Letter of Transmittal

July 1, 1976

THE HONORABLE MILLS E. GODWIN, JR.
Governor of Virginia
The State Capitol
Richmond, Virginia 23219

My dear Governor Godwin:

In accordance with the provisions of § 2.1-128, Code of Virginia of 1950, I transmit to you herewith the Annual Report of the Attorney General, covering the period beginning July 1, 1975, and ending June 30, 1976.

As in the past during my tenure as Attorney General, you will find in the Report, as the statutes require, those official Opinions rendered by this Office during the period referred to which seem to be of general interest or helpful in promoting uniformity in the construction of the laws of Virginia. I have also included the required statements of cases now pending or disposed of since the last Report issued by this Office. I call to your attention once again that the volume of tax collection cases on behalf of the Virginia Employment Commission and habeas corpus proceedings makes it impractical to state them individually in this Report. Of course, the record of these cases is available in this Office.

Opinions and cases alone do not constitute an adequate record of either the nature or the scope of the responsibilities of the Office of Attorney General of Virginia; I take pleasure, therefore, in presenting a summary of Fiscal 1975-1976 which will, I trust, give you a fuller understanding of the work performed by my staff and me.

The duty to provide the best possible legal services to the Commonwealth has become increasingly demanding upon this Office in the six and one-half years it has been my privilege to act as Attorney General. The past fiscal year was no exception. Once again, the increased work load required employment of additional personnel and a further reorganization of the Office itself to ensure prompt and effective performance of duty.

As of June 30, 1976, the Office of Attorney General consisted of five divisions (Civil Divisions I, II and III; the Criminal Division and the Transportation Division). The staff included one Chief Deputy Attorney General, five Deputy Attorneys General (each in charge of a Division), forty-seven Assistant Attorneys General, nineteen Special Assistants, one Assistant to the Attorney General, three administrative assistants, two legal assistants, one fiscal officer, thirty-seven administrative secretaries, one clerk, one librarian and one receptionist.

Ten Assistant Attorneys General, three of the Deputies, my Chief Deputy, and the Assistant to the Attorney General have offices along with my own in the Supreme Court Building; the remaining thirty-seven Assistants and two Deputies are assigned office space in other facilities in Richmond. Special Assistants are now assigned as follows: District offices of the Department of Highways and Transportation: eight; regional offices of the Department of Welfare: six; the University of Virginia: two; Virginia Commonwealth University: one; Virginia Polytechnic Institute and State University: one; and the Virginia State Bar: one.

In my last Annual Report, I commented upon the fact that the steady growth of my staff, necessitated by the demands of State departments and
agencies for legal services, has created an urgent need for additional office space. The fact that thirty-seven Assistant Attorneys General and two of my Deputies are in twelve separate locations in Richmond at varying distances from the Supreme Court Building is a source of great concern to me. Such a dispersion of personnel is an inconvenience at the least and a serious hindrance to efficiency at worst. I regret that the General Assembly has not seen fit to respond favorably to my request for space in which my entire Richmond staff might be housed. I am convinced that this deficiency will have to be remedied in the very near future if the quality of legal services from the Office of Attorney General is to be maintained at its present level. Certainly, the work load, including litigation, is not likely to decrease.

The following summary of activities of this Office since my last Annual Report will be helpful in assessing both the broad range of duties of the Office of Attorney General and the effectiveness with which it has discharged those responsibilities. I have divided the summary into major areas of effort.

CONSUMER PROTECTION

Complying with its statutory mission, the Division of Consumer Counsel presented a series of legislative recommendations in the consumer interest to you and the 1976 General Assembly. Among those recommendations which met with the approval of the legislature was repeal of the Virginia Fair Trade Act. The Act had allowed manufacturers of brand name products to fix prices at the retail level. It thus conflicted with policy established by the General Assembly in the Virginia Antitrust Act. Statistics available to me clearly indicate that, now that the Fair Trade Act has been repealed, consumers in Virginia are finding lower prices on a significant number of brand name products.

The General Assembly agreed with the Division of Consumer Counsel that loopholes existed in the 1975 referral sales statute. 1976 amendments to the law broadened its scope and narrowed, if not entirely closed, the loopholes. At the same time, the legislature corrected a major deficiency in the Home Solicitation Sales Act by providing penalties for violations. Consumers will now be able to recover a minimum of $100 damages as well as attorneys' fees.

The Division of Consumer Counsel's steadily lengthening experience in public utility rate cases before the State Corporation Commission provided the impetus for several successful recommendations to the 1976 Session of the General Assembly. The legislature approved, for example, a measure which establishes a clear legal basis for conducting electric rate design experiments. The aim is to facilitate exploration of new concepts in rate structures to control the growth of demand. It is, after all, the growth in demand which, perversely, magnifies the burden imposed on electric utility consumers.

The General Assembly also acted favorably on a recommendation of the Division of Consumer Counsel to mandate the Corporation Commission to review periodically the acts, practices, rates and charges of public utilities. Such a review will assist in determining whether the rates are reasonably calculated to promote maximum effective conservation of both energy and capital resources by the utilities.

Additionally, a resolution was adopted to encourage the SCC to monitor negotiations between VEPCO and the electric cooperatives of Virginia on possible joint ownership of generating and transmission facilities. This is an important proposal because, if implemented, it could reduce costs for the utility and consumers alike.

I am also pleased that the General Assembly adopted resolutions in two areas of keen interest to consumers. In the first, the legislature urged the
Corporation Commission to reconsider its decision which established a charge of twenty cents for local station calls. In the second, the General Assembly supported adoption of regulations to improve operation of the 1975 Competitive Insurance Pricing Act.

These were positive accomplishments. On the other hand, I regret that the General Assembly declined, for the fourth time, to approve no fault insurance legislation. I am also concerned that legislation to achieve reform in the practices and procedures of the State Corporation Commission was rejected. And finally, I think it is unfortunate that the 1976 General Assembly refused to enact a proposal that would regulate debt collection practices in the Commonwealth. We may be encouraged, however, that measures to regulate home improvement contractors and auto repair shops and to impose civil penalties for violation of the State's consumer fraud laws will be considered again at the 1977 Session.

Legislation aside, the Division of Consumer Counsel's commitment to the consumer interest continues to produce dividends. Completion of a project to give the Corporation Commission permanent staff capability to conduct electric demand forecasts should be realized soon. Sometime prior to the end of the summer of 1976, an experimental demonstration of an annual cycle energy system (ACES) will begin in Henrico County. This system is now being installed in a residence under construction. It will permit us to develop information on the potential of storage cooling as a means of controlling electric bills. ACES, which also provides heating and hot water requirements for the dwelling, was developed by engineers at the Oak Ridge National Laboratory. Almost all of the materials and professional services for the project have been provided—at no expense to taxpayers—by Virginia and national firms and organizations.

Less spectacular, but no less noteworthy, have been the efforts of the Division to protect the consumer in the marketplace. In December, 1976, the Division was successful in securing a permanent injunction against a firm known as Hong Kong International Tailors. Our investigation had revealed violations of Virginia laws regarding comparative pricing and untrue, misleading and deceptive advertising. More than $1,600 was returned to customers who had ordered clothes from the firm.

The Division also secured injunctions in eight lawsuits against those found to be violating State laws banning fraudulent practices and deceptive advertising and the Virginia Home Solicitation Sales Act. Some $20,000 was recovered for fifty individuals. Two additional lawsuits in the series are pending at present.

Among the eight lawsuits settled at this writing is the case of Commonwealth v. William Wyant, t/a W. W. Ventures, Inc., et al. Acting at the request of the Federal Maritime Administration for assistance, the Division obtained a permanent injunction on September 5, 1975, to prohibit W. W. Ventures, Inc., from offering cruises on the ocean liner S. S. United States. Since neither Wyant nor his firm owned the vessel, the promised cruise could not be realized. The federal government has since obtained a conviction for mail fraud against Wyant.

The Division further obtained—in January, 1976—an injunction against a firm marketing a device which it claimed would reduce residential consumption of electricity by twenty-five to thirty-eight percent. Tests initiated at the request of this Office and conducted by VPI-SU proved that the device was worthless.

Injunctions were also entered in the past fiscal year against operators of a truck driver training program for misrepresentation of the state of the job market to its graduates. About $7,000 was returned to some two dozen individuals who had enrolled in this program.

Thus, in reviewing the achievements of the Division of Consumer Counsel in legislation, litigation and regulatory proceedings, it is obvious that the Virginia consumer has benefitted from an excellent record of service.
I cannot leave the subject of consumer protection in this report, however, without pointing out once again the necessity for continued adequate funding of consumer protection programs in the Commonwealth. It is nothing less than remarkable that the staff of the Division of Consumer Counsel has achieved such successful results in both litigation and settlements with severely limited resources in funds and personnel. Moreover, despite the fact that Virginia's Charitable Solicitations Act is recognized as one of the nation's finest, it is virtually worthless because the General Assembly has yet to appropriate the modest sum needed to implement it. This kind of legislative oversight can, in the long run, be damaging to Virginia's overall consumer protection effort.

ANTITRUST

In 1974, the General Assembly enacted a completely refurbished Virginia Antitrust Act. The new statute provided the Commonwealth with effective means to improve the competitive economy and at the same time combat any incursion by organized crime into white collar areas. Although it was clear that enforcement of the Act placed new burdens upon the Office of Attorney General, it was not until January, 1976, that funds could be obtained in the form of a grant from LEAA to establish an Antitrust Unit in the Office of Attorney General. The Unit consists of an Assistant Attorney General, a legal assistant and a secretary. Despite its belated appearance, the Antitrust Unit has moved with alacrity to investigate possible violations of the Virginia Antitrust Act.

At present, the Unit has investigations in progress with respect to price fixing by barbers, price fixing by court reporters, price discrimination by armored car carriers, tying and bribery in the construction field and an output contract in the coke industry. The Unit is also pressing an investigation begun by my Office in 1975, into alleged price fixing in the grain industry. It is now studying alleged restrictive clauses in shopping center leases which eliminate competition and is collecting data on anti-competitive contract agreements between certain commercial photographs and some public schools. The staff of this Unit is working closely with purchasing agents throughout the State to assure the purchase of merchandise by government at competitive prices.

PUBLIC EDUCATION

In my most recent Annual Report, I mentioned a trend toward increased legal activity in the field of public education. That trend continued during Fiscal 1975-1976. More than in previous years, litigation occupied much of the total effort of the four Assistant Attorneys General assigned to the Education Section of this Office. There were major actions in the fields of civil rights, discrimination, contracts and administrative law throughout the year.

I am pleased to report that my staff conducted the Fourth Attorney General's Conference on college law during June. As in prior conferences, the purpose was to discuss, with representatives of Virginia's public and private institutions of higher education, a variety of legal questions bearing on the administration of education at colleges and universities. Incidentally, attendance at the Fourth Conference was greater than at the first three, an indication that the college administrators themselves regard these sessions as valuable.

Continued federal emphasis on equal employment opportunity and major new initiatives in the prohibition of discrimination on the basis of sex or handicap in admission to federally-assisted programs have impacted on Virginia's educational institutions. As a result, the demands made upon my Office in the past fiscal year required a significant volume of additional
legal work. It is also worth noting that increased efforts by the Office of Attorney General in defense of charitable trusts ensured that the resources of a number of public educational institutions were protected.

ENVIRONMENTAL PROTECTION

My Office has been extensively involved in a rapidly increased number of enforcement actions involving the Commonwealth's water pollution statutes. The most notable of these actions is a suit for three and one-half million dollars in civil penalties on behalf of the State Water Control Board in connection with the discharge of Kepone into State waters. My staff has been represented on your Kepone Task Force since its inception to provide advice and counsel. Another tragic incident during the past fiscal year was the Chesapeake Bay oil spill in February of 1976. My Office is now preparing to institute court proceedings as a result of the spill.

The Office of Attorney General will represent the Commonwealth in two lawsuits of major significance presently pending before the Supreme Court of the United States. One of these cases is of paramount significance. At issue is whether the federal government has the power to require individual States to establish and implement programs without their consent. The case involves key provisions of the Federal Clean Air Act as applied to Northern Virginia and was instituted at the request of the State Air Pollution Control Board. A second case involves issues relative to the right of individual States to protect their commercial fisheries from depletion by foreign-owned and non-resident commercial fishing interests. I anticipate that arguments in these cases will be heard in the fall of 1976.

During the fiscal year just completed, my Office sought, on behalf of the State Water Control Board, relief from federally-established sewage treatment upgrading deadlines in those cases where federal construction funds either are frozen or are clearly inadequate. After an adverse ruling in the United States Court for the Eastern District of Virginia, an appeal was taken. That appeal is now pending in the United States Circuit Court of Appeals for the Fourth Circuit.

Reference should also be made in this letter to several judicial and federal administrative proceedings involving the Blue Ridge hydroelectric project of the Appalachian Power Company and the VEPCO North Anna Nuclear Power station. Both continue at this writing. The Office of Attorney General is taking an active role in these proceedings to ensure that the position of the Commonwealth is forcefully presented.

SOCIAL SERVICES

Additional legal support was requested in the past fiscal year by the Department of Welfare as it began to implement a number of new programs. Accordingly, the services of this Office to the Department were expanded by the addition of a second Assistant Attorney General in Richmond. The two Assistants in Richmond plus the seven Special Assistants in the regional offices enable this Office to provide the required legal assistance with respect to the complex activities of the Department.

One such program is designed to enforce support orders across the State. The program, which the members of my staff assigned to the Department of Welfare helped design, allows the Department to initiate proceedings against persons responsible for supporting recipients of public assistance. At the same time, the program will allow the Department to use part of the funds recovered as reimbursement for welfare funds already paid out. The program is now in operation in five of the seven welfare regions, and will be operational in the remaining two by the end of the current year.

My staff has assisted in the development of regulations for operation of the Department's Central Registry. This is a most important function, since
the Registry is the place where suspected child abuse and neglect reports are to be filed. The Assistants have advised State, regional and local welfare employees on the confidentiality requirements of these reports. My staff has also helped in the preparation of manuals of procedure for local agencies so that administration of the various welfare programs will be uniform throughout the State and accountability at the local level will improve.

There was a considerable increase in the amount of litigation relating to the Department of Health during the past fiscal year, primarily the result of new questions which have arisen from application of the Certificate of Public Need law. A major achievement of my Office and the Department involved proposed federal regulations governing the shellfish industry. Our combined efforts and the passage of amendments to the Coastal Zone Management Act persuaded the Federal Food and Drug Administration to withdraw the proposed regulations. The Health Department considered the regulations unnecessarily burdensome to the shellfish industry. It also regarded the proposed regulations as less than effective in improving protection of public health in Virginia.

Because of increased health litigation, the need for close attention to implementation of the Federal Health Planning Act and anticipation of additional State responsibilities for implementation of the Federal Safe Drinking Water Act, it was necessary to assign a second Assistant Attorney General to the Department of Health. A second Assistant Attorney General is also to be employed to provide legal counsel to the Department of Mental Health and Retardation because of the increasing legal needs of the Virginia mental hospital system.

EQUAL OPPORTUNITY

Emphasis within State government on fair employment practices led to the assignment of an Assistant Attorney General to the Virginia Equal Employment Opportunity Office in November, 1975. In the eight months that have passed, this Assistant has proved the value of his assignment. He has been active in the resolution of complaints, participating in workshops, and providing technical expertise to a number of agencies in solving problems related to equality of employment.

Since November, 1975, some seventy-five complaints have been received by the State EEO Office. Investigations have now been completed in a majority of these cases, and satisfactory solutions have been reached. The State EEO Office has continued to provide assistance to State agencies as well as local governments in developing affirmative action plans. I can report that almost every State agency with twenty or more full-time employees has now drafted and adopted such a plan.

My Office has also provided assistance on a variety of EEO-related problems to the Department of Corrections, the Department of Alcoholic Beverage Control, the Marine Resources Commission, the Department of Agriculture and Commerce, the Department of Highways and Transportation, the Commission of Game and Inland Fisheries and George Mason University.

At present, the Office of Attorney General is preparing a draft revision of the Personnel Act of 1942, and the Rules and Regulations for implementing that Act.

CRIMINAL DIVISION

The large number of suits filed by prisoners in the State and federal courts imposed a heavy burden on the Criminal Division of this Office in Fiscal 1975-1976. The types of cases handled by the Criminal Division grow more complex each year in the wake of new decisions in the field of criminal law which tend to complicate the overall administration of criminal justice.
Indeed, the burden on the Criminal Division includes many requests for lectures in schools approved by the Criminal Justice Officers Training and Standards Commission so that student officers may be kept abreast of new judicial decisions.

This past year found the Criminal Division writing an increased number of Opinions; this was due in large measure to the recodification of Titles 18.1 and 19.1 and an unusual number of requests for interpretation of the revised Criminal Code.

Studies undertaken by the Virginia State Crime Commission resulted in a considerable number of legislative recommendations. The staff of the Criminal Division of this Office prepared the draft legislation and was frequently called upon during the 1976 Session of the General Assembly to discuss these proposals before committees of the House and Senate which considered them. I am pleased to report that most of such bills were enacted into law.

Litigation involving all divisions of the Department of Corrections occupied much of the Criminal Division's time. Not only must these cases be defended, but a great deal of effort is expended in providing legal advice on a daily basis to the Department. Since preventive legal medicine is a principle of this Office, my staff devoted many hours to revising Corrections' rules and regulations to conform to judicial decisions as they were handed down.

The Technical Assistance Unit of the Criminal Division continues to provide assistance and information to all segments of the criminal justice system in Virginia. The three Assistant Attorneys General who staff the TAU publish—on a monthly basis—newsletters for Commonwealth's Attorneys and their assistants (The Virginia Prosecutor); law enforcement officers (The Virginia Peace Officer); and magistrates (The Virginia Magistrate). In addition, the TAU is called upon to write an ever-increasing number of memoranda for Commonwealth's Attorneys who need assistance in legal research. I am pleased to report that TAU memoranda have been well received by both Commonwealth's Attorneys and the courts. In many cases, the memoranda have been helpful in the successful prosecution of individuals charged with violations of law.

For the sixth year, the Criminal Division of the Office of Attorney General sponsored an Institute for Commonwealth's Attorneys. Additionally, because of the election or appointment of some thirty-four new Commonwealth's Attorneys in the past fiscal year, a special institute was held in January for them and their assistants.

IN OTHER AREAS

While financial crises deepened in many governmental circles, my Office worked actively in support of the fiscal soundness of our Commonwealth. I am pleased to report that, in a transaction concluded this past month, the Office of Attorney General successfully negotiated an assumption of some default investments held by the Virginia Supplemental Retirement System, thereby turning a potential loss into a gain estimated at $310,000. The notes in question were issued by a wholly-owned subsidiary of the now defunct Franklin National Bank of New York. When the bank passed into receivership, in October, 1974, these notes went into default. My staff negotiated an exchange of these notes for new obligations of the Federal Deposit Insurance Corporation at a higher interest rate.

Also during the fiscal year just concluded, New York's much-publicized financial distress created disclosure problems for governmental entities which sell bonds to finance their activities; my Office assisted the State Treasurer in documenting and marketing the first Virginia bonds to be sold under the new guidelines of the nationwide Municipal Finance Officers Association.
As counsel to the Department of Taxation, the Office of Attorney General has represented the Department in a number of cases before the Supreme Court of Virginia. Perhaps the most significant of these during Fiscal 1975-1976 was Commonwealth v. Lucky Stores, Inc., decided last month. It was the first Virginia decision dealing with "formula method" income taxation of multistate corporations. The decision greatly clarifies existing law and will facilitate future tax administration in this very important area.

Another case of more than passing interest was that known as Commonwealth of Virginia v. Cavenaugh Corporation, et al. The case arose out of the destruction by fire of the pier at Williamsburg called Cheatham Annex in October, 1973. The pier had been leased from the United States so that the Commonwealth could bring in and store emergency supplies of fuel oil. Settlement of the lawsuit for $300,000 represented a remarkable recovery of damages under the circumstances.

Assistant Attorneys General assigned to the Department of Highways and Transportation reviewed and, on occasion, participated in the trial of 1187 right-of-way condemnation cases in Fiscal 1975-1976. In all, the Transportation Division of my Office supervised the legal steps in the Department's acquisition of $30 million worth of right-of-way property. In addition, Division attorneys were involved in 130 cases beyond the realm of right-of-way litigation in State and federal courts. These involved the full range of civil litigation, from personal injury to eminent domain. The Division recovered, settled or compromised eighty-eight property damage claims, reimbursing the State of Virginia in the amount of $48,418.

As always, Assistant Attorneys General in the Division of Transportation provided counsel and Opinions to the Department and to all other transportation agencies. In addition, matters pertaining to transportation were discussed with Commonwealth's Attorneys and city and county attorneys throughout the year. Finally, these attorneys played a major role in drafting the Department's legislative program for 1976 and are preparing to assist with its 1977 proposals.

A publication that first appeared in 1975, The Civil Digest, has elicited much favorable comment from constitutional officers in the various localities. Compiled by the librarian of the Office of Attorney General, The Civil Digest includes significant Opinions of this Office in civil law. The Civil Digest's readership is composed primarily of local government officials, but it is also being sent to all law school and community college libraries.

Before concluding this letter, I think it is worthy of note that Assistant Attorneys Generals assigned to the Virginia Employment Commission were able to collect $124,871 in delinquent contributions during the year, a not insignificant sum.

CONCLUSION

As in past Letters of Transmittal accompanying this Annual Report, I have attempted no more than a brief overview of the activities and, I trust, achievements of this Office in the preceding fiscal year. Despite its somewhat superficial treatment of a year's work, I believe this letter documents the kind of legal services and their quality now being provided to the Commonwealth by the Office of Attorney General. It summarizes the work product of a most dedicated staff who seek daily to protect the legal interests of this State and her citizens.

Respectfully submitted,

ANDREW P. MILLER
Attorney General
# Personnel of the Office

(Post Office Address, Richmond)

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<td>Andrew P. Miller</td>
<td>Washington County</td>
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<td>Donald F. Murray</td>
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<td>Assistant to the Attorney General</td>
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<td>Anthony F. Troy</td>
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<td>Stuart H. Dunn</td>
<td>Henrico County</td>
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<td>J. Westwood Smithers, Jr.</td>
<td>Hanover County</td>
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<td>Amelia County</td>
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<td>Pittsylvania County</td>
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<td>Amherst County</td>
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<td>Michael F. Blair</td>
<td>Roanoke City</td>
<td>Special Assistant</td>
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<td>Jane V. Wells</td>
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<td>Linda S. Mallory</td>
<td>Louisa County</td>
<td>Clerk</td>
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REPORT OF THE ATTORNEY GENERAL

ATTORNEYS GENERAL OF VIRGINIA

FROM 1776 TO 1976

Edmund Randolph ........................................ 1776-1786
James Innes ............................................. 1786-1796
Robert Brooke ........................................... 1796-1799
Philip Norborne Nicholas ............................... 1799-1819
James Robertson ....................................... 1819-1834
Sidney S. Baxter ...................................... 1834-1852
Willis P. Bocock ...................................... 1852-1857
John Randolph Tucker ................................ 1857-1865
Thomas Russell Bowden ................................ 1865-1869
Charles Whittlesey (military appointee) ............ 1869-1870
James C. Taylor ...................................... 1870-1874
Raleigh T. Daniel .................................... 1874-1877
James G. Field ........................................ 1877-1882
Frank S. Blair ......................................... 1882-1886
Rufus A. Ayers ......................................... 1886-1890
R. Taylor Scott ........................................ 1890-1897
R. Carter Scott ........................................ 1897-1898
A. J. Montague ......................................... 1898-1902
William A. Anderson .................................. 1902-1910
Samuel W. Williams .................................... 1910-1914
John Garland Pollard .................................. 1914-1918
*J. D. Hank, Jr. ...................................... 1918-1918
John R. Saunders ...................................... 1918-1934
†Abram P. Staples ..................................... 1934-1947
‡Harvey B. Apperson .................................. 1947-1948
§J. Lindsay Almond, Jr. ............................... 1948-1957
**Kenneth C. Patty .................................... 1957-1958
A. S. Harrison, Jr. ................................... 1958-1961
***Frederick T. Gray ................................ 1961-1962
Robert Y. Button ...................................... 1962-1970
Andrew P. Miller ...................................... 1970-

*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.
†Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. Jno. R. Saunders and served until October 6, 1947.
‡Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of Hon. Abram P. Staples and served until his death on January 31, 1948.
§Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B. Apperson. Resigned September 16, 1957.
**Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.
***Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April 30, 1961, and served until January 13, 1962.
REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Davis, Robert Lee v. Commonwealth. Petition for writ of certiorari from Virginia Supreme Court on issues of search and seizure; restrictions on voir dire; and restrictions and defense argument. Certiorari denied.


Gibson, Theodore Roosevelt v. Commonwealth. Petition for writ of certiorari from Virginia Supreme Court on issue of whether the right against self-incrimination is violated by admission of testimony of a State psychiatrist relating a confession made to him by an accused during a State mental examination. Certiorari denied.


Harris, Eugene V. v. Commonwealth. Petition for writ of certiorari from Virginia Supreme Court; whether habitual offender classification is subject to attack pursuant to Argersinger. Petition denied.

Hicks, Ronald Owen v. Commonwealth. Petition for writ of certiorari from Virginia Supreme Court regarding constitutionality of jury instruction on offense of escape from State penitentiary, and the refusal of trial court to permit defense to introduce evidence concerning policy of Virginia Department of Corrections re inmates leaving State property. Certiorari denied.


Kleppe, Thomas S., Secretary of the Interior v. Sierra Club. Amicus curiae brief supporting requirement for environmental impact statement for federal development of coal resources of Northern Great Plains to consider effects on Appalachian coal. Reversed.

Virginia Citizens Consumer Council, etc. v. State Board of Pharmacy. Appeal from United States District Court. Action to declare unconstitutional pharmacy statute regarding advertising of price of prescription drugs. Judgment of District Court affirmed.

Whorley, Charles William v. Commonwealth. Petition for writ of certiorari from Virginia Supreme Court; whether habitual offender classification is subject to attack pursuant to Argersinger. Petition denied.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Douglas, James E., Jr. v. Seacoast Products, Inc., et al. Appeal from de-
cision of three-judge federal court holding unconstitutional two Virginia statutes relating to licenses for commercial fishing.


Jones, Joseph W. v. The Rath Packing Company, etc., et al. Suit challenges California's procedures for enforcement of its Weights and Measures Law. Commonwealth acting in support of Attorney General, California, as amicus curiae.

Klimko, Dennis v. Virginia Employment Commission and Singer-Friden Division. Petition for writ of certiorari to decision of Virginia Supreme Court which upheld the constitutionality of procedures for termination of unemployment compensation benefits.


State Air Pollution Board v. Train. Appeal from United States Circuit Court of Appeals. Statutory and constitutional authority of federal regulations compelling purchase of buses by State, and interfering with State registration laws.

The Stuart McGuire Co., Inc. v. William H. Forst, Frank Lewis and the Virginia Department of Taxation. Bill of injunction to cancel surety bond which McGuire made to remove liens for tax assessments on sales catalogs.

Train v. D. C. Appeal from United States Court of Appeals. Statutory and constitutional authority of federal regulations compelling enactment and enforcement of State inspection.

CASES DECIDED OR PENDING IN THE UNITED STATES COURTS OF APPEALS


Campbell, Thomas Edward v. Superintendent, Bland Correctional Field Unit. Appeal from judgment of District Court denying petition for a

**Clay, Gene Davis v. Walter M. Riddle, Acting Superintendent.** Appeal from dismissal of petition for writ of habeas corpus. Miranda warnings in misdemeanor investigation. Pending.

**Commonwealth v. Tenneco, et al.** Appeal by natural gas pipeline companies from an order temporarily restraining them from curtailing the delivery of natural gas to Southwestern Virginia. Reversed and remanded.

**Cooper, Jesse A. X. v. Director.** Appeal with respect to due process requirements for inmates in maximum security. Remanded.

**Cramer, James A. v. Virginia Commonwealth University.** Appeal from injunction against preferential hiring on the basis of sex. Pending.

**Denson, Leroy v. Department of Corrections, etc.** Appeal from dismissal of a complaint filed pursuant to the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1343, Federal Rules of Civil Procedure. The United States District Court summarily denied the complaint which alleged that a transfer within the Virginia State Farm was in violation of due process of law. The case was consolidated for briefing and oral argument with three cases from North Carolina, and the Court of Appeals reversed the district court and remanded the case for further fact findings in light of Kirby, et al. v. Blackledge, et al., Mem. Dec. No. 73-2236 (4th Cir. 1976).


**District of Columbia v. Train.** Suit to revoke Environmental Protection Agency traffic regulations in Northern Virginia. Claim that EPA rules and regulations were invalid. Appealed. Reversed.


**Gay Alliance of Students v. Virginia Commonwealth University.** Civil Rights suit. Appeal from judgment for the defendants. Pending.

**Graham v. Riddle, etc., et al.** Appeal of a civil rights action. Revocation of the privilege to file pro se complaints because of abuse of the court. Pending.

**Gray, Leroy T., et al. v. Douala Devine, et al.** Appeal from judgment of District Court dismissing suit challenging the plaintiff's hospitalization and treatment in a State Hospital for the mentally ill. Pending.


**Harris, Leroy v. Walter M. Riddle.** Appeal from the denial of writ of habeas corpus. Sufficiency of evidence and confession. Pending.

**Jackson, Carlton Van v. Superintendent.** Appeal from the dismissal of a
suit pursuant to § 1983. Sufficiency of medical care provided to inmates. Held in abeyance.


Jones, John Paul, Jr. v. K. R. Purvis, Superintendent. Appeal from dismissal of petition for writ of habeas corpus. Whether there was dissipation of probable cause for search warrant due to lapse of time, and whether the evidence established that the substance possessed by petitioner was marijuana as defined under Virginia law. Pending.


Morris v. McCaddin. Suit seeking declaratory judgment that a reduction in force was wrongfully implemented. Pending.

Nelson v. Rogers. Injunction action involving constitutionality of State statute requiring indigent plaintiff to pay fees for newspaper publication in a divorce action. On appeal from District Court.


Strader v. Commonwealth. Appeal from a dismissal of a habeas corpus petition. Whether appellant was in custody for purposes of relief under the federal habeas corpus statute. Transferred to the United States District Court in North Carolina.


Woolfolk, Vivian, et al. v. Otis L. Brown, etc., et al. On appeal from District Court order denying defendants’ motion to vacate prior injunction enjoining implementation of a State work program for welfare recipients. Reversed and remanded with directions to issue an order dissolving the injunction.


CASES DECIDED OR PENDING IN THE UNITED STATES DISTRICT COURTS


Bass v. Weinberger, et al. Action to enjoin defendants from failing to provide supplement to social security benefits. Pending.


Brown, Inga Kay v. William S. Allerton, et al. Suit seeking injunctive and declaratory relief alleging that hospitalization of allegedly mentally ill and mentally retarded minors by their parents or guardians was a violation of minors' constitutional rights. Dismissed by agreement of parties.


Cheatwood, Henry Terrell v. John F. Hacker, Southwestern State Hospital. Pro se action alleging improper medical treatment while plaintiff was hospitalized in a State Mental Hospital. Pending.


Commonwealth v. Owen H. Mullenix, Sr. A complaint to determine that a debt due the Department of Mental Health and Mental Retardation for the care of the bankrupt's child was nondischargeable. Final order entered finding debt nondischargeable.


Conley, James A. v. Director, Southwestern State Hospital. Pro se action seeking damages alleging that plaintiff was deprived of certain rights and received improper medical treatment while hospitalized in a State Hospital for the mentally ill. Dismissed.


Craig, Paul H., et al. v. Virginia State Board of Elections, et al. Suit challenging constitutionality of State Constitution and State statute requiring that a person registering to vote must provide his social security number if he or she has one. Summary judgment for defendants.

Crawford, Clifton Paul v. Commonwealth of Virginia and Department of Highways and Transportation. Suit of entrance permit holder to enjoin closing his entrance for failure to complete permit. Suit dismissed.

Davis v. Wolff, et al. Suit alleging conspiracy by State employees to deny person on work release his constitutional rights. Pending.


Doe, Jane v. Virginia Commonwealth University. Suit to enjoin enforcement of consent requirement in sterilization. Pending.


Drewery, William Lee v. Commonwealth. Suit to enjoin the Commonwealth
REPORT OF THE ATTORNEY GENERAL

...to transfer a prisoner from Roanoke County Jail to the Virginia correctional system. Relief denied.

Dull, Roger Lee v. Dr. John F. Hacker. Pro se suit alleging denial of right to treatment while hospitalized in a State Hospital for the mentally ill. Dismissed.


Evans, Thomas E., Sr. v. Dr. Frank F. Merker, et al. Pro se habeas corpus petition alleging deprivation of rights while hospitalized in a State hospital for the mentally ill to determine competency to stand trial. Petition dismissed for failure to exhaust State remedies.

Fairfax County Wide Citizens Association, et al. v. County of Fairfax, Douglas B. Fugate, et al. Motion by citizens to enforce a settlement agreement entered into by Fairfax County. Suit alleged Fourteenth Amendment violations in highway maintenance. Pending.


Hirschkop, Philip J. v. Virginia State Bar, et al. Suit by civil rights attorney against State Bar, Supreme Court and others charging conspiracy to violate his civil rights and unconstitutionality of State Bar “no-comment” rule. Dismissed agreed in part. Pending on question of constitutionality of rule.

Historic Green Springs, Inc., et al. v. Board of Supervisors of Louisa County, et al. Injunctive and declaratory judgment action brought to forestall a rezoning of certain land in Louisa County from agricultural to heavy industrial, including vermiculite strip mining, due to unconstitutionality of tie breaker statute, §§ 15.1-535 and 15.1-540 of Virginia Code. Dismissed.


Hurst, Edith W. v. Medical College of Virginia. Action claiming denial of civil rights by Medical College of Virginia doctors. Pending.


In re Penn Central Transportation Company, Inc. Penn Central Bankruptcy proceedings. Pending.

Inmates of the Richmond City Jail v. Jack Davis, et al. Suit to enjoin overcrowded conditions at Richmond City Jail and to enjoin the Commonwealth to transfer various petitioners to the Virginia correctional system. Pending.


Jordan v. Godwin, et al. Action to enjoin enforcement of State statute which provides that only optometrists may serve on State Board of Optometry. Pending.


Kendrick, Robert v. Dr. Frank Merker, Superintendent, Southwestern State Hospital. Pro se suit filed by patient hospitalized in a State Hospital for the mentally ill alleging violation of constitutional rights. Dismissed.

Kibert, Lloyd P. v. Superintendent. Petition for writ of habeas corpus alleges inter alia that United States Constitution requires the evidence be adduced in connection with a guilty plea. Pending.


Lawton General Corp. v. The Boston Company. Sixty thousand shares of equity funding bought for VSRS by investment advisors, Boston Company. The shares were sold and Lawton is suing for recision and refund of what they paid for it. Pending.


Lumbermen Mutual Casualty Co. v. Fugate. Truck lost brakes on Route
21-52 as reconstructed on north side of Brushy Mountain, Bland County, injuring person and hitting parked vehicle. Seeking reimbursement on various theories that Department was either negligent, had violated its implied warranty to public, or by taking Federal money, had come under provisions of Federal Tort Claims Act.


Mcgrogan, James E. v. Rebecca Ponder. Pro se suit alleging violation of various constitutional and statutory rights while hospitalized in a State facility for the mentally ill to determine competency to stand trial. Dismissed.

Melton, Bernard E. v. Superintendent, Central State Hospital. Pro se habeas corpus petition challenging legality of plaintiff's hospitalization in a State Hospital for the mentally ill. Dismissed.


Morris v. McCaddin. Suit seeking declaratory judgment that a reduction in force was wrongfully implemented. Judgment for defendant.


Ramada Inn of Alexandria Creditor's Committee v. Commissioner of IRS, et al. Creditor sued Department for funds paid to Department for taxes, which funds creditor claims should have been paid to them by Ramada for debts. Pending.

Ransom v. Ballou and Carter. Injunction action involving constitutionality of State statute concerning recovery of attorney's fees from persons who have had counsel appointed in criminal matters. District Court abstained.


Robertson, Donald Walter v. State of Virginia. Pro se suit filed by patient
hospitalized in a State hospital for the mentally ill alleging unlawful involuntary commitment and unlawful restriction of activities. Dismissed.

*Robertson, Donald Walter v. John Wampler. Pro se* suit filed by patient hospitalized in a State hospital for the mentally ill alleging violation of mail privileges. Dismissed.


*Taliaferro, Ruth H. v. Dykstra, et al.* Sex discrimination suit involving individuals and a class. Judgment was entered for the defendants on the class issues and against two plaintiffs. Judgment was entered in favor of one plaintiff.


*U.S.A. v. 15.95 acres of land, Commonwealth of Virginia.* Notice of taking. Discover if any roads, tax liens or judgment liens affected.

*United States v. 62.61 acres of land.* Involving an interest of Old Dominion University. Condemnation action. Concluded.

*U. S. of America & Hercules, Inc. v. W. H. Forst.* Issue whether purchases of tangible personal property pursuant to contract between U. S. Department of Army and Hercules for production of military propellants and explosives at the government owned facility are taxable. Pending.


Washington Metropolitan Area Transit Authority v. Commonwealth. Eminent domain. To condemn half of street (secondary highway) for a Metro project.


Woodard, Jesse Lincoln v. Virginia Board of Bar Examiners, et al. Civil rights action for declaratory judgment, injunctive relief and damages alleging that the Virginia Bar Examination is racially discriminatory. Pending.


CASES BEFORE FEDERAL AGENCIES


North Atlantic Fares Investigation, Docket No. 27918. Before Civil Aero-
nautics Board. Intervention in CAB investigation to set transatlantic fares. Equitable passenger rates on international flights into Virginia.

**Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2).** Before Nuclear Regulatory Commission. Administrative proceeding on application for construction permits for two nuclear reactors and appurtenant facilities. Pending.

**Southside Electric Cooperative.** Before Federal Power Commission. Application for a preliminary permit to study the feasibility of building a hydroelectric and pumped-storage project. Closed.


**Tenneco Oil Company and Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.** Before Federal Power Commission. Proceeding to require the make-up of a deficiency in deliveries of natural gas. Closed.


**Transcontinental Gas Pipeline Corporation.** Before Federal Power Commission. Application for a certificate authorizing the transportation of natural gas owned by Dan River, Inc. Closed. (Two cases.)


**Virginia Electric and Power Company.** Before Federal Energy Administration. Administrative proceeding to consider ordering ten generating units to convert from oil to coal. Closed.

**Virginia Electric and Power Company.** Before Federal Power Commission. Application for an increase in wholesale electric rates. By order of April 12, 1976, a settlement agreement was approved which provided $13 million dollars of the requested $21 million dollars rate increase.

**Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2).** Before Nuclear Regulatory Commission. Administrative proceeding on application for licenses to operate two nuclear reactors and appurtenant facilities. Pending.

**Virginia Electric and Power Company (North Anna Power Station, Units 3 and 4).** Before Nuclear Regulatory Commission. Administrative proceeding on application for permits to construct two nuclear reactors and appurtenant facilities. Pending.

**Virginia Electric and Power Company Project No. 2716 (Bath County Project).** Before Federal Power Commission. Proceeding to license a pumped-storage hydroelectric facility. Pending.


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**CASES DECIDED IN THE SUPREME COURT OF VIRGINIA**


Barnett, Melvin Lander v. Commonwealth. From Circuit Court, City of


*Chesson, James Adolph v. Commonwealth.* From Circuit Court, Hanover County. Search and seizure, no standing to object. Affirmed.

*Coleman, Maurice v. Commonwealth.* From Circuit Court, City of Richmond. Appeal from the dismissal of a *habeas corpus* petition. Denial of a plenary hearing. Affirmed.

*Commissioner v. Butterworth.* From Circuit Court, Dinwiddie County. Condemnation appeal.

*Commissioner v. Carter.* From Circuit Court, Dinwiddie County. Condemnation appeal.

*Commissioner v. Owen.* From Circuit Court, Powhatan County. Condemnation appeal. Prejudice of commissioner.

*Commissioner v. Yeatts.* From Circuit Court, Nottoway County. Condemnation appeal. Exceptions filed.

*Dillard v. Industrial Commission.* From Circuit Court, City of Richmond. Suit seeking declaratory judgment as to interpretation of § 65.1-100 of the Code. Writ of error denied.


*Fogg, Sandra Epps v. Commonwealth.* From Circuit Court, City of Richmond. Appeal from a conviction of possession of heroin. Insufficient evidence to convict the defendant of possession of heroin. Reversed.

*Fulk, Robert R. v. State Highway Commissioner.* From Circuit Court, Dickenson County. Appeal from commissioner's challenging constitutionality of Highway procedure award in eminent domain case. Judicial ruling that land worth over $1,000,000 per acre; that selection of commissioners unconstitutional; that quick take denies due process; that certificate of deposit must be in amount landowner claims; that testimony of witnesses disagreeing with landowner's opinion must be struck as incompetent. Writ denied.


*Gibson, Theodore Roosevelt v. Commonwealth.* From Circuit Court, City of Richmond, Division II. Right against self-incrimination and testimony of State psychiatrist relating confession made to him by accused; evidence of prior crimes of accused; propriety of remarks of trial judge on credibility of a witness; and refusal to grant insanity instruction. Affirmed.


Hollis, Orlando A. v. Commonwealth. From Circuit Court, City of Richmond, Division I. Search and seizure. Affirmed.

In re Historic Green Springs, etc., et al. Petition for mandamus against judge of circuit court. Petition denied and dismissed.


Jordon, Matthew, Sr. v. Commonwealth. From Circuit Court, City of Virginia Beach. Admissibility of testimony relating difficulties between accused and a third party, not the victim of the violent offense; exclusion of character testimony concerning the victim; sufficiency of the evidence; admission of statement by accused to police in absence of Miranda warnings. Affirmed.


Kilbert, Lloyd P. v. Commonwealth of Virginia, W. D. Blankenship, Superintendent of the Bland Correctional Center. Petitioner’s appeal from a denial by the Circuit Court of Lee County for a petition for a writ of habeas corpus on the issue of whether a trial court must hear evidence in conjunction with a guilty plea. A petition for a writ of error was granted at the request of the petitioner and the Commonwealth. It was the decision of the Supreme Court of Virginia that the Constitution and laws of the Commonwealth do not require that evidence be adduced by the Commonwealth in conjunction with a guilty plea.

Klimko, Dennis v. Virginia Employment Commission and Singer-Friden Division. From Circuit Court, Arlington County. Issues: (a) Whether the contingent expectancy of future receipt of unemployment compensation benefits is a property interest protected by the Fourteenth Amendment. (b) Whether the interstate hearings and appeals procedure comport with procedural due process requirements of the Fourteenth Amendment to the United States Constitution. (c) Did the claimant fail without good cause to accept suitable work when so offered? Affirmed.

Leftwich, C. H. and Thelma Leftwich v. State Highway Commissioner. From Circuit Court, Wise County. Appeal from eminent domain commissioners’ award. New trial on theory landowners were taken by surprise despite statutory provisions for discovery. Writ denied.

Lucky Stores, Inc. v. Commonwealth. From Circuit Court, Fairfax County. California Corp. qualified to do business in Virginia alleged assessment erroneous based upon statutory formula. Decided in favor of taxpayer in lower court, reversed in Supreme Court.


Niblett, Billy Wayne v. Commonwealth. From Circuit Court, City of Martinsville. Appeal from a conviction of robbery and wounding while in the commission of a felony. Testimony of third party as to extrajudicial pretrial photographic identification. Affirmed.
Ocean Sands Holding Corp v. Commonwealth. From Circuit Court, City of Virginia Beach. Motion to Quash Assessment of additional taxes based on IRS audit.


Patterson, Eddie Lee v. Commonwealth. From Circuit Court, City of Portsmouth. Appeal from a conviction of larceny by checks. Statutory construction of a disjunctive word. Affirmed.


Robertson, In re Russell P. Mandamus petition against Circuit Court Judge to order elections to city council based upon alleged requirements of § 24.1-76. Petition denied.

Rose, Luther Lee v. Superintendent. From Circuit Court, City of Richmond. Appeal from denial of a writ of habeas corpus. Affirmed.

Rowe, Horace C., Jr. v. Commonwealth. From Circuit Court, Rockingham County. Appeal from conviction of perjury. Instructions to jury. Conviction affirmed.

Royal, Willie v. Superintendent. From Circuit Court, City of Norfolk. Appeal from denial of a writ of habeas corpus. Affirmed.


State Highway and Transportation Commissioner v. Aubrey C. Foster. From Circuit Court, Culpeper County. Condemnation appeal.

State Highway and Transportation Commissioner v. Trustees of St. John's Baptist Church. From Circuit Court, New Kent County. Appeal by Commonwealth of condemnation award. Appeal withdrawn in March, 1976, after unfavorable decisions in Foster and Carter cases.


Ward, John Lewis v. Commonwealth. From Circuit Court, City of Richmond. Appeal from a conviction of voluntary manslaughter. Admissibility of
medical examiner's report after the death of the medical examiner. Reversed.


Wheeler, Jean and Keith v. Commonwealth. From Circuit Court, City of Richmond, Division II. Appeal from convictions of possession with intent to distribute narcotics. Sufficiency of affidavit in support of search warrant. Affirmed.

Wilder, Wesley Rudolph v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction for credit card theft. Sufficiency of indictment. Reversed.

Wilson, Bobby R. v. Commonwealth. From Circuit Court, City of Portsmouth. Appeal from a dismissal of a habeas corpus petition. Prior misdemeanor conviction without the benefit of counsel used to convict. Affirmed.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA


Berger, Carl Michael v. Commonwealth. From Circuit Court, Franklin County. Competency of mentally retarded prosecution witness; leading questions to such witness on direct examination; admissibility of extra-judicial statement of co-conspirator made after crime committed.

Bourgeois, Bruce E. v. Commonwealth. From Circuit Court, City of Richmond, Division II. Conviction of grand larceny. Sufficiency of the evidence; admissibility of evidence.


Hall, Marvin Junior v. Commonwealth. From Circuit Court, Gloucester County. Appeal from conviction of burglary. Pre-sentencing report requirements.


Hicks, Darrell v. Shenandoah Intelligence Agency & Virginia Employment
Commission, et al. From Circuit Court, City of Fredericksburg. Petition for appeal.

Hiss v. Virginia Real Estate Commission. From Circuit Court, City of Alexandria. Appeal from revocation of licensure by Virginia Real Estate Commission. Affirmed by Circuit Court. Appeal denied by Supreme Court of Virginia.

Hodge, James B. v. Commonwealth. From Circuit Court, City of Martinsville. Appeal from conviction of murder in the second degree. Instructions to the jury; applicability of Mullaney v. Wilbur.

Hummel, Lindberg v. Commonwealth. From Circuit Court, Rockingham County. Defense counsel not permitted to cross-examine prosecution witness concerning number and nature of his felony convictions.


Jefferson Publishing Corp. v. William H. Forst. From Circuit Court, City of Charlottesville. Application for correction of erroneous assessment made on publication ("This Week in Jefferson County") which is given away, disseminating current information.

Jones, Carson Alvin v. Commonwealth. (Record No. 750653). From Circuit Court, Franklin County. Exclusion of defense testimony relating to prior acts allegedly establishing character of the deceased victim.

Jones, Carson Alvin v. Commonwealth. (Record No. 751063). From Circuit Court, Franklin County. Collateral estoppel.

Jones, William Avery, II v. Commonwealth. From Circuit Court, City of Richmond. Conviction of distribution of controlled substances. Sufficiency of the evidence; validity of re-sentencing.

Lamb, Claude Z. v. Commonwealth. From Circuit Court, City of Portsmouth. Interrogation of accused after counsel indicated that any questioning was to be perfunctory; sufficiency of the evidence.


Maxfield, David Allen v. Vern L. Hill, et al. From Circuit Court, City of Richmond. Appeal from decision to deny class action, costs and attorney's fees in a suit under § 46.1-438(c).


R. Cross, Inc. v. City of Newport News. From Circuit Court, City of Newport News. Issue is tax classification of tangible personal property. Amicus brief filed by the Attorney General.

Santmier, Phillip Marshall v. Commonwealth. From Circuit Court, City of Winchester. Appeal from conviction of possession with intent to distribute narcotics. Instructions; admissibility of evidence.

Smith, John Paul v. Commonwealth. From Circuit Court, Gloucester County. Appeal from conviction of burglary. Pre-sentencing report requirements.

Smith, William Randolph v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of possession with intent to distribute narcotics. Admissibility of evidence.


State Highway Commissioner v. Homer N. Pankey, Executor. From Circuit Court, Fauquier County. Appeal from condemnation order by landowner.

State Highway Commissioner v. Godfrey Slaughter, et ux. From Circuit Court, Fauquier County. Appeal from condemnation order by landowner.

State Highway Commissioner v. John C. Wright, et ux. From Circuit Court, Loudoun County. Appeal from condemnation order by landowner.

State Highway and Transportation Commissioner v. Cy S. Eichelbaum, et ux. From Circuit Court, City of Lynchburg. Landowners' appeal of an award in condemnation cross-error was assigned by the Department. New trial. Cross-error will be waived if writ not granted.

State Highway and Transportation Commissioner v. Reed Johnson, et ux. From Circuit Court, Loudoun County. Appeal by Commonwealth of a condemnation award. Petition by writ of error to be filed.

United Air Lines, Inc. v. Commonwealth. From Circuit Court, City of Richmond, Division I. Whether food and supplies for passengers and certain equipment delivered to United at Washington National Airport is taxable.


1713 Wilson, Incorporated v. Virginia A.B.C. Board. From Circuit Court, City of Richmond. Appeal from Board order suspending license for thirty days.

WTAR Radio-TV Corp. v. Commonwealth of Virginia, et al. From Circuit Court, City of Norfolk. Contest involving assessment of equipment. Exemption applies to broadcasting equipment and parts and accessories thereto § 58-441.6(j).

CASES DECIDED OR PENDING IN THE CIRCUIT COURTS OF THE STATE


Board of Supervisors of Stafford County v. State Water Control Board, et al. Circuit Court, City of Richmond. Motion For Declaratory Judgment and Petition for a Writ of Mandamus to compel review of additional plans for a proposed sewage treatment system. Judgment for plaintiff.

Bradley v. Virginia State Board of Architects, Professional Engineers and Land Surveyors. Circuit Court, City of Richmond, Division I. Appeal from action of Board of Architects, Professional Engineers and Land Surveyors. Pending.

Braithwaite v. Commonwealth of Virginia and Marine Resources Commission and Department of Highways, etc. Circuit Court, City of Virginia Beach. Suit seeking ejectment and establishment of property line. Pending.


Commonwealth v. The Board of Supervisors of Arlington County and Commonwealth v. The County School Board of Arlington County. Circuit Court, Arlington County. Declaratory Judgment actions challenging legality of collective bargaining agreements between both County Board and County School Board and various unions and associations representing employees of those bodies. Pending.


Commonwealth v. Mohan N. Chandramani, t/a Hong Kong Tailors, et al. Circuit Court, City of Richmond. Permanent injunction entered against deceptive advertising.


Commonwealth v. Dare To Be Great, Inc., et al. Circuit Court, City of Richmond. Bill for injunction and restoration of monies. Pending—enjoined by Federal District Court from further action.


Commonwealth v. George I. Vogel, II, Committee for Cordelia Ann Bolliger. Circuit Court, City of Roanoke. Suit to recover outstanding patient charges due the Department of Mental Health and Mental Retardation. Pending.


Commonwealth v. William Wyant, et al., t/a W. W. Ventures. Circuit Court,
REPORT OF THE ATTORNEY GENERAL

City of Richmond. Permanent injunction entered against deceptive advertising.

Commonwealth of Virginia, ex rel. Mason Carbaugh, Commissioner of the Department of Agriculture and Commerce, Trustee v. Raymond P. Mills, Jr., et al. Circuit Court, City of Richmond. Action by Commonwealth on behalf of a livestock market to recover monies due from a livestock dealer under his bond, and an action to declare that the claim of another market is not covered by the bond. Pending.


Commonwealth of Virginia, ex rel. State Water Control Board v. Allied Chemical Corporation, et al. Circuit Court, City of Richmond, Division I. Motion for judgment for civil penalties for violation of the State Water Control Law. Pending.


Commonwealth of Virginia, ex rel. Charles B. Walker, Comptroller v. James W. Baer and Jim Baer Sporting Goods, Inc. and The Travelers Indemnity Company. Circuit Court, City of Richmond. Suit to recover funds for licenses unaccounted for by license agent of Commission of Game and Inland Fisheries and to recover on surety bond of license agent. Default judgment in favor of Commonwealth as to first two named defendants. Dismissed agreed as to third defendant upon full settlement in favor of Commonwealth.

Cooper, Margo D. v. Board of Visitors of Virginia Commonwealth University. Circuit Court, City of Richmond. Breach of contract. Pending.

Crest Construction v. Old Dominion University. Circuit Court, City of Richmond. Action for liquidated damages and interest under construction contract. Pending.


Escape Restaurant, Inc. v. Virginia Alcoholic Beverage Control Board. Circuit Court, City of Richmond. Appeal from Board order suspending license for fifteen days. Board order affirmed.

Evell, Administrator v. Davis, et al. Circuit Court, City of Chesapeake. Suit for wrongful death arising out of the alleged murder of a Portsmouth woman by an inmate of the Virginia correctional system. Case has been transferred to the Circuit Court of the City of Richmond. Nonsuited.


Fleetwood B. Howell, t/a Mobjack Bay Marine v. Marine Resources Com-


Greene, Mary S. v. Newton Bus Service, Inc., et al. Circuit Court, City of Richmond. Medical malpractice case involving subpoena of medical records from the Medical College of Virginia. Motion to Quash Subpoena filed for nonpayment of duplicating costs. Pending.


Hall, et al. v. Davis. Circuit Court, Montgomery County. Petition for a peremptory writ of mandamus seeking to enjoin the State from transferring a prisoner to the Bland Correctional Farm. Relief was denied.


In re Roosevelt Cavanaugh. Circuit Court, Augusta County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Nola May Cole. Circuit Court, Smyth County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Ida Bell Cross. Circuit Court, Augusta County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.


In re Ruby Elizabeth Ford. Circuit Court, Dinwiddie County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Pearl Frazier. Circuit Court, Smyth County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Mabel E. McCracken. Circuit Court, Smyth County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Henrietta Nelson. Circuit Court, Smyth County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Joseph Poland. Circuit Court, Smyth County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Bertha Quillen. Circuit Court, Smyth County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Norma Floyd Raymer. Circuit Court, Augusta County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Philip Samuels. Circuit Court, Augusta County. Petition for a de-
termination of partial legal incompetency and appointment of a limited guardian. Petition granted.


In re James Merrill Watson. Circuit Court, Augusta County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Campbell Wells. Circuit Court, Smyth County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

Lee County Board of Public Welfare v. Lee County Board of Supervisors, et al. Circuit Court, Lee County. Suit for Declaratory Judgment as to whether the Board of Public Welfare was properly constituted. Pending.

Lewis v. Department of Labor and Industry. Circuit Court, City of Richmond. Appeal from decision of Department of Labor and Industry. Pending.


Lotta and Free, Incorporated v. Virginia Alcoholic Beverage Control Board. Circuit Court, City of Richmond. Appeal from Board order suspending license for thirty days. Board order affirmed.

Low, Joseph L. v. Browne, June E. Circuit Court, City of Virginia Beach. Action against employee of State Consolidated Laboratory for false arrest, false imprisonment, malicious prosecution. Pending.


Lukhard v. Graham. Circuit Court, City of Roanoke. Injunction to close an adult care facility operating without a license from the Department of Welfare. Injunction granted.

Lukhard v. Watts. Circuit Court, City of Norfolk. Injunction to close adult care facility operating without a license from the Department of Welfare. Granted.


Medicenters of America, Inc. v. Commonwealth. Circuit Court, City of Richmond. Suit for additional claim against Medicaid Program above payments already made. Pending.


Mizpah v. Shanholtz, et al. Circuit Court, City of Richmond. Suit to recover
alleged underpayment of care rates by the Departments of Health and Welfare. Pending.


Morris v. Loving, et al. Circuit Court, Augusta County. Medical malpractice suit by an inmate of the Augusta Correctional Unit. Relief was denied.


Pharmacy, State Board of v. Irwin and Sacks. Circuit Court, City of Chesapeake. Appeal from action of State Board of Pharmacy. Appeal dismissed.

PHD Services, Inc. v. Virginia Collection Agency Board. Circuit Court, City of Norfolk. Appeal from order of Virginia Collection Agency Board. Dismissed.


Steele v. Brophy. Circuit Court, Fairfax County. Petition for Writ of Mandamus to order a District Court Judge to enter a judgment for support payments due. Dismissed.


Tanner's Transfer and Storage v. Virginia Alcoholic Beverage Control Board. Circuit Court, City of Richmond. Appeal from Board's decision to award moving contract to another firm. Board's decision upheld.


Walker, Charles B., Comptroller, Commonwealth of Virginia, ex rel. Department of Agriculture and Commerce v. R. H. Feagans and Co., Inc., et al. Circuit Court, Campbell County. Motion for judgment for damages due to improper construction of roof of Department of Agriculture's South Central Laboratory in Campbell County, Virginia. Pending.


Winston, Andrew v. Davis. Circuit Court, City of Richmond. Suit to enjoin the State to transfer prisoners from the Richmond City Jail. Pending.


Wright, Edward B. v. Herbert W. Coone, M. D. Circuit Court, Prince William County. Suit for declaratory relief under a subsequently repealed county ordinance. Continued generally by agreement.

Wright, James D., Jr. v. Stafford County School Board, et al. Circuit Court, City of Richmond. Damage action against State Board of Education for special education tuition assistance. Pending.


CASES DECIDED OR PENDING IN THE CIRCUIT COURTS OF THE STATE IN WHICH THE VIRGINIA DEPARTMENT OF HIGHWAYS AND TRANSPORTATION WAS INVOLVED


Bailey and Assoc., Inc. v. State Highway Commissioner. Circuit Court, City of Richmond. Motion on judgment. Motion to dismiss on statute of limitations. Pending.


Commissioner v. Trivett. Circuit Court, Dickenson County. Eminent domain. Motion to dismiss. Concluded.


Douglas B. Fugate v. J. I. Case Co. (a Del. Corp.). Circuit Court, City of Richmond. Motion for judgment. Pending.


Fugate, Douglas B. v. J. I. Case Co. (a Del. Corp.). Circuit Court, City of Richmond. Motion for judgment. Pending.


Hickle, Mary L., Committee, etc. v. Lulu A. Hickle, Incompetent, et al. Circuit Court, Stafford County. Intervention in suit for the sale of land of an incompetent in order to confirm a conveyance made to the Commonwealth by the committee without the necessary court approval. Proper conveyance obtained. Closed.


James v. Commissioner. Circuit Court, Culpeper County. Petition under § 33.1-132.5. Motion to dismiss filed. Pending.


Powell, Mr. & Mrs. W. R. v. Virginia Department of Highways. Circuit Court, Mecklenburg County. Motion to dismiss. Drainage claim. Pending.
Richmond Shopping Center v. State Highway Commissioner. Circuit Court, City of Richmond. To argue demurrer. Demurrer on grounds of sovereign immunity. Pending.
Service Oil Co. v. Fugate. Circuit Court, Halifax County. Motion for judgment. Pending.
State Highway Commissioner v. Thomas L. Barnard. Circuit Court, Patrick County. Landowner ponding water on highway by treating earth embankment. Injunction to cause removal, or permit department to remove.
State Highway and Transportation Commissioner v. Harvey Bell and Maxine Dorset Bell. Circuit Court, City of Richmond. Argument of exceptions to ruling by the court with regard to certain matters in a condemnation suit. New trial ordered. Settlement reached. Closed.


