiction that appropriate records be prepared in each misdemeanor case so that counsel appointed in such cases subsequent to Argersinger may be properly compensated if such retroactive payment is authorized by the legislature.

FIREMEN—Death Benefits—Differ from “other benefits”—How computed.

December 18, 1972

The Honorable Willard J. Moody
Member, Senate of Virginia

In your recent letter, you stated that a member of the Fire Department of the City of Portsmouth recently died as a result of hypertension or heart disease, and that his beneficiaries are seeking benefits provided by a pension and retirement fund. You further indicated that the fund includes certain benefits for firemen who die in the line of duty, and that those benefits are substantially greater than those in the case where a fireman does not die in the line of duty.

You then asked whether the language of § 27-40.1, Code of Virginia (1950),
as amended, should be interpreted to extend the presumption provided for therein to the case described above.

Section 27-40.1 provides, in part, as follows:

"Any condition or impairment of health of salaried or volunteer firemen caused by . . . hypertension or heart disease resulting in total or partial disability shall be presumed to have been suffered in the line of duty unless the contrary be shown by competent evidence. . . " (Emphasis supplied.)

The presumption is made subject to a proviso in the section that, prior to making any claim based upon such presumption for retirement, sickness or "other benefits" on account of the disability, such salaried or volunteer fireman shall have been found free from cardiovascular disease by physical examination. The section further provides that any "such fireman" claiming that the disability was suffered in the line of duty shall, if requested, submit himself to physical examination.

Section 27-40.2 provides as follows:

"Such presumption, subject to the provisions of § 27-40.1, shall be employed in determining eligibility for retirement, sickness and other benefits provided pursuant to the authority granted by § 27-39 for persons totally or partially disabled." (Emphasis supplied.)

Section 27-39 relates to relief which may be provided by local jurisdictions to any fireman who is "injured" while in the line of duty.

The language of §§ 27-40.1 and 27-40.2 are couched in language relating to disability, either partial or total. The sections do not relate, either expressly or impliedly, to cases of death. Section 27-40.2 expressly refers only to benefits provided pursuant to § 27-39, which grants authority to localities to provide relief in cases of firemen who are injured. Therefore, "other benefits," referred to in § 27-40.1, does not include those relating to death.

In my opinion, therefore, the presumption that a condition or impairment of health of a fireman caused by hypertension or heart disease was suffered in the line of duty has no application to the case where a beneficiary seeks additional benefits occasioned by death.

FIREWORKS—Sale of—Unlawful sale of those listed in § 59.1-147.

November 8, 1972

THE HONORABLE FREDERICK T. GRAY
Member, Senate of Virginia

This is in reply to your letter of October 16, 1972, in which you request my opinion as to whether certain fireworks enumerated in § 59.1-147 of the Code of Virginia (1950), as amended, may be legally sold in Virginia.

The answer to your question is in the negative.

Chapter II of Title 59.1, §§ 59.1-142 through 59.1-148, contains provisions which make it unlawful in Virginia to sell, offer for sale, expose for sale, buy or use any fireworks as defined therein. Section 59.1-145 makes a violation of the chapter a misdemeanor and provides punishment therefor.

Section 59.1-147 provides for certain fireworks to receive limited exemptions from the chapter's application, and reads as follows:

"§ 59.1-147. Certain fireworks exploded on private property.—This chapter shall not apply to sparklers, fountains, Pharaoh's serpents, caps for
pistols, nor shall it apply to pinwheels commonly known as whirligigs or spinning jennies, when used, ignited or exploded on private property with the consent of the owner of such property.” (Emphasis supplied.)

The effect of § 59.1-147 is that the provisions of the chapter dealing with seizure and destruction (§ 59.1-143), and punishment (§ 59.1-145), are not applicable when certain fireworks are used under the conditions specified therein. The above cited exemption relates to the use of certain fireworks and is silent as to authority to sell.

The rather clear import of § 59.1-147 is substantiated by the section heading, to wit, “Certain fireworks exploded on private property.” Although most section headings of Virginia statutes are not specifically enacted by the legislature, the heading in question is a direct product of the General Assembly and is entitled to some weight. The General Assembly, in an effort to recodify the general laws of Virginia relating to trade and commerce, reenacted § 59.1-147 in its entirety, including the aforesaid section heading which previously was found solely in the Code and not in the Acts. Acts of Assembly (1968), Ch. 439.

I am of the opinion, therefore, that the specific fireworks enumerated in § 59.1-147 may not be sold in Virginia, and that the exemption provided therein relates only to use on private property with the consent of the owner of such property.

GAME AND INLAND FISHERIES—Licenses to Hunt, Trap or Fish—Exemptions—Renters of certain camping spaces not exempt.

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

This will acknowledge receipt of your letter of October 10, 1972, requesting my opinion concerning the application of § 29-52(2), Code of Virginia (1950), as amended, to the renters of certain camping spaces delineated on a diagram accompanying your letter.

In your letter you note that the land is rented by certain parties who utilize it for camping, and that, insofar as you are aware, none of the renters actually resides there during the entire year. You further note that the spaces are used with a fair degree of regularity during the warmer months with some of the camping equipment, such as trailers, campers and tents, remaining there year round. It also appears that the rented spaces are not contiguous to the stream, but are separated therefrom by a road, although the renters have access to, and fishing rights in, the stream.

In response to your specific inquiry as to whether or not the renters of such spaces are exempt from the requirement of having to secure a fishing license, I call your attention to the opinion of this office rendered to the Honorable H. Selwyn Smith, Substitute Trial Justice for Prince William County, dated July 16, 1952, and found in Report of the Attorney General (1952-1953), p. 110, a copy of which is enclosed herewith for your information. In that opinion it was ruled that one who owned a subdivision lot separated by a road from the lake to which he had fishing rights did not come within the strict meaning of the exemption provisions of § 29-52(2) of the Code.

Statutory provisions purporting to exempt one from licensing requirements are to be strictly construed. See Commonwealth v. Bailey, 124 Va. 800 (1919). In this regard, it does not appear that the renters of the camping spaces are fishing within the boundaries of the lands or waters of which they are tenants, renters
or lessees and on which they reside. Accordingly, I am of the opinion that such renters are not exempt from the licensing requirements under § 29-52(2) of the Code.

GAME AND INLAND FISHERIES—Members of Private Fishing Club May Lawfully Fish at Club Pond Prior to Official Season.

GAME AND INLAND FISHERIES—Transportation of Fish Taken at Privately Owned Lake Not Regulated by § 29-156.

March 21, 1973

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

This will acknowledge receipt of your recent letter in which you request my advice with respect to two questions:

(1) May the members of a private fishing club fish for trout in the club's privately owned and privately stocked fishing pond prior to the opening of the statewide trout season?

(2) If such trout fishing by members prior to the opening of the regular statewide season is legal, may such fish be transported from the club property within or outside the county in light of § 29-156 of the Code?

With respect to your first question, § 29-150, Code of Virginia (1950), as amended, provides in relevant portion:

"... Trout ... The owner, or lessee, of any private pond stocked by himself, or by the Commission not less than three years prior thereto, may capture any fish therefrom for his own use at any time; ..."

I am, therefore, of the opinion that the club members may lawfully fish for trout at the club pond prior to the opening of the official statewide trout season.

Regarding the transportation and carriage of fish, § 29-156 of the Code provides:

"When taken in accordance with the provisions of this title wild birds, wild animals or fish or parts thereof may be transported as follows:

(a) By any person properly licensed, for lawful use in or out of the county where taken to another county in this State or to another state during the open season in the county where taken, but not more than the number thereof that may be taken in two days by one person in the county where taken may be so transported by him in one calendar week. . . ."

The apparent intent of the legislature in enacting this provision was twofold. First, it reasonably extends the scope of the Game Commission's regulation of hunting and fishing season laws so that violators of hunting and fishing seasons need not be caught actually taking fish or killing game in order to be found guilty of a violation. Secondly, this provision is a conservation measure in that it prohibits the transportation of more than a two-day limit of fish or game. Regulation of carriage and transportation of game and fish by § 29-156, therefore, is directed at conservation of fish and wildlife which are the property of the general public.

I am, therefore, of the opinion that § 29-156 was not intended to regulate transportation of fish taken at a privately owned lake which is stocked by its owner. Individuals transporting such fish would assume the risk of establishing that the origin of the fish was their club's privately owned and stocked pond. If such
proof were not forthcoming in a particular case, § 29-156 would be deemed applicable.

GAME AND INLAND FISHERIES—Motorcycle Clubs; Use of Commission Wildlife Management Areas or Trails Not Authorized.

ENVIRONMENTAL PROTECTION AGENCIES—Game and Inland Fisheries Commission Wildlife Management Areas or Trails Not Authorized for Use by Motorcycle Clubs.

May 3, 1973

THE HONORABLE CHESTER F. PHELPS
Executive Director, Commission of Game and Inland Fisheries

This will acknowledge receipt of your recent letter in which you request advice regarding the authority of the Commission of Game and Inland Fisheries to authorize use of certain trails on Game Commission wildlife management areas by the Lonesome Pine Enduro Riders Association, Inc., for their annual motorcycle riding competition. Your letter further advises that the particular trails to be used are not normally open to public vehicular traffic, by hunters, fishermen, and other visitors to such wildlife management areas. It is my further understanding that the land in question was purchased by the Game and Inland Fisheries for the specific purpose of establishing wildlife management areas thereon.

The authority of the Commission of Game and Inland Fisheries to purchase real property and the activities which may be promoted by the Commission thereon are set forth in § 29-11, Code of Virginia (1950), as amended, as follows:

"In addition to the specific authority elsewhere herein conferred the Commission shall have general power and authority to acquire by purchase, lease, exchange, gift or otherwise, such lands and waters anywhere in this State as it may deem expedient and proper; to establish and erect thereon and therein such buildings, structures, dams, lakes and ponds as it may deem necessary and proper, and to conduct and carry on such operations for the preservation and propagation of game birds, game animals, fish and other wildlife as it may deem proper to increase, replenish and restock the lands and inland waters of the State; . . ." (Emphasis supplied.)

Section 29-11 of the Code, in addition, sets forth the general responsibility and authority of the Commission of Game and Inland Fisheries, specifically providing that the Commission is vested with the general authority to:

". . . have and to exercise such other powers and to do such other things as it may deem advisable for the conservation, protection, replenishment, propagation of and increasing the supply of game birds, game animals and fish and other wildlife of the State. . . ." (Emphasis supplied.)

With respect to the use of Commission lands, § 29-11.1 of the Code provides in relevant portion:

"The Commission is authorized, with the approval of the Governor, to lease, upon such terms and conditions as deemed advisable by the Commission, any land or buildings owned by it to private persons, corporations, public authorities duly created by law or political subdivisions of the State, in a form to be approved by the Attorney General, when such action is otherwise consistent with the powers, authority and responsibilities of the Commission . . ." (Emphasis supplied.)
The foregoing statutory provisions clearly authorize acquisition and development of land by the Commission but limit the uses of such property and the activities to be promoted thereon to those which will conform with the responsibility of the Commission for the conservation, protection, replenishment and propagation of wild game birds, animals and fish.

The use of Game Commission land for motorcycle competition would in no way promote the conservation, protection, replenishment, or propagation of wild game birds, animals or fish as mandated by §§ 29-11 and 29-11.1 governing the use and purchase of Game Commission property.

I must find, therefore, that the Commission is not authorized to permit the use of its natural wildlife management areas or trails therein for motorcycle runs and related activities by motorcycle clubs or associations.

GAME AND INLAND FISHERIES—No Minimum Allowable Distances Between Stationary Waterfowl Blinds of Riparian Owners.

LICENSES—Erecting of Stationary Waterfowl Blinds by Owners of Riparian Rights; Location of Blinds in Public Waters by Nonriparian Owners.

August 18, 1972

THE HONORABLE JOHN D. EURE, JR.  
Commonwealth's Attorney for the City of Nansemond

This will acknowledge receipt of your letter of August 3, 1972, requesting my opinion concerning the licensing and erecting of stationary waterfowl blinds. Your letter states, in pertinent part, as follows:

"I would appreciate your opinion as to whether or not owners of riparian rights, their lessees or permittees may erect blinds in the public waters in front of their respective shorelines notwithstanding the fact that such blinds so erected might be less than five hundred yards from an existing blind. I would also appreciate your opinion as to whether or not any distinction would be made between blinds erected in public waters by riparian owners, their lessees or permittees, within less than five hundred same side of the river as opposed to blinds erected by riparian owners, their lessees or permittees in public waters adjacent to opposite banks of a river or stream.

"In the event that your opinion would allow the erection of blinds by riparian owners, their lessees or permittees, within less than five hundred yards of each other, I would appreciate your opinion as to whether or not there would be any given minimum distance required between the blinds as a safety factor."

As you indicate in your letter, § 29-85, Code of Virginia (1950), as amended, provides that the owners of riparian rights, their lessees or permittees, shall have the exclusive privilege of locating blinds on their shores and the prior right to license and erect blinds in the public waters in front of such shores. Section 29-85 of the Code further provides that, upon the proper location of such blinds by riparian owners, their lessees or permittees, no other stationary or floating blinds shall be located in the public waters closer than five hundred yards thereto without the consent of such riparian owners, their permittees or lessees.

In treating the location of stationary blinds in the public waters by nonriparian owners, § 29-86 of the Code provides for the licensing and erecting of such blinds on a nonpriority basis. In this regard, riparian owners who fail to meet the time limitations placed upon them by § 29-85 of the Code are treated on the same
nonpriority basis as nonriparian owners. In addition, § 29-86 of the Code provides that all sites selected pursuant to the provisions thereof shall be at least five hundred yards from any other properly licensed stationary blind.

It would appear from a review of the foregoing statutory provisions that each riparian owner, his permittee or lessee, has the prior right to locate a stationary blind in the public waters in front of his shore. While the Code clearly establishes a system of priority rights between riparian owners and nonriparian owners, there are no such provisions made for respective riparian owners. Indeed, to place riparian owners on a first-come, first-served basis is to deny the prior right expressly granted to each such riparian owner by § 29-85 of the Code. In this same regard, that the minimum distance requirements were not intended to apply to the location of blinds in the public waters by riparian owners finds additional support in the fact that there is no statutory prohibition whatsoever against the location of shore blinds (a privilege exclusive with riparian owners, their lessees or permittees) within less than five hundred yards from one another.

I am, therefore, of the opinion that the prohibition against the location of a blind closer than five hundred yards to a blind properly licensed pursuant to the provisions of § 29-85 of the Code relates to the location of a blind in the public waters by a nonriparian owner. Accordingly, each riparian owner, his permittee or lessee, as the case may be, may locate a blind in the public waters in front of his shore even though such blind may be located within five hundred yards of a blind licensed by another riparian owner, his permittee or lessee. It makes no difference in this regard whether or not the riparian owners own property adjacent to, or across the water from, one another.

With regard to your last inquiry, I am aware of no statutory provisions or Game Commission regulations establishing minimum allowable distances between the blinds of riparian owners, their permittees or lessees, for purposes of safety. Accordingly, I am of the opinion that such would be governed by prudence and reason.

GENERAL ASSEMBLY—Attendance—Attendance is actual presence during session of General Assembly.

May 23, 1973

THE HONORABLE GEORGE R. RICH
Clerk, House of Delegates

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

"With reference to Chapter 512 of the Acts of 1973 which amended Section 30-19.4 of the Code of Virginia, I request your opinion on the interpretation of the second paragraph of this section.

"The point in question is a provision for expenses allowed aides of members of the House of Delegates. The act reads 'there shall be allowed to each secretary or administrative assistant reasonable expenses incurred in the performance of his official duties for each such member of the General Assembly not exceeding twenty-five dollars per day in attendance at the General Assembly . . .'.

"The question is an interpretation of what 'attendance at the General Assembly' constitutes. Does attendance at an interim study committee satisfy this requirement? Could an aide be reimbursed for expenses incurred in places other than where the General Assembly is meeting?"

The second paragraph of Chapter 512 of the 1973 Acts of Assembly provides:

"Each member of the General Assembly shall be entitled to an allow-
ance of three thousand six hundred dollars per calendar year for the purpose of compensating any secretary or administrative assistant whose services such member may choose to retain for aid in performing duties incidental to the legislative process and in addition, there shall be allowed to each such secretary or administrative assistant reasonable expenses incurred in the performance of his official duties for each such member of the General Assembly not exceeding twenty-five dollars per day in attendance at the General Assembly and the President Pro Tempore of the Senate and the Floor Leader of the House of Delegates shall be entitled to an additional fifteen hundred dollars allowance for compensation of one or more secretaries or administrative assistants."

This language provides for an allowance to each member of the General Assembly of three thousand six hundred dollars per calendar year to be expended as compensation for any secretary or administrative assistant retained by the member to perform duties incidental to the legislative process. In addition to this amount, each secretary or administrative assistant is allowed reasonable expenses not to exceed twenty-five dollars per day incurred in the performance of his official duties for each member in attendance at the General Assembly.

"Attendance" is the fact of being present. Lang v. Dick, 347 P.2d 581, 583, 87 Ariz. 25. "In attendance" as used in § 19.1-204 of the Code, a law relating to excusing jurors, means those in attendance when the case was called. Ballard v. Com., 156 Va. 980, 159 S.E. 222 (193).

I am of the opinion that as used in this chapter, the words "in attendance at the General Assembly" means being actually present during the session of the General Assembly in the place where it is meeting. The language would not permit the secretary or administrative assistant to be reimbursed for expenses incurred when performing duties while attending an interim study committee or performing duties in places other than where the General Assembly is meeting.

GENERAL ASSEMBLY—Bills—Form required by Article IV, Section 12, of the Constitution.

January 18, 1973

The Honorable W. Roy Smith
Member, House of Delegates

This is in reply to your letter of January 16, 1973, in which you requested my opinion concerning the validity of the form in which proposed House Bill No. 1250 has been submitted. Your letter reads:

"Amendments to Chapter 804, Acts of Assembly, 1972, (1972 Appropriation Act) are proposed in H. B. 1250, copy of which is enclosed. I shall appreciate your opinion concerning the validity of the form in which a bill has been prepared.

"As background information, it is noted that the Constitution requires the printing of an entire section of a statute if an amendment to a section is proposed. Anticipating the possibility of more frequent amendments to the Appropriation Act, the 1972 Appropriation Act designated more segments as 'Sections,' usually including all items for a single agency under a single section. Accordingly, the H.B. 1250 amendments include, by number, the amended sections in their entirety and includes a few new sections which are assigned distinctive numbers. The amended sections themselves identify appropriation increases as 'Additional Appropriations'; all changes fol-
low the pattern of 'strike-throughs' for changed language and figures and italics for additional language figures."

The pertinent section of the Constitution of Virginia is Article IV, Section 12, which reads:

"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."

This section requires that the section of a bill amended shall be reenacted and published at length.

Chapter 804, Acts of Assembly, 1972 (Appropriations Act) was submitted to the General Assembly containing sections including all items for a single agency under a single section. House Bill No. 1250, a copy of which you enclosed, includes by number the amended sections in their entirety and includes a few new sections which are assigned distinctive numbers. I am of the opinion that House Bill No. 1250 is in the form required by Article IV, Section 12, and, therefore, valid. See Sutherland, Statutory Construction, § 1928.

GENERAL ASSEMBLY—Legislation—May reintroduce bill at new session which bill was passed by indefinitely at last session.

October 26, 1972

The Honorable John B. Boatwright, Jr., Director
Division of Statutory Research and Drafting

This will acknowledge receipt of your letter of October 4, 1972, in which you pose the question of whether standing committees of the General Assembly, meeting during the interim period between the long and short sessions, may take final action on bills which are before them prior to the convening of the next regular session. I am enclosing herewith a copy of an opinion issued this date to the Honorable Edward E. Willey, President Pro Tempore of the Senate, which should be responsive to your first inquiry.

In regard to committee actions between the long and short sessions, you also ask:

"... if final action be taken which results in any such bill's being passed by indefinitely would it be proper for an identical bill to be introduced in the next regular session or in order to prevent the reintroduction of such a like bill would it be necessary for a committee to postpone final action until the session?"

In reviewing the House and Senate Debates on Article IV of the Constitution, as well as the legislative continuity rules adopted by both houses, I find no prohibition to the introduction during the short session of a bill identical to one killed either by the legislature during the sixty-day session or "passed by indefinitely" by committee action in the period between the long and short sessions. Similarly, committee postponement of final action on a bill until the beginning of the next regular session would not preclude the introduction of an identical bill at that session although, as a practical matter, the fate of the "re-introduced bill" would seem predictable.
GENERAL ASSEMBLY—Legislation—Senate and House committees may act on carry-over bills when the General Assembly is not in session.

October 26, 1972

THE HONORABLE EDWARD E. WILLEY
President Pro Tempore
Senate of Virginia

This will acknowledge receipt of your letter of October 6, 1972, in which you set forth the following questions in regard to consideration of legislative matters by committees of the General Assembly during the interim period between legislative sessions:

"(1) Can the Senate and House committees act on carry-over bills when the General Assembly is not actually in session?

"(2) If not, could the Rules of each body require the vote of the committees to be taken only after the General Assembly convenes for its regular sixty-day or thirty-day session?"

Article IV, Section 6, of the Virginia Constitution specifies that the General Assembly shall meet annually. Article IV, Section 7, provides, in part, that "... the houses may jointly provide for legislative continuity between sessions occurring during the term for which members of the House of Delegates are elected." Pursuant to Section 7, the House and Senate adopted rules which, in my opinion, permit committee consideration and action on agenda items during the interim between the sixty-day and thirty-day (or the long and short) sessions. For example, Senate Rule 20E states:

"Any bill or resolution introduced in an even-numbered year, and not reported to the Senate by a Committee may, upon the majority vote of the elected membership of the Committee to which it has been referred, and upon request of the chief patron of the bill or resolution, be continued on the agenda of the Committee for hearings and Committee action during the interim between sessions or for future action by the Committee during the following odd-numbered year regular session; a bill or resolution may be continued only one year from an even-numbered year session and not otherwise. The Committee shall report, prior to the adjournment sine die of the Senate, such bills or resolutions as shall be continued and the Clerk of the Senate shall enter upon the Journal the fact that such bill or resolution has been continued. Any bill or resolution which has been continued and subsequently reported from a Committee shall be placed upon the privileged calendar of the Senate.

"The Senate upon consideration of any bill or resolution on the calendar may rerefer the bill to the Committee reporting the same, and direct the Committee to continue the bill or resolution until the following odd-numbered year regular session, and hold such hearings or render such further consideration of the bill or resolution as the Committee may deem proper.

"The Chairman of the Committee, or the majority of the elected membership of a Committee, may call meetings of the Committee during the interim between sessions to study, call hearings, and consider any bill or resolution continued for further action at the odd-numbered year session, or to consider such other matters as may be germane to the duties of the Committee.

"The provisions of this rule relating to legislative continuity between sessions shall be subject to provisions of Article IV, Section 7 of the Constitution of Virginia." (Emphasis supplied.) See Va. House Rule 24(a)
for similar provisions governing House procedures on "carry-over" bills or resolutions.

The subject of legislative continuity is not discussed in the Report of the Commission on Constitutional Revision which, as you may recall, did not recommend annual legislative sessions. Although the Proceedings and Debates of the House of Delegates pertaining to Revision of the Constitution have not been published yet, our review of the non-indexed page proofs supplied by the Clerk of the House reveals an absence of any discussion of Committee functions and power between sessions.

It is instructive, however, to consider the Proceedings and Debates of the Senate of Virginia pertaining to Amendment of the Constitution, hereinafter referred to as Senate Debates on the Constitution, for it is clear that both proponents and opponents of annual sessions contemplated legislative committees functioning fully between sessions in the event that the annual session floor amendments before the Senate were approved by the legislature and ultimately made a part of the Constitution. Consider the following colloquy:

"Senator Breeden: Mr. President, I would like to offer this very brief explanation. The amendment that we have offered provides for annual sessions.

..."

"We have in the package of amendments—and this is the first bridge that has to be crossed—an additional amendment that first would provide that by joint rule the two Houses could provide for continuity between what I will call the long and the short sessions. Loss of time at the beginning of a session is going to be cured, I think, in part by the legislative process study group which Senator Andrews heads, by provision for prefiling of bills and other efforts to get the most work possible out of the House and the Senate. If in addition to that we permitted a continuity between the two sessions we could go home and some measure that had not been passed could be taken up where we left off when we came back the next year.

"Of course it stands to reason that there will be errors to correct. There are some we are going to try to correct this time, I understand. And there are measures that would be so pressing that we would not want to delay them from one year to the next. But experience tells me there are a lot of things that could be left where they are, and maybe profitably so, because they could be considered at greater length and could be perfected in language and intent and purpose. So we have an amendment that will permit that, if the legislature wants to have continuity ... ." Senate Debates on the Constitution 350 (1969).

"Senator Andrews: ... I had the honor of serving with Senator Fitzgerald and our distinguished President on the Legislative Process Commission headed by the Speaker of the House. We explored this matter thoroughly, ascertained factual situations happening in the nation, the growth of the multitude of bills that each session brings forth. It was the opinion of the Legislative Process Commission that the proposal set forth in the amendment of Senator Breeden, Senator Hirst and myself of sixty day and thirty day annual sessions was the proper approach together with the companion amendment, which would enable the General Assembly, to be, in a sense, a continuing body between the sessions, which would in effect permit committees under a joint rule of the two bodies to act between sessions." (Emphasis supplied.) Senate Debates on the Constitution 352 (1969).
"Senator Hutcheson: Mr. President, I rise in opposition to the proposed amendment.

... You say that you can merge, coordinate, marry the two sessions so that you can continue from one work that was assumed at another, and that committees can be working in the interim. Now, gentlemen, what committees? Our regular standing committees will come to Richmond and work on their legislative duties while we are not in session?" (Emphasis supplied.) Senate Debates on the Constitution 355-356 (1969).

"Senator Hirst: ... The question before the Senate at this time in its narrowest sense is a very simple one. The Committee Substitute recommends once each two years a ninety day session. The amendment offered by Senator Breeden, Senator Andrews and me, recommends that in the even year there be a sixty day session and in the odd year a thirty day session, but taken in context with the total amendment, a continuity between them.

... [T]he approach recommended in these amendments provides for what you might call an accumulation of effort. Reference has been made to the fact that a bill might carry over from one session to another. It has been my experience to benefit as a legislator from the help that other members have given me in improving my bills. It has also been my misfortune on occasion to have a bill which I was not able to make as good as it should be and the members did not have time to improve, and a well meaning purpose was not accomplished.

"The question also has been raised as to what might be done by committees between sessions. I submit that there is an opportunity without undue burden upon members of the Assembly to prepare for the coming session, the second session of the biennial, the legislation to be foreseen coming up and to have it in much better shape when it is introduced than would be the case otherwise." Senate Debates on the Constitution 358 (1969).

In reviewing all of the pertinent sources, I find no basis for concluding that the committees of the House and Senate are not empowered between the long and short sessions to consider and dispose of "carried over" legislative matters. To the contrary, I find that the clear meaning of the Senate Debates, of Article IV, Section 7, of the Constitution and of the legislative continuity rules adopted by both houses, permits committees of both houses to exercise their powers as they may deem proper, to the same extent as if the legislature were in actual session. Consequently, I am of the opinion that your first inquiry should be answered in the affirmative.

In regard to your second question, based upon my review of the relevant authorities, I am of the opinion that, if it is the will of both houses, and so provided jointly, the rules of both houses could be revised in order to preclude final action on carry-over bills between the long and short sessions by committees of the House and Senate.

GENERAL ASSEMBLY—Members—No prohibition against receiving salary as professor while in attendance.

STATE INSTITUTIONS—College Professor Serving in House of Delegates Would Not Violate § 2.1-349(a)(2); Analogous to Employment Contract.
VIRGINIA CONFLICT OF INTERESTS ACT—College Professor Serving in House of Delegates Would Not Violate § 2.1-349(a)(2); Analogous to Employment Contract.

June 20, 1973

The Honorable William P. Robinson, Sr.
Member, House of Delegates

This is in response to your recent letter wherein you inquire whether a previous opinion of this office to the effect that a college professor seeking a seat in the House of Delegates could continue in his post as a professor, is still in effect.

The opinion you refer to is found in the Report of the Attorney General (1969-1970), p. 138. I reaffirm such opinion and enclose for your information copy of an opinion to the Honorable H. M. Gander, Commissioner of the Revenue for Page County, dated June 18, 1973. Based upon the rationale of that decision, it would be my opinion that a college professor serving in the House of Delegates would not violate § 2.1-349(a)(2) Virginia Conflict of Interests Act in that the contract which the officer of the House of Delegates would have, would be a relationship analogous to an employment contract and, therefore, not prohibited by that statute.

GENERAL ASSEMBLY—Members—Secretary or administrative assistant may be employed to serve more than one member.

October 24, 1972

The Honorable Louise O'C. Lucas
Clerk, Senate of Virginia

This will acknowledge receipt of your letter of October 16, 1972, in which you set forth in the following question relating to the employment of persons to assist the officers, members and committees of the General Assembly:

"May more than one member of the General Assembly employ the same person as the secretary to serve more than one member, such as a group of senators or delegates from the same district hiring one person to serve their delegation in the General Assembly, this secretary to receive compensation fixed by the group within the total amounts available to the delegation for a given year?"

Chapter 822 of the Acts of Assembly of 1972, codified as § 30-19.4 of the Code of Virginia (1950), as amended, authorizes each member to employ one secretary or administrative assistant to assist each member of the General Assembly. While limitations are placed upon salaries and expenses of such a secretary or an administrative assistant, there is no restriction placed upon the same person being employed by several legislators. Consequently, I am of the opinion that more than one member of the General Assembly may employ the same person to serve as secretary or administrative assistant, and that said secretary or administrative assistant may receive compensation not to exceed the total annual amount available to the members for such services.

GENERAL ASSEMBLY—Standing Committees May Exercise Subpoena Power Between Sessions if so Authorized; § 30-10.

October 16, 1972
This is in reply to your recent request on behalf of the members of the Commission on the Legislative Process for my opinion regarding the applicability of § 30-10 of the Code of Virginia (1950), as amended, to standing committees of the General Assembly meeting in the interim between sessions.

Section 30-10 as it existed prior to amendment in 1958 was first codified as § 10, Chapter XV of Title 8 of the Code of Virginia of 1849 and had its genesis in Chapter 40 of the Acts of Assembly of 1842-43. I find no difficulty in applying the elementary rule of statutory construction that a statute may be so broad in its language or general in its object that it encompasses conditions not existing until a long time after its enactment. *Smith v. Commonwealth*, 190 Va. 10 (1949); *Great Atlantic & Pacific T. Co. v. Richmond*, 183 Va. 931 (1945). Therefore, I am of the opinion that § 30-10 has present application to the activities of standing committees between sessions of the General Assembly. I believe that this construction is especially apt in view of the fact that § 30-10 does not confer subpoena power, but rather, merely specifies the manner in which that power is to be exercised. Moreover, while interim meetings of the standing committees are a new practice, the General Assembly has always had the power to create, by joint action of its respective houses, committees which could conduct their affairs beyond the end of the session. Cf. Chapter 373, Acts of Assembly of 1958; and see *Ex parte Caldwell*, 61 W.Va. 49 (1906).

You have also requested any ancillary interpretation of § 30-10 which might be of interest to the Commission. I note that the authorities uniformly indicate that subpoena power is inherent in legislatures and their committees; however, § 30-10 contains words of limitation vis-à-vis committees which indicates to me that the standing committees of the General Assembly cannot avail themselves of the provisions of § 30-10 unless they are authorized to exercise subpoena power by the respective house of the General Assembly to which the committees belong. See *Ex parte Caldwell*, supra, and compare § 30-10 with Chapter 40 of the Acts of Assembly of 1842-43.

I am unaware of the existence of any provision by either house of the General Assembly whereby, in the language of § 30-10, standing committees have been authorized to "send for persons or papers." Consequently, I am of the opinion that the General Assembly must act to specifically cloak its committees with subpoena power before persons or papers may be summoned by the said committees in connection with their legislative duties.

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**GENERAL ASSEMBLY**—State Agency Publications—Individual members must request receipt of a particular publication.

**PUBLICATIONS**—Definition of as to State Agency Newsletter.

**STATE LIBRARY**—Catalog Published Annually of All Available State Agency Publications.

July 17, 1972

**THE HONORABLE T. EDWARD TEMPLE**
Secretary of Administration

This will acknowledge receipt of your letter of June 27, 1972, in which you requested advice regarding distribution of state agency publications to members of the General Assembly in light of Chapter 566 of the Acts of Assembly of 1972. Your request appears to be more specifically related to the planned publication of
a general newsletter by the Division of State Planning and Community Affairs. Your inquiry raises three questions:

1. Is a general newsletter to be considered a "publication" within the purview of Chapter 566?

2. Does Chapter 566 require individual requests for publications by General Assembly members, or may one member request distribution of a publication to all members?

3. If the newsletter must be requested on an individual basis, what are the appropriate procedures for making known the newsletter’s availability to General Assembly members? (i.e., may the Division of State Planning and Community Affairs send one or several publications of the newsletter to members of the General Assembly with request forms attached thereto?)

Chapter 566 of the Acts of Assembly of 1972 reads in relevant portion:

"... except for the publications required to be printed and distributed by the Code of Virginia, no state agency shall send any member of the General Assembly any publications unless such members shall have requested a copy thereof ... ."

This legislation will be codified as § 2.1-299.1 of Title 2.1, Chapter 15, Article 2, of the Code of Virginia (1950), as amended, dealing generally with state agency publications.

Section 2.1-295 of the Code defines "publication" as follows:

"... 'Publication' includes all unrestricted publications of whatever kind which are printed or reproduced in any way, published or issued by an agency of the State in full or in part at State expense." (Emphasis supplied.)

The breadth of the Code’s definition of "publication" makes it apparent that a general newsletter published by any state agency and printed at state expense would clearly qualify as a publication for purposes of §§ 2.1-295 and 2.1-299.1 of the Code. Chapter 566 therefore applies to the proposed newsletter in question here.

As to whether individual requests for publications are required by Chapter 566, it is my opinion that the language of the statute clearly sets forth the intent of the General Assembly that individual General Assembly members must request the receipt of a particular publication. Chapter 566 provides that no publication shall be sent to any member of the General Assembly unless requested by such member.

Regarding the problem of making General Assembly members aware of the publication’s availability, § 2.1-301 and § 2.1-302 of the Code provide some enlightenment. Section 2.1-301 of the Code requires that the State Librarian prepare and publish annually a catalog of all available state agency publications. Section 2.1-302 provides that such catalog be made available, without cost, to all persons indicating their interest in such information. It would therefore appear that listing the State Planning and Community Affairs Newsletter in the above-mentioned catalog would adequately apprise General Assembly members of the newsletter’s availability. The practice of sending one of several unsolicited issues of the newsletter with request forms attached would merely perpetuate a problem the statute (Chapter 566) obviously seeks to avert.

Accordingly, I am of the opinion that the newsletter is within the purview of Chapter 566, must be requested by members of the General Assembly on an individual basis, and would be appropriately publicized to the General Assembly through listing in the State Librarian’s catalog of publications.
GOOD SAMARITAN LAW—Physicians Not Excluded from Statutory Immunity When Rendering Emergency Medical Services.

MEDICINE—Physicians Not Excluded from Statutory Immunity Under Good Samaritan Law When Rendering Emergency Medical Services.

PHYSICIANS—Good Samaritan Law—Physicians not excluded from statutory immunity when rendering emergency medical services.

April 18, 1973

The Honorable J. Harry Michael, Jr.
Member, Senate of Virginia

This is in response to your letter and enclosure relative to the Good Samaritan Law. The background information provided would indicate the following:

The Martha Jefferson Hospital of Charlottesville, a liaison Hospital with the University of Virginia, does not have a full-time resident staff of interns and residents who are in training. For years the Hospital has had no physician at night on a full-time basis to provide emergency medical services, but has depended upon the attending physician to provide such services for his individual patients. Because of the necessity for rapid response in emergency cases involving cardiac arrest or airway obstruction, the Hospital instituted an emergency “Code 12” program. The Hospital voluntarily began to have members of the active staff at the Martha Jefferson Hospital spend the night in the Hospital from approximately 6 P.M. until 7 A.M. the following morning to give this coverage. These physicians do this on a voluntary basis without pay. A course in cardiopulmonary resuscitation was given at the Martha Jefferson Hospital and refresher courses are planned in order to keep all the physicians currently abreast on the techniques of this type of emergency resuscitation.

The physician who takes the “Code 12” duty is on an actual emergency call status. He provides the truly emergency medical services while the attending physician is being called, but in this interval the “Code 12” doctor is providing the initial life saving emergency procedures and he only handles the emergency until such other physician or physicians as are responsible for the patient have arrived. In other words, he is doing this voluntarily—without pay—and is giving only emergency life saving care. Also, with respect to the patients, there is no prior patient-physician relationship.

After providing the above facts, you ask for my opinion “. . . as to whether or not the Martha Jefferson program falls under the Good Samaritan Law coverage.”

Section 54-276.9(c) reads as follows:

“Any person having attended and successfully completed a course in cardiopulmonary resuscitation, which has been approved by the Board of Health, who in good faith and without compensation renders or administers emergency cardiopulmonary resuscitation, cardiac defibrillation or other emergency life-sustaining or resuscitative treatments or procedures which have been approved by the State Board of Health to any sick or injured person, whether at the scene of a fire, an accident or any other place . . . shall not be liable for acts or omissions resulting from the rendering of such emergency resuscitative treatments or procedures.”

The facts indicate that the physicians in question are rendering emergency medical services which are provided for in the Good Samaritan Act. Therefore, with respect to such services, if rendered in good faith and without compensation,
even though provided by a qualified and licensed physician, such physician would be afforded the protection of the statute. That is to say, one would not of necessity be excluded from statutory immunity merely because one is a physician.

HEALTH INSURANCE—University of Virginia Hospital Staff Members Not State Employees; Ineligible for State Health Insurance Program.

STATE EMPLOYEES—University of Virginia Hospital Staff Members Not Eligible for State Health Insurance Program.

August 3, 1972

The Honorable Thomas J. Michie, Jr.
Member, House of Delegates

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

“A constituent of mine who is on the House Staff at the University of Virginia Hospital has called me on behalf of all House Staff members. They understand that they are not eligible to be a part of the group for the new health insurance plan for State employees. They further understand that even if they were eligible the State would not pay their own share of the plan under the terms of the act passed by the legislature.

“These members of the House Staff are interns and residents who are appointed by the Board of Visitors of the University of Virginia on salary for one year. As a matter of practice it is generally understood (if everything is satisfactory) they will be reappointed on a year to year basis until they complete their program. This may run as long as seven years but generally lasts two or three years.

“I would appreciate your opinion as to whether this group of employees of the State are eligible for the new health insurance plan and if eligible whether the State will pay the employee’s share of the cost of the plan.”

House Bill No. 22, § 2.1-20.1 of the Code of Virginia (1950), as amended, directs the Governor to establish a plan for providing health insurance coverage for certain State employees as defined therein, with the State paying the cost thereof. Paragraph (4) of that section reads in pertinent part as follows:

“(4) For the purposes of this section, the term ‘State employee’ includes State employees as defined in paragraph (5) of § 51-111.10 of the Code of Virginia, employees as defined in paragraph (3) of § 51-144 of the Code of Virginia, justices and judges of courts of record of the Commonwealth, members of the State Corporation Commission and Industrial Commission, and judges of regional juvenile and domestic relations, county and county juvenile and domestic relations courts of the Commonwealth.”

Section 51-111.10 (5), to which House Bill No. 22 refers, provides as follows:

“‘State employee’ means any person who is regularly employed full time, on a salary basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of, and whose compensation is payable, not oftener than biweekly, in whole or in part by the Commonwealth or any department, institution of agency thereof, including, without limitation, clerks and employees of regional juvenile and domestic relations courts, except (a) an officer elected by popular vote with the exception of members of the General Assembly or, with the exception of the Auditor of
Public Accounts, the clerks of the State Senate and House of Delegates elected initially after July one, nineteen hundred seventy, and the Director of the Division of Statutory Research and Drafting, by the General Assembly or either House thereof, (b) a judge of a county court, county or city treasurer, commissioner of the revenue Commonwealth’s attorney, clerk, sheriff, sergeant or constable and, with the exception of employees of county courts, a deputy or employee of any such officer, (c) any employee of a political subdivision of the Commonwealth, (d) a State police officer of the Department of State Police.

House Staff members at the University of Virginia hospitals, although appointed on a full-time basis for a specified period of time, are considered to be combination students and employees engaged in a training program required for their profession. However, as such, they are not classified or salaried as permanent employees under the State personnel system, but are given a restricted tenure status.

As you will note, the definition of “State employee” adopted by House Bill No. 22 is the same definition used to determine which employees are covered by the Virginia Supplemental Retirement Act. For purposes of that Act, House Staff members are not and have not been considered qualified for such coverage because of their provisional nature.

For these reasons, in my opinion, House Staff members at the University of Virginia Hospital are not included within the definition of “State employees” as used in House Bill No. 22, § 2.1-20.1 of the Code, as amended, because of the temporary and provisional nature of their employment, and thus are ineligible for this State health insurance program.


HIGHWAYS—State Highway Commission—Authority to aid mass transit.

January 17, 1973

The Honorable William J. Hassan
Commonwealth’s Attorney for Arlington County

This is in response to your recent letter wherein you inquire whether the County of Arlington would have the power to establish exclusive bus lanes in certain lanes of its roads.

Section 33.1-46.1 of the Code of Virginia (1950), as amended, provides for the State Highway Commission to render aid to mass transit, which may be accomplished by, among other things, expending funds for exclusive bus lanes. You will note that there is no similar provision granting such authority to Arlington County or indeed to any other county. It is my opinion that through the passage of such act the General Assembly has manifested its intent that highway aid to mass transit is to be carried out by State Highway Commission.

Since I am unable to find any special act granting Arlington County the right to expend funds for exclusive bus lanes, I am of the opinion that it lacks such authority.

HIGHWAYS—Certificate Filed in Lieu of Condemnation—Vests title to property in State.

November 9, 1972
REPORT OF THE ATTORNEY GENERAL

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 your advice regarding the following:

"Pursuant to a Highway Department eminent domain proceeding, a Certificate was filed in connection with a portion of real estate owned by a then living individual and, subsequently, a petition for condemnation was filed. Thereafter, this individual died, testate, and devised a portion of his real estate, part of which was included in the Highway Department take to an individual. The named Executor under the Will declined to qualify and, therefore, two administrators were appointed to act as the Estate's personal representatives.

"The Testator's Will provided that the residue of his real estate, after the specific devise, was to be sold, with the proceeds to be used to satisfy certain specific bequests and the balance to be paid to a residuary legatee. Thereafter, all parties in interest agreed with the Highway Department to a settlement which was approximately $40,000.00 in excess of the Certificate.

"That portion of the take included in the specific devise comprised approximately one-fifth of the total take and the devisee is inquiring about his right to a proportionate share of the settlement proceeds. The residuary legatee is taking the position that the proceeds of settlement are personalty because the statute specifically provides that all liens on the realty, subject the filing of the Certificate. The devisee fortified his argument that the proceeds of the Certificate and settlement are characterized as realty because the statute specifically provides that all liens on the realty, subject to the take, immediately attached to the proceeds of the Certificate.

"Therefore, I would appreciate your opinion regarding the following inquiries:

"1. Are the proceeds represented in a Certificate characterized as realty or personalty for purposes other than liens?

"2. Given the above factual situation, is the devisee entitled to share in the proceeds of settlement?"

I shall answer your questions seriatim:

1. Section 33.1-122 of the Code of Virginia (1950), as amended, providing for the filing of certificates by the State Highway Commissioner in lieu of condemnation, provides that upon recordation of the certificate the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth, and such owner shall have such interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged, and all liens by deed of trust, judgment or otherwise upon such property or estate of interest shall be transferred to such funds. I am of the opinion that by the language of this statute the proceeds represented in the certificate are characterized as personalty for purposes other than liens.

2. Section 64.1-61 of the Code, provides as follows:

"No conveyance or other act, subsequent to the execution of a will, shall, unless it be an act by which the will is revoked as aforesaid, prevent its operation with respect to such interest in the estate comprised in the will as the testator may have power to dispose of by will at the time of his death."
The application of this statute is discussed in § 399, *Harrison on Wills and Administration*, second edition. There it is said:

"By the plain terms of the statute the provision of the will operates upon whatever estate the testator has in the property at the time of his death, no matter what intermediary dealing there may have been between the date of the will and the death of the testator. An absolute conveyance of the property will adeem the provision in the will because there no longer exists the property for the will to operate upon. This is equally true of an executory contract of sale. The only right remaining in the testator in the property after a binding contract of sale which he could dispose of by his will is the dry legal title."

Applying this rule to the facts in your case, I am of the opinion that, by § 33.1-122 of the Code, the title to the property in question vested in the Commonwealth prior to the death of the testator and at the time of his death he had no devisable real property interest in this property but instead held a chose in action. The devisee, therefore, had no right to the specific devise as there had been an ademption when the Commonwealth filed the certificate.

**HIGHWAYS—Secondary System—Procedure for taking certain streets into.**

**The Honorable John F. Ewell**  
Commonwealth's Attorney for Warren County

By your letter of October 5, 1972, you asked, "Was the effective date of the 1972 amendment to Section 33.1-72 such that a holdover from the 1971-1972 year to the 1972-1973 year is authorized?"

The operative portion, § 33.1-72(c), Code of Virginia (1950), was the only part of the statute affected by the 1972 amendment, and, as amended, it reads:

"Whenever the governing body of a county, at the meeting referred to in Section 33.1-70, recommends in writing to the Department of Highways that any street in the county be taken into and become a part of the secondary system, shall take such street into the secondary system of State Highways thereupon, within the limit of available funds and the mileage available in such county for the inclusion of roads and streets in the secondary system, shall take such street into the secondary system of State highways provided such street has a dedicated width of forty feet at the time of such recommendation, and thereafter maintain the same in the manner provided by law, provided the governing body of the county agrees to contribute from county revenue one half of the cost to bring the streets up to the necessary minimum standards for acceptance. Any funds allocated to any county for the purpose of adding to the secondary system of highways, if not used by such county for such purpose during the fiscal year they were so allocated, may be held for such purpose until the end of the succeeding fiscal year.

"Notwithstanding any limitation in Section 33.1-225 the local governing body of the county may expend general county revenue for the purposes of this section and may levy county or district road taxes for such purposes."

By the provisions of § 1-12 of the Code this amendment to § 33.1-72 became effective on July 1, 1972. There is nothing in the language of the amendment specifically indicating any legislative intent to make its effect retroactive.

By the terms of § 2.1-197 the fiscal year commences on the first day of July
and ends on the 30th day of June. Thus, the amendment became effective upon the first day of the 1972-1973 fiscal year. The 1971-1972 fiscal year had ended prior to the effective date of the amendment.

My answer to your question must be in the negative.

However, I am informed that normally it is the policy of the Virginia Department of Highways to reallocate to the county such funds as are described in § 33.1-72 when preparing the budget for the new fiscal year if those funds were not utilized in the previous fiscal year. Usually no county is penalized for not being able to utilize all of the funds alloted to it for the purposes of implementing § 33.1-72.

It should also be noted that § 33.1-72 refers to a relatively limited situation. Sub-section (a) defines the "street" to be taken into the secondary system of highways as being a street or highway shown on a plat recorded prior to July 1, 1958, and the street or highway was on July 1, 1958, open to and used by motor vehicles, and, on the date of being taken into the secondary system of highways, has on it at least three families per mile. In addition, the county, according to sub-section (b), must be one in which the secondary system of highways is constructed and maintained by the Department of Highways, and the county must have adopted an ordinance for control of the development of subdivision streets to the necessary standards for acceptance into the secondary system of highways.

HIGHWAYS—State Highway Commission—Member may serve as chairman of Richmond-Petersburg Turnpike Authority.

RICHMOND-PETERSBURG TURNPIKE AUTHORITY—Chairman—May also serve as member of State Highway Commission.

CONFLICT OF INTERESTS—State Highway Commission Member May Serve as Chairman of Richmond-Petersburg Turnpike Authority.

September 13, 1972

THE HONORABLE LAWRENCE DOUGLAS WILDER
Member, Senate of Virginia

This is in response to your letter of August 29, 1972, wherein you requested whether a conflict of interest would exist where the representative from the Richmond construction district to the State Highway Commission serves as chairman of the Richmond-Petersburg Turnpike Authority. I am of the opinion that your inquiry is answered in the negative.

The Richmond-Petersburg Turnpike Authority was created by Chapter 705 of the Acts of Assembly of 1954. It is provided therein in § 33-255.26 [recodified as § 33.1-319 of the Code of Virginia (1950), as amended] that one member of the Authority shall be a resident of the state at large who, “unless a member of the State Highway Commission”, shall reside in a political subdivision other than the Cities of Richmond, Colonial Heights or Petersburg or the Counties of Henrico, Chesterfield or Dinwiddie. It is my opinion that this manifests a legislative intent that a member of the State Highway Commission may serve on the Authority. It is further provided therein that all other general or special laws inconsistent with the provisions of the chapter are to be inapplicable to those provisions. Accordingly, I am of the opinion that no conflict of interest would exist where a member of the State Highway Commission serves as Chairman of the Richmond-Petersburg Turnpike Authority.
HOSPITALS—Patient's Right to Privacy; Only Essential Personnel Permitted to Observe Operation, Examination or Procedure Without Specific Consent of Patient.

RIGHT TO PRIVACY—Hospitals; Only Essential Personnel Permitted to Observe Operation, Examination or Procedure Without Specific Consent of Patient.

March 20, 1973

THE HONORABLE LESTER E. SCHLITZ
Member, House of Delegates

This is in reply to your letter wherein you stated:

"I would appreciate an opinion from you relating to who may be permitted to observe an operation and at the same time not violate the patient's right to privacy in a hospital."

In recent years there has been increasing legal recognition by the courts of one's right of privacy and attempts have been made to limit or prohibit unwarranted publicity which may cause undue embarrassment, shame, or humiliation. When a patient disrobes for an examination, operation, or any medical or surgical procedure, one does so for the professional benefit of the physician. In the absence of a contrary indication, one does not consent to be subjected to examination or observation by persons, medical or nonmedical, who are not necessary to the performance of the procedure. Therefore, in my opinion, only essential medical and nonmedical personnel may be permitted to observe an operation, examination, or procedure without the specific consent of the patient.

HOUSING AUTHORITIES—Bonds and Interest on Bonds Issued by Authority Exempt from State and Federal Tax.

HOUSING AUTHORITIES—Relocation Benefits; When Authority Not Required to Give; When City Liable for.

TAXATION—Housing Authorities May Issue Tax Exempt Bonds; Interest on Bonds also Tax Exempt.

CITIES—Relocation Benefits; Liable for if Prevents Use of Buildings as Rental Property by Enforcing Housing Code.

July 27, 1972

THE HONORABLE ROBERT E. GIBSON
Member, House of Delegates

Your recent letter requested an opinion on several matters relating to the South Norfolk Redevelopment and Housing Authority of Chesapeake. I understand that certain rental properties which the Authority has owned since 1953 are in disrepair and in need of replacement. Your specific questions are as follows:

1. Can the Authority issue tax exempt bonds to finance the replacement of these buildings?

The Authority is created under the Housing Authorities Law, Chapter 1 of Title 36 of the Code of Virginia (§ 36-1, et seq.). Section 36-4 of that Act provides that Authorities created thereunder are political subdivisions of the State. Section 36-29 gives the Authority the power to issue bonds.

Section 103 of the Internal Revenue Code exempts from income tax interest on
obligations of political subdivisions of the State. The bonds issued by the Authority would thus not be subject to federal income tax. The interest on those bonds would also be exempt from tax under § 58-151.013, as there is no provision for adding such interest to federal adjusted gross income before assessing the State tax.

2. Would the Authority be financially responsible for relocation benefits under Chapter 6 of Title 25 if it phased out the occupants of its apartments and then rebuilt them?

Section 25-238(c) defines “displaced person” to include a person who is required to move as a result of the acquisition of real property by a State agency or as a result of “the written order of an acquiring State agency to vacate real property.” (Emphasis supplied.) In addition, § 25-245 states that the term shall include “a person who ... moves from his dwelling ... as the direct result of building or other similar code enforcement activities, or a program of rehabilitation or demolition of buildings conducted pursuant to a governmental program ... .” (Emphasis supplied.) As the Authority already owns the real property involved, it would not be an “acquiring State agency.” It appears from your letter that the Authority contemplates phasing out the occupants of the buildings by nonrenewal of leases or normal attrition. In that case, it would be merely taking the kind of action open to an individual property owner. So long as this procedure is followed, the removal of the tenants would not be due to the kind of overriding governmental action contemplated by § 25-245, and the Authority would not be required to give relocation benefits under Chapter 6 of Title 25 of the Code of Virginia.

3. If the city of Chesapeake condemned the property through enforcement of the Minimum Housing Code, would it be financially responsible to make relocation payments?

If the city of Chesapeake prevented the use of the buildings as rental property through enforcement of a housing code, the city would be liable for relocation benefits by virtue of the portion of § 25-245 quoted above.

HOUSING AUTHORITIES—City of Suffolk—No authority for the Suffolk Redevelopment and Housing Authority to conduct activities into entire consolidated area.

HOUSING AUTHORITIES—Redevelopment and Housing Authority—City of Suffolk—Authority upon consolidation of cities of Suffolk and Nansemond.

THE HONORABLE J. SAMUEL GLASSCOCK
Member, House of Delegates

This is in reply to your recent letter in which you ask my opinion whether, after merger of the City of Suffolk and the City of Nansemond into a new City of Suffolk, the Suffolk Redevelopment and Housing Authority may legally conduct its activities throughout the confines of the new City of Suffolk. You state that the City of Nansemond does not have a Redevelopment and Housing Authority.

Housing authorities are political subdivisions of the Commonwealth with such public and corporate powers as are set forth in Title 36 of the Code of Virginia, and by § 36-4 of the Code are activated by a majority vote of qualified voters in a county or city voting on whether or not there is a need for an authority to function in such county or city.

Under this section, the City of Suffolk created the Suffolk Redevelopment and Housing Authority. There has been no creation or activation of any Housing
Authority for the area which is now the City of Nansemond.

Recently the City of Nansemond and the City of Suffolk took action to merge the two cities and in November 1972 the voters of the two cities approved a merger agreement. The merger agreement incorporated by reference the Charter for the new city. The Charter contains the following provision:

"Section 21.08. HOUSING AUTHORITY. All of the ownership, rights, title, interest, powers and obligations of the City of Suffolk relative to or in any manner connected with the Suffolk Redevelopment and Housing Authority shall be vested in, inure to and be assumed by the consolidated city. The members of such authority shall continue in office until the expiration of the terms for which they were appointed." (Emphasis supplied.)

This section does not give authority to the Suffolk Redevelopment and Housing Authority to extend its jurisdiction into the entire consolidated city. The section addresses itself to the rights, interests, powers and obligations "of the City" and not the rights, interests, powers and obligations of the Housing Authority.

I can find no other reference in the merger agreement (or charter) to the Housing Authority or to its status after merger. In the absence of such, and since § 36-47 of the Code requires certain procedures be followed before activation of a Housing Authority, I am of the opinion that the Suffolk Redevelopment and Housing Authority cannot legally conduct its activities throughout the confines of the new City of Suffolk but only in the area of the former City of Suffolk.

HOUSING AUTHORITIES—Distincton Between Regional and Consolidated Housing Authorities.

August 18, 1972

The Honorable John N. Dalton
Member, House of Delegates

This is in reply to your letter of July 19, 1972, which reads as follows:

"There appears to be some confusion as to the distinction between a regional and a consolidated housing authority. Under the Virginia Housing Authority law, the statutory procedure for establishing a consolidated housing authority is somewhat unclear. I would appreciate your opinion as to whether proceeding under Section 36-47 of the Code it will be necessary to have a public referendum in each of the local jurisdictions to establish a consolidated housing authority where one has never existed before and where interested jurisdictions are not contiguous.

The primary distinction between regional and consolidated housing authorities is that the former must be composed of "two or more contiguous counties" (§ 36.40 of the Code of Virginia (1950), as amended (whereas consolidated housing authorities must be composed of "two or more municipalities (whether or not contiguous)" (§ 36-47 of the Code).

Section 36-47 of the Code reads in pertinent part as follows:

"If the governing body of each of two or more municipalities (whether or not contiguous) by resolution declares that there is a need for one housing authority to be created for all of such municipalities to exercise in such municipalities the powers and other functions prescribed for a con-

solidated housing authority, a political subdivision of the Commonwealth to be known as a consolidated housing authority (with such corporate name as it selects) shall thereupon exist for all of such municipalities and exercise its public and corporate powers and other functions within its area of operation (as herein defined), including the power to undertake projects therein; and thereupon each housing authority (if any) created for each of such municipalities shall cease to exist except for the purpose of winding up its affairs and executing a deed of its real property to the consolidated housing authority: Provided that the creation of a consolidated housing authority and the finding of need therefor shall be subject to the same provisions and limitations of this chapter as are applicable to the creation of a regional housing authority and that all of the provisions of this chapter applicable to regional housing authorities and the commissioners thereof shall be applicable to consolidated housing authorities and the commissioners thereof; . . . .” (Emphasis supplied.)

The only Code section which applies to the initial creation of a regional housing authority, other than § 36-40, is § 36-44 which provides in pertinent part as follows:

“The board of supervisors of a county shall not adopt any resolution authorized by §§ 36-40, 36-41 or 36-42 unless a public hearing has first been held. The clerk of such county shall give notice of the time, place, and purpose of the public hearing at least ten days prior to the day on which the hearing is to be held, in a newspaper published in such county, or if there is no newspaper published in such county, then in a newspaper published in the Commonwealth and having a general circulation in such county. Upon the dates fixed for such public hearing an opportunity to be heard shall be granted to all residents of such county and to all other interested persons.”

Pursuant to the language of § 36-47, this provision applies equally to regional and consolidated housing authorities. In accord with my statement in an opinion dated July 6, 1972, found in Report of the Attorney General (1970-1971), p. 207, I am of the opinion that there is nothing in Article 6 of Chapter 1 of Title 36, Code of Virginia, which indicates that a public referendum is necessary in each of the local jurisdictions to establish a consolidated housing authority when proceeding under § 36-47. However, each of the municipalities’ governing body must adopt a resolution creating such housing authority subject to certain provisions of § 36-40. Before the adoption of such a resolution a public hearing must be held pursuant to § 36-44 of the Code after proper notice is given.

INDUSTRIAL DEVELOPMENT—Purposes for Industrial Development Authorities.

July 17, 1972

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

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

“I am writing for an opinion as to the scope of the Industrial Development and Revenue Bond Act contained in the Code of Virginia, Sections 15.1-1373 through 15.1-1390.

“Consolidated Coal Company owns some 46,000 acres of land in Bland County upon which the Jefferson National Forest has an option for pur-
chasing same. Our Board of Supervisors is opposed to the purchase of this land by the Jefferson National Forest since it already owns considerable land in Bland County, and the land if purchased would be exempt from taxation.

"The County would like to form an Industrial Development Authority and resale the land to an individual or individuals.

"Your opinion in this matter would be greatly appreciated."

Section 15.1-1375 of the Code provides:

"It is the intent of the legislature by the passage of this chapter to authorize the creation of industrial development authorities by the several municipalities in this Commonwealth so that such authorities may acquire, own, lease, and dispose of properties to the end that such authorities may be able 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, and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall in all respects be exercised for the benefit of the inhabitants of the Commonwealth, for the increase of their commerce, and for the promotion of their safety, health, welfare, convenience and prosperity. It is not intended hereby that any such authority shall itself be authorized to operate any such manufacturing, industrial or commercial enterprise. This chapter shall be liberally construed in conformity with the said intention."

The purposes for industrial development authorities are set forth in this section. These are to promote industry and develop trade by inducing manufacturing, industrial, government and commercial enterprises to locate in or remain in the areas of the Commonwealth. From the purposes outlined by you, I am unable to conclude that these fall within the statute. I am therefore of the opinion that the purposes outlined by you are not within § 15.1-1375.

INDUSTRIAL DEVELOPMENT AUTHORITY—Authority Must Have Annual Audit Pursuant to Chapter 643, § 5, Acts of Assembly of 1964.

COUNTIES, CITIES AND TOWNS—Industrial Development Authority Created by Chapter 643, Acts of Assembly of 1964, Must Have Annual Audit of Its Financial Transactions.

April 9, 1973

THE HONORABLE M. LANGHORNE KEITH
County Attorney for Fairfax County

I have received your letter of March 12, 1973, inquiring whether a "comparative statement of expenditures" submitted by the county's independent certified public accounting firm constitutes evidence of adequate compliance with the audit requirements of Chapter 643, § 5, Acts of Assembly of 1964, by the Fairfax County Economic Development Authority. I am informed by counsel for the Authority that the Authority did not engage the accounting firm to perform an audit of its accounts but that the statement was prepared in connection with the audit of the county accounts. The firm was not compensated by the Authority except with respect to an audit of the "Transpo 72 Fund" which is not involved in your request.

Chapter 643, § 5, Acts of Assembly of 1964, provides that the Authority "... shall keep suitable records of all its financial transactions and shall arrange to
have the same audited annually." The Authority is required to furnish copies of each audit report to the governing body of Fairfax County and to allow the public access to the report.

The statement which you submitted with your letter was prepared by the firm which performs the county audit. It is a summary schedule of the Authority's expenditures by accounting classification (i.e. rent, office supplies, printing, etc.), compared with the revised budget for each classification for the year ended June 30, 1972. The firm submitted a letter dated November 6, 1972, with the comparative statement which indicates that the total budgeted and expenditure amounts are "... the same as those included in the financial statements of the County of Fairfax, Virginia for the year ended June 30, 1972, which were audited by us." The letter also refers to a review of the fixed assets and makes a recommendation that their cost be placed under dollar control. The letter does not contain any opinion upon the fairness of the Authority's financial statements.

On November 30, 1972, the accounting firm advised the Authority by letter that additional auditing procedures would be required "... if the Board of Commissioners of the Fairfax County Economic Development Authority decided to have a special audit made of its expenditures from the General Fund of Fairfax County." On January 5, 1973, the firm wrote to counsel for the Authority and endorsed a copy of the November 30 letter and a draft of the firm's anticipated report "... if we extended our procedures sufficiently to report on this statement [Statement of Expenditures Compared With the Budget]..."

In consideration of the foregoing, I am of the opinion that the statement submitted with the letter of November 6 does not constitute evidence that the audit requirements of Chapter 643, § 5, of the Acts of Assembly of 1964, have been satisfied. The section contemplates a complete audit of all of the financial transactions of the Authority and a report thereon by the firm engaged to perform such audit, which report should include an opinion upon the fairness of the Authority's financial statements.

INDUSTRIAL LOAN ASSOCIATIONS—Installment Debts—Controlled by § 6.1-234.

INTEREST—Rates—Loans—Industrial Loan Associations—Amendment to § 6.1-330 does not apply.

June 4, 1973

The Honorable Owen B. Pickett
Member, House of Delegates

This is in reply to your letter of May 16, 1973. I will restate the issues presented therein to which I will address this opinion:


2. Whether the addition to the Code of § 6.1-2.2 embodied in Chapter 111 of the Acts of Assembly of 1973 limits the late charge that may be imposed by Industrial Loan Associations as provided in Code § 6.1-234?

3. Whether the aforesaid addition of Code § 6.1-2.2 applies to loans covered under the following sections:
   (a) Section 6.1-319 of the Code of Virginia (1950), as amended:
(b) Section 6.1-237 of the Code of Virginia (1950), as amended;
(c) Section 6.1-327.1 of the Code of Virginia (1950), as amended.

My opinions will be rendered as numbered above:

1. It is clear that the amendment to Code § 6.1-330 embodied in Chapter 239 of the Acts of Assembly of 1973 does not apply to Industrial Loan Associations as Code § 6.1-330 is a part of Chapter 7.1 of Title 6.1 and Code § 6.1-330.3 of that same Chapter provides:

   This chapter shall not apply to loans made by any lender licensed by, and under the supervision of the State Corporation Commission.

Industrial Loan Associations are "licensed by, and under the supervision of the State Corporation Commission." See, Code § 6.1-237.

2. The addition of § 6.1-2.2 to the Code by the 1973 General Assembly places in Chapter 1 of Title 6.1 a "General Provision" limiting late charges on "an installment debt." Code § 6.1-234 contains, and has contained, a specific provision concerning late charges on transactions which may be installment debts applying to Industrial Loan Associations.

When the legislature passes a new law, it is presumed to act with full knowledge of the law as it stands bearing upon the subject with which it proposes to deal. Powers v. Dickenson, 148 Va. 661 (1927); School Board v. Patterson, 111 Va. 482 (1910). Accordingly where two statutes are in apparent conflict they should be construed, if reasonably possible, to allow both to stand and give force and effect to each. Am. Cyanamid Co. v. Com., 187 Va. 831 (1948); Scot v. Luckford, 164 Va. 419 (1935). In situations where one of the statutes is general and the other specific, the general must give way to the specific. Davis v. Davis, 206 Va. 381 (1965).

Based on the facts as I have presented them and the law as stated in the preceding paragraph, it is my opinion that the specific provisions of Code § 6.1-234 will be controlling as to Industrial Loan Associations and must stand.

3. As a starting point to answering your inquiries that are stated in issue numbered 3, I would state that Code §§ 6.1-2.2 applies to all "installment debts" unless there is a specific exception. It is also important to note that late charges are not included within the definition of "interest" in the Commonwealth of Virginia. Ward's Adm'r. v. Cornett, 91 Va. 676 (1895).

   (a) It is my opinion that Code § 6.1-2.2 will apply to all contracts providing for an "installment debt" at, or below, the legal rate of interest as provided in Code § 6.1-319. [Note that Code § 6.1-319 does not cover first mortgages on real estate as provided for in Code § 6.1-319.1.]

   (b) It is my opinion that the provisions of Code § 6.1-2.2 will apply to the type of "installment debt" covered in Code § 6.1-327 and quantifies the maximum "reasonable penalty" that may be charged pursuant to Code § 6.1-324(4).

   (c) It is my opinion that the provisions of Code § 6.1-2.2 will apply to the type of "installment debt" covered in Code § 6.1-327.1.

It is important to remember that the opinions given in issues 3(a), 3(b) and 3(c) are subject to the specific exception previously referred to for Industrial Loan Associations and any other similar specific exceptions upon which this opinion has not been requested to focus.

________________________________________________________________

INSPECTOR—May Qualify in Jurisdiction in Which He Resides or in His District.

September 14, 1972
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE JAMES E. DOUGLAS, JR., Commissioner
Marine Resources Commission

This will acknowledge receipt of your letter of September 11, 1972, requesting my opinion concerning the provisions of § 28.1-42 of the Code of Virginia (1950), as amended. Your specific inquiry is as follows:

"...[I]n how many jurisdictions is one inspector required to be bonded?"

Section 28.1-42 of the Code reads, in pertinent part, as follows:

"Each inspector appointed by the Commissioner shall qualify before the circuit or corporation court of the county or city in which he resides, or in which his district may be...

It is clear from the foregoing provisions that an inspector may qualify in either the jurisdiction in which he resides or the jurisdiction in which his district may be. Accordingly, I am of the opinion that an inspector is required to qualify in but one such jurisdiction only. I am further of the opinion that no purpose is served by requiring, nor does the statute require, qualification in more than one jurisdiction should the inspector's district actually encompass several jurisdictions.

JAILS—Funds for Construction of Regional Jails—Reimbursement by State.

COUNTIES, CITIES AND TOWNS—Reimbursement of Funds for Construction of Regional Jails—Effect of merger of cities.

January 29, 1973

THE HONORABLE J. SAMUEL GLASSCOCK
Member, House of Delegates

This is in reply to your recent letter in which you request an opinion concerning an interpretation of § 53-133.2 of the Code of Virginia (1950), as amended, relating to reimbursement to localities for construction of regional jails on land owned by the Commonwealth. The situation which you present concerns a joint construction project by the Cities of Nansemond, Suffolk, and Franklin and the Counties of Isle of Wight and Southampton.

Under the provisions of § 53-133.2 of the Code, each of the localities involved in such a joint construction project is entitled to be reimbursed by the Commonwealth up to $100,000 for the construction of such a regional jail. However, your situation is complicated by the fact that there is presently pending a merger between the Cities of Suffolk and Nansemond which was approved by referendum of the people on November 7, 1972, and is to be effective on January 1, 1974. You inquire as to whether the reimbursement of jail construction funds is to be $100,000 each for the Cities of Suffolk and of Nansemond or whether the fact of their merger on January 1, 1974, means that they are to receive a total of $100,000 between them.

Under the provisions of § 53-133.2 of the Code, such reimbursement for jail construction funds is authorized when an agreement is entered into between the localities involved and the Board of Welfare and Institutions. Since the commitment for such funds is made when such agreement is entered into, it is my opinion that the question of whether reimbursement is affected by the merger of Suffolk and Nansemond would be controlled by the date upon which such agreement is entered into between the localities and the Board. If that agreement was entered into prior to January 1, 1974, then the City of Suffolk and the City of Nansemond, as well as the City of Franklin and the Counties of Isle of Wight...
and Southampton, would each be entitled to reimbursement of construction costs up to the $100,000 limit.

JAILS AND PRISONERS—Work Release; Construction of §§ 20-61 and 53-166.1.

JUVENILE AND DOMESTIC RELATIONS COURTS—Sentencing for Non-support to City Jail Work Release Program.

December 20, 1972

THE HONORABLE VON L. PIERSALL, JR., Judge
Juvenile and Domestic Relations Court

This is in reply to your recent inquiry regarding the interpretation and operation of §§ 20-61 and 53-166.1 of the Code of Virginia (1950), as amended. You point out that the Portsmouth City Jail has recently undertaken a work-release program for prisoners therein, and you inquire as follows:

"I am concerned about the penalty provisions of 20-61. It seems to indicate that one who violates this section shall be punished by a fine not exceeding $500 or jail sentence not exceeding twelve months, or both, or in the case of a husband or father by confinement on the State Convict Road Force for not less than ninety days nor more than twelve months. Must this be interpreted to mean that in case of a husband or father who is convicted of failing to support his wife or children, that he must be confined on the State Convict Road Force and cannot be confined in jail? If it is your opinion that a husband or father can be confined in jail, then I have no problem with the jail releasing him on a work-release program. However, if a husband or father can only be confined on the State Convict Road Force under the provisions of 20-61 of the Code, then would 53-166.1 of the Code give the Court authority to order a person committed to the State Convict Road Force to be released on a work-release program administered by the City Jail in the City of Portsmouth? If the answer is in the negative to that question, could the State Convict Road Force allow a person committed to them to remain in the Portsmouth City Jail where he would be supervised on a work release program administered by the jail."

Your basic question is whether these two sections of the Code are in conflict.

Section 20-61, in pertinent part, provides that if a husband or father is found guilty of the misdemeanor of nonsupport, he shall be punished:

"... by confinement on the State convict road force at hard labor for a period of not less than ninety days nor more than twelve months . . . ."

Section 53-166.1, on the other hand, states, in pertinent part, as follows:

"Any court having jurisdiction for the trial of a person charged with a misdemeanor or charged with an offense under chapter 5 (§ 20-61 et seq.) of Title 20 of the Code of Virginia may, if defendant is convicted, and if it is made to appear to the court that in the event of his being sentenced to confinement in jail his dependents may become public charges, or if it otherwise appears that he is a proper and suitable candidate for work release employment, may provide in the sentence for the release of the defendant from confinement on the days he is regularly employed or during the time necessary to proceed to his place of employment, perform his work, and return to quarters designated by his custodial authorities . . . ."
It does appear that the latter section, especially in light of its specific reference to § 20-61, et seq., would modify the provisions of § 20-61. In addition, § 20-62 of the Code provides, in relevant part, that:

"In the event that the cities or counties of this State or any of them establish workhouses, city farms or work squads on which prisoners are put to work, persons convicted of nonsupport under the provisions of this chapter may be committed to the farms, workhouses or work squads instead of to the Bureau of Correctional Field Units . . . ."

It is, therefore, my opinion that the clear intent of the legislature is to provide an alternative to a sentence of commitment to the Bureau of Correctional Field Units where the locality has provided comparable correctional facilities which allow the defendant to work and, at the same time, provide support for his family. It would be my opinion, therefore, that the Judge of the Juvenile and Domestic Relations Court, upon convicting a person of a violation of § 20-61 of the Code, may sentence that person in accordance with § 53-166.1 of the Code where the locality has the appropriate facilities and programs in compliance with § 20-62.

JUDGES—Appointment of District Judge—Eligibility of member of General Assembly.

GENERAL ASSEMBLY—Member—Appointment of to district judgeship.

DISTRICT COURT BILL—Judges—Appointment of—Eligibility of member of General Assembly.

May 31, 1973

THE HONORABLE WILLIAM R. MURPHY
Member, House of Delegates

This is in reply to your recent letter in which you request an opinion concerning whether or not you are eligible, as a present member of the House of Delegates, to an appointment as District Judge. You indicate that a vacancy in the position of District Judge is contemplated through the retirement in October of a present Judge. You further inquire whether this question is affected by the new District Court bill enacted by the 1973 Session of the General Assembly. (Acts of Assembly, 1973, Chapter 546).

Article IV, Section 4, of the Constitution of Virginia provides that no judge of any court in the Commonwealth shall be a member of either House of the General Assembly during his continuance in office. Clearly, under this section, it would not be possible for you to hold the office of District Judge while continuing to be a member of the General Assembly. Therefore, any appointment that you might receive as District Judge would require that you vacate your membership in the General Assembly. This is in line with a previous opinion of this office rendered to the Honorable Donald G. Pendleton, Member of the House of Delegates, dated August 15, 1966, and found in Report of the Attorney General (1966-1967), page 153. However, this does not entirely answer your inquiry.

Article IV, Section 5, of the Constitution of Virginia provides that members of the General Assembly, during the term for which they have been elected, cannot be elected by the General Assembly to any civil office of profit in the Commonwealth. Section 16.1-69.9 of the Code of Virginia (1950), as amended, as enacted in the District Court bill referred to above, provides for the election or appointment of District Court Judges. Subsection (a) thereof provides that with respect to terms expiring prior to July 1, 1980, successor full-time judges shall be
REPORT OF THE ATTORNEY GENERAL

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elected by the General Assembly. Subsection (a1) thereof, with respect to such terms, provides that successor part-time judges shall be appointed by the judges of the circuit court having jurisdiction in the district. Therefore, if the district judgeship about which you inquire is a part-time judgeship, Article IV, Section 5, of the Constitution of Virginia would not apply, and a member of the General Assembly would be eligible for appointment to that judgeship, provided that he vacates his position as a member of the General Assembly. If the judgeship about which you inquire is a full-time judgeship, then election to that judgeship is by the General Assembly, and Article IV, Section 5, of the Constitution would prohibit a member of the General Assembly from being elected to that judgeship during the term of office for which he was elected to the General Assembly.

A further question arises in light of the language of § 16.1-69.9:2 of the new District Court bill which provides for the filling of vacancies in the office of a full-time District Judge, since you indicate that the vacancy about which you inquire will occur prior to the convening of the next regular session of the General Assembly. That section provides that the judges of the circuit having jurisdiction over the district shall have the power during the recess of the General Assembly to "fill pro tempore vacancies in the office of full-time district court judges. Such appointment to every such vacancy shall be by commission to expire at the end of thirty days after the commencement of the next session of the General Assembly." While this might indicate that a member of the General Assembly would be eligible, if he resigned from the legislature, to fill such vacancy, since it is filled by appointment and not by election of the General Assembly, the better reasoning is to the contrary.

It is my opinion that Article IV, Section 5, of the Constitution prohibits the appointment of a member of the General Assembly to fill such a vacancy where the judgeship in question is ultimately filled by election by the General Assembly. This opinion is in keeping with a previous opinion of the Attorney General to the Honorable John S. Battle, Governor of Virginia, dated August 20, 1952, and found in Report of the Attorney General (1952-1953), page 116, a copy of which is enclosed, which opinion is based upon the decision of the Supreme Court of Virginia in Norris v. Gilmer, 183 Va. 367 (1944), a copy of which is also enclosed. I can find no changes in either the Constitution of Virginia or in Virginia law otherwise that would justify a different position from that adopted in said previous opinion.

JUDGES—Authority to Order Deputy Sheriff as Crier.

SHERIFFS—Deputy Sheriff—Court may order to act as crier.

December 4, 1972

THE HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

In your recent letter, you stated that your Court is assigned a bailiff by the Sheriff's Department in each of the counties in which you operate. You further stated that the custom had always been for the deputies, who are acting as bailiffs to call the cases for trial. You then indicated that one of the sheriffs has forbidden his deputies, who are acting as bailiffs, to call the cases, and inquired as to whether the Court may nevertheless order the bailiff to call the cases.

Section 53-168.1, Code of Virginia (1950), as amended, provides, in part, as follows:

(a) "It shall be the duty of every sheriff to provide for security from
disruption and violence for every courthouse and courtroom within his jurisdiction."

(b) "Each sheriff shall designate deputies who shall perform the duties necessary to insure that the courthouses and courtrooms within his jurisdiction are secure from violence and disruption. . . ."

Section 16.1-147, presently in effect, provides, in part, as follows:

"The bailiff shall have charge of the courtroom and the offices connected therewith, and shall be responsible for the safekeeping of the furniture and other property therein. He shall perform such other services as are required of him by the judge, and shall attend such sessions of the court as the judge shall direct. . . ." (Emphasis supplied.)

Pursuant to § 53-168.1, a deputy sheriff must be assigned to each courtroom. The deputy is in the same position as a bailiff pursuant to § 16.1-147 and consequently is under the obligation to perform services required of him by the judge.

In my opinion, therefore, the judge has authority to order such deputy sheriff to call cases in his court.

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JUDGES—Brother of County Court Judge May Practice Law in County Court Before Substitute Judge.

June 22, 1973

THE HONORABLE HERBERT A. PICKFORD, Judge
County Court of Albemarle County

This is in response to your inquiry in which you advise that you have been appointed as Judge of the Albemarle County Court. You further point out that your brother has been associated in the practice of law with you and you question whether your brother would be prohibited from practicing in the Albemarle County Court before a substitute judge of that Court under § 16.1-10 of the Code of Virginia (1950), as amended.

Section 16.1-10 of the Code provides only for limitations on the legality of practice of judges who are attorneys and would not in any way govern the eligibility of your brother to practice law in your Court before a substitute judge of that Court. It would be my opinion, however, that under Canons 2 and 3 of the Canons of Judicial Conduct for the Commonwealth of Virginia which were adopted by the Supreme Court of Virginia to become effective on July 1, 1973, that your brother could not appropriately practice law in your Court before you as a Judge. This would be true not only because of the fact that he is so closely related to you, but your letter does not relate whether you will be serving as a part-time judge or as a full-time judge and in the first instance you would theoretically be drawing income from his practice as a partner before you.

However, I can find nothing that would prohibit your brother from practicing law in the County Court of Albemarle County before a substitute judge of that Court serving under § 16.1-21 or in any other capacity.

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JUDGES—County Court—Salaries of Henrico and Fairfax judges.

November 8, 1972

THE HONORABLE JOSEPH S. JAMES, Secretary
Committee of Judges
Your letter of November 6 requests an opinion interpreting the provisions of § 14.1-41 as applied to the salaries of judges in Fairfax and Henrico counties. The pertinent portions of that section are as follows:

"In counties having a population of more than fifty thousand inhabitants, but not more than ninety-nine thousand inhabitants, such salaries shall not be less than eight thousand eight hundred dollars nor more than fifteen thousand dollars.

In counties having a population of more than ninety-nine thousand but less than one hundred twenty-five thousand, such salaries shall not be less than eleven thousand nor more than fifteen thousand two hundred dollars." (Emphasis supplied.)

The underscored language was added to the statute, and the salary brackets raised, by the 1972 Session of the General Assembly.

The second paragraph quoted above was added in 1960. Before that enactment, the highest salary bracket was assigned to counties having a population of 50,000 or more. According to the 1970 census, applicable by the rule of construction in § 1-13.22, Fairfax County has a population of 455,021 and Henrico County a population of 154,364; therefore, neither county is included in the statute.

The rule of construction of population brackets provided in § 1-13.35 is that a population bracket, if applicable to a county, will continue to be applicable to it unless the General Assembly specifically provides otherwise. By this rule Henrico, with a population in 1960 of 117,339, can be included in the highest salary category, but Fairfax, with a population of 262,482 at that time, cannot. As the first bracket quoted above has been changed to exclude Fairfax there is no provision applicable to that county. It appears that the failure to delete the upper limitation on the highest bracket was an error.

It is my opinion, however, that the meaning of the section should be determined in conjunction with subsection (14) of Section 14 of Article IV of the Constitution, which provides:

"The General Assembly shall not enact any local, special or private law in the following cases:

* * *

"(14) Creating, increasing, or decreasing, or authorizing to be created, increased, or decreased, the salaries, fees, percentages, or allowances of public officers during the term for which they are elected or appointed."

In interpreting this section, the Supreme Court of Virginia has repeatedly held that a classification within a statute does not render it special or local legislation if the classification is reasonable and appropriate to the occasion. See, e.g., County Board of Supervisors v. American Trailer Company, Inc., 193 Va. 72, 68 S.E. 2d 115 (1951). The population classifications used in § 14.1-41 to set the salary scales of judges are reasonable and appropriate, as the number of persons in a jurisdiction is an important indication of the amount of litigation which may occur, and thus the time and effort required of a judge. If salaries are determined on this basis, it is not reasonable to pay the judges of Fairfax County less than those of counties with lower population.

As the 1972 enactment clearly contains an error, it is my opinion that in order that it may comply with Article IV, Section 14, of the Constitution, it should be construed to include those counties with a population of over 125,000 in the final highest salary category.

I would concur that it would be wise to seek amendment of the statute in the 1973 Session if Chapter 708 of the 1972 Acts, creating the district court
system, is not reenacted as a whole. In addition to the problem discussed above, the 1972 amendment, which raised the salary brackets, expires on July one, 1973, unless reenacted by the General Assembly.

JUDGES—Courts of Record Holding Over After Expiration of Term.

February 1, 1973

The Honorable Willard J. Moody
Member, Senate of Virginia

This is in reply to your letter of January 31, 1973, which reads as follows:

"I am writing to inquire regarding the status of judges of courts of record in Virginia whose terms expire on January 31, 1973, if they have not been elected by the General Assembly of Virginia for a new term on that date.

Would you please advise me regarding the legal status of such judges should they not be re-elected on or before their term expires."

There is no constitutional or statutory provision in this State that judges shall hold office until their successors are elected or appointed and qualified. Authority exists, however, that, in the absence of statute, it is the right and duty of an incumbent judge to hold over and exercise the duties and functions of the office until his successor is appointed. 48 C.J.S., Judges, § 23. He is not a judge de jure but a judge de facto. He performs the functions of the office until a duly qualified appointee appears, and then is bound to yield the office to the appointee. His incumbency de facto thus terminates upon the filling of the vacancy.

JUDGES—District—Full-time—May not serve as substitute juvenile and domestic judge.

JUDGES—County Court Judge—Part-time—May continue to serve as part-time juvenile and domestic relations judge.

DISTRICT COURT BILL—Judges—District and county court judges.

June 18, 1973

The Honorable Donald G. Pendleton
Member, House of Delegates

This is in response to your recent request for an opinion concerning the "District Court bill," and your inquiries are set forth below:

"(1) Can a full-time district judge serve as a substitute Juvenile and Domestic Relations Court judge?

"(2) Can a part-time County Court judge continue to serve as a part-time Juvenile and Domestic Relations Court judge in the same district?"

Your second question is substantially answered by my opinion to the Honorable Donald H. Sandie, Judge of the Municipal Court of the City of Portsmouth, dated May 10, 1973, a copy of which is enclosed. For the reasons stated in that opinion, my answer to your second inquiry is in the affirmative. However, my answer to your first question would be in the negative as it would appear under Chapter 546 of the Acts of Assembly, 1973, to be a contradiction in terms for a full-time General District Court Judge to serve as a substitute Juvenile and Domestic Relations District Court Judge.
In addition, although my answer to your second inquiry was in the affirmative with regard to the legal authority for a part-time General District Court Judge to serve as a part-time Juvenile and Domestic Relations District Court Judge in the same district, there is an additional question that is raised by § 16.1-69.11 (b) and § 16.1-69.33 of the Code of Virginia (1950), as amended.

Section 16.1-69.11(b) states that "each judge, except substitute judges, shall be designated either general district court judge or juvenile and domestic relations district court judge depending on the court he is so designated to serve..." Section 16.1-69.33 further provides, in pertinent part, that the Committee on District Courts "is directed to make an initial determination as to the number of full-time judges and those judges who shall serve as full-time judges in each district for the period beginning June one, nineteen hundred seventy-three and ending February one, nineteen hundred seventy-four." Thus, it is my further opinion that for a judge to serve both a General District Court and a Juvenile and Domestic Relations District Court up until July 1, 1980, there would have to be such a designation.

JUDGES—District Courts—Prior to July 1, 1980, may serve as both general district court and domestic relations district court judge.

JUDGES—Part-time—Successor may be appointed by judges of circuit court for term of four years or for term to expire June 30, 1980, whichever comes first.

JUDGES—Part-time—Number of new judges to be determined by committee on district courts.

DISTRICT COURT BILL—Judges—Part-time district judges.

May 10, 1973

The Honorable Donald H. Sandie, Judge
Municipal Court, City of Portsmouth

This is in response to your recent request for an opinion regarding the interpretation of Chapter 546 of the Acts of Assembly, 1973, commonly referred to as the "District Courts Bill". Your full inquiry is set forth as follows:

"House Bill 1497 recently enacted by the General Assembly appears to prohibit a full time Judge from serving both a General District Court and a Juvenile and Domestic Relations District Court.

"Will you please give me your opinion in that regard. The pertinent Sections are 16.1-69.10(b) and (d) and Section 16.1-69.35(c) or the last unnumbered paragraph of subsection (c).

"Can you also advise whether a new part-time Judge could be appointed between July 1, 1973 and July 1, 1980."

I will first deal with your question as to whether a full-time judge can serve as both a general district court judge and a juvenile and domestic relations district court judge. Although the language of § 16.1-69.7 refers to the two categories of district cour.s and states that "for each such court there shall be one or more judges", I am of the opinion that my answer to your question must by governed by § 16.1-69.10 of Chapter 546, subsections (b) and (d). That section states that after July 1, 1980, no district judges shall be elected "to serve both a general district court and juvenile and domestic relations district court in any district." The language of this section carries the clear implication that prior to July 1, 1980, a district court judge may serve both courts so long as his term does not commence on or after July 1, 1980.
Your second inquiry is whether a new part-time judge could be appointed between July 1, 1973, and July 1, 1980. My answer to that question is governed by § 16.1-69.9(a1) and § 16.1-69.10 of Chapter 546 and it would appear from those sections that a successor part-time judge may be appointed by the judges of the circuit court having jurisdiction over the district for a term of four years or for a term to expire June 30, 1980, whichever comes first. However, under § 16.1-69.10(b) as of January 1, 1973, the number of judges in each district is to be determined by the Committee on District Courts so that, if your inquiry refers to the creation of a new part-time judgeship, the answer would be governed by the deliberations of the Committee on District Courts under Chapter 546.

JUDGES—Retired—May not be reimbursed for expenses to attend Judicial Conference.

October 30, 1972

THE HONORABLE W. FRANCIS BINFORD
County Judge for Prince George County, retired

I have received your recent letter inquiring whether, as a retired county judge, you are eligible for reimbursement by the Commonwealth for your expenses of attending the Judicial Conference of Virginia for Courts Not of Record. As a retired county judge, you are subject to recall to the bench for a limited period. Section 16.1-218, Code of Virginia (1950), as amended, provides, inter alia:

"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 domestic relations court of the Commonwealth. . . ."

Section 16.1-221 provides:

"The active members and honorary members shall receive their actual expenses while in attendance at the meetings of the Conference, and of the executive committee."

The active membership of the Conference is limited to the active judge and associate judge of the county courts. Expenses are only payable to active and honorary members. A retired judge is not an active or honorary member within the purview of § 16.1-218. I am not aware of any other provision of law under which a retired judge would be entitled to reimbursement for expenses during attendance at the Conference; therefore, it is my opinion that such expenses cannot be reimbursed by the Commonwealth.

JURIES—Selection of for Newly Consolidated Cities of Suffolk and Nansemond.

June 15, 1973

THE HONORABLE JOHN H. POWELL, Clerk
Circuit Court, City of Nansemond

This is in response to your request for an official opinion in connection with the selection of juries for the City of Suffolk which will come into a new form of existence on January 1, 1974, through the merger of the Cities of Suffolk and Nansemond. Your specific inquiry is as follows:

"During the month of February, 1973, jury commissioners appointed by the judge of the Circuit Courts of the City of Nansemond and the City
of Suffolk, will draw jurors to serve for the jury year ending February 15, 1974.

"The Clerks will draw jurors, as provided by law, for each term of court from the names selected by the jury commissioners. There will be no difficulty for the April and July Terms of Court in 1973, but the October Term will continue until the new January, 1974 Term of court, which will be, I presume, until the fourth Monday in January 1974. The January 1974 term jurors will have to be drawn prior to the end of the jury year (February 15, 1974), and are supposed to serve until the April 1974 Term begins.

"In your opinion from which lists should the juries for October Term 1973 and January Term 1974 be drawn, the list of the old City of Nansemond or the list of the old City of Suffolk, or from both lists?"

My answer to your inquiry is governed by the amendments to the Virginia Jury Laws which are contained in Chapter 439 of the Acts of Assembly for 1973. Section 8-208.8 of the Code of Virginia (1950), as amended, now provides that jury commissioners are to be appointed prior to the first day of October in each year and those commissioners under § 8-208.10 of the Code are to submit a list of proposed jurors not later than the first day of December with "such list to become effective January first following."

It is my opinion that prior to October 1 of this year jury commissioners should be appointed with persons from the present cities of Suffolk and Nansemond both represented, and a consolidated master jury list for 1974 should be prepared following the admonition of § 8-208.10 of the Code that "substantially the same percentage of population shall be taken from each magisterial district, borough, ward or precinct if there be no wards." Jury venires drawn for the trial of any case to be commenced on or after January 1, 1974, should then be drawn from this list prepared by the jury commissioners.

JURISDICTION—Nonresidents—"Long-arm Statute"—Applicability to enforcement of ordinance.

"LONG-ARM STATUTE"—Jurisdiction over Nonresidents in Cases of Violations of Ordinances.

October 24, 1972

The Honorable Edward M. Holland
Member, Senate of Virginia

In a recent letter you described your efforts during the last session of the General Assembly to secure the enactment of legislation which would require non-resident landlords owning more than four dwelling units for rent in Virginia to appoint an agent for service of process. This measure was, however, killed in committee because of a suggestion that existing legislation effecting personal service on nonresidents, such as the "long-arm statute", renders this measure unnecessary.

You advise that you now have reason to believe that nonresident landlords are not subject to service of process under the "long-arm statute" where alleged health and building code violations are involved and you solicit my opinion regarding the applicability of the "long-arm statute" to this situation.

The "long-arm statute" is, of course, a euphemism for §§ 8-81.1 through 8-81.5, comprising Chapter 4.1 of Title 8 of the Code of Virginia (1950), as amended, which provides a supplementary basis for personal jurisdiction over nonresidents.
Specifically, § 8-81.2(a) provides for "... personal jurisdiction over a person... as to a cause of action arising from the person's... (6) Having an interest in, using, or possessing real property in this State. ..." (Emphasis supplied.)

In my opinion, the phrase "cause of action" as used in § 8-81.2 relates to civil actions. Thus, the "long-arm statute" is of no utility when application of criminal sanctions, such as those pertaining to health and building codes, is sought.

On the other hand, the "long-arm statute" would, in my opinion, have application to a civil action by a political subdivision seeking reimbursement for abatement or removal of a nuisance pursuant to § 15.1-864, assuming that the violation of health and building codes constituted a nuisance under the relevant ordinance. Furthermore, the "long-arm statute" lends itself to application of § 15.1-905 by a political subdivision seeking to enjoin continued violation of its ordinances. I am enclosing a copy of an opinion dated May 12, 1972, addressed to the Honorable Glen B. McClanan, which bears relevancy to the application of §§ 15.1-864 and 15.1-905.

JUSTICE OF PEACE—Fees for Issuance of Warrants.

FEES—Justice of Peace—Issuance of warrants. September 12, 1972

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

This is in reply to your recent letter in which you request an opinion concerning the payment of fees for issuance of warrants by justices of the peace under the provisions of § 46.1-178 of the Code of Virginia (1950), as amended, with particular reference to warrants issued as a result of the 1972 amendment to such section. You point out that in some situations the courts have advised all police officers to obtain warrants for each summons issued by them pursuant to the above section. In such a situation, your question is whether the fee for issuing the warrant is to be collected as part of the costs from the defendant who has been convicted or, if the fees and costs are not paid, whether the justice of the peace can bill the Commonwealth for his fee for issuing the warrant.

The fees for justices of the peace in criminal matters are specified in § 14.1-128 of the Code, and these fees are applicable for the issuance of all criminal warrants. These fees may be charged for warrants issued under § 46.1-178 and may be collected from the defendant or from the Commonwealth under the same procedure as they would be in any other situation.

JUSTICE OF PEACE—May Not Be Employed as Deputy Clerk.

JUSTICE OF PEACE—May Not Be Employed by Police Department.

PUBLIC OFFICERS—Compatibility—Justice of Peace may not be employed as Deputy Clerk.

PUBLIC OFFICERS—Compatibility—Justice of Peace may not be employed by Police Department.

WARRANTS—Valid—Incumbent Justice of Peace not affected by amendment to § 39.1-10.

February 21, 1973
This is in reply to your recent letter in which you request an opinion concerning the compatibility of office of special justices of the peace for the City of Galax. You inquire as to whether persons can serve as such special justice under the following two situations:

1) Where the special justice is employed as a radio dispatcher for the City Police Department. The duties include sending notice on parking tickets, receiving payment on parking tickets, and the regular duties as dispatcher. It involves no other police duties, and the individual is not trained as a police officer and does not wear the regular police uniform. The duties of special justice would be performed in addition to his regular duties as an employee of the Police Department.

2) Where the special justice is employed by the Police Department as general secretary and as assistant radio dispatcher. In this capacity the duties include the typing of reports, correspondence, and other clerical duties, as well as filling in as dispatcher. It involves no police duties and does not involve the wearing of a police uniform. In addition to these duties, the individual also is a deputy clerk of the Police Court and a secretary to the City Judge and the City Attorney.

Section 39.1-10 of the Code of Virginia (1950), as amended, specifically provides that no person shall be eligible for election or appointment to the office of justice of the peace of any county, city or town if he is a law enforcement officer, or 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. The terms of that section appear to be quite clear if applied to the situations about which you inquire. Since both situations involve individuals who are employees of the Police Department, and in one case additionally an employee and deputy clerk of the court not of record, it is my opinion that the provisions of § 39.1-10 prohibit such persons from serving as a justice of the peace of the City.

However, you point out that these positions are filled by appointment under the provisions of § 13.01 of the Charter of the City of Galax and are designated as special justices rather than justices of the peace. It is my opinion that this distinction is not sufficient to remove these positions from the effects of § 39.1-10. Section 39.1-1 of the Code specifically provides that all provisions of municipal charters inconsistent with the provisions of Title 39.1 are repealed to the extent of such inconsistency. The fact that they are called “special justices” does not remove them from the proscriptions of § 39.1-10 of the Code.


You also inquire as to the validity of warrants issued by the first-mentioned justice above since his original appointment on September 8, 1958. It is my opinion that this does not create a problem since the provisions of § 39.1-10 do not apply
JUSTICE OF PEACE—Payment of Fees for Issuance of Warrants—Payment by municipality.

FEES—Payment of Justice of Peace Fees by Municipality.

CITIES AND TOWNS—Payment of Justice of Peace Fees.

November 29, 1972

The Honorable Fred M. Burnett, III
Justice of the Peace

This is in reply to your recent letter in which you request an opinion concerning the liability of a municipality for payment of fees to justices of the peace for the issuance of warrants when such fees are not paid by the prosecutor or the defendant. You also inquire as to whether justices of the peace can be reimbursed for their time and expenses in preparing the statement of such fees submitted to the municipality for payment.

Fees for the issuance of warrants by justices of the peace are established in §14.1-128, Code of Virginia (1950), as amended; however, that section makes no reference to the manner of payment of such fees. Section 14.1-85 of the Code specifies that fees for services of justices of the peace,

"... 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 costs, shall be paid out of the State treasury unless now or hereafter otherwise provided by law, when certified as prescribed by §19.1-317, ..."

The above provision of §14.1-85 of the Code was interpreted in an opinion of the Attorney General to the Honorable Caesar R. Allen, Commonwealth's Attorney for the City of Waynesboro, dated August 22, 1968, and found in Report of the Attorney General (1968-1969), page 106, to allow for such payment of uncollected fees out of the State treasury only in those cases where the charge is a violation of State law. That same opinion, a copy of which is enclosed, reiterated the view expressed in an earlier opinion of the Attorney General that in those cases where the charge is a violation of a municipal ordinance, the city, rather than the State, should pay the fees for issuing the warrants.

Section 14.1-85 of the Code also was interpreted in an opinion of the Attorney General to the Honorable David A. Lyon, III, Secretary-Treasurer, Association of Justices of the Peace, dated June 21, 1968, and found in Report of the Attorney General (1967-1968), page 114, to provide for the payment of such fees when the charges against the defendant are dismissed. Section 14.1-85 of the Code uses the phrase, "acquitted, or convicted and unable to pay the costs." "Acquitted" is defined in Black's Law Dictionary to mean discharged from the criminal charges brought against an individual. This would include both dismissal and nolle prosse of criminal charges.

It is my opinion that the municipality would be responsible for the payment of the fees for the issuance of warrants by justices of the peace where the warrants
charged a violation of a municipal ordinance and where the charges were either dismissed or nol-prossed. This position is consistent with an opinion of the Attorney General to the Honorable M. H. Turnbull, Clerk of the Circuit Court of Brunswick County, dated January 21, 1960, and found in Report of the Attorney General (1959-1960), page 128, which ruled that a municipality is responsible for the cost of a jury in a criminal prosecution under a town ordinance since all fines collected are paid over to the municipality. This position is also consistent with an opinion of the Attorney General to the Honorable LeRoy T. Cheshire, President, Association of Justices of the Peace, dated October 29, 1968, and found in Report of the Attorney General (1968-1969), page 104, where it was ruled that such fees are not to be paid for the issuance of a warrant where the case never appears on the court docket, since this is not a situation of acquittal. Copies of these opinions are also enclosed.

As to your second inquiry, I can find no authority whatsoever which would authorize the municipality to pay the justices of the peace for their time and expenses in preparing the statement of such fees which they submit to the municipality. Therefore, it is my opinion that these expenses cannot be paid by the municipality.

JUVENILE AND DOMESTIC RELATIONS COURTS—Adjudication by Not Charged Considered Conviction for Crime; Imposes no Disabilities; Not Disqualified from Voting.

CRIMINAL PROCEDURE—Juvenile and Domestic Relations Court Adjudication Not Considered Conviction for Crime; Imposes no Disabilities; Not Disqualified from Voting.

July 26, 1972

THE HONORABLE ROBERT F. RIPLEY, JR.
Commonwealth's Attorney for York County

In your letter of July 21, 1972, you inquire whether an individual who has been found "not innocent" in a juvenile court of an offense which would constitute a felony if the individual were tried and convicted as an adult is disqualified from voting under Article II, Section 1, of the Constitution of Virginia.

Article II, Section 1, reads, in pertinent part, as follows:

"... No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. . . ."


This office has ruled, in an opinion to Mr. William P. Campbell, Probation and Parole Officer, dated November 28, 1960, and found in the Report of the Attorney General (1960-1961) at p. 173, a copy of which is attached, that where a juvenile and domestic relations court has assumed jurisdiction and imposed punishment on a child, such adjudication is not considered a conviction for a crime and imposes no disabilities ordinarily resulting from such a conviction, including forfeiture of the right to vote. See also Watts v. Commonwealth, 212 Va. 5557 (June 12, 1972). Assuming that the individual found "not innocent" is not certified to a grand jury and subsequently convicted in a court of record, it is my opinion that such an individual has not been convicted of a felony within the meaning of the constitutional prohibition.

Your inquiry, therefore, is answered in the negative. To the extent an opinion
of this office to the Honorable L. Waverly Hudgins, General Registrar of the City of Portsmouth, dated January 10, 1962, and found in the Report of the Attorney General (1961-1962), at p. 96 indicates to the contrary, said opinion is withdrawn.

JUVENILE AND DOMESTIC RELATIONS COURTS—Attorneys’ Fees—Judge may submit form directly to comptroller without order by judge of court of record.

ATTORNEYS—Appointed in Juvenile Courts—Claim for fees may be submitted without approval by judge of court of record.

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

This is in reply to your recent inquiry as to whether it is necessary for the Judge of the Circuit Court to enter an order for the payment of claims for attorneys’ fees in connection with the representation of indigent children or minors in the Juvenile and Domestic Relations Court pursuant to § 16.1-173 of the Code of Virginia (1950), as amended. You point out that attorneys appointed pursuant to that provision of the Code have been signing and making affidavit on a Form 4 for services and the Judge of the Juvenile and Domestic Relations Court has been certifying on the front of the form that the attorney has performed the services in question and has fixed the amount of compensation for the services of that attorney. The forms were thereafter transmitted to the State Comptroller’s Office for payment. You further indicate that the Comptroller’s Office has returned these forms to you and requested that the Judge of the Circuit Court enter an order for payment of the claims.

My reply to your inquiry is governed by the provisions of §§ 16.1-173 and 19.1-319 of the Code. Section 19.1-319 provides that:

“(a) A judge of a court not of record before whom there is any proceeding in a criminal case shall certify to the clerk of the circuit court of his county or the corporation court of his city, and a judge or court before whom there is, in a criminal case, any proceeding preliminary to conviction in another court, upon receiving information of the conviction from the clerk of the court wherein it is, shall certify to such clerk all the expenses incident to such proceedings which are payable out of the State treasury.”

This section is clearly intended to apply to criminal cases and not to proceedings in the juvenile courts. There is no provision in the Code of Virginia at this time which allows for the payment of counsel fees to attorneys representing indigent misdemeanants. The only authorization for the payment of attorneys’ fees in criminal proceedings in a court not of record is for the representation of persons charged with felonies where the proceeding in the court not of record is in the nature of a preliminary hearing. On the other hand, § 16.1-173 provides, in pertinent part, as follows:

“(d) Counsel appointed to represent such child or minor shall be compensated for his services out of the appropriation for criminal charges in an amount fixed by the court, except that in no event shall the payment for his services exceed the sum of seventy-five dollars.”

Section 16.1-141 provides that the term “the court” when used in Chapter 8 of Title 16.1 means the juvenile court. Proceedings in the juvenile court are not criminal proceedings and § 16.1-173 would be the relevant section of the Code as opposed to § 19.1-319.
It is, therefore, my opinion that the appropriate certification would be that made by the Judge of the Juvenile and Domestic Relations Court and that the necessary documentation for the payment of claims for attorneys' fees for persons appointed to represent indigent children or minors should be forwarded directly to the Comptroller by the Juvenile and Domestic Relations Court. Action by the Judge of the Circuit Court is not a necessary prerequisite to the payment of such claims.

JUVENTILE AND DOMESTIC RELATIONS COURTS—County of Roanoke
—“Court of competent jurisdiction” within the meaning of § 32-353.19 to establish new certificate of birth.

COURTS—Juvenile and Domestic Relations Courts—County of Roanoke—
“Court of competent jurisdiction” within the meaning of § 32-353.19.

June 14, 1973

THE HONORABLE JAMES I. MOYER, Judge
Juvenile and Domestic Relations Court of the County of Roanoke

I am in receipt of your letter wherein you inquired whether the Juvenile and Domestic Relations Court of the County of Roanoke is a “court of competent jurisdiction” within the meaning of § 32-353.19(a)(2) of the Code of Virginia (1950), as amended, which provides as follows:

“(a) The State Registrar of Vital Statistics shall establish a new certificate of birth for a person born in this State, when he receives the following:

* * *

“(2) A request that a new certificate be established and such evidence as required by regulation proving that such person has been legitimated, or that a court of competent jurisdiction has determined the paternity of such a person.”

Section 20-61.1 of the Code of Virginia (1950), as amended, reads in pertinent part as follows:

“Whenver in proceedings hereafter under this chapter concerning a child whose parents are not married, a man admits before any court having jurisdiction to try and dispose of the same, that he is the father of the child or the court finds that the man has voluntarily admitted paternity in writing, under oath, or if it be shown by other evidence beyond reasonable doubt that he is the father of the child and that he should be responsible for the support of the child, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock . . . .”

And § 20-67 provides that:

“Proceedings under this chapter shall be had in the circuit court of the counties and before the police justice or corporation court of the cities; provided that in cities and counties having them, the juvenile and domestic relations courts shall have exclusive original jurisdiction in all cases arising under this chapter, . . . .” (Emphasis added.)

You will note that § 20-61.1 is within the chapter of the Code referred to in § 20-67.

Furthermore, § 20-88.26 gives juvenile and domestic relations courts in proceedings under the Uniform Reciprocal Enforcement of Support Act (§ 20-88.13,
et seq.) the authority to "adjudicate the paternity issue within the same limits as provided in § 20-61.1."

It is clear, therefore, that juvenile and domestic relations courts have the authority to determine the question of paternity within the limits stated in § 20-61.1 of the Code.

In addition, § 8-329.1 of the Code, as amended, allows the court before whom divorce or support proceedings may be brought, in which proceedings the question of paternity arises, to direct and order that the alleged father, the mother and child submit to a blood grouping test. It is clear under § 16.1-158(1) (a) of the Code that juvenile and domestic relations courts have jurisdiction over cases, matters and proceedings involving the support of a child "whose parent or other person legally responsible for the care and support of such child is unable, or neglects or refuses when able so to do, to provide proper or necessary support, education as required by law, or medical, surgical or other care necessary for his well-being."

In light of the above, I am of the opinion that the County of Roanoke Juvenile and Domestic Relations Court is a "court of competent jurisdiction" within the meaning of § 32-353.19 of the Code.

JUVENILE AND DOMESTIC RELATIONS COURTS—Nonsupport—Contempt not only means of enforcement pending appeal.

December 6, 1972

The Honorable G. Garland Wilson, Judge
Third Regional Juvenile and Domestic Relations Court

This is in reply to your recent letter in which you request my opinion regarding the proper construction of § 20-68 of the Code of Virginia (1950), as amended, which provides for an appeal from a conviction of nonsupport. You inquire as to whether contempt is the only available procedure for enforcing the support order during the pendency of the appeal.

Section 20-68 provides, in relevant part, as follows:

"The person accused shall have the same right of appeal as provided by law in other similar cases; provided that any order of court requiring support of wife or children shall remain in full force and effect until reversed or modified by judgment of a superior court, and in the interim the order shall be enforceable by the court entering it and the court may punish for violation of the order as for contempt. . . ."

It is my opinion that the language of the statute is properly construed to provide for the enforcement of the order by any method which is available to the Court, including contempt proceedings, during the pendency of the appeal. Thus, the Court would not be limited solely to the utilization of contempt procedures in order to enforce its nonsupport order. If imprisonment is contemplated, care should be exercised to insure that counsel is provided.

JUVENILE AND DOMESTIC RELATIONS COURTS—Probation and Detention Officers and Their Staffs Not Included Within Coverage of § 16.1-69.49.

Courts Not of Record—Juvenile and Domestic Relations Courts—Probation and detention officers and their staffs not included within coverage of § 16.1-69.49.

November 2, 1972
This is in reply to your recent letter in which you inquire whether juvenile probation officers, secretarial and stenographic assistants to probation officers, and officers and employees engaged in the operation of detention homes and probation houses would be included within the contemplation of § 16.1-69.49 of the Code of Virginia (1950), as amended, as "... other officers or employees of courts not of record..." As you point out, this section is part of amended Title 16.1 as passed by the 1972 Session of the General Assembly to provide for the establishment of a system of district courts at the court not of record level. It provides for governmental units to pay the State in ensuing fiscal years a sum equal to the total of all salaries of certain officers and employees paid during the current fiscal year under the present court structure. You indicate that, since the adjournment of the 1972 General Assembly, there has been a reluctance on the part of local units of government to establish juvenile probation, detention and other social services for juvenile and domestic relations courts or to expand already existing services because of their uncertainty as to whether this would bind them to the obligations set forth in § 16.1-69.49.

Two other sections of amended Title 16.1 are relevant to an interpretation of § 16.1-69.49. Section 16.1-69.37 is entitled, Personnel Continued in Office, and reads in part as follows:

"The clerk, deputy clerks, referees, bailiffs and other officers and employees of county, municipal and juvenile and domestic relations courts shall continue in office in like positions with the general district courts and juvenile district courts until the expiration of the term, if any, for which elected or appointed..."

Section 16.1-69.38 provides in part as follows:

"The Committee on Courts Not of Record established in § 16.1-69.33 shall, subject to the provisions of § 16.1-69.37, establish guidelines and determine the necessity for the employment of substitute judges, part-time judges, clerks, deputy clerks and all other personnel of the district courts and authorize the employment of such personnel by the courts. For purposes of this chapter, the term 'personnel,' as related to the courts, shall not include probation officers and other social service officers of a juvenile district court covered in Article 5 (§ 16.1-203, et seq.) of Chapter 8 of this title..."

It appears from § 16.1-69.37 that the term "personnel" was intended to cover "other officers and employees" of juvenile and domestic relations courts, whereas under § 16.1-69.38 probation and other social services officers were excluded from that term.

A review of Chapter 8 of Title 16.1 which deals with juvenile and domestic relations courts, reveals that Article 2 is entitled, Courts, Judges and Other Officers and Employees, and contains numerous references regarding employment, powers and duties, salaries, etc., of these personnel. On the other hand, Articles 4 and 4.1 cover the operation and management of detention facilities, including the employment of personnel, and Article 5 provides for a probation system and the employment, duties, and compensation of probation officers and their staff.

I would, therefore, conclude that juvenile probation officers, secretarial and stenographic assistants to these probation officers, and officers and employees engaged in the operation of detention homes and probation houses for juvenile and domestic relations courts are excluded from the language of § 16.1-69.49 dealing with judges, clerks or other officers or employees of courts not of record. My conclusion is based upon the separate and distinct treatment in Chapter 8 of detention..."
and probation officers and their staff from judges, clerks, and other officers and employees of the court generally, and upon the exclusions in amended Title 16.1 of probation and other social services officers of juvenile district courts from the term "personnel" as used in that Chapter.


September 5, 1972

THE HONORABLE J. ENGLISH FORD, Judge
Sixth Regional Juvenile and Domestic Relations Court

This is in reply to your recent letter in which you inquire regarding the applicability of § 16.1-176.1 of the Code of Virginia (1950), as amended, to the following situation. You point out that a 17 year old boy appeared in Court charged with vandalism of various types, all misdemeanors, as a result of which you gave him a suspended commitment to the State Department of Welfare and Institutions. The commitment was suspended on condition of restitution, fines and probation supervision. Subsequent to this earlier order, the same young man was charged with an offense which would be a felony were he an adult. You then refer to the language of § 16.1-176.1 of the Code as follows:

"If a juvenile sixteen years of age or over, who has been previously committed to any juvenile training school in this state or in any other state, is charged with an offense which, if committed by an adult, could be punishable by death or confinement in the penitentiary, the case shall be certified for proper criminal proceedings, if probable cause be found, to the appropriate court of record having jurisdiction of such offense if committed by an adult, unless the Juvenile and Domestic Relations Court shall find and shall certify in its order that it is in the public interest for the matter to be disposed of therein."

You finally inquire as to whether the action previously taken brought the young man within the language of being one "who has been previously committed to any juvenile training school in this state."

Although no definition of the term "committed" is contained within Title 16.1 of the Code, I am of the opinion that this term must be considered in this section within the context of the other sections of Chapter 8 of Title 16.1 which deal with Juvenile and Domestic Relations Courts. For example, §§ 16.1-178 and 16.1-185 both relate to commitment of juveniles to custodial agencies or the State Board of Welfare and Institutions and the term is used in such a way as to mean the actual commitment itself and not the order of commitment. Therefore, it would be my opinion that the phrase "who has been previously committed" would mean that the person has actually been formally admitted to the institution and § 16.1-176.1 would not be applicable to the situation you described.

JUVENILES—Disclosure of Names—Authority of court to control.

COURTS—Rules May Be Adopted and Distributed to News Media; Contempt Proceedings for Violations—Disclosure of names of juveniles.

June 25, 1973

THE HONORABLE ALBERT TEICH, JR.
Member, House of Delegates
This is in response to your recent letter in which you request additional clarification of my letter of May 9, 1973, with regard to the question of the publication of names of juveniles in newspapers and the power of Juvenile and Domestic Relations Court judges to prohibit the news media from publishing such names. You note that I enclosed with my letter of May 9th a copy of an opinion to the Honorable Edwin A. Henry, Judge of the Juvenile and Domestic Relations Court for the City of Norfolk, dated June 7, 1971, and contained in Report of the Attorney General, 1970-1971, pages 225-226. However, you indicate that that opinion did not include any recent changes in § 16.1-162, Code of Virginia (1950), as amended.

Of course, the opinion to Judge Henry dated June 7, 1971, was subsequent to the amendments to that section which were passed at the 1971 Special Session of the General Assembly and approved on March 31, 1971 (See Chapter 228, Acts of Assembly, 1971). In addition, the 1971 amendments did not in any way relate to the portions of § 16.1-162 which govern the question of confidentiality, but in fact were limited to the question of the presence of the child or adult at a hearing and the right to a public hearing unless expressly waived. Thus, the 1971 amendments are not in any way relevant to your inquiry and do not effect or alter my opinion of June 7, 1971.

As my opinion of June 7, 1971, points out, §§ 16.1-140 and 16.1-162 of the Code establish a policy of nondisclosure of the names of juveniles unless the court deems such disclosure to be in the public interest. Consequently, the publication in the news media of the names of juveniles involved in cases pending before the Juvenile and Domestic Relations Court would be a violation of the purpose and intent of the Juvenile and Domestic Relations Court law. As I further pointed out in the opinion to Judge Henry, there are no sanctions in the Code for violations of § 16.1-162 and contempt would be an impermissible remedy where the names were obtained through means other than court records or court personnel. However, I reaffirm my position in that opinion that Rules of Court may be adopted to regulate proceedings before the courts and the conduct of officers and employees of the court and these rules could be distributed to the media with "the advice that violations of the... rules of court would raise the possibility of contempt proceedings for violations thereof." I might point out, however, that the rule making procedure has been modified and under § 16.1-69.32 the rules shall be formulated by the Supreme Court of Virginia and shall be subject to revision by the General Assembly.

LAW ENFORCEMENT OFFICER—Eligibility With Relation to Salary of—

Must have as primary responsibility law enforcement.

November 15, 1972

The Honorable Gary T. Keyser
Sheriff of Warren County

In your letter of November 9, 1972, you inquire as to the definition of "full-time deputy sheriff who is a law enforcement officer" within the meaning of § 14.1-73.2 of the Code of Virginia (1950), as amended.

Section 14.1-73.2 provides, in pertinent part, as follows:

"(a) The salary of any full-time deputy sheriff, who is a law enforcement officer and who has met the requirements established by the Law Enforcement Officers Training Standards Commission as provided in § 9-109(2)(a) of this Code shall not be less than $7,200 per annum. . . ."

It is my opinion that in order to be qualified for the minimum salary under this
section a deputy must have as his primary responsibility law enforcement, as would be comparable to a municipal police officer in a detective or patrol assignment. Jailers, bailiffs, process servers, cooks or other persons who may be employed by a county sheriff in duties other than law enforcement, or a part-time employee in any capacity, do not qualify for the minimum salary under this section. The mere fact, however, that due to the small size of some departments, a deputy may occasionally be pressed into service in a capacity other than law enforcement would not, in my opinion, disqualify him under § 14.1-73.2.

I call your attention to the fact that the aforementioned minimum salary may not be implemented in some localities or as to some employees due to the operation of the economic controls imposed pursuant to the Economic Stabilization Act of 1970.

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**LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION**

—Law Enforcement Officers from Other States Must Have Attended Approved Schools.

**LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION**

—Law Enforcement Officers in Permanent Positions on July 1, 1971, Not Required to Comply With Training Under § 9-109(3).

September 12, 1972

**The Honorable C. W. Woodson, Jr., Director**

Law Enforcement Officers Training Standards Commission

You have recently requested two opinions concerning interpretations of § 9-109 of the Code. I am joining your requests, and will answer your questions seriatim:

"1. **If a person is employed as a law enforcement officer or administrator by another state or the Federal government and is subsequently employed in a like capacity by the Commonwealth of Virginia or any of its political subdivisions after July 1, 1971, does he have to, within a two year period, successfully complete a training program under Section 9-109 (2) of the Code of Virginia, 1950, as amended?**"

Pursuant to the authority of § 9-109 (1) of the Code the Commission promulgated certain rules and regulations for the administration of the Commission. Rule 3.0 provides that "every person employed as a permanent full-time law enforcement officer, as defined by § 9-108 of the Code of Virginia, 1950, as amended, subsequent to July 1, 1971, must meet compulsory minimum training standards herein established by the Commission." Rule 5.0 describes how the minimum training may be secured and provides that such training can only be obtained by attending and graduating from an approved training school.

I have previously ruled in an opinion to you dated October 20, 1971, that the minimum training requirements may be secured by attending an approved school prior to employment. Therefore, if a person employed by another state or the Federal government has attended an approved training school, he would already have met the requirements of § 9-109 (2) and would not have to take this training again. However, if such person has not previously attended an approved training school, he would be required to take the training required by § 9-109 (2).

"2. **If a person is employed as a law enforcement officer or administrator by the Commonwealth of Virginia or any of its political subdivisions prior to July 1, 1971, is he required to comply with the training programs of Section 9-109 (3) of the Code of Virginia, 1950, as amended?**"
The answer to your inquiry is found in § 9-111, which provides in pertinent part,

"The provisions of this chapter shall not be construed to require any law-enforcement officer serving under permanent appointment on July one, nineteen hundred seventy-one, to meet the training standards provided for herein, nor shall failure of any such officer to meet such standards make him ineligible for any promotional examination for which he is otherwise eligible . . . ."

The exemption from training provided for in the above section contains no qualifications, and I am of the opinion that persons employed as a law enforcement officer or administrator by the Commonwealth of Virginia or any of its political subdivisions prior to July 1, 1971, are not required to comply with the training programs of § 9-109 (3).

LEGAL HOLIDAYS—Local Courts—Closing of offices.

January 30, 1973

THE HONORABLE LINWOOD HOLTON
Governor of Virginia

This is in reply to your recent letter in which you ask whether "local courts" in the State should close on days that are "unscheduled closings of State offices," such days not being listed as legal holidays according to the provisions of § 2.1-21 of the Code of Virginia (1950), as amended.

Section 2.1-21 of the Code, after listing certain specific days as legal holidays, states that any day appointed by the Governor of this State, or the President of the United States, shall be a legal holiday as to the transaction of all business. I am of the opinion that the days listed in this section, and those appointed by the Governor or the President as legal holidays, are legal holidays for business purposes. Therefore, local courts should close on all such holidays. The clerks’ offices are not included in § 2.1-21 but are controlled specifically by § 17-41 of the Code.

Section 2.1-29 of the Code of Virginia (1950), as amended, provides as follows:

"The offices of all State officers, departments, boards, bureaus, commissions, divisions and institutions required by law to maintain regular business quarters at the seat of government shall hereafter be kept open for transaction of public business in accordance with such executive order or orders of the Governor as may be issued from time to time.

"This section shall not apply to the offices of the legislative and judicial departments of the State government." (Emphasis supplied.)

Any executive order issued by the Governor pursuant to the provisions of this section (§ 2.1-29) would not apply to the judiciary and, in my opinion, local courts would not be required to close.

LINE OF DUTY ACT—Application to Member of Rescue Squad.


November 21, 1972

THE HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

This is in reply to your letter of October 28, 1972, wherein you inquired as to
whether §§ 15.1-136.1 through 15.1-136.7, both inclusive, known as the Line of Duty Act, apply (1) in the case of a crewman of a rescue squad who loses his life outside the normal territorial jurisdiction of his crew, whether within or without the Commonwealth, and (2) to a crewman of a rescue squad which has a contract with the City of Hopewell.

Section 15.1-136.2, defining the terms used in the Act, provides, in part, as follows:

“(a) ‘deceased’ shall mean any person whose death occurs as a direct or proximate result of the performance of his duty as . . . a member of any . . . rescue squad which shall have been recognized by an ordinance of any county, city or town of this State as an integral part of the official safety program of such county, city or town. The term ‘deceased’ shall not include any person insured under a group life insurance program administered by the Board of Trustees of the Virginia Supplemental Retirement System.”

The section admits of no exceptions or limitations relevant to the questions you presented.

It is my opinion, therefore, that the Line of Duty Act applies in the case of a crewman who loses his life outside the jurisdiction of the rescue squad, whether within or without the Commonwealth, and applies to a crewman who is a member of a rescue squad which has a contract with a city, if the death of the crewman occurs as a direct or proximate result of the performance of his duty, such crewman is not insured under a group life insurance program administered by the Board of Trustees of the Virginia Supplemental Retirement System, and the rescue squad has been recognized by an ordinance of the city as an integral part of the official safety program thereof.

LINE OF DUTY ACT—Recognition Ordinance—Locality does not assume liability for operation of fire department or rescue squad upon adoption.

COUNTIES, CITIES AND TOWNS—Recognition Ordinances—Locality does not assume liability for operation of fire department or rescue squad.

ORDINANCES—Recognition—No liability for operation of fire department or rescue squad.

May 24, 1973

THE HONORABLE DUNCAN C. GIBB
Member, House of Delegates

This is in reply to your recent letter in which you requested my opinion whether a county, city or town of this State, in adopting a recognition ordinance under § 15.1-136.2(a) of the Code of Virginia (1950), as amended, assumes legal responsibility for any negligent acts of the members of the fire department or rescue squad recognized as an integral part of the official safety program of such county, city or town.

The purpose of requiring that a fire department or rescue squad be recognized by ordinance as an integral part of the official safety program of a county, city or town is to qualify a deceased member of a fire department or rescue squad for benefits under the Line of Duty Act.

By employing recognition language in an ordinance the county, city or town does not thereby assume legal liability for the operation of the fire department or rescue squad.
LINE OF DUTY ACT—Validity of Retroactive Ordinance Relating Thereto.


May 31, 1973

THE HONORABLE DAVID B. AYRES, JR.
Comptroller of Virginia

This is in reply to your recent letter with which you enclosed a decree of the Circuit Court of Westmoreland County directing you to issue a warrant in the sum of $7,500.00 payable to the beneficiary of a rescue squadsman who died while in the line of duty. You also enclosed a copy of an ordinance passed by the Westmoreland County Board of Supervisors on October 11, 1972, which, in part, designated the Westmoreland County Rescue Squad as an integral part of the Westmoreland County safety program and provided that such designation should be effective as of July 1, 1972. The rescue squadsman was a member of that Squad and was killed on September 28, 1972. You then inquired as to whether the claim was valid.

At issue, is the Line of Duty Act, Title 15.1, Chapter 3, Article 1.1, Code of Virginia (1950), as amended. Section 15.1-136.1, contained therein, defines "deceased" as "any person whose death occurs as a direct or proximate result of the performance of his duty as a . . . member of any . . . rescue squad which shall have been recognized by an ordinance of any county, city, or town of this State as an integral part of the official safety program of such county, city or town."

The section does not state when a squad must have been recognized by an ordinance as an integral part of the official safety program. To interpret the section as requiring that such an ordinance be passed prior to death would add words of limitation to the section which, it would appear, would not be justified.

Therefore, in my opinion, the claim is valid even though the ordinance designating the rescue squad as an integral part of the official safety program of Westmoreland County was passed subsequent to the death of the rescue squadsman inasmuch as the ordinance, by its term, is retroactive, and such retroactivity is not precluded by the Line of Duty Act.

LOCAL LEVIES—Interest on Delinquent Taxes—County ordinance may provide for payment of interest up to eight percent.

April 20, 1973

THE HONORABLE JOSEPH M. KUCZKO
Commonwealth's Attorney for the County of Wise and City of Norton

I have received your recent letter inquiring whether § 58-964, Code of Virginia (1950), as amended, prevents a county from imposing interest at 8% upon delinquent local taxes pursuant to § 58-847.

Section 58-964 provides, inter alia:

"Interest at the rate of six per centum per annum from the thirtieth day of June of the year next following the assessment year . . . shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid . . . ."

Section 58-847 provides, inter alia:

"Notwithstanding provisions contained in §§ 58-837, 58-961, 58-963, 58-964 and 58-965, the governing body of any county . . . may 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."

The Wise County Board of Supervisors proposes to adopt an ordinance containing the following provision:

"Interest at the rate of eight per cent per annum shall be collected on delinquent county taxes commencing January 1 of the year next following that for which such taxes are assessed."

In my opinion, the adoption of the proposed ordinance is authorized by § 58-847 and when adopted, the ordinance will supersede the provisions of § 58-964. See Report of the Attorney General (1971-1972), p. 408.

LOTTERIES—Bingo—Definitions of exempt organizations.
LOTTERIES—Bingo—Delegation of authority to issue permits.
LOTTERIES—Bingo—Enforcement by injunction and criminal penalties.
LICENSES—Lotteries—Delegation of authority to issue permits.
CRIMINAL PROCEDURE—Lotteries—Enforcement by injunction and criminal penalties.

June 22, 1973

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth's Attorney for the City of Norfolk

This is in response to your recent request for an opinion concerning several aspects of Chapter 463, Acts of Assembly, 1973, which provided for an amendment to § 18.1-340 of the Code of Virginia (1950), as amended, allowing certain organizations to conduct bingo games and raffles. I will answer your questions seriatim.

Subsection (b)(1)(i) of § 18.1-340 of the Code contains the definition of various organizations which are operated exclusively for religious, charitable, scientific, literary, community, or educational purposes. You question as to what limitations would be put on this definition as it relates to "community" purposes. Subsection (2) of § 18.1-340 defines those organizations which are permitted to conduct bingo games and raffles under certain conditions. The definitions appearing in § 18.1-340(b) are practically identical to the definitions of such organizations in § 58-220 of the Code which relates to organizations exempt from state gift taxes. A major difference between the two definitions is that the word "community" is not used in § 58-220; however, § 58-12 of the Code relating to real and personal property exempt from state and local taxation does refer, in subsection (5) thereof, to property "used or operated exclusively for general and community purposes and not for profit."

It is my opinion that guidance in the interpretation of the definitions of the various exempt organizations appearing in § 18.1-340 can be made by reference to the provisions of the state tax laws relating to organizations exempt from state taxation. However, the ultimate decision as to whether a certain organization is within the exemption of § 18.1-340 will have to be made by the governing body of the political subdivision granting the permit required by the statute.

Your second question is whether an athletic club which sponsors baseball leagues of youngsters and other types of athletic activities would qualify under one of the definitions of an exempt organization under § 18.1-340, assuming that this
athletic club is a nonprofit organization and has been in existence continuously for a period of two years immediately prior to seeking a permit under § 18.1-340. The same considerations referred to above in answer to your first question would also be applicable to this question. If the organization in question qualifies for any type of tax exemption under the state tax laws, then the organization would be an organization exempt under § 18.1-340. If the organization in question is not in any manner a tax exempt organization, it would be my opinion that the organization would qualify under § 18.1-340 only if it fell within the definition of an organization operated exclusively for "community" or "educational" purposes. Without knowing more about the various activities of the organization in question, I cannot determine whether it meets the qualifications; however, the organization appears to be qualified unless some other of its activities are such as to take it outside of the definition.

The third question is whether a garden club for a small community within the City of Norfolk qualifies under any of the definitions of exempt organizations in § 18.1-340, assuming that it is a nonprofit organization and has been in existence continuously for a period of two years immediately prior to seeking a permit under § 18.1-340. It is my opinion that this organization comes within the definition of § 18.1-340(b)(2)(iv), so long as it is a corporation or association "organized and operated exclusively" for the restoration and maintenance of historic gardens and the general promotion of beautiful gardens.

Your next question relates to the issuance of the permit that is required by the statute prior to the conducting of bingo games and raffles by the exempt organizations. As you point out, the statute provides that the governing body of the locality where the organization is located is to issue such permits. Your question is, "Can this authority be delegated by the City of Norfolk to the City Manager or to the Chief of Police or some other designated city official, which would be in a position to investigate the application, issue the permit, and follow up on enforcement procedures, rather than having all of this required of the City Council?"

Section 18.1-340 of the Code sets forth no procedures or guidelines to be followed in the issuance of the permits that are required by the statute. It is my opinion that the administrative responsibility for the actual issuance of the permits, including the taking of applications, investigation of applicants, etc., can be delegated by the City Council to an administrative official of the City. However, the administrative official in question would have no discretionary authority as to the issuance of such permits so long as the organization applying therefor meets all of the requirements and qualifications of § 18.1-340. Furthermore, it is my opinion that any organization denied a permit by such administrative official would have an automatic right of review of that decision by the City Council, which is the issuing authority pursuant to the statute.

Your last question is as follows:

"The statute provides, in part, that any person or member of an organization violating this statute shall be guilty of a misdemeanor. It then further provides that should an organization be found in violation of this section, then the Commonwealth's Attorney may, in addition to the foregoing criminal penalty, apply for an injunction. My question is, should a member of an organization violate this section, rather than the organization itself, could the organization then be enjoined? Secondly, must the conviction take place prior to the seeking of an injunction?

"As I read the statute, an individual can be prosecuted criminally, but an 'organization' cannot. If this interpretation is correct, how does the violation by a member, which could be a criminal offense, tie into the violation by the organization, which could result in injunctive proceedings?"
Under the statutory scheme set up in § 18.1-340, the person or persons organizing, managing, or conducting authorized bingo games or raffles on behalf of exempt organizations must be bona fide members of such organization. In that capacity, such individuals would be acting on behalf of the organization. Therefore, a violation of the provisions of § 18.1-340 by an individual would also be a violation by the organization sponsoring or conducting the bingo game or raffle in question. The penalties provided in the statute, therefore, provide for two types of enforcement in such a situation. One type of enforcement is the criminal penalty brought against the individual in question, and the other type of penalty is the injunction brought against the organization in question. Therefore, it is my opinion that when a violation of the section occurs, an injunction may be brought against the organization, as well as criminal prosecution against the individual involved. Further, the conviction of the individual would not be a prerequisite to the obtaining of the injunction. It is my opinion that your interpretation is correct and that criminal prosecutions can only be brought against the individual in question and not against the organization. Therefore, the use of the injunction proceeding is for the purpose of preventing further violations in the future by the organization where a past violation has occurred.

LOTTERIES—Bingo and Raffles; Not Legal When Conducted by Tax-exempt Organization.

July 18, 1972

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

This is in response to your recent letter in which you inquire regarding the effect of Chapter 364 of the Acts of Assembly of 1972, adding § 18.1-318.1 of the Code of Virginia (1950), as amended, upon the legality of the operation of bingo games and raffles in the Commonwealth of Virginia. Your specific inquiry is whether this change in the law has the effect of legalizing the operation of bingo games and raffles by organizations exempt from tax under the United States Internal Revenue Code of 1954, as amended.

This same inquiry was previously posed by the Honorable James A. Cales, Jr., Commonwealth's Attorney of the City of Portsmouth. In my opinion to him of June 14, 1972, a copy of which is enclosed herewith, I pointed out that § 18.1-318.1(d) operates only to exempt from the coverage of the other paragraphs of that section the tax exempt organizations described. Thus, the legislation enacted at the 1972 Session of the General Assembly did not have the effect of legalizing the operation of bingo games and raffles conducted by tax exempt organizations in Virginia but only excluded such organizations from the coverage of the section prohibiting the operation of an illegal gambling business. Thus, my opinion to the Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated July 20, 1971, is still valid.

Prior to the convening of the 1972 General Assembly Session the Virginia State Crime Commission recommended the enactment of legislation making felonious the conduct of a professional gambling enterprise and § 18.1-318.1 is the result of that recommendation. The exclusion of tax-exempt organizations from the operation of that statute is an obvious effort to insulate them from felony charges. However, several other bills which were introduced at the 1972 Session which would have removed even the misdemeanor penalty for such organizations for the operation of bingo games, lotteries or other games of chance were defeated. Senate Bill 76 and House Bill 539, copies of which are enclosed, were not passed. Thus, § 18.1-318.1 constitutes the only amendment enacted by the General Assembly this
year as a result of its consideration of various measures designed to modify Virginia's lottery laws. As you know, any further modification or amendment would have to be initiated by the General Assembly.

LOTTERIES—City May Include in Ordinance Reasonable Regulations for Bingo and Raffle Permits.

CITIES, COUNTIES AND TOWNS—Lotteries—Ordinance may include reasonable regulations for bingo and raffle permits.

LICENSES—Lotteries—Ordinance may include reasonable regulations for bingo and raffle permits.

ORDINANCES—Lotteries—City may set reasonable regulations for bingo and raffle permits.

June 21, 1973

THE HONORABLE LEROY S. BENDHEIM
Member, Senate of Virginia

This is in reply to your letter of June 14, 1973, in which you request an opinion concerning the effect of Chapter 463, Acts of Assembly, 1973, which provides for an amendment to § 18.1-340 of the Code of Virginia (1950), as amended, to authorize certain organizations to conduct bingo games and raffles. Your specific question is as follows:

"The City Council of the City of Alexandria, as a result of the enactment of § 18.1-340(b), is considering the passage of an ordinance which would establish procedures and regulations for obtaining annual bingo and raffle permits. Assuming the city otherwise has the power to restrict the location and hours of operation of bingo games and raffles within the city:

1. Would § 18.1-340(b) preclude the city from including in such ordinance a regulation which would restrict the location and hours of operation of bingo games and raffles within the city in some reasonable way?

2. If the answer to question 1 is yes, then would § 18.1-340(b) preclude the city from accomplishing the same purpose by amending its zoning ordinances?"

Subsection (b) of § 18.1-340, as amended by the 1973 Session of the General Assembly, provides that those organizations qualified therefor may not conduct bingo games and raffles without first obtaining an annual permit from the governing body of the locality wherein the business office of the organization is located. The statute in question also places some restrictions on such bingo games and raffles, particularly relating to the use of the proceeds therefrom and what individuals can properly manage and conduct such bingo games and raffles. The statute makes no reference whatsoever to restrictions on location and times when bingo games or raffles may be conducted. Furthermore, the statute makes no reference as to whether the locality issuing the annual permit may impose additional restrictions on bingo games and raffles conducted within that locality.

Generally speaking, when a statute or legislation authorizes a locality to issue permits, it is implicit within that authority that the locality may place reasonable restrictions upon the activity for which such permits are issued. 51 Am. Jur. 2d, "Licenses and Permits," §§ 88-93. The only limitation on such authority is that such restrictions should be for the sole purpose of promoting the public health,
safety, and welfare and, further, such restrictions should be for reasonable regulation only, and not of a prohibitive nature or prohibitive force. 51 Am. Jur. 2d, "Licenses and Permits," § 101.

Therefore, in answer to question 1, it is my opinion that § 18.1-340(b), as enacted by the 1973 Session of the General Assembly, does not preclude the city from including in their ordinance regulations restricting the location and hours of operation of bingo games and raffles within the city as long as those regulations meet the requirements set forth above and are reasonable requirements. Since the answer to question 1 is in the negative, no answer to question 2 is required.

LOTTERIES—Minors Can Play Bingo Games and Participate in Raffles Conducted Under § 18.1-340(b).

LOTTERIES—Alcoholic Beverage Control Laws Do Not Prohibit Sale of Alcoholic Beverages Where Bingo Games Held.

ALCOHOLIC BEVERAGE CONTROL LAWS—Lotteries—Sale of alcoholic beverages where bingo games held.

THE HONORABLE LLOYD H. HANSEN
Commonwealth's Attorney for the City of Hampton

This is in response to your recent request for an opinion concerning the interpretation of Chapter 463, Acts of Assembly, 1973, which provided for an amendment to § 18.1-340 allowing certain organizations to legally conduct bingo games and raffles. I will answer your questions seriatim.

Your first question is whether minors can play bingo and participate in raffles which are conducted pursuant to the authority under § 18.1-340 of the Code. The effect of the 1973 amendment to § 18.1-340 is to provide an exemption from the prohibition of the gambling laws for certain nonprofit organizations conducting bingo games or raffles under the requirements set out in the statute. The statute makes no reference whatsoever to what persons will be allowed to participate in such bingo games or raffles, but applies only to setting up the regulations under which such games can be conducted. I can find no other legislation which would prohibit minors from participating in legal activities of this nature, and therefore it is my opinion that minors can play bingo games and participate in raffles which are conducted pursuant to the authority of subsection (b) of § 18.1-340 of the Code.

Your second question is whether newspaper advertising is permitted in conjunction with authorized bingo games and raffles. This question was answered in a previous opinion to the Honorable Benjamin H. Woodbridge, Jr., a Member of the House of Delegates, dated June 4, 1973, a copy of which is enclosed.

Your third question is as follows:

"Should an organization decide to rent the Roof Garden of the Hotel Chamberlin to conduct their bingo games, can the Hotel legally sell alcoholic beverages to such participants within the confines of the Roof Garden?"

Section 18.1-340 of the Code makes no reference whatsoever as to where such authorized bingo games or raffles may be conducted, and places no prohibitions or restrictions on the conduct of such games in the manner about which you inquire. The Alcoholic Beverage Control Laws of Virginia do not prohibit the activity about which you inquire, and there are no regulations of the Alcoholic
Beverage Control Board at this time regulating this situation. Therefore, the answer to your question is in the affirmative.

LOTTERIES—Punch Boards Prohibited by § 18.1-329 Even to Organization Authorized to Conduct Bingo Games and Raffles.


June 21, 1973

The Honorable Edward E. Lane
Member, House of Delegates

This is in response to your recent request for an opinion concerning an interpretation of Chapter 463, Acts of Assembly, 1973, which provided for an amendment to § 18.1-340 of the Code of Virginia (1950), as amended, authorizing certain organizations to conduct bingo games and raffles without being in violation of the gambling prohibitions of §§ 18.1-316 and 18.1-340 of the Code. Your first question is as follows:

"Does a punch board in which each punch is sold for the same price with a set and pre-determined prize consisting of merchandise, money or other prize constitute a raffle? Is the use of a punch board permitted by those legally authorized to conduct a bingo and raffle pursuant to Section 18.1-316 and Section 18.1-340 of the Virginia Code as amended? Reference is made to Section 18.1-329 of the Virginia Code."

The 1973 amendment to § 18.1-340 provides that § 18.1-340 shall not apply to any bingo game or raffle conducted solely by certain exempt organizations under certain restrictions. The 1973 amendment also provided for an exemption to the prohibitions of § 18.1-316, which prohibits certain types of gambling activities, for the organizations that are authorized to conduct bingo games and raffles under § 18.1-340(b). However, as you point out in your letter, the operation, use, etc., of punch boards is specifically prohibited by § 18.1-329 of the Code. The exemptions provided in the 1973 amendments make no reference to the prohibitions of § 18.1-329; therefore, it is my opinion that organizations legally authorized to conduct bingo games and raffles pursuant to § 18.1-340 would not be authorized as a part thereof to use the punch board in violation of § 18.1-329.

Your second question is as follows:

"Does the drawing of a number from a bowl or other container in which each number is sold for the same price for a prize which is pre-determined in advance constitute a raffle?"

"In each instance, every participant is equal with every other in proportion to his risk and prospective gain. The prize is a common fund or that which is purchased by a common fund. Each is an equal actor in developing the chance in proportion to his risk. The successful party takes the whole prize and the rest lose, unless there is pre-determined in advance a first, second and third or other order of prizes."

Section 18.1-340 of the Code, prior to the 1973 amendments, had been interpreted on many occasions by previous opinions of this office, as well as by court decisions. Such interpretations specified that an illegal raffle or lottery existed whenever the elements of prize, chance and consideration are present in combination. Clearly, all three elements are present in the activity about which you inquire. Therefore, such an activity is prohibited by the provisions of § 18.1-340(a). It therefore follows that an organization authorized to conduct bingo games and
raffles under § 18.1-340(b) is in fact authorized to conduct those types of raffles which are prohibited under subsection (a) of that section. Therefore, it is my opinion that the activity about which you inquire does constitute a raffle and could be conducted by an exempt organization authorized to conduct raffles under subsection (b) of § 18.1-340.

LOTTERIES—Sweepstakes Not a Lottery if no Purchase or Other Consideration Required.

December 6, 1972

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

This is in reply to your inquiry of November 20, 1972, as to whether the promotion of certain sweepstakes by national manufacturers would constitute a lottery under Virginia law. You attached to your inquiry copies of several of the entry blanks which all consistently provide for a person to fill in his name and address, and none of which require any purchase as a prerequisite for entering the sweepstakes. The winners will then be selected at random from among the persons who make entries. Your inquiry would appear to be governed by a prior opinion of this office of December 29, 1969, to the Honorable Frederick T. Gray, then a Member of the House of Delegates of Virginia, which may be found in the Report of the Attorney General (1969-1970), page 167, a copy of which is attached hereto.

In that opinion, this office pointed out that a lottery as proscribed by § 18.1-340 of the Code of Virginia (1950), as amended, consists of the three elements of prize, chance, and consideration. Section 18.1-340.1 states the following with regard to the meaning of the term “consideration”:

“In any prosecution under § 18.1-340, no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith.”

Since no purchase is required as a prerequisite for the entry of either of the sweepstakes described in your letter, the element of consideration is not present, and participation in the contests described would not be violative of the laws of Virginia prohibiting the operation of lotteries.

MARRIAGE—Minister Authorized to Celebrate Rites of Matrimony—One qualified anywhere in State may celebrate marriages in any county or city within the State.

MINISTERS—Celebration of Rites of Matrimony in the State.

September 29, 1972

THE HONORABLE JOHN H. POWELL, Clerk
Circuit Court of the City of Nansemond

This is in reply to your letter of September 19, 1972, which reads in part as follows:

“A minister while ordained as a Baptist qualified in Brunswick County,
Virginia, to celebrate the rites of matrimony. Since that time he has become a minister in the United Church of Christ. Is it necessary that he again qualify to celebrate the rites of matrimony?"

Section 20-23 of the Code of Virginia (1950), as amended, reads as follows:

"When a minister of any religious denomination shall produce before the circuit court of any county or city or before the corporation court of any city in this State, or before the judge of either of such courts in vacation, proof of his ordination and of his being in regular communion with the religious society of which he is a reputed member, or proof that he holds a local minister's license and is serving as a regularly appointed pastor in his denomination, such court, or the judge thereof in vacation, may make an order authorizing such minister to celebrate the rites of matrimony in this State, upon the execution by such minister of a bond in the penalty of five hundred dollars, with surety, conditioned according to law, before either of such courts, or before the judge of either of such courts in vacation, or before the clerk of either of such courts. Any order made under this section may be rescinded at any time by the court or by the judge thereof in vacation."

Since the minister in question has been qualified to celebrate the rites of matrimony in this State under an order of a circuit court of one county, I am of the opinion that he is not required to again qualify in another county.

This office has ruled in a former opinion that the order of a circuit court judge issued under this section, and the execution of the bond, gives the minister the right to celebrate marriages in any county or city within the jurisdiction of this State. See opinion to Rear Admiral G. H. Burrage, United States Navy, Commandant, Naval Operating Base, dated August 4, 1930, and found in Report of the Attorney General (1930-1931), p. 144.

In the present situation the minister has been qualified to celebrate the rites of matrimony in Brunswick County. While he has become a minister in a different church than that in which he was originally ordained, he still meets the requirements under § 20-23 above quoted, and, in my opinion, is not required to requalify in order to celebrate the rites of matrimony. I, therefore, answer your question in the negative.


January 4, 1973

THE HONORABLE MACK I. SHANHOLTZ, M. D.
State Health Commissioner

This is in reply to your letter of December 4, 1972, wherein you state that the 1972 General Assembly of Virginia amended § 54-276.9 of the Code of Virginia (Good Samaritan Law) by adding §§ (b) and (c), the latter reading as follows:

"Any person having attended and successfully completed a course in cardiopulmonary resuscitation, which has been approved by the Board of Health, who in good faith and without compensation renders or administers emergency cardiopulmonary resuscitation, cardiac defibrillation, or other emergency life-sustaining or resuscitative treatments or procedures which have been approved by the State Board of Health to any sick or injured person, whether at the scene of a fire, an accident or any other place, or while transporting such person to or from any hospital, clinic, doctor's
office or other medical facility, shall be deemed qualified to administer such emergency treatments and procedures; and such individual shall not be liable for acts or omissions resulting from the rendering of such emergency resuscitative treatments or procedures."

Thereafter, you ask:

"... whether or not the specialized ambulance personnel so trained would be violating the Medical Practice Act of Virginia in carrying out the measures specified in the Legislation."

Section 54-276.9 of the Code reads, in pertinent part, as follows:

"Any person having attended and successfully completed a course in cardiopulmonary resuscitation, which has been approved by the Board of Health ... shall be deemed qualified to administer such emergency treatments and procedures ..."

Therefore, in my opinion, § 54-276.9 of the Code would provide an exception to the Medical Practice Act and one who provides medical services as specified therein would not be in violation of the Medical Practice Act.

MENTAL HYGIENE AND HOSPITALS—Authority to Refuse Admission of Patient Certified by Court.

JUDGES—Bound by § 37.1-1(15).

MENTALLY RETARDED—Necessity for Determination of—Mentally deficient patients treated as mentally retarded.

July 7, 1972

The Honorable F. Nelson Light, Judge
County Court of Pittsylvania County

This is in response to your letter wherein you posed two inquiries which I will consider and answer in the order posed.

First, your initial inquiry reads as follows:

"Please advise me under what authority the Department of Mental Hygiene and Hospitals through its hospital facilities has to refuse admission of this court under Section 37.1-67 and further advise me as to whether I am bound by 37.1-1(15)."

The Department of Mental Hygiene and Hospitals has authority to refuse admission of a patient certified pursuant to § 37.1-67, if (1) the certification or order for admission does not conform to law and does not contain satisfactory and sufficient evidence of mental illness (§ 37.1-68); or (2) the person, upon examination at the hospital by a staff physician, is determined not to reveal sufficient cause to believe that such person is or may be mentally ill (§ 37.1-70), or if the hospital has become too crowded (§ 37.1-71). Under any of these conditions, the hospital facility has authority to refuse admission to the patient, even those involuntarily certified. Further, with respect to the second part of your inquiry as to whether or not you are bound by § 37.1-1(15) of the Code, I would advise that, in my opinion, you are bound by the aforesaid section.

With respect to your inquiry as to the necessity for a determination as to whether or not the person is mentally retarded, the answer is in the affirmative. Further, patients who are mentally deficient shall, with respect to admission, be treated as patients who are mentally retarded. Such individuals are, therefore, to be removed to the appropriate hospital or other facility as designated by the
Commissioner of the Department of Mental Hygiene and Hospitals pursuant to § 37.1-67 of the Code.

MENTAL HYGIENE AND HOSPITALS—Mental Hygiene Clinics — Local funds; not public funds; not subject to control by State.

April 13, 1973

THE HONORABLE ALEXANDER B. McMURTRIE
Member, House of Delegates

This is in reply to your letter wherein you make inquiry into the propriety of certain actions by a State agency. Specifically, your inquiry is as follows:

"Is it proper for the head of a Virginia State Agency to make arrangements in its own name—not through its advisory board—to authorize the use of its name, its letterhead, a letter signed by its director, and to pledge that the State will match any donation "dollar for dollar" for a promotional drive by one weekly newspaper in competition with another weekly newspaper in its area?"

In investigating this matter, it was learned that the arrangement to which you make reference was not entered into by a State agency head, but was with the local advisory board. Also, in discussing this matter with you, it was learned that the agency in question is the Chesterfield Mental Health Clinic, a local-State jointly funded and operated facility established pursuant to § 37.1-23 of the Code of Virginia (1950), as amended. The local share of the funds is provided by contributions or donations from various individuals, organizations and agencies, which local share is administered by the local Advisory Board of the Mental Health Clinic concerned.

With respect to your specific inquiry, I refer you to an official opinion rendered to the Honorable Alfred E. H. Ruth, Director, Department of Mental Hygiene and Hospitals, dated May 26, 1958, which opinion reads in part as follows:

"I am of the opinion that this Fund B is not public or State funds and, therefore, that the Department of Mental Hygiene and Hospitals has no control over or responsibility for the administration and audit of these funds. These funds are raised and expended by local charitable organizations, namely, the local advisory board of a mental hygiene clinic. The State has no voice in how these funds were raised or how these funds are to be expended. . . ."

Therefore, based on the facts of the particular situation in question, I would conclude that the arrangement as outlined would not be unlawful.

MENTALLY RETARDED—Person Adjudicated Mentally Retarded, Disqualified from Registering and Voting.

ELECTIONS—Mentally Retarded; Disqualified from Registering and Voting.

ELECTIONS—Burden of Proof on Mentally Retarded Applicant to Prove by Medical Evidence Sufficient Mental Capacity to Vote.

August 1, 1972

THE HONORABLE LESLIE C. CURDTS
General Registrar for the City of Norfolk
In your letter of July 26, 1972, you inquire whether a person who has been adjudicated to be mentally retarded is disqualified from registering and voting under § 24.1-42 of the Code of Virginia (1950), as amended.

That section provides in pertinent part as follows:

"... No person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished."

This provision is also found in Article II, Section 1, of the Constitution of Virginia. The purpose of these provisions is to ensure that the franchise is exercised only by persons capable of making a mature and responsible decision among candidates and issues. While some mentally retarded persons may eventually achieve this maturity through training, it is unfortunately true that in most cases mentally retarded persons do not achieve the degree of responsibility contemplated by the Constitution for exercise of the franchise.

It is my opinion, therefore, that a person who has been adjudicated to be mentally retarded is disqualified from registering and voting within the meaning of § 24.1-42. May I point out, however, that such a person may be able to establish by appropriate medical evidence that he or she is of sufficient mental capacity to establish his competency to vote. In such a case the burden of proof is on the applicant. I enclose an opinion of this office to the Honorable Charles G. Stone, Commonwealth's Attorney for Fauquier County, dated December 13, 1966, and found in the Report of the Attorney General (1966-1967), at page 241, which so holds.

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MILK AND MILK PRODUCTS—Grade “A” Unpasteurized Milk—No authority to institute State program for certification.

May 31, 1973

THE HONORABLE V. EARL DICKINSON
Member, House of Delegates

This is in reply to your letter of April 23, 1973, which reads as follows:

"I have been requested to obtain an opinion from your office. The question is whether or not our Department of Agriculture and Commerce has the power through its Division of Animal Health and Dairies to institute a state program for certified Grade ‘A’ unpasteurized milk."

In view of the fact the licensed producers may presently lawfully sell raw unpasteurized milk to processors who, in turn, are required to pasteurize the milk prior to sale for human consumption, I assume that a State program for certified Grade A unpasteurized milk would permit the sale of such raw or unpasteurized milk to consumers for human consumption.

The State Board of Agriculture and Commerce has been authorized to establish and enforce definitions, standards of quality and identity, and regulations dealing with the issuance of permits, production, importation, processing, grading, labeling and sanitary standards for milk and milk products. Section 3.1-530.1, Code of Virginia (1950), as amended. Section 3.1-530.2 provides enabling legislation for the Board of Agriculture and Commerce and further provides the Board with the necessary standards which the Board must follow in promulgating its regulations dealing with the sanitation and marketing of milk and milk products. That statute reads as follows:

"§ 3.1-530.2. In adopting regulations for the purpose of sanitation and to prevent deception, the Board shall be guided by those regulations recom-
mended from time to time by the United States Department of Health, Education and Welfare and the United States Department of Agriculture. The definitions and standards so promulgated may conform, so far as practical, to the definitions and standards promulgated or recommended by the Secretary of the United States Department of Health, Education and Welfare. The regulations authorized by § 3.1-530.1 and this section shall be adopted in accordance with the General Administrative Agencies Act.” (Emphasis supplied.)

In this regard, the most recent recommendations (which were also in effect at the date of the enactment of § 3.1-530.2) of the United States Department of Health, Education and Welfare and the United States Department of Agriculture are contained in the 1963 Recommendations of the United States Public Health Service, Grade “A” Pasteurized Milk Ordinance. No allowance is made in the Grade “A” Pasteurized Milk Ordinance for the sale of unpasteurized milk in any form if such milk is intended for human consumption by the final consumer or sold to restaurants, soda fountains, grocery stores or similar establishments. In fact, Section 9 of that publication expressly recommends that “only Grade A pasteurized milk and milk products shall be sold to the final consumer. . . .”

Although § 3.1-530.2 does not require that the State Board of Agriculture and Commerce adopt verbatim the provisions of the Grade “A” Pasteurized Milk Ordinance, the statute does make it mandatory that the Board be guided by those recommendations, and the recommendations that only pasteurized milk be lawfully sold appear to be an integral part of such recommendations. In addition, I would also point out that Virginia law, in effect immediately prior to the enactment of the aforementioned §§ 3.1-530.1 and 3.1-530.2, expressly prohibited the sale of any milk or milk products to final consumers except Grade “A” pasteurized. See Ch. 57 of the Acts of Assembly 1962.

In view of the previous policy expressed by the General Assembly to prohibit the sale of unpasteurized milk taken in conjunction with present enabling legislation requiring that the Board of Agriculture and Commerce in determining such matters be guided by recommendations which also prohibit the sale of unpasteurized milk, I am constrained to opine that the answer to your question is in the negative.

MINORS—Individual 18 Years of Age and Older No Longer a Minor Child Within Meaning of § 20-107.

MINORS—Parent’s Duty to Support Child 18 Years of Age and Older.

CONFLICT OF LAWS—Sections Providing Specific Exceptions Prevail Over General Sections; When 18-Year Old Is Considered an Adult.

AMENDMENTS—Sections Providing Specific Exceptions Prevail Over General Sections; When 18-Year Old Is Considered an Adult.

July 17, 1972

The Honorable Thomas W. Moss, Jr.
Member, House of Delegates

In your recent letter you inquire as to whether the provisions of § 20-107 of the Code of Virginia (1950), as amended, continue to require the father in a divorce action to support children beyond the age of 18 years, in view of the recent legislation enacted by the 1972 General Assembly which lowered the age of majority for most purposes to 18.
Section 20-107 of the Code provides:

"Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce the court may make such further decree as it shall deem expedient concerning the estate and the maintenance of their minor children, and may determine with which of the parents the children or any of them shall remain, provided, that the court shall have no authority to decree support of children or alimony to continue after the death of the father or husband. The word "estate" as used in this section shall be construed to mean only those rights of the parties created by the marriage in and to the real property of each other, and such rights of either party, in the event of the death of the other, in the distribution of such decedent's estate pursuant to § 64.1-11."

Chapter 824 of the Acts of Assembly of 1972, amended the Code by adding § 1-13.42 as follows:

§ 1-13.42. (a) Unless a different meaning appears from the context:

(1) The words 'infant', 'child', 'minor', 'juvenile' or any combination thereof shall be construed to mean a person under eighteen years of age.

(2) When used to mean or include disability because of age, the term 'person under disability' shall be construed to mean or include a person under eighteen years of age.

(3) The word 'adult' shall be construed to mean a person eighteen years of age or over.

(4) The word 'infancy' shall be construed to mean the state of being under eighteen years of age.

(b) For the purposes of all laws of the Commonwealth including common law, case law and statutory law, unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age and shall reach the age of majority when he becomes eighteen years of age."

It is my opinion that after July 1, 1972, when the above-quoted language of § 1-13.42 became effective, an individual eighteen years of age and older may no longer be considered a minor child within the meaning of § 20-107. Section 1-13.42 makes it quite clear that such an individual is an adult.

Although § 20-107 can therefore not be read to require the payment of child support for persons 18 years of age and older, this does not affect any duty of support which a parent might otherwise owe to his child as a matter of law, even after such child attains the age of majority, e.g., where the child is under a mental or physical incapacity.

MINORS—Uniform Gifts to Minors Act—Section 1-13.42 classifying 18-year old as adult not applicable to this Act, § 31-26, et seq.

CONFLICT OF LAWS—Sections Providing Specific Exceptions Prevail Over General Sections.

July 17, 1972

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

I have received your recent letter inquiring whether § 1-13.42, Code of Virginia
REPORT OF THE ATTORNEY GENERAL

(1950), as amended, classifying an adult as a person eighteen years of age or over, applies to the Virginia Uniform Gifts to Minors Act, § 31-26, et seq.

Section 1-13.42 provides, inter alia:

"(a) Unless a different meaning appears from the context:

'* * *

"(3) The word 'adult' shall be construed to mean a person eighteen years of age or over.

'* * *

"(b) For the purposes of all laws of the Commonwealth including common law, case law and statutory law, unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age and shall reach the age of majority when he becomes eighteen years of age."

(Emphasis supplied.)

Section 31-26 describes an adult, for the purposes of the Virginia Uniform Gifts to Minors Act, as "a person who has attained the age of twenty-one years."

Section 1-13.42 was enacted by the General Assembly as part of House Bill No. 379. This bill specifically amended a number of other sections of the Code of Virginia by deleting "twenty-one" and inserting "eighteen" within provisions concerning minimum age. No reference was made in the bill to § 31-26. In view of these facts and the provision within § 1-13.42 that it applies unless an exception is specifically provided elsewhere in the Code, I am of the opinion that the Virginia Uniform Gifts to Minors Act was not affected by the enactment of House Bill No. 379. Accordingly, an adult, for the purposes of § 31-26, et seq., continues to be a person who has attained the age of twenty-one years.

MOTOR VEHICLES—Believed in Violation of Lawful Weight Limits—May be weighed by loadometers as provided in § 46.1-437.

EVIDENCE—Testing of Loadometers; Sufficient to Establish Prima Facie Case of Accuracy.

AUGUST 23, 1972

THE HONORABLE KEARY R. WILLIAMS
Commonwealth's Attorney for Buchanan County

This is in reply to your letter of August 5, 1972, in which you relate the circumstances of trial and convictions in two instances of operating vehicles over the gross weight permitted by law and present the questions raised in the paragraph which I quote, as follows:

"The basic question presented was whether the portable scales or loadometers used by the Troopers in these cases are permissible and whether the case may go to the Jury on the Commonwealth showing that the scales were calibrated and found to be accurate for field use on November 17, 1971, approximately 6 1/2 months before this weighing took place and calibrated again on July 29, 1972, approximately 1 1/2 to 2 months after the weighing took place and found to be accurate for field use when it is conceded that the Commonwealth did not and could not show that the scales were tested for accuracy on June 3, 1972, the day the weighing took place."

The authority for weighing vehicles believed to be operating in violation of the lawful weight limits is found in § 46.1-347, Code of Virginia (1950), as amended, which I quote, in part, as follows:
“Any officer authorized to enforce the law under this title, having reason to believe that the weight of a vehicle and load is unlawful, is authorized to weigh the same. If the place where the vehicle is stopped is ten miles or less from a permanent weighing station, the officer may, and upon demand of the driver shall, require the vehicle to proceed to such station; if the distance to the nearest permanent weighing station is more than ten miles such vehicle may be weighed by loadometers.”

In regard to your first question, this section clearly authorizes the use of loadometers under the stated conditions. In my interpretation, the use of such loadometers is precluded only in any instance in which the vehicle is stopped not more than ten miles from a permanent weighing station and the driver demands that the vehicle be weighed at such station. There is nothing in the facts presented to show that such conditions existed. Accordingly, it is my opinion that the use of the loadometers in these cases was permissible.

You further raise the question of whether the case may go to the jury on the Commonwealth’s showing that, although they were not tested on the date of use, the loadometers were tested approximately six and one-half months before and again one and one-half months after the date of use, and “found to be accurate for field use” each time. My answer is in the affirmative, since I believe such evidence is sufficient to establish a prima facie case as to the accuracy of the loadometers. There are no requirements that the scales or loadometers prescribed by § 46.1-347 be tested or calibrated on the date of use. In fact, this section contained no reference to testing the accuracy of such weighing machines prior to the amendment found in Chapter 292, Acts of Assembly of 1972, which became effective July 1, 1972. The amendment, which has no direct bearing on the cases under consideration, provides, essentially, that in any court or legal proceeding in which any question arises as to the calibration or accuracy of any such scales or loadometers, a certificate, executed and signed under oath by the inspector calibrating or testing any such device, “shall be admissible when attested by one such inspector who executed and signed it as evidence of the facts therein stated and the results of such testing.”

MOTOR VEHICLES—Breath or Blood Test—Unavailability of one test not grounds for refusing other.

POLICE OFFICERS—Meaning of “Participating” in Arrest—Restraining accused at place of testing is not participating in arrest.

September 21, 1972

Colonel H. W. Burgess, Superintendent
Department of State Police

This is in reply to your letter of September 1, 1972, in which you refer to § 18.1-55.1 of the Code of Virginia (1950), as amended, in light of its amendment by Chapter 756 of the Acts of Assembly of 1972, effective January 1, 1973, and ask my opinion in the following, which I quote:

“1. Subparagraph (b) contains the provision that any person arrested for driving under the influence of intoxicants shall elect to have either the breath or blood sample taken but not both. There is the further provision that it shall not be a matter of defense that either test is not available.

“In view of this language, should an individual choose a type of test which is not available, can he then be charged with the refusal to take one that is available? The situation might occur in which
the arrested individual chooses a blood test and no qualified person is available to draw blood in the county of arrest nor in adjacent jurisdictions, however, the breath test might be immediately available.

"2. Who is deemed to be 'participating in the arrest of the accused' as used in the third paragraph of subparagraph (rl)? The situation might arise in which the arresting officer carries the accused to a point where another police officer, who is a licensed breath test device operator, is preparing to administer the test. The accused tries to leave and it is necessary for both officers to restrain him. Would the breath test device operator then be considered participating in the arrest of the accused and thereby ineligible to make the test?"

Paragraph (b) of § 18.1-55.1, as amended by Chapter 756 of the Acts of Assembly of 1972, is as follows:

"(b) Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after January one, nineteen hundred seventy-three, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood, if such person is arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense. Any person so arrested shall elect to have either the breath or blood sample taken, but not both. It shall not be a matter of defense that either test is not available."

The 1972 amendment inserted the reference to the breath sample and provided that a person so arrested shall elect to have either the breath or blood sample taken, but not both. The broadening of the statute to offer two types of tests instead of one, as formerly, has the dual advantage of choice and availability. It offers an alternate scientific test to those persons who may be adversely affected by drawing a blood sample. At the same time, it recognizes the fact that one or the other of the two tests may not be available in some instances.

Although the person arrested makes the election to have either the breath or blood sample taken, the last sentence of paragraph (b) specifically states that the fact that either test is not available shall not be a matter of defense. This is tantamount to a declaration that the chemical test may not be avoided by choosing a test which is not available. In my opinion, the fact that one or the other test is not available in a given situation is not a basis for a reasonable refusal of the one which is available. I shall answer your first question, therefore, in the affirmative.

In regard to the questions contained in paragraph numbered 2 of your letter, paragraph (rl) of § 18.1-55.1 states: "In no case may the officer making the arrest, or anyone with him at the time of the arrest, or anyone participating in the arrest of the accused, make the breath test or analyze the results thereof." Any person participating in the arrest, or with the arresting officer at the time of the arrest, is placed in the same category as the officer making the arrest, insofar as being excluded from making the test or analyzing the results is concerned.

As defined in Black's Law Dictionary, Fourth Edition, the word "Arrest" means "To deprive a person of his liberty by legal authority. Taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand." Clearly, the arrest is accomplished when the person is first deprived of his liberty and taken into custody. The word "participating," as used in this statute, obviously means "taking a part" in the arrest.

In regard to your question of who is deemed to be participating in the arrest of
the accused, therefore, it is my opinion that anyone who takes a part in initially depriving the accused of his liberty and taking him into custody would be deemed to be "participating."

It is provided in paragraph (b) of § 18.1-55.1 that any person who operates a motor vehicle on a public highway in this State shall be deemed to have consented to the test, if such person "is arrested . . . within two hours of the alleged offense." Obviously, the term "arrest," as used in this section, has reference to the initial deprivation of liberty and taking into custody of the person accused of driving under the influence of intoxicants. If the arrest were a protracted or continuing act, there would be no way to determine whether it took place within two hours of the offense. Further, if the arresting process continued up until the time the person accused was taken to the place of obtaining the breath sample, it would be impossible to apply the statute, since the person making the test would then be with the arresting officer at the time of arrest, which, under paragraph (d) of § 18.1-55.1, would preclude him from giving the test. It is my opinion that any necessary restraint of the accused at this point comes after the arrest is consummated, and, therefore, your final question is answered in the negative.

MOTOR VEHICLES—Conviction of Violating Posted Weight Limit on Bridge—Assessment of liquidated damages mandatory under §§ 46.1-340 and 46.1-342 and parallel ordinances under § 46.1-342.1.

October 4, 1972

The Honorable H. Ratcliffe Turner, Judge
County Court for the County of Henrico

This is in reply to your letter of September 18, 1972, which I quote, as follows:

"Recently several County officers have written summonses on County Ordinance 9-210 for trucks violating the gross weight limits on a particular bridge. My question is whether or not the provisions of County Ordinance 9-214.2 would require the assessment of liquidated damages upon conviction of the stated offense. For your purposes, Section 9-210 and 9-214.2 of the County Code parallel and are identical with Virginia Code Sections 46.1-340 and 46.1-342.1. My same question would be asked had the charges been brought under Virginia Code Section 46.1-340.

"It would appear to me that the language of § 46.1-342.1 of the Virginia Code would make the assessment of liquidated damages in such a case mandatory but since there may be a question, I would appreciate your advice."

Section 46.1-339, Code of Virginia (1950), as amended, establishes the maximum gross weight and axle weight of any vehicle to be permitted on the road surface of any highway. Section 46.1-340, Code of Virginia (1950), as amended, states: "No vehicle shall cross any bridge or culvert within the State if the gross weight of such vehicle is greater than the amount posted on the bridge or culvert as its carrying capacity." Section 46.1-341, Code of Virginia (1950), as amended, provides, in part, that, "Any violation of §§ 46.1-339 and 46.1-340 shall constitute a misdemeanor and shall be punished as provided in § 46.1-16; . . . ." Section 46.1-342, Code of Virginia (1950), as amended, states, in part, "Upon conviction of any person for violation of any weight limit as provided in this chapter . . . the court shall assess the owner, operator or other person causing the operation of such overweight vehicle liquidated damages. . . ."
It will be noted that § 46.1-342 refers to the violation of any weight limit as provided in this chapter. The weight limit for vehicles crossing bridges, as provided in this chapter, is "the amount posted on the bridge," as indicated in § 46.1-340, previously quoted herein. Further, the liquidated damages provision of § 46.1-342 is mandatory. A similar view is expressed in a letter to The Honorable George A. Pruner, Commonwealth's Attorney for Russell County, dated November 8, 1968, and found in Report of the Attorney General (1968-1969), p. 177.

The purpose of § 46.1-342.1, Code of Virginia (1950), as amended, to which you refer, is to authorize any county such as Henrico, which has withdrawn its roads from the secondary system of the State highways in accordance with Chapter 415 of the Acts of 1932, to adopt ordinances providing for weight limits and the assessment of liquidated damages as to overweight vehicles. Such weight limits are to be in accordance with the weight limits established by § 46.1-339, and the liquidated damages are to be assessed at rates and amounts "not exceeding those applicable to the liquidated damages under § 46.1-342."

While you refer to §§ 46.1-340 and 46.1-342.1, you make no reference to § 46.1-342 which authorizes the court to assess liquidated damages. Assuming, however, that the Henrico County ordinance parallels § 46.1-342, it is my opinion that the assessment of liquidated damages under such ordinance, upon a conviction for violating the posted gross weight limit on a particular bridge, is mandatory.

MOTOR VEHICLES—Convictions of "Drunk Driving" and Reckless Driving Growing Out of Same Act.

October 25, 1972

The Honorable William F. Watkins, Jr.
Commonwealth's Attorney for Prince Edward County

This is in reply to your letter of October 4, 1972, from which I quote the following:

"I would request your interpretation of the provisions of Section 19.1-259.1 of the Code of Virginia, 1950, as amended, and the case of Crawley vs. Wilkerson, 283 Fed. Supp. 447 under the following facts. A defendant is charged with reckless driving and driving under the influence, is convicted in a county court of both charges, and files an appeal of the drunk driving charge. Would this automatically under Crawley vs. Wilkerson also appeal the reckless driving charge for disposition in the Circuit Court?"

Section 19.1-259.1, Code of Virginia (1950), as amended, states: "Whenever any person is charged with a violation of § 18.1-54 or any similar ordinance of any county, city, or town and reckless driving growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge."

In the case of Crawley v. Wilkerson, 283 F. Supp. 447 (1968), to which you refer, one of the issues was whether the petitioner was denied his right to a trial de novo. The petitioner was originally tried in the Lynchburg Municipal Court on charges of reckless driving and driving under the influence of intoxicants. Upon his conviction for driving under the influence of intoxicants, the charge of reckless driving was dismissed as required by § 19.1-259.1. Upon appeal to the Corporation Court for the City of Lynchburg, he was tried only on the charge of driving while under the influence of intoxicants and was refused the right to submit instructions on the reckless driving charge. The Crawley v. Wilkerson case held
this to be in error on the theory that, when the petitioner's conviction was annulled by the appeal, the bar to a conviction on the dual charge of reckless driving was also annulled. The Court held that, upon the appeal to the Corporation Court, the petitioner was entitled to a trial *de novo* and, therefore, was entitled to have the whole charge considered in the Corporation Court that had been considered in the Municipal Court.

In the given facts, the defendant was convicted of both reckless driving and driving under the influence of intoxicants. If both charges grew out of the same act or acts, § 19.1-259.1 requires that upon conviction of one of such charges, the court shall dismiss the remaining charge. If, therefore, the defendant was first convicted of driving under the influence of intoxicants, the Municipal Court was required to dismiss the remaining charge of reckless driving. In my opinion, under these circumstances, § 19.1-259.1 would render the conviction on the remaining charge of reckless driving a nullity. Following the holding in *Crawley v. Wilkerson*, upon appeal of the "drunk driving charge," the defendant would be entitled to a trial *de novo* at which the reckless driving charge, as well as the charge of driving under the influence of intoxicants, must be considered. Hence, your question is answered in the affirmative.

**MOTOR VEHICLES—Convictions Required to Be Reported to the Division Under §§ 46.1-412 and 46.1-413—Does not include misdemeanor of "assault by use of motor vehicle."**

**COURTS—Record of Convictions—Misdemeanor of "assault by use of motor vehicle" not required to be reported to Division of Motor Vehicles under §§ 46.1-412 and 46.1-413.**

August 11, 1972

**The Honorable Michael T. Goode**

Assistant Commonwealth's Attorney for the City of Portsmouth

This is in reply to your letter of August 4, 1972, in which you request my opinion as to whether or not a clerk of court has authority under §§ 46.1-412 and 46.1-413, Code of Virginia (1950), as amended, to furnish the Division of Motor Vehicles an abstract of conviction for "assault by the use of a motor vehicle."

Section 46.1-412 states, in part, as follows:

"Every county or municipal court or the clerk thereof or clerk of a court of record in this State shall keep a full record of every case in which:

"(a) A person is charged with (1) a violation of any law of this State pertaining to the operator or operation of a motor vehicle; (2) a violation of any ordinance of any county, city or town pertaining to the operator or operation of any motor vehicles except parking regulations; (3) any theft of a motor vehicle or unauthorized use thereof or theft of any part attached thereto;

"(b) A person is charged with manslaughter or any other felony in the commission of which a motor vehicle was used; ..."

Section 46.1-413 provides, in part, that "In the event a person is convicted of a charge described in subdivision (a) or (b) of § 46.1-412 or forfeits bail or collateral or other deposit to secure the defendant's appearance upon such charges unless the conviction has been set aside or the forfeiture vacated; ... every county or municipal court or clerk of a court of record shall forward an abstract of the
record to the Commissioner within fifteen days, . . . after such conviction, forfeiture or judgment has become final without appeal or has become final by affirmance on appeal. . . ."

This office has been further advised that the case in question was tried as a misdemeanor by the Municipal Court, which, of course, being a court not of record, does not have jurisdiction to try felonies. Hence, the conviction would have no application under paragraph (b) of § 46.1-412, which relates only to felonies. Manifestly, § 46.1-412 (a) (3), pertaining to theft or unauthorized use, is inapplicable. The remaining part of § 46.1-412, stated under paragraph (a), (1) and (2), relates to a violation of any law or any ordinance pertaining to the operator or operation of a motor vehicle. There is no statute specifically pertaining to assault by the operator or operation of a motor vehicle. Such violation is covered by general law or ordinance against committing an assault, rather than by any law or ordinance pertaining to the operator or operation of a motor vehicle. Your question, therefore, is answered in the negative.

MOTOR VEHICLES—Driving Under Influence of Intoxicants—Revocation of license on first offense under § 46.1-417—Should be based on court's revocation under § 18.1-59.

July 19, 1972

THE HONORABLE VERN L. HILL, Commissioner
Division of Motor Vehicles

This is in reply to your letter of July 6, 1972, which I quote as follows:

"The 1972 General Assembly changed § 18.1-59 to allow a minimum court suspension of a driver's license to be six months for the first offense of driving while intoxicated.

"I believe this change was made because some Judges felt that the mandatory one year court suspension was too severe and were not convicting under § 18.1-59.

"A problem has arisen in that § 46.1-417 requires the Commissioner of the Division of Motor Vehicles to revoke for one year for a violation of § 18.1-54 and this section (46.1-417) was not changed to correspond to § 18.1-59.

"Realizing that the intent of the General Assembly was to reduce the time that a citizen would lose his driver's license, should the Division of Motor Vehicles enforce that part of § 46.1-417 that pertains to violation of § 18.1-54 or should the Division use the court suspension period as the period of revocation?"

The amendment to § 18.1-59, Code of Virginia (1950), as amended, is embodied in Chapter 757, Acts of Assembly of 1972, which became effective July 1, 1972. This amendment changed the period for which a judgment of conviction for a first offense under § 18.1-54, or for a similar offense under any county, city or town ordinance, shall of itself operate to deprive the person so convicted of the right to drive or operate a motor vehicle in this State, from "one year" to "not less than six months nor more than one year in the discretion of the court" from the date of such judgment.

While no corresponding change was made in § 46.1-417, Code of Virginia (1950), as amended, and, obviously, an amendment should be presented to the next session of the General Assembly to resolve this conflict, it is my opinion that, meanwhile, the Division should use the period specified by the court in its judgment of conviction as the period of revocation of license to drive. I base this on the rule.
of construction that the legislature does not require a court to perform a vain act. To hold otherwise, the discretion given the trial court under § 18.1-59 to set the revocation at not less than six months nor more than one year would amount to an exercise in futility, since the fixed term of revocation under § 46.1-417 is one year.

MOTOR VEHICLES—Exemption from Annual Registration Fee Pursuant to § 46.1-149.1—Applies to veterans with certain service-connected disabilities discharged from armed forces under conditions other than dishonorable.

January 12, 1973

THE HONORABLE WILLIAM B. HOPKINS
Member, Senate of Virginia

This is in reply to your letter of recent date, in which you request my interpre-
tation of the term "veteran" as used in § 46.1-149.1, Code of Virginia (1950), as amended, which embodies Senate Bill 354, enacted into law by Chapter 80, Acts of Assembly of 1972. In this connection, I quote from your letter the following:

"The chief attorney of the Veterans administration has asked me for an interpre-
tation of the term 'Veteran' and I am making this request of you.

"To quote him 'It will be observed that the bill provides for the free license plates to be issued when the veteran is classified by the Veterans Administration as having met certain requirements. The difficulty stems from the fact that we are not sure whether, in using the term "Veteran," the General Assembly had in mind the technical definition of veteran as set forth in Title 38 U.S.C. § 101 (2) or whether it intended the term "Veteran" in a more general sense to apply to anyone who had served in the armed forces. There are some persons who are still on active duty in the armed forces but who would otherwise meet the criteria set forth in S.B. 354. We are wondering if the Legislature intended to include such persons within the term "Veteran."'

Section 46.1-149.1 states, in part, "No annual registration fee prescribed in § 46.1-149 shall be required for any one motor vehicle owned and used personally by any veteran who has either lost or lost the use of one or both legs, or an arm or a hand, or who is blind." A further stipulation of this section is that "The Commissioner (Division of Motor Vehicles) shall prescribe application forms for such exemptions, and the application shall be accompanied by a statement that such veteran has been so designated or classified by the Veterans Administration as to meet the requirements of this section, and that such disability is service-connected."

For many years, Virginia law has provided for a "Commission on Veterans' Affairs," as set forth in Chapter 10, Title 9, Code of Virginia (1950), as amended. Under this Chapter, § 9-86 refers to "citizens of Virginia who are war veterans." Section 14.1-91, Code of Virginia (1950), as amended, provides that "court clerks of the several counties and the Registrar of the Bureau of Vital Statistics" shall not charge for copies of veterans' records in certain cases. This section refers to "any honorably discharged member of the military or naval forces of the United States." Section 2.1-112, Code of Virginia (1950), as amended, in providing for certain grade or rating increases for veterans on an examination for a position in the State service, refers to persons who have served in the armed forces of the United States "having a discharge not dishonorable."

I find no definition of the term "veteran" in any of the named sections nor elsewhere in the laws of this Commonwealth. The language used in the cited sections,
however, indicates application to persons discharged from the armed forces, as opposed to those in active service. In Title 38 U.S.C. § 101 (2), to which you refer, the term "veteran" is defined as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." In my opinion, this is the definition which should be applied in considering persons for exemption from the annual registration fee for a motor vehicle under § 46.1-149.1. It follows that such exemption would not apply to persons who are still on active duty in the armed forces.

MOTOR VEHICLES—Exemption from Registration and Licensing of Motor Vehicles Used for Agricultural, etc., Purposes Under § 46.1-45—Ten-mile limitation applies to distance which vehicle may travel on highway.

September 29, 1972

THE HONORABLE RALPH P. ZEHLER, JR., Judge
Eighth Regional Juvenile and Domestic Relations Court

This is in reply to your letter of September 22, 1972, from which I quote the following:

"Code § 46.1-45(a) provides in part as follows:

'No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor,—for any motor vehicle, trailer or semi-trailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin; provided that the distance between the points shall not exceed ten miles.'

'I would like to have your opinion as to whether or not the ten mile limitation underlined above should be measured from the point of beginning to the point of termination in a straight line as the crow flies, or should it be measured along the route or highway traveled by the vehicle in going from the point of beginning to the point of termination.'

The purpose of the quoted section is to permit a certain class of vehicles, otherwise required by law to obtain registration and licenses before operation upon a highway, to operate upon the highway within the specified limits without the necessity of registration and licensing. In view of the fact that the purpose is focused on operation upon the highway, the ten mile limitation would have no significance except as applied to highway use. In my opinion, therefore, the ten mile limitation should be measured upon the highway to be traveled by the vehicle.

MOTOR VEHICLES—Exemption of Disabled Veteran's Personally Used Motor Vehicle from Payment of State Registration Fee Pursuant to § 46.1-149.1—Requires exemption of such vehicle from county, city or town license fee.

April 2, 1973

THE HONORABLE EDWARD E. LANE
Member, House of Delegates
This is in reply to your letter of recent date, from which I quote the following:

"Would you advise me whether certain veterans receive State automobile license plates free?"

"Would you further advise me whether there is in the Statutory Law of Virginia a provision that no City or County charge more for motor vehicle license plates than does the State of Virginia?"

"Would you further advise me what effect this has on the sale of City and County license tags to veterans? Can veterans who receive their State license plates free be required to pay for City and County license tags?"

Section 46.1-149.1, Code of Virginia (1950), as amended, states that "No annual registration fee prescribed in § 46.1-149 shall be required for any one motor vehicle owned and used personally by any veteran who has either lost or lost the use of one or both legs, or an arm or a hand, or who is blind." The application for license "shall be accompanied by a statement that such veteran has been so designated or classified by the Veterans Administration as to meet the requirements of this section, and that such disability is service-connected." Your first question, therefore, is answered in the affirmative.

In answer to your second question, there is such a statutory law. Section 46.1-65 of the Code states, in part, "The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater than the amount of the license tax imposed by the State on vehicles of like class."

If a veteran's service-connected disabilities bring him within the class indicated in § 46.1-149.1, so as to exempt a motor vehicle owned and personally used by such veteran from the State registration fee, it is my opinion that such vehicle would likewise be exempt from any local license fee because of the limiting clause in § 46.1-65. For this reason, your final question is answered in the negative.

MOTOR VEHICLES—Habitual Offender—License to drive may not be restored by administrative action during period of interdiction fixed by § 46.1-387.7

December 4, 1972

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

This is in reply to your letter of recent date, from which I quote the following:

"A constituent of mine was required to appear before a Court of Record on a Show Cause Order issued in connection with the Habitual Offender Act. This Order was entered on October 10, 1969. The Court, at the hearing, found him to be an habitual offender and entered the appropriate Order.

"Thereafter, in May of 1972, this individual received a letter from the Division of Motor Vehicles informing him that he was now eligible to have his driving privileges restored upon proof of financial responsibility and successful completion of a driver's examination. In response to this letter, this individual obtained automobile liability insurance in the requisite amounts and took a driver's examination which he passed. Subsequently, the Division of Motor Vehicles issued him an operator's permit.

"It may be an administrative error which resulted in the restoration of this individual's driving privileges during the period his license was sus-
The finding of a court of record pursuant to § 46.1-387.6, Code of Virginia (1950), as amended, that a person is an habitual offender, requires the court to "direct such person not to operate a motor vehicle on the highways of the Commonwealth of Virginia and to surrender to the court all licenses or permits to operate a motor vehicle on the highways of this State for disposal in the manner provided in § 46.1-425." The restoration of any such person's right to operate a motor vehicle is controlled by § 46.1-387.7, Code of Virginia (1950), as amended. This section states: "No license to operate motor vehicle in Virginia shall be issued to an habitual offender, (1) for a period of ten years from the date of the order of the court finding such person to be an habitual offender, and (2) until the privilege of such person to operate a motor vehicle in this State has been restored by an order of a court of record entered in a proceeding as hereinafter provided."

A representative of the Division of Motor Vehicles has informed this office that the letter written by that office related to suspension on other grounds and, through administrative error, the Division failed to notice the fact that the person had been adjudged an habitual offender. In any event, § 46.1-387.7, quoted herein, prohibits the person from operating a motor vehicle for a period of ten years from October 10, 1969, the date he was adjudged an habitual offender, and until the privilege is properly restored by a court of record. Since this section is mandatory, it is my opinion that the habitual offender has no right to operate a motor vehicle during such statutory period.

In view of the circumstances, it is suggested that the habitual offender's identity be made known to the Division of Motor Vehicles, in order that appropriate corrective action may be taken in regard to the operator's permit issued.

MOTOR VEHICLES—Habitual Offenders—Construing paragraph (b) of § 46.1-387.2.

CRIMINAL PROCEDURE—Habitual Offenders—Construing paragraph (b) of § 46.1-387.2.

February 15, 1973

The Honorable Wescott B. Northam
Commonwealth’s Attorney for Accomack County

This is in reply to your letter of recent date in which you request my advice (1) as to whether or not three convictions of speeding within one year should be counted as one offense under § 46.1-387.2 (b), Code of Virginia (1950), as amended, and (2) whether or not a conviction that has been counted once in determining an offense can be counted again to constitute another offense under the Virginia Habitual Offender Act."

Section 46.1-387.2 states, in part, "An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subsections (a), (b) and (c), of this section, . . . ." Paragraph (b) of this section states the following:

(b) Twelve or more convictions, or findings of not innocent in the case of a juvenile, of separate and distinct offenses, singularly or in combination,
in the operation of a motor vehicle which are required to be reported to the Division of Motor Vehicles and the commission whereof requires the Division of Motor Vehicles or authorizes a court to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more and such convictions shall include those offenses enumerated in subsection (a) above when taken with and added to those offenses described herein."

The transcript enclosed with your letter indicates that some of the offenses occurred in other states. Paragraph (c) of § 46.1-387.2 provides that the offenses included in subsection (a) and (b) shall be deemed to include offenses under any law or ordinance of another state.

In making the determination as to whether or not a person should be classified as an habitual offender under § 46.1-387.2 (b), it is necessary to count the number of offenses which, singularly or in combination, require the Division or authorise a court to suspend or revoke such person's privilege to operate motor vehicles on the highways of this State for a period of thirty days or more. In regard to speeding offenses which require the Division to revoke a person's privilege to drive pursuant to § 46.1-419, Code of Virginia (1950), as amended, only the last occurring offense in the combination of two or more speeding offenses requiring revocation should be counted.

To illustrate, I shall use some examples from your letter. The person was convicted of speeding offenses which occurred on June 15, 1964, and December 13, 1964. Only the latter would be counted as one offense under § 46.1-387.2 (b). Since such person was convicted of an additional offense of speeding on August 9, 1965, however, this would be counted as one, because it combines with the previous offense on December 13, 1964, to require a revocation by the Division. The offense of August 25, 1965, should also be counted as one since it combines with the offense of August 9, 1965, to require a revocation by the Division. Likewise, the offense of March 24, 1966, should be counted as one, since it combines with the offenses of August 9, 1965, and August 25, 1965, to require a revocation by the Division.

In specific reference to your first question, convictions of three offenses of speeding committed within the period of twelve consecutive months constitutes two offenses under § 46.1-387.2 (b). The reason is that no revocation is required on the first such conviction. The second such conviction, however, combines with the first to require a revocation of license by the Division under § 46.1-419. The third such conviction combines with the previous two convictions to require an additional revocation under the same section.

In regard to your other question, one conviction is never counted as more than one offense under § 46.1-387.2 (b). Such conviction also may be considered in combination with a subsequent conviction, however, so as to require that the latter be counted as an offense under § 46.1-387.2 (b).

MOTOR VEHICLES—Habitual Offenders—Driving without operator’s license not included under § 46.1-387.2.

February 6, 1973

The Honorable Fred D. Smith, Jr.
Assistant Commonwealth’s Attorney for Henry County

This is in reply to your letter of February 1, 1973, in which you request my opinion as to whether or not driving without an operator’s license can be considered an habitual offender classification under paragraph (b) of § 46.1-387.2, Code of Virginia (1950), as amended.
This question is answered in the negative. Paragraph (b) of § 46.1-387.2 is limited to convictions, or findings of not innocent in the case of a juvenile, for offenses which require the Division of Motor Vehicles or authorize a court to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more. Driving a motor vehicle without a license to drive does not fall within this category.

Formerly, § 46.1-387.2(a)(5) contained the classification "Willfully operating a motor vehicle without a license so to do." This classification was deleted, however, by Chapters 507 and 724, Acts of Assembly of 1970.

MOTOR VEHICLES—Licenses—No exemption for farm truck transporting produce to market.

August 10, 1972

The Honorable Ernest W. Goodrich
Commonwealth's Attorney for Surry County

This is in reply to your letter of August 2, 1972, concerning the question of exemption from registration and license of motor vehicles and farm equipment used in connection with farm operations, under the conditions described in the passages which I quote as follows:

"1. A farmer has a truck which has been cut down so that it is usable and used only to pull farm trailers and equipment from farm to farm and from farm to market in place of a regular farm tractor. Will you please advise me whether or not a motor vehicle of this character and this use is required to be licensed?

"2. A farmer uses a truck solely for the purpose of hauling farm products, in this case, peanuts, wheat, corn, beans and other grains, from the farm to the market. Is it required that this motor vehicle be licensed?"

The situation in each instance is controlled by § 46.1-45, Code of Virginia (1950), as amended. This office has consistently given a strict construction to the exemptions found in § 46.1-45, since they are in derogation of the registration and license laws. The exemption found in paragraph (a) as to transporting produce and livestock to a "storage house or packing plant" is not sufficiently broad to include transporting to market. The only provision of this section for transporting produce to market, except the provision in paragraph (c) relating to vehicles registered in another state, is found in paragraph (h) thereof, which is as follows:

"The exemptions contained in this section shall also apply to any trailer or semitrailer drawn by a farm tractor, or any properly licensed motor vehicle when used by a farmer, his tenant, agent or employee, or cotton ginner or peanut buyer in transporting unginned cotton or peanuts owned by such farmer, cotton ginner or peanut buyer from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, when not operated on a for-hire basis."

The language in this paragraph exempts a trailer or semitrailer drawn by a farm tractor, or any properly licensed motor vehicle when used under the stated conditions in transporting the named products. The term "farm tractor" has a special meaning, as defined in § 46.1-1 (7), Code of Virginia (1950), as amended, and does not include a truck which has been altered for use or which is used solely for farm purposes. See, Triplett v. Commonwealth, 212 Va. 649, 186 S.E. 2d 16.

Since neither of the trucks described in (1) and (2) of your letter are
licensed, nor does either qualify as a "farm tractor," they are not authorized for use in drawing or transporting farm products to market unless they first be properly licensed to operate on the highways. Further, the exemptions found in this paragraph extend only to transporting unginned cotton and peanuts. Your questions, therefore, are both answered in the affirmative.

MOTOR VEHICLES—Lighting Devices—Opticom is a lighting device within meaning of and use controlled by § 46.1-275.

October 16, 1972

The Honorable Overton Jones, Chairman
Virginia Highway Safety Commission

This is in reply to your letter of September 26, 1972, from which I quote the following:

"I have been directed by the Virginia Highway Safety Commission to request an opinion from you as to whether or not the device known as Opticom is a 'lighting device' within the meaning of Section 46.1-275 of the Code of Virginia.

"Opticom is the trade name of a device which, when operated from an emergency vehicle, automatically activates traffic signals in order to give the emergency vehicle the green light at intersections. While activation of the signal is the primary purpose of the device, it also emits a pulsating, high density light. A detailed description of Opticom is enclosed with this letter.

"If Opticom is a communications, rather than a lighting device, is its use in Virginia governed by Section 46.1-275?"

Section 46.1-275, Code of Virginia (1950), as amended, which relates to the "Specifications for and tests of lighting devices," is as follows:

"The Superintendent shall determine whether any lighting device of a type sold for use or used upon any motor vehicle, trailer or semi-trailer will comply with the requirements of this title and the specifications adopted by him for laboratory tests. The Superintendent may adopt current specifications of the Society of Automotive Engineers or the regulations of the federal Department of Transportation for such laboratory tests. He shall publish lists of approved devices by name and type."

The manufacturer's brochure furnished with your letter, under "Specifications," states, in number 4 thereof, that the device known as Opticom "Shall be an electronic flash lamp of the gaseous discharge type." Among its "Features" listed on the front of the brochure are the following:

"2. Produces a pulsating, high intensity light in the near infrared and visible spectrum.

"3. Acts as an auxiliary warning light.

"4. Has a transmission range of at least one-third mile."

In view of these and other specifications and features listed by the manufacturer, it is my opinion that this equipment qualifies as a "lighting device," within the meaning of § 46.1-275.

Although its primary purpose is the activation of traffic signals, the purpose is not a determining factor under § 46.1-275. This section requires that the Superintendent shall determine whether any lighting device used upon any motor vehicle
meets the stated requirements: Your question as to whether the use of Opticom is governed by § 46.1-275, therefore, is answered in the affirmative.

MOTOR VEHICLES—Local License—County may impose license fee on automobile of resident of town therein which also imposes license fee, but must give credit for amount of fee paid the town.

February 16, 1973

THE HONORABLE V. EARL DICKINSON
Member, House of Delegates

This is in reply to your letter of February 2, 1973, in which you request my opinion on the question contained in the passage which I quote as follows:

"A county levies a tax of ten dollars for a local automobile license. If an incorporated town within the county levies a tax of five dollars for a town automobile license, then can the county impose an additional tax of five dollars upon the town resident on an automobile?"

The answer to your question is in the affirmative. Section 46.1-65 (d), Code of Virginia (1950), as amended, states, in part:

"If in any county imposing license fees and taxes under this section, a town therein imposes like fees and taxes upon vehicles of owners resident in such town, the owner of any vehicle subject to such fees or taxes shall be entitled, upon such owner displaying evidence that he has paid the amount of such fees or taxes, to receive a credit on the fees or taxes imposed by the county to the extent of the fees or taxes he has paid to such town."

In the given situation, the county may impose its tax of ten dollars, but the owner of the vehicle is entitled to a credit for the amount of five dollars paid the incorporated town. The net effect is that both the town and the county receive a fee in the amount of five dollars. I expressed a consistent view in a letter to The Honorable Charles L. McCormick, III, Commonwealth's Attorney for Halifax County, dated April 29, 1971, and found in Report of the Attorney General (1970-1971), p. 259. See, also, Town of Ashland v. Supervisors, 202 Va. 409, 117 S.E. 2d 679 (1961).

MOTOR VEHICLES—Local License—Moving from one county or city to another does not subject vehicle to requirement of new license during current license year.

TAXATION—Motor Vehicles—Limited to one jurisdiction during license year.

April 18, 1973

THE HONORABLE V. A. ETHERIDGE
Treasurer of the City of Virginia Beach

This is in reply to your recent letter from which I quote the following:

"A resident of Virginia Beach on January 1st, owning a motor vehicle, is required by ordinance to purchase during the month of January a City Decal for that vehicle.

"Should that person purchase a decal for his vehicle, then move to another county or city during that calendar year, can that person be required to purchase another local automobile license or decal during that calendar year?"
Counties, cities and towns are authorized by § 46.1-65, Code of Virginia (1950), as amended, to levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers. Certain limitations are placed upon the localities, however, by this section and by § 46.1-66, Code of Virginia (1950), as amended. Section 46.1-65, paragraph (f), contains a limitation that, with exceptions not applicable to your question, "no vehicle shall be subject to taxation under the provisions of this section in more than one jurisdiction."

In my opinion, the effect of the quoted clause is to limit the requirement for local license for a vehicle to one county or city during a given license year. A person who has purchased a city or county license for his vehicle and moves to another city or county within this State shall not be required to purchase a license for such vehicle in the new location during the current license year. A similar view was expressed by my predecessor in office in an opinion found in Report of the Attorney General (1964-1965), p. 203.

MOTOR VEHICLES—Local License—Residence of owner determines taxing authority.

TAXATION—Local License—Motor vehicles—Residence of owner determines taxing authority.

June 5, 1973

The Honorable W. S. Harris, Jr.
Treasurer of the City of Emporia

This is in reply to your letter of recent date, in which you request my opinion on the factual situation and related question which I quote as follows:

"A motor vehicle is owned by a corporate business situated in the City of Emporia and used principally upon the streets of the City. The operator of the vehicle, however, is a resident of the County, which means that the vehicle is parked in the County at night."

"My question is whether the vehicle in question is required to display a City of Emporia tag or a County of Greensville sticker?"

Section 46.1-65, Code of Virginia (1950), as amended, provides, in part, that: "Except as provided in § 46.1-66 counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers. . . ." The initial limitation in § 46.1-66 is that "No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when: (1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident. . . ." This office has consistently interpreted this to mean that the residency of the owner of the vehicle determines the taxing authority. See, Reports of the Attorney General (1964-1965), pp. 205, 238; (1968-1969), p. 161.

The vehicle in question "is owned by a corporate business situated in the City of Emporia." Although the operator of the vehicle is a resident of the County, it is the residency of the owner which determines the situs for imposing the license tax. In my opinion, therefore, the City of Emporia is the jurisdiction authorized to impose the license tax under the stated facts.

MOTOR VEHICLES—Local Licenses—Section 46.1-65(c) authorizes conditioning issuance upon personal property taxes on vehicle sought to be licensed only.

December 18, 1972
This is in reply to your letter of November 21, 1972, in which, by reference to an attached letter to the Honorable Stanford E. Parris, you request a ruling on the constitutional status of the requirement of localities that the issuance of a local motor vehicle license be conditioned on the payment of other taxes unrelated to such license.

Statutory authority for the issuance of local motor vehicle licenses by counties, cities and towns is found in § 46.1-65, Code of Virginia (1950), as amended. Paragraph (c) of this section states the following:

"A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town." (Emphasis added.)

As indicated in the emphasized language, localities are authorized to deny the issuance of a license for a motor vehicle, trailer or semitrailer until all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid. I find no authority for conditioning the issuance of a license upon the payment of other taxes unrelated to the vehicle to be licensed. In my opinion, the only payments upon which the issuance of local motor vehicle licenses may be conditioned are the license fee and the personal property taxes on the vehicle sought to be licensed. I expressed a similar view in an opinion found in Report of the Attorney General (1969-1970), p. 182.