Weinberg v. Fugate. Circuit Court, City of Suffolk. Motion for judgment. Concluded.


CASES DECIDED OR PENDING IN THE COURTS OF RECORD AND COURTS NOT OF RECORD IN WHICH THE DIVISION OF MOTOR VEHICLES WAS INVOLVED

Acord, Stephen Denny v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Virginia Beach. Petition to restore operator's license revoked under § 46.1-421(a). Pending.

Anglin, Robert Fay, Jr. v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Virginia Beach. Appeal from action of Commissioner suspending license under § 46.1-417. Dismissed.

Arndt, Stephen v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Richmond, Division I. Petition for writ of mandamus to restore operator's license revoked under § 46.1-421(a). Pending.


Brechbiel, Noah C. v. Division of Motor Vehicles. Circuit Court, Fairfax County. Notice for motion for judgment to change registration month after failure to renew as required by § 46.1-63. Pending.

Castle Cars, Inc. v. Vern L. Hill, etc. Circuit Court, City of Norfolk. Motion for judgment for damages. Pending.


Citizens National Bank, K/N/A Midlantic National Bank/Citizens v. L. J. Ramey and Division of Motor Vehicles. General District Court, City of Richmond, Division I. Petition to establish ownership of 1966 Atlas Mobile Home. Title awarded to plaintiff.

Comeyne, Robert G. v. Vern L. Hill, Commissioner, etc. Circuit Court, Fairfax County. Notice of appeal to restore operator's license revoked under § 46.1-421(a). Dismissed.

Davis, Edward R. (In the Matter of). Circuit Court, City of Virginia Beach. Petition to restore operator's license revoked under §§ 46.1-421(a) and 46.1-418. Dismissed.

Davis, Edward Ray (In the Matter of). General District Court, City of Chesapeake, Traffic Division. Petition from revocation and suspension pursuant to §§ 46.1-421(a) and 46.1-418. Pending.

Edwards, Joseph Harding v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Hampton. Petition of appeal from revocation of license under §§ 46.1-417 and 46.1-466. Pending.


Gouldthorpe, David S., t/a P & G Oil Company, etc. v. Vern L. Hill, Commissioner, etc. Circuit Court, Amherst County. Petition for appeal from fuel tax assessment pursuant to § 58-747. Pending.

Gruber, William F. v. Vern L. Hill, Commissioner. Circuit Court, City of Norfolk. Petition to restore operator's license revoked and suspended pursuant to §§ 46.1-421(a) and 46.1-418. Pending.

Hankins, Donnie Stanley v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Norfolk. Appeal from action of Commissioner suspending license under § 46.1-417. Dismissed.

Harrington, Russell James v. Commissioner, Division of Motor Vehicles. Circuit Court, Frederick County. Bill of complaint from suspension of operator's license under § 46.1-442. Pending.

Harris, Wayne R. v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Richmond. Petition to restore operator's license revoked under § 46.1-421(a). Dismissed.


Jones, Donna Darnley v. Commonwealth of Virginia, Division of Motor Vehicles. Circuit Court, City of Hampton, Part II. Amended petition for an injunction from suspension of driving privileges under § 46.1-167.4. Pending.

Joynt, Thomas V. v. Vern L. Hill, etc. Circuit Court, City of Virginia Beach. Order an appeal from revocation of automobile dealer's license and salesman's license pursuant to § 46.1-535. Pending.

Kalvin, Albert Reiter v. Division of Motor Vehicles. Circuit Court, Rockingham County. Appeal from Commissioner's suspension of license pursuant to § 46.1-430. Affirmed.

Katrobos, Leon Alton Jr. v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Virginia Beach. Petition for appeal from revocation and suspension of operator's license pursuant to § 46.1-421(a). Dismissed.

Kitchen, Dana v. Commonwealth of Virginia, Division of Motor Vehicles. Circuit Court, City of Richmond, Division I. Petition to establish ownership of 1950 Cushman Motor Scooter. Title awarded to petitioner. Division held harmless.

Leathers, Chester Louis, Jr. v. Vern L. Hill, Commissioner, etc. Circuit Court, Madison County. Petition of appeal from action of Commissioner suspending license under §§ 46.1-417 and 46.1-466. Pending.

Levin, Florence V., In re. General District Court, City of Richmond, Civil Division. Petition to establish ownership of vehicle. Title awarded to petitioner.

Marshall, Robert B., In re. General District Court, City of Richmond. Petition to establish ownership of 1913 and 1914 Ford automobiles. Titles awarded to petitioner.

Martin, Evangeline Marie v. Vern Hill, Commissioner. Circuit Court, Roanoke County. Appeal requesting declaratory judgment and injunction from suspension of registration certificate and plates pursuant to § 46.1-418. Dismissed.
Maxfield, David Allen v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Richmond. Bill of complaint for refund of reinstatement fee to plaintiff under § 46.1-438(e), to bring class action and for award of costs and attorney's fees. Refund awarded complainant; class action, costs and attorney's fees denied.


Moorefield, James Herbert, Jr. v. Vern L. Hill, etc. Circuit Court, Halifax County. Bill of complaint to establish that plaintiff was not operating motor vehicle at the time of accident. Pending.

Nadeau, Ronald M. v. Vern L. Hill, Commissioner, etc. General District Court, City of Richmond. Motion for judgment to establish ownership of motorcycle. Pending.

Napier, Joseph Wayne v. Vern L. Hill, etc. Circuit Court, Henry County. Petition of appeal and application for injunctive relief from Commissioner's order of suspension pursuant to § 46.1-167.4. Dismissed.

Omega Auto Systems, Inc. v. Commissioner, etc. Circuit Court, City of Richmond. Notice of appeal of tax assessment pursuant to §§ 58-685.12(b1) and 58-685.17. Pending.

People's Bank of Chesapeake v. Division of Motor Vehicles, et al. Circuit Court, City of Chesapeake. Motion for judgment to establish liens on two automobiles. Dismissed with prejudice.


Phillips, Joseph Lee v. Division of Motor Vehicles, etc. Circuit Court, Campbell County. Petition for appeal to restore operator's license revoked under § 46.1-421(a). Pending.

Richmond Motor Company, Inc. v. Ford Motor Company and Mechanicsville Motor Company, Inc. Circuit Court, City of Richmond, Division I. Petition for court review to grant additional franchise in trade area pursuant to § 46.1-547(d). Pending.

Rogers Motors, Ltd. v. American Motors Sales Corporation. Circuit Court, Fairfax County. Notice of appeal from decision of Commissioner under § 46.1-547(a) not to bar additional jeep franchise. Affirmed.

Salmon, Charles Thomas v. Vern L. Hill, Commissioner. Circuit Court, Roanoke County. Petition of appeal from revocation of operating privileges pursuant to § 46.1-421(b). Dismissed.

Shuttleworth, Marian L. and Thomas B. Shuttleworth v. Vernon Hill, etc. Circuit Court, City of Norfolk. Petition from suspension of driving privileges under § 46.1-167.4. Pending.


Sokol, Frank Richard v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Petersburg. Petition to restore operator's license revoked and suspended pursuant to §§ 46.1-421(b) and 46.1-418. Pending.


Twiford, Lee Roy, Sr. v. Division of Motor Vehicles. Circuit Court, City of Virginia Beach. Appeal from revocation and suspension of operator's license pursuant to § 46.1-417. Dismissed.

Title, In re: To a 1966 Volkswagen Sedan, Identification # 11686669. General District Court, City of Richmond, Civil Division. Petition to establish ownership of motor vehicle. Title awarded to Frances H. Goodwin.
Underwood, Doris Ann v. Vern L. Hill. Circuit Court, City of Richmond, Division I. Petition for injunction from Commissioner's order of suspension pursuant to § 46.1-167.4. Dismissed.

Williams, Jack G. v. Vern L. Hill, et al. Circuit Court, City of Portsmouth. Motion for declaratory judgment from being adjudged habitual offender pursuant to § 46.1-387.6. Pending.

Williams, Luke v. Vern L. Hill, Commissioner, etc. Circuit Court, City of Richmond, Division I. Appeal from revocation and suspension of license under § 46.1-421(a). Dismissed.

Wingler, John William v. Commonwealth of Virginia, Division of Motor Vehicles, etc. Circuit Court, Grayson County. Appeal to restore operator's license revoked under § 46.1-421(b). Pending.

CASES DECIDED OR PENDING IN THE CIRCUIT COURTS OF THE STATE IN WHICH THE DEPARTMENT OF TAXATION WAS INVOLVED


Architectural Engineering Products Co. v. Summit Insurance Company of New York, et al. Circuit Court, City of Richmond, Division I. Bill of Complaint requesting sale of securities of Summit held by Treasurer for payment of contract entered into in reliance upon payment bond issued by Summit. Pending.


Causey, John P. v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of erroneous inheritance tax assessment. Dismissed agreed.

Chickahominy Academy, Inc. v. Boyd F. Collier, Director, Virginia Supplemental Retirement System. Circuit Court, City of Richmond. Bill of
Complaint requesting withdrawal from VSRS due to financial inability. Pending.
Commercial & Savings Bank, et al. v. Dennis W. Stine. Circuit Court, Frederick County. Amended Bill of Complaint requesting advice of court as to which of two wills written the same day is valid and if trust created by will is valid. Pending.
Community Colleges, State Board of v. Get-Em-Up-Go, Inc., et al. Circuit Court, City of Richmond, Division I. Bill of Interpleader requesting that community colleges be allowed to pay into fund established by the court money owned to Get-Em-Up-Go for contract performed. Pending.
Delta Electric Company v. Summit Insurance Co. of New York, et al. Circuit Court, City of Richmond, Division I. Bill of Complaint requesting sale of securities of Summit held by Treasurer of Virginia to pay lien. Pending.
Door Engineering Corp. v. Summit Insurance Co. of New York, et al. Circuit Court, City of Richmond, Division I. Bill of Complaint requesting sale of securities of Summit, insolvent, by Treasurer of Virginia to pay petitioner for bond executed to guarantee payment of contract of insolvent construction company. Pending.
Eastern Roofing Corporation v. Robert C. Watts, Jr. Circuit Court, City of Richmond, Division I. Action seeking payment of securities of Summit Insurance Company held by Treasurer. Pending.
First & Merchants National Bank (Hinton) v. Virginia H. Dillon, et al. Circuit Court, City of Richmond, Division I. Request that trust be reformed to allow maximum deduction for federal estate tax purposes. Pending.
First & Merchants National Bank v. United Virginia Bank. Circuit Court, City of Richmond, Division I. Suit to reform trust instrument if the IRS tries to tax charitable remainder. Pending.
Flow Research Animals v. State Tax Commissioner. Circuit Court, Pulaski County. Whether corporation raising experimental animals is farmer engaged in agricultural production for market or is processor entitled to processing exemption. Pending.
plaintiff requesting sale of securities of Summit, insolvent, held by Treasurer to pay complainant for legal fees. Pending.

Gibson, George T., et al. v. School Board of Loudoun County, et al. Circuit Court, Loudoun County. Motion for judgment of payment of life insurance of decedent allegedly on leave of absence from Loudoun County School Board. Pending.


Hampton, School Board v. Stuart W. Connoch. Circuit Court, City of Hampton. Application of sales tax exemption to purchase (trophies, etc.) by schools and payment for same from school activity fund. Pending.

Harman Mining Corporation v. Commonwealth. Circuit Court, Buchanan County. Taxpayer engaged in mining and processing of coal for sale and alleges taxes erroneously assessed on machinery, tools, etc. Pending.


Howard, James S., III, v. Robert C. Watts, Jr. & Professional Insurance Company of New York. Circuit Court, City of Richmond, Division I. Bill of Complaint requesting sale of securities of Professional Insurance held by Treasurer to pay legal expenses in malpractice suit for which plaintiff was insured by insurance company and such insurance company was liable for payment. Pending.


Hunton, Eppa & First & Merchants National Bank v. Andrew P. Miller. Circuit Court, City of Richmond. Request to reform trust so that trust will be validly exempt from federal income tax. Pending.


Lebanon General Hospital, Inc. v. Department of Taxation. Circuit Court, Russell County. Petitioner alleges assessment was erroneous on purchases of drugs. Pending.


Markley, Maria L. v. H. L. Keller. Circuit Court, City of Staunton. Civil action against tax department employee. Pending.

Markley, Maria L. v. Frank Terry. Circuit Court, City of Staunton, Civil action against tax department employee. Pending.

Mead Corporation and Its Consolidated Subsidiaries v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of erroneous assessment of corporate income taxes. Pending.

Miller-Morton Co. v. Commonwealth. Circuit Court, City of Richmond, Division I. Whether sample drugs are taxable. Pending.


Mumford, Frank Morris v. Curtis C. LaForge, Jr. Circuit Court, City of
REPORT OF THE ATTORNEY GENERAL

Richmond, Division I. Assistant Commonwealth's Attorney filing bill of complaint to allow private practice of law while in office. Dismissed.

Robins, A. H. v. Commonwealth. Circuit Court, City of Richmond, Division I. Whether sample drugs are taxable. Pending.


Stanley Construction Co., Inc. v. W. H. Forst. Circuit Court, Hanover County. Application for relief of assessment on purchases on which no sales tax was paid. Pending.


The Stuart McGuire Co., Inc. v. William H. Forst, et al. Circuit Court, City of Richmond, Division I. Bill of injunction to cancel surety bond made by McGuire to remove liens of sales tax assessments. Decision in favor of Department of Taxation.


Thompson, Paul Singer v. W. H. Forst. Circuit Court, City of Richmond. Petition for relief of income tax assessment claiming he was not a legal resident of Virginia. Pending.


United Airlines, Inc. v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of sales tax assessment. Whether food and supplies for passengers and certain equipment delivered to United at Washington National Airport are taxable. Decision in favor of taxpayer.

United Virginia Bank v. VMI Foundation, Inc., et al. Circuit Court, City of Richmond, Division I. Bill of Complaint requesting that trust be reformed. Pending.

Vess, Lee Roy, Jr. v. Charles B. Walker, et al. Circuit Court, City of Richmond, Division I. Motion for declaratory judgment requesting that plaintiff be paid retirement allowance. Pending.

Virginia Egg Producers, Inc. v. William H. Forst. Circuit Court, Rockingham County. Application for correction of sales tax assessment. Claiming processing exemption on machinery used in making eggs marketable and also agricultural exemption as corporation is owned by farmers. Dismissed agreed.

Virginia National Bank v. Leona Painter Brown, et al. Circuit Court, Rockingham County. Request for direction of funds left in will to charitable organization which does not exist. Pending.


Virginia National Bank v. Thomas A. Hubbard. Circuit Court, City of
Norfolk. Action to enforce series of liens against a parcel of real estate to satisfy back judgments. Pending.

Virginia Trust Co. v. Andrew P. Miller. Circuit Court, Henrico County. Bill of Complaint. Advice and guidance as to construction of will-appportionment of taxes among beneficiaries, some of which are charities. Pending.


CASES TRIED OR PENDING IN THE CIRCUIT COURTS OF THE STATE IN WHICH THE VIRGINIA EMPLOYMENT COMMISSION WAS INVOLVED


REPORT OF THE ATTORNEY GENERAL


Hale, Calvin v. Davenport Insulation, Inc. Circuit Court, County of Fairfax. Pending.


Hicks, Darrell v. Virginia Employment Commission and Shenandoah In-
telligence Agency and Mr. Aram A. Manaigre, Mrs. Marjorie T. O’Roarke. Circuit Court, City of Fredericksburg. Affirmed.


Loudoun Memorial Hospital, Inc. v. Virginia Employment Commission and William J. Pond, Sr. Circuit Court, County of Loudoun. Affirmed.

Mary Baldwin College v. Virginia Employment Commission. Circuit Court, City of Richmond. Pending.


Mod-U-Kraf Homes, Inc. v. Frank Butcher. Circuit Court, County of Franklin. Pending.


Murphy Bros., Inc., t/a Falls Church Yellow Cab v. Virginia Employment Commission and John E. Lavers. Circuit Court, Fairfax County. Pending.

Newcomb, Charles L. v. Richmond Glass Shop. Circuit Court, City of Richmond. Pending.


Sodano, Robert J. v. Virginia Employment Commission and Peoples Service
Drug Stores, Inc. and Reed, Roberts Associates, Inc. Circuit Court, City of Waynesboro. Affirmed.


CASES BEFORE THE STATE CORPORATION COMMISSION

Columbia Gas of Virginia, Inc. Application for increase in gas rates. Pending.

Commonwealth Natural Gas Corporation. Application for an increase in gas rates. By order of February 11, 1976, the motion of the applicant to withdraw its application for an increase in gas rates was granted.

Investigation to Determine Priority for Available Gas Supplies. Administrative proceeding to consider the adoption of a State-wide natural gas curtailment plan. Pending.

Roanoke Gas Company. Application for an increase in gas rates and for approval of a surcharge. By order of November 10, 1975, the applicant was granted $968,780 of the requested $1,016,942 rate increase. By order of March 2, 1976, the applicant was denied authority to impose a surcharge designed to produce approximately $750,000 in additional gross revenues.

Shenandoah Gas Company. Application for an increase in gas rates. By order of April 16, 1976, the applicant was granted $341,410 of the requested $475,301 rate increase.

Southwestern Virginia Gas Company. Application for an increase in gas rates. By order of April 7, 1976, the applicant was granted $60,833 of the requested $80,466 rate increase.

Virginia Electric and Power Company. Application for an increase in gas rates. By order of December 31, 1975, the applicant was granted $3,074,807 of the requested $4,953,000 rate increase.

CASES BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA


Cress, Fred W. v. Department of Highways and Transportation. Changed condition under Workmen's Compensation Act. Doctor found no physical manifestations of injury from fall. Cress later developed other symptoms and the doctor supported him.

Doty, Patricia v. Old Dominion University. Claim for workmen's compensation benefits. Claim denied.

Knights, Vicki S. v. Virginia Commonwealth University. Application for termination of benefits due to change in condition. Application granted.

Lawson, Thomas R., Claimant v. Commonwealth of Virginia, Department of Highways and Transportation. Hearing requesting termination of payments because claimant was offered and refused to accept light work. Award entered in favor of Department. Closed.

CASES DECIDED OR PENDING IN THE GENERAL DISTRICT COURTS OF THE STATE


Kephart v. Minnich. General District Court, City of Richmond, Civil Division. Action for damages for alleged false arrest, malicious prosecution. Dismissed without prejudice.

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<th>Date of Hearing</th>
<th>Name of Offender</th>
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ACCOUNTANTS—Certified Public Accountants Hired As Salaried Employees Of CPA Firm Must Have A Revenue License Under § 58-372.1.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Accountants—Certified public accountants hired as salaried employees of CPA firm must have a revenue license under § 58-372.1.

April 8, 1976

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

You have inquired whether certified public accountants hired as salaried employees of a CPA firm are required to be licensed in accordance with Chapter 243 of the Acts of Assembly of 1975. I assume for purposes of this opinion that the employees in question have been licensed as certified public accountants under the provisions of Chapter 5 of Title 54 of the Code, and are in fact performing accounting work for their employer in Virginia. Chapter 243 was codified as Section 58-372.1, which provides, in relevant part, as follows:

"Every certified public accountant practicing in this State, in addition to being licensed as provided in Chapter 5 of Title 54 of this Code, shall obtain a revenue license. . . ." (Emphasis added.)

In my opinion, the language emphasized in the above-quoted provision requires a revenue license to be obtained by any person who is licensed as a certified public accountant under the provisions of Chapter 5 of Title 54 of the Code, and is in fact performing accounting work in Virginia. Your inquiry is therefore answered in the affirmative.

ALCOHOL SAFETY ACTION PROGRAM—Person Charged With Drunk Driving—May not be assigned to driver education program before trial—All requirements of § 18.2-271.1 must be met.

CRIMINAL PROCEDURE—Person Charged With Drunk Driving—May not be assigned to driver education program before trial—All requirements of § 18.2-271.1 must be met.

MOTOR VEHICLES—Person Charged With Drunk Driving—May not be assigned to driver education program before trial—All requirements of § 18.2-271.1 must be met.

July 9, 1975

THE HONORABLE WILLIAM S. BURROUGHS, JR.
Commonwealth's Attorney for Arlington County

This is in reply to your recent letter from which I quote the following:

"Presently in Arlington the D.W.I. arrestee is not put on probation upon the trial, which is the procedure suggested in Chapter 601. Rather, the individual is given the opportunity to volunteer for the program before trial. If the individual enters and completes the program, the charge is usually amended to a lesser included offense, and it is then that the defendant is tried by the court, normally on a plea of guilty.
We have found that beginning the process at the pre-trial stage spares the court, the police and my office a great deal of time and effort. Further, we believe such a procedure to be more in line with the general philosophy of the ASAP method of dealing with the drinking driver.

"Although I am reasonably confident that my view of the act is correct, the statute is sufficiently ambiguous to be subject to different interpretations. Therefore, I would be most grateful if you would furnish me with an opinion, as to whether Chapter 601 of the Acts of the General Assembly of 1975 precludes our continuing to operate Arlington's ASAP system as it presently exists, in light of subsection (e) of § 18.2-271.1, set forth in the said Chapter 601, which appears to permit the same."

Chapter 601, [1975] Virginia Acts of Assembly 1262, now embodied in § 18.2-271.1 of the Code of Virginia (1950), as amended, grew out of the findings of the Committee established by the General Assembly of 1974, in House Resolution No. 16, to “determine whether there is a need to revise Virginia law relating to ‘driving while intoxicated’ in light of the various model legislative proposals and the Alcohol Safety Action Project in Fairfax County.” Its enactment by the General Assembly strongly indicates its belief in a need for such legislation. If, in the minds of the legislators, existing law covered the situation, no purpose would be served by enacting this new statute.

In outlining your present procedure you indicate that the person charged with driving while intoxicated is given the opportunity to volunteer for the statutory program before trial. He is not brought to trial until after he completes the program. I find no authority of law in § 18.2-271.1 of the Code for assigning a person to a driver education program or to an alcohol or rehabilitation program under such conditions. Subsection (a) of this statute states, in relevant part:

“Upon the trial of any person for a violation of § 18.2-266, or any ordinance of a county, city or town similar to the provisions thereof, and upon motion of the defendant, the court may order probation to the defendant, on condition that he be assigned to a driver education program, and, in the discretion of the court, to an alcohol treatment or rehabilitation program, or both such programs. Such trial may be continued for a period up to one year and during such time of continuance the court may:

“(1) Require the defendant to cooperate in any investigation conducted by any probation officer assigned to the case or such other person working in a driver education program, and

“(2) Require the defendant moving for probation under the provisions of this section to pay a fee not to exceed one hundred fifty dollars, which amount shall be forwarded by the clerk to be deposited with the State Treasurer.”

The clear meaning of this language is to give the court the discretion to order probation to the defendant on condition that he be assigned to a driver education program, and, in the court's discretion, to an alcohol treatment or rehabilitation program, upon the trial for the offense of driving while intoxicated. I consider the “trial” to mean a judicial examination by the court having jurisdiction. Thereafter, the trial may be continued, and during such time of continuance the court may require the defendant to cooperate in any necessary investigation by a probation officer and to pay a fee not to exceed one hundred fifty dollars. I find nothing in the statute to permit assignment to any such program at some pre-trial stage.
Subsection (e) provides that nothing in this section shall be construed to prevent the exercise by a court of its authority to make any lawful disposition of a charge of driving under the influence of intoxicants. I interpret this to mean that a court may, in its discretion, make disposition of any such charge under other existing law. If the election is made to dispose of a charge of driving under the influence of intoxicants by assigning the defendant to “a driver education program, and, in the discretion of the court, to an alcohol treatment or rehabilitation program, or both such programs,” as outlined in subsection (a) of § 18.2-271.1 of the Code, then all the requirements of this statute must be followed. Applying this to your specific question, it is my opinion that the statute precludes your continuing to operate Arlington’s ASAP system as it presently exists.

ALCOHOLIC BEVERAGE CONTROL LAWS—Line Of Duty Act Does Not Apply To Inspectors, Investigators And Watchmen Of ABC Board.

CRIMINAL JUSTICE OFFICERS TRAINING AND STANDARDS COMMISSION—Law Enforcement Officer—Definition does not include ABC officers.

DEFINITIONS—“Law Enforcement Officer”—Does not include ABC officers.

LAW ENFORCEMENT OFFICERS TRAINING STANDARDS COMMISSION—Law Enforcement Officer—Definition does not include ABC officers.

LINE OF DUTY ACT—Does Not Apply To Inspectors, Investigators And Watchmen Of ABC Board.

STATUTES—Code Of Virginia Constitutes Single Body Of Law—Other sections can be looked to where same phraseology is used.

STATUTES—Definition Of “Law Enforcement Officer” In Title 9, Chapter 16, Of Code Provides Assistance In Defining Term In Other Section Of Code.

September 15, 1975

THE HONORABLE ROBERT W. JEFFREY, Member
Virginia Alcoholic Beverage Control Board

This is in response to your letter of August 22, 1975, from which I quote as follows:

“Under Section 4-8 of the Code, members of the Virginia Alcoholic Beverage Control Board are vested, and such officers, agents and employees of the Board as shall be designated by it shall upon being so designated be vested, with like power to enforce the provisions of the Alcoholic Beverage Control Act and the criminal laws of the State as is now vested in sheriffs of counties and police of cities and towns.

“Pursuant to authority vested in the Board by virtue of the provisions of Section 4-8, Code, the Board has vested certain employees with certain police powers as follows:

“(a) Inspectors have taken and subscribed to the oath to perform all duties incumbent on them with like power to enforce the provisions of Chapter 1 (Alcoholic Beverage Control Act), Chapter 1.1 (Mixed Beverage Laws) and Chapter 2 (3.2 Beverage Laws) of Title 4 of the Code of Virginia as is now vested in sheriffs of counties and police of cities and towns.
“Police power has been granted inspectors that they may carry a concealed weapon to improve the protection afforded them and in vesting such authority, the Board has expressed the desire that the inspectors should refrain from becoming involved in arrests and court cases.

“(b) Investigators have taken and subscribed to the oath to perform all duties to enforce the provisions of the Alcoholic Beverage Control Act and the criminal laws of this State with the same power and authority as is now vested in sheriffs of counties and police of cities and towns.

“(c) Watchmen have taken and subscribed to the oath to have police powers limited to properties owned by or under control of the Board.

“In connection with the above, I would appreciate your opinion as to whether or not the Line of Duty Act applies to inspectors, investigators and watchmen of the Board.”

In my opinion the Line of Duty Act, §§ 15.1-136.1-.7 of the Code of Virginia (1950), as amended, does not apply to inspectors, investigators and watchmen of the Virginia Alcoholic Beverage Control Board.

The term “deceased” in the Line of Duty Act is defined in § 15.1-136.2 of the Code as follows:

“‘Deceased’ shall mean any person whose death occurs on or after April eight, nineteen hundred seventy-two, as the direct or proximate result of the performance of his duty as a law-enforcement officer of this State or sheriff, deputy sheriff, or as a member of any fire company or department or rescue squad which shall have been recognized by an ordinance or a resolution of the governing body of any county, city or town of this State as an integral part of the official safety program of such county, city or town, or a member of the Virginia national guard while such member is serving in the Virginia national guard on official State duty.” (Emphasis added.)

It is apparent that an employee of the Board must be a “law-enforcement” officer of this State in order to be within this statutory definition.

The Law-Enforcement Officers Training Standards Commission was established by Chapter 740, [1968] Acts of Assembly 1333, the name being changed to Criminal Justice Officers Training and Standards Commission by Chapter 377, [1974] Acts of Assembly 651. Under this Act the term “law-enforcement officer” is defined in § 9-108 as follows:

“As used in this chapter, the term ‘law-enforcement officer’ means any full-time employee of a police department or sheriff’s office which is a part of or administered by the State or any political subdivision thereof and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this State.”

In an opinion to the Honorable Roger Earl Frankey, Assistant Director, Law Enforcement Officers Training Standards Commission, dated May 5, 1971, and found in the Report of the Attorney General (1970-1971) at 230, copy of which is enclosed, I ruled that officers of the Enforcement Division of the ABC Board were not included within the above-quoted definition inasmuch as they were not employees of a police department or sheriff’s office. This same reasoning would apply equally to other employees of the Board.

While it is noted that the foregoing definition of law-enforcement officer is for use in Chapter 16, Title 9 of the Code, it does provide assistance in

ALCOHOLIC BEVERAGE CONTROL LAWS—Service Stations—Regulations restricting wine and/or beer off-premises retail license are constitutional.

January 20, 1976

THE HONORABLE EDWARD E. WILLEY
President Pro Tempore
Senate of Virginia

In your recent letter you seek my opinion as to the constitutionality of § 50 of the Alcoholic Beverage Control Board Regulations, copy of which is enclosed, as it relates to the issuance of a license to an establishment operated in conjunction with an automobile service station or gasoline station. In this connection you advise that several major oil companies are seeking to establish a chain of convenience food stores throughout the Commonwealth which would combine the sale of basic food items with the self-service sale of gasoline. A number of these establishments have attempted to obtain an off-premises alcoholic beverage license, but such requests have been summarily denied by the Alcoholic Beverage Control Board.

The types of wine and beer licenses that may be granted by the Board are described in § 4-25 of the Code of Virginia (1950), as amended. Code § 4-25(j) authorizes the issuance of retail off-premises wine and beer licenses “in accordance with regulations of the Board,” and § 4-25(l) authorizes the issuance of off-premises beer licenses “in accordance with regulations of the Board.” The regulation you are concerned with implements these subsections by setting forth qualifications therefor and imposing certain restrictions or conditions with which licensees must comply.

For example, subsection (a) of the regulation requires an applicant to qualify as either a delicatessen, a drug store or a grocery store, each of which is defined, in order to obtain a wine and beer off-premises retail license. While subsection (b) indicates that an applicant may obtain a retail off-premises beer license if it qualifies as a delicatessen, drug store, grocery store or marina store as defined therein, the definitions do not contain as stringent requirements as those contained in subsection (a). Subsection (c) defines “substantial amount” as the phrase may elsewhere appear in the regulation, and subsection (d) relates to businesses which conduct an automobile service, or gasoline, station business in conjunction with businesses otherwise eligible under the section. It is provided that, if the automobile service or gasoline station business is predominant by a 5 to 1 ratio over the otherwise qualified business, the license would be restricted against the chilling of alcoholic beverages or beverages sold for consumption off the premises. It is further provided that, if the ratio is as much as 10 to 1, no license may be issued.

I had occasion to construe Regulation 50 in an opinion to the Honorable Warren J. Davis, Member, House of Delegates, dated March 22, 1972, and found in the Report of the Attorney General (1971-1972) at 9. While amendments have been made to this regulation since the previous Opinion, it continues to provide qualifying criteria for the types of licenses autho-
rized in subsections (j) and (l) of § 4-25. The restrictions concerning service stations were not explicitly included in the regulation in 1972. The Board has apparently since reached the conclusion that unrestricted sales in the instances specified represent a potential danger that should be controlled. I cannot say that this determination is devoid of any basis in fact. For the reasons set forth in my previous Opinion, I must conclude that the regulation is constitutional.

AMENDMENTS—Errors In Engrossed Bill—Bill is still valid as engrossed despite error during enrolling process.

TAXATION—Exemption From Service Charges—Section 58-16.2 applies to private educational or charitable purposes.

THE HONORABLE EDWARD E. WILLEY
President Pro Tempore
Senate of Virginia

This is in response to your recent request for my opinion on the status of § 58-16.2 of the Code of Virginia (1950), as amended, as a result of amendments made by House Bill 1522 during the 1975 Session of the Virginia General Assembly. Section 58-16.2 relates to service charges on certain tax exempt real property. At the 1975 Session, it was amended to exempt property used for private nonprofit educational purposes from the service charge which may be levied by a county, city, or town in lieu of real property taxation. House Bill 1522 was amended in the Senate to insert the word “private” as shown.

“(ii) used or operated exclusively for private educational or charitable purposes and not for profit other than faculty and staff housing of any such educational institution.” (Emphasis added.)

The Bill passed both Houses and was engrossed as set out above. During the enrolling process, however, a comma was inadvertently inserted after the word “private.” The enrolled document was subsequently signed by the Governor and codified with the comma remaining in place. You inquire about the effect of this insertion.

Article IV, Section 11(d), of the Constitution of Virginia (1971), requires that a vote be taken in each House for final passage of an engrossed bill and that the vote be recorded in the proper journal. After passage, the bill is printed and it becomes an enrolled bill. See Smith v. McMichael, 203 Ga. 74, 35 S.E.2d 431 (1947). An enrolled bill only becomes law when duly signed by the presiding officers and approved by the Governor. Article IV, Section 11, and Article V, Section 6.

An enrolled bill which has been duly signed by the presiding officers and the Governor is regarded as the best evidence of what the legislature has passed. The enrolled bill, however, may be impeached in Virginia, as in some other states, by reference to the journals of the legislature. Henrico v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941); Wise v. Bigger, 79 Va. 269 (1884). In states that allow the enrolled bill to be challenged in this manner, cases hold that absolute correspondence between the bill as enacted and as signed by the Governor is not necessary. Mere clerical errors and minor discrepancies will not be permitted to defeat the intent of the legislature. See State v. Hanson, 342 P.2d, 706 (Idaho 1959). Although the Virginia Supreme Court has not had occasion to decide this issue, it has made changes in printed acts where omissions were inadvertent and where adoption of a literal construction would lead to absurd results. See
Hutchings v. Commercial Bank, 91 Va. 68 (1895). Based on the foregoing, the addition of the comma in the enrolling process is not fatal to House Bill 1522.

In the present case, any such addition would substantially broaden the scope of the exception from the service charge which may be levied by a county, city, or town in lieu of real property taxation. Clearly, the printed version of House Bill 1522 is not the law since clerical inadvertence cannot be permitted to expand the scope of legislation. I am of the opinion, therefore, that House Bill 1522 is valid as engrossed without the added comma. The exemption from service charges provided by § 58-16.2 applies to otherwise qualified property used or operated exclusively for "private educational or charitable purposes," and not to such property used for "private, educational or charitable purposes."

ANNUITIES—Authority Of School Boards To Participate In Annuity Pension Plan; Employee Salary Contributions Invested In Mutual Funds; No Public Funds Involved.

INCOME TAX—Employee Contributions To Annuity Pension Plan Not Subject To State Or Federal Income Tax.

SCHOOLS—School Boards—Authority to participate in annuity pension plan; employee salary contributions invested in mutual funds; no public funds involved.

SCHOOLS—School Boards—Authority to purchase insurance on behalf of employees.

SCHOOLS—Tax-sheltered Annuities.

TAXATION—Income Tax—Employee contributions to annuity pension plan not subject to State or Federal income tax.

TAXATION—Tax-sheltered Annuities—No public funds involved.

DEFERRED COMPENSATION COMMISSION—School Annuity Pension Plan In Which School Employee Salary Contributions Are Invested In Mutual Funds Must Be Approved By Commission.

August 4, 1975

THE HONORABLE JOHN L. MELNICK
Member, House of Delegates

This is in response to your recent letter requesting an opinion (1) whether it is permissible for a school board to participate in an annuity pension plan in which employee salary contributions are invested in mutual fund shares held in custodial accounts, such plans now being eligible for favorable tax treatment under a recent amendment to § 403(b) of the Internal Revenue Code; and (2) whether employee contributions to such plans are subject to Virginia State income tax.

Section 403(b) of the Internal Revenue Code previously provided a tax shelter for amounts paid by a § 501(c) (3) organization or public school for the purchase of an annuity contract under an annuity pension plan. For federal tax purposes, such amounts were excluded from the employee's gross income for the taxable year in which the purchase was made up to a certain exclusion allowance, even though the annuity contract was purchased pursuant to a salary reduction agreement. In addition, lump sum payments made to an employee under such a pension fund annuity contract were entitled to capital gains treatment. In an Opinion to the Honorable Charles H. Smith, Director, Virginia Supplemental Retirement System,
REPORT OF THE ATTORNEY GENERAL

dated March 1, 1962, and found in the Report of the Attorney General (1961-1962) at 217, this Office ruled that State agencies and local school boards were not prohibited from arranging for the purchase of such tax sheltered annuities for employees, provided such purchase would impose no legally binding obligation upon the State or its localities and entailed no expenditure of public funds.

A recent amendment to § 403(b), effective January 1, 1974, provides that amounts paid by a § 501(c) (3) organization or public school for mutual fund shares pursuant to a pension plan are to be treated for tax purposes the same as amounts paid by such entities for a pension fund annuity contract. The mutual fund shares, however, must be those of a regulated investment company and must be held in a custodial account which satisfies § 401(f) (2). Furthermore, under the recently enacted Government Employees Deferred Compensation Plan Act, §§ 51-111.67:14 to -111.67:20 of the Code of Virginia (1950), as amended, county or municipal deferred compensation plans, such as the one about which you inquire, must be approved by the Deferred Compensation Commission. See § 51-111.67:18.

I am of the opinion that, as in the case of pension fund annuity contracts, a school board has the authority to arrange for the purchase of mutual fund shares meeting the requirements of § 403(b), as amended, provided that the purchase will not entail an expenditure of public funds and provided the approval of the Deferred Compensation Commission is obtained. See Opinion to the Honorable John A. K. Donovan, Member, Virginia State Senate, dated July 5, 1963, and found in the Report of the Attorney General (1963-1964) at 266, holding that a school board has the authority to purchase on behalf of employees a group permanent life contract where all funds for the plan would be invested in mutual funds programs, provided no expenditure of public funds was involved. Participation in a mutual fund pension program would, of course, be within the discretion of the school board. See Opinion to the Honorable Edward E. Lane, Member, House of Delegates, dated February 23, 1971, and found in the Report of the Attorney General (1970-1971) at 341.

With respect to whether employee contributions to such plans are subject to Virginia State income tax, § 58-151.013 of the Code of Virginia provides that the taxable income of a Virginia resident means his federal adjusted gross income for the taxable year, subject to certain modifications. As hereinabove indicated, amounts paid by a public school for the purchase of annuity contracts or mutual fund shares pursuant to a pension plan are excluded from the employee's federal gross income. Since no modifications have been made concerning the same under State tax law, such amounts contributed by an employee are not subject to Virginia State income tax.

APPROPRIATIONS—Governor's Authority To Reduce Appropriations In Event Of Shortfall In Estimate Of General Fund Revenues Applies To Basic School Aid Fund.

EDUCATION—Standards Of Quality—Obligation of localities to comply with; new cost apportioned by law must be considered.

SCHOOLS—Standards Of Quality—Constitutional requirements.

THE HONORABLE MILLS E. GODWIN, JR.
Governor of Virginia

September 26, 1975

This is in reply to your recent inquiry regarding the extent to which
your authority conferred by § 166 of the Appropriations Act, Chapter 681, [1974] Acts of Assembly, to reduce appropriations in the event of a short-fall in the estimate of general fund revenues, applies to the basic school aid fund set forth in Item 573 of the Appropriations Act. Section 166 of the Act provides in pertinent part as follows:

"In the event the estimated general fund revenues are exceeded by the total of general fund appropriations, the Governor shall, subject to the qualifications herein contained, reduce the general fund expenditures and withhold allotments of the appropriations to the extent necessary to prevent any expenditure in excess of the estimated general fund revenues."

I am of the opinion that § 166 does authorize the Governor to reduce the appropriation in Item 573 to the extent necessary to prevent any expenditure in excess of revenues.

It is noted that the operations cost of $730 per pupil is established by virtue of Item 573(b) (1), which sets forth the formula for computing the State share thereof. Although § 22-21.2 of the Code of Virginia (1950), as amended, requires localities to appropriate and expend "that portion of the cost apportioned by law for maintaining an approved educational program" as required by the standards of quality, a reduction in the appropriation pursuant to § 166 would only go to determining the "cost apportioned...by law" rather than increasing a locality's share.

Article VIII, Section 2, of the Constitution of Virginia requires that the General Assembly establish standards of quality, which standards are set forth as required programs and services in §§ 2-9 of Chapter 316, [1974] Acts of Assembly. Chapter 316 states that the obligation of the locality is only "to provide such services and programs to an extent proportionate to the funding therefor provided by the General Assembly." Consequently, the obligation of localities to comply with the standards of quality would reflect the lower minimum level of funding.

The effect of the foregoing language of § 3 of Chapter 316 is not to revise the standards of quality, for that would be in contravention of Article VIII, Section 2, of the Constitution and the General Assembly's obligation to provide for funding of the standards. See Report of the Attorney General (1972-1973) at 351. It does mean that, in determining whether a local school division's programs and services are in compliance with the standards, the new cost apportioned by law must be taken into account.

APPROPRIATIONS—Reversion Provisions Of Appropriations From General Fund Of State Treasury—Not applicable to Interdepartmental Transfers.

JUSTICE AND CRIME PREVENTION, DIVISION OF—Funds For Legitimate Expenditures But In Incorrect Expenditure Object Codes May Be Redirected To Proper Accounts To Correct Errors.

STATE AGENCIES—Payment Of Funds Made By Interdepartmental Transfer—Appropriations Acts do not require reversion of such transfers.

January 30, 1976

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

This is in response to your request for my opinion concerning use by the Division of Justice and Crime Prevention (DJCP) of its biennial appropria-
tions for legitimate expenditures but in incorrect expenditure object codes. You state that in fiscal years 1970-71, 1972-73, and 1973-74, DJCP erroneously overpaid the employer's share of FICA payments to the Virginia Supplemental Retirement System, and at the same time underpaid the employee retirement, employee life insurance, and employee health insurance premiums to the VSRS and the State Comptroller by the same amount. In each biennium concerned, the proper total amount for FICA employee retirement, employee life insurance, and employee health insurance was paid. The entire amount, however, was erroneously paid to the FICA account. The other accounts were unpaid. You ask whether these funds may now be redirected to their proper object expenditure accounts so that the errors of past payment and distribution can be corrected.

In each of the Appropriation Acts under which the general funds in question were appropriated, the following or substantially similar language appears:

“All the appropriations herein made out of the general fund of the State treasury for the current biennium, which have not actually been disbursed by warrants drawn by the Comptroller on the State Treasurer and are thus unexpended on the books of the Department of Accounts at the close of business on the last day of the current biennium shall, except as may be subsequently provided by the General Assembly, revert to and become a part of the general fund of the State treasury of the Commonwealth of Virginia, and shall not thereafter be paid by the Comptroller and the same shall be charged off upon the books in his office.” See Chapter 461, Section 50, [1970] Acts of Assembly 825, and Chapter 804, Section 190, [1972] Acts of Assembly 1398.

The funds about which you inquire may be redirected to their proper object expenditure accounts unless the foregoing reversion provision prevents the use of the funds erroneously overpaid to the FICA account for such purpose. This result would occur if the funds erroneously overpaid to this account “have not actually been disbursed by warrants drawn by the Comptroller on the State Treasurer and are thus unexpended on the books of the Department of Accounts at the close of business on the last day of the biennium.”

Payment of the funds in question to the VSRS-FICA account was made by an Interdepartmental Transfer (IDT). Under established procedures applicable to IDT’s, checks are not actually issued upon warrants drawn by the Comptroller on the State Treasurer because the transferror and transferee are both state agencies for whom the State Treasurer acts as depository and disbursal officer. The IDT accomplishes the identical purpose of disbursal by warrant drawn on the Treasury, however, because it subtracts the amount paid from the appropriation of DJCP and adds this amount to the amounts received for the specified purpose by VSRS. Funds transferred in this manner are thus expended on the books of the Department of Accounts at the close of business on the last day of the applicable biennium.

Because the Appropriation Acts do not require reversion in the case of Interdepartmental Transfers, and since an Interdepartmental Transfer accomplishes the same purpose as a disbursal of the type which would prevent such a reversion, the funds about which you inquire were expended during the applicable biennium and did not revert to the general fund at the end of each such biennium. These funds may, therefore, be redirected to their proper expenditure accounts so that the errors of past payment and distribution can be corrected without additional appropriations from the General Assembly.
REPORT OF THE ATTORNEY GENERAL

ARREST—Improper For Officer To Arrest Convicted Misdemeanant On Authority Of Capias Which Is Not In His Possession At Time Of Arrest.

CRIMINAL PROCEDURE—Proper Procedure For Serving Capias Upon Convicted Misdemeanant.

POLICE—Capias—Improper for officer to arrest convicted misdemeanor on authority of capias which is not in his possession at time of arrest.

THE HONORABLE DAVID G. SIMPSON, Judge
Frederick—Winchester General District Court

You request my opinion concerning the proper manner of service of a capias upon an individual who has been legally tried and convicted of a misdemeanor in absentia. Specifically, you inquire whether a duly authorized police officer must have the capias physically in his possession when arresting an individual so convicted. Your problem arises, of course, only with respect to misdemeanor convictions.

The proper procedure for executing such judgments is governed by § 19.1-180 of the Code of Virginia (1950), as amended, which provides as follows:

"No capias to hear judgment shall be necessary in any prosecution for a misdemeanor, but the court may proceed to judgment in the absence of the accused; and, if such judgment requires confinement in jail, the court may make such order as may be necessary for the arrest of the person against whom such judgment is and for the execution thereof. The proceedings upon such order shall conform, as nearly as may be to those upon a capias to hear judgment and all officers charged with its execution shall have the same powers, be charged with the same duties and be subject to the same responsibilities as provided by law in case of a capias to hear judgment." (Emphasis added.)

The procedure for serving a post conviction capias, thus, is the same as that pertaining to a capias to hear judgment. Although the italicized portions of the statute have not been incorporated into the equivalent section under Title 19.2 of the Code (§ 19.2-237, effective October 1, 1975), I am of the opinion that the same procedure applies to service of capias whether pre- or post-conviction, as is clearly the case under § 19.1-180.

The proper manner of service of a capias to hear judgment is established by Rule 3A:9(c) of the Rules of the Supreme Court of Virginia. Subsection (1) thereof states that the "... capias shall be executed as provided in Rule 3A:4(c)." Rule 3A:4(c) was redesignated as 3A:4(d) in 1972. Subsection (2) thereof states, in pertinent part, as follows:

"(2) Manner.—The warrant [capias] shall be executed by the arrest of the accused. The officer shall deliver a copy of the warrant [capias] to the accused at the time of the arrest unless the arrest is for a felony and the officer does not have the warrant [capias] in his possession at the time of the arrest, in which case he shall (i) inform the accused of the offense charged and that a warrant [capias] has been issued and (ii) deliver a copy of the warrant [capias] to the accused as soon thereafter as practicable."

Under the foregoing rule, an officer "shall" present an individual with a copy of the warrant or capias unless the arrest is for a felony.

I find no authority for permitting an exception to the personal service
rule established by Rule 3A:4(d)(2); accordingly, it is my opinion that it is improper for an officer to arrest a convicted misdemeanant on the authority of a capias which is not in his possession at the time of the arrest.

ARREST—No Authority To Arrest A Material Witness.

CIVIL PROCEDURE—Material Witness—No authority to arrest.

JUDGES—No Authority To Arrest A Material Witness.

MAGISTRATES—No Authority To Arrest A Material Witness.

POLICE OFFICERS—No Authority To Arrest A Material Witness.

WITNESSES—No Authority To Arrest—Recognizance may be required of a witness.

WITNESSES—Warrant For Arrest May Not Issue—Recognizance may be required.

September 19, 1975

THE HONORABLE J. R. ZEPKIN, Judge
District Court, Ninth Judicial District

This is in response to your recent letter, in which you asked the following questions:

1. Does the authority to arrest a person as a material witness exist in Virginia?
2. If it does, does the authority lie with a magistrate or police officer as well as a judge?
3. Again, if the answer to question 1 is in the affirmative, what is the proper charge in the warrant of arrest and the proper procedure to be followed?
4. If the answer to number 1 is in the affirmative does it make any difference whether the arrest is made at the time of the issuance of the charges against the defendant or is it necessary to wait until the matter comes before the Court?
5. Lastly, assuming the authority exists, I assume that the considerations with regard to the amount and type of bond or recognizance required of the witness would be the same as that for the release of the accused as set forth in 19.1-109.2.”

In an opinion to the Honorable Andre Evans, Commonwealth’s Attorney for the City of Virginia Beach, dated March 26, 1968, and found in the Report of the Attorney General (1967-1968) at 49, this Office determined that there is no specific statutory authority in Virginia for the issuance of a warrant for the arrest of a material witness. Neither subsequent amendments to the Virginia Code nor the recodification of Titles 18.1 and 19.1 as Titles 18.2 and 19.2 furnish a basis for changing that Opinion. Accordingly, I must give you a negative answer to your first question.

Though my response to your first inquiry moots your other questions, I would point out that § 19.1-91 (§19.2-72) of the Code of Virginia (1950), as amended, authorizes any officer who may issue process of arrest to cause summonses to be issued for witnesses in criminal cases. Section 19.1-128 (§ 19.2-135) clearly contemplates that a recognizance may be required of a witness. The conditions of such recognizance are that the witness be re-
required to appear to give evidence and be prohibited from departing the State without leave of the court or judge requiring such recognizance.

Section 19.1-109.6 (§ 19.2-127) specifies the conditions under which a judge may further limit the conditions of the release of a material witness. That section provides:

"If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and it reasonably appears that it will be impossible to secure his presence by a subpoena, a judge shall inquire into the conditions of his release pursuant to § 19.1-109.2."

There are specific statutes governing the sanctions for a failure to comply with the conditions of a recognizance. Section 19.1-137 (§ 19.2-143) specifies the procedures for determining whether a recognizance should be forfeited. Section 19.1-144 (§ 19.2-149) provides that, in the event a witness should fail to appear before a court, his surety may surrender him or a capias may issue for his arrest. Finally, a witness' failure to abide by the terms of his recognizance subjects him to contempt proceedings in accordance with the provisions of § 18.1-292 (§ 18.2-456).

ARREST—Report Of Arrest To CCRE Not Required When Offender Is Issued Summons Under § 19.2-74.


ARREST—Report To CCRE Required Where Officer Refuses To Issue Summons Under § 19.2-74 And Takes Arrestee Before Magistrate.

CENTRAL CRIMINAL RECORDS EXCHANGE—No Arrest Report Required When Offender Is Issued Summons Under § 19.2-74.

CENTRAL CRIMINAL RECORDS EXCHANGE—No Arrest Report Required Where Summons Issued Pursuant To § 19.2-73 For Accused Not Brought Before Magistrate, Who Appears For Trial After Service Under § 19.2-76.

CENTRAL CRIMINAL RECORDS EXCHANGE—Report Of Arrest Required Where Officer Refuses To Issue Summons Under § 19.2-74 And Takes Arrestee Before Magistrate.

CLERKS—Required To Report Convictions To CCRE When Offender Is Issued Summons Under § 19.2-74.

CONFLICT OF LAWS—Reconciliation Of § 19.2-73 With §§ 19.2-387 To -392.

DEFINITIONS—Arrest Defined.

MAGISTRATES—When May Issue Summons Under § 19.2-73 For Accused.

SUMMONS—Procedure For Issuing Summons And Complying With Requirement Of Central Criminal Records Exchange.

WARRANTS—Issuance Of Summonses In Lieu Of. May 27, 1976

THE HONORABLE J. R. ZEPKIN, Judge
District Court, Ninth Judicial District

This is in response to your letter in which you inquired how to reconcile
§ 19.2-73, Code of Virginia (1950), as amended, with Chapter 23 (§§ 19.2-387 to -392) of Title 19.2. Section 19.2-73 authorizes the issuance of a summons, rather than a warrant, by magistrates in certain misdemeanor cases. Chapter 23 of Title 19.2 has reference to the Central Criminal Records Exchange (CCRE) of the Department of State Police and the reporting of criminal offenses thereto. Specifically, § 19.2-390(a) requires that a report be made to CCRE by the arresting agency of any arrest for a misdemeanor under Title 54, or a Class 1 or 2 misdemeanor under Title 18.2. It is further required by § 19.2-390(b) that clerks of court make reports of final dispositions in the case of any person charged with an offense for which an arrest report is required.

You accurately noted that this Office has previously reconciled § 19.2-74 (formerly § 19.1-92.1) with Chapter 23 (formerly Chapter 1.1 of Title 19.1). See Report of the Attorney General (1973-1974) at 47. Section 19.2-74 requires the issuance of a summons in lieu of a warrant by an officer making an arrest for certain offenses. It was held in the foregoing Opinion that, in those cases in which § 19.2-74 requires the issuance of a summons, the officer should process the offender for Central Criminal Records Exchange, issue a summons, and then release him forthwith.

The 1975 Session of the General Assembly changed the procedure outlined in the foregoing Opinion for making arrest reports to CCRE when offenders are issued summonses pursuant to § 19.2-74. This change in procedure resulted from the addition of the following sentence at the end of paragraph (a) of § 19.2-390:

“For persons arrested and released on summonses in accordance with § 19.2-74, such reports shall not be required until a disposition of guilt is entered by a competent judicial authority.” (Emphasis added.)

Paragraph (b) of § 19.2-390 provides, in part, as follows, with respect to reporting of final dispositions by clerks of court:

“The clerk of each court of record and court not of record shall make a report to the Central Criminal Records Exchange of any dismissal, nolle prosequi, acquittal, or conviction of, or failure of a grand jury, to return a true bill as to, any person charged with an offense listed in subsection (a) of this section. No such report of conviction shall be made by the clerk of a court not of record unless the period allowed for appeal has elapsed and no appeal has been perfected.”

Therefore, the current procedure does not require an arrest report from the arresting agency to CCRE when an offender is issued a summons pursuant to § 19.2-74. Subsequent to trial of the offender on the summons in a district court, the clerk of such court is required to make a report to CCRE when “a disposition of guilt is entered.” See § 19.2-390(a). Such report ought not to be made unless the time for an appeal has elapsed and no appeal has been perfected. In the case of an appeal, the report should be made by the clerk of the circuit court when “a disposition of guilt is entered.”

Section 19.2-73 about which you specifically inquired provides as follows:

“In any misdemeanor case or in any class of misdemeanor cases, or in any case involving complaints made by any State or local governmental official or employee having responsibility for the enforcement of any statute, ordinance or administrative regulation, the magistrate may issue a summons instead of a warrant when specifically authorized by the court or courts having jurisdiction over the trial of the offense charged. Any person on whom such summons is served shall appear on the date set forth in same, and if such person fails to appear in
such court at such time and on such date then he shall be guilty of a Class I misdemeanor.”

A magistrate may issue a summons under § 19.2-73 for an accused who has not been brought before him or for an accused who has been arrested and brought before him. I shall address myself to the former circumstance first.

This situation would arise where a citizen appears before a magistrate and makes a complaint against another person. If the offense is one for which the magistrate has been specifically authorized by the appropriate court to issue a summons, § 19.2-73 empowers the magistrate to issue a summons in lieu of a warrant. Such summons would be personally served on the accused by an officer pursuant to § 19.2-76, and the accused would subsequently be tried thereon. Section 19.2-390(a), of course, requires law enforcement agencies to report arrests for felonies, misdemeanors under Title 54, and Class I or 2 misdemeanors under Title 18.2. An arrest requires that an accused’s freedom of movement be restricted. See Land v. Commonwealth, 211 Va. 223, 176 S.E.2d 586 (1970); McChan v. State, 238 Md. 149, 207 A.2d 632 (1965); Report of the Attorney General (1973-1974) at 18. Therefore, where an accused has merely been served with a summons without being detained, there has been no arrest, and the law enforcement agency serving the summons issued pursuant to § 19.2-73 would be required to make no arrest report to CCRE.

Under the foregoing circumstances, the clerk of the district court is, however, required by § 19.2-390(b) to make a report of the disposition of the charge to CCRE. In the event of a conviction, the district court clerk should refrain from making a report to CCRE unless no appeal has been noted and the time for appeal has elapsed. In instances of offenses tried on a summons issued pursuant to § 19.2-73 and an appeal to the circuit court, the clerk of the circuit court should report the final disposition to CCRE.

I shall now address myself to the situation where an accused is brought before a magistrate and a summons is issued under § 19.2-73. This could occur in one of those instances wherein § 19.2-74 authorizes an officer making an arrest for a misdemeanor or local ordinance to refuse to issue a summons. An arrestee may be taken before a magistrate (1) if he refuses to give a written promise to appear, (2) if he is believed by the arresting officer to be likely to disregard a summons, or (3) if he is reasonably believed by the arresting officer to be likely to cause harm to himself or another person. See § 19.2-74. I am of the opinion that, when an officer elects on one of the foregoing grounds to take an accused before a magistrate, an arrest has been made, and § 19.2-390(a) requires the officer to process the arrestee for CCRE, should the arrest be for an offense which must be reported. The arrest report would be required by § 19.2-390(a) in such case even though the magistrate issued a summons under § 19.2-73 rather than a warrant. The exception contained in the last sentence of paragraph (a) of § 19.2-390, which dispenses with arrest reports for persons arrested and issued summons, has application only to cases in which summonses are issued under § 19.2-74.

ARREST—Shoplifting-misdemeanor Suspect—Police officer has no authority to arrest without warrant for such offense not committed in his presence.

ARREST—Shoplifting-misdemeanor Suspect—Citizen merchant has no authority to arrest.

CRIMINAL PROCEDURE—Arrest—Police officer has no authority to arrest shoplifting-misdemeanor suspect without warrant for such offense not committed in his presence.
CRIMINAL PROCEDURE—Citizen’s Arrest—Citizen merchant has no authority to arrest shoplifting-misdemeanor suspect.

CRIMINAL PROCEDURE—Detention—Police officer has no authority to detain or transport shoplifting-misdemeanor suspect, pending execution of warrant, for such offense not committed in his presence.

POLICE—Arrest—No authority to arrest shoplifting-misdemeanor suspect without warrant for such offense not committed in his presence.

POLICE—Detention—No authority to detain or transport shoplifting-misdemeanor suspect, pending execution of warrant, for such offense not committed in his presence.

August 13, 1975

THE HONORABLE STANLEY C. WALKER
Member, Senate of Virginia

This is in reply to your recent inquiry concerning the authority of a police officer to arrest a shoplifting-misdemeanor suspect without a warrant for such an offense not committed in his presence. You further asked that I address the propriety of a police officer detaining or transporting the suspect against his will until a warrant can be executed and an arrest effected. Finally you requested that I consider the legality of a citizen’s arrest in the context of shoplifting.

It is well settled in Virginia that a police officer may legally arrest without a warrant for a breach of the peace or a misdemeanor committed in his presence; otherwise, in the absence of a statutory provision to the contrary, he must secure a warrant in order to arrest for misdemeanors. Montgomery Ward and Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387 (1943); Byrd v. Commonwealth, 158 Va. 897, 164 S.E. 400 (1932). A shoplifting-misdemeanor arrest, though warrantless, would be valid where an officer had probable cause to believe that such misdemeanor was committed in his presence, even though the action he observed did not in fact constitute a misdemeanor. Yeatts v. Minton, 211 Va. 402, 177 S.E.2d 646 (1970). An offense is “committed in his presence” when he has direct personal knowledge through his sight, hearing, or other senses that it is then and there being committed. Gallihar v. Commonwealth, 161 Va. 1014, 170 S.E. 734 (1933).