In view of the foregoing, I believe further consideration of the question of constitutionality is unnecessary.

MOTOR VEHICLES—Local Licenses—When affected by Soldiers' and Sailors' Civil Relief Act.

SERVICEMEN—Soldiers' and Sailors' Civil Relief Act Exemption Not Applicable to Civilian Spouse; Local License for Motor Vehicle.

TAXATION—Soldiers' and Sailors' Civil Relief Act Exemption Not Applicable to Civilian Spouse; Local License for Motor Vehicle.

July 6, 1972

The Honorable Catesby Graham Jones, Jr.
Commonwealth's Attorney for Gloucester County

I have received your recent letter from which I quote:

"1. Is the wife of a non-domiciliary serviceman, who is residing in Gloucester County and teaching school, exempt from the County motor vehicle license tax?

"2. If the spouse of the serviceman is required to obtain such license, does the ruling apply where the vehicle is jointly owned by the serviceman and his spouse?"

In reply to your first question, it is my opinion that the civilian spouse of a serviceman, who owns the vehicle, is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C.A. App. § 501 et seq.
as respects exemption from local license taxation. Sections 510 and 511 indicate the purposes of the Act and the persons protected. Neither section contains any reference to a civilian spouse of a person in the military service. Section 574 contains the tax benefits available to persons in the military service. It has been construed to exempt non-domiciliary servicemen from local license taxation imposed for revenue purposes, but nothing in the opinion indicates that a spouse who owns an automobile individually is entitled to any protection thereunder. *California v. Buzard*, 382 U.S. 386 (1966). *See generally Christian v. Strange*, 392 P. 2d 575 (Ariz. 1964); *Gilbride v. City of Algona*, 20 N.W. 2d 905 (Iowa 1945); *Mims Bros. v. N. A. James*, 174 S.W. 2d 276 (Texas 1943).


**MOTOR VEHICLES—Maximum Speed Limit of Seventy Miles Per Hour on Certain Highways—Governor may reduce only if he declares an emergency.**

May 25, 1973

**THE HONORABLE WYATT B. DURRETTE, JR.**
Member, House of Delegates

This is in reply to your letter of May 21, 1973, with which you enclosed a copy of your letter of the same date to the Honorable Linwood Holton, Governor of Virginia, expressing your concern for the anticipated gasoline shortage. You cite authority indicating that an automobile traveling at sixty miles per hour utilizes eleven per cent less gasoline than the same vehicle traveling at seventy miles per hour. In this connection, you ask that I render an opinion as to whether or not the Governor has the authority to lower the speed limits on the highways of this State from the present limit of seventy miles per hour to sixty miles per hour.

There appears no provision in the motor vehicle laws to cover this situation. Section 46.1-193, Code of Virginia (1950), as amended, prescribes a maximum speed of seventy miles per hour on the Interstate System of Highways or other limited access highways with divided roadways. This section authorizes the State Highway Commissioner to reduce the speed limit "after a traffic engineering and traffic investigation and when indicated upon the highway by signs." Also, § 46.1-345 of the Code authorizes the State Highway Commissioner to reduce the speed limits prescribed in Title 46.1, Code of Virginia (1950), as amended, "whenever an engineering study discloses that it would promote the safety of travel or is necessary for the protection of any such highway." Neither of these sections would be applicable to the situation in question.

A review of the provisions of the Constitution and statutes relating to the powers of the Governor reveals no statutory authority for the action in question under normal conditions. Section 44-142.2, however, provides, in part, that "Whenever, in the opinion of the Governor, the safety of the Commonwealth requires the exercise of extreme emergency measures due to war, grave national peril, or serious natural disaster, he may declare an emergency to exist in the State or any portion thereof. . . ." In the event the gasoline shortage should become so acute as to induce the Governor to declare such an emergency, it is my opinion he would have the power to reduce the speed limits to help preserve the gasoline supply. The Governor may proclaim and publish rules and regulations
and issue executive orders, under such conditions, which shall have the force and effect of law pursuant to § 44-142 of the Code.

MOTOR VEHICLES—Motorcycle—If self-propelled and capable of transporting its operator upon highway, operator's license, registration and title required.

January 15, 1973

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

This is in reply to your letter of January 8, 1973, in which you refer to §§ 46.1-1 (14), 46.1-149 (8), 46.1-370.1 and 46.1-373, Code of Virginia (1950), as amended, and request information as to (1) whether or not an operator's license is required to operate a motorcycle on a highway regardless of the size, weight, horsepower or number of cylinders of such vehicle and (2) whether or not any such vehicle is required to be registered and titled with the Division of Motor Vehicles.

My answer to both of these questions is in the affirmative. In defining the term “Motorcycle,” paragraph (14) of § 46.1-1 sets no minimum requirements as to size, weight, horsepower or number of cylinders. On the contrary, it includes “Every motor vehicle designed to travel on not more than three wheels in contact with the ground and any four-wheeled vehicle weighing less than five hundred pounds and equipped with an engine of less than six horsepower, except any such vehicle as may be included within the term ‘farm tractor’ as herein defined.”

The term “Motor vehicle” as defined in paragraph (15) of the same section includes “Every vehicle as herein defined which is self-propelled or designed for self-propulsion. . . .” Paragraph (34) of the same section defines the term “Vehicle” as “Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.”

Considering the foregoing definitions in relation to each other, the only minimum requisites for a motorcycle are that it be a motor vehicle, i.e., a vehicle which is self-propelled and capable of transporting a person upon the highway. It is not necessary that such vehicle be capable of transporting passengers other than the operator.

Section 46.1-41, Code of Virginia (1950), as amended, with exceptions not applicable to the questions raised, states, in part, “. . . every person, . . . owning a motor vehicle, . . . intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division for and obtain the registration thereof and a certificate of title therefor in the name of the owner.”

Since a motorcycle is by definition a motor vehicle, the owner of every motorcycle operated upon any highway in this State is required to comply with § 46.1-41 by obtaining registration and title for such vehicle.

It is prescribed in § 46.1-370.1, which you cite, that “No person shall operate any motorcycle upon a highway in this State unless such person shall have passed a special examination, including written material and a road test, pertaining to the ability of such person to operate a motorcycle with reasonable competence and with safety to other persons using the highways. The Division of Motor Vehicles shall adopt such rules and regulations as may be necessary . . . for the granting of licenses or permits suitably endorsed for qualified applicants.”

Section 46.1-373 states, in part, “Every such license applied for and issued or renewed, on and after July one, nineteen hundred seventy, shall contain the appropriate endorsement or indication where applicable that the licensee has
been licensed . . . (3) to operate a motorcycle, as defined in paragraph (14) of § 46.1-1 excluding four-wheeled vehicles, . . ." This means that any person who operates any motorcycle, except a four-wheeled vehicle, over any highway of this State must first obtain a suitable endorsement on his license or permit. An operator's license or permit is required for operating any four-wheeled motorcycle upon any highway.

MOTOR VEHICLES—Operator's License—Reinstatement by Juvenile and Domestic Relations Court After Short Suspension of.

JUVENILE AND DOMESTIC RELATIONS COURTS—Collection of Fee Required After Short Suspension of Motor Vehicle Operator's License.

October 19, 1972

THE HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

This is in reply to your letter of October 3, 1972, in which you request my opinion as to whether or not § 46.1-380.2 (d1), Code of Virginia (1950), as amended, enacted by Chapter 490, Acts of Assembly of 1972, is applicable when a license is suspended by the Juvenile and Domestic Relations Court and retained under the control of the Court for a short period of time before being returned to the licensee.

There is no exception in § 46.1-380.2 (d1) for a license suspended by the Juvenile and Domestic Relations Court; neither is there any exception for licenses suspended for only short periods of time. I have previously expressed the view that the return of a license to the licensee by a Municipal Court at the termination of a short suspension period is a reinstatement of the license. In this connection, I enclose a copy of my letter of September 29, 1972, to the Honorable Henry L. Lam, Judge, Municipal Court, Princess Anne Station, Virginia Beach, Virginia. Section 46.1-380.2 (d1) states that the fee for reinstatement or reissuance of any operator's or chauffeur's license that has been suspended or revoked shall be twenty-five dollars. Your question, therefore, is answered in the affirmative.

MOTOR VEHICLES—Operator's or Chauffeur's License—Reinstatement of at termination of suspension of same—Collection of fee required by § 46.1-380.2.

September 29, 1972

THE HONORABLE HENRY L. LAM, Judge
Municipal Court for the City of Virginia Beach

This is in reply to your letter of September 19, 1972, in which you ask my opinion in regard to the twenty-five dollar fee now imposed by § 46.1-380.2, Code of Virginia (1950), as amended, for the reinstatement of an operator's or chauffeur's license that has been suspended or revoked. You also refer to the problem of timely return of such license by the Division of Motor Vehicles after a relatively short period of suspension by a court. The matter of time required by the Division of Motor Vehicles to return a license following a court suspension, in a given situation, is a factual one which must be determined by the Division. In view of Commissioner Hill's letter to you dated September 27, 1972, I consider no further comment necessary in regard to that subject.

In regard to the collection of the fee required by § 46.1-380.2, you present the questions which I quote, as follows:
"1. If I revoke a license for a period of 10 days, and at the expiration thereof, return such license to the operator, is this $25.00 fee to be collected by the Clerk?

"2. Pursuant to Section 46.1-413, the Clerk is to forward the license and record transcript within 15 days after trial. Should I revoke a license for 15 days, and return it to the operator, is the $25.00 fee then required to be collected by the Clerk?"

Chapter 490, Acts of Assembly of 1972, amended § 46.1-380.2 by adding paragraph (d1), which states, in part, the following:

"On and after July one, nineteen hundred seventy-two, the fee for reinstatement or reissuance of any operator's or chauffeur's license that has been suspended or revoked shall be twenty-five dollars, . . . ." 

Such fee is clearly mandatory for the reinstatement or reissuance of any operator's or chauffeur's license that has been suspended or revoked. In most cases, the reinstatement or reissuance of a license is effected by the Division of Motor Vehicles. There are instances, however, in which it is not necessary for the courts to forward the license to the Division following a suspension or revocation. Section 46.1-425, Code of Virginia (1950), as amended, which controls as to the disposition of licenses surrendered to the courts, provides that in cases in which the suspension coincides with the appeal time, the court need not send the license to the Division but may retain the license and return it to the accused at the expiration of the suspension. Since the word "reinstate" means to restore to its former state, the return of a license by the court to the accused at the termination of the suspension period, pursuant to this section, is a reinstatement of the license.

While § 46.1-380.2 fails to specify who shall collect the required fee of twenty-five dollars, it is my opinion that such fee should be collected as a prerequisite to reinstatement or reissuance of the license. It follows that in those cases in which a court reinstates the license, the court should collect the fee, and, therefore, both of your questions are answered in the affirmative.

In all cases, any such fees collected should be paid into the State treasury for carrying out the purposes set forth in § 33.1-24.1, Code of Virginia (1950), as amended, which, like paragraph (d1) of § 46.1-380.2, was enacted by Chapter 490, Acts of Assembly of 1972.

MOTOR VEHICLES—Overnight Camper Owned by the United States Navy and Upon Its Authority Drawn by Private Car of a Member—No State registration or license required for trailer.

MOTOR VEHICLES—Federal Government Has Overriding Power to Register and License its Vehicles; State Registration Not Required for Camper Owned by Navy.

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

This is in reply to your letter of October 4, 1972, in regard to a member of the United States Navy driving a personal car drawing an overnight camper owned by the United States Navy. In this connection, you request my opinion on the questions which I quote, as follows:

"1. Is there any provision under the law which requires some type of registration for these type trailers?
"2. Shouldn't these be licensed if they are going to be used by off-duty naval personnel for personal use, even though (they) are Navy property?"

The Federal Government has overriding power to register and license its motor vehicles, or not, as it deems appropriate to serve its purpose. Since the Virginia statutes, with certain exceptions not applicable to the instant situation, are silent as to the registration and licensing of motor vehicles owned by the United States Government, no State registration or licensing is required for such vehicles.

Certain methods of motor vehicle identification are used by the Federal Government and its various departments. One such method is by placing markings on the bumpers or the body of the vehicle. It is true that the use of a private car drawing an unlicensed camper, under the stated circumstances, may present a situation for inquiry by a police officer. There is no Virginia law which would prohibit such use, however, if the United States Navy has given its authorization to have the vehicle used in such manner. Your questions, therefore, are answered in the negative.

MOTOR VEHICLES—Person Stopped Suspected of Violation of § 18.1-54—Officer required to advise suspect of right to preliminary breath test under § 18.1-54.1, but failure to do so does not affect prosecution under § 18.1-55.1.

CRIMINAL PROCEDURE—Person Stopped Suspected of Violation of § 18.1-54—Officer required to advise suspect of right to preliminary breath test under § 18.1-54.1, but failure to do so does not affect prosecution under § 18.1-55.1.

October 4, 1972

THE HONORABLE JOSEPH E. HESS, Judge
Municipal and Juvenile and Domestic Relations Courts for the City of Buena Vista

This is in reply to your letter of September 19, 1972, in which you refer to § 18.1-54.1, paragraph (f), Code of Virginia (1950), as amended, and inquire whether it is essential that a police officer advise a suspect at the scene of his rights under the provisions of this section.

The named paragraph states: "Police officers or members of any sheriff's department shall, upon stopping any person suspected of having violated the provisions of § 18.1-54, advise such person of his rights under the provisions of this section."

I believe the quoted language requires the police officer to advise the suspect forthwith of his rights under this section. The stated purpose of § 18.1-54.1, in paragraph (e) thereof, is "to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated the provisions of § 18.1-54."

(Emphasis supplied.) In my opinion, however, failure of the officer to so advise the suspect does not affect prosecution of the person under the provisions of § 18.1-55.1, Code of Virginia (1950), as amended. It is provided in paragraph (c) of § 18.1-54.1 that "nothing in this section shall be construed as limiting in any manner the provisions of § 18.1-55.1." A similar view is expressed in a letter to the Honorable Richard W. Davis, Judge, Municipal Court for the City of Radford, dated February 25, 1971, and found in Report of the Attorney General (1970-1971), p. 269. A copy of that opinion is enclosed for your convenience.
MOTOR VEHICLES—Person Who Has Changed His Domicile and Residence to This State—Must register vehicle before operating it upon a highway.

April 20, 1973

The Honorable Emmitt F. Yeary
Assistant Commonwealth's Attorney for Washington County

This is in reply to your letter of April 9, 1973, which I quote as follows:

"I would appreciate your opinion as to what length of time a person, who was formerly a domiciliary of a foreign state, has to license and register a motor vehicle once he has changed his domicile and residence to the State of Virginia. In this regard please see Virginia Code Annotated §§ 46.1-1 (16), 46.1-132."

I find no statute authorizing any grace period in the given situation. Sections 46.1-1 (16) and 46.1-132, to which you refer, have reference only to nonresidents. In my opinion, therefore, a person who has changed his domicile and residence to the State of Virginia must register and license his motor vehicle in accordance with the provisions of § 46.1-41, Code of Virginia (1950), as amended. This section requires that the vehicle be registered and titled before it is operated upon any highway in this State.

MOTOR VEHICLES—Reinstatement of Operator's or Chauffeur's License after Suspension Pursuant to § 46.1-423.3—Collection of twenty-five dollar fee required by § 46.1-380.2(d1).

December 20, 1972

The Honorable Thomas A. Williams, Jr.
Judge of the Traffic Court of the City of Richmond

This is in reply to your letter of December 1, 1972, which I quote, as follows:

"Your recent opinions to Hon. Henry L. Lam, Judge of Municipal Court, Virginia Beach, Virginia, and Senator Hunter B. Andrews, of Hampton, Virginia, expressing your feeling that a $25.00 reinstatement fee provided for by Section 46.1-380.2 (d1) applied to short term suspensions and subsequent reinstatement or restoration of the license by the courts, has been distributed by the Auditor of Public Accounts and just came to hand.

"As you know, Section 46.1-423.3 provides for the holding of an operator's license as security for the payment of fines and costs. Is it your opinion that, upon the payment of such fines and costs and the concurrent restoration of the license to the defendant, the court must collect the $25.00 fee specified in Section 46.1-380.2 (d1)?"

Section 46.1-423.3, Code of Virginia (1950), as amended, to which you refer, provides that when any person is convicted, or found not innocent in the case of a juvenile, of any violation of Title 46.1, Code of Virginia (1950), as amended, or other law of this State, or valid ordinance enacted in pursuance of law, pertaining to the operator or operation of a motor vehicle, "the privilege of such person to operate a motor vehicle upon the highways of this State may be suspended by the court or judge until such time as such fine and costs shall have been paid." This section further states: "In such case, the court or judge shall order the surrender of such person's operator's or chauffeur's license or both to the court. In the event such fine and costs shall not be paid, then the court shall dispose of such license in accordance with the provisions of § 46.1-425."
In my letter to the Honorable Henry L. Lam, Judge of Municipal Court, Virginia Beach, Virginia, dated September 29, 1972, to which you refer, I expressed the view that the return of a license by the court to the accused at the termination of the suspension period constitutes a reinstatement of the license. Section 46.1-380.2 (d1) states, in part, "the fee for reinstatement or reissuance of any operator's or chauffeur's license that has been suspended or revoked shall be twenty-five dollars." This section contains no exception for suspension under § 46.1-423.3. I find no other reason for making an exception in any such case. On the contrary, it is my opinion that the twenty-five dollar fee should be collected upon reinstatement of the license pursuant to this section. Your question therefore, is answered in the affirmative. If the court has forwarded the license to the Commissioner of the Division of Motor Vehicles, in accordance with the provisions of § 46.1-425, however, the twenty-five dollar fee should be collected by the Division upon reinstatement or reissuance of a license.

MOTOR VEHICLES—Rescue Squad Vehicle—Exemptions under § 46.1-226(a) apply only under emergency conditions.

January 17, 1973

THE HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for Essex County

This is in reply to your letter of recent date, in which you inquire whether a rescue squad vehicle which is transporting a person in a non-emergency situation qualifies for the exemptions stated in § 46.1-226 (a), Code of Virginia (1950), as amended.

Paragraph (a) of § 46.1-226 is as follows:

"The operator of (1) any police vehicle operated by or under the direction of a police officer in the chase or apprehension of violators of the law or persons charged with or suspected of any such violation, (2) any vehicle used for the purpose of fighting fire, including publicly owned State forest warden vehicles not to exceed two hundred in number, when traveling in response to a fire alarm or emergency call, (3) any vehicle owned by a political subdivision of the Commonwealth for rescue purposes when traveling in response to a fire alarm or an emergency call, or (4) any ambulance or rescue or lifesaving vehicle designed or utilized for the principal purposes of supplying resuscitation or emergency relief where human life is endangered, whether such vehicle is publicly owned or operated by a nonprofit corporation or association, when such vehicle is being used in the performance of public services, and when such vehicle is operated under emergency conditions, may, without subjecting himself to criminal prosecution:

"(1) Proceed past red signal, light, stop sign or device indicating moving traffic shall stop if the speed and movement of the vehicle is reduced and controlled so that it can pass a signal, light or device with due regard to the safety of persons and property.

"(2) Park or stand notwithstanding the provisions of this chapter.

"(3) Disregard regulations governing a direction of movement of vehicles turning in specified directions so long as the operator does not endanger life or property.

"(4) Pass or overtake, with due regard to the safety of persons and property, another vehicle at any intersection."

It is clear that the quoted language contemplates an emergency situation. This
is shown by the qualifying clause "when such vehicle is operated under emergency conditions." Only under such conditions may the driver operate any such vehicle within the exemptions enumerated in paragraphs (a), (1), (2), (3) and (4) of this section. Paragraph (b) thereof further provides that these exemptions shall apply only when the operator displays a flashing, blinking or alternating red light and sounds a siren, exhaust whistle or air horn. The latter is an additional requirement, however, that does not replace the initial requirement of the existence of emergency conditions. Accordingly, it is my opinion that a rescue squad vehicle or other emergency type vehicle operating in a non-emergency situation does not qualify for the stated exemptions. Your question, therefore, is answered in the negative.

MOTOR VEHICLES—School Buses—Vehicle properly identified as school bus by color, lettering and warning signals may comply with § 46.1-1(37) although not specifically designed by manufacturer as school bus.

October 5, 1972

THE HONORABLE JOHN D. EURE, JR.
Commonwealth's Attorney for the City of Nansemond

This is in reply to your letter of September 20, 1972, in which you request my opinion as to the application of § 46.1-1(37), Code of Virginia (1950), as amended, to the vehicles described in that part of your letter which I quote, as follows:

"A number of private schools and possibly some public schools in the Tidewater, Virginia, area operate small vans, which accommodate nine to twelve passengers each, as school buses to transport students to and from various educational institutions. These vans are of a common variety manufactured by the major automobile and truck manufacturers and cannot be readily categorized as a commercial bus, station wagon, automobile or truck; neither can it be said these vehicles are designed specifically for use as a school bus.

"These vans are used primarily for the transportation of pupils to and from public, private or parochial schools. It could be argued that these vans are 'designed' for such use as they are painted yellow with the words 'school bus, stop, state law' in black letters of the specified size on the front and rear, and are equipped with warning devices for use when the vans are picking up or discharging students.

"If the above-described vans are used, painted, lettered and equipped with warning devices prescribed in Section 46.1-287 of the Code of Virginia, do they fall within the definition of a 'school bus' as set forth in Section 46.1-1(37), notwithstanding the fact that they are not designed by the manufacturer specifically for use as a school bus."

The given facts show that the vehicles are painted, lettered and equipped with the warning devices required by law for any "School bus" and that they are used primarily for the transportation of pupils to and from public, private and parochial schools. These requirements are set forth in §§ 46.1-1(37), 46.1-286.1 and 46.1-287, Code of Virginia (1950), as amended.

None of these sections contains a specific requirement as to the maximum or minimum size or capacity of a school bus, although §§ 46.1-1(37) and 46.1-286.1 exclude automobiles and station wagons, as well as trucks and commercial buses. You raise the question, however, as to whether the vehicles under consideration fall within the definition of "School bus," as set forth in § 46.1-1(37), notwith-
standing the fact that they were not designed by the manufacturer specifically for use as a school bus.

The term "School bus" is defined in § 46.1-1(37), 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."

The word "Designed" means "Appropriate, fit, prepared, or suitable; done by design or purposely; also adapted, designated, or intended." 26A C.J.S., p. 863. Following this definition, as applied under a different statute in the case of Smith v. Commonwealth, 190 Va. 10 (1949), manifestly the vehicles under consideration are "appropriate" for the stated use. A school bus does not derive its distinguishing characteristics from the manufacturer's label so much as from its color of paint, its lettering and its warning devices, all of which are expressly required by law. These are the features which set it apart as a vehicle for which the law demands special consideration by other users of the highway in order to provide an extra margin of safety. It is my opinion, therefore, that the vehicles in question meet the requirements of § 46.1-1(37), notwithstanding the fact that they were not built specifically by the manufacturer for school bus use only.

In addition, you request information as to what types and sizes of warning devices have been prescribed by the State Board after consultation with the Superintendent of State Police. The State Board has prescribed that every school bus must be equipped with four red flashing traffic warning lights, each seven inches in diameter. Two of these lights shall be mounted on the front of the vehicle, above the windshield, and two shall be mounted on the rear, above the rear view window. In this connection, I enclose for your information a wiring diagram for Virginia school bus traffic lights, furnished by the State Board of Education.

MOTOR VEHICLES—Special Registration for Certain Vehicles of Nonresidents
Under § 46.1-154.2—Must be inspected—Must pay uninsured motorist fee if not insured.

April 19, 1973

The Honorable Wescott B. Northam
Commonwealth's Attorney for Accomack County

This is in reply to your letter of recent date in which you inquire whether a nonresident who registers his vehicle in compliance with § 46.1-154.2, Code of Virginia (1950), as amended, is required to obtain a Virginia inspection sticker and liability insurance as prescribed by the Code of Virginia.

Section 46.1-154.2 states the following:

"A nonresident owner of a motor vehicle properly licensed in another state, that is to be used in the intrastate transportation of exempt agricultural products, may after properly titling his motor vehicle, trailer or semitrailer in Virginia, make application for and be issued distinctive registration identification valid for a period of two months. The fee for this identification shall be one sixth the annual registration fee in accordance with the classification and gross weight of the vehicle as shown in §§ 46.1-154 and 46.1-157. The registration identification so issued under this section shall be valid to transport only exempt agricultural products. Vehicles registered under provisions of this section shall be exempt from the tax imposed under the provisions of § 58-685.12."
The only exemption stated in this section is from the "tax imposed under the provisions of § 58-685.12," i.e., the motor vehicle sales and use tax. The inspection laws prescribed in Article 10, Chapter 4, Title 46.1, of the Code contain several exemptions, none of which are applicable to a vehicle registered pursuant to § 46.1-154.2. The Governor's Proclamation, as set forth in the Official Inspection Manual, also contains a number of exemptions from the requirement of inspection, none of which apply to the situation in question. In my opinion, therefore, such vehicle must be inspected.

Inasmuch as the transportation authorized by § 46.1-154.2 applies only to exempt agricultural products, the requirements for liability insurance found in Article 7, Chapter 12, Title 56 of the Code, do not apply to these vehicles. Hence, liability insurance is not required. The requirements of Article 10, Chapter 3, Title 46.1, Code of Virginia (1950), as amended, however, do apply. This means that a person registering any such vehicle which is not covered by liability insurance in the amounts specified in § 46.1-504 must comply with § 46.1-167.1 by paying the uninsured motor vehicle fee.

MOTOR VEHICLES—Suspension by Court of Driver's License for Failure to Pay Fine and Costs upon Conviction for Violation of Motor Vehicle Laws—Option given under § 46.1-423.3, if exercised, should be done at time of conviction.

CRIMINAL PROCEDURE—Suspension by Court of Driver's License for Failure to Pay Fine and Costs upon Conviction for Violation of Motor Vehicle Laws—Option given under § 46.1-423.1, if exercised, should be done at time of conviction.

February 2, 1973

The Honorable James A. Cales, Jr.
Commonwealth's Attorney for the City of Portsmouth

This is in reply to your letter of recent date, in which you request my opinion on the question which I quote as follows:

"Must the court invoke Sec. 46.1-423.3 at the time of conviction, or may the court at a date subsequent to the date of conviction have a defendant brought before the court who has failed to pay his fine and costs and revoke or suspend his license under Sec. 46.1-423.3?"

Section 46.1-423.3, Code of Virginia (1950), as amended, was enacted by Chapter 249, Acts of Assembly of 1971, to provide for the suspension of operators' or chauffeurs' licenses, or the privilege to drive, for the failure or refusal to pay fines incurred for the violation of any motor vehicle laws. Paragraph (b) of this section states as follows:

"In addition to any other penalty provided by law, when any person shall be convicted, or found not innocent in the case of a juvenile, of any violation of this title, or any other law of this State pertaining to the operator or operation of a motor vehicle or of any valid ordinance of any county, city or town adopted pursuant to § 46.1-180, and shall fail or refuse for any reason to provide for payment of any fine and costs lawfully assessed against him, the privilege of such person to operate a motor vehicle upon the highways of this State may be suspended by the court or judge until such time as such fine and costs shall have been paid. In such case, the court or judge shall order the surrender of such person's operator's or chauffeur's license or both to the court. In the event such fine and costs shall not be paid, then the court shall dispose of such
license in accordance with the provisions of § 46.1-425. If such person has not obtained a license as required by Chapter 5 (§ 46.1-348 et seq.) of this title, or is a nonresident, the court may direct in the judgment of conviction that such person shall not drive or operate any motor vehicle in this State for a period to coincide with the nonpayment of such fine and costs.”

This section authorizes suspension of a person’s license by the court or judge, under the stated circumstances, “when any person shall be convicted.” In case the court suspends a person’s license under this section, the court shall order the surrender of such person’s license to the court. The suspension continues in force “until such time as such fine and costs shall have been paid.” In the event such fine and costs shall not be paid, the court shall dispose of such license “in accordance with the provisions of § 46.1-425.” The latter provides, in part, that the license “shall remain in the custody of the court until (1) the time allowed by law for appeal has elapsed, when it shall be forwarded to the Commissioner, or (2) an appeal is effected and proper bond posted, at which time it shall be returned to the accused.” Section 46.1-423.3 further provides that if the person is not licensed in Virginia, or is a nonresident, “the court may direct in the judgment of conviction that such person shall not drive or operate any motor vehicle in this State for a period to coincide with the nonpayment of such fine and costs.” (Emphasis added.)

Considering the language of this section in the context of its obvious purpose to aid in the collection of fines and costs in such cases, and in relation to other laws pertaining to the collection and disposition of fines, as found in § 19.1-338, Code of Virginia (1950), as amended, et seq., it is my opinion that if the prerogative of invoking § 46.1-423.3 is exercised by the court or judge, it should be done at the time of conviction.

MOTOR VEHICLES—Taxation—Situs; where vehicle physically garaged.

MOTOR VEHICLES-License Taxation—Lessor’s residence determines.

TAXATION—Motor Vehicles—Situs; personal property.

August 10, 1972

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

I have received your letter of July 25, 1972, from which I quote:

“A professional firm is incorporated and located in the City of Norfolk. The firm owns and holds title to all personal vehicles driven by the members of the firm. Each of the members live in an adjacent city. The vehicles are used in the conduct of their business in the City of Norfolk, however. Each night they are driven home by the individual to whom the vehicle is assigned.

“The question of situs for personal property taxation is involved. It is the contention of the City of Norfolk that since title is held by a Norfolk based firm and the vehicles are used within the City of Norfolk during the day, they should be licensed and taxed.”

The situs of property for taxation must be determined pursuant to § 58-834, Code of Virginia (1950), as amended. This section has been interpreted by the Supreme Court of Appeals in Hogan v. County of Norfolk, 198 Va. 733, 735 (1957):

“... the common law rule that the situs of personal property for
taxation follows the owner may be changed by the legislature at its pleasure. . . . It has been changed in Virginia by § 58-834, which provides that the situs of tangible personal property for tax purposes is the county, etc., in which it is physically located. 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."

In light of the foregoing interpretation, this office has expressed the opinion that the proper situs for taxation is the place where the vehicle is customarily garaged, and not the location of the business that owns it. See the Reports of the Attorney General (1965-1966), p. 286; (1964-1965), p. 333; (1959-1960), p. 354. The General Assembly has amended § 58-834, effective July 1, 1972, to make the situs of motor vehicles the locality where they are normally garaged or parked. It is my opinion that this amendment merely codifies the existing law, as declared by the Virginia Supreme Court, and that the motor vehicles in question are not subject to tax by the City of Norfolk either before or after the effective date of the amendment.

With regard to the proper locality for licensing these vehicles, § 46.1-66 of the Code provides:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident."

Since the vehicles in question are owned by a corporation with its place of business in Norfolk, it is my opinion that the City of Norfolk has the right, under § 46.1-65, to impose a license fee. If Norfolk exercises this right, the locality in which the vehicles are garaged is precluded by the quoted section of the Code from imposing a similar license fee.

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MOTOR VEHICLES—Traffic Controls—Speed limit for a motor vehicle at a "stop" sign or red traffic light is zero—Such signs replace the posted highway speed.

September 13, 1972

THE HONORABLE JOSEPH M. WHITEHEAD
Commonwealth’s Attorney for Pittsylvania County

This is in reply to your letter of August 18, 1972, in which you request my opinion on the following, which I quote:

"As to filing of accident or police reports:

"(1) The Code of Virginia requires a motor vehicle to stop before entering a highway, does the lawful speed limit as posted on any given highway prevail at a stop sign or would the lawful speed limit be zero at a stop sign?

"(2) What would be the speed limit status with respect to the foregoing at an intersection controlled by a stop light when the light is red?"

The lawful speed limit, as posted on any given highway, must be considered in conjunction with other traffic controls, as well as with existing highway and traffic conditions. Section 46.1-173, Code of Virginia (1950), as amended, authorizes the
State Highway Commission to "classify, designate and mark State highways and provide a uniform system of marking and signing such highways under the jurisdiction of this State." This section further provides that the driver of a motor vehicle shall comply with such road signs erected by the State Highway Commission or by local authorities in cities and towns and that "the failure of such driver to obey such signs or to comply with this provision shall constitute a misdemeanor."

The speed limit, as posted on the highway, would not be applicable at a location controlled by a stop sign erected pursuant to § 46.1-173. The driver of a motor vehicle approaching a "stop" sign must bring his vehicle to a complete halt, in order to "obey and comply" with the sign as required by this section. In answer to your question numbered (1), therefore, it is my opinion that the lawful speed limit at a "stop" sign would be zero. In respect to your question numbered (2), the same is true for a motor vehicle at an intersection when faced with a red traffic signal. In regard to traffic signals by lights or semaphores, § 46.1-184, Code of Virginia (1950), as amended, states: "(a) Red indicates that traffic then moving shall stop and remain stopped as long as the red signal is shown.

MOTOR VEHICLES—Violation of § 46.1-341—Qualifies as traffic violation under § 46.1-179.2 requiring arresting officer to issue citation to resident of reciprocating state.

December 14, 1972

THE HONORABLE HORACE A. REVERCOMB, JR.
Judge of the County Court of King George County

This is in reply to your letter of recent date, in which you request my opinion as to whether or not charges under § 46.1-341, Code of Virginia (1950), as amended, for violating the weight limits prescribed for vehicles used on the highways, are covered by the reciprocal provisions of Article 1.1, Chapter 4, Title 46.1, Code of Virginia (1950), as amended, §§ 46.1-179.1 through 46.1-179.3.

The latter, in § 46.1-179.2, provides that, with certain exceptions, "a police officer making an arrest for a traffic violation shall issue a citation as appropriate to any motorist who is a resident of or holds a license issued by a reciprocating state." (Emphasis added.) None of the exceptions found in § 46.1-179.2 relates to a violation of the lawful weight limits.

The answer to your question is dependent upon whether the operation of a motor vehicle over the highways in violation of the weight laws qualifies as a traffic violation. The weight laws are classified under the general heading of "Regulation of Traffic" in Chapter 4, Title 46.1, Code of Virginia (1950), as amended. Further, the definition of the word "traffic," in Black's Law Dictionary, Fourth Edition, includes, in pertinent part, "the passing to and fro of . . . vehicles . . . along a route of transportation, as along a street. . . ."

In view of the foregoing, it is my opinion that the term "traffic violation," as used in § 46.1-179.2, is broad enough to include a violation of § 46.1-341 for exceeding the statutory weight limits, and, therefore, I shall answer your question in the affirmative.

NATIONAL GUARD—Commission—Minimum age eighteen.

May 31, 1973
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE WILLIAM J. McCADDIN
The Adjutant General
Virginia National Guard

This is in reply to your recent letter in which you requested advice as to the minimum age at which a National Guardsman, graduate of an Officer Candidate School, may be commissioned in the Virginia Army National Guard.

Section 44-2 of the Code of Virginia (1950), as amended, provides that the qualifications for National Guard officers shall be as prescribed in current and subsequently amended National Guard Regulations.

The National Guard regulation currently in effect establishing the age at which a graduate of an Officer Candidate School may be federally recognized is NGR 600-100, dated 22 May 1972. Section 2-9 b:(1)(a) of that regulation permits federal recognition of graduates of accredited officer candidate schools at the age of eighteen where State law permits.

VA ARNGR 351-5, dated 23 April 1973, promulgated by the Adjutant General of Virginia, permits candidates to enter Officer Candidate School at the age of eighteen and provides that such members may apply for appointment as Second Lieutenants and federal recognition upon graduation. See, secs. 6-1 and 6-5. This is supported by VA ARNGR 351-5, paragraph 5, subsections (7), (8) and (9), dated 1 January 1971.

In view of the foregoing, I am of the opinion that a successful candidate from a National Guard Officer Candidate School may be commissioned in the Virginia National Guard and be federally recognized at any age above eighteen at which time he successfully qualifies.

NEWSPAPERS—Legal Advertisement—Newspaper must meet requirements of § 8-81 of Code.

ORDINANCES—Publication of Legal Notices in Newspaper of General Circulation.

October 18, 1972

THE HONORABLE H. SELWYN SMITH
Member, Senate of Virginia

This will acknowledge receipt of your recent letter in which you question the legality of a resolution passed by the Prince William County Board of Supervisors directing that the publication of legal notices in two newspapers of general circulation in the county be discontinued and that the future publication of such legal notices be entered in the PIEDMONT VIRGINIAN, a newspaper published in Fauquier County and having a circulation of 1300 in Prince William County, a county with a population in excess of 110,000. According to your information, such circulation is concentrated primarily in the western portion of Prince William County.

The general legal requirement for newspaper publication of legal notices is set forth in § 8-81, Code of Virginia (1950), as amended, which provides in relevant portion:

"Whenever there are required by law to be published by any county, city or other municipality . . . any ordinances, resolutions, or notices or advertisements of any sort, kind or character by printing and publishing the same in a newspaper, such newspaper must in addition to any qualifications otherwise required by law meet the following qualifications, namely: such newspaper shall be entirely printed in the English language, shall have
been entered as second class mail matter under the postal laws and regulations of the United States and shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or have agreed to pay a stated price for subscription . . . ."

Your information would indicate that the PIEDMONT VIRGINIAN meets these general requirements. It should be noted, however, that § 8-81 of the Code, quoted above, provides that these general requirements must be met "in addition to any other qualifications otherwise required by law."

A number of specific Code sections require that particular types of legal advertisements be published in a newspaper of "general circulation" within the political subdivision.

As an example, § 15.1-504 of the Code provides that no county ordinance shall be passed until:

". . . after descriptive notice of an intention to propose the same for passage shall have been published once a week for two successive weeks . . . in some newspaper published and having a general circulation in the county, and if there be none such, or if the local governing body whose decision in the matter shall be conclusive deems it necessary, in some newspaper published in an adjoining county or a nearby city and having a general circulation in the county . . . ." (Emphasis supplied.)

Similarly, § 15.1-536 of the Code requires that in the event the meeting place or time for county board of supervisor meetings be altered from that established as custom:

". . . the governing body shall pass a resolution as to such future meeting place or time and shall cause a copy of such resolution to be . . . inserted in a newspaper having a general circulation in the county . . . ." (Emphasis supplied.)

While there are no Virginia court decisions construing the term "general circulation," a substantial body of law on the subject exists as a result of decisions in other states. Those decisions set forth as the relevant criteria for determining whether a newspaper is one of "general circulation" such considerations as: (1) the diversity of interests of its subscribers; (2) the diversity of the news published therein; and (3) the breadth of the area in which the newspaper is circulated or distributed. Eisenberg v. Wabash, 35 Ill. 495, 189 N.E. 301 (1934); Bowler v. Board of Comm. Daniels Cty., 106 Mont. 251, 76 P.2d 648 (1938), State v. Wood County Comm., 84 Ohio 443, 95 N.E. 1157 (1911). Whether a newspaper is one of "general circulation" is therefore a matter of substance rather than size. Pirie v. Kamps, 2 Col. App. 2d 748, 229 P.2d 927 (1951).

Ultimate resolution of the issue in this instance will depend upon a factual determination of such matters as have been found relevant in the above cited decisions, i.e., the diversity of the news published, the diversity of subscriber interests, and the physical area of distribution within the county. Assuming the facts to be correct as set forth in your letter, however, I am of the opinion that use of the PIEDMONT VIRGINIAN for publication of legal notices which by statute are to be advertised in newspapers of "general circulation" in Prince William County does not satisfy statutory requirements.


NEWSPAPERS—Notice Published Once a Week for Two Successive Weeks Construed to Be Fourteen Days.

December 12, 1972
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE DONALD W. DEVINE
Commonwealth’s Attorney for Loudoun County

This is in reply to your recent letter in which you asked my opinion as to the meaning of the words “published once a week for two successive weeks” for determining a time period which begins “not less than five days nor more than twenty-one days after final publication”, all of which language appears in § 15.1-431 of the Code.

The language “published once a week for two successive weeks” was construed to be fourteen days in an opinion to the Honorable Sterling M. Harrison, Commonwealth’s Attorney for Loudoun County, dated February 28, 1968 (citing an earlier opinion directed to the Honorable G. Garland Wilson, found in the Report of the Attorney General (1965-1966) p. 220), a copy of which is enclosed.

I have reviewed these opinions along with the language quoted by you from § 55-59(6) of the Code and am still of the opinion that under the language of § 15.1-431, “published once a week for two successive weeks”, the date of final publication occurs fourteen days after the first insertion (in a weekly paper) of the notice for the purpose of determining a time period which begins “not less than five days nor more than twenty-one days after final publication.”

NOTARIES PUBLIC—Bond—Commission forfeited when bond withdrawn.

December 6, 1972

THE HONORABLE KATHERINE V. RESPESS, Clerk
Corporation Court, City of Norfolk

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

“Section 47-1(4) of the Code of Virginia of 1950, as amended requires each Notary Public to give bond with surety in the penalty of $500.00 at the time of qualifying as such.

“An instance has arisen where a Notary has qualified in this office and given the required bond and subsequent thereto the surety has advised this office that he desires to be relieved on the bond immediately.

“In view of the foregoing, what action is required of this office other than notifying the Secretary of the Commonwealth?”

I am of the opinion that the bond with surety given you by a notary under § 47-1(4) remains in effect and that the surety thereon cannot be relieved therefrom upon his sole application to you. The notary and the surety together are required to appear before you and concur in the request for the relief. In the event the surety is relieved by you, unless the notary simultaneously provides you with another proper bond, his commission as notary is forfeited. You should advise the Secretary of the Commonwealth immediately.

NOTARIES PUBLIC—Person on Active Duty in Armed Forces May Not Be—Exception where appointed notary before entering active duty.

January 15, 1973

THE HONORABLE LOUISE JONAS
Acting Secretary of the Commonwealth

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

“Please give me an official opinion as to whether or not a person on ac-
tive duty in the armed forces may be a notary public.'"

Pursuant to § 2.1-33(3) of the Code of Virginia (1950), as amended, reservists and members of the National Guard may continue to serve as notaries public after being called to active duty. See Report of the Attorney General (1961-1962), p. 193. The reservist or member of the National Guard must have been serving as a notary at the time he is called to active duty and cannot be appointed while on active duty. See Report of the Attorney General (1967-1968), p. 191.

The position of notary public is an "office of honor, profit or trust" and the provisions of § 2.1-30 of the Code are applicable. Except as provided above by § 2.1-33(3) of the Code, a person on active duty of the armed forces may not be a notary public.

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NOTARIES PUBLIC—Procedure for Waiver of Felony Disability for Office of:

CRIMINAL PROCEDURE—Notary Public; Procedure for Waiver of Felony Disability for Office of.

July 12, 1972

THE HONORABLE CYNTHIA NEWMAN
Secretary of the Commonwealth

This is in reply to your letter of June 1, 1972, inquiring whether there is a recognized legal procedure for petitioning for a waiver of the felony disability for the office of notary public.

The power of the Governor to remove political disabilities, imposed as an incident to the conviction of certain offenses, is derived from Article V, Section 12, of the Constitution of Virginia:

"The Governor shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment."

There is no statutory provision establishing a uniform procedure for such waiver petitions and the question is apparently without precedent. Considering the absence of legislative restriction, it is my opinion that there is no legally required procedure with respect to application for waivers of political disability, and the Governor may establish or accept such application procedures as he deems properly necessary to carry out his executive duties in this area.

ORDINANCES—Air Pollution Control Board Regulations; Burning of Leaves.

March 8, 1973

THE HONORABLE JAMES T. EDMUNDS
Member, Senate of Virginia

At its 1973 Session, the General Assembly amended § 10-17.18(b) of the Code of Virginia, relating to air pollution control as follows:

"(b) The Board, after having made an intensive and comprehensive study of air pollution in the various areas of the State, its causes, prevention, control and abatement, shall have the power to formulate, adopt
and promulgate, amend and repeal rules and regulations abating, controlling and prohibiting air pollution throughout the State or in such areas of the State as shall be affected thereby; provided, however, that no such rule or regulation and no such amendment or repeal shall be adopted so as to prohibit the burning of leaves from trees by persons on property where they reside if the local governing body of the county, city, or town in which such persons reside has enacted an otherwise valid ordinance regulating such burning in all or a part of said county, city or town, nor shall any other rule or regulation and no such amendment shall be adopted except after public hearing to be held after thirty days prior public notice thereof by public advertisement of the date, time and place of such hearing, at which opportunity to be heard with respect thereto shall be given to the public; and provided, further, that no such rule or regulation and no such amendment or repeal, shall be or become effective until sixty days after the adoption or entry thereof as aforesaid. The rules and regulations shall not promote or encourage any substantial degradation of present air quality in any air basin or region which has an air quality superior to that stipulated in the rules and regulations."

You have requested my formal opinion as to the application of § 10-17.30 of the Code to ordinances promulgated for the purpose of making the proviso of the amendment first appearing in the quoted portion of § 10-17.18(b) operative in the county, city or town wherein the ordinance was enacted.

Section 10-17.30 provides that "ordinances relating to air pollution" in effect prior to July 1, 1972, remain in effect unless in conflict with a rule or regulation of the Air Pollution Control Board, in which event the Board's regulation governs unless it is less stringent than the conflicting ordinance. Ordinances relating to air pollution proposed for adoption subsequent to July 1, 1972, must be first approved by the Board and may be no less stringent than the analogous regulation of the Board. Thus, § 10-17.30 expresses a clear intent that local ordinances which are more stringent than the applicable rule or regulation shall govern. If the ordinance and rule or regulation are the same then § 10-17.30 would not bar dual application if otherwise practicable.

The amendment to § 10-17.18(b) is unambiguous in its terms and I interpret the phrase "otherwise valid ordinance" to mean "enforceable." Nevertheless, the class of ordinances specified in the amendment to § 10-17.18(b) are either subject to the provisions of § 10-17.30 or they are not so subject and the proper interpretation must depend upon a determination of the intent of the General Assembly.

In my opinion, the ordinances regulating the burning of leaves by persons on property where they reside as specified in the amendment are intended to be drawn to control air pollution from this source in some manner and, thus, are "ordinances relating to air pollution" as this phrase is used in § 10-17.30. However, if the General Assembly intended that the class of ordinances relating to air pollution specified in the amendment to § 10-17.18(b) be subject to the conditions imposed by § 10-17.30, then the result is that there can be no Board prohibition of leaf burning if there is a local ordinance regulating such burning, and there can be no such ordinance if it is less stringent than Board regulation. Inasmuch as this result is absurd, I reject this interpretation of legislative intent.

If the General Assembly intended by its amendment that the class of ordinances specified therein be not subject to the conditions imposed by § 10-17.30, then a reasonable result is produced, i.e., the absence of the specified ordinance is a precondition to Board prohibition of the burning indicated in the amendment and the specific ordinance mentioned in the amendment is excepted thereby from the general class of ordinances mentioned in § 10-17.30.
Consequently, in my opinion, § 10-17.30 has no application to the class of ordinances specified in the amendment to § 10-17.18(b).

ORDINANCES—County May Enact Zoning Ordinance Encompassing Portion of County.

COUNTIES—Qualification for Recreational Access Road Funds.

ZONING—County May Enact Zoning Ordinance Encompassing Portion of County.

COUNTIES—Ordinance—May adopt ordinance dividing county into districts for zoning purposes.

July 18, 1972

The Honorable A. Dow Owens
Commonwealth's Attorney for Pulaski County

This is in reply to your recent letter in which you ask my opinion whether Pulaski County may enact a zoning ordinance applicable only to one magisterial district of the county.

Section 15.1-486 of the Code of Virginia (1950), as amended, provides that the governing body of a county may, by ordinance, divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of zoning.

I am, therefore, of the opinion that the county may enact a zoning ordinance which applies to a portion of the county which encompasses the territory described in the proposed ordinance. See opinion of this office to the Honorable M. G. Anderson, Member, House of Delegates, dated January 31, 1964, and found in Report of the Attorney General (1963-1964), p. 65.

I am further of the opinion that this proposed ordinance is such as is defined by § 33.1-223(4) of the Code, relating to Recreational Access Road Funds. Whether the county qualifies for Recreational Access Road Funds will depend upon its meeting all of the requirements of § 33.1-223 of the Code and not just (4) of that section.

ORDINANCES—Publication in Newspaper of Notice Required by § 15.1-504—Local governing body determines necessity to have notice published in newspaper other than the one published in the county.

BOARDS OF SUPERVISORS—Publication of Notices Concern Ordinances—Determine necessity for publishing notice in newspaper outside the county.

March 29, 1973

The Honorable W. Kendall Lipscomb, Jr.
Commonwealth's Attorney for New Kent County

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

"Section 15.1-504 of the Code of Virginia, relating to adoption of county ordinances, was amended in 1972 by substituting in the third paragraph thereof the language 'and having a general circulation in the county and if there be none such, or if the local governing body whose decision in the matter shall be conclusive deems it necessary' in lieu of the language 'in the county, or'. Prior to this amendment the 1970 amendment permitted notice
in a newspaper published in the county or (emphasis added) in an adjoining county or nearby city which has a general circulation in the county.

"New Kent County now has a newspaper published in the county, but there has been problems with errors in its publication of notices, failure to publish on schedule and failure to print the notices the required number of successive weeks.

"This raises the following questions:

"1. Would the circumstances related above be sufficient for the governing body to take action to require all future notices to be published in a newspaper other than the one published in the county?

"2. Should the governing body take any formal action to establish that it deems it necessary?

"3. If so, what action would be recommended? (General resolution, resolution prior to each notice, with or without reasons therefor).

"4. Although the amendment states that the decision of the governing body shall be conclusive, would it create a 'cloud' over any ordinance or amendment enacted under such circumstances?"

I shall answer your questions seriatim:

1. Under §15.1-504 of the Code the local governing body may deem it necessary to have its ordinances printed in a newspaper published in an adjoining county but having general circulation in its county. The decision of that body is conclusive as to necessity. Therefore, the decision of "necessity" is a matter for the local governing body to determine based on such facts and circumstances as it deems pertinent.

2. It would seem appropriate for the board to record its decision, along with the reason therefor, in its minutes.

3. See the answer to number (2).

4. In view of the language of the statute providing that the decision of the governing body shall be conclusive, I am of the opinion that the answer to this question is in the negative.

ORDINANCES—Subdivision—Board of Supervisors may not adopt unless statutory procedure followed.

BOARDS OF SUPERVISORS—Ordinances—Must be adopted in manner provided by statute.

SUBDIVISIONS—Board Must Follow Statutory Procedure in Adopting.

March 7, 1973

The Honorable Douglas S. Mitchell
Commonwealth's Attorney for King and Queen County

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

"At the February meeting of the Board of Supervisors of King and Queen County, the King and Queen County Planning Commission proposed to the Board as an emergency action to protect the health and safety of the County until a proper subdivision ordinance can be prepared and adopted the following:

"'Effective on the passage of this ordinance no residence shall be started or constructed on a parcel of land not served by public water or sewer which shall measure less than 150 feet wide at the building line
or contain less than 40,000 square feet. This ordinance to remain in force until a subdivision ordinance is prepared and adopted."

"After some discussion the Board requested that I communicate with you to determine your opinion of the validity of such an ordinance.

"You will note the County has no subdivision ordinance at this time and the duration of the proposed ordinance is for no special time nor does it provide for any enforcement nor punishment for violators or any action that might be taken by the Board of Supervisors to enforce the proposed ordinance, if adopted."

Section 15.1-465 of the Code of Virginia (1950), as amended, authorizes a board of supervisors to adopt a subdivision ordinance to assure the orderly subdivision of land and its development. Section 15.1-466 of the Code provides that the county may place in the ordinance reasonable regulations thereinafter mentioned and prohibits the adoption of any such regulations until certain orderly procedures have been followed, including the holding of a public hearing in accordance with § 15.1-431 of the Code. When a statute specifies the steps to be taken by a local governing body in adopting an ordinance, it cannot be validly adopted unless such preliminary steps are taken. In this instance the county has not complied with the general provisions of Chapter 11, Article 7, of Title 15.1 (§§ 15.1-465 through 15.1-485 of the Code). There is no provision in the Code for an "emergency" subdivision ordinance. I am, therefore, of the opinion that the proposed ordinance is invalid.

ORDINANCES—Subdivisions—County may adopt ordinances providing for off-site drainage.

COUNTIES—Ordinances—Subdivision drainage—Adoption by certain counties.

THE HONORABLE PHILIP H. MILLER
County Attorney for Augusta County

January 10, 1973

This is in reply to your recent letter which reads:

"I have been requested as county attorney for Augusta County, Virginia to ascertain the various means of financing a storm drainage system to alleviate certain areas of the County where flooding has become a problem. In one area of the County a storm drainage study is being made at a considerable expense to determine what steps may be taken to cure the problems in that area. Similar studies will be made of other areas as demands may dictate.

"I am familiar with Section 15.1-239 et seq. regarding the imposition of assessments against existing property owners. However, the County would rather assess new developers as this particular area is a tremendous growth area and it is felt that the County would be substantially reimbursed upon complete development of the area.

"Section 15.1-465 et seq. and in particular 466(c) and (d) would have permitted the preferred method of assessment against a new subdivision or developer; however, Section 14.1-510.7 makes specific provisions for the method of assessment for offsite drainage and further provides that only certain cities and counties can pass ordinances allowing such assessments.

"The questions are:

"1. Is my position correct in that Augusta County could have assessed
subdividers and developers for offsite drainage under Section 15.1-465 et seq.

"2. If Augusta County was permitted to assess for offsite drainage under Section 15.1-465 et seq., is it still able to do so in light of the recent passage of Section 15.1-510.7."

I shall answer your questions seriatim:

1. Section 15.1-465 of the Code of Virginia (1950), as amended, empowers a county to adopt subdivision ordinances to assure the orderly division and development of its land. Section 15.1-466(c) permits the ordinances to provide for the coordination of street drainage in the subdivision and (d) to provide adequate provisions for drainage and flood control and other public purposes. Subsection (f) provides for the acceptance of dedication of public use of rights-of-way, drainage or sewerage system or other improvements financed by private funds. I am of the opinion that under these sections the county in adopting a subdivision ordinance may assess subdividers and developers for offsite drainage.

2. Section 15.1-510.7 of the Code was enacted by the 1972 General Assembly as Chapter 656. This section specifically empowers counties organized pursuant to Chapter 15 (§ 15.1-722, et seq.) of Title 15.1 to adopt land use regulations requiring a subdivider or developer of land to pay his pro rata share of the cost of providing reasonable and necessary sewerage and drainage facilities, located outside the property limits of the land owned or controlled by the developer. The counties included in Chapter 15 (§ 15.1-722, et seq.) of Title 15.1 are those counties adopting the urban county form of government. Augusta County does not fall within this chapter. Augusta County is authorized by § 15.1-465, et seq. to assess subdividers for offsite drainage. These sections are still in effect and are not directly affected by the adoption of § 15.1-510.7 which applies to certain other counties only. I am, therefore, of the opinion that the answer to this question is in the affirmative.

PARENT AND CHILD—Unwed Father Entitled to Notice of Entrustment Proceeding.

ADOPTION—Each Parent's Rights Must Be Severed Prior to, Either by Entrustment Agreement or Court Proceedings Held After Notice to Each Parent.


August 8, 1972

THE HONORABLE HERBERT A. KRUEGER, Director
Division of General Welfare
Department of Welfare and Institutions

This is in response to your recent letter in which you inquire as to the effect of Stanley v. Illinois, 92 S.Ct. 1208 (1972), on §§ 63.1-56 and 63.1-204 as amended in 1972 by House Bill No. 319, Code of Virginia (1950), as amended. The Supreme Court held in Stanley that, as a matter of due process, an unwed father is entitled to a hearing with regard to fitness in a dependency proceeding initiated by the State. The Court also held that the Illinois scheme which granted such a hearing to married or divorced parents and unwed mothers but not to unwed fathers, violated the father's right to equal protection of the laws.

More recently, in Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan, 92 S.Ct. 1488 (1972), the Supreme Court extended the holding of Stanley to the adoption area by reversing the Wisconsin Supreme Court’s hold-
ing that "the putative father of a child born out of wedlock does not have any parental rights; and that the failure of the Wisconsin statutes to grant parental rights or notice of hearing to a putative father prior to termination of parental rights does not constitute a violation of the State or Federal Constitution." *State v. Lutheran Social Services of Wisconsin and Upper Michigan*, 178 N.W.2d 56, 63 (1970).

Given the *Stanley* holding as extended by *Rothstein*, it is my judgment that §§ 63.1-56 and 63.1-204, as amended, are superseded by federal law and are void to the extent that they deny the putative father of an illegitimate child the right to notice of an entrustment proceeding which would have the effect of depriving the father of the parental rights to said child. Each parent's rights must be severed prior to adoption or other award of custody either by obtaining an entrustment agreement properly endorsed by each parent, or by custody or adoption court proceedings held after notice to each of the parents.

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**PARK AUTHORITIES—Political Subdivisions Forming A Park Authority Need Not Be Contiguous to One Another.**

*The Honorable Rob R. Blackmore, Director*

Commission of Outdoor Recreation

This is in reply to your recent letter requesting my interpretation of § 15.1-1230 of the Code of Virginia (1950), as amended, relating to the creation of park authorities. Specifically, you raise the question whether political subdivisions forming a park authority must be contiguous to one another.

A careful reading of § 15.1-1230 reveals no such requirement either as to political subdivisions forming a park authority or political subdivisions joining a park authority previously created. Thus, with reference to the situation mentioned in your letter, if a county does not join a park authority, an incorporated town located within the county would not be thereby precluded from doing so.

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**PERSONNEL ACT—Executive Director and Assistants of Virginia Eastern State Hospital Bicentennial Anniversary Commission Exempt From Provisions of.**

*The Honorable John W. Garber*

Director of Personnel

I am in receipt of your letter wherein you inquired whether or not the executive director of, and such other assistants as may be required by, the Virginia Eastern State Hospital Bicentennial Anniversary Commission are exempt from the provisions of the Virginia Personnel Act (§ 2.1-110, *et seq.*).

Chapter 485 of the 1970 Acts of Assembly provides in pertinent part as follows:

"§ 2. The Commission shall employ an executive director and such other assistants as may be required. They shall be charged with developing and coordinating the plans . . . for the Anniversary observance . . . ." (Emphasis added.)

Therefore, the Commission is specifically required by statute to employ an executive director and such other assistants as may be necessary who are charged with developing and coordinating the plans for the anniversary observance. The Commission is also authorized to use funds appropriated by the General Assembly

If the General Assembly intended for employees of the Commission to be subject to the provisions of the Virginia Personnel Act, it could have specifically so provided. For example, § 62.1-135 of the Code of Virginia (1950), as amended, which deals with the power of the Virginia Ports Authority, reads in part as follows:

"In order to enable it to carry out the purposes of this chapter, the Authority, but without pledging the faith and credit of the Commonwealth of Virginia:

*   *   *

"(d) May appoint and employ and dismiss, subject to the provisions of chapter 10 (§ 2.1-110 et seq.) of Title 2.1 of the Code of Virginia, such employees as it may select. . . ." (Emphasis added.)

*   *   *

"(f3) Is authorized, subject to the provisions of chapter 10 (§ 2.1-110 et seq.) of Title 2.1 of the Code of Virginia, to employ, fix and pay compensation of employees. . . ." (Emphasis added.)

It should also be noted that § 2.1-116(7) of the Code exempts from the provisions of the Virginia Personnel Act officers and employees of the General Assembly. The right to control is the critical factor bearing on the question of whether an employer-employee relationship exists. Smith, Adm'r v. Grenadier, 203 Va. 740, 746 (1962). The Commission is an arm of the General Assembly and has no authority to exercise powers beyond those granted by the legislature. It is dependent upon appropriations from the General Assembly in order to operate. Therefore, the General Assembly has the power of control over the Commission and its employees.

In light of the above, I am of the opinion that the executive director of, and such other assistants as may be required by, the Virginia Eastern State Hospital Bicentennial Anniversary Commission are exempt from the provisions of the Virginia Personnel Act.

PLANNING COMMISSION—District—Powers and purposes of planning district commission; may not do indirectly what it is prohibited from doing directly.

July 6, 1972

THE HONORABLE ROBERT H. KIRBY, Director
Division of State Planning and Community Affairs

This will acknowledge receipt of your letter of June 15, 1972, requesting my opinion relating to the authority of a planning district commission to create a non-profit corporation or special authority to receive, disburse and administer grants for programs which would be operated by another agency. Your letter notes that such corporation "would not employ staff, purchase equipment or actually operate or carry out programs [but] would probably provide staff assistance."

As you are aware, the statutory function and purpose of a planning district commission is to plan. Correspondingly, the implementation of plans, the providing of governmental services and activities other than planning are outside the scope of authority of a planning district commission. See the opinion of this office rendered to Mr. Stanley S. Kidwell, Regional Planning Officer, Division of State Planning and Community Affairs, dated January 12, 1971. As was noted in
the opinion of this office rendered to the Honorable Charles H. Graves, Director, Division of State Planning and Community Affairs, dated October 22, 1970, and found in Report of the Attorney General (1970-1971), p. 294, the General Assembly has clearly manifested its intent that the voters must first approve a district-wide service mechanism; and where the authority of a planning district commission is sought to be broadened to include the performance of services, although on a limited, administrative basis, such legislative intent would be violated.

In this regard, that which a planning district commission is without authority to do itself, it may not authorize or delegate to some other governmental or corporate entity to do. See Report of the Attorney General (1970-1971), p. 295. Similarly, should it be improper for a planning district commission to perform a particular function, it would also be improper for the planning district commission to receive funds for that purpose. See the opinion of this office rendered to Mr. Stanley S. Kidwell, Regional Planning Officer, Division of State Planning and Community Affairs, dated January 12, 1971, relating to the owning and operating of mass transit buses by the Richmond Regional Planning District Commission.

In view of the foregoing, I am of the opinion that the receipt, disbursement and administration of grants for projects not within the planning process are outside the scope of authority of a planning district commission; a planning district commission may not create a non-profit corporation or special authority to administer such, even though the member local governments concur and the program would be operated by the separate agency. A planning district commission may not do indirectly that which it is prohibited from doing directly. To rule otherwise would be to circumvent and violate the procedures and safeguards embodied within Article III of Chapter 34 of Title 15.1 of the Code of Virginia (1950), as amended. Should a departure from the provisions of the Virginia Area Development Act be desirable, such may be accomplished only through appropriate legislative amendment as was recently done in the case of Lenowisco Planning District Commission. See Chapter 814 of the Acts of Assembly of 1972.

PLANNING COMMISSION—Express Language of § 15.1-437 Prohibits More Than One Member of Town Council from Serving on.

ZONING COMMISSION—Authority of Terminates upon Creation of Local Planning Commission.

August 14, 1972

THE HONORABLE CHARLES L. MCCORMICK, III
Commonwealth's Attorney for the County of Halifax and the City of South Boston

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

“Virginia Code Section 15.1-437 provides that one member of the Local Planning Commission of a municipality may be a member of the governing body of such municipality. I would like your opinion as to whether or not this prevents a town from having more than one member of its council on its Local Planning Commission?”

Under the provisions of § 15.1-437 of the Code of Virginia (1950), as amended, to which you make reference, it is expressly provided that one member of the local planning commission may be a member of the governing body of the county or municipality, and one member may be a member of the administrative branch of government of the county or municipality. Section 15.1-430 of the Code defines "governing body" as "the board of supervisors of a county or the council of a city
or town." This allowance of dual membership provides an exception to § 15.1-50 of the Code which prohibits supervisors from holding more than one office. It is also an exception to § 15.1-800, which declares members of councils ineligible to hold certain offices. In my opinion this express language of § 15.1-437 prohibits more than one member of a town's council from serving on the local planning commission.

With reference to your second inquiry, you set forth the following:

"Section 15.1-487 of the Virginia Code appears to enable a municipality which has no Local Planning Commission to appoint a Zoning Commission to act in zoning matters. If a town already has a Zoning Commission and thereafter establishes its own Local Planning Commission, can the town thereafter continue to use its Zoning Commission for zoning matters, or does the authority of the Zoning Commission terminate with the creation of a Local Planning Commission?"

Section 15.1-487 of the Code provides:

"In order to avail itself of the powers conferred by this article, the governing body of any county or municipality in which no local planning commission has been created shall appoint a commission of not less than five nor more than fifteen members to be known as the zoning commission to recommend the boundaries of the various districts and the regulations to be enforced therein. Any commission so appointed shall exercise the powers and perform the duties conferred and imposed on local planning commissions under this article. Such commission shall cease to exist upon the creation of a local planning commission for the political subdivision."

(Emphasis supplied.)

In my opinion this section requires that the authority of the zoning commission terminate upon the creation of the local planning commission.

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PLANNING COMMISSION—Non-freeholder May Not Be Appointed to.

HOUSING AUTHORITIES—Local Government May Not Participate in Housing Program in Absence of Creation of a Housing Authority.

CITIES, COUNTIES AND TOWNS—County Could Not Indirectly Participate in Housing Program Intended for Municipalities.

August 21, 1972

The Honorable William J. Hassan
Commonwealth's Attorney for Arlington County

This is in reply to your letter of July 31, 1972, in which you related to this office the following questions on behalf of the Arlington County Board of Supervisors:

1. May a non-freeholder validly be appointed to a local Planning Commission?

2. May Arlington County participate in a housing program in which the County rents residential units from private owners and, in turn, sublets such units at reduced rents to individual moderate-income tenants, such tenants in effect receiving a rent subsidy?

In response to question one, I must call your attention to § 15.1-437 of the Code of Virginia (1950), as amended, which provides, in part, as follows:
"A local planning commission, hereinafter sometimes referred to as a
local commission shall consist of not less than five nor more than fifteen
members, appointed by the governing body, all of whom shall be residents
of the county or municipality, and who shall be freeholders qualified by
knowledge and experience to make decisions on questions of community
growth and development . . .". (Emphasis added.)

The section quoted clearly prescribes a requirement that members of local
planning commissions be freeholders. An appointment of a non-freeholder to such
a position would be valid only if such requirement of law were void. Said require-
ment would be void if it were unconstitutional; however, all Acts of the legisla-
ture which are not unreasonable, arbitrary or discriminatory on their face are
presumptively constitutional, in the absence of compelling facts to the contrary.
While it is conceivable that, on the facts of a fully-developed record in a given case
or controversy, the constitutionality of some freeholder-type requirements would
be jeopardized, I cannot reach the general conclusion that this requirement, on its
face, creates an unreasonable (and therefore unconstitutional) classification.

With regard to question two, you are of course aware that, under Title 36 of the
Code of Virginia, the several units of local government are authorized to create
housing authorities by referendum. However, the Arlington Board's Resolution re-
garding this proposed project, a copy of which was furnished to this office in
your request for an opinion, states, "Arlington County does not desire to establish
a public housing authority." I am aware of no legislative delegation of authority
enabling a unit of local government to participate in a program such as that de-
scribed in the Board's Resolution, in the absence of the creation of a housing
authority.

It is to be noted that, under § 36-23 of the Code of Virginia (1950), as
amended, an existing housing authority may, after certain hearings and findings by
a requesting governing body, "exercise any or all of its powers within the terri-
torial boundaries of any municipality not included in the area of operation of
such housing authority . . .". However, on the basis of definitions of "municipal-
ity" and "municipal corporation" furnished in §§ 36-47 and 15.1-837, respectively,
it appears that such terms are limited to cities and towns. Therefore, it does not
appear that Arlington County could not indirectly participate in the proposed hous-
ing program by means such as that set forth in § 36-23.

PLANNING COMMISSION—Planning District Commissions Not Authorized to
Provide Industrial Development Services.

December 7, 1972

THE HONORABLE THOMAS E. CROSLEY, JR.
County Attorney for Stafford County

This will acknowledge receipt of your recent letter in which you request my
opinion with regard to the following questions:

". . . 1. Is industrial development a governmental service restricted to
local government or is it a function which may be performed by a plan-
ing district commission created pursuant to the Virginia Area Develop-
ment Act of 1968?

"2. If so, is it permissible to use planning district commission funds for
industrial development?

"3. If so, would the use of such funds by the planning district com-
mission which has been funded by local governments restrict and limit the
power of the local government to appropriate funds under Section 15.1-10.1
of the 1950 Code of Virginia, as amended?"

The Virginia Area Development Act, Title 15.1, Chapter 34, Code of Virginia (1950), as amended, provides for the establishment of planning district commissions within geographic boundaries of planning districts. The stated purpose and function of such planning district commissions, as provided in § 15.1-1405 of the Code is as follows:

"... to promote the orderly and efficient development of the physical, social and economic elements of the district by planning, and encouraging and assisting governmental subdivisions to plan for the future. It shall not be the duty of the commission to perform the functions necessary to implement the plans and policies established by it or to furnish governmental services to the district . . . ." (Emphasis supplied.)

The legislature has, thus, defined the function of planning district commissions as that of planning, not plan implementation or performance of governmental services. Furthermore, Article 3, Chapter 34, Title 15.1 of the Code, providing for the creation of service districts, establishes statutory machinery for the provision of governmental services on a district-wide basis.

That a planning district commission may plan with regard to industrial development is unquestioned. However, many of the activities associated with industrial development, such as advertising and giving publicity to advantages of industrial location in a particular area or negotiating agreements with industries, are clearly in the nature of governmental services to be performed by local governmental subdivisions or by area-wide service districts.

Accordingly, I am of the opinion that the activities involved in promoting and securing industrial development are not proper functions of a planning district commission.

In view of this determination, I find it unnecessary to answer your second and third questions above. I further refer you to two opinions of this office (attached hereto), both dated October 22, 1970, to Mr. Charles H. Graves, Director, Division of State Planning and Community Affairs, which outline the proper functions and purposes of planning district commissions.

POLICE—Authority of County Police Within Towns Located in County.

COUNTIES, CITIES AND TOWNS—Authority of County Police in Towns.

September 7, 1972

This is in reply to your recent letter in which you request an opinion concerning the proper interpretation of § 15.1-608 of the Code of Virginia (1950), as amended, which deals with the establishment of departments of law enforcement in counties operating under the county executive form of government. The question you raise is as follows:

"Does the reference in Section 15.1-608, which is enabling legislation for the establishment of county police under the County Executive form of government, give authority to such county police to operate within the incorporated towns in the county?"

The pertinent language of § 15.1-608 is as follows:

"The county executive shall have supervision and control of the police force of the county. Such police may be appointed pursuant to § 15.1-598,
and all police officers appointed by the board of county supervisors, pursuant to such section, including the chief of the department, shall be conservators of the peace in the county and shall be charged with the enforcement of all criminal laws throughout the confines of the county."

I can find no other statute nor any case law which would govern the question you have raised, or which would indicate the extent of jurisdiction of such county police officers. The significant language in § 15.1-608 is the phrase, "throughout the confines of the county." It is my opinion that these words should be interpreted to mean the entire county, including incorporated towns located within the county. It is therefore my opinion that such county police officers do have authority and jurisdiction to enforce the criminal laws of the state within the limits of incorporated town located in such a county.

POLICE—Authority of Virginia Port Authority Police To Make Arrests on Vessels.

LOCAL-Fees, etc. on vessels enrolled.

ARREST—Port Authority Police Making Arrests on Vessels.

December 6, 1972

THE HONORABLE JAMES A. CALES, JR.
Commonwealth's Attorney for the City of Portsmouth

This is in response to your recent letter and subsequent telephone conversations with this office. You request an opinion concerning the authority of the Virginia Port Authority police officers to make arrests of individuals who are charged with offenses occurring on property of the Portsmouth Marine Terminal when said individuals are found on board a vessel docked at that facility.

In two earlier opinions to you dated August 30, 1971, and February 28, 1972, it was pointed out that the policemen in question derived their authority from § 62.1-135 (k) and (1) of the Code of Virginia (1950), as amended, and that under said section, such policemen are empowered 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. Also, these policemen have the same police powers vested in state and city police officers under §§ 15.1-138 and 52-8 of the Code. As pointed out in those earlier opinions, this police authority extends within one mile of the limits of the Terminal property.

You have pointed out that when a vessel is docked at the Terminal, it is considered to be in an area that is under the control of the Authority, although not owned by the Authority. Furthermore, it would be within one mile of the limits of the property of the Authority. In either situation, the powers of the Authority police officers would be as given to them in § 62.1-135 of the Code.

Therefore, it is my opinion that the police officers of the Virginia Port Authority do have power to make an arrest on board a vessel docked at the Portsmouth Marine Terminal in the exercise of their responsibilities and authority to enforce the laws of the Commonwealth and the rules and regulations of the Authority.

POLICE—Special Policemen—Salaries—Payment by county and industry.

COUNTIES—Special Policemen—Payment of salary by county.

November 15, 1972
This is in reply to your recent letter, wherein you stated that special policemen have been appointed in Henry County pursuant to § 15.1-144 of the Code of Virginia (1950), as amended, some of whose salaries are paid partially by the county and partially, or in some cases wholly, by industry located in the area of the respective departments of which the policemen are members. You further stated that all county payments for salaries are made from the General Fund of Henry County. You also indicated that the area of responsibility of the police departments comprised of special policemen is generally limited to the area surrounding the vicinity in which the department is located. You then asked essentially three questions.

The first question is as follows:

Is it legal for the County to pay the salary of special policemen from the General Fund of the County, when the principal area of their responsibility is restricted to one particular area of the County?

Pursuant to § 15.1-144, special policemen may be appointed for so much of a county as is not embraced within an incorporated town located in the county. Section 15.1-152 provides, in part, as follows:

"The jurisdiction and authority of such police upon order entered of record by the Circuit Court of the county, or the judge thereof in vacation, may be limited to a specific place or places in such county . . . ."

Section 15.1-146 provides as follows:

"The governing body of such county may, if deemed proper, except where the policeman is otherwise regularly employed and his duties as a policeman are merely incidental to such private employment, allow such compensation to the policeman appointed under the provisions of § 15.1-144 as, together with any expenses incurred in executing his duties, shall be deemed right and proper by such governing body to be paid out of the county levy."

Because § 15.1-152 specifically grants the appointing authority of a county the power to limit the jurisdiction and authority of special policemen, and because § 15.1-146 provides that such policemen may be allowed compensation and expenses incurred in executing their duties, except as therein stated, to be paid out of the county levy, in my opinion it is legal for Henry County to pay from its General Fund the salaries of special policemen, even though such policemen’s responsibilities are restricted to a particular area of the county.

The second question is as follows:

Is it legal for an industry to pay the entire salary of a county special policeman?

Section 15.1-146, quoted above, recognizes that a policeman may be otherwise regularly employed and performing duties as a policeman incidental to such employment; therefore, it is legal for an industry to pay the entire salary of such special policeman.

The third question is as follows:

Is it legal for an industry to supplement the salary paid a special policeman by the county from the County General Fund?

Consistent with what has been hereinabove stated, it is legal for an industry to supplement the salary of a special policeman. Section 15.1-146 makes an exception to allowance of compensation to a special policeman where the police-
PRISONERS—Authority to Execute Deeds—Inmate sentenced to twelve months in jail, as opposed to State correctional facility, may transfer real estate.

JAILS AND PRISONERS—Authority to Execute Deeds—Inmate sentenced to twelve months in jail, as opposed to State correctional facility, may transfer real estate.

REAL ESTATE—Prisoners—Execution of deeds—Twelve month jail sentence, as opposed to State correctional facility, does not require committee to execute deed.

May 16, 1973

THE HONORABLE ALBERT T. MITCHELL
Commonwealth's Attorney for Shenandoah County

This is in reply to your recent letter in which you request an opinion concerning the following matter:

"With reference to § 53-305 of the Code of Virginia of 1950, as amended, may an individual who has been convicted of a felony and sentenced to twelve months in jail, but who is serving such sentence in the Bureau of Field Correctional Units lawfully execute an instrument conveying interest in real estate in which he has an interest located in the State of Virginia?"

Further discussion with you indicates that in the situation in question the Court order convicting the individual specifically sentences said individual to "twelve months in jail", and that the individual's transfer to the Bureau of Field Correctional Units was accomplished not by court order, but by normal administrative procedures allowing transfer of prisoners from jails to State correctional institutions.

Section 53-305, Code of Virginia (1950), as amended, relates to the appointment of a committee for the purpose of managing and otherwise administering the real and personal property of an individual who "is convicted of a felony and sentenced to confinement in a State correctional institution for one year or more . . . " Section 53-312 of the Code specifies that the real estate of a person so convicted may be leased or sold by said committee. Therefore, the answer to your question depends upon an interpretation of the language of § 53-305, specifically the language referring to "confinement in a State correctional institutional" and the language "for one year or more".

Section 53-9 of the Code defines "correctional institution" as used in Title 53 to mean and include "every prison, prison camp, prison farm, or correctional field unit heretofore or hereafter established with funds appropriated from the State Treasury, and every jail, jail farm, lockup or other place of detention owned, maintained, or operated by any political subdivision of the Commonwealth . . . " Clearly under that definition, a "correctional institution" would include a local jail. However, § 53-305 refers to a "State" correctional institution. It is thus my opinion that § 53-305 does not apply to a person convicted of a felony and sentenced to confinement in jail, since a jail is not by definition a "State" correctional institution.
Since the opinion expressed above would remove your situation from the operation of § 53-305, it is not necessary to determine whether his sentence to twelve months would be equal to a sentence of "one year or more". I conclude that its provisions are inapplicable in this instance since § 53-312 does not cover the individual in question. Consequently said individual can convey an interest in real estate and execute a deed as any other competent person, without the appointment of a committee.

PRISONERS—Confinement—Credit for confinement awaiting trial in two jurisdictions.

JAILS AND PRISONERS—Confinement—Credit for confinement awaiting trial in two jurisdictions.

May 8, 1973

The Honorable Daniel M. Chichester
Commonwealth's Attorney for Stafford County

This is in response to your recent inquiry in which you seek an opinion of the Attorney General predicated upon the following situation and question:

"A man is charged in County A and while awaiting trial in that county he is further charged in County B. Part of his pre-trial confinement time is spent in Counties A and B before his trial in County A. His trial in County A results in his receiving a jail term of six months on one charge and ten days for contempt of court. It is calculated that he has a hundred and thirty days to serve as a result of the ten days for contempt and the four months that he would serve after getting two months off for good behavior. Part of his post-conviction time is spent in County A and part in County B. The net result is that he has spent fifty-eight days in County A and seventy-two days in County B where trial had yet to take place. The question is whether or not he gets credit for the seventy-two days that he has spent in County B toward the one hundred and thirty days that he must serve in County A."

Section 53-208, Code of Virginia (1950), as amended, provides in pertinent part:

"Any person who may be sentenced by any court to a term of confinement in the Penitentiary, or by any court or judge to a term of confinement in jail, for the commission of a crime, or in jail for default in the payment of a fine, shall have deducted from any such term all time actually spent by such a person . . . in jail or the Penitentiary awaiting trial . . . and it shall be the duty of the court or judge, when entering the final order in any such case, to provide that such person so convicted be given credit for the time so spent . . . ."

There is no question that a person convicted is entitled to credit for time spent awaiting trial. See Report of the Attorney General (1964-1965), page 141. Since the legislature has made no distinction as to the location of the jail in which the individual is confined, the answer to your question is that he receives credit for the seventy-two days spent in County B's jail toward the one hundred and thirty days which he is to serve in County A. It would seem that notification of this disposition to County B would preclude County B from awarding credit for the same time upon its sentence in the event such person is subsequently convicted in County B.
REPORT OF THE ATTORNEY GENERAL

PRISONERS—Transfer from Jail to Penitentiary.

SHERIFFS—Transfer of Prisoners from Jail to Penitentiary.

April 10, 1973

The Honorable C. J. Smith
Sheriff, City of Danville

In your recent letter, you make the following inquiry:

"What length of time do we have to hold a defendant in our local jail, who has been convicted in the Corporation Court with an appeal already prepared before transferring him to the State Penitentiary?"

The answer to your inquiry can be found in §§ 19.1-296 and 53-21.1 of the Code of Virginia (1950), as amended. Both of these sections deal with transportation of convicts to the penitentiary. The language of these sections is similar although they contain slight variations.

These sections provide that the Clerk of the Court in which the person is sentenced is to forthwith transmit to the Director of the Division of Corrections an abstract of the judgment. Upon receipt of the abstract, the Director of the Division of Corrections shall dispatch a guard to the county or corporation with a warrant directed to the sheriff authorizing him to deliver the convict to the guard whose duty it shall be to take charge of the person and convey him to an appropriate receiving unit. Section 19.1-296 contains the following proviso:

"Under no circumstances shall persons be conveyed to the receiving unit or units of the State penal system beyond the maximum capacity of the unit or units as established by the Director of the Division of Corrections; in this regard, the Director of the Division of Corrections or his designee shall allocate space available in the receiving unit or units by giving first priority to the transportation, as the transportation facilities of the Division of Corrections may permit, of those persons held in jails who in the opinion of the Director or his designee require immediate transportation to a receiving unit."

These sections do not provide any definite time within which a person must be transferred from the local jail to a receiving unit. However, it is my opinion that the intent of these statutes is to provide for the transfer as soon as space is available in the receiving units. Since § 19.1-296 makes the transfer of prisoners contingent upon space being available in the receiving units, the transfer time is going to vary depending upon the available space in the receiving units.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Professional Corporation Offering Engineering, Land Surveying or Architectural Services May Not Offer Planning Services Outside Normal Services of Corporation.


August 3, 1972

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

This is in response to your letter of July 13, 1972, from which I quote as follows:
"The Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors requests your interpretation and opinion regarding the following application of its regulatory statutes as encompassed in Chapter 3, Title 54, Code of Virginia, 1950.

"Section 54-27, in part, provides that 'It shall be unlawful for any person to practice, or to offer to practice the profession of engineering, architecture or land surveying, in this State, or to use in connection with his name, or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional engineer, architect or land surveyor, unless such person has been duly registered or is exempted under the provisions of this chapter.'

"In 1970, the Virginia General Assembly amended Chapter 7, Title 13.1, Code of Virginia to provide for the practice of the aforementioned professions by corporations, and on December 14, 1970, the Board adopted Rules and Regulations with respect thereto. A copy of such regulations is enclosed. The Board's question relates specifically to the Rules and Regulations on Professional Practice.

"Section 13.1-548 provides, in part, that 'No corporation organized under this chapter shall engage in any business other than the rendering of the professional services for which it was specifically incorporated;'

"In view of the above statutory restrictions, the Board would ask if the name of an individual who is pursuing a profession not regulated by Virginia Statutes, such as a 'Planner', might appear in the name of a corporation or association offering engineering, land surveying or architectural services, or if the corporation or association might, in fact, be legally entitled to offer such a service.

With regard to your more general question of whether a professional corporation offering engineering, land surveying or architectural services might be legally entitled to offer planning services, the answer is in the negative to the extent that such planning services are outside of the scope of the normal services offered by said professional corporation pursuant to its charter. The relevant provision of the Virginia Code which speaks to this question is § 13.1-548, set out above, which provides explicitly that no professional corporation "shall engage in any business other than the rendering of the professional services for which it was specifically incorporated; . . . ."

With regard to your specific question as to whether the name of an individual who is pursuing another profession not regulated by Virginia statutes may appear in the name of a corporation or association offering engineering, land surveying or architectural services, the answer is also in the negative to the extent that such person would render services outside of the scope of the normal services rendered by said corporation. In reaching this conclusion, I am mindful of the special provisions relating to corporations organized for the sole purpose of rendering the professional services of architects, professional engineers, and land surveyors found at § 13.1-543(2) and § 13.1-549. It is my judgment, however, that these provisions relate only to the composition of such corporations and do not in any way expand the scope of services which such corporations may perform.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Shop Permits Necessary for Both Barber Shop and Beauty Salon in Same Location.

July 10, 1972

The Honorable Turner N. Burton, Director
Department of Professional and Occupational Registration
This opinion relates to your inquiry as to whether persons engaged in barbering and hairdressing in the same location need to obtain both a permit to operate a barber shop and a license to operate a beauty salon. It is my opinion that, although the businesses are being practiced in the same location, each is required to obtain a license under § 54-83.19 and § 54-112.27, respectively. I am unable to find, in either the Barber's Act or the Hairdresser's Act, any provision exempting persons from obtaining the respective shop permit. This ruling should be distinguished from my opinion that holders of licenses as Professional Hairdressers were exempt from licensure as barbers when practicing as such. Opinion of the Attorney General 1969-1970, p. 213. That opinion refers to individual licensees; the instant opinion applies to shop permits.

PROPERTY—Real Estate—Minerals—Existence of—Action to require determination and clear title—Where may be brought under §§ 55-154 and 55-155.

February 12, 1973

THE HONORABLE FRANK M. SLAYTON
Member, House of Delegates

This is in reply to your letter of February 1, 1973, in which you state:

"I would, therefore, like your opinion as to whether or not Section 55-154 is applicable to Halifax County, Virginia and, if so, whether or not the suit provided for in Section 55-155 of the Code may be properly instituted in Halifax County, Virginia."

Sections 55-154 and 55-155 of the Code of Virginia (1950), as amended, provide for the bringing of an action to require a determination whether minerals in fact exist, and to have reservations on title cleared.

Section 55-154 excludes from its provisions lands lying west of the Blue Ridge Mountains, except lands in those counties west of the Blue Ridge having certain populations therein enumerated.

Since all of Halifax County lies east of the Blue Ridge Mountains, I am of the opinion that §§ 55-154 and 55-155 apply in that county. Since the land in question is located in Halifax County, a suit in equity may be brought in the circuit court of that county to settle claims to minerals, coals, oils, ores and subsurface substances. See Love v. Lynchburg Nat'l Bank & Trust Co., 205 Va. 860, 140 S.E.2d 650 (1960), in which an action was successfully instituted in Campbell County under these sections to clear title on land in that county.

PROXY—Ex-officio Members Serving on Council on Criminal Justice May Attend and Vote by Proxy Only When Provided by Statute.

COUNCIL ON CRIMINAL JUSTICE—Attendance by Proxy Members—Regulated by Statute.

March 29, 1973

THE HONORABLE RICHARD N. HARRIS, Director
Division of Justice and Crime Prevention

This is in reply to your recent letter with which you included a set of proposed by-laws for the Council on Criminal Justice and asked whether ex-officio members of the Council may designate representatives to attend Council meetings when they are unable to attend and whether such representatives may be given voting privileges at such meetings.
Section 2.1-64.23, Code of Virginia (1950), as amended, provides, in part, as follows:

“There is hereby created the State Division of Justice and Crime Prevention, which shall be under the supervision and direction of the Governor, acting through the Commissioner of Administration . . . .

* * *

“The Governor shall also appoint a Council on Criminal Justice . . . consisting of eighteen members . . . .”

The above-quoted section then provides for the appointment by the Governor of six ex-officio members of the Council, including the “Attorney General of Virginia or a representative from the office of the Attorney General,” and for the appointment of twelve additional members who are residents of the State and are representatives of various fields and interests.

The section is clear in its intent and meaning and does not, expressly or by implication, authorize the attendance at meetings of the Council by proxy, except in the case of the Attorney General. The fact that the section provides for appointment of “the Attorney General of Virginia or a representative from the office of the Attorney General” clearly negates the theory that a representative of any other member may attend as a proxy.

Section 9-121, relating to the appointment of members of the Drug Abuse Control Council, provides for the appointment of certain ex-officio members of the Council, including “the Attorney General or a representative designated by him.” The 1973 Session of the General Assembly amended § 9-121 by increasing the number of members on the Council, to be re-named the Virginia Drug Abuse Advisory Council, so that included now is the Chairman of the Virginia State Crime Commission, “or a representative designated by him.” This section, including its recent amendment, makes clear that the intent of the General Assembly is that only the members named in the section may attend as members of the Virginia Drug Abuse Advisory Council.

The existence of § 9-121 serves to further evidence the intent of the General Assembly that there may be attendance at meetings by proxy only when it is so provided in the statute relating to membership of the particular body the General Assembly is creating.

Therefore, in my opinion, only those officials named in § 2.1-64.23 may attend and vote at meetings of the Council on Criminal Justice. The sole exception is in the case of the Attorney General who may designate a representative from his Office to attend and vote. Of course, a representative of these officials may attend the meetings under the same circumstances and conditions as those relating to other members of the public.

PUBLIC OFFICERS—Compatability—Member of school board may not serve as election judge.

SCHOOLS—School Boards—Member may not serve as election judge.

ELECTIONS—Judge—Member of school board may not serve.

May 24, 1973

The Honorable Thomas H. Wood
Commonwealth's Attorney for the City of Staunton

In your letter of May 17, 1973, you inquire whether a member of a city school
board is prohibited by the provisions of § 22-92 of the Code of Virginia from serving at the same time as an election judge.

I enclose herewith a copy of an opinion to the Honorable M. A. Hamlett, Secretary of the Charlotte County Electoral Board, dated September 13, 1972, in which it is held that persons employed by a school board are barred by the provisions of § 24.1-33 of the Code of Virginia (1950), as amended, from serving as members of the electoral board or as registrar or as an officer of election. It is my opinion that this section is applicable to members of the school board itself as well, and in view of this opinion it is not necessary to consider the provisions of § 22-92.

PUBLIC OFFICERS—County Attorney’s Salary to Be Paid by Year or Other Fixed Period, Not by Job Done or Hours Worked.

COMMISSIONER OF ACCOUNTS—May Also Serve as County Attorney If Able to Perform Duties of Both Satisfactorily.

COUNTY ATTORNEY—Salary—Paid by year or other fixed period, not by job done or hours worked.

COUNTY ATTORNEY—Commissioner of Accounts May Also Serve as, If Able to Perform Duties of Both Satisfactorily.

SALARIES—County Attorney Paid by Year or Other Fixed Period, Not by Job Done or Hours Worked.

June 19, 1973

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

This is in reply to your recent letter in which you asked whether the salary fixed by the governing body of a county for the county attorney may be based on the job done, and/or the hours worked rather than a fixed amount per month or per year.

A salary is a fixed periodical compensation paid for services rendered; a stated compensation, amounting to so much by the year, month, or other fixed period, to be paid to public officers. See, Black’s Law Dictionary, third edition, page 1576. Also, Unemployment Compensation Commission of Virginia v. Union Life Ins. Co., 184 Va. 54, 34 S.E.2d 385, 388. As used in § 15.1-9.1:1 of the Code of Virginia (1950), as amended, the term “salary” refers to a stated compensation to be paid by the year, month, or other fixed period, and does not include compensation paid by the job done or by the hours worked. Therefore, the governing body of the county may not set the salary based on the job done or the hours worked but must set it for a year, month, or other fixed period.

You next asked whether a commissioner of accounts may also serve as county attorney. I am unable to find any prohibition against the commissioner of accounts serving as a county attorney. It becomes a question of whether the county attorney appointed by the governing body under § 15.1-9.1:1 of the Code is able to perform satisfactorily the duties required by the section along with his duties as commissioner of accounts.

PUBLIC RECORDS—Welfare Records Privileged; Not Subject to Court Subpoena; Other Information Available to Persons Having Legitimate Interest.
WELFARE—Records Privileged; Not Subject to Court Subpoena; Other Information Available to Persons Having Legitimate Interest.

March 6, 1973

THE HONORABLE WILLIAM L. LUKHARD, Director
Department of Welfare and Institutions

This is in response to your inquiry regarding Mrs. Burcham's letter to you, dated February 8, 1973, which concerned the confidentiality of information pertaining to welfare recipients. As you will recall, Mrs. Burcham's letter involved a request by a juvenile court probation officer for the local welfare department to supply him with the address of a person whom he believed to be a recipient of public assistance. He needed this information as part of his investigation concerning a child who was charged with shoplifting. Mrs. Burcham indicated that the local Board refused to give the information requested. You inquired as to the propriety of releasing information concerning welfare recipients to such persons.

Section 63.1-53 of the Code controls this situation. It provides:

"All records of the local boards and other information pertaining to assistance and services provided any individual shall be confidential and shall not be disclosed except to persons having a legitimate interest . . . . The local boards shall allow the Commissioner, the Director of the Virginia Commission for the Visually Handicapped, and duly authorized agents and employees of each, at all times, to have access to the records of the local boards relating to the appropriation, expenditure and distribution of funds for, and other matters concerning assistance and services under this title."

"Except as to the Commissioner, the Director of the Virginia Commission for the Visually Handicapped, and duly authorized agents and employees of each, records shall be made available as aforesaid only on an individual basis and the person, firm or corporation shall name the individual whose record is requested. No record shall be made available except for purposes directly connected with the administration of the public welfare program . . . ." (Emphasis added.)

As you will note, the first paragraph allows persons having a "legitimate interest" access to "records . . . and other information" which pertains to assistance and services provided. It cannot seriously be argued that a court or another public official would not have a legitimate interest in certain specific information contained in a local Board's files as it may relate to a specific case in question. You will note, however, that the second paragraph of § 63.1-53 specifically states that "records" will be available only for the purposes "directly connected with the administration of the public welfare program." This sentence places a restriction on the availability of the records of the local Board, even to those persons having a "legitimate interest" and distinguishes "records" from "other information."

Where a person has a legitimate interest, he does not have the right of access to "records" unless it is for a purpose which is directly related to the administration of the public welfare program. Nevertheless, he may have access to "other information" which pertains to assistance and services provided any individual. He may inquire of the local Board's staff as to specific information of which staff has knowledge even though such information is also in the "records". In my opinion the "records" themselves are not subject to subpoena and inspection by the court.

In summary, where the court has a legitimate interest in "other information" which is in the files of the local Board, it may inquire of and receive such facts. This information would include, for example, a person's name, that of his spouse and children, and their address. Such facts would be available to agents of the court, police, or other similar public officials having need of the information to
carry out their particular duties. These people would not have access to "records" even by subpoena unless for a purpose directly connected with welfare administration. Any individual staff member knowing any of the facts that might be contained in such records could be questioned by the court and would be required to answer as to those matters within his personal knowledge regardless of the fact that the "records" might also contain the information sought.

PUBLIC SERVICE CORPORATIONS—Classification of Property for Taxation
—To be made by commissioner of revenue after analysis and review of facts and circumstances.

November 8, 1972

The Honorable D. B. Edwards
Commissioner of the Revenue for the City of Danville

I have received your letter of October 19, 1972, inquiring whether certain property owned by a public service corporation should be classified as real estate for purposes of property tax assessments. You refer to Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550 (1970), and § 58-514.2, Code of Virginia (1950), as amended, and inquire whether or not either is pertinent to the classification of pole lines, conduit, wire lines and central office equipment owned by a telephone company. You also enclose a copy of a franchise agreement with the company requiring it to remove its poles and supporting fixtures upon expiration of the franchise term and authorizing the city of Danville by ordinance to also require it to remove conduits and fixtures under the street surface, and you inquire if the removal clause affects the classification.

Transco held that whether certain gas mains were real or tangible personal property was to be determined by the law of fixtures and not by the provisions in easement agreements reserving Transco's right to remove the mains. A fixture has been defined as realty with a chattel past and the fear of a chattel future. The Court stated:

"Three general tests are applied in order to determine whether an item of personal property placed upon realty becomes itself realty. They 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. The intention of the party making the annexation is the chief test to be considered in determining whether the chattel has been converted into a fixture."

The Court held that underground gas mains buried at a minimum depth of thirty inches from the top of the pipe, which were a permanent part of the gas transmission system, and had an expected life of one hundred years, were taxable as real property, because it was clearly the intent of Transco to make the gas mains a part of the realty.

Section 58-514.2 does not affect the classification of property owned by a public service corporation. It merely provides how the property is to be taxed once it has been classified. Therefore, property previously classified as tangible personalty can be reclassified as real estate if it is determined that the previous classification was erroneous, and the property percentage required by § 58-514.2 will subsequently be applied only to that class of property validly taxed as tangible personal property in 1966. See Reports of the Attorney General (1970-1971), p. 375 (2).

A provision in a franchise agreement concerning removal of the property may be of some evidentiary value in determining the intent of the party who has an-
nexed personal property to real estate. Likewise, the nature of the owner's estate in the real property to which personalty has been annexed is considered as evidence of intent. In the Transco case, the company acquired perpetual rights of way and easements in the property in which it located its gas mains.

In view of the fact that the intention of the parties is of great significance in determining whether property is real or personal, it is apparent that a classification cannot often be made solely upon the physical nature and location of the property sought to be classified. Because the question necessarily involves matters of fact which must be determined before a conclusion regarding classification can be reached, I am unable to state that the property is necessarily personality or realty. However, I trust the foregoing will assist you in making the proper classification.

REAL ESTATE—Procedure for Selling Delinquent Lands.

TAXATION—Procedure for Selling Delinquent Lands.

August 1, 1972

The Honorable W. O. Jones
Treasurer of the City of Nansemond

I have received your recent letter in which you request an opinion as to the disposition of delinquent tax lands. Your letter implies that the lands have been offered for sale and purchased by the Commonwealth.

A valid sale of delinquent land can be made only if the procedures required by statute are followed. Dennis v. Robertson, 123 Va. 456 (1918). Chapter 21 of Title 58 of the Code of Virginia, (§ 58-1022, et seq.) specifies how delinquent land is to be sold. Under these provisions there are two courses of action open to you:

1. Even though the title to delinquent land has vested in the Commonwealth, it should still be offered for bids at the annual tax sale auction. See § 58-1080. To be acceptable, a bid must be at least as great as the original indebtedness and the taxes and other costs that would have been charged against the land, had it not been purchased by the Commonwealth. A purchaser at a tax sale cannot receive a tax deed until the original owner's right to redeem has expired.

2. The other procedure available is a suit in the local circuit court to enforce the tax lien on the property. This will involve the cost of a lawsuit, but the statutes provides that reasonable attorney's fees incurred by the county can be charged against the property to be sold (§ 58-1104), and that any number of parcels of land can be joined in the same suit if each has an assessed value not exceeding one thousand dollars (§ 58-1107).

An additional procedure established by Chapter 52 of the Acts of Assembly of 1906, as amended, and continued in force by § 58-1099 of the Code, applies to the sale of lots which were part of a plat or subdivision of land.

I am aware of no other procedures authorized by statute through which this land could be sold.

REAL PROPERTY—Historic Petersburg Foundation, Inc., Formed to Preserve and Restore Sites and Structures; Authority to Sell Mayfield.

April 23, 1973
You have recently solicited my opinion regarding the authority of Historic Petersburg Foundation, Inc., to dispose of the house known as Mayfield and the tract upon which it is located.

Historic Petersburg Foundation, Inc., by the terms of its charter, was formed for the purpose of preserving and restoring sites and structures of historic or architectural interest in and around Petersburg, Virginia, and to increase knowledge and appreciation of such sites and structures. The Foundation is not organized for profit and its charter provides that no part of its net income shall inure to the benefit of any private individual. It is my understanding that the proceeds of the disposition of Mayfield are to be placed in a revolving fund to further the activities of the Foundation.