Virginia statutory law does provide for arrests by police officers without a warrant in certain situations for misdemeanors not committed in the presence of the officer. For example, § 19.1-100 of the Code of Virginia (1950), as amended, authorizes a police officer to arrest without a warrant at the scene of a motor vehicle accident any person whom he believes, on reasonable grounds based upon his investigation, has committed a crime. This statute further authorizes an arrest without a warrant of persons “duly charged with a crime in another jurisdiction” upon receipt of certain information through specified reliable channels. Of course, a police officer may arrest without a warrant persons he has probable cause to believe have committed a felony, regardless of whether the offense was committed in his presence, and this would include felonious shoplifting involving larceny of merchandise of $100.00 or more in value. See Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242 (1924). I can find no statute, however, authorizing a warrantless arrest for a shoplifting-misdemeanor not committed in the presence of the police officer and, thus, I conclude that a police officer has no authority to make such an arrest.

In regard to whether a police officer is authorized to detain or transport a shoplifting suspect against his will, pending execution of a warrant, I opine that he does not have this authority, unless he is acting pursuant to

Section 18.1-127 of the Code of Virginia (1950), as amended, provides that a merchant or his agent who "causes the arrest" of a shoplifting suspect will not be civilly liable for torts associated with the arrest where the merchant or his agent had probable cause to believe that the person committed willful concealment of goods or merchandise. This exemption from civil liability, which includes the torts of false arrest, false imprisonment, assault and battery, slander, malicious prosecution, and unlawful detention, extends to apprehension and detention, regardless of whether it is consummated with formal arrest by a police officer. F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 198 S.E.2d 595 (1973). In my opinion, this statute does not create and vest in the merchant or his agent any special authority for citizen's arrest or detention of shoplifters, but rather it clothes him with a very broad exemption from civil liability. Although a private citizen may lawfully arrest without a warrant for felonies, and affrays or breaches of the peace which are committed in his presence, pending arrival of a police officer, this arrest authority does not extend to misdemeanors such as shoplifting. See Report of the Attorney General (1951-1952) at 9; Lima v. Lawler, 63 F.Supp. 446 (E.D.Va. 1945). A breach of the peace signifies disorderly conduct disruptive of the public peace or decorum, while an affray is the fighting of two or more persons in a public place. Byrd v. Commonwealth, 158 Va. at 902-903; Wilkes v. Jackson, 2 Hen. & M. 355, 12 Va. 355 (1808). Of course, the usual shoplifting incident does not constitute a breach of the peace or an affray. Great Atlantic & Pacific Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970).

There was an attempt during the 1974 legislative session of the Virginia General Assembly, through introduction of House Bill 310, to amend § 19.1-100 to authorize warrantless arrests by police officers for certain misdemeanors, which included shoplifting, not committed in the presence of the officer, provided that such arrest was based upon probable cause and reasonable complaint from the person who observed the alleged offense. This proposed amendment was referred to committee, wherein it was carried over to the 1975 Session. House Bill 310 was not, however, enacted into law.

Section 19.1-92.1, Code of Virginia (1950), as amended, authorizes an arresting officer to issue a summons for an offense punishable as a misdemeanor, instead of requesting issuance of a warrant by a magistrate. This provision simplifies the arrest procedure, but it does not expand arrest authority to include offenses not committed in the presence of the officer. A proposed amendment to § 19.1-92.1, introduced as House Bill 1755 in the 1975 Session, would have permitted arrest by summons either when the offense was committed in the officer's presence or when a complaint had been made to him based on probable cause. House Bill 1755 was not reported out of the Courts of Justice Committee.

In my opinion, under current Virginia law, a warrantless arrest by a police officer cannot be effected at the scene of shoplifting-misdemeanors not committed in his presence, nor can such an arrest be effected by a citizen under any circumstances. While § 18.1-127 exempts a citizen merchant or his agent from civil liability for "arresting" a shoplifter, I can find no authority which sustains such restraint as lawful. Some of the aforesaid legal difficulty in arresting shoplifters could, however, be alleviated by the location of magistrates near primary shopping areas, thereby reducing the time required for citizens to procure arrest warrants. Furthermore, em-
ployment of special police officers by merchants would permit warrantless arrests for shoplifting committed in the presence of such officers, because they are peace officers with the arrest authority of policemen. See §§ 15.1-153 and 19.1-30 of the Code of Virginia (1950), as amended. See generally Williams v. Commonwealth, 142 Va. 667, 128 S.E. 667 (1925). These special police officers have the same authority as any other police officer to issue a summons for a misdemeanor. See § 19.1-92.1 of the Code. The orders of courts appointing special policemen may limit their authority and jurisdiction to specific premises and may restrict or prohibit the carrying of weapons by such officers. See §§ 15.1-152 and 19.1-30. In the exercise of its discretion in the making of such appointments, a court may also require appropriate training of individuals selected as special policemen.

ARREST—Warrantless Searches Of Persons Incident To Lawful Arrests.

CRIMINAL PROCEDURE—Warrantless Searches Of Persons Incident To Lawful Arrests.

SEARCH AND SEIZURE—Warrantless Searches Of Persons Incident To Lawful Arrests.

WARRANTS—Searches Without Warrants Incident To Lawful Arrests.

June 24, 1976

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

This is in response to your letter in which you seek an opinion concerning the effect of the recent amendment to § 19.2-59 of the Code of Virginia (1950), as amended. Section 19.2-59 presently provides that it shall be a misdemeanor for a police officer or other person to make a search without a search warrant. This section, however, contains a proviso that officers empowered to enforce the game laws may search without a warrant under certain conditions, and further provides that, as incident to a lawful arrest, an officer may also conduct a search without a search warrant. Chapter 293, [1976] Acts of Assembly 326, which becomes effective July 1, 1976, has removed the proviso for making a search without a search warrant as incident to a lawful arrest. Your inquiry is whether a search incident to a lawful arrest without a search warrant will be valid after July 1, 1976.

Section 19.1-88 was the forerunner of § 19.2-59. That section contained language similar to that found in § 19.2-59, except that it did not contain the proviso relating to searches incident to lawful arrests. That proviso was added when Title 19.1 was repealed and replaced by Title 19.2, effective October 1, 1975.

The Virginia Supreme Court has on several occasions interpreted the language which was found in § 19.1-88. In Carter v. Commonwealth, 209 Va. 317, 163 S.E.2d 560 (1968), the Court held that the provisions of § 19.1-88 afforded in substance only the same protection as that afforded by the Fourth Amendment, and like the Fourth Amendment proscribed only an unreasonable search without a warrant. In Carter the Virginia Supreme Court specifically held that a search incident to an arrest without a search warrant did not violate the provisions of § 19.1-88.

When the amendment to § 19.2-59 becomes effective on July 1, 1976, that section will then contain the language of former § 19.1-88. Since the language will be the same as it was when the Virginia Supreme Court rendered its decision in Carter, it is my opinion that warrantless searches of
persons incident to lawful arrests will not be proscribed by § 19.2-59. I am of the further opinion that other warrantless searches which have been found to be reasonable by both the United States Supreme Court and the Virginia Supreme Court will not be in violation of the provisions of § 19.2-59. For a listing of some of the types of searches to which I refer, see Chevrolet Truck v. Commonwealth, 208 Va. 506, 158 S.E.2d 755 (1968).

ART COMMISSION—Eligibility Of Members For Reappointment.

April 20, 1976

THE HONORABLE MAURICE B. ROWE
Secretary of Administration
Office of the Governor

This is in reply to your recent letter in which you inquire as to the eligibility of the members of the Art Commission for reappointment.

Chapter 510, [1975] Acts of Assembly 1027, amended § 9-7 of the Code of Virginia (1950), as amended, to provide that “[n]o member shall serve for more than two consecutive four-year terms, except that any member appointed to the unexpired term of another shall be eligible to serve two consecutive four-year terms in his own right.”

You inquire whether the amendment is applicable to current members of the Commission and, if so, how it affects their eligibility for reappointment.

The tenure of the individual members is as follows:


Although the limitation to two terms of service was added in 1975, I am of the opinion that it applies to individuals who served prior to the effective date of the limitation. Cf. Walker v. Massie, 202 Va. 886, 121 S.E.2d 448 (1961). In view of the foregoing, the persons referred to in examples 1 and 2 are ineligible for reappointment. I am informed that the person referred to in example 3 was appointed in November 1970 to a full four-year term, so he, too, would be ineligible for reappointment. The persons in examples 4 and 5 are in their first full term. Consequently, they may be reappointed for another consecutive four-year term.

ATTORNEYS—Compensation In Criminal Cases—Separate fee for show cause hearing on suspended sentence.

ATTORNEYS—Fees For Defense Of Indigents—Separate fee for each indictment.

CRIMINAL PROCEDURE—Fees For Court-appointed Attorneys—Separate fee for show cause hearing on suspended sentence.
REPORT OF THE ATTORNEY GENERAL

October 15, 1975

THE HONORABLE H. RATCLIFFE TURNER, Judge
Henrico County General District Court

This is in reply to your letter of September 29, 1975, wherein you referred to §§ 19.1-241.5 and 19.1-241.11 of the Code of Virginia (1950), as amended, and inquired whether the provisions therein, relating to compensation of court appointed counsel, authorized additional payment to such counsel for appearing before the Court, on an order to show cause why a suspension of sentence should not be revoked, when counsel has already been paid for his original representation of the misdemeanant in the case. You explained that your question arose in the context of a defendant originally charged with a felony but convicted in general district court of a misdemeanor.

You further inquired, if the attorney were not entitled to a separate fee, whether the Court could pay the difference between the amount previously paid and the $75.00 maximum permitted by statute, the original fee being less than such maximum.

As you know, effective October 1, 1975, §§ 19.1-241.5 and 19.1-241.11 were incorporated into one equivalent section in Title 19.2 of the Code, as § 19.2-163.

Your specific questions have not previously been considered by this Office. In a closely analogous situation, however, my predecessor opined that an attorney was entitled to a fee for representing a defendant on a motion to revoke probation, in addition to the fee he received for representing the defendant at the original trial. See Report of Attorney General (1962-1963) at 4, copy of which is enclosed. Also, this Office has ruled that a court appointed attorney is entitled to a separate fee for each indictment charged against his client in a particular case. See Report of Attorney General (1969-1970) at 17, copy of which is also enclosed. In both situations the entitlement was to compensation reasonably and fairly related to actual services performed by the attorney. No subsequent amendments to the Code warrant a different analysis in the instant case.

It is my opinion, therefore, that a court appointed attorney may be paid a separate fee, not to exceed the statutory maximum, as compensation for representation provided at a show cause hearing and for this reason your second question is rendered moot.

ATTORNEYS—Indigents—Court appointed—When person charged with a crime where statutory penalty involves confinement without regard to intention of judge as to sentence.

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

DEFINITIONS—“Loss Of Liberty” Synonymous With “Commitment To Institution In Which Juvenile’s Freedom Is Curtailed.”

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Appointment Of Counsel For Juveniles.

MINORS—Appointment Of Counsel For—Charged with crime where statutory penalty involves confinement as punishment.

THE HONORABLE ROBERT F. WARD, Judge
Juvenile and Domestic Relations District Court for Pittsylvania County

You request an official opinion relative to the appointment of counsel for juveniles, in cases pending in juvenile and domestic relations district courts.
You initially inquire whether § 19.1-241.8 requires the appointment of counsel in a criminal case if the court, before trial, determines that no confinement will be a part of the sentence. Section 19.1-241.8 must be construed with § 19.1-241.7 which provides, in pertinent part, that:

"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."

In a prior Opinion to the Honorable Donald H. Sandie, Judge of the Municipal Court of the City of Portsmouth, dated May 15, 1973, and found in the Report of the Attorney General (1972-1973) at 18, I opined that (1) the appointment of counsel, unless waived, is required in every case "where a person is charged with a crime for which the statutory penalty may constitute confinement" and (2) there is "no authority allowing a judge to determine in advance of trial that he will not sentence a defendant to confinement in jail." Thus, as previously construed, the appointment of counsel is required in every case in which the penalty prescribed by law includes confinement without regard to any intention of the judge as to sentence.

You next inquire whether such a rule would also apply in juvenile cases where the court determined that there would be no "loss of liberty" within the meaning of § 16.1-173(a). Since that section requires advice as to the right to counsel "prior to the hearing by the court of any charge against a child or minor for which such child or minor could be subjected to loss of liberty" it is my opinion that the same rule applicable to adult cases would govern. The right to counsel attaches where the charge includes a possible loss of liberty and the intent of the judge is simply not relevant to the question of counsel.

Your final question is whether the phrase "loss of liberty" in § 16.1-173(a) contemplates such dispositional alternatives as suspension of a driver's license, curfews or probation restrictions. It is my opinion that the terminology "loss of liberty" is intended to be synonymous and coincidental with the terminology of "commitment to an institution in which the juvenile's freedom is curtailed", see In re Gault, 387 U.S. 1, 41 (1967), and that such language is intended to apply only in delinquency proceedings. Thus, it is my opinion that the right to counsel, referred to in § 16.1-173(a), adheres to all proceedings wherein a child may be sentenced to serve a term in jail under § 16.1-177.1 or may be committed to the State Board of Corrections under § 16.1-178(4) of the Code regardless of actual disposition at hearing.

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BAIL—Modified By General District Court—Bond may be posted by magistrate or clerk of general district court.

BONDS—Bail Modified By General District Court—Bond may be posted by magistrate or clerk of general district court.

CLERKS—Appeal Bond In Civil Case Under § 16.1-69.42 May Not Be Posted With Clerk, Only Bail Bond Under § 19.2-120.

CLERKS—Bail Modified By General District Court—Bond may be posted by magistrate or clerk of general district court.

COURTS—Bail Modified By General District Court—Bond may be posted by magistrate or clerk of general district court.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Bail Modified By General District Court—Bond may be posted by magistrate or clerk of general district court.

DEFINITIONS—“Judicial Officer” In § 19.2-119 Includes Magistrates, Clerks Or Deputy Clerks Of Any District Court.

MAGISTRATES—Bail Modified By General District Court—Bond may be posted by magistrate or clerk of general district court.

February 27, 1976

THE HONORABLE JOHN H. THOMAS, Judge
Juvenile and Domestic Relations District Court for Chesterfield County

You have requested my opinion as follows:

“After trial of a criminal case Defendant notes an appeal and is advised by the Court the amount of bond required to perfect same. After the Clerk’s office closes for the day Defendant wants to post said appeal bond. Can a magistrate accept said bond pursuant to § 19.2-45, or any other section, or must the Clerk do so under § 16.1-69.42?”

As you have subsequently clarified, the bond you inquire about is a bail bond, not an appeal bond. The bond in question would allow a defendant to remain on bail until such time as he is tried in the circuit court.

Section 19.2-130 of the Code of Virginia (1950), as amended, provides that a person admitted to bail shall not be required to be admitted to bail in a subsequent proceeding arising out of the initial arrest unless the court having jurisdiction in such subsequent proceeding deems the initial amount of bail or security taken inadequate and, in that case, the court may increase the amount of such bail or require new and additional sureties. Section 19.2-120 provides that an accused who is held in custody pending trial for an offense shall be admitted to bail by a judicial officer except under certain circumstances. The term, “judicial officer,” as defined in § 19.2-119, includes, among others, magistrates and clerks or deputy clerks of any district court. Section 19.2-45(3) specifically authorizes a magistrate to admit to bail, or commit to jail, persons charged with an offense.

In my opinion, in cases where bail is modified pursuant to the provisions of § 19.2-130 by a general district court, a bail bond may be posted with either a magistrate or the clerk of the general district court and, although a bond may be posted with a clerk pursuant to § 19.2-120, there is no authority to do so under § 16.1-69.42 which has reference only to appeal bonds in civil cases.

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

APPROPRIATIONS—For School Purposes Appropriations Restricted To Either Lump Sum Appropriations Or One Designating Major Categories Of Expenses Prescribed By State Board Of Education.

BOARDS OF SUPERVISORS—School Appropriations—Board may not fund or alter individual line items; may increase or decrease lump sum or major categories.

SCHOOLS—Board Of Supervisors May Not Alter School Board Budget.

SCHOOLS—School Boards—Required to submit budget estimate to board of supervisors—Separate from appropriation process.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—School Boards—When must approve or request shifts in categories of school appropriations.

SCHOOLS—Teachers' Salaries—Line item of appropriation, not major category—Board of supervisors may not alter.

May 14, 1976

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

This is in reply to your recent inquiry concerning the authority of the board of supervisors to review the school board budget and reduce or delete certain line items therein.

The school board is required to submit its budget estimates to the board of supervisors by April of each year. Sections 22-120.3 and 15.1-160 of the Code of Virginia (1950), as amended. The board of supervisors then prepares its budget for the county, which budget must include at least one of the estimates submitted by the school board. See § 22-120.5 of the Code. The budget prepared by the board of supervisors, however, is for informative and planning purposes only and is separate from the appropriation process. See § 15.1-160 of the Code.

Because the budget prepared by the board of supervisors is a planning document, the board may review the various items contained therein, including the estimate submitted by the school board. This Office has consistently and uniformly ruled, however, that § 22-127 of the Code restricts "the appropriation for school purposes to either a lump sum appropriation or one designating the sums appropriated under the major categories of expenses as prescribed by the State Board of Education." See Report of the Attorney General (1971-1972) at 333. See also Reports of the Attorney General (1967-1968) at 19 and (1973-1974) at 317.

The board of supervisors may not fund individual line items, nor may it alter individual line items, either by way of an increase or a reduction. On the other hand, the board may increase or decrease the lump sum or the appropriations for the major categories. Id. It is elementary that "[t]eachers' salaries is a line item and not a major classification of expense prescribed by the State Board of Education. The Board of Supervisors may not in any way alter, amend or restrict the school board's budget proposal for teachers' salaries." See Report of the Attorney General (1971-1972) at 25.

BOARD OF SUPERVISORS—Authority—May enlarge itself by adding additional supervisor to each district without changing boundaries.

ELECTIONS—Reapportionment—"Interim" or in year elections for supervisors would normally be scheduled.

REDISTRICTING—Board Of Supervisors Only Required To Redistrict In 1971 And Every Ten Years Thereafter—Other redistricting permitted.

VOTING RIGHTS ACT—Board Of Supervisors May Enlarge Itself By Adding Additional Supervisor To Each District Without Changing Boundaries—Must be approved by U. S. Justice Department.

January 22, 1976

THE HONORABLE ROBERT C. OLIVER, JR.
Commonwealth's Attorney for Northampton County

Your recent request for an opinion, raises three questions:
(1) Is the Northampton County Board of Supervisors authorized to enlarge itself from three to six members without any alteration in the district boundaries?

(2) If the Board of Supervisors determines to enlarge itself by altering the boundaries and increasing the number of election districts, what effect would such reapportionment have upon the members of the Board then in office?

(3) In the event that additional positions were created on the Board of Supervisors, it appears that upon their creation they would constitute vacancies which would thereupon be filled by appointment until the happening of a special election. May the Board of Supervisors avoid the necessity of appointments by postponing the effectiveness of any proposed changes until the happening of either a special election or the next regularly scheduled general election for new supervisors?

I will answer your questions seriatim:

(1) Section 15.1-37.4, Code of Virginia (1950), as amended, provides explicitly that “[n]othing in this section shall preclude the apportionment of more than one member of the governing body of any county, city or town to a single district or ward.” This section permits the Board to enlarge itself by adding an additional supervisor to each district without changing the boundaries.

Under Section 111 of the Virginia Constitution (1902), magisterial districts were expressly limited to one supervisor. Article VII, Section 5, of the 1971 Constitution removed this numerical limitation. Section 24.1-88(a) now permits “one or more supervisors” per magisterial district. Such multi-member apportionment is of course subject to the equal protection clause of the United States Constitution. Avens v. Wright, 320 F.Supp. 677 (W.D. Va. 1970). Accordingly, I am of the opinion that the Board may enlarge itself by adding an additional member to each district without changing the district boundaries. Such a change would of course have to be approved by the United States Justice Department under the Voting Rights Act. The regulations give the Justice Department a minimum sixty-day period within which to approve or disapprove such proposals. A copy of the applicable regulations is enclosed.

(2) A Board of Supervisors is only required to redistrict in 1971 and every ten years thereafter. See Article VII, Section 5, Constitution of Virginia (1971). Redistrictings other than those required by Article VII, Section 5, are permitted however. See Article VII, Section 5; §§ 15.1-37.5, 15.1-571.1. When a Board of Supervisors chooses to redistrict its county in an interim period, it can choose to make the redistricting ordinance effective in a year when elections for supervisors would normally be scheduled or in a year when no such elections are scheduled. In the event that the Board chooses the former course, there is no effect on the incumbent supervisors because they must stand for reelection in any event; they merely stand in any new district of their residence. See my Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated December 4, 1974, copy of which is enclosed. If, on the other hand, the Board of Supervisors chooses to make its redistricting effective in a non-election year, the incumbent supervisors must vacate their office as soon as possible after the effective date of redistricting with the least possible disruption to the continuity of government. This would require that a special election for supervisors from the new districts be held at the next general election in November following effective reapportionment. The persons elected at such election would qualify and hold office until after the next regular election at which supervisors are elected had been held.

(3) There is no statutory requirement that interim redistricting be ac-
complished on a given date. Accordingly, the answer to your third question is in the affirmative.

BOARDS OF SUPERVISORS—Authority—May not provide architectural and landscape services to property owners; expend public funds to facilitate pedestrian circulation systems on private property; provide advice to promote use of private business; clean parking lots on private property.

COUNTIES—Authority—Limited to powers expressly granted or necessarily implied.

COUNTIES, CITIES AND TOWNS—Advertising Campaign—Permissible to use public funds to promote resources and advantages of county—Prohibited to foster and encourage construction and operation of private businesses.

COUNTIES, CITIES AND TOWNS—Constitution Prohibits Expenditure of Public Funds For Private Purposes.

CONSTITUTION—Prohibits Expenditure of Public Funds For Private Purposes.

January 22, 1976

THE HONORABLE JERRY K. EMRICH
County Attorney for Arlington County

I am responding to your inquiries whether the County Board of Arlington County is authorized by §§ 15.1-10 and 15.1-10.1, Code of Virginia (1950), as amended, to do any or all of the following:

1. to provide architectural and landscape services to assist property owners in making their property more attractive;
2. to expend public funds on landscaping, screening, lighting and physical improvements to facilitate pedestrian circulation systems on private property;
3. to provide expert business advice to assist property owners in the best way to promote the use of their businesses;
4. to clean parking lots on privately-owned property; and
5. to publicize within the county the various types of businesses which are available and the type of merchandise and services which they provide.

I understand further that the recipients of county funds spent in the above fashion would be required to enter into covenants in which they agree to continue using their property for retail purposes.

I will answer your questions seriatim:

1. - (4) Section 15.1-10 of the Code provides:
“Any county, city or town may, in its discretion, expend not exceeding two per centum of the locally derived revenues of the county, city or town for the purpose of promoting the resources and advantages of the county, city or town. Such purposes shall include, without limiting the generality thereof, watershed projects and expenditures in connection therewith for which the county, city or town may make expenditures without regard to the limitation hereinabove provided.”
(Emphasis added.)

Section 15.1-10.1 provides:
“The board of supervisors of any county may appropriate out of the
general levy, except the school fund, in their discretion, a sum not exceeding one per centum of their annual revenues, from all sources, in advertising and giving publicity to the resources and advantages of their county, and in securing and promoting industrial development of such county. For the purposes set out in this section the county governing body may make such appropriation, not exceeding ten thousand dollars per year and notwithstanding the one per centum limitation hereinabove imposed, to chambers of commerce or similar organizations within such county, or to employ a suitable person to secure and promote industrial development of the county.” (Emphasis added.)

While these sections have not been construed by the Supreme Court of Virginia, similar provisions have been interpreted to assist a municipality in:

“... advertising and otherwise calling attention to its natural advantages, its resources, its enterprises, and its adaptability for industrial sites, with the object of increasing its trade and commerce and of encouraging people to settle in that particular community.” Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728, 730 (1931).

Of course, the county’s authority under §§ 15.1-10 and 15.10.1 is limited to those powers expressly granted, and those necessarily or fairly implied therein. City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684, 101 S.E.2d 641 (1958). On their face, the statutes authorize the expenditure of funds for advertising and publicity campaigns only. The proposed actions outlined in paragraphs 1-4 of your letter are not expressly allowed by the statutes, nor am I of the opinion that they can be said to be necessarily or fairly implied in the powers granted by the statutes. Therefore, the county is not authorized to take such actions. Additionally, the proposed actions would contravene Article X, Section 10, of the Constitution of Virginia (1971) which expressly prohibits the expenditure of public funds for private purposes. See Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968); Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956); Report of the Attorney General (1973-1974) at 93.

If the purpose of the advertising campaign outlined in question (5) is to promote the resources and advantages of the county or to secure and promote industrial development in the county, it would be permissible under §§ 15.1-10 and 15.1-10.1. On the other hand, if the purpose of the publicity activities is “to foster and encourage construction and operation” of the private businesses, Almond v. Day, supra at 793, the activities would be prohibited under Article X, Section 10, of the Constitution.

BOARD OF SUPERVISORS—Authority—May reenact ordinance—Reenactment will speak from time of original ordinance.

ORDINANCES—Adoption Of Is A Legislative Act—May be amended or reenacted.

ORDINANCES—Reenactment Of Zoning Ordinances Permitted By § 15.1-493.

STATUTES—Later Act Manifests Clear Intent Not To Repeal Earlier Act; Later Act Is Continuation Of, Not Substitute For, First Act And Speaks From Time Of Original Enactment.

ZONING—Board Of Supervisors May Reconfirm And Reenact Ordinance—Reenactment will speak from time of original ordinance.
March 24, 1976

THE HONORABLE STEPHEN C. HARRIS
Commonwealth's Attorney for Louisa County

I am responding to your recent inquiry concerning the power of a board of supervisors to reenact an ordinance already adopted. I understand the facts to be that a rezoning ordinance was adopted on September 3, 1975, after the board of supervisors' tie vote was broken by the tie breaker. Subsequent litigation developed over the tie breaker's role in the vote, and the board now desires to reconfirm its 1975 action. Your questions are:

"1. May the Board of Supervisors of Louisa County, after hearings pursuant to § 15.1-431 of the Code, reconfirm and reenact the September 3, 1975, rezoning pursuant to § 15.1-493?

"2. If so, would the rezoning be enacted pursuant to the vote taken at the time of reconsideration and reenactment?"

Adoption of ordinances is a legislative act. Martinsville v. County of Henry, 204 Va. 757, 133 S.E.2d 287 (1963). The board's legislative power is not limited, or exhausted, by one exercise; an ordinance or statute once adopted may be amended or reenacted. Section 15.1-493, Code of Virginia (1950), as amended, specifically permits reenactment of zoning ordinances. Since the proposed Louisa County ordinance manifests a clear intent to reenact and reconfirm the September 3, 1975, ordinance, I conclude that it merely continues that ordinance.

It is a rule of common law that where a later legislative act covers the whole subject of an earlier one, and manifests a clear intent not to repeal the earlier act, the later act is construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first legislative act. Posadas v. National City Bank of New York, 296 U.S. 497 (1936). Accordingly, I am of the opinion that the Board of Supervisors of Louisa County may reenact its September 3, 1975, ordinance pursuant to § 15.1-493, and that its reenactment will speak from the time of the original ordinance.

BOARDS OF SUPERVISORS—Member—Domicile not affected by temporary removal from district pending construction of new home.

DEFINITIONS—Domicile—Not affected by board of supervisors member's temporary removal from district pending construction of new home.

ELECTIONS—Domicile—Not affected by temporary removal from district pending construction of new home.

PUBLIC OFFICERS—Domicile—Not affected by temporary removal from district pending construction of new home.

RESIDENCE—Domicile—Not affected by board of supervisors member's temporary removal from district pending construction of new home.

January 6, 1976

THE HONORABLE LUTHER E. MILLER, Clerk
Circuit Court of Page County

I am writing in response to your inquiry whether a supervisor who temporarily leaves the district he was elected to represent, pending construction of a new house in that district, must vacate his position on the board of supervisors by virtue of his temporary removal from the district.
Section 15.1-52, Code of Virginia (1950), as amended, provides as follows:

"If any officer, required by the preceding section (§ 15.1-51) to be a resident at the time of his election or appointment of the county, city, district or town for which he is elected or appointed, or of the city wherein the courthouse of such county is or in a city wholly within the boundaries of such county, remove therefrom, except from the county to such city or from such city to the county, or in case a nonresident who has been elected Commonwealth's attorney remove from the county or county seat of the county in which he resided when elected, except to the county in which he is elected, his office shall be deemed vacant."

"Residence" for purposes of both voting and holding office has been equated by the Supreme Court of Virginia with domicile. See Kegley v. Johnson, 207 Va. 54, 57, 147 S.E.2d 735 (1966). Domicile requires both the physical act of residence in a geographical location and the intention of remaining in that place. See Dotson v. Commonwealth, 192 Va. 565, 571, 66 S.E.2d 490 (1951).

The Supreme Court in Dotson endorsed the following test for determining whether the residence of a public officer has changed sufficiently to disqualify him from holding office:

"...If a person leave his original residence with the intention of not returning, and adopt another, for a time however brief, with the intent to remain there, his first residence is lost. But if he left his original residence with the intention of returning, such original residence continues in law, notwithstanding the temporary absence of himself and family."

Domicile once acquired continues until a change is proved and the burden of proving the change is on the party alleging it. See Williams v. Commonwealth, 116 Va. 272, 278, 86 S.E. 61 (1914). In Williams, the Supreme Court held that the absence of a city council member from the district he represented for a long, but temporary, period did not operate to remove him from office because the evidence established his intent to return to the district as soon as possible.

It appears from your letter that the supervisor in question will only be temporarily out of the district he was elected to represent while his new home is being constructed in the district and that he fully intends to return to his new residence upon its completion. Under such circumstances, I am of the opinion that his domicile, and consequently his residence, has not changed. I conclude, therefore, that his tenure in office will not be affected by the provisions § 15.1-52 of the Code.

BOARD OF SUPERVISORS—Tie Breaker—Procedure for electing instead of judge of circuit court appointing.

ELECTIONS—Tie Breaker Of Board Of Supervisors—Election conducted at general election and person should qualify and serve identical term as the supervisors.

VOTING RIGHTS ACT—Applicability Of Statute To Louisa County Must Be Approved By Department Of Justice.

August 13, 1975

THE HONORABLE JOHN B. GILMER
Commonwealth's Attorney for Louisa County

Your letter of July 25, 1975, reads, in pertinent part, as follows:
“The tie breaker of Louisa County has resigned and, in response to a request by the Board of Supervisors, the Judge of the Circuit Court is going to appoint a tie breaker for the period ending December 31, 1975. The Board of Supervisors has also passed a resolution that pursuant to § 15.1-535 a tie breaker shall be designated by election by the voters of Louisa County. The question arises as to the mechanics of electing the tie breaker and I have been requested to advise how this can be done.”

Section 15.1-535 of the Code of Virginia (1950), as amended, provides that:

“The governing body of each county may designate a tie breaker, whose duty it shall be to cast the deciding vote in case of tie, as set forth in § 15.1-540. The designation of the tie breaker shall be, in the discretion of the governing body, by: (1) election by the voters of the county from the county at large; or (2) appointment by the circuit court, or judge thereof in vacation, which shall be by order entered in the common-law order book. In the event the governing body fails to decide on the method of designating a tie breaker or whether to have a tie breaker, a tie breaker shall be designated by the court as set forth above. Every tie breaker so appointed shall serve for a period of four years from the date of his appointment or election and every tie breaker so elected shall serve the same term as a member of the governing body. No person shall be appointed or elected or serve as tie breaker who is not a resident of the county; who is not qualified to hold office as supervisor or who is an employee or officer of the county. Tie breakers heretofore appointed or elected shall continue in office until the expiration of the respective terms. First appointments or elections pursuant to the provisions of this section, as amended, shall be made to fill vacancies existing on or occurring subsequent to the date this amended section shall take effect [July one, nineteen hundred seventy-four]. Every appointment made pursuant to the provision of this section to fill a vacancy, whether occasioned by the expiration of a term or otherwise, shall be for a period of four years and in the case of election in the same manner as vacancies in the governing body.”

The resignation of the tie breaker of Louisa County was submitted on July 9, to be effective July 16, 1975. I am of the opinion that the adoption of the resolution by the Board of Supervisors to elect the tie breaker has limited the authority of the judge to appoint a tie breaker. The appointment can now be made either by the governing body or by the court. Section 24.1-76.1. If the court makes the appointment, due to the inability of the Board to agree on a new tie breaker, the provisions of Article VI, Section 12, of the Constitution of Virginia (1971) would be applicable since, upon the adoption of a resolution by the Board to have the tie breaker elected, the tie breaker would be a “local governmental official elected by the voters.” Because the vacancy in question occurred within 120 days of the November 4, 1975, general election, the appointment by the court would, in the words of the statute (§ 24.1-76), normally be until “the second ensuing general election.” In this instance, however, § 15.1-535 dictates that “every tie breaker so elected shall serve the same term as a member of the governing body.”

Members of the governing body of counties will be elected in November, 1975, for a term of four years commencing on the first day of January, 1976. See § 24.1-88. In other words, the foregoing provision of § 24.1-76 which implements Article VI, Section 12, is applicable only if there is a second ensuing general election between the time a vacancy occurs and the
end of a term. In this instance, due to action by the Board of Supervisors, a tie breaker is to be elected for the same regular four-year term as members of the Board. Consequently, an election for tie breaker should be conducted at the November 4, 1975, general election and the person elected should qualify and serve the identical term as the supervisors, commencing January 1, 1976. The appointment by the court of a tie breaker until December 31, 1975, is authorized by § 24.1-76. In my opinion the court also has authority pursuant to the provisions of §§ 24.1-76, 24.1-163 and 15.1-535 to issue a writ of election for a special election which would be held on November 4, 1975. See § 24.1-1(5) (c). Under the facts presented, any candidate for the tie breaker position would have to qualify at least 60 days before the election. See § 24.1-166.

I would point out that, though Chapter 550, [1974] Acts of Assembly 1043 (§ 15.1-535), was approved by the Department of Justice under the Voting Rights Act, the applicability of such statute to the County of Louisa would also have to be approved. See 42 U.S.C. § 1973(c) (1974)

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BOARDS OF SUPERVISORS—Tie Breaker—When board may abolish the office.

BOARDS OF SUPERVISORS—Tie Breaker—When court is permitted to appoint.

COUNTIES, CITIES AND TOWNS—Tie Breaker—Section 15.1-535 permits governing body to eliminate office of tie breaker.

JUDGES—Vacation Of Office As Judge By Appointment Or Election As Supervisor Or Tie Breaker.

PUBLIC OFFICERS—Commissioner In Chancery For Circuit Court; Substitute District Court Judge—Not officers of county under § 15.1-535.

VOTING RIGHTS ACT—Applicability Of Statute To County Must Be Approved By Department Of Justice.

May 20, 1976

THE HONORABLE WILLIAM J. MCGHEE
County Attorney for Montgomery County

I am responding to your request concerning the December 29, 1975, appointment of a tie breaker for the Board of Supervisors of Montgomery County by the Circuit Court, at the request of the outgoing Board of Supervisors. The newly elected Board of Supervisors, which took office on January 1, 1976, wishes to abolish the office of tie breaker. Your questions are as follows:

1. May the present Board of Supervisors abolish the office of tie breaker pursuant to § 15.1-535 of the Code of Virginia (1950), as amended?

2. What determines the time element with respect to which a governing body has failed to decide on the method of designating a tie breaker or whether to have a tie breaker, so as to permit the Court to make the appointment for them?

3. Is a commissioner in chancery for the Circuit Court of Montgomery County or a substitute district court judge of the County deemed to be an employee or an officer of the County under § 15.1-535 of the Code?

I will answer your questions seriatim:

1. Section 15.1-135, Code of Virginia (1950), as amended, governs the
appointment and term of tie breakers and requires each county to determine "whether to have a tie breaker." That section, therefore, permits the governing body to determine not to have a tie breaker, in which instance the office of tie breaker is abolished. See Opinion to the Honorable A. Plunkett Beirne, Commonwealth's Attorney for Orange County, dated April 8, 1975, and found in Report of the Attorney General (1974-1975) at 61. It must be noted that, because the statute establishes a fixed term of four years, it cannot be read to permit the board of supervisors an option to abolish the office to end the term of an already incumbent tie breaker before those four years have been served.

In the event the board of supervisors fails to exercise its option of dispensing with the office of tie breaker, the statute requires that a tie breaker "shall be designated by the court." This language establishes the office of tie breaker in every county in the Commonwealth not otherwise provided for by law, unless the board of supervisors chooses to dispense with the office. Since the incumbent tie breaker in Montgomery County was appointed by the court, at the request of the board of supervisors, I am of the opinion that his appointment is legal in this regard.

2. If the governing body does not decide to abolish the office of tie breaker, § 15.1-535 provides that the governing body may designate which of the methods set forth therein shall be utilized for the selection of a tie breaker. Section 15.1-535 states that “[i]n the event the governing body fails to decide on the method of designating a tie breaker or whether to have a tie breaker, a tie breaker shall be designated by the court as set forth above.” The section does not set forth a particular time period in which the governing body must act before the authority to appoint a tie breaker vests in the circuit court. Because of this absence of a specified time period, I am of the opinion that § 15.1-535 must be construed to require the governing body to make its decision concerning the method of designating the tie breaker or to abolish the office at or before the expiration of the term of the incumbent tie breaker. Once the term of the incumbent expires and the office becomes vacant, and the governing body has not taken either of the actions authorized by § 15.1-535, the circuit court shall appoint the tie breaker.

3. The General Assembly in 1972 consolidated all courts in the Commonwealth into a unified court system administered by the Supreme Court. District courts are part of this State system (§ 16.1-69.30), as are circuit courts (§ 17-116.3). The judges of these courts are appointed by the General Assembly. Commissioners in chancery are in turn appointed by the circuit court judges, see § 8-248, as are substitute district court judges. See § 16.1-69.9:1. Both full-time and substitute district court judges are "subject to the administrative supervision of the Chief Justice of the Supreme Court." See § 16.1-69.30. Accordingly, I am of the opinion that neither the commissioner in chancery nor the substitute district court judge can be deemed a county officer for purposes of § 15.1-535.

It should be noted, however, that § 15.1-535 provides that a person shall not serve as tie breaker who is not qualified to hold office as a county supervisor. Section 15.1-50 provides that a supervisor may not hold any other appointive or elective office, except that of commissioner in chancery and certain others not relevant to your inquiry. The statute provides further that:

“If any person shall be elected or appointed to two or more offices except as herein provided, his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, and if any person while holding any of such offices shall be appointed or elected to any other office, his qualification in such office shall thereby vacate any of the above offices he then holds, except as provided above.”
It is clear from this language that, were a substitute district court judge to be appointed or elected to the office of supervisor, his office as a judge would be automatically vacated by virtue of § 15.1-50. I am of the opinion that the same result would obtain if the substitute district court judge were to be appointed tie breaker.

I would point out that, though Chapter 550, [1974] Acts of Assembly 1043 (§ 15.1-535) was approved by the Department of Justice under the Voting Rights Act, the applicability of such statute to the County of Montgomery would also have to be approved. See 42 U.S.C. 1973(c) (1974).

BOARDS OF SUPERVISORS—Tie Breaker Cast Deciding Vote—Does not modify board's legislative power to reconsider conditional use permit for quarrying operations.

BOARDS OF SUPERVISORS—Decision Of Board With Assistance Of Tie Breaker Is Decision Of Board In Every Respect.

ORDINANCES—Time Limiting Reconsideration Of Conditional Use Permit Request.

ZONING—Time Limiting Reconsideration Of Conditional Use Permit Request.

November 5, 1975

THE HONORABLE ERIC LEE SISLER
Commonwealth's Attorney for Rockbridge County

This is in response to your inquiry whether it is permissible for the Rockbridge County Board of Supervisors to reconsider a landowner's request for a conditional use permit for quarrying operations after the original request has been denied with the deciding vote cast by a duly constituted tie breaker.

The fact that the deciding vote of the Board of Supervisors was cast by a duly constituted tie breaker does not modify the Board's legislative power to reconsider the request. It is expressly provided in § 15.1-540 of the Code of Virginia (1950), as amended, that:

"... When he [the tie breaker] casts his vote the clerk shall record his vote and the tie shall be broken, and the question shall be decided as he casts his vote. . . . After a tie has happened, the tie breaker shall be considered a member of the board for the purpose of counting a quorum for the sole purpose of breaking the tie."

The effect of this language is to guarantee that any decision reached by a board through the assistance of the tie breaker will be considered the decision of the board in every respect.

Once the board has denied the request, it may, in the absence of a statute or procedural rule adopted by the board to the contrary, reconsider the request and approve it, provided that no rights have vested by reason of its prior denial. See 56 Am.Jur.2d Municipal Corporations § 352 (1971). In this case, no rights would appear to have vested by virtue of the board's prior denial.

Section 15.1-491(g) of the Code states that local zoning ordinances may:

"... provide for the consideration of proposed amendments only at specified intervals of time, and may further provide that substantially the same petition will not be reconsidered within a specified period, not exceeding one year. . . ."
If the Rockbridge County zoning ordinance contains a provision limiting reconsideration of a conditional use permit request until some specific period of time has passed, that provision will govern. If there is no such provision, however, I am of the opinion that the Board may reconsider the request.

BONDS—Counties, Cities And Towns—May utilize blanket surety bond for constitutional officers, their deputies and employees.

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

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

COUNTIES, CITIES AND TOWNS—May Utilize Blanket Surety Bond For Constitutional Officers, Their Deputies And Employees.

PUBLIC OFFICERS—Counties, Cities And Towns—May utilize blanket surety bond.

TREASURERS—Bonds Of Treasurer And Deputies—Selection of sureties—Treasurer has right to select—May agree to be covered under blanket bond plan proposed by County Manager.

July 24, 1975

THE HONORABLE W. CLAUDE DODSON, CLERK
Circuit Court of Bath County

This is in reply to your recent letter in which you request my opinion whether, under § 15.1-41, Code of Virginia (1950), as amended, the county may execute a blanket bond to cover all constitutional officers and county employees; in the event this cannot be done, you ask whether the county may execute a separate blanket bond for each constitutional officer and his employees.

Section 15.1-41 provides:

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

This section requires the various officers therein enumerated at the time they qualify to "give such bond as is required by § 49-12." Section 49-12 says each bond "shall be made payable to the Commonwealth of Virginia" and "shall be with condition for the faithful discharge by him of the duties of his office, post or trust." Section 15.1-41 further provides that "[s]ubject to the provisions of §§ 15.1-43 and 15.1-45, the board of super-
visors of any county or the council of any city or town in this State may pay the costs of the premium of the surety on such bond when the surety is a surety or guaranty company." Under § 15.1-43 of the Code, the premium on the treasurer's bond in counties is paid one-half by the State and the remaining one-half by the county of which the principal is a treasurer. As to a treasurer's bond required by a city's charter or ordinance, the premium thereon is paid by the municipality. See § 15.1-45. In § 15.1-44, applying to city treasurers, an additional bond is required the premium on which is paid by the State. Section 15.1-44.2, enacted by Chapter 327, [1975] Acts of Assembly 544, authorizes the Comptroller to obtain a scheduled position blanket bond for treasurers in lieu of the bond required by § 15.1-43.

A related question to those which you pose was considered in an Opinion to the Honorable Colin C. MacPherson, Treasurer of Arlington County, dated June 17, 1959, and found in Report of the Attorney General (1958-1959) at 303. In that Opinion it was held that the county could obtain a blanket bond to cover all employees of constitutional officers and other county employees where the county is the named insured under the coverage and the constitutional officers are named individually as insureds. I concur in that Opinion and am of the further opinion that a blanket bond may be obtained to cover the constitutional officers as well as their deputies and employees and other county employees. It should be noted that a constitutional officer, required by § 49-12 to present the bond in which he is individually named to the clerk, must do so at the time of taking his oath of office. See Opinion to the Honorable William F. Watkins, Jr., Commonwealth's Attorney for Prince Edward County, dated January 19, 1972, and found in Report of the Attorney General (1971-1972) at 32. Accordingly, it will be necessary to utilize a duplicate original bond for this purpose.

BONDS—Surety On Notary's Bond No Longer Required To Appear Person-ally Before Judge Or Clerk To Give Bond—Signature as binding as if he had so personally appeared.

NOTARIES PUBLIC—Surety On Notary's Bond No Longer Required To Appear Personally Before Judge Or Clerk To Give Bond—Signature as binding as if he had so personally appeared.

September 2, 1975

THE HONORABLE GEORGE E. ALLEN, JR.
Member, House of Delegates

This is in reply to your recent letter concerning the proper procedure for complying with the recently enacted amendment to § 47-1 of the Code of Virginia (1950), as amended. At its 1975 Session, the General Assembly amended § 47-1 to provide that a surety on a notary's bond "shall not be required to appear before the judge or the clerk, and his signature on the bond shall be as binding as if he had so personally appeared." Prior to the amendment, which became effective on June 1, 1975, such sureties were required to give the bond before the clerk or judge of the circuit court. I am advised that the practice which existed in the circuit courts prior to June 1, 1975, was for the surety to appear personally and give his bond in a form approved by the court. By virtue of the 1975 amendment to § 47-1, however, the surety is no longer required to appear personally before the judge or the clerk to give the bond. I am of the opinion, however, that the surety must still give the bond in a form approved by the circuit court.
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CANDIDATES—County Without Authority To Enact Personnel Rule Requiring County Official Or Employee Who Becomes Candidate For Public Office To Resign From Office Or Employment.

CONSTITUTION—Localities Not Empowered To Enact Blanket Policy Prohibiting Local Officers And Employees From Being Candidates For Local Elective Office.

COUNTIES, CITIES AND TOWNS—Authority—Fairfax County without authority to enact personnel rule requiring county official or employee who becomes candidate for public office to resign from office or employment.

COUNTIES, CITIES AND TOWNS—Political Off-duty Activity—If it renders person unable to perform public duties.

DILLON'S RULE—Limits Authority Of Local Governments To Powers And Functions Statutorily Established.

GENERAL ASSEMBLY—Localities Not Empowered To Enact Blanket Policy Prohibiting Local Officers And Employees From Being Candidates For Local Elective Office.

PERSONNEL ACT—Localities Not Empowered To Enact Blanket Policy Prohibiting Local Officers And Employees From Being Candidates For Local Elective Office.

PUBLIC OFFICERS—General Assembly Has Power To Prevent Conflict Of Interests, Dual Officeholding Or Incompatible Activities.

November 19, 1975

THE HONORABLE IRA M. LECHNER
Member, House of Delegates

This is in reply to your inquiry whether the County of Fairfax may adopt personnel rules requiring any county official or employee who becomes a candidate for any local public office to resign from his office or employment.

Section 5 of Article II of the Virginia Constitution provides, in pertinent part, that:

"The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

* * *

"(c) nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials, of the Commonwealth or of any political subdivision."

While the General Assembly's power to prevent local officers and employees from being candidates for local elective office is retained by virtue of the above-quoted constitutional provision, the General Assembly has enacted no such law. Likewise, the legislature has not enacted any statute authorizing counties, cities and towns to enact a blanket policy prohibiting such conduct. Because counties, cities and towns may exercise only those powers granted to them by the Constitution of Virginia or the General Assembly,
and because neither the Constitution nor the legislature has empowered localities to enact a blanket policy prohibiting local officers and employees from being candidates for local elective office, I am of the opinion that the County of Fairfax is without authority to enact the personnel rule in question. The county may determine, however, that specific off-duty activity, including political activity, on the part of a certain individual would render that person unable to perform his public duties. In this event, the county would have the authority to require that individual to either cease such activity or terminate his public employment.

CENTRAL CRIMINAL RECORDS EXCHANGE—Mandatory That Arrestee’s Social Security Number Be Included In Arrest Report.

ARREST—Mandatory That Arrestee Provide Police With His Social Security Number.

CRIMINAL PROCEDURE—Social Security Number Of Arrestee Is Part Of Information Which Must Be Forwarded To Central Criminal Records Exchange.

LAW ENFORCEMENT OFFICERS—Social Security Number—Mandatory that arrestee provide police with.

POLICE—Social Security Number Must Be Provided By Arrestee.

PRIVACY ACT—No Application To Arrestee Giving His Social Security Number To Law Enforcement Agency.

RECORDS—Social Security Number Included In Information Required By Central Criminal Records Exchange—Used solely as personal identifier.

REPORTS—Mandatory That Reports To Central Criminal Records Exchange Be Made On Forms Provided By Exchange And Include All Information Required—Social security number.

SHERIFFS—Social Security Number—Mandatory that arrestee provide.

SOCIAL SECURITY—Number Must Be Provided To Police By Arrestee.

STATE POLICE—Social Security Number—Mandatory that arrestee provide police with.

March 24, 1976

THE HONORABLE AUBREY M. DAVIS, JR.
Commonwealth’s Attorney for the City of Richmond

This is in reply to your recent letter in which you asked whether it is mandatory or voluntary that an arrestee provide police with his social security number. As you indicated, this question arises because of the provisions of the Privacy Act of 1974, § 7. See 5 U.S.C. § 552a note (1974). Pertinent provisions of such Act deal with federal, State, or local government agencies’ requesting individuals to disclose their social security number. Section 7 provides as follows:

“(a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.

“(2) the provisions of paragraph (1) of this subsection shall not apply with respect to—
“(A) any disclosure which is required by Federal statute, or
“(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.
“(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.”

Paragraph (a), of § 7, has reference to denying a person a “right, benefit, or privilege” because of such person’s refusal to disclose his social security number. It cannot be said that a right, benefit, or privilege is bestowed upon an arrestee when a report of his arrest is forwarded to Central Criminal Records Exchange of the Department of State Police. Furthermore, such report will be forwarded to the Exchange even if the arrestee refuses to give his social security number. I am of the opinion, therefore, that paragraph (a) has no application to your inquiry.

I find no exceptions to paragraph (b), of § 7, which requires that a person requested to give his social security number by any federal, State, or local government agency be informed whether such disclosure is mandatory or voluntary. Whether disclosure of the social security number by an arrestee is mandatory or voluntary must be considered in the context of Virginia law. The forms provided to local law enforcement agencies by the Central Criminal Records Exchange of the Department of State Police include a space for the social security number of an arrestee.

Section 19.2-390(a), Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

“Every State official or agency having the power to arrest, the sheriffs of counties, the police officials of cities and towns, and any other local law-enforcement officer or conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange on forms provided by it, of any arrest on a charge of treason or of any felony or of any offense punishable as a misdemeanor under Title 54, or Class 1 and 2 misdemeanors under Title 18.2. Such reports shall contain such information as shall be required by the Exchange....” (Emphasis added.)

Section 19.2-388 provides, in relevant portion, as follows, with respect to the forms utilized for reporting arrests to the Exchange:

“The Exchange is authorized to prepare and furnish to all State and local law-enforcement officials and agencies, and to clerks of circuit courts and courts not of record, forms which shall be used for the making of such reports.” (Emphasis added.)

Reading §§ 19.2-388 and 19.2-390 together, it is mandatory that reports to the Exchange be made on forms provided by the Exchange and that such reports must include all information required by it. The General Assembly has authorized the Exchange to determine what information shall be required, and the Exchange has indicated through its form that the social security number of an arrestee is necessary. Thus, I am of the opinion that it is mandatory that an arrestee reveal his social security number to the law enforcement agency preparing the necessary paperwork for an offense required to be reported to the Exchange.

In summary, when a person is arrested for an offense which must be
reported to the Exchange, such person should be informed that it is mandatory that he reveal his social security number for purposes of completing the form required by the Exchange. The arrestee should further be advised that such disclosure is required by §§ 19.2-388 and 19.2-390. The social security number is used by the Central Criminal Records Exchange solely as a personal identifier. This information should also be given to an arrestee.

CENTRAL CRIMINAL RECORDS EXCHANGE—Reportable Offenses Under Title 18.2.

ARREST—Offenses Reportable To Central Criminal Records Exchange.

CONFLICT OF LAWS—Conflict Between Acts Passed At Same Session Of General Assembly.

CRIMINAL PROCEDURE—Offenses Reportable To Central Criminal Records Exchange Under Title 18.2.

MOTOR VEHICLES—Drunk Driving—Reportable to Central Criminal Records Exchange under Title 18.2.

August 21, 1975

THE HONORABLE HAROLD W. BURGESS
Superintendent, Department of State Police

This is in response to your inquiry with respect to the possibility of a conflict between Chapter 495, [1975] Acts of Assembly 846, which repeals Title 19.1 and substitutes therefor Title 19.2, and Chapter 584, [1975] Acts of Assembly 1222, which amends § 19.1-19.3, Code of Virginia (1950), as amended, effective October 1, 1975. Specifically, you inquired whether the offenses of driving under the influence, drunkenness, and disorderly conduct must be reported to the Central Criminal Records Exchange of the Department of State Police on and after October 1, 1975.

Chapter 495 provides, in pertinent part, as follows in § 19.2-390(a):

"Every State official or agency having the power to arrest, the sheriffs of counties, the police officials of cities and towns, and any other local law-enforcement officer or conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange, on forms provided by it, of any arrest on a charge of treason or of any felony or of any offense punishable as a misdemeanor under Title 54, under Title 18.2 except a violation of Chapter 7, Article 2 (§ 18.2-266 et seq.) of this latter title and except drunkenness and disorderly conduct." (Emphasis added.)

Chapter 584 amended § 19.1-19.3, effective October 1, 1975, in pertinent part, as follows:

"Every State official or agency having the power to arrest, the sheriffs of counties, the police officials of cities and towns, and any other local law-enforcement officer or conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange, on forms provided by it, of any arrest on a charge of treason or of any felony or of any offense punishable as a misdemeanor under Title 54, or Class 1 and 2 misdemeanors under Title 18.2." (Emphasis added.)

Chapters 495 and 584 are in agreement as to the requirement that treason and felonies must be reported to the Exchange. The Chapters, however, differ with regard to the reporting of misdemeanors. Chapter 495 requires
that misdemeanors under Title 54 and under Title 18.2, except driving while under the influence, drunkenness, and disorderly conduct be reported, whereas Chapter 584 requires that misdemeanors under Title 54 and Class 1 and 2 misdemeanors under Title 18.2 be reported to the Exchange. In light of the conflict between Chapters 495 and 584, I must determine which act governs with respect to reporting to the Exchange.

This question is resolved by § 1-13.39 which provides, in pertinent part, as follows:

"Whenever, during any regular session of the General Assembly of Virginia there shall have been enacted any statute purporting to revise, rearrange, amend and recodify any title of the Code of Virginia, such statute shall be deemed to have been enacted prior in time to any other statute enacted at such session adding to, repealing or amending and reenacting any portion of such title; and every such other statute shall be deemed to have so added to, repealed or amended and reenacted, as the case may be, such title as so revised, rearranged, amended and recodified; provided, however, that effect shall be given to any such other, or subsequent, statute only to the extent of any apparent changes in the law as it existed prior to such session."

Chapter 495, which was enacted during a regular session of the General Assembly, recodified Title 19.1 as new Title 19.2. Chapter 584, which was enacted at the same session, amends only a portion of Title 19.2. Thus, in accordance with § 1-13.39, it must be deemed that Chapter 495 was enacted first. Moreover, it is also true as a factual matter that Chapter 495 was signed into law by the Governor prior to Chapter 584.

Section 1-13.39 requires that Chapter 584 be deemed to amend Chapter 495, but "only to the extent of any apparent changes in the law as it existed prior to such session." Prior to the 1975 Session of the General Assembly, the offenses required to be reported to the Exchange were the same as those required by Chapter 495. Section 19.1-19.3. Chapter 584 changes the law as it existed prior to the 1975 Session to the extent that it requires reporting only of Class 1 and 2 misdemeanors under Title 18.2. To the extent of this change Chapter 584 must prevail.

Giving effect to Chapter 495, and to Chapter 584 to the extent it changes the law as it existed prior to the 1975 Session, I am of the opinion that, on and after October 1, 1975, treason, felonies, and misdemeanors under Title 54 and Class 1 and 2 misdemeanors under Title 18.2 must be reported. In answer to your specific question, disorderly conduct and driving while under the influence would have to be reported because they are Class 1 and 2 misdemeanors, respectively, under new Title 18.2. Drunkenness would not have to be reported because it is a Class 4 misdemeanor under new Title 18.2.

CHILD ABUSE—Definition Of “Mental Injury” And “Abandonment”—Duty of social worker to make initial determination—Duty of court to make custody determination.

CHILD ABUSE—Child Abuse And Neglect Law Is Not A Criminal Statute.

DEFINITIONS—Child Abuse—“Mental injury” and “abandonment.”

September 18, 1975

THE HONORABLE R. BAIRD CABELL, JUDGE
Juvenile and Domestic Relations Court for the Fifth Judicial District

This is in reply to your recent request for my interpretation of two
provisions of the new Child Abuse and Neglect Law, §§ 63.1-248.1, et seq., of the Code of Virginia (1950), as amended. You submitted for my consideration a letter to you from the Director of Court Services for your judicial district, which reads as follows:

"Section 63.1-248.2 A.1. states that an 'abused or neglected child shall mean any child less than eighteen years of age whose parents or other person responsible for his care:

" 1. Creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, impairment of bodily or mental functions;' 

"Section 63.1-248.2 A.3. refers to abandonment and states: '3. Abandons such child;'

"In regards to A.1 above the reference to mental injury and mental functioning gives us the most difficulty. In many cases we run across parents who are having problems in rearing their children and who by their actions might be said to be causing a mental injury or impairment to mental functioning. For example, the alcoholic father who comes home and beats his wife in front of the children. Is he causing a mental injury or impairment to his children? Or, the alcoholic father who just drinks and has nothing to do with his family. Is he creating a mental injury or impairment by his lack of providing a positive role model for his children and by depriving them of the companionship of their father in a sober state? Are they neglected or abused by the spouse's failure to protect them from the effects of an alcoholic father?

"To take a different tack, is a child abused or neglected when his parents fail to give their permission for him to be tested psychologically and then if eligible to be placed in a proper special education class or program? Is a child abused or neglected when parents refuse to participate in therapy? Can poverty be a bar to prosecution for a parent's lack of participation in therapy to help their child with an emotional problem?

"These are just a sampling of some of the ideas that have been discussed in regards to mental injury or impairment. When a counselor observes this in the course of his preparation of a social history should it be reported to the local DPW or handled by the court?

"In regards to § A.3. what constitutes abandonment as contemplated by the statute?"

I have been unable to find any judicial decision defining the terms "mental injury" or "mental functions" as used under this new law. I note that the Office of Child Development of the United States Department of Health, Education and Welfare is presently drafting a new model Child Protective Services Act, in which it is attempting to arrive at a satisfactory legal definition of these terms. Child Protective Report, August 14, 1975, at 3.

"Under the proposed definitions, any of the situations raised by the Director of Court Services could be included. It is likewise possible that any one of the circumstances set forth herein might constitute child abuse or neglect under the Virginia statutory definition. Each set of circumstances would have to be evaluated on its merits, supported by competent medical, psychological, sociological and/or other evidence. These evaluations are properly left initially to the welfare department social worker whose duty it is to investigate and provide necessary services to families or to request an alternative disposition for the child. In the latter event, the court must decide whether the social worker's recommendation is warranted under the circumstances, i.e., the child should be removed from the custody of his parents because of the adverse physical or mental impact on the child.