Mayfield is a house of architectural significance which was located on the grounds of Central State Hospital and slated for demolition to make room for new construction. The demolition contractor became the owner of this structure and subsequently donated it to Historic Petersburg Foundation, Inc., for the purpose of preserving Mayfield. Mayfield was then moved to an unused portion of the Central State Hospital grounds and, at its 1970 Session, the General Assembly authorized the State Hospital Board to convey to the Foundation a tract of approximately four acres upon which Mayfield then rested. See Chapter 677, Acts of Assembly of 1970.

Pursuant to the terms of Chapter 677, the State Hospital Board conveyed the tract described therein to the Foundation by deed dated July 2, 1970, and of record in the Clerk's Office of the Circuit Court of Dinwiddie County in Deed Book 146 at page 49. The Foundation subsequently undertook the preservation and renovation of the structure and funds furnished by the State and federal governments were employed for this purpose. The Foundation has granted an easement to the Virginia Historic Landmarks Commission which contains restrictive covenants designed to preserve the structure and four acre tract in its present state in perpetuity. This easement was recently recorded in the Clerk's Office of the Circuit Court of Dinwiddie County in Deed Book 161 at page 316.

Neither Chapter 677 nor the deed which effectuated the transfer of the four acre tract restrict its subsequent sale and I am unaware of any condition placed on the grant of State or federal funds for the purpose of restoration and preservation of Mayfield which would have this effect. By the terms of its charter, the Foundation is empowered to sell real property. Consequently, I am of the opinion that the Foundation has legal authority to sell Mayfield.

RECORDATION—A Document Presented for Recordation Cannot Be Recorded Unless the Clerk Who Takes the Acknowledgment Signs the Notarial Certificate, in Accordance With § 55-113.

April 18, 1973
Virginia which is owned by the grantor. It is not the original, but a copy certified to be correct by the clerk of the San Diego County Court in which it was originally recorded.

Section 55-106, Code of Virginia (1950), as amended, requires a clerk to admit to record a writing as to any person whose name is signed thereto when it is acknowledged in the manner prescribed by §55-113. Section 55-113 requires that the clerk who took the acknowledgment sign the notarial certificate. The certificate under consideration does not meet the latter requirement. It states that "... before me, Jesse Osuna, County Clerk and ex officio Clerk of the Superior Court in and for said County, personally appeared. ..." It is signed, however, by a deputy clerk who apparently did not take the acknowledgment.

In consideration of the foregoing, it is my opinion that the document should not be admitted to record.

RECORDATION—Deeds of Trust—Tax does not apply to interest.

TAXATION—Recordation of Deeds of Trust—Tax does not apply to interest.

July 11, 1972

THE HONORABLE RICHARD F. GEORGE, Clerk
Circuit Court of Fluvanna County

I have received your letter of May 31, 1972, inquiring whether the recordation tax imposed by §58-55, Code of Virginia (1950), as amended, should apply to the interest as well as principal amount secured by the deed of trust. The right anticipation is reserved by the debtor, and the deed of trust instrument indicates the principal amount as well as the interest and monthly payments required to amortize the loan as follows:

"This conveyance is IN TRUST, however, to secure the principal sum of Four Thousand and no/100........................Dollars ($4,000.00), plus accrued interest thereon, hereinafter referred to as "Obligation", and evidenced by:

"One negotiable promissory note of even date herewith in the face amount of $5,679.24 (including $4,000.00 principal and $1,679.24 interest) payable ... in 84 monthly installments of $67.61. ..."

Section 58-55 provides, in pertinent part:

"On deeds of trust or mortgages the tax shall be fifteen cents upon every hundred dollars or portion thereof of the amount of bonds or other obligations secured thereby."

It is my opinion that the amount of the obligation secured within the purview of the statute is the principal amount only exclusive of interest. In a broad sense, of course, the obligation secured extends to the payment of interest until the principal debt is repaid, but to construe §58-55 to include the interest where it is possible to determine the principal amount secured from the face of the deed of trust would result in unintended taxation and lead to difficulty in administration, particularly where the note was payable on demand and the total interest to be paid could not be determined prior to repayment.

REFERENDUM—May Be Held Only Where Specifically Authorized by Statute in Connection with a Particular Issue.

PARI-MUTUEL BETTING—Referendum May Be Held Only Where Specifically Authorized by Statute in Connection with a Particular Issue.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Advisory Referendum; No Authority to Call.

August 24, 1972

The Honorable Glenn B. McClanan
Member, House of Delegates

In your letter of August 22, 1972, you inquire:

"Does a municipality have the authority to hold an advisory referendum other than those specifically designated in the various sections of the Code? Specifically, does the City of Virginia Beach have the power to place a question before the voters in the November election, such as, 'If the General Assembly of Virginia approves pari-mutuel betting on horse racing in Virginia, do you wish to allow such a facility to exist in the City of Virginia Beach?'"

Referenda in Virginia may be held only where specifically authorized by statute in connection with a particular issue. For example, §§ 4-98.12 and 4-98.13 provide a procedure for local referenda on the sale of mixed alcoholic beverages. If and when the General Assembly enacts legislation permitting pari-mutuel betting on a local option basis, it will have to provide procedures for referenda in a similar fashion at that time. At this time, however, there is no provision in Virginia law for the conducting of an advisory referendum such as you describe. I enclose herewith copies of opinions of this office to the Honorable Robert C. Goad, Commonwealth's Attorney for Nelson County, dated June 20, 1950, and found in the Report of the Attorney General (1949-1950), p.12, and to the Honorable T. Stokely Coleman, Commonwealth's Attorney of Spotsylvania County, dated September 12, 1951, and found in the Report of the Attorney General (1951-1952), p.122, both of which contain a similar holding.

REGISTRAR—Assistants—May be appointed in each of several wards of city.

ELECTIONS—Registrars—Assistants may be appointed in each of several wards of city.

May 23, 1973

The Honorable Howard L. Meredith, Secretary
Electoral Board of Petersburg

In your letter of May 20, 1973, you raise three questions with regard to the appointment of assistant registrars for the City of Petersburg, which I shall answer seriatim.

"1. Since Petersburg has employed a full time registrar could the Electoral Board appoint an additional deputy registrar in and for each of the 7 wards of the city?"

Answer: The authority to determine the number of assistant registrars, as well as to determine the places in which the registrar and his or her assistants will maintain offices, are conferred on the electoral board by the provisions of §§ 24.1-45 and 24.1-46 of the Code of Virginia (1950), as amended. Section 24.1-45 provides, in pertinent part, as follows:

"The electoral board shall determine the number, set the term, and establish the duties of such assistant registrars as may be required in accordance with the following guidelines: (Guidelines omitted.)

* * *
"All assistant registrars shall be appointed by the general registrar and 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. All other employees shall be employed by the general registrar . . .

* * *

"The compensation of any assistant registrar or any other employee of the general registrar shall be fixed and paid by the local governing body."

Section 24.1-46 provides, in pertinent part, as follows:

"In addition to the other duties provided by law, it shall be the duty of the general registrar to: (1) maintain the public office provided by the local governing body and to establish and maintain such additional public offices for the registration of voters as are designated by the electoral board; . . ."

The answer to your question, therefore, is in the affirmative. The electoral board should determine how many assistant registrars are needed for the City of Petersburg and should also determine whether, in its judgment, any additional offices other than the main office are necessary for the proper discharge of the duties of the registrar. Although the guidelines contained in the 1973 amendments to § 24.1-45 (Chapter 30 of the Acts of Assembly of 1973) do not provide for the number of assistants which would be necessary to place one in each of the seven wards, the suggestions contained in the present statute are guidelines only at this time and do not limit the electoral board to the number of assistant registrars contained therein. If the electoral board, in its judgment, believes that the appointment of seven additional assistant registrars are necessary, and if the board believes that the location of an office in each of the seven wards of the city is necessary, then the board has the authority to so provide.

"2. Could this be a permanent deputy registrar as requested?"

Answer: Assuming that by the words "permanent deputy registrar" you mean an assistant registrar as defined in § 24.1-45, the answer to this question is also in the affirmative. See the answer to Question 1 above.

"3. Could such persons be appointed to serve on a volunteer basis, that is, without compensation?"

Answer: As stated in the foregoing quoted paragraphs of § 24.1-45, the compensation of any assistant registrar is to be fixed and paid by the local governing body. If the local governing body fixes the compensation of such assistant registrars at zero, there is no prohibition against the registrar's appointment of persons who would agree to work for zero compensation assuming that they meet the qualifications of assistant registrars. The answer to your third question, therefore, is also in the affirmative.

May I conclude by pointing out that any establishment of additional offices such as that suggested in your letter would be a change in election procedures which may not be implemented until approval of such change is obtained from the Attorney General of the United States pursuant to § 5 of the Voting Rights Act of 1965.

REGISTRAR—Employee of Municipality, Subject to Its Rules and Regulations Not Conflicting with Duties Imposed by State Law.

COUNTIES, CITIES AND TOWNS—Ordinances Valid Not Allowing Two
Members of Same Family to Be Employed by Municipality; Applies to General Registrar.

ORDINANCES—Two Members of Family May Not Be Employed; Choice Left to Family.

December 20, 1972

The Honorable Howard L. Meredith, Secretary
Electoral Board of Petersburg

In your letter of December 15, 1972, you ask three questions relating to the appointment of a general registrar for the City of Petersburg, which I will answer seriatim:

"1. Is the General Registrar considered an employee of the municipality, subject to all the rules and regulations of the municipality?"

This question is answered in the affirmative, with the qualification that the rules and regulations of the municipality are applicable only insofar as they do not conflict with any duties or requirements imposed by State law.

"2. If the municipality has a regulation stating that two members of the same family may not be employed by the municipality, would this regulation pertain to the appointment of a general registrar?"

The regulation you described is in the nature of a conflict of interest act which is more stringent than the requirements of the Virginia Conflict of Interests Act, § 2.1-347, et seq. of the Code of Virginia (1950), as amended. I have previously ruled, in an opinion to the Honorable Edward M. Holland, Member, Senate of Virginia, dated November 14, 1972, that such ordinances are valid. Hence your question is answered in the affirmative.

"3. If a general registrar was appointed whose spouse was already employed by the municipality, could the spouse be discharged for this reason?"

The answer to this question necessarily depends on the language of the local regulation to which you refer. If that regulation states that no one may be appointed or employed whose spouse is already in the employ of the municipality, then the individual in question would be ineligible for appointment so long as the spouse retained his or her employment. If the regulation says, on the other hand, only that two members of the same family may not be employed by the municipality, then the prospective registrar could conceivably be appointed but the family would then have to decide which spouse would retain municipal employment. In either case, however, it would hardly be good cause for the firing of one spouse that the city hoped to hire the other, and I would advise that the choice be left to the family.

REGISTRATION REQUIREMENTS—Machine Guns and Sawed-off Shotguns.

December 15, 1972

Colonel H. W. Burgess
Superintendent, Department of State Police

This is in reply to your letter of December 5, 1972, in which you make the following inquiry:

"Under Sections 18.1-264 and 18.1-268.6 of the Code of Virginia, every
manufacturer or dealer shall keep a register of all machine guns and sawed-off shotguns manufactured or handled by them.

"I should like your opinion as to whether these manufacturers and dealers must register annually with the Department of State Police every machine gun and sawed-off shotgun handled by them as provided in Sections 18.1-265 and 18.1-268.7 of the Code of Virginia."

Every machine gun adopted to use cartridges of thirty (thirty one-hundredths inch or seven and sixty-three one hundredths millimeter) or larger caliber and every sawed-off shotgun must be registered within twenty-four hours and annually thereafter from the date of its acquisition. In addition, the application shall, among other requirements, show the purpose the gun was acquired by operation of §§ 18.1-265 and 18.1-268.7, Code of Virginia (1950), as amended.

The words acquired and acquisition imply a transfer and not manufacture. Therefore, it is my opinion that all persons, including dealers but not manufacturers, must comply with the registration requirements of the Code.


PARA-MEDICS—Emergency Room of Hospital; Volunteers and Paid Para-medical Personnel May Perform Acts Not Requiring Skill of Licensed Professional.

September 27, 1972

THE HONORABLE ELMON T. GRAY
Member, Senate of Virginia

This is in response to your recent letter in which you asked my opinion whether the use of volunteer para-medical rescue personnel in the emergency room of Petersburg General Hospital is in violation of the Virginia Code. It is my understanding that these para-medics help the regular hospital staff in getting patients undressed and dressed, cleansing wounds, applying bandages, taking vital signs, and transporting patients to the x-ray department and other areas of the hospital. These activities generally fall within the definition of nursing as set forth in § 54-367.2 of the Code.

Chapter 13.1 of Title 54, Code of Virginia (1950), as amended, deals generally with the profession of nursing. Section 54-367.35 of that chapter provides that it shall be a misdemeanor for any person to "[p]ractice nursing unless duly licensed to do so under the provisions of this chapter. . . ." Section 54-367.36, which contains the exemptions to the requirements of Chapter 13.1, provides, in part, as follows:

"This chapter does not prohibit or require a license for the following:

"(f) The performance by any person of acts in the care of a patient when such acts do not require the knowledge and skill required of a registered professional nurse or licensed practical nurse or when such acts are performed under direction of a licensed medical practitioner or professional nurse. A person performing such acts may not designate himself or be designated by the word 'nurse,' but may, to distinguish his occupation, use the term 'nursing attendant,' 'nursing assistant' or 'nursing aide.'"

Given the exemption contained in subsection (f) of § 54-367.36, it is clear that the Petersburg General Hospital may utilize the services of para-medical rescue
personnel to perform acts not requiring the skill of a registered professional nurse or licensed practical nurse. In my judgment, such acts might include the dressing and undressing of patients and the transporting of them to various parts of the hospital, but would not include the cleansing of wounds, applying of bandages, and the taking of vital signs. These latter acts would require, in my opinion, the knowledge and skill of a licensed professional. Such acts, however, may be performed if under the direction, i.e., supervision and control, of a licensed medical practitioner or professional nurse.

This opinion would apply equally to volunteer as well as paid para-medical rescue personnel.


LINE OF DUTY ACT—Rescue Squads—Recognition of by ordinance of city.

January 26, 1973

THE HONORABLE ROYSTON JESTER, III
Commonwealth's Attorney for the City of Lynchburg

This is in reply to your recent letter wherein you stated that recently one of the members of the Lynchburg Life Saving Crew, Inc., while responding to an accident call, suffered a heart attack and died as a result.

You then outlined the history of the Crew as follows: The Crew was organized and has been in existence for more than thirty years. At its inception, its vehicle was housed in one of the City fire stations, and off-duty firemen, with the approval of the City, operated the vehicle in emergency situations until 1970, when the Crew located itself on its own property which was conveyed as a gift to the Crew by the City for the purpose of erecting thereon its headquarters. A resolution authorizing the conveyance of the property was adopted by the City on May 27, 1969. The City has expended in excess of $2500 for driveways, curbs and gutters upon the property. The City has, in addition, appropriated money in its budget for operation of the Crew.

You then inquired as to whether the City has under the provisions of § 15.1-136.2 of the Code of Virginia (1950), as amended, recognized the Crew as an integral part of the official safety program of the City.

The above referred-to section is a portion of the Line of Duty Act, contained in Article 1.1 of Chapter 3 of Title 15.1.

Section 15.1-136.2 provides, in pertinent part, as follows:

For the purpose of this article, the following words shall have the meanings herein ascribed to them:

(a) 'Deceased' shall mean any person whose death occurs as a direct or proximate result of the performance of his duty as . . . a member of any . . . rescue squad which shall have been recognized by an ordinance of any county, city or town of this State as an integral part of the official safety program of such county, city or town. . . ."

The section is clear and unequivocal. Recognition by a jurisdiction can come only by way of an ordinance.

The action taken by the City in the form of the resolution authorizing and directing conveyance to the Crew of the property housing its headquarters, and incorporation into the budget of the City of appropriations for the operation of the Crew, adequately reflect recognition by ordinance of the City of the Crew as an integral part of its official safety program.
The fact that recognition given by the City is in the form of a resolution, in one case, is of no consequence. A resolution, in this instance, has the same legal effect as does an ordinance.

The resolution and appropriations on their face adequately express the intent of the City to recognize the Crew as an integral part of its safety program.

Conduct by the City short of the passing of a resolution or ordinance, such as providing space for operation of the Crew, falls short of reaching the requirement of recognition by ordinance contained in § 15.1-136.2.

In my opinion, however, the City of Lynchburg has within the meaning of § 15.1-136.2 by ordinance recognized the Lynchburg Life Saving Crew, Inc., as an integral part of its official safety program.

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RETIREMENT SYSTEM—Group Insurance—Local school board is authorized to pay premiums on group life insurance for teachers.

April 18, 1973

The Honorable A. Dow Owens
Commonwealth's Attorney for Pulaski County

Your recent letter requested an opinion whether the local county school board could assume the payment of all or a portion of the teacher's or employee's premium for the group life insurance provided under Article 9 of Chapter 3.2 of Title 51 of the Code of Virginia (§ 51-111.67:1, et seq.).

Section 51-111.67:5 requires that each insured employee contribute to the cost of the life insurance a specified proportion of the premium. The last sentence of that section provides as follows:

"Nothing contained in this section shall be construed to prohibit any employer from making the contributions required herein for his employees, in whole or in part."

Section 51-111.67:9 requires employers other than the Commonwealth to pay to the Board the percentage of the premiums not paid for by employee contributions. Section 51-111.10(7) provides that a local school board is the "employer" in the case of a public school teacher.

It is my opinion that the sections cited above authorize a local school board to pay the premiums on group life insurance for its teachers.

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SANITARY DISTRICT—Garbage Service—Charges may be made for persons contracting for same.

GARBAGE DISPOSAL SERVICES—Sanitary District—Charges for services may be made to persons contracting for same.

January 9, 1973

The Honorable Wm. Roscoe Reynolds
Commonwealth's Attorney for Henry County

This is in reply to your recent letter in which you requested an opinion of this office on the following two questions:

"(1) Does the Sanitary District have the authority to require all residents of the Sanitary District to pay for a garbage service provided by the Sanitary District?"
“(2) If a resident of the Sanitary District should decide to have a private service other than the Sanitary District provide their garbage service, does the Sanitary District have the authority to charge the residents of the Sanitary District for the garbage service provided by the Sanitary District, even though they do not receive it?”

Section 21-260 of the Code of Virginia (1950), as amended, authorizing a Sanitary Commission created in a Sanitary District under § 21-237 of the Code to collect fees, rent and charges from any person contracting for the services of sewage and industrial wastes, reads:

“Every commission is hereby authorized and empowered to charge and collect fees, rents, or other charges for the use and services of the sewage disposal system. Such 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 use or occupy any real estate which directly or indirectly is or has been connected with the sewage disposal system, or from or on which originates or has originated sewage or industrial wastes, or either, which directly or indirectly have entered or will enter the sewage disposal system, and the owner or lessee or tenant of any such real estate shall pay such fees, rents and charges to the commission at the time when, and place where, such fees, rents and charges are due and payable.”

Unless the residents of the District have contracted for or use the garbage disposal services, I am of the opinion they cannot be made to pay for the services. I therefore answer both questions in the negative. I enclose a copy of an opinion of this office to the Honorable Robert L. Powell, Commonwealth’s Attorney for Giles County, dated March 23, 1972, in which the same conclusion was reached involving a County Public Service Authority created under § 15.1-1241 of the Code.

SANITARY DISTRICTS—Loan of Funds by County—Limited to initiation of project.

WATER AND SEWERAGE AUTHORITY—Loans by Governing Bodies of Counties May Be Made.

COUNTIES—Debt Limitation—May exceed 18% where sanitary district issues revenue producing bonds.

The Honorable Catesby Graham Jones, Jr.
Commonwealth’s Attorney for Gloucester County

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

“Gloucester County Sanitary District No. 1 located within the County of Gloucester and encompassing the Village of Gloucester has been in existence for over thirty years. The Board of Supervisors feels that we should expand the facilities of the said District at a cost of something in excess of $600,000.00.

“I note that 15.1-26.1 authorizes the County to advance funds not specifically allocated or obligated from the general fund to a sanitary district for the purposes of initiating a project. 21-134.1 provides for the reimbursement to the County of such advances.

“My first question is, may the Board of Supervisors lend the Sanitary District a sum of approximately $130,000.00 in anticipation of a public
referendum for the issuance of bonds? This money would be used for the construction of a new water tank to replace or supplement the existing one.

"The Board of Supervisors has also been considering the creation of a water and sewage authority pursuant to Chapter 28, Title 15.1 of the Code. My second question is, may the Supervisors lend the approximate amount of $130,000.00 to such water and sewage authority for the purpose of constructing a new water tank.

"My third question is, what are the conditions under which the eighteen per centum limitation on assessed value of real estate in the district not apply for the issuance of bonds under 21-122 of the Code of Virginia?"

I shall answer your questions seriatim:

(1) Section 15.1-26.1 of the Code of Virginia (1950), as amended authorizes the board of supervisors to advance money from the general fund not otherwise specifically allocated or obligated to a sanitary district to initiate the project for which the district was created. Since the project has been initiated and has been in operation for over thirty years, I am of the opinion the loan cannot be made under this section for the purpose of expanding existing facilities.

(2) Section 15.1-511.1 of the Code of Virginia (1950), as amended, reads as follows:

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

I am of the opinion that this section authorizes the board of supervisors to lend funds not otherwise specifically allocated or obligated to a water and sewage authority which it has created pursuant to Chapter 28, Title 15.1, of the Code. This conclusion, insofar as it may conflict therewith, supersedes that in an opinion to the Honorable Edward McC. Williams, Commonwealth's Attorney for Clarke County, found in Report of the Attorney General (1970-1971), p. 24.

(3) Section 21-122 of the Code places the 18% debt limitation upon sanitary districts with respect to the issuance of bonds unless the bonds being issued are revenue bonds; that is, bonds issued for a specific undertaking from which the sanitary district may derive revenue from charges made for services. Therefore, if the district intends to derive revenue from those using the facilities to be installed in the sanitary system, the bonded indebtedness can exceed 18% of the assessed evaluation of all of the real estate in the district subject to local taxation.

SANITARY DISTRICTS—Merger With Water and Sewer Authority—No Authority for merger.

WATER AND SEWERAGE AUTHORITIES—Merger With Sanitary District—No authority for merger.

June 1, 1973

The Honorable David D. Brown
Commonwealth's Attorney for Washington County

This is in reply to your recent letter in which you ask my opinion whether the Goodson-Kinderhook Water Authority and the Washington County Sanitary District No. 1 may merge or consolidate.

Sanitary districts are created under § 21-113 of the Code of Virginia (1950),
as amended. They may be enlarged by § 21-116 of the Code and any two or more of such districts may be merged by § 21-117. Section 21-117.1 provides for their abolition, provided that all outstanding bonds of the district have been redeemed and the purposes for which the sanitary district was created have been completed, or that all obligations and functions of the sanitary district have been taken over by the county as a whole. I find no specific authority in §§ 21-113 to 21-140.2 of the Code for a sanitary district to merge or consolidate with a water authority established under the provisions of the Water and Sewer Authorities Act (§§ 15.1-1239 through 15.1-1270).

A water and sewer authority may be created under the Water and Sewer Authorities Act. Section 15.1-1242 of that Act requires an authority to adopt articles of incorporation setting forth its purpose or purposes. Having specified the initial purpose or purposes and/or project to be undertaken, it may specify additional projects under § 15.1-1247. It may be dissolved under § 15.1-1269.1. I find no specific authority in this Act for a water and sewer authority to merge or consolidate with a sanitary district.

I conclude, therefore, that there is no statutory authority for a merger or consolidation of a sanitary district with a water and sewer authority. This conclusion does not preclude a water and sewer authority from specifying additional projects which could include that formerly performed by an abolished sanitary district. By the same token, where a water and sewer authority has dissolved, the project formerly performed by the authority could be included in the enlarged sanitary district under the provisions of § 21-116 of the Code.

SCHOOLS—Child Care Centers—Licensure of.

WELFARE—Child Care Centers—Licensure of.

November 21, 1972

The Honorable Herbert A. Krueger
Director, Division of General Welfare
Department of Welfare and Institutions

This is in reply to your letter of October 5, 1972, which reads as follows:

"Your opinion is requested as to interpretation of the definition of a child care center, Section 63.1-195, as amended by the 1972 Legislature, specifically item (2) under exceptions from licensure:

'A public school or a private school unless the Commissioner determines that such private school is operating a child care center outside the scope of regular classes.'

"We have tried to explore with the State Department of Education the definition of a public school and have found that there is no legal definition. A 'working' definition was given as follows:

'An educational institution in which all children are eligible to attend under the attendance laws (five years of age as it pertains to kindergartens, and six years of age as it pertains to first grade) for as long as they wish to stay and profit from instruction.'

"A public school may operate a public kindergarten for as little as three hours exclusive of the noon day intermission, or it may operate up to six and one-half hours per day. Grades one through seven may be operated for not less than five, nor more than six and one-half hours a day, exclusive of the noon day intermission.

"Apparently no definition of a private school exists and no regulations as
to the age of children served nor the length of the school day or what constitutes 'regular classes.' Accreditation by the State Department of Education of private elementary schools is on a voluntary basis.

"Section 63.1-195 carries the following additional exemption:

'(3) A school operated primarily for the educational instruction of children from three to five years of age at which children three or four years of age do not attend in excess of four hours per day and children five years of age do not attend in excess of six and one-half hours per day.'

"Private nursery schools and kindergartens serving children three to five years of age operating beyond the hours specified above have been construed to fall within the definition of a child care center. The problem therefore is focused on exemption (2) as it relates to private schools operated for two year old children (including Montessori Schools) and private elementary schools offering extended school care to accommodate working parents.

"In your opinion, should we recognize as a private school a facility for the education of two year olds regardless of the hours of operation, or is such a facility construed to be a child care center because of the age of children served? Also, in your opinion, what criteria establishes that a private elementary school is operating a child care center outside the scope of regular classes in the absence of any determinant as to length of the school day?"

Section 63.1-195 of the Code of Virginia (1950), as amended, defines a "child care center" for licensure purposes as:

"Any facility operated for the purpose of providing care, protection and guidance to a group of children separated from their parents or guardians during part of the day only except (1) a facility required to be licensed as a summer camp under §§ 35-43 through 35-53; (2) a public school or a private school unless the Commissioner determines that such private school is operating a child care center outside the scope of regular classes; (3) a school operated primarily for the educational instruction of children from three to five years of age at which children three or four years of age do not attend in excess of four hours per day and children five years of age do not attend in excess of six and one-half hours per day; and (4) a facility which provides child care on an hourly basis which is contracted for by a parent occasionally only; . . . ."

In determining the scope of the second exception as to what constitutes a "private school" and when such a school is operating "outside the scope of regular classes," it is relevant to review the use of the term "private school" in other sections of the Code. Most important is § 22-275.1 which provides for compulsory school attendance of certain children. That section requires that children ages six through sixteen attend either a "public school or a private, denominational or parochial school," or be taught by a qualified tutor, and such children must regularly attend such school "during the period of each year the public schools are in session and for the same number of days and hours per day as in the public schools." I refer you to an opinion of the Attorney General dated August 28, 1972, to the Honorable Woodrow W. Wilkerson, attached, which reiterates this point.

I would conclude that it is the intent of § 63.1-195, in using the language "private school" to exclude from its definition of "child care center" only those private schools which are the equivalent of public schools, that is, those which are operated for the same ages as the public schools and for the same number of days and the same number of hours per day as the public schools and which would provide an exemption from the compulsory school attendance laws. As I pointed
out above, the age requirements for public school attendance are set forth in § 22-275.1. In addition, the regulations of the State Department of Education provide that a public school: 1) must operate 180 teaching days per year; 2) may operate grades one through seven for not less than five nor more than six and one-half hours per day exclusive of the noon day intermission; and 3) may operate secondary schools for a minimum of five hours per day, exclusive of the noon day intermission, with no maximum limit.

Therefore, in answer to your question whether you should recognize as a private school a facility for the education of two year olds regardless of the hours of operation, I would conclude that such a school does not meet any of the exemptions provided in § 63.1-195, and, therefore, must be licensed in accordance with § 63.1-196. Second, concerning what criteria establish that a private school is operating a child care center outside the scope of regular classes, a private school which does not meet the criteria for exemption from the compulsory attendance laws or which operates for a fewer or greater number of hours per day or days per year than established by regulations of the State Department of Education for public schools, would be operating “outside the scope of regular classes” and would not be subject to exemption from the licensure requirements for child care centers.

SCHOOLS—Compulsory Attendance—Married females under age of seventeen may not be required to attend.

November 21, 1972

THE HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court for Amherst County

I am writing in response to your letter of October 26, 1972, concerning the Compulsory Attendance Law.

In your letter you stated that in a particular school division there are two married females, both under the age of seventeen years, who refuse to attend school. You inquire whether these girls can be required to attend school under the Compulsory Attendance Law.

Section 22-275.1 of the Code of Virginia (1950), as amended, provides in pertinent part as follows:

"Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the sixth birthday . . . and have not passed the seventeenth birthday, shall send such child, or children, to a public school . . . ."

Section 22-275.6 of the Code rearticulates the obligation imposed in § 22-275.1 and § 22-275.6 makes it a misdemeanor to violate either of the sections previously mentioned.

It is clear from §§ 22-275.1 and 22-275.6 of the Code that the person having control over the child is the person who is required to comply with the statutory obligations. A married female is emancipated from her parents by virtue of her marriage. Accordingly, her parents are not in a position to exercise control over her and, therefore, they may not be required to comply with the Compulsory Attendance Law.

In the absence of any person having control over a child of school age, there is no person who may be prosecuted for failure to comply with the Compulsory Attendance Law. This, of course, does not mean that school officials should abandon their efforts to have the girls in question voluntarily attend school.
SCHOOLS—Crossing Guards—Under supervision of sheriff in county having county executive form of government.

COUNTIES—County Executive Form of Government—School crossing guards may be placed under supervision of sheriff.

September 14, 1972

The Honorable F. Caldwell Bagley
County Attorney for Prince William County

This is in reply to your letter of August 22, 1972, in which you state:

"The attached Resolution has been passed by the Board of County Super-
visors of Prince William County, Virginia.

"The question has risen as to whether school crossing guards, who were appointed under our previous form of County government as Special Police, can be continued as such under the County Executive Form of Govern-
ment and under the supervision of the County Sheriff."

Section 15.1-598 of the Code of Virginia (1950), as amended, which applies to counties adopting the county executive form of government authorizes the board of county supervisors to appoint the county crossing guards. Section 15.1-608 provides that the county police force shall be under the supervision and control of the county executive. Whether the crossing guards may, with the concurrence of the sheriff, be placed under the supervision of his department will depend upon whether they are appointed as special police or members of the county police force. Since these guards are appointed as special police, I am of the opinion they may be placed under the supervision and management of the sheriff.

SCHOOLS—Each Election District Entitled to Representation on School Board—"Special school districts."

ELECTIONS—Each Election District Entitled to Representation on School Board—"Special school districts."

September 27, 1972

The Honorable William J. McGhee
County Attorney for Montgomery County

I am writing in response to your recent letter concerning representation on the School Board of Montgomery County.

The Town of Blacksburg and the Town of Christiansburg are contained wholly within Montgomery County. These two towns are the only incorporated towns in the County and each has been designated as a "special school district" for the purpose of representation on the County School Board.

The Board of Supervisors of Montgomery County now appoints the members of the school board. The County is districted into seven election districts. One of the election districts encompasses no territory of an incorporated town. One election district lies wholly within the Town of Blacksburg. Each of the remaining five districts is comprised of territory in the unincorporated area of the County as well as territory within either the limits of the Town of Christiansburg or the Town of Blacksburg. Under Article 2.1, Chapter 6, Title 22, of the Code of Virginia (1950), as amended, each election district is entitled to representation on the school board.

In light of the foregoing facts you ask whether a resident of a given election
district is prohibited from representing that district on the school board simply because he is a resident not only of the election district but also of one of the incorporated towns.

I am of the opinion that there is nothing in the Code of Virginia which prohibits a resident of an incorporated town designated as a special school district from representing an election district on the county school board. Supportive of this is § 15.1-51 of the Code of Virginia which, while not directly applicable, provides that residence of a county district officer in any incorporated town within the district shall be regarded as residence in the district.

In an opinion to the Honorable John C. Stephens, Jr., Commonwealth’s Attorney for York County, dated June 17, 1971, found in Report of the Attorney General (1970-1971), p. 331, I stated that a resident of the Town of Poquoson was not eligible to serve on the School Board of York County. The Town of Poquoson lies wholly within York County but, under § 22-30 of the Code, the Town of Poquoson is not a part of the York County School Division. Because the Code provision excluded Poquoson from the York County School Division, I was of the opinion that a resident of Poquoson could not serve on the York County School Board.

The situation in Montgomery County is distinguishable from that in York County. The Town of Christiansburg and the Town of Blacksburg are included in the Montgomery County School Division and, therefore, would not be subject to the ruling previously given to Mr. Stephens.

SCHOOLS—For Handicapped—Definition of.

January 10, 1973

The Honorable Calvin W. Fowler
Member, House of Delegates

I am writing in response to your recent letter inquiring whether Goodwill Industries of the Danville Area, Inc. (G.I.D.A.), comes within the purview of § 22-330.17 of the Code of Virginia.

It is my understanding that Goodwill Industries can be classified as a school, industrial institution, or educational organization, which conducts classes for the purpose of offering instruction to handicapped persons for which they are paid a consideration by the Department of Vocational Rehabilitation. Assuming the correctness of this understanding, I am of the opinion that Goodwill Industries falls within the definition of a school for the handicapped as set forth in § 22-330.17 (3a).

SCHOOLS—Funds—Localities share of foundation cost of standards of quality does not include capital outlay and/or debt service.

May 9, 1973

The Honorable Joseph M. Whitehead
Commonwealth’s Attorney for Pittsylvania County

This is in reply to your recent letter which states:

"I request your opinion on the following:

"Article VIII, Section 2, the Constitution of Virginia, and § 22-126.1, § 22-127, Code of Virginia, set forth the requirements for sufficient funds relating to the appropriation of funds to be provided by the governing body of any county for maintaining an approved educational program.
cluded under the provisions of § 22-127 in defining such funds is capital outlay and/or debt service to the public schools. At the 1973 Session of the General Assembly, House Bill No. 1250, § 96, Item 523.1, Sub-paragraph c., which I understand was adopted, sets forth requirements how each locality's share of the foundation cost of Standards of Quality is established to be the expenditure from local funds for operating expenses. In considering the appropriations to public schools, can a County Board of Supervisors meet the requirements of local expenditures from local sources by including capital outlay and/or debt service to public schools, as is set forth in § 22-127, or would the provisions of the above referred to House Bill which states as its purpose to assure apportionment by the State Government be controlling?"

Article VIII, Section 2, of the Constitution of Virginia 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.

"The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds."

Under this section of the Constitution, the General Assembly determines the manner in which funds are provided for the cost of maintaining an educational program meeting the standards of quality determined and prescribed by the Board of Education, and provides for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising each school division.

Item 523.1, subparagraph c, of § 96, which appears in Chapter 464 of the 1973 Acts of Assembly, designates the amount of local funds which localities must provide for operating expenses for schools. This amount does not include allocations for capital outlay and/or a debt service which are required by § 22-127 of the Code. Thus, in addition to those funds required by item 523.1, the Board of Supervisors must appropriate funds, as they may be needed, for capital outlay and debt service.

SCHOOLS—Grievance Procedure for Adjusting Grievances of Public School Employees.

SCHOOLS—School Boards—Agreement with association of teachers—Authority to execute.

SCHOOLS—Arbitration—Grievance procedure prohibits modifying powers of school board.

June 26, 1973

The Honorable Woodrow W. Wilkerson
Superintendent of Public Instruction
State Department of Education

This is in reply to your recent letter requesting my opinion of certain provisions of the "Procedure For Adjusting Grievances" of public school employees adopted by the Board of Education at its May 25, 1973, meeting pursuant to Chapter 311
of the 1973 Acts of Assembly. The provisions in question provide that, after the first three steps of the grievance procedure have been exhausted, the grievant may submit his grievance to a panel for a hearing. The grievant and the local school board each select a member of the panel, and those two members jointly select a third member to serve as chairman of the panel. The decision of the panel is final and binding.

Under the procedure, a grievance is defined as "a difference or dispute . . . with respect to the application of the provisions of the [School] Board's Policies, Rules and Regulations as they affect the work activity of such employee." The procedure provides further that the panel's jurisdiction and authority is limited exclusively to the application of the provision of the school board's policy, rule or regulation at issue and that the panel has no authority to add to, detract from or amend any such provision. The procedure also lists the following prerogatives of the school board, the superintendent and his designees which cannot be circumscribed or modified:

(a) determine and administer the mission of the school system;
(b) hire, promote, transfer, discipline, suspend, assign and retain employees in positions within the school system;
(c) maintain the efficiency of school operations;
(d) relieve employees from duties for legitimate reasons;
(e) take action as may be necessary to carry out the duties of the school system in emergencies;
(f) determine the methods, means and personnel by which operations are to be carried on;
(g) direct the work of board employees;
(h) issue and revise policies, rules and regulations necessary to carry out the foregoing and all other managerial functions entrusted to and conferred upon the board by law.

In my opinion to the Honorable Hunter B. Andrews, found in Report of the Attorney General (1969-1970) at page 231, I addressed the question whether a school board and an association of teachers could agree that, in the event contract negotiations reached an impasse, the parties would submit such matters to mediation and/or arbitration, but the final decision would rest with the school board. My response was that "there appeared to be no authority which would preclude submission of a disputed issue to mediation or arbitration, but that it would be necessary that the final decision rest with the board." In my response to Senator Andrews, however, I was not called upon to give my opinion concerning binding arbitration of disputes arising out of a contract already entered into between the school board and its employees.

The grievance procedure adopted by the Board of Education does not provide for binding arbitration when there is an impasse in contract discussions nor does it call for binding arbitration of matters within the sole discretion of the school board. Rather, the grievance procedure only becomes operative after the school board has exercised its discretionary authority by promulgating policies, rules and regulations and by contracting with its employees, and then only to the extent an employee disagrees with the application of those policies, rules and regulations. By its own terms, the grievance procedure prohibits the arbitration panel from exercising, circumventing or modifying the powers conferred on the school board by the Constitution of Virginia or statutory law.

The Supreme Court of Virginia has held that a governmental body may enter into binding arbitration in limited instances. In McKennie v. Charlottesville and Albemarle Railroad, 110 Va. 70 (1909), the Court upheld the use of binding ar-
bitration to settle a dispute arising out of a contract between the city and the railroad. The Court refused to approve, however, a portion of the arbitration award that had the effect of contravening the contracts entered into between the city and the railroad and repealing city ordinances.

In summary, the grievance procedure adequately limits, by its express terms, the jurisdiction of the arbitration panel to issues pertaining to the application of policies, rules and regulations and protects the authority of the school board to make those policies, rules and regulations. It is my opinion that a school board may enter into binding arbitration to resolve disputes arising out of the application of its policies, rules and regulations. Accordingly, I am of the opinion that the provisions of the grievance procedure in question are permissible.

SCHOOLS—School Board, Not Department of Social Services, Has Obligation to Furnish School Books to Children Receiving Public Assistance.

October 19, 1972

THE HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County

This is in response to your recent letter in which you indicated that the Department of Social Services requested that the Board of Supervisors pay for school books for children whose families receive maximum grants under the Aid for Dependent Children Program. After the books had been issued, the Department of Social Services refused to reimburse the School Board. You indicated that the Board of Supervisors questioned the legality of the payment of this request and you further ask that I render an opinion on the propriety of such a payment.

In my opinion the School Board has the obligation to furnish the school books to children receiving public assistance and it is therefore not incumbent upon or proper for the Department of Social Services to pay for them. Section 22-72(8) of the Code of Virginia (1950), as amended, provides:

"School boards shall provide, free of charge, such textbooks as may be necessary for children attending public schools whose parent or guardian is financially unable to furnish them; . . ."

By definition, parents of children who are eligible for Aid to Dependent Children payments are financially unable to supply textbooks. Therefore, such children would qualify under this section to receive textbooks free of charge from the School Board and the payment indicated in your letter was properly the financial responsibility of the School Board.

SCHOOLS—School Boards—Approves expenditures where central purchasing agent is used.

September 27, 1972

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates

I am writing in response to your recent letter concerning the expenditure of school funds under a central accounting system established pursuant to § 15.1-712 of the Code of Virginia (1950), as amended.

Section 15.1-712 of the Code establishes the county purchasing agent for those counties having the county board form of government. In Chapter 820, Acts of Assembly of 1972, the General Assembly deleted that portion of the statute which
provided that the county purchasing agent shall have no authority to exercise any powers with reference to the purchase, transfer and sale of equipment, materials and supplies belonging to the county school board. As the statute now reads, the county purchasing agent shall, unless an exception is granted by the board of supervisors, make all purchases for the county and its departments, offices and agencies. In an opinion to the Honorable Woodrow W. Wilkerson, Superintendent of Public Instruction, dated October 10, 1960, found in Report of the Attorney General (1960-1961), p. 260, this office approved the establishment of a similar system for a county school board.

In your letter you raise certain questions concerning the manner in which expenditures are made. The questions are as follows:

"(1) Do all purchases which require expenditure of school funds have to be approved by the School Board?"

"(2) Do all purchases which involve School Board property, such as buses, buildings, etc., have to be approved by the School Board?"

"(3) In regards to bids on property titled to the School Board, should these bids originate and be approved by the School Board and advertised by the School Board instead of by the central purchasing agent?"

Article VIII, Section 7, of the Constitution of Virginia provides that:

"The supervision of schools in each school division shall be vested in a school board."

The predecessor to this provision and various statutes in Title 22 of the Code have consistently been interpreted by the Supreme Court of Virginia to grant a school board the exclusive right to determine how various monies appropriated to it will be spent so long as the board stays within the limits of its budget. Board of Supervisors v. County School Board, 182 Va. 266 (1944). See also County School Board v. Farrar, 199 Va. 427 (1957). These opinions make it clear that the discretion to control the expenditure of school funds is vested in the school board. The school board has the right to approve the expenditure of all school funds and, subject to the requirements of Chapter 4 of Title 11 of the Code of Virginia relating to public contracts, the right to select the equipment, supplies, etc., to be purchased.

Because the discretion to expend school funds is vested in the school board, bids on property to be titled should originate and be approved by the school board. The actual handling of the bid for advertisement may be given to the central purchasing agent, for this activity does not involve any discretionary actions concerning expenditures of school funds.

SCHOOLS—School Boards—Board of Supervisors may place interest on bonds in general fund.

BOARDS OF SUPERVISORS—School Bonds—Interest on—May place interest in general fund.

November 27, 1972

THE HONORABLE DANIEL M. CHICHESTER
Commonwealth's Attorney for Stafford County

I am writing in reply to your recent letter in which you ask whether § 58-930 of the Code of Virginia (1950), as amended, gives the Board of Supervisors the right to place interest from the proceeds of school bonds into the general fund to be used for purposes other than those designated in the school bonds.
In 1971 the voters of Stafford County approved the issuance of general obligation bonds of the county in a prescribed amount for the purpose of constructing a new high school in the county. The full faith and credit of Stafford County is pledged for the payment of the bonds.

Section 15.1-207 of the Code which relates to the investment of the proceeds of bonds pending application of the proceeds to the authorized purpose provides in pertinent part as follows:

"Any security so purchased as investment of the proceeds of such bonds shall be deemed at all times to be a part of such proceeds, and the interest accruing thereon and any profit realized from such investment shall be credited to such proceeds."

This section was last amended in 1962.

Section 58-930 of the Code of Virginia relating to the duties of county treasurers provides in pertinent part as follows:

"Whenever the treasurer of any county or city in this State shall receive interest on funds belonging to the State or to any political subdivision thereof, such interest shall become a part of the principal of the particular fund on which such interest accrued and shall be accounted for by the treasurer in the same manner as he is required by law to account for the principal; provided, however, that the governing body of any county or city may direct that the interest received from general obligation bond proceeds invested shall be credited to the general fund of such county or city."

The proviso attached to this sentence was added by General Assembly in 1970.

The bonds in question are general obligation bonds and the funds derived from these bonds are funds of Stafford County, a political subdivision of the Commonwealth. In addition to the above quoted sentence, § 15.1-207 of the Code also provides that any security purchased with the proceeds of bonds shall be held by the treasurer or chief financial officer for the governmental body as custodian thereof, or by an appropriate bank or trust company as custodian thereof in safekeeping for the account of the treasurer.

The conflict between § 15.1-207 and § 58-930 of the Code is irreconcilable. The former section requires that interest be applied to the proceeds while the latter section authorizes the application of interest to the general fund of the county. Because § 58-930 of the Code was enacted subsequent to § 15.1-207 of the Code, § 58-930 governs. See Sutherland, Statutory Construction, § 1609.

Accordingly, I am of the opinion that § 58-930 of the Code of Virginia empowers the Board of Supervisors to cause interest derived from the proceeds of the school bonds in question to be placed in the general fund for use other than that prescribed in the school bonds.

**SCHOOLS—School Boards—Circumstances allowing severance of teacher’s contract at any time.**

**September 19, 1972**

**The Honorable Woodrow W. Wilkerson**
Superintendent of Public Instruction
State Department of Education

I am writing in response to your recent letter in which you request my opinion regarding § 22-217.4 of the Code of Virginia (1950), as amended, which provides in pertinent part as follows:
"Written notice of noncontinuation of the contract [by the School Board or the teacher] must be given by April fifteenth of each year. . . .

*A board may reduce the number of teachers, whether or not such teachers have reached continuing contract status, because of decrease in enrollment or abolition of particular subjects."

In your letter you inquire whether "the last paragraph provides a waiver of the April 15 notice in the event of an unpredicted decrease in enrollment in the fall."

I am of the opinion that the School Board may sever its contract with the teacher at any time because of decrease in enrollment or abolition of particular subjects. The purpose of the sentence is to allow School Boards to release a teacher who is not needed due to either circumstance. This flexibility is necessary in order to insure efficiency and maximum utilization of tax resources. Of course, the decrease in enrollment or abolition of particular subjects must be demonstrable and the decision must be made in good faith. Neither of these circumstances can be used as a pretext for releasing a teacher whom the School Board wishes to terminate for some other reason.

SCHOOLS—School Boards—Discretion to admit certain students into public schools.

August 25, 1972

THE HONORABLE THOMAS STARK, III
Commonwealth's Attorney for Amelia County

I am writing in response to your letter of August 14, 1972, in which you ask whether the School Board of Amelia County may admit a child who has not reached his sixth birthday by September 30 to the first grade and to charge such child tuition.

Section 22-218 of the Code of Virginia (1950), as amended, provides in pertinent part as follows:

"The public schools in each county . . . shall be free to each person, who is not less than six (6) years of age . . . provided, however, that only those persons having reached their sixth birthday on or before September thirtieth for the 1972-1973 and 1973-1974 school years . . . shall be admitted free to the public school in their respective counties. . . ."

Section 22-218 of the Code also establishes certain admission requirements relating to residency in the school division.

Section 22-218.2 contains provisions similar to § 22-218 and authorizes the admission into kindergarten of persons who have reached their fifth birthday.

Section 22-218.3 of the Code provides that the School Board may, in its discretion, admit persons twenty years of age and above to public schools and may charge such persons a tuition fee. Section 22-219 of the Code which also relates to the admission to public schools of persons not defined in § 22-218, provides in pertinent part as follows:

"The school board of each county . . . shall have the power to make regulations whereby persons other than those defined in § 22-218 who are residents of the State of Virginia may attend school in such county . . . and may charge tuition for the attendance of such persons in such school. . . ."

In recent years conflicting opinions have been given regarding the authority of
a school board to admit students who are not six years of age by September 30 into the first grade. An opinion to the Honorable M. H. Bell, Superintendent of Schools for Harrisonburg, dated May 18, 1959, found in Report of the Attorney General, (1958-1959), p. 244, concluded that it was permissible for a school board to allow a child under the age of six, who is otherwise qualified, to attend the first grade of an elementary school. An earlier opinion to the Honorable R. V. Stephenson, Jr., Commonwealths Attorney for Alleghany County, dated August 18, 1958, found in Report of the Attorney General (1958-1959), p. 260, reached a contrary result.

It is clear from the statutes cited earlier in this letter that the General Assembly contemplates an educational program whereby certain students must be admitted to public schools free of charge and other students, in the discretion of the school board, may be admitted to public schools and may be charged a tuition fee. I am of the opinion that the interpretation in the earlier letter to Mr. Stephenson was unduly restricted, and that the opinion to Mr. Bell contains the correct interpretation.

Section 22-218 of the Code does not purport to set forth in exclusive terms those people who may be admitted into the schools. It defines those persons who must be admitted free of charge. It is clear from § 22-219 of the Code that other persons may be admitted in the discretion of the school board. Accordingly, I am of the opinion that the school board may admit into the first grade pupils who have not reached the age of six years by September 30 and the school board may charge such pupils tuition consistent with the provisions of § 22-219 of the Code.

SCHOOLS—School Boards—Employees of—May not be appointed member of electoral board or registrar or officer of election.

The Honorable M. A. Hamlett, Secretary
Charlotte County Electoral Board

In your letter of September 6, 1972, you inquire whether persons employed by a school board are barred from serving as members of the electoral board by § 24.1-33 of the Code of Virginia (1950), as amended.

Section 24.1-33 provides 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.”

Although the school board of a county or city is a separate entity from the governing body, it is nevertheless a part of the county government, and its employees are therefore within the prohibition of § 24.1-33. That section, however, became effective on July 1, 1971, and I have previously ruled in an opinion to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated July 7, 1971, a copy of which is attached, that persons who would now be barred from appointment at this time but who were duly appointed prior to that date may continue to serve out their terms, although they may not be reappointed.

SCHOOLS—School Boards—Liability for Operation of school buses.

August 9, 1972
I am writing in reply to your recent request concerning the use of school buses in Stafford County.

In your letter you set forth two questions as follows:

1. If the School Board of Stafford County agrees to transport children over roads below State standards, is it liable for an accident that may result from operating over such a road?

2. Do State Police investigate traffic accidents involving public school buses that occur on a private road?

Sections 22-289 and 22-290 of the Code of Virginia (1950), as amended, provide that, subject to certain limitations, liability will attach to a school board for an accident when the school board, through the medium of a driver, operates the school bus in a negligent manner. If the roads over which the school bus passes contain such serious defects that to operate the bus over those roads would constitute an act of negligence, and the operation over those roads is the proximate cause of an accident, then liability would attach, subject to the limits set forth in the above-mentioned sections of the Code of Virginia. Of course, the particular facts of any given situation will determine whether the bus was operated in a negligent manner.

I am advised that the State Police will investigate accidents involving public school buses which occur on private roads.

SCHOOLS—School Boards—May authorize use of county school buses to transport students attending Governor's School.

June 18, 1973

I am in receipt of your letter of June 4, 1973, in which you inquire whether the Augusta County School Board may authorize the use of county school buses for transporting students attending the Governor's School program to be located in Staunton.

Section 46.1-169.1 of the Code of Virginia (1950), as amended, permits the use of yellow school buses for the transportation of students who attend public, private or parochial schools. The Governor's School is sponsored and financed by the State Board of Education and is designed for the education of certain high school students. Accordingly, I am of the opinion that the use of yellow school buses by students participating in this school is permissible under § 46.1-169.1 of the Code.

Section 22-72.1 of the Code authorizes county school boards to provide for transportation of pupils. There is nothing in that section or in Title 22 of the Code which would prohibit a school board from contracting with the Governor's School to provide the desired transportation. Section 46.1-287.1 of the Code which authorizes particular groups to hire regular school buses clearly contemplates that school boards may contract for the use of their school buses for purposes permitted by law.

I am of the opinion, therefore, that the Augusta County School Board may authorize the use of county school buses for the purpose of transporting students attending the Governor's School.
SCHOOLS—School Boards—Members—Number authorized—Districts from which appointed and terms of office.

SCHOOLS—School Boards—Members—Application of § 22-61.

November 28, 1972

THE HONORABLE V. EARL DICKINSON
Member, House of Delegates

I am writing in response to your letter of November 15, 1972, in which you request my opinion on several questions relating to representation on a School Board.

As stated in your letter, Powhatan County has three magisterial districts. During the past year the number of members on the Board of Supervisors was increased from three to five with one member coming from the smallest magisterial district and two members coming from each of the remaining magisterial districts. At the present time, there are three School Board members, with one member representing each magisterial district. The School Board is appointed by the School Trustee Electoral Board.

In your letter you asked the following questions:

"1. What procedure must be followed to have the number of School Board members increased?
"2. What is the maximum number of School Board members our system may have?
"3. From which districts should the additional members be appointed?
"4. What will be the dates or term of office for the new members?"

Section 22-61 of the Code of Virginia (1950), as amended, provides in pertinent part as follows:

"Except as otherwise provided by law, the county school board shall consist of the same number of members from each district in the county as there are members of the board of supervisors from each district in the county, 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."

Prior to being amended by the 1972 General Assembly, the section provided that there should be one member from each district in the county from which a member of the Board of Supervisors is elected.

It is clear from § 22-61, as revised, that the School Board of Powhatan County should contain a minimum of five members. The General Assembly has mandated this minimum number and no local action is required to implement the General Assembly’s authorization. The only action required is for the School Trustee Electoral Board to appoint the new members. One new member should come from one magisterial district having two representatives on the Board of Supervisors while the second member should come from the other magisterial district having two members on the Board of Supervisors.

If the Board of Supervisors desires, they may authorize the School Trustee Electoral Board to appoint two additional members from the county at large. The additional members may reside anywhere in the county.

The terms of the new members who must be appointed will commence at the date of their appointment and shall expire in four years less that period of time which has lapsed since July 1. Thus the terms of the new members will expire on June 30 as anticipated by § 22-60 of the Code of Virginia.
SCHOOLS—School Boards—Members—Residency as related to representation on County School Board.

June 28, 1973

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

I am writing in response to your recent letter in which you request that I reconsider my earlier opinion to the Honorable William J. McGhee, dated September 27, 1972, advising of the effect of the recent redistricting of Montgomery County on representation on the County School Board.

The County has been redistricted into seven election districts. These districts serve as the basis for representation on the School Board. Section 22-61 of the Code of Virginia (1950), as amended. One district lies completely within the Town of Blacksburg and five districts include, in part, a portion of either the incorporated Towns of Blacksburg or Christiansburg in addition to unincorporated area of the County. The seventh district lies wholly within the unincorporated area of the County.

The School Board of Montgomery County also has representatives from Blacksburg and Christiansburg, as these two towns have been designated special town school districts for purposes of representation on the division school board. Section 22-43 of the Code of Virginia.

In my letter to Mr. McGhee I advised that a resident of an election district would not be prohibited from representing that district on the School Board simply because he is also a resident of one of the incorporated towns. In your letter you correctly point out that this may result in eight of the nine representatives on the School Board residing in the two towns. You suggest that the General Assembly could not have intended this result and request that I change my opinion.

I have carefully considered the matter and must adhere to my earlier opinion to Mr. McGhee. There is nothing in the Code of Virginia which dictates a contrary conclusion. Indeed, § 15.1-51 of the Code, while not directly applicable, supports my result, for it provides that every district officer shall reside within the district for which he is appointed “and residence in any incorporated town within the district shall be regarded as residence in the district.”

To hold that a resident of a town may not represent an election district which includes part of the town may give just as disproportionate representation to residents of the unincorporated area of the County as appointing eight representatives who live in the towns may give to the towns. Additionally, it would result in the incongruous situation in which a resident of a town is disqualified from representing his district if his district includes unincorporated area but permit a resident of a town to qualify if his district lies wholly within a town.

SCHOOLS—School Boards—No authority to use public school buses for college students.

SCHOOLS—Buses, Under § 46.1-287.1, May Be Hired by Other Bodies—College students doing practice teaching.

SCHOOLS—Transportation—Extracurricular activities.

June 25, 1973

THE HONORABLE JOHN D. BUCK
Commonwealth's Attorney for the City of Radford
I am writing in response to your recent letter in which you ask whether the City of Radford school system may provide transportation to and from school on public school buses for Radford College students engaged in practice teaching related activities in the public school system.

Section 22-97.1 of the Code of Virginia authorizes a city school board to "provide for the transportation of pupils. . . ." There is no provision authorizing the school board to transport any other group of persons. See opinion to Miss Eliza W. Christian, Clerk of the School Board of Augusta County, 1966-1967 Opinions of the Attorney General, p. 259. In an opinion to the Honorable M. Patton Echols, Jr., member of the Senate of Virginia, 1970-1971 Opinions of the Attorney General, p. 344, I recognized that where it is necessary to achieve the dominant purposes of the Code provision, staff members or other adults may be permitted to accompany the students as chaperons.

From the facts stated in your letter, it is clear that the transportation in question is designed to benefit a group of non-public school pupils. Because the Code of Virginia does not authorize a school board to provide for such transportation, I am of the opinion that the school board does not have authority to transport the Radford College practice teachers in question.

Section 46.1-287.1 of the Code, however, provides:

"Any private individual, corporation or civic, charitable or eleemosynary organization, for the purpose of transporting children to or from school, camp or any other place during any part of the year, may contract to hire motor vehicles identified as regular school buses. . . ."

While the statute refers to "children", that term is not defined and I am of the opinion that it should be liberally construed to best accomplish the intent of the General Assembly. Thus, it appears that, assuming acceptable arrangements are made, the buses may be used by other bodies for the purpose outlined in the first paragraph of this letter.

SCHOOLS—School Boards—Requirements for continuing contract status of teachers.

August 2, 1972

THE HONORABLE W. BYRON KEELING
Commonwealth's Attorney for Charlotte County

I am writing in reply to your letter of July 26, 1972, in which you ask my opinion on a matter arising under §§ 22-217.1, et seq., of the Code of Virginia (1950), as amended, the continuing teacher contract provisions of the Code.

In your letter you state that a teacher was employed by the City of Norfolk with a continuing contract for the school year beginning in September, 1969. The school teacher subsequently left the Norfolk school system and was employed by the School Board of Charlotte County. The teacher has since signed three annual contracts for specified contractual periods with the School Board of Charlotte County, the most recent contract being for the 1972-1973 school year. The School Board of Charlotte County has now informed the teacher that her contract will not be renewed at the termination of the 1972-1973 contractual period.

Based on the foregoing factual situation, you have asked two questions:

1. Is a local continuing contract binding upon another school district within the state?

2. Is the teacher entitled to a continuing contract in Charlotte County?
when no probationary period is specifically designated in the annual contract form used by Charlotte County for all of the teacher's contracts?

Section 22-217.3 of the Code provides in pertinent part as follows:

"A probationary term of service for three years in the same county or city school system shall be required before a teacher is issued a continuing contract; provided, that, in the discretion of the local school board, service rendered prior to July one, nineteen hundred sixty-nine in the same county or city under the provisions of § 22-208 of the Code of Virginia may be determined as satisfying in whole or in part such probationary term. Once a continuing contract status has been attained in a school division in the State, another probationary period need not be served in any other school division, unless such probationary period up to three years be made a part of the contract of employment."

Section 22-217.3 of the Code does not prescribe the language which the contract must contain in order to require a teacher to again satisfy the three year probationary period in a new school system. Nevertheless, the Code provision clearly contemplates that the contract contain language which in unambiguous terms requires the completion of a new probationary period before the teacher is eligible for a continuing contract. In the absence of such language, continuing contract status attained in one school division is binding upon another school division in the State.

I am of the opinion that the mere use of an "annual contract" with a specified time period not exceeding one year is not sufficient to convey to a teacher who has previously attained continuing contract status and is now changing school divisions the requirement that she satisfy an additional probationary period before again becoming eligible for continuing contract status. The continuing contract legislation is remedial in nature and should be strictly construed to implement the General Assembly's intent.

The failure of the Charlotte County contracts to include a provision requiring the completion of another probationary period before the transferring teacher is again eligible for continuing contract status precludes the School Board of Charlotte County from contending that the teacher in question does not now have continuing contract status. Section 22-217.3 compels such a conclusion.

SCHOOLS—School Children—Residency—Determination of for purpose of free tuition.

SCHOOLS—Compulsory Attendance—Residency determined.

November 9, 1972

The Honorable John D. Eure, Jr.
Commonwealth's Attorney for the City of Nansemond


Section 22-275.1 of the Code provides in pertinent part that every parent, guardian, or other persons in the Commonwealth having control or charge of any child or children between the ages of six and seventeen shall send such child or children to a public school or other suitable school. Section 22-218 provides in pertinent part that "public schools . . . shall be free to each person . . . residing in such county, city or town. . . ." The section also provides that "every such person shall be deemed to reside in a county, city or town" when (1) living with
a natural parent or parent by legal adoption who actually resides in the locality, (2) the parents of such person are dead and he or she is living with a person in loco parentis who actually resides in the locality or (3) he or she is living with such parent or person on a military reservation located wholly or partly within the geographical boundaries of the locality. Section 22-220 of the Code authorizes the school board of a locality to admit into its schools certain persons who are nonresidents of the Commonwealth who may be living temporarily with relatives or others within the locality. The section requires the payment of a tuition for the attendance of such persons.

In your letter you stated that there are a number of children of school age in the City of Nansemond whose natural parents no longer reside in the Commonwealth. These children are now residing in Nansemond with relatives or friends. Although the natural parents may be living, they have abandoned their children and no longer provide support for them. Apparently, the children have not been legally adopted by the person or persons with whom they reside. Although §§ 22-220 and 22-275.1 of the Code require that these children attend school, the School Board of the City of Nansemond refuses to admit these children without the payment of a tuition fee. Many of the families caring for these children are unable to afford the tuition fee. You ask my opinion for the resolution of this apparent conflict.

It appears that §§ 22-218 through 22-220 of the Code use residence synonymous with domicile. While children are presumed to have the same domicile as their parents, this need not always be the case. Where a child has become emancipated or the parents have abandoned a child, that child may establish his domicile distinct from that of his parents. Thus, where parents leave the Commonwealth of Virginia and abandon their child who remains in the City of Nansemond with relatives or friends, the child will take the domicile of the relatives or friends with whom he is residing.

Section 22-218 of the Code requires that schools be free to a person residing in the locality. The three categories contained in that section are only presumptions of domicile or residence. Those categories may not be regarded as being exclusive. There may be other situations in which a person is residing in the locality and therefore entitled to free admission to the schools.

Children in the category described in your letter should be classified as residents for the purposes of satisfying § 22-218 of the Code. Accordingly, it would not be necessary for the persons having control of such children to pay tuition to the School Board for the admission of these children.

SCHOOLS—School Trustee Electoral Boards; Appointment of Members.

BOARDS OF SUPERVISORS—Appointments of School Trustee Electoral Board Members.

August 2, 1972

The Honorable Daniel M. Chichester
Commonwealth's Attorney for Stafford County

I am writing in reply to your letter of July 27, 1972, concerning the appointment of members of the School Trustee Electoral Board.

Section 22-60 of the Code of Virginia (1950), as amended, by the 1972 Session of the General Assembly, provides in pertinent part as follows:

"... and upon the request of the local governing body, any school trustee electoral board will be composed of one [member] from each election district of such county ... to be appointed by the circuit court of
SCHOOLS—School Trustee Electoral Board; Compensation of Members and Clerk.

July 25, 1972

I am writing in response to your letter of July 6, 1972, in which you ask two questions relating to school trustee electoral boards.

In your first question you ask whether members of the school trustee electoral board may be paid transportation expenses in addition to per diem expenses. Section 22-60 of the Code of Virginia (1950), as amended, provides in pertinent part that:

"The members of the trustee electoral board shall each receive a per diem of ten dollars for each day actually employed, to be paid out of the funds made available by the school board."

I am of the opinion that the General Assembly, having failed to include authorization for transportation expenses in the general compensation provision, did not intend for members of the school trustee electoral board to receive transportation expenses. This conclusion is supported by the fact that § 22-67.2 of the Code of Virginia which specifies salaries for members of the various school boards also makes specific reference for payment of transportation expenses.

In your second question you ask whether the clerk of a school trustee electoral board may be paid for his service as clerk to the board from school funds. I have searched the pertinent portions of Title 22 of the Code of Virginia, and I can find no authorization for the compensation of the clerk of a school trustee electoral board from school funds. The reference to officers in § 22-72(5) of the
REPORT OF THE ATTORNEY GENERAL

Code is to officers of the school board and not of the school trustee electoral board which is a distinct and separate body. Accordingly, I am of the opinion that the clerk may not be so compensated.

SCHOOLS—Standards of Quality—Constitutional requirements.

February 7, 1973

THE HONORABLE V. ROY SMITH
Member, House of Delegates

This is in reply to your inquiry of February 6, 1973, concerning the funding of the Standards of Quality. Specifically, you ask if the distribution of a supplemental appropriation for public elementary and secondary schools under the present Basic School Aid Formula comports with Section 2 of Article VIII of the Constitution of Virginia. In order to adequately respond to your inquiry, I think it necessary to examine the requirements of the Constitution as they relate to the Standards of Quality.

The tenor of the Education Article (Article VIII) of our Constitution is set forth in Section 1 of Article VIII in which the General Assembly is enjoined to "seek to ensure that an educational program of high quality is established and continually maintained." As stated in the Report of the Commission on Constitutional Revision, p. 258, this section "states the fundamental principles which govern the Education Article as a whole."

Section 2 of Article VIII sets forth the manner in which the General Assembly shall seek to ensure a high quality educational program and provides as follows:

"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.

"The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds."

The above-quoted language contains certain express requirements and procedures for the establishment and funding of the Standards of Quality. First, the Board of Education is required to determine the Standards. Second, these Standards, as they may be revised by the General Assembly, become applicable to the several school divisions. Third, the General Assembly must apportion the cost of establishing and maintaining the Standards of Quality between the Commonwealth and its local units of government. In order to fulfill this last requirement, the General Assembly must take three steps: (1) It must establish the cost of the Standards of Quality; (2) It must establish the fair or equitable share of this cost to be borne by the localities; and (3) It must appropriate from State funds the difference between the share to be borne by the localities and the cost of the Standards. See Report of the Commission on Constitutional Revision, pp. 261-263.

Although what items shall comprise the Standards is a matter for the exercise of sound judgment by the Board of Education, subject only to revision by the General Assembly, the Standards cannot be prescribed in a vacuum but must be realistic in relation to the Commonwealth's current educational needs and practices. Similarly, in estimating the cost of implementing the Standards, the General Assembly must take into account the actual cost of education rather than developing
cost estimates based on arbitrary figures bearing no reasonable relationship to the actual expense of education prevailing in the Commonwealth. Finally, in apportioning the cost of the Standards between the Commonwealth and the several school divisions, the General Assembly must take into account the local ability to pay. “The constitutional standard is that the division be equitable.” Report of the Commission on Constitutional Revision, p. 261.

For the 1972-1974 biennium, the General Assembly utilized the Basic School Aid Formula for establishing and apportioning the cost of the Standards of Quality. The Basic School Aid Formula uses a minimum teacher salary scale and a fixed pupil-teacher ratio in order to establish the amount of State aid. Statistics provided this office by the State Department of Education show that every school division in the Commonwealth exceeds the minimum teacher salary scale and that last year all but one of the school divisions had a lower pupil-teacher ratio than that adopted in the Basic School Aid Formula. It is clear from these statistics that the teacher salary scale and pupil-teacher ratio contained in the Basic School Aid Formula do not reflect current educational practices in the Commonwealth and, therefore, utilization of the Basic School Aid Formula by the General Assembly in funding the Standards of Quality does not comport with Section 2 of Article VIII of the Constitution. For this reason, the teacher salary scale and the pupil-teacher ratio should not be used by the General Assembly in establishing the cost of the Standards of Quality. Rather, the General Assembly should take into account the actual salaries being expended by the local school divisions and the actual pupil-teacher ratio existing within the school divisions in estimating the cost of the Standards of Quality.

As you know, because of the time factors involved in the almost simultaneous development of the Standards of Quality and the 1972-1974 biennial budget, the exact cost of the Standards of Quality had not been determined when the General Assembly was called on to apportion that cost. Furthermore, the Basic School Aid Formula does not provide a means for establishing an exact cost for implementing the Standards of Quality, nor does it ensure that each locality has the necessary funds to meet the cost of the Standards. Finally, the Formula does not provide adequately for differences among school divisions in ability to pay for the Standards in light of the existing six-to-one discrepancy in wealth among Virginia’s cities and counties.

You have called to my attention the formula developed by the Governor’s Task Force on Financing the Standards of Quality for Virginia Public Schools. Under that formula, the Standards would be costed out in light of current educational practices. Furthermore, every locality would be required to make a realistic and equitable effort to finance the Standards of Quality. Those school divisions which could not raise a sufficient amount of money by exerting such uniform effort would receive the necessary additional funds required to meet the Standards from the State. The Task Force formula appears to be what was envisioned by the Commission on Constitutional Revision:

“School divisions in some poorer localities, especially those where per capita education costs are high, will be left with inadequate funds to maintain state standards of quality even after receiving the 60% state aid for teachers’ salaries and the full percentage of local revenues under (2) above. This is particularly likely to occur in certain rural counties where taxable resources are low and per capita costs high because of small school population and the higher salaries required to lure qualified teachers out of urban areas. The proposed Education article contemplates that this situation will be met in two ways. First, unless it elevates the maximum level of local participation under (b) above, or lowers the state standards of quality, the
General Assembly must appropriate sufficient extra funds to the school division to enable it to meet the state standards of quality."


In summary, the Basic School Aid Formula fails to take into account the current educational practices in the Commonwealth as required by Section 2 of Article VIII of the Constitution. Use of the Basic School Aid Formula to distribute a supplementary appropriation would be subject to the same infirmities. Now that the Standards have been costed out, the General Assembly, if it is to comply with the mandate of the Constitution, should take into account these actual costs and should apportion the costs on an equitable basis. This approach will ensure that those localities lacking sufficient resources to enable them to meet the costs of the Standards will receive such supplements from the State as are necessary to offer educational programs of the prescribed quality.

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**SCHOOLS—Superintendents—Engaging in other business or employment—Meaning of term.**

February 20, 1973

**The Honorable H. Benjamin Vincent**  
Commonwealth's Attorney for Greensville County

I am writing in response to your letter of February 12, 1973, in which you request my opinion on the following question:

"Does the ownership of common stock by a school superintendent in a funeral home corporation and a mobile home sales corporation constitute 'engaging in any other business or employment' as contemplated by Section 22-38 of the Code of Virginia of 1950, as amended?"

The pertinent portion of the statute in question provides as follows:

"The office of any division superintendent shall be deemed vacant upon his engaging in any other business or employment during his term of office as such superintendent, unless such superintendent shall have been accepted for part-time employment. . . ."

Mere ownership of common stock by a school division superintendent does not constitute "engaging in any other business or employment" as that phrase is used in § 22-38 of the Code. Such an interpretation would preclude a division superintendent from making investments as are made routinely by other persons.

In order to come within the prohibition of engaging in other business or employment, the division superintendent must devote substantial efforts to the other business or employment. For example, in an opinion to the Honorable Robert B. Ely, dated March 17, 1941, found in Report of the Attorney General (1940-1941), p. 134, it was ruled that a division superintendent may act as "president of the board of directors of his local bank, serving the same without pay and at their meetings once a month." In making this ruling, Attorney General Staples ruled that the provision in question refers "to some substantial business activity or employment. It was not intended to require a person holding the office of division superintendent of schools to give up such a purely nominal activity" as the one described in that opinion. In an opinion to the Honorable Tyler Fulcher, dated January 6, 1961, found in Report of the Attorney General (1960-1961), p. 276, Attorney General Harrison suggested that publication of a book or books by a division superintendent may fall within the proscription found in § 22-38 of the Code.
As the foregoing opinions indicate, the school superintendent will not violate § 22-38 of the Code unless he engages in substantial activity in some other business or employment. The determination of the existence of such activity must be made on a case by case basis.

SCHOOLS—Teachers—Public schools—Educational standards necessary for accreditation may be imposed by school boards.

April 9, 1973

THE HONORABLE COLEMAN B. YEATTS
Member, Senate of Virginia

In your recent letter you inquired whether public school teachers who have been teachers for many years and who hold certificates or licenses may be required to meet educational requirements in addition to those necessary for their certificates or licenses in order to continue to teach. You asked this with reference to non-degree teachers.

Certificates and licenses are issued and renewed pursuant to rules and regulations of the Board of Education under authority of § 22-204 of the Code of Virginia. Generally they may be renewed by completion of six semester hours of college credit during the life of the certificate of license.

The Board of Education has promulgated standards for accreditation of elementary schools pursuant to § 22-21 of the Code of Virginia. These standards require that each teacher hold a Collegiate Professional Certificate for which a college degree is necessary. One exception to this requirement is an elementary school teacher who is enrolled in an approved teacher education program earning six semester hours credit per year toward a degree and certification requirements. This standard was adopted by the Board of Education in September, 1969, and has been in effect since the 1970-1971 school year.

The standards of quality prescribed by the Board of Education and revised by the General Assembly pursuant to Section 2 of Article VIII of the Constitution of Virginia and Chapter 732 of the Acts of Assembly of 1972 require that a school division that has one or more elementary schools unaccredited or accredited with a warning develop by September 1, of the ensuing school year, a plan for each such school to meet the accrediting standards.

It therefore appears that a non-degree teacher may meet the requirements for renewal of a certificate or license by earning six semester hours of credit over the life of the certificate or license but that a school employing that teacher incurs accreditation deficiencies unless the teacher earns six semester hours per year toward a degree and certification requirements. If a school incurs sufficient deficiencies, it may be unaccredited or accredited with a warning and thus the division may not be able to meet the standards of quality.

Since these teachers have been teaching for many years, they have evidently achieved continuing contract status in accordance with §§ 22-217.1 through 22-217.8 of the Code of Virginia. A teacher who has achieved continuing contract status is entitled to a continuing contract during good behavior and competent service. (§ 22-217.4 of the Code of Virginia.) Such a teacher may be dismissed for “incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence, or for other good and just cause.” (Emphasis supplied.) (§ 22-217.5 of the Code of Virginia.) A school board may give notice of noncontinuation by April fifteenth of any year. It is not clear whether there must be grounds for dismissal to discontinue a teacher’s contract at the end of a school year. (See Edward C. Bolmeier: Teachers’ Legal Rights, Restraints and Liabilities (1971), p. 4) However, it is unnecessary to reach that
question since I am of the opinion that there would be good cause for dismissal and, a fortiori, grounds for noncontinuation of a contract.

The purpose of laws such as §§ 22-217.1 through 22-217.8 is to maintain an adequate and competent teaching staff free from arbitrary or political interference and thus more secure and capable of efficient performance. The ultimate goal is better education of children. (See Bolmeier, supra, pp. 8-11.) That ultimate goal is also the goal of the Constitution of Virginia, the standards of quality and the accreditation standards. To achieve that goal the accreditation standards have raised the qualifications of teachers and the standards of quality have made those qualifications essentially mandatory.

Professional growth, continued study and further training have been recognized as reasonably related to competence and a teacher's ability to discharge his professional duties. See Richards v. Board of Education of Twp. H.S.D. No. 201, 21 Ill. 2d 104, 171 N.E. 2d 37 (1960); Ribble v. Hughes, 24 Cal. 2d 437, 150 P. 2d 455 (1944); Board of School Trustees v. Moore, 218 Ind. 386, 33 N.E. 2d 114 (1941). The absence of life certificates in Virginia and the requirement of additional education for certificate renewal indicates Virginia's belief in the advisability of professional growth.

The term "good and just cause" as grounds of dismissal is not defined. It has been stated to mean any ground put forth in good faith which is not unlawful, arbitrary, unreasonable or capricious. Lopez v. State Board of Education, 70 N.M. 166, 372 P. 2d 121 (1962); 47 Am. Jur., Schools, §139. A local school board that dismisses a teacher in order to meet standards which are imposed by State authorities, which are intended to improve the quality of education and which are reasonably related to that purpose would not be acting unlawfully, arbitrarily, capriciously or unreasonably and, in my opinion, would have good and just cause for dismissal. The continuing contract laws are not meant to protect teachers from reasonable requirements and improvements.

Furthermore, a continuing contract does not mean a contract the terms of which never change so long as the teacher continues to teach. Different terms may be imposed so long as they are calculated to meet current needs and best serve the interests of a school. New Castle—Henry Township School Corp. v. Hunt, 145 Ind. App. 131, 247 N.E. 2d 835 (1969). Consequently a school board may impose contract terms requiring additional education when necessary to meet accreditation standards.

It is, therefore, my opinion that a school board may require teachers to meet the educational standards necessary for accreditation even though they exceed the requirements for renewal of a certificate or license and would have good and just cause to discontinue the contract of a teacher who fails or refuses to meet such requirements.

SCHOOLS—Teachers' Salaries—May be paid over twelve-month period.

SCHOOLS—School Boards—May pay teachers' salaries over twelve-month period.

February 22, 1973

The Honorable Russell I. Townsend, Jr.
Member, Senate of Virginia

I am writing in response to your recent inquiry in which you ask my opinion whether a city school board may enter into a contract with a teacher to pay the teacher's salary in twelve monthly payments as opposed to paying all of the salary during that nine to ten month period when the teacher is actually teaching.

Section 22-97 of the Code of Virginia (1950), as amended, empowers a city
school board to employ teachers and to provide for their pay. Section 22-57.2 of the Code of Virginia provides in pertinent part as follows:

"School boards may adopt rules and regulations governing the timing and methods of payment of compensation of teachers and other personnel under term or annual contract as follows:

"(a) Payment of contract salaries may be made in equal monthly installments not exceeding twelve, irrespective of the annual contract work. . . ."

In light of the foregoing statutory provisions, I am of the opinion that a school board may enter into a contract with a teacher providing that the teacher will be paid in twelve monthly payments regardless of the fact that the teacher will be teaching for only a nine or ten month period.

SCHOOLS—Transportation—Extracurricular activities.

March 8, 1973

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

In your letter of February 22, 1973, you ask if a student club may underwrite the cost of using a county school bus to transport members of the club if the club's sole source of income is from student fees or if the club's sole source of income is from money-making projects.

Section 22-72.1 of the Code of Virginia (1950), as amended, provides that "county school boards may provide for the transportation of pupils. . . ." In an opinion to the Honorable M. Patton Echols, Jr., Member, Senate of Virginia, dated December 10, 1970, and found in the Report of the Attorney General (1970-1971), p. 344, it was held that county school boards may authorize the use of school buses for extracurricular activities which are school connected or a part of the local school program, but that no charge may be made for transportation provided by a school board pursuant to this section, and that all costs must be paid from public funds.

Thus, a student club may not underwrite the cost of the use of a school bus regardless of the source of its income.

SEWAGE DISPOSAL SYSTEM—Hampton Roads Sanitation District Commission Has Authority, With Approval of Governor, to Use State-owned Subaqueous Bottoms For.

WATER AND SEWER AUTHORITIES—Hampton Roads Sanitation District Commission—Authority, with approval of Governor, to use State-owned subaqueous bottoms for.

February 22, 1973

THE HONORABLE JAMES E. DOUGLAS, JR.
Commissioner, Marine Resources Commission

This will acknowledge your recent letter in which you request advice as to whether Chapter 584, § 11(d) of the Acts of Assembly of 1962, exempts the Hampton Roads Sanitation District Commission from the permit requirements of § 62.1-3 of the Code where state-owned subaqueous bottoms are to be used for construction of a sewage disposal system or improvements thereto.
Section 62.1-3 of the Code of Virginia (1950), as amended, provides that:

"... It shall be unlawful and constitute a misdemeanor for anyone to build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission..." (Emphasis supplied.)

Chapter 584 of the Acts of Assembly of 1962, in § 11(d) provides:

"... The Commonwealth with the approval of the Governor hereby consents to the use of any lands or property owned by the Commonwealth, including lands lying underwater, which are deemed by the Commission to be necessary for the construction or operation of any sewage disposal system or sewer improvements..." (Emphasis supplied.)


Accordingly, I am of the opinion that the Hampton Roads Sanitation District Commission need only obtain formal approval of the Governor in order to use state-owned subaqueous bottoms for the construction or maintenance of its sewage disposal facilities.

SEWAGE DISPOSAL SYSTEM—State Water Control Board May Prohibit, or Control Rate of, Connections to.

STATE WATER CONTROL BOARD—If Expansion of Existing Sewage Disposal System Ordered, Board Must Commit Itself in Advance to Provide Maximum Federal and State Financial Assistance Available.

STATE WATER CONTROL BOARD—May prohibit, or Control Rate of, Connections to Sewage Disposal System.


February 28, 1973

THE HONORABLE JOHN N. DALTON
Member, Senate of Virginia

THE HONORABLE JERRY H. GIEISLER
Member, House of Delegates

THE HONORABLE W. WARD TEEL
Member, House of Delegates

This will acknowledge receipt of your letter of January 29, 1973, which states as follows:

"We would appreciate an interpretation concerning Code Section 62.1-44.15:1. The last sentence of that statute provides as follows: The foregoing restrictions shall not apply to those cases where existing sewage systems or sewage treatment works cease to perform in accordance with their approved certificate requirements.

"The specific question that we wish answered is that if a sewage treatment plant has an approved certificate requirement of two million gallons per day and due to growth in the area served by that treatment plant, the
flow going into the treatment plant exceeds two million gallons per day but the treatment plant is still operating with the same machinery, etc. as it was when it was carrying one and one-half million gallons per day can the Water Pollution Control Board cut off the growth to the community by preventing an overload on this plant under this code section or are they required to fund an expansion or construction of new facilities?"

Section 62.1-44.19 of the Code of Virginia (1950), as amended, provides that before an owner may construct or expand a sewage treatment works, that owner must submit plans and specifications for those works to the State Department of Health and the State Water Control Board. The Department and the Board are required to review those plans and specifications, and, if it is determined that the proposed works will provide the level of treatment necessary to prevent contravention of water quality standards, the Board is required to issue a certificate authorizing the construction of those works. This certificate shall specify the treatment requirements which must be met, and, in accordance with § 62.1-44.15(5) of the Code, prescribe the conditions under which the works must be operated.

If the Board finds that an owner is violating the terms and provisions of such a certificate, the Board is authorized to order the owner to comply with those terms and provisions. See § 62.1-44.15(8) of the Code. Further, the Board may, in its discretion, order the owner to comply with the Board’s duly-adopted Requirement No. 1. Board Requirement No. 1 prohibits additional sewer connections to a sewage treatment works which is not being operated in accordance with applicable certificate terms and provisions. Connections may be permitted where the owner applies for and receives the express authorization of the Board.

In 1971 the General Assembly enacted § 62.1-44.15:1 of the Code which provides, in part, as follows:

"Nothing contained in this chapter shall be construed to empower the Board to require the State, or any political subdivision thereof, to construct any sewerage system or sewage treatment works necessary to (1) upgrade the present level of treatment in existing systems or works to abate existing pollution of State waters, or (2) expand a system or works to accommodate additional growth, unless the Board shall have previously committed itself to provide financial assistance from federal and State funds equal to the maximum amount provided for under § 8 or other applicable sections of the Federal Water Pollution Control Act (P.L. 84-660, as amended), or unless the State or political subdivision agrees, or is directed by the Board with the concurrence of the Governor, to proceed with such construction, subject to reimbursement under § 8, or other applicable sections of such federal act.

"The foregoing restriction shall not apply to those cases where existing sewerage systems or sewage treatment works cease to perform in accordance with their approved certificate requirements."

The clear meaning of this section is to require Board allocation of federal and State funds to those cases where the Board has required owners (1) to upgrade the present level of treatment in existing works from primary to secondary treatment, for example, or (2) to expand an existing work in order to accommodate additional growth. Equally clear is the intent of the legislature that § 62.1-44.15:1 shall not apply to those situations where the Board’s directive is aimed only at insuring that existing works operate in accordance with their certificate terms and provisions, especially where further connections would lead to, or increase the intensity of, violations of those terms and provisions.

Accordingly, in response to your specific inquiry, I am of the opinion that where an existing sewage treatment works ceases to perform in accordance with
its approved certificate requirements, the State Water Control Board may pro-
hit, or control the rate of, connections to that works without financing the nec-
essary corrective action required for compliance. If, however, the State Water
Control Board orders an owner to expand an existing works to upgrade the design
level of treatment or to accommodate additional growth, I am of the opinion that
the Board must commit itself in advance to provide the maximum federal and
State financial assistance available.

SHERIFFS—Deputies Must Meet Requirements of Law Enforcement Officers
Training Standards Commission to Come Within Minimum Salary Scale.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION
—Deputy Sheriff Must Meet Requirements of to Receive Minimum Salary Scale.

August 3, 1972

THE HONORABLE ROBERT A. CLENDENEN
Sheriff of Washington County

This is in further reply to your recent communications in which you request
an opinion concerning the new Minimum Pay Bill for sheriff’s deputies. You
inquire as to whether a deputy sheriff, who was employed by a sheriff’s depart-
ment prior to July 1, 1971, would be required to have a certificate of successful
completion from a school approved by the Law Enforcement Officers Training
Standards Commission before he would come under the Minimum Pay Bill. The
legislation to which you refer is Chapter 716 of the Acts of Assembly of 1972,
which was approved April 10, 1972, and which took effect on July 1, 1972.
That Bill added a new section to the Code, § 14.1-73.2, which reads as follows:

“§ 14.1-73.2. (a) The salary of any full-time deputy sheriff, who is a
law enforcement officer and who has met the requirements established by
the Law-Enforcement Officers Training Standards Commission as provided
in § 9-109(2)(a) of this Code shall not be less than seven thousand two
hundred dollars per annum. Any such deputy sheriff employed on or after
July 1, 1971, shall not be deemed to have met the requirements described
above unless he has successfully completed a course of instruction estab-
lished by the Law-Enforcement Officers Training Standards Commission
as provided in § 9-109(2)(a) of this Code.

(b) The Compensation Board shall establish a schedule of salary in-
creases for all such deputy sheriffs to insure that each one attains a
minimum salary of ten thousand five hundred dollars per annum after
seven years of satisfactory and competent service subsequent to the effec-
tive date of this section.

(c) Nothing in this section shall be construed as preventing the Com-
penation Board from fixing any salary in excess of the minimum amount
stated herein.

(d) Provided, the salary of any full-time deputy sheriff shall not
exceed ninety per centum of his sheriff.” (Emphasis added.)

The above section provides that deputy sheriffs, in order to come within the
provisions of the minimum salary scale established therein, must have met the
requirements established by the Law Enforcement Officers Training Standards
Commission as provided in § 9-109(2)(a), Code of Virginia (1950), as amended.
The provisions of § 14.1-73.2 are not in conflict with the provisions of § 9-111 of
the Code, since § 9-111 does not relate to eligibility for minimum salary but in-
stead creates an exemption from taking training otherwise required as a condition
of continued employment and promotion. It is my opinion that in order to meet these requirements, a deputy sheriff hired before July 1, 1971, must either successfully complete an approved course of instruction as established by the Law Enforcement Officers Training Standards Commission or be deemed by the Commission to have received acceptable training as a result of employment experience in law enforcement commencing prior to said date. A deputy sheriff hired on or after July 1, 1971, must complete an approved course.

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November 27, 1972

THE HONORABLE WILLIAM T. KING
Commonwealth’s Attorney for Richmond County

In your recent letter you pose four questions relating to the operation of § 14.1-73.2 of the Code of Virginia (1950), as amended, in conjunction with the economic controls imposed by the Pay Board pursuant to the Economic Stabilization Act of 1970. I shall answer your questions seriatim.

Question 1: “Does Section 14.1-73.2 of the Code of Virginia require that all deputy sheriffs, who have successfully completed the prescribed training course, be paid a minimum salary of $7,200.00 per year beginning July 1, 1972?”

Answer: Section 14.1-73.2 provides as follows:

“The salary of any full-time deputy sheriff, who is a law-enforcement officer and who has met the requirements established by the Law-Enforcement Officers Training Standards Commission as provided in § 9-109(2) of this Code shall not be less than seven thousand two hundred dollars per annum. Any such deputy sheriff employed on or after July one, nineteen seventy-one, shall not be deemed to have met the requirements described above unless he has successfully completed a course of instruction established by the Law-Enforcement Officers Training Standards Commission as provided in § 9-109(2)(a) of this Code.”

The answer to this question is clearly in the affirmative.

Question 2: “If a deputy sheriff was employed under a federal grant prior to the passage of the above section for a salary of less than $7,200.00 and he continues to be paid with the money from the federal grant supplemented as required by the county, when must his salary be raised $7,200.00 per year?”

Answer: Regardless of the fact that some of the funds used for payment of a deputy’s salary may be obtained through a federal grant, if the deputy in question has met the standards set forth in § 14.1-73.2 he must receive the $7,200.00 minimum salary effective July 1, 1972.

Question 3: “Do the Internal Revenue Service regulations governing wage increases in any way limit the amount of the pay increase that can be given a deputy sheriff to bring his salary into compliance with Section 14.1-73.2?”

Answer: This question must be answered in the affirmative. Since federal law takes precedence over any conflicting state law by virtue of the Supremacy Clause of the United States Constitution, wage increases for deputy sheriffs are governed by the 5.5% increase limitation as long as the economic controls remain in effect. Under certain circumstances, however, various exceptions to the general
rule may apply, and I enclose a copy of an opinion to the Honorable David B. Ayres, Comptroller, dated October 2, 1972, which details the applicable exceptions. Please note that the 5.5% standard applies to the average increase given to the entire employee unit (in this case all deputy sheriffs employed by Richmond County), not to the individual employee.

Question 4: "Can a deputy sheriff, with approximately eight years of service, whose present salary fixed by the compensation board is in excess of $7,200.00 be increased at this time and if so under what procedure?"

Answer: As is indicated by the answer to Question 3, any employee can receive an increase as long as the average aggregate increase to the total employee unit does not exceed 5.5% in any given year.

I should point out that the regulations issued by the Pay Board do change quite frequently and often require interpretation as to the specific facts of any situation. In that regard, I suggest that you contact the Internal Revenue Service, which has the sole authority to give official rulings on these questions.

SHERIFFS—Required to Provide Security for All Courthouses and Courtrooms in His Jurisdiction.

December 13, 1972

THE HONORABLE S. R. ROYALL
Sheriff of Nottoway County

In your recent letter you advise that there are located within Nottoway County three Mayor's Courts. You further advise that the only cases tried in these courts are those which are violations of town ordinances. You seek an opinion as to your responsibility for providing courtroom security for these Mayor's Courts.

The answer to your inquiry is found in § 53-168.1, Code of Virginia (1950), as amended. This section provides in pertinent part that "it shall be the duty of every sheriff to provide for security from disruption and violence for every courthouse and courtroom within his jurisdiction." This section places the responsibility upon the sheriff to provide courtroom security for every courthouse and courtroom within his jurisdiction. The language of this statute does not provide for any exceptions, and it is my opinion that you have the responsibility for providing for security for every courthouse and courtroom within your jurisdiction, including the Mayor's Courts about which you inquired.

SHERIFFS—Service of Civil Process Beyond Corporate Limits of City.

CIVIL PROCEDURE—Service of Civil Process Beyond Corporate Limits of City.

CITIES—Service by Sheriffs—Civil process beyond corporate limits of city.

October 31, 1972

THE HONORABLE J. A. WILKERSON
City Sheriff for the City of Lynchburg

This is in reply to your letter of October 5, 1972, wherein you asked the following question:

"Has the Sheriff for the City of Lynchburg the authority to serve a civil process beyond the corporate limits of the City?"
Your attention is invited to § 15.1-79, Code of Virginia (1950), as amended, which provides, in part, as follows:

“Every officer to whom any order, warrant, or process may be lawfully directed, shall execute the same within his county or corporation or upon any bay, river or creek adjoining thereto. The word 'county' as herein before used shall embrace any city included within the boundaries of such county, and the word 'corporation' as herein before used shall embrace all property belonging to the county within the territorial limits of such corporation.” (Emphasis supplied.)

Section 8-52 provides that “Any sheriff or sergeant thereto required, shall serve a notice in his county or city...” (Emphasis supplied.)

Reenforcing the view that a sheriff may only serve process within the corporate limits of his city, § 16.1-79 provides, in part, that “A civil action in a court not of record may be brought by warrant directed to the sheriff of the county or sergeant of the corporation, or to any other officer authorized to serve process in such county or corporation...” (Emphasis supplied.)

Section 8-50 gives authority to the sheriff of any county, in which is situated a city, to execute in such city process he might execute in his county. However, there is no counterpart statute granting sheriffs of cities authority to execute any process in an adjoining county, or part thereof.

In view of the above sections, it is my opinion that the Sheriff for the City of Lynchburg has authority to serve civil process only within the corporate limits of the city or upon any river or creek adjoining thereto.

SHERIFFS—Service of Process on Registered Agent of Corporation.

SHERIFFS—Duty Where Service of Process Refused by Person Named Therein.

July 7, 1972

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

This is in reply to your recent letter, in which you request an opinion concerning the following situation:

“A Deputy Sheriff attempts to serve process on a registered agent who admits he is the person named but denies that he is, in fact, the registered agent.

“Is it the responsibility of the serving officer to return process to the Court with the explanation given; or should he execute service of process, thus, requiring the individual served to present his defense to the Court.”

Under the provisions of §§ 8-52 and 15.1-80 of the Code of Virginia (1950), as amended, it is the duty of the sheriff or any other proper person to serve a process in compliance with the instructions of said process and to make a return thereon. The person making the service is not to look behind the process to determine the validity or legality of it.

Therefore, it is my opinion that the deputy sheriff in the situation you have presented should execute the service of process on the individual, despite his disclaimer as being the registered agent, so long as that person is the individual named in the process.

Although it would not appear to be required by any statutory provision, it would be entirely proper for the deputy sheriff when he makes his return to
state thereon the fact that the person served had disclaimed being the registered agent, thereby bringing it to the attention of the person requesting the service.

SHERIFFS AND SERGEANTS—City of Richmond—Continue to serve until election held to determine successor.

ELECTIONS—City of Richmond—Postponed by court order.

June 18, 1973

THE HONORABLE JAMES H. YOUNG
Sheriff, City of Richmond

In your letter of May 25, 1973, you pose the following inquiry:

"On January 16, 1973, you ruled that due to the pending Federal Court Order that prohibited the City of Richmond from holding elections, that no primary elections can be conducted nor can any date for same be set.

"Under Section 15.1-796.1 the Office of the City Sergeant was abolished by the Acts of the 1971 Extra Session of the General Assembly, but it allowed, in the case of the City of Richmond that the City Sergeant shall continue in office until the expiration of the term for which he was elected or appointed.

"Section 15.1-89 relates to the office of Sheriff for the City of Richmond. Senate Bill #691 introduced in the 1973 General Assembly repealed this section provided that if such election be postponed or suspended because of the provisions of any federal law, that the Sheriff in office on July 1, 1973 shall continue in office until the said election is held and his successor duly qualifies for said office.

"In view of your January 16, 1973 ruling and also in view of the two above sections of the Code of Virginia does both the City Sergeant and City Sheriff remain in office until an election is held for office of Sheriff?" 

Senate Bill 691, to which you refer in your letter, was enacted as Chapter 449 of the Acts of Assembly of 1973 and reads as follows:

"1. That § 15.1-89, as amended of the Code of Virginia relating to the sheriff of the city of Richmond, be and is hereby repealed.

"2. This act shall become effective at midnight, December 31, 1973; provided, however, that so much of said section as would provide for the election of such sheriff on Tuesday after the first Monday in November, 1973, shall be in force and effect on July 1, 1973; and provided further, that if such election aforesaid be postponed or suspended because of the provisions of any federal law, the sheriff elected prior to July 1, 1973, shall continue in office until the said election is held and his successor duly qualifies for said office."

The first proviso of Section 2 of this Act is, in effect, a nullity, since it provides that a portion of § 15.1-89 is to be in force and effect on July 1, 1973, when the repealer of the entire section does not take effect until December 31, 1973. As a result, § 15.1-89 in its entirety is in effect on July 1, 1973, and the first proviso amounts to no more than surplusage. The second proviso, however, clearly expresses the intent of the legislature that the incumbent City Sheriff of the City of Richmond is to remain in office until there is an election for that office and a successor is duly qualified.

As for the incumbent City Sergeant of the City of Richmond, you are correct in pointing out that the appropriate provisions of § 15.1-796.1 do not contain similar
language extending the term of that officer until his successor duly qualifies. That section provides, in pertinent part, as follows:

“Notwithstanding any charter provision or special act, on and after July one, nineteen hundred seventy-one, the office of city sergeant is abolished. Any person holding office as city sergeant on July one, nineteen hundred seventy-one, shall continue in office as city sheriff until the expiration of the term for which he was elected, and his successor is elected and qualified, except that in any city having a city sheriff on or before July one, nineteen hundred seventy-one, the person holding the office of city sheriff shall continue in office until his successor is elected and qualified and the person in office as city sergeant in any such city shall continue in office as city sergeant until the expiration of the term for which he was elected or appointed. . . .”

While this section provides that, in general, each city sergeant is to hold office until his successor is qualified, special provision is made for cities, like Richmond, where the offices of city sheriff and city sergeant have existed simultaneously, and it is expressly stated that the city sheriff is to hold his office until his successor is qualified while the city sergeant is only to hold office until the expiration of his term. Underlying this special provision, however, is the overall legislative scheme to convert all city sergeants to city sheriffs and the assumption by the General Assembly in 1971 that the two offices would be merged into one in cities such as Richmond. This eliminated the need to provide for the extension of the tenure of the city sergeant in such cities beyond the expiration date of his term since no successor would be elected (the successor would be to the pre-existing office of sheriff).

The General Assembly simply did not foresee, in its enactment of this general statute, the possibility that elections in cities such as Richmond might be indefinitely postponed by court order, which postponement would have the effect of extending the terms of the various city officers. Now that the elections in the City of Richmond have been thus indefinitely postponed, as I outlined in my letter to you of January 16, 1973, it is my opinion that the term for which the current City Sergeant of the City of Richmond was appointed has been extended, within the meaning of § 15.1-796.1, until such time as an election may be held for the office of sheriff and the person elected has duly qualified. At that time, the current offices of City Sergeant and City Sheriff in the City of Richmond will be, in effect, merged into one office, that of City Sheriff. I conclude, therefore, that your question must be answered in the affirmative.

SOLICITATION OF CONTRIBUTIONS—Local Bicentennial Commission May Solicit Donations Subject to Requirements of § 57-40, et seq.