The obvious thrust of this new law is to protect the interests of children
within the Commonwealth by assuring that services are made available to such children and their families when the parents are neglecting their parental responsibilities to the child, as well as when individuals are actually imposing physical or mental injury on the child. Such a policy is enunciated in § 63.1-248.1 of the Code, which states:

“The General Assembly declares that it is the policy of this Commonwealth to require reports of suspected child abuse and neglect for the purpose of identifying children who are being abused or neglected, of assuring that protective services will be made available to an abused or neglected child in order to protect such a child and his siblings and to prevent further abuse or neglect, and of preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate child care.” (Emphasis added.)

This last concern was one of the major reasons why the legislature removed the previous responsibility of the police and the courts in investigating child abuse and neglect cases and transferred this duty to the Department of Welfare.

You also raise the question whether poverty can be a bar to prosecution for a parent's failure to participate in necessary therapy. The Child Abuse and Neglect Law is not a criminal statute and carries no connotation of prosecution. It is possible under other statutory provisions for individuals to be prosecuted for acts or omissions discovered under this law. In the event of such a prosecution, the court would have to determine whether poverty could be asserted as a defense.

With respect to your last question on the definition of “abandonment,” I would conclude that the definition you have provided is correct, i.e., “abandonment” means “to forsake, desert, and to leave altogether.”


FINES—Child Abuse—Failure of physician to file required report.


PHYSICIANS—Child Abuse—Physician-patient privilege not applicable in legal proceeding resulting from filing of report by physician.


THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth's Attorney for the City of Norfolk

October 27, 1975

This is in reply to your recent inquiry concerning § 63.1-248.3 of the Code of Virginia (1950), as amended, which imposes an affirmative duty upon certain specified individuals to report suspected cases of child abuse and neglect to the local welfare departments. You questioned the effect of this obligation upon the physician-patient relationship, particularly in the area of mental health, and requested an opinion as to the obligation of doctors to report in three hypothetical circumstances:

“1. A family doctor repeatedly notices serious welts and bruises on
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a child apparently inflicted as a result of intense beatings with a belt. The doctor makes inquiry of the mother and is told that the child merely fell while playing. The mother's explanation is obviously false.

"2. During the course of a therapeutic encounter session, a child's mother tells the psychiatrist treating her that she receives pleasure from starving her infant child.

"3. During the course of a therapeutic encounter session, a patient tells the psychiatrist treating her that her brother locks his children in a closet for three days at a time."

An abused or neglected child is defined in § 63.1-248.2(A) as "...any child less than eighteen years of age whose parents or other person responsible for his care:

"1. Creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, impairment of bodily or mental functions;

"2. Neglects or refuses to provide care necessary for his health. . . .

"3. Abandons such child; or

"4. Commits or allows to be committed any sexual act upon a child in violation of the law."

Section 63.1-248.3 imposes a duty upon any person licensed to practice medicine or any of the healing arts who has reason to suspect that a child is abused or neglected "to report the matter immediately to the local department" of welfare. This section also establishes a fine to be imposed upon any such person who fails to file the required report. Section 63.1-248.11 further provides that, in any legal proceeding resulting from the filing of a report, the physician-patient privilege shall not apply.

Although the Code of Ethics of the American Medical Association requires that physicians maintain the confidentiality of information secured from their patients, these ethical standards are subordinate to State law. I note that, in addition to the Child Abuse and Neglect Law, there are several other statutory sections in Virginia which require a physician to file reports based upon information secured from patients. These include: § 32-48, communicable diseases; § 32-91, venereal diseases; § 54-10, gunshot wounds; and § 63.1-71, blind persons. Although physicians have to make individual determinations based upon the information revealed to them by their patients, it appears in the three circumstances you have presented that the physician would have reason to suspect that a child was abused or neglected and, therefore, would be required to make a report in accordance with § 63.1-248.3.

CIVIL PROCEDURE—Storage And Sale Of Personal Property Removed From Premises In Execution Of Writ Of Possession—Notice to holders of liens of record.

CIVIL PROCEDURE—Service Of Process In Civil Matters.

SHERIFFS—Storage And Sale Of Personal Property Removed From Premises In Execution Of Writ Of Possession—Notice to holders of liens of record.

September 19, 1975

THE HONORABLE W. JERRY ROBERTS, JUDGE
City of Richmond General District Court, Civil Division

This is in reply to your recent request for an Opinion concerning the proper interpretation to be given to certain provisions of § 8-825.1, Code of Virginia (1950), as amended. Section 8-825.1 provides for a procedure for
the removal and storage of personal property from premises as part of an action of unlawful detainer or ejectment, or other writ of possession. A sheriff, city sergeant or constable, under certain situations, is authorized to place such personal property in a storage area provided by the county or city. If the cost of such removal and storage is not paid within a certain time period, the sheriff, city sergeant or constable is authorized to dispose of the property by an advertised public sale. The significant provision of that section about which you inquire reads as follows:

"Should such owner fail or refuse to pay such costs within thirty days from the date of placing the property in storage, the sheriff, city sergeant or constable shall, after due notice to the owner and holders of liens of record, dispose of the property by publicly advertised public sale." (Emphasis added.)

Your first inquiry is what duty does the sheriff, city sergeant or constable have to examine title, search records, or otherwise determine or find out who are or may be "holders of liens of record." Inasmuch as the language of the statute requires notice to be given to the "holders of liens of record," it is my opinion that it is mandatory on the sheriff, city sergeant or constable to make a reasonable effort to determine who are such lien holders. This can be accomplished by examining the appropriate record books in the office of the clerk of the circuit court wherein personal property liens are recorded, such as Miscellaneous Lien Books, Conditional Sales Books, Financing Statement Books, and similar records.

You next inquire what constitutes "due notice" under the terms of the statute quoted above. The manner of service of process in civil matters is set out in Title 8, Chapter 4, Code of Virginia (1950), as amended (§§ 8-43 to 8-81), and, in particular, § 8-51 provides the manner for service on individuals of notices of various civil proceedings for which no particular mode of serving is otherwise prescribed in the Code. It is my opinion that the notice specified in § 8-825.1 should be served in accordance with the provisions in Title 8, Chapter 4, referred to above, including both § 8-51, with respect to individuals, and §§ 8-59, 8-59.1 and 8-60, with respect to corporations and partnerships.

Section 8-825.1 also does not provide for any particular time limitations on the serving of such notices. It is my opinion, therefore, that the provisions of § 8-422.1 of the Code, relating to the manner of conducting sales of personal property by sheriffs in general execution proceedings, should be followed, and that the notice required in § 8-825.1 should be given at least ten days prior to the date set for such public sale.

CLERKS—Acceptance Of Counterfeit Bill In Payment Of Fine—Clerk not liable for amount of fine until it has been collected in lawful money.

FINES—Clerk Not Liable For Until Collected In Lawful Money—Counterfeit bill.

PUBLIC FUNDS—Responsibility Of Officials In Case Of Theft Or Other Loss.

PUBLIC OFFICERS—Held To Very Strict Liability For Public Funds Entrusted To Their Care—Clerks of court.

THE HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

October 3, 1975

I have received your letter inquiring whether a clerk of a general district court is liable for the loss resulting from acceptance of a counterfeit $20
bill in payment of fines and costs. The identity of the person who tendered
the bill is unknown. The clerk was unaware that the bill was spurious until
she was notified by the bank at which she presented the bill for deposit.

A general district court clerk is a public officer as distinguished from a
(1950), as amended; 63 Am. Jur. 2d Public Officers and Employees § 11
(1972). Virginia follows the rule of strict liability with respect to the loss
of public funds by a public officer, "which requires a public officer to
assume all risks of loss, and imposes upon him the duty to account for the
public funds which go into his hands, except in cases where the loss results
from the act of God or the public enemy, or possibly from some other
Leachman v. Board of Supervisors, 124 Va. 616 (1919); Mecklenburg v.
Beales, 111 Va. 691 (1911); Report of the Attorney General (1973-1974)
at 8; (1956-1957) at 203.

The inquiry thus becomes whether there has been a loss of public funds
under the aforementioned circumstances. If so, no act of God or the public
enemy being present, the clerk is liable. If not, no liability arises. The
clerk was tendered a worthless bill to satisfy the obligation of a fine. Since
the party tendering the bill has not paid the fine, the fine remains out-
standing and collectible. The clerk has accounted for what she received.
She received a worthless bill, not a genuine bill, and is in the same position
as if she had received a worthless check except that the identity of the
person who tendered the bill is unknown. If a worthless check is returned
from the bank, the clerk would make a book entry reflecting the uncollected
fine and would not be required to account for the sum represented by
the check until the same was actually collected. The same practice should
obtain in the present case even though the identity of the person who owes
the fine is presently unknown.

The clerk's inability to determine the identity of the person who owes
the fine constitutes a mere clerical error. I am aware of no rule of law
imposing a pecuniary liability upon the clerk for an error of this nature.
Accordingly, I am of the opinion that the clerk should not be held account-
able for the amount of the fine until it has been collected in lawful money.

CLERKS—Amendment Of § 16.1-115 Eliminates Transmission Of Civil
Papers From District Courts To Circuit Courts.

AMENDMENTS—Clerk's Transmission Of Civil Papers From District
Court To Circuit Court Eliminated By Amendment Of § 16.1-115.

DISTRICT COURTS—Disposition Of Papers In Civil Cases Tried In Dis-
trict Courts In Smaller Municipalities.

FEES—Clerk's Fees Collected On Executions, Garnishments, And Warrants
After Amendment Of § 16.1-115 Must Be Returned.

FEES—Clerks—Application of amendments in circuit and district courts.

THE HONORABLE THOMAS F. TUCKER, Clerk
Circuit Court of the City of Danville
Twenty-second Judicial Circuit

You request my opinion concerning the effect of the repeal of paragraphs
(3) and (4) of § 16.1-115, Code of Virginia (1950), as amended, on the
transmission of papers received prior to the June 1, 1975, amendment to
that section. I shall answer your questions seriatim:
“1. Does the district court still have the authority to transmit and the circuit court clerk to receive all such papers disposed of in a district court for the months of December, 1974, January, February, March, April and May of 1975?”

In my Opinion to the Honorable Joseph S. James, Auditor of Public Accounts, dated July 23, 1975, I stated that the repeal of paragraphs (3) and (4) of § 16.1-115 had the effect of eliminating the authority of certain district courts to transmit civil papers to circuit court clerks for filing and indexing. The effective date of the repeal of these paragraphs was June 1, 1975. Consequently, there is no authority in the Code that permits the subsequent transmission of such papers nor does the circuit court clerk now have authority to receive them. I am, therefore, of the opinion that the answer to your first inquiry is in the negative.

“2. Am I entitled to retain the fees collected for the indexing and filing work?”

Even though the civil papers for December, 1974, and January and February, 1975, were received from the district court in June, July and August and filed and indexed, as you indicate in your letter, I am of the opinion that you are not entitled to retain the fees collected for indexing and filing such papers for the reason stated in my answer to your first inquiry; pursuant to § 14.1-125 of the Code, the district court is entitled to the $1.25 fee as a court fee which is to be paid into the city treasury under § 16.1-69.48 of the Code.

“3. Do these civil papers have to be returned to the district court? If so, the indexes in this office will reflect papers no longer in the files of the circuit court clerk’s office.”

As the authority of district courts to transmit civil papers to the circuit court expired with the repeal of paragraphs (3) and (4) of § 16.1-115, I am of the opinion that civil papers received on or after June 1, 1975, must be returned to the district court and the indexes in your office should be updated to reflect their return.

“4. What disposition must be made of clerk’s fees collected on executions and garnishments issued on these papers since they have been filed in this office? In some instances, return dates on garnishments have not expired.”

In those situations where fees have been collected on executions and garnishments issued on papers forwarded to the circuit court by the district court after June 1, 1975, I am of the opinion that the fees must be returned to the plaintiff who instituted the proceeding. This result obtains because, as stated in my answer to your first inquiry, district courts, after June 1, 1975, are without authority to transmit these papers to the clerk of the circuit court; thus, the civil papers upon which the garnishments and executions were issued were improperly lodged with the circuit court clerk, and the collection of a fee was incorrect.

You further indicate that at the request of the city auditors, the circuit court clerk’s fees for warrants have been sent to you at the end of the month in which they were collected instead of being held for six months, but the warrants were retained for the statutory period of six months and then transmitted to you. You point out that as a consequence, the $1.25 fee for each warrant issued in June, 1975, was paid in July and that July fees were received in August. You state that the check for the August fees has not been deposited, and you inquire whether it should be retained or re-
turned. I am of the opinion that pursuant to the repeal of paragraphs (3) and (4) of § 16.1-115, the fees about which you inquire must be returned to the district court.

CLERKS—Authority For Destruction Or Disposition Of Papers On File In Various Courts.

DISTRICT COURTS—Clerk Of Circuit Court Not Authorized To Destroy Civil Papers Filed In District Court.

RECORDS—Clerk Of Circuit Court Not Authorized To Destroy Civil Papers Filed In District Court.

May 13, 1976

THE HONORABLE MICHAEL M. FOREMAN, Clerk Circuit Court of the City of Winchester

You have inquired whether, under §§ 16.1-115, 16.1-117 and 16.1-118, Code of Virginia (1950), as amended, the clerk of the circuit court of a city with a population of 20,000 may destroy certain civil papers filed from the city's general district court. The city in question is Winchester, Virginia; the city's circuit court was formerly its corporation court; and the city's general district court was formerly its municipal court. The Circuit Court of the City of Winchester is a court of record. See § 17-116.1.

Of the Code sections cited in your inquiry only § 16.1-118, which provides authority for the destruction of papers on file in a court of record, is applicable. Section 16.1-117 delineates instances when the clerk of any municipal court (now known as district courts) may destroy certain civil papers filed and preserved in such court. Section 16.1-115 provides for the disposition, as distinguished from destruction, of certain civil papers in city and county district courts.

Section 16.1-115 has been amended twice in recent years. Prior to 1975 and with exceptions irrelevant for present purposes, § 16.1-115 required civil papers in a municipal court of a city with the characteristics of Winchester, in the absence of a provision in the city charter controlling their disposition, to be "properly indexed, filed and preserved in the corporation, circuit or hustings court of record for such city. . . ." Specifically, the disposition of papers in civil matters for district courts of most cities was then controlled by the provisions of § 16.1-115(4) which read as follows:

"If in any other municipal court, they [papers in civil matters] shall be disposed of as provided by charter, but if there be no applicable charter provisions, then they shall be properly indexed, filed and preserved in the corporation, circuit or hustings court of record for such city, and the clerk thereof shall receive a fee of twenty-five cents for such filing to be taxed as a part of the costs."

Chapter 228, [1975] Acts of Assembly 420, deleted the requirement in subparagraph (4) and referred to courts not of record as "district" courts rather than "county" or "municipal," thereby conforming § 16.1-115 to the nomenclature established by Chapter 546, [1973] Acts of Assembly 1250, commonly referred to as the "District Court Bill." As amended, however, § 16.1-115 provided for disposition of civil papers (1) in a district court of a county, (2) in a district court of a county adjoining certain size cities and (3) in a district court of cities within certain population brackets. Section 16.1-115 did not provide for the disposition of civil papers in district courts of most cities.

This apparent inadvertent omission was remedied by Chapter 387, [1976]
Acts of Assembly, which became effective April 2, 1976. This Act amended § 16.1-115(1) by deleting the reference to district courts of a county and thus providing for disposition of civil papers in all district courts, whether in counties or cities. Thus now, as prior to the 1975 amendment, certain papers in civil cases from the district court for the City of Winchester shall be filed with the clerk of the circuit court.

As previously indicated, § 16.1-118 provides for destruction of certain papers by the clerk of the circuit court. This section provides in pertinent part that:

“The clerk of any court of record to whose office papers in civil cases in the county court have been returned for indexing and preserving under § 16.1-115 may destroy the files, papers and records connected with any such civil case. . . .” (Emphasis added.)

Though § 16.1-118 provides for destruction of papers filed pursuant to § 16.1-115, that authority is applicable only to papers in civil cases forwarded from a “county court.” There is no present statutory authority to destroy papers filed by the district court of a city and thus I am of the opinion that your inquiry must be answered in the negative.

CLERKS—Liability For Public Funds Stolen From Office.

BOARDS OF SUPERVISORS—Authority—May not reimburse clerk for public funds stolen from office.

PUBLIC FUNDS—Responsibility Of Officials In Case Of Theft Or Other Loss.

PUBLIC OFFICERS—Held To Very Strict Liability For Public Funds Entrusted To Their Care—Clerks of court.

October 2, 1975

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

This is in response to your recent inquiry whether the Charles City County Board of Supervisors may reimburse the Clerk of the Circuit Court for a loss of funds resulting from a burglary. You indicate that the Clerk’s office was broken into and the sum of $243.00 in cash was taken. Of this amount, $223.00 was due the Commission of Game and Inland Fisheries from the sale of fishing licenses and $20.00 was derived from a deed recordation.

The Supreme Court of Virginia has on prior occasions adopted the rule that public officers are held to a very strict liability for public funds which are entrusted to their care. Camp v. Birchett, 143 Va. 686 (1925); Leachman v. Board of Supervisors, 124 Va. 616 (1919); Mecklenburg v. Beales, 111 Va. 691 (1911). This rule can best be stated by the language utilized by the Supreme Court in Leachman, supra:

“For reasons of public policy, fiscal officers are held to a very strict liability for public funds entrusted to their care. They have been held liable for losses resulting from fire, theft, robbery, burglary, failure of banks in which money was deposited, and, in fact, losses sustained by almost every cause except the act of God or a public enemy. (Citation omitted.) In Mecklenburg v. Beales, 111 Va. 691, 69 S.E. 1032, 36 L.R.A. (N.S.) 285, it was said that the court favored the rule of strict liability which required a public official to assume all risk of loss, and imposed upon him the duty to account for the public funds which go into his hands.” 124 Va. at 622.
In an Opinion to the Honorable J. Gordon Bennett, Auditor of Public Accounts, dated September 12, 1956, and found in the Report of the Attorney General (1956-1957) at 203, it was ruled that the Clerk of the County Court of Alleghany County was liable for public funds stolen from his office. See also Report of the Attorney General (1973-1974) at 8. In view of the foregoing, I am of the opinion that the Clerk is liable for the public funds lost as a result of the burglary.

The authority of the Board of Supervisors to appropriate public funds depends upon the existence of statutory authority authorizing the appropriation. See Report of the Attorney General (1972-1973) at 30. I am unable to find any statute authorizing the Board to appropriate funds to reimburse the Clerk for public funds stolen from her office. I am, therefore, of the opinion that such reimbursement is not authorized.

The Peninsula Airport Commission seeks an option to acquire a parcel of property, with the term of the option approximately two or three years, to permit the Commission to secure necessary environmental and other governmental approvals for the construction of a general service airport to serve the Williamsburg area. The property in question was acquired on September 11, 1933, by deed from Charles P. Andrews, et ux, to the College of William and Mary in Virginia. Its purchase price was $10,000.00 and the funds for the purchase were supplied by an appropriation by the General Assembly for the biennium 1934-36. The appropriation was from the Motor Vehicle Fuel Tax and was for the purpose of constructing an airport to replace an airport facility which lay in the path of a proposed highway. The property is no longer used as an airport. The deed is in the College's name and is assumed to be a general warranty deed with no conditions or restrictions on the use of the land.

Your letter presents three questions which are answered seriatim:

"1. Assuming that price and other terms of an option are satisfactory, does the College, through its Board of Visitors, have the authority, with the approval of the Governor, to execute an option and subsequently make conveyance of the property?

"2. Does the College have the right to accept the proceeds of such sale,
"a. for use in its general educational program?
"b. for use in funding its capital projects?
"3. Other than approval of the documents as to form by the Attorney General, is any other approval by a State agency or the General Assembly required prior to execution of such an option and any conveyance made pursuant thereto?"

Answer 1. Section 23-4.1 of the Code of Virginia (1950), as amended, authorizes State educational institutions to sell land acquired by purchase and to use the proceeds as those from other gifts and bequests. The approval of the Governor is required to execute the deed of conveyance, but it could be expected that the purchaser would require the Governor's approval of the option as well. Since the purchase was made by the College, and title taken in the name of the College rather than in the name of the Commonwealth, the fact that the purchase was made with appropriated funds is immaterial in construing § 23-4.1.

Answer 2. The uses of the proceeds as permitted by § 23-4.1 are broad in that they can be used for any purpose for which colleges may use gifts and bequests. Pursuant to § 23-9.2 of the Code, such funds do not replace State funding. Nonetheless, the expenditure of the funds, whether for the general educational program or for capital outlay is subject to any restrictions and regulations on the expenditure of funds as may be provided by the Code and the Appropriations Act. There would be no limitation on the Governor's discretion to consider the uses of the proceeds as a condition precedent to his approval of the conveyance.

Answer 3. In the case of the conveyance in question, only the consent of the Governor is required by § 23-4.1. See Report of the Attorney General (1971-1972) at 78. However, the Governor would have the discretion to seek advice or recommendations from other agencies or officials. As you are aware, present practice is for the Governor's Office to obtain review by the Division of Engineering and Buildings and approval as to form by the Attorney General. While the approval of the Attorney General is required in a number of other statutory provisions dealing with the conveyance of real property, e.g., §§ 2.1-6, 2.1-8, 2.1-106.7, in the case of conveyances pursuant to § 23-4.1, review by this Office is by request of the Governor or the particular institution involved.

COMMISSIONERS OF REVENUE—May Prescribe Working Hours For Employees.

BOARDS OF SUPERVISORS—Authority—Cannot control hours of work of employees of constitutional officers.

COMMISSIONERS OF REVENUE—Deputy—Not employee of city and therefore not required to comply with city ordinance regarding retirement.

CONSTITUTIONAL OFFICERS—Employees And Deputies Of—Expressly exempted from uniform pay plan; board of supervisors cannot control such employees' hours of work.

DEPUTIES—Constitutional Officers' Employees And Deputies—Board of supervisors cannot control hours of work.

SALARIES—Employees Of Constitutional Officers Exempted From Uniform Pay Plan For County, City Or Town Employees.
April 12, 1976

THE HONORABLE RICHARD M. CHAPMAN
Commissioner of the Revenue for Scott County

Your request for an opinion of this Office poses two questions:

"1. Can a County Board of Supervisors require the Office of Commissioner of Revenue to submit daily time sheets on salaried employees of that office?

"2. Can the Board of Supervisors restrict salaried employees of the Commissioner of Revenue's office to a 40 hour week even though their normal salary contained in the budget of the office is based on a 44 hour week?"

Section 15.1-7.1 of the Code of Virginia (1950), as amended, provides in part that:

"Notwithstanding any other provision of law to the contrary, the governing body of every county, city and town which has more than fifteen employees shall establish by June thirty, nineteen hundred seventy-four, a grievance procedure for its employees to afford an immediate and fair method for the resolution of disputes which may arise between such public employer and its employees and a personnel system including a classification plan for service and uniform pay plan for all employees excluding the employees and deputies of constitutional officers and division superintendents of schools; provided, however, employees of local welfare departments and local welfare boards may be included in such a grievance procedure at the discretion of the governing body of the county, city or town but shall be excluded from such a personnel system."

The employees of a commissioner of revenue, as a constitutional officer, have been expressly exempted by the General Assembly in § 15.1-7.1 from inclusion in the statutorily required uniform pay plan for county, city or town employees. Accordingly, a county board of supervisors cannot control such employees' hours of work or require submission of daily time sheets. In addition, this Office has previously held that the employment terms of employees of constitutional officers are not subject to the control of a local governing body, absent statutory authority. See Opinion to the Honorable W. S. Harris, Jr., Treasurer of the City of Emporia, dated December 30, 1974, and found in Report of the Attorney General (1974-1975) at 538; and Opinion to the Honorable Ivan D. Mapp, Commissioner of the Revenue for the City of Virginia Beach, dated July 9, 1973, and found in Report of the Attorney General (1973-1974) at 67. I am unaware of any statute that gives the board of supervisors such authority over employees of a commissioner of revenue and conclude, therefore, that both of your questions must be answered in the negative.

COMMISSIONERS OF REVENUE—Resident Of Albemarle County May Not Be Hired As Deputy Commissioner Of Revenue Of Charlottesville.

CONSTITUTIONAL OFFICERS—Deputies Are Public Officers Subject To Requirements Of § 15.1-51—Resident of county may not be appointed deputy commissioner of revenue of city.

PUBLIC OFFICERS—Conflict Of Interest—Deputies are public officers subject to requirements of § 15.1-51—Resident of county may not be appointed deputy commissioner of revenue of city.
REPORT OF THE ATTORNEY GENERAL

January 15, 1976

THE HONORABLE ORA A. MAUPIN
Commissioner of the Revenue for the City of Charlottesville

I am writing in response to your inquiry whether you can hire a resident of Albemarle County as deputy commissioner of the revenue of the City of Charlottesville.

Section 15.1-51, Code of Virginia, (1950), as amended, provides:

“Every district officer shall, at the time of his election or appointment, have resided in the district for which he is elected or appointed thirty days next preceding his election or appointment, and residence in any incorporated town within the district shall be regarded as residence in the district. Every county officer, except deputy clerks of circuit courts, shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment, either in the county for which he is elected or appointed, or in the City wherein the courthouse of the county is or in a city wholly within the boundaries of such county, except that, if no practicing lawyer, who has resided in the county or in such city for the period aforesaid, offer for election or appointment, it shall be lawful to elect or appoint as attorney for the Commonwealth for such county a nonresident, or one who has not resided in the county, or in such city, for the period above mentioned. Every city and town officer except the town attorney shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment in such city or town unless otherwise specifically provided by charter. Assistant attorneys for the Commonwealth shall not be required to reside in the jurisdiction in which they are appointed.

“Notwithstanding the preceding provisions of this section, deputy sheriffs and jailors for the cities of Fredericksburg, Lynchburg and Newport News and the county of Arlington and jailors and other jail personnel in the city of Alexandria shall not be required to reside within the corporate limits of the city or within the county for which they are deputy sheriffs or jailors.” (Emphasis added.)

This section requires that public officers of the City of Charlottesville must be residents of the City. Deputies of constitutional officers, such as commissioners of the revenue, are also public officers and as such are subject to the requirements of § 15.1-51. See Report of the Attorney General (1970-1971) at 349.

Accordingly, I am of the opinion that you may not appoint a resident of Albemarle County as deputy commissioner of revenue of the City of Charlottesville.

COMMISSIONERS OF REVENUE—“Suitable Office Space”—Joint determination of Commissioner and local governing body.

CONSTITUTIONAL OFFICERS—Performance Of His Duties Not Controlled By City Or County Officials Without Specific Statutory Authority.

COUNTIES, CITIES AND TOWNS—City Manager Implements Requirements Of § 14.1-64 [Suitable Office Space] Pursuant To Specific, Formal Direction Of City Council.

DEFINITIONS—General Assembly Has Refrained From Defining What Is “Suitable Office Space” For Constitutional Officers.
The Honorable Robert H. Waldo
Commissioner of the Revenue for the City of Chesapeake

This is in response to your inquiry whether the city manager may, without your consent, determine that some part of your office space is unnecessary and transfer it to another department of city government.

Article VII, Section 4, of the Constitution of Virginia, mandates that a commissioner of the revenue shall be elected for each city and county in the Commonwealth. It has been consistently held that such a constitutional officer cannot be controlled in the performance of his duties by city or county officials unless there is specific statutory authority for such control. See Report of the Attorney General (1969-1970) at 59; Report of the Attorney General (1966-1967) at 65.

Provision of office space by a city to the commissioner of revenue is mandated by statute. Section 14.1-64 of the Code of Virginia (1950), as amended, provides in pertinent part that:

"The governing body of each county and city shall provide suitable office space for the treasurer and commissioner of the revenue, together with the necessary heat, light, water and janitorial service."

What constitutes "suitable office space" to allow the commissioner of revenue to perform his duties will vary in different localities throughout the Commonwealth. The General Assembly has refrained from defining what is suitable for each locality, leaving that decision to the joint determination of the local commissioner of revenue who needs the space and the local governing body which must provide the space.

I am of the opinion that the statute directs the local city council to make enough space available to permit the commissioner of revenue to perform properly the duties imposed upon him by statute. It requires no more and no less. I am further of the opinion that the requirements of § 14.1-64 must be implemented by the city manager acting pursuant to specific, formal direction of the city council.
"Virginia Code § 24.1-76 provides that when a vacancy occurs and no other provision is made for filling it, then the Judge of the Court of Record shall make the appointment; the Virginia Code also provides that the appointment shall be until the next ensuing general election. "The Covington City charter, at § 14.06 provides that:

'Vacancies in the offices of treasurer, commissioner of the revenue, and city sergeant shall be filled by the council for the unexpired portion of the term of office. Vacancies in the offices of the clerk of the circuit court, sheriff and attorney for the commonwealth shall be filled by the circuit court, or the judge thereof in vacation, in accordance with the provisions of general laws.'

"The question is two-fold: First, does the city charter prevail and would the city council be the proper appointing agency; or, secondly, would the appointment be only until the next general election or would the charter provision prevail making the appointment good for the unexpired term of office."

This Office has consistently ruled that, when a charter provision touches upon the appointment to and holding of public office, it is one for the organization and government of a city and prevails over general law. See Opinions of the Attorney General to the Honorable Don E. Earman, Member, House of Delegates, dated January 6, 1971, and found in the Report of the Attorney General (1970-1971) at 137, and to the Honorable Bernard Levin, Member, House of Delegates, dated August 28, 1967, and found in the Report of the Attorney General (1967-1968) at 44, copies of which I enclose. The provision of the City Charter for Covington which you quote does provide for the appointment to and holding of public office. Consequently, it would prevail over § 24.1-76 of the Code. The vacancy existing in the Office of the Commissioner of the Revenue would, in accordance with the provisions of the Charter, be filled by the City Council and the person so appointed would serve for the unexpired term of office.

COMMONWEALTH ATTORNEYS—Candidate Must Be Qualified To Vote For And Hold Office He Seeks—Individual who is not a lawyer is not qualified to hold office of Commonwealth Attorney.

ATTORNEY GENERAL—Qualifications For Election As.

ATTORNEYS—Always Means "Attorney At Law"—Definition of practice of law and who may so practice.

CANDIDATES—Must Be Qualified To Vote For And Hold Office He Seeks.

COMMONWEALTH ATTORNEYS—Constitution Requires Election Of An Attorney For The Commonwealth—Qualification of being Commonwealth Attorney is that individual must be "an attorney."

CONSTITUTION—Qualifications To Hold Any Elective Office Of The Commonwealth Or Of Its Governmental Units.

DEFINITIONS—Practice Of Law And Who May So Practice.

ELECTIONS—Candidate Must Be Qualified To Vote For And Hold Office He Seeks—Individual who is not a lawyer is not qualified to hold office of Commonwealth Attorney.

GENERAL ASSEMBLY—Powerless To Add To Or Subtract From Qualifications For Public Office Established In Constitution.
REPORT OF THE ATTORNEY GENERAL

GENERAL ASSEMBLY—Qualifications For Election As Member Of.

GOVERNOR—Qualifications For Election As.

STATUTES—Obligation Of Attorney General To Construe Statutes, While Not Binding On Courts, Is Of "Persuasive Character."

August 28, 1975

THE HONORABLE DOROTHY C. SAMSON, Secretary
Electoral Board of King George County

You have informed me that

"[a] resident and registered voter in King George County who is neither a member of the Virginia State Bar, the Bar of any other state, nor a practicing attorney, has filed with the Clerk of the Court and the Electoral Board a petition containing sufficient signatures to announce as a candidate for the office of Commonwealth's Attorney. No other candidate has filed for this office and the deadline for filing has since passed."

You request my opinion whether the individual in question is qualified to be a candidate for the office of Commonwealth’s Attorney. Section 2.1-118 of the Code of Virginia (1950), as amended, obligates this Office to give advice and render official opinions when requested by, among others, "a chairman or secretary of an electoral board." The obligation of this Office to construe statutes, while not binding on courts, has been considered to be of "persuasive character." See Barber v. City of Danville, 149 Va. 418, 424 (1928).

Article II, Section 5, of the Constitution of Virginia (1971) provides that:

"The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

"(a) the General Assembly may impose more restrictive geographical residence requirements for election of its members, and may permit other governing bodies in the Commonwealth to impose more restrictive geographical residence requirements for election to such governing bodies, but no such requirement shall impair equal representation of the persons entitled to vote;

"(b) the General Assembly may provide that residence in a local governmental unit is not required for election to designated elective offices in local governments, other than membership in the local governing body; and

"(c) nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision."

Except for paragraph (c), Section 5 is limited to elective office and its basic thrust is that those persons entitled to vote for an office elective by the people are entitled to hold that office. There are, however, four exceptions. Three exceptions, set forth in paragraph 5(a) through 5(c), allow the General Assembly to enact legislation (1) imposing more restrictive geographical residence requirements, (2) permitting nonresidents to hold some local offices, and (3) prohibiting conflict of interests, dual officeholding and other incompatible activities.
The fourth exception is contained in the phrase "except as otherwise provided in this Constitution." For example, the Constitution imposes additional qualifications for membership in the General Assembly, Article IV, Section 4, and for holding Statewide elective office, Article V, Sections 3, 13 and 15. The question you pose is whether Article VII, Section 4, which requires that there shall be elected "an attorney for the Commonwealth," mandates that the Commonwealth's Attorney so elected be a lawyer. Yours is a question of first impression in this Commonwealth.

Some suggestion has been made that § 15.1-51 of the Code requires that a Commonwealth's Attorney be a lawyer. This section provides that:

"Every county officer,... shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county, except that, if no practicing lawyer, who has resided in the county or in such city for the period aforesaid, offer for election or appointment, it shall be lawful to elect or appoint as attorney for the Commonwealth for such county a nonresident, or one who has not resided in the county, or in such city, for the period above mentioned...."

The provisions of this statute do not, in my opinion, so require. Rather, as authorized by Article II, Section 5(b), of the Constitution, § 15.1-51 provides that a Commonwealth's Attorney does not have to be a resident of the jurisdiction in which he is elected if no resident practicing law offers for election or appointment. Since there is no statute which in itself mandates that the Commonwealth's Attorney be a lawyer, an interpretation must be made of the Constitution to determine whether it is dispositive of your inquiry.

The predecessor of Article II, Section 5, was Section 32 of the Constitution of Virginia (1902). Section 32 read:

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

"Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

The Supreme Court of Virginia in Dean v. Paolicelli, 194 Va. 219, 234 (1952), commented upon Section 32 and noted:

"Section 32, as now worded, was first adopted in 1902. The debates of that convention disclose that as proposed, it provided that 'Every person qualified to vote shall be eligible to hold any office...’ Debates Constitutional Convention, 1901 and 1902, Vol. 2, Article on Elective Franchise, pp. 2939 (13) and 3039. However, as finally adopted, it was so changed as to delete the word, 'hold', from the above phrase."

The Court then went on to state:

"...The qualifications of eligibility to office fixed and stated in section 32 have to do with, and are limited to, qualifications necessary
to be elected as distinguished from the electee's capability and capacity to hold the office.” *Id.* at 236.

Finally, the Court held that Section 32 had to be construed with all other provisions of the Constitution to determine not only whether an individual was eligible to office but had the capacity to hold the office. The same is true of Article II, Section 5.

The Constitution of Virginia, as indicated, does impose certain qualifications on other offices, beyond the requirement of Article II, Section 5, that a person be qualified to vote for the office. For example, Article IV, Section 4, requires that members of the General Assembly be twenty-one years of age and may not hold certain offices under the government of the Commonwealth, nor is an individual eligible to either house if he holds any office under, or is in the employment of, the government of the United States; Article V, Sections 3 and 13, require that the Governor and Lieutenant Governor “shall have attained the age of thirty years and have been a resident of the Commonwealth and a registered voter in the Commonwealth for five years next preceding [the] election;” and Article V, Section 15, requires that the Attorney General, to be eligible for election or appointment, must have “attained the age of thirty years, and have[ve] the qualifications required for a judge of a court of record.” A qualification required for a judge of a court of record is that, at least five years prior to appointment or election, “he shall have been admitted to the bar of the Commonwealth.” Article VI, Section 7.

Prior to 1971, there was no constitutional requirement that the Attorney General be a lawyer. This requirement was specifically imposed upon the Office of Attorney General since the Commission on Constitutional Revision “decided that since the Attorney General is the state’s chief legal officer, he should be an attorney.” See *Commentaries on the Constitution of Virginia*, H. Doc. No. 1, 1969 Ex. Sess. at 212. The Constitution of Virginia, thus, in Article II, Section 5, establishes eligibility for public office generally and recognizes specific additional qualifications for certain offices. Since the Constitution delineates such qualifications, the General Assembly is powerless to either add to or subtract from them. See *Howard, Commentaries on the Constitution of Virginia*, Vol. 1 at 394 (1974); Annot., 34 A.L.R. 2d 155 (1954).

In *Black v. Trower*, 79 Va. 123, 124-25 (1884), the Supreme Court of Virginia in construing language similar to Article II, Section 5, stated that:

“It is manifest, therefore, that the framers of the constitution, and those who adopted it, intended to establish a government not republican in form merely, but with powers limited and defined, and with ample guarantees for the equal protection of the rights it was designed to secure. And hence it follows that a statute which discriminates in favor of one class against other classes of citizens in respect to eligibility to office, or otherwise in respect to public privileges, cannot be sustained unless authorized by the constitution itself, either expressly or by necessary implication.”

The Court went on to hold that “eligibility to office”, as construed in the light of the “civil and political equality of all citizens,” was “co-extensive with the right of suffrage” and the Court laid down the rule that “when the constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications thus defined.” *Id.* at 125; see also *Richmond v. Lynch*, 106 Va. 324, 326 (1907). *Black v. Trower*, in dicta recognized, however, that in some instances offices “of peculiar and professional character” could by “fair implication” be further qualified. 79 Va. at 127.

It is not expressly required by Article VII, Section 4, that a Common-
wealth's Attorney be a lawyer. The question thus arises whether the Constitution of Virginia implicitly requires that the Commonwealth's Attorney be a lawyer. The Virginia Supreme Court has not decided this issue. My research has revealed that in 1952 the Circuit Court of Craig County refused to qualify, for the office of Commonwealth's Attorney, a law graduate who was elected but had failed to pass the Virginia State Bar examination. Cf. State, ex rel., Dostert v. Riggleman, 187 S.E. 2d 591 (W. Va. 1972). Although there has been no decision by the highest court in this State, the issue at hand has been ruled upon in other states. See, chronologically, e.g., People, ex rel., Hughes v. May, 3 Mich. 598 (1855); State v. Russell, 53 N.W. 441 (Wis. 1892); Danforth v. Egan, 119 N.W. 1021 (S.D. 1909); Kinsella v. Eberhart, 133 N.W. 857 (Minn. 1911); Enge v. Cass, 148 N.W. 607 (N.D. 1914); People, ex rel., Elliot v. Benefiel, 91 N.E. 2d 427 (1950); In re Petition of Justice of the Peace Association of Indiana, 147 N.E. 2d 16 (Ind. 158); State v. Betensen, 378 P. 2d 669 (Utah 1963); State v. Moritz, 191 N.E. 2d 21 (Ind. 1963); State v. Maxwell, 135 S.E.2d 741 (W.Va. 1964); State, ex rel., Chavez v. Evans, 446 P. 2d 445 (N.M. 1968); In re Daly, 200 N.W. 2d 913 (Minn. 1972); Phagan v. State, 510 S.W. 2d 665 (Tex. 1974).

These decisions of courts of last resort in other jurisdictions are, of course, not binding, especially since each decision interprets constitutional provisions of that jurisdiction which must be construed in light of the peculiar legislative history of such enactments. The decisions are, however, helpful guidance in determining how other jurisdictions have approached and resolved the question. Of the cases cited only the states of Minnesota (Kinsella v. Eberhart, supra), and Utah (State v. Betensen, supra) determined that a prosecuting attorney did not have to be a member of the bar. In State v. Maxwell, supra, the Supreme Court of West Virginia stated that, in light of the various duties imposed on a prosecuting attorney, it was implicit that a person not licensed to practice law was unable to perform such duties. The Court believed that the people of West Virginia were entitled to as equally capable an attorney at law to represent them as would be representing defendants in criminal and civil cases. Consequently, it held that to be eligible to the office of prosecuting attorney one had to be a resident lawyer. I must, however, reject this logic for the people in any given election, absent any applicable constitutional provision, have the right to decide who is best qualified to represent them. Only if the people by fair implication have previously ratified a Constitution which limits their choice can specific additional qualifications be required.

In this regard, it is pertinent that Article VII, Section 4, requires that "there shall be elected by the qualified voters of every county and city... an attorney for the Commonwealth." (Emphasis added.) See also § 24.1-86 of the Code. It is significant that the Constitution does not create the office of "Commonwealth's Attorney"; rather it mandates that an attorney for the Commonwealth shall be elected. This phraseology in my opinion does more than merely establish the office Cf. State v. Moritz, supra at 31 (Jackson, J., dissenting). Unlike Article V, Section 15, which creates the office of "Attorney General," and then further qualifies that office with the requirement that the individual must be an attorney, Article VII, Section 4, itself requires "an attorney for the Commonwealth." (Emphasis added.) Consequently, upon a review of all the cases hereinabove cited, and of the pertinent Virginia constitutional provisions, I am constrained to rule that a qualification of being Commonwealth's Attorney is that an individual must be "an attorney."

This interpretation of the constitutional language in Article VII, Section 4, is also confirmed by Article III, Section 1, of the Constitution—the separation of powers clause. A majority, if not all, of the duties of the
Commonwealth's Attorney involve the rendition of legal advice or appearances in court. The control of those officers who appear in court lies within the judiciary and the phrase attorney, when used with reference to procedures in courts or the transaction of business with courts, always means "attorney at law" unless a contrary meaning is clearly indicated. Black's Law Dictionary 164 (4th ed. 1951). The Supreme Court of Virginia has defined the practice of law and who may so practice. See Chapter 4 of Title 54 of the Code. Compare also State v. Moritz, supra, which held that similar language in the Constitution of Indiana could not be construed to take from the courts the inherent right to say who shall as attorneys be recognized as officers of the court. As stated by the Indiana court, quoting from Danforth v. Egan, 119 N.W. at 1024:

"Did the framers of the Constitution intend to indirectly take from the courts, in favor of a certain excepted class of persons, a right which the statutes of the territory had recognized as resting in the courts—a right recognized for centuries, by all countries and states having laws based on the English common law, as the inherent right of the court, a right necessary in the very nature of courts and the duties devolving upon them, a right which, if lost, would soon bring the courts of our land into contempt—the right to say who shall as attorneys be recognized as officers of the courts, ***? This right of the courts is as much the law of our land, and of as much dignity as such, as any law found in the Constitution or statutes." 191 N.E. 2d at 24.

If the individual about whom you inquire is not qualified to discharge the duties of the office himself, the majority rule is that the fact he might perform duties through a deputy still does not qualify him to hold the office. It is a duty to accept the people's trust and one must be fully qualified to execute that trust. State v. Maxwell, supra; 67 C.J.S. Officers § 7 at 118 (1950).

To be entitled to have one's name printed on the ballot an individual must qualify as a candidate and "must be qualified to vote for and hold that office." See § 24.1-167. Since the individual in question is not a lawyer, he is not qualified to hold the office of Commonwealth's Attorney. I am, therefore, of the opinion that his name may not be printed on the official ballot. Since no one else has qualified as a candidate for the office, the ballot would be blank. A qualified individual could be elected Commonwealth's Attorney by write-in vote or, if there are no write-in votes, a vacancy would exist to be filled by appointment by the Circuit Court of King George County. See § 24.1-76.

COMMONWEALTH ATTORNEYS—Duty To Give Advice To Public Officials And Boards Of County.

COMMONWEALTH ATTORNEYS—Duty To Represent Board Of Supervisors In Appeal Before Virginia Supreme Court—County attorney brought and won action but subsequently resigned.

COMMONWEALTH ATTORNEYS—When There Is No Longer A County Attorney, Commonwealth Attorney Reassumes Duty Of Representing Various County Boards And Officials.

August 27, 1975

THE HONORABLE JOHN B. GILMER
Commonwealth's Attorney for Louisa County

This is in reply to your recent inquiry whether you have the duty to represent your Board of Supervisors in an appeal pending before the Supreme
Court of Virginia. You state in your letter that the county attorney, who has subsequently resigned, brought an action on behalf of the Board in the Circuit Court to enjoin certain actions of a State agency. The Board prevailed in the Circuit Court and the State agency has appealed the Court’s final order.

This Office has consistently ruled that the Commonwealth’s Attorney has the duty to render legal advice and opinions to all public officials and boards of his county unless statutory provision exists to the contrary. See Report of the Attorney General (1972-1973) at 87. I have ruled that this duty includes, *inter alia*, the obligation to seek a Writ of Certiorari pursuant to § 15.1-497 of the Code of Virginia (1950), as amended, to review a decision of a board of zoning appeals, Report of the Attorney General (1973-1974) at 68, and to represent the local welfare department in the collection of a nondischarged lien against the estate of a former bankrupt person. *Id.* at 69. Obviously, then, the general duty of the Commonwealth’s Attorney hereinabove stated encompasses the obligation to represent the Board in litigation.

When a county attorney is appointed, a Commonwealth’s Attorney is relieved of his duties of advising county boards and officials and “of defending or bringing actions” on their behalf. See § 15.1-9.1:1. In this event, the Commonwealth’s Attorney is not relieved of the duties imposed upon him by §§ 2.1-356 and 15.1-66.1 but neither of these sections is relevant to your inquiry. I am of the opinion that, when there is no longer a county attorney, the Commonwealth’s Attorney reassumes his duties of representing the various county boards and officials. The answer to your question, therefore, is in the affirmative.

**COMMONWEALTH ATTORNEYS—Person Taking Office As Commonwealth Attorney For One County Vacates Seat On Board Of Zoning Appeals In Another Jurisdiction.**

**PUBLIC OFFICERS—Compatibility—Person taking office as Commonwealth Attorney for one county vacates seat on board of zoning appeals in another jurisdiction.**

**ZONING—Person Taking Office As Commonwealth Attorney For One County Vacates Seat On Board Of Zoning Appeals In Another Jurisdiction.**

January 14, 1976

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

I am writing in response to your question whether a person who is presently serving on the board of zoning appeals must vacate that position by virtue of § 15.1-50, Code of Virginia (1950), as amended, upon his appointment as Commonwealth’s Attorney in another jurisdiction.

Section 15.1-50 provides specifically that “[n]o person holding the office of... attorney for the Commonwealth... shall hold any other office, elective or appointive, at the same time” with certain exceptions not pertinent to your question. (Emphasis added.) This section does not provide that the “other office” must be in the same jurisdiction. Because membership on a board of zoning appeals is an appointed office, I am of the opinion that a person taking office as Commonwealth’s Attorney for one county vacates, by operation of law, his seat on the board of zoning appeals in another jurisdiction.
COMMONWEALTH ATTORNEYS—Procedures For Retention And Destruction Of Records.


COUNTIES, CITIES AND TOWNS—State Library Board Responsible For Determining Which Local Records Have Significant Historical Value—Retention; destruction schedule.

STATE LIBRARY BOARD—Responsible For Determining Which Local Records Have Significant Historical Value—Retention, destruction schedule.

September 29, 1975

THE HONORABLE JAMES A. CALES, JR.  
Commonwealth’s Attorney for the City of Portsmouth

This is in reply to your recent letter concerning the destruction of closed case files which are presently stored in the Commonwealth's Attorney's Office.

In my Opinion to the Honorable John E. Kennehan, Commonwealth's Attorney for the City of Alexandria, dated January 28, 1970, and found in the Report of the Attorney General (1969-1970) at 61, it was ruled that:

"...all official files, papers and records of the Office of the Commonwealth's Attorney are public records belonging to that Office and should be maintained for the official use of the incumbent of such Office."

Subsequently, the legislature enacted § 42.1-23.1 of the Code of Virginia (1950), as amended, which provides, in part:

"The State Library Board shall formulate and execute a program to inventory, schedule, and microfilm official records of counties and cities which it determines have permanent value and to provide safe storage for microfilm copies of such records, and to give advice and assistance to local officials in their programs for creating, preserving, filing and making available public records in their custody."

It is clear that the State Library Board is responsible for determining which local records have significant historical value; additionally, the Board is responsible for determining the manner in which such records are to be preserved.

Accordingly, before destroying any official records, a Commonwealth's Attorney should communicate with the Archives Division of the State Library for assistance in determining what records have permanent value. The Archives Division will also assist a Commonwealth's Attorney in establishing a records retention and disposition schedule for future reference. Once the State Library has determined that particular records within the Office have no permanent value, the Commonwealth's Attorney should decide whether the records have enduring legal significance to justify retention for his successor. If the records have neither permanent value nor enduring legal significance, they may be destroyed.

COMMUNITY ANTENNA TELEVISION SYSTEMS—City May Require Owner Of System To File Financial Statement.

CITIES—Authority—Regulation of community antenna television system—May require owner of system to file financial statement.
REPORT OF THE ATTORNEY GENERAL

May 17, 1976

THE HONORABLE C. L. MARCUM
Commissioner of Revenue for the City of Norton

This is in response to your letter inquiring as follows:

"Is it possible for the City Council, or any other City official, to require a financial statement from the owner of the local T. V. cable franchise?"

For purposes of this opinion, I assume that the "local T. V. cable franchise" referred to in your letter is a "community antenna television system" within the meaning of § 15.1-23.1, Code of Virginia (1950), as amended. Section 15.1-23.1 authorizes the governing body of any city to regulate community antenna systems, including the establishment of fees and rates. Under this authority, the governing body of a city may, in my opinion, require the owner of a community antenna television system to file a financial statement. Your inquiry is therefore answered in the affirmative.

CONSTITUTIONAL LAW—County May Lease Space From Church-controlled Corporation For Senior Citizens’ Activities Center Open To All County Residents Without Violating Virginia Constitution.

RELIGIOUS ORGANIZATION—Rent Paid By County For Space Leased From Church-controlled Corporation For Senior Citizens’ Activities Center Is Expenditure Of Public Funds For Nonsectarian, Public Purpose Which Neither Advances Nor Inhibits Religion.

SCHOOLS—School Boards—May rent space in church to house kindergarten class without violating either United States or Virginia Constitutions.

TAXATION—Rent Paid By County For Space Leased From Church-controlled Corporation For Senior Citizens’ Activities Center Is Not A Tax.

July 29, 1975

THE HONORABLE JERRY K. EMRICH
County Attorney for Arlington County

This is in reply to your recent inquiry whether a proposed lease between Arlington County and the Arlington Retirement Housing Corporation would violate Article I, Section 16, or Article IV, Section 16, of the Constitution of Virginia (1971). The proposed lease provides for the rental of space to be used as a senior citizens’ activities center by the County Recreation Department. The Corporation’s Articles of Incorporation provide, inter alia, that, other than the initial directors, all directors shall be appointed by the Board of Trustees of the Unitarian Church of Arlington and that a majority of the directors must be members of the Unitarian—Universalist Church or Fellowships of the greater Washington area. It is clear, therefore, that the Corporation is controlled by the Unitarian Church of Arlington. See Opinion of the Attorney General to the Honorable Daniel E. Marvin, Jr., Director of the State Council of Higher Education, dated August 26, 1974, a copy of which is enclosed.

I am of the opinion that the leasing of space by the County for a senior citizens’ activities center, which center will be open to all County residents meeting the age requirements, does not violate Article I, Section 16. No one is being compelled to support any religion; nor would expenditures for
rent constitute a "tax." Renting of the space would be an expenditure of public funds for a nonsectarian, public purpose which neither advances nor inhibits religion.

With regard to Article IV, Section 16, none of the opinions of the Supreme Court of Virginia construing that section are dispositive of the issue raised in your letter. I have previously ruled, however, that the rental of church property by a school board to conduct public kindergarten classes does not violate the Virginia Constitution. See Opinion of the Attorney General to the Honorable Sol Goodman, Commonwealth's Attorney for the City of Hopewell, dated January 15, 1975, a copy of which is enclosed. For the reasons stated in the Goodman Opinion, I conclude that the leasing of the space in question for the purpose stated would not be prohibited by Article IV, Section 16.

CONSTITUTIONAL OFFICERS—Required To Purchase Through Central Purchasing Agency Established By Board Of Supervisors But Needs And Specifications Determined By Those Officers.

BOARDS OF SUPERVISORS—Constitutional Officers Required To Purchase Through Central Purchasing Agency Established By; But Needs And Specifications Determined By Those Officers.

BOARDS OF SUPERVISORS—No Authority Over Vehicles Of Sheriffs.

CLERKS—Required To Purchase Through Central Purchasing Agency Established By Board Of Supervisors But Needs And Specifications Determined By Clerk.

COMMISSIONERS OF REVENUE—Required To Purchase Through Central Purchasing Agency Established By Board Of Supervisors But Needs And Specifications Determined By Commissioner.

COMMISSIONERS OF REVENUE—Deputy—Not employee of city and therefore not required to comply with city ordinance regarding retirement.

COMMONWEALTH ATTORNEYS—Required To Purchase Through Central Purchasing Agency Established By Board Of Supervisors But Needs And Specifications Determined By Commonwealth Attorney.

COUNTIES—Constitutional Officers Required To Purchase Through Central Purchasing Agency Established By Board Of Supervisors But Needs And Specifications Determined By Those Officers.

DILLON'S RULE—Limits Authority Of Local Governments To Powers And Functions Statutorily Established.

SCHOOLS—School Boards—Must purchase through county central purchasing agency, but school board alone is judge of its needs and specifications.

SHERIFFS—Independent Operation Of Constitutional Office Does Not Justify Refusal To Explain Use Of Sheriffs' Cars When Purchased With County Funds.

SHERIFFS—Purchases Of Supplies Must Be Pursuant To County Resolutions And Ordinances.

TREASURERS—Required To Purchase Through Central Purchasing Agency Established By Board Of Supervisors But Needs And Specifications Determined By Treasurer.
PURCHASES AND SUPPLY, DEPARTMENT OF—Constitutional Officers Required To Purchase Through Central Purchasing Agency Established By Board Of Supervisors But Needs And Specifications Determined By Those Officers.

December 18, 1975

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

This is in response to your inquiry whether constitutional officers, namely, sheriff, treasurer, Commonwealth's attorney, commissioner of revenue and clerk of the circuit court, are required to purchase through a centralized competitive purchasing agency when such an agency is established by the county board of supervisors pursuant to § 15.1-127 of the Code of Virginia (1950), as amended.

Section of 15.1-127 provides, in pertinent part, as follows:

"The governing body of any county having an executive secretary is authorized to provide for the centralized competitive purchasing of all supplies, equipment, materials and commodities for all departments, officers and employees of the county, including the county school board and the board of public welfare or social services... Such purchasing shall be done by the executive secretary under the supervision of the governing body of the county."

Because the board of supervisors is required by law to bear at least a portion of the costs of supplies, equipment and materials used by the constitutional officers, I am of the opinion that the word "officers" in § 15.1-127 includes the constitutional officers, and that they are therefore required to purchase through a central purchasing agency.

The positions of sheriff, treasurer, Commonwealth's attorney, commissioner of revenue and clerk of the circuit court of a county, traditionally referred to as "constitutional officers," are created by Article VII, Section 4, of the Constitution of Virginia (1971). The duties and compensation of such officers are not defined in the Constitution itself, but are left to the discretion of the General Assembly. The General Assembly has defined the duties of these officers of the county in considerable detail. See generally Titles 15.1, 17 and 58 of the Code. Title 14.1 of the Code establishes the compensation of the constitutional officers, and provides that the county will pay some part thereof. Section 14.1-64 requires the county to pay one-half of the "salaries, expenses and other allowances" of Commonwealth's attorneys; § 14.1-80 requires the county to pay for sheriff's supplies; § 15.1-19 requires the county to pay for the necessary supplies of the treasurer, clerk of circuit court and commissioner of revenue.

In an Opinion to the Honorable C. L. Marcum, Commissioner of Revenue, City of Norton, and found in Report of the Attorney General (1966-1967) at 65, it was stated that:

"... an officer elected by the people pursuant to the Constitution is charged with the obligation to perform certain duties connected with that office and should not have his control over the office impaired by an officer appointed by a council or other local governing body."

This statement has served as the foundation for opinions that a city has no authority to compel the retirement of a deputy commissioner of the revenue at age 70 (Report of the Attorney General (1973-1974) at 67); that a county cannot dictate what method the treasurer is to use in collecting taxes (Report of the Attorney General (1972-1973) at 39); that a county cannot mandate how a sheriff shall use his cars from day to day (Report

The Constitution of Virginia also provides for the creation of cities and counties, but leaves their powers and organization to the discretion of the General Assembly. See Article VII, Sections 1 and 2. Under the familiar rule of Judge Dillon adopted in the Commonwealth:

"...a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied."


The parameters of the implied power have been described in the following manner:

"...This necessarily implied power has been interpreted to mean that which is essential to the accomplishment of the statute's declared object and purpose—not simply convenient, but indispensable. However, the implied power need not be absolutely indispensable, and it is sufficient if it is reasonably necessary to effectuate a power expressly granted."


Section 15.1-127 is an express grant of power to allow the county to establish a centralized, competitive purchasing system. This power emanates from a recognition by the General Assembly of the monetary savings to be achieved by single source purchasing on a competitive bid basis of all goods and services which the county is obligated to purchase in order to serve its citizens. I am of the opinion that the county has the implied power under this statute to extend its centralized purchasing to all goods, supplies, equipment and materials that are to be purchased with county tax money. Without such an implied power, successful implementation of the express power could be frustrated by piecemeal purchasing outside of the central agency.

I am of the opinion, therefore, that the sheriff, treasurer, Commonwealth's attorney, commissioner of revenue and clerk of the circuit court may be required to purchase through the central purchasing agency. Indeed, I have previously ruled that sheriffs must purchase their supplies pursuant to county resolutions and ordinances. See Opinion to the Honorable Irving C. Newcomb, Sr., Sheriff of Charles City County, dated August 26, 1974, a copy of which is attached.

I am further of the opinion, however, that the board of supervisors' powers contained in § 15.1-127 are limited by the obligation of the constitutional officers to carry out these tasks assigned them by the General Assembly as they see fit. This Office has previously opined that while a school board must purchase through its county central purchasing agency, it alone must be the judge of its needs and it alone can write the specifications for the materials it purchases. See Report of the Attorney General (1964-1965) at 19. The same principle must apply to constitutional officers, lest their control over their statutory functions be impaired by an appointed purchasing agent of the governing body. Accordingly, I am of the opinion that the material and equipment needs, and the specifications
therefor, of constitutional officers are to be determined by those officers, and not by the county purchasing agent. The ministerial act of actually purchasing such equipment and material may, as indicated, be required to be performed through a centralized system.

CONSUMER AFFAIRS—Locality May Establish Office Of—Limitations of its authority.

COUNTIES, CITIES AND TOWNS—County May Establish Office Of Consumer Affairs.


WELFARE—Confidentiality Of Welfare Records Required By Federal And State Law.

WELFARE—Fraud—Persons checking records for possible fraud must be employed by local welfare department.

THE HONORABLE GEORGE N. MCMATH
Member, House of Delegates

This is in reply to your recent inquiry in which you raise the following questions:

"(1) Can a county establish an office of consumer affairs and, if so, what would be the limitations of its authority?
"(2) Can a county employ persons to check welfare records for the purpose of determining if there are cases of fraud?"

The answer to your first question is in the affirmative. Local offices of consumer affairs may be established in a county pursuant to §§ 15.1-23.2 and 15.1-23.3 of the Code of Virginia (1950), as amended. Section 15.1-23.2 provides that a local office of consumer affairs

"... shall have only such powers as may be necessary to perform the following duties:

"(a) To serve as a central coordinating agency and clearinghouse for receiving and investigating complaints from citizens of the county or city of illegal, fraudulent, deceptive or dangerous practices, and referring such complaints to the local departments or agencies charged with enforcement of consumer laws. The processing of complaints involving statutes or regulations administered by State agencies shall be coordinated, where applicable, with the State Office of Consumer Affairs;

"(b) To attempt to resolve complaints received pursuant to subsection (a) hereof by means of voluntary mediation or arbitration;

"(c) To develop programs of community consumer education and information; and

"(d) To maintain records of consumer complaints and their eventual disposition, provided that records disclosing that business interests of any person, trade secrets, or the names of customers shall be held confidential except to the extent that disclosures of such matters may be necessary for the enforcement of laws. A copy of all periodic reports compiled by any local office of consumer affairs shall be filed with the State Office of Consumer Affairs."
I am informed that local offices of consumer affairs have been established in the cities of Virginia Beach, Newport News, Alexandria, Norfolk and Roanoke and in the counties of Arlington, Prince William and Fairfax. For ease of administration, several of these jurisdictions have combined their office of consumer affairs with other functions of local government such as the weights and measures bureau or the landlord/tenant commission.

In reply to your second question, it would be permissible for a county to employ persons to check welfare records for possible fraud provided such persons are employees of the local welfare department. Both federal and State law require confidentiality of welfare records and limit their use and disclosure to purposes directly connected with administration of specific welfare programs. Social Security Act, 42 U.S.C. §§ 601-644 (1974); 45 C.F.R. § 205.50 (1974); § 63.1-53 of the Code of Virginia (1950), as amended. Consequently, any person provided general access to welfare case records in order to check for fraud would have to be an employee of the welfare department in order to ensure this confidentiality. Recent changes in the Social Security Act make it clear that welfare records cannot be divulged to public officials on any different basis than to the public generally. 42 U.S.C.A. § 602(a)(9) (August, 1975). I would point out that federal regulations adopted pursuant to the Social Security Act require State welfare agencies to establish and maintain methods for identifying suspected fraud cases and referring such cases to the appropriate law enforcement authorities. 45 C.F.R. § 235.110 (1974). Such a system is currently being implemented by the State Department of Welfare through local welfare personnel.

CONTRACTS—Amendment To § 53-67 Not In Effect At Time Contract Signed—Laundry services for MCV.

AMENDMENTS—Not In Effect At Time Contract Signed For Laundry Services For MCV—Amendment given prospective application only.

AMENDMENTS—Retrospective Application Of A Statute Never Presumed—Must be made applicable in express language.

MEDICAL COLLEGE OF VIRGINIA—Laundry Services Procured Through Contract With Virginia Hospital Laundry, Inc., Instead Of Virginia Correctional Center For Women.

PURCHASES AND SUPPLY, DEPARTMENT OF—Director May Make Exceptions To Requirement That All State Departments, Institutions And Agencies Purchase Articles Produced By Convict Labor.

STATUTES—Retrospective Application Of Amendments Never Presumed —Must be made applicable in express language.

July 28, 1975

THE HONORABLE V. EARL DICKINSON
Member, House of Delegates

I am in receipt of your letter requesting a formal opinion concerning the interpretation of Chapter 647, [1975] Acts of Assembly 1350, which amended § 53-67 of the Code of Virginia (1950), as amended. You indicate in your letter that it is your understanding that VCU/MCV has entered into a contract with Virginia Hospital Laundry, Inc., for laundry services. You further state that such services are to commence January 1, 1976, and all laundry services which are presently being furnished by the Virginia
Correctional Center for Women in Goochland County are to be provided by Virginia Hospital Laundry, Inc., by January 1, 1977. Your specific inquiry is:

"With the passage of... HB 1646 which amends Section 53-67 of the code to include purchase of services in addition to articles by State agencies, would not VCU-MCV be in violation of the code?"

Section 53-67 of the Code, as amended, reads as follows:

"Agencies may purchase.—All departments, institutions and agencies of this State which are supported in whole or in part by the State shall, and all counties and districts of such counties and cities and towns in this State may, purchase from the Director all articles and services required by such departments, institutions and agencies of the State for their use or the use of the person or persons whom they assist financially, or by such counties, districts, cities or towns, produced or manufactured by the Director by convicts or misdemeanants confined within the penitentiary or elsewhere employed within this State, including products of the State correctional institutions and no such article or service shall be purchased by any such department, institution or agency of the State from any other source unless excepted under the provisions of § 53-69. The purchase of services required herein may be excepted by the Director of the Department of Purchases and Supply in the event that such services do not meet the reasonable requirements of such department, institution or agency of the State, or in any case where the requisition for such service cannot be complied with substantially on account of an insufficient supply of the services required or otherwise." (Emphasis added.)

Virginia Commonwealth University, Medical College of Virginia Hospitals, has entered into a contract dated October 1, 1974, with Virginia Hospital Laundry, Inc., for complete laundry and linen services starting once Virginia Hospital Laundry, Inc., has completed a new laundry facility, but not later than January 1, 1977. Medical College of Virginia Hospitals, one of several hospitals to participate in the project, has heretofore, on a voluntary basis, utilized the Virginia Correctional Center for Women for its laundry service needs. The requirement of § 53-67, as amended at the 1975 Session of the General Assembly, that "services" as well as "articles" must be obtained from the Department of Corrections was not included in State law at the time the above-referenced contract was signed. Thus, the threshold question is whether the 1975 amendment to § 53-67 can be construed as having a retroactive effect on preexisting contractual obligations of State agencies.

It is generally recognized that the law governing a contract is usually that in force at the time of its inception. Memphis Railroad Company v. Commissioners, 112 U.S. 609, 623 (1884); Citizens Mutual Building Association, Inc. v. Edwards, 167 Va. 399, 189 S.E. 453 (1937). This being so, almost all statutes apply prospectively, that is, to events, occurrences or contracts which are initiated after the statute becomes effective or which do not create vested rights until that time. Both Virginia Commonwealth University, Medical College of Virginia Hospitals, and Virginia Hospital Laundry, Inc., have vested rights in the contract since no further condition must occur to mature their commitments to each other. Thus, in order for the present laundry service contract to be affected by the amended statute, the amendment to § 53-67 must be found to have retrospective application.

Retrospective application of a statute is never presumed by Virginia courts. In Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 30 S.E.2d 686 (1944), the appellee attempted to set aside a foreclosure sale on the
grounds that notice of the sale did not conform to certain statutory re-
quirements which were enacted after the deed of trust was granted, but
prior to the sale. The Court, in holding that notice under the old statutory
 provision was sufficient, stated:

"The legislature, in the enactment of the amendment, did not employ
express language making it apply to deeds of trust made before
its effective date. The words used are not those usually employed when
the legislature intends an enactment to have a retrospective effect. It
was not expressly made applicable to deeds of trust 'heretofore and
hereafter made', as is usual in retrospective statutes. The absence of
apt language making the amendment apply to those instruments
executed prior to its effective date rather clearly demonstrates that it
was not the intent of the legislature that it should apply to such prior
instruments....

"It will not be presumed that the legislature would intentionally and
advisedly amend a statute that would so materially affect such an
important contract right.... 'The general rule is that no statute,
however positive in its terms, is to be construed as designed to interfere
with existing contracts, rights of action, or suits, and especially vested
rights, unless the intention that it shall so operate is expressly de-
clared; the courts will apply new statutes only to future cases unless
there is something in the very nature of the case, or in the language
of the new provision, which shows that they were intended to have
a retrospective action.'" Id. at 874, 30 S.E.2d at 686-89.

Further, § 1-16 of the Code reads in pertinent part as follows:

"No new law shall be construed to repeal a former law, as to any
offense committed against the former law, or as to any act done, any
penalty, forfeiture, or punishment incurred, or any right accrued, or
claim arising under the former law, or in any way whatever to affect
any such offense or act so committed or done, or any penalty, forfeiture,
or punishment so incurred, or any right accrued, or claim arising
before the new law takes effect...."

In light of the above-referenced case and statute, the general proposition
that statutes are not presumed by Virginia courts to have retrospective
application, and the absence of any language in § 53-67 of the Code to
indicate legislative intent that the statute have such application, it is my
opinion that § 53-67, as amended in 1975, must be given prospective appli-
cation only. Therefore, Virginia Commonwealth University, Medical Col-
lege of Virginia Hospitals, is not in violation of the section's provisions
since the contract to which you refer was entered into prior to the effective
date of its amendment. Further, since the statute can only be given pros-
spective application, the need for elaboration on otherwise relevant con-
stitutional considerations is rendered moot.

CONTRACTS—Amendment To § 53-67 Not In Effect At Time Contract
Signed—Laundry services for MCV.

AMENDMENTS—Not In Effect At Time Contract Signed For Laundry
Services For MCV—Amendment given prospective application only.

APPROPRIATIONS—Contractual Obligations Of State Agencies Running
Beyond End Of Current Biennium Are Contingent Upon Continuing
Appropriations—Maximum number of years MCV can sign contract
for laundry services.
CONTRACTS—Maximum Number Of Years MCV Can Sign Contract For Laundry Services With Virginia Hospital Laundry, Inc.

CONTRACTS—Section 53-67 Will Prohibit MCV From Purchasing Laundry Services From Any Source But Department Of Corrections At Expiration Of Present Agreement.

MEDICAL COLLEGE OF VIRGINIA—Laundry Services Procured Through Contract With Virginia Hospital Laundry, Inc., Instead Of Virginia Correctional Center For Women.

October 28, 1975

THE HONORABLE V. EARL DICKINSON
Member, House of Delegates

This is in reply to your recent letter seeking further clarification of the effect of § 53-67 of the Code of Virginia (1950), as amended, on the contract which VCU/MCV has entered into with Virginia Hospital Laundry, Inc. (VHL), for laundry services.

Your first inquiry was:

“(1) What is the maximum number of years for which MCV can sign a legal contract with VHL for VHL's laundry services to MCV?”

Article X, Section 7, of the Constitution of Virginia (1971) provides, in relevant part, that:

“...No money shall be paid out of the State treasury except in pursuance of appropriations made by law; and no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same.”

Accordingly, contractual obligations of State agencies which run beyond the end of the current biennium are contingent upon the continuing appropriation of sufficient funds by the General Assembly to allow the agency to fulfill its obligations. This was recognized and specifically stated in Paragraph 12(B) of the contract between VCU/MCV and VHL. Aside from the constitutional prerequisite of continuing biennial appropriations, there is no legal authority which would limit the number of years for which VCU/MCV can sign a legally binding contract with VHL for laundry services.

The second question you posed was as follows:

“(2) At the expiration of this present MCV contract with VHL, will Section 53-67 of the Code, as amended, become effective with respect to MCV and will it prevent MCV from renewing or extending its present contract with VHL or from signing a new one with VHL?”

Paragraph 10 of the contract between VCU/MCV dated October 1, 1974, states “[t]his agreement shall be effective upon execution hereof by all the parties hereto and shall expire on November 1, 1966,. . . . At least six (6) months prior to the expiration of the term hereof, each Participating Hospital desiring to renew this agreement for an additional term of five years shall give written notice to that effect to Hospital Laundry and all other Participating Hospitals. This agreement shall then be renewed as to all Participating Hospitals who have given such notice for a second term of five years.” Paragraph 11 defines “Events of Default” and provides that VHL has the right to terminate the Agreement with any defaulting Participating Hospital subject, under certain conditions, to the prior written approval of Connecticut General Life Insurance Company.
Unless the contract is terminated under Paragraph 11, the present contract will terminate on November 1, 1996, provided that VCU/MCV has the right to renew the Agreement for a second term of five years. If VCU/MCV exercises its option, the present contract between VCU/MCV and Virginia Hospital Laundry, Inc., will terminate on November 1, 2001. As stated in my previous opinion to you, the law governing a contract is generally that in force at the time of its inception. See Opinion to you dated July 28, 1975, Report of the Attorney General (1975-1976) at ....... Consequently, at the expiration of the present Agreement in 1996 or 2001, as the case may be, § 53-67 of the Code would prohibit VCU/MCV from purchasing laundry services from any source other than the Department of Corrections.

**CONTRACTS—Consideration Paid For Pre-need Burial Contracts.**

**CONTRACTS—Default On Pre-need Burial Contract By Either Seller Or Purchaser—Disbursement of trust funds.**

**CEMETERIES—Consideration Paid For Pre-need Burial Contracts; Default On Contract.**

January 19, 1976

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

This is in reply to your letter in which you make the following inquiries concerning §§ 57-39.8 to -39.18 of the Code of Virginia (1950), as amended:

1. Assume two items, one of which is to be delivered within 120 days and one of which is to be delivered after 120 days, and that although the items are separately stated and priced in a single contract, they are added to become part of a total contract price.

   Is the required deposit 40% of the price stated for the item which will not be delivered within 120 days or 40% of the total contract price?

2. A ‘burial or interment right’ is the right to be buried in a cemetery in a particular location.

   Does the deposit requirement apply to the separate sale of such a right?

3. If the answer to question 2 is no, and such an item is included in a contract as described in question 1, does the 40% deposit requirement apply to the portion of the purchase price attributable to the ‘burial or interment right’?

4. May the trustee of a pre-need trust account pay the funds identified or earmarked to a specific pre-need contract to the cemetery owner upon a default by the contract purchaser?

5. May the trustee of a pre-need trust account pay the funds identified or earmarked to a specific pre-need contract to the contract purchaser upon a default by the cemetery owner in the delivery of the property or performance of the services called for in such contract?

6. Assuming the trustee may pay the purchaser upon a default by the cemetery owner, must the trustee pay the purchaser the amount identified and earmarked to the specific contract or can the trustee pay the purchaser the amount necessary to insure delivery of the property or performance of the services called for in such contract, whether or not such amount is less than the amount identified or earmarked to the contract?”
I will answer your questions *seriatim*:

1. There are no requirements that any part of the consideration paid for pre-need burial contracts be held in trust except those contained in §§ 57-39.9 and 57-39.10 of the Code. These sections require that forty percent of the purchase price of items or services which may be delivered or performed after 120 days following receipt of initial payment be placed in a trust account. Since you have stipulated that there is a separately stated purchase price for each item, the seller may retain the full purchase price on those items which must be delivered within 120 days after receipt of initial payment.

2. Section 57-39.9 provides that all personal property or services shall be subject to the requirements contained therein and in § 57-39.10. A burial or interment right, as defined by you, constitutes intangible, personal property. If evidence of the right to immediate interment of the buyer, or someone designated by him, is to be delivered within 120 days of receipt of initial payment, there need be no deposit in the pre-need trust account. If the delivery of that right may occur after 120 days, forty percent of the purchase price must be deposited in the pre-need trust account.

3. Because of my answer to your second question, your third inquiry is rendered moot.

4, 5 and 6. Section 57-39.12 provides the conditions upon which the trust funds may be disbursed to the seller. This section, however, applies solely to those contracts which have been fully performed by the seller. Nowhere in the applicable statutes are there provisions concerning the disbursement of trust funds in the event either the seller or the purchaser defaults on the contract. I am of the opinion that, upon the occurrence of such an event, the seller or the purchaser, as the case may be, could institute an appropriate action for breach of contract. In this action, the court would have authority to order the disbursement of the trust funds. Additionally, the trustee, if and when he becomes aware of a breach of contract, could bring an action in a court of appropriate jurisdiction to seek its aid and guidance in the disbursement of trust monies.

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**CONTRACTS—Procedure For Opening Bids For Equipment Purchased With Capital Outlay Funds.**

**CONFLICT OF LAWS—General Conditions Of Contract For Capital Outlay Projects Conflict With Statute Governing Bid Opening Procedure—Statute controls.**

**PURCHASES AND SUPPLY, DEPARTMENT OF—Bid Opening Procedure Specified In Statute Prevails Over General Conditions Of Contract For Capital Outlay Projects.**

**VIRGINIA FREEDOM OF INFORMATION ACT—Provisions Of Act Relating To Inspection Of Public Records Do Not Apply To Bid Opening Procedure.**

October 14, 1975

**The Honorable Philip R. Brooks, Director**

**Department of Purchases and Supply**

This is in reply to your request for an opinion as to the required procedure for the opening of bids on contracts for equipment purchased with capital outlay funds. You state that the Department recently solicited bids for certain accessories that were to be purchased out of capital outlay funds. Because of the nature of the funding, the Department attached to the bid invitation the General Conditions of the Contract for Capital Outlay Proj-
ects. You further advised me that one bidder contended that paragraph 10 of the General Conditions governed the bid opening procedure rather than the provisions of § 2.1-275 of the Code of Virginia (1950), as amended.

Section 2.1-275 provides, in pertinent part, that “[e]ach bid with the name of the bidder shall be entered of record, and each record, with the successful bid indicated, shall, after the letting of the contract, be open to public inspection.” (Emphasis added.) Paragraph 10 of the General Conditions, on the other hand, provides in pertinent part, that “bids will be opened at the time and place stated in the invitation, and their contents made public for the information of bidders and others interested who may be present either in person or by representative.” (Emphasis added.)

The General Conditions are standard contract clauses administratively adopted for use in capital outlay project contracts. Section 2.1-275, on the other hand, is an enactment of the General Assembly and, of course, would control in the event of any conflict with the General Conditions, provided the contract in question is one to which § 2.1-275 applies. Section 2.1-275 is part of Article 3 of Chapter 15 of Title 2.1, which establishes a centralized purchasing system for “all materials, equipment and supplies of every description, the whole or a part of the costs whereof is to be paid out of the State treasury....” (See § 2.1-273.) Assuming, therefore, that the “accessories” purchased pursuant to the contract in question constitute materials, equipment or supplies, I am of the opinion that the bid opening procedure specified in § 2.1-275 applies notwithstanding anything to the contrary in paragraph 10 of the General Conditions.

Your final inquiry is whether the Virginia Freedom of Information Act contains any requirement which can be construed to require the Department to follow a bid opening procedure different from that spelled out in § 2.1-275. Section 2.1-342, a provision of the Freedom of Information Act requiring official records to be open to inspection, does not apply to any situation in which other procedures relating to the inspection of public records are specifically provided by law. Section 2.1-275 contains a specific provision relating to the inspection of bid records. Consequently, I conclude that the provisions of the Act relating to the inspection of public records do not apply in this instance.

CONTRACTS—Section 11-20.2 Invalid As Applied To Local Governments—Bid advertising.

CONTRACTS—Awarded To Lowest Responsible Bidder—Applicable to both State and local government contracts.

CONTRACTS—Failure Of Municipality To Award Public Works Contract In Excess Of $2500 To Lowest Responsible Bidder Renders Contract Void.

CONTRACTS—Formal Advertising For Bids On State Contracts But Not For Local Governments.

COUNTIES, CITIES AND TOWNS—Contracts—Awarded to lowest responsible bidder—Applicable to both State and local government contracts.

COUNTIES, CITIES AND TOWNS—Contracts—Language of § 11-20.2, standing alone, not sufficient to create requirement that local government public works contracts be awarded only after advertising for bids.

STATUTES—Section 11-20.2 Invalid As Applied To Local Governments—Bid advertising.
This is in reply to your recent request for an opinion in which you raise the following question:

"Do Virginia Code Sections 11-20 and 11-23 require a municipality that seeks to award a contract for the construction of a public parking facility, the cost of which is in excess of $2,500.00, to do so only after first advertising for bids and awarding the contract to the lowest responsible bidder, and if so, does the failure of a municipality to observe any such requirements render the contract so awarded void?"

Sections 11-20 and 11-23 of the Code of Virginia (1950), as amended, are part of a general statutory scheme relating to public contracts set forth in Chapter 4, Title 11, of the Code. They must be read in conjunction with the other provisions of Chapter 4 in which there are three provisions which pertain expressly to advertising for bids. Section 11-17 contains a general requirement that public works contracts in excess of twenty-five hundred dollars be awarded only after advertising for bids. That section, however, applies only to contracts awarded by "the State of Virginia, or any department, institution, agency or water, sewer or sanitation authority thereof." Section 11-21, relating to the rejection of bids and advertising for new bids, refers only to rejection of bids by "the State" and, as to advertisement for new bids, merely provides that "new bids shall be made as in the first instance." Section 11-20.2 is the only provision in Chapter 4 which refers to both State and local government contracts and which makes any reference to advertising for bids. This section, which permits the withdrawal of bids under certain circumstances, provides that "[t]he contracting authority must require, and so state in its advertisement for bids, either of the following two procedures for withdrawal of a bid...." The term "contracting authority," as it is used in § 11-20.2, means, and includes, any "county, city, town, school board, or agency thereof."

Reading the above-quoted portions of § 11-20.2 together, it appears that its drafters may have assumed that bids for contracts by local governments would normally be preceded by advertising. I do not believe, however, that the language of § 11-20.2, standing alone, is sufficient to create a requirement that local government public works contracts be awarded only after advertising for bids. In any event, I have opined that § 11-20.2 is invalid insofar as it applies to local governments. See Opinion to the Honorable Joseph A. Leafe, Member, House of Delegates, dated August 6, 1975, a copy of which is enclosed. In addition, the other provisions of Chapter 4, which deal broadly with the question of bid advertising, do not impose such a requirement on local government contracting authorities.

You also inquire whether a public works contract in excess of twenty-five hundred dollars awarded by a municipality must be awarded to the lowest responsible bidder. Two provisions in Chapter 4 of Title 11 are relevant to this question. Section 11-20, relating to both State and local government contracts, provides, in part, that "[t]he contract shall be let to the lowest responsible bidder for the particular work covered in the bid when the contract is to be let for a lump sum, or to the responsible bidder naming the lowest per centum of fee if the contract is to be let on a cost-plus basis." Section 11-23, the only section in Chapter 4 relating generally to public works contracts awarded by local governments, provides, in part, that "[n]o contractor, as the lowest responsible bidder, shall subcontract any work required by the contract except under the following conditions...." (Emphasis added.) In my opinion, the quoted portions of §§ 11-20 and 11-23 reveal a legislative intent to require all public works
contracts, including those awarded by local governments, to be awarded only to the lowest responsible bidder. This requirement necessarily implies that some procedure must be employed to obtain competitive bids. This procedure might include advertising in the commercial sense, the posting of notices, use of a bidders' list, etc.

In summary, a general requirement that contracts be awarded to the lowest responsible bidder is applicable to both State and local government contracts. As to each category of contracts, Chapter 4, Title 11, requires the contracting authority to take steps to obtain competitive bids. This procedure is required to be formal advertising for bids in the case of State contracts, but is not so restricted in the case of local governments.

Your final inquiry raises the question whether failure on the part of a municipality to observe the requirement of awarding a contract to the lowest responsible bidder would render a contract so awarded void. It is a well-established principle of law in the Commonwealth that contracts which are contrary to public policy, even though resting on a valuable consideration, are void. As hereinabove noted, there is a general requirement applicable to local government public works contracts in excess of twenty-five hundred dollars that such contracts be awarded only to the lowest responsible bidder. In my opinion, this requirement is a basic tenet of the public policy of the Commonwealth of Virginia as it relates to government contracts. The failure to abide by it is a violation of a statute and a public works contract in excess of twenty-five hundred dollars awarded by a municipality to any bidder other than the lowest responsible bidder is, therefore, void.

CONTRACTS—Term "State Contracts" Does Not Include Contracts Of Counties, Cities and Towns.

AMENDMENTS—Title Of Act—Restrictive language sets bounds of act; provisions exceeding those bounds are void.

AMENDMENTS—Title Of Act—Subjects in a statute, not specified in title, must be germane to, or in furtherance of, object expressed in title.

BONDS—Title Of Act—Restrictive language referred only to bonds to secure benefits of National Industrial Recovery Act and other federal statutes.

CONTRACTS—Section 11-20.2 Invalid As Applied To Local Governments—Bid advertising.

COUNTIES, CITIES AND TOWNS—Contracts—Term "State contracts" does not include contracts of counties, cities and towns.

COUNTIES, CITIES AND TOWNS—Title Of Act—Restrictive language referred only to bonds to secure benefits of National Industrial Recovery Act and other federal statutes.

STATUTES—Section 11-20.2 Invalid As Applied To Local Governments—Bid advertising.

August 6, 1975

THE HONORABLE JOSEPH A. LEAFE
Member, House of Delegates

This is in response to your recent request for an opinion whether the title of Chapter 683, [1974] Acts of Assembly 1449, sufficiently expresses
the object of that legislation. The title of the legislation in question is as follows:

"An act to amend the Code of Virginia by adding a section numbered 11-20.2, to provide for withdrawal of bids for State contracts under certain circumstances."

The specific issue you raise is whether the above-quoted title is broad enough to support the provisions in the body of the Act which provide for the withdrawal of bids for contracts awarded by cities.

Article IV, Section 12, of the Constitution of Virginia (1971) provides, in part, that "no law shall embrace more than one object, which shall be expressed in its title." Nearly all of the decisions of the Virginia Supreme Court dealing with the question you raise relate to Section 52 of the 1902 Constitution of Virginia, the predecessor to Section 12. There is no evidence, however, that the framers of the 1971 Constitution intended any change in the substance of those decisions. It is, therefore, my opinion that the decisions construing Section 52 of the 1902 Constitution are applicable to questions arising under Article IV, Section 12. See Prince William County v. Wood, 213 Va. 545, 549 (1973).

Except for a special rule which has been developed for amendatory acts, the decisions of the Virginia Supreme Court construing the constitutional mandate that no law shall embrace more than one object have generally dealt with two issues. By far the most frequently litigated issue has been whether broad and unspecific language in the title of an act is sufficient to support the inclusion of a variety of matters in the body of the legislation in question. With regard to that issue, the Supreme Court of Virginia has repeatedly held that the Constitution does not require the title to be an index or digest of the various provisions of the act. Rather, all that is required is that the subjects embraced in a statute, but not specified in the title, be germane to, or in furtherance of, the object expressed in the title, or have a legitimate and natural association therewith. Fairfax County Ind. Dev. Authority v. Lewis M. Coyner, Director, 207 Va. 351, 355 (1966), and cases cited therein.

A second line of decisions arising under old Section 52 dealt with the effect of restrictive language in the title. In Wooding v. Leigh, 163 Va. 785 (1934), the Supreme Court held that "the title to an act sets the bounds in the act; and to the extent that its provisions exceed those bounds they are void." In that case, the title to the act in question referred only to bonds issued to enable counties, cities and towns to secure the benefits of the National Industrial Recovery Act and other federal statutes. To the extent that the text of the act undertook to authorize the issuance of bonds for purposes other than to enable a county, city or town to secure the benefits of the federal statutes mentioned, it was held void. Id. at 802. Likewise, in Fidelity Ins., Trust & Safe Deposit Co. v. Shenandoah Valley R.R., 86 Va. 1 (1889), wherein the title to an act referred only to the payment of wages or salaries to certain employees, the Virginia Supreme Court invalidated those portions of the text of the act which purported to secure payment of, among other things, the price of a locomotive. In the Fidelity decision, the Court observed:

"When the title is general, as it may be, all persons interested are put upon inquiry as to anything in the body of the act which is germane to the subject expressed; but when the title is restrictive, and confined to a special feature of a particular subject, the natural inference is that other features of the same general subject are excluded." Id. at 6.

In Irvine v. Commonwealth, 124 Va. 817 (1919), a case involving the effect of restrictive language in the title of a legislative enactment, the court observed:
"[The title to the act] enumerates the places in which it shall be unlawful to use the common or 'roller towels,' viz: 'In any hotel, railway train, railway station, public or private school, public lavatory or washroom.' It has thus set the bounds, and to add 'office building' (another distinct place) in the body of the act, would violate the terms and intendment of section 52..."

In my opinion, the issue raised in your request is controlled by the rule developed in the second line of cases dealing with the effect of restrictive language in the title to the legislative enactment. The answer to your inquiry thus depends upon the meaning of "State contracts" as it is used in the title to Chapter 683. In my opinion, the term "State contracts" does not mean and does not include contracts of cities, counties and towns. I conclude, therefore, that Chapter 683 is void insofar as it purports to authorize the withdrawal of bids for contracts of counties, cities and towns. So much of the statute as is fairly included within the title, however, is valid. See Commonwealth v. Chesapeake & Ohio Ry. Co., 118 Va. 261, 272 (1916).

COUNTIES—Amherst County May Not Give Deed Of Trust On Property Leased To Quasi-public Corporation, To Secure Bank Loan To Corporation.

COUNTIES—Prohibited From Contracting Debt Without Specific Statutory Authority—Deed of trust.

DEED OF TRUST—County May Not Give Deed Of Trust On Property Leased To Quasi-public Corporation, To Secure Bank Loan To Corporation.

LOANS—County May Not Give Deed Of Trust On Property Leased To Quasi-public Corporation, To Secure Bank Loan To Corporation.

March 24, 1976

THE HONORABLE J. B. WYCKOFF
Commonwealth's Attorney for Amherst County

I am responding to your inquiry as to whether Amherst County may give a deed of trust on property it has leased to a quasi-public corporation for operation as a county country club, in order to secure a bank loan to that corporation for improvements to the property.

By giving the deed of trust as security for a loan to the country club corporation, the county will be contracting a debt. Article VII, Section 10(b), of the Constitution of Virginia (1971) prohibits counties from contracting debt without specific statutory authority, with certain exceptions not here pertinent. I am unaware of any statutory authority permitting the county to contract debt by deed of trust. It is my opinion, therefore, that your question must be answered in the negative.

COUNTIES—Finance Board Created By § 58-940 In All Counties Without Any Action By Board Of Supervisors.

April 12, 1976

THE HONORABLE ROBERT C. BOSWELL
Commonwealth's Attorney for Floyd County

Your recent inquiry raises three questions:

"1. Does § 58-940 of the Code create a County finance board in all
counties without any action being taken by the local governing body?

2. If affirmative action is needed on the part of the local governing body, what is needed beyond appointment of a citizen member?

3. If affirmative action is necessary to establish such a board and none was taken or the requirements were not met, what would be the proper procedure to evidence an intent not to have such a board since the statute only provides that once a board is established it can be abolished by duly adopted ordinance and makes no mention of the situation set out above?"

I will answer your questions seriatim:

(1) Section 58-940, Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

“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....”

The foregoing language manifests a clear intent by the General Assembly to create finance boards in all counties without the necessity for any implementing action by the board of supervisors. Section 58-940 provides that "there shall be for each county of the Commonwealth a county finance board," and makes the chairman of the board of supervisors and the county treasurer ex officio members. The third member, "a citizen of the county of proven integrity and business ability," is court-appointed. Therefore, the finance board comes into being without any action by the board of supervisors. Accordingly, I am of the opinion that your first question must be answered in the affirmative.

(2, 3) For the reasons stated in the response to your first question, your second and third questions are moot.

COUNTIES, CITIES AND TOWNS—Cost Of Relocating Sewer Lines Of Hampton Roads Sanitation District Located Within Public Street Right Of Way, Necessitated By Street Improvement, Borne By District, Not Municipality Or Department Of Highways And Transportation.

HAMPTON ROADS SANITATION DISTRICT—Cost Of Relocating Sanitation District Sewer Lines Located Within Public Street Right Of Way, Necessitated By Street Improvement, Borne By District, Not Department Of Highways And Transportation Or Municipality.

HIGHWAYS—Cost Of Relocating Hampton Roads Sanitation District Sewer Lines Within Public Highway Right Of Way, Necessitated By Road Improvement, Borne By District, Not Municipality Or Department Of Highways And Transportation.

HIGHWAYS—Location Of Facilities Within Right Of Way—Permit from State Highway Commission required.

STATUTES—Legislature Presumed Not To Intend To Alter Common Law In Absence Of Specific Words To Contrary.
REPORT OF THE ATTORNEY GENERAL

UTILITIES—Cost Of Relocating Sanitation District Sewer Lines Located Within Public Street Right Of Way, Necessitated By Street Improvement, Borne By District, Not Department Of Highways And Transportation Or Municipality.

July 28, 1975

THE HONORABLE DOUGLAS B. FUGATE
State Highway and Transportation Commissioner

In your letter of July 21 you posed the following inquiry:

"Whether the Virginia Department of Highways and Transportation and/or municipalities (jointly and separately as the case may be) or the Hampton Roads Sanitation District must bear the cost of relocating and/or adjusting sewer lines, and appurtenances, of such District, which lines are presently located within existing public highway or street right of way, when such relocation and/or adjustment is necessitated by a planned alteration in or improvement to the existing road, except in those instances wherein Section 33.1-55(a) and Section 33.1-56, Code of Virginia (1950), as amended, apply? Please answer this question without regard to the provisions of any written permit which may have been issued by the Department for the utility's original installation of such sewer line. Please assume also that the utility has no right to be located upon the right of way other than pursuant to Chapter 66, Section 10(k), [1960] Acts of Assembly 69, and, that the relocated lines will remain within the public highway or street right of way."

Chapter 66, § 10(k), [1960] Acts of Assembly 69, (hereinafter referred to as "the enabling Act" or "the Act") authorizes and empowers the Hampton Roads Sanitation District to act through its Commission as follows:

"to construct and operate trunk, intercepting or outlet sewers, sewer mains, laterals, conduits or pipelines in, along or under any streets, alleys, highways or other public places within or without the District; in so constructing its facilities, it shall see that the public use of such streets, alleys, highways, and other public places is not unnecessarily interrupted or interfered with and that such streets, alleys, highways and other public places are restored to their former usefulness and condition within a reasonable time; to this end the Commission shall cooperate with the State Highway Commission and the appropriate officers of the respective counties, cities and towns having an interest in such matters;"

I am of the opinion that the privilege to occupy public rights of way given to the Sanitation District under the foregoing provision is subordinate to the primary purpose for which such rights of way were originally obtained. Consequently, any relocation or adjustment in the utility's facilities necessitated by a street or road improvement, whether undertaken by a municipality or the Department of Highways and Transportation, or both, must be made at the expense of the utility. This conclusion is supported by several factors including: (1) the wording of the enabling Act, (2) a prior Opinion of the Attorney General and (3) the common law rule pertaining to the relocation of utility lines within public highway or street right of way.

It should be noted that under § 10(k) of the Act, quoted above, the authorization given the Sanitation District to locate its facilities within public right of way is specifically subject to the proviso that public use of
the right of way shall not be “unnecessarily interrupted or interfered with”,
that the right of way be “restored” to its “former usefulness and condition”,
and that the Commission “cooperate with” the State Highway Commission
and responsible local officials. These important restrictions upon the au-
thorization granted constitute evidence that the legislature in no way
intended that the utility’s use of the road or street would take precedence
over the original public purpose for which the right of way was secured.

The privilege granted the District to occupy public right of way does not,
in my opinion, create in the District a vested property right. Such con-
clusion is supported by a prior Opinion of the Attorney General to you,
dated December 4, 1964, and found in the Report of the Attorney General
(1964-1965) at 129. Such Opinion held that the Highway Commission (now
Highway and Transportation Commission) has the authority to require
the Sanitation District to obtain permits for the installation and operation
of facilities within highway rights of way pursuant to a rule of the
Highway Commission adopted under § 33-12(3) (now § 33.1-12(3)). The
effect of the terms of any written permits which the Department may have
issued for the original installation of the District’s facilities is not within
the scope of the inquiry. The fact that a permit may be required does,
nevertheless, substantiate the conclusion that the permission given under
the statute to locate within existing right of way does not give rise to a
vested property right.

Further support for the determination made herein is found in the
common law rule, recognized in Virginia, imposing upon a utility the burden
of relocating facilities at its own cost, when it occupies highway property
under license and relocation is necessitated by road or street improvements.
PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971);
Anderson v. Water Company, 197 Va. 36, 87 S.E.2d 756 (1957). Thus, in
the absence of the specific statutory sanction, had the Sanitation District
merely located its sewer lines within public right of way with the permis-
sion of the Department of Highways and Transportation or the munici-
pality, it is clear that the burden of subsequent relocation, compelled
by improvement of the roadway, would have fallen on the utility. Chapter 66
of the 1960 Acts, does not, in my judgment, alter this common law rule.

In ascertaining the meaning of a statute it will be presumed, in the ab-
sence of words therein specifically indicating to the contrary, that the
legislature did not intend to alter the common law. Norfolk and Western
previously indicated, the language of the legislation in question actually
confirms, rather than contradicts, the common law.

Inherent in your inquiry, though not specifically stated, is the problem
of whether the District has the authority to collect and expend moneys
for relocation of sewer lines under the circumstances in question. A
reading of the enabling Act, together with the Trust Agreement entered
into pursuant to such Act, reveals that the District through its Commission,
does have such authority. Under § 22(a) of the Act, the Commission is
empowered to collect through its various charges, sufficient funds “to pay
the cost of maintaining, repairing and operating such sewage disposal
system or systems and sewer improvements, if any, including reserves for
such purpose and for renewals and replacements and necessary extensions
and additions to the sewage system.” In my opinion, such language is
broad enough to encompass authorization to collect revenues to pay for
relocation or adjustment of sewer lines necessitated by road or street im-
provements. (It should be noted that a liberal construction of the pro-
visions of the Act is specifically mandated by § 50 thereof.)

Without going into a detailed discussion of the terms of the Trust
Agreement, it will suffice to note that the Commission’s powers thereunder,
with respect to the purposes for which charges can be enacted, are co-
incident with those set forth in the aforequoted § 22(a) of the Act. See Article V, Trust Agreement. In light of my conclusion that the Commission can expend moneys collected from its charges to customers to relocate lines, when necessitated by road or street improvement, it is unnecessary to determine whether the proceeds from bond sales can be so used.

In view of the foregoing, I am of the opinion that, under the facts which you have given, the Hampton Roads Sanitation District, rather than the Virginia Department of Highways and Transportation or municipalities, must bear the cost of relocating and/or adjusting such sewer lines and appurtenances.

COUNTIES, CITIES AND TOWNS—Transition Of County To County Executive Form Of Government—Functions unassigned by statute shall be assigned to appropriate department.

BOARDS OF SUPERVISORS—Authority—May require school board to channel purchases through county purchasing agent.

BOARDS OF SUPERVISORS—Policy-making Power Granted To—Independent policy-making power also granted to school, welfare and library boards.

COUNTIES—Purchasing In County Executive Form Of Government Under Director Of Finance—May except school, welfare and library boards from centralized purchasing.

DILLON'S RULE—Limits Authority Of Local Governments To Powers And Functions Statutorily Established.

LIBRARIES—Board Of Supervisors In County Executive Form Of Government Has Choice Of Creating Library Board With Policy-making Power, Or Retaining That Power Itself.

PERSONNEL ACT—County Executive Form Of Government—Appointments in school and welfare areas governed by statute; library personnel.

SCHOOLS—Board Of Supervisors Does Not Have Policy-making Power Over Schools Or Control Over Their Personnel.

SCHOOLS—School Boards—Authority over purchases of supplies for school purposes.

WELFARE BOARD—Board Of Supervisors Does Not Have Policy-making Power In Welfare Area.

THE HONORABLE EDWARD A. NATT
County Attorney for Roanoke County

You have indicated that Roanoke County's transition to the county executive form of government has raised certain questions. They are as follows:

"1. At the present time, the County provides several services which do not tie in closely with any of the departments set out in § 15.1-604. These services include a fire service and parks and recreation service and in the near future the County will be providing utility service and planning services. I would respectfully request your opinion whether it would be permissible under the county executive form of government
to prescribe that these services may be established as divisions or sections of the county executive office without the necessity of being included in any one of the particular departments.

“2. Under the county executive form of government, § 15.1-605(g) states that the director of finance shall be the purchasing agent for the county unless the board of county supervisors shall designate some other officer or employee for such purpose. Section 42.1-35 of the Code states that the library board is responsible for management and control of the operation of public libraries. Section 22-72 of the Code implies that the school board has the power over purchasing for school purposes and Article II, Chapter 3, Title 63.1 implies that the local welfare board shall have control of the funds budgeted by the local governing body and shall expend the funds as needed in order to carry out its functions. In regard to purchasing, my inquiry is whether or not the county board of supervisors must centralize purchasing under a single officer or employee in accordance with § 15.1-605(g) or do the departments of libraries, schools and welfare continue to be independently responsible for their respective purchases.”

With respect to your second inquiry, in addition to your concern regarding purchasing, you raise two other issues, those of appointment of personnel and policy-making, as follows:

“Section 15.1-598 of the Code states that the board of county supervisors shall appoint all officers and employees in the administrative services of the county, except that the board may authorize the head of a department or office to appoint such subordinates in his office. Section 22-72(5) provides that the school board employ all teachers in the system; § 42.1-35 implies that the library board has such power for the library system and § 63.1-60 provides that the welfare board is authorized to employ persons in that department. Again, the inquiry is whether or not the board of county supervisors must appoint all employees or whether such function may be delegated to the various agencies.

“Section 15.1-590 provides that the board of county supervisors is the policy determining body of the county. However, § 22-72 provides that the school board is responsible for various policy decisions relating to schools, § 42.1-35 states that the library board has the same responsibility in relation to libraries and § 63.1-50 implies the same for the welfare board. Again, my question is, will the board of supervisors be the policy making body for all county business, or will the library, school and welfare boards continue to function independently of the elected governing body.”

Your last two inquiries are:

“3. If it is your opinion that the provisions of the county executive form control, may the Board of Supervisors, by resolution, delegate the policy making decision for the departments back to such boards as the welfare board, the library board and the school board.

“4. May the Board of Supervisors, by resolution, delegate the administrative functions such as purchasing and personnel to the school board, welfare board and library board or the staffs of said departments.”

I will respond to your questions seriatim:

1. Section 15.1-604 states unequivocally that the functions of county government shall be assigned to any one of the following six departments: Department of finance, Department of public welfare, Department of law enforcement, Department of education, Department of records and De-
partment of health. Three additional departments may be created by the board of supervisors: Department of assessments, Department of extension and continuing education and Department of public works. The statute explicitly limits the total possible number of departments to these nine, however, and all county functions must be assigned within these departments. If the board chooses not to create any of the optional three departments, it must assign all county functions among the six departments mandated by the statute.

The county's park and recreation services may be assigned to the Department of public welfare (see § 15.1-607) or, if the board chooses, to one of the other five mandated departments, or to any one of the three optional departments if created. This same statutory constraint governs assignment of the fire department and the office of planning. The authority for such assignments is limited only by the requirement that functions unassigned by the statute shall be assigned to the "appropriate" department. See § 15.1-604. This language clearly leaves the assignment function to the discretion of the board acting upon recommendation of the county executive.

Your first question is, therefore, answered in the negative.

2. Under the rule of Judge Dillon adopted in this Commonwealth, counties have only those powers expressly granted them by statute, those fairly implied in or incidental to the express powers, and those essential to the declared purpose of the County. City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684 (1958). While the General Assembly has constituted the board of supervisors in a county executive form of government as the "policy-determining body of the county" (see § 15.1-590), it has also granted independent policy-making power for schools, welfare, and libraries to the county school board, welfare board and library board, respectively.

Article VIII, Section 7, of the Constitution of Virginia (1971) provides:

"The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

The General Assembly has implemented this mandate in Title 22 of the Code. Absorption of the local school board, school superintendent and school employees into the Department of education of the county executive form of government does not disturb these constitutional and statutory delegations of policy-making power to the school board. Section 15.1-609 expressly provides that "[e]xcept as herein otherwise provided, the county school board and the division superintendent of schools shall exercise all the powers conferred and perform all the duties imposed upon them by general law." Therefore, the board of supervisors does not have any policy-making power over schools.

The General Assembly has likewise provided in Title 63.1 of the Code that the welfare laws of the Commonwealth shall be administered by joint effort of the State Board of Welfare and local welfare boards. Section 63.1-50 expressly provides that the local board of welfare shall administer its own operations and the public aid programs in its county. The county executive form of government expressly recognizes this grant of policy-making power to the welfare board by declaring, in § 15.1-607, that the superintendent of public welfare 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." The same section requires
appointment of a county board of public welfare pursuant to the require-
ments of Title 63.1. As with § 15.1-609, the exception clause ("not incon-
sistent herewith") in § 15.1-607 cannot be construed to give the board of supervisors policy-making powers in the welfare area.

Section 42.1-33 grants governing bodies of counties the power to estab-
lish a free public library for its residents. Section 42.1-35 provides that management and control of such library system shall be vested in a library board. Section 42.1-36, however, exempts the county executive form of government from the requirement of a library board. Thus, the board of supervisors in a county executive form of government has the choice of creating a library board which has the policy-making power over the county library system, or of forming a public library system within its executive branch, thereby retaining the policy-making power unto itself.

Your concern in the area of personnel appointments has been explicitly
answered by the General Assembly in the school and welfare areas. School teachers, principals and other personnel are to be employed by the school board. Sections 22-72(5), 22-203 and 22-217.3. Section 63.1-60 expressly provides that the board of supervisors in a county executive form of gov-
 ernment has the option of appointing welfare employees itself, or dele-
gating that responsibility to the superintendent of public welfare. Under either option, welfare employees are to be hired pursuant to the personnel regulations of the State Board of Welfare.

If the board chooses not to create a library board, but decides to manage the library itself, employment of library personnel would be an express power of the board of supervisors under § 15.1-598. On the other hand, § 42.1-35 expressly provides that management and control of the library system belongs to the library board, if it is created. While employee hiring is not addressed directly in this latter statute, the grant of management and control powers to the library board appears too complete to exclude personnel control. Therefore, if the board chooses to create a library board, it will thereby decide to vest hiring of library personnel in the library board.

Finally, with respect to your third area of concern, i.e., purchasing, § 15.1-605(a) provides that the director of finance in a county governed under the county executive form shall:

"...have charge of the administration of the financial affairs of the county, including...the purchase, storage and distribution of all supplies, materials, equipment and contractual services needed by any department, office or other using agency of the county...."

This broad grant of purchasing power is not contravened by any specific grant of similar power to the school, welfare, or library board, all of which rely upon county funds for the purchase of their equipment and supplies. Accordingly, I am of the opinion that such boards are required to purchase through the countywide purchasing agency. While school boards may be required to utilize the central purchasing system, they retain the right to dictate the specifications for all items. See Report of the Attorney General (1964-1965) at 19.

3. As stated in response to your second question, school, welfare and library boards are expressly granted policy-making power by the General Assembly; such authority is not conferred through any "delegation" on the part of a board of supervisors.

4. As further indicated in response to your second question, the school board has control over its own personnel, and the statutes provide the board of supervisors with the option of vesting personnel control in the welfare and library boards as well. The board of supervisors also has the option of excluding school, welfare and library purchases from its central-
ized purchasing agency should it so desire. Section 15.1-605(g) provides, in pertinent part, that the county purchasing agent "shall make all pur-
chases, subject to such exceptions as may be allowed by the board of county supervisors, for the county. . . .” This language leaves to the board of supervisors discretion to make exceptions to the centralized purchasing function of the director of finance. There is nothing to prevent such exceptions from including all supplies of a school, welfare or library board under the county executive form.

COUNTY ATTORNEY—Erroneous Assessment Refunds Should Be Reviewed By.

COMMISSIONERS OF REVENUE—Erroneous Assessment Refunds Should Be Reviewed By County Attorney.

COMMONWEALTH ATTORNEYS—Civil Duties Transferred To County Attorney By § 15.1-9.1:1.


TAXATION—Assessments—Erroneous assessment refunds should be reviewed by county attorney.

March 24, 1976

THE HONORABLE FREDERIC LEE RUCK
County Attorney for Fairfax County

This is in response to your recent inquiry whether the review of erroneous assessment refunds should be performed by the county attorney in counties in which one has been appointed.

Section 58-1142, Code of Virginia (1950), as amended, provides, in pertinent part, that where the county commissioner of revenue determines that he has erroneously assessed a taxpayer, and the taxpayer has already paid the erroneous levy:

“...the governing body of the county or city shall, upon the certificate of the commissioner ...with consent of the town, city or Commonwealth's attorney that such assessment was erroneous, direct the treasurer of the county or city to refund the excess to the taxpayer. . . .”

(Emphasis added.)

Section 15.1-9.1:1 provides, in pertinent part, that:

“...the governing body of any county may create the office of county attorney. . . . In the event of the appointment of such county attorney, the attorney for the Commonwealth of any such county shall be relieved of the duty in civil matters of advising the governing body and all boards, departments, agencies, officials and employees, of the county, . . . and in any other matter advising or representing the county, its boards, departments, agencies, officials and employees, and all such duties shall be performed by the county attorney. Nothing herein, however, shall relieve the attorney for the Commonwealth from any of the other duties imposed on him by law including those imposed by §§ 2.1-356 and 15.1-66.1.”

Section 15.1-9.1:1 expressly directs that, in all instances where the Commonwealth's Attorney is responsible for advising the board of supervisors, the county attorney is to be substituted. The requirement in § 58-1142 that the governing body obtain the consent of its town, city or Commonwealth's Attorney prior to the refund is merely the imposition of a duty upon Com-
monwealth's Attorneys to advise county boards whether they agree with the commissioner's determination that the assessment was erroneous. This is clearly no more than a duty to advise the governing body, a duty which § 15.1-9.1:1 has transferred from the Commonwealth's Attorney to the county attorney. Accordingly, I am of the opinion that the county attorney should assume the duties imposed upon the Commonwealth's Attorney by § 58-1142.

CRIMES—Abduction Of Child By Parent—Contempt of court—Punishment.

CRIMINAL LAW—Abduction Of Child By Parent—Contempt of court—Punishment.

CRIMINAL PROCEDURE—Abduction Of Child By Parent—Contempt of court—Punishment.

September 30, 1975

THE HONORABLE MARSHALL R. WILLIAMS
Substitute Judge, Juvenile and Domestic Relations District Court
Twenty-Fourth Judicial District

This is in reply to your recent letter in which you asked the following question about the interpretation of § 18.1-37, Code of Virginia (1950), as amended: "What is the proper punishment for the offense of abduction committed by a parent and punishable as contempt of court in any proceeding then pending?"


The punishment for abduction is set forth in § 18.1-37 as follows:

"Abduction for which no punishment is otherwise prescribed, shall be punished by confinement in the penitentiary for not less than one year nor more than twenty years; or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for not more than twelve months or a fine of not more than one thousand dollars, either or both; provided, however, that such offense, if committed by the parent of the person abducted and not punishable as contempt of court in any proceeding then pending, shall be a misdemeanor."

In an Opinion to the Honorable Willard M. Robinson, Jr., Commonwealth's Attorney for the City of Newport News, dated May 26, 1970, and found in the Report of the Attorney General (1969-1970) at 89, the Attorney General was asked if § 18.1-37 made abduction by a parent of his child a misdemeanor. In answering this question in the negative, I stated that a parent may be guilty of a felony under § 18.1-37, if it can be shown that the action of the parent in abducting the child could be punished as contempt. Thus, if the person having custody of the child has been given that custody by a court of competent jurisdiction, a parent abducting such child from the person having custody would be guilty of a felony.

Specifically, § 18.1-37 provides that abduction, including abduction of a child by his parent, is punishable as a felony; abduction by a parent of his
child is punishable as a misdemeanor only if such abduction is "not punishable as contempt of court in any proceeding then pending." The same result obtains under new Title 18.2. See § 18.2-47.

CRIMINAL JUSTICE OFFICERS TRAINING AND STANDARDS COMMISSION—Authority—May but not required to establish advanced special training requirements.

LAW ENFORCEMENT OFFICERS—Criminal Justice Officers Training And Standards—May but not required to establish advanced special training requirements.

POLICE—Criminal Justice Officers Training And Standards Commission—May but not required to establish advanced special training requirements.

SHERIFFS—Criminal Justice Officers Training And Standards Commission—May but not required to establish advanced special training requirements.

December 19, 1975

THE HONORABLE L. T. ECKENRODE, Director
Criminal Justice Officers Training and Standards Commission

This is in response to your letter of November 18, 1975, wherein you inquired, with respect to the Criminal Justice Officers Training and Standards Commission, whether the law establishing the Commission requires that advanced training be mandated.

The General Assembly has conferred various powers on the Commission both at the time of and subsequent to its creation. For example, § 9-109.1 empowers the Commission to fix compulsory minimum training standards for those persons designated to provide courthouse and courtroom security. Section 9-109.2 authorizes the Commission to set such standards for individuals employed as jailers or custodial officers. Section 9-110 provides authority for the Commission to establish and maintain police training programs through such agencies and institutions as it may deem appropriate.

Section 9-109 gives various additional powers to the Commission, the most relevant of which to your inquiry is § 9-109(3), which provides as follows:

"§ 9-109. Powers—In addition to powers conferred upon the Commission elsewhere in this chapter, the Commission shall have power to:

“(3) Establish compulsory minimum curriculum requirements for in-service and advanced courses and programs for schools operated by or for the State or any political subdivisions thereof for the specific purpose of training law-enforcement officers.” (Emphasis added.)

Under § 9-109(3) the Commission has been given the power to set curriculum requirements for certain training programs. These programs are "in-service and advanced courses and programs for schools." Nowhere in this section, or in any other relevant section, have I been able to find language commanding the Commission to create a program for the training of advanced specialities, such as, e.g., homicide investigation. The Commission clearly may establish advanced courses pursuant to § 9-109(3) if it is of the opinion that such training is necessary. This section then merely provides authority for the Commission to act but does not command it to do so.
I am, therefore, of the opinion that the statutory provisions applicable to the Criminal Justice Officers Training and Standards Commission do not require it to establish advanced training programs.

CRIMINAL PROCEDURE—Arrest And Confinement—Deserter from armed forces—Authority of State officer.

ARMED FORCES—Local Police Have Authority To Arrest Army Deserter.

POLICE—Local Police Have Authority To Arrest Army Deserter.

SERVICEMEN—Arrest And Confinement By State Officers.

SHERIFFS—Local Police Have Authority To Arrest Army Deserter.

October 24, 1975

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

This is in response to your recent letter in which you requested an opinion from this office concerning the authority of local police to assist military authorities, at their request, in returning a member of the armed services to military control.

In an Opinion to the Honorable Robert L. DeHaven, Sheriff of Frederick County, dated March 8, 1967, and found in the Report of the Attorney General (1966-1967) at 103, this Office opined that the authority of State officials to apprehend deserters and A.W.O.L.’s from the armed forces is found in 10 U.S.C. § 808 (1925), which provides:

“Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.”

Under the authority of this federal law, county police who have received reliable information that a member of the armed services is A.W.O.L. or a deserter may apprehend and detain the suspect without a warrant pending return to military control. The apprehension of the suspect constitutes an arrest and is thus subject to the requirement of probable cause.

You further requested an opinion concerning the applicability of § 18.1-301, Code of Virginia (1950), as amended, which has been recodified as § 18.2-463, where military authorities request aid of civil authorities. That section requires any person to assist “any sheriff or other officers” under certain circumstances if so requested. This provision is applicable only to State authorities and would not apply where the requesting officer is a military authority.

CRIMINAL PROCEDURE—Arrest Warrant Without Criminal Charge Stated Thereon Is Not To Be Served.

CRIMINAL PROCEDURE—Warrant Must Specify An Offense—Charging suspicion not sufficient.

POLICE OFFICERS—Arrest Warrant Without Criminal Charge Stated Thereon Is Not To Be Served.
PROCESS—Arrest Warrant Without Criminal Charge Stated Thereon Is Not To Be Served.

SHERIFFS—Arrest Warrant Without Criminal Charge Stated Thereon Is Not To Be Served.

WARRANTS—Defective Because Criminal Charge Not Stated Thereon—Returned to issuing officer for completion.

December 22, 1975

THE HONORABLE HARRY O. TINSLEY
Sheriff of Madison County

This is in response to your recent letter wherein you inquired whether an arrest warrant which does not contain on its face a criminal charge should be served by you. I have been advised that the warrant in question has a space wherein the criminal charge is to be stated, but such space is left blank. The statute applicable to such warrant is § 19.2-72 of the Code of Virginia (1950), as amended, which provides:

"On complaint of a criminal offense to any officer authorized to issue criminal warrants he shall examine on oath the complainant and any other witnesses, or when such officer shall suspect that an offense punishable otherwise than by a fine has been committed he may, without formal complaint, issue a summons for witnesses and shall examine such witnesses. If upon such examination such officer finds that there is probable cause to believe the accused has committed an offense, such officer shall issue a warrant for his arrest. The warrant shall (i) be directed to an appropriate officer or officers, (ii) name the accused or, if his name is unknown, set forth a description by which he can be identified with reasonable certainty, (iii) describe the offense charged with reasonable certainty, (iv) command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the offense was allegedly committed, and (v) be signed by the issuing officer.” (Emphasis added.)

A warrant similar to that of your present inquiry was considered by this Office in a prior Opinion to the Honorable Elwood H. Richardson, Jr., Commonwealth's Attorney for the City of Hampton, dated September 21, 1960, and found in the Report of the Attorney General (1960-1961) at 104. In that Opinion an arrest warrant charging “unlawfully and feloniously is suspected of a felony, to wit: (name of the felony)” was held to be invalid. The Attorney General, relying upon the language of § 19.1-91, the predecessor of § 19.2-72, said that “[t]he offense... should be clearly set forth in the warrant; otherwise, the validity thereof could be seriously challenged.” It is clear that the warrant in question herein is defective, inasmuch as it is blank, and therefore fails to comply with § 19.2-72.

Under the Code a sheriff has the duty to serve arrest warrants. Section 15.1-79 in relevant part states that “[e]very 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 adjoined thereto.” (Emphasis added.) With regard to this duty under § 15.1-79, the facts of your inquiry raise the issue whether this arrest warrant must be served.

In light of the language in § 15.1-79, I am of the opinion that a sheriff is under a general obligation to serve arrest warrants and such duty is mandatory. On the other hand, when an arrest warrant is presented to the sheriff for service wherein the space for the criminal charge is left blank the sheriff should not serve the warrant because of obvious failure to comply with the provisions of § 19.2-72. In other words, when a warrant
is clearly defective for the reason cited, the sheriff cannot in good faith undertake to serve it. Instead he should return the warrant to the issuing officer so that compliance with the statutory requirements may be effected.

CRIMINAL PROCEDURE—No Statutory Requirement To Include Motions Made At Trial In Judgment Order.

COURTS—No Statutory Requirement To Include Motions Made At Trial In Judgment Order.

December 1, 1975

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

This is in reply to your recent letter wherein you requested my opinion as follows:

"For many years it has been a practice in the Circuit Court of the City of Danville to include all motions made at a trial in the judgment order. Section 19.2-307 of the Code of Virginia does not include this requirement.

"Is it necessary that any motion made during the trial of a case be included in the judgment order?"

Section 19.2-307 of the Code of Virginia (1950), as amended, is a new statute added to the Code in 1975, and it provides as follows:

"The judgment order shall set forth the plea, the verdict or findings and the adjudication and sentence, whether or not the case was tried by jury, and if not, whether the consent of the accused was concurred in by the court and the attorney for the Commonwealth. If the accused is found not guilty, or for any other reason is entitled to be discharged, judgment shall be entered accordingly. If an accused is tried at one time for two or more offenses, the court may enter one judgment order respecting all such offenses."

Construing your inquiry to be whether there is a statutory requirement that motions be included in the judgment order, your inquiry is answered in the negative.

Though there is no statutory requirement that reference to motions made at trial be included in the judgment order, the final order forms suggested in the Handbook of Standard Procedures and Model Orders In Certain Cases for Judges and Clerks of Courts of Record, prepared by the Judicial Council for Virginia, do include the recital of such motions.

CRIMINAL PROCEDURE—Presentence Reports—Provisions of § 53-278.1 supersede provisions of § 19.2-299.

CONFLICT OF LAWS—Last Approved Governs.