The Honorable Lewis A. McMurran, Jr.
Chairman, Virginia Independence Bicentennial Commission

I have received your letter of October 25, 1972, inquiring whether or not there is any Virginia statutory requirement regarding the authority of a local bicentennial commission to receive and disburse funds, donations or grants.

Section 57-40, Code of Virginia (1950), as amended, provides, inter alia:

“Every person, firm, corporation or association, soliciting subscriptions or contributions to any cause or thing, except as hereinafter provided, shall keep adequate books showing all sums of money collected and how, to whom, and for what disbursed. Receipts shall be kept itemized to as great
an extent as may be practicable, and disbursements shall in all cases be itemized and not shown merely by totals."

Section 57-44 provides that § 57-40 does not apply to any person or entity provided less than one hundred and twenty-five persons are jointly or severally solicited for subscriptions or contributions.

I am not aware of any other provision of law that would affect the right of a private local bicentennial commission to solicit or disburse funds. Therefore, it is my opinion that such commission may do so subject to the preceding record-keeping requirements. A copy of § 57-40, et seq., is enclosed for your information.

STATE AIR POLLUTION CONTROL BOARD—Burning of Leaves—Extent of control over.

September 11, 1972

The Honorable William R. Meyer
Executive Director
State Air Pollution Control Board

This is in response to your recent letter in which you present the following:

"The Regulations for the Control and Abatement of Air Pollution Adopted by the State Air Pollution Control Board of Virginia states in Section 4.01.01—OPEN BURNING:

'(h) For burning of leaves, while not encouraged, in approved containers in those areas where provision for public or private collection of leaves is not available.'

'A poll of leaf pickup capabilities has been conducted in counties surrounding a metropolitan city in Virginia. We believe these facts to be true of metropolitan areas throughout the Commonwealth. The facts are:

'CITY: Leaf pickup provided as a service by the city. Open burning of leaves banned by local ordinance.

'COUNTY A: Refuse pickup provided once per month by county. Leaves in bags or cans are removed. County has two trucks only. Few citizens are using system because of use of private contractors. No special leaf pickup is provided and no local ordinance banning open burning.

'COUNTY B: All refuse pickup is provided by private contractors who are licensed by the county. 20% of the county has no service but it is proposed to provide dumpsters in designated locations in the near future. No ordinance to ban open burning.

'COUNTY C: Weekly refuse pickup provided by county in several scattered areas. This service includes removal of leaves in cans or bags (up to 3 a week).

'Limited leaf pickup by county. Two vacuum leaf pickup machines used for one year in areas which have curbs and gutters. Many difficulties encountered. County estimates six to eight additional machines would be necessary to provide county wide service. No plans to order any. No ordinance to ban open burning.

'PRIVATE SERVICE: Great proliferation of small contractors through the three counties. Each contractor operates business according to his rules—not controlled by counties. Some contractors charge 25 cent pickup
for each bag of leaves. Some pickup as space in trucks allow. Contractors point out that it is not economical to buy trucks for leaf pickup as the trucks would be idle approximately 10 months per year.

"I request your formal opinion regarding the application of the rule in those areas described above."

Section 4.01.01 of the Regulations for the Control and Abatement of Air Pollution allows open burning of leaves only under the following circumstances:
1. If no smoke or fly ash nuisance is created;
2. If the burning is done in an approved container;
3. If there are no facilities available, either public or private, for the collection of leaves.

In my opinion, the Regulation's language "... provision for public or private collection of leaves ..." includes the regular pickup service of the local government or of a private contractor that has been licensed by the local governing body.

I will apply this construction of the regulation seriatim to the situations in the localities which you describe.

CITY: Open burning of leaves would be prohibited.
COUNTY A: Open burning of leaves would be prohibited, as both public and private collection service is available. The prohibition of the regulation is not conditioned upon any frequency of the service.
COUNTY B: Open burning of leaves would be prohibited in the 80% of the county in which service by licensed private contractors is available. Until such time as public or private collection facilities are made available to the 20% of the county now without any means of collection, open burning of leaves would be permitted. It is my opinion that the placing of dumpsters in designated locations would be a "provision for public ... collection of leaves ..." in those areas which the dumpsters are expected to serve.
COUNTY C: In the areas of the county which have weekly pickup service provided, no burning of leaves would be permitted, regardless of the three-bag limit. The regulation does not limit its prohibition to situations where unlimited service is provided and, in my opinion, the regulation does not authorize the open burning of leaves in excess of those which are collected since excess leaves could be disposed of over a period of time by the available pickup service.

In summary, it is my opinion that Section 4.01.01 permits the burning of leaves only where pickup service is not provided nor licensed by the local governing body. Where no such service exists, open burning in proper containers is permitted only if it is done without creating a smoke or fly ash nuisance.

STATE CORPORATION COMMISSION—Fees—Clerk may charge fee to copy transcript of case for Supreme Court record, as he is not required to accept copy from appellant as true and complete.

October 5, 1972

THE HONORABLE HENRY E. HOWELL, JR.
Lieutenant Governor of Virginia

I have received your letter of September 28, 1972, from which I quote:
"I am writing to request an interpretation of the third paragraph of Section 13.1-124, as amended, which reads as follows:

'For making up, certifying and transmitting a record on appeal the clerk shall charge and collect fifty cents per page for all papers necessary to be copied, and, in addition, the sum of five dollars.'

'I am requesting that you construe the meaning of the word 'copied'.

'It is my interpretation of this section that the intent of the legislature was that if it was necessary for the Clerk of the Corporation Commission to copy a particular page necessary for making up the record on appeal, then he would receive the sum of $0.50 per page and, in addition thereto, the sum of $5.00 for the administrative work required in putting the record together.

"For example, if I have already purchased several copies of a transcript of the proceedings that are the subject of the appeal, I would turn a copy of the transcript over to the Clerk to be included in the record on appeal. At the present time, the Clerk interprets the subject paragraph to mean that even though I have paid for the transcript and furnished it to him, he can still collect $0.50 per page.

"Again, I submit that the proper interpretation is that he can only collect $0.50 for each page that he or the employees of his office must copy."

I am informed that the Commission has its own reporter present during each proceeding, and the reporter furnishes an original and three copies of a transcript to the Commission upon request. The original is retained in the Commission's records, and a copy is furnished to each commissioner. If an appeal is taken, the clerk makes an additional copy of the transcript from the original and forwards it as part of the record to the Supreme Court of Virginia. The clerk will not accept a copy of the transcript which an interested party has purchased from the reporter and incorporate it into the record because he does not wish to verify its accuracy by comparison in detail with the original; therefore, he finds it necessary to copy each page of the Commission's original transcript. Pursuant to Rule 5:18(d) of the Rules of the Supreme Court of Virginia, the clerk must certify that the record is true and complete. I am unable to conclude that the clerk is required to incorporate the appellant's copy of the transcript into the record when he does not wish to certify that it is an accurate copy of the original transcript. Therefore, I must conclude that so long as the clerk follows his present practice, it is proper for him to collect the fee allowed by § 13.1-124. Of course, if he chose to utilize the copy of the transcript purchased and furnished by the appellant as part of the record, he could not collect a fee for the transcript because he would not have copied it.

STATE HOSPITALS—Section 37.1-105 Applicable to Residents and Non-residents Alike.

COSTS—State Hospitals—Section 37.1-105 applicable to residents and non-residents alike.

July 29, 1972

The Honorable Donald G. Pendleton
Member, House of Delegates

This is in response to your letter of July 17, 1972, wherein you requested an opinion with respect to the interpretation of § 37.1-105 of the Code of Virginia
REPORT OF THE ATTORNEY GENERAL

(1950), as recently amended by the 1972 Session of the General Assembly. Your inquiry relates to whether or not § 37.1-105 applies to non-residents of Virginia. Specifically, § 37.1-105 reads in pertinent part as follows:

"... no parent, guardian, spouse or relative shall be liable for any expense which arose from the care, treatment or maintenance furnished to any patient subsequent to institutionalization of such patient in a State hospital for a period of sixty months..."

Therefore, in view of the above quoted Code section, in my opinion, § 37.1-105 is equally applicable to residents and non-residents alike.

STATE OFFICERS—Simultaneous Service as Secretary of Finance and State Treasurer Permissible.

July 10, 1972

THE HONORABLE LINWOOD HOLTON
Governor of Virginia

I have received your letter of June 27, 1972, inquiring whether Mr. Walter Craigie may serve as the Secretary of Finance and also as State Treasurer pending his relinquishment of the duties of the latter when it becomes convenient for him to do so.

I am not aware of any constitutional or statutory provision which would preclude such an arrangement. The two offices are not in themselves incompatible. Section 2.1-51.9, Code of Virginia (1950), as amended, provides that the Secretary of Finance shall be responsible to the Governor for several State agencies, including the Department of the Treasury. So long as you do not assign to Mr. Craigie as Secretary of Finance any duties which would require him to approve or disapprove the actions of the Department of the Treasury, while he remains State Treasurer, I am of the opinion that he may serve in both capacities. His compensation should be fixed at the greater of that provided for the two offices.

STATE WATER CONTROL BOARD—Water Quality Standards—Adoption and enforceability under State law.

WATER—State Water Control Board—Quality standards enforceable.

June 5, 1973

THE HONORABLE EUGENE T. JENSEN, Executive Secretary
State Water Control Board

This will acknowledge receipt of your recent letter in which you requested my opinion as to (1) whether the recent amendments to the State Water Control Board's water quality standards were adopted in accordance with State law, and (2) whether such water quality standards, as amended, are enforceable under State law. It is noted that the basis for your request is the requirement of the U.S. Environmental Protection Agency that, when amendments to water quality standards are submitted for federal approval, such amendments must be accompanied by an opinion from this Office that they have been promulgated in accordance with State law and that they will be enforceable under State law.

The Board is authorized to establish water quality standards for all State waters. § 62.1-44.15(3) (a) of the Code of Virginia (1950), as amended. Such standards may only be adopted or amended after public hearing. Notice of the time, place
and purpose of the public hearing must be published at least thirty days, but not more than sixty days, in a paper of general circulation in the locality where such standards will apply. Such standards, as adopted or amended, become effective thirty days after they are filed with the Secretary of the Commonwealth. § 62.1-44.15(3) (b) of the Code. Based upon my review of the documents enclosed with your letter and in view of your statement that the Board adopted the recent amendments pursuant to the foregoing procedure, I am of the opinion that those amendments were adopted in accordance with State law.

With regard to the second part of your question, I am of the opinion that the Board may enforce compliance with its duly-adopted water quality standards under State law. See opinion of the Attorney General to Mr. A. H. Paessler, Executive Secretary, State Water Control Board, dated September 29, 1970, found in Report of the Attorney General (1970-1971), p. 451, a copy of which is enclosed.

STATUTES—Legislative Intent Resorted to in Construing Language; Members of Board of State Building Code Review.

August 14, 1972

THE HONORABLE CYNTHIA NEWMAN
Secretary of the Commonwealth

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

"Chapter 829 of the 1972 Acts of Assembly sets forth the provisions for the Board of State Building Code Review.

"Apparently, Article Two, Section Twelve contains some faulty wording and therefore, I would like to request a clarification. Will the Governor make seven appointments or five appointments to this Board?"

Section 12 of Chapter 829 of the Acts of the Assembly of 1972 reads as follows:

"§ 12. 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."

I am of the opinion that the Governor should make six appointments to the Board of State Building Code Review.

I enclose a copy of an opinion to the Honorable B. R. (Bev) Middleton, Member, House of Delegates, dated April 25, 1972, in which this conclusion was reached.
STATUTES—When Effective—Statute speaks as of the time it takes effect and not prior thereto.

May 2, 1973

THE HONORABLE VICTOR J. SMITH
Commissioner of the Revenue for the City of Harrisonburg

I have received your recent letter inquiring whether the 1973 amendment to § 58-16.2, Code of Virginia (1950), as amended, precludes the city of Harrisonburg from collecting a service charge upon tax-exempt real property for the tax year 1973 pursuant to its ordinance adopted December 26, 1972.

Section 58-16.2 was enacted by Chapter 133 of the Acts of Assembly of 1971 and became effective July 1, 1971. It was first amended by Chapter 770 of the Acts of Assembly of 1972. Pursuant to this amendment, the City Council of Harrisonburg adopted an ordinance subjecting certain tax-exempt real property to a service charge for police and fire protection beginning January 1, 1973.

Chapter 444 of the Acts of Assembly of 1973 amended § 58-16.2 and provided that the amendment shall be effective on and after January 1, 1974. As a general rule, a statute speaks as of the time when it takes effect and not as of the time it was passed, and it ordinarily has no effect prior to that time. School Board v. Town of Herndon, 194 Va. 810, 814 (1953); 50 Am. Jur., Statutes, § 500. Accordingly, I am of the opinion that the provisions of § 58-16.2, as amended by Chapter 770 of the Acts of Assembly of 1972, will remain in full force and effect through December 31, 1973, and that the Harrisonburg ordinance adopted pursuant thereto will not be affected by the enactment of Chapter 444 of the Acts of Assembly of 1973 until January 1, 1974. If the city wishes to impose a service charge for the tax year 1974, it should adopt an ordinance pursuant to the 1973 amendment to § 58-16.2 to provide for such service charge.

STERILIZATION—Therapeutic Distinguished from Eugenic or Purely Contraceptive; Medical Determination to Be Made by Physician.

September 6, 1972

THE HONORABLE LLOYD H. HANSEN
Commonwealth's Attorney for the City of Hampton

This is in reply to your letter of August 11, 1972, which reads as follows:

"I would like the opinion of your office in respect to the following situations concerning the Sexual Sterilization Act, Va. Code Ann. Section 32-423, et seq.

I. Patient is a married woman, nineteen years of age; she has no children. Though not legally separated, she and her husband have lived apart for more than a year, and his whereabouts are unknown. Patient is a diabetic and has a past medical history of miscarriage and is either allergic to or physically rejects birth control methods. Patient's doctor has concluded that surgical sexual sterilization would be advisable for therapeutic reasons.

II. Patient is a married woman, currently pregnant with third child. Her husband is twenty-four years of age and consents to patient's surgical sexual sterilization. Such sterilization would be undertaken after the termination of the current pregnancy. Patient has medical problems with birth control pills. Other birth control methods have not been tried."
"Question: In both cases, can the patients' doctors perform the requisite surgical treatment, with or without, further legal action?"

With regard to your first inquiry, the patient's physician may perform a therapeutic sterilization without further legal action. Section 32-424 of the Code of Virginia (1950), as amended, deals with eugenic sterilization and applies only to persons afflicted with an hereditary form of mental illness that is recurrent or with mental deficiency. This section is inapplicable with respect to therapeutic sterilizations. I refer you to § 32-427 of the Code which reads in pertinent part as follows:

"Nothing in this chapter shall apply or be construed so as to prevent, control, or regulate the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician or surgeon licensed by the State, which treatment may require sexual sterilization or may involve the nullification or destruction of the reproductive functions."

Since the sterilization procedure you have described appears to be therapeutic in nature, as distinguished from eugenic or purely contraceptive, the procedural requirements of § 32-424 of the Code need not be followed. However, I would point out that whether or not a sterilization operation is eugenic or therapeutic in nature is a medical determination to be made by the physician. For such a therapeutic sterilization, the only legal requirement would be the informed consent of the patient herself to the particular procedure.

Concerning your second inquiry, since you did not specify the age of the patient herself, I will assume that she is over twenty-one. Also, you did not indicate whether the physician in this case would consider the sterilization a therapeutic or purely contraceptive one. Therefore, if the operation is purely contraceptive in nature, § 32-423 of the Code provides for the procedures to be followed and reads as follows:

"It shall be lawful for any physician or surgeon licensed by this State, when so requested by any person who has attained the age of twenty-one years, to perform, upon such person a vasectomy, or salpingectomy, or other surgical sexual sterilization procedure, as the case may be, provided a request in writing is made by such person and by his or her spouse, if there be one, prior to the performance of such surgical operation and provided further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequences of such operation. No such request shall be necessary for the spouse of the person requesting such surgical operation if the person requesting such operation shall state in writing under oath that his or her spouse has disappeared or that they have been separated continually for a period of more than one year prior thereto. Provided, however, no vasectomy shall be performed pursuant to the provisions of this section prior to thirty days from the date of consent or request therefor; provided further that no salpingectomy or other irrevocable surgical sexual sterilization procedure shall be performed prior to thirty days from the date of consent or request therefor on any female who has not theretofore given birth to a child."

On the other hand, if the operation is determined by the physician to be therapeutic in nature, the only requirements would be as outlined in response to your first inquiry.


August 18, 1972
THE HONORABLE THOMAS P. CREDEL
State Coordinator, Office of Civil Defense

This is in reply to your letter of August 8, 1972, to which you attached a letter from the Office of Emergency Preparedness, requesting an opinion whether the following authorities are political subdivisions of the Commonwealth:

"Albemarle County Service Authority
Augusta County Service Authority
Bedford County Service Authority
Campbell County Utilities and Service Authority
Fairfax County Water Authority
Fauquier County Water and Sewer Authority
Henry County Public Service Authority
Loudoun County Sanitation Authority
V. P. I. Sanitation Authority
Pulaski County Sewage Authority"

These Authorities have been established under the provisions of § 15.1-1241 of the Code of Virginia (1950), as amended, whereby they are made public bodies politic and corporate. They are defined as political subdivisions of the State by § 15.1-1240(e) of the Code. I am, therefore, of the opinion that these Authorities are political subdivisions of the Commonwealth and are within the definition of eligible applicants under the provisions of Public Law 91-606.

SUNDAY CLOSING LAW—Antique Gun and Coin Show Prohibited if Not Act of Necessity.

April 3, 1973

THE HONORABLE ROBERT RIDER
Commonwealth's Attorney for the City of Roanoke

This is in response to a recent request for an official opinion from your predecessor, the Honorable Richard Lee Lawrence, with regard to the applicability of the so called Sunday Closing Law, § 18.1-358, et seq., of the Code of Virginia (1950), as amended, to certain activities. The request stated the following inquiry:

"What I need to know is may an individual for personal profit and gain, on Sunday, hold an antique gun show, coin show, etc. wherein the usual procedure here in the City of Roanoke is that he will lease an area, charge admission for people who wish to come in and observe the various wares, guns, coins, etc., plus charge the exhibitor a table fee for letting them use whatever table they need to exhibit their wares. Of course, there is a lot of buying, selling and exchanging between the spectators who will be charged by the promoter to enter the premises and the various persons who lease tables to exhibit their wares."

The inquiry, therefore, relates to whether such activities would be a violation of § 18.1-358 of the Code.

The core of the Sunday Closing Law is that the transaction of work, labor or business on Sunday is a criminal violation unless that work is household work or work of necessity or charity. The 1973 Amendments to the statute narrow considerably the exception for works of charity and would limit that exception to organizations that are truly non-profit. Thus, the touchstone becomes whether the activities described are works of necessity or whether they are activities that are specifically excluded from the operation of the law by terms of the statute. Since
there appear to be no express exclusions that would render the law inapplicable to the activities described by Mr. Lawrence, the remaining question would be whether the activities were works of necessity. This is always a factual determination that must be made in each individual case (See Pirkey Brothers v. Commonwealth, 134 Va. 713, 114 S.E. 764 (1922); Lakeside Inn Corp. v. Commonwealth, 134 Va. 696, 114 S.E. 769 (1922); Williams v. Commonwealth, 179 Va. 741, 20 S.E. 2d 493 (1942); Rich v. Commonwealth, 198 Va. 445, 94 S.E. 2d 549 (1956)). Thus, without a full knowledge of all the facts and circumstances, it would be difficult to give a conclusive answer; however, from the facts described in the inquiry by Mr. Lawrence, I am of the opinion that such an activity would be in violation of § 18.1-358 of the Code.

SUNDAY CLOSING LAW—Funeral Service Establishments Subject To.

May 25, 1973

The Honorable Paul W. Manns
Member, Senate of Virginia

This is in response to your recent inquiry regarding the applicability of § 18.1-358, Code of Virginia (1950), as amended, commonly referred to as the Sunday Closing Law, to funeral service establishments. You enclose with your letter a copy of a letter from the Honorable Thomas J. Billey, Jr., posing certain questions as set forth below:

"1. May funeral homes operate on Sunday: i.e., conduct funerals, allow visitation and embalm remains?
"2. May funeral homes sell caskets, vaults, clothing and other merchandise on Sunday?
"3. May Funeral Directors arrange to have graves opened and have vaults serviced on Sunday?
"4. If the answer is no to any of the three above, what about Jewish cases that cannot be handled on Saturday?
"5. May private cemeteries operate on Sunday?"

I have previously ruled in an opinion dated April 3, 1973, to the Honorable Robert Rider, Commonwealth's Attorney of the City of Roanoke, that "the core of the Sunday Closing Law is that the transaction of work, labor or business on Sunday is a criminal violation unless that work is household work or work of necessity or charity." Section 18.1-358, which is the primary operative section in the Sunday Closing Law, lists a number of examples of certain activities which are not to be deemed works of necessity and there are other activities which are specifically exempted from the operation of the act. The operation of funeral service establishments is not specifically listed among the latter exempted activities, but the operation of such an establishment is quite dissimilar from any of the businesses or activities referred to as examples of matters which are not to be deemed works of necessity. It is, therefore, my opinion that the performance of essential acts in connection with the operation of funeral service establishments may be deemed a work of necessity and would thus be legal under the Sunday Closing Law.

SUNDAY CLOSING LAW—Locality May Not Be Exempted from by Special Legislation.

COUNTIES, CITIES AND TOWNS—Locality May Not Be Exempted from by Special Legislation.
REPORT OF THE ATTORNEY GENERAL

GENERAL ASSEMBLY—May Not Pass Special Law Exempting Locality from Operation of Sunday Closing Law.

December 20, 1972

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

This is in reply to your recent inquiry regarding the operation of § 18.1-358, et seq., of the Code of Virginia (1950), as amended, generally referred to as the Sunday Closing Law. You inquire as to whether legislation could be enacted which would expressly exempt the City of Bristol from the operation of that law or, in the alternative, would give the governing body of the City of Bristol the power to exempt the city from the operation of that law by local ordinance.

The power of the General Assembly of Virginia to pass legislation in this regard is governed primarily by Section 15 of Article IV of the Constitution of Virginia. That section is set forth, in pertinent part, below:

"Any general law shall be subject to amendment or repeal, but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of enactment of, a special, private, or local law."

It is my opinion that the enactment of either of the options that you have presented would amount to the provisions of a special, private, or local law, and would be prohibited by the Constitution of Virginia.

SUNDAY CLOSING LAW—Nurseries—Subject to.

May 25, 1973

THE HONORABLE WYATT B. DURRETTE, JR.
Member, House of Delegates

This is in response to your recent letter presenting an inquiry in connection with §§ 18.1-358 and 18.1-358.3, Code of Virginia (1950), as amended, which is set forth below.

"The question is whether or not Nurseries may remain open on Sunday and lawfully sell plants, shrubs, trees, fertilizers, seeds, etc. I have had the inquiry from several people and would very much appreciate your interpretation as to whether or not this is lawfully possible under Virginia's existing Sunday Closing Laws."

As I pointed out in my opinion of April 3, 1973, directed to the Honorable Robert Rider, Commonwealth's Attorney of the City of Roanoke, a copy of which is attached hereto, "the core of the Sunday Closing Law is that the transaction of work, labor or business on Sunday is a criminal violation unless that work is household work or work of necessity or charity." The statute specifically exempts certain activities from the purview of the statute and it further refers in detail to certain activities that will not be deemed to fall within the exemption for works of necessity. Among the latter activities that are specifically deemed not to be works of necessity are the sale of "lawn or garden equipment and supplies." Among the certain activities that are excluded from coverage in the statute is "the sale during a holiday season of evergreen trees, holly, mistletoe or similar plants grown and customarily sold for home decoration." Viewing these two statutory provisions referred to in combination, I must necessarily conclude that the sale of plants, shrubs, trees, fertilizers, seeds, and other like substances other than "during a holiday season" of items "grown and customarily sold for home decoration" would be illegal.
SUNDAY CLOSING LAW—Sunday Sales—Computation of new profit.
November 16, 1972

THE HONORABLE H. SELWYN SMITH
Member, Senate of Virginia

This is in response to your recent letter in which you requested my opinion concerning the construction of § 18.1-358.4 of the Code of Virginia (1950), as amended, especially with regard to the proper method for computing and reporting all true net profits of Sunday sales of the prohibited items in § 18.1-358 of the Code. Section 18.1-358.4 provides as follows:

"A sale on Sunday of any merchandise included in a class of personal property enumerated in § 18.1-358 shall be deemed a work of charity; provided that the person making the sale or his employer proves that all true net profits of such sales on Sunday were used for charitable purposes; and provided, further, that a written accounting verified under oath as to the amount of such sales, the amount of net profits of such sales, the method by which net profits of such sales were determined, the amount of such sales applied for charitable purposes, and the name of the charity or a description of the charitable purpose involved is filed with the Commonwealth's attorney for the jurisdiction in which the sale or sales were made within thirty days after the day the sale or sales were made."

The effect of § 18.1-358.4 is to deem a sale of any prohibited classes of merchandise on Sunday a work of charity providing that all true net profits of those sales be used for charitable purposes. The language of the section quoted above is quite explicit insofar as the proper method of computing the true net profits is concerned. Throughout the statute it is made clear that the use of the true net profits for charitable purposes is meant to include all of the true net profits of "such sales," thus referring to the actual sales of the prohibited classes of merchandise on Sunday.

The scheme set forth in your letter, whereby some stores are calculating "true net profits" on the basis of the chain's aggregate net profit for the year, is not properly within the contemplation of the statute. In order to comply with § 18.1-358.4, any person selling prohibited merchandise on Sunday would have to calculate the true net profit on the sale of each prohibited item and that amount must be applied for charitable purposes. A failure to so calculate the true net profit would constitute a violation of the statute.

SUPPORT ACT—Father Not Held Civilly Liable for Support Where Wife Wrongfully Keeps Children from Him.

CIVIL PROCEDURE—Foreign Decree Must Be Enforced When Registered.

COURTS—Juvenile and Domestic Relations Court Clerk Maintains Registry of Foreign Support Orders.

July 8, 1972

THE HONORABLE HAROLD B. SINGLETON, Judge
Fifth Regional Juvenile and Domestic Relations Court

This is in response to your letter concerning the application of the Uniform Reciprocal Enforcement of Support Act. You asked essentially three questions, each of which I shall take up in turn:
1) Does the Uniform Reciprocal Enforcement of Support Act overrule Butler v. Commonwealth, 132 Va. 609 (1922)?

The answer to this question is in the negative.

As this office indicated in an opinion dated March 28, 1956, found in the Report of the Attorney General (1955-1956), page 205, a copy of which is attached, Butler stands for the proposition that a father shall not be held civilly liable for the support and maintenance of his children where a wife wrongfully keeps the children away from him.

2) Must a foreign decree be enforced once it has been registered under § 20-88.30:2?

The answer to this question is in the affirmative.

A foreign decree cannot be acted on until it is registered but, once it is registered, enforcement is mandatory.

3) Which court is required to maintain a Registry of Foreign Support Orders pursuant to § 20-88.30:3?

Section 20-88.13(4), as amended, defines “court” as “a juvenile and domestic relations court of this State. . . .” Under this definition, the registry would be maintained by the clerk of that court.

TAXATION—Agricultural, Horticultural, Forest, or Open Space Real Estate—Locality may not increase minimum acreage requirements.

September 12, 1972

The Honorable Herbert A. Pickford
County Attorney for Albemarle County

Your letter of September 7 requests an opinion whether a locality may adopt an ordinance pursuant to Article 1.1 of Chapter 15 of Title 58 of the Code of Virginia (§ 58-769.4, et seq.) which provides minimum sizes for tracts which are greater than those set forth in § 58-769.7.

Section 58-769.7 states in part:

"Prior to the assessment of any parcel of real estate under any ordinance adopted pursuant to this article, 'responsible officers' shall:

". . . (b) Determine further that real estate devoted to (1) agricultural or horticultural use consists of a minimum of five acres . . . (2) forest use consists of a minimum of twenty acres and (3) open space use consists of a minimum of five acres."

In addition, § 58-769.6 states:

"Such ordinance shall provide for the assessment and taxation in accordance with the provisions of this article of all four classes of real estate set forth in § 58-769.5." (Emphasis supplied.)

Section 58-769.7 is mandatory in language. In addition, if a locality were able to increase the minimum acreage, it would be able to avoid the clear intent expressed in § 58-769.6 that all classes be taxed according to use if an ordinance is adopted. For these reasons, I am of the opinion that a locality may not increase the minimum acreage requirements.
TAXATION—Albemarle County Utility Tax—Miller School of Albemarle is not exempt.

July 7, 1972

THE HONORABLE HERBERT A. PICKFORD
County Attorney of Albemarle County

I have received your recent letter in which you asked whether the Miller School of Albemarle is a State agency which should be exempted from the utility tax pursuant to the provision of Virginia Code §§ 58-587.1 and 58-617.2, Code of Virginia (1950), as amended.

The Miller School was chartered as a corporation by the General Assembly (Acts of 1874, Chapter 61, approved February 24, 1874). The school is financed from the income of a trust fund established by the will of Samuel Miller. While the trustees of the school are appointed by the Governor, the school is essentially private in nature, since it derives its income from a private fund, and since the legal title to all its property is held by a corporation and not by the State. Therefore, it is my opinion that the school is not exempt from the Albemarle County utility tax.

TAXATION—Assessments of Public Service Corporation Property at Forty Percent of Fair Market Value Pursuant to § 58-512.1 Does Not Conflict With Article X, Section 2, of the Virginia Constitution.

March 30, 1973

THE HONORABLE PETER K. BABALAS
Member, Senate of Virginia

I have received your recent letter from which I quote:

"I would like your opinion as to the constitutionality of the General Assembly statute directing the State Corporation Commission to assess the property of public service corporations at 40% of their fair market value when the Constitution of Virginia requires that all property be assessed at its fair market value and not at a percentage thereof."

Article X, Section 2, provides, in pertinent part:

"All assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law."

Section 58-512.1 provides, in pertinent part:

"Any increase in the assessed valuation of any public service corporation property in any taxing district shall be made by application of the local assessment ratio prevailing in such taxing district for other real estate as determined by the most recently published findings of the Department of Taxation; 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 on January one, nineteen hundred sixty-six shall be assessed by application of the local assessment ratio as provided above, and the remainder shall continue assessed by application of the forty per centum assessment ratio as heretofore administered. Thereafter the whole shall be assessed by application of
the local assessment ratio as provided above provided however, such property will be assessed at its fair market value at the time of each assessment.”

(Emphasis supplied.)

The requirement that assessments be at fair market value first appeared in the Constitution of 1902, which differed from earlier Constitutions in that the latter provided that all property shall be assessed “... in proportion to its value.” Virginia Constitution of 1870, Article X, Section 1; Constitution of 1864, Article IV, Section 23; Constitution of 1851, Article IV, Section 22; Report of the Commission on Constitutional Revision, p. 297 (1969). Section 169 of the Constitutions of 1902 and 1928 provided that “... all assessments of real estate and tangible personal property shall be at their fair market value. ...” However, in Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146 (1926), the Court noted that the fair market value requirement of Section 169 was “... more observed in the breach than in the execution. ...” A similar statement appears in Griffin v. Norfolk County, 170 Va. 370, 375 (1938), and in Washington Bank v. Washington Co., 176 Va. 216, 218 (1940).

The State Corporation Commission had followed the practice of assessing the real estate and tangible personal property of public service corporations at an amount equal to 40 percent of its fair market value, with limited exceptions, for more than fifty years prior to the enactment of § 58-512.1 in 1966. Southern Railway v. Commonwealth, 211 Va. 210 (1970); City of Richmond v. Commonwealth, 188 Va. 600 (1948). In the latter case, the city of Richmond challenged the constitutionality of this practice and the Court, after observing that local assessors had assessed other property below its fair market value for many years, held that the State Corporation Commission could do likewise without violating Section 169.

In the Southern Railway decision, supra, the Court referred to the inequities that existed in some localities between the taxation of public service corporation property and other property and noted that § 58-512.1 was designed to correct these inequities by gradually equalizing the assessment of all public service corporation property with the respective ratios in force in localities where the properties are located. Although the constitutionality of § 58-512.1 was not at issue, the Court’s reference to the problem can fairly be regarded as an indication of its approval of this gradual equalization.

In consideration of the cases cited and of the fact that § 58-512.1 does not require that the 40 percent assessment ratio continue except as to an annually diminishing percentage of the 1966 assessed value of a public service corporation’s property, I am of the opinion that the statute is not in conflict with the fair market value requirement of Article X, Section 2, of the Constitution.

TAXATION—Cigarette Tax—No county can impose except Fairfax and Arlington.

May 11, 1973

THE HONORABLE GARRY G. DEBRUHL
Member, House of Delegates

I have received your letter of May 7, 1973, inquiring whether Roanoke County has the authority to levy a tax upon the sale of cigarettes. You enclosed a proposed ordinance which provides, inter alia:

“...There is hereby levied and imposed by the county upon each and every sale of cigarettes, as herein defined, a tax, equivalent to two and one-half cents for ten cigarettes, or fractional number of ten cigarettes,
sold within the county, the amount of said tax to be paid by the seller in the manner and at the time hereinafter prescribed."

A county cannot impose a tax unless it is authorized to do so by the General Assembly, as the powers of the boards of supervisors are fixed by statute and are only such as are conferred expressly or by necessary implication. Johnson v. Goochland County, 206 Va. 235 (1963); Board of Supervisors v. Corbett, 206 Va. 167 (1965). Section 58-757.28, Code of Virginia (1950), as amended, provides:

"Fairfax and Arlington Counties shall have the power to levy tax upon the sale or use of tobacco or tobacco products. Such tax shall be in such amount and on such terms as the governing body may by ordinance prescribe, not to exceed five cents per pack or the amount levied under State law, whichever is greater, and the provisions of § 58-757.27 shall apply to such counties, mutatis mutandis."

This statute was first enacted by Chapter 512 of the 1970 Acts of Assembly. An amendment to it was introduced by House Bill No. 1648 offered during the 1973 Session of the General Assembly. The sole purpose of the proposed amendment was to include Roanoke County within the statute and thereby to authorize it to enact a tax upon the sale or use of tobacco or tobacco products. The bill was referred to the House Committee on Finance, but it was not reported out of the Committee.

Although § 58-757.27 provides that nothing within Chapter 14.2 of Title 58 (§ 58-757.1, et seq.) shall be construed to deprive counties, cities and towns of the right to levy taxes upon the sale or use of tobacco or tobacco products, this statute cannot be construed as an affirmative grant of the authority to impose such taxes. Nor does the reference to excise taxes or cigarettes within § 58-441.49 operate as an authorization, as it merely provides that the Virginia Retail Sales and Use Tax Act does not impair in any way the authority conferred upon any city, town or county by any other statute, including charter provisions, to impose excise taxes on cigarettes.

I am not aware of any statute other than § 58-757.28 which can be construed to authorize a county to impose a tax upon the sale of cigarettes, and if such a statute existed, § 58-757.28 would have been redundant except as to the limitation of the amount of tax authorized. Although several Virginia cities impose a tax upon the sale of cigarettes, these taxes are authorized by the broad taxing powers granted in the city charters. See Report of the Attorney General (1970-1971), p. 392(2). Since this authority does not exist with respect to counties, I am of the opinion that no county except Fairfax and Arlington may impose such tax. The opinion is in accord with a previous opinion given by my predecessor in office prior to the enactment of § 58-757.28. See Report of the Attorney General (1968-1969), p. 250.

TAXATION—Collection—Section 58-1010 appropriate to use in collecting bank stock tax.

September 18, 1972

The Honorable M. A. Firebaugh
Treasurer for the City of Harrisonburg

Your recent letter requested an opinion as to the proper method of collecting the unpaid portion of Virginia National Bank's bank stock tax.

Chapter 10 of Title 58, which provides for the State and local tax on the shares of banks and trust companies, does not set forth any procedure for collecting
the local portion of the tax. Ordinarily, the locality could rely on the State's collection procedures, as the bank would not receive a credit on its State tax return if the local tax were not paid. In the instant case, however, the bank has challenged the assessment under § 58-1140, and the Commonwealth has agreed not to proceed with the collection of the outstanding tax while the legal issue is in litigation. I understand that the Tax Department notified the localities of this agreement, and suggested that they also await the outcome of the case.

While I would recommend that you follow this approach, the State agreement not to collect is in no way binding upon the localities, and the provisions of the Code for collection of local taxes are available to you. As the tax is assessed against the shareholders of the bank, although collected and paid by the bank, § 58-1010 would be an appropriate provision to use. You would apply to the bank under that section to withhold from the dividends to the shareholders the tax owed to the locality.

TAXATION—Collection of Delinquent Taxes by Distraint—Debtor's property may be seized and sold for unpaid taxes pursuant to §§ 8-422.1 and 58-1001.

SHERIFFS—Collection of Delinquent Taxes by Distraint—Debtor's property may be seized and sold for unpaid taxes pursuant to §§ 8-422.1 and 58-1001.

TREASURERS—Collection of Delinquent Taxes by Distraint—Debtor's property may be seized and sold for unpaid taxes pursuant to §§ 8-422.1 and 58-1001.

May 16, 1973

THE HONORABLE DAN D. JACKSON
Sheriff of Charlotte County

I have received your recent letter inquiring as to the procedure to be employed in distraining property for local taxes pursuant to § 58-1001, Code of Virginia (1950), as amended.

Section 58-1001 provides:

"Any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, constable or collector. In all cases property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes thereon."

Distress for taxes is the seizure of personal property to enforce payment of taxes due, to be followed by its public sale. Black's Law Dictionary 561 (Rev. 4th ed. 1968). In acting pursuant to § 58-1001, a sheriff may take possession of the debtor's property and remove it from the premises. Such removal may be followed by a sale of the property in accordance with the provisions of § 8-422.1. See Report of the Attorney General (1953-1954), p. 204, (1950-1951), p. 301. The purchaser may be given a sheriff's bill of sale describing the property and stating the authority by which it was sold. See Report of the Attorney General (1968-1969), p. 228. The proceeds of such sale, less proper costs, should be paid to the local treasurer to the extent of the unpaid taxes and the balance should be paid to the property owner. If the property is subject to a security interest perfected prior to any distraint for taxes, only the amount of taxes assessed against the property subject to such interest may be paid over to the treasurer and the balance must be paid to the secured party to the extent of the debt due him. § 58-1009.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Contractor's License—Person who conducts test boring or limited excavation for purposes of soil or earth analysis not a contractor under § 58-297.

December 28, 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:

"On many occasions various persons, firms, or corporations come in to this city to execute extensive earth test borings, which is in connection with the construction of buildings, bridges, foundations, etc. Many times these businesses will operate under the guise that they are taking soil samples rather than admitting to the fact that their operation is a form of excavation directly connected with the process of building a structure.

"It would appear that soil sampling would be a process of removing the upper layer of earth that may be dug or plowed for the specific purpose of making a soil analysis or analyzing that part of the surface material of the earth in which agricultural or plant life may grow. Also, it would appear that the operation of test boring is a form of excavation to the extent that one forms a cavity or a hole in the earth by digging out, drilling, or removing that part of the earth after the soil or surface covering has been removed.

"I respectfully request your opinion as to whether or not the operation of test boring comes within the purview of Section 58-297 of the Code of Virginia requiring such businesses to obtain a contractor's license, considering that the operation may be incorporated in the business of professional engineering or testing laboratories."

Section 58-297, Code of Virginia (1950), as amended, provides, inter alia:

"Any person, firm or corporation:

- * * *

"(3) Who shall accept or offer to accept an order for or contract to excavate earth, rock, or other material for foundation or any other purpose. . . .

- * * *

"Shall be deemed a contractor." (Emphasis supplied.)

In the absence of the specific facts and the contract between the property owner and the person, firm or corporation engaged in "test boring" it is difficult to reply to your inquiry in a manner applicable under all circumstances. Nevertheless, it may be generally stated that if the contract provides generally for the excavation of earth, rock or other material, it falls within the purview of § 58-297. If the essence of the contract is not the excavation of earth, rock or other material, but instead is the analysis of the soil or earth preliminary to construction, or is in connection with the engineering and design of structures as distinguished from their actual construction, the contract would not be included within § 58-297 notwithstanding that as a necessary incident of its performance limited excavation will be necessary.

One who is engaged in general excavation work, of course, cannot escape classification and taxation as a contractor under § 58-297 merely by denoting his activities as something else. The facts and not the label control. Therefore, it is my opinion that you should examine the contract as well as the actual facts surrounding the activity to determine its nature. If you determine that excavation is the essence of the undertaking, you should assess the license tax.
On the other hand, if soil analysis is the essence of the undertaking, § 58-297 has no application.

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TAXATION—Contractor's License Tax—Locality may not tax same contract twice.

March 19, 1973

The Honorable Julian H. Osborne
Commissioner of the Revenue for the City of Richmond

Your recent letter requested an opinion as to the validity of the method by which James City County is levying its contractor's license tax. The particular case in which you were interested involves a Richmond contractor who accepted an order to perform a contract in James City County in 1972 but did not begin work until 1973. Apparently the county intends to collect for both years a gross receipts license tax based on the full amount of the same contract.

Section 58-302.1 of the Code of Virginia authorizes a locality to levy a license tax on contractors for the privilege of doing business as defined in Article 5 of Chapter 7 of Title 58 (§ 58-297, et seq.). Section 58-299 in that article provides as follows:

"When a contractor . . . shall have paid the aforesaid State license and any local license required by the city, town or county in which his principal office and any branch office or offices may be located, no further license shall be required by the State or other city, town or county for conducting any such business within the confines of this State, except where the amount of business done by any such contractor in any other city, town or county exceeds the sum of twenty-five thousand dollars in any year such other city, town or county may require of such contractor a local license, and the amount of business done in such other city, town or county in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the city, town or county in which the principal office or any branch office of the contractor is located. . . ."

The James City County ordinance, which you enclosed, provides that "Every person . . . which accepts or offers to accept orders or contracts for doing any work on or in any building or structure . . . shall be deemed to be a general contractor and shall pay a license tax of $50.00 on the first $10,000.00 of gross orders and contracts and in addition thereto $.10 per $100.00 on all contracts or orders in excess of $10,000." The ordinance thus defines "doing business" as accepting or offering to accept orders. In my opinion, it is permissible to tax the acceptance of orders. Other sections in Article 5 of Chapter 7, § 58-301, for example, indicate that the acceptance of an order or contract constitutes doing business. However, that article does not, in my opinion, authorize the taxation of a mere offer or bid on an order.

Your letter indicates that the county intends to require a second license in 1973 based on the full amount of the contract accepted in 1972. In my opinion, neither the ordinance nor the statute authorizes this requirement. The ordinance purports to levy the tax on the acceptance of a contract, not on its performance. Although the county could, under § 58.302.1, base its tax on receipts rather than orders, it must use a single consistent taxable event. Otherwise, it is levying a double tax, which is unauthorized by the Code and in conflict with the provisions of § 58-299.
TAXATION—County May Not Levy Registration Fee in Absence of Specific Legislative Authority.

ORDINANCES—County Without Authority to Adopt Ordinance Prohibiting Electric Company from Furnishing Electricity Until Proof that Registration Fee Paid.

August 14, 1972

THE HONORABLE CHARLES L. MCCORMICK, III
Commonwealth's Attorney for the County of Halifax
and the City of South Boston

This is in reply to your recent letter in which you request my opinion as to whether or not a county Board of Supervisors may impose a tax, called a registration fee, "on new homes, including mobile homes used as dwellings or living quarters, which fee shall be paid before any electric company is authorized to furnish electricity to the dwelling." The proposed ordinance would make it unlawful for the electric company to furnish electricity prior to the presentation of evidence of payment of the fee to the county by the homeowner.

Section 58-766.2 of the Code of Virginia (1950), as amended, provides:

"The governing body of any city or county may provide by ordinance that no person, firm or corporation shall park a mobile home or office, classified as such under § 58-829.3, in any trailer park or individual lot, located within such city or county, until there shall first have been obtained from the commissioner of the revenue or other designated officer of such city or county a permit in writing signed by such commissioner of the revenue or other officer, in which permit the mobile home or office shall be described with reasonable certainty, and that the permit shall be renewed annually. No permit shall be required hereunder of any vehicle, bearing valid license plates issued by this or any other state, unless the vehicle remains in the city or county for a period of ninety days or more. The ordinance may provide further for the issuance of metal, plastic or other tags which shall be prominently displayed in a conspicuous place on the exterior of the mobile home or office or the premises on which it is located. The ordinance may fix a fee, not exceeding five dollars, for the issuance of the permit and tag, and may prescribe penalties for the failure to comply therewith, which shall constitute a misdemeanor."

Under this section a mobile home owner may be required to obtain a permit and pay a fee therefor.

The General Assembly has not, however, passed such a statute in regard to fixed dwellings. In the absence of specific legislative authority empowering the county to levy such a registration fee, I am of the opinion that the county may not so levy.

Finally, in the absence of legislative authority, I am of the opinion that a county is without authority to adopt an ordinance which prohibits the electric company from furnishing electricity until proof is given that a registration fee has been paid.

TAXATION—Delinquent Lands—Taxes paid by former owner of delinquent land subsequent to sale to Commonwealth should be retained by locality.

October 20, 1972

THE HONORABLE JAMES E. GANDER
Treasurer of Page County
I have received your letter of September 15, 1972, inquiring as to the proper disposition of funds paid to you by an applicant for the purchase of real estate previously sold to the Commonwealth for delinquent taxes. You state that one of the owners entitled to redeem the property had, subsequent to the sale to the Commonwealth, paid part of the delinquent taxes but that the applicant insisted upon payment of the entire amount of taxes previously assessed and that you have therefore collected a sum in excess of the total amount due with respect to the property.

Section 58-1083, Code of Virginia (1950), as amended, requires that the applicant for the purchase of lands bought in the name of the Commonwealth for delinquent taxes must apply for the purchase "... for the amount for which it was purchased in the name of the Commonwealth and the taxes and levies due the [locality] in which the land is situated, together with such additional sums as would have accrued from taxes, levies, penalties and interest if such real estate had not been so purchased ..." (Emphasis supplied.) The emphasized language was construed in Zimmerman Co. v. Day, 121 Va. 709 (1917), to require the applicant's payment of all sums assessed for taxes subsequent to the sale to the Commonwealth whether paid by the owner entitled to redeem or not. The court reasoned that the applicant should not be given the benefit of payments by the former owner. Language in the opinion implies that the former owner might be entitled to a refund of the amount paid by him, but the court considered that any taxes assessed to the former owner subsequent to the sale to the Commonwealth were erroneously assessed because the property then belonged to the State. The Code provision (§ 469 Code of 1904) necessitating this construction was subsequently revised to require the commissioner of the revenue to continue to assess taxes to the former owner each year subsequent to the sale to the Commonwealth until there is a transfer of title of record. See § 58-1079. It is clear, therefore, that assessments subsequent to the sale to the Commonwealth, made in the name of the former owner, are not erroneous within the purview of § 58-1141, et seq., and no refund can be obtained by the former owner under those statutes.

In consideration of the foregoing, it is my opinion that there is no provision for a refund and the former owner's partial payment should be retained by the county. The taxpayer may subsequently redeem the property or defeat the tax deed and, in such case, he would be entitled to credit for the amount of the partial payment.

TAXATION—Delinquent Lists—Procedure for collection of delinquent taxes by treasurer; right of redemption of land by owner.

November 13, 1972

The Honorable F. B. Huber
Treasurer of Campbell County

Your letter of October 25 requesting an opinion whether § 58-983 of the Code of Virginia, as amended in the 1972 Session, has any effect on the procedure for collection of delinquent taxes under § 58-1029, et seq.

Subsection (b) of § 58-983, added in 1972, is as follows:

"If the taxes and levies on any real estate appearing on the list mentioned in paragraph (2) of § 58-978 are not paid by the third anniversary of the original due date thereof, a lien shall be recorded by the treasurer in the appropriate clerk's office and the county, city or town may proceed according to the provisions of Article 9 (§ 58-1014 et seq.) of this chapter. When the list mentioned in paragraph (2) of § 58-978 is published as required by subsection (a), such publication shall state the provisions of this subsection."
Section 58-989 requires the treasurer to continue to collect the taxes on the delinquent lists for one year, after which he resubmits the lists to the governing body (§ 58-990). The governing body then may require the treasurer to collect for an additional period of two years.

Section 58-1029 requires the treasurer to sell all the real estate embraced in his list of delinquent real estate on the second Monday in December in the year next after the year in which the treasurer submitted his list of delinquent real estate. If no person bids the amount of taxes on the real estate, it is purchased in the name of the Commonwealth under § 58-1067. Section 58-1073 provides that the previous owner of the real estate has the right to redeem it by paying the taxes, interest and penalties, at any time prior to further sale under §§ 58-1083 to 58-1097, 58-1101 to 58-1106, or other court proceedings.

As the General Assembly did not amend any of the foregoing sections, they should be read together with the amendment to § 58-983. It is therefore my opinion that the amendment to § 58-983 does not necessarily require the treasurer to continue to collect taxes for an additional year, unless the governing body directs him to do so under § 58-990. As the language in § 58-1029 remains mandatory, it is my opinion that land should be sold at the date provided in that section. The procedure outlined in subsection (b) of § 58-983 would then apply to land purchased at that sale and not subsequently redeemed. The right of redemption under § 58-1073 would be cut off by a sale of the land pursuant to proceedings instituted under subsection (b) of § 58-983.

**TAXATION—Delinquent Real Estate Taxes—Delinquent tax collector may not be appointed by locality for collection of real estate taxes.**

**STATUTE OF LIMITATIONS—Twenty-year Statute of Limitation Upon Suit to Enforce Tax Lien.**

November 21, 1972

**The Honorable William J. Hassan**

Commonwealth's Attorney for Arlington County

I have received your recent letter inquiring whether the Board of Supervisors of Arlington County has the authority to appoint a delinquent tax collector for the collection of delinquent real estate taxes. You also inquire whether there is any statute of limitation upon the institution of a suit in equity, pursuant to § 58-762, Code of Virginia (1950), as amended, to enforce a tax lien upon real property.

Title 58, Chapter 20, Article 7, of the Code provides generally for the collection of delinquent taxes. Sections 58-978 and 58-983 require each local treasurer to prepare annual lists of delinquent taxes and submit them to the governing body of the locality. Section 58-989 requires each local treasurer to continue to collect delinquent real estate, tangible personal property and other local taxes for one year following the date as of which the lists were prepared. Section 58-990 provides that at the end of such year, the treasurer shall prepare and submit a second delinquent list indicating the changes which have occurred since the date as of which the original delinquent list was prepared. The treasurer is required by § 58-990 to continue his efforts to collect delinquent real estate taxes until it is sold pursuant to § 58-1029, et seq.; however, he is not required to make any further effort to collect other local taxes unless he is directed to do so by the governing body of his locality. The governing body is generally authorized to direct the treasurer to continue efforts to collect other local taxes for two years in addition to the year required by § 58-989. Arlington County, however, due to its density of population, falls within an exception to the limitations imposed.
with regard to the collection of delinquent real estate and other local taxes subsequent to the one-year period required by § 58-989. The board of supervisors of any county containing more than five hundred inhabitants per square mile is authorized by § 58-990 to require the treasurer to continue to collect delinquent real estate and other local taxes for an unlimited time.

Section 58-991 authorizes the governing body of any county to employ a local delinquent tax collector to collect delinquent tangible personal property, machinery and tools and merchants' capital taxes but not real estate taxes.

In consideration of the foregoing, it is my opinion that the Board of Supervisors of Arlington County does not have the authority to appoint a delinquent tax collector to collect real estate taxes.

With respect to your inquiry concerning any statute of limitation applicable to a suit in equity to enforce the lien for taxes assessed upon real estate, § 58-762 provides that such lien "... shall continue to be such prior lien until actual payment shall have been made to the proper officer. ..." The statute further provides for enforcement of the lien by suit in equity without limitation upon the time within which such suit may be commenced; however, § 58-767 provides that no lien upon real estate for taxes delinquent for twenty or more years shall be enforceable in any proceeding at law or in equity. Therefore, I am of the opinion that any suit in equity must be commenced before the expiration of the twenty-year period during which the lien is enforceable. The fact that the county board of supervisors may have directed the treasurer to continue efforts to collect delinquent real estate taxes does not, in my opinion, prohibit the board from proceeding with suits in equity for collection pursuant to § 58-762.

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TAXATION—Delinquent Real Property—Application to purchase land sold to Commonwealth at delinquent tax sale cannot be accepted within three years of such sale.

May 14, 1973

The Honorable Joseph T. Martz, Clerk
Circuit Court of Loudoun County

I have received your recent letter from which I quote:

"A certain tract of land in Loudoun County was sold for the tax year 1969 to the Commonwealth by the Treasurer of Loudoun County at his delinquent tax sale on December 11, 1972.

"On February 28, 1973, a prospective purchaser made a 10% deposit of the 1969 taxes plus penalties and costs to me in anticipation of making a valid application pursuant to Section 58-1083.

"I wish to be advised on the following questions:

"1. Am I authorized to accept this payment?

"2. And if so, has the prospective purchaser the right to make application for a tax deed at this time even though the land has not stood in the name of the Commonwealth for 3 years?

"3. Additionally, the question has arisen as to whether the Treasurer will at the December 10, 1973 sale continue to list for sale this property after payment is accepted as set out above?"

Section 58-1083 provides:

"When real estate so purchased in the name of the Commonwealth is not redeemed by the previous owner, his heirs or assigns or some person having
the right to charge the same with a debt, within three years from the date of such purchase, any person desiring to purchase it shall file an application with the clerk of the circuit court of the county or corporation court of the city wherein it is situated, for the purchase of such real estate. . . ."

The statute does not, in my opinion, grant an applicant the right to file a purchase application until the expiration of three years from the date that the property was purchased in the name of the Commonwealth pursuant to § 58-1067. Since this purchase was made at the tax sale on December 11, 1972, no application can be accepted at this time. This three year period will not expire prior to June 1, 1973, the effective date of Chapter 467, Acts of Assembly of 1973, which completely revised the procedures applicable to the sale of real property for the collection of delinquent taxes and repealed §§ 58-1029 through 58-1117. A new § 58-1117.9, which is contained in the aforementioned chapter, provides:

"On the effective date of this act the title to any real estate purchased by the treasurer of any county, city, district or town in the name of the Commonwealth pursuant to §§ 58-1067 through 58-1072, which are hereby repealed, and not sold by the treasurer pursuant to such sections shall revert to the former owner or owners, or his or their heirs, successors and assigns, subject to the lien created by § 58-1023. The liens of such delinquent taxes shall continue to be recorded in the appropriate clerk's office or other office where such liens are customarily recorded."

In consideration of the foregoing, it is my opinion that you should return the deposit made by the prospective purchaser and advise him that he should await the institution of proceedings pursuant to § 58-1117.1, et seq., to purchase the property. In reply to your third question, since § 58-1029 was repealed, the December 10, 1973, treasurer's sale will not be conducted.

TAXATION—Delinquent Tax Lands; Purchase in Name of Commonwealth—How real estate so purchased may be redeemed.

September 20, 1972

The Honorable John F. Deekens
Treasurer of Amelia County

Your recent letter requested an opinion as to the procedure for redemption of delinquent tax lands while a chancery suit instituted under Article 6 of Chapter 21 of Title 58 of the Code of Virginia (§ 58-1101, et seq.) is pending. Your letter asks:

"Can the clerk and the treasurer refuse to accept taxes once this chancery suit has been brought unless payment of all the county's cost has been made? Or, is there another way of protecting or recouping these costs once suit has been initiated?"

Section 58-1073 provides as follows:

"The previous owner of any such real estate [purchased by the Commonwealth], his heirs or assigns or any person having the right to charge the same with a debt may, until further sale thereof under §§ 58-1083 to 58-1097 or 58-1101 to 58-1106 or under other court proceedings, redeem such real estate by paying to the clerk of the circuit court of the county or corporation court of the city in which such real estate is situated the amount for which the sale was made, together with such additional sums as would have accrued from taxes and levies if the same
had not been purchased by the treasurer in the name of the Commonwealth, with interest on the amount for which the sale was made at the rate of six per centum from the day of sale and with a penalty on the additional sums of five per centum as of December fifth of the year in which the same would have accrued, plus interest at the rate of six per centum from the first day of July of the year next following the year in which such additional sums would have accrued. . . . When any such real estate shall be fully redeemed by the payment of all the taxes, interest and costs necessary for the full redemption thereof as hereinabove required, the clerk shall endorse the fact of such payment on the delinquent land book opposite the entry of the tract or lot.” (Emphasis supplied.)

This section permits redemption until actual sale of the property. It is therefore clear that the clerk may not refuse to accept payment in redemption after suit is instituted, but before actual sale. The section is somewhat ambiguous on whether costs must be included in the payment. Whereas the first sentence quoted above requires only that taxes and levies with interest and penalties be paid, without mention of costs, the last sentence of the section provides that the clerk may record the payment only if taxes, interest and costs are paid. In Article 5 of the same chapter, a parallel section, which provides for redemption after an application has been made to purchase lands acquired by the Commonwealth, clearly requires the person redeeming the property to pay costs.

In consideration of the ambiguity of § 58-1073, and the inclusion of costs in other similar situations, I do not believe the General Assembly intended that a locality be required to make expenditures without reimbursement to dispose of delinquent lands. It is therefore my opinion that if a previous owner offers to redeem real estate after a suit in equity has been commenced under Article 6 of Chapter 21 of Title 58, the clerk should require payment of any costs which the locality has incurred relative to disposal of the properties.

TAXATION—Delinquent Taxes—Sale by proceeding in equity not precluded by payment of three years’ back taxes, complete redemption necessary to prevent sale.

April 26, 1973

THE HONORABLE JOHN F. DEEKENS
Treasurer of Amelia County

I have received your recent letter from which I quote:

“A problem has arisen here which I hope you can help me to resolve. We are attempting to bring bills in equity to have delinquent tax lands sold. Because we have been at this for over one year, we are having good results in getting delinquent taxes paid back. However, some people are taking the notion that if they pay their taxes back three successive years, then their land is not delinquent for three years under the statute. There may be fifteen other previous years which are delinquent.

“My question is this: whether or not the payment of taxes back for a period of three years, or the payment of even the tax for the most recent year which would be delinquent for three years, is enough to preclude the bringing of a bill in equity when there is or are other(s) year(s) delinquent more than three years.”

Section 58-1101, Code of Virginia (1950), as amended, provides:

“When real estate heretofore or hereafter purchased in the name of the Commonwealth or any city or town is not redeemed by the previous owner,
his heirs or assigns or some person having the right to charge it with a
debt within three years from the date of the purchase, it may be sold
under the provisions of this article. The remedy given by this article is in
addition to other remedies provided by law."
The purchase of land in the name of the Commonwealth occurs pursuant to
§ 58-1067, et seq., when real estate is offered for sale as provided in § 58-1032
and no person bids the amount of the delinquent taxes, interest, costs and other
charges thereon. Redemption of such property is allowed in accordance with
§ 58-1073 until a further sale of the land has taken place. Prior to the expiration
of three years from the date the land was first purchased by the Commonwealth
in accordance with § 58-1067, the bill in equity procedure for such sale is not
available. But the redemption contemplated by § 58-1101 is a redemption in full
for both the amount for which the original sale was made to the Commonwealth
and the amount of all subsequent taxes plus interest and penalty, as provided by
§ 58-1073. The taxpayer cannot defeat the procedure afforded the Common-
wealth by § 58-1101, et seq., through a partial redemption. Therefore, if three
years have elapsed since the first purchase by the Commonwealth, a taxpayer who
is delinquent in taxes for more than three years cannot prevent a sale pursuant to
§ 58-1101, et seq., merely by paying taxes which became due within three years
of the date of payment. To decide otherwise would allow a delinquent taxpayer
to prevent a sale of the property by paying only the most recent taxes although
other taxes remained delinquent for longer periods of time. This results, in my
opinion, is not required by § 58-1101.

TAXATION—Double Wide Mobile Homes—Classified as real property—Not
considered vehicles.

September 11, 1972

The Honorable Herbert H. Bateman
Member, Senate of Virginia

Your letter of July 28, 1972, requested an opinion whether “double wide
mobile homes” should be classified as real or personal property.

Section 58-829.3 of the Code of Virginia provides that “vehicles without
motive power, used or designed to be used as mobile homes or offices or for
other means of habitation by any person” constitute a separate classification of
personal property.

In interpreting this provision, this office has ruled that a mobile home of
ordinary width does not lose its classification as personalty, or as a “vehicle”
under § 58-829.3, because it has been placed on a permanent foundation on
property belonging to its owners. See Report of the Attorney General (1967-
1968), p. 291. This office has also ruled that modular homes are not within
§ 58-829.3 and should be classified as real property for purposes of taxation and
land use; although they can be dismantled and moved without great difficulty after
they are installed, their design is far more consistent with permanent location in
one place. See opinion of the Attorney General to the Honorable W. Kendall
Lipscomb, Jr., Commonwealth’s Attorney for New Kent County, dated November
5, 1971.

“Double wide mobile homes” are built in two sections which are designed to
be attached together as a single housing unit. Although the two sections may be
dismantled and transported after installation, they are neither transportable as
a unit nor inhabitable in their “mobile” state. For this reason, I am of the opinion
that such units, once they are prepared for habitation, should be classified as real
property for purposes of property tax in the same manner as modular homes, and should not be considered "vehicles" in the meaning of § 58-829.3.

You also inquire whether such units should be subject to the sales tax (§ 58-441.1, et seq.) or the motor vehicle sales tax (§ 58-685.10, et seq.). It is not clear that Title 46.1 of the Code authorizes the Division of Motor Vehicles to title mobile homes of this type, nor is it clear that they come within the definition of motor vehicles in § 58-685.11 of the Virginia Motor Vehicle Sales and Use Tax Act. On the other hand, the Virginia Sales and Use Tax Act appears to contemplate that they be subject to the motor vehicle sales tax rather than the sales tax. In view of the ambiguity of the law, and the fact that it has been the practice of the Division of Motor Vehicles to title these units and collect the motor vehicle sales tax on them, it is my opinion that this practice should be continued until action is taken by the General Assembly to clarify this matter.

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**TAXATION—Equalization Board—What tax year adjustments are effective.**

March 1, 1973

**The Honorable George W. Titus**

Treasurer of Loudoun County

Your recent letter requests an opinion as follows:

"The County of Loudoun had a general reassessment effective January 1, 1970. On March 5, 1970, the Judge of the Circuit Court appointed three members to the Equalization Board and their term expired on December 31, 1970. On December 17, 1970, the same three members were appointed to the Equalization Board effective January 1, 1971, and the term expired on December 31, 1971.

"In December, 1970, a Loudoun taxpayer appealed his assessments. The Board did not take any action in 1970, but rendered a decision in June, 1971, lowering his assessments. Please advise me if this reduction applies to the 1970 tax bill."

I am in accord with the opinion addressed to you which you have cited in your letter, found in Report of the Attorney General (1965-1966), p. 268. Under § 58-898 the powers of an equalization board appointed in 1970 expire on December 31 of that year, and the board appointed for 1971 cannot be considered a continuation of it, but must be treated as a new board. Assessments reviewed and changed in 1971 may not be applied to taxes for years prior to 1971, even in those cases where application for review was made in 1970. See Report of the Attorney General (1962-1963), p. 276. The opinion of the Attorney General to Miss Mary Sue Fuller, Treasurer of Russell County, dated December 12, 1941, and found in Report of the Attorney General (1941-1942), p. 153, is not in conflict with this view, as the changes referred to in that opinion were made in 1941 by an equalization board which was appointed for 1941.

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**TAXATION—Exemption—Only certain property owned by Boy Scouts of America exempt from taxation.**

June 7, 1973

**The Honorable Leslie D. Campbell, Jr.**

Member, Senate of Virginia
This is in reply to your recent letter inquiring as to the tax-exempt status of real property owned by the Boy Scouts of America.

As you are aware, Article X, Section 6(a) (6), of the Constitution of Virginia (1971) provides that the General Assembly may by three-fourths' vote of each house classify or designate as exempt any properties used "for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes." The 1973 amendment to § 58-12 of the Code of Virginia, found in Chapter 438 of the Acts of Assembly of 1973, does not purport to exercise this exemption power, as the sole change to that section was the insertion of language stating that the properties listed therein which were exempt prior to the effective date of the 1971 Constitution will continue to be exempt under the old rules of construction. Although Chapter 438 contained other sections providing for tax-exempt classifications and designations, property owned by the Boy Scouts was not so classified. Thus, the 1973 amendment to § 58-12 did not alter its tax status.

Article X, Section 6(f), of the Constitution of Virginia (1971) provides:

"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."

This language, and the amended introductory language of § 58-12, thus continue the tax-exempt status of those classifications which were constitutionally exempt prior to July 1, 1971, the effective date of our new Constitution. This office has held that the Boy Scouts of America was not constitutionally exempt prior to July of 1971 under subsection (5) of § 58-12, even though it is listed therein, as it was not a Young Men's Christian Association or other similar religious association, as required by Section 183(e) of the Constitution of 1902. The same opinion held that the Boy Scouts was charitable and benevolent under the holding of our Supreme Court in Richmond v. United Givers Fund, 205 Va. 432 (1964), and that its property has therefore been exempt to the extent that it was used for "lodge purposes or meeting rooms" within the meaning of Section 183(f) of the Constitution of 1902. Report of the Attorney General (1971-1972), p. 414. It is my opinion that, pursuant to the grandfather clause of Article X, Section 6(f) of our new Constitution, the Boy Scouts continue to be entitled to this limited exemption, but only this exemption.

You further inquire as to the appropriate procedure for effecting an exemption from real property taxes. In my opinion, the proper procedure is to apply to the Commissioner of Revenue for the locality in which the property is situated to determine the extent to which real estate belonging to the Boy Scouts is used for lodge purposes or meeting rooms and is thus exempt from taxation.

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TAXATION—Exemption—Organizations exempt from property taxes can be exempted from consumers’ utility taxes by county.

March 23, 1973

The Honorable F. Caldwell Bagley
County Attorney for Prince William County

I have received your recent letter from which I quote:

"Can the County Board of Supervisors of Prince William County exempt any or all of those organizations enumerated in Section 58-12 of the
Code from the collection of the consumer tax under its ordinance adopted pursuant to Sections 58-587.1 and 58-617.2?"

Sections 58-587.1 and 58-617.2, Code of Virginia (1950), as amended, authorize cities, towns, and counties to impose a tax upon the consumers of certain utility services. I have previously opined that a locality may classify residential and commercial consumers separately and fix a different maximum amount of tax applicable to taxpayers in each classification. See Report of the Attorney General (1970-1971), p. 400. It follows that other classifications which have a reasonable basis may be established for purposes of the utility tax and that exemptions may be provided for organizations included in such classifications. If a locality may exempt a residential consumer from a tax upon part of his utility usage and not exempt a commercial consumer upon the same basis, it may completely exempt religious, charitable, educational, and other consumers which it has placed in a separate classification. The constitutional requirement of uniformity in Article X, Section 1, of the revised Virginia Constitution does not apply to utility taxes because they are not direct taxes on property. See Ashland v. Board of Supervisors, 202 Va. 409 (1961), and my opinion to the Honorable Charles L. McCormick III, Commonwealth's Attorney for Halifax County, dated May 2, 1972, a copy of which is enclosed.

The classifications, of course, must have a reasonable basis or they may violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Whyy, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968), and the cases cited therein. But those classifications prescribed by Article X, Section 6(a), and § 58-12 are accorded a strong presumption of reasonableness and may be relied upon by the county if it creates exemptions from its utility tax. See Fireman's Mutual Aid Ass'n. v. Commonwealth, 166 Va. 34 (1936).

Accordingly, it is my opinion that the Prince William County Board of Supervisors may exempt all or part of the organizations enumerated in § 58-12 from its consumer utility taxes imposed pursuant to §§ 58-587.1 and 58-617.2.

TAXATION—Exemption—Real estate owned by Ashland War Memorial Association not exempt.

August 8, 1972

The Honorable Charles F. White, Jr.
Commissioner of the Revenue for Hanover County

I have received your letter of August 1, 1972, inquiring whether property owned by the Ashland War Memorial Association to be used for a public war memorial is exempt from taxation. The association is a nonprofit, non-stock corporation organized under the laws of Virginia. The purpose of the association is "to provide a public memorial to perpetuate the memory of the men and women of Ashland and Hanover County, Virginia, living or dead, who have represented said County and Town in all wars, especially World War I and II."

Article X, Section 6(a)(6), of the revised Constitution of Virginia exempts:

"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."

I am not aware of any action by the General Assembly since the effective date of this section that would exempt the association's property.

The Constitution further provides 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." Article X, Section 6(f), revised Constitution of Virginia. Since the association was in existence prior to the adoption of the revised Constitution, it is necessary to determine whether it was exempt under prior law. Section 183(g) of the Constitution of Virginia exempted:

"Property of the Association for the Preservation of Virginia Antiquities, the Confederate Memorial Literary Society, the Mount Vernon Ladies' Association of the Union, the Virginia Historical Society, the Thomas Jefferson Memorial Foundation, Incorporated, the posts of the American Legion and such other similar organizations or societies as may be prescribed by law."

Since the association is not named in this clause nor in § 58-12, Code of Virginia (1950), as amended, it was not exempted from property taxation prior to the effective date of the revised Constitution. See Report of the Attorney General, (1967-1968), p. 264-265.

I am not aware of any other authority under which the property of the Ashland War Memorial Association might be exempt; therefore, I am of the opinion that it is taxable.

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**TAXATION—Exemption—Real estate owned by Christian Enterprises Incorporated not exempt.**

August 10, 1972

**The Honorable Charles F. White, Jr.**
Commissioner of the Revenue for Hanover County

I have received your letter of August 1, 1972, inquiring whether real property owned by Christian Enterprises, Incorporated, and upon which is constructed a radio station, is exempt from taxation.

Its articles of incorporation indicate that the purposes of the organization are to establish and operate a radio station for cultural, educational and religious broadcasts; to establish a Bible institute; to grant diplomas or degrees in biblical education; to provide for lectures related to Christian education; to establish and operate a bookstore to distribute religious literature; and to publish religious literature.

The corporation has presented its claim for exemption under § 58-12(5), Code of Virginia (1950), as amended, which provides an exemption for property "

. . . owned by any church, religious association or denomination or its trustees or duly designated bishop, minister or other ecclesiastical officer, and used or operated exclusively for religious, denominational, educational or charitable purposes and not for profit. . . ." This provision was originally enacted pursuant to Section 183(e) of the Virginia Constitution, which granted an exemption for real estate belonging to and exclusively occupied and used by "Young Men's Christian Associations, and other similar religious associations . . . conducted not for profit, but exclusively as charities. . . ." This office has previously opined that the quoted provision within § 58-12(5) was an invalid attempt by the General Assembly to extend the exemptions granted by the Virginia Constitution. See Report of the Attorney General (1965-1966), p. 277.

Assuming, but not deciding, that Article X, Section 6(a)(6), of the revised Virginia Constitution grants to the General Assembly the authority to exempt broadcasting facilities, § 58-12, as amended by Chapter 667 of the 1972 Acts of property owned and used by Christian Enterprises, Incorporated, for its radio
Assembly, is not a valid exercise of that authority because the requisite three-fourths vote was not obtained in the Senate.

Therefore, any exemption must necessarily be predicated upon a conclusion that the property under consideration is owned by a religious association similar to the Young Men's Christian Association. See my opinion to the Honorable Leslie D. Campbell, Jr., Member, Senate of Virginia, dated April 20, 1972, a copy of which is enclosed. See also Report of the Attorney General (1956-1957), p. 254. I am unable to reach such a conclusion, and therefore it is my opinion that the property owned by Christian Enterprises, Incorporated, is taxable.

TAXATION—Exemption—Real estate owned by Rockville Center, Incorporated, not exempt.

August 8, 1972

THE HONORABLE CHARLES F. WHITE, JR.
Commissioner of the Revenue for Hanover County

I have received your letter of August 1, 1972, inquiring whether property owned by the Rockville Center, Incorporated, is exempt from taxation.

The bylaws of the corporation indicate that its primary objective is to provide social and recreational facilities for the use of its members. Membership is granted by the Board of Directors in its sole discretion after unanimous approval by a membership committee and the facilities are not open to the general public.

Property tax exemptions are provided by Article X, Section 6, of the revised Constitution of Virginia, and, pursuant thereto, by Title 58, Ch. 1, Art. 3, Code of Virginia (1950), as amended. Section 58-12 purports to grant an exemption for property "owned by any community club or association or its trustees, when said property is used or operated exclusively for general and community purposes and not for profit." However, this office has previously declared this provision unconstitutional. See Report of the Attorney General (1966-1967), p. 283. Although the previous opinion was rendered pursuant to Section 183 of the Constitution of Virginia, which was superseded by Article X of the revised Constitution, I am unable to perceive any present constitutional authority for the exemption of property of the nature contemplated by the quoted provision.

I am of the opinion, therefore, that the property owned by the Rockville Center, Incorporated, is taxable.

TAXATION—Federal Credit Unions—Exempt from consumers' utility taxes imposed pursuant to § 58-587.1.

May 30, 1973

THE HONORABLE THOMAS J. ROTHROCK
Member, House of Delegates

I have received your recent letter inquiring whether 12 U.S.C.A. § 1768 exempts a federal credit union from local utility taxes imposed upon consumers of telephone services pursuant to § 58-587.1, Code of Virginia (1950), as amended.

The exemption statute to which you refer provides as follows:

"The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, 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 Federal credit
unions shall be subject to Federal, State, Territorial, and local taxation
to the same extent as other similar property is taxed."

Section 58-587.1 authorizes a local tax on the consumers of telephone service
provided by a public service corporation doing business in Virginia. This tax, of
course, cannot be imposed upon a consumer which is exempt from State or local
taxation by a federal law enacted pursuant to constitutional authority. Pittman v.
Home Owners’ Loan Corporation, 308 U. S. 21, 60 S. Ct. 15, 84 L. Ed. 11
(1939). A consumers’ utility tax is not a tax upon property. Report of the
Attorney General (1971-1972), p. 419. Accordingly, I am of the opinion that
federal credit unions are not subject to local consumers’ utility taxes. See Report

TAXATION—Filing of Income Tax Return—Department authorized to process
return and assess tax if taxpayer mails return to it.

July 21, 1972

The Honorable Edward E. Willey
Member, Senate of Virginia

Your letter of July 13 requests an opinion whether the following language,
printed on the income tax return for 1972, is authorized:

“The filing of this return with the Department of Taxation will be
deemed a request for the Department to assess the tax.”

Section 58-857 of the Code of Virginia gives the Tax Commissioner broad
authority to supervise, in a manner consistent with law, the commissioners in
the performance of their duties, especially those relating to State taxes. Section
58-151.064 of the Code of Virginia, the successor to § 58-105, states as follows:

“Every resident who is required by this chapter to file a return shall file
his return with the commissioner of the revenue for the county or city in
which he resides. . . .”

The following section, § 58-151.065, the successor to § 58-106, provides:

“Whenever an individual or fiduciary files with the Department of
Taxation a State income tax return for a current year, the Department of
Taxation may, at the request of the taxpayer, and for reasons sufficient to it,
assess the State income tax against such taxpayer instead of transmitting
such return to a commissioner of the revenue for assessment; but in every
such case the Department of Taxation shall advise the appropriate
commissioner of the revenue of such action.”

The latter section, by implication, permits the taxpayer to file directly with
the Department instead of following the procedure prescribed by § 58-151.064.
It also authorizes the Department of Taxation to assess the tax and process the
return if requested to do so by the taxpayer. The language quoted above
is sufficient to alert the taxpayer that the Department will consider his act
of mailing the return to it as a conscious request that the tax be assessed by it. In
my opinion, the Department is authorized to include such language on the return,
and is authorized to process the return and assess the tax if the taxpayer mails
the return to the Department.
TAXATION—Flood Disaster; Property Tax Relief Granted Only Where There Is Actual Property Damage, Not Reduction of Value.

DISASTERS—Common Disasters; Flood; Hurricane; Property Tax Relief Granted Only Where There Is Actual Property Damage, Not Reduction of Value.

July 27, 1972

The Honorable M. Langhorne Keith
County Attorney for Fairfax County

I have received your letter of July 14, 1972, inquiring whether §§ 58-27.2 and 58-811.2, Code of Virginia (1950), as amended, authorize a county to grant tax relief to property owners in situations where the "locational value" of property but not the property itself has been damaged by a common disaster. Specifically, you mention lake-front property, the value of which was affected adversely by lake drainage caused by hurricane Agnes.

Section 58-27.2 provides, in pertinent part:

"All taxpayers of the State whose lands, improvements thereon, or personal property, or any portion thereof, shall be in any year destroyed in any manner by common disaster . . . may be relieved from the payment of taxes and levies . . ." (Emphasis supplied.)

Section 58-811.2 provides for the abatement of levies "... on buildings which are razed or destroyed or damaged by a fortuitous happening . . ." (Emphasis supplied).

I do not construe these provisions to allow relief for a diminution in property value due solely to the destruction of or damage to adjacent property. The language of these statutes does not indicate any intent by the General Assembly to relieve from consequential or indirect property damage occasioned by the disaster. I am of the opinion, therefore, that your county cannot grant tax relief to lake-front property owners unless there is some actual destruction of or damage to their land or improvements as distinguished from damage to adjacent property which results in a reduction in the value of their property.

TAXATION—Interest—Increase of interest from six percent to eight percent applies after June 1, 1973.

May 24, 1973

The Honorable Sally D. Shackelford
Treasurer of Northumberland County

Your letter of May 17 requested an opinion as to the application of § 58-964 of the Code of Virginia, as amended by Chapter 410 of the Acts of Assembly of 1973, which raised the interest rate in that section from six to eight percent. I will answer your questions seriatim:

1. "In § 58-964 of the Code of Virginia, as amended by 1973 General Assembly, does the increase of interest from six per centum per annum to eight per centum per annum apply to 1971 and 1972 county taxes, or to prior years' taxes in the Clerk's office collected after June 1, 1973, or does it affect only the taxes for 1973 and thereafter?"

Chapter 410 of the Acts of Assembly becomes effective on the first day of June. As of that date, § 58-964 will provide in pertinent part as follows:

"Interest at the rate of eight per centum per annum from the thirtieth day of June of the year next following the assessment year and from
February fifteenth of the year next following the assessment year in the cases of taxes required by § 58-963 to be paid by August fifteenth of the assessment year, shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid. . . .”

It is my opinion that the change of interest rate from six to eight percent should apply to all interest assessed for months following June 1, 1973, regardless of the year for which such taxes are assessed. Therefore, 1971 taxes would accrue interest of six percent per annum through the month of May, 1973, but thereafter would accrue interest of eight percent until paid.

2. “Does this increase of interest from six per centum to eight per centum affect Virginia income tax because of § 58-963’s wording ‘any State taxes’?”

Section 58-963 provides in part as follows:

“Any person failing to pay any State taxes or county and city levies on or before the fifth day of December shall incur a penalty thereon of five per centum, which shall be added to the amount of taxes or levies due from such taxpayer. . . .”

It is my opinion that the penalty provision in this section, and the interest provision in § 58-964 which refers to this section, are intended to cover only State or local taxes which generally become due on December fifth. It therefore has no application to the income tax.

TAXATION—Interest Rate—Section 58-847 controls the interest rate where a locality collects its tax by installments.

June 19, 1973

The Honorable B. L. Fletcher, Jr.
Treasurer of Arlington County

Your letter of June 11 requested an opinion as to the applicability of § 58-964 of the Code of Virginia, as amended in 1973, to Arlington County. The amendment in question raised the interest rate on delinquent taxes from 6% to 8%.

My opinion to the Honorable Sally D. Shackelford, Treasurer of Northumberland County, dated May 24, 1973, to which you refer in your letter, held that § 58-964 applied to taxes which in normal circumstances are due on December 5. As § 58-964 also specifically covers county taxes which have a due date of August 15, the new interest rate therein would also apply to those taxes. However, your letter indicates that Arlington County has adopted an ordinance providing for the collection of taxes in installments. Therefore the interest rate maximum of 8% specified in § 58-847, the section which authorizes installment collection, would control, rather than the interest rates specified in § 58-964. You will note that the General Assembly amended § 58-847 in 1973 to permit the collection of interest and penalties the month following the month of the installment payment date.

TAXATION—Licenses—Stock savings and loan associations subject to tax computed on capital if assessed during the calendar year 1972.

August 4, 1972

The Honorable John Alexander
Commonwealth’s Attorney for Fauquier County
I have received your recent letter from which I quote:

"The Town of Warrenton has called to my attention Senate Bill No. 30, with particular reference to the amendment of Code Section 58-373.

"This Code Section provides that savings and loan associations shall pay a license tax of $50.00 and that no County, City or Town shall levy a greater license tax than that imposed by the State.

"Confusion arises over the last paragraph of that Section which says that the act shall apply to tax years beginning on and after January 1, 1972; provided that the license taxes imposed by Section 58-373 on the capital of stock savings and loan associations for the privilege of doing business in this State shall be applicable for the tax year 1972 and not thereafter.

"The tax year of the Town of Warrenton commences July 1, 1972, and I would appreciate your advice as to whether the Town can legitimately collect a former capital stock tax from savings and loan associations for that tax year, or whether they will be limited to the $50.00 figure."

Chapter 310 of the 1972 Acts of Assembly provides for State taxation of the income of savings and loan associations beginning January 1, 1972. By the same Act, the General Assembly amended § 58-373 to limit the State and local license tax upon the capital of stock savings and loan associations to fifty dollars per annum. Since many localities assess the license tax on a calendar year basis and had, prior to the enactment of Chapter 310, already collected the 1972 license tax from stock savings and loan associations upon the basis permitted by § 58-373 prior to its amendment, the General Assembly included a provision as follows:

"This act shall apply to taxable years beginning on and after January one, nineteen hundred seventy-two; provided, that the license tax imposed by § 58-373 on the capital of stock savings and loan associations for the privilege of doing business in this State shall be applicable for the tax year nineteen hundred seventy-two, and not thereafter." (Emphasis supplied.)

I interpret this provision to prohibit any locality from assessing the license tax upon the former basis after December 31, 1972. I construe "tax year" to mean the year in which the assessment is made. 


It is my opinion, therefore, that the town of Warrenton may assess the license tax during 1972 upon the basis used previously, notwithstanding the fact that its fiscal year begins July 1, 1972.

TAXATION—Local Levies—Notice of budget and tax levy increase may be published together, new rate of levy must be included, fifteen days' notice of meeting concerning increased levy not required.

July 7, 1972

The Honorable William J. McGhee
County Attorney for Montgomery County

I have received your letter of July 5, 1972, concerning the validity of the 1972-1973 fiscal year tax increase and budget of Montgomery County. You ask three questions which I shall answer seriatim.

1. Can the notices of the budget proposal pursuant to § 15.1-162, Code of Virginia (1950), as amended, and for the increase in the local tax levy pursuant to § 58-846.1 be published together or must they be published separately?
Section 15.1-162 requires the publication of a brief synopsis of the budget and the giving of notice of a hearing "... at least seven days prior to the date set for hearing ..." and the hearing must be held "... at least seven days prior to the beginning of the fiscal year ..."

Section 58-846.1 provides:

"Before any local tax levy shall be increased in any county, city, town, or district, such proposed increase shall be published in a newspaper having general circulation in the locality affected at least fifteen days before the increased levy is made and the citizens of the locality shall be given an opportunity to appear before, and be heard by, the local governing body on the subject of such increase."

Both statutes are successors of the Acts of Assembly of 1927, Chapter 37, page 125. This act was interpreted in Smith v. Board of Supervisors, 155 Va. 343 (1930), to allow the notice of the tax increase and the synopsis of the budget to be published together. Neither of the current statutes differ materially from the 1937 act. Accordingly, I am of the opinion that separate publication is not required.

2. Must the old tax rate and the amount of the increase be published in the notice of the tax levy increase, or is the notice sufficient if it states only the proposed new rate of levy?

Smith v. Board of Supervisors, supra, at 348, interpreted the predecessor of § 58-846.1 which required that the "amount and purpose of such increase be published. Acts of Assembly of 1927, Chapter 37, Section 5, page 127. The court declared that it was unnecessary to state in the notice the fact that the rate was so much per one hundred dollars of assessed valuation, since this was a matter of common knowledge. You will note that the correct statute does not state that the amount of the increase need be published, only that "such proposed increase" be published. I do not construe this statute to require more than the publication of the new proposed rate of levy. The amount of the old levy would likewise appear to be a matter of common knowledge. The opinion of the court in Smith v. Board of Supervisors, supra, at 350, indicates that substantial compliance is sufficient as follows:

"When the board has strictly complied with the statutory provisions in fixing within legal limits a rate of taxation on property which is a legal subject for taxation, and for a purpose fixed by law, a substantial compliance with the statutory provisions as to the manner and form should be upheld by the court."

3. Does § 58-846.1 require fifteen days' notice of the meeting at which the citizens may be heard, or merely fifteen days' notice prior to the adoption of the increase, with the meeting occurring sometime during such period?

The statute, in my opinion, does not require fifteen days' notice prior to the meeting. It is sufficient if the meeting occurs any time subsequent to the publication and prior to the adoption of the new rate of levy, provided the citizens are given reasonable notice of the meeting.

TAXATION—Local License—Contractors—Payment of flat rate local license tax and required State license tax to locality where office located qualifies contractor for exemption from other local license taxes.

November 22, 1972

The Honorable Charles Aubrey Callahan
Commissioner of the Revenue for the City of Alexandria
REPORT OF THE ATTORNEY GENERAL

I have received your recent letter inquiring whether a contractor subject to local license taxation is entitled to the benefit of § 58-299, Code of Virginia (1950), as amended, with respect to business done outside the locality in which his principal office is located when such locality does not base its license tax upon gross receipts. You state that Alexandria has a flat rate license tax and that contractors are occasionally subjected to local license taxation in other jurisdictions upon the ground that they have not paid a local license tax based upon gross receipts to Alexandria.

Section 58-299 provides:

“When a contractor, electrical contractor or a plumbing and steam fitting contractor shall have paid the aforesaid State license and any local license required by the city, town or county in which his principal office and any branch office or offices may be located, no further license shall be required by the State or other city, town or county for conducting any such business within the confines of this State, except where the amount of business done by any such contractor in any other city, town or county exceeds the sum of twenty-five thousand dollars in any year such other city, town or county may require of such contractor a local license, and the amount of business done in such other city, town or county in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the city, town or county in which the principal office or any branch office of the contractor is located, and except further that qualification under § 32-61 may be required of contractors doing plumbing business.”

This benefit of this statute is not conditioned upon the requirement that the contractor pay a local license tax based upon gross receipts to the locality where his principal office is located. To the contrary, the provision benefits a contractor who has paid “any local license required.” Therefore, it is my opinion that a contractor whose sole office is in Alexandria and who has paid Alexandria’s flat rate license tax in addition to the applicable State license tax is not subject to a local license tax in any other jurisdiction unless the volume of his business in such jurisdiction exceeds twenty-five thousand dollars per annum.

TAXATION—Local License Tax—Tax not applicable to national banks on sale of tangible personal property for promotional campaign.

August 21, 1972

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

I have received your letter of July 26, 1972, inquiring in part:

“The County of Henrico has enacted license tax provisions under the powers granted in § 58-266.3 of the Code of Virginia. It seeks to enforce these against national banks for their gross receipts from the sale of wigs, rings, and other items as part of bank promotions and for their gross receipts from the sale and lease of credit card imprints.

* * *

“One of these banks has resisted this tax on the basis that they were exempt under Public Law 91-156, 12 U.S.C. § 548 (as amended).”

Public Law 91-156, 83 Stat. 434, granted to the states the power to tax national banks in the same manner and to the same extent that they taxed state banks with the exception of a tax upon intangible personal property. During the
debates upon this act, concern was expressed regarding the effects of repealing the previous prohibitions upon national bank taxation. It was determined that various states had enacted a tax previously permitted by 12 U.S.C.A. § 548 upon both state and national banks in lieu of taxes imposed upon other businesses. Many of these other tax statutes did not expressly exclude state banks from their operation due to the existence of a statute excluding all state banks from taxes not valid as to national banks. See § 58-466.1, Code of Virginia (1950), as amended. Immediately upon the effective date of Public Law 91-156, such other taxes would be applicable to national banks; and because the state statutes excluding state banks from discriminatory taxation would then be inapplicable, a substantial increase in the total tax burden on all banks in those states would result. The other taxes as well as the in lieu taxes would be applied to all banking organizations and would unbalance banking's share of the state's taxes. To avoid this result, Congress included a saving provision requiring affirmative state action to give the states an opportunity to review their tax policy and presumably to reduce or eliminate the in lieu taxes when they imposed other taxes under the new grant of authority.

The saving provision was not made applicable to the following:

“(1) any sales tax or use tax complementary thereto,
“(2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or
“(3) any tax on tangible personal property (not including cash or currency), or for any license registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,”

The answer to your question turns upon the interpretation of (3) above. Apparently Congress was of the opinion that the automatic imposition of the types of taxes mentioned in (1)—(3) would not have the unbalancing effect previously discussed or that such effect would be minimal. Since the General Assembly of Virginia has not affirmatively subjected banks to additional taxation subsequent to the effective date of Public Law 91-156, it is only by including a license tax imposed upon the privilege of doing business and based upon gross receipts within (3) of the exceptions that the Henrico County retail license tax can be applied to national banking institutions.

The Henrico County retail merchant's tax is imposed “upon the privilege of doing business in the county.” See §§ 8-1 and 8-112 of the Henrico County ordinance. Congress apparently did not consider that the exceptions to the saving provision included such taxes, because it provided in § 4 of the act that the Board of Governors of the Federal Reserve System was to study the impact on the banking systems of “income taxes, intangible property taxes, so-called doing business taxes, and any other similar taxes which are or may be imposed on banks” and to report the results in order that Congress might place any limitation upon the imposition of such taxes that might be warranted. It was to prevent the imposition of significant taxes without affirmative state action that the saving provision was included. Intangible property taxes were completely excluded from the additional authority granted to the states by Public Law 91-156, and income taxes and taxes imposed upon the privilege of doing business were deemed of such significance as to require affirmative state action. This conclusion is supported by the Conference Report reprinted in 2 U.S. Cong. & Admin. News 1601, 1602 (1969), which stated that the only exceptions to the saving provision were “. . . sales taxes, documentary taxes, and [tangible] property taxes . . . .”

With respect to your reference to First National Bank of Santa Fe v. Commissioner of Revenue, 80 N.M. 699, 460 P.2d 64 (1969), which upheld state taxation of the bank's receipts from a data processing bookkeeping service rendered to other banks, the case does present authority for the proposition that an ultra
vires transaction is not shielded by the bank's tax immunity. However, it is doubtful that a bank's sale of articles of tangible personal property as part of a promotional campaign to increase its deposits is ultra vires. Furthermore, I submit that the Santa Fe authority is weakened in view of the subsequent change in state taxation of national banks permitted by Public Law 91-156.

For these reasons, I am of the opinion that the Henrico County license tax cannot presently be applied to a national bank in respect to the transactions under consideration.

TAXATION—Local License Tax Imposed on Ship Brokers or Agents Is Constitutional.

ORDINANCES—Local License Tax Imposed on Ship Brokers or Agents Is Constitutional.

July 28, 1972

THE HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

I have received your recent letter inquiring whether the license tax imposed by the city of Newport News upon ship brokers and agents is in conflict with the Commerce Clause of the U. S. Constitution. The city ordinance provides:

"Every person, firm, or corporation engaged in the business of ship broker and/or agent for a shipping line shall pay a license tax of $225.00 per annum.

"A ship broker and/or agent shall be defined as an agent to bring buyer and seller together.

"This license tax shall not be pro-ratable."

You stated that payment of the license tax is a condition precedent to conducting business as a ship broker or agent within the city and that a tax is applied to ship brokers and agents who deal solely with interstate or international commerce.

It is my opinion that the ordinance quoted above is constitutional. A ship broker is defined by the ordinance as "an agent to bring buyer and seller together." Their activity as so defined is local in nature, and it can properly be taxed by the locality. While the services of such a ship broker may facilitate interstate and international commerce, it is not an essential part of that commerce, nor is ship brokerage so closely related to interstate or international commerce that a tax on ship brokers cannot be meaningfully distinguished from a tax on the commerce itself. See generally Joseph v. Carter & Weekes, 330 U. S. 422 (1947). Ship brokers as defined by the ordinance do not directly participate in the actual movement of cargo from one part to another, and their activities cannot be said to be interstate or international commerce within the meaning of the Commerce Clause.


I do not read these cases as precluding a nondiscriminatory local tax on an enterprise even if it is engaged in interstate commerce, provided the tax does not constitute an undue burden on such commerce.

TAXATION—Local Motor Vehicle Licenses—County cannot require applicant
for license tax to file current year's personal property return as condition precedent to issuance of license.

MOTOR VEHICLES—Local Licenses—County cannot require applicant for license tax to file current year's personal property return as condition precedent to issuance of license.

May 30, 1973

THE HONORABLE J. MARVIN DAVIS
Treasurer for Nelson County

I have received your letter of May 17, 1973, inquiring whether § 46.1-65(c), Code of Virginia (1950), as amended, authorizes a county to condition the issuance of local motor vehicle licenses upon the filing of the current year's personal property tax return. You indicate that local licenses are issued on and after March 15 of each year and that applicants for vehicle licenses are required to file a personal property return for the current year before a license can be purchased.

Section 46.1-65(c) provides:

"A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town."

Pursuant to the foregoing authority, the Nelson County Board of Supervisors adopted the following ordinance:

"No Nelson County motor vehicle license shall be issued unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes due Nelson County, Virginia, upon such motor vehicle to be licensed have been fully paid, which personal property taxes have been properly and lawfully assessed or are properly and lawfully assessable against such applicant by said County. Evidence of the assessment of such motor vehicle shall be supplied by a certificate from the Commissioner of Revenue of Nelson County, Virginia."

Section 58-837 provides that returns of tangible personal property must be filed on or before May first of each year and § 58-961 requires that the taxes be paid on or before December fifth of the same year. Although a county may change these dates by ordinance adopted pursuant to § 58-847, such action has not been taken by the Nelson County Board.

Section 46.1-65(c) is designed to condition the issuance of a local license upon the payment of the personal property taxes, not upon the filing of the tax return. Since the taxes are not due and payable until December fifth of each year, it is my opinion that a county cannot refuse to issue a local vehicle license if taxes which were due on the previous December fifth have been fully paid, whether or not the current year's tangible personal property return has been filed by the license applicant.

TAXATION—Local Property Taxes—Increase in rate of levy is invalid in absence of 15-day notice—Cities and towns not required to fix rate so long as rate is fixed before date taxes are due.

November 22, 1972
THE HONORABLE FRANK D. HARRIS
Commonwealth's Attorney for Mecklenburg County

I have received your recent letter inquiring whether the Town Council of LaCrosse is authorized to increase the town rate of levy on taxable property without notice to the citizens of LaCrosse. You also inquire whether the local rate of levy can be increased after January 1 for the current year's taxes.

The Town Council adopted the following resolution on September 11, 1972:

"RESOLVED: The tax rates of LaCrosse, Virginia, were increased from $1.00 per hundred to $1.50 per hundred beginning the year 1972."

Town taxes are due and payable January 1 of each year for the preceding year. The increased rate of levy will be applied to the assessed value as of January 1, 1972, and the tax will be due and payable January 1, 1973.

Section 58-844, Code of Virginia (1950), as amended, provides inter alia:

"The council of every city and town shall annually ..., order a city or town levy of so much as in their opinion is necessary to be raised in that way. ..., The levy so ordered may be ..., upon any property therein subject to local taxation. ..."

Section 58-846.1 provides:

"Before any local tax levy shall be increased in any county, city, town or district, such proposed increase shall be published in a newspaper having general circulation in the locality affected at least fifteen days before the increased levy is made and the citizens of the locality shall be given an opportunity to appear before, and be heard by, the local governing body on the subject of such increase."

Section 58-839, applicable to counties, requires that each county board of supervisors fix the county rate of levy no later than June 30 of each year for that year's taxes. Section 58-844, however, does not contain a similar requirement, nor does the town charter. See Ch. 189 of the 1901 Acts of Assembly as amended by Ch. 89 of the 1912 Acts.

In consideration of the foregoing, it is my opinion that the quoted resolution is invalid insofar as it purports to increase the rate of levy in the absence of the notice and public hearing required by § 58-846.1, but that the town council may validly increase the 1972 rate of levy during the remainder of this calendar year after complying with § 58-846.1.

TAXATION—Machinery and Tools—Taxable although manufacturer ceases to do business and closes plant.

December 6, 1972

THE HONORABLE JOSEPH J. SAUNDERS, JR.
Commissioner of the Revenue for the City of Bedford

I have received your letter of November 17, 1972, inquiring whether a corporation engaged in manufacturing in Bedford until November 19, 1971, is liable for 1972 personal property taxes on its machinery and tools located in the city of Bedford and held for liquidation on January 1, 1972. You indicate that the manufacturing facility was not operated after November 19, 1971, but that the machinery and equipment were not sold until March 1972 and had not been dismantled as of January 1, 1972. The corporation's counsel asserts that § 58-412, Code of Virginia (1950), as amended, does not authorize the city to tax the
property because it was not being used in a manufacturing business on January 1, 1972.

Article X, Section 1, of the Constitution of Virginia requires that all property be taxed unless it is exempted pursuant to other constitutional provisions. Exemptions are provided by Article X, Section 6; however, there is no general exemption for property, real or personal, owned by a manufacturer, whether or not it is used in manufacturing.

Sections 58-834 and 58-835 establish the situs for the assessment of tangible personal property and machinery and tools and fix the tax date of January first of each year. Section 58-831 requires that machinery and tools segregated for local taxation only should be taxed as provided by § 58-412. Section 58-412 provides, in pertinent part:

"Machinery and tools used in a manufacturing . . . business taxable on capital under § 58-418 shall not be held to be capital under the preceding section, nor shall such machinery and tools be hereafter assessed as real estate. . . . All such machinery and tools used in a manufacturing . . . business . . . shall be listed for local taxation exclusively and each city, town and county shall make a separate classification for all such machinery and tools and fix the rate of levy thereon. . . ."