CONFLICT OF LAWS—Presentence Reports—Provisions of § 53-278.1 supersede provisions of § 19.2-299.

PARDON, PROBATION AND PAROLE—Presentence Reports—Provisions of § 53-278.1 supersede provisions of § 19.2-299.

STATUTES—Repeal By Implication.
This is in reply to your recent letter wherein you stated that § 53-278.1, Code of Virginia (1950), as amended, had been revised by the 1975 Session of the General Assembly by the enactment of Chapter 371 so as to provide that a person tried and convicted of a felony, no matter what the minimum sentence may be and whether or not the person is tried by a judge or jury, upon request is entitled to a presentence report. Section 53-278.1 requires that such report be furnished to counsel for the accused at least five days prior to sentencing. You further pointed out that the General Assembly in the same Session passed Chapter 495, a revision and recodification of Title 19.1, and that contained therein is § 19.2-299, which provides that an accused may demand and be entitled to a presentence report only if he has pleaded guilty to, or has been convicted in a trial without a jury, of a felony punishable by death or confinement for more than ten years. That section also requires that a presentence report be furnished to the court and the attorney for the Commonwealth, as well as defense counsel, within a reasonable time prior to the day of sentencing. Chapter 371 was approved on March 19, 1975, and became effective on June 1, 1975. Chapter 495 was approved on March 22, 1975, and will go into effect on October 1, 1975. You then inquired whether these sections are in conflict and, if so, what is the legal consequence.

Section 53-278.1 provides as follows:

"When a person is tried upon a felony charge, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer, after having made same available to counsel for the accused by furnishing him with a copy of same for his permanent use at least five days prior thereto, shall present his report in open court in the presence of the accused who shall have been advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case."

Section 19.2-299 provides as follows:

"(a) After a finding of guilty, a court of record may direct a probation officer to make a presentence investigation and a written report in any case. The accused may demand and be entitled to such investigation and report after he has pleaded guilty to, or has been convicted in a trial without a jury of, a felony punishable by death or confinement for more than ten years.

"(b) The written report of the presentence investigation shall contain any prior criminal record of the accused and such additional information as the court may desire or the probation officer may deem helpful to the court in imposing sentence or in granting probation. The probation officer shall file his written report with the judge and shall furnish copies to the attorney for the Commonwealth and defense counsel after entry of a guilty plea or conviction and within a reasonable time before the day of sentencing. The probation officer shall present his report in open court in the presence of the accused, who
shall be advised of its contents and given the right to cross-examine
the probation officer as to any matter contained therein and to present
additional facts bearing upon a proper sentence.

Chapter 593, [1975] Acts of Assembly, approved March 24, 1975, re-
pealed § 53-278.1 but further provided that, if any section repealed thereby
should be amended and reenacted by the Acts of Assembly of 1975, such
amendments were to be thereby reenacted in the Title 19.2 sections of the
Code equivalent to the repealed section. Chapter 593 becomes effective on
October 1, 1975.

The effect of Chapter 593 is to carry over the newly amended provisions
of § 53-278.1 (Chapter 371) to Title 19.2. An appropriate section number
will be assigned by the Virginia Code Commission pursuant to the pro-
visions of Chapter 593. Until October 1, 1975, however, § 53-278.1, as
amended by the 1975 Session, will remain in Title 53.

Section 19.2-299 will also remain in Title 19.2 and will not be replaced as
a result of the carrying over into that Title of § 53-278.1. If there is a
conflict between the two sections, the general rule is that the last approved
govens. Chapter 495 was approved subsequent to Chapter 371.

The General Assembly is, of course, presumed to know legislation it has
passed during a Session and the effect of subsequent legislation on legisla-
tion that has previously been enacted in such Session. If the amendments
are in irreconcilable conflict, the last amendment must prevail. Common-
wealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938). Repeal of a statute
by implication is not favored but, if inevitable, is as effective as is an
express statutory mandate. The repeal of a statute by implication is called
for if there is substantial conflict between the two statutes being considered
and the subject matter of the first statute is fully covered by the second.
It is well settled that if there are two statutes in apparent conflict, they
should be construed as reasonably as possible so as to allow both to stand and
give force and effect to each. Kirkpatrick v. Board of Supervisors, 146 Va.
113, 136 S.E. 186 (1926).

There is a real, and not merely apparent, conflict, however, between
Chapter 371 and Chapter 495, containing § 19.2-299. Chapter 371 provides
for presentence reports in cases where § 19.2-299 would not provide for such
reports. Chapter 371 requires that a presentence report be furnished to an
accused at least five days prior to sentencing, whereas § 19.2-299 merely
requires that the report be furnished within a reasonable time. Since
Chapter 593 carries over the provisions of Chapter 371 and was approved
subsequent to Chapter 495, the provisions of § 53-278.1 supersede the pro-
visions of § 19.2-299, as of October 1, 1975.

CRIMINAL PROCEDURE—Role Of Commonwealth's Attorney After Cer-
tification Of Criminal Charge To Grand Jury.

COMMONWEALTH ATTORNEYS—Role After Certification Of Criminal
Charge To Grand Jury.

COURTS—Jurisdiction Of Circuit Court Over Accused After Certification
In General District Court And Prior to Indictment By Grand Jury.

CRIMINAL PROCEDURE—Determination That Charge Certified To Grand
Jury Is Not Best Charge—Proper course of action.

July 23, 1975

THE HONORABLE JOHN N. LAMPROS
Commonwealth's Attorney for Roanoke County

This is in response to your request for an official opinion regarding the
proper handling of felony charges after certification by a district court following a preliminary hearing and prior to indictment by the grand jury. As you point out, Rule 3A:5(b) of the Rules of the Supreme Court of Virginia deals with the preliminary hearing in a district court and provides, in part, that the judge thereof shall "certify the case to a court of record having jurisdiction to try the accused if he finds there is probable cause to charge the accused with a felony."

You initially inquire whether the district court or the circuit court has jurisdiction over the accused with regard to matters relative to the certified charge during the period of time after certification in the general district court and prior to indictment by the grand jury. Rule 3A:5(b)(2)(ii) provides that, after certification by the district court, "the judge may admit the accused to bail or commit him to jail and shall transmit all papers in the case to the clerk of the court of record." Consequently, after the decision has been made by the judge of the district court relative to the setting of bail or the commitment of the accused to jail any further jurisdiction over the accused would rest in the circuit court.

Your second inquiry is whether the Commonwealth must present an indictment to the grand jury where the charge has been certified from the district court in a situation where the Attorney for the Commonwealth has determined, after certification, from newly developed evidence, that the defendant either did not commit the crime or that the crime was committed in another jurisdiction and venue would not properly lie in the jurisdiction in which the charge is pending. It is my opinion that under the circumstances that you have delineated the Attorney for the Commonwealth has two options that he may pursue. He may either decline to prepare an indictment for presentation to the grand jury or he may prepare an indictment and present it to the grand jury with the recommendation that it be endorsed "Not a True Bill" and returned with that endorsement to the Court after having been signed by the foreman. In a situation where it appears that the venue is not properly laid the appropriate course of action would be for the Attorney for the Commonwealth not to present the indictment to the grand jury in the first instance.

Your final question addresses the fact that there are situations after certification on a felony charge to the grand jury where the Attorney for the Commonwealth determines that the charge certified is not the best charge and that another offense would more accurately describe what had occurred. You inquire whether the Attorney for the Commonwealth must submit an indictment on the charge for which the defendant is certified and on the new charge, or could he merely submit a new charge to the grand jury and forego submitting the initial charge. It is my opinion that the proper courses of action would be to either have a new warrant issued on the revised charge for a new preliminary hearing and possible certification to the grand jury, or an indictment reflecting only the new charge may be submitted to the grand jury.

CRIMINAL PROCEDURE—Sentencing—Where defendant not delivered to penitentiary, although twenty-one day period has elapsed, sentencing order may be modified.

CRIMINAL PROCEDURE—Sentencing—Even if defendant delivered to penitentiary, if twenty-one day period has not elapsed court may suspend or modify its sentence.

CRIMINAL PROCEDURE—Sentencing—If court takes under advisement motion to suspend sentence, sentencing order is not at that time a final order.
REPORT OF THE ATTORNEY GENERAL

CONFLICT OF LAWS—Conflict Between Rules Of Criminal Practice And Procedure And Statute; Latter Controls.

COURTS—Sentencing—When sentencing order may be modified.

PARDON, PROBATION AND PAROLE—Sentencing—When sentencing order may be modified.

SUPREME COURT OF VIRGINIA—Rules Of Superseded By Statute.

October 8, 1975

THE HONORABLE J. RANDOLPH TUCKER, JR., Judge
Circuit Court of the City of Richmond

This is in reply to your recent letter wherein you referred to § 53-272, Code of Virginia (1950), as amended, which provides for placing a defendant on probation under the supervision of a probation officer in a case where he has been sentenced for a felony but not actually committed and delivered to the penitentiary, and to Rule 1:1, Rules of the Supreme Court of Virginia, which provides that all final judgments shall remain under the control of a trial court and subject to be modified or vacated for twenty-one days after the date of entry. You also made reference to an Opinion to the Honorable George F. Abbitt, Jr., Judge, Fifth Judicial Circuit, dated May 2, 1972, found in Report of the Attorney General, (1971-1972) at 126, wherein it was held that Rule 1:1 controls Rule 3A:25, which grants to a circuit court the power to suspend a felony sentence.

You then inquired as to the latest time within which a court may suspend or modify the sentence of a defendant convicted of a felony, or place him on probation, where he has been delivered to the penitentiary prior to the expiration of the twenty-one day period.

Rule 1:1, Rules of the Supreme Court, provides that all final judgments, orders, and decrees shall remain under the control of a trial court subject to be modified or vacated for twenty-one days after the date of entry. Section 53-272 provides, in pertinent part, as follows:

"After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

"In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine. (Emphasis added.)"

In the case where a defendant has been delivered to the penitentiary prior to the expiration of the twenty-one day period, I construe § 53-272 as not
being applicable and Rule 1:1 as controlling. A court may, therefore, suspend or modify the sentence of such defendant until such time as the twenty-one day period expires even though the defendant has been delivered to the penitentiary.

You next inquired as to the latest time within which a court may suspend or modify the sentence of a defendant convicted of a felony, or place him on probation, where he has not been delivered to the penitentiary but the twenty-one day period has elapsed.

In an Opinion to the Honorable Charles R. Haugh, Commonwealth’s Attorney for Albemarle County, found in the Report of the Attorney General (1971-1972) at 134, it was ruled that the Rules are superseded by Acts of the General Assembly in conflict therewith. I construe § 53-272 as superseding Rule 1:1 and as extending the time within which a court may modify its sentencing order and place a defendant on probation under the supervision of a probation officer. In a case where a defendant has not been delivered to the penitentiary although the twenty-one day period has elapsed, a court, therefore, may modify its sentencing order by placing the defendant on probation under the supervision of a probation officer, pursuant to the provisions of § 53-272, at any time until he is actually delivered to the penitentiary. Since § 53-272 only authorizes modification of the sentencing order by placing a defendant on probation under the supervision of a probation officer, a court may not suspend the sentence of a defendant once the twenty-one day period has elapsed even if the defendant has not been delivered to the penitentiary.

You then asked as to the latest time within which a court may suspend or modify the sentence of a defendant convicted of a felony, or place him on probation, where such court sentences the defendant to a specific term in the penitentiary but takes under advisement suspension of a portion of the sentence.

Since an order taking under advisement a motion to suspend the sentence would be interlocutory in nature, it would not appear that such defendant has been “sentenced”, as the term is used in § 53-21.1, which provides that every person “sentenced” shall be transferred to the penitentiary. As the order is not final and the defendant is not eligible to be committed and delivered to the penitentiary, neither Rule 1:1 nor § 53-272 are applicable, and a court may modify its sentence without regard to either the Rule or the statute. In such cases, however, the defendant should not be transferred to the penitentiary and should be held in a local jail.

DEED OF TRUST—Marginal Release—By attorney-in-fact who may confer upon another his authority to release deed of trust.

DEED OF TRUST—Marginal Release—“B” could convey to “C” authority to release deed on behalf of both “A” and “B.”

DEED OF TRUST—Marginal Release—Assignee of note for purposes of release may confer same authority upon another person.

THE HONORABLE T. F. TUCKER, Clerk
Circuit Court of the City of Danville
Twenty-Second Judicial Circuit

February 27, 1976

Your recent letter inquired as follows:

“(1) ‘A’, by a duly recorded limited power of attorney, delegates and authorizes ‘B’ as his agent and attorney-in-fact to make marginal
releases of deeds of trust. Can 'B' acting under this limited power of attorney authorize 'C' as its attorney-in-fact to make a specified marginal release on behalf of 'A'?

“(2) ‘A’ gives ‘B’ a general power of attorney. ‘A’ and ‘B’ are the noteholders of a deed of trust which has been duly recorded. ‘A’ and ‘B’ desire to have the deed of trust released. ‘B’ executes an instrument designating ‘C’ as their attorney-in-fact and ‘B’ signs this instrument ‘individually and as attorney-in-fact for ‘A.’’ Does ‘B’ have the authority under the general power of attorney to appoint ‘C’ as ‘A’s’ attorney in fact to make a specified marginal release?”

Section 55-66.3, Code of Virginia (1950), as amended, allows a marginal release of a deed of trust to be made by the lien creditor “or his duly authorized agent, attorney or attorney-in-fact, or any person to whom the instrument evidencing the indebtedness has been endorsed or assigned for the purpose of effecting such release.” (Emphasis added.) A person having the authority to make a marginal release of a deed of trust may confer the same authority upon another. See Report of the Attorney General (1973-1974) at 126.

With respect to the first factual circumstance described in your letter, “B” was authorized by “A” to make marginal releases of deeds of trust and, therefore, could properly confer his authority in that regard upon “C.” Thus, your first inquiry is answered in the affirmative.

With respect to the second question, I assume that the circumstances and the language of the general power of attorney given “B” by “A,” a copy of which power was not forwarded with your letter, are such that a third person might fairly understand that “A” executed the power to enable “B” to make the marginal release in question. See Bukva v. Matthews, 149 Va. 500 (1927). If so, “B” could properly convey to “C” the authority to release the deed of trust on behalf of both “A” and “B.” Your second inquiry is, therefore, also answered in the affirmative.

DEED OF TRUST—Procedure For Effecting Release Of—Endorsed “for release purposes only.”

DEED OF TRUST—Marginal Release—Lien creditor or agent must present cancelled note.

DEED OF TRUST—Marginal Release—Lien creditor may assign note to maker for purpose of marginal release.

DEEDS—Procedure For Effecting Release Of Deed Of Trust—Endorsed “for release purposes only.”

March 16, 1976

The Honorable T. F. Tucker, Clerk
Circuit Court of the City of Danville
Twenty-Second Judicial Circuit

Enclosed with your recent letter was a copy of the back of a note that had been endorsed to an individual “for release purposes only.” You inquire whether the language of this endorsement is sufficient under § 55-66.3, Code of Virginia (1950), as amended, to permit the individual to mark the note “Paid and Cancelled.” I assume that the debt evidenced by the note in question was not properly payable to the individual to whom the note was endorsed “for release purposes only.”

Section 55-66.3 establishes a procedure for effecting the release of a deed of trust or other lien securing a debt that has been paid or satisfied. It
requires the lien creditor, unless he has delivered a proper release deed, to cause payment or satisfaction of the debt to be recorded on a certificate of satisfaction in the clerk's office or be entered on the margin of the page of the book where the deed of trust or other lien has been recorded. It further requires that the certificate of satisfaction or marginal entry of payment or satisfaction "be signed by the creditor or his duly authorized agent, attorney or attorney-in-fact, or any person to whom the instrument evidencing the indebtedness has been endorsed or assigned for the purpose of effecting such release...." In addition, if the debt is evidenced by a separate obligation, the "duly cancelled" note, bond or other evidence of debt secured by the deed of trust or other lien be produced before the clerk unless it has been lost or destroyed, in which case an affidavit to that effect must be filed with the clerk.

In an Opinion to you dated August 3, 1971, and found in the Report of the Attorney General (1971-1972) at 139, I concluded that the language of an assignment of a note to an individual "for the purpose of marginal release only" did not purport to make the assignee an agent or attorney-in-fact for the lien creditor, and that the individual assignee was therefore not authorized either to mark the note satisfied or to make a marginal release. Since that Opinion was issued, § 55-66.3 has been amended by Chapter 280, [1972] Acts of Assembly 341, to expand the categories of persons authorized to sign the marginal entry of payment or satisfaction of a debt secured by a deed of trust or other lien to include "any person to whom the instrument evidencing the indebtedness has been endorsed or assigned for the purpose of effecting....[a marginal]...release." See Report of the Attorney General (1973-1974) at 126 wherein I ruled that the maker of a note, who presented a properly cancelled note, qualified as a person who could make a marginal release when the note was assigned to him for that purpose.

The 1972 amendment did not, however, make such person the agent or attorney-in-fact for the lien creditor. In the absence of a statutory amendment doing so and in light of the fact that the language of the endorsement about which you inquire is substantially similar to the language of the assignment at issue in my Opinion to you dated August 3, 1971, I am of the opinion that the individual to whom the note was endorsed "for release purposes only" is not authorized to cancel the note by marking it paid or satisfied. Once the note is duly cancelled and produced before the clerk, the individual in question may, of course, make a marginal release. Your inquiry is therefore answered in the negative.

DEED OF TRUST—Recordation Tax—Deed securing loan by Virginia Housing Development Authority.

June 30, 1976

THE HONORABLE EDWARD G. KIDD, Clerk
Circuit Court of the City of Richmond

This is in response to your inquiry whether a deed of trust given to secure a loan made by the Virginia Housing Development Authority (VHDA) is subject to the state recordation tax. Since I first expressed my views to you regarding this matter, I have become aware of additional factors which make further analysis desirable. These factors are considered in this Opinion, which should be regarded as my formal response to your inquiry.

VHDA is a political subdivision of the Commonwealth which operates
pursuant to the Housing Development Authority Act, §§ 36-55.24 to -55.52 of the Code of Virginia (1950), as amended. It is authorized to issue bonds and use the proceeds to make construction and mortgage loans to housing “sponsors” for low and moderate income housing. VHDA is further empowered by § 36-55.32 to lend money to mortgage lenders to finance such housing and to enter into mortgage insurance agreements in connection therewith.

VHDA exercises the foregoing statutory powers through single family and multi-family housing programs. Its single family programs include the purchase of qualified loans from lenders, and loans which are serviced by lenders. Multi-family programs include construction and permanent loans to sponsors, mortgage purchase programs, and 95% construction loans which are permanently financed from federal sources.

On those loans in which VHDA is the secured party, it requires that its borrowers pay the applicable recordation taxes on the necessary deeds of trust. Although it may lend borrowers the funds to pay such taxes, these funds are repaid by the borrowers to VHDA. VHDA does not bear the economic burden of recordation taxes applicable to its deeds of trust under any of its programs.

Pursuant to § 36-55.37(1), VHDA is declared to be performing an essential governmental function such that its bonds, the transfer thereof, and all receipts pledged to the payment of the bonds are exempt from state and local taxation. Its property is exempt from assessment under § 36-55.37(2). Housing developments which it owns are exempt from property taxation, under § 36-55.37(3), although VHDA may pay service charges in lieu thereof. There is no provision in VHDA's enabling legislation, however, which exempts its borrowers from license or privilege taxes otherwise payable because VHDA lends the borrowers the funds to pay such taxes.

Section 58-55 imposes a tax on the recordation of deeds of trust. It is not a tax on property but a license or privilege tax imposed on the civil privilege of using the registration laws of the Commonwealth. Pocohontas Consol. Collieries Co., Inc. v. Commonwealth, 113 Va. 103, 112, 73 S.E. 446, 448 (1912). I am therefore of the opinion that deeds of trust given to secure VHDA loans are not exempt from recordation taxes as a result of any provision contained in the Act.

The only remaining basis on which an exemption could be founded would be the recordation tax provisions of the Code, §§ 58-54 to -65.1. Sections 58-55.1, 58-60 and 58-64 contain recordation tax exemption provisions, none of which apply to the facts of your inquiry. Specifically, the § 58-64 exemption for deeds conveying property to political subdivisions is inapplicable to deeds of trust given to secure payment of VHDA loans. Accordingly, I am of the opinion that deeds of trust given to secure loans made by VHDA are subject to the recordation tax imposed by § 58-55.

DEEDS—Delinquent Lands—Tax deed may be executed pursuant to repealed provisions if proceedings were instituted prior to June 1, 1973.

TAXATION—Delinquent Tax Land—Paying back taxes does not preserve right to tax deed.

TAXATION—Sale Of Delinquent Lands—Purchase of land at a tax sale is first step in proceeding to obtain title to land.

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

This is in response to your recent request for my opinion whether you
should execute a tax deed conveying property to a purchaser who seeks to acquire it under repealed §§ 58-1083 to -1100 of the Code of Virginia (1950), as amended. Prior to 1972, the Commonwealth had purchased several tracts of land in Bedford County by payment of the delinquent taxes thereon. In December, 1972, a party paid the taxes that were delinquent on these tracts and reimbursed the Commonwealth for its expenditures. In March, 1973, this party filed an application for the purchase of the land. Orders of publication were entered and published, but no further action was taken until September, 1975. On September 15, 1975, new orders of publication were entered. These orders were published for the first time on September 17, 1975. You ask whether, if these proceedings are completed, you should execute a tax deed conveying the property to this party.

Sections 58-1117.1 to -1117.11 establish the present procedure whereby land is sold for delinquent taxes. Prior to June 1, 1973, purchase of delinquent lands was accomplished pursuant to §§ 58-1029 to -1117. These sections were repealed by the 1973 General Assembly when it enacted the present provisions. Section 58-1117.11 provides:

"Any suit or proceedings which have been instituted, prior to June one, nineteen hundred seventy-three, under the provisions of § 58-1027 and §§ 58-1029 through 58-1117... which are repealed by this act, may be completed in accordance with such provisions for the purpose of effecting the objectives of such suit or proceedings."

Your present inquiry depends upon whether any suit or proceedings "have been instituted" prior to June 1, 1973.

In an Opinion to the Honorable Edith H. Paxton, Clerk, Circuit Court of the City of Staunton, dated June 29, 1973, and found in the Report of the Attorney General (1972-1973) at 442, I held that the purchase of land at a tax sale is the first step in a "proceeding" within the meaning of § 58-1117.11 to obtain title to land. My Opinion to the Honorable J. Marshall Coleman, Member, House of Delegates, dated April 8, 1974, and found in the Report of the Attorney General (1973-1974) at 353, held that mere payment of taxes is not the initiation of a proceeding under § 58-1117.11 and that, in order for the right to a tax deed to be preserved under the repealed provisions, the land would have to be purchased at a tax sale or an application for purchase would have to be made prior to June 1, 1973.

In the present case, an application for purchase pursuant to § 58-1083 was filed on March 22, 1973, covering a seven-acre tract in Forest, Virginia. Because this application was filed prior to June 1, 1973, I am of the opinion that, in accordance with § 58-1117.11, the other proceedings may be perfected pursuant to the repealed provisions and a tax deed may be executed.

You further inquire whether a party who paid delinquent taxes on two parcels of land on August 24, 1970, and has continued to pay all taxes since that date but made no application for tax deeds until September 17, 1975, is entitled to a tax deed under the repealed provisions. The Opinion to the Honorable J. Marshall Coleman, supra, held that mere payment of taxes is not the initiation of a proceeding and that an application for purchase made pursuant to former § 58-1083 must be filed prior to June 1, 1973. Because, no application was made by that date, and the land was not purchased at a tax sale, the former procedure is not available for the purchaser's acquisition of the described parcels of land. Accordingly, a tax deed may not now be executed under the repealed provisions.
DISTRICT COURTS—No Statutory Authority For Appointment Of Bailiffs.

JUDGES—Authority To Order Deputy Sheriff As Crier; Section Repealed.

SHERIFFS—Deputy Sheriff—Court may order to act as crier; section repealed.

SHERIFFS—Number Of Deputies Fixed By Compensation Board—Deputy appointed for courtroom security included in number.

SHERIFFS—Required To Provide Security For All Courthouses And Courtrooms In His Jurisdiction.

August 4, 1975

THE HONORABLE GEORGE R. ST. JOHN
County Attorney for Albemarle County

This is in response to your recent inquiry concerning the status of the bailiff in the Albemarle County Juvenile and Domestic Relations District Court. You pointed out that the Sheriff of Albemarle County has traditionally furnished the bailiff in this Court, both prior to and since the establishment of the district court system. You posed three questions which will be answered seriatim.

Your first question is as follows:

"Is the Sheriff of Albemarle County required to supply a deputy to serve as bailiff of the Albemarle County Juvenile and Domestic Relations District Court pursuant to § 53-168.1 of the Code or is the bailiff to be chosen by the chief judge of the district in accordance with § 16.1-69.39 of the Code?"

Section 53-168.1 provides 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 ensure that the courthouses and courtrooms within his jurisdiction are secure from violence and disruption. A list of such designations shall be forwarded to the Director of the Law Enforcement Officers Training Commission."

I have previously held that the language of § 53-168.1 does not provide for any exceptions and that this section requires each sheriff to provide courtroom security for every courthouse and courtroom within his jurisdiction. Report of the Attorney General (1972-1973) at 361. The deputy sheriff who is designated to provide courtroom security would not, however, perform all those functions which were required of bailiffs by §§ 16.1-60 and 16.1-147. The aforementioned sections were repealed in 1972, and no other statute requires the deputy appointed for courtroom security to perform such additional functions. Nothing, of course, would preclude a sheriff from voluntarily assuming on behalf of his deputy those duties which were formerly the responsibility of a bailiff.

In an Opinion to the Honorable Harold B. Singleton, Judge of the Fifth Regional Juvenile and Domestic Relations Court, dated December 4, 1972, and found in Report of the Attorney General (1972-1973) at 231, I held that a judge may require the deputy designated to provide courtroom security to call cases. This Opinion is, however, no longer applicable because it was predicated upon § 16.1-147 which, as I have previously noted, has
been repealed. Section 16.1-147 had required that a bailiff perform those services required of him by a judge.

The legislation which establishes the district court system has no reference to bailiffs, and I am advised that the Committee on District Courts has taken the position that bailiffs are not district court personnel appointed pursuant to § 16.1-69.39 and paid pursuant to § 16.1-69.45. I also am of the opinion that district court judges are no longer authorized to appoint bailiffs.

Therefore, in answer to your first question, it is my opinion that the Sheriff of Albemarle County must designate a deputy to provide courtroom security for the Albemarle County Juvenile and Domestic Relations Court. Such deputy, however, has no statutory functions other than providing courtroom security. Furthermore, because District Court judges no longer have authority to appoint the officer traditionally designated as bailiff, those functions which were formerly the responsibility of the bailiff may now be performed by the deputy sheriff appointed for courtroom security on a voluntary basis or by the clerk or a deputy clerk at the direction of the Court.

Your second question is as follows:

“If the Sheriff's department is required to furnish a deputy to serve as bailiff of the said Court, is this deputy to be included in the number of deputies allocated to the Sheriff's department by the Compensation Board or is he to be treated separately under § 16.1-69.45 of the Code for purposes of determining his proper compensation?”

As indicated, a sheriff does not have authority to appoint a deputy to serve in the capacity of bailiff; he must appoint a deputy, however, to provide courtroom security. Section 15.1-48 is the general statute which authorizes a sheriff to appoint deputies to discharge the official duties of the office of sheriff during the continuance of the principal in office. Because courtroom security is an official duty of the sheriff, deputy sheriffs who are designated to provide courtroom security are appointed pursuant to § 15.1-48. The number of full and part-time deputies within a sheriff's office is fixed by the Compensation Board after the Board has considered the recommendation of the local governing body. Section 14.1-70. Therefore, I am of the opinion that deputies appointed for courtroom security are included in the number of deputies allocated to a sheriff's department by the Compensation Board.

In view of my response to your first inquiry, your third question, “How and by whom is the salary of the bailiff of the said Court to be paid?”, is rendered moot. The deputy sheriff designated to provide courtroom security would, of course, be paid in the same manner as law enforcement and correctional deputies. The Commonwealth pays two-thirds of the salaries of deputy sheriffs, and the remaining one-third is paid by the respective counties or cities for which such deputies are appointed. Section 14.1-79.

DISTRICT COURTS—City Council May Not Supplement Salary Of Substitute Judge.

JUDGES—City Council May Not Supplement Salary Of Substitute Judge.

SALARIES—City Council May Not Supplement Salary Of Substitute Judge.

AMENDMENTS—City Council No Longer Allowed To Supplement Salary Of Substitute Judge.
You request my opinion whether a city council can supplement the salary of a substitute judge. Prior to the 1975 Session of the General Assembly, § 16.1-69.47, Code of Virginia (1950), as amended, provided that the governing body of a county or city might supplement the salaries of district court judges. Chapter 334, [1975] Acts of Assembly 554, however, amended § 16.1-69.47, to provide that salaries of district court judges may be supplemented except for substitute judges. Your inquiry is, therefore, answered in the negative.

DISTRICT COURTS—Fees—Collection under § 14.1-123 for individuals tried on State misdemeanor and city ordinance offenses; paid to City of Norfolk.

ANIMALS—Collection Of Court Costs Where Summons Not Served On Defendant Personally.

DOG LAWS—Collection Of Court Costs Where Summons Not Served On Defendant Personally.

BONDS—Forfeiture Costs—Collection by district court.

DISTRICT COURTS—Fees—Collection under § 14.1-105(4) as part of other costs for receiving and discharging prisoner.

DISTRICT COURTS—Fees—Collection under § 14.1-200.2 on charges not related to traffic offenses.

DISTRICT COURTS—Fees—Collection of court costs where summons not served on defendant personally.

DISTRICT COURTS—Fees—Scire facias—Collection of for Commonwealth's Attorney.


SHERIFFS—Fees—Collection as part of other costs for receiving and discharging prisoner—Service of summons.

You request my opinion concerning various sections of the Code of Virginia and their effect on the collection of court costs. I shall answer your questions seriatim.

1. "Pursuant to § 14.1-123(3): Will the $10.00 fee be paid to the City of Norfolk for individuals tried for both state misdemeanor offenses and city ordinance offenses?"

Section 14.1-123(3), Code of Virginia (1950), as amended, Chapter 591, [1975] Acts of Assembly 1235, effective October 1, 1975, provides for a $10.00 fee to be collected for trying or examining a misdemeanor case, except offenses involving traffic violations. Section 16.1-69.48(a) of the
Code provides, in pertinent part, that all fees collected by the clerk of a general district court of any city having a density of population in excess of 5,000 per square mile are to be paid into the treasury of the city. Therefore, I am of the opinion that the $10.00 fee authorized by § 14.1-123(3) is to be paid to the City of Norfolk for the trial of both state misdemeanor and city ordinance offenses. Your first inquiry is thus answered in the affirmative.

2. "Pursuant to § 14.1-105(4): Will the district court collect the $1.00 fee for the sheriff as part of the other costs for receiving and discharging a prisoner?"

Section 14.1-105, Code of Virginia (1950), as amended, Chapter 591, [1975] Acts of Assembly 1235, effective October 1, 1975, provides that the fees authorized by this section are allowable only for services provided by sheriffs in the circuit court; therefore, I am of the opinion that a district court may not separately collect the $1.00 fee provided in subparagraph 4 of this section for receiving and discharging a person in jail.

3. "Pursuant to § 14.1-121 no mention is made of scire facias costs. At present the costs of court on a bond forfeiture under $3,000 are: $10.00 Commonwealth's Attorney fee, $5.00 clerk's fee and $1.25 sheriff's fee on each service on a state bond forfeiture; on a city bond forfeiture the present costs are: $6.25 clerk's fee and $1.25 sheriff's fee for each service. Should this court continue to collect these forfeiture costs?"

Section 14.1-122, provides that in every scire facias or other proceeding upon a forfeited recognizance, where judgment is awarded to the Commonwealth, a $10.00 attorney's fee is to be taxed as costs in the case. Although § 14.1-121 of the Code provides that no Commonwealth's Attorney is to receive a fee for appearing in misdemeanor cases before a general district court, notwithstanding any provision of the law to the contrary, a forfeiture proceeding is civil in nature and not criminal. Badalson v. Lamm, 195 Va. 1018, 81 S.E.2d 750 (1954). Thus, I am of the opinion that the prohibition contained in § 14.1-121 is not applicable to forfeitures pursuant to § 14.1-120, and the $10.00 fee may still be collected.

Section 14.1-125 provides that for all court and magistrate services in each distress, detinue, interrogatory summons, unlawful detainer, civil warrant, notice of motion, garnishment, attachment issued, or other civil proceeding, a $5.00 fee, which shall include the fee prescribed by § 16.1-115 is to be collected. I am of the opinion that the maximum fee allowed by this section is $5.00. As previously stated § 14.1-105 provides that sheriff's fees are to be collectable only in cases in the circuit court. Thus, the assessment of a separate $1.25 sheriff's fee for service by a district court is prohibited by this statute. My answer to your inquiry concerning the costs of city bond forfeitures is the same as my response to the costs of state bond forfeitures.

4. "Pursuant to § 14.1-200.2, on a charge of a violation of a local criminal ordinance on a summons (a summons which is not related to a traffic offense) should this court collect the $1.00 summons fee?"

Section 14.1-200.2 of the Code provides that whenever a person is convicted of a violation of any provision of a state or local ordinance after being tried on the basis of a summons issued pursuant to § 46.1-178 or other applicable provision of law, the $1.00 fee is to be assessed. In light of the specific language used in the statute, I am of the opinion that the $1.00 fee should be collected whenever a person is convicted of a violation
of any provision of state law or local ordinance after being tried on the basis of a summons.

5. "Should costs of court be collected on summonses relating to animal (specifically dogs) control violations under local ordinances when, in a normal procedure used for service thereof, the summons is not served on the defendant personally?"

Pursuant to § 14.1-105 the sheriff is entitled to a $1.25 fee for the service of a summons on any person, firm or corporation. Section 8-61 of the Code provides that where no particular mode of service is prescribed, service may be had by delivering a copy in writing to the party in question or, if the person is not present, to a member of the family or, if no one is available, by leaving a copy posted at the front door. I am of the opinion that the fee should be collected even though the summons is not served on the defendant personally, regardless of the type of violation involved. It should be pointed out, however, that § 14.1-105, Code of Virginia (1950), as amended, Chapter 591, [1975] Acts of Assembly 1235, effective October 1, 1975, provides that the fees contained in this section are allowable only for services provided by sheriffs in the circuit court. Therefore, I am of the opinion that the fee should not be separately assessed by a district court.

DISTRICT COURTS—Fees—Separate fees not to be collected for sheriffs or their deputies in general district courts.

BAIL—Fee For Accepting Cash Bond Is Payable From State Treasury Only To Magistrates Who Continue On Fee Basis For Terms For Which Elected.


COMMONWEALTH ATTORNEYS—Fees—Collection of various Commonwealth's Attorney fees in misdemeanor cases and at preliminary hearing of felony charge in general district courts—Appeal to circuit court.

DISTRICT COURTS—Fee In § 14.1-123 Is Separate And Distinct From Fee In § 14.1-123(6).

DISTRICT COURTS—Fee Required By § 14.1-200.2 Is Not Affected By Amendment (Chapter 591, 1975 Acts Of Assembly); Still Collectible.

DISTRICT COURTS—Fees—Collection of fee provided by § 14.1-123(3a) —Traffic violation.

DISTRICT COURTS—Fees—Collection of various Commonwealth's Attorney fees in misdemeanor cases and at preliminary hearing of felony charge in general district courts—Appeal to circuit court.

DISTRICT COURTS—Fees—Language of § 14.1-125 providing that court fees shall not include service fees of sheriff, no longer applicable to district courts.

REPORT OF THE ATTORNEY GENERAL

MAGISTRATES—Fee For Accepting Cash Bond Is Payable From State Treasury Only To Magistrates Who Continue On Fee Basis For Terms For Which Elected.

SHERIFFS—Fee Required By § 14.1-200.2 Not Affected By Amendment Of Chapter 591, 1975 Acts of Assembly; Still Collectible.

SHERIFFS—Fees—Language of § 14.1-125 providing that court fees shall not include service fees of sheriff, no longer applicable to district courts.

SHERIFFS—Fees—Separate fees not to be collected for sheriffs or their deputies in general district courts.

July 30, 1975

The Honorable Joseph S. James
Auditor of Public Accounts


Your first inquiry relates to the fact that amended § 14.1-69 apparently provides that fees and mileage allowances in criminal matters for sheriffs and their deputies shall be collectible only for services rendered in circuit courts. You point out that §§ 14.1-105 and 14.1-111 have also been amended to provide that specific fees of sheriffs and their deputies in civil and criminal matters are to be collected only in those cases coming before or pending in the circuit courts. You specifically inquire whether it would be correct to advise the district courts that, on and after the effective date of these amendments, no separate fees for sheriffs or their deputies are to be collected in such courts. In light of the specific language in §§ 14.1-69, 14.1-105 and 14.1-111, directing that fees and mileage allowances be collected only in connection with the matters pending in the circuit courts. I am of the opinion that the answer to your first inquiry is in the affirmative.

Your next inquiry deals with the amendment to § 14.1-121, which provides that no Commonwealth's Attorney shall receive a fee for appearing in misdemeanor cases before a district court. You further point out that this section provides that, when an individual is prosecuted at a preliminary hearing upon a felony charge before any court or judge in his county or city, a $5.00 fee is to be imposed. You inquire (1) whether the district court should be advised not to collect a Commonwealth's Attorney's fee in misdemeanor cases coming before such courts, (2) whether the $5.00 Commonwealth's Attorney's fee should be assessed for the prosecution of a person at a district court preliminary hearing on a felony charge; and, lastly, (3) whether the $5.00 fee is assessable if a misdemeanor conviction in the district court is appealed to the circuit court and the Commonwealth's Attorney appears in that case.

Section 14.1-121 specifically provides that no Commonwealth's Attorney shall receive a fee for appearing in misdemeanor cases before a district court notwithstanding any provisions of law to the contrary. The answer to the first part of this inquiry is thus in the affirmative. Section 14.1-121 further provides that the $5.00 fee shall be assessed for each person prosecuted at a preliminary hearing upon the charge of a felony before any court. Therefore, the answer to the second part of this inquiry is also in the affirmative. Section 14.1-121 also provides that, for each person tried for a misdemeanor in a circuit court, the $5.00 fee is to be assessed. Pursuant to this provision, I am of the opinion that, where a misdemeanor
conviction is appealed to the circuit court and the Commonwealth's Attorney appears in that case, the $5.00 fee is assessable for his appearance before the circuit court. Thus, the answer to the third part of this inquiry is also in the affirmative.

Your third inquiry relates to § 14.1-123(3a), which provides:

“For trying or examining a case of traffic violation, including swearing witnesses and taxing costs, $15.00, which shall include the fee prescribed in § 46.1-413 for transmitting the abstract to the Division of Motor Vehicles and the assessment of $5.00 for reportable violations, payable to the State Treasurer as a new source of revenue for highway purposes as defined in §§ 33.1-38 and 33.1-74.”

You specifically inquire whether $5.00 should be remitted separately by the court to the State treasury as a cost for reportable violations, or should the entire sum be remitted as a court fee to the State or local treasury as provided in § 16.1-69.48. The precursor of Chapter 591 was House Bill No. 1047 which provided in its proposed § 14.1-123(3a):

“For trying and examining a case of traffic violation, including swearing witnesses and taxing costs, $15.00, which shall include the fee prescribed in § 46.1-413 for transmitting the abstract to the Division of Motor Vehicles and the assessment for reportable violations as prescribed in § 46.1-200.1.”

This bill was amended in committee and finally enacted as Chapter 591. It is apparent from examining these two documents that the General Assembly intended that $5.00 of the $15.00 fee now provided in § 14.1-123(3a) is to be remitted by the court to the State treasury as a cost for reportable violations and that the remaining portion of the $15.00 fee is to be distributed as a court cost of $10.00 pursuant to § 16.1-69.48 of the Code, which provides that all fees collected by the judge, substitute judge, clerk or employees of a general district court of any county, except a county having a density of population in excess of five thousand per square mile, are to be paid to the clerk of the circuit court who is to pay them to the State treasury. This section further provides that in the case of a city or a county having a density of population in excess of five thousand, the fee is to be paid into the treasury of that city or county.

Your fourth inquiry concerns the $3.00 fee provided for in § 14.1-123 of the Code which is to be charged for admitting any person to bail. You note that § 19.1-109.9 provides a fee of $3.00 for a justice of the peace, magistrate or clerk for admitting a person to bail. Chapter 591 amends the Code by adding § 14.1-128.1 containing substantially the same provisions as are found in § 19.1-109.9. You note that in a previous Opinion to you of August 22, 1974, I stated that, when cash bail bonds are taken, the magistrate or other bailing officer may include the $3.00 bail fee in the required cash deposit. This was to avoid further collection efforts in the event the case was tried in the absence of the defendant and costs were awarded to the Commonwealth. Your inquiry is (1) whether the provisions of Chapter 591 will cause any change to be made in my previous Opinion and (2) whether the fee for accepting a cash bond is payable from the State treasury only in those instances where a magistrate is continuing on a fee basis for the term for which he was elected. I am of the opinion that the amendments to § 14.1-123 and the enactment of § 14.1-128.1 of the Code do not change my Opinion of August 22, 1974, to you. Further, I am of the opinion that the fee for accepting a cash bond is payable out of the State treasury only to those magistrates who continue on a fee basis for the terms for which they were elected.

Your fifth inquiry is whether the $2.00 fee provided for in § 14.1-123 for
filing and indexing papers connected with any criminal action in a district court is in addition to the $15.00 provided for in subsection (3a). You further inquire whether this $2.00 fee should be separately assessed to be transmitted to the clerk of the circuit court when papers are filed and, in the event that the papers are not required by law to be transmitted to the circuit court, should the fee be collected as a district court fee and remitted as provided in § 16.1-69.48. Section 14.1-123(3a) authorizes the collection of a $15.00 fee. The $2.00 fee about which you inquire is provided for in § 14.1-123(6). I am of the opinion that this constitutes a clear manifestation of legislative intent that the two fees be distinct. Therefore, the $2.00 fee is in addition to the $15.00 fee provided for by the section and it should be separately assessed to be transmitted to the clerk of the circuit court when such papers are so filed. In the event that the papers are not required by law to be transmitted to a circuit court, the fee is to be collected as a district court fee and remitted as provided by § 16.1-69.48 of the Code.

Your sixth inquiry is whether § 14.1-125 is to be construed to mean that the clerks of circuit courts of counties are to receive compensation for filing and indexing civil papers and, if so, the amount of the fee. Section 14.1-125, as amended, Chapter 591, [1975] Acts of Assembly 1235, provides that for all court and magistrate services, in certain instances, a $5.00 fee, which shall include the fee prescribed by § 16.1-115, shall be collected. Section 16.1-115(1) provides that all papers connected with any civil action or proceeding in a district court of a county are to be retained for six months after the actual proceeding is concluded, and at the end of that period they are to be delivered to the clerk of the circuit court where they are to be properly filed and indexed, for which filing and indexing the clerk is to receive a fee of $1.25 which shall be paid by the plaintiff. Thus, I am of the opinion that the circuit court clerks who receive papers from district courts of counties, pursuant to § 16.1-115(1), are entitled to the $1.25 fee.

Your next inquiry deals with amended § 14.1-125 which provides in part as follows:

"...The foregoing court fee shall not include the service fee of any sheriff, or other officer serving, but the person issuing process shall accept and forward any such service fees when tendered at the time of issuing process."

Your inquiry is whether, in view of the amendment to § 14.1-105, any separate sheriff's fee should be collected in a district court proceeding. Section 14.1-105 specifically states that separate fees for sheriffs and deputies are only to be allowed for services rendered in circuit courts. I am of the opinion, therefore, that the quoted language no longer has any application to district courts and the answer to your question is in the negative.

Your last inquiry deals with § 14.1-200.2. Your specific question is whether it would be correct to assume that the amendments made by Chapter 591 do not affect the collection of the additional fee required by § 14.1-200.2 in each case coming before a district court when the defendant is convicted after being tried on the basis of a summons. There is no provision in Chapter 591 which repeals § 14.1-200.2. Thus, I am of the opinion that the $1.00 fee provided for by that section must still be collected. The answer to this inquiry is in the affirmative.

DOG LAWS—Augusta County Dog Warden May Not Give Impounded Dogs To Staunton SPCA.
REPORT OF THE ATTORNEY GENERAL

DOG LAWS—Augusta County May Contract With Staunton SPCA To Dispose Of Impounded Dogs For The County, But Only By Those Means Available To The County.

DOG LAWS—Disposition Of Unlicensed Dogs—By humane destruction or delivery to resident (of county or city where dog impounded) who pays license fee; subject to owner's right of recovery.

DOG LAWS—Disposition Of Unlicensed Dogs—By sale or gift to a federal agency or State-supported institution or agency.

DOG LAWS—Disposition Of Unlicensed Dogs—Not permitted by sale or gift to private dealer merely licensed by a federal agency.

DOG LAWS—Dog Wardens—Not permitted to sell dogs to private individuals who are not residents of county or city in which dogs impounded.

DOG LAWS—SPCA, Acting For The County, May Not Require That Adopted Dogs Be Neutered.

April 20, 1976

THE HONORABLE PHILIP H. MILLER
County Attorney for Augusta County

This is in response to your recent letter wherein you inquire as follows:

"Augusta County and Waynesboro are currently disposing of their abandoned dogs after confining them for the required minimum of five (5) days, by sale to a nonresident duly licensed by the United States Department of Agriculture. The question arises as to whether such sales are authorized under § 29-194.1 of the Code of Virginia as amended and it would be appreciated if you would render an opinion if such sales are permitted under this section or any other section of the Code of Virginia. It is our understanding that these dogs are sold for medical research by this licensed dealer to such institutions as Johns Hopkins University, etc.

In an Opinion to the Honorable J. Marshall Coleman, Member, Senate of Virginia, dated April 19, 1976, a copy of which is enclosed herewith, I held that § 29-194.1, prior to its amendment in 1975, authorized disposition of unlicensed dogs only by means of humane destruction or delivery to a resident of the county or city in which the dog was impounded who was willing to pay the dog's license fee, subject to the dog owner's right of recovery. As also noted in Coleman Opinion, the 1975 amendment of § 29-194.1 authorized two additional means of disposing of impounded dogs: sale or gift to (1) a federal agency or (2) a State-supported institution or agency in the Commonwealth of Virginia. None of the above-mentioned means of disposition authorized by § 29-194.1 prior to or after its amendment would allow sales or gifts of dogs to the private dealer you describe. While the nonresident in question may be licensed by the United States Department of Agriculture, he is not employed by the Department of Agriculture and does not act as an agent for that Department. Accordingly, I am of the view that the 1975 amendment authorizing sales or gifts of dogs to "a federal agency" would not permit sales or gifts to a private dealer who is merely licensed by a federal agency. I must, therefore, respond to your first inquiry in the negative.

You also pose several additional inquiries:

"(1) Under § 29-194.1, et seq., or other provisions of the Code, can the County give the dogs to the local SPCA?

"(2) Under § 18.2-338, et seq., or other provision of the Code, can
the County contract with the local SPCA on a per diem basis, monthly basis, etc., to dispose of said dogs?

“(3) Can the local SPCA humanely destroy stray or abandoned dogs without complying with §§ 18.2-401 and 18.2-402?

“(4) If the County and City can enter into a contract with the local SPCA for the care and disposition of all dogs delivered to the County Dog Pound; in disposing of said dogs will the SPCA be required to kill all dogs delivered by the County and/or City, or can they put some up for adoption?

“(5) If question number 5 is answered in the affirmative, I assume that the dogs put up for adoption can be claimed upon payment of the license fee only and the SPCA could not require that the dog be neutered as they now require prior to adoption. Is this a correct assumption?”

With respect to whether the County dog warden may, pursuant to § 29-194.1, give unlicensed impounded dogs to the SPCA located in the City of Staunton, I have hereinabove noted that under § 29-194.1 the County dog warden may dispose of impounded dogs by delivery “to any person in his county” who will pay the dog’s license fee, subject to the right of the dog’s owner to reclaim the dog as set forth in § 29-199. In disposing of dogs in this manner, however, § 29-194.1, as limited by § 29-199, requires that the person to whom the dog is delivered be a resident of the county where the dog was impounded. See Opinion to the Honorable J. Marshall Coleman, supra. I am, therefore, of the opinion that the Augusta County dog warden may not give impounded dogs to the Staunton SPCA.

Your next question relates to whether the County may contract with the Staunton SPCA to dispose of impounded dogs for the County. I am of the opinion that the County may so contract with the SPCA. Under such an arrangement, however, the SPCA could dispose of County impounded dogs only by those means available to the County under § 29-194.1. In this regard the SPCA could (1) destroy such dogs, after compliance with the provisions of § 18.2-402 requiring notice and a hearing before a judge prior to destruction. The County cannot, by contract, expand the limited authority which the SPCA has to destroy abandoned animals; or (2) deliver such dogs to persons for adoption, provided such person is a resident of the County where the dog was impounded as required by §§ 29-194.1 and 29-199. Pursuant to this arrangement, persons adopting County impounded dogs from the SPCA would not pay the dog’s license fee to the SPCA but would pay such fee to the County; or (3) give or sell County impounded dogs to federal agencies or State institutions or agencies.

As I noted in response to the foregoing question, the SPCA is not authorized to destroy stray or abandoned dogs except after compliance with the requirements of § 18.2-402. Accordingly, I must respond to your third question in the negative.

With respect to your next question, I have previously ruled that the SPCA could, acting under contract with the County, dispose of County impounded dogs by offering them for adoption by residents of Augusta County, the County in which they were impounded. See Opinion to the Honorable J. Marshall Coleman, supra.

In response to your final inquiry, I have hereinabove stated that the SPCA, acting for the County under contract in disposing of impounded dogs, is limited by the provisions of §§ 29-194.1 and 29-199 just as the County would be if it disposed of the dogs. The provisions of § 29-194.1 and, more specifically, § 29-199 do not authorize the County to require that dogs delivered to County residents be neutered. I am, therefore, of the opinion that the SPCA, in acting for the County, may not require that adopted dogs be neutered.
REPORT OF THE ATTORNEY GENERAL

DOG LAWS—Disposition Of Unlicensed Dogs By Sale Or Gift To A Federal Agency Or State-supported Institution Or Agency.

DOG LAWS—Dog Wardens—Not permitted to sell dogs to private individuals who are not residents of county or city in which dogs impounded.

April 19, 1976

THE HONORABLE J. MARSHALL COLEMAN
Member, Senate of Virginia

This is in reply to your recent letter from which I quote the following:

"Section 29-194.1 permits governing bodies to dispose of confined dogs by 'sale or gift to a federal agency or state-supported institution or agency in the Commonwealth of Virginia, or otherwise;'.

"I should like to know whether this statute or any other law makes it permissible for local governing bodies to dispose of such dogs by sale or gift to a private individual not a resident of that county or city involved."

Prior to its amendment in 1975, § 29-194.1 of the Code provided:

"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. Any ordinance providing for the above shall be effective upon passage." (Emphasis added.)

Two previous Opinions of this Office have construed the provisions of § 29-194.1 before its amendment in 1975. See Opinions to the Honorable Henry S. Hathaway, Commonwealth's Attorney for Northumberland County, dated May 1, 1973, and found in the Report of the Attorney General (1972-73) at 158, and to the Honorable Don E. Earman, Member, House of Delegates, dated June 10, 1971, and found in the Report of the Attorney General (1970-71) at 115. The aforementioned Opinions held that § 29-199 limited the alternative means by which county or city dog wardens could dispose of unlicensed impounded dogs under former § 29-194.1. Prior to 1975, this latter section authorized disposal of unlicensed dogs only by means of (1) humane destruction or (2) delivery to any person, in the county or city where the dog was impounded, willing to pay the dog’s license fee, subject, of course, to the right of recovery by the dog’s owner. Accordingly, as previously opined, § 29-194.1 did not authorize dog wardens to sell or give unlicensed dogs to persons not residents of the county or city in which the dog was confined.

The 1975 amendment to § 29-194.1 added language authorizing disposition of unlicensed dogs by "sale or gift to a federal agency or state-supported institution or agency in the Commonwealth of Virginia." Though the foregoing Opinions dealt with the authority of dog wardens to sell impounded dogs, both Opinions specifically implied that the provisions of § 29-194.1 were controlled and limited by § 29-199, which authorizes a game warden to deliver a dog only to a person in his county or city. The additional authority given dog wardens by the 1975 amendment, permitting sale or gift of dogs to federal or State agencies or institutions, would not, in my view, alter the limitations on delivery of dogs to private individuals under § 29-194.1 which are imposed by § 29-199. I am, therefore, of the opinion..."
that county or city dog wardens are not authorized to sell or give dogs to private individuals who are not residents of the county or city in which the dogs are impounded.

EDUCATION—Effect Of Public Law 93-380 Is Direct And Substantial Aid To Private Schools.

SCHOOLS—Child Electing To Attend Private School Is Not Entitled As A Matter Of Right To Enroll In Selected Portion Of Public School Program.

SCHOOLS—Federal Funds—State funds.

SCHOOLS—Students In Private Schools Who Are Eligible For Free Admission To Public Schools Permitted Use Of Libraries Receiving Federally Funded Materials.

STATE AGENCIES—Functions Forbidden Under State Or Constitutional Law May Not Be Assumed Merely Because Funded With Federal Monies.

July 21, 1975

THE HONORABLE WILLIAM H. COCHRAN
Acting Superintendent of Public Instruction

This is in response to your recent letter in which you inquire whether local educational agencies may provide secular, neutral, and nonideological services, material, and equipment for the benefit of children in private, nonprofit elementary and secondary schools, both sectarian and nonsectarian, as provided in §§ 401-06 of Public Law 93-380, 20 U.S.C. §§ 1801-06.

This law, one of the Education Amendments of 1974, provides grants to States for use by local educational agencies in obtaining school library resources, textbooks, and other printed and published instructional materials, the acquisition of instructional equipment (including laboratory and audio-visual materials), and the establishment and maintenance of programs of testing, counseling, and guidance. The statute also provides that, unless contrary to State law, a local educational agency which is the recipient of funds under this Act shall, after consultation with appropriate officials of private, nonprofit elementary and secondary schools, provide for the benefit of children in such schools, secular, neutral, and nonideological services, materials, and equipment, or otherwise assure equitable participation of such children in the purposes and benefits of the Act.

Section 2.1-3 of the Code of Virginia (1950), as amended, provides that a department of the State may accept grants of funds made by the United States to be applied to purposes within the functions of such State department. In determining whether the purpose of a grant is within the function of the department, one must determine whether funds generated by the State are, or could be, used for that purpose. In this sense, the federal funds, upon receipt by the State, would become State funds and are subject to the limitations imposed by the General Assembly or the Constitution of Virginia. See Opinion to the Honorable Woodrow W. Wilkerson, Superintendent of Public Instruction, dated December 4, 1974. Stated another way, a State department may not assume functions forbidden under Virginia statutory or constitutional law merely because those functions are funded with federal monies.

In my opinion, the programs described above involve substantial aid to private schools. The programs directly benefit and support private schools by supplementing the library resources, instructional equipment, and
counseling services of these schools. The natural, reasonable and realistic effect of Public Law 93-380 is direct and substantial aid to private schools. See Almond v. Day, 197 Va. 419 at 426, 428 (1955).

Article VIII, Section 10, of the Constitution of Virginia (1971), forbids the appropriation of public funds to any school or institution of learning not owned or exclusively controlled by the State or a political subdivision, except that, subject to such limitations as may be imposed by the General Assembly, the General Assembly and local governing bodies may appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education in public and nonsectarian private schools and institutions of learning. This section narrowly circumscribes aid to nonpublic education. In the absence of legislative authority for aid to private schools of the type envisioned by the federal statute, neither the State Department of Education nor local educational agencies may provide direct aid. I also note that any program providing aid to sectarian institutions would also be in violation of both Article VIII, Section 10, and Article IV, Section 16, of the Constitution of Virginia (1971).

I have previously held that a child entitled to free admission to the public schools who elects to enroll elsewhere is not entitled as a matter of right to enroll in selected portions of the public school programs, but the school board is not prohibited from accepting such a child if it chooses. Opinion to the Honorable Donald G. Pendleton, Member, House of Delegates, dated November 30, 1973, and found in the Report of the Attorney General (1973-1974) at 305. This opinion is relevant to a portion of your inquiry. In furtherance of its function of administering a system of free public elementary and secondary schools, the State Department of Education could apply for and accept funds under Public Law 93-380. Local agencies, after implementing the programs described in the statute, legally could permit access to these programs by individual students attending private schools who are otherwise eligible for free admission to the public schools. For example, students in private schools who are eligible for free admission to the public schools could be permitted access to and use of libraries which receive materials pursuant to this federal law. Such participation by eligible individuals could not detract from the availability of these programs for regularly enrolled public school students.

EDUCATION—Handicapped Children—Rehabilitative School Authority only responsible for educational costs of children committed to institutions operated by Department of Corrections who attend schools operated by Authority—Costs for private nonsectarian school borne by Board of Corrections and child's home school division.

REHABILITATIVE SCHOOL AUTHORITY—Distinct From Department Of Corrections And State Board Of Education.

SCHOOLS—Handicapped Children—Rehabilitative School Authority only responsible for educational costs of children committed to institutions operated by Department of Corrections who attend schools operated by Authority—Costs for private nonsectarian school borne by Board of Corrections and child's home school division.

September 15, 1975

THE HONORABLE CHARLES K. PRICE
Division Superintendent, Rehabilitative School Authority

This is in response to your recent letter requesting an opinion as to who is responsible for providing special education instruction to handicapped
school-age children committed to the care and custody of the State Board of Corrections. You indicate that the Youth Services Division of the Department of Corrections has placed some of these children in institutions operated by the Department of Corrections while others, because of their particular needs, have been placed in special care facilities such as public hospitals, private nonsectarian residential schools and hospitals, and foster care homes. You specifically inquire from what source funds are to be derived to meet the cost of educating these children and whether the Rehabilitative School Authority is responsible for such costs.

Section 22-218 of the Code of Virginia (1950), as amended, requires that the public schools in each county, city and town operating as a separate school division shall be free to persons between the ages of 6 and 20, residing in such county, city or town. As I previously ruled in an opinion to the Honorable John D. Eure, Jr., Commonwealth's Attorney for the City of Nansemond, dated November 9, 1972, and found in the Report of the Attorney General (1972-1973) at 348, this section of the Code uses residence synonymously with domicile and the domicile of a child is presumed to be that of his parents. I further ruled in that same opinion that the categories of persons deemed to reside or be domiciled in the county, city or town set forth in § 22-218 are presumptions of domicile and are not to be regarded as exclusive.

Under § 22-10.5 of the Code, each public school division is required to provide special education for handicapped children “within its jurisdiction.” If a school division is unable to provide the appropriate special education for a handicapped child and such instruction is not available in a State school or institution, pursuant to § 22-10.8(a) that school division is obligated to pay the parent or guardian of such child a portion of the tuition cost of sending such child to a private nonsectarian school for the handicapped.

Children committed by a court to the care and custody of the Board of Corrections are wards of the State, and the Board is authorized to place such children in facilities which are available and deemed by it to be in the best interests of the child. § 22-233, providing that for school population census purposes, “[p]ersons of school age confined in mental institutions, State or federal industrial schools or prisons, shall be included in the census for the county or city that is the legal residence of the parents or guardians of such child or children.”