The phrase "used in a manufacturing business" cannot be interpreted to exclude machinery and tools which are temporarily not being used by a manufacturer on January first; otherwise, the machinery and tools of seasonal businesses not in operation on January first of each year would not be subject to the tax. Nor should it be interpreted to preclude the taxation of such property pending its sale solely because its owner has ceased to operate the plant in which it is located. In Hamilton Mfg. Co. v. City of Lowell, 274 Mass. 477, 175 N.E. 73 (1931), the court upheld an assessment of machinery owned by a cotton cloth manufacturer pursuant to a statute taxing "[m]achinery employed in any branch of manufacture or . . . used in the conduct of [the] business . . ." although at the time of assessment the company was in receivership and had not operated its manufacturing plant for more than six months. The court stated, at 175 N.E. 77:

"The words of the statute 'employed in manufacture' and 'used in manufacture' are of broad signification and import a degree of permanence. [Cites] They have acquired in tax statutes a comprehensive denotation and do not lend themselves to a narrow or technical construction."

In the Hamilton case, part of the plant had been dismantled but its integrity as a manufacturing facility had not been impaired, although its potential capacity had been reduced.

In consideration of the foregoing, it is my opinion that a manufacturer's machinery and tools are taxable under § 58-412, notwithstanding that on the tax day they are being held for sale when they have not been dismantled and the manufacturing facility in which they were formerly used retains its physical integrity.

TAXATION—Member of Armed Forces—Personal Property Tax—Property located in Virginia but owned by serviceman stationed in his state of domicile is taxable—Property used in a trade or business is taxable.

TAXATION—Income Tax—Serviceman engaged in business in Virginia should file nonresident tax return.

November 20, 1972
The Honorable Robert H. Waldo
Commissioner of the Revenue for the City of Chesapeake

I have received your recent letter in which you present two questions which I shall answer seriatim.

"1. A service man is a legal resident and an actual resident of the State of Florida and owns a Mobile Home in the City of Chesapeake which he rents to another party. The service man claims exemption from payment of Personal Property Tax under the Soldier's and Sailor's Civil Relief Act. My question is, is he entitled to such exemption?"

The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 574, provides, inter alia:

"For the purposes of taxation in respect of the personal property . . . of any such person by any State . . . or political subdivision [of a state] . . . of which such person is not a resident or in which he is not domiciled . . . personal property shall not be deemed to be located or present in or to have a situs for taxation in such . . . political subdivision. . . . 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 . . . 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. . . ."

The quoted provisions apply to persons in the military service who are absent from their state of domicile in compliance with military or naval orders and who own property located in a state other than their state of domicile.

The clear implication of the statute is that it is not applicable where the owner of personal property is not absent from his state of residence or domicile in compliance with military or naval orders. Therefore, it is my opinion that property located in Virginia and owned by a serviceman who is stationed under military orders in his state of domicile is taxable.

"2. A service man claims Ohio as his residence. He and his wife own a farm, jointly, in Chesapeake on which they have a farming operation. He pays Personal Property Tax on his farm equipment, claims military exemption for his automobiles, and files a Non-Resident Income Tax Return on his income from the farming operation. My question is, is this man entitled to military exemption and should he continue to file a Non-Resident Return?"

Additionally, 50 U.S.C. App. § 574 provides that nothing contained therein shall prevent state taxation in respect of personal property used in a trade or business. Therefore, property used by a serviceman in conducting a farm business is taxable. See Report of the Attorney General (1970-1971), p. 372. The fact that the serviceman is engaged in a business, however, does not operate to destroy any exemption to which he is otherwise entitled under the Soldiers' and Sailors' Civil Relief Act with respect to property not used in the business. Therefore, an automobile used for personal transportation by a serviceman, and not used for business purposes is within the exemption provided by the Act.

With respect to income taxes, although the serviceman is engaged in a business in Virginia, he retains the status of a nonresident so long as he remains domiciled in another state. See Report of the Attorney General (1965-1966), p. 278. Therefore, it is my opinion that the business income should be reported on a Virginia nonresident income tax return.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Merchants' Capital—Inventory subject to security interest.

March 5, 1973

THE HONORABLE ROBERT H. BURNS
Commissioner of the Revenue for Tazewell County

Your recent letter requests an opinion whether certain automobiles displayed by dealers in your county should be treated as their inventory for purposes of the tax on merchants' capital. I understand that the dealers in question claim that the automobiles do not belong to them, but are on consignment from the manufacturers.

It is clear that merchandise bought by a dealer under the sample agreement which you enclosed should be included in the inventory of the dealer, as the manufacturer withholds only a reasonable security interest. Moreover, it is my opinion that any items included in inventory for income tax purposes should be included in inventory for purposes of the merchants' capital tax.

You also wanted to know whether inventory located in another county or another state should be removed from your capital tax assessment. Section 58-834 provides that the situs for merchants' capital is the locality in which the property is physically located on the first day of the tax year. Under this section, you may not tax any inventory which was not physically located in Tazewell County. However, as you have found that no returns were filed in the other localities, you should require the dealers to furnish you with adequate proof that the inventory was located elsewhere on that day.

TAXATION—Merchants' Capital—Motor vehicle dealers taxable if property owned by dealer—Circumstances indicating sale or consignment set forth.

May 29, 1973

THE HONORABLE R. LEWIS KEITH
Commissioner of the Revenue for Amherst County

I have received your letter of April 30, 1973, inquiring whether automobiles and mobile homes in the possession of retail dealers in your county on January the first should be regarded as part of their inventory for purposes of the merchants' capital tax as defined by § 58-833, Code of Virginia (1950), as amended. You indicate that several of the dealers contend that they do not have title to the property because it is held by them on consignment from the manufacturer, and others state that title passes directly from the manufacturer to the local bank that finances their inventory on a floor-plan basis.

Section 58-20 provides that property is generally taxed to its owner, and § 58-9 segregates the capital of merchants for local taxation. Section 58-833 defines merchants' capital to include the inventory of stock on hand.

In the absence of the specific agreement between each manufacturer and dealer, it is impossible to determine whether the dealer has sufficient interests in the property to constitute ownership for purposes of merchants' capital taxation. Generally, the question whether a particular transaction is one of sale or consignment is determined by the intention of the parties as ascertained by the provisions of their contract as well as their conduct. 67 Am Jur 2d, Sales, §§ 27 and 35. Circumstances indicating that the transaction is a sale include the fact that the dealer has full power to dispose of the property to anyone for such price as he might choose, that the manufacturer has no right to demand at any time a return of unsold property, that the manufacturer expressly reserves title to the property, and that liability for the purchase price arises at the time of
shipment by the manufacturer or receipt by the dealer, although the time for payment is postponed until some later date. *Id.*, § 37. Circumstances indicating that the transaction is a consignment include the fact that the manufacturer reserves the right to control the prices at which the dealer is to sell the property, that the only liability of the dealer is to pay to the manufacturer a fixed price when the property is sold, that the manufacturer reserves title to the proceeds of the sale, that no debtor-creditor relationship arises between the dealers and the manufacturer until the dealer sells the property, and that the manufacturer retains the right to demand a return of unsold property. *Id.*, § 36.

In addition to the foregoing, the inclusion of the purchase price of the property in the dealer's inventory for income tax purposes requires its inclusion for capital tax purposes, as a taxpayer cannot include goods held on consignment in inventory for income tax purposes. Treas. Reg., § 1.471-1 (1958), provides that "[m]erchandise should be included in the inventory only if title thereto is vested in the taxpayer." See my opinion to the Honorable Robert H. Burns, Commissioner of the Revenue for Tazewell County, dated March 5, 1973, a copy of which is enclosed.

With respect to the retention of the title by the local bank which finances the dealer's inventory, such transaction does not affect the dealer's tax liability, as he is the owner of the property for purposes of taxation, the title retention being solely for security.

TAXATION—Municipality—Tax statutes do not apply to municipality in absence of express provision subjecting same to the tax.

October 4, 1972

THE HONORABLE DON BRENNAN
Executive Secretary, Virginia Athletic Commission

I have received your recent letter inquiring whether the city of Richmond is required to pay the tax imposed by § 9-29.1, Code of Virginia (1950), as amended, when it promotes a closed circuit boxing event in the Richmond Coliseum.

The second paragraph of § 9-29.1 provides:

"Every owner or operator of any theater, arena or other place of public amusement who shall show or exhibit a simultaneous telecast of any live, current or spontaneous boxing, sparring or wrestling match, exhibition or performance, viewed within this State, whether originating within this State or another state, shall within twenty-four hours after the termination of such showing, pay to the Commission a tax of five per centum of the total gross receipts from the sale of tickets of admission to, and moneys received from subscription for, the showing or exhibiting of said boxing, sparring or wrestling match, exhibition or performance."

Chapter 4 of Title 9, containing the above section, is primarily a regulatory chapter. It created the Virginia Athletic Commission and gave it regulatory authority over matches or exhibitions of professional boxing or wrestling held or given anywhere in Virginia by any club, corporation or association.

Section 9-29.1 was enacted in 1962, apparently to deal with the simultaneous closed circuit telecast method of showing boxing events. The first paragraph, which is not under consideration, requires a license and sanction for every "... person or persons, club, corporation or association holding, showing or exhibiting a simultaneous telecast of any live, current or spontaneous boxing, sparring or
The second paragraph of § 9-29.1, however, is purely a tax provision. It subjects "[e]very owner or operator of any theater, arena or other place of public amusement . . ." to a tax of five percent of the gross receipts from ticket sales for the event. (Emphasis supplied.) It contains no exception for a municipal owner of the facility. However, our Supreme Court of Appeals in Pelouze v. Richmond, 183 Va. 805 (1945), declared that a tax statute would not be presumed to apply to a municipal corporation in the absence of specific language including municipal corporations among those taxable. Two previous opinions of the Attorney General have also reached a similar conclusion. See Reports of the Attorney General (1938-1939), p. 182, and (1943-1944), p. 204. In the latter opinion, the following appears:

"In my opinion, a State statute imposing a tax should not be construed to impose the tax on a political subdivision of the State, unless it is expressly so provided in the statute."

Although the Pelouze decision, as well as both opinions cited, was concerned solely with the writ tax, there is no indication that the same principle would not apply to any other tax.

Section 9-47 also supports the view that a municipality was not intended to be subject to the tax, since it provides that one-half of the tax collections shall be returned to the cities, counties and towns where the taxable events were held. It would appear that had the General Assembly intended to tax a municipal corporation at all, it would have provided instead for a tax of half the regular rate, because there would be no valid reason to collect five percent from a city and to subsequently return half of it.

Cases in other jurisdiction support the foregoing. See City of Anniston v. State, 91 So. 2d 211 (Ala. 1956); State v. City of Montgomery, 151 So. 856 (Ala. 1933), City of Phoenix v. Moore, 113 P. 2d 935 (Ariz. 1941).

In consideration of the above, it is my opinion that § 9-29.1 does not apply to the city of Richmond.

TAXATION—Personal Property—Cannot exempt in absence of constitutional authority.

TAXATION—Personal Property—Certain property may be classified separately and taxed at rate lower than other.

December 22, 1972

The Honorable David D. Brown
Commonwealth's Attorney for Washington County

I have received your letter of November 24, 1972, from which I quote:

"The classification of tangible personal property by Section 58-829 of the Code of Virginia, 1950, as amended, is set out in seventeen separate subdivisions.

"Section 58-829.1 of the Code of Virginia, 1950, as amended, enables the governing body of any county to exempt in whole or in part from taxation all or any of the classes of household goods and personal effects.

"Although it would seem logical that the power to tax carries with it the power not to tax, there appears to be no statutory authority enabling the governing body of a county to exempt from taxation the classes of
tangible personal property set out in subdivisions (1), (2), (3) and (4) of Section 58-829.

"In the absence of specific statutory authority so to do, may the governing body of Washington County exempt from taxation the classes of tangible personal property set out in subdivisions (1), (2), (3) and (4) of Section 58-829?"

"If the governing body of Washington County exempts from taxation the classes of tangible personal property set out in subdivisions (1), (2), (3) and (4) of Section 58-829, is there a possible problem involving the uniform application of the tax on tangible personal property?"

Article X, Section 1, of the revised Constitution of Virginia, provides, in pertinent part:

"All property, except as hereinafter provided, shall be taxed. 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..."

"The General Assembly may define and classify taxable subjects." (Emphasis supplied.)

Article X, Section 6, provides, in pertinent part:

"(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation..."

"(e) The General Assembly may define as a separate subject of taxation household goods and personal effects and by general law may allow the governing body of any county... to exempt or partially exempt such property from taxation..." (Emphasis supplied.)

It is evident from the foregoing constitutional requirements that neither the General Assembly nor any political subdivision of the Commonwealth can exempt property from taxation in the absence of constitutional authority to do so. There is no such authority for the exemption of the farm animals classified by § 58-829 (1), (2), (3) and (4). Therefore, I am of the opinion that such property cannot be exempted from taxation. See Report of the Attorney General (1965-1966), p. 287(2) and 288. However, pursuant to § 58-851, the governing body of any county may classify farm livestock separately from other tangible personal property and may fix a rate of levy thereon lower than that imposed by it upon other classes of tangible personal property. See my opinion to the Honorable Harold Hawkins, Commonwealth's Attorney for Clarke County, dated June 19, 1972, a copy of which is enclosed. Such rate, however, must be in excess of zero. See Report of the Attorney General (1965-1966), p. 279. This authority enables a county to supersede the classifications of § 58-829 to the extent that property classified thereby is included in § 58-851.

With respect to your question concerning uniformity, the constitutional requirement previously quoted is satisfied when the taxes are uniform upon the same class of taxable subjects within each taxing jurisdiction. Washington Bank v. Washington Co., 176 Va. 216, 218 (1940). Therefore, all property within each class must be taxed at a uniform rate, but all classes of property do not have to be taxed at a uniform rate. City of Richmond v. Commonwealth, 188 Va. 600 (1948).

TAXATION—Personal Property—Domiciliary serviceman subject to local personal property taxation although property located outside of Commonwealth.

February 14, 1973
THE HONORABLE E. G. HEATWOLE
Director of Finance for Henrico County

I have received your recent letter inquiring whether a motor vehicle owned on January 1, 1972, by a serviceman who is a Virginia domiciliary and whose legal residence is within Henrico County is subject to personal property taxation by the county although the vehicle was located in Missouri from October, 1970, until July, 1972, where the serviceman was residing pursuant to military orders. You enclosed a letter from the serviceman to you in which he suggested that § 58-834, Code of Virginia (1950), as amended, placed the taxable situs of the vehicle in Missouri on January 1, 1972, and that Taylor v. Commonwealth, 124 Va. 445 (1919), decided that the situs of tangible personal property for taxation was the locus of the property itself, and not the domicile of its owner.

Section 58-834, as of January 1, 1972, provided:

"The situs for the assessment and taxation of tangible personal property . . . shall in all cases be the county, district or city in which such property may be physically located on the first day of the tax year."

Since the statute refers to the county, district or city in which the property is located and not to the state in which it is located, it is my opinion that it applies solely to property physically located in Virginia, and not to property located outside of the Commonwealth during the entire year. Therefore, the statute has no application to the motor vehicle which is the subject of your inquiry.

Taylor v. Commonwealth, supra, referred to by the owner of the motor vehicle, held that the situs for taxation of intangible personal property owned by a minor who was domiciled in Virginia was the domicile of the minor and not that of his guardian. The Court reasoned that in the absence of a statute changing the common law doctrine of mobilia sequuntur personam is operative and fixes the situs of such property for taxation. I can find nothing in the opinion supporting the owner's contention that the situs for taxation of his personal property is the locus of the property itself.

I am not aware of any statute by which the General Assembly has altered the common law doctrine of mobilia sequuntur personam as to property owned by a Virginia domiciliary which is located outside of the Commonwealth. This doctrine provides that the situs of movable property follows the domicile of its owner. The taxation of such property, however, must be consistent with the Constitution of the United States. In this regard, Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944), reaffirmed the principle established by earlier cases that tangible property for which no tax situs has been established elsewhere may be taxed to its full value by the owner's domicile. See, e.g., Central R. R. Co. v. Pennsylvania, 370 U.S. 607 (1962).

The serviceman's automobile could never acquire a tax situs in Missouri so long as the serviceman's domicile remained in Virginia, because the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. § 574, provides that "[f]or the purposes of taxation . . . personal property [of the non-domiciliary serviceman] shall not be deemed to be located or present in or to have a situs for taxation in such State [in which the property is physically located] . . . ." Since there is no Virginia statute applicable to the tax situs of the serviceman's automobile, it follows that the common law doctrine of mobilia sequuntur personam places its situs in Virginia, where the owner is domiciled, and in Henrico County, the place of his legal residence. Accordingly, it is my opinion that a serviceman domiciled in Virginia is amenable to local personal property taxes in Virginia although the physical location of his property is outside of the Commonwealth during his period of military service.
TAXATION—Personal Property—Non-Domiciliary serviceman is exempt whether he registers and licenses his vehicle in Virginia or elsewhere.

MOTOR VEHICLES—Local Licenses—When affected by Soldiers' and Sailors' Civil Relief Act.

July 6, 1972

THE HONORABLE CATHERINE C. LUCIE
Commissioner of the Revenue for the City of Colonial Heights

I have received your recent letter inquiring whether a non-domiciliary serviceman becomes liable for local personal property taxation in Virginia if he registers and licenses his vehicle in this state.

The newspaper article which you enclosed discussed two opinions of this office but did not mention to whom the first was rendered. It apparently referred to an opinion to the Honorable Daniel Fairfax O'Flaherty, Judge of the Municipal Court for the City of Alexandria, dated September 15, 1971, a copy of which I enclose. You will note that this opinion responded to an inquiry concerning § 46.1-354.1, Code of Virginia (1950), as amended, which provides for exemption of non-domiciliary spouses of persons in the armed services from the requirement of obtaining a Virginia operator's license if such spouse has a valid operator's license issued by his or her home state. The opinion has no application to your question.

The second opinion referred to was rendered to the Honorable Ruth R. St. Clair, Commissioner of Revenue for the City of Radford, dated November 10, 1971. This opinion, also enclosed, concluded that an automobile owned by a serviceman domiciled in another state may not be the subject of personal property taxation in Virginia even when it is used here by the serviceman's civilian spouse. It was not apparent from the inquiry initiating this opinion whether the vehicle was registered in Virginia or elsewhere; however, I do not attach any significance to the fact of registration for the purposes of deciding the question of personal property tax exemption under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. I am in accord with the opinion to the Honorable Kenneth S. Shenk, Commissioner of the Revenue of Clarke County, dated November 10, 1966, and found in Report of the Attorney General (1966-1967), p. 291. The opinion stated, inter alia:

"... the fact that a non-domiciliary serviceman purchases real estate or obtains Virginia licenses for his automobile would not subject him to assessment of the local personal property taxes."

TAXATION—Personal Property—Soldiers' and Sailors' Civil Relief Act not applicable to property of serviceman domiciled and residing outside of Virginia when brought into Virginia solely for his son's use while attending college.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT—When Applicable to Personal Property of Serviceman for Taxation.

December 18, 1972

THE HONORABLE ORA A. MAUPIN
Commissioner of the Revenue for the City of Charlottesville

I have received your letter of November 17, 1972, inquiring whether the Soldiers' and Sailors' Civil Relief Act of 1940 precludes personal property taxation of a mobile home and an automobile located within your jurisdiction and used by the
son of a serviceman. The mobile home is owned solely by the serviceman, who is domiciled in Florida but is stationed in Georgia pursuant to military orders. The automobile is titled jointly in the names of the serviceman and his son. Both the mobile home and the automobile are titled and registered in Georgia but are in Virginia in the son's possession during the school year while he is attending college. You attached a copy of a letter from the serviceman's counsel which asserts that neither vehicle is subject to Charlottesville local property tax.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C.A. App. § 574, provides, inter alia:

"For the purposes of taxation in respect of the personal property . . . of [a person in the military service who is absent from his state of domicile in compliance with military orders] by any State . . . or political subdivision . . . of which such person is not a resident or in which he is not domiciled . . . personal property shall not be deemed to be located or present in or to have a situs for taxation in such State . . . or political subdivision. . . . 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."

The section, before the addition of the last sentence quoted, was construed in Dameron v. Brodhead, 345 U.S. 322 (1953), at 326, to exempt "... servicemen from . . . property taxes imposed by any state by virtue of their presence there as a result of military orders." The last sentence was added by Public Law 87-771 in 1962. Its purpose was to clarify the existing law and assure that a serviceman would not lose the benefit of the exemption when he left his property with his family in a non-domiciliary state after he was transferred elsewhere. S. Rep. No. 2182, 87th Cong., 2d Sess., 1 (1962); Sullivan v. United States, 395 U.S. 169, 183 (1969). In United States v. Arlington County, 326 F. 2d 929 (4th Cir. 1964), the court held that the exemption was applicable, under the statute as it existed prior to the 1962 addition, to personal property left in Arlington County, Virginia, by a serviceman domiciled in New Jersey when he was assigned to see duty abroad and left his family and property in Virginia.

In California v. Buzard, 382 U.S. 386 (1966), at 393, the Court stated that "[t]he very purpose of § 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders."

I am not aware of any court decision applying 50 U.S.C.A. App. § 574 to property located outside of a serviceman's state of domicile for reasons other than those related to his or his family's absence from its state of domicile because of his compliance with military orders. The facts under consideration clearly indicate that the serviceman's property is not in Virginia because of his compliance with military orders. It is here solely because his son brought it here for his personal use while attending college in Charlottesville. The serviceman is not stationed in Virginia, and he did not bring the property into this Commonwealth. There is no indication that the serviceman has ever been stationed in Virginia. Under these circumstances, it would be contrary to the intent and spirit of the Soldiers' and Sailors' Civil Relief Act to conclude that the serviceman is entitled to personal property tax exemption. There is no military related reason why the serviceman should be relieved of the burden of taxation in Virginia.

Since the automobile is owned jointly by the serviceman and his son, it should be noted that the son, as co-owner, would be taxable upon the entire
value of the automobile even if his father could claim a valid exemption under 50 U.S.C.A. App. § 574. This is because the statute does not apply to persons who are not in the military service. See Christian v. Strange, 392 P. 2d 575 (Ariz. 1964); Gilbridge v. City of Algota, 20 N.W. 2d 905 (Iowa 1945); Mims Bros. v. N. A. James, 174 S.W. 2d 276 (Texas 1943). The personal property tax, like the real property tax, is not assessed upon an individual's fractional interest in property. See City of Norfolk v. Stephenson, 185 Va. 305 (1946). The total tax upon the property is assessed to all of its owners, which makes them jointly and severally liable for the entire tax. The fact that one of the owners is entitled to the benefits of an exemption statute does not operate to exempt the other owners. This office, therefore, has previously opined that property owned jointly by a serviceman and his spouse is taxable to the spouse. Report of the Attorney General (1960-1961), p. 301; (1965-1966), p. 196; (1970-1971), p. 372.

Counsel for the serviceman also suggests that the automobile did not have a Virginia situs under § 58-834 because it was not physically present in Virginia on January 1, 1972. Apparently the student drove it to his parent's home in Georgia for the Christmas holidays. This office has consistently maintained 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. See my opinion to the Honorable Robert H. Waldo, Commissioner of the Revenue for the City of Chesapeake, dated June 22, 1972. This is true notwithstanding that on January first the vehicle was elsewhere because the student left school during the usual Christmas holiday period. See Report of the Attorney General (1967-1968), p. 275.

Accordingly, I am of the opinion that both the mobile home and the automobile are properly subject to the local personal property tax imposed by the city of Charlottesville.

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TAXATION—Personal Property Tax—Soldiers' and Sailors' Civil Relief Act precludes taxation of property owned by non-domiciliary serviceman whether or not he has paid taxes on property in his home state.

December 12, 1972

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

I have received your letter of November 15, 1972, from which I quote:

"The Soldiers and Sailors Civil Relief Act protects a serviceman from paying taxes, other than in his home State or place of legal residence.

"May I have your opinion on the following case? A serviceman, living in the City of Norfolk (not on a naval reservation), owns a boat and keeps it in local waters. He has declared that his legal residence is in another State and this is substantiated by his personnel jacket. Investigation reveals that he has not paid taxes on the boat in his home State and the City of Norfolk has assessed him for personal property taxes on the boat."

The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. § 574, provides that a person in the military service who is absent from his state of domicile in compliance with military orders shall not be deemed to have acquired a residence or domicile in any other state solely by reason of such absence and that his personal property shall not be deemed to be located or present in or to have a situs for taxation in a state other than his state of domicile.

The serviceman's personal property cannot be taxed by a state or political subdivision thereof other than his state of domicile whether or not he has paid the
tax required by his state of domicile. Congress saved the sole right of taxation to
the serviceman’s home state whether or not that state exercised the right. Dameron v. Broadhead, 345 U.S. 322 (1953).

In consideration of the foregoing, it is my opinion that you cannot impose a
local personal property tax upon persons in the military service of the United
States who are not domiciled in Virginia whether or not they have paid the
personal property tax required by their state of domicile.

TAXATION—Probate Tax—Computed upon gross estate without deductions
for decedent’s debts.

February 12, 1973

THE HONORABLE KATHERINE V. RESPES
Clerk of Courts for the City of Norfolk

I have received your letter of January 24, 1973, from which I quote:

“Section 58-66 of the Code of Virginia of 1950, as amended deals with
the tax on wills and administration and imposes a tax based on the value
of the estate of the decedent.

“My query is should the amount due on a deed of trust on real estate
be deducted from the market value of the real estate prior to applying
the tax?”

Section 58-66 imposes a tax upon the probate of a will or the grant of ad-
ministration based upon the value of every estate passing by such will or by
intestacy. Section 58-67 provides that “[t]he value of all real estate shall be
included in determining the tax imposed by § 58-66. . . .”

The tax upon the probate of wills and the grants of administration is a tax
on the privilege of qualifying as the personal representative of a decedent. The
measure of the tax is the gross estate left by the decedent. See Lamb, Virginia
Probate Practice, § 6 (1957). The statute provides that the tax is measured by
the value of the estate, real, personal or mixed “. . . passing by such will or by
intestacy of the decedent . . .” The gross estate so passes. It is true that the
decedent’s debts must be paid, but this does not affect the measure of the tax.

Therefore, in my opinion, the amount due on a note secured by a deed of trust
on the decedent’s real estate at his death cannot be deducted from the market
value of the real estate for probate tax purposes.

TAXATION—Procedure for dispensing of Income Tax Return—State Tax Com-
missoner has authority to process returns and mail directly to taxpayer.

TAXATION—State Tax Department Must Require Taxpayer to Submit Depre-
ciation Schedules.

July 6, 1972

THE HONORABLE D. B. HANEL
Commissioner of the Revenue for the City of Martinsville

Your letter of June 5 requests an opinion whether the proposed 1972 income
tax return and procedures, announced recently by the Department of Taxation,
are in conformity with the law.

Section 58-857 of the Code of Virginia states as follows:

“The State Tax Commissioner shall, by letter, printed circular or other-
 wise, give instructions to the commissioners of the revenue in respect to their duties as to him shall seem judicious."

This provision gives the Tax Commissioner broad authority to supervise, in a manner consistent with law, the commissioners in the performance of their duties, especially those relating to State taxes. Your letter raises the following specific questions:

1. **May the Department of Taxation mail the returns directly to the taxpayers?**

Section 58-151.066 provides as follows:

"Blank forms of returns for individual, estate or trust income shall be supplied by the Department of Taxation to the commissioners of the revenue, who shall mail or deliver them to the taxpayers not later than January fifteenth of each year."

In addition, § 58-858 directs the Department of Taxation to prepare and forward to the commissioners the necessary number of blank returns. Although the statutes cited above set forth the normal procedure for dispensing returns, there is no provision of law prohibiting the Department from mailing returns directly to the taxpayers; it has been doing so, if requested by a taxpayer, for many years. However, direct mailing, though not prohibited, does not relieve the Department of the duty under § 58-151.066 of supplying returns to the commissioners, nor does it relieve the commissioner of the revenue of the responsibility of seeing to it that all taxpayers in the jurisdiction receive returns, except to the extent that the commissioner authorizes the Tax Department to act as his agent. If the commissioner gives such authority, he need not mail returns to those taxpayers who receive returns directly from the Department, but he is still responsible for mailing returns to those taxpayers not reached by the Department’s mailing.

2. **May the Department process the returns?**

Section 58-151.064 of the Code of Virginia provides as follows:

"Every resident who is required by this chapter to file a return shall file his return with the commissioner of the revenue for the county or city in which he resides . . . ."

The following section, § 58-151.065, provides:

"Whenever an individual or fiduciary files with the Department of Taxation a State income tax return for a current year, the Department of Taxation may, at the request of the taxpayer, and for reasons sufficient to it, assess the State income tax against such taxpayer instead of transmitting such return to a commissioner of the revenue for assessment; but in every such case the Department of Taxation shall advise the appropriate commissioner of the revenue of such action."

The latter section, by implication, permits the taxpayer to file directly with the Department instead of following the procedure prescribed by § 58-151.064. It also authorizes the Department of Taxation to assess the tax and process the return if requested to do so by the taxpayer. As I understand it, the sample return for 1972, in its present form, states: "Filing of this return with the Department of Taxation will be deemed a request for the Department to process it." The quoted language alerts the taxpayer that the Department will consider his act of mailing the return to it as a conscious request that the tax be assessed by it. In my opinion, the Department is authorized to include such language on the return and is authorized to process the return and assess the tax if the taxpayer mails the return to the Department.

3. **Should the Department require attachment of depreciation schedules?**

Sections 58-151.066 and 58-151.078, as amended by Chapter 465 of the Acts
of Assembly of 1972, require that the information submitted with a tax return include gross receipts and depreciation schedules. In my opinion, it is mandatory that the Department of Taxation require that the taxpayer submit such information with the return. However, it is not necessary that the direction appear on the face of the return, so long as it is included in the instructions with the return.

TAXATION—Property—Locality must adopt land-use plan pursuant to § 15.1-446 prior to enactment of ordinance assessing land on the basis of use.

September 13, 1972

The Honorable Robert L. Gilliam, III
Commonwealth's Attorney for Westmoreland County

I have received your recent letter inquiring whether § 58-769.6, Code of Virginia (1950), as amended, requires that a county adopt a "land-use plan" pursuant to § 15.1-446 as a condition precedent to the adoption of an ordinance under § 58-769.6. You indicate that Westmoreland County has enacted a zoning ordinance and zoning map but has not adopted a "land-use plan."

Section 58-769.6, authorizing local governing bodies to classify and assess agricultural, horticultural, forest and open space land on the basis of use, provides in pertinent part:

"Any county, city or town in the Commonwealth which has adopted a land-use plan may adopt an ordinance to provide for the assessment and taxation, in accord with the provisions of this article, of real estate classified in § 58-769.5." (Emphasis supplied.)

The emphasized wording was not present in the preliminary drafts of the proposed bill but was added during the legislative process.

Section 15.1-446 contemplates the preparation of a comprehensive plan for the physical development of the territory within its jurisdiction by the local planning commission. Such plan shall show the commission's long-range recommendations for the general development of the territory covered by the plan. The portion of the plan designating areas for various types of public and private development and use, such as different kinds of residential, commercial, industrial, agricultural, conservation, recreation, public service, flood plain and drainage, and other areas "... may be known as a Land Use Plan. . ."

Although § 58-769.6 does not specifically refer to the § 15.1-446 "land-use plan," the Commission of the Industry of Agriculture approved a model ordinance to be used by localities which contained a footnote providing that "a land-use plan pursuant to Virginia Code § 15.1-446 is required by [§ 58-769.6] to be adopted before the enactment of this ordinance." In view of this interpretation of § 58-769.6 by a State agency which was actively involved in the preparation and implementation of the bill providing for use assessment, I am of the opinion that a "land-use plan" pursuant to § 15.1-446 must be adopted by a county prior to its enactment of an ordinance under § 58-769.6.

TAXATION—Property Tax—No proration of taxes for exemption effective June 1.

May 24, 1973

The Honorable Frederic Lee Ruck
County Attorney for Fairfax County
Your letter of May 16 requested an opinion whether Vinson Hall Corporation, exempted from property taxation by § 58-12.11 of the Code of Virginia, effective June 1, 1973, is entitled to any relief from taxes during the calendar year 1973.

As your letter indicates, §§ 58-796 and 58-835 establish that property taxes are assessed as of January 1 of each year. The status of the taxpayer, as well as of the property, is determined as of that day unless specific statutory language provides otherwise. Although §§ 58-818 and 58-822 provide for relief from a portion of the tax when properties are acquired by certain tax-exempt entities, these sections apply only to properties acquired by the United States, the State, a political subdivision, or a church or religious body. Property which is acquired during a calendar year by any other exempt organization is subject to tax for the full calendar year.

I know of no other provision which would alter the rule that taxes are assessed as of January one. It is therefore my opinion that the exemption granted to Vinson Hall by the General Assembly applies only to taxes for the calendar year 1974 and thereafter. No proration for the year 1973 should be permitted.

TAXATION—Property Tax—Property is taxed to owner on tax day.

October 4, 1972

The Honorable H. A. Ransone
Commissioner of the Revenue for Botetourt County

I have received your recent letter from which I quote:

"The following resolution has been adopted by the Botetourt County Board of Supervisors:

"WHEREAS, assessment of new construction is made on an annual basis in Botetourt County by the Commissioner of Revenue.

"WHEREAS, Section 58-811.1 of the Code of Virginia provides for assessment of new buildings on a prorated basis and the tax to be computed according to the portion of the year such building is substantially completed or fit for use.

"NOW, THEREFORE, BE IT RESOLVED pursuant to Section 58-811.1 of the Code of Virginia, the Botetourt County Board of Supervisors does hereby direct the Commissioner of Revenue of Botetourt County to assess new buildings in Botetourt County at the time such building is substantially completed or fit for use, occupancy and enjoyment.

"BE IT FURTHER RESOLVED the Commissioner is directed to assess new construction in Botetourt County on July 1 of 1972 and semi-annually thereafter.'

"A great portion of the new construction to be assessed on July 1 has been a speculative venture by various contractors, and the land upon which these buildings are located has changed hands one or more times since January 1, 1972. My question is this: In whose name should a building be assessed on July 1—the owner of the land on January 1 or the owner of the new construction on July 1?"

Section 58-20, Code of Virginia (1950), as amended, provides that property shall be taxed to the owner. Improvements are taxed to the owner of the land except as provided by § 58-773.1. Taxes are always assessed to the owner on the tax day. Therefore, it is my opinion that any additional assessment pursuant to § 58-811.1 must be to the owner on the tax day used for assessment purposes, which in your case is July 1.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Property Tax Exemption—Real estate owned by the Old Church Community Club, Incorporated, is not exempt.

December 1, 1972

The Honorable Charles F. White, Jr.
Commissioner of the Revenue for Hanover County

I have received your recent letter inquiring whether property owned by the Old Church Community Center, Incorporated, is exempt from taxation.

The corporation owns a community center building and land used for a baseball diamond, a horse rink and picnic shelters. It sponsors a little league baseball team, a Halloween party for community children, and annual horse show and similar activities. The corporate charter indicates that the primary purpose is to "... further civic and social development in and about the community of Old Church." The corporation is non-stock, nonprofit and is supported by nominal membership fees and dues. Membership is granted upon application endorsed by two members in good standing and approved by the membership committee and the board of directors.

Property tax exemptions are provided by Article X, Section 6, of the revised Constitution of Virginia, and pursuant thereto, by Title 58, Ch. 1, Art. 3, Code of Virginia (1950), as amended. Section 58-12 purports to grant an exemption for property "owned by any community club or association or its trustees, when said property is used or operated exclusively for general and community purposes and not for profit. However, this office has previously declared this provision unconstitutional. See Report of the Attorney General (1966-1967), p. 283. Although the previous opinion was rendered pursuant to Section 183 of the Constitution of Virginia, which was superseded by Article X of the revised Constitution, I am unable to perceive any present constitutional authority for the exemption of property of the nature contemplated by the quoted provision.

Upon consideration of the foregoing, I am of the opinion that the property owned by the Old Church Community Club, Incorporated, is taxable.

TAXATION—Public Service Corporations—Property—Taxable on property at current real estate rate when it exceeds personal property rate on January 1, 1966.

October 31, 1972

The Honorable Lorena D. Conner
Commissioner of the Revenue for Lancaster County

I have received your recent letter from which I quote:

"I respectfully request an opinion from you as to the affect of code section 58-514.2 on the 1972 assessment of taxes on the personal property of Public Service Corporations under the following circumstances:

"1. From 1966 thru 1971 inclusive our personal property tax levy has been at the rate of $2.45 per hundred. In 1972 the levy has been raised to $3.80 per hundred.

"2. From 1966 thru 1971 while the real estate levy has changed, it never reached as high a rate as $2.45. The 1972 real estate levy is at the rate of $2.70.

"3. This office has been transferring 1/20 of the property previously taxed as tangible personal property of such corporations starting with the year 1967 to the real estate classification. Therefore prior to this year 25%
of this property (excluding automobiles and trucks) has been so transferred.

"My question is whether or not for the year 1972 the remaining personal property should be subject to the levy of $2.70 (the real estate rate) or to a levy of $2.45 the 1966 personal property rate."

Section 58-514.2, Code of Virginia (1950), as amended, provides that, as a general rule, all property of public service corporations, both real and personal (except automobiles and trucks), shall be taxed at the real estate rate applicable each year in the locality where the property is taxable. An exception to this general rule applies to localities which on January 1, 1966, imposed a higher rate of taxation upon personal than upon real property. The exception places a ceiling upon the tax rate applicable to the assessed valuation of any class of property (except automobiles and trucks) taxed as tangible personal property by a locality prior to January 1, 1966. The ceiling is the higher of the current real estate tax rate or the 1966 personal property tax rate. See Report of the Attorney General (1970-1971), p. 375. The amount of property subject to taxation at the personal property rate is reduced each year beginning January 1, 1967, by one-twentieth of the assessed valuation of such tangible personal property on January 1, 1966. By January 1, 1986, all of the property of public service corporations (except automobiles and trucks) will be taxed at the current real estate tax rate. The exception to the general rule was not enacted to prohibit a locality from imposing its current real estate tax rate upon the tangible personal property of public service corporations. The exception was designed to gradually eliminate the imposition of personal property tax rates which are higher than real estate tax rates to the classes of property taxed as tangible personal property on January 1, 1966.

In view of the foregoing, it is my opinion that all of the personal property (except automobiles and trucks) of public service corporations may be taxed by Lancaster County at the $2.70 rate for the 1972 tax year.

TAXATION—Real and Personal Property—Community association operating recreational facility not exempt.

June 14, 1973

THE HONORABLE IVAN D. MAPP Commissioner of the Revenue for the City of Virginia Beach

I have received your letter of June 4, 1973, inquiring whether the real property owned by Green Run Homes Association, a Virginia nonprofit and non-stock corporation, is exempt from taxation.

The Association's charter provides that its purpose is "... to provide for maintenance, preservation, and operation of [common areas in a residential development set aside for the use of the homeowners, including a swimming pool and clubhouse] ... and to promote the health, safety and welfare of the residents within the [development]. ..." Membership in the Association is limited to the owners of the property in the development.

Property tax exemptions are provided by § 58-12, et seq., Code of Virginia (1950), as amended, pursuant to Article X, Section 6, of the revised Constitution of Virginia. Section 58-12(5) purports to exempt property "owned by any community club or association or its trustees, when said property is used or operated exclusively for general and community purposes and not for profit." However, this office has previously declared this provision unconstitutional. See Report of the Attorney General (1966-1967), p. 283; (1956-1957), p. 252. Although the previous opinions were rendered pursuant to Section 183 of the Constitution of 1928, which was superseded by Article X of the present Constitu-
tion, I am unable to discern any present constitutional authority for the exemption of property as described in the quoted provision of § 58-12(5). Accordingly, it is my opinion that property owned by the Green Run Homes Association is subject to taxation. This opinion is in accord with other recent opinions upon similar issues. See my opinion to the Honorable Charles F. White, Jr., Commissioner of the Revenue for Hanover County, dated December 1, 1972, a copy of which is enclosed, and Report of the Attorney General (1971-1972), p. 426.

TAXATION—Real Estate—Application for assessment and taxation on basis of use cannot be accepted after November one for succeeding tax year.

COMMISSIONERS OF REVENUE—Assessment of Real Property on Basis of Use—Application cannot be accepted after November one for succeeding tax year.

March 30, 1973

The Honorable Ivan Mapp
Commissioner of the Revenue for the City of Virginia Beach

I have received your letter of March 21, 1973, from which I quote:

"Several property owners who live in Virginia Beach have failed to meet the deadline of November 1, 1972 to file an application with this office to have property assessed under the new State law as it applies to special assessments of agricultural, horticultural, forest and open space real estate.

"These people have expressed a desire to make application at this time. I will appreciate if you will advise me whether or not the law permits the Commissioner of Revenue to accept applications, process them and assess real estate as open space land after the expiration of the deadline."

Article X, Section 2, of the revised Constitution of Virginia provides that the General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses and may by general law authorize any locality to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate. The General Assembly is required to "... prescribe the limits, conditions, and extent of such deferral or relief."

Section 58-769.4, et seq., Code of Virginia (1950), as amended, authorizes counties, cities and towns to adopt an ordinance providing for assessments of certain land upon the basis of its value for the use to which it is devoted. Section 58-769.8 provides, inter alia:

"Property owners must submit an application for taxation on the basis of a use assessment to the commissioner of the revenue by November one preceding each tax year for which such taxation is sought."

Section 58-769.8 prescribes, in unequivocal terms, one of the conditions of tax relief which is authorized by Article X, Section 6. Therefore, it is my opinion that the commissioner of the revenue is not permitted to accept applications for use assessment for any tax year after the deadline of November one of the preceding year.
TAXATION—Real Estate—Counties, Cities and Towns—Resolution requiring assessment of new buildings pursuant to § 58-811.1 deemed to include provisions of § 58-811.2.

January 23, 1973

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

I have received your recent letter inquiring whether the resolution adopted by the city of Franklin pursuant to § 58-811.1, Code of Virginia (1950), as amended, authorizes you to be abate a portion of the real property tax assessed upon buildings which were razed or destroyed subsequent to the date as of which the assessment was made, in accordance with § 58-811.2, although the resolution does not contain any reference to the matters provided for in the latter statute.

Section 58-811.1 provides, inter alia:

"In any county, incorporated town or city in which a resolution so directing shall have been adopted by an affirmative vote of a majority of the members of the governing body thereof, all new buildings substantially completed or fit for use, occupancy and enjoyment prior to November one of the year of completion shall be assessed when so completed or fit for use, occupancy and enjoyment, and the commissioner of the revenue of such county, incorporated town or city shall enter in the books the fair market value of such building. . . . The tax on such new building for that year shall be computed according to the ratio which the portion of the year such building is substantially completed or fit for use, occupancy and enjoyment bears to the entire year. . . ."

Section 58-811.2 provides, inter alia:

"In any county or city wherein assessments are made as provided in § 58-811.1, the governing body shall provide for the abatement of levies on buildings which are razed or destroyed or damaged by a fortuitous happening beyond the control of the owner. . . . The tax on such razed, destroyed or damaged building shall be computed according to the ratio which the portion of the year such building was fit for use, occupancy and enjoyment bears the entire year."

It is my opinion that when a locality has adopted a resolution pursuant to § 58-811.1, such resolution proprio vigore incorporates the provisions of § 58-811.2 notwithstanding that the resolution does not specifically provide for the abatement of levies on buildings which are razed or destroyed subsequent to the date as of which the assessment was made. See Report of the Attorney General (1969-1970), p. 247; (1963-1964), p. 294(1).

TAXATION—Real Estate—Property owned by Robert E. Lee Memorial Association, Inc.—Not used for purposes of national shrine not exempt from taxation.

July 13, 1972

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

I have received your recent letter referring to my opinion to the Honorable John P. Beale, Commissioner of the Revenue for Westmoreland County, dated March 15, 1971, and found in Report of the Attorney General (1970-1971), p. 374. You inquire whether that opinion would be changed by § 58-14, Code of Virginia (1950), as amended, and by the fact that the Robert E. Lee Memorial Association,
Inc., charges a fee to enter the grounds and an additional fee to enter the mansion and also raises livestock and crops on the acreage it owns.

The opinion to which you refer held that there was no statutory limitation on the amount of real estate which may be owned by the corporation *consonant with its purposes* to maintain Stratford Hall as a national shrine in perpetual memory of Robert E. Lee. That opinion would not be affected by the additional facts which you now present.

Section 58-14, however, does contain a limitation upon the tax exemptions granted by § 58-12 pursuant to Section 183 of the Constitution of Virginia and continued by Article X, Section 6(f), of the revised Constitution of Virginia. The limitation is that land or buildings which are leased or otherwise become a source of "revenue or profit" lose exempt status to the extent they are so utilized.

I do not interpret "revenue or profit" to include a small fee charged for entry into the buildings or grounds of a national shrine. *Norfolk v. Nansemond Supervisors*, 168 Va. 606, 620 (1937), stated that the term required that there be a substantial net profit remaining after the deduction from gross income of all proper charges and expenses.

I do not, however, construe the corporation's *purposes*, quoted in my prior opinion, to include the operation of a sizable farming or cattle-raising business. Therefore, whether "revenue or profit" exists is of no consequence since the property is not exempted by § 58-12 unless its use is within the purposes of the corporation. You have indicated that the corporation now owns an estate of 1,200 acres, a substantial percentage of which is under cultivation. It is my opinion that to the extent the land owned by the corporation is so utilized, it is a proper subject for real estate taxation.

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**TAXATION—Real Estate Assessment by Use Value—Application by property owners.**

June 7, 1973

**The Honorable Alice Jane Childs**

Commissioner of the Revenue for Fauquier County

Your letter of May 28 requested an opinion interpreting the requirement in § 58-769.8 of the Code of Virginia that "property owners" submit applications for taxation on the basis of use under Article 1.1 of Chapter 15 of Title 58 of the Code of Virginia (§ 58-769.4).

The provisions for assessment of land devoted to agricultural, horticultural, forest and open space uses on the basis of its use extend to the landowner the privilege to pay taxes on a lower valuation of his property than fair market value. Section 58-769.10, providing for rollback taxes in the case of a change in use, creates an obligation to which the landowner submits when he applies for assessment by use. Because the land will be subject to the lien of the rollback taxes in the future, it is my opinion that the words "property owners" should be interpreted to mean *all* owners of the property, and therefore that all owners of any property for which an application is filed should be accounted for in the application. I will answer your specific questions *seriatim*.

1. How should estate or heir property be handled?

It is my opinion that every heir to the property for which assessment in accordance with use is desired should sign the application unless an affidavit signed by all heirs is recorded in the Clerk's office designating the person who has the power to make such an application. It would be advisable for the Commissioner of the
Revenue to note on the application the book and page on which this affidavit is recorded. If it is impossible to account for all of the heirs, application should not be permitted until the question of ownership is resolved.

2. What procedures should be used where property is owned by infants?

In the case where the infant is residing with his parents, you may accept the signature of the parents or parent with whom he is living as that of his guardian. The child should be required to sign also if he is old enough to do so. Where the child is not residing with a parent, an instrument designating a guardian should be recorded in the Clerk's office.

3. When accepting applications from corporations must all corporate officers sign?

The application should contain the signature of one officer who is authorized by the corporation to sign on its behalf. It is unnecessary for any more than one to sign.

4. Is it permissible for people claiming to be agents for landowners to sign the application?

Unless a power of attorney or other legal document designating the agent empowered to sign use assessment applications is recorded in the Clerk's office, no agents should be permitted to sign. Again, a marginal notation on the application of book and page would be advisable.

5. Is a witnessed “x” mark acceptable? Must it be notarized?

In my opinion, a witnessed “x” mark is acceptable for a person who is unable to write. Two witnesses would be advisable. It is not necessary to have it notarized.

TAXATION—Real Estate Assessments—Commissioner of revenue cannot change an assessment based upon possibility that record owner has lost title through adverse possession.

November 29, 1972

THE HONORABLE ALENE H. TUCKER
Commissioner of the Revenue for Charlotte County

I have received your letter of November 18, 1972, inquiring whether you can delete a parcel of real property consisting of timber land from the land book at the request of its owner of record due to the owner's inability to fix the boundaries of the tract and because of an alleged loss of title through adverse possession. You state the facts as follows:

"An 8 acre tract of land was conveyed to the grantee by general warranty deed in 1951. In November of 1952 a 301.5 acre tract was conveyed to [a corporation] by a different grantor which was supposed to join the 8 acre tract. A plat was recorded with the deed to [the corporation]. The owner of the 8 acre tract feels that her land was included (in error) in the plat recorded with the deed to [the corporation] since she cannot locate her 8 acres. I have traced the deeds to the 8 acre tract and even though it joins the 301.5 acre tract, it should be an entirely separate tract of land. The owner of the 8 acres has been told that [the corporation] would now own her land by adverse possession although she has paid the taxes each year; therefore she is requesting me to drop the 8 acre tract from the Land Book."

The acquisition of title by adverse possession requires the performance of acts indicating possession under a claim of right. *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612 (1908). The acts relied upon to establish such ownership must

The foregoing indicates that the acquisition of title through adverse possession is not easy to establish and cannot be presumed, and a commissioner of the revenue should not change an assessment based upon the possibility that the record owner has lost his title through adverse possession. Section 58-809 provides that land which has been correctly assessed to one person cannot be assessed to another without evidence of record that such change is proper.

Therefore, it is my opinion that a commissioner of the revenue has no authority to assess land to a person other than its record owner because of an alleged loss of title through adverse possession nor to delete property from the land book because its record owner does not know its exact location. If the law were otherwise, the assessment process would be clouded with an element of uncertainty.

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**TAXATION—Real Estate Taxes**—Taxes assessed to person other than owner constitute a valid lien upon land unless such assessment has been prejudicial to party challenging same.

November 22, 1972

**The Honorable Victor J. Smith**
Commissioner of the Revenue for the City of Harrisonburg

I have received your recent letter inquiring whether real property taxes assessed to the wrong person constitute a lien upon the land with respect to which they were assessed. You indicate that a parcel of real property was erroneously assessed in the name of a person who was not the owner from 1932 until 1964, that it was sold to the Commonwealth for delinquent taxes for several years from 1952 through 1963, and that in 1964 the devisee of the former owner asserted a claim to the property and paid the 1964 taxes. Taxes assessed since 1964 have been paid by the devisee. She now desires to sell the property and has inquired whether the taxes returned delinquent prior to 1964 constitute a lien upon the property.

Section 58-762, Code of Virginia (1950), as amended, provides that there shall be a lien on all real estate subject to annual taxation for the payment of taxes assessed thereon, which lien shall continue until actual payment has been made.

Section 58-767 releases all liens for delinquent real estate taxes at the expiration of twenty years following the date upon which they became delinquent. Taxes become delinquent on June 30 of the year following the year for which they are assessed. See § 58-964, § 58-979 and Report of the Attorney General (1968-1969), p. 227. Therefore, taxes for years prior to 1952 cannot constitute a lien upon the property.

Section 58-815 provides that no assessment of real estate shall be held to be invalid "... because of any error, omission or irregularity by the commissioner of the revenue . . . in charging such real estate on the land book unless it be shown by the person . . . contesting any such assessment that such error, omission or irregularity has operated to the prejudice of his . . . rights."

This section was enacted to change the law regarding the validity of real
estate assessments. Banks v. County of Norfolk, 191 Va. 463 (1950). Prior to the enactment of this statute, an assessment in the wrong name was invalid and therefore could not constitute a lien. County of Albemarle v. Massey, 183 Va. 310 (1944).

City of Richmond v. McKenny, 194 Va. 427 (1952), decided that § 58-815 covered every conceivable situation in which an assessing official had failed to charge real estate on the land book according to law. The Court observed, at 433:

"The legislature says, in effect, that the interest of the public in the collection of taxes is more important than the failure of an assessing official to properly perform his duties and unless such failure on the part of the assessing officer has been prejudicial according to the terms of § 58-815, it will not invalidate the assessment."

I am unable to perceive how the present owner could successfully challenge the erroneous assessments on the basis that she was prejudiced thereby. To the contrary, she and the former owner from whom she inherited the property were both benefited by the error because they escaped the personal liability for taxes imposed by § 58-1014. Banks v. County of Norfolk, supra. Accordingly, I am of the opinion that the taxes, although assessed to a person other than the owner, constitute a valid lien upon the property.

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TAXATION—Real Property—Effective date of use assessment ordinance may be postponed from 1973 to 1974 tax year—Roll-back taxes not imposed unless use of property changes.

June 1, 1973

THE HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

I have received your letter of May 10, 1973, from which I quote:

"In October of 1972, the Loudoun County Board of Supervisors adopted an ordinance to provide for special assessment and taxation of agricultural, horticultural, forestry, and open space real estate pursuant to the provisions of Article 1.1, Chapter 15, Title 58 of the Code of Virginia (1950) as amended. The Board of Supervisors at that time declared the ordinance to be effective for the 1973 real estate tax year. A number of property owners submitted applications for taxation on the basis of use assessment by November 1, 1972, as required by § 58-769.8.

"Under the provisions of § 58-769.5, 'real estate devoted to agricultural use' and 'real estate devoted to horticultural use' were established and defined, thereby requiring the local officer to insure that the applicant's real estate fell within the definition in § 58-769.5 and that the requirements of § 58-769.7 were met relating to minimum acreage and gross revenue in determining qualification for special land use tax treatment.

"The 1973 Virginia General Assembly, in Chapter 209 of the Acts, amended § 58-769.5 to the extent of removing the statutory definitions of agricultural and horticultural real estate and inserting in their stead authority for the Commissioner of Agriculture and Commerce to prescribe uniform standards for real estate to meet in order to qualify for special treatment as agricultural or horticultural real estate. Due to the effect of the 1973 amendments, it now appears that certain real estate which appeared to be entitled to special assessment as agricultural or horticultural real estate under the 1971 Act will not be so entitled under the uniform
standards soon to be prescribed by the Commissioner of Agriculture and Commerce.

“In light of the foregoing, I request your opinion as to the following:

1. Can the Board of Supervisors change the effective date of the ordinance passed in October 1972 so that it would not now be effective for the 1973 tax year but, instead, would only be effective for tax year 1974, thereby allowing the local assessor to determine qualification for special assessment treatment under the forthcoming standards to be promulgated by the Commissioner of Agriculture and Commerce, and not under present law?

2. Can the Board apply the standards to be promulgated by the Commissioner of Agriculture and Commerce retroactive to January 1, 1973, so that qualification for special assessment for the 1973 tax year will be determined under the 1973 amendments and not the definitions of the 1971 Act?

3. Can the Board apply the forthcoming standards to be promulgated by the Commissioner of Agriculture and Commerce for the remaining portion of the 1973 tax year?

4. Would land owners who qualify for special assessment and taxation under the 1971 Act but whose real estate no longer qualifies under the 1973 amendment and the Commissioner's standards be subject to a roll-back tax for preceding years?”

With respect to your first question, I am unaware of any legal principle that would preclude the board from changing the effective date of the use assessment ordinance from January 1, 1973, to January 1, 1974. The tax rate has not yet been fixed, and the taxpayers have not been assessed with 1973 real property taxes. Although the applications required by § 58-769.8, Code of Virginia (1950), as amended, have been submitted and the property has been valued on the basis of its use for purposes of assessment, I am of the opinion that this action has not vested the taxpayers with a legal right to use value assessments for the 1973 tax year. Accordingly, I conclude that the board may defer the effective date of the ordinance to January 1, 1974.

Your second and third questions are related in that in either case a change in the qualifications at this time might result in denial of a taxpayer's right to apply for use assessment pursuant to § 58-769.8 because an application cannot now be accepted for the 1973 tax year. See my opinion to the Honorable Ivan Mapp, Commissioner of the Revenue for the City of Virginia Beach, dated March 30, 1973, a copy of which is enclosed. Assuming, arguendo, that a change could be made by the board pursuant to the amended statutes which become effective today, the board cannot, in my opinion, select the portion of the amendments it wishes to follow and disregard the balance. Regardless of the fact that the standards to be promulgated are unlikely to broaden the qualifying uses, it is conceivable that a use previously thought to be ineligible might be within the standards. In addition, § 58-769.7(b) no longer contains the gross sales provision and thus property which was not eligible because it had not produced sufficient revenue in prior years can now qualify. It is my opinion, therefore, that the answer to your second and third questions is in the negative.

In reply to your fourth question, § 58-769.10 provides that property is subject to roll-back taxes when “... the use by which it qualified changes, to a nonqualifying use. . .” (Emphasis supplied.) The statute does not purport to subject property to such taxes unless its use changes; and, therefore, I am of the opinion that a change in the statutory criteria for use value assessment does not operate to subject property which no longer qualifies to the roll-back taxes.
TAXATION—Real Property—Leasehold interest.

March 19, 1973

The Honorable R. Lewis Keith
Commissioner of the Revenue for Amherst County

Your letter of March 7 requested an opinion whether a tract of land owned by the county of Amherst and leased to the Winton Country Club and Golf Course, Inc., is exempt from real estate taxes.

All property owned by political subdivisions of the State is exempt from tax under Article X, Section 6(a)(1), of the Constitution. However, § 58-758 of the Code of Virginia includes in the definition of “taxable real estate,” and thus subjects to tax, any leasehold interest in land which is exempt from taxation to the owner. This section was upheld by the Supreme Court in Shaia v. City of Richmond, 207 Va. 885 (1967). That case also contains a discussion of the method of valuing such a leasehold interest.

As there is no provision of the Code or the Constitution which would exempt the Winton Country Club from property tax, it is subject to tax on its leasehold interest.

TAXATION—Real Property—Library owned by nonprofit corporation exempt.

March 19, 1973

The Honorable James W. Haley, Jr.
Commonwealth’s Attorney for King George County

I have received your recent letter from which I quote:

"[An individual] has erected with her own funds, a library in King George County which she intends to be for the benefit of the residents of King George. She intends to create a non-stock Virginia Corporation, have it qualified before the Internal Revenue Service as a nonprofit organization, and convey the library and its appurtenant land to the corporation. It will be a free public library to anyone wishing to use it. She will invite contributions for its operating expense from any interested contributors, but, in any event, will create an endowment sufficient for all future operating expenses.

"The Board of Supervisors of King George County wishes to exempt the property from the payment of real property taxes. Section 58-12 of the Code of Virginia provides that property owned by public libraries together with the endowment funds thereof not invested in real estate are exempt from taxation. Will you please advise me if the library in question would qualify under the definition of public library so as to come within the provisions of 58-12?"

Article X, Section 6(a)(4), of the revised Virginia Constitution, exempts “[p]roperty 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.” A similarly worded exemption was contained in Section 183(d) of the Virginia Constitution of 1902 and is also found in § 58-12(4), Code of Virginia (1950), as amended.

In St. Andrew's Assn. v. City of Richmond, 203 Va. 630 (1962), the Court held that real property owned by a non-stock, nonprofit Virginia corporation chartered for benevolent and charitable purposes was exempt from taxation pursuant to Sections 183(d) and 58-12(4). A free public library building was erected
upon the property by the association with funds contributed by an individual donor. The library was operated with the aid of the income from an endowment fund which had also been given to the association by the donor.

The factual similarity of the case to the situation under consideration necessitates an exemption for this property after it is conveyed to the corporation by the donor. Accordingly, it is my opinion that the library property will become exempt from taxation beginning January 1 of the year following the year in which the corporation acquires the property, provided that it is primarily used for a public library.

TAXATION—Real Property—Use valuation—Gross revenue requirement for use assessment of agricultural lands may be met by current owner on basis of former owner's revenues from property sold.

November 24, 1972

THE HONORABLE ALICE JANE CHILDS
Commissioner of the Revenue for Fauquier County

I have received your letter of October 30, 1972, from which I quote:

"On October 12, 1972, the Board of Supervisors of Fauquier County passed an ordinance adopting the Land Use Tax, and the following problem has come to my attention for a ruling:

'Eighty-seven and two-tenth acres of land were transferred by a father to a son in February of 1969. The son came to the Commissioner of the Revenue's Office to apply for land use and was informed that he could not qualify under agricultural use because he had not had gross receipts of $500 for three out of the past five years. However, the father claims that he has farmed his son's acreage along with his own acreage and that the income the father received should be allocated to the lands owned by him and his son.'

"Would you please let me know at the earliest possible date whether the son would qualify for land use under these circumstances?"

Section 58-769.7 provides inter alia:

"Prior to the assessment of any parcel of real estate under any ordinance adopted pursuant to this article, 'responsible officers' shall:

* * *

"(b) Determine further that real estate devoted to (1) agricultural or horticultural use consists of a minimum of five acres and has produced gross sales of agricultural or horticultural products produced thereon together with any payments received under a soil conservation program averaging at least five hundred dollars per year for each of three years in a five-year period immediately preceding the tax year in issue . . . ."

The statute requires that the gross sales of agricultural or horticultural products produced from the land sought to be taxed on the basis of use, plus any soil conservation payments attributable to such land, must have averaged at least five hundred dollars per year for each of three years in the five years preceding the year for which use assessment is sought. The statute does not provide that the owner seeking the use assessment must have owned the land during the time the gross sales and conservation payments occurred. To place the latter requirement in the statute by construction would impair the attainment of the public policies as declared by the General Assembly in § 58-769.4, one of which is to discourage the conversion of agricultural real estate to nonfarm use. The minimum receipts
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requirement prevents the qualification of land for agricultural or horticultural use taxation until it is demonstrated that the property has been utilized as a productive farm for several years prior to the application. It should not be construed to prevent use taxation of farm property recently acquired by the applicant if the receipts of the previous owner of the land meet the statutory requirements.

Therefore, I am of the opinion that the gross receipts from the agricultural or horticultural use of the land sought to be assessed pursuant to § 58-769.4, et seq., should be determined without regard to the ownership of the property during the period under consideration.

TAXATION—Real Property Reassessments—Commonwealth's partial payment of salary of city appraiser as employee of commissioner of revenue does not affect requirement of quadrennial reassessments nor prohibit adoption of annual assessments.

February 20, 1973

THE HONORABLE D. B. HANEL
Commissioner of the Revenue for the City of Martinsville

I have received your recent letter from which I quote:

“We need an interpretation of Tax Law 58-769.2 which has to do with annual real estate assessment and equalization by commissioner of revenue.

“We have been informed that due to the fact that our local city appraiser has his salary paid 1/2 by the State and 1/2 by the city we would still have to have a quadrennial reassessment. To me, this does not seem logical. I realize that any outside help that I may require would have to be paid for from city funds. Also, the costs of the equalization board plus supplies and postage would have to be assumed by the city. Code 58-769.3 spells out what would be required should my office refuse the reassessment duties.

“I would appreciate clarification of this law.”

Section 58-769.2, Code of Virginia (1950), as amended, provides in pertinent part:

“The governing body of any county or city may, by resolution duly adopted, in lieu of the method now prescribed by law, provided for the annual assessment and equalization of real estate for local taxation by the commissioner of the revenue; provided, however, that no commissioner of the revenue without his consent shall be required to make such annual assessment and equalization, and if made, all costs incurred shall be borne by the county or city.”

The fact that the local appraiser’s salary is partially paid by the Commonwealth as an expense of your office pursuant to § 14.1-64 does not affect the provisions of law requiring the city of Martinsville to have quadrennial reassessments, or allowing it to adopt annual assessments. If you accept the annual assessment duties pursuant to a resolution adopted by the city council as authorized by § 58-769.2, all costs of such annual assessments must be borne by the city. You must continue to perform the routine duties required of you by law, and the expenses of performing same should be submitted to the Compensation Board in the manner provided by § 14.1-50. However, if you must employ additional assessors to assist you in making the annual assessments, their salaries will not be partially paid by the Commonwealth.
TAXATION—Recordation—Applies to deed conveying real estate from trustee to beneficiary; does not apply to buildings upon land which are owned by lessee and are not conveyed to beneficiary.

February 13, 1973

THE HONORABLE CARL E. HENNICH, Clerk
Corporation Court for the City of Charlottesville

I have received your recent letter inquiring whether the recordation tax imposed by § 58-54, Code of Virginia (1950), as amended, applies to a deed conveying real estate from a trustee to the beneficiary of the trust, and if so, whether the value of certain improvements which were erected upon the property by a lessee should be included in determining the tax. The lease was entered into when the property was unimproved and is for a term of ninety-nine years. It provides that the lessee may construct buildings on the demised premises and that title to such buildings "... shall be in and remain in Tenant for and during the entire term of the lease, but at the expiration or other termination thereof, the improvements erected and in place at that time shall vest in Landlord."

Section 58-54 provides, in pertinent part:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater."


TAXATION—Recordation—Applies to entire amount secured by new deed of trust although earlier deed of trust previously recorded secured a portion of the current debt.

February 13, 1973

THE HONORABLE J. PHIL BENNINGTON, Clerk
Circuit Court of Grayson County

I have received your letter of January 26, 1973, from which I quote:

"I have been presented a Deed of Trust for Fifty Thousand ($50,000.00) Dollars, said Deed of Trust indicates that Thirty Thousand ($30,000.00) Dollars of it was a prior Deed of Trust recorded in this office and the Twenty Thousand ($20,000.00) Dollars is for additional money. Can this instrument be recorded by charging the tax on Twenty Thousand ($20,000.00) Dollars? If not, can an instrument be written covering the prior Deed of Trust and including the above mentioned addition so that the Thirty Thousand ($30,000.00) Dollars will not be taxable?"
Section 58-55, Code of Virginia (1950), as amended, provides, inter alia:

"On deeds of trust or mortgages the tax shall be fifteen cents upon every hundred dollars or portion thereof of the amount of bonds or other obligations secured thereby."

Section 58-60 exempts certain supplemental deeds of trust from the tax imposed by § 58-55 provided it has been paid upon the recordation of the original instrument. This exemption, however, is limited by the requirement that "... the sole purpose and effect of the supplemental [instrument] is to convey ... property, real or personal, in addition to or in substitution ... of the property conveyed ... in the original instrument, to secure or to better secure the payment of the amount contracted for in the original instrument. ..."

When a new deed of trust is given to secure both the amount secured by a previous deed of trust and an additional sum owned as a result of another loan, the sole purpose of the new deed of trust is not to secure or to better secure the payment of the amount secured by the previous instrument. Accordingly, this office has previously stated that the tax imposed by § 58-55 is measured by the entire amount secured by the new deed of trust. See Report of the Attorney General (1969-1970), p. 283; (1967-1968), p. 284; (1955-1956), p. 217.

Therefore, in the circumstances under consideration, the recordation tax imposed by § 58-55 must be based upon the sum of fifty thousand dollars. I am not aware of any manner by which this result can be circumvented without utilizing a second deed of trust securing the sum of twenty thousand dollars, which would be subordinate to the first deed of trust previously recorded.

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TAXATION—Recordation—Assignment of deed of trust is subject to recordation tax.

January 8, 1973

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

I have received your recent letter inquiring whether an assignment of a deed of trust is subject to recordation taxes. The deed of trust was recorded previously and the tax imposed by § 58-55, Code of Virginia (1950), as amended, was paid at the time of recordation. Subsequently, the bank holding the notes secured by the deed of trust sold them to another bank, and the purchasing bank required that the deed of trust be assigned to it and now desires to record the assignment.

Section 58-58 provides, in pertinent part:

"On every contract or memorandum thereof, relating to real or personal property ... 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... ."

This office has previously stated, by opinions in which I concur, that an assignment of a deed of trust is a contract which is subject to the recordation tax imposed by § 58-58. See Report of the Attorney General (1961-1962), p. 260; (1957-1958), p. 278. The assignment is subject to the tax in addition to the tax applicable to the recordation of the deed of trust even when the assignment is made on the face of the deed of trust. See Report of the Attorney General (1963-1964), p. 295. The tax is based upon the consideration given for the purchase of the notes secured by the deed of trust which is assigned.
TAXATION—Recordation—Deed of trust executed to secure entire amount of old loan plus new loan taxed upon total amount secured and not merely upon amount of new loan.

June 14, 1973

THE HONORABLE KATHERINE V. RESPESS
Clerk of Courts for the City of Norfolk

I have received your letter of May 8, 1973, inquiring whether the recordation tax imposed by § 58-55, Code of Virginia (1950), as amended, should be computed upon the total amount secured by a fourth deed of trust although such amount includes the unpaid principal balances on the notes secured by three prior deeds of trust. Apparently, the landowner desired to borrow additional money and consolidate his entire indebtedness in order that only one payment would be made monthly, and the lender agreed to make the loan and to pay the other noteholders the periodic installments on their notes secured by the three prior deeds of trust. The attorney recording the fourth deed of trust suggests that since the recordation tax was paid upon the full amount of the notes when the three prior deeds of trust were recorded, the tax upon the recordation of the fourth deed of trust should be computed solely upon the additional sum borrowed by the landowner.

Section 58-55 provides, in pertinent part:

"On deeds of trust or mortgages the tax shall be fifteen cents upon every hundred dollars or portion thereof of the amount of bonds or other obligations secured thereby."

Section 58-60 exempts a supplemental deed of trust from the recordation tax. This exemption, however, is not applicable to the facts under consideration because the fourth deed of trust does not convey property "... in addition to or in substitution ..." of the property conveyed by the three prior deeds of trust, nor does it "secure" or "better secure" the payment of the three prior notes. The other lenders are not affected in any way by the note secured by the fourth deed of trust, except that in the future they will receive payments on their notes from the lender secured by the fourth deed instead of from the landowner.

This office has consistently held that a deed of trust which arises out of an additional loan and incorporates the entire obligation of the landowner to the noteholder is taxable upon recordation on the full amount secured although the recordation tax had previously been paid upon the amount secured by the earlier deed of trust. See my opinion to the Honorable J. Phil Bennington, Clerk of the Circuit Court of Grayson County, dated February 13, 1973, a copy of which is enclosed. See also Report of the Attorney General (1969-1970), p. 283; (1967-1968), p. 284; (1955-1956), p. 217.

In consideration of the foregoing, it is my opinion that the recordation tax imposed by § 58-55 must be based upon the sum of two million one hundred ninety-seven thousand five hundred dollars ($2,197,500.00) which is the full amount secured by the deed of trust.

TAXATION—Recordation—Deeds presented for recordation need not contain reference to divorce or separation of the parties to qualify for tax reduction.

October 16, 1972

THE HONORABLE EDWARD G. KIDD, Clerk
Chancery Court of the City of Richmond

I have received your letter of September 25, 1972, inquiring whether § 58-57,
Code of Virginia (1950), as amended, requires that a deed transferring property pursuant to a decree of divorce or separate maintenance or pursuant to a written instrument incident to such divorce or separation contain a recitation that one of the above requisites exists to qualify for taxation thereunder.

Section 58-57 provides, in pertinent part:

"The tax . . . on any deed transferring property pursuant to a decree of divorce or of separate maintenance or pursuant to a written instrument incident to such divorce or separation, shall be fifty cents per deed."

The statute does not expressly require that the deed contain any indication that any of the requisites for qualification thereunder exists. In instances where the General Assembly has intended that an instrument contain a statement qualifying it for tax exemption, it has so provided. For example, § 58-61 requires that a deed of gift "... shall state therein that it is a deed of gift." In the absence of similar language in § 58-57, it is my opinion that it is not essential for a deed, presented for recordation and taxation pursuant to the statute, to contain any reference to the divorce or separation of the parties. Of course, the clerk must be satisfied from other evidence that the deed qualifies for such taxation. The evidence may be affidavits of the parties, a copy of the decree of divorce or written instrument pursuant thereto which requires the transfer of title to the property, or other extrinsic evidence sufficient to indicate that § 58-57 is applicable under the circumstances.

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TAXATION—Recordation—Separation of title to land and buildings—Conveyance of one without other subject to recordation tax computed upon value of property conveyed.

February 15, 1973

THE HONORABLE CLYDE E. GIBB, Clerk
Circuit Court of Northampton County

I have received your letter of January 30, 1973, from which I quote:

"Enclosed is a copy of Assignment of Lease and Bill of Sale. I would like to know if the additional recordation tax applies to the value of the building which in this case was $12,500.00. I do not believe that the additional tax applies to the Assignment of Lease. In reference to State Taxes imposed by Sec. 58-54 in calculating the value of the lease to satisfy Section 58-58 I added to the value of the building a valuation for the land feeling that the one (1) year which was automatically extended and renewed was not appropriate in this instance but that the ninety-nine (99) years was the real term of the lease.

"Also another question which was raised in this instance was the application of the fee referred to in Section 58-816. In this case there was no transfer of land but there was a transfer of the dwelling which dwelling is assessed on the Land Book of this County."

The document which you enclose with your letter contains an assignment of a lease as well as a conveyance of title to a building constructed upon the demised land by the lessee. I am advised that the lease previously recorded contains a provision that the lessee may erect improvements upon the property and that title to the improvements shall be vested in the lessee until the termination of the lease. The lease term began in 1961, and the lease contains an option to extend for an additional ninety-nine years.

With respect to the assignment of lease, the tax imposed upon contracts relating
to real or personal property by § 58-58, Code of Virginia (1950), as amended, is applicable. See Report of the Attorney General (1966-1967), p. 297; (1955-1956), p. 217. Since the demised premises consist solely of land, the value of the building is not considered in determining the amount of tax pursuant to § 58-58 except to the extent, if any, that the landowner's reversionary interest in the building increases the value of the land. See my opinion to the Honorable Carl E. Hennrich, Clerk, Corporation Court for the City of Charlottesville, dated February 13, 1973. The tax imposed by § 58-54.1 does not apply to the lease assignment because the assignment is not a sale of the property as required by the statute.

With respect to the conveyance of the building, the taxes imposed by §§ 58-54 and 58-54.1 apply. See Report of the Attorney General (1969-1970), p. 282(1). The tax imposed by § 58-54 is computed upon the greater of the consideration of the deed or the actual value of the building. The tax imposed by § 58-54.1 is computed upon the actual net consideration if it can be definitely determined, or the actual net value of the building if the consideration cannot be determined. The net consideration or the net value is the gross consideration or gross value less the amount of any liens or encumbrances upon the building existing before the sale and not removed thereby. See my opinion to the Honorable Vernon C. Womack, Clerk of the Circuit Court of Prince Edward County, dated August 21, 1972, a copy of which is enclosed.

Section 58-816 requires a fee for transferring land on the land books prepared by the commissioner of the revenue. Although the statute uses the words "land" or "lands", it is my opinion that it is also applicable to a transfer of a building independent of the land upon which it is situated due to a separation of title. The building is listed upon the land book, and a conveyance of the building requires that it be transferred upon the land book, for which transfer the fee is provided.

TAXATION—Recordation Tax—Applies to lease and contract of sale when both agreements are contained in a single document.

April 24, 1973

The Honorable John H. Powell, Clerk
Circuit Court for the City of Nansemond

I have received your recent letter inquiring whether a separate recordation tax is applicable to a lease and a contract of sale when both agreements are contained in a single document. You enclosed a contract which is a lease of a certain parcel of real property as well as an agreement to sell the same property to the lessors at a stated consideration. The lease term commenced October 1, 1964, and will terminate sixty days after the death of the survivor of the two lessors unless terminated earlier by a conveyance of the property pursuant to the sales agreement. The sales agreement provides:

"The said [lessors] hereby agree to sell, and the said [lessees] to purchase, for the sum of [amount], all that parcel of land described above with the buildings and improvements thereon . . . upon the death of the said [lessors], or the survivor of them, or within sixty days from the death of said survivor."

Section 58-58, Code of Virginia (1950), as amended, provides in pertinent part:

"On every contract or memorandum thereof, 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. . . ."
A lease contract is included within the purview of § 58-58 in express language not quoted above. A contract for the sale of real property is also within the purview of § 58-58. When a single document contains more than one type of contract, it is my opinion that the recordation tax is computed upon each separate contract contained within the document. This opinion is in accord with previous interpretations of the recordation tax statutes by this office. See Report of the Attorney General (1969-1970), p. 280 (1), p. 283 (3); (1963-1964), p. 295 (1).

TAXATION—Recordation Tax—Deed from husband and wife as tenants by entirety to themselves as tenants in common is deed of gift exempt from tax.

DEEDS—Taxation—Deed or deeds by which a husband and wife who own two parcels of real property as tenants by entirety convey one parcel to husband and other to wife are taxable as deeds of partition.

May 23, 1973

THE HONORABLE JAMES F. TOBKy, Clerk
Circuit Court for the City of Salem

I have received your recent letter inquiring whether a deed conveying a parcel of real property from a husband and wife as tenants by the entirety with right of survivorship to the same individuals as tenants in common without consideration is a deed of gift within the purview of § 58-61, Code of Virginia (1950), as amended, and therefore is exempt from the recordation tax imposed by § 58-54. You also inquire whether a husband and wife who hold two separate parcels of real property as tenants by the entirety with right of survivorship and who divide the property between them by deeds conveying one parcel to the husband and the other to the wife have partitioned their property in a manner which would justify taxation of the deeds in accordance with § 58-57.

Section 58-61 formerly expressly exempted a deed “... in which a husband and wife being tenants in common, joint tenants or tenants by the entireties whether or not with right of survivorship as at common law are both grantors and grantees from themselves to themselves, the only change being one of tenancy ... when the tax has been paid at the time of the recordation of the original deed. ...” Chapter 361, Acts of Assembly of 1964; Chapter 461, Acts of Assembly of 1952. In 1970, the statute was amended by deleting the quoted language and inserting “... any deed between parent and child or husband and wife and no monetary consideration passes between the parties. ...” Chapter 420, Acts of Assembly of 1970. By Chapter 250 of the Acts of Assembly of 1972, § 58-61 was again amended to delete any reference to deeds between specific related parties, and the following provision was added, which currently is in effect:

"Nor shall any additional recordation tax be required for admitting to record any deed of gift between an individual grantor or grantors and an individual grantee or grantees, irrespective of tenancy; provided, however, that any such deed shall state therein that it is a deed of gift."

The statute does not define the term “deed of gift”; therefore, it must be construed according to its ordinary and familiar meaning, within the context of the statute. Lawrence v. Craven Tire Co., 10 Va. 138 (1969). A deed of gift is defined as a deed executed and delivered without consideration. Black's Law Dictionary, 503 (Rev. 4th ed. 1968). The essence of a deed of gift is that the grantor transfers the property or some interest therein to the grantee without receiving any consideration therefor.

The effect of the deed about which you inquire is to sever the unity of person that previously existed and terminate the right of survivorship. See 2 Minor,
Real Property, § 852-857. I am informed that the transaction may result in the imposition of a gift tax by the Internal Revenue Service and the Virginia Department of Taxation. The amount of the tax is determined by an application of actuarial principles and varies according to the age of each spouse and the consideration furnished by each at the time the property was acquired. Accordingly, it is my opinion that the deed should be regarded as a deed of gift for purposes of the recordation tax provided that no consideration exists for the transaction. It should be noted, however, that the gift tax cannot be avoided merely by recording such deed as one of bargain and sale and paying the recordation tax, nor can the recordation tax be avoided by providing in a deed that it is one of gift when in fact consideration exists for the conveyance. The substance of the transaction determines the tax consequences.

In reply to your inquiry concerning a deed of partition, § 58-57 provides:

"The tax on any deed of partition, or any combination of deeds simultaneously executed and having the effect of a deed of partition, among joint tenants, tenants in common or copartners . . . shall be fifty cents per deed."

"Partition" is defined as "[t]he dividing of lands held by joint tenants, coparceners, or tenants in common, into distinct portions, so that they may hold them in severalty [and], in a less technical sense, any division of real or personal property between co-owners or co-proprietors," and a deed of partition is defined as "[a] species of primary or original conveyance between two or more joint tenants, coparceners, or tenants in common, by which they divide the land so held among them in severalty, each taking a distinct part." Black's Law Dictionary, 1276 (Rev. 4th ed. 1968).

A deed by which tenants by the entirety convey property from themselves to themselves as tenants in common is not a deed of partition because the deed does not divide the property into separate parts and the same individuals remain owners of an undivided interest after the conveyance. So long as these undivided interests remain, partition has not occurred. 59 Am. Jur. 2d, Partition, § 3. But where two or more separate and distinct parcels of real property are held in concurrent ownership by the same two persons, it is not necessary that a partition of each parcel into separate parcels be made, it is sufficient if the whole of each parcel is assigned to one or the other of the joint owners. See Lucy v. Kelly, 117 Va. 318 (1915); Cox v. McMullin, 55 Va. (14 Gratt.) 82 (1857); Henrie v. Johnson, 28 W. Va. 190 (1886) (dictum); § 8-692, Code of Virginia (1950), as amended; 2 Minor, Real Property, § 896. Accordingly, I am of the opinion that a deed or deeds by which a husband and wife convey one of two parcels held by them as tenants by the entirety to the husband and the other to the wife should be taxed as deeds of partition pursuant to § 58-57. This conveyance, however, may result in a gift tax liability although the deeds are not recorded as deeds of gift.

TAXATION—Recordation Tax—Exclusion for encumbrance not applicable unless grantee assumes same or takes property subject to the encumbrance.

August 21, 1972
parcel of real estate upon which a lien existed under the terms of a consolidated mortgage, that the mortgagee released the lien contemporaneously with the transfer of title to the grantee, and that the grantor contends that the tax is inapplicable because the encumbrance existed at the time of the sale of the property and the amount of the mortgage exceeds the consideration received for the realty sold. I am informed that the terms of the mortgage require that the proceeds of sale be reinvested in other property to which the lien will attach and that pending such reinvestment, the trustee under the mortgage contract retains the consideration that the railway received for the property.

Section 58-54.1 provides, *inter alia*:

". . . 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 . . . when the consideration or value of the interest exceeds one hundred dollars, a tax at the rate of fifty cents for each five hundred dollars or fraction thereof, exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale. . . ." (Emphasis supplied.)

It is apparent that it is only the difference between the consideration received or the value of the interest conveyed and the unpaid amount of any encumbrance remaining upon the property at the time of the sale that is subject to the § 58-54.1 grantors' tax. There is no question as to the application of the tax when the grantee assumes the debt which is secured by the grantor's mortgage or deed of trust or when the grantee takes the property subject to the existing encumbrance without expressly assuming same. The difficulty as to the application of the tax arises when the encumbrance is released as a part of the transaction of purchase and sale, but not prior to the sale.

I construe "sale" as used in the statute under consideration to mean the time at which title to the property becomes vested in the grantee. See *Faulkner v. Town of South Boston*, 141 Va. 517, 520 (1925). A literal reading of the statute would require an exemption from tax equal to the amount of the encumbrance existing when the deed was delivered to the grantee, even though the grantor or his agent applied a portion of the proceeds to satisfy the debt and the lien was released subsequent to the delivery of the deed. But to give effect to such an interpretation would be to exempt a large proportion of realty transfers from a tax upon the entire consideration. Quite often the existing encumbrance is not released until the grantor satisfies the debt owed the mortgagee or noteholder from the proceeds of the sale. Accordingly, I am of the opinion that exemption from the grantor's tax only applies where the encumbrance remains after the transfer of title to the grantee because he has assumed the grantor's obligation or taken title to the property subject to the preexisting encumbrance, whether it be the lien of a mortgage or deed of trust or a tax, judgment or other lien. Under this construction of the statute, it is immaterial that the grantor was obligated by the terms of a consolidated mortgage to apply the proceeds of the sale to the purchase of other property.

**TAXATION**—Recordation Tax—Not applicable to instrument which is not a declaration of trust or a contract.

**FEES**—Clerk of Court—Should be collected upon recordation of instrument which is not subject to recordation taxes.

December 28, 1972

*The Honorable J. E. Crockett, Clerk*

Circuit Court of Wythe County
I have received your letter of December 14, 1972, and the attached "declaration of trust." The instrument recites in essence that certain designated real estate was conveyed to various individuals by deeds, that the deeds did not refer to the grantees as trustees, but that the grantees acknowledge that they took legal title as trustees and not in their individual capacity, and that they hold the property in trust to the use of certain named beneficiaries. You inquire as follows:

"(1) In your opinion does this document come under § 6.1-345 and 6.1-350.1?

"(2) What is the proper recording fee or tax to charge on such a document?

"(3) If the document does come under the above sections, in what book should it be recorded, considering that this office does not have a book or index for real estate trusts?"

The document is not a declaration of trust within the purview of § 6.1-343, et seq., Code of Virginia (1950), as amended, because there is no indication that a real estate investment trust is created by it, nor would it suffice even if such intention were evident because it does not comply with the essential requirements of § 6.1-345.

The document does not purport to convey title to real estate and does not affect the state of the legal title to the real estate mentioned. The document says, in effect, that "what we took by the deeds mentioned we took as trustees and not as beneficial owners." Once the document is properly recorded it should serve as notice to all parties interested in the property that its record owners are not the beneficial owners.

A declaration of trust relating to real or personal property which is in the form of a trust deed actually conveying the property to trustees to be held for the benefit of named beneficiaries is taxable under § 58-54. See Report of the Attorney General (1949-1950), p. 229(2). The document under consideration does not expressly convey any property, nor does it create a trust. It merely indicates the actual state of the record owner's title and the interests of the beneficiaries of the trust in the lands conveyed to the trustees by previous deeds. Therefore, it is not taxable under § 58-54, nor is it a contract relating to real property within the purview of § 58-58.

In consideration of the foregoing, it is my opinion that the document is not subject to a recordation tax, but you should collect the usual clerk's fees for its recordation. It should be recorded in the deed book, since it concerns the state of the title to the real estate previously conveyed to the trustees.

TAXATION—Recordation Tax—The Nature Conservancy exempt from recordation taxes.

March 19, 1973

THE HONORABLE JOHN H. POWELL, Clerk
Circuit Court of the City of Nansemond

Your letter of February 8 requested an opinion whether the gift of property in the Dismal Swamp by Union Camp Corporation to The Nature Conservancy was subject to the recordation tax levied under §§ 58-54, 58-54.1 and 58-65.1 of the Code of Virginia. As you know, the introduction of Senate Bill 925, which was designed specifically to exempt the transaction, caused me to delay my answer.

That bill, a copy of which is enclosed, was signed into law by the Governor on March 15, and was effective immediately. It exempts from all recordation taxes...
any gift or lease of real property to The Nature Conservancy or an agency of the United States Government for the purpose of preserving wilderness and open space areas. It is therefore my opinion that any such deed of gift to The Nature Conservancy recorded after the effective date of this Act is exempt from recordation taxes.

TAXATION—Recordation Tax—When grantor rescinds transaction and obtains reconveyance from grantee, tax is applicable to deed.

September 13, 1972

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

I have received your letter of August 10, 1972, inquiring whether the recordation tax imposed by § 58-54, Code of Virginia (1950), as amended, applies to a deed reconveying property to the former owner which was executed pursuant to a court order entered after a finding of fraud in the original transaction which rendered the conveyance voidable.

Section 58-54 places a tax upon the recordation of "... every deed, except a deed exempt from taxation by law ...." Section 58-61 contains exemptions for deeds of confirmation or correction when the tax has been paid at the time of the recordation of the original deed, as well as other exemptions not pertinent to your facts. Section 58-64 contains exemptions for deeds conveying property to various classes of grantees, none of which are applicable.

The conveyance under consideration is not a deed of confirmation, which ratifies a voidable estate, nor is it a deed of correction, which cures a defect in the original conveyance. If the grantor who had the right to render the original transaction voidable had decided to affirm and executed a second deed reciting the infirmity of the original transaction, it would have been an exempt deed of confirmation assuming that the tax had been paid upon the recordation of the original instrument of conveyance. But when the grantor decides to rescind the transaction and obtains a reconveyance from the grantee, whether the grantee voluntarily or pursuant to a court order executes the deed reconveying the property, its recordation is taxable.

I am of the opinion, therefore, that when the deed under consideration is recorded, the State and local recordation taxes imposed by § 58-54 and pursuant to § 58-65.1 are applicable.

TAXATION—Redistricting Does Not Change School Districts of County for Tax Purposes.

REDISTRICTING—School Districts of County for Tax Purposes Not Changed by.

SCHOOLS—Redistricting Does Not Change School Districts of County for Tax Purposes.

July 17, 1972

THE HONORABLE ROBERT H. BURNS
Commissioner of the Revenue for Tazewell County

In your letter of July 5, 1972, you point out that on June 30, 1971, the Board of Supervisors of Tazewell County adopted an ordinance establishing new election
districts in accordance with the provisions of § 15.1-571.1 of the Code of Virginia (1950), as amended. You inquire whether the effect of this ordinance is to alter the taxing districts of the county insofar as special taxes were levied on such districts to finance school construction bonds.

Authority for the issuance of school district bonds is found in § 15.1-190 of the Code, which provides as follows:

“(a) The governing body of any county, acting for and on behalf of any school district, or acting for and on behalf of two or more school districts jointly in such county, may provide for the issuance of general obligation bonds of such school district or districts for school purposes. Where voter approval is required by the Constitution of Virginia or the provisions of this chapter, the bonds shall not be issued unless a majority of the qualified voters voting in the election in such district, or so voting in each of such districts separately, shall approve the contracting of the debt and the issuing of the bonds. The bonds of two or more school districts shall be issued as joint obligations of such school district. Any such school district or any such school districts jointly shall constitute a unit. For the purpose of this section, each magisterial district in each county shall constitute a school district, but any such school district shall not include a town constituting a separate school district. In any county where an incorporated town constitutes both a school district and an entire magisterial district, the remaining magisterial districts shall, upon the adoption of resolutions by the governing body and the school board, constitute a single school district which may thereafter issue general obligation bonds for school purposes after approval by a majority of all the qualified voters of such district voting in an election therein. The issuance of such bonds shall be governed by the provisions of this chapter.

“(b) All such bonds heretofore issued and proceedings had in connection therewith which conform to this section as amended are hereby ratified, validated and confirmed and declared to be legal and as fully binding obligations as if issued under this section as hereby amended.”

In addition, district taxes may be levied on one or more districts for school purposes as provided in § 22-42 of the Code:

“Each magisterial district shall, except where otherwise provided by law, constitute a separate school district for the purpose of representation. For all other school purposes, including taxation, management, control and operation, unless otherwise provided by law, the county shall be the unit; and the school affairs of each county shall be managed as if the county constituted but one school district provided, however, that nothing in this section shall be construed to prohibit the levying of a district tax in any district or districts sufficient to pay any indebtedness, of whatsoever kind, including the interest thereon, heretofore or hereafter incurred by or on behalf of any district or districts for school purposes.”

Under the provisions of § 15.1-571.1, the election districts established in Tazewell County on June 30, 1971, pursuant to that Code section, now constitute school districts for the purposes of § 22-61 of the Code, which provides for the appointment of members of the county school board. It is my opinion, however, that this provision does not affect pre-existing school districts for taxing purposes under these circumstances provided that the old magisterial districts remain the same. This is specifically permitted by the second paragraph of § 15.1-571.1 which provides for the establishment of election districts for representational purposes only. The copy of the Tazewell County redistricting ordinance furnished with your letter indicates that the old magisterial districts were not abolished, therefore this provision is applicable to your question.
The effect of the 1971 redistricting, then, will not operate to change the school districts of Tazewell County for past or future tax purposes. This is consistent with § 15.1-190.1 of the Code, which provides that bonds issued prior to July 1, 1971, for school purposes are to be ratified:

“All bonds issued prior to July one, nineteen hundred seventy-one, for school purposes by or on behalf of any magisterial district or districts, or by or on behalf of any school district or districts, are hereby ratified, validated and confirmed, and all proceedings taken prior to such date to authorize the issuance of bonds for school purposes by or on behalf of any magisterial district or districts, or by or on behalf of any school district or districts, are hereby ratified, validated and confirmed, and all such bonds may be issued as bonds of a school district or districts pursuant to the provisions of § 15.1-190 of the Code of Virginia.”

TAXATION—Sale of Delinquent Lands—Purchaser under former law entitled to privileges and subject to limitations contained in § 58-1029, et seq.; subject to former owner’s right of redemption.

June 29, 1973

THE HONORABLE EDITH H. PAXTON, Clerk
Circuit Court of the City of Staunton

Your letter of June 25 requested an opinion as follows:

“Since I have been informed by one of my attorneys that I will be asked to execute a tax title deed to a person who several years ago purchased real estate in the City of Staunton at a sale of delinquent tax land conducted by the Treasurer, I would appreciate your opinion in this matter.

“Next year the purchaser would have been entitled to receive a tax title deed pursuant to § 58-1052 of the Code of Virginia after giving the required notice provided for in § 58-1053. These sections have now been repealed and in the future it is my understanding sales of land for delinquent taxes shall be pursuant to § 58-1117.1 et seq.

“Section 58-1117.11 states that any suit or proceedings which have been instituted prior to June 1, 1973, under the provisions of §§ 58-1027 and 58-1117 may be completed in accordance with such provisions for the purpose of effecting the objectives of such suit or proceedings.

“There is no suit instituted under the above sections but a purchase has been made at a sale of delinquent lands and plans have been made to apply to me for a tax title deed. Could this be interpreted as one of the 'proceedings' contemplated in § 58-1117.11?’”

A purchaser at a tax sale held under § 58-1029, et seq., repealed by Chapter 467 of the Acts of Assembly of 1973, obtained by his purchase the privilege to apply after three years for a tax deed. As his purchase paid for the amount of taxes and costs, it effectively removed the property from the delinquent tax lists and therefore from control of the city unless and until he failed to pay subsequent taxes.

Section 58-1117.9 of the new delinquent tax statute provides that all lands purchased by the locality at a tax sale revert to the former owner subject to the locality's lien. There is no provision for the reversion of land purchased by an individual. If such individual continues to pay the taxes on the land, the locality will not regain control in order to subject it to the new procedure.

For the reasons stated above, I am of the opinion that the purchase of land at a tax sale is the first step in a “proceeding” in the meaning of § 58-1117.11 to obtain
title to the land. The purchaser is therefore entitled to the privileges and is subject to the limitations contained in the repealed § 58-1029, et seq. He may therefore obtain a tax title thereunder, but he also remains subject to the former owner’s right of redemption as specified therein.

TAXATION—Sale of Delinquent Lands—When clerk may accept payment of delinquent taxes.

June 29, 1973

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

Your letter of June 20 requested advice relative to the new procedures for sale of delinquent tax lands established by Chapter 467 of the Acts of Assembly of 1973. I will answer your questions seriatim:

1. Can the owner of delinquent real estate which has not been purchased by a person at a tax sale redeem it prior to the filing of a bill in equity under § 58-1117.1?

Pursuant to § 58-1117.9 the title of all real estate purchased at a tax sale by the county in the name of the Commonwealth reverts to the former owner. The county retains a lien on the property which, like any other lien, is released when the debt is paid. Whether it is paid pursuant to the treasurer’s efforts to collect the tax under § 58-990 or by other means, any payment of taxes made after the list of delinquent taxes has been transmitted to the clerk under § 58-984 should be reported to the clerk under § 58-985.

After a bill in equity has been filed, the owner may release the lien at any time before the date of the sale by paying the taxes and costs. See § 58-1117.10.

2. May the clerk of the county accept payment of real estate taxes and release the lien?

In my opinion the clerk may accept payment of delinquent taxes, interest, penalties and costs and release the county’s lien on the property at any time after the lien is recorded under § 58-983 and before the bill in equity is filed under § 58-1117.1. After the bill is filed, the court must accept the payment. Before the lien is recorded, payments should be made to the treasurer or other tax collector and recorded pursuant to § 58-983.

3. Can the purchaser of delinquent lands under a previous tax sale accept the amount due and release the property?

In answer to this question I enclose a copy of my opinion to the Honorable Edith H. Paxton, Clerk, Circuit Court for the City of Staunton, dated June 29, 1973, which holds that a purchaser at a tax sale has begun a “proceeding” in the meaning of § 58-1117.11 and is therefore entitled to all privileges and subject to all restrictions contained in the repealed § 58-1029, et seq. In accordance with this ruling, it is my opinion that a purchaser at a tax sale held prior to the effective date of the new legislation holds the land subject to the right of redemption in § 58-1043. If the purchaser refuses to accept payment, the former owner has a right to redeem by paying the clerk under § 58-1045.

TAXATION—Sales and Use Tax—Chrysler Museum is not exempt.

July 6, 1972
I have received your recent letter inquiring whether the Chrysler Museum is exempt from the Virginia retail sales and use tax.

The Virginia retail sales and use tax is not applicable to purchases of tangible personal property for the use or consumption of any political subdivision of the State. See § 58-441.6(p), Code of Virginia (1950), as amended. The term "political subdivision" is usually interpreted as referring to those bodies to which the State has delegated the function of local government within a specified area (Commander v. Board of Commissioners of Buras Levee District, 202 La. 325, 11 So. 2d 605 (1942); Standard Oil Co. v. National Surety Co., 143 Miss. 841, 107 So. 559 (1926)). Generally, a political subdivision is characterized by clearly delineated geographic boundaries, public officials, taxing power and a broad purpose or benefit that extends to all citizens residing within the area (Bolen v. Board of Firemen, Policemen and Five Alarm Operators' Trustees, 308 S.W. 2d 904 (Tex. Civ. App. 1957)). The Chrysler Museum is closely associated financially with the city of Norfolk, but it is a separate, differentiated entity in its own right, and as such it does not possess the attributes characteristic of a political subdivision. For this reason, it is my opinion that the Chrysler Museum is not exempt from the Virginia retail sales and use tax.

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TAXATION—Sales and Use Tax—Sheriff not required to collect tax on property sold under execution issued by a court.

July 7, 1972

I have received your recent letter inquiring whether you should collect the Virginia retail sales tax upon sheriff's sales under executions issued by the courts.

Section 58-441.6(m), Code of Virginia (1950), as amended, provides an exclusion from the tax for "an occasional sale." This is defined as "a sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a certificate of registration..." A sheriff is not a "retailer" engaged in the "business" of making "sales at retail" as defined in §§ 58-441.2 and 58-441.3. Therefore, he is not a "dealer" as defined in § 58-441.12 and is not required to register under § 58-441.16.

It is my opinion, therefore, that a sheriff is not required to collect sales tax upon the sale of property under an execution issued by a court.

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TAXATION—Service Charge—No service charge may be imposed on church property exempt from taxation under § 57-12(2).

August 21, 1972

I have received your letter of August 1, 1972, from which I quote:

"I was chief patron of 1972 Senate Bill No. 338 (Chapter 770 of the 1972 Acts of Assembly) which permits localities to impose service charges upon the owner of tax exempt real estate. We did exclude church property, using language identical to that found in Virginia Code § 58-12(2), with
the understanding that all church property which was exempt from real estate taxation under that section would also be excluded from local service charges.

"Would you please advise me whether there is any circumstance in which real property, other than that which may be held in endowment funds, could be exempt under § 58-12 but taxable under an ordinance enacted pursuant to Virginia Code § 58-16.2."