With respect to the education of such children, § 22-9.1:04 of the Code provides that:

“Each State board, agency and institution having children in residence or in custody shall provide education and training to such children which is at least comparable to that which would be provided to such children in the public school system pursuant to the provisions of this Code. Such board, agency or institution may provide such education and training either directly with its own facilities and personnel in cooperation with the Board of Education or under contract with a school division or any other public or private nonsectarian school, agency or institution. The Board of Education shall prescribe standards, rules and regulations for such education and training provided directly by a board, agency or institution. Each board, agency or institution providing such education and training shall submit
annually its program therefor to the Board of Education for approval in accordance with rules and regulations of the Board. If any child in the custody of any State board, agency or institution is a handicapped child as defined in § 22-10.3 and such board, agency or institution must contract with a private nonsectarian school to provide special education as defined in § 22-10.3 for such child, the board, agency or institution may proceed as a guardian pursuant to the provisions of § 22-10.8(a).” (Emphasis added.)

Under this section, a State board, agency or institution having a child in residence or in custody must provide for that child's educational needs. The source of funds for financing that education depends on what the child's educational needs are, where the child is placed and what State board, agency or institution is involved. See, e.g., § 22-142 concerning the costs of attendance in a public school of a child placed in a foster home or similar care facility in a county or city other than the child's domicile and § 37.1-96 concerning the costs of schooling of a child who is a patient in a State hospital. With respect to a handicapped child, however, if that child's special educational needs cannot be met within State facilities or the facilities of the school division of his domicile and that child must be sent to a private nonsectarian school, the last sentence of § 22-9.1:04 allows the State board, agency or institution involved to receive payments from the school division of the child's domicile to help defray tuition costs.

As noted above, in the case of children within the care and custody of the Board of Corrections, these children may be placed within institutions operated by the Department of Corrections. In 1974, the General Assembly created the Rehabilitative School Authority. Under § 22-41.3 of the Code, the Board of the Rehabilitative School Authority has the responsibility of establishing and maintaining “a general system of schools for persons committed to institutions composing the Rehabilitative School Authority.” Such system shall include “special educational schools.” As I previously ruled in an opinion to the Honorable Branch K. Rives, Chairman, Rehabilitative School Authority Board, dated March 4, 1975, a copy of which is enclosed, the Rehabilitative School Authority is an entity separate and distinct from the Department of Corrections and the State Board of Education and is not to be regarded as identical to a school division in the State. It has its own budget which is submitted to the General Assembly, see § 22-41.5(i), and the costs of operating its schools are part of that budget.

The creation of the Rehabilitative School Authority, did not, however, abrogate the responsibility of the Board of Corrections to provide for the general education of those children who it does not or cannot place in its own institutions and who do not attend public schools. Nor, in the case of a handicapped child, does it abrogate the responsibility of the child's home school division to share in the costs of sending that child to a private nonsectarian school when that child's educational needs cannot be met within existing State facilities or facilities within the home school division. In this regard, it should be noted that the provision in § 22-9.1:04 explicitly stating that a State board, agency or institution having custody of a handicapped child could proceed as a guardian for purposes of obtaining funds from the local school division for the education of that child by a private nonsectarian school was added by the General Assembly in the same year in which it created the Rehabilitative School Authority.

In response to your question, then, the Rehabilitative School Authority is only responsible for the educational costs of children who are committed to institutions operated by the Department of Corrections and who attend schools operated by the Authority; if the educational needs of a handicapped child cannot be met within existing facilities and that child must
be sent to a private nonsectarian school, the costs must be borne by the Board of Corrections and the child's home school division.

ELECTIONS—Campaign Funds—Up to candidate what he does with balance after election.

CANDIDATES—May Donate Surplus Campaign Funds To Nonprofit Organization In His District.

January 30, 1976

THE HONORABLE RALPH L. "BILL" AXSSELL, JR.
Member, House of Delegates

I am responding to your inquiry whether a successful candidate for political office on a local governing body may donate the surplus of campaign funds he has solicited to a nonprofit organization within the district the candidate will represent as a member of the local governing body.

There is no law of the Commonwealth which affects what a candidate does with excess campaign funds after all obligations of the campaign have been satisfied. See Opinion of the Attorney General to the Honorable John E. Kennahan, Commonwealth's Attorney for the City of Alexandria, dated February 26, 1972, and found in Report of the Attorney General (1971-1972) at 160. Accordingly, your question is answered in the affirmative.

ELECTIONS—Candidates—Individual other than campaign treasurer may be authorized to sign checks drawn on designated campaign depository.

August 7, 1975

THE HONORABLE JOSEPH V. GARTLAN, JR.
Member, Senate of Virginia

Your letter of July 21, 1975 reads as follows:

"Section 24.1-254, Code of Virginia (1950), as amended through 1975, requires the designation of campaign depositories and the deposit of campaign receipts by candidates in such accounts. The Section provides, in the portion pertinent to this inquiry, as follows:

"...No candidate, campaign treasurer or other individual shall pay any expense on behalf of a candidate, directly or indirectly, except by check from such designated depository...." (Emphasis added.)

"My specific inquiry is whether or not a duly designated campaign treasurer may designate one or more persons whose signatures would be authorized signatures for checks drawn on the account in the designated campaign depository so that the designated campaign treasurer's signature need not necessarily be affixed to every check drawn on the account...."

Though in my opinion § 24.1-254 is not directly applicable, I know of no prohibition which would prevent an individual other than the campaign treasurer from being authorized to sign checks drawn on the account in a duly designated campaign depository.

ELECTIONS—Domicile Of Husband Does Not For Voting Purposes Fix Domicile Of Wife.
RESIDENCE—Soldiers' And Sailors' Civil Relief Act—Person on active duty with armed forces neither loses nor acquires residence or domicile for state or local taxation.

TAXATION—Domicile Of Individual For Virginia Tax Purposes Not Controlled By Fact That Individual's Spouse Is Registered To Vote In Virginia.

April 19, 1976

THE HONORABLE A. JOE CANADA, JR.
Member, Senate of Virginia

Your recent letter reads as follows:

"If a military couple is residing in Virginia and the husband maintains a residence in another state, is it possible for the wife to register to vote in Virginia and not affect her husband's tax status?"

The residence or domicile of the husband for state or local tax purposes is the aspect of his tax status that arguably could be affected by the fact that his wife registers or has registered to vote in Virginia. Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940 provides that a person on active duty with any branch of the armed forces of the United States neither loses nor acquires a residence or domicile, for purposes of state and local taxation with respect to his person, personalty or income, solely by reason of being absent or present in a state or locality in compliance with military orders. 50 U.S.C. § 574. Neither § 514 nor any other section of the Act purports, however, to prevent such person from voluntarily changing his residence or domicile to the State or locality in which he is physically present pursuant to military orders. See Ellis v. Southeast Construction Co., 280 F.2d 280 (8th Cir. 1958); and Draper v. Draper, 107 Ohio App. 32, 151 N.E.2d 379 (1958). Thus, the protection against multiple taxation provided by the Soldiers' and Sailors' Civil Relief Act does not obviate the necessity of determining, on a case by case basis, whether a serviceman who was a resident or domiciliary of a state other than Virginia prior to joining the armed forces and who has subsequently lived in Virginia in compliance with military orders, is in fact a Virginia resident or domiciliary for state or local tax purposes.

In Commonwealth v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (1933), a married woman, living with her husband on amicable terms, contended that she was not domiciled in Virginia for purposes of state income and intangible personal property taxes even though she owned real property in Virginia and her husband admittedly domiciled in Virginia for tax purposes, exercised the right of franchise as a registered voter in Virginia. The Virginia Supreme Court sustained this contention, treating as a rebuttable presumption the common-law fiction that the entity or being of a wife is merged in that of her husband. The Court's decision in Rutherfoord, therefore, stands for the proposition that the domicile of an individual for Virginia tax purposes is not controlled by the fact that the individual's spouse is registered to vote in Virginia. See also Report of the Attorney General (1970-1971) at 175 where this office ruled that the domicile of a husband does not, for voting purposes, fix the domicile of a wife. Your inquiry is therefore answered in the affirmative. Cf. Woodroffe v. Village of Park Forest, 107 F. Supp. 906 (N.D. Ill. 1952).

ELECTIONS—Nonregistered Voter Elected To Town Council By Write-in Vote, May Qualify To Hold Office By Registering To Vote Prior To Commencement Of His Term.
CONSTITUTION—Permits Nonregistered Voter Elected To Town Council By Write-in Vote, To Qualify To Hold Office By Registering To Vote Prior To Commencement Of His Term.

DEFINITIONS—Persons Elected On Write-in Vote.

June 25, 1976

THE HONORABLE FRANK A. HOS, JR.
Secretary, Prince William County Electoral Board

This is in reply to your inquiry whether a nonregistered voter, who was recently elected to the Haymarket town council by write-in vote, qualifies to hold the office of councilman and, if not, whether registration prior to the commencement of his term of office would permit him to qualify.

Persons elected on a write-in vote are, by definition, unannounced candidates whose names are not printed on the ballot. See §§ 24.1-129 and 24.1-217, Code of Virginia (1950), as amended. Their qualification to hold town office is governed by Article II, Section 5, of the Constitution of Virginia (1971), which provides in pertinent part that “[t]he only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must...be qualified to vote for that office...”

This Section of the current Constitution was drawn from Section 32 of the 1902 Constitution, which was construed by the Virginia Supreme Court in Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952), to require that a person be a qualified voter in order to be elected to, rather than to hold, elective office. The Court's construction was based upon the deletion of a reference to “holding” office in the adoption process of the earlier Constitution. In the 1971 Constitution, however, the language specifically applies the qualified voter requirement to the holding of office. Such requirement as a condition of election to, rather than holding of, elective office has been retained in the present Constitution only for members of the Senate and House of Delegates. See Article IV, Section 4, of the Constitution. For this reason the Opinion to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated May 6, 1971, and found in Report of the Attorney General (1970-1971) at 130 is inapposite to your inquiry.

Accordingly, I am of the opinion that, while the person elected is not presently qualified to hold office because he is not registered, the Constitution of Virginia permits him to qualify to hold office by registering to vote prior to the commencement of his term.

ELECTIONS—Overseas Citizens Voting Rights Act—Absentee vote in federal election in state where last domiciled.

ELECTIONS—Overseas Citizens Voting Rights Act—Temporary registration list for citizen who has Virginia domicile but no place of abode.

ELECTIONS—Residency As Prerequisite To Vote—Overseas Citizens Voting Rights Act, effect on Virginia law.

June 15, 1976

THE HONORABLE JOAN S. MAHAN
Executive Secretary
State Board of Elections

I am responding to your questions concerning the recently enacted Overseas Citizens Voting Rights Act of 1975. This Act grants to United States
citizens residing outside the United States, the right to register and vote absentee in any federal election in the state where they were last domiciled prior to leaving the country. You request my opinion on the following two matters:

1. What is the effect of this law on Virginia's voting requirement that residence must include both domicile and place of abode?
2. Will it be necessary to have separate registration for federal elections for such persons?

I will answer your questions seriatim:

1. The "Overseas Citizens Voting Rights Act of 1975" delineates certain rights of citizens residing outside the United States to register and vote in any federal election.

Section 3 of the Act provides as follows:

"Each citizen residing outside the United States shall have the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State, or any election district of such State, in which he was last domiciled immediately prior to his departure from the United States and in which he could have met all qualifications (except any qualification relating to minimum voting age) to vote in Federal elections under any present law, even though while residing outside the United States he does not have a place of abode or other address in such State or district, and his intent to return to such State or district may be uncertain, if—

"(1) he has complied with all applicable State or district qualifications and requirements, which are consistent with this Act, concerning absentee registration for, and voting by, absentee ballots;
"(2) he does not maintain a domicile, is not registered to vote, and is not voting in any other State or election district of a State or territory or in any territory or possession of the United States; and
"(3) he has a valid passport or card of identity and registration issued under the authority of the Secretary of State."

Accordingly, I am of the opinion that the effect of the Overseas Citizens Voting Rights Act is to suspend, for those persons to whom it applies, the requirement of Article II, Section 1, of the Constitution of Virginia (1971) that Virginia voters maintain a place of abode as a qualification to vote in the State, while leaving intact the Virginia requirement of domicile. (To the extent the 1975 Act conflicts with my Opinion to the Honorable Nancy P. Haydon, General Registrar for Prince William County, dated March 7, 1974, and found in Report of the Attorney General (1973-1974) at 159, that Opinion is hereby modified.)

2. A voter who meets the domicile and place of abode requirements of Article II, Section 1, of the Virginia Constitution may register to vote. Once registered, such person retains his registration permanently, unless he changes it or fails to vote for four years. See § 24.1-48 of the Code of Virginia (1950), as amended. When a Virginia registered voter leaves the State and abandons his place of abode there, he automatically ceases to qualify to be registered and is removed from the permanent registration list. The Federal Act, however, permits the overseas citizen who has a Virginia domicile but no place of abode, to register and vote by absentee methods, on an election-by-election basis. Since the Act is so structured, I am of the opinion that a temporary registration list is permissible under the Act, and required under Virginia law, since any voter, without a place of abode in the Commonwealth, is not qualified to enter a permanent registration on the books.
ELECTIONS—Part-time, Non-contract Employee Of County (Kindergarten Aide) Prohibited From Serving As Election Judge.

ELECTIONS—County Employee Prohibited By § 24.1-33 From Appointment As An Officer Of Election.

ELECTIONS—County Librarian Ineligible For Appointment As Deputy Registrar.

ELECTIONS—Problems Encountered By § 24.1-33 Can Only Be Corrected By Constitutional Amendment.

ELECTIONS—School Cafeteria Employee Ineligible For Appointment As An Officer Of Election.

ELECTIONS—Sheriff's Radio Dispatcher Ineligible For Appointment As An Officer Of Election.

PUBLIC OFFICERS—De Facto' Officer Should Be Replaced By One Qualified To Hold The Office.

August 7, 1975

The Honorable Warren G. Stambaugh
Member, House of Delegates

Your recent letter requests my opinion whether a part-time, non-contract employee of the county is prohibited from serving as an election judge. The individual in question is employed as a kindergarten aide in the Arlington County school system. She is employed by the county for ten months or 188 working days, in other words the school year. She is not a "permanent employee" in that she has no contract relating to job security.

Section 24.1-33 of the Code of Virginia (1950), as amended, which is identical in language to the last paragraph of Article II, Section 8, of the Constitution of Virginia (1971), provides that:

"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or officer of election."


In short, your inquiry is answered in the affirmative. The fact that the individual has previously served as an officer of election would not be relevant. Section 24.1-33 prohibits the appointment of a county employee as an officer of election. Such election officers are appointed in the month of February each year. See § 24.1-105. If the individual was appointed in February 1975, she should be replaced. See Report of Attorney General (1971-1972) at 329.

I would note that the problems encountered by § 24.1-33 can only be corrected by a constitutional amendment. The General Assembly of Virginia is in the process of proposing such an amendment. See Chapter 653, [1975] Acts of Assembly 1469, 1472.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Reapportionment—Biennial Board of Supervisors option offered counties is discretionary.

CONFLICT OF LAWS—Statutes Passed As A Whole; Each Section Considered With Every Other Section.

COUNTIES—Following Reapportionment, Election Of Board Of Supervisors On Staggered Term Basis Is Optional.

REDISTRICTING—Biennial Board Of Supervisors Option Offered Counties Is Discretionary.

STATUTES—Passed As A Whole; Each Section Considered With Every Other Section.

December 12, 1975

THE HONORABLE JOAN S. MAHAN
Executive Secretary
State Board of Elections

This is in response to your inquiry regarding § 24.1-88(b) (iii) of the Code of Virginia (1950), as amended. Your letter states:

"Please refer to the opinion you gave to the Honorable Robert F. Ripley, Jr., Commonwealth's Attorney for York County, dated June 17, 1975.

"Does the opinion specifically say that following reapportionment, election of the Board of Supervisors must be on a staggered term basis with an election being held every two years for part of the Board?"

Section 24.1-88 provides:

"(a) In each magisterial district or election district there shall be chosen by the qualified voters thereof at the general election in November, in the year nineteen hundred and seventy-one and every four years thereafter, one or more supervisors who shall hold office for the term of four years, except as may be provided by law for those counties having the optional forms of government under the provisions of articles 1 through 4 (§ 15.1-669 through § 15.1-695) of chapter 14 of Title 15.1 and except as hereinafter provided.

"(b)(i) Notwithstanding the provisions of subsection (a) of this section or any other law to the contrary, the governing body of any county may by resolution provide that the county board of supervisors be elected biennially for four-year terms. In lieu of a resolution by the board of supervisors, upon a petition filed with the circuit court of the county or the judge thereof in vacation signed by ten per centum of the qualified voters of the county as of January one of the year the petition is filed requesting that a referendum be held....

Such referendum shall be held only in the year preceding the year in which a general election for supervisors is to be held, and no further such referendum may be held in the same county for a period of four years.

"(ii) If a majority of the voters voting in such election voted for biennial election of the members of the board of supervisors for four-year terms, or if the governing body shall have so provided by resolution, then the members of the board of supervisors shall be elected as follows:

"The terms of their successors elected at the next general election for supervisors shall be as follows: If the number of supervisors elected in the county is an even number, half of the successful candidates shall be elected for terms of four years and half of the successful candidates..."
shall be elected for terms of two years; if the number of supervisors in the county is an odd number, the smallest number of candidates which creates a majority of the elected supervisors shall be elected for terms of four years and all other successful candidates shall be elected for terms of two years. Assignment of the individual terms of members shall be determined by lot by the electoral board of the county at the meeting of the board as required by § 24.1-146 on the second day following the election and immediately upon certification of the results of the election. In all elections thereafter all successful candidates shall be elected for terms of four years.

“In any county where the chairman of the board is elected from the county at large, the provisions of this section shall not affect such office. The chairman of the board shall be elected for a term of four years in nineteen hundred seventy-five and every four years thereafter.

“(iii) In the event the representation in the board of supervisors among the magisterial districts or election districts is reapportioned, or the number of districts is increased or diminished or the boundaries of the districts are changed, the members of the boards of supervisors shall be elected as provided in subsection (b) (ii) of this section at the next general election wherein the supervisors are to be elected following such reapportionment, change in number of districts or change in boundaries.”

While subsection (b) (iii) of the statute does appear, when read apart from the rest of the statute, to require all counties in the Commonwealth to adopt automatically a biennial system for their boards of supervisors following reapportionment or redistricting, the statute read as a whole manifests a clearly different intent on the part of the General Assembly.

It is a cardinal rule of statutory construction that statutes are passed as a whole, and that each section of the statute should be considered in conjunction with every other section so as to produce a harmonious result. Every word in the statute must be given its fullest meaning consistent with the entire statute. Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953). Section 24.1-88 establishes a clear restatement of existing law in subsection (a), and offers counties the new biennial option in subsections (b) (i) and (b) (ii). The biennial option is, however, entirely discretionary. To read subsection (b) (iii) as an automatic imposition of the biennial system upon all counties after reapportionment negates subsection (a) completely and makes subsection (b) mandatory by 1981 when all counties must redistrict. Giving such force to subsection (b) (iii) does violence to the structure of the entire statute, since the subsection is a mere subpart of subsection (b), which makes the biennial system optional.

These conflicts are avoided by reading subsection (b) (iii) as a further qualification upon the biennial option created in subsection (b). So read, subsection (b) (iii) becomes a savings clause which provides that when a county which has adopted the biennial system redistricts, and an election is held, the biennial term system is not disturbed by the redistricting; there is no need for a new resolution or a referendum. The electoral board is required to draw lots to determine which members shall serve two year terms, as they did when the biennial system was first adopted.

I am, therefore, of the opinion that § 24.1-88(b) (iii) does not require automatic transition to a biennial board of supervisors following reapportionment, redistricting or boundary changes. My Opinion to the Honorable Robert F. Ripley, Jr., to which you referred, dealt with the transition of Poquoson from a town to a city of the second class and the effect of that transition upon York County. The Opinion did not deal with the question whether subsequent to redistricting biennial elections were mandatory and it should not be so construed.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Registrar May Make Reasonable Inquiry To Resolve Doubt That Person Who Applies To Register To Vote Is Eighteen Years Old.

REGISTRARS—Determination Whether Applicant For Registration Possesses Necessary Voting Qualifications Is Left To Registrar's Discretion.

February 24, 1976

THE HONORABLE J. PAUL COUNCILL, JR.
Member, House of Delegates

I am responding to your inquiry whether a general registrar can require proof that a person who applies to register to vote is eighteen years old.

Article II, Section 1, of the Constitution of Virginia (1971) requires that a person shall have attained the age of eighteen years before he be allowed to vote. Section 24.1-47 of the Code of Virginia (1950), as amended, requires the registrar to register all persons "who shall have the qualifications required by the Constitution." The determination whether an applicant for registration possesses the necessary voting qualifications is left to the registrar's discretion. Fleenor v. Dorton, 187 Va. 659, 47 S.E.2d 329 (1948).

Accordingly, I am of the opinion that when a registrar doubts that an applicant for registration possesses any of the required qualifications to vote, the registrar may make such reasonable inquiries as are necessary to resolve his doubt. With respect to the age qualifications, Article II, Section 1, of the Virginia Constitution provides that "[a]ny person who will be qualified with respect to age to vote at the next general election shall be permitted to register in advance and also to vote in any intervening primary or special election."

ELECTIONS—Special Election To Fill Vacancy In Office Of City Treasurer.

CHARTERS—Elections—No charter provision for filling city treasurer vacancy—Special election.

ELECTIONS—Definition Of "General Election."

PUBLIC OFFICERS—De Facto Officers—Past official acts valid—New appointment pending special election.

TREASURERS—De Facto Officers—Past official acts valid—Special election to fill vacancy.

June 30, 1976

THE HONORABLE NORMAN SISISKY
Member, House of Delegates

I am responding to your recent request for an opinion which raises the following two issues:

1. A city councilman resigned on April 16, 1976. His term would have expired June 30, 1978. This position has been filled by a majority vote of the council as provided in the city charter. The charter further provides that, "[w]hen 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."

There was a general election for city council in May, 1976; the next general election now scheduled in Petersburg is in November, 1976. The next scheduled election for city council members is May, 1978. As yet, no writ of election has been issued for this seat.
You inquire which of these elections is the general election at which the court should order a special election to fill the vacancy?

2. The city treasurer retired on September 30, 1975. His term of office expires December 31, 1977. The judge of the circuit court has appointed a successor to serve until a successor has been elected to fill the vacancy. When should the election be held to fill this term?

I will answer your questions seriatim:

1. The Petersburg Charter requires the court to issue a writ of election, following temporary appointment by the city council of a successor to the vacant seat, for an election to be held at the "next ensuing general election." Section 24.1-1(5) of the Code of Virginia was amended in 1975 to provide that either the May or November election shall be considered a general election. This amendment operated to modify an earlier Opinion of this Office to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated January 24, 1972, and found in Report of the Attorney General (1971-1972) at 164, which held that a May city council election did not possess full general election status under State law.

The language in the Petersburg Charter is identical to that of Article VI, Section 12, of the 1971 Virginia Constitution. The meaning of the constitutional language is very clear:

"...It is important to note that 'next ensuing general election' means whatever general election next ensues; it does not mean the next general election at which the office in which the vacancy has occurred would normally be filled." II Howard, Commentaries on the Constitution of Virginia at 773, 777 (1974).

The "next ensuing general election" referred to in the Petersburg Charter was the May, 1976, election. Since the April vacancy occurred within 120 days of the May election, the Charter provision requiring that the vacancy election be held at the second ensuing general election comes into play. I am of the opinion, therefore, that the election must be held in November, 1976. Under such circumstances, the filing date for candidates of such election is governed by § 24.1-166 of the Code, which provides:

"...where the writ of election...directs that a special election be held at the second ensuing general election, any person who intends to be a candidate at such an election shall give the aforesaid notice of candidacy no later than the time fixed for the giving of such notice by candidates for offices to be filled in the general election at which time the special election is conducted."

In this case, the time fixed was June 8, 1976. No writ of election has yet been issued, however, which means that when the writ is issued it will be subsequent to June 8, thereby rendering compliance with the foregoing deadline impossible for all who might choose to run. In such circumstances, the filing deadline for candidates is governed by the general provisions of § 24.1-166, which state:

"Any person other than a candidate for a party nomination or party nominee, who intends to be a candidate at any election for any other office, shall give notice...at least sixty days before the election when it is a special election to be held at the same time as the general or primary election..."

2. There is no Petersburg Charter provision for filling the city treasurer vacancy and, accordingly, § 24.1-76 governs. The vacancy was filled by court appointment, but such appointments are limited in duration by both § 24.1-76 and Article VI, Section 12, of the Constitution to the second
election ensuing after occurrence of the vacancy when that vacancy occurs within 120 days of the first ensuing election. Since the first ensuing election was in November, 1975, the election of May, 1976, became the appropriate election at which to elect the successor. Failure to hold a special election at that time creates a new vacancy in the office of treasurer, since the court appointment expired. This vacancy should be filled by a new appointment pursuant to § 24.1-76, pending a special election to elect a new treasurer called for the November, 1976, general election. Past actions of the treasurer presently in office are valid under the *de facto* officer doctrine. *See Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated March 6, 1975, and found in Report of the Attorney General (1974-1975) at 419.*

Accordingly, I am of the opinion that a special election should be called to fill the vacancy for city treasurer in November, 1976; the filing deadline for this election is likewise governed by § 24.1-166 of the Code.

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**ELECTIONS—Town Council—Authority to call special election to determine if voters desire General Assembly to amend charter.**

**CHARTERS—Town Council—Authority to call special election to determine if voters desire General Assembly to amend charter.**

**CITIES AND TOWNS—Town Council—Authority to call special election to determine if voters desire General Assembly to amend charter.**

**REFERENDUM—Town Council—Authority to call special election to determine if voters desire General Assembly to amend charter.**

January 26, 1976

**The Honorable Ralph R. Repass, Chairman**

Electoral Board of Smyth County

I am responding to your inquiry whether the town council of Saltville can call a special election to determine if the qualified voters of the town desire their council to request the General Assembly to amend the existing charter.

Requests from cities and towns that the General Assembly modify the charters governing such municipal corporations are governed by § 15.1-834 of the Code of Virginia (1950), as amended. That section provides, in pertinent part, as follows:

"The municipal corporation shall provide for holding an election to be conducted as provided in § 24-141 [§ 24.1-165] of this Code to determine if the qualified voters of the municipal corporation desire that it request the General Assembly to grant to the municipal corporation a new charter or to amend its existing charter. Such election shall be held within thirty days following the action of the municipal corporation with respect thereto. At least ten days prior to the holding of such election the text or an informative summary of the new charter or amendment desired shall be published in a newspaper of general circulation in the municipal corporation."

Section 15.1-834 delegates to the town council authority to call an election to ascertain the desire of the voters. The statute provides that the conduct of the election shall be governed by § 24.1-165, but it also provides that the initiative to call it lies with the council. Section 24.1-165 provides for the conduct of special elections and sets forth procedures for presentation of referendum questions to voters of a munici-
The statute anticipates, however, that its procedures will be triggered by one of several sources other than a court order. Accordingly, I am of the opinion that the town council of Saltville is authorized by § 15.1-834 to request the electoral board to prepare a special election for the foregoing purpose without applying to the circuit court for an order directing the electoral board to call such an election.

ELECTIONS—Validity Of Petition And Notice Of Candidacy For Office Of “County Clerk” For General Election—Wrong date of election on such papers; title not in exact language of statute—Substantial compliance.

ELECTIONS—Name Of Candidate Cannot Be Kept Off Printed Ballot Because Of Insubstantial Defects In Petition And Notice Of Candidacy.

August 7, 1975

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

You request my opinion on the validity of a petition and notice of candidacy for the office of “County Clerk” for the general election to be held on “November 2, 1975.” As you point out, the general election in November, 1975, is on the fourth (4th) day of the month, not the second (2nd); and “County Clerk” is not the exact title of the office as set forth in § 24.1-87 of the Code of Virginia (1950), as amended, nor as set forth in Article VII, Section 4, of the Constitution of Virginia (1971).

The general rule, which is well recognized, is that a petition will not be invalidated by insubstantial “errors or omissions, or by unimportant irregularities and defects. Hence it is not essential that the petition be couched in the exact language of the statute. A substantial compliance therewith is sufficient.” 26 Am.Jur.2d Elections § 189, at 17 (1966). Section 24.1-87 requires that there shall be elected “a clerk of the court of record.” Article VII, Section 4, requires that “[t]here shall be elected . . . a clerk, who shall be clerk of the court in the office of which deeds are recorded. . . .”

The term “county clerk” is certainly in substantial compliance with these statutory and constitutional provisions. In my opinion, a petition for the general election in 1975 does comply with the clear intent that the petitioners seek to have placed on the ballot, on November 4, 1975, the name of the candidate they have endorsed, notwithstanding that the petition refers to November 2, 1975. Thus the name of the candidate in question cannot be kept off the printed ballot because of the foregoing insubstantial defects in his petition and notice of candidacy.

ELECTORAL BOARD—Member May Solicit Voter Registration—Acting in individual rather than official capacity.

ELECTIONS—Registrars And Assistants—Prohibited from solicitation of registration.

REGISTRARS—Assistant Subject To Same Limitations As General Registrars.

REGISTRARS—Prohibited From Solicitation Of Registration.

REGISTRARS—Required To Register Voters In Public Offices And Buildings Known To Public; May Not Register Voter In His Car.
REPORT OF THE ATTORNEY GENERAL

December 12, 1975

THE HONORABLE W. A. POWERS, Secretary
Dickenson County Electoral Board

You have inquired whether:

1. a county electoral board member may solicit voter registration; and
2. an assistant registrar may register a person in the assistant registrar's car, when requested to do so by the applicant.


There is no comparable statute prohibiting solicitation of registration by members of electoral boards. Nor is there any statute which makes it an official duty of electoral board members to register voters. Consequently, an electoral board member who does engage in soliciting registration would be acting in an individual rather than in an official capacity. Your first inquiry is, therefore, answered in the affirmative.

Assistant registrars are subject, pursuant to §24.1-45 of the Code, to the same limitations as general registrars. General registrars are required by §§24.1-46(1) and 24.1-49 to register voters in public offices and buildings known to the public. Accordingly, the assistant registrar may not register a voter in his car, even if requested to do so by the voter, since such vehicle is neither a public office nor a public building. Your second inquiry is answered in the negative.

ESCHEATS—Inquest Did Not Result In Verdict For State; Publication Against Unknown Parties.

CIVIL PROCEDURE—Ownership Of Real Estate Uncertain; Escheat Inquest Did Not Result In Verdict For State; Publication Against Unknown Parties.

TAXATION—Assessments—Ownership of property unknown—Inquest to determine whether land has escheated to State.

TAXATION—Delinquent Taxes—Land may be sold to collect.

TAXATION—Untaxed Parcels—Escheat or sale of such parcels.

February 18, 1976

THE HONORABLE CALVIN W. FOWLER
Member, House of Delegates

I have received your letter, from which I quote:

"In using the procedure provided in Article 8 of Chapter 21 of Title 58 of the Code of Virginia (§§ 58-1117.1, et seq.), the City Attorney and assessor have encountered several problems.

"First, there are a number of parcels of land on which taxes are past due and owing listed in specific names for which no title of record in these names can be found. Likewise, there are considerably more parcels that have no name at all. My question is, in your opinion, is there a method of selling this property under the present procedure..."
prescribed in the Code of Virginia and referred to above? Could this property possibly be sold under the aforesaid facts as 'unknown owners' and still meet the requirements of the statute that 'all necessary parties shall be made parties defendant’”?

If the ownership of the parcels in question cannot be ascertained by an investigation of the records available in the clerk’s office, it would be appropriate to seek to have them declared escheated to the State. Section 55-171, Code of Virginia (1950), as amended, requires each commissioner of the revenue to furnish annually to the local escheator a list of lands within his district to which no person is known by him to be entitled. Section 55-172 provides that, upon receiving such list, the escheator shall proceed to hold an inquest to determine whether any land mentioned in the list has escheated to the Commonwealth. If the verdict on such inquest is for the Commonwealth, and if a claim of any interest in the land has not been made or, if made, has been decided in favor of the Commonwealth, the land may be sold in accordance with the provisions of § 55-184. See Report of the Attorney General (1973-74) at 415.

If the land has not escheated to the Commonwealth, and if the taxes due thereon are delinquent on December thirty-one following the third anniversary of the date on which such taxes have become due, the land may be sold in accordance with the provisions of §§ 58-1117.1 to -1117.11 for the purpose of collecting the delinquent taxes. In a proceeding under §§ 58-1117.1 to -1117.11, all necessary parties shall be made parties defendant and publication, if necessary, shall be as provided by § 8-77. See § 58-1117.3.

If the ownership of the real estate being sold is subject to some uncertainty, but an escheat inquest under § 55-172 did not result in a verdict for the Commonwealth, an order of publication against unknown parties may be entered. See §§ 8-77 and 8-71.

EVIDENCE—Statement In Medical Examiner’s Report As To Cause Of Death—Only facts contained in medical examiner’s report have weight of prima facie evidence.

CRIMINAL LAW—Statement In Medical Examiner’s Report As To Cause Of Death—Only facts contained in medical examiner’s report have weight of prima facie evidence.

CRIMINAL PROCEDURE—Statement In Medical Examiner’s Report As To Cause Of Death—Only facts contained in medical examiner’s report have weight of prima facie evidence.

EVIDENCE—Hearsay Rule Exception—Use in evidence of medical examiner’s report; testimony of lay witnesses.

EVIDENCE—Cause Of Death—Type of testimony to prove; medical examiner’s report; lay witnesses.

REPORTS—Medical Examiner's Statement In Report As To Cause Of Death—Only facts contained in medical examiner’s report have weight of prima facie evidence.

November 12, 1975

THE HONORABLE JAMES A. CALES, JR.
Commonwealth’s Attorney for the City of Portsmouth

You request my interpretation of the recent Virginia Supreme Court decision in Ward v. Commonwealth, ....... Va. ....... (Record No. 741101, Sept. 5, 1975); specifically, you inquire under what, if any, circumstances
may a statement of the cause of death in a medical examiner's report be admitted to show the cause of death.

In Robertson v. Commonwealth, 211 Va. 62, 175 S.E.2d 260 (1970), it was held that while an autopsy report and duly attested copies thereof are admissible in evidence as provided by § 19.1-45 (now 19.2-188), the facts set forth in the certificate are only "of the dignity of prima facie evidence." In Edwards v. Jackson, 210 Va. 450, 171 S.E.2d 854 (1970), the Supreme Court of Virginia held that, although signed by the decedent's attending physician, a statement in a death certificate concerning the cause of death "was but the expression of an opinion" and "was not, therefore, competent to show the cause of the decedent's death." In light of these authorities, I am of the opinion that Ward, supra, merely restates the law in Virginia. While the medical examiner's statement is admissible, nothing but the facts contained in it are accorded the weight of prima facie evidence. Thus, there are no circumstances under which the statement of the cause of death in a medical examiner's report is sufficient to show the cause of death.

This result obtains because § 19.2-188 provides an exception to the hearsay rule in authorizing the use in evidence of the medical examiner's report. The statutory exception is limited in its operation to admissibility of just the facts contained in the report. The exception to the hearsay rule which provides for the admissibility of expert opinion into evidence would be applicable to those situations where the medical examiner actually testifies as to the cause of death. In Ward, however, the medical examiner who performed the autopsy on the deceased had died prior to trial. Since he was not available to testify as to the cause of death, no other evidence on this point was offered. Under the foregoing circumstances the Supreme Court of Virginia held that the evidence was insufficient to support the verdict. I conclude, therefore, that although the medical examiner's report is admissible it is insufficient to prove the cause of death and the prosecution must prove this element of its case by other means.

The cause of death may be proved without the aid of expert testimony where the circumstances are such that a layman could reasonably ascertain what act caused death. In determining whether the layman may give an opinion as the cause of death, the court normally considers such factors as the nature and position of wounds, the time between infliction of trauma and death, and the prior health of the deceased. Laymen such as undertakers, constables and justices of the peace have been allowed to testify as to the cause of death. A. Moenssens, R. Moses, and F. Inbau, Scientific Evidence In Criminal Cases 177 (1973). Thus, although the medical examiner's report is not admissible to show the cause of death, there are circumstances under which the cause of death can be proved by resort to testimony of lay witnesses. When this type of testimony is available, I am of the opinion that it would not be necessary to have an expert testify.

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FEES—Clerk May Not Charge Fee For Administering Oaths, Recording Order And Indexing For Persons Appointed To Commissions Or Boards —Not a “court proceeding.”

CLERKS—Fee May Not Be Charged For Administering Oaths, Recording Order And Indexing For Persons Appointed To Commissions Or Boards —Not a “court proceeding.”

May 10, 1976

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

You have inquired whether a clerk is entitled to charge a fee of $5.00 pursuant to § 14.1-112(23), Code of Virginia (1950), as amended, for
“administering oaths, recording the order and indexing the same in the proper book for persons appointed to various commissions or boards by the City Council.”

Section 14.1-112(23) provides that “[f]or all services rendered by the clerk in any court proceeding for which no specific fee is provided by law, the clerk shall charge a fee of five dollars, to be paid by the party filing said papers at the time of filing.” (Emphasis added.) I am unaware of any Code provision or case law defining a “court proceeding” for purposes of § 14.1-112(23). That language, however, would appear to contemplate a proceeding which would require in some manner a court’s attention or involvement. Since the services you describe are not rendered in a “court proceeding”, your inquiry is answered in the negative.

**FEES—Clerks—Furnishing copies of indictments and presentments to retained counsel of non-indigent defendant.**

**ATTORNEYS—Normal Fees Payable To Clerk For Copies Of Indictments And Presentments Provided To Retained Counsel Of Non-indigent Defendant At His Request.**

**CLERKS—Normal Fees Payable To Clerk For Copies Of Indictments And Presentments Provided To Retained Counsel Of Non-indigent Defendant At His Request.**

**CRIMINAL PROCEDURE—Copies Of Indictments And Presentments For Retained Counsel—Normal fees payable.**

January 20, 1976

**THE HONORABLE HUGH L. STOVALL, Clerk**

Circuit Court of the City of Norfolk

This is in reply to your letter requesting an official opinion from which I quote the following:

"Is the Clerk required to furnish free of charge copies of indictments and presentments to a defendant’s personally retained attorney?

"The situation is this: The defendant was brought to this court after having been indicted by a Grand Jury and a capias was issued for his arrest—i.e., he did not come to the court via the General District Court. He retained counsel of his own choosing who is now seeking copies of the above-mentioned records without payment to the Clerk.

"If the Clerk charges for copies of the records, should the charge be made when the service is initially requested; or, as an alternative, can this charge be added to the costs?"

Section 17-43 of the Code of Virginia (1950), as amended, provides as follows:

"The records and papers of every court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided. The certificate of the clerk to such copies shall, if the paper copied be recorded in a bound volume, contain the name and number of the volume and the page or folio at which the recordation of the paper begins. No person shall be permitted to use the clerk’s office for the purpose of making copies of records in such manner, or to such extent, as will interfere with the business of the office or with its reasonable use by the general public."
It is axiomatic that an attorney must be permitted to inspect indictments and presentments rendered against his client, and he may be provided with certified copies of these documents for his convenience. This does not mean, however, that he is entitled to be furnished copies free of charge. Although the Supreme Court of Virginia has ruled that an indigent prisoner is entitled to be furnished, without cost, certified copies of arrest warrants, indictments, and orders of conviction for use in applying pro se and in forma pauperis for a writ of habeas corpus, the Court based its determination upon the fact that a prisoner confined in the State Penitentiary has no access to the records of his criminal trial which are reposed with the clerk of the circuit court. McCoy v. Lankford, 210 Va. 264, 170 S.E.2d 11 (1970). Inasmuch as the counsel retained by a non-indigent defendant to represent him at his pending criminal trial has access to all requested documents, I am of the opinion that normal fees are payable for any copies furnished.

In regard to whether the charge should be made when the service is initially requested or subsequently should be added to costs, it is my opinion that the former procedure ought to be employed since such expenses are not incurred as incident to prosecution but rather as a convenience to retained counsel.

FEES—Clerks—Tax deed application—Same as chancery suits plus fee previously authorized by § 58-1057.

CLERKS—Fees For Tax Deed Application—Same as chancery suits plus fee previously authorized by § 58-1057.

TAXATION—Clerk's Fees And Costs—Application for deed of land should be treated as chancery suit for purpose of determining clerk's fees.

TAXATION—Delinquent Lands—Tax deed application to clerk treated as chancery suit.

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.

July 29, 1975

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

I have received your recent letter inquiring as to whether an application for a tax deed for property purchased at a tax sale in 1957 should be treated as an action at law or a chancery suit and the proper clerk's fee applicable to the proceeding.

Sections 58-1052 to -1066, Code of Virginia (1950), as amended, which provided for the issuance of tax deeds by a clerk, were repealed by Chapter 467, [1973] Acts of Assembly 832, which enacted §§ 58-1117.1 to -1117.11. Section 58-1117.11 provides that proceedings instituted prior to June 1, 1973, under the repealed provisions of §§ 58-1029 to -1117 may be completed in accordance with such repealed provisions. I have previously concluded that the purchase of land at a tax sale constituted the first step in a "proceeding" within the meaning of § 58-1117.11, and that the purchaser may obtain a tax deed by complying with the repealed provisions. See Report of Attorney General (1972-1973) at 442-43. Section 58-1053 required that four months' notice of the applicant's intention to apply for a tax deed be given to the person in whose name the land stood at the time of the tax
sale and to his grantee, or their personal representatives, heirs and devisees, as well as to trustees and beneficiaries under any deed of trust on the property. Section 58-1057 provided a clerk's fee of one dollar payable upon delivery of the deed. These statutes did not expressly characterize a proceeding to obtain a tax deed as either an action at law or a suit in chancery, but I concluded in an Opinion to the Honorable H. C. DeJarnette, Clerk of the Circuit Court of Orange County, dated November 10, 1971, and found in the Report of the Attorney General (1971-1972) at 385-86, that an application pursuant to § 58-1052 should be treated as a chancery suit for the purpose of determining clerk's fees and costs.

In consideration of the foregoing, I am of the opinion that pursuant to § 58-1117.11 the matter about which you inquire may be completed in accordance with the provisions of §§ 58-1052 to -1066 and that such proceeding should be regarded as a chancery suit for the purpose of determining your fees in addition to the deed fee formerly provided by § 58-1057.

FEES—Clerks Of Circuit And District Courts; Sheriffs; Trial Fees.

AMENDMENTS—Fees Of Sheriffs—Application to circuit and district courts.

CLERKS—Fees—Maximum which clerk of district court may receive.

CONFLICT OF LAWS—General Assembly Presumed To Know Legislation It Passed During Session—Irreconcilable conflict; last amendment prevails.

DISTRICT COURTS—Fees—Composition of the $5.00 provided in § 14.1-125.

DISTRICT COURTS—Fees—Collection of filing fees provided by § 16.1-115.

DISTRICT COURTS—Disposition Of Papers In Civil Cases Tried In District Courts In Smaller Municipalities.

DISTRICT COURTS—Sheriff's Fees In District Court Cases—Effect of amendment.

FEES—Sheriffs—Application of amendments in circuit and district courts.

July 23, 1975

The Honorable Joseph S. James
Auditor of Public Accounts

Your recent letter notes that Chapter 228, [1975] Acts of Assembly 420, effective June 1, 1975, amends and reenacts § 16.1-115, Code of Virginia (1950), as amended, by increasing the fee of the clerk of a circuit court for filing and indexing papers in each case from $.25 to $1.25. Section 14.1-125 of the Code, as amended by Chapter 591, [1975] Acts of Assembly 1235, establishes a uniform fee of $5.00 in civil proceedings in district courts. You note that this fee was increased from $3.25, which, until the precursor of § 14.1-125 (§ 14-133) was amended by Chapter 555, [1958] Acts of Assembly 822, was composed of specific sums allocated for trial fees, issuing fees and filing fees for clerks of circuit courts. The 1958 amendment eliminated the listing of specific fees and provided for a general fee of $3.00. Chapter 591 also eliminated the separate $1.25 fee for sheriffs for the service of civil papers in district courts as of October 1, 1975.

You indicate that the $5.00 amount provided in the amended version of § 14.1-125 could be deemed to consist of a $2.00 trial fee, an issuance fee
of $1.50, a sheriff's fee of $1.25 (formerly provided by § 14.1-105) and a clerk's fee of $.25. You further note that, in amending § 16.1-115 to increase the clerk's fee from $.25 to $1.25, apparently the provisions of Chapter 591 were ignored because of the allocation of only $.25 of the sum to be used as the clerk's fee. You request my opinion whether district courts should collect an additional cost of $1.00 from the plaintiff in each civil case in order to pay the clerk the increased filing fee of $1.25.

Chapter 228, which contains the amendment to § 16.1-115, was approved on March 11, 1975. Chapter 591, which contains the amendment to § 14.1-125, was approved on March 24, 1975. A bill becomes law when it is approved by the Governor or becomes law without his signature. Article V, Section 6, Constitution of Virginia (1971). The General Assembly is, of course, presumed to know legislation it passed during a session and the effect of subsequent legislation that has already been enacted in the same session. If the amendments are in irreconcilable conflict, the last amendment must prevail. Commonwealth v. Sanderson, 170 Va. 133, 195 S.E. 516 (1938). I am of the opinion that the statutes are in conflict.

Thus, the provisions of § 14.1-125 control and the maximum fee which a clerk of a district court may receive is $5.00. I am of the opinion that the $5.00 fee provided by § 14.1-125 is to be composed of a $1.50 issuance fee, a sheriff's fee of $1.25, a clerk's fee of $1.25 and a trial fee of $1.00. It should be noted that, although § 14.1-105 now provides that separate sheriff's fees are only to be collected in circuit court cases, I am advised that the $5.00 fee authorized by § 14.1-125 was intended to include a sheriff's fee and that the aforesaid portion of it should be allocated for such purpose.

Your next question deals with the disposition of papers in civil cases tried in district courts of smaller municipalities and Hanover County. You note that previously subsections (3), (4) and (5) of § 16.1-115 provided an answer to this question, but that these subsections have been repealed by the amendments to § 16.1-115 effective June 1, 1975. You specifically inquire whether papers in civil cases may be voluntarily filed with the clerk of the circuit court and he be paid the appropriate filing and indexing fee as is now paid the clerks of circuit courts of other jurisdictions, or whether such papers and fees should be retained in the district courts.

As you have pointed out, the 1975 Session of the General Assembly repealed those subsections of § 16.1-115 of the Code which provided for the disposition of papers filed in a district court (a) of a city or town which has combined with a county for the joint operation of the court, (b) of any district not covered by any other provision of § 16.1-115, and (c) of the County of Hanover. I am of the opinion that the repeal of paragraphs (3) and (4) of § 16.1-115, which provided the procedure to be followed by the district courts of certain smaller municipalities, requires that the applicable papers be retained in the district court; thus the clerks of the respective circuit courts are not entitled to any filing and indexing fee. This result obtains because the effect of the repeal of the subsections is to eliminate the authority of the district courts in question to transmit papers to circuit court clerks for filing and indexing. In the case of Hanover County's district court, I am of the opinion that the effect of the repeal of subparagraph (5) is to place that court under the provisions of § 16.1-115(1).

FEES—Clerks Of General District Courts—Section 14.1-125 only applicable in civil cases; not in conflict with § 46.1-413 on criminal matters.

CIVIL PROCEDURE—Fees Of Clerks—Section 14.1-125 only applicable in civil cases. Not in conflict with portions of § 46.1-413 on criminal matters.

CLERKS—Fees—Clerks of general district courts—Section 14.1-125 only applicable in civil cases; not in conflict with § 46.1-413 on criminal matters.

CONFLICT OF LAWS—Fees Of Clerks—Section 14.1-125 only applicable in civil cases; not in conflict with portions of § 46.1-413 on criminal matters.


December 8, 1975

THE HONORABLE FRED E. MARTIN, JR., Judge
Norfolk General District Court, Civil Division

You have requested my opinion as follows:

"Under 14.1-125, this Court is to receive $5.00 and no other fee for services. Under 46.1-413 there appears to be a fifty cent fee allowable. Please advise whether 14.1-125 repeals that portion of 46.1-413 calling for the fifty cent fee."

Section 14.1-125 of the Code of Virginia (1950), as amended, provides that the fees it prescribes are to be the only fees charged in civil cases for services performed by clerks of general district courts. This statute was amended by Chapter 591, [1975] Acts of Assembly 1235.

Section 46.1-413 provides in pertinent part as follows:

"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; or in the event there is rendered a judgment for damages against a person as described in subdivision (c) of § 46.1-412 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, or in case of civil judgments, upon the request of the judgment creditor or his attorney, thirty days after such conviction, forfeiture or judgment has become final without appeal or has become final by affirmance on appeal....

"There shall be allowed to the clerk of any court a fee of fifty cents for each report hereunder to be taxed and payable as a part of the court costs."

The provisions of this statute were not amended by the 1975 General Assembly.

In Mandell v. Haddon, 202 Va. 979, 121 S.E.2d 516 (1961), it was held that where a later Act is irreconcilably inconsistent with an earlier Act, the earlier is repealed. This rule is applicable whether the later Act contains specific words of repeal or not. Section 14.1-125 specifically states that the fees it prescribes shall be the only fees charged in civil cases for services performed by the clerk. I am of the opinion that this later Act is in irreconcilable conflict with that portion of § 46.1-413 which allows a fifty cent fee to the clerk for forwarding an abstract of a civil judgment to the
Commissioner of the Division of Motor Vehicles in those instances where the Commissioner is required to suspend the operator's or chauffeur's license and registration in the name of the judgment debtor. See § 46.1-412.

Section 14.1-125 is only applicable, however, in civil cases. It is not in conflict with those portions of § 46.1-413 wherein the clerk must, in connection with criminal matters, forward certain reports to the Commissioner of the Division of Motor Vehicles. Where the clerk does forward records in connection with charges described in subdivision (a) or (b) of § 46.1-412, the fifty cent fee is taxable.

FEES—Collection Of Commonwealth's Attorney Fee Where Preliminary Hearing Waived.

FEES—Collection Of Trial Fee Where Preliminary Hearing Waived—1975 amendment.

COURTS—Fees—Collection of Commonwealth's Attorney fee and trial fee where preliminary hearing waived.

July 23, 1975

THE HONORABLE JOSEPH S. JAMES
Auditor of Public Accounts

You request my opinion concerning the collection, in those felony cases where a preliminary hearing is waived, of (1) a Commonwealth's Attorney fee and (2) a trial fee.

Section 14.1-121 of the Code of Virginia (1950), as amended, is applicable to your first inquiry whether the Commonwealth's Attorneys fee should be collected. The statute provides certain fees for the Commonwealth's Attorney in all felony and misdemeanor cases in which there is a conviction and the sentence is not set aside on appeal. This section specifically provides that a $5.00 fee is to be assessed for each person prosecuted by the Commonwealth's Attorney at a preliminary hearing upon a felony charge. In light of the language of § 14.1-121, the prerequisite for the fee is not met in the circumstance you relate and, therefore, no fee may be assessed.

You next inquire whether the trial fee should be collected where a preliminary hearing is waived. The 1975 Session of the legislature amended § 14.1-123 effective October 1, 1975, by repealing subparagraph (4) which provided for a $2.00 fee for judges or clerks of courts not of record for examining a charge of a felony. See ch. 591, [1975] Acts of Assembly 1235. Thus, I am of the opinion that the trial fee of which you inquire may not be collected after the effective date of the amendment to § 14.1-123.

FEES—High Constable Of City Of Danville—When precluded from collecting fees for service of process; may receive commission for making levies and attachments.

CHARTERS—High Constable’s Fees Same As Those Of Sheriff Established By City Of Danville Code.

DISTRICT COURTS—High Constable Of City Of Danville—When precluded from collecting fees for service of process; may receive commission for making levies and attachments.

PUBLIC OFFICERS—High Constable Encompassed By Term “Other Officer Serving Papers” in § 14.1-125.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS—High Constable Of City Of Danville—When precluded from collecting fees for service of process; may receive commission for making levies and attachments.

February 5, 1976

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

You request my opinion concerning the effect of §§ 14.1-125 and 14.1-105.1 of the Code of Virginia (1950), as amended, on the collection of fees by the high constable of the City of Danville. Section 14.1-125 of the Code provides, in pertinent part:

"The foregoing court fees shall not include the service fee of any sheriff, or other officer serving papers, but the person issuing process shall accept and forward any such service fees when tendered at the time of issuing process."

Section 14.1-105.1 allows a city, having the office of high constable, to establish fees for the service of process by the adoption of a local ordinance and, further, provides that the fees collected are to be deposited in the treasury of the city for use in the general operation of city government. You specifically inquire whether it is correct to assume that the high constable is an officer within the meaning of the phrase "or other officer serving papers" contained in § 14.1-125 and, if so, whether this means the high constable is now precluded from receiving fees for the service of process issued by the district court.

The term "officer" connotes one who is invested with some portion of the functions of government to be exercised for the public benefit. Black's Law Dictionary (4th ed. 1968). Consequently, I am of the opinion that the language "or other officer serving papers" contained in § 14.1-125 does encompass the high constable of the City of Danville. The high constable, therefore, is precluded from receiving fees for the service of process issued by the district court. This result obtains because § 14.1-105 of the Code provides that sheriff's fees are only to be collected for services provided in circuit courts, and § 2-54 of the Danville City Code states, as you note: "Fees authorized by law to be charged by the sergeant shall be the fees charged by the high constable." The City of Danville has, through § 2-54 of its own Code, established the high constable's fees as the same as that of the city sergeant (now sheriff). Pursuant to § 14.1-105, the high constable is, therefore, barred from collecting service fees in the district court.

You next inquire as to the effect of the enactment of § 14.1-105.1 of the Code on § 2-54 of the Danville City Code. You specifically inquire whether all civil process fees, levy and attachment fees, and commissions collected by the high constable must be paid into the city treasury regardless of the court from which the process was issued. Section 14.1-105.1 is restricted in its application to service fees and, pursuant to § 2-54 of the City Code, such fees can only be collected by the high constable in the circuit court. It should also be noted that the Danville City Charter, Chapter 578, [1952] Acts of Assembly 986, states that the powers and duties of the high constable are to be as defined in the Constitution and general laws of the Commonwealth or as fixed by ordinance. Further, § 2-52 of the City Code provides that the duties of the high constable are to serve civil process in the municipal (now district) court and make levies and attachments. I conclude, therefore, that, pursuant to the specific language of § 14.1-105.1 of the Code, any fee in the circuit court for making levies and attachments, but not commissions, must be deposited in the municipal treasury.

Your last inquiry is whether it is correct to assume that the only source of income for the high constable would be civil process fees, levy and
attachment fees, and commissions earned on processes issued from the circuit court. As stated in my answer to your previous inquiry, § 14.1-105.1 provides that any service fee collected pursuant to its operation is to be deposited in the city treasury. In light of § 2-54 of the Danville City Code, I am of the opinion that this requirement applies solely to service fees in the circuit court and, pursuant to § 2-52 of said Code, the high constable is not authorized to serve process other than levies and attachments in such court. Thus, apart from any salary paid him by the City of Danville, the income of the high constable would be limited to monies he collects as commissions. In an Opinion to the Honorable Robert Asbury, Commonwealth's Attorney for Smyth County, dated December 30, 1975, a copy of which is enclosed, I held that the provisions of § 14.1-109 of the Code of Virginia, which provide for a commission by a sheriff receiving payment under an execution or other process was not affected by § 14.1-105. Therefore, in light of the fact that the City of Danville has, through § 2-54 of its Code, established the high constable's fees as the same as that of the sheriff, the high constable may receive a commission on collections pursuant to § 14.1-109.

FEES—Sheriffs And High Constables—Application of amendments in circuit and district courts; effect on city charter.

AMENDMENTS—Fees Of Sheriffs And High Constables—Application to circuit and district courts; effect on city charter.

CHARTERS—Amended By Enactment Of General Law By General Assembly Which Adds To Authority Provided In City Charter To Local Government Unit.

CHARTERS—Duties Of Sheriff And High Constable Coincide—Litigant or court may choose either officer to serve civil process.

CIVIL PROCEDURE—Duties Of Sheriff And High Constable Coincide Under Charter—Litigant or court may choose either officer to serve civil process.

DISTRICT COURTS—Sheriff's Fees In District Court Cases—Effect of amendment.

SHERIFFS AND SERGEANTS—Effect On City Charter Of Amendment Enabling City To Set High Constable Fees.

SHERIFFS AND SERGEANTS—Litigant Or Court May Choose Either City Sheriff Or High Constable To Serve Civil Process.

WARRANTS—Litigant Or Court May Choose Either City Sheriff Or High Constable To Serve Civil Process.

July 21, 1975

THE HONORABLE FRED E. MARTIN, JR., Judge
Norfolk General District Court, Civil Division

You request my opinion regarding the effect of the 1975 amendment of § 14.1-105, Code of Virginia (1950), as amended, on the collection of sheriff's and high constable's fees. Your first inquiry relates to the fact that § 14.1-105, as amended, which becomes effective October 1, 1975, contains the proviso that the fees contained in the section are to be allowable only for services provided in circuit courts. You specifically inquire (1) whether this means that sheriffs may charge these fees only in circuit court cases,
(2) whether this leaves § 14.1-105 as it existed prior to the amendment in force in the district courts, and (3) whether § 14.1-105, as it existed prior to amendment, is still in effect from June 1, 1975 to October 1, 1975.

In light of the specific proviso added by the General Assembly to § 14.1-105, I am of the opinion that sheriffs may charge these fees only in circuit court cases. In the case of district courts, § 14.1-125 of the Code, effective October 1, 1975, establishes a uniform fee of $5.00 in civil proceedings in general district courts. This $5.00 fee includes a sheriff’s fee of $1.25. Thus, the answer to the second part of your inquiry is in the negative. Further, I am of the opinion that § 14.1-105, as it existed prior to the 1975 Session of the General Assembly, remains in effect until October 1, 1975.

You next inquire whether it would be in order for any litigant or the court to refer papers to the sheriff rather than the high constable to take advantage of a situation where the sheriff has the lower fee schedule. Section 129 of the Norfolk City Charter provides that the high constable is to execute all civil processes, warrants, summonses and notices from or to the civil justice of the city or from a justice of the peace of the city. He is to have the same powers, duties and authority with respect to the execution of these papers as the city sergeant (now city sheriff). Pursuant to the provisions of the city charter, I am of the opinion that in civil cases the duties of the high constable and the city sheriff coincide and that there is no prohibition against a litigant or a court choosing either officer to serve civil process.

Your last inquiry is whether an amendment enabling the city to set high constable fees, in effect, amends the city charter to that extent. Section 14.1-105.1 does provide that any city having the office of high constable may establish fees for the service of process by such an officer. Article VII, Section 2, of the Constitution of Virginia (1971) states that the General Assembly shall provide by general law for the organization, government, and powers of counties, cities and towns. Further, an implied condition is attached to every statute, charter, ordinance or resolution affecting or adopted by a municipality that it must yield to the state’s predominant power when exercised. Brackman’s, Inc. v. Huntington, 126 W.Va. 21, 27 S.E.2d 71 (1945). Thus, I am of the opinion that, pursuant to that Section, enactment of a general law by the General Assembly which adds to the authority provided in a city charter to a local government unit has the effect of amending the city charter. Therefore, the answer to your inquiry is in the affirmative.