Virginia Code § 58-16.2 was enacted pursuant to Article X, Section 6(g) of the revised Virginia Constitution which provides:

"The General Assembly may by general law authorize any county, city, town, or regional government to impose a service charge upon the owners of a class or classes of exempt property for services provided by such governments."

It is clear that by enacting § 58-16.2 the General Assembly permitted localities to impose a service charge upon all classes of exempt property, except the class made exempt by Virginia Code § 58-12(2). Although exemptions from taxation are to be strictly construed pursuant to Article X, Section 6(f), of the revised Virginia Constitution, legislative grants of local taxing power are strictly construed against the locality. Richmond v. Valentine, 203 Va. 642 (1962). By using the identical language in § 58-16.2 as is used to exempt church property in § 58-12(2) the General Assembly manifested its intent that the religious classification excluded from local service charges under § 58-16.2 be mutually coextensive with the religious exemption from local property taxes. In my opinion no local service charge may be imposed on any real property exempt from taxation under § 58-12(2), except for such property as may be held in endowment funds.

TAXATION—Severance Tax—Nature and administration.

October 26, 1972

The Honorable R. V. Presley
Commissioner of the Revenue for Buchanan County

I have received your recent letter which requested an opinion interpreting § 58-774 of the Code of Virginia. Your letter indicates that Buchanan County wishes to enact an ordinance imposing a severance tax as authorized by the language added to that section in 1972. Your questions relate specifically to the methods of administration and enforcement which are available to the county.

Section 58-774, which provides the procedure for assessing mineral lands and improvements thereon for purposes of real property taxation, requires that three classifications of such property be placed separately upon the land book: (1) The land under development, (2) the improvements and (3) the land not under development. The third paragraph of that section, added in 1972, provides as follows:

"In the alternative to the procedure outlined in (1) above, any county or city may impose by ordinance a severance tax on all coal and gases extracted from the land lying within its jurisdiction. The rate of such tax shall not exceed one half of one per centum of the gross receipts from such coal or gases. Any such county or city may further require any producer of such coal or gases and any common carrier to maintain records showing the quantities of coal and gases which they have produced or transported, respectively."

The courts of other states have generally classified taxes on the severance of
natural resources as excise taxes on the privilege of extracting the resources, although some have been held to be property taxes. However, § 58-774 differs from the usual severance tax statute in that it specifically provides that the severance tax is an alternate procedure for determining the value of mineral lands under development. It is my understanding that because it is extremely difficult to value mineral lands under development, localities which supported the enactment of a severance tax have for some time used gross receipts from mining as an aid, as the amount received from mining has a very close connection with the value of the mined property. In consideration of the manifest intention of the General Assembly, and the case of Haughton v. Lankford, 189 Va. 183 (1949), it is my opinion that this tax should be deemed a property tax, subject to the same general rules of administration and enforcement as other property taxes.

Your specific questions relative to the severance tax ordinance are as follows:

1. The ordinance requires common carriers and producers of coal to file reports. Is this authorized, and may the county impose penalties for failure to report?

Although counties may exercise only those powers delegated by statute, any power delegated must necessarily include by implication those powers necessary to effectuate it. As it would be virtually impossible to collect a tax of this nature without a requirement that the taxpayer file a return, authorization to impose the severance tax in my opinion includes the authority to require filing of all information necessary to assess the tax. This filing and the payment of the tax may be enforced under §§ 58-860, 58-27, 58-847 and 58-963.

Although the power to tax implies the power to require a taxpayer to file a return, it does not, in my opinion, imply the power to require reports by producers or carriers who are not owners of the property or mineral rights. This information may be obtained by audit, as § 58-774 authorizes a county to require any producer or carrier of coal or gas to keep records. In my opinion, the authorization to require such persons to keep records does not imply the power to force them to file reports.

2. The statute authorizes the county to base its tax on gross receipts from coal or gases. Does this mean that the tax may be based on the receipts from the coal at the time of sale, which is generally after processing, or must the coal be valued when extracted from the mine?

As the severance tax provided as an alternative method of valuing lands for property taxes, it would be consistent with its purpose to assess the tax on the value of the coal immediately after it is extracted from the mine. However, because each load of coal may vary in quality, it would be virtually impossible to establish an accurate measure of value at this point. As coal typically changes hands after processing, at the time it is loaded on the carrier, it is my opinion that the intention of the General Assembly in providing gross receipts as a measure, and in permitting the locality to require the carrier to keep records, was to permit the valuation of the coal by gross receipts at such sale.

TAXATION—Severance Tax Refund of Taxes Erroneously Collected.

June 11, 1973

The Honorable Joseph M. Kuczko
Commonwealth's Attorney for the County of Wise and City of Norton

I have received your recent letter inquiring as to the authority of the Board of Supervisors to order the Treasurer of Wise County to refund tax monies collected from coal producers pursuant to a county ordinance which was subsequently held to be unconstitutional.
Section 58-1141, Code of Virginia (1950), as amended, provides a procedure for correcting “erroneous assessments of real estate if the error sought to be corrected in any case was made by the commissioner of revenue or such other official.” In a letter dated October 26, 1972, to the Honorable R. V. Presley, Commissioner of Revenue for Buchanan County, this office advised that a tax on the severance of natural resources is properly deemed a property tax rather than an excise tax. Thus, an assessment for severance tax purposes would be considered an assessment of real estate taxes within the meaning of § 58-1141.

Since the Wise County Severance Tax Ordinance was declared unconstitutional, any assessment of tax which was made pursuant thereto was erroneous. The error of the tax assessor, whether commissioner of revenue or “such other official,” was reliance upon an unconstitutional statute. With respect to the tax assessor, such action was probably unavoidable, but an error nevertheless.

In consideration of the foregoing, it is my opinion that after application by the aggrieved taxpayers pursuant to § 58-1141, the Board of Supervisors is required under § 58-1142, upon the certification of the Commissioner of Revenue and with the consent of the Commonwealth’s Attorney for the County of Wise, to direct the Treasurer to refund the severance tax to the coal producers, provided that application for correction is made within five years from the last day of the year in which the tax was erroneously assessed.

It should be noted that the erroneous assessment could also be corrected pursuant to § 58-1145 by application for relief to the Circuit Court for the County of Wise. The remedy provided by § 58-1142 is in addition to the right of the taxpayer to apply for correction to the commissioners of revenue. § 58-1144. As an alternative remedy, the Board of Supervisors may provide by ordinance under § 58-1152.1 for the refund of severance taxes erroneously paid.

TAXATION—Special Assessments for Agricultural, Horticultural, Forest, Open Space Real Estate—Constitutional requirements.

August 21, 1972

The Honorable J. E. Givens, Chairman
Commission of the Industry of Agriculture

Your recent letter requested an interpretation of the constitutional provision permitting tax relief for land classified as agricultural, horticultural, forest, or open space. The pertinent part of Article X, Section 2, states as follows:

“The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservation of real estate for such uses. In the event the General Assembly defines and classifies real estate for such purposes, it shall prescribe the limits, conditions, and extent of such deferral or relief. No such deferral or relief shall be granted within the territorial limits of any county, city, town, or regional government except by ordinance adopted by the governing body thereof.”

In 1971 the General Assembly enacted enabling legislation, which is found in Article 1.1 of Chapter 15 of Title 58 (§ 58-769.4, et seq.), of the Code of Virginia. You asked the following questions:
1. Could the General Assembly permit a local government to decide which one or more of the four classes of property should be allowed tax deferral?

Section 58-769.6 of the current enabling legislation requires that any ordinance permitting assessment according to use embrace all four classes of real estate. In my opinion, the constitutional provision quoted above permits but does not dictate this approach. The Constitution does require that the General Assembly determine that protection of any class is in the public interest before permitting tax deferral for it. The legislative finding in § 58-769.4 is a general one, and applies equally to all four classes. It is my opinion that the General Assembly would have to make a separate finding as to each classification in order to permit a locality to provide for deferral on one class and not on the others.

There would not, in my opinion, be a constitutional objection if the General Assembly should permit a locality to defer tax on land used for agriculture but not that used for forests or horticulture even though horticultural and forest uses are usually considered types of agricultural use. The Constitution gives the General Assembly the power to define the classes of real estate as well as to establish them; so long as the definition is reasonable in relation to the legislative determination that preservation of such real estate is in the public interest, I believe the classification would be constitutional.

2. May a land-use plan, or a zoning ordinance, be used as an aid in classification of property?

Section 58-769.5 defines the classes of real estate eligible for tax deferral. The local ordinances granting deferral must use the same definitions. Unless the General Assembly changes these definitions to include a reference to zoning or land-use classification, a locality may not condition tax deferral under this statute on the classification of the land in a zoning ordinance or land-use plan. However, the definitions of real estate devoted to forest and open space uses refer to standards set by the Director of the Department of Conservation and Economic Development and the Director of the Commission of Outdoor Recreation, respectively. In my opinion, those officials could include as a standard a requirement that the land be zoned for a use compatible with the definition in the statute, or be included on a land-use plan for such a use.

3. Would classification in relation to zoning have any effect on the regular zoning procedures?

In my opinion, conditioning tax deferral on zoning would not change the zoning procedures now set out in the Code. In general, a change in zoning is made by the local governing body after recommendations from a planning commission on the motion of the property owner. The legality of the decision may be appealed to the court of record, and from there to the Supreme Court.

4. Could the procedure for classifying property according to use be channeled through the local governing body?

At present, application for assessment in accordance with use is made to the commissioner of the revenue. In my opinion, there would be no constitutional objection if the General Assembly should designate the local governing body, or another official, to receive such applications. The Constitution does require that the General Assembly define the classes of property which may be exempt. Once a classification is made, all property within the class must be treated alike. For this reason, the governing body could not be given the power either to define the classes or to decide on a case by case basis which property should be permitted deferral; it would merely be permitted a ministerial determination whether certain property comes within a class defined by the General Assembly.

TAXATION—State and Local License Taxes Upon Persons Selling Goods
Through Coin-operated Vending Machines—Locality required to follow State classification.

January 17, 1973

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

I have received your recent letter from which I quote:

"I am advised that the Town of Farmville has in effect an ordinance which imposes a license tax on vending machines which is measured by the value of the article sold in the machine. A copy of the Farmville Town Ordinance covering license taxes on slot machines and vending machines is enclosed herewith. Your attention is directed to Sec. 13-86 of the Town Ordinance, which apparently makes no distinction between slot machines and vending machines used to sell merchandise.

"The tax in question applies to vending machines such as those used by a soft drink manufacturer or bottler or a manufacturer of nuts, candy and sandwiches, who leases, rents or otherwise furnishes vending machines to his customers for their use in selling at retail, soft drinks or packaged nuts, candy or sandwiches.

"Secs. 58-362 to 58-369.1 of the Virginia Code seem to prohibit the Town of Farmville from imposing the tax in question, and I would like to request that you please advise whether, in your opinion the tax imposed by Sec. 13-86 of the Farmville Town Ordinance, is valid."

Section 58-355, Code of Virginia (1950), as amended, imposes a State license tax for the privilege of ". . . having anywhere in this State a coin-operated machine or device of any description into which are inserted nickels or coins of larger denominations to dispose of articles of merchandise or for the purpose of operating devices that operate on the coin-in-the-slot principle, used for gain, . . ." The tax is a fixed amount for each such machine or device, the amount being determined by the type of machine licensed. Section 58-361, contained within the same article, authorizes the governing body of any county, city or incorporated town to impose a local license tax upon such machines.

Section 58-362 imposes a State license tax upon persons ". . . engaged in the business of selling goods, wares and merchandise through the use of coin-operated vending machines . . . ." The statute classifies such persons as retail merchants with respect to the business done through the use of such machines and includes a soft drink manufacturer or bottler and a manufacturer or packager of nuts, candy, and sandwiches who leases, rents, or otherwise furnishes vending machines to his customers even though such manufacturer or bottler actually sells the merchandise directly to a lessee and not to the ultimate consumer. Section 58-366 provides that the taxes imposed by § 58-362, et seq., ". . . shall be in lieu of any license tax on the individual vending machines." Section 58-368 provides that § 58-362, et seq., ". . . shall not apply to any vending machine upon which the license tax is paid under the provisions of § 58-355."

Section 58-367.2 provides, inter alia:

"The governing body of every city, town, and county in this State is hereby authorized to impose local license taxes on every person, firm, and corporation coming within the provisions of this article and engaged in the business of selling goods, wares and merchandise through the use of coin-operated vending machines in such city, town, or county, and to classify such business as that of a retail merchant; but no such local license tax shall be imposed on any such person, firm, or corporation except by local ordinance adopting this classification."
This office has previously opined that persons whose business activities fall within § 58-362, et seq., can elect to pay either the State tax upon each machine pursuant to § 58-355 or the State retail merchant’s license tax pursuant to § 58-362 and that in the event the latter choice is made, a local tax imposed pursuant to § 58-361 is inapplicable to such persons. See Report of the Attorney General (1962-1963), p. 266. See also Hill v. City of Richmond, 181 Va. 744 (1943).

In consideration of the foregoing, it is my opinion that the town of Farmville may not impose a tax pursuant to § 58-361 upon persons whose business activities are within § 58-362 and who elect to pay the State license tax imposed by the latter provision in lieu of the State license tax upon the individual vending machines imposed by § 58-355. The town may, of course, impose a town license tax upon such persons pursuant to § 58-367.2 which parallels the State license tax required by § 58-362.

TAXATION—Tangible Personal Property—Penalty for late filing cannot be assessed by commissioner of revenue in absence of local ordinance providing for same.

TAXATION—Local Business License Returns—County not authorized to impose penalty for late filing.

May 22, 1973

The Honorable E. D. Rudolph, Jr.
Commissioner of the Revenue for Frederick County

I have received your recent letter inquiring whether a commissioner of the revenue has the authority to impose a penalty for the late filing of tangible personal property and county business license returns.

Section 58-847 provides that “. . . the governing body of any county, city or town may provide by ordinance the time for filing annual return of taxable tangible personal property, machinery and tools and merchants capital . . . and may provide by ordinance penalties for failure to file such returns and for nonpayment in time . . . . Neither such penalty shall exceed ten percent of the tax assessable or due on such property or the sum of two dollars, whichever shall be the greater. . . .”

Section 58-837 requires that taxpayers file personal property returns on or before May first of each year, and § 58-838 provides that the commissioner of the revenue shall make an assessment from the best information available if a taxpayer neglects or refuses to file. Section 58-860 provides that the commissioner may summons a taxpayer who has failed to file a return and require him to answer questions relating to his tax liability. None of these statutes, however, mentions any monetary penalty for the failure of a taxpayer to file a tangible personal property tax return. Section 58-438, to which you referred, does require a penalty in cases of late filing of intangible personal property returns, but this statute has no application to other tax returns.

In the absence of a statute expressly authorizing a commissioner of the revenue to impose a penalty for the late filing of tangible personal property returns, I am of the opinion that none may be imposed except by the county board of supervisors pursuant to § 58-847. Since § 58-847 does not apply to business license returns, neither the county board of supervisors nor the commissioner is authorized to impose a penalty for the late filing of same in the absence of some other statute. I am not aware of any statute authorizing such penalty; therefore, I am of the opinion that it cannot be imposed.
TAXATION—Tax Assessment—Legal limits of Town of Cedar Bluff are those provided in its charter.

June 1, 1973

THE HONORABLE ROBERT H. BURNS
Commissioner of the Revenue for Tazewell County

Your recent letter requested an opinion whether your office should make its tax assessments in accordance with a recent survey of the Town of Cedar Bluff. I understand that the survey does not agree with your records, which date from 1912 when the town was incorporated and its boundaries established by charter.

The legal limits of the town are those provided in the 1912 charter of Cedar Bluff, found in § 2 of Chapter 6 of the Acts of Assembly of 1912, and reenacted without change in the new charter as § 1-3 of Chapter 113 of the Acts of Assembly of 1971. The question whether your records or the recent survey more accurately reflect those boundaries is one of fact which can only be decided by a court. Although it would appear that if landmarks in the description have disappeared or changed, your ancient records are more likely to be accurate than a recent survey, any dispute as to the accuracy of either must be resolved by a court with all the facts before it.

TAXATION—Tax Bills—To be prepared by local treasurers and not by commissioners of the revenue.

May 14, 1973

THE HONORABLE BILLY K. MUSE
Commissioner of the Revenue for Roanoke County

I have received your letter of May 2, 1973, inquiring as to whether you are required by law to prepare the annual tax bills for real estate and personal property taxes.

The duties of each commissioner with respect to real property taxes are prescribed by § 58-796, et seq., Code of Virginia (1950), as amended. Section 58-796 requires each commissioner to ascertain annually all the real estate within his jurisdiction and the person to whom it is chargeable with taxes on January the first. Section 58-804 provides that the information so acquired shall be entered in the land books, and § 58-806 requires that a copy of the completed land book be delivered to the local treasurer. Sections 58-852 through 58-894 contain similar provisions with respect to personal property taxes, and § 58-884 requires that each commissioner deliver a copy of the personal property book to the local treasurer by a certain date, generally not later than September 30 of each year.

I am not aware of any provision of law which requires a commissioner of the revenue to prepare the tax bills. Chapter 19 of the Acts of Assembly of 1946, continued in effect by § 58-894, specifically authorized the board of supervisors of certain counties to require the commissioner of the revenue “. . . to prepare and make all tax bills in accord with all items shown on the land books and personal property books for the current year and deliver the same to the treasurer of the county at the same time such land books and personal property books are delivered to such treasurer under the general law.” Roanoke County does not meet the criteria for inclusion in this Act, and therefore, it is my opinion that you cannot be required to prepare the tax bills. This duty is placed by implication upon the treasurer pursuant to § 58-960, which requires that he mail a bill for taxes to each taxpayer assessed therewith as shown by the land and personal property books in his office.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Taxes Not a Lien Upon Nonpossessory Freehold Estates; Reversioners Property Assessable With Taxes Following Termination of Life Estate.

August 23, 1972

THE HONORABLE D. PAGE ELMORE
Treasurer of Accomack County

I have received your recent letter inquiring whether the general rule that delinquent real estate taxes due during the term of a life estate do not constitute a lien on other nonpossessory estates in the same land is applicable when the life estate is created by the holders of the other estates. You also inquire whether a reverter clause in a deed, providing that if the grantee sells or encumbers the interest conveyed to him it shall immediately revert to the grantors, becomes operative due to the failure of the grantee to pay the real estate taxes which results in a sale of the land to the Commonwealth.

You state the facts as follows:

"A woman who was a resident of Accomack County died intestate in the year 1955 seized and possessed of a parcel of land, leaving as her sole heirs at law her husband and five children. In 1956, the five children conveyed their interest in said real estate to their father for life with remainder at his death to the said five children. A provision in the deed stated that if the father were to sell or encumber the land, said land would immediately revert back to the said children. The interest purportedly conveyed by this deed was a two-thirds life estate, the father having inherited a one-third life estate from the wife.

"No real estate taxes were paid by the father, the life tenant, from the year 1960 through his death in the year 1969. The property was assessed in the name of the father as life tenant, and the property was first sold and bought by the Commonwealth for delinquent taxes in the year 1960, which procedure was followed until his death."

Section 58-1023, Code of Virginia (1950), as amended, provides:

"There shall be a lien upon all real estate for the taxes assessed and county, district, city and town levies assessed thereon, prior to any other lien or encumbrance thereon. The words 'taxes' and 'levies,' as used in this section, include the penalties and interest accruing on such taxes and levies in pursuance of law."

This statute, when construed with other statutes in pari materia, including the provisions of §§ 58-805, 58-1001, 58-1006, 58-1010 and Title 58, Chapter 21, was held to create a lien limited to the estate of the person having the freehold and entitled to possession. See Tabb v. Commonwealth, 98 Va. 47 (1900); Ceroli v. Clifton Forge, 192 Va. 118 (1951). Exceptions to this principle are provided by some city charters and also by § 58-1024; however, none is applicable to Accomack County. There is no indication in the Tabb decision that the principle would not apply if the life estate was carved out of the fee by deed from the heirs of the previous owner. The decision was not based upon the source of the life estate, but upon the general rule that real estate taxes are the sole liability of the party who has the freehold in possession. I am of the opinion, therefore, that taxes assessed in the name of the life tenant prior to his death do not constitute a lien upon the estates of the reversioners or remaindermen irrespective of the source of the life estate.

Your second inquiry requires a determination of the intent of the grantors, to be ascertained from the terminology adopted, in providing for reversion if the life tenant encumbered the interest conveyed. The deed recites, in pertinent part:
"WHEREAS, [the grantee] inherited a One Third (1/3) interest for life in the following described property; and

"WHEREAS, it is the desire of the [grantors] to convey unto [the grantee] a full life estate in and to the following described property reserving unto themselves, however, the remainder interest in said property:

"NOW, THEREFORE, THIS DEED WITNESSETH, . . . the said [grantors] do hereby give, grant, bargain, sell and convey, with GENERAL WARRANTY of title unto the said [grantee], a full life estate in and to the home place . . . .

". . . [the grantee], covenants and agrees that he will neither sell nor incumber said two thirds (2/3) interest for life, as herein above conveyed to him, and should the said [grantee] sell or incumber said two thirds (2/3) interest, then said two thirds (2/3) interest is to immediately revert back to the [grantors] . . . ."

The grantors inherited the fee in the property under § 64.1-1. Their father's curtesy consummate interest was not an estate in the land but merely the right to subject a third of the land to assignment pursuant to § 64.1-24. See Coleman v. Virginia Stave Co., 112 Va. 61, 69 (1911). Therefore the grantee took by the conveyance a life estate in the entire property, determinable as to two-thirds of the property upon the happening of the stated event.

The failure of the grantee to pay the taxes resulted in an encumbrance upon his interest within the plain language of the deed. Although the tax lien created by § 58-1023 may not, of itself, have been an encumbrance as contemplated by the grantors, the sale of the grantee's interest to the Commonwealth pursuant to § 58-1067, et seq., certainly constituted an encumbrance sufficient to terminate the life estate as to two-thirds of the property.

I am of the opinion that the reversionary interest retained by the grantors became possessory at the time of the sale to the Commonwealth, and that subsequent to such event the grantors were owners within the purview of § 58-796 and were properly assessable with the taxes.

TAXATION—Utility Tax—All towns may impose—County tax not applicable within town if town provides certain governmental services—Location within sanitary district which provides services does not qualify town thus county tax will apply to town consumers.

June 21, 1973

The Honorable F. Caldwell Bagley
County Attorney for Prince William County

I have received your letter of May 11, 1973. You ask three questions which I shall answer seriatim.

"1. Under the provisions of Section 58-587.1, may any Town impose a consumers utility tax even though it does not provide either police or fire protection and either water or sewer services? (Assuming that no special school district is involved)."

Section 58-587.1 provides, in pertinent part:

"Any city or town or county may impose a tax on the consumers of the utility service or services provided by any corporation coming within the provisions of this article. . . ."

"Any county tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town now or
hereafter imposes a town tax on consumers of utility service . . . provided that such town (1) provides police or fire protection, and water or sewer services or (2) constitutes a special school district and is operated as a special school district under a town school board of three members appointed by the town council."

The statute grants the authority for cities, towns and counties to impose a tax upon local telephone service in the first paragraph. The second paragraph is solely a limitation upon the power of counties to impose the tax upon utility consumers located in certain towns. Accordingly, I am of the opinion that all towns may impose the tax whether or not they provide any of the services mentioned in the second paragraph. See generally Report of the Attorney General (1970-1971), p. 400.

"2. In the event a County consumers utility tax has been imposed would it apply in a Town which also has a consumers utility tax, but does not provide either police or fire protection and either water or sewer services?"

A county consumers' utility tax applies within a town which also imposes such tax unless the town:

(1) provides police or fire protection, and water or sewer services, or

(2) constitutes a special school district and is operated as same under a town school board of three members appointed by the town council.

Therefore, if such town provides police protection and water, or police protection and sewer, or fire protection and water, or fire protection and sewer, or constitutes a special school district, the town tax supersedes the county tax. Otherwise, both taxes are applicable to town consumers. See Report of the Attorney General (1969-1970), p. 272. Thus the answer to your second question is in the affirmative.

"3. Does the fact that a Town lies within a sanitary district, which sanitary district provides sewer and water service directly to the ultimate consumers, qualify the Town as one which provides water or sewer services?"

The fact that a town provides police or fire protection and is within a sanitary district which provides sewer or water services, or both, does not, in my opinion, preclude the imposition of the county tax within the town. This is because the statute specifically requires that the town itself must provide the services. The reason for the limitation upon the power of counties to impose the tax upon town consumers who are subject to town consumers' utility taxes when the town provides the specified protection and service is that the town taxpayers bear the expenses for these services and the county taxpayers outside of the town do not contribute to their cost. This being so, the General Assembly deemed it inequitable to allow such counties to impose additional taxes upon town residents. When the services are provided by a sanitary district which encompasses territory outside of the town, county residents within such territory contribute to the cost of the services, either through service fees or special district taxes. § 21-118(5) and (6).

In consideration of the foregoing, I am of the opinion that the answer to your third question is in the negative.
LEFT: 

FEES—Clerks—Section 14.1-112(23) applicable to condemnation petition, § 33.1-126 applicable to petitions pursuant to §§ 33.1-124 and 33.1-129.

January 30, 1973

The Honorable Rudolph L. Shaver, Clerk Circuit Court for Augusta County

I have received your recent letter inquiring as to the amount of writ tax and clerk’s fee to be imposed upon the filing of a petition for condemnation pursuant to § 25-46.1, et seq., Code of Virginia (1950), as amended, and upon the filing of petitions pursuant to §§ 33.1-124 and 33.1-129.

Condemnation proceedings are on the law side of the court. § 25-46.4:1. Section 58-71 imposes a writ tax of five dollars upon an original action commenced in a court of record when the demand for damages does not exceed fifty thousand dollars. Since a condemnation petition does not seek damages, the maximum tax thereon is five dollars, unless the petition is filed by the Commonwealth or a political subdivision thereof, in which case the writ tax does not apply. See Pelouze v. Richmond, 183 Va. 805 (1945); Report of the Attorney General (1970-1971), p. 56, (1966-1967), p. 60, (1951-1952), p. 163.

The writ tax is likewise inapplicable to petitions filed pursuant to §§ 33.1-124 and 33.1-129, because such petitions do not commence an original action as required by § 58-71.

With respect to the clerk’s fee applicable to the filing of a condemnation petition, it is my opinion that § 14.1-112(17) does not apply because a condemnation petition does not seek a monetary award, as is contemplated by § 14.1-112(17). Therefore, the five dollar fee provided by § 14.1-112(23) is applicable unless the petition is filed by the Commonwealth, in which case § 14.1-87 precludes a clerk’s fee.

The clerk’s fee for the filing of petitions pursuant to §§ 33.1-124 and 33.1-129 is fifty cents, as provided by § 33.1-126. Section 14.1-87 does not preclude this fee as to petitions filed by the State Highway Commissioner in accordance with § 33.1-129, because § 33.1-126 supersedes the prohibition of § 14.1-87.

TAXATION—Writ Tax—Applies to third-party motion for judgment.

CLERKS—Fees—Chargeable for filing third-party motion for judgment.

June 25, 1973

The Honorable G. R. C. Stuart
Member, House of Delegates

I have received your recent letter inquiring whether the clerk’s fee required by § 14.1-112(17) and the writ tax imposed by § 58-71 should be collected upon the filing of a third-party motion for judgment pursuant to Rule 3:10, Rules of the Supreme Court of Virginia.

Section 14.1-112(17) provides, in pertinent part:

“In all actions at law the clerk’s fee chargeable to the plaintiff shall be five dollars in cases not exceeding five hundred dollars . . . to be paid by the plaintiff at the time of instituting the action . . . provided, however, there shall be no fee charged for the filing of a cross claim, counterclaim, or setoff in any pending action.”

Rule 3:10 provides that “[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may file and serve a third-party
motion for judgment upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." This rule became effective on March 1, 1972, and revived third-party practice which had been abolished on October 1, 1951, by Rule 3:9.1. A third-party plaintiff institutes an action by filing a third-party motion for judgment, and § 14.1-112(17) does not specifically exclude a third-party motion for judgment from the application of a clerk's fee. The General Assembly is presumably aware of the revival of third-party practice in Virginia; however, it has not acted to exclude third-party motions for judgment from the clerk's fee although cross claims, counterclaims and setoffs are specifically excluded. Accordingly, I am of the opinion that the usual clerk's fee should be collected upon the filing of a third-party motion for judgment.

With respect to the writ tax, § 58-71 provides, in pertinent part:

"When any original suit . . . or other action . . . is commenced in a court of record . . . there shall be a tax. . . ."

The foregoing statutory language, in my opinion, is sufficiently comprehensive to require the collection of a writ tax upon the filing of a third-party motion for judgment. This office has previously stated that the tax is applicable to adversary proceedings. See Report of the Attorney General (1970-1971), p. 396; (1969-1970), p. 296. A third party motion for judgment commences an adversary proceeding which, although ancillary to the first action, is itself an original action as distinguished from an appeal.


CHARTERS—Town of Big Stone Gap—Vote of vice-mayor.

June 7, 1973

THE HONORABLE ELCIE D. MULLINS
Clerk of the Circuit Court of Wise County

This is in reply to your recent letter in which you requested my opinion whether the vice-mayor of the Town of Big Stone Gap, when presiding as mayor, may vote on a motion except in case of a tie vote.

Section 5-2 of the charter of Big Stone Gap provides that the mayor shall have no vote except in the case of a tie vote. Section 3-7 of the charter pertaining to the vice-mayor provides that he shall serve as mayor whenever the mayor is ill, absent, or otherwise unable to discharge the duties of his office.

I am, therefore, of the opinion that when acting as mayor, the vice-mayor has no vote except in the case of a tie.

TOWNS—Constitutionality of Mayors' Courts.

COURTS—Constitutionality of Mayors' Courts or Courts of Limited Jurisdiction.

November 30, 1972

THE HONORABLE ERWIN S. SOLOMON
Commonwealth's Attorney for Bath County

This is in reply to your recent request for an opinion as to whether a mayor or other town official may serve as town judge in view of the recent holding of the United States Supreme Court in Ward v. Village of Monroeville, .... U.S. .... (November 14, 1972).
Under the provisions of § 16.1-70, et seq., of the Code of Virginia (1950), as amended, most of the towns in Virginia have courts of limited jurisdiction sometimes known as "police courts" and sometimes known as "mayor's courts." The jurisdiction of these courts is limited to cases involving violations of town ordinances and cases instituted for the collection of town taxes or assessments or other debts due and owing to such town. A recent survey indicates that there are approximately ninety-two such town courts in Virginia and that approximately thirty-seven of these courts are presided over by the mayor or other town official. It should also be noted that Chapter 708 of the Acts of Assembly, 1972, which established the district court concept for Virginia and which becomes effective July 1, 1973, if reenacted by the upcoming session of the General Assembly, will abolish all such courts of limited jurisdiction. (See § 16.1-70.1 of the Code.)

The Ward case, recently decided by the United States Supreme Court, to which you refer, involves a mayor's court in the State of Ohio, which court had jurisdiction in cases of violations of town and municipal ordinances and certain traffic offenses. This court appears to be basically similar to our town courts in Virginia. In that case, the Supreme Court held that it was a violation of a defendant's constitutional rights to a fair and impartial trial for him to be tried for a violation of a traffic offense by the town's mayor. The basic reason behind such decision was that the mayor in question "has wide executive powers and is the chief conservator of the peace. He is president of the village council, presides at all meetings, votes in case of a tie, accounts annually to the council respecting village finances, fills vacancies in village offices, and has general overall supervision of village affairs. A major part of village income in derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court."

The situation in the Ward case was distinguished from an earlier case of Dugan v. Ohio, 277 U.S. 61 (1928), involving another mayor's court in Ohio, on the basis that, in Dugan, the mayor had judicial functions, but only very limited executive authority, and the municipality was governed by a commission of five members including the mayor which exercised all legislative powers. In addition, there was a city manager who exercised executive powers. In those circumstances, the Supreme Court held that the mayor's relation to the finances and financial policy of the municipality was too remote to warrant a presumption of bias toward conviction on charges brought before him as judge.

From a review of the two cases referred to above and of the various practices existing in the towns in Virginia which have courts, it appears that a single answer cannot be given as to whether such town courts are no longer proper under Ward. Instead, it is my opinion that it will be necessary to determine the factual situation involving each particular town as to whether the mayor or other town official, who presides as town judge, has a sufficient connection with the financial affairs of the town so as to prevent him from being a disinterested judicial officer when presiding over offenses from which a portion of the town income might be derived. If the town income from this source is de minimis in light of its overall budget, the issue of bias due to financial interest does not arise.

In conclusion, if the income of the town from fines, forfeitures, costs and fees imposed by a mayor or other town official acting in a judicial capacity is more than trivial and such town judge has a significant responsibility for municipal finances, he does not constitute an impartial officer as required by the due process clause of the Fourteenth Amendment. On the other hand, if such judge's executive authority is limited, and consequently his relation to town financial matters slight, no disqualification results. In order to ensure the appearance as well as the reality of disinterest in the administration of municipal justice, should there be any doubt as to the substantiality of the town's income from fines, etc.,
and/or the extent of the judge's executive authority particularly as it relates to finances, the presiding officer of the court should be someone besides the mayor or other town official.

TOWNS—Council—Member may not be appointed citizen member of planning district commission representing county.

PUBLIC OFFICERS—Compatibility—Town council member may not be appointed citizen member of planning district commission representing county.

PLANNING COMMISSION—District—Member town council may not be appointed citizen member representing county.

June 15, 1973

THE HONORABLE MARTIN F. CLARK
Commonwealth's Attorney for Patrick County

This is in reply to your recent letter in which you requested my opinion whether the Board of Supervisors may appoint, as its citizen member of the West Piedmont Planning District Commission, a member of the town council of the incorporated town of Stuart, Virginia.

Section 15.1-1403(4) of the Code of Virginia (1950), as amended, provides:

"(a) At any time after the establishment of the geographic boundaries of a planning district, pursuant to § 2.1-63.5 of the Code, the governmental subdivisions embracing at least forty-five percent of the population within the district acting by the governing body may organize a planning district commission by written agreement among them. Any governmental subdivision not a party to such charter agreement shall continue as a part of the planning district but, until such time as such governmental subdivision elects to become a part of the planning district commission as hereinafter provided, shall not be represented in the composition of the membership of the planning district commission.

"(b) The charter agreement shall set forth:

* * *

"(4) The composition of the membership of the planning district commission; provided, however, that at least a majority, but not substantially more than a majority, of its members shall be elected officials of the governing bodies of the governmental subdivisions within the district with each county, city and town of more than three thousand five hundred population having at least one representative, and the other members being qualified voters and residents of the district, who hold no office elected by the people; and provided further, however, should the charter agreement, as adopted, so provide, an alternate may serve in lieu of one of the elected officials of each of the governing bodies of the participating governmental subdivisions."

You advised that Patrick County under the West Piedmont Planning District Commission's charter is entitled to three members of the Commission. Two of these three members are members of the Board of Supervisors of Patrick County. You ask whether the third member may be a member of the town council of the Town of Stuart.

The third member from Patrick County must be a qualified voter and resident of the district who holds no elective office.

Section 3 of Chapter 582, 1952 Acts of Assembly, provides that the councilmen
of the Town of Stuart shall be elected by the qualified voters of the town. See also § 15.1-829 of the Code. It seems clear that the member of the town council to whom you refer holds an office elected by the people. The member of the town council of the Town of Stuart cannot, therefore, be appointed as the citizen member of the West Piedmont Planning District Commission representing Patrick County.

TOWNS—County Not Required to Finance Dump or Landfill for Towns in the County.

COUNTIES, CITIES AND TOWNS—County Not Required to Finance Dump or Landfill for Towns in the County.

March 7, 1973

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

This is in reply to your recent letter in which you ask whether, in view of my opinion to the Honorable Nathan H. Miller, Member, House of Delegates, dated January 11, 1973, the County of Highland, after July 1, 1973, will have to provide a dump or landfill for the Town of Monterey or will the Town be required to provide its own disposal unit.

Section 32-9.1 of the Code of Virginia (1950), as amended, which was discussed in the Miller opinion cited above, is not to be construed broadly to require counties to completely finance the methods of disposition of garbage, refuse and other solid waste for towns in the county. The plan required to be submitted by that section by each county, city and town or any combination thereof, is to include the cost and the proposed method of financing. In my opinion this does not mandate that the county finance a facility for a town within its boundaries.

I am aware of no other statute requiring a county to provide a dump or landfill for a town; therefore, the Town of Monterey may be required to provide its own disposal unit in the absence of agreement with the County as to the operation of a joint unit.

TOWNS—Gifts and Donations—May make to chambers of commerce if nonprofit and nonsectarian.

CHAMBERS OF COMMERCE—Gifts and Donations—May receive from tours if nonprofit and nonsectarian.

May 4, 1973

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

This is in reply to your recent letter in which you ask my opinion whether the Town of Narrows in Giles County may make a gift in the amount of $40,000 to the Narrows Chamber of Commerce, Incorporated, for the purchase of certain real estate located in the town.

Section 15.1-25 of the Code of Virginia (1950), as amended, authorizes towns to make gifts and donations of property, real or personal, or money to be appropriated from their respective treasuries, to chambers of commerce which are nonprofit and nonsectarian.
REPORT OF THE ATTORNEY GENERAL

I am of the opinion that under this section the Town of Narrows may make a gift of $40,000 to the Narrows Chamber of Commerce, Incorporated, for the purchase of real estate located in the town provided the Chamber of Commerce is nonprofit and nonsectarian.

TOWNS—Indebtedness—Authority to borrow money—Limitations.

TOWNS—Authority to Condemn Land Necessary for Water System.

CONDEMNATION—Town Has Authority to Condemn Land Necessary for Water System.

August 1, 1972

THE HONORABLE C. RICHARD CRANWELL
Town Attorney for the Town of Vinton

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

"The Town of Vinton is at present considering the creation of its own water supply and distribution system; and the plans call for the activating of several wells in the Vinton Area, of which the cost thereof would be approximately One Hundred Fifty Thousand Dollars ($150,000.00). Phase II of the plan would be the creation of a system to capture surface water located in Bedford County. The approximate cost of this project is in the neighborhood of Three Million Five Hundred Thousand Dollars ($3,500,000.00).

"The questions that I would like answered are as follows:

"1. Can the Town of Vinton borrow money on an open note from one of the local banks to finance Phase I of the plan? That is, the activation of the wells at a cost of approximately $150,000.00. Aiding you in answering this question, I would refer you to Section II, Subparagraph 3 of the Vinton Charter which states; 'Subject to the provisions of the Constitution of Virginia, and this Charter, the Town of Vinton has the power to contract debts, borrow money and make and issue evidence of indebtedness'. Of course, the primary purpose of this inquiry is that the Town of Vinton prefers to borrow the money rather than go through the time consuming process of bond issues in order to initiate Phase I of the proposed project.

"2. Under the Laws of the Commonwealth and the Charter of the Town of Vinton, does the Town of Vinton have the authority to institute condemnation proceedings in Bedford County to acquire the necessary land for the surface water system? In answering this question, I would refer you specifically to Section II, Article 5 of the Vinton Charter which says: 'The Town has the power to acquire by purchase, gift, devise, condemnation, or otherwise, property, real or personal, or any estate or interest therein, within or without the town or state and for any of the purposes of the town; and to hold, improve, sell, lease, mortgage, pledge or otherwise dispose of the same or any part thereof including any property now owned by the town.'"

I shall answer your questions seriatim:

1. Section 15.1-843 of the Code of Virginia (1950), as amended, authorizes the Town of Vinton to borrow money subject to such limitations as may be imposed by law. Section 10 of Article VII of the Constitution of Virginia prohibits the town from incurring indebtedness in excess of eighteen per centum of the
assessed valuation of the real estate in the town. Sections 15.1-222 and 15.1-223 of the Code, specifically applicable to your inquiry, limit the borrowing of money by a town to loans to meet appropriations for the then current year and loans in anticipation of bond issues under Chapter 5 known as the "Public Finance Act of 1958." Applying these sections to your factual situation, I am of the opinion that the Town of Vinton may not borrow money on the open market from one of the local banks to finance the activating of several wells for its water supply and distribution system.

2. Section 15.1-292 of the Code authorizes the town to condemn the necessary land within or without the town to establish water works. The Town's charter provisions which authorize it to condemn property for this purpose are saved by § 15.1-840. I am therefore of the opinion that the Town of Vinton has authority to institute condemnation proceedings in Bedford County to acquire the land necessary for the water system.

TOWNS—May Become City if it Meets Constitutional Requirements, Though Located in County With Urban Executive Government.

CITIES—Town May Become City if it Meets Constitutional Requirements, Though Located in County With Urban Executive Government.

COUNTIES—Urban Executive Government; Town May Become City if it Meets Constitutional Requirements.

July 18, 1972

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

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

"I have been requested by the Mayor of the Town of Manassas and the town attorney to obtain your opinion on the following question:

"Should the County adopt the Urban County Executive form of government, would that prevent a now incorporated town from becoming a city once such form of government becomes effective within the county?"

Article VII, Section 1, of the Constitution of Virginia provides that a "city" means an independent incorporated community which has within defined boundaries a population of 5,000 or more and which has become a city as provided by law. A "town" means any existing town or an incorporated community within one or more counties which has within defined boundaries a population of 1,000 or more and which has become a town as provided by law.

Assuming that the incorporated town and city meet these constitutional requirements, I am of the opinion that the town may become a city even though located in a county which has adopted the urban county executive form of government.

TOWNS—Mayor Has No Authority to Issue Warrants Beyond His Territorial Jurisdiction.

TOWNS—Mayor; Warrants Issued By Must Be Returnable to County Court.

WARRANTS—Mayor Has No Authority to Issue Beyond His Territorial Jurisdiction; Must Be Returnable to County Court.

August 21, 1972
THE HONORABLE DAVID A. LYON, III
Justice of the Peace, Prince George County

This is in reply to your recent request for an opinion in which you enclose a letter from a justice of the peace of Dickenson County regarding the authority of a town mayor to issue warrants within his territorial jurisdiction. The letter you enclose inquires specifically as to whether such a mayor could issue a warrant which would then be returnable in the police court over which the mayor presided as a police justice. That letter further inquires as to whether the mayor of such a town could issue warrants for offenses committed in the county as well as within the territorial limits of the town.

These questions are governed by the provisions of §§ 16.1-70 and 16.1-75.1 of the Code of Virginia (1950), as amended, which sections relate to the creation and jurisdiction of courts of limited jurisdiction. Section 16.1-75 provides as follows:

"No mayor, except when serving as the presiding officer of a court of limited jurisdiction therein, shall, within any incorporated town, or in any city in which a county court has jurisdiction under the provisions of Chapter 4 (§ 16.1-64 et seq.) of this Title, exercise any civil or criminal jurisdiction conferred upon such county court. Any mayor or other trial officer authorized to preside over a court of limited jurisdiction under this Chapter, shall, however, have within his territorial jurisdiction, the same power to issue attachments, warrants, and subpoenas within the jurisdiction of such county court as is conferred upon the judge of the court and he shall also have power to grant bail in any case in which he is authorized by general law to grant bail, and to receive his fee therefor. But any such attachment, warrant or subpoena shall be made returnable before the county court for action thereon."

Thus, any warrants issued by the mayor acting as a police justice must be made returnable to the county court. See Report of the Attorney General (1961-1962), page 151; see also Report of the Attorney General (1960-1961), page 188.

It would also be my opinion consistent with § 16.1-75 that the authority of the mayor acting as a police justice to issue warrants would be limited to "his territorial jurisdiction."

TOWNS—Ordinance Required for Sale of Rights to Property Acquired for Public Purposes.

TOWNS—No Authority to Convey Real Estate Except under Certain Circumstances.

REAL ESTATE—Town Has No Authority to Convey Real Estate Except Under Certain Circumstances.

July 6, 1972

THE HONORABLE CLINTON MILLER
Member, House of Delegates

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

"I am writing this letter in regard to the following situation: The Town of Shenandoah, Virginia, in Page County did, by deed dated the 28th day of February, 1969, acquire as a gift for 'public purposes' from Southern States Cooperative, Inc., a brick building and land of approximately 20,000 sq. ft., situated within the corporate limits of the
Town. (A copy of the deed with Grantor and Grantee resolutions is attached).

"At the time of receipt by the Town, a professional appraisement set the value on this property at $36,000.00.

"During its three years of ownership, the Town has insured and maintained the building and used same for storage of municipal property and supplies. In addition, the Town has leased to others a portion of space in the building for storage.

"At a regular meeting of the Town Council on the 11th day of April, 1972, the six Council members and the Mayor of Shenandoah recorded a public vote of 3 to 3 with the Mayor breaking the tie favoring the sale of said building and land to a private interest for a token price of $1.00.

"To date, no formal bid offering has been solicited by the Town, no formal ordinance or resolution which would authorize the Mayor and Town Clerk to execute a deed of conveyance has been presented to the Council for official and final vote.

"My question is this: Would not the Town of Shenandoah be required to follow the provisions of Code Section 15.1-307 regarding the conveyance of its rights in this property? That is, would they not be required to do so by an ordinance passed by a recorded affirmative vote of ¾ of all the members elected to the Council?"

Section 9 of Article VII of the Constitution of Virginia and § 15.1-307 of the Code of Virginia (1950), as amended, are applicable to the sale of rights to the property of the town acquired for public purposes. Both provisions require an ordinance be passed by a recorded affirmative vote of three-fourths of all members elected to the council before the sale of such rights.

You next ask:

"May a Town make a gift of a piece of publicly-owned property appraised at such a high figure as $36,000.00 for a sum of $1.00 to a private individual?"

There is no general law under which the governing body of a town is empowered to sell or otherwise dispose of the real estate owned by the town. See opinion to the Honorable W. Carrington Thompson, Member, House of Delegates, dated March 10, 1961, and found in Report of the Attorney General (1960-1961), p. 327. Some town charters contain specific provisions authorizing the disposal of real estate owned by the town. We have examined the charter of the Town of Shenandoah and it does not appear that this authority is contained in that charter. I therefore answer your question in the negative.
This is in reply to your letter of recent date which reads as follows:

"The town of Ashland, situated in Hanover County, Virginia, has for many years owned and operated its own water system serving customers both within and without the corporate limits of the town.

"Specific authority for Ashland to own and operate a water system is contained in paragraph 2.302 of the Ashland Town Charter which is published in the 1952 Acts of Assembly, Chapter 556.

"Pursuant to the provisions of Section 15.1-292 and 15.1-299 of the 1950 Code of Virginia as amended, Hanover County adopted a comprehensive water ordinance in the year 1971. The County Water Ordinance provides for standardized specifications concerning construction of water systems in the County and provides further that plans for a water system for any new subdivision, housing development or shopping center or an expansion of an existing subdivision, housing development or shopping center shall be submitted to and approved by the Director under the Ordinance. The Ordinance further provides that with plans for a new water system or an extension on an existing water system, there shall be a deed dedicating such system or extension to the County.

"In your opinion, does the County Ordinance apply to an extension of the Ashland town water system outside the corporate limits of the town to the extent that the town would have to comply with the required specifications contained in the Ordinance and would the town be required to dedicate such extension to the County in conformity with the Ordinance?"

Section 2.302 of the town charter of Ashland provides:

"To own, operate and maintain water works to acquire in any lawful manner in any county of the State, such water, lands, property rights, and riparian rights as the council may deem necessary for the purpose of providing an adequate water supply to the town and of piping and conducting the same; to lay, erect and maintain all necessary mains and service lines, either within and without the corporate limits of the town for the distribution of water to its customers and consumers, both within and without the corporate limits of the town and to charge and collect water rents thereof; to erect and maintain all necessary dams, pumping stations and other works in connection therewith; to make reasonable rules and regulations for promoting the purity of its water supply and for protecting the same from pollution; and for this purpose to exercise full police powers and sanitary control over all land comprised within the limits of the water shed tributary to any such water supply wherever such lands may be located in this State; to impose and enforce adequate penalties for the violation of any such rules and regulations; and to prevent by injunction any pollution or threatened pollution of such water supply and any and all acts likely to impair the purity thereof; and to carry out the powers herein granted, the town may exercise within the State all powers of eminent domain provided by the laws of this State." (Emphasis supplied.)

The Hanover County water ordinance was adopted under the provisions of § 15.1-299 which reads:

"Any county which has adopted regulations under chapter 11 (§ 15.1-427 et seq.) of Title 15.1 of the Code of Virginia governing the use and development of land may also adopt regulations, subject to the provisions of chapter 2 (§ 62-10 et seq.) of Title 62 [chapter 3.1
(62.1-44.2 et seq.) of Title 62.1], fixing requirements as to the extent to which and the manner in which water, sewer and other utility mains, piping, conduits, connections, pumping stations and other facilities in connection therewith shall be installed as a condition precedent to the approval of an original plat of a subdivision or a development plan adopted pursuant to § 15.1-491, or alteration of any such plat or a development plan adopted pursuant to § 15.1-491. Such regulations may require the water source to be an approved source of supply capable of furnishing the needs of the eventual inhabitants of such subdivision proposed to be served thereby. Such regulations also may include requirements as to the size and nature of the water and sewer and other utility mains, pipes, conduits, connections, pumping stations or other facilities installed or to be installed in connection with the proposed water or sewer systems."

The charter provisions prevail over the provisions of § 15.1-299 of the Code insofar as they are applicable. These provisions authorize the Town of Ashland to lay, erect and maintain all necessary mains and service lines either within and without the corporate limits of the town. This permits the town to operate its water system outside its limits which otherwise may be ultra vires because extra-territorial but does not expressly or impliedly authorize the town to disregard the county's water ordinance. See City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679. Therefore, I am of the opinion that the town is required to comply with the specifications contained in the ordinance. The authority of the county to require the town to convey its water system to the county appears to exceed the authority granted the county by § 15.1-299. Therefore, I am of the opinion that this portion of the ordinance is unenforceable.

TOWNS—Solid Waste Disposal Areas—Responsible for furnishing.

April 9, 1973

THE HONORABLE C. RICHARD CRANWELL
Member, House of Delegates

This is in reply to your recent letter in which you ask my opinion whether a county is responsible for furnishing a solid waste disposal area for a town and, if so, whether the town has the responsibility of bearing any of the cost of the project.

The opinion, to which you refer, to the Honorable Nathan H. Miller, Member, House of Delegates, dated January 11, 1973, was followed by an opinion to the Honorable R. Turner Jones, Commonwealth's Attorney for Highland County, dated March 7, 1973. Copies of both opinions are enclosed.

I am aware of no statute requiring a county to provide a dump or landfill for a town; thus, the Town of Vinton is required to provide its own disposal unit in the absence of an agreement with the county as to the operation of a joint unit. See the Jones opinion above. House Bill No. 1875, Chapter 416 of the 1973 Acts of Assembly, which will become effective June 1, 1973, requires a town to provide for the proper disposal of its solid waste, including waste from households, commercial establishments, manufacturing, industry, agriculture and institutions.

I am, therefore, of the opinion that a town is responsible for furnishing its own solid waste disposal area and that it is responsible for the cost of such project.
TOWNS—Town of Ashland—Water and sewer services—May erect and extend service lines within county.

October 30, 1972

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

This is in reply to your recent letter in which you requested my opinion on the following three questions:

"1. Does Hanover County have the authority to prohibit the Town of Ashland from extending its water and sewer service and sales into areas outside of the Ashland Town limits where other services of water and sewer service are not presently available?

"2. Does § 15.1-299 of the Code of Virginia or any other provision of law grant authority to Hanover County to disapprove an original plat of a subdivision or a development plan or the alteration of any such plat or development plan for any reason relating to water or sewage if all of the housing and other facilities to be constructed on such plat or according to such plan are to be provided water and sewer service by the Town of Ashland and if standards of the Ashland water and sewer system are equal to, or superior to, any requirements of Hanover County relating to the extent to which and the manner in which water and sewer mains, piping, conduits, connections, pumping stations and other facilities in connection therewith are to be installed?

"3. If plans for a water system, as required by § 16-3 of the County of Hanover Public Water Code, include connection with the Ashland water system and such plans meet all of the requirements and specifications of the Ashland water system, do any of the provisions of §§ 16-4 through 16-6 and Code apply to such system?"

I shall answer your questions seriatim.

1. The charter provisions of the Town of Ashland prevail over the provisions of § 15.1-299 of the Code of Virginia (1950), as amended, and permit the Town of Ashland to lay, erect and maintain all necessary mains and service lines either within or without the corporate limits of the town. The exercise of this authority however, is subject to the county water ordinance which has been adopted by the county. See opinion of this office to the Honorable Andrew J. Ellis, County Attorney for Hanover County, dated July 17, 1972, a copy of which is enclosed.

2. The Town of Ashland is required to comply with the Hanover County water ordinance. If the standards of the Ashland water and sewer system are equal to or better than that set forth in the county's water ordinance, I am of the opinion that the county may not disapprove an original plat of a subdivision solely because the Ashland water and sewer system will supply the subdivision with water.

3. The provisions of §§ 16-4 through 16-6 of the County of Hanover Public Water Code establish specifications for the installation of a water system in the county. These must be met by the Town. See opinion to the Honorable Andrew J. Ellis, County Attorney for Hanover County, dated July 17, 1972, above cited.

TREASURERS—Acceptance of Check—Tender of check in payment of taxes may be refused by treasurer.

April 26, 1973
I have received your letter of March 30, 1973, from which I quote:

"Real estate taxes become delinquent to the point where the property is advertised for sale, at which time the owner, or someone in his behalf, goes to the Treasurer and offers to pay him by personal check and then by certified check, both of which are refused by the Treasurer with the reason given that it is his policy that once the property is advertised for sale, he will only accept cash.

"Does he have a right to do this?"

A check, certified or not, is not legal tender for the payment of a debt. *Vick v. Howard*, 136 Va. 101 (1923). Coins and currency of the United States, including Federal Reserve Notes, are made legal tender by 31 U.S.C.A. § 392. In the absence of a contrary agreement between a debtor and his creditor, a tender of a check to pay a monetary obligation fixed in dollars may be refused by the creditor. See generally 60 Am. Jur. 2d, Payment § 22, *et seq.*, and cases cited therein. And in the absence of a statute providing otherwise, it follows that a treasurer may properly refuse to accept a check in payment of a tax liability. See Report of the Attorney General (1950-1951), p. 300. I am not aware of any statute requiring a treasurer to accept a check in payment of taxes and, therefore, I am of the opinion that he may properly refuse to do so.

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**Treasurers—Bonds and Bond Coupons—Destruction of—Not personally liable if fiscal agent has certified bonds as having been destroyed.**

September 11, 1972

I have received your letter of August 17, 1972, inquiring whether a county treasurer is relieved from personal liability in the event local bonds or interest coupons certified by the county fiscal paying agent as having been destroyed pursuant to § 15.1-191, Code of Virginia (1950), as amended, are subsequently presented to him for payment. You refer to an opinion of this office to the Honorable J. Gordon Bennett, Auditor of Public Accounts, dated March 17, 1958, and found in Report of the Attorney General (1957-1958), p. 31, which stated (prior to the enactment of § 15.1-191) that a treasurer would not be relieved of personal liability if bonds or coupons certified as having been cremated were subsequently submitted to him for payment. You also enclose copies of a proposed resolution and agreement for my comments.

Chapter 564, Acts of Assembly of 1960, codified as § 15-666.32:2 (now § 15.1-191), changed the prior law as interpreted by the opinion to which you referred. Section 15.1-191 provides, in pertinent part:

"(1) Whenever the fiscal agent for any county shall have made payment in full for any bond or bond coupon representing an obligation of such county, such fiscal agent may, by agreement with the governing body of the county, forthwith destroy such bond or bond coupon and shall certify the facts of such payment and destruction to the treasurer or director of finance, as the case may be, of such county.

"(4) Whenever any such certification, appearing upon its face to have been executed and acknowledged as hereinabove prescribed, shall have
been delivered to the treasurer or director of finance of any county by such fiscal agent, then such treasurer or director of finance shall, in the absence of actual knowledge of any misrepresentation or irregularity as to such certification, be relieved of all further liability for all such bonds and bond coupons therein represented to have been paid and destroyed. For accounting purposes, every such certification which appears upon its face to have complied with the requirements of this section shall constitute sufficient evidence of the fact set forth therein."

Sections (2) and (3) of the statute contain the facts required to be included in the certification and provide that the form of the certification shall be prescribed by the Auditor of Public Accounts.

The quoted provisions have changed the law as interpreted by the opinion of March 17, 1958. A treasurer, acting pursuant to § 15.1-191, is not personally liable for the bonds and bond coupons certified as having been destroyed by the fiscal agent for the county.

The proposed resolution of the Board of Supervisors and agreement between the county and its fiscal agent appear sufficient to accomplish their intended purpose.

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**TREASURERS—City or County Treasurer May Act As Treasurer of Welfare Board Created Under § 63.1-44.**

**WELFARE BOARD—Treasurer—Statute does not provide for; any person may serve in that capacity.**

August 23, 1972

**The Honorable W. S. Harris, Jr.**

Treasurer of the City of Emporia

I am in receipt of your letter of July 24, 1972, wherein you request whether § 15.1-50 of the Code of Virginia (1950), as amended, prohibits a city or county treasurer from serving with or without compensation as treasurer of a welfare board created under § 63.1-44. You further inquire if any person other than a city or county treasurer may serve as the treasurer of such Board.

Section 15.1-50 provides in relevant part that a person holding the office of county treasurer shall not hold any other office at the same time with exceptions not pertinent here. I am of the opinion that a treasurer of the joint welfare board would not be an "officer" within the meaning of the above section. Such person has no statutory powers and duties, he is not denominated an officer by statute, he has no statutory term of office and he is not required to take oath of office or to give bond. Accordingly, your inquiry is answered in the negative as to a county treasurer serving as a treasurer of a joint welfare board.

As to a city treasurer serving in such capacity, § 15.1-50 does not apply. I am further unaware of any prohibition as to city treasurers serving in such capacity elsewhere in the Code. Accordingly, I am of the opinion that your inquiry as to city treasurers must also be answered in the negative.

As to your final inquiry with regard to any person other than a city or county treasurer serving as treasurer of a joint welfare board, inasmuch as the statute does not provide for a treasurer to be appointed for a welfare board I know of no reason why any person may not serve in that capacity.
REPORT OF THE ATTORNEY GENERAL

TREASURERS—Delinquent Property Taxes—Local treasurer has authority to lease property for delinquent taxes but must strictly observe statutory prerequisites.

BOARDS OF SUPERVISORS—May Postpone Treasurer's Authority to Lease Property.

December 4, 1972

The Honorable Bennie L. Fletcher, Jr.
Treasurer for Arlington County

I have received your letter of November 13, 1972, inquiring, pursuant to the request of the Board of Supervisors, whether you are authorized by § 58-1003, Code of Virginia (1950), as amended, to lease property upon which taxes are delinquent in order to obtain funds to satisfy the delinquent taxes.

Section 58-1003 provides, inter alia:

"Any real estate in the county . . . belonging to the person or estate assessed with taxes or levies due on such real estate may be rented or leased by the treasurer . . . privately or at public outcry, after due publication, in the discretion of such treasurer . . . Such leasing shall be for a term not exceeding one year and for cash sufficient to pay the taxes or levies due on the real estate so rented and the costs and charges of advertising and leasing. When a lease is effected, the treasurer . . . leasing such real estate shall put the lessee in possession thereof and for such purpose shall have like powers as those exercised by a sheriff acting under a writ of possession.

"The board of supervisors . . . may, by resolution adopted by a majority of the members thereof by a recorded yea and nay vote, postpone the time when any real estate in such county may be rented or leased for the taxes or local levies for any year until after the fifteenth day of November of the next succeeding year."

Section 58-1004 requires that a notice shall be served upon any tenant in possession of the property advertised for lease at least five days prior to the day of leasing which notice shall conform to §§ 8-51 to 8-53.

The Virginia Supreme Court affirmed a trial court decree invalidating a lease made to collect delinquent town taxes because of the failure to comply with the notice requirement. Construction Corp. v. Apt. Corp. 158 Va. 415 (1932). The Court stated, at 418:

"That the tax sales and leases must conform to the statute under which they are made is ancient law. They are 'founded on forfeitures, deserve no indulgence from the court. It is, therefore, the well settled law, that he who claims under a forfeiture must show that the law has been exactly complied with.'"

Upon consideration of the foregoing, it is my opinion that a treasurer has the authority to lease property for delinquent taxes; however, he must strictly observe the statutory prerequisites to the exercise of such authority. The board of supervisors, acting pursuant to § 58-1003, may postpone the treasurer's authority to lease in the manner provided.

TRUSTS—Testamentary—Trustees' commissions—Awarding of commissions discretionary with Commissioner of Accounts.

September 8, 1972
Major General Richard L. Irby
Superintendent
Virginia Military Institute

I am writing in response to your letter of September 5, 1972, concerning the administration of the testamentary trust established by George Randall Collins.

In your letter you stated that Virginia Military Institute serves as trustee under the will of George Randall Collins who died on June 27, 1964. In accordance with the terms of the will, the remainder of Mr. Collins' estate was left to Virginia Military Institute "to be used as a trust to perpetuate and maintain as a memorial of the Battle of New Market..." certain real estate. All income from the trust is deposited with the Treasurer of Virginia Military Institute and has been used pursuant to the provisions of the will.

As trustee, the Institute has made no charge against the trust funds for administration of the trust. In your letter you request my opinion with respect to the following recommendation:

"That VMI, as Trustee for the New Market Battlefield Memorial, assess the normal and customary charge of five per cent (5%) for administration of trusts against the total annual income of the Memorial; that an accrued liability for previous years, not so assessed, be recorded and recovered against future income from the Collins trust; and further, that expenditure of all such recoveries be subject to the approval of the Board of Visitors."

Section 55-27 of the Code of Virginia (1950), as amended, clearly authorizes a State institution of higher education to serve as trustee in circumstances such as you have outlined. Section 55-29 of the Code requires the trustee annually to render and state before the Commissioner of Accounts for the county or city wherein the trust subject is situated an account showing the investment of the trust funds, the receipts from such investment, and the disbursement of the same, in like manner as is required of every personal representative, guardian, curator or committee, under Chapter 2 (§ 26-8, et seq.) of Title 26 of the Code.

Section 26-30 of the Code, a part of Chapter 2 of Title 26, provides that the Commissioner, in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise. The case law of Virginia makes it clear that the normal commission is five percent (5%); nevertheless, the Commissioner of Accounts must consider the actual work required or performed in determining the appropriate commission.

In light of the statutory law cited above, I am of the opinion that the Institute may request, when it files its annual account, reimbursement for actual expenses incurred and compensation in the form of a five percent (5%) commission on the total income. Of course, the awarding of such costs and a commission is within the sound discretion of the Commissioner of Accounts. Similarly, the awarding of costs and a commission for previous years would be within the Commissioner's discretion. Should such costs and a commission be awarded, then the expenditure of all recoveries would necessarily be subject to the approval of the Board of Visitors.

Virginia Conflict of Interests Act—Appointments to County School Board—When not in conflict with Act.

January 30, 1973

The Honorable F. Caldwell Bagley
County Attorney for Prince William County
This is in response to your letter of January 26, 1973, together with further information provided at my request, wherein you inquire whether a violation of the Virginia Conflict of Interests Act would exist where: (1) an assistant principal in one county school system is appointed to a county school board in a school system other than the one in which he is an assistant principal; and (2) the son of a member of a county board of supervisors, who does not reside with said member, is appointed to the school board of such county. I will answer your questions seriatim.

1) This appointment would be governed by § 2.1-349(a)(2) of the Code of Virginia (1950), as amended. As long as the provisions of that section are complied with, there would be no violation of the Act.

2) Since the son does not reside with his father, the father would have no material financial interest in the son's appointment. See § 2.1-348(f)(4). Accordingly, I am of the opinion that no conflict of interests exists.

VIRGINIA CONFLICT OF INTERESTS ACT—City Attorney Prohibited from Serving on City School Board.

PUBLIC OFFICERS—City Attorney is City Officer; May Not Serve on City School Board.

PUBLIC OFFICERS—Conflict of Interest—City Attorney is city officer; may not serve on city school board.

July 17, 1972

THE HONORABLE DON R. PIPPIN

City Attorney for the City of Norton

This is in reply to your recent letter in which you request whether a conflict of interest exists where a city attorney serves on the City School Board. The answer to such inquiry is found in § 22-92 of the Code of Virginia (1950), as amended, which reads as follows:

"No State officer, except a notary public, no city officer, no member of council, or any officer thereof, shall during his term of office be chosen or allowed to act as a school trustee; but this provision shall not have the effect of prohibiting a referee in chancery or commissioner in bankruptcy, or member of the board of health from holding such office."

Inasmuch as the charter of the City of Norton, found in Chapter 565 of the 1954 Acts of Assembly, provides for the appointment of a city attorney, I am of the opinion that he would clearly be a "city officer" within the meaning of § 22-92. Accordingly, he would be prohibited from serving on the city school board.

VIRGINIA CONFLICT OF INTERESTS ACT—City Council—Savings and loan association in which member has material interest may, as result of competitive bid, purchase land from redevelopment and housing authority if member discloses interest.

CITIES—Council—Member must disclose interest in savings and loan association purchasing property from redevelopment and housing authority.

May 18, 1973
This is in response to your recent letter with respect to the following situation: a savings & loan association has submitted a bid to purchase land from a redevelopment and housing authority in order to participate in the construction of a low and moderate income housing project. A member of the Portsmouth City Council, who is president and director of the savings & loan association, voted to approve the construction of the project, although at that time he did not know that the association would bid on the project. Your inquiry is whether the association may purchase the land from the authority and whether the councilman must make a disclosure of his interest pursuant to § 2.1-349 of the Code of Virginia (1950), as amended.

Section 2.1-349 prohibits an officer of a governmental agency from having a material financial interest in a contract with an agency, other than the one of which he is an officer, unless (a) written disclosure of the officer's interest is made and (b) the contract is let after competitive bidding or certified that it is not in the public interest to let after competitive bidding. I have previously ruled that authorities such as these are "agencies" within the meaning of that section in an opinion to the Honorable Jack F. DePoy, Commonwealth's Attorney for the County of Rockingham, City of Harrisonburg, dated September 15, 1970 [Report of the Attorney General (1970-71), pp. 66-67].

Accordingly, if the proper disclosure were made pursuant to § 2.1-349, the Association could purchase land from the authority. Additionally, the councilman should refrain from voting pursuant to § 2.1-352, with respect to any approval which might subsequently be given with reference to the purchase.

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**VIRGINIA CONFLICT OF INTERESTS ACT—Contracting Firm May Not Bid on Project to Construct Library; Spouse of Secretary of Library Board Is Major Stockholder of Firm.**

October 12, 1972

This is in response to your letter of October 2, 1972, wherein you inquire whether a conflict of interest would exist in a case where the spouse of the secretary of a regional library board is the major stockholder of a contracting firm which desires to bid on the construction of a regional library. Section 2.1-348(f) of the Code of Virginia (1950), as amended, provides:

"Material financial interest shall include a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household . . . ."

Since § 2.1-349(a)(1), prohibits an officer of a governmental agency from having a material financial interest in any contract with the governmental agency of which he is an officer, I am of the opinion that a conflict of interest would exist with regard to the contracting firm and, accordingly, it could not bid upon the project to construct the library.

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**VIRGINIA CONFLICT OF INTERESTS ACT—County Treasurer Serving on Board of Directors of a Bank in the Area—Conditions under which may serve.**

February 8, 1973
THE HONORABLE C. L. GLASS
Treasurer of Culpeper County

This is in response to your recent letter wherein you inquire if, as county treasurer, you may serve on the board of directors of a bank in Culpeper.

Section 2.1-348(f)(3) of the Code of Virginia (1950), as amended, is applicable to your inquiry. It reads as follows:

"Except for the purposes of §§ 2.1-352 and 2.1-353, employment by, ownership of, and interest in, or service on the board of directors of public service corporations, financial institutions . . . shall not be deemed a material financial interest within the meaning of this chapter;"

I am, therefore, of the opinion that there would be no violation of § 2.1-349 were you to accept such a position.

Section 2.1-352 prohibits an officer from voting upon a transaction in which he has a material financial interest. Since § 58-943 requires the county treasurer to select, with the approval of the county finance board, the depositories for monies received by the treasurer, you would not be able to select the bank on whose board of directors you serve as a depository if you have a material financial interest, as defined in § 2.1-348(f), in such bank.

VIRGINIA CONFLICT OF INTERESTS ACT—Deputy Clerk and Her Husband May Sell Real Estate to Board of Supervisors for Purposes of § 15.1-18.

BOARDS OF SUPERVISORS—Deputy Clerk and Her Husband May Sell Real Estate to Board of Supervisors for Purposes of § 15.1-18.

CLERKS—Deputy Clerk and Her Husband May Sell Real Estate to Board of Supervisors for Purposes of § 15.1-18.

REAL ESTATE—Deputy Clerk and Her Husband May Sell Real Estate to Board of Supervisors for Purposes of § 15.1-18.

April 27, 1973

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

This is in reply to your letter of April 13, 1973, in which you requested my opinion whether under § 2.1-349(b)(1) of the Code of Virginia (1950), as amended, a deputy clerk and her husband may, by option and subsequent deed, sell and convey real estate to the Board of Supervisors for the purposes set forth in § 15.1-18 of the Code.

Section 2.1-349(b)(1) of the Code permits an officer or employee of a governmental agency to sell, lease or exchange real property to a governmental agency provided the officer or employee does not participate in any way as such officer or employee in such sale, lease or exchange, and this fact is set forth as a matter of public record by the governing body of such governmental agency or by the administrative head thereof.

I am of the opinion that this language permits the deputy clerk and her husband, by option and subsequent deed, to sell and convey real estate to the Board of Supervisors for the purposes set forth in § 15.1-18 of the Code.

VIRGINIA CONFLICT OF INTERESTS ACT—Each Department of Municipal
Government Is Separate Agency—Employee of county fire department may be member of board of supervisors.

BOARDS OF SUPERVISORS—Employee of County Fire Department May Be Member of.

June 21, 1973

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

This is in reply to your letter and further information provided inquiring whether an employee of a county fire department may hold office as a member of that county's board of supervisors.

I enclose for your information a copy of an opinion to the Honorable Alan A. Diamonstein, Member, House of Delegates, dated March 23, 1973, in which I ruled that since each department of municipal government is a separate agency within the meaning of § 2.1-348(a) of the Code of Virginia (1950), as amended, there would be no prohibition against an employee of the fire department serving on his city council.

Accordingly, since the employee's service on the board of supervisors is analogous to an employment contract, such contract is not prohibited by § 2.1-349-(a)(2).

VIRGINIA CONFLICT OF INTERESTS ACT—“Employee” in Act Refers to Present Employees Only—Does not affect post-employment activities.

February 6, 1973

THE HONORABLE M. LANGHORNE KEITH
County Attorney for Fairfax County

This is in response to your letter of February 1, 1973, wherein you inquire if the enactment of an ordinance by Fairfax County dealing with post-employment activities of County employees would violate the Virginia Conflict of Interests Act and whether enactment of an ordinance which would require the disclosure of financial information not required to be disclosed under the Virginia Conflict of Interests Act would violate such Act.

With regard to the first inquiry, I am of the opinion that “employee” as defined in § 2.1-348(e) of the Code of Virginia (1950), as amended, would apply to present employees only. Accordingly, the ordinance in question would not be pre-empted by the Act.

With regard to the second inquiry, I enclose for your convenience a copy of an opinion to the Honorable Edward M. Holland, Member, Senate of Virginia, dated November 14, 1972, wherein I ruled that a county has the authority to pass an ordinance requiring the disclosure of more information than that required by the Virginia Conflict of Interests Act. Accordingly, I am again of the opinion that there would be no pre-emption of this ordinance by the Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Employee of Governmental Agency—May not contract with agency if “material” financial interest involved.

November 15, 1972
This is in response to your recent letter wherein you inquired if the following factual situation would constitute a violation of the Virginia Conflict of Interests Act:

A former writer for a local newspaper became a city employee in March, 1971. Prior to that time he contracted with the Executive Director of the Norfolk Kiwanis Club, who was also his supervisor at the newspaper, to write an article for a promotional program magazine, a portion of the revenue from which accrued to the benefit of the City. The employee reported that he completed a substantial portion of the work toward the article for which he received $425.00, prior to his leaving his previous employment.

Section 2.1-349(a)(1) of the Code of Virginia (1950), as amended, is applicable to your inquiry. This section prohibits an employee of a governmental agency from contracting with or having a material financial interest in a contract with his own agency. Even if the employee were deemed to have a financial interest in the contract between the city and the Kiwanis Club, the interest is not "material" since the remuneration to the employee is less than $5,000.00. Accordingly, I am of the opinion that there is no violation of the Virginia Conflict of Interests Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Employee of School Board of One Locality May Serve on School Board of Another Locality; Provisions of § 2.1-349(a) (2) Must Be Complied With.

VIRGINIA CONFLICT OF INTERESTS ACT—Prohibited Contracts—School Board member prohibited from selling insurance to Board.

March 6, 1973

I will answer your questions seriatim.


2. With respect to the second question, I enclose for your convenience an opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated January 30, 1973, wherein I ruled that, as long as the provisions of § 2.1-349(a)(2) were complied with, there would be no violation of the Virginia Conflict of Interests Act. Based upon the further information pro-
vided me that the "regional district" to which you refer is a regional planning district, the fact that the other locality is in the same regional district as Powhatan County does not affect my opinion.

VIRGINIA CONFLICT OF INTERESTS ACT—High Constable Serving as Bondsman.

COUNTIES, CITIES AND TOWNS—High Constable Serving as Bondsman.

HIGH CONSTABLE—Serving as Professional Bondsman.

April 10, 1973

THE HONORABLE FREDERICK T. GRAY
Member, Senate of Virginia

This is in reply to your recent letter requesting an opinion concerning the question of whether an individual who is elected to and holds office as High Constable could also conduct business as a professional bondsman within the same jurisdiction for which he is serving as High Constable.

The office of the High Constable is not created by statute or by the Constitution of Virginia, nor are the powers and duties of a High Constable covered in any way by statute. Instead the office of High Constable within certain cities in Virginia is a creature of municipal charter. As best that can be determined the office of High Constable exists in only the Cities of Bristol, Chesapeake, Danville, Norfolk, Petersburg, Portsmouth, Richmond, and Virginia Beach. Therefore, the powers and duties of High Constable are determined by the specific provisions of the municipal charter which creates said office. For instance, in the city of Richmond, the duties of the High Constable relate solely to matters involving civil jurisdiction of the Civil Court of the City of Richmond. (See Charter of the City of Richmond, Acts of Assembly, 1948, Ch. 116, page 270; and see also City of Richmond v. Johnson, 202 Va. 33.) On the other hand, the High Constable of the City of Virginia Beach serves as the ministerial officer of the courts of the City and has such duties as the City Council may prescribe. (See Charter of Virginia Beach, Acts of Assembly, 1962, Ch. 147, page 204.) There appear to be no statutory provisions nor any case law on the question you asked, nor are there any previous opinions of the Attorney General relating directly to this question. It would appear that the answer to the question would depend upon the duties of a particular High Constable.

If the High Constable has jurisdiction in both criminal and civil matters, such as the power to serve arrest warrants in criminal matters, as is the case in some of the cities mentioned above, this would mean that the High Constable in making an arrest would be in an advantageous position to solicit business as a professional bondsman. Furthermore, in some instances, an arresting officer has authority to personally admit the person arrested to bail, taking a recognizance in such sum as he may deem sufficient. This would obviously create a conflict where the amount of the bondsman's fee would depend upon the amount of bail. Therefore, it would be my opinion that there is a conflict of interests between an individual serving as High Constable in those instances referred to above and also serving as a professional bondsman, and that such a High Constable may not with propriety also serve as a professional bondsman. This opinion is in line with a previous opinion of the Attorney General to the Honorable Carleton Penn, II, Judge of the Juvenile and Domestic Relations Court for Loudoun County, dated July 18, 1956, and found in Opinions of the Attorney General (1956-1957), page 143, a copy of which is enclosed, which relates to a justice of the peace serving as a professional bondsman.
In those instances where the High Constable has only civil jurisdiction, such as in the City of Richmond, the answer to your question would again depend upon the extent of his duties. If those duties do not in any way place him in a position of advantage in soliciting business as a bondsman, and do not in any way require his involvement in proceeding to let to bail or to require a bond, then the obvious conflict of interests referred to above would not become involved. Therefore, it is my opinion that in those limited circumstances where the High Constable has no contact whatsoever with any matters that might relate to giving bond, that it would not be a conflict of interests and would not be improper for said individual to also serve as a professional bondsman. This opinion in no way should be considered as affecting the question whether or not an individual serving as High Constable is prohibited from holding any other job or outside employment, which would be a matter for the particular city for which he serves.

VIRGINIA CONFLICT OF INTERESTS ACT—Judge, Member of Law Firm Which Drafts Ordinances; Must Disclose His Interest to the Agency in Advance.

ORDINANCES—Judge, Member of Law Firm Which Drafts Ordinances; Under Conflict of Interests Act Must Disclose His Interest to the Agency in Advance.

JUDGES—Member of Law Firm Which Drafts Ordinances; Under Conflict of Interests Act Must Disclose His Interest to the Agency in Advance.

July 17, 1972

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

"Over the past few years a local firm has been employed by an incorporated town to draft proposed ordinances. The firm has been requested to draft new ordinances incorporating any changes necessitated by the laws of the most recent session of the General Assembly. A member of the law firm is now serving in the capacity of municipal judge.

"Will you please advise me whether or not the above described situation involves any conflict of interest."

Your inquiry is governed by § 2.1-349 of the Code of Virginia (1950), as amended. Pursuant to that provision, an employee of a governmental agency shall not be a contractor with the agency of which he is an employee or have a material financial interest in any contract with the agency of which he is an employee; however, § 2.1-349(b)(5) provides that such prohibition does not apply:

"To an employee of a governmental agency whose duties are nonsupervisory and who does not on behalf of such agency participate in or have authority to participate in the procurement or letting of the contract or subcontract or in any manner effect the approval or disapproval of its performance, and provided, further, that the employee's interest in the contract or subcontract is disclosed in writing to such agency in advance."

It would appear that pursuant to the above-quoted section, there would be no conflict of interest where the employees interest was disclosed to the agency in advance.

This opinion is given without regard to problems arising should the judge be
called upon to construe an ordinance drafted by his firm, as this is a matter for consideration by the Judicial Ethics Committee of the Virginia State Bar.

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**VIRGINIA CONFLICT OF INTERESTS ACT**—Material Financial Interest—Relatives must live in same household.

**PUBLIC OFFICERS**—Conflict of Interest—No material financial interest between relatives not members of same household.

**SHERIFFS**—May Hire Brother; Does Not Reside in Sheriff’s Household.

**SHERIFFS**—Not Responsible for Providing Armed Guards at Airport.

April 2, 1973

**The Honorable Frank M. Pritt, Jr.**
Sheriff of Bath County

This is in reply to your recent letter in which you ask my opinion on the following question:

May a sheriff hire his brother to work in the sheriff’s office where the brother earns $7,200 annually and does not reside in the sheriff’s home?

The answer is in the affirmative. I have previously ruled in an opinion to the Honorable Donald C. Stevens, County Attorney for Fairfax County, dated July 27, 1970, and found in Report of the Attorney General (1970-1971), p. 430, that in order for a material financial interest to exist between relatives, they must reside in the same household. Additionally, pursuant to the provisions of § 2.1-348(f)(4) of the Code of Virginia (1950), as amended, no material financial interest would exist because the brother earns less than $7,500 annually.

You next ask whether it is the responsibility of the sheriff’s department to provide armed guards at the Hot Springs Airport in compliance with the Federal Aviation Regulations of the Federal Aviation Administration, Department of Transportation, adopted March 16, 1972.

I have reviewed the subject Federal Aviation Regulations and find that the responsibility for providing the armed guards is that of the airport operator and not of the local authorities. I therefore answer your inquiry in the negative.

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**VIRGINIA CONFLICT OF INTERESTS ACT**—Member of Board of State Building Code Review May Not Be Consultant to Office of Housing.

April 9, 1973

**The Honorable Robert H. Kirby, Director**
Division of State Planning and Community Affairs

This is in response to your letter of March 29, 1973, wherein you inquire if the employment by the Office of Housing of a consultant, who is a member of the Board of State Building Code Review, would be in violation of the Virginia Conflict of Interests Act.

The Office of Housing is created as a part of the Division of State Planning and Community Affairs pursuant to § 36-55.7 of the Code of Virginia (1950), as amended. It is provided by statute that the Board of State Building Code Review is created as a part of the Office of Housing pursuant to § 36-108.

Section 2.1-349(a)(1) prohibits an officer or employee of an agency from contracting with the agency of which he is an officer or employee. Even if the Of-
office of Housing could be deemed to be a separate agency from the Division of State Planning and Community Affairs, it is clear that the Board of State Building Code Review is a part of the Office of Housing. The employee, therefore, by having a contract with the Office of Housing, while retaining membership on the Board of State Building Code Review, would be in violation of § 2.1-349(a)(1).

VIRGINIA CONFLICT OF INTERESTS ACT—Member of Board of Supervisors—Contracts with city school board—Conditions under which contracts not in conflict with Act.

February 13, 1973

The Honorable Thomas J. Surface
Commonwealth’s Attorney for Craig County

This is in response to your letter of December 6, 1972, as supplemented by your letter of February 8, 1973, in which you inquire whether a conflict of interest exists with respect to the following situation: a member of the Board of Supervisors who, together with his wife, owns one hundred percent of the stock in a corporation which contracts with the county School Board.

Your inquiry is covered by § 2.1-349(a)(2) of the Code of Virginia (1950), as amended. Pursuant to that section, as long as the competitive bidding and disclosure provisions therein are complied with, there would be no violation of the Virginia Conflict of Interests Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of Board of Supervisors, President of Corporation, Not Prohibited from Voting Unless He Has Material Financial Interest in Transaction.

October 12, 1972

The Honorable F. Caldwell Bagley
County Attorney for Prince William County

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

"We have a member of the Board of County Supervisors who is President and Chairman of the Board of a corporation and owns 16.6% of the stock of the corporation which leases 16 acres of land and 4 buildings at the Manassas Municipal Airport owned by the Town of Manassas.

"The question raised is as to whether this member may vote on questions arising concerning the Town of Manassas, such as the possible sale of real estate from the County to the Town."

A vote concerning the Town of Manassas would not be prohibited simply because the member of the Board has an interest in land owned by the Town. If the vote involves a transaction in which the member had a material financial interest, which would be affected by such transaction, he would be prohibited from voting pursuant to §§ 2.1-352 and 2.1-353 of the Code of Virginia (1950), as amended.

VIRGINIA CONFLICT OF INTERESTS ACT—Member of County Planning Commission May Serve on County School Board.

February 12, 1973
THE HONORABLE WILLIAM R. BLANDFORD
Commonwealth's Attorney for Powhatan County

This is in response to your letter of January 26, 1973, wherein you inquire if a member of the Powhatan County Planning Commission may serve on the Powhatan County School Board.

Section 2.1-349 of the Code of Virginia (1950), as amended, is not applicable to your inquiry since the Planning Commission is an advisory rather than a governmental agency. I am further of the opinion that § 22-69 would not prohibit such dual service inasmuch as a member of the Planning Commission is not an "officer" within the meaning of that section.

Finally, I am unable to see any incompatibility with respect to these two positions. Accordingly, your inquiry is answered in the affirmative.

VIRGINIA CONFLICT OF INTERESTS ACT—Members of Town Council Voting on Rezoning of Property Adjacent to Their Property.

ZONING—Members of Town Council Voting on Rezoning of Property Adjacent to Their Property.

TOWNS—Members of Town Council Voting on Rezoning of Property Adjacent to Their Property.

April 30, 1973

THE HONORABLE WOODROW CROOK
Commonwealth's Attorney for Isle of Wight County

This is in response to your recent letter wherein you inquire if a conflict of interest exists with respect to the following matter: a petition was filed with the Planning Commission for the Town of Smithfield requesting rezoning of certain property from residential to business. Two of the persons signing the petition were adjacent land owners and members of the Town Council for the Town of Smithfield. When the matter came before the Town Council, the two councilmen refused to disqualify themselves from voting on the basis that they had no material financial interest and subsequently voted in favor of the rezoning. Based upon a search of the records, the two councilmen have no ownership in the property in question. The councilmen themselves further advised that they have no financial or other interest in the property and signed the petition as adjacent landowners only to show that they had no objection to the rezoning.

Section 2.1-352 of the Code of Virginia (1950), as amended, requires an officer of an agency who knows that he has a "material financial interest" in any transaction in which the agency of which he is an officer may be concerned to disclose to the board or the agency the interest which he has and to disqualify himself from voting or participating in any official action with respect to that transaction on behalf of such agency. Whether the councilmen in voting upon the rezoning violated that section depends upon the effect of the rezoning upon the adjacent land which they own. This necessarily requires a consideration of a number of facts not presented in your letter, e.g., the proximity of the land owned by the councilmen to the land in question; the respective values of the properties in question; the increased likelihood, if any, that the councilmen's properties would be rezoned as a result of the rezoning in question; and the extent to which, if any, the councilmen's property might have increased in value as a result of such rezoning.

It would appear that no simple answer can be given to your question; however, a review of the pertinent facts outlined above against the background of § 2.1-352
should provide an answer. If no material financial interest is found to exist, then the requirements of § 2.1-352 would be inapplicable.

VIRGINIA CONFLICT OF INTERESTS ACT—Officers of Construction Company Are Also Members of Agencies Transacting with Company; Member Must Disclose His Interest in Such Transaction and Refrain from Voting.

VIRGINIA CONFLICT OF INTERESTS ACT—Advisory Agencies Differentiated from Governmental Agencies.

VIRGINIA CONFLICT OF INTERESTS ACT—Board of Zoning Appeals May Not Contract Directly With Construction Company Whose Officers Are Members of Board.

THE HONORABLE GEORGE S. ALOHIZER, II
Member, Senate of Virginia

In your letter of June 16, 1972, you inquire whether a conflict of interest exists where a construction company which periodically contracts with the Commonwealth of Virginia and local governments, sometimes on an advertised and competitive basis and at other times on a negotiated, cost basis, and some of whose major stockholders, who are also officers and members of the board of directors of such company, serve in the following capacities:

1) Member of local Planning Commission, which assists in recommending rezoning and overall city planning.

2) Member of local board of zoning appeals.

3) Member of a local bi-racial commission, which merely advises on inter-racial matters within the locality.

4) Member of a State Advisory Council, who has already filed statement of disclosure.

Questions (1), (3) and (4) are governed by § 2.1-352 of the Code of Virginia (1950), as amended, which in pertinent part reads as follows:

"Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualify himself from voting or participating in any official action thereon in behalf of such agency."

Pursuant to the above-quoted section, I am of the opinion that, if any of these agencies were concerned with a transaction involving the construction company in question, the member would have to disclose his interest in such transaction and refrain from voting. In addition the disclosure provisions of § 2.1-353, should be complied with.

Section 2.1-349 is inapplicable because contracts with governmental agencies only are prohibited and the agencies mentioned in question (1), (3) and (4) are advisory in nature.

Section 2.1-349(a)(2) of the Code of Virginia (1950), as amended, is applicable to your second inquiry and reads as follows:

"(a) No officer or employee of any governmental agency shall:

* * *

(2) Be a contractor or subcontractor with any governmental agency
other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be left 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; . . ."

A "governmental agency" is defined in § 2.1-348(a) as follows:

"‘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."

I am of the opinion that the board of zoning appeals would be a governmental agency since it clearly exercises some sovereign power. Accordingly, a conflict of interests exists unless the disclosure and competitive bidding provisions of § 2.1-349(a)(2) are complied with. In addition §§ 2.1-352 and 2.1-353 would be applicable.

In answering your inquiry I have assumed that the board of zoning appeals would not be contracting directly with the construction company in question. Such a contract would, of course, be prohibited by § 2.1-349(a)(1).

**VIRGINIA CONFLICT OF INTERESTS ACT—Public School Principals—May serve as member of planning commission.**

**VIRGINIA CONFLICT OF INTERESTS ACT—Planning Commission—Member—May serve as principal of public school.**

February 19, 1973

**THE HONORABLE LAWRENCE DOUGLAS WILDER**

Member, Senate of Virginia

This is in response to your letter of February 12, 1973, together with enclosure, wherein you inquire if there is a conflict of interest where a public school principal serves as a member of the Lunenberg County Planning Commission.

Section 2.1-349 of the Code of Virginia (1950), as amended, is not applicable to your inquiry since the Planning Commission is an advisory rather than a governmental agency.

I am further of the opinion that there is no incompatibility with respect to these two positions. Accordingly, your inquiry is answered in the negative.

**VIRGINIA CONFLICT OF INTERESTS ACT—Real Estate Agents May Serve on Planning Commissions, Reassessment Boards and Boards of Zoning Appeals; Disclosure Provisions of Act Apply.**

July 17, 1972
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE DAVID D. BROWN
Commonwealth's Attorney for Washington County

This is in response to your letter of June 21, 1972, in which you request whether there is a conflict of interest in a case where real estate agents serve on planning commissions, reassessment boards and boards of zoning appeals. There would be no prohibition as to such service; however, the disclosure provisions of § 2.1-333 of the Code of Virginia (1950), as amended, would be applicable. This section reads as follows:

"Any officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by actions of the governmental or advisory agency of which he is an officer or employee shall 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."

Accordingly, I am of the opinion that no conflict of interests exists where there is disclosure. Additionally, § 2.1-352 may be applicable in particular instances.

VIRGINIA CONFLICT OF INTERESTS ACT—Regional Water and Sewer Authority is a Governmental Agency; Member of Board of Supervisors Must Meet Disclosure and Competitive Bidding Requirements to Contract with Authority.

July 17, 1972

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

I am in receipt of your letter of July 5, 1972, which reads in pertinent part as follows:

"The Wythe-Bland Water and Sewer authority is composed of five individuals, three of whom are appointed by the Wythe County Board of Supervisors and two being appointed by the Bland County Board of Supervisors. It is subsidized by federal funds and no funds are allocated by either county for its operation. May a member of the Board of Supervisors of either county, engaged in the business of general contracting, contract with the Wythe-Bland Water and Sewer authority without creating a conflict of interest?"

Whether a conflict of interest exists depends upon whether the Authority is a "governmental agency" or an "advisory agency". Section 2.1-348(a) of the Code of Virginia (1950), as amended, defines "governmental agency" as follows:

"'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."

that such an authority exercises governmental functions. Accordingly, § 2.1-349(a) (2) is applicable to your inquiry. It reads as follows:

"(a) No officer or employee of any governmental agency shall:

* * * *

"(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding; . . . ."

I am of the opinion that a conflict of interest exists where a member of the board of supervisors contracts with the Authority unless the disclosure and competitive bidding requirements are met.

VIRGINIA CONFLICT OF INTERESTS ACT—School Board Appointee Who Owns in Excess of Five Per Cent of Insurance Agency May Not Sell Insurance to School Board, but May Sell to City.

April 3, 1973

THE HONORABLE EDWIN P. DAUGHTREY, JR.
City Treasurer for City of Franklin

This is in response to your letter of March 29, 1973, wherein you set out the following situation:

The City Council of Franklin has appointed, as a member of the City School Board, a person who holds in excess of five per cent of the stock of a particular insurance agency. The insurance agency, as a result of being the lowest competitive bidder, writes liability and fire insurance for both the City and the City School Board.

You inquire (a) if the School Board appointee is prohibited from currently or in the future serving while his agency insures the City and the School Board; (b) whether the insurance agency, as long as the appointee serves on the School Board, would be prohibited from bidding on insurance for the City or the School Board, whether liability or health and medical insurance; (c) whether competitive bidding would change the answer; and (d) how could the appointee serve on the City School Board and not be in violation of the Virginia Conflict of Interests Act.

I will answer your questions seriatim.

(a) With respect to selling insurance to the School Board, I enclose for your information a copy of an opinion to the Honorable William R. Blandford, Commonwealth’s Attorney for Powhatan County, dated March 6, 1973, in which I ruled that a member of the School Board could not sell insurance to the School Board of which he is a member. With respect to selling insurance to the City, I enclose for your information a copy of an opinion to the Honorable A. Dow Owens, Commonwealth’s Attorney for Pulaski County, dated December
6, 1971, and found in Report of the Attorney General (1971-1972), p. 456, in which I ruled that an officer of a governmental agency may have an interest in a contract with a governmental agency other than the one of which he is an officer pursuant to § 2.1-349(a)(2), as long as the disclosure and competitive bidding provisions of that section are complied with.

(b) For the reasons stated above, the answer is in the affirmative with respect to the City School Board and in the negative with respect to the City. The type of insurance being sold is irrelevant.

(c) Competitive bidding is relevant only with respect to a sale of insurance to an agency other than the one of which the person is an officer. Accordingly, as previously stated, if insurance is let by public bidding and there is proper disclosure, the agency could sell insurance to the City.

(d) Violation of the Virginia Conflict of Interests Act cannot be avoided as long as the appointee serves on the School Board, sells insurance to the School Board and owns in excess of five per cent of the agency which sells insurance.

VIRGINIA CONFLICT OF INTERESTS ACT—Schools—Wife of assistant school superintendent may not be teacher in same school system as husband if she earns more than $7500.00 annually.

February 8, 1973

THE HONORABLE ROYSTON JESTER, III
Commonwealth's Attorney for the City of Lynchburg

This is in reply to your letter of January 26, 1973, wherein you inquire if a person could work in a school system where her husband was assistant superintendent for instruction with broad supervisory powers over the entire system. Your inquiry is covered by § 2.1-348(f)(4) of the Code of Virginia (1950), as amended. If the teacher earns more than $7500.00 annually, the teacher could not work in the same system where her husband was assistant superintendent for instruction.

VIRGINIA CONFLICT OF INTERESTS ACT—Virginia College Building Authority—Member—Fund-raising campaigns—Extent to which member may participate in.

February 7, 1973

THE HONORABLE T. JUSTIN MOORE, Chairman
Virginia College Building Authority

This is in response to your recent letter, together with further information provided me, wherein you inquire whether any of the affiliations of the following members of the Virginia College Building Authority would be proscribed by the Virginia Conflict of Interests Act:

Question 1. A member who is also a member of the board of trustees of a college and of the Virginia Foundation for Independent Colleges, which conducts annual fund-raising campaigns for certain private colleges in Virginia.

Question 2. A member who is also a member of the board of a college.

Question 3. A member who is also executive director of the Council of Independent Colleges, in which capacity he receives a salary in excess of $5,000 annually. The Council is composed of 26 private colleges which pay annual dues of up to $2,500.
Question 4. A member who is also president of a college in Virginia.

Question 5. A member who is also a member of the president's Advisory Council of a college in Virginia.

I will answer your questions seriatim.

Answers 1 and 2. Assuming that the member does not receive over $5,000 annually from any one of the organizations in question, there is no material financial interest and, therefore, no violation of the Act.

Answer 3. The answer to this inquiry is governed by § 2.1-352 of the Code of Virginia (1950), as amended, which prohibits the voting upon a transaction in which the voter has a material financial interest. In his capacity as Executive Director of the Council of Independent Colleges he represents private colleges only; however, the duties of the Virginia College Building Authority require that it purchase bonds of public (Chapter 3.2, Title 23) as well as private (Chapter 3.3, Title 23) institutions. Since the conferring of benefits upon certain colleges by way of voting to purchase their bonds could have an effect upon the member's financial interest as Executive Director of the Council, it is my opinion that such member would be unable to vote in such transactions. Given this fact, the member may be unable to make any significant contribution to the activities of the Authority if he continues to serve.

Answer 4. The college of which the member is president would be unable to avail itself of the benefits offered by the Authority so long as its president was a member since the purchase of the college's bonds would give the president a material financial interest in a contract with his own agency. As long as the college did not ask for any assistance from the Authority, there would be no conflict of interest problem.

Answer 5. Same as (1) and (2).

VIRGINIA CONFLICT OF INTERESTS ACT—Welfare Recipients May Be Referred by Welfare Board to Physician Who Is Member of Board of Supervisors if § 2.1-349(a)(2) Complied With.

WELFARE—Not Conflict of Interest for Recipients to Be Referred by Welfare Board to Physician Who Is Member of Board of Supervisors if § 2.1-349(a)(2) Complied With.

August 25, 1972

THE HONORABLE FLOYD CALDWELL BAGLEY
County Attorney for Prince William County

I am in receipt of your letter of July 31, 1972, together with further information provided at my request with reference to an opinion whether it is lawful for the Board of Public Welfare to refer welfare recipients to a physician who is a member of the County Board of Supervisors and who is paid for such services out of welfare funds.

I am of the opinion that your inquiry is governed by § 2.1-349(a)(2). This section reads as follows:

"(a) No officer or employee of any governmental agency shall:

* * *

"(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract with any governmental agency other than the governmental agency of which
he is an officer or employee, unless full written disclosure of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, either (1) such contract be let after competitive bidding, or (2) 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; . . . ."

Accordingly, if the requirements of the above quoted provisions have been complied with, there would be no violation of the Virginia Conflict of Interests Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Wife of Member of Board of Supervisors May Be Employed by Local Board of Welfare.

BOARDS OF SUPERVISORS—Members—Wife may be employed by local board of welfare.

June 18, 1973

THE HONORABLE H. M. GANDER
Commissioner of the Revenue for Page County

This is in response to your recent letter together with further information provided wherein you inquire if the wife of a member of the county's board of supervisors may be employed by the local board of public welfare where the local board receives county funds for its operation.

The answer to your inquiry is found in § 2.1-349(a) (2). That section provides that an officer of a governmental agency should not be a contractor or have a material financial interest in a contract "other than a contract of salaried employment" with a governmental agency other than the agency of which he is an officer unless certain provisions are complied with. Since the contract in which the member of the board of supervisors has an interest is one of salaried employment, i.e., his wife's employment contract with the welfare board, there would be no such prohibition.

Accordingly, it is my opinion that there would be no conflict of interest for the wife of a member of the board of supervisors to have a contract of employment with a local board of welfare.

VIRGINIA FREEDOM OF INFORMATION ACT—Applicability to the Virginia Judicial Conference of Courts of Record—Required to be open to press and public.

JUDICIAL CONFERENCE—Freedom of Information Act Applicable to; Meetings Required to Be Open to Press and Public.

October 13, 1972

THE HONORABLE EDWARD E. WILLEY
Member, Senate of Virginia

This will acknowledge receipt of your inquiry of October 6, 1972, in which you pose the following questions about the Virginia Freedom of Information Act:

[1] "Is the 'Virginia Freedom of Information Act,' which is found
in Chapter 21 of Title 2.1 of the Code, applicable to the Virginia Judicial Conference of Courts of Record?

[2] "If so, is a voluntary conference of that body, scheduled for Oct. 18-20 in Fredericksburg, Virginia, to discuss the report of the Virginia Court Systems Study Commission and pending state legislation that would implement commission recommendations, required to be open to the press and public?

[3] "Are both general sessions and workshop sessions, where attendance is divided into four groups to discuss specific aspects of one or more pending court reform measures, also to be open to the press and public? And how about consideration and action on resolutions?"

The Freedom of Information Act clearly requires that:

"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. Section 2.1-343 of the Code of Virginia (1950), as amended." (Emphasis supplied.)

I have examined Chapter 10 of Title 17 of the Code, which establishes the Judicial Conference of Virginia, and find it silent as to meetings other than the requirement that the conference meet at least once in each calendar year. Similarly, I would have examined § 2.1-345 of the Code, which sets forth certain legislative commissions and agencies of government, to which the Freedom of Information Act is inapplicable; the Judicial Conference of Virginia is not listed therein. Consequently, I am of the opinion that the Freedom of Information Act is applicable to the Judicial Conference of Virginia, and that all of your questions must be answered in the affirmative. Section 2.1-344 does set forth seven purposes for which executive or closed meetings may be held. Based on the information contained in your letter, however, I am of the opinion that a discussion of the Virginia Court System Study Commission's report, and pending legislation related thereto, would not fall within the scope of the purposes stated in the above-mentioned section.

VIRGINIA FREEDOM OF INFORMATION ACT—Closed Meetings—May discuss only the subject for which session held.

January 3, 1973

THE HONORABLE PETER K. BABALAS
Member, Senate of Virginia

This will acknowledge receipt of your recent letter in which you set forth the following questions in regard to the Virginia Freedom of Information Act:

"If local official bodies meet in private, can they discuss any subject other than the ones covered by the law?"

"When such closed meetings are held, must the body vote in public to hold each individual meeting, or can they pass a blanket resolution declaring that it will hold secret meetings or closed meetings on a specific day and at a specific time perpetually?"

In response to your first inquiry, the Virginia Freedom of Information Act clearly states that except where specifically authorized by law or exempted by § 2.1-345 of the Code of Virginia (1950), as amended, closed meetings may be held only for the purposes set forth in Code § 2.1-344. I am of the opinion, therefore, that when a unit of government meets in closed session for one of the specific purposes enumerated in the Act, it would be impermissible for that body
to consider subjects during the course of the closed session that would not be included in Code § 2.1-344.

The answer to your second question must be stated in the negative. The purpose of the Virginia Freedom of Information Act is to ensure that all meetings of state and local governmental bodies shall be open to the public except where specific provisions to the contrary are provided. In availing itself of the provisions set forth in § 2.1-344(a) of the Code with respect to closed meetings, the unit of government is required by § 2.1-344(b) to vote in public prior to each such closed session and thereafter comply with the requirements of § 2.1-344(c).

VIRGINIA FREEDOM OF INFORMATION ACT—Closed Sessions—Public hearings by local governments.

VIRGINIA FREEDOM OF INFORMATION ACT—Closed Sessions—When readvertisement not necessary.

December 7, 1972

THE HONORABLE LAWRENCE DOUGLAS WILDER
Member, Senate of Virginia

This will acknowledge receipt of your recent letter in which you request my opinion as to two questions relating to the Virginia Freedom of Information Act. The Act, as you may know, specifically forbids the convening of executive or closed meetings of state and local agencies, boards and commissions except where otherwise specifically provided by law. Section 2.1-344(7) of the Code of Virginia (1950), as amended, permits a closed session to be convened where:

"Discussion of any matter . . . 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."

In regard to the above-mentioned provision, you inquire if a public hearing must be convened by a local government where that body held a closed session for the purpose of discussing a matter which was announced as a topic of a future public hearing. I am of the opinion that your question must be answered in the affirmative, for the thrust of § 2.1-344(7) of the Code of Virginia (1950), as amended, permits a closed session to be convened where:

"Discussion of any matter . . . 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."

In your letter you raise a second problem, namely:

"When a public hearing has been properly advertised and held, does that hearing continue to the next meeting of the body if it is not re-advertised? Does the adjournment of a group until an announced date mean that a public hearing is also continued to that date without advertisement as prescribed by law?"

Where the public has been given notice as required by law in regard to a public hearing, I am of the opinion that the hearing may be continued for conclusion to a date, time and place certain in the future, provided that the governmental body in question announces to the public at the public hearing the need to recess and reconvene the public hearing. Unless otherwise required by law, re-advertising the continued public hearing by newspaper publication is not
necessary and, in many cases, would not be practical if the public hearing were recessed or adjourned from day to day as permitted, for example, by § 15.1-162 of the Code in local budget hearings.

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**VIRGINIA FREEDOM OF INFORMATION ACT—Closed Sessions—When permitted.**

**December 7, 1972**

**THE HONORABLE EDWARD E. WILLEY**

Member, Senate of Virginia

This will acknowledge receipt of your letter of November 17, 1972, in which you stated that a county board of supervisors recently held a public hearing on increasing the county's business license tax. The hearing was continued to a later date, apparently for the purpose of hearing further evidence. Between the two hearings, the board held a closed meeting to discuss the tax. You then posed the following question in regard to the Virginia Freedom of Information Act:

"Can a board of supervisors hold a closed meeting on a topic it already has brought up in a public hearing and will again bring up in a continuation of that hearing?"

The Virginia Freedom of Information Act was the subject of a recent opinion to the Honorable Donald G. Pendleton, and I enclose a copy of that opinion which examines the Act closely with respect to substantive and procedural duties required by the legislation of all agencies and institutions of state and local government.

With respect to your inquiry, it is instructive to review the language of § 2.1-343 of the Code of Virginia (1950), as amended.

"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." (Emphasis supplied.)

One of the permitted purposes of a closed session is set forth in Code § 2.1-344(a) (7):

"Discussion of any matter which will be the topic of a public hearing prior to a final decision, provided that notice of every such public hearing shall be published generally in the community not less than ten days prior to such public hearing." (Emphasis supplied.)

It is clear that the Act permits closed session discussion of any matter which will be the topic of a public hearing prior to a final decision by the governmental body in question. If a public hearing is continued to a date, time and place certain for such purpose as receiving further comments and evidence from the public, all prior to a final decision by the governmental body, then I am of the opinion that the Virginia Freedom of Information Act requires that your question be answered in the affirmative.

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**VIRGINIA FREEDOM OF INFORMATION ACT—Deed Receipts Book Must Be Available to Public—Custodian may impose regulations appropriate for safety and preservation of records.**

**DEEDS—Receipts Books Must Be Available to Public Under Freedom of Information Act—Regulations appropriate for safety and preservation of records.**

**June 20, 1973**
The Honorable William E. Maxey, Jr., Clerk
Circuit Court of Powhatan County

This is in response to your recent letter wherein you inquire if the Virginia Freedom of Information Act requires that deed receipts be made available to the public, where such receipts are quite fragile and where the information is available from other sources.

Enclosed for your information is a recent opinion to the Honorable V. Earl Dickinson, Member, House of Delegates, dated March 5, 1973, in which I ruled that deed receipts books are required to be made available to the public pursuant to the Virginia Freedom of Information Act. The custodian of such records may impose reasonable restrictions and regulations as are appropriate for the safety and preservation of the records. The Act, however, requires that such records must be available to the public; and it is, accordingly, my opinion that access to them may not be prohibited.

Virginia Freedom of Information Act—Executive or Closed Meetings—1973 amendments to Act.

Public Meetings—Executive or Closed Meetings—1973 amendments to Freedom of Information Act.

May 11, 1973

The Honorable W. Ward Teel
Member, House of Delegates

This is in response to your recent letter with respect to the following inquiries:

1. Whether pursuant to the Virginia Freedom of Information Act a Board of Supervisors may hold executive sessions with its County Administrator to discuss "policy matters as a master to servant relationship," a former opinion of the Attorney General dated August 22, 1968, having been cited as authority for doing so;

2. Whether the specific subject to be discussed must be announced;

3. Whether the agreements reached or decisions made must be announced.

I will answer your questions seriatim.

1. The opinion referred to was rendered to the Honorable Robert L. Gilliam, III, Commonwealth's Attorney for Westmoreland County, and found in Report of the Attorney General (1968-1969), pp. 259-260. Section 2.1-344(a) (6) of the Code of Virginia (1950), as amended, on which the opinion was based and which permitted executive sessions for the county executive in order to brief the Board of Supervisors, was amended in 1970 to read as follows:

"(a) Executive or closed meetings may be held only for the following purposes:

*(6)* Consultation with legal counsel and briefings by staff members, consultants or attorneys, pertaining to pending litigation, or legal matters within the jurisdiction of the public body, including legal documents."

While it is not entirely clear from your letter what "master to servant relationship" means, presumably it relates to briefings of the Board by the County Administrator with respect to county business. Unless these discussions relate to one of the purposes enumerated in § 2.1-344(a), the convening of an executive session would not be permitted.

It was noted also in the previously cited opinion of 1968 that § 2.1-344(a)(7)
might provide a basis for executive sessions. If the provisions of that section are complied with, it may provide a basis for closed sessions with respect to the present case. I enclose for your convenience an opinion to the Honorable Lawrence D. Wilder, Member, Senate of Virginia, rendered on December 7, 1972, which discusses this provision. It is important to note, however, as a result of legislation enacted by the 1973 General Assembly that effective June 1, 1973, § 2.1-344(a) (7) is repealed and cannot be cited thereafter as a reason for convening executive sessions.

2. There is no requirement under the present law that a public body announce, prior to the convening of an executive session, the specific subject to be discussed. Again, however, effective June 1, 1973, pursuant to § 2.1-344(b), which was amended by the 1973 General Assembly:

"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, which motion shall state specifically the purpose or purposes herein above set forth in this section which are to be the subject of such meeting."

3. Section 2.1-344(c) provides that any agreement reached or decision made in executive session should not become effective until the public body, following such session, reconvenes in open meeting and votes upon the action taken in closed session. Again for your convenience, enclosed is an opinion to the Honorable Donald G. Pendleton, Member, House of Delegates, dated September 25, 1972, which discusses the Act in a general and comprehensive way.

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**VIRGINIA FREEDOM OF INFORMATION ACT—Executive or Closed Meetings; Action Invalid if Procedures Not Followed.**

**VIRGINIA FREEDOM OF INFORMATION ACT—Informal Sessions—Distinction between formal and informal sessions erased by legislature.**

**VIRGINIA FREEDOM OF INFORMATION ACT—Public Bodies—All meetings public except where specifically authorized by law to the contrary.**

**VIRGINIA FREEDOM OF INFORMATION ACT—Citizens; Rights Conferring by Act May Be Enforced in Court.**

September 25, 1972

**THE HONORABLE DONALD G. PENDLETON**
Member, House of Delegates

This will acknowledge receipt of your recent inquiry relative to the application of the Freedom of Information Act to a situation in which the Campbell County School Board recently held a closed “informal session” for the purpose of discussing personnel matters. According to the information supplied in your letter the pertinent facts may be summarized as follows:

(a) No notice of the meeting was announced to the public in general and, in particular, to the news media;
(b) No vote was taken to go into executive session;
(c) No minutes were taken during the “informal meeting” nor were votes recorded;
(d) The “informal session” apparently involved personnel problems with high-level school board employees;
(e) No proof exists of any formal action taken by the county school board
Your letter poses four questions for resolution:

1. Was the meeting held on August 31, 1972, legal or illegal according to the Code of Virginia, Chapter 21 (Virginia Freedom of Information Act)?

2. If, in fact, the meeting was illegally held behind closed doors can the actions of the meeting be held secret?

3. If, in fact, any action was taken in the session, is this action valid?

4. Are the public bodies covered under the Freedom of Information Act required to make public any or all planned meetings? Or, what is required of the news media to insure that they are legally notified of all such meetings?

Your questions require an examination of the Freedom of Information Act which was first enacted by the General Assembly in 1968 to require, among other things, that all meetings of State and local agencies, boards and commissions be open to the public. The Act, unequivocally requires that:

"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."

Section 2.1-343 of the Code of Virginia (1950), as amended. (Emphasis supplied.)

Application of the label "informal session" as a means of circumventing the requirements of the Act is not permissible, for the 1970 General Assembly amended the Freedom of Information Act to erase any distinction between formal and informal meetings. Section 2.1-341 now defines meetings in unmistakable terms: meeting or meetings "means the meetings, when sitting as a body or entity, or as an informal assemblage of the constituent membership, with or without minutes being taken, whether or not votes are cast . . ." (Emphasis supplied.) The Freedom of Information Act applies to all State and local agencies, institutions, departments, authorities, and other organizations supported wholly or principally by State funds unless otherwise exempted by law.

Section 2.1-345 exempts from the Freedom of Information Act committees of the General Assembly, legislative and gubernatorial study commissions and committees; also excluded are certain other boards and committees, including "study commissions or committees appointed by the governing bodies of counties, cities and towns, provided that no committee or commission appointed by such governing body, the membership of which consists wholly of members of such governing body, shall be deemed to be study commissions or committees under the provisions of this section."

The Freedom of Information Act specifically forbids the convening of executive or closed meetings except for the purposes set forth in Code § 2.1-344:

(1) "Discussion or consideration of employment, assignment, appointment, promotion, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body.

(2) Discussion or consideration of the condition, acquisition or use of real property for public purpose, or of the disposition of publicly held property.

(3) The protection of the privacy of individuals in personal matters not related to public business.

(4) Discussion concerning a prospective business or industry where no previous announcement has been made of the business' or industry's interest in locating in the community.

(5) The investing of public funds where competition or bargaining are in-
volved, where if made public initially the financial interest of the government unit would be adversely affected.

(6) Consultation with legal counsel and briefings by staff members, consultants or attorneys, pertaining to pending litigation, or legal matters within the jurisdiction of the public body, including legal documents.

(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.

It should be emphasized at this point that a unit of government covered by the Act cannot go into executive session to discuss any matter not covered by § 2.1-344; nor can it go into an executive session to discuss one item permitted by law and then to proceed to a discussion of other matters not authorized by the Act.

There are procedural requirements that must be strictly observed once it has been determined that a particular item of business, which falls within § 2.1-344, should be discussed in executive session. Section 2.1-344 (b) requires that "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." Further, § 2.1-344 (c) states that "no resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion." Failure to comply with the above-mentioned procedural requirements would nullify the action taken by the public body in question.

In reviewing the above mentioned sections, it is clear, therefore, that, in enacting the Freedom of Information Act, the General Assembly intended to forbid certain practices of public exclusion by public bodies from the decision-making process and to place upon those units of government the responsibility of conducting the public's business in public. Any person denied the rights and privileges conferred by the Freedom of Information Act may proceed to enforce such rights in an appropriate court, and the General Assembly has provided in § 2.1-346 of the Code that such actions "... shall be given precedence on the docket of such court over all cases which are not otherwise given precedence by law."

Accordingly, in response to your questions, I am of the opinion that:

(1) the meeting held on August 31, 1972, by the Campbell County School Board was in contravention of the Freedom of Information Act;
(2) if any votes were recorded or minutes taken, they must be disclosed;
(3) any action taken during the closed session would not be valid.

In regard to your final question, § 2.1-343 requires that "information as to the time and place of each meeting shall be furnished to any citizen of this State who requests such information."

VIRGINIA FREEDOM OF INFORMATION ACT—Notification of Time and Place of Each Meeting—Person may be advised on continuous basis.

January 3, 1973

The Honorable Paul W. Manns
Member, Senate of Virginia
This will acknowledge receipt of your recent letter in which you posed the following questions concerning the Virginia Freedom of Information Act:

“If an individual requests to be notified of the time and place of each meeting of a board of supervisors, a school board or any other public body on a continuous basis, is he entitled to these notifications?

“Does a public body have to vote to go into executive or closed session before each session when the body plans to hold several closed sessions in a row?”

In response to your first inquiry, it should be noted that § 2.1-343 of the Code of Virginia (1950), as amended, provides, in part, that “information as to the time and place of each meeting shall be furnished to any citizen of this state who requests such information.” I am of the opinion that this provision when construed with the purpose of the Act and other specific provisions set forth therein with respect to public meetings, permits an individual to request the unit of government that he be notified on a continuous basis of the time and place of each meeting of said governmental body.

The answer to your second question must be stated in the affirmative. The purpose of the Virginia Freedom of Information Act is to ensure that all meetings of state and local governmental bodies shall be open to the public except where specific provisions to the contrary are provided. In availing itself of the provisions set forth in § 2.1-344(a) of the Code with respect to closed meetings, the unit of government is required by § 2.1-344(b) to vote in public prior to each such closed session and thereafter comply with the requirements of § 2.1-344(c).

VIRGINIA FREEDOM OF INFORMATION ACT—Official Records of Treasurer Open to Inspection—Limitations.

TREASURERS—Inspection of Records—Limitations.

December 21, 1972

The Honorable Joseph M. Kuczek
Commonwealth’s Attorney for the County of Wise and City of Norton

Your recent letter requested an opinion as to which parts of the official records of the treasurer’s office of Wise County could be examined by citizens.

Section 2.1-342 of the Code of Virginia, in the Virginia Freedom of Information Act, provides that official records, which are defined as “records pertaining to completed actions or transactions which the . . . [agency is] . . . required by statute to keep and maintain, or reports paid for by public funds,” shall be:

“[O]pen to inspection and copying by any citizens of this State having a personal or legal interest in specified records during the regular office hours of the custodian of such records. Access to such records shall not be denied to any such citizen of this State, nor to representatives of newspapers published in this State, and representatives of radio and television stations located in this State.”

In addition, § 58-919 requires that any taxpayer of the county be permitted to inspect the books, papers and monies pertaining to the treasurer’s office. This right to inspect records is limited by § 58-46, which prohibits any State or local revenue officer from divulging information “acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties.”

In my opinion, these sections of the Code require the treasurer to permit
public access to any records which he is required by law to keep unless they are in the categories listed in § 58-46.

This right of access is subject to the restriction that there be some purpose for which the applicant desires the inspection. In addition, the custodian of the records may impose such reasonable restrictions and regulations as are necessary for the safety of the records, and the inspection must be had in such manner and at such times as not to interfere with the business of the office. See Report of the Attorney General (1954-1955), p. 240. Section 2.1-342 supports this principle, as only those having a “personal or legal interest in specified records” may have access to them. The custodian of the records therefore has the power and the responsibility to require any person who wishes to inspect them to state his purpose in doing so and to specify the records or types of records which he wishes to inspect. The statute does not give any citizen or news medium the power to make an indiscriminate experimental search of the treasurer's records.

VIRGINIA FREEDOM OF INFORMATION ACT—Proceedings of Commission of Outdoor Recreation; Purpose of Executive Meetings.

August 1, 1972

THE HONORABLE ROB R. BLACKMORE, Director
Commission of Outdoor Recreation

This is in reply to your recent request for my interpretation of The Virginia Freedom of Information Act in the context of the proceedings of the Commission of Outdoor Recreation.

According to your letter, the Commission meets several times each year for the purpose of considering requests for the allocation of funds to State, regional and local agencies for the purpose of acquiring and developing park land and providing and maintaining access roads to recreational facilities.

Applicants for funds present their projects to the Commission in open meeting and all persons wishing to voice an opinion on the projects are given an opportunity to do so. Following the presentations, the Commission goes into executive meeting upon an affirmative vote and considers each project. The Commission then returns to open meeting and each application is put to the vote. If an application is turned down or deferred, the applicant is informed of the reasons for that decision.

I am advised that the primary purpose underlying consideration of these applications in executive meeting is that the Commission wishes to reconcile requests for funds with funds actually at its disposal. Section 2.1-344 of the Code of Virginia (1950), as amended, provides that executive meetings may be held only for seven specified purposes, none of which fairly include that of the Commission.

In view of the above, I am of the opinion that the executive meetings of the Commission as described have been held in violation of § 2.1-344. If in the future the Commission deliberates in executive session, then prior thereto, it must assure itself that the purpose of the meeting is fairly encompassed by the provisions of § 2.1-344 and discussion must be limited to that purpose.

VIRGINIA FREEDOM OF INFORMATION ACT—Special Investigative Commission—Not subject to.

January 3, 1973
THE HONORABLE ROBERT E. WASHINGTON  
Member, House of Delegates

This will acknowledge receipt of your recent letter in which you posed the following question:

"Is a special investigative commission organized pursuant to a resolution by the City Council, City of Norfolk, acting under the authority granted them by Section 51 of the Charter of the City of Norfolk, Virginia, which states in part, 'the Council ... or commission authorized by the ... shall have power to make investigations into City affairs, and for that purpose to subpoena witnesses, administer oaths, and compel the production of books and paper', subject to the provisions of the Virginia Freedom of Information Act, Chapter 21, Section 2.1-340 through Section 2.1-346, Code of Virginia?"

Section 2.1-345 of the Code of Virginia (1950), as amended, sets forth those agencies and institutions of government to which the provisions of the Freedom of Information Act are inapplicable, among which are "study commissions or committees appointed by the governing bodies of counties, cities and towns, provided that no committee or commission appointed by such governing bodies, the membership of which consists wholly of members of such governing body, shall be deemed to be study commissions or committees under the provisions of this section."

I find from a review of general reference sources that study and investigative commissions are considered to share the same purpose of making an investigation, an inquiry or search, of pursuing a course of investigation and study. Consequently, I am of the opinion that a special investigative commission such as the one mentioned in your letter would not be subject to the provisions of the Virginia Freedom of Information Act.

VIRGINIA FREEDOM OF INFORMATION ACT—Use of Mail Ballots not Prohibited; Conditions.

VIRGINIA PORT AUTHORITY—Freedom of Information Act—Use of mail ballots not prohibited; conditions.

March 2, 1973

THE HONORABLE E. P. HOLMES, Admiral, USN (Ret.)
Executive Director, Virginia Port Authority

This is in response to your recent letter wherein you inquire if the use of a mail ballot to determine a course of action is prohibited by the Virginia Freedom of Information Act and whether an open public vote at the next ensuing meeting of the Board of Commissioners of the Virginia Port Authority, confirming the ballot, would satisfy the requirements of the Act.

Pursuant to §§ 62.1-135(g) and (h) of the Code of Virginia (1950), as amended, the Authority has the power to adopt reasonable regulations governing the transaction of its business. On the assumption that the course of action to be determined is a routine or administrative one, the use of such ballot would not be proscribed by the Virginia Freedom of Information Act. The Act could not, of course, be circumvented by the utilization of mail ballots in lieu of public meetings, to conduct important or substantial business of the Board. Additionally, pursuant to § 2.1-342, the letter ballots would, of course, be open for public inspection.

With the provisos as stated above, an open public vote at the next ensuing meet-
ing of the Board confirming the action taken by mail ballot would satisfy the requirements of the Act.

It may also be of interest to you that § 62.1-130 provides for the delegation to the Executive Director of the Authority of certain powers and duties, which powers and duties might reasonably encompass routine or administrative actions.

VIRGINIA FREEDOM OF INFORMATION ACT—Welfare Adoption and Illegitimate Birth Records—Not covered by.


May 30, 1973

THE HONORABLE WILLIAM L. LUKHARD, Director
Department of Welfare and Institutions

This is in reply to your recent letter in which you set out the following:

"The 1973 amendments to the Virginia Freedom of Information Act removed welfare records, adoption records and illegitimate birth records from the list of those records excluded from the provisions of the act. (Sec. 2.1-342) (b) (3).

"However, sections 63.1-53 and 63.1-209 apparently require that these records be kept confidential. The Social Security Act also appears to require confidentiality of such information.

"Do the 1973 amendments to the Freedom of Information Act affect the confidentiality of welfare, adoption and illegitimate birth records in view of the apparent conflicts with the above cited sections? If so, to what extent can agencies of the Commonwealth and its subdivisions permit or deny access to these records in compliance with the law?"

The Virginia Freedom of Information Act in relevant part requires all official records to be open to inspection "except as otherwise specifically provided by law . . ." [§ 2.1-342(a) of the Code of Virginia (1950), as amended].

Accordingly, since §§ 63.1-53 and 63.1-209 do otherwise provide for confidentiality with respect to certain records, they control with respect to the records covered by those sections.

It may be of interest to you to know that with respect to the 1973 amendments to the Act, it is the recollection of this Office that the General Assembly considered the confidentiality for the welfare records, etc., under § 2.1-342(b) (3) to be duplicative of the confidentiality provided under Title 63.

VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT—Applies to All Agreements Entered Into Between Dealer and Distributor after July 1, 1973.

VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT—Remedies for Aggrieved Party.

June 12, 1973

THE HONORABLE JOSEPH V. GARTLAN, JR.
Member, Senate of Virginia
This is in reply to your letter of June 4, 1973, concerning the application of certain provisions of Chapter 2.2 of Title 59.1 of the Code of Virginia (1950), as amended, entitled “Virginia Petroleum Products Franchise Act.” In your letter, you have included the following background material:

“It has come to my attention that certain oil company representatives, who are distributors as defined in Section 59.1-21.10 of the Act, maintain that Section 59.1-21.11 (a) applies only to those distributors which have not heretofore included provisions as to hours of operation in the lease/franchise agreements entered into with their dealers and that distributors which have heretofore made provision in such agreements with respect to hours of operation are not subject, with respect to franchise agreements hereafter entered into, to the provisions of the cited section.

Additionally, I am informed that a number of distributors whose lease/franchise agreements with their dealers expire after July 1, 1973, have approached their dealers with requests to enter into new agreements, prior to July 1, 1973, calling for hours of operation in excess of those permitted under Section 59.1-21.11 (a). The dealers are being told that if they decline to enter into such new agreements now, termination notices as to their existing agreements will follow and the agreements will not be renewed at their stated expiration dates.”

I shall state and answer your questions seriatim:

“1. Whether the ‘hours of operation’ provisions of the Act [§ 59.1-21.11 (a)] apply to lease/franchise agreements between distributors and dealers as defined therein whether or not such distributors had heretofore included provisions as to hours of operation in such agreements with their dealers;”

The provisions of the “Virginia Petroleum Products Franchise Act” are applicable only to franchise agreements entered into on and after July 1, 1973. Section 59.1-21.17. Section 59.1-21.11 provides that every such agreement “shall be subject to the following provision, whether or not expressly set forth therein: (a) The dealer may agree, but in the absence of an agreement, shall not be required to keep his retail outlet open for business for more than sixteen consecutive hours per day, nor more than six days per week; . . . .”

In light of the foregoing it is my opinion that § 59.1-21.11 (a) applies to all agreements entered into between a petroleum distributor and a dealer on and after July 1, 1973, regardless of whether franchise agreements entered into prior to that date include provisions relating to hours of operation.

“2. What remedies, if any, under the Act or otherwise, are available to dealers faced with the demands of distributors as outlined above and, specifically, whether or not these demands constitute violations which may be investigated and enjoined pursuant to the authority vested in you by Section 59.1-68.2.”

Sections 59.1-21.12 and 59.1-21.16 make it clear that civil action may be brought by an aggrieved party and that the Attorney General may investigate and seek to enjoin violations of the “Virginia Petroleum Products Franchise Act”; however, those specific procedural provisions can be applied only to violations which arise under franchise agreements entered into on and after July 1, 1973.

VIRGINIA PORT AUTHORITY—Security Personnel—Validity and enforceability of agreement to provide security force arising out of the acquisition and lease of Norfolk terminal.

May 24, 1973
Your letter of May 16 requested an opinion as to the validity and enforceability of certain obligations arising out of the acquisition by the Virginia Port Authority ("VPA" or "the Authority") of Norfolk International Terminals from the City of Norfolk and the subsequent lease of the terminals to Maritime Terminals, Inc. ("MTI").

As your letter indicates, paragraph 2 of the agreement of acquisition among the City of Norfolk, the Norfolk Port and Industrial Authority and the Virginia Port Authority contains the following language:

"The Virginia Port Authority covenants and agrees to absorb the sales representatives and security force of the Norfolk Port and Industrial Authority who may desire to become employees of the Virginia Port Authority in accordance with customary provisions and at appropriate salary scales as are approved by the Commonwealth of Virginia."

Following the actual sale of the property an Agreement of Lease was entered into between the Virginia Port Authority and Maritime Terminals, Inc., a Virginia nonprofit, non-stock corporation which was created to operate the terminal. Article IV, Section 4.2 of the lease states as follows:

"MTI covenants and agrees that it will provide at its own cost and expense, all tools, equipment supplies and personnel, except security necessary for the proper operation, management and maintenance. . . . (Emphasis supplied.)"

Article X, Section 10.2, states as follows:

"The VPA will provide security personnel to police the terminal facility with respect to all police functions. The terminal management shall establish close liaison with VPA security police to assure that absolute maximum security is effective and all regulations are observed. The VPA security police shall be under the general operating direction of MTI, but answerable solely to the VPA if there is a conflict in directives."

There is no provision in either the lease or the agreement to indicate where the money for payment of the security personnel is to be obtained. It is clear, however, from Article III, Section 3.2, of the lease that the income from the terminal itself is not to be so used, as that section prescribes in detail the disposition of all operating income. I understand that although the Authority requested that the General Assembly provide funds for security personnel in the 1972 and 1973 Appropriations Acts, no appropriation has yet been made for the purpose.

The Authority has in effect admitted its obligation to provide a security force by requesting appropriations for the purpose. Even disregarding this admission, however, it is my opinion that the portions of the lease and agreement quoted above obligate the Authority to provide security if it is authorized to make such a contract.

The Authority derives its powers from Chapter 10 of Title 62.1 of the Code of Virginia (§ 62.1-128, et seq.). Section 62.1-133 of that chapter, as amended in 1970, gives the Port Authority the right and duty:

"(a) To seek to effect consolidation of the water terminals of the several cities within the ports of this State and their administration, and to promote a spirit of cooperation among these cities in the interest of the ports as a whole."

Section 62.1-135 provides in part as follows:

"In order to enable it to carry out the purposes of this chapter, the
Authority, but without pledging the faith and credit of the Commonwealth of Virginia:

"(b) Is authorized and empowered to rent, lease, buy, own, acquire and dispose of such property, real or personal, as the Authority deems proper to carry out the purposes and provisions of this chapter, all or any of them and to issue revenue bonds for buying or acquiring such property; and to lease to another such part or all of its property, real or personal, for such period or periods of years, upon such terms and conditions, with or without an option on the part of the lessee to purchase any or all of the leased property at such price, at or after the retirement of all indebtedness incurred by the Authority on account thereof, as the Authority shall determine;

"(cl) Is authorized and empowered to acquire marine terminals, port facilities and other equipment referred to in this chapter from political subdivisions of the State and to give written assurances, including agreements to reconvey such properties to such political subdivisions, for the installment payments of such terminals, facilities and equipment so acquired;

"(1) 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. Such policemen shall have the powers vested in police officers under §§ 15.1-138 and 52-8 of the Code of Virginia which sections shall apply, mutatis mutandis, to police appointed hereunder..."

As can be seen, the contract to acquire the terminal was made pursuant to a specific directive of the General Assembly. Moreover, the Authority has specifically been given the power to provide security for ports under its jurisdiction. It is therefore my opinion that the agreement as to security personnel constitutes a legally binding obligation of the Authority.

Although the contract in question is legal and binding on the Authority, it does not bind the Commonwealth, nor does it obligate the General Assembly to provide funds for its implementation. You will note that the portion of § 62.1-135 quoted above specifically withholds from the Authority the power to bind the faith and credit of the Commonwealth. To the same effect, the last paragraph of § 62.1-147 states:

"All expenses incurred in carrying out the provisions of this chapter shall be payable solely from funds provided under the authority of this chapter and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been provided under the provisions of this chapter."

Although the contract in question was made by an instrumentality of the Commonwealth pursuant to specific directives of the General Assembly, its fulfillment cannot be considered a legal obligation of that body. In light of the sections quoted above, it is my opinion that the agreement to supply a security force does not at law obligate the General Assembly to provide the funds for its implementation. The agreement does, however, constitute a legal obligation of the Authority.

VIRGINIA SUPPLEMENTAL RETIREMENT ACT—Pensions and Retirement
—Full-time teacher or professor does not receive retirement credit for part-
time teaching at night or during summer—Five highest consecutive years of creditable service means sixty highest consecutive months.

September 28, 1972

THE HONORABLE ALBERT TEICH, JR.
Member, House of Delegates

I have received your recent letter from which I quote:

“In regard to [§ 51-111.10(15), Code of Virginia (1950), as amended] I would appreciate your official opinion as to whether or not salary paid to Virginia teachers and professors for summer and night teaching, not included in their basic contract, should be considered 'creditable compensation.'

"I would also appreciate an opinion as to whether the five highest consecutive years of creditable service [as used in § 51-111.10(16)] means the sixty highest consecutive months or the five highest consecutive years figured either on a calendar or a fiscal year basis."

I shall answer your questions seriatim:

Section 51-111.10(15) provides in pertinent part:

"'Creditable compensation' means the full compensation payable annually to an employee working the full working time for his covered position...."

It is my opinion that the above-quoted language limits the "creditable compensation" of a professor or teacher to that paid for full-time services during the school year and does not allow the full-time employee to receive additional retirement credit for part-time teaching at night or during the summer.

Section 51-111.10(16) defines "average final compensation" as ".... the average annual creditable compensation of a member during his five highest consecutive years of creditable service ...."

The Virginia Supplemental Retirement System construes § 51-111.10(16) as if "five highest consecutive years" was "sixty highest consecutive months." This construction has continued for over thirty years under the present law as well as under § 2672(1)(17), Code of Virginia (1942), as amended. When the present retirement system act was adopted in 1952, the General Assembly did not alter that portion of the prior law defining "average final compensation" so as to affect the administrative construction of "five years." Although the general definition of "year" in § 1-13.33 is a calendar year, since the General Assembly is presumably aware of the administrative construction of "five years" as if it was "sixty months" and has not changed the definition of average final compensation contained in the Virginia Supplemental Retirement Act, such construction has attained the effect of law. It is my opinion, therefore, that the "average final compensation" of an employee may properly be determined on a basis of the sixty highest consecutive months of service without regard to the calendar or fiscal years of service.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Disability Retirement Allowance—How joint and survivor option determined.

March 30, 1973

THE HONORABLE H. W. BURGESS, Superintendent
Department of State Police

Your recent letter requested an opinion as to the validity of the method used
by the Board of Trustees of the Virginia Supplemental Retirement System (VSRS) to determine the amount of the retirement benefit of a member of the State Police who retired at age 53 on account of disability. In computing the amount of the member's benefit under a joint and survivor option, the VSRS made an actuarial assumption that he was sixty years old at the time of retirement. You question the validity of that assumption.

The VSRS is given the responsibility of administering the State Police Officers' Retirement System by § 51-143 of the Code of Virginia. Retirement on account of disability is provided for under §§ 51-152 and 51-153. Section 51-154 permits any member of the System, including one retiring for disability, to elect to have his retirement allowance payable "under an actuarially equivalent option as provided in § 51-111.60." Subsection (a)(2) of § 51-111.60 provides for a joint and last survivor option. The first paragraph of subsection (a) states in part: "The amount of any such optional retirement allowance shall be the actuarial equivalent of the amount of such retirement allowance otherwise payable to him." The words "actuarial equivalent" are defined, both in subsection (18) of § 51-111.10 and in subsection (14) of § 51-144, to mean "a benefit of equal value when computed upon the basis of such actuarial tables as are adopted by the Board."

In my opinion, the use by the VSRS of an assumption that a person retiring for disability has the life expectancy of a person sixty years of age is a valid exercise of administrative discretion in determining the actuarial equivalent of his benefit. I am informed by the actuary for the VSRS that the use of such assumptions is an acceptable actuarial procedure in determining disability benefits, which has been consistently followed by the VSRS. As total disability indicates a shortened life expectancy in the great majority of cases, and thus affects the validity of the probabilities expressed in the actuarial tables, some adjustment must be made, either by the use of some kind of assumption or the use of a special table for disabled persons. Some adjustment in the probabilities is also demanded by the fact that the retiring member can make an election with all the facts before him; he is far more likely to elect the joint and survivor option if he is very ill and expects to live a short time. In opting to use the assumption of age sixty, the VSRS has taken its cue from the section providing the disability retirement allowance, § 51-153, which requires that the benefit be computed in most cases by assuming the recipient has reached age sixty.

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VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM— Judges— Retirement benefits not lost due to consolidation of court system.

October 16, 1972

The Honorable Duncan C. Gibb
Member, House of Delegates

I have received your letter of September 6, 1972, from which I quote:

"Thank you for your letter of August 18th in which you state that in the event the Corporation Court of the City of Winchester is merged into the 17th Judicial Circuit by legislative action the person elected and designated to the combined judgship would only be entitled to receive one state salary.

"This raises one further question and that is, what happens to the funds which have been paid into the Judge's retirement system based upon both salaries? If the present Judge retires sometime after the merger would his retirement be based upon the combined salaries which he received before the merger or the one salary which he received after? If it is the latter
then what happens to the money which has been paid into the retirement system based on the salary he received as Judge Designate of the Corporation Court?"

Section 51-168(a), Code of Virginia (1950), as amended, provides for a normal retirement allowance of an amount equal to one and one-half per centum of the average final compensation multiplied by the number of years of creditable service, not to exceed seventy-five per centum of average final compensation. Such compensation is defined by § 51-161 as the average creditable compensation payable annually by the State to a judge for his covered position during his five highest consecutive years of actual service. Under these provisions, it is immaterial how salary is credited as long as it is in fact credited to a member's account. In my opinion, the judge would not lose any retirement benefits because of the consolidation of the court system.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Transfer of Securities Outside of Commonwealth—State Treasurer may approve bank's transfer of securities out of Virginia if bank assumes liability for any loss—Transfer would not affect Treasurer's liability as custodian.

September 11, 1972

THE HONORABLE WALTER W. CRAIGIE, JR.
Treasurer of Virginia

I have received your letter of September 6, 1972, from which I quote:

"I have entered into a custodial agreement with First & Merchants National Bank for the deposit of securities beneficially owned by the Virginia Supplemental Retirement System with the bank for safekeeping and for convenience of transfer. The bank has solicited my permission to deliver these securities to the Central Certificate Service in New York City, a division of the Stock Clearing Corporation, to facilitate transfers. The Stock Clearing Corporation was organized under the laws of New York State and is a wholly owned subsidiary of the New York Stock Exchange.

"The arrangement contemplated involves the registration of the securities in the name of 'Cede & Co.,' a common nominee for all securities held by the Central Certificate Service. Beneficial ownership is transferred through bookkeeping entries from seller to buyer and the legal title remains vested in the name of the nominee. Possession of the securities remains with the Central Certificate Service.

"Neither the Commonwealth nor the Virginia Supplemental Retirement System will contract directly with the Service. The Treasurer's custodial agreement will be solely with First & Merchants National Bank but will be amended to allow the bank to deliver the securities to the Service.

"Your opinion concerning the legality of the proposal and its effect, if any, upon my liability as custodian of the Retirement System's assets is requested."

This office previously rendered an opinion that the Treasurer could contract with a bank or banks located in the Commonwealth for the safekeeping of the securities owned by the Virginia Supplemental Retirement System and for servicing of the securities by personnel of the bank. See Report of the Attorney General (1958-1959), p. 310. The question of keeping securities outside of the Commonwealth was not considered by the previous opinion.

The arrangement to which you refer is not prohibited by any provision of law
of which I am aware. Section 51-111.24, Code of Virginia (1950), as amended, provides that the Board of Trustees of the Virginia Supplemental Retirement System is the trustee of the funds of the System. Section 51-111.51 makes the State Treasurer custodian of the assets of the System. Neither statute limits the authority of the State Treasurer to approve the delivery of the securities to a clearing system located outside of the Commonwealth.

Under the contemplated proposal, a bank located in the Commonwealth can assume liability for any loss to the Virginia Supplemental Retirement System resulting from the bank’s transfer of the securities to the Central Certificate Service. This will insure that any necessary litigation concerning the securities be between you and the bank in the courts of Virginia, eliminating any objection to the proposal upon the grounds that it would be necessary to conduct litigation in a court of another jurisdiction.

Subject to obtaining the bank’s agreement as to liability, I am of the opinion that you may legally approve the bank’s transfer of the securities to the Stock Clearing Corporation. Such approval would not affect your liability as custodian, and you should take all necessary steps to safeguard the securities wherever they are located.

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VIRGINIA WATER AND SEWER AUTHORITIES ACT—Roanoke Public Service Authority—May undertake additional area.

May 22, 1973

The Honorable Edward A. Natt
County Attorney for Roanoke County

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

“Do you have an opinion concerning action taken by the Board specifying as an additional project area to be undertaken by the Roanoke County Public Service Authority for the purpose of exercising powers conferred upon said Authority by the Virginia Water and Sewer Authorities Act, an area which includes all of the unincorporated area of Roanoke County except those areas already previously set out as project areas by the Board of Supervisors.

“At its meeting held on February 13, 1973, after the matter had been advertised in accordance with provisions of the Code of Virginia, 1950, as amended, the Board of Supervisors adopted a resolution which specified the entire County as a project area over which the Roanoke County Public Service Authority had jurisdiction. Said resolution provided, however, that existing private water and sewer systems would have concurrent jurisdiction in those areas in which they were operating.

“I am enclosing for your consideration in rendering an opinion concerning its validity, a copy of the resolution adopted by the Board specifying the County generally as a project area over which the Roanoke County Public Service Authority shall exercise the powers conferred upon it by the abovementioned Act.”

The Board of Supervisors of Roanoke County, under § 15.1-1247 of the Code of Virginia (1950), as amended, was authorized to specify an additional project. The project area specified was described thusly:

“All of the unincorporated area or territory of Roanoke County, Virginia, and, also such areas of the City of Salem as are of the date of this
contract, March 17, 1972, served by sewage collector and transmission facilities of said county but excluding such area or areas of said county as are of the date of this contract, March 17, 1972, served by sewage collector, transmission or treatment facilities of any municipality, excluding those areas of Roanoke County previously specified as projects or project areas under the jurisdiction of the Roanoke County Public Service Authority, or Roanoke County Sanitation Authority, in accordance with Section 15.1-1247 of the Virginia Water and Sewer Authorities Act of 1950, as amended, and as recorded in the Board of Supervisors' Order Books of record in the Clerk's Office of the Circuit Court of Roanoke County."

I am of the opinion that the area specified was within the authority of the Board of Supervisors.

The resolution also contained the following language:

"WHEREAS, there are existing private water and sewer systems within the County now serving portions of the County, which systems will need to expand their service areas from time to time, and

"WHEREAS, there will possibly be private systems to be established in the future, all of which systems will, of necessity, have to have concurrent jurisdiction over areas hereby granted to the Roanoke County Public Service Authority.

"NOW, THEREFORE, BE IT RESOLVED, that those private water and sewer systems now existing and operating, and any systems to be hereafter established, shall have concurrent jurisdiction with the Roanoke Public Service Authority so long as such systems, (and 'systems' shall be corporately-owned projects), shall comply with all state and local regulations; and so long as such systems provide the Board of Supervisors with evidence satisfactory to the Board as to the intent and ability of such private systems to provide all citizens with the area to be served with its services, and to post a reasonable performance bond, if the Board of Supervisors should deem it desirable."

The private water and sewer systems received no superior privileges to those of the governing body of the county when they received certificates of convenience and necessity from the State Corporation Commission under the Utility Facilities Act.

In the absence of specific privileges being granted the private water and sewer systems under the certificates of convenience and necessity and in view of the amendment to § 14.1-1251 of the Code removing the prohibition against an authority exercising its powers under the Virginia Water and Sewer Authorities Act, Chapter 28 of Title 15.1 of the Code, I am of the opinion that the Board of Supervisors was authorized to adopt the foregoing language.

WAR VETERANS' CLAIMS, DIVISION OF—Children Eligible For Benefits—
Must be child of parent who was citizen of Virginia at time he or she was inducted into military service.

November 21, 1972

The Honorable A. J. Canada, Jr.
Member, Senate of Virginia

I am writing in response to your recent inquiry relating to § 23-7.1 of the Code of Virginia (1950), as amended. In your letter you asked for my interpretation of the word "citizen" and the term "at the time of entering war service" as used in the above mentioned Code section.
Section 23-7.1 of the Code provides that certain benefits will be given to eligible children "either of whose parents was a citizen of Virginia at the time of entering war service . . . ." I am of the opinion that the word "citizen" as used in this section incorporates the elements of domicile. Thus the parent in question must have been a resident of the Commonwealth who intended to remain in the Commonwealth indefinitely.

According to the requirements of the section, the parent in question must have been a citizen "at the time of entering war service . . . ." This means that the parent must have been a citizen of Virginia at the time he or she was inducted into military service. The statute is remedial and should be given a liberal construction. Any other construction would be too imprecise to provide for intelligent administration of the statute.

WAR VETERANS' CLAIMS, DIVISION OF—Children of Veteran Defined.

VETERANS—Claims—Children of a veteran include stepchildren and children legally adopted.

January 17, 1973

The Honorable Harry F. Carper, Jr.
Director of the Division of War Veterans' Claims

This is in reply to your recent letter in which you ask for an interpretation of the word "children" as used in § 23-7.1 of the Code of Virginia (1950), as amended.

Section 23-7.1 of the Code reads, in part, as follows:

"All sums appropriated by law for the purpose of carrying into effect the provisions of this section shall be used for the sole purpose of providing for tuition and institutional fees, board and room rent and books and supplies at any education or training institution of collegiate or secondary grade in the State of Virginia approved in writing by the Director of the Division of War Veterans' Claims for the use and benefit of the children not under sixteen and not over twenty-five years of age either of whose parents was a citizen of Virginia at the time of entering war service, and was killed in action or died from other causes in World War I extending from April sixth, nineteen hundred seventeen, to July second, nineteen hundred twenty-one, or in any armed conflict subsequent to December sixth, nineteen hundred forty-one, while serving in the army, navy, marine corps, air force or coast guard of the United States, either of whose parents was or is or may hereafter become totally and permanently disabled due to service during such periods, whether such parents be now living or dead." (Italics supplied.)

You enclose a copy of VA Regulation 1057 which defines a child of a veteran to include a stepchild and a legally adopted child.

Since § 23-7.1 of the Code does not qualify the words "children of a veteran" and since this statute is remedial in nature, it should be broadly interpreted to accomplish its purpose. Therefore, I am of the opinion that the words "children of a veteran" as used in the statute include stepchildren and children legally adopted by the veteran.

WARRANTS—Civil—Destruction; when clerk of court may destroy warrants.
WARRANTS—Destruction—No specific statutory authority to destroy criminal warrants.

September 14, 1972

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

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

"Whether the Code of Virginia provides authority through the Commonwealth’s Attorney or directly to local police establishments to destroy unserved warrants and capias after they have remained outstanding for a measurable and given period of time."

I have examined the sections of the Code of Virginia relative to criminal warrants and am unable to find specific authority to destroy them. In contrast, however, there is authority to destroy civil warrants under certain circumstances pursuant to § 16.1-118, Code of Virginia (1950), as amended. (See also Report of the Attorney General [1962-1963], p. 291.)

Therefore, I am of the opinion that there is no specific statutory authority to destroy criminal warrants.

WATER—Regional Water Authority—May condemn private land in county which is not a member of the authority.

EMINENT DOMAIN—Regional Water Authority—May condemn private land in county which is not a member of the authority.

February 21, 1973

THE HONORABLE RICHARD C. GRIZZARD
Commonwealth’s Attorney for Southampton County

This is in reply to your recent letter in which you ask my opinion whether a regional water authority created under § 15.1-1241, Code of Virginia (1950), as amended, can condemn private land in Southampton County, which county is not a member of the authority.

Section 15.1-1250 of the Code authorizes and empowers an authority established under § 15.1-1241 of the Code to condemn land. The pertinent portion of that section reads:

"Each authority created hereunder shall be deemed to be an instrumentality exercising public and essential governmental functions to provide for the public health and welfare, and each such authority is hereby authorized and empowered:

* * * *

"(f) To acquire, purchase, lease as lessee, construct, reconstruct, improve, extend, operate and maintain any water system, or sewer system, or sewage disposal system, or a garbage and refuse collection and disposal system or any combination of such systems within, without, or partly within and partly without one or more of the political subdivision or subdivisions by action of whose governing body or governing bodies the authority was created, or who may hereafter [after February twenty-seventh, nineteen hundred and sixty-two], join such authority, and to acquire by gift, purchase or the exercise of the right of eminent domain lands or rights in land or water rights in connection therewith, within, without, or partly within and partly without one or more of the political
subdivision or subdivisions by action of whose governing body or governing bodies the authority was created, or who may hereafter [after February twenty-seventh, nineteen hundred and sixty-two], join such authority; and to sell, lease as lessor, transfer or dispose of all or any part of any property, real, personal or mixed, or interest therein at any time acquired by it; provided, that the authority shall have the same power of eminent domain and shall follow the same procedure therefor as provided in §§ 15.1-335 and 15.1-340 of the Code of Virginia, except that the authority shall not take by condemnation proceedings any property belonging to any corporation possessing the power of eminent domain, unless, after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto; and except that the authority shall not take by condemnation proceedings less than the whole of the property owned by any corporation possessing the power of eminent domain, unless the property taken is not essential to the purpose of the corporation; or unless the authority, as a part of the properties taken, takes the whole of the property owned by the corporation located within the county, city or town which created the authority or which is a member thereof; and provided, that the authority shall not have the power to condemn any property owned or operated by any corporation which is subject to regulation by the Interstate Commerce Commission; and provided further, that no property or any interest or estate therein owned by any county, city, town or other political subdivision of the State shall be acquired by the exercise of the power of eminent domain without the consent of the governing body of such county, city, town or political subdivision; except as otherwise herein provided, each authority is hereby vested with the same authority to exercise the power of eminent domain as is vested in the State Highway Commissioner of Virginia; . . . .” (Emphasis supplied.)

The authority and power of eminent domain vested in a regional authority by this section extends to lands within the political subdivisions that are members of the authority; to lands without these political subdivisions; as well as to lands lying partly within and partly without these same areas. I am of the opinion, therefore, that an authority properly established under § 15.1-1241 of the Code may condemn private land in Southampton County, which county is not a member of the authority.

WATER AND SEWER AUTHORITIES—Authority to Require Residents to Connect to New Sewer Lines.

March 6, 1973

The Honorable William G. Davis
Commonwealth’s Attorney for Franklin County

This is in reply to your letter of February 23, 1973, which reads as follows:

“Please advise if a proposed municipality or sewer authority would have the authority to require residents of the area that it proposes to serve connect to their new sewer lines if the homeowners have adequate and approved private septic tank systems which are operating efficiently. The private septic systems in question were installed prior to the installation of the municipal or sewer authority disposal system.”

I am of the opinion that your inquiry is answered in the affirmative.

Section 15.1-1261 of the Code of Virginia (1950), as amended, provides for
the enforcement of sewerage connections. This section, the collection of charges (§ 15.1-1262) and the creation of a lien therefor (§ 15.1-1263) were held constitutional as being reasonable exercises of the police power of the state and bearing a substantial relation to the protection and preservation of the public health. They do not deprive landowners of their property without due process of law. *Farquhar v. Board of Supervisors*, 196 Va. 54, 82 S. 2d. 577 (1954).

**WATER AND SEWER AUTHORITIES—Two Authorities Cannot Operate in Same County; § 15.1-1251 Precluded County from Establishing.**

May 9, 1973

**The Honorable Clinton Miller**

Member, House of Delegates

This is in reply to your recent letter which reads:

"This letter is in reference to Chapter 28 of Title 15.1 of the Code of Virginia of 1950, as amended, ‘Virginia Water and Sewer Authorities Act’.

"On January 16, 1969, the State Corporation Commission issued a Certificate of Incorporation to the Toms Brook-Maurertown Service Authority. The incorporating political subdivisions were Shenandoah County, Virginia, and the Town of Toms Brook, Virginia. I enclose herewith a copy of the Articles of Incorporation.

"You will note in Paragraph (c) on the second page that the initial project was to be as set forth on certain engineering studies referred to in said paragraph and such adjacent areas as may be conveniently served by the system. This project was to construct water lines from the Toms Brook area to the Maurertown area, being a distance of some three to five miles and paralleling Route No. 11. This project has now been completed. You will note on the third page of the Articles of Incorporation that no other projects were to be undertaken until authorized by resolution of the Board of Supervisors of Shenandoah County and the Council of the Town of Toms Brook.

"Subsequent to the aforementioned project the Board of Supervisors of Shenandoah County and the Council of the Town of Toms Brook authorized an additional project for the construction of sewage collection and treatment facilities and this project was to cover an area from the Town of Toms Brook, running south on Route No. 11 to within approximately 1,000 feet of the north corporate limits of the Town of Woodstock. I enclose herewith a copy of the resolution from the Board of Supervisors of Shenandoah County. This project is still in the planning stage.

"On May 9, 1972, the Board of Supervisors of Shenandoah County created the ‘Shenandoah County Sanitation Authority’ with general authority over all of Shenandoah County for the acquisition, construction, operation and maintenance of water and sewer systems. I enclose herewith a copy of these Articles of Incorporation. The Certificate of Incorporation was issued by the State Corporation Commission on May 25, 1972. At this time, there are no other political subdivisions participating in this Authority.

"A question has arisen as to whether or not these two Authorities can both operate in Shenandoah County, Virginia. The purpose in creating the Shenandoah County Sanitation Authority was to serve all areas in Shenandoah County, excepting those areas served by the Toms Brook-
Maurertown Service Authority. There will be no duplication of services by the two Authorities, this being prohibited by Section 15.1-1251 of the Code of Virginia of 1950, as amended, and actually it is contemplated that the two Authorities will be merged at some future time so that there will only be one Authority operating in the County.

"The question posed at this time is that a Federal agency which regularly assists in financing projects of this type has informally indicated that the Shenandoah County Sanitation Authority does not have any legal existence under Title 15.1 since it was created after the Toms Brook-Maurertown Service Authority. Although there has been no formal attack on the legal standing of Shenandoah County Sanitation Authority, the Authority felt it wise to seek an opinion as to its right to act under Title 15.1 before undertaking any projects.

"As noted above it is the position of the Authority that its creation is not contrary to Section 15-1251 or any other provisions of Title 15.1 and said Title does not prohibit the existence of two Authorities within the County, both Authorities having Shenandoah County as a member, so long as there is not a duplication of services being performed in whole or in part in the respective areas being served by said Authorities.

"I will appreciate an opinion as to the matters set forth herein."

The Toms Brook-Maurertown Service Authority was established under the Virginia Water and Sewer Authorities Act, Title 15.1, Chapter 28, Code of Virginia (1950), as amended. The articles of incorporation provided for by § 15.1-1242 were approved by the State Corporation Commission. These contained the initial project to be undertaken. This reads:

"(c) The purposes for which said Authority is created are: The acquisition, construction, operation and maintenance of water systems, sewer systems, sewerage disposal systems for the collection and treatment of sewerage, and garbage and refuse collection and disposal systems, and for the purpose of exercising the powers conferred by the Virginia Water and Sewer Authority Act in relating to the foregoing.

"The initial project shall be: To acquire, construct, operate and maintain a public water system for an area of Shenandoah County, Virginia, including the Town of Toms Brook, Virginia, as shown on plats and study entitled, 'A PRELIMINARY STUDY WATER AND SEWERAGE SERVICES DEVELOPMENT PROGRAM FOR THE TOWN OF TOMS BROOK AND MAURERTOWN COMMUNITY,' prepared by Thompson and Litton, Civil and Mining Engineers, Wise, Virginia, and which said plats are filed with a document entitled, 'A PRELIMINARY STUDY WATER AND SEWERAGE SERVICES DEVELOPMENT PROGRAM FOR THE TOWN OF TOMS BROOK AND MAURERTOWN COMMUNITY,' dated July, 1968, and prepared by Thompson and Litton, reference to said plat and report is hereby made as if the same were set out herein in its entirety, which area shall include the area shown on the aforesaid plat and such adjacent areas as may be conveniently served by the said system."

Subsequently, this Authority was empowered to undertake a further project by the following resolution:

"The Toms Brook-Maurertown Service Authority be authorized to acquire, construct, operate and maintain public sewage collection and treatment facilities for an area in Shenandoah County, Virginia, including the Town of Toms Brook, Virginia, as shown on the plats and a study entitled 'Interim Management Plan and Preliminary Engineer’s Report of Sewage
Collection and Treatment Facilities, Toms Brook-Maurertown, Virginia, June, 1972, prepared by Henry P. Sadler, Consulting Engineer, 6924 Lakeside Avenue, Richmond, Virginia 23228, which said plats and reports are filed with the Clerk of the Board of Supervisors of Shenandoah County, Virginia, reference to which is hereby made as if the same were set out herein in its entirety, the area to be served to include the area shown on the said plat and such adjacent areas that may be conveniently served by the said system.

On May 9, 1972, the Board of Supervisors of Shenandoah County created the “Shenandoah County Sanitation Authority”. The Articles of Incorporation contain the following language:

“(c). The purpose for which said Authority is created is the acquisition, construction, operation and maintenance of (a) an integrated water system for supplying and distributing water in Shenandoah County and (b) an integrated sewer system and sewage disposal system for Shenandoah County, and for the purpose of exercising the powers conferred by said Virginia Water and Sewer Authorities Act in relation to the foregoing.”

(Emphasis added.)

You ask whether the creation of the “Shenandoah County Sanitation Authority” was prohibited by § 15.1-1251 of the Code.

Section 15.1-1251 of the Code reads:

“No governing body which shall have created a then existing authority or which shall have joined with any other governing body or governing bodies in the creation of or which shall have joined an authority under the provisions of this chapter and which shall then be a member of the authority so created or joined shall thereafter create or join with any other governing body or governing bodies in the creation of or join an authority under the provisions of this chapter if the authority then to be created or joined would duplicate the services then being performed in the whole or any part of the areas then being served by such authority theretofore created or joined by said governing body.”

The Articles of Incorporation of the Shenandoah County Sanitation Authority authorize it to provide service throughout the county. This includes all of the area over which the existing Toms Brook-Maurertown Service Authority is authorized to operate. I am, therefore, of the opinion that § 15.1-1251 precluded the county from establishing the “Shenandoah County Sanitation Authority” as proposed. The actual language of the Articles of Incorporation, which would permit duplication of services in this instance, rather than the intent of the incorporator controls. See Loyd v. Lynchburg, 113 Va. 627, 632 75 S.E. 283 (1912).

WATER AND SEWERAGE SYSTEMS—Public Water and Sewer Works—Easements for installation of—Involves acquisition of right in real estate.

EMINENT DOMAIN—Easements for Water and Sewer Works—Involves acquisition of rights to real estate.

June 5, 1973

THE HONORABLE ANDREW J. ELLIS, JR.
County Attorney for Hanover County

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

“Hanover County is embarking upon the establishment of public water
and sewer works to serve its citizens. In connection therewith, it is necessary to acquire easements for the installation of water and sewer lines.

"I would appreciate your advising me whether or not in your opinion the provisions of Sections 15.1-285 and 15.1-286 are applicable to the acquisition of easements for the above purposes."

I am of the opinion that the acquisition of easements for the installation of water and sewer lines involves the purchase and acquisition of title to real estate for public uses within the contemplation of §§ 15.1-285 and 15.1-286, Code of Virginia (1950), as amended.

WATER AND WATERCOURSES—Wetlands Act—Exemptions under.

THE HONORABLE JAMES E. DOUGLAS, JR.
Commissioner, Marine Resources Commission

This will acknowledge receipt of your recent letter in which you request my interpretation of the Wetlands Act “grandfather clause” as follows:

"Does a plat of subdivision, filed with appropriate local bodies prior [to] 1 July 1972, constitute an exemption under Section 62.1-13.20?"

The Wetlands Act, § 62.1-13.1, et seq., Code of Virginia (1950), as amended, provides generally that all development of wetlands in Virginia shall require prior issuance of a permit from either a local wetlands zoning board or the Marine Resources Commission. Certain exemptions from the general permit requirements of the Act are set forth in § 62.1-13.20 of the Code as follows:

"Nothing in this chapter shall affect . . . (2) any project or development as to which, prior to July one, nineteen hundred seventy-two, a plan or plan of development thereof has been filed pursuant to ordinance or other lawful enactment with either an agency of the federal or State government, or with either the planning commission, board of supervisors, or city council of the jurisdiction in which the project or development is located . . . ."

In order to fall within the exception created by subsection (2) of § 62.1-13.20 one must satisfy two criterion:

(1) One must have filed, prior to July 1, 1972, a plan or plan of development for the project which will encroach upon wetlands; and,

(2) One must have filed such plan or plan of development pursuant to local ordinance or other lawful enactment.

Where a subdivision plat is filed with a local planning commission in a political subdivision which requires the filing of such subdivision plat by ordinance as a regular step in governmental approval of development, the second criterion has clearly been met.

Furthermore, a subdivision plat which clearly indicates lot lines and streets, the confines of which are identifiable, would constitute a plan or plan of development within the meaning of the Wetlands Act. Such subdivision plat need not specifically indicate on its face that wetlands areas were affected or included within such proposed area of development.

I am, therefore, of the opinion that, where a subdivision plat for development of an area has been filed in a political subdivision which requires such filing by
ordinance, and the land area shown on that plat, in fact, includes wetlands, any encroachment upon or development of wetlands in the platted area is exempted from regulation under the Wetlands Act by § 62.1-13.20(2).

WATER CONTROL BOARD—Authority—May Develop Metropolitan Regional Water Quality Plans for Three Planning Districts Which Have No Planning Commission.

PLANNING COMMISSION—Water Control Board May Develop Metropolitan Regional Water Quality Plans for Three Planning Districts Which Have No Commission.

August 4, 1972

The Honorable A. H. Paessler, Executive Secretary State Water Control Board

This will acknowledge receipt of your letter of July 18, 1972, in which you request advice regarding the authority of the State Water Control Board (Board) to develop Metropolitan Regional Water Quality Plans (M/R plans) for three planning districts which, at the present, have no planning district commission to develop such plans. You advise that all planning districts seeking federal grants for implementation of M/R plans must develop and submit an M/R plan, certified by the Governor as consistent with state programs, to the U.S. Department of Housing and Urban Development (HUD) and the U.S. Environmental Protection Agency (EPA) for approval, on or before July 1, 1973. You advise further, that in order that these three planning districts have an M/R plan to submit before the July 1, 1973, deadline, the Board wishes to employ certain private consultant engineers to develop M/R plans for these three planning districts. The focus of your inquiry, as clarified by telephone conversation, is whether the Board's planning on behalf of these planning districts contravenes legislation providing for planning district commissions as embodied in Title 15.1, Chapter 34, Articles 1 and 2, Code of Virginia (1950), as amended.

Section 62.1-44.15(13), Code of Virginia (1950), as amended, empowers the Board to plan for pollution abatement and water quality control on an area-wide basis:

"It shall be the duty of the Board and it shall have the authority:

"(13) To establish policies and programs for effective area-wide or basin-wide water quality control and management. The Board may develop comprehensive pollution abatement and water quality control plans on area-wide or basin-wide basis."

Section 15.1-1405(a), of the Code, provides in relevant part:

"... No action of planning district commission shall affect the powers and duties provided to local planning commission by law. . . ."

It would appear to be clear, therefore, that the General Assembly did not intend that planning district commissions assume exclusive authority to plan for the localities within their planning districts.

Furthermore, § 15.1-1411 of the Code contemplates cooperative planning efforts by planning district commissions and the various state agencies, departments and boards which might provide information and assistance. This further evidences legislative intent that planning district commissions would not pre-empt the entire planning function for localities within their districts.

I am, therefore, of the opinion that the Board, which clearly is empowered to
perform a planning function, has authority to undertake the development of M/R plans for use in the three planning districts in question.

WELFARE—Composition of Local Board—Members ineligible to serve after two consecutive terms, but continue to serve as de facto officers despite ineligibility.

PUBLIC OFFICERS—Local Board of Public Welfare—Members ineligible to serve after two consecutive terms, but continue to serve as de facto officers despite ineligibility.

June 22, 1973

THE HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for Essex County

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

"I am writing to request clarification of the composition of the Essex County Board of Public Welfare.

"By an order entered by the Essex County Circuit Court on June 9, 1965, the three members of the local welfare board were appointed for terms of three years each beginning July 1, 1965 and ending June 30, 1968. Thereafter, by an order of the Essex County Circuit Court of June 28, 1968, Member A was reappointed for a term of two years beginning July 1, 1968 and ending June 30, 1970; Member B was reappointed for a term of three years beginning July 1, 1968 and ending June 30, 1971 and Member C was reappointed for a term of four years beginning July 1, 1968 and ending June 30, 1972.

"On July 14, 1970, pursuant to Sec. 63.1-40 of the Code of Virginia, the Board of Supervisors reappointed Member A to a three year term from July 1, 1970 to June 30, 1973; Member B to a one year term from July 1, 1970 to June 30, 1971 (the period covered by his court appointment of June 28, 1968); and Member C for a two year term beginning July 1, 1970 to June 30, 1972 (also the term provided for in his court appointment of June 28, 1968).

"On June 13, 1971, Member B was reappointed by the Board of Supervisors for a three year term beginning July 1, 1971 and ending June 30, 1974.

"Finally, on July 11, 1972 Member C was reappointed by the Board of Supervisors for a four year term beginning July 1, 1972 and ending June 30, 1976.

"I understand that Sec. 63.1-39 limits terms of service on the welfare board to two, including the term being served on June 28, 1968. Further, after initial appointments for staggered terms, each appointment is required to be for terms of four years each. Inasmuch as all three members were serving terms on June 28, 1968 which expired on June 30, 1968, it appears that each was eligible for no more than one additional appointment for a term of four years.

"I would appreciate very much your opinion in this regard and also any advice you might have as to how we might best rectify this situation."

Based upon the information contained in your letter, I would conclude that all of the present members of the local Board of Welfare are ineligible to be serving their present terms of office under the provisions of § 63.1-39 of the Code of Virginia (1950), as amended. As you correctly point out, § 63.1-39 provides that:
"No person shall serve more than two consecutive terms of office and the term of office being served on June 28, 1968, if a full term, shall constitute the first of such terms; . . . ."

According to this provision, each member to whom you referred was serving a first term which expired on June 30, 1968, and was thereafter appointed to and served a second consecutive term beginning on July 1, 1968, and ending respectively on June 30, 1970, June 30, 1971, and June 30, 1972. At the expiration of each of these terms, these individuals were ineligible to serve another consecutive term of office. You are also correct that § 63.1-39 requires that subsequent appointments following the initial staggered terms must be for four years each.

With regard to the present membership of the board, however, I would point out that these individuals are currently serving as de facto officers despite their ineligibility under § 63.1-39 and that their official acts are valid nevertheless. In support thereof, I refer you to an opinion of the Attorney General dated July 16, 1959, to the Honorable Alonzo Beauchamp, Commonwealth’s Attorney for Russell County; Michie’s Jurisprudence, Vol. 15, Public Officers, §§ 56-60; 63 Am. Jur. 2d, Public Officers, § 507; and § 2.1-37 of the Code of Virginia (1950), as amended.

Considering that the members of the Board are ineligible to be serving their present terms, you have also requested advice on how to remedy this situation. I would suggest several alternative approaches:

1) The current members might resign and new members could be appointed in their place in accordance with the applicable statutory provisions.

2) The Board of Supervisors, as the appointing authority for the Welfare Board, might remove the present members in accordance with Va. Code Ann. § 63.1-45. Since such removal must be “for cause,” however, this action would be subject to attack in a judicial proceeding by the members so removed. In this case, the court would ultimately be required to determine whether adequate cause existed for such removal. I would conclude that the Board could carry the burden of providing “cause” based upon the members’ statutory ineligibility to hold office.

3) An action in the nature of quo warranto might be instituted as provided in § 8-857, et seq., in order to test the right of the present members to continue in office.
"'shall exercise all the powers conferred and perform all the duties imposed by general law upon the county Board of Public Welfare not inconsistent herewith. . . .

"'A County Board of Public Welfare shall be appointed pursuant to the provisions of 63.1-41 of the Code of Virginia'

"Whereas Section 63.1-41 states:

"'where statutes dealing with special forms of government provide for the appointment of local boards, the provision of such statutes shall control'

"QUESTIONS:

"1. Does the local Superintendent assume all the duties provided, among others, in Code 63.1-50 thru 63.1-58 for local Boards of Public Welfare?

"2. If so, what is the function and what are the duties and responsibilities of the local board under the County Executive form? (Code 15.1-588 thru 621)"

Insofar as the County Executive form of government is a special form of government by statute, the statutory provisions relating to the appointment and powers of the county board of public welfare and the superintendent of public welfare under the County Executive form would take precedence over the general law provisions on the same subject. Section 63.1-41 specifically reiterates this point. However, since § 15.1-607 does not define the powers and duties of a county board of public welfare or of the superintendent except insofar as he performs the duties of the local board, one must look to the general law sections to decide the duties and powers of the board and superintendent.

Section 63.1-38 requires every county and city of the State or a combination of such counties and cities to appoint a local board of public welfare. Each local board is empowered generally to administer the various laws dealing with public assistance in the state in accordance with §§ 63.1-50 through 63.1-58 of the Code. In addition to a local board, each county or combination of counties is required to appoint a local superintendent of public welfare in accordance with § 63.1-59. The superintendent serves as the actual administrator of the various welfare programs operated by each locality and serves as administrator and executive officer of the local board. See § 63.1-57.1 and § 63.1-63. In accordance with § 63.1-67.1 through § 63.1-67.7, the superintendent is empowered to perform the actual administration of the public assistance programs in the locality and the other duties specified in these sections, all of which duties are subject to the supervision of the local board unless otherwise specifically stated. See § 63.1-67.1.

Therefore, I would conclude that the intent of § 15.1-607 is to empower a superintendent under the County Executive form of government to perform any and all duties of the local board which may be delegated to him by the board and as supervised by the board in accordance with § 63.1-67.1, in addition to the duties required of a superintendent by § 63.1-67.1 through § 63.1-67.7 of the Code. I reach this determination based on the language of § 15.1-607 which provides that the superintendent shall exercise all the powers and perform all the duties of the local board "not inconsistent herewith." I would conclude that the provision of § 63.1-67.1 which requires the local superintendent to be supervised by the local board would be inconsistent with the superintendent performing all the duties of the board without such supervision. If the superintendent under the County Executive form of government were required to perform all the duties of the local board in lieu of the local board's performing them, it would be superfluous for the locality to be required to also appoint a local board which would have no function.
WELFARE—Entrustment Proceedings—Consent of putative father to custody proceedings—Actions necessary by local boards to secure proper consent for children awaiting adoption.

January 16, 1973

THE HONORABLE HERBERT A. KRUEGER, Director
Division of General Welfare
Department of Welfare and Institutions

This is in response to your recent letter in which you seek further clarification concerning the applicability of Stanley v. Illinois, 92 S.Ct. 1209 (1972), and Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan, 92 S.Ct. 1488 (1972), especially as they relate to: 1) Children now awaiting adoptive placement, who have been committed or entrusted for the purpose of permanent separation from the parents with only one parent having been made a party to the entrustment or commitment procedures; and 2) Children now under supervision in adoptive homes, placed prior to or since April 1972 in accordance with the previous provisions of Virginia law. Specifically, your questions are as follows:

"a) Should agencies be advised to make both parents parties to entrustment agreements in all cases in which the child is awaiting adoption placement?

"b) Should agencies be advised to secure court commitments on such children entrusted by the mother only if she was a party to the entrustment agreement and it is now impossible to secure an entrustment agreement from the father?

"c) Should agencies be advised to ask the Court to reopen cases on commitments of such children resulting from proceedings in which the father was not made a party?

"d) Should agencies be advised to initiate action to make fathers a party to commitments or entrustments in cases in which children have been placed in an adoptive home and the petition for adoption has not been filed?"

In my letter to you of August 8, 1972, I stated that the effect of Stanley and Rothstein on entrustment proceedings, adoption proceedings, or other awards of custody, was to require that the putative father of an illegitimate child, as well as the mother, be given notice and a right to be heard in such proceedings in order to properly sever the parental rights of each parent. The holdings of these two cases indicate that any child, who is presently under the supervision of a local board of public welfare by a custody agreement or award in which the putative father did not consent or was given no notice and opportunity to be heard, would not properly be within the custody of the local board. Therefore, the local board would be unable to give a valid consent to the later adoption of the child without the parental rights of the putative father having been severed at some point.

It is my conclusion that Stanley and Rothstein would require that all of your questions be answered in the affirmative. If the father's consent has not been obtained or his rights have not been properly severed in a proceeding prior to the time of adoption, then the agency would be unable to consent to his adoption and the court would be required to secure the father's consent or sever his rights by notice to him and an opportunity to be heard at the time of the adoption proceeding.

Therefore, I would suggest that the implications of these two decisions for local boards presently having custody of children by proceedings in which the rights
of the father were not properly terminated under the Stanley and Rothstein decisions, require the following action:

1. The local board should obtain proper custody of any child now awaiting adoption or who may be adopted at some later date either by:
   a) obtaining an entrustment agreement in which the father gives his consent along with the mother, or
   b) initiating a court proceeding in which notice to the putative father and a right to be heard are afforded him. Thus, the parental rights of both the mother and father may be severed by the court and custody may be properly awarded to the local board for purposes of later consenting to adoption. Not only will this give the board proper custody of the child which it does not now have, but it will also be far less disruptive to the child to secure proper custody prior to any adoption proceeding.

2. The department should secure proper custody of any other child who has been entrusted or committed to it by an improper proceeding in which the putative father did not consent or was given no notice or opportunity to be heard in the proceeding. This would assure that the department had proper custody of the child which could not be raised at some later date and would also assure that proper consent to adoption could be given at such time as the child might become a candidate for adoptive proceedings.

As I indicated above, local boards should attempt to secure proper custody of all children currently under their supervision by entrustment or court commitment in order to avoid the question of proper consent being raised at a later date. However, at the very minimum, it is necessary for local boards to obtain proper custody of those children who are awaiting adoption or are candidates for adoption in order that the board may then consent in the adoptive proceeding. Further, local boards are obligated to advise any court in which an adoption is pending as to whether the putative father's consent was obtained and, if not, the information available to the agency concerning the father's identity and residence, and what efforts, if any, were made to secure consent from the father at the time custody was awarded to the local board. It would then be the duty of the court to assure that the parental rights of the father are properly severed in the adoption proceeding.

WELFARE—Identification Cards—May be issued recipients so long as not made condition of eligibility for assistance.

November 15, 1972

The Honorable Eleanor P. Sheppard
Member, House of Delegates

This is in reply to your letter of October 16, 1972, which reads as follows:

"I would appreciate your opinion on the following question.

"Are there statutory or constitutional prohibitions against a city's or county's power to issue identification cards to welfare recipients and require these cards to be carried by the recipients for the purpose of protecting merchants, banks and others with whom they have business?"

"My inquiry is addressed specifically in the interest of the City of Richmond, but would seem to have broader application."

There is no prohibition upon the Welfare Department's issuing an identification
card to the welfare recipient for his use in cashing his welfare check so long as the identification card is not made a condition of eligibility for assistance. In other words, a department might issue an identification card to a recipient at the time he is determined to be eligible for public assistance and it might encourage merchants, banks, and other institutions cashing public assistance checks to utilize the identification card. However, a department could not withhold assistance or deny assistance to an individual because of his failure or refusal to secure or use such an identification card, as this would violate the Federal Social Security Act and regulations issued pursuant to it which define the criteria of eligibility for public assistance.

Because of the problems with check theft and fraud, several states have now adopted policies providing for the issuance of an identification card to all recipients of public assistance and providing that any person may require the presentation of this card for check-cashing purposes. For example, under the New York Social Services law, § 131(9):

"Upon determining that a person is eligible for any form or category of public assistance, the social services official shall issue to any such person to whom payment is to be made, an appropriate identification card, with his photograph affixed, in a form approved by the department, which shall be used as the department, by regulation, may prescribe for improved administration. Any person, including the drawee bank, may require the presentation of such identification card as a condition for the acceptance and payment of a public assistance check."

Rather than encouraging recipients to apply for an identification card, such a law makes it mandatory for the department to issue such cards as a matter of course to all recipients. Although recipients could not be penalized for refusal to obtain the card, this would be a much more effective means of assuring that all recipients did in fact receive cards and would encourage check cashing facilities to require the use of such a card before honoring an assistance check.

Pennsylvania has a similar program known as the "Philadelphia Plan" introduced by that state on an experimental basis last year. Under this system, the state provides each recipient with an identification card which is required by banks participating in the delivery and cashing of public assistance checks. The state will then indemnify the bank against loss where the check cashed was presented for payment with the use of this state issued identification card.

I am therefore of the opinion that such a system of issuing identification cards for public assistance recipients and encouraging the use of such cards by check-cashing facilities to enable the recipient to convert his check into cash is legally permissible as long as the acceptance and use of such a card is not made a condition of the individual's receipt of public assistance funds.

WELFARE—Local Welfare Board—Authority to bring suit to secure support for public assistance.

WELFARE—Local Welfare Board—Recovery of welfare payments from legally responsible relatives.

April 10, 1973

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

This is in reply to your recent letter concerning the authority of local boards of public welfare to bring suit against legally responsible relatives to secure support for public assistance applicant/recipient, where the applicant/recipient expressly
refuses to bring suit himself or states that he does not want suit brought by anyone else. You indicate that some confusion in this regard has been generated by Manual Transmittal No. 41, Amendments to Manual of Policy and Procedure, Board of Welfare and Institutions, which reads as follows:

"If it is determined that a legally responsible relative is able to contribute to an applicant/recipient's support and he refuses or fails to do so in the amount of his potential contribution, court action to secure support is to be initiated either by the client or, if he is unwilling to do so, by the agency. If the applicant/recipient is otherwise eligible, assistance is to be granted or continued on the basis of the actual support received whether voluntary or by court order." ¶ 305.7.

You note that prior to the time of this amendment, when the applicant refused to proceed in court or to permit the agency to proceed on his behalf, the applicant was denied aid.

It is my opinion that §§ 63.1-127 and 20-64 of the Code of Virginia (1950), as amended, provide standing for a local board of public welfare to bring suit to secure support of an applicant/recipient from a legally responsible relative, despite the applicant/recipient's refusal to institute suit himself or opposition to such a suit brought by the local board. Section 63.1-127 provides:

"The local board may proceed in a manner provided by law against any person who is legally liable for the support of an applicant or recipient of assistance to require such person, if of sufficient financial ability, to support the applicant or recipient."

Section 20-64, found in Title 20, Chapter 5, dealing with desertion and non-support, further provides:

"Proceedings under this chapter may be instituted upon petition, verified by oath or affirmation, filed by the wife or child or by any probation officer or by a State or local law enforcement officer or by any State or local public welfare officer upon information received, or by any other person having knowledge of the facts, and the petition shall set forth the facts and circumstances of the case." (Emphasis added.)

The Social Security Act and federal regulations promulgated thereunder require that a state, in administering the Aid to Dependent Children Program, must develop a plan designed to secure support from a parent or other person legally liable for such support and to assure that appropriate law enforcement officials are notified as soon as assistance is furnished in respect to a child who is believed to have been deserted or abandoned by his parents. However, an individual who is otherwise eligible for assistance cannot be denied aid on the basis of his refusal to initiate a support action or to cooperate with the agency in doing so. See Meyers v. Juras, 327 F. Supp. 759 (1971), affirmed without opinion Juras v. Meyers, 404 U.S. 803 (1971); Taylor v. Martin, 330 F. Supp. 85 (1971), affirmed without opinion 404 U.S. 980 (1971).

States are, therefore, required to seek support from legally responsible relatives of public assistance applicant/recipients of Aid to Dependent Children, regardless of whether the applicant/recipient is willing to initiate such action. The policy statement contained in the Manual of Policy and Procedure to which you refer is supportive of your position that local boards may, and in fact are obligated to, initiate actions for support of a public assistance applicant/recipient where the applicant/recipient does not take such action himself.

WELFARE AND INSTITUTIONS—Authority of Public and Private Welfare
Agencies to Maintain Custody and Control Over Committed Children.

MINORS—Age of Majority; Eighteen Years or Over.

CONFLICT OF LAWS—Age limitation—Custody by commitment extends to age of twenty-one; by entrustment to age of eighteen.

September 12, 1972

The Honorable Herbert A. Krueger
Director, Division of General Welfare
Department of Welfare and Institutions

This is in response to your letter of August 31, 1972, in which you asked several questions relating to the authority of public and private welfare agencies to maintain custody and control over children entrusted or committed to the care of such agencies under the provisions of §§ 63.1-56 and 63.1-204 of the Code of Virginia (1950), as amended, after those children have attained the age of eighteen.

Specifically, you asked:

"In your opinion, is a local board that has been given custody over such a child, either by an entrustment or commitment authorized to continue custody and to make payments of public funds on his behalf? If public funds may be paid, may the locality be reimbursed by the Department of Welfare and Institutions from State appropriations under authority of Item 362 of Chapter 804 of the Acts of Assembly? Is a private agency that has been given custody over such a child authorized to continue custody after the child's eighteenth birthday?"

Section 63.1-56 of the Code of Virginia (1950), as amended, provides, in part, as follows;

"A local board shall have the right to accept for placement in suitable family homes or institutions, subject to the supervision of the Commissioner and in accordance with rules prescribed by the State Board, such persons under eighteen years of age as may be entrusted to it by the parent, parents or guardian or committed by any court of competent jurisdiction. Such local board shall, in accordance with the rules prescribed by the State Board and in accordance with the parental agreement or other order by which such person is entrusted or committed to its care, have custody and control of the child so entrusted or committed to it until he is lawfully discharged, has been adopted or has attained his majority . . . ."

Section 63.1-56 is in conflict with § 16.1-180 insofar as the age limitation is concerned. In my opinion the intention of the legislature is clearly manifest and that intention is to extend the period of custody when obtained by commitment to the age of twenty-one. Therefore, a local board of public welfare would be authorized to pay for the support of such children and to
receive reimbursement from the State pursuant to Item 362 of the Appropriations Act, Chapter 804 of the Acts of Assembly of 1972.

A different result is reached when the local board obtains custody by entrustment. Section 16.1-180 is not applicable here and therefore the provisions of §§ 63.1-56 and 1-13.42 apply. Custody and control obtained by entrustment are thereby severed upon the child attaining his eighteenth birthday. As the Appropriations Act authorizes reimbursement only where custody is authorized under §§ 63.1-56, 16.1-178(3), 16.1-10, or § 16.1-211 of the Code, no reimbursement is authorized for those children whose custody was obtained by entrustment who have attained the age of eighteen.

Private agencies that have obtained custody and control by commitment may retain such custody and control until the child is twenty-one for the same reasoning as above. These agencies lose custody and control where it was obtained by entrustment when the child attains his eighteenth birthday.

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**WELFARE AND INSTITUTIONS—Custody Over Juveniles—Retained until relinquished or juvenile becomes twenty-one years of age.**

**JUVENILE AND DOMESTIC RELATIONS COURTS—Custody Over Juveniles.**

**JUVENILES—Committed to Department of Welfare and Institutions Remain Under Custody of Department Even Though Subsequently Convicted and Treated as Adults.**

February 7, 1973

The Honorable William L. Lukhard, Director
Department of Welfare and Institutions

This is in response to your letter of January 24, 1973, in which you ask whether the Department of Welfare and Institutions retained custody over a juvenile committed to the Department pursuant to § 16.1-178 of the Code, after such juvenile had been certified and treated as an adult, for another crime, pursuant to § 16.1-177.1 of the Code. You indicated that in several instances juveniles that had been committed to the custody of the Department became involved in other crimes, either in the Department's facility or upon their escape from the facility, for which they were arrested, tried and convicted as adults pursuant to the provisions of § 16.1-177.1. Your question was whether the Department still maintained custody over these persons after they had served their sentences in an adult institution.

In my opinion, the Department would maintain custody over such persons. The duration of custody over juveniles committed to the Department of Welfare and Institutions is determined by § 16.1-180 of the Code which provides:

"all commitments under this law shall be for an indeterminate period having regard to the welfare of the child and interests of the public, but no child committed hereunder shall be held or detained after such child shall have attained the age of 21 years; . . . ." (Emphasis added.)

In the situation outlined by you, the Department has not relinquished custody over these persons by virtue of the fact that they have been treated as adults for crimes committed subsequent to obtaining custody. It is my opinion that the Department maintains custody over a juvenile until it relinquishes its right to custody or until he attains the age of 21 years. Upon release from the institution in which the person was placed pursuant to § 16.1-177 of the Code, he should re-
main under the control and supervision of the Department of Welfare and Institutions in accordance with the provisions of any outstanding § 16.1-178 decree.

WELFARE AND INSTITUTIONS—Director May Consent to Medical or Surgical Treatment, Including Abortions, for Wards Committed to State Board.

JUVENILES—Delinquent—Consent to medical or surgical treatment—How given.

April 2, 1973

THE HONORABLE WILLIAM L. LUKHARD, Director
Department of Welfare and Institutions

This is in reply to your letter of March 30, 1973, which is a request for an opinion concerning the authority of the Commissioner of Public Welfare to consent to medical and/or surgical treatment, including abortions, of wards committed to the State Board of Welfare and Institutions. Your specific inquiry is as follows:

"We currently have in our care a 16 year old child who is pregnant. She has requested an abortion and has consented to this in writing. I have also given my consent. The problem arises from the fact that her parents have refused to grant their consent. I am satisfied that this procedure is in her best interests and is necessary to protect her mental health. A physician at the Medical College of Virginia hospital has seen her and recommended this procedure, but has refused to perform the abortion without parental consent.

"Specifically, does § 32-137(2), Code of Virginia, give the Commissioner of Public Welfare the authority to consent to medical and surgical treatment including abortions without the consent of or in opposition to the wishes of a parent of a child who has been committed to the care and custody of the State Board of Welfare and Institutions as a delinquent juvenile pursuant to § 16.1-178(4) Code of Virginia?"

My reply to your inquiry is governed by § 32-137 of the Code of Virginia (1950), as amended, and by my recent opinion to the Honorable Ford C. Quillen, Member of the House of Delegates, dated March 1, 1973, a copy of which is attached hereto. In that opinion, I held that the consent provisions of § 18.1-62.1(e) were not invalidated by the decisions of the Supreme Court of the United States in Roe v. Wade, ...... U.S. ......, 41 L.W. 4213, and Doe v. Bolton, ...... U. S. ......, 41 L.W. 4233, and these provisions are still operative. That section provides, in pertinent part, that an abortion may be performed;

"... if the said woman shall be an infant or incompetent as adjudicated by any court of competent jurisdiction, then only after permission is given in writing by a parent, or if married by her husband, guardian or person standing in loco parentis to said infant or incompetent."

Section 32-137 of the Code provides, in pertinent part as follows:

"Whenever any person who is under eighteen 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:

* * *

"(2) Upon the Commissioner of Public Welfare with respect to any ward of the Board of Welfare and Institutions."
Thus, these statutes, when read together, provide that for an infant consent may be given in writing by a parent and, when the child has been separated from the custody of his parent and committed to the Board of Welfare and Institutions, then the Commissioner of Public Welfare may give consent to surgical or medical treatment “commensurate with that of a parent in like cases.”

Thus, is is my opinion that § 32-137(2), Code of Virginia (1950), as amended, gives authority to the Commissioner of Public Welfare to consent to medical and surgical treatment, including abortions, without the consent of or in opposition to the wishes of a parent of a child who has been committed to the care and custody of the State Board of Welfare and Institutions.

WETLANDS ACT—“Grandfather Clause” Exempts Projects Begun or Planned Prior to Amendment.

MARINE RESOURCES COMMISSION—Wetlands Act “Grandfather Clause” Exempts Projects Begun or Planned Prior to Amendment.

March 20, 1973

THE HONORABLE JAMES E. DOUGLAS, JR.
Commissioner, Marine Resources Commission

This will acknowledge receipt of your recent letter requesting advice regarding the applicability of § 62.1-3 of the Code, as amended by the 1972 legislature, to subaqueous permit application filed with the Marine Resources Commission prior to July 1, 1972, the effective date of the amendment to § 62.1-3, but considered by the Commission after July 1, 1972.

My understanding of your request, after clarification by telephone conversation, is that your particular concern centers upon the question of whether the Marine Resources Commission may, in considering an application for use of subaqueous bottom, filed prior to July 1, 1972, but heard by the Commission after July 1, 1972, take into consideration the effect of the applicant's proposed activity upon wetlands as provided under the amended provisions of § 62.1-3, effective July 1, 1972.

The 1972 General Assembly enacted a rather comprehensive statute regulating the use and development of wetlands in Virginia, embodied in Chapter 2.1, Title 62.1, Code of Virginia (1950), as amended. Section 62.1-13.20 of the Code sets forth various specific exemptions to regulation under the Wetlands Act, including any project commenced or for which a plan of development was filed pursuant to ordinance or lawful enactment prior to July 1, 1972. In addition to passing the Wetlands Act, the General Assembly amended § 62.1-3, authorizing the Marine Resources Commission to issue permits for the use of the Commonwealth's subaqueous beds, to allow, as one consideration in issuing such permits, the assessment of the effect of the proposed subaqueous project upon wetlands.

The so-called “grandfather clause” of the Wetlands Act, § 62.1-13.20 referred to above, indicates the clear intention of the legislature to exempt from wetlands regulation any project begun or planned prior to July 1, 1972. To apply § 62.1-3 of the Code, as amended effective July 1, 1972, to subaqueous applications filed with the Marine Resources Commission prior to July 1, 1972, could, under certain circumstances lead to anomalous results. First, such an interpretation would enable the Marine Resources Commission to deny subaqueous permit applications, filed before July 1, 1972, because of certain detrimental effects upon wetlands. Those same detrimental infringements upon wetlands would clearly be exempted from regulation under the Wetlands Act grandfather clause as a project or plan of development filed pursuant to statute prior to July 1, 1972. The
grandfather clause of the Wetlands Act clearly indicates that projects affecting wetlands which were planned prior to July 1, 1972, were not intended to be the subject of regulation by the legislature. A second anomaly could result where two substantially similar subaqueous permit applications were filed in April of 1972 with identical effects upon wetlands. Because of administrative convenience of the Commission or the applicant involved, one application might be considered prior to July 1, 1972, and approved, while the other, considered after July 1, 1972, applying the amended version of § 62.1-3 might be denied due to detrimental effects upon wetlands. The intention to permit such inequitable result brought about by administrative fortuities cannot be ascribed to the legislature in its amendment to § 62.1-3.

For the foregoing reasons, I conclude that subaqueous permit applications filed prior to July 1, 1972, but considered by the Marine Resources Commission after July 1, 1972, are to be considered under the guidelines set forth in § 62.1-3 prior to its 1972 amendment.

WILLS—Executor of Estate; Nonresident Can Qualify as if a Virginia Resident also Qualifies as Co-executor.

July 26, 1972

The Honorable T. F. Tucker, Clerk
Corporation Court of the City of Danville

I have received your letter of July 20, 1972, in which you stated that a will had been presented to you for probate which named two Virginia residents and one nonresident as co-executors of the estate. You asked how you should proceed to qualify the nonresident to perform his duties under the will.

A nonresident can qualify as an executor of an estate if a Virginia resident is also qualified as co-executor. See § 26-59, Code of Virginia (1950), as amended. Consequently, the nonresident can qualify as a co-executor if either of the Virginians is also qualified. It will not be necessary for the two Virginians named as executors to decline to qualify as executors and then be appointed with the nonresident as co-administrators of the estate with the will annexed.

WILLS—Wills and Decedents' Estates—How will may be made self-proved.

October 11, 1972

The Honorable Bertha R. Drinkard
Clerk of Corporation Court for the City of Bristol

Your letter of September 28 requested an opinion whether a self-proved will executed in Texas in 1965 in the form prescribed by § 64.1-87.1 of the Code of Virginia may be accepted for probate in Virginia as properly self-proved. Section 64.1-87.1 was enacted during the 1972 Session of the General Assembly, and was effective on July 1 of this year. It states as follows:

"A will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgement thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows. . . .

"The sworn statement of any such witnesses taken as herein provided
shall be accepted by the court as if it had been taken ore tenus before such court."

The statute provides no time limitations, but merely states that a will so executed shall be taken as self-proved. It is therefore my opinion that any will complying with the form prescribed by the statute probated after the effective date of the statute should be accepted for probate as provided therein.

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**WILLS—Without Requirement of Bond Means No Bond or Surety on Bond—Testator waived security of executor nominated.**

**July 7, 1972**

The Honorable O. G. Caldwell, Clerk  
Circuit Court of Giles County  
This is in reply to your recent letter which reads:

"I have had presented in this office for probate a will containing the following clause: 'I do hereby constitute and appoint my son, ............... as Executor of my estate and direct that he serve in this capacity without the requirement of bond.'

"May I ask for an interpretation of the meaning of phrase, 'without requirement of bond.' Does it mean no bond or does it mean without surety on the bond?"

By inserting this language in the will the testator waived security of the executor nominated. Therefore, no bond or surety on a bond is required. See §64.1-121, Code of Virginia (1950), as amended.

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**ZONING—Board of Zoning Appeals Had Authority to Act on All Applications Filed, Advertised, and Set for Public Hearing Prior to Passage of Ordinance.**

**BOARDS OF SUPERVISORS—Right to Issue Use Permits on Multiple-family Dwellings.**

**ORDINANCES—Reserved to Board of Supervisors Authority to Grant Use Permits for Multiple-family Dwellings.**

**September 15, 1972**

The Honorable Oliver D. Rudy  
Commonwealth's Attorney for Chesterfield County  
This is in reply to your recent letter which reads as follows:

"I am enclosing a copy of an ordinance passed by the Board of Supervisors of Chesterfield County on April 12, 1972. This ordinance was considered by the Chesterfield County Planning Commission on March 21 and was advertised for a public hearing by the Board of Supervisors on March 29 and April 5.

"Prior to the passage of this ordinance the authority to grant use permits for multi-family dwellings reposed in the Board of Zoning Appeals. The effect of the amendment to the ordinance passed on April 12 was to reserve unto the Board of Supervisors the authority to grant use permits for multiple-family dwellings.

"On March 13, 1972, there were filed with our Planning Department
several applications to the Board of Zoning Appeals for use permits for multiple-family dwellings. Notices to the adjoining landowners were sent as required by law on these applications on March 17, 1972, and the applications were also advertised in the Richmond Times-Dispatch on March 22 and March 29. These notices and this advertisement was for the regular monthly meeting of the Board of Zoning Appeals to be held on April 5, 1972. At that meeting several of the applications were deferred until the May meeting of the Board of Zoning Appeals.

"At the meeting of April 5 I advised the Board of Zoning Appeals that since the proposed ordinance had not been passed, they had the authority to consider and act upon all applications that had been duly filed, advertised and set for public hearing prior to the passage of the ordinance.

"At the time of the passage of the zoning ordinance by the Board of Supervisors, I advised the Board of Supervisors that the Board of Zoning Appeals, in my opinion, could act on the applications that had been deferred from the April meeting to the May meeting. The ordinance was then passed. The question has now arisen as to whether or not the Board of Zoning Appeals had authority to consider the deferred applications at its meeting on May 3 when the ordinance changing the authority to issue these use permits to the Board of Supervisors was passed on April 12."

Section 15.1-491(c) of the Code of Virginia (1950), as amended, was amended in 1966 to permit the board of supervisors to reserve unto itself the right to issue special exceptions or use permits. The board in this case exercised its authority on April 12, 1972, and at such time reserved unto itself a right to grant use permits for multiple-family dwellings. There were several applications for these permits then on file with the planning commission. These applications had been filed, advertised as required by the board of zoning appeals, and were ready for consideration by that board.

I am of the opinion that the board of zoning appeals had the authority to consider and act upon all applications that had been duly filed, advertised, and set for public hearing prior to passage of the ordinance. The reservation of the right of the board of supervisors to issue these use permits on multiple-family dwellings was effective on all applications filed in accordance with any requirements of that board after the date of the ordinance.

ZONING—Maps Are Part of Proposed Ordinance and Must Be Available at Public Hearing for Viewing by Public.

October 12, 1972

The Honorable Glenn B. McClanahan
Member, House of Delegates

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

"The City of Virginia Beach may adopt a new zoning ordinance and a new zoning map, both affecting the entire city, showing the division of our territory into districts.

"The first paragraph of Section 15.1-493 of the Virginia Code provides that 'The local commission of each county or municipality may, and at the direction of the governing body shall, prepare a proposed zoning ordinance including a map or maps showing the division of the territory into districts and a text setting forth the regulations applying in each district.' The same paragraph concludes by providing 'Upon the completion of
its work, the commission shall present the proposed ordinance or amendment including the district maps to the governing body together with its recommendations and appropriate explanatory materials. (Emphasis added.) Thus far, our city has conducted numerous public meetings concerning our new proposed city-wide zoning ordinance; however, the new zoning maps have not been completed.

"May the City legally hold the public hearing(s) required by §§ 15.1-431 and 15.1-493 on the new zoning ordinance without the proposed new zoning map being available at the same time for viewing by the public?"

"May our City Council legally adopt a new zoning ordinance without the new zoning map being available for simultaneous enactment?"

Section 15.1-493 of the Code of Virginia (1950), as amended, provides in pertinent part:

"The local commission of each county or municipality may, and at the direction of the governing body shall, prepare a proposed zoning ordinance including a map or maps showing the division of the territory into districts and a text setting forth the regulations applying in each district. The commission shall hold at least one public hearing on such proposed ordinance or any amendment of an ordinance, after notice as required by § 15.1-431, and may make appropriate changes in the proposed ordinance or amendment as a result of such hearing. Upon the completion of its work the commission shall present the proposed ordinance or amendment including the district maps to the governing body together with its recommendations and appropriate explanatory materials.

After June twenty-ninth, nineteen hundred sixty-two, no zoning ordinance shall be amended or reenacted unless the governing body has referred the proposed amendment or reenactment to the local commission for its recommendations. Failure of the commission to report ninety days after the first meeting of the commission after the proposed amendment or reenactment has been referred to the commission, or such shorter period as may be prescribed by the governing body, shall be deemed approval.

"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. (Italics supplied.)

This section requires the local zoning commission to present the proposed ordinance or amendment including the district maps to the governing body together with its recommendations and appropriate explanatory materials. Thereafter the governing body must hold a public hearing on any zoning ordinance before approving and adopting the same.

The district maps are a part of the proposed ordinance presented to the governing body. They must be available at the public hearing for viewing by the public. I therefore answer your questions in the negative.
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