FINANCING STATEMENT—Amendment—Must be signed by both the debtor and the secured party.

December 2, 1975

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

This is in response to your recent request for my opinion whether an amendment to a previously filed financing statement must be signed by the debtor.

Section 8.9-402(4) of the Code of Virginia (1950), as amended, provides:

“A financing statement may be amended by filing a writing signed by both the debtor and the secured party.”

This section requires that an amendment to a financing statement must be signed by the debtor as well as the secured party.
FINES—Treasurer May Be Required To Collect Local Parking Fines.

MOTOR VEHICLES—Treasurer May Be Required To Collect Local Parking Fines.

TREASURERS—City—Responsibility for city revenues.

TREASURERS—No Right To Refuse Responsibility For Collecting Local Parking Fines.

TREASURERS—Parking Fines—May be required to collect local parking fines.

August 22, 1975

THE HONORABLE MARTIN R. ROBERTS
Treasurer for the City of Radford

This is in response to your recent request for my opinion whether you, as Radford City Treasurer, may be required to collect local parking fines which have previously been collected by the Clerk of the Radford General District Court.

Since the establishment of the statewide district court system, effective July 1, 1973, the administrative power and responsibility for the operation of the General District Court for the City of Radford has been vested in the Committee on District Courts. See § 16.1-69.38 of the Code of Virginia (1950), as amended. Section 16.1-69.48(b) clearly establishes that the general responsibility for the collection of fines imposed for violation of municipal ordinances is vested in the office of the clerk. A more specific provision, however, controls in the case of uncontested parking citation penalties. Section 46.1-254.1 states in pertinent part:

“(a) Any ordinance regulating parking by a city or county under the provisions of §§ 46.1-252, 46.1-252.1, 46.1-253 or 46.1-254 shall contain provisions that require: (1) that uncontested payment of parking citation penalties be collected and accounted for by a city or county administrative official or officials who shall be compensated by the city or county; (2) that contest by any person of any parking citation shall be certified in writing, on an appropriate form, to the general district court of the county or city, by such administrative official or officials; and (3) that such administrative official or officials shall cause complaints, summons or warrants to be issued for delinquent parking citations.”

It is clear that the responsibility for the collection and accounting for uncontested parking citations is vested in city or county administrative officials and not in the office of the clerk. Based on the foregoing, I conclude that the committee's relinquishment of this responsibility to the locality is mandated by and is in accordance with the laws of the Commonwealth.

Your next question is whether, when the responsibility for collecting parking fines has been properly vested in the locality, the locality may impose the obligation of collections of these city funds upon your office. The office of treasurer is a constitutional office established by Article VII, Section 4, of the Constitution of Virginia (1971), which provides that the duties of the treasurer may be prescribed by general law or by special act. Section 58-958, which is general law, imposes upon the treasurer the duty to collect taxes and other amounts payable into the treasury of the political subdivision. See also Report of the Attorney General (1970-1971) at 404. The Charter of the City of Radford, which is a special act, provides in part, as follows in Article VIII:
"[The treasurer] shall collect and receive all city taxes, levies, assessments, license taxes, rents, school funds, fees and other revenue or moneys accruing to the city, except such as council shall by ordinance make it the duty of some other office to collect."

Sections 8-14 through 8-25 of the Code of the City of Radford also require the treasurer to perform various duties with respect to city funds at the direction of city council. The parking fines in question are "other revenue or moneys accruing to the city" within the contemplation of Article VIII of the Charter of the City of Radford, and they are public funds of the city within the meaning of § 58-958 of the Code. It is, therefore, my opinion that the city council may validly delegate the duty of collection of these revenues to the treasurer.

Your last inquiry is whether you have the right to refuse to accept the responsibility granted to you by the city council. I know of no authority which would allow you to refuse to accept this responsibility and am of the opinion that you cannot refuse it.

FINES AND COSTS—Delayed Payment Procedure—Installments authorized by district court.

COURTS—Authority—Judge of circuit court has no authority to authorize installment payment of fines imposed by district court—When judge of district court may authorize.

DISTRICT COURTS—Delayed Payment Procedure—When installment payment of fines may be authorized by district court.

JUDGES—Authority—Judge of circuit court has no authority to authorize installment payment of fines imposed by district court—When judge of district court may authorize.

April 6, 1976

THE HONORABLE KENNETH M. COVINGTON, Judge
Martinsville General District Court

You request my opinion on questions arising from a factual situation in which a defendant is tried for a misdemeanor in the general district court and his sentence includes both a term in jail and payment of a fine. The defendant is informed of the availability of the delayed payment procedure provided by § 19.2-354 of the Code of Virginia (1950), as amended, but does not choose to utilize it at the time of sentencing because of confinement on other sentences or because of jail time in the instant case. Near the end of his term of confinement, after the papers in his case have been forwarded from the district court to the circuit court pursuant to § 19.2-345 of the Code, he petitions for permission to make installment payments.

Your first inquiry is to whom should the defendant make his request for the payment of his fine on an installment basis. An ancillary question is whether the judge of the circuit court could enter an order prescribing a method of payment of the fine and punish for contempt if that order were violated even though he did not initially try the case and there was no appeal to the circuit court. Section 19.2-354 of the Code deals specifically with the authority of a court to order payment of a fine and costs in installments. That section provides that whenever a defendant is convicted of a violation of any criminal law and is sentenced to pay a fine, and it appears to the court that he is unable to pay it, the court may order payment to be made in installments or upon such other terms as enable the defendant to make payment. You point out in your inquiry that
$19.2-346$ of the Code provides that the clerk of the circuit court, upon receipt of the papers directed to be forwarded to him pursuant to $19.2-345$, may, when necessary, issue execution upon the fines and costs remaining unpaid as though they had been imposed in his court. I am of the opinion, however, that $19.2-354$ does not give jurisdiction to the circuit court to order installment payments in the situation you pose. That section confers such authority upon the sentencing court in which the application is to be made. The mere transfer of the papers in the case from the district court does not place the matter before the circuit court with the limited exception hereinabove noted.

Your second inquiry is whether the district court would have authority under the circumstances you relate to enter an order for the payment of a fine after the case had been finally disposed of in the district court as provided by $19.2-345$ of the Code and forwarded to the circuit court. Rule 1:1, Rules of the Supreme Court of Virginia, provides that all final judgments remain under the control of the court and subject to be modified or vacated for twenty-one days after the date of entry and no longer. I am of the opinion, therefore, that once the twenty-one day period has passed, the district court is without jurisdiction to enter any further orders. Consequently, your question is answered in the negative. It should be noted, however, that pursuant to $53-272$ of the Code the court may suspend a misdemeanor sentence at any time prior to its expiration and place the defendant on probation under such circumstances as it deems appropriate. The court could, by utilizing this section, provide as a condition of probation that the defendant pay his fine in installments in spite of the fact that the twenty-one day period had elapsed.

FIREARMS—Volunteer Fire Department Cannot Conduct Shooting Match Within 100 Yards Of State Road.

HIGHWAYS—Shooting In Road—When $18.2-286$ applicable.

CRIMES—Shooting In Road—When $18.2-286$ applicable.

November 25, 1975

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

This is in reply to your letter of October 22, 1975, in which you make the following inquiry:

"I have been asked by a local incorporated volunteer fire department if it is legal for them to conduct a shooting match within 100 yards of a state road, where the weapons will be fired from within 100 yards of the state road, at targets also within that same distance, as well as beyond that distance."

"... it is not clear whether, in order to be excepted from the provisions of the first paragraph of that Section (33.1-349, Code of Virginia (1950), as amended), the shooting match must be maintained by law enforcement officers or military personnel in performance of their lawful duties, or whether it is sufficient that the shooting matches conducted by other than law enforcement officers or military personnel be either supervised or approved by law enforcement officers in the performance of their lawful duties."

Section 33.1-349, of the Code of Virginia (1950), as amended, was repealed by the 1975 Session of the Legislature and the provisions of such
statute are now codified in § 18.2-286. That section now provides, in pertinent part, that:

"If any person discharge a firearm in or along any road, or within one hundred yards thereof, . . . he shall for each offense, be guilty of a Class 4 misdemeanor.

"The provisions of this section shall not apply to firing ranges or shooting matches maintained, and supervised or approved, by law-enforcement officers and military personnel in performance of their lawful duties." (Emphasis added.)

Section 33-287 of the Code, the predecessor to both, §§ 33.1-349 and 18.2-286, provided for a fine if a firearm was discharged within 100 yards of a public road. See Report of the Attorney General (1962-1963) at 107. The 1968 Legislature amended that Act to include the exceptions now encompassed in § 18.2-286. Chapter 393, [1968] Acts of Assembly 503.

The General Assembly clearly intended to further safety on public highways by prohibiting the discharge of firearms within 100 yards of a road, and at the same time to allow limited firing for law enforcement officers and members of the military in the performance of their lawful duties. I am of the opinion that the foregoing exception contained in § 18.2-286 includes only those firing exercises relating to the training of law enforcement officers and military personnel. It is, therefore, my opinion that a shooting match conducted by a volunteer fire department is subject to the limitations of § 18.2-286, even if it is supervised or approved by law enforcement officers or military personnel.

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FIREMEN—County May Accept And Use Funds Donated By Private Organization To Employ A Fireman.

BOARDS OF SUPERVISORS—Vested With Same Powers And Authority As Council Of Cities And Towns.

COUNTIES, CITIES AND TOWNS—Authorized To Establish A Fire Department.


EMPLOYEES—As Many Officers And Employees Other Than The Chief May Be Employed In Fire Department As Governing Body Approves.

July 1, 1975

THE HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

This is in reply to your recent letter inquiring whether a county may accept and use funds contributed by a private organization to employ a fireman.

Section 15.1-522 of the Code of Virginia (1950), as amended, provides, in pertinent part, that boards of supervisors are vested with the same powers and authority as the council of cities and towns. Section 15.1-848 provides that "[a] municipal corporation may accept or refuse gifts, donations, bequests or grants from any source, which are related to the powers, duties and functions of the municipal corporation." Counties, cities and towns are also authorized to establish a fire department. See § 27-6.1.
"The head of such fire department shall be known as 'the chief.' As many other officers and employees may be employed in such fire department as the governing body may approve." Id.

I am of the opinion, therefore, that a county may accept and use funds donated by a private organization to employ a fireman. If the fireman employed is to head the fire department, he shall be known as "the chief."

FIREMEN—Fire Marshals—No State standards for type of uniform worn when performing law enforcement duties.

CRIMINAL PROCEDURE—Uniform Worn By Fire Marshal When Performing Law Enforcement Duties.

UNIFORMS—Fire Marshals—No State standards for type of uniform worn when performing law enforcement duties.

February 2, 1976

THE HONORABLE JAMES A. CALES, JR.
Commonwealth's Attorney for the City of Portsmouth

This is in response to your recent request for an Opinion in which you inquire whether there are any regulations governing the type of uniform which must be worn by local fire marshals and assistant fire marshals in exercising the authority granted to them under § 27-34.2 of the Code of Virginia (1950), as amended. Under § 27-34.2 of the Code local fire marshals and their assistants have certain limited law enforcement powers, and that section states that the powers in question may only be exercised when such officers are in uniform and serving a designated tour of duty. No standards have been adopted under State law to regulate the type of uniforms worn by these officers, and I am unaware of any State regulations that would be applicable to their apparel.

GAMBLING—Operation Of Gambling School To Teach Techniques And Mathematical Probabilities Of Gambling.

CRIMINAL LAW—Operation Of Gambling School To Teach Techniques And Mathematical Probabilities Of Gambling.

May 17, 1976

THE HONORABLE C. B. HARRELL, JR.
Commissioner of the Revenue for the City of Newport News

This is in response to your request for an Opinion concerning the legality of the operation of a gambling school, the operator of which has applied for a business license from your office. In particular, you inquire whether such activity violates, in any manner, § 18.2-331 of the Code of Virginia (1950), as amended, or any other provision of State law.

The activity in question is the operation of a gambling school whereby the instructors will teach various techniques of gambling, including instructions on black jack, keno, craps, and baccarat, and the object of the instruction would be to teach the student the mathematical probabilities involved in the art of gambling. You advised that in conjunction with such instruction it will be necessary for the school to use various aids, such as black jack tables, crap tables, cards, dice and related paraphernalia, but that such items of equipment will be used merely as training aids and they will not be used in any way for gambling. You further advised that at no
time will any gambling for money or other thing of value be conducted on the premises used by the school. Appropriate officials in the local police department will be allowed to visit the premises for purposes of observation or investigation.

Section 18.2-331 of the Code provides as follows:

“A person is guilty of illegal possession of a gambling device when he manufactures, sells, transports, rents, gives away, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of any gambling device, believing or having reason to believe that the same is to be used in the advancement of unlawful gambling activity. Violation of any provision of this section shall constitute a Class 1 misdemeanor.”

A gambling device is defined in § 18.2-325(2)(b) of the Code as follows:

“Any machine, apparatus, implement, instrument, contrivance, board or other thing, including but not limited to those dependent upon the insertion of a coin or other object for their operation, which operates, either completely automatically or with the aid of some physical act by the player or operator, in such a manner that, depending upon elements of chance, it may eject something of value or determine the prize or other thing of value to which the player is entitled;...”

Under the foregoing definition, it would appear that some of the equipment to be used by the school, such as black jack tables, crap tables, roulette tables, etc., would be gambling devices. Pursuant to § 18.2-331, the possession of such gambling devices is prohibited as long as such possession is under those circumstances where the person possessing them believes or has reason to believe that the same are to be used in the advancement of unlawful gambling activity.

If the school in question does not use such devices for any illegal gambling purposes, or allow such devices to be used in any way for illegal gambling, it would be my opinion that the possession of them would not be in violation of § 18.2-331 of the Code. By the same token, the activities of the school, if limited to instruction as described in your letter and if no actual gambling took place whereby students or other persons could win or lose anything of value, would not be illegal under any other provision of Virginia law. I also call your attention to § 58-356, Code of Virginia (1950), as amended, which provides that the licensing of any slot machines or other gambling devices does not permit the operation of such devices in any manner which is prohibited by law.

GAME AND INLAND FISHERIES—Agents For Sale Of Permits And Licenses—Commission may appoint seven agents or less, but not more, in Franklin County.

April 12, 1976

THE HONORABLE VIRGIL GOODE, JR.
Member, Senate of Virginia

This is in reply to your recent letter wherein you make the following inquiries:

“Section 29-65 of the Code of Virginia authorizes the Commission of Game and Inland Fisheries to appoint Agents for the issuance and sale of hunting, trapping, and fishing licenses.

“Can the Commission appoint fewer agents in a particular county
REPORT OF THE ATTORNEY GENERAL

(For example: Franklin) than is listed in that section? Can any more agents than the number listed in that section be appointed?"

Section 29-65, Code of Virginia (1950), as amended, provides:

"The Commission shall have authority to appoint agents for the issuance and sale of the permits provided for in this title; the Commission may designate agents in counties, cities and towns for the issuance and sale of licenses provided for in this title. If the clerk of any court desires to be relieved of this duty, or gives his consent thereto in writing, the Commission shall have authority to require its agents also to sell hunting, trapping and fishing licenses in the place of or in addition to the clerk; provided, however, that in the counties of Caroline, Rockingham, Scott and Tazewell the Commission may appoint not exceeding five agents, in the county of Franklin the Commission may appoint not exceeding seven agents...." (Emphasis added.)

In view of the foregoing statutory language, I am of the opinion that the Commission is authorized to appoint seven agents, or any number of agents less than seven, but may not appoint more than seven agents in Franklin County. Accordingly, I must respond to your first inquiry in the affirmative and to your second inquiry in the negative.

GAME AND INLAND FISHERIES—Bear And Deer Damage Stamp Fund
—Use of surplus funds restricted by statute.

COUNTIES—Bear And Deer Damage Stamp Fund—Use of surplus funds restricted by statute.

PARKS—Surplus In Bear And Deer Damage Stamp Fund May Not Be Used To Acquire And Develop Park In Botetourt County.

February 26, 1976

THE HONORABLE REBECCA H. HANSLIN
Commonwealth's Attorney for Botetourt County

This is in reply to your recent letter wherein you ask whether surplus monies remaining for more than three years in the Botetourt County Bear and Deer Damage Stamp Fund may be used in acquisition and development of land for use as a park. Your letter indicates the proposed park would serve various purposes, and would include such features as an athletic field, a picnic area, recreational play areas and nature trails.

Pursuant to Chapter 420, [1962] Acts of Assembly 679, certain counties, including Botetourt County, were authorized to enact an ordinance requiring a special stamp for hunting bear and deer. This Act repealed all prior separate Acts dealing with the establishment of and authorized uses of special deer and bear stamp funds. With respect to the authorized uses of surplus deer and bear stamp funds, Chapter 420 provides:

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

Subsequent to its passage in 1962, Chapter 420 has been amended on various occasions to authorize certain named counties to use surplus funds for
purposes other than conservation, restoration and protection of wildlife. In view of the restrictive language of Chapter 420 regarding use of surplus funds generally, and in view of the subsequent specific enactments authorizing uses of surplus funds by certain counties, not including Botetourt, for purposes other than those specified generally in Chapter 420, I am of the opinion that Botetourt County is not authorized to use its surplus deer and bear stamp funds for acquiring and developing a park as described in your letter.

GENERAL ASSEMBLY—Compatibility—Member may also serve on Hampton Roads Sanitation District; not a “salaried” office.

POLITICAL SUBDIVISIONS—Hampton Roads Sanitation District Is.

PUBLIC OFFICERS—Compatibility Of Office—Member of Hampton Roads Sanitation District not a “salaried” office—May also be member of General Assembly.

SALARIES—Per Diem Constitutes An “Emolument” But Applicable Only To Holding Federal Position, Not State.

DEFINITIONS—Per Diem Constitutes An “Emolument” But Applicable Only To Holding Federal Position, Not State.

December 8, 1975

THE HONORABLE WILLIAM T. PARKER
Delegate Elect

You state that you serve as a Commissioner of the Hampton Roads Sanitation District, your present term expiring on June 7, 1976, and request my opinion whether you may continue to serve in this position now that you have been elected to the House of Delegates of the Virginia General Assembly.

The District is a political subdivision of the Commonwealth established as a governmental instrumentality to provide for the public health and welfare. Members are appointed by the Governor and “receive no salary,” but are paid necessary expenses and a per diem. See § 21-291.2 of the Code of Virginia (1950), as amended.

Article IV, Section 4, of the Constitution of Virginia (1971) provides in part that:

“No person holding a salaried office under the government of the Commonwealth...shall be a member of either house of the General Assembly during his continuance in office; and his qualification as a member shall vacate any such office held by him. No person holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, shall be eligible to either house.”

This Office has previously ruled that a per diem does constitute an “emolument.” See Report of the Attorney General (1961-1962) at 206. The term “emolument,” however, is applicable only to the holding of a federal position, not a state position, and is construed more broadly than the term “salaried office.” I A. E. Howard, Commentaries on the Constitution of Virginia 479-85 (1974).

A member of the District does hold an “office.” There is no need to determine, however, whether it is an office “under the government of the Commonwealth” since I am of the opinion that, in any event, it is not a “salaried” office. Consequently, qualification as a member of the House of Delegates will not vacate your position as a Commissioner.
GENERAL ASSEMBLY—Legislation Could Be Drawn Requiring Magazines Such As “Playgirl” And “Penthouse” To Be So Displayed To Prohibit Only The Viewing Of Such Materials By Minors.

AMENDMENTS—Obscene Materials Not Protected By First Amendment.

MINORS—Test Of Obscenity As To Minors.

OBSCENITY—Unconstitutional To Ban Sale Of Magazines Such As “Playgirl” And “Penthouse” On Assumption They Will Be Obscene.

STATUTES—Unlawful To Distribute Obscene Material To Adults As Well As Minors.

May 11, 1976

THE HONORABLE CHARLES J. COLGAN
Member, Senate of Virginia

This is in reply to your letter in which you seek my opinion whether the General Assembly could pass legislation which would require magazines such as “Playgirl” and “Penthouse” to be displayed only in adult book stores.

In 1973 the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), reaffirmed that obscene materials were not protected by the First Amendment. Expression, however, is presumptively protected by the First Amendment, and retains this protection until the contrary is shown in an adversary hearing wherein the questioned material when viewed as a whole is found to appeal to the prurient interest in sex, to portray sexual conduct in a patently offensive way, and to lack serious literary, artistic, political, or scientific value. Since each separate issue of a magazine of the type you have mentioned would have to be viewed in its entirety to determine whether it was obscene, it is my opinion that it would be unconstitutional to ban the sale of such magazines on the assumption they will be obscene, or to require that they be displayed only in “adult” book stores. Our present statutes, of course, make it unlawful to distribute obscene material to adults as well as minors. See §§ 18.2-374, -391.

The Supreme Court has recognized that the First Amendment rights of minors are not co-extensive with those of adults. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). A state may permissibly determine that at least in some precisely delineated areas, a child is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. *Ginsberg v. New York*, 390 U.S. 629 (1968). It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene such expression must be, in some significant way, erotic. *Cohen v. California*, 403 U.S. 15 (1971).

In the recent case of *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Supreme Court reaffirmed the proposition that a state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults. The Court did note that only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to minors. In *Conners v. Riley*, 395 F.Supp. 1244 (W.D. Ark. 1975), the district court held that an ordinance which prohibited the display of explicit sexual material in areas where minors have access was not facially unconstitutional. In view of these authorities, it is my opinion that a statute could be drawn to prohibit the public display of explicit sexual material. In order to comport with constitutional standards, such a statute would have to be drawn in such a way as to prohibit only the viewing of such materials by minors.
GENERAL ASSEMBLY—Members—Appointment of as county attorney, attorney for school board, or hearing officer not prohibited.

COUNTY ATTORNEY—Salaried Employment—Conflict of Interests Act not applicable to General Assembly member appointed as.

PUBLIC OFFICERS—Compatibility—Member of General Assembly not prohibited from appointment as county attorney, attorney for school board, or hearing officer.

VIRGINIA CONFLICT OF INTERESTS ACT—General Assembly Member Must Comply With If Contracts To Render Services To School Board Or As Hearing Officer.

May 28, 1976

THE HONORABLE FLOYD C. BAGLEY
Member, House of Delegates

This is in response to your inquiries whether any provision of the Constitution or statutes of Virginia prohibits a member of the General Assembly from being (a) a full-time county attorney, (b) an Attorney for a school board or (c) a hearing officer appointed pursuant to § 54-872.1 of the Code of Virginia (1950), as amended.

I am unable to find any constitutional or statutory provision which prohibits a member of the General Assembly from holding any of the three enumerated positions. Article IV, Section 4, of the Constitution of Virginia does prohibit members of the General Assembly from holding salaried offices "under the government of the Commonwealth" and certain local offices. None of the positions in question, however, are included in that prohibition. Furthermore, § 15.1-50, which prohibits incompatibility of offices by certain officials serving on the local level of government, is inapplicable.

I would note, however, that the Virginia Conflict of Interests Act would apply to a member of the General Assembly who contracted to render services to a school board or as a hearing officer. In those instances, it would be necessary for the General Assembly member to comply with § 2.1-349(a)(2) before entering into such contracts. Because being appointed a full-time county attorney is analogous to a contract for salaried employment, § 2.1-349(a)(2) would not be applicable to that relationship.

GENERAL ASSEMBLY—Members—Cannot serve as judge of any court.

GENERAL ASSEMBLY—Members—Cannot be elected or appointed as judge of any court during term for which he was elected.

JUDGES—Cannot Serve As Member Of General Assembly.

September 5, 1975

THE HONORABLE WILLARD J. MOODY
Member, Senate of Virginia

Your letter of August 28, 1975, states:

"Please advise whether or not, in the opinion of the Attorney General, a member of the General Assembly of Virginia is eligible to be appointed [by the Governor] to a Judgeship during his term of office when that term of office will expire [at the commencement of] the next regular session of the General Assembly."
Article IV, Section 4, of the Constitution of Virginia (1971) 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, therefore, under this provision a member of the General Assembly could not hold the office of judge of any court while continuing to be a member. See Report of the Attorney General (1966-1967) at 153. Even if a member resigned from the General Assembly, Article IV, Section 5, would be applicable to him:

"...[n]o member during the term for which he shall have been elected shall be elected by the General Assembly to any civil office of profit in the Commonwealth." (Emphasis added.)

In Norris v. Gilmer, 183 Va. 367 (1944), the Supreme Court ruled that an appointment by the Governor of a member of the State Corporation Commission was subject to the requirement that the appointee be "a qualified person" which meant one who would not only meet the necessary qualifications, but would also not be disqualified by any other provision of the Constitution. Senator Norris was held disqualified by Section 45 of the Constitution of Virginia (1902), the predecessor to Article IV, Section 5.

Subsequently, my predecessor in office, the Honorable J. Lindsay Almond, Jr., in an Opinion to the Honorable John S. Battle, Governor of Virginia, dated August 20, 1952, and found in the Report of the Attorney General (1952-1953) at 116 opined that the Norris case was just as applicable to appointment to the office of judge as it was to appointment to the State Corporation Commission. A copy of that Opinion is herewith enclosed.

Article VI, Section 7, provides that when a vacancy exists in a judgeship while the General Assembly is not in session the Governor may "appoint a successor to serve until thirty days after the commencement of the next session of the General Assembly." Under the inquiry you have posed, the term of the member of the legislature will expire at the commencement of the next regular session of the General Assembly; such individual would then be eligible to be elected by the General Assembly to a judgeship. Article VI, Section 7, however, is not limited to regular sessions.

The Commission on Constitutional Revision had proposed that appointments continue until thirty days after the beginning of the next "regular" session of the General Assembly. See H. Doc. No. 1, 1969 Ex. Sess. at 201. The word "regular" was deleted at the 1969 special session thereby causing a gubernatorial appointment to expire thirty days after the commencement of any ensuing session, regular or special. See II Howard, Commentaries on the Constitution of Virginia, 743 (1974). The Assembly may, therefore, take up election of judges in a special session, even if such vacancies are not mentioned in the call. See Report of the Attorney General (1914) at 50.

A special session of course could legally be convened at anytime. A member of the General Assembly "would be ineligible to be elected at any special session held during the time for which he was originally elected as a member." Report of Attorney General (1952-1953) at 117. The Governor, as indicated, must appoint a "qualified" person.

In view of the foregoing, I am of the opinion that a current member of the General Assembly under the organic law of the Commonwealth may not be appointed to a judgeship at any time during the term for which he was elected, notwithstanding his resignation during the course of such term and his eligibility for election by the General Assembly at the commencement of the next regular session.

GOOD SAMARITAN LAW—Immunity From Liability Under § 54-276.9 Applies Only To Person Who Renders Emergency Care, Without Compensation, To Injured Person.
CITIES—Sovereign Immunity—City of Newport News not liable for torts resulting from performance of emergency medical services by salaried medical attendants.

EMPLOYEES—Sovereign Immunity Protects Salaried Medical Attendant From Liability Unless He Commits Intentional Tort Or Is So Negligent As To Exceed Scope Of Employment.

SOVEREIGN IMMUNITY—City Of Newport News Not Liable For Torts Resulting From Performance Of Emergency Medical Services By Salaried Medical Attendants.

May 6, 1976

THE HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

This is in response to your recent inquiry on behalf of the Newport News City Attorney in which you asked whether the immunity from civil liability conferred by § 54-276.9 of the Code of Virginia (1950), as amended, which is popularly known as the Good Samaritan Law, extends to the salaried medical attendants of the City of Newport News. In a similar situation involving paid firemen and policemen who render emergency services, I answered in the negative. See Opinion to the Honorable Adelard L. Brault, Member, Senate of Virginia, dated September 24, 1974, and found in the Report of the Attorney General (1974-75) at 185, a copy of which is attached. Based upon the reasoning stated therein, I also respond to your inquiry in the negative.

You have further inquired whether the doctrine of sovereign immunity would bar suits for civil damages against the City and against its employees in connection with the provision of emergency medical services. Municipal corporations are protected from liability in tort by the doctrine of sovereign immunity in those cases where the function performed is governmental in nature. Taylor v. Newport News, 214 Va. 9, 197 S.E.2d 209 (1973). It has long been held in Virginia that the provision, by a municipal corporation, of health care is a governmental function. City of Richmond v. Long, 58 Va. 375 (1867). It follows from these principles that the City of Newport News could not be held liable for torts which resulted from the performance of emergency medical services.

An employee of a municipal corporation is not immune from liability should he commit an intentional tort. Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967). Nor will the employee be immune if he acts so negligently as to take himself outside the scope of his employment. Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 (1942). Moreover, the employee has no immunity where he is negligent in performing acts which are purely ministerial in character, as distinguished from those acts which require judgment and discretion. Berry v. Hamman, 203 Va. 596, 125 S.E.2d 851 (1962). The provision of medical services is not ministerial in character; rather, it is an activity which requires judgment and discretion. Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973). Based upon the foregoing principles, unless the employee who performs medical services commits an intentional tort or is so negligent as to exceed the scope of his employment, the doctrine of sovereign immunity protects him from liability for damages which result from his acts.

GRIEVANCE PROCEDURE—Employees And Deputies Of Constitutional Officers Not Covered By A County's Grievance Procedure And Personnel System.
CLERKS—Employees And Deputies Of Constitutional Officers (Clerk Of Court) Not Covered By A County's Grievance Procedure And Personnel System.

CONSTITUTIONAL OFFICERS—Authority To Exercise Control Over Employees And Deputies Includes Authority To Remove Personnel Appointed By Him.

CONSTITUTIONAL OFFICERS—Employees And Deputies Of (Clerk Of Court) Not Covered By A County's Grievance Procedure And Personnel System.

GRIEVANCE PROCEDURE—No Statute Mandates Grievance Or Appeal Procedure To Personnel Removed By A Clerk—Appeal procedures when removed by circuit court.

STATE EMPLOYEES—Employees And Deputies Of Constitutional Officers Are Not State Employees Subject To State Grievance Procedure And Personnel System.

January 19, 1976

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

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

"1. Does an employee of a Constitutional Officer, specifically an employee of the Clerk of Court, have a right of appeal and grievance submission as provided by existing personnel regulations in this County?

"2. If the answer to '1' above is in the negative, may such an employee appeal or submit grievances under existing State regulations?

"3. If the answers to '1' and '2' above would not permit such action by the employee, would it be correct to assume that employees of Constitutional Officers work strictly at the pleasure of these officials and have no rights of appeal and grieve under present provisions of the Code of Virginia?"

Section 15.1-7.1 of the Code of Virginia (1950), as amended, provides, inter alia, that the governing body of every county, city and town with more than fifteen employees shall establish a grievance procedure and personnel system for its employees "excluding the employees and deputies of constitutional officers." Thus, by virtue of § 15.1-7.1 employees and deputies of constitutional officers are not covered by a county's grievance procedure and personnel system. A clerk of court is a constitutional officer. Article VII, Section 4, Constitution of Virginia. Accordingly, employees and deputies of the clerk of court have no rights under the grievance procedure or personnel regulations of the county. Furthermore, such individuals are not State employees subject to the State grievance procedure and personnel system.

The clerk of court has the sole and exclusive appointing power with respect to deputies and personnel within his office and under his supervision. Section 15.1-48 of the Code; Report of the Attorney General (1974-1975) at 408. Section 15.1-48 authorizes a clerk to remove personnel appointed by him. This section further provides that such employees may be removed by the circuit court pursuant to § 24.1-79.1. No statute mandates that any grievance or appeal procedure be made available to personnel removed by a clerk. Sections 24.1-79.1, et seq., prescribe the procedures, including the right to appeal, when such employees are removed by the circuit court.
GRIEVANCE PROCEDURE—Employees Of County's Community Mental Health And Mental Retardation Services Board Are Employees Of Board Of Supervisors—Subject to its grievance procedure, classification and uniform pay plans.

APPROPRIATIONS—Community Mental Health And Mental Retardation Services Boards.

BOARDS OF SUPERVISORS—Employees Of County's Community Mental Health And Mental Retardation Services Board Are Employees Of Board Of Supervisors—Subject to its grievance procedure, classification and uniform pay plans.

COUNTRIES—Authority—Power to establish a community mental health and mental retardation services board; agency of county, not of State.

GRIEVANCE PROCEDURE—Employees Of County's Library Board Are Not Employees Of Board Of Supervisors—Not subject to county's or State's grievance procedure.

LIBRARIES—Employees Of County's Library Board Are Not Employees Of Board Of Supervisors—Not subject to county's or State's grievance procedure.

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

BOARDS OF SUPERVISORS—Employees Of County's Library Board Are Not Employees Of Board Of Supervisors—Not subject to county's or State's grievance procedure.

March 31, 1976

THE HONORABLE MORRIS E. MASON
County Attorney for Chesterfield County

I am responding to your inquiry whether employees of the county's Mental Health and Mental Retardation Services Board and its Library Board are subject to the county's grievance procedure, classification system and uniform pay scale plan and, if not, whether such employees would be covered under the State's grievance regulations by virtue of § 15.1-7.1, Code of Virginia (1950), as amended. This section requires the governing body of every county, city and town to establish a grievance procedure "for its employees" and a personnel system, including a service classification plan and a uniform pay plan, for all employees, with certain exceptions not pertinent to your inquiry.

A county is given the power to establish a community mental health and mental retardation services board. See § 37.1-195. Such boards are agencies or instrumentalities of the county, not the State. See Opinion to the Honorable Glen D. Pond, Director of the Virginia Supplemental Retirement System, dated October 10, 1974, and found in Report of the Attorney General (1974-1975) at 336; and Opinion to the Honorable William S. Allerton, Commissioner, Department of Mental Hygiene and Hospitals, dated January 19, 1972, and found in Report of the Attorney General (1971-1972) at 17. The enabling authority for these boards does not delegate specific personnel management functions to them. Rather, they are given the power to "execute such program and maintain such services as may be authorized under . . . appropriations." See § 37.1-197(c). I am, therefore, of the opinion that employees of the county's Community Mental Health and Mental Retardation Services Board are employees of the board of supervisors and
are subject to its grievance procedure and classification and uniform pay plans.

Employees of the county's Library Board are not employees of the board of supervisors. Section 42.1-35 of the Code provides that "[t]he management and control of a free public library system shall be vested in" a library board, and not the board of supervisors. I have previously opined that this section delegates control of library employees to the library board, except under certain special forms of government not adopted by your county. See Opinion to the Honorable Edward A. Natt, County Attorney for Roanoke County, dated November 20, 1975, a copy of which is enclosed. Since § 15.1-7.1 only applies to employees of the county's governing body, it is my opinion that the Library Board's employees are not subject to the county's grievance procedure or classification and uniform pay plans. Further, the grievance procedure of the Commonwealth is only brought into operation by § 15.1-7.1 when the governing body has failed to adopt an approved procedure and plans. Since such is not the case as to Chesterfield County, I conclude that employees of the Library Board are not covered under the State's grievance procedure.

GRIEVANCE PROCEDURE—State Board Of Education Amended, To Provide For Compulsory Arbitration—Must be submitted to General Assembly.

AMENDMENTS—Grievance Procedure Amendment Of State Board Of Education Must Be Submitted To General Assembly.

ARBITRATION—Grievance Procedure Amendment Of State Board Of Education Must Be Submitted To General Assembly.

EDUCATION—Standards Of Quality—State Board of Education lacks authority to change, without submitting to General Assembly.

PERSONNEL—Manual Includes Grievance Procedure Prescribed By State Board Of Education In Standards Of Quality.

SCHOOLS—Arbitration—Grievance procedure prohibits modifying powers of school board.

SCHOOLS—Grievance Procedure For Adjusting Grievances Of Public School Employees.

SCHOOLS—School Boards—Agreement with association of teachers—Authority to execute.

SCHOOLS—School Boards—Authority of State Board of Education to amend grievance procedure to provide for compulsory arbitration.

October 30, 1975

The Honorable E. Bruce Harvey
Commonwealth's Attorney for Campbell County

This is in reply to your letter of September 4, 1975, in which you note that on August 22, 1975, the State Board of Education amended the "Procedure for Adjusting Grievances" to provide for compulsory arbitration as the means of resolving questions whether any matter at issue is a non-grievable prerogative of the school board as listed in Section 7 of the Procedure. You inquire whether there is any limitation on the authority of the State Board of Education to impose such a requirement. Your question is presented in the context of Article VIII, Section 7, of the Const-
stitution of Virginia, which provides that the supervision of schools in each school division is vested in the local school board.

The authority of the State Board of Education to require localities to adopt a grievance procedure is set forth in the Standards of Quality, § 9(a), Ch. 316, [1974] Acts of Assembly at 490, which requires each school division to maintain a personnel manual which shall include the "grievance procedure prescribed by the Board of Education." Section 22-19.1 of the Code of Virginia (1950), as amended, requires the submission to the General Assembly by September 1 of each odd-numbered year of the Standards to be in effect for the ensuing biennium, but there is no provision of law which would preclude the General Assembly from revising the Standards at any time. Chapter 316 thus contains the Standards of Quality for the 1975-76 school year.

I previously have ruled that a school board may enter into compulsory arbitration to resolve disputes arising out of the application of its policies, rules, and regulations. Report of the Attorney General (1972-1973) at 337. I also noted that, because the grievance procedure was limited to the application of policies, rules, and regulations and protected the prerogatives of the school board, such procedure was constitutionally permissible. Id. at 338. The 1975 amendments to the grievance procedure do not constitute any infringement of the school board's constitutionally conferred prerogatives. While Section 7 of the Procedures was amended to confer upon the panel the power to resolve questions of arbitrability, Section 3(e)(4) provides that only decisions on the merits are binding. This would leave the school board or the grievant free to contest any jurisdictional determination. The amendments, however, would require school personnel to complete the grievance procedure before contesting the panel's jurisdiction.

Of more immediate concern, however, is the fact that the August 22nd action of the State Board of Education was taken subsequent to the legislative mandate that school boards maintain a personnel manual containing the grievance procedure previously submitted to the General Assembly and embodied in the Standards of Quality for the 1975-76 school year. Because the State Board of Education lacks authority to change the Standards of Quality without complying with the requirement of § 22-19.1, that proposed Standards of Quality be submitted to the General Assembly, it is without authority to require localities to adopt the August amendment. A school division would not, however, be precluded from adopting a grievance procedure which went beyond that required by the General Assembly so long as such procedure was not in conflict with the legislative mandate.

GRIEVANCE PROCEDURE—State Employee From State Service At Large Means State Employee Covered By Virginia Personnel Act—Grievance panel.

DEFINITIONS—State Employee From State Service At Large Means State Employee Covered By Virginia Personnel Act—Grievance panel.

GENERAL ASSEMBLY—Members Of Are Officers, Not State Employees Covered By Virginia Personnel Act—May not serve on grievance panel.

JUDGES—Not State Employees Covered By Virginia Personnel Act—Officers—May not serve on grievance panel.

PERSONNEL ACT—Grievance Panel—State employee from State service at large means State employee covered by Act.

STATE EMPLOYEES—Grievance Panel—State employee from State service at large means State employee covered by Virginia Personnel Act.
THE HONORABLE ADELARD L. BRAULT  
Member, Senate of Virginia

This is in reply to your recent inquiry whether a member of the General Assembly or a Circuit Court judge are State employees from the State service at large for the purpose of serving on a grievance panel under the State grievance procedure.

The State grievance procedure provides for a panel hearing as the last step in processing a grievance. Under the grievance procedure, the agency head supplies both parties with a list of prospective panel members from which the panel is to be chosen. The grievance procedure further provides that, if the grievant finds the entire list to be unacceptable, "he may select one (or two of a five-member panel) State employee from the State service at large." The State grievance procedure only applies to those State employees who are covered by the Virginia Personnel Act, §§ 2.1-110 to -116 of the Code of Virginia (1950), as amended. There are several exemptions from the Virginia Personnel Act, including members of the General Assembly and judges. See § 2.1-116. This exemption from the Virginia Personnel Act also exempts those individuals from the operation of the State grievance procedure.

In light of the coverage of the State grievance procedure, I am of the opinion that a "State employee from the State service at large" can only be interpreted to mean a State employee covered by the Virginia Personnel Act. Members of the General Assembly and judges do not fall within that definition. Furthermore, members of the General Assembly and judges are not "employees" of the State; rather they are officers of the State. For the foregoing reasons, therefore, I conclude that members of the General Assembly and judges are not "State employee[s] from the State service at large" for purposes of serving on a grievance panel.

HIGHWAYS—Amendment To § 33.1-151 Empowers Counties To Abandon Sections Of Secondary System Of State Highways Under Specified Conditions.

HIGHWAYS—Discontinued Section Of Secondary System Of State Highways Remains Public Right Of Way—No reversion to adjacent fee owners.


THE HONORABLE GEORGE R. ST. JOHN  
County Attorney for Albemarle County

This is in response to your recent letter in which you inquire whether "a secondary road can still be discontinued for maintenance purposes but remain a public right of way rather than having the public's right completely extinguished as in the case of abandonment?"

You further inquire whether the 1975 amendment of § 33.1-151 of the Code of Virginia (1950), as amended, authorizes only counties with a population of 1,000 people per square mile to abandon sections of the Secondary System of State Highways or whether the 1975 amendment simply gives additional authority to various counties to abandon sections of the Secondary System if certain conditions are found to exist.

I shall answer your questions seriatim.
1. As you point out, the Supreme Court in Ord v. Fugate, 207 Va. 752, 757-58, 152 S.E.2d 54, 58-59 (1967) was faced with the exact question you pose, and determined that “discontinuance” and “abandonment” were not synonymous when it contrasted § 33-76.7 (now 33.1-150) with § 33-76.8 (now 33.1-151). Discontinuance, the Court ruled, does not eliminate a section of road as a public road or render it unavailable for public use. Id. at 757, 152 S.E.2d at 59. Upon abandonment, however, such section ceases to be a public road. Id. The question before the Court in Board of Supervisors of Louisa County v. VEPCO, 213 Va. 304, 192 S.E.2d 768 (1972), was the effect of abandonment, not discontinuance, of a section of the Secondary System. The Court concluded that, when a section of the Secondary System is abandoned, the public’s right of way reverts to the fee owners adjacent to the abandoned section in the absence of clear fee ownership in the county or the Commonwealth. See Bond v. Green, 189 Va. 23, 32, 52 S.E.2d 169, 173 (1949), a case decided under pre-1950 statutes and relied upon in Louisa County.

The Court in Ord, supra, had disregarded cases decided under pre-1950 statutes because “abandonment” and “discontinuance” had been used interchangeably, which the General Assembly had remedied by enacting §§ 33-76.7 and 33-76.8. Your query points to the danger of relying on the older cases. The two statutes interpreted and distinguished in Ord v. Fugate, supra, have remained unchanged in their basic thrust since 1967. It is the State Highway and Transportation Commission that discontinues and the Board of Supervisors that abandons sections of the Secondary System of State Highways. Furthermore, since the question relative to the effect of discontinuance was not before the Court, the language in Louisa County, 213 Va. at 411, 192 S.E.2d at 771, was clearly dicta. Accordingly, I am of the opinion that a section of the Secondary System of State highways which is discontinued remains a public right of way and no reversion to the adjacent fee owners occurs even if fee ownership of the right of way is not in the county or Commonwealth. See also Opinion to the Honorable Ford C. Quillen, Member of the General Assembly, dated April 1, 1975, copy of which I have enclosed, which discusses the effects of “discontinuance” and “abandonment.”

2. Authority to abandon sections of the Secondary System of State Highways has remained within the province of the governing bodies of the several counties even after the enactment of the Byrd Road Act, Chapter 415, [1932] Acts of Assembly 872. When the abandonment statutes were recodified in 1950, grounds for abandonment were set out in the disjunctive: either (1) “no public necessity exists for the continuance of the section” or (2) “that the welfare of the public would be served best by abandoning the section of the road.” Smith v. Board of Supervisors of Franklin County, 201 Va. 87, 89, 109 S.E.2d 501, 504 (1959). See § 33.1-151.

The Supreme Court in Board of Supervisors of Fairfax County v. Horne, 215 Va. 238, 208 S.E.2d 56 (1974), read half of the disjunctive, “no longer necessary for the uses of the Secondary System,” as not authorizing abandonment of a road because of excessive public use. At the next session of the General Assembly this past January, the senators from Fairfax sponsored an amendment to § 33.1-151 of the Code which was enacted as Chapter 255, [1975] Acts of Assembly 443. The phrase “no longer necessary for the uses of the Secondary System” was expanded by setting forth additional criteria by which governing bodies could determine whether abandonment of a road in the Secondary System was proper. At the same time the ground that the “welfare of the public would best be served by abandoning the section of the road,” was broadened by the addition of the word “safety.” By the amendment’s terms, only counties of certain population density could avail themselves of the first change. No such limitation exists with respect to the second half of the amendment. As introduced, Senate Bill No. 682
by its language clearly sought to respond to the Court's decision in Horne, supra, and permit counties additional grounds to abandon sections of the Secondary System for reasons of excessive public use under specified conditions.

As adopted, the amendment contained in Chapter 255 achieves this purpose. Without altering any existing statutory language, particularly the phrase "the governing body of any county" (emphasis added), the General Assembly inserted new grounds for abandonment. The governing body of a county "may" make a finding "that a section of the Secondary System is no longer necessary for the uses of the Secondary System" if certain conditions are met. A new ground—excessive use that threatens public safety and welfare in residential areas—is tacked onto existing grounds for abandonment, e.g., nonuse, construction of new roads or impossibility of use of old roads.

If the General Assembly meant to preclude abandonment of roads by counties which do not meet the population density test under § 33.1-151 of the Code, such action would have reversed a long standing policy of the Commonwealth in effect since before 1932. Specific language, not the language of the amendment, would be necessary to accomplish that reversal. In fact, to be internally consistent the statute must be read to authorize additional grounds for abandonment, not curtail present grounds.

I am of the opinion, therefore, that the 1975 amendment to § 33.1-151 of the Code was the General Assembly's response to the Court's decision in Board of Supervisors of Fairfax County v. Horne, supra, and was enacted to empower certain counties to abandon sections of the Secondary System of State highways under certain specified conditions of excessive public use and to empower all counties to consider safety as a reason for abandonment. No limitation of existing abandonment grounds was intended nor enacted.

HIGHWAYS—Authority Of Madison College To Regulate Public Use Of Primary Highways Within Its Boundaries.

COLLEGES AND UNIVERSITIES—Authority Of Madison College To Regulate Public Use Of Primary Highways Within Its Boundaries.


HIGHWAYS AND TRANSPORTATION, DEPARTMENT OF—Authority Of Madison College To Regulate Public Use Of Primary Highways Within Its Boundaries Accepted By Department For Maintenance.

STATE INSTITUTIONS—Authority To Regulate Public Use Of Primary Highways Within Boundaries Of Institutions—Madison College.

May 10, 1976

THE HONORABLE BONNIE L. PAUL
Member, House of Delegates

This is in response to your recent letter in which you inquire whether Madison College at Harrisonburg, Virginia, has authority under its police power to close or restrict public use of roads within its grounds after such roads have been accepted for maintenance by the Virginia Department of Highways and Transportation pursuant to § 33.1-33 of the Code of Virginia (1950), as amended. That section states:
“The State Highway Commissioner may when requested by the governing body of a State institution assume the maintenance of any road situated within the grounds of such State institution which has heretofore been or is hereafter established and constructed by such institution to standards acceptable to the Commissioner. Any such roads accepted for maintenance by the State Highway Commissioner under the provisions of this section shall be a part of the State Highway System, but the State institution shall continue to exercise police power over such roads.”

One of the roads, which you offer as an example, connects South Mason Street and Hillcrest Drive in the City of Harrisonburg, but lies entirely within the boundaries of land owned by Madison College. I am advised that construction of the road in question was financed through funds allocated to the College for such improvements prior to 1970 and subsequently was accepted for maintenance and designated as State Route 331 by the Department. (The remaining roads within the grounds of Madison College were likewise constructed by the College and then accepted for maintenance by the Department.) The College, thereafter, restricted travel on this road to one direction, and began closing it to traffic during holidays and between the hours of 8:00 a.m. and 4:30 p.m. on days when students were in attendance. I am advised that these restrictions have been imposed in order to insure the safety of the large numbers of students who cross this street between classes and, further, to facilitate the policing of the campus with limited forces when students are on vacation.

In Richmond v. Smith, 101 Va. 161, 166, 43 S.E. 345, 346 (1903), the Court stated: “It is well settled that public highways, whether they be in the country or in the city, belong, not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature.” The General Assembly has provided that roads made part of the State Highway System by virtue of their acceptance under § 33.1-33 are, by definition under § 33.1-25, part of the “primary system of State highways.” As primary highways, normally the regulation of traffic upon the roads in question would be deemed subject to the same restrictions as are applicable to other primary highways; however, the language of § 33.1-33 retains in the State institution the right to continue their exercise of police powers over the accepted roads. As to those police powers retained, § 23-9.2:3(a) is apposite. That section states:

“In addition to the powers now enjoyed by it, the board of visitors or other governing body of every educational institution shall have the powers...to provide parking and traffic rules and regulations on property owned by such institution.”

Accordingly, it is my opinion that Madison College has the power to temporarily close or restrict travel on the roads in question when it deems it necessary for the safety of its students and the protection of its property.

HIGHWAYS—Board Of Supervisors Has No Authority To Enact Ordinance Authorizing Play On Cul-de-sac Roads In County Which Are Part Of State Highway System.

BOARDS OF SUPERVISORS—No Authority To Enact Ordinance Authorizing Play On Cul-de-sac Roads In County Which Are Part Of State Highway System.

COUNTIES, CITIES AND TOWNS—Board Of Supervisors Has No Authority To Enact Ordinance Authorizing Play On Cul-de-sac Roads In County Which Are Part Of State Highway System.
DILLON'S RULE—Limits Authority Of Local Governments To Powers And Functions Statutorily Established.

ORDINANCES—Board Of Supervisors Has No Authority To Enact Ordinance Authorizing Play On Cul-de-sac Roads In County Which Are Part Of State Highway System.

ORDINANCES—May Go Further Than Statute In Its Prohibitions But Cannot Counter Statute’s Prohibition.

POLICE—Duty Of County Police To Enforce State Law—When local ordinance conflicts, State law prevails—Play on cul-de-sac roads in county.

TORTS—Counties Share Sovereign Immunity Of Commonwealth From Tort Claims—Members of Board of Supervisors voting for ordinance not liable in tort for effects of their enactments.

COUNTIES—Share Sovereign Immunity Of Commonwealth From Tort Claims—Members of Board of Supervisors voting for ordinance not liable in tort for effects of their enactments.

September 3, 1975

THE HONORABLE CHARLES L. WADDELL
Member, Senate of Virginia

This is in response to your recent letter in which you inquired whether an ordinance enacted by the Board of Supervisors of Fairfax County, authorizing play on all cul-de-sac roads throughout the County, was within the Board's authority. You further inquired:

“What is the obligation of the Fairfax County Police to enforce State law in this matter? Can they [the police] be arbitrary in their enforcement because of a desire to maintain good community relations? "If Fairfax County has passed an illegal ordinance in this instance and serious injuries, or worse, result from this action, who is liable?"

I will answer your questions seriatim.

1. County ordinances must not only be consistent with the laws of the Commonwealth, §§ 1-13.17 and 15.1-510 of the Code of Virginia (1950), as amended, but, under the Dillon Rule, authority for such ordinances must be expressly or impliedly delegated to the County by State statute. Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 118, 197 S.E.2d 355 (1975); Gordon v. Board of Supervisors of Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967); Richmond v. Hanes, 203 Va. 102, 122 S.E.2d 895 (1961); 13 Michie's Jurisprudence, "Municipal Corporations," §§ 25 and 26 (1951). A county ordinance may go further in its prohibition than a statute, but it cannot counter the statute’s prohibition. Thus, so long as the ordinance does not conflict with the statute, both may coexist and be effective. King v. County of Arlington, 195 Va. 1084, 1090, 81 S.E.2d 587, 59 (1954).

Section 46.1-235 of the Code sets forth State law on the subject and reads as follows:

“No person shall play on a highway or street other than upon the sidewalks thereof, within a city or town, on any part of a highway outside the limits of a city or town designated by the State Highway Commissioner exclusively for vehicular travel. No person shall use on a highway or street where play is prohibited, roller skates, or toys or other devices on wheels or runners, except bicycles and motorcycles.
The governing bodies of counties, cities and towns may designate areas on highways or streets where play is prohibited or may restrict play to the use of roller skates, or toys or other devices on wheels or runners...." (Emphasis added.)

Prior to 1972, the emphasized portions read:

"Local authorities of cities and towns may designate areas on highways or streets where play is prohibited in which persons may be permitted to use roller skates, or toys or other devices on wheels or runners."

The pre-1972 language allowed cities and towns to permit the use of roller skates, or toys or other devices on wheels or runners on municipal streets where play was prohibited. The 1972 amendment allows a county, city or town to place a restriction on a road where play is permitted, whereby play is either banned completely or limited to roller skating, or toys or other devices on wheels or runners.

The Commissioner and the Members of the State Highway and Transportation Commission, under the authority of § 33.1-12(3) of the Code, have enacted General Rules and Regulations, Section 8 of which reads as follows:

"No person, firm, or corporation shall use or occupy the right of way of any highway for any purpose except travel thereon except as may be authorized by the Commission or Commissioner either in the Land Use Permit Manual or as provided by law."

This Rule and Regulation prohibits play and, under § 33.1-19 of the Code, has the force of law, the violation of which is punishable as a misdemeanor. Section 8 applies to all highways and streets in Fairfax County under the jurisdiction of the Department of Highways and Transportation.

It is also significant that the General Assembly determined legislation was necessary to grant authority to counties, cities and towns allowing them to permit certain highways or portions thereof to be utilized for sledding and similar recreational activities. Section 46.1-180.2(6).

In light of the foregoing, I am of the opinion that the Board of Supervisors of Fairfax County has no authority to allow play on cul-de-sac streets in the County which are part of the State Highway System; the ordinance, which is inconsistent with State law, is of no force and effect on such roads. Sections 1-13.17 and 15.1-510.

2. By virtue of their oath of office as police officers, members of the Fairfax County Police Department are obligated to enforce State law as well as local ordinances. When the two conflict, as I have hereinabove stated, State law prevails.

3. Counties, being integral parts of the State, share the sovereign immunity of the Commonwealth from tort claims of whatever nature. Mann v. County Board, 199 Va. 169, 98 S.E.2d 515 (1957). Enactment of an ordinance is a legislative act by the Board of Supervisors. Martinsville v. County of Henry, 204 Va. 757, 133 S.E.2d 287 (1964). Although ultra vires, its enactment imposes no tort liability upon Fairfax County. I am of the opinion that the individual members of the Board in voting for the ordinance were exercising legislative judgment and are not liable in tort for the effects of their enactments. 63 Am. Jur. 2d., Public Officers and Employees, § 289 (1971); Annot., 22 A.L.R. 125 (1923).

TRANSPORTATION—Median Strip For I-66—Mass transit authority does not have authority to construct rapid transit in median strip if Arlington I-66 not constructed.

July 9, 1975

THE HONORABLE DOUGLAS B. FUGATE
State Highway and Transportation Commissioner

In your letter of July 2 you posed the following inquiries:

"1. Should Arlington I-66 not be constructed, what would be the disposition, under state law, of the right of way already acquired?

"2. In such event, would the Washington Metropolitan Area Transit Authority have the authority to construct rapid transit and ancillary facilities within the area presently designated as the proposed median strip for I-66?"

Analysis of these two questions involves the interpretation of several statutory provisions, i.e., §§ 33.1-90, -90.1 and -97, Code of Virginia (1950), as amended.

**Question 1**

The pertinent portions of §§ 33.1-90 and 33.1-90.1 are as follows:

"...In the event that the highway project, or project as defined in § 33.1-268 of the Code, contemplated has not been let to contract or construction commenced within a period of twelve years, if in the Interstate Highway System, or eleven years, if in any other system of highways, from the date of the acquisition of such property, upon written demand of the owner or owners, their heirs or assigns, such property shall be reconveyed by the Commonwealth of Virginia to such owner or owners, their heirs or assigns, upon repayment of the original purchase price, without interest. Any such contract shall provide for completion within three years. Provided, however, that the time periods established by this section within which the Department must let to contract or begin construction in order to avoid reconveyance shall be extended by the number of days of delay occasioned by litigation involving the project or by the failure of the State to receive anticipated federal funds for such project. Nor shall such reconveyance be required for rights-of-way acquired for future street and highway improvements at the request of local governing bodies; or for rights-of-way acquired for State construction designed to provide future additional lanes, service roads or interchanges." (§ 33.1-90.)

"The period specified in § 33.1-90 within which an Interstate Highway System project or projects as defined in § 33.1-268 of the Code must be let to contract or commenced shall be fifteen years plus the number of days delay occasioned by litigation or by failure of the State to receive anticipated federal funds for such projects in lieu of the period specified in § 33.1-90, and no requirement on the department to reconvey such property shall lie until the expiration of such time." (§ 33.1-90.1.)

Accordingly, it is my opinion that if I-66 were not constructed, on such occasion as a written demand were made, and upon the expiration of the specified time period and the repayment of the original purchase price without interest, the Commissioner would be obligated to reconvey the land to the owners, heirs or assigns so entitled.
It is my opinion that the answer to your second question is in the negative; this conclusion is predicated on the application of § 33.1-97; in conjunction with the previously discussed effect of the reconveyance provisions of §§ 33.1-90 and 33.1-90.1. Section 33-58.1, the statutory predecessor of § 33.1-97, was enacted in 1962. It consisted of what are now the first three paragraphs of § 33.1-97. The original statute permitted the State Highway Commissioner, when acquiring land for the construction of divided highways, to acquire sufficient land in the median strip for the use of public mass transportation. The statute further provided that such additional land could be acquired only after agreement between the Commissioner and the mass transit authority whereby the authority would pay the cost of the additional land acquired and all expense incidental to the acquisition.

In 1973, the current fourth and fifth paragraphs were added to § 33.1-97:

"... The Commission is authorized and directed with the consent of the Federal Highway Administration to permit the Washington Metropolitan Area Transit Authority to commence construction of rapid transit and ancillary facilities within the proposed median strip of Interstate Route 66 between Glebe Road in Arlington County and Nutley Road in Fairfax County.

"Provided, however, that construction of rapid transit shall conform with highway plans and that construction procedures shall be reviewed and approved by the State Highway Commissioner. Provided, further, that prior to construction of rapid transit, a mutually satisfactory allocation of cost shall be agreed to by the Washington Metropolitan Area Transit Authority, the State Highway Commission and the Federal Highway Administration."

Thus, the statute specifically permits W.M.A.T.A. to commence construction of its rapid transit facilities within the proposed median strip of I-66 provided that the consent of F.H.W.A. has been obtained, that construction procedures have been approved by the Commissioner and that a mutually satisfactory allocation of costs has been agreed upon by W.M.A.T.A., the Commission and F.H.W.A. The amendment presupposes the existence of a proposed median strip for I-66. In the event a decision is made that such highway should not be built, there would be no proposed median strip and the foregoing authority conferred upon W.M.A.T.A. would lapse.

This interpretation is buttressed by the specific provisions of the fifth paragraph requiring that construction of the transit facilities "conform with highway plans" and that "construction procedures" be reviewed and approved by the Commissioner. The entire statute contemplates the existence of a highway. Without Interstate Route 66, there can be no median strip and thus no area for mass transit facilities.

The 1973 amendment hereinabove referred to manifestly permitted W.M.A.T.A. to commence construction of mass transit facilities in the proposed median strip immediately, subject to the important and restrictive provisos that F.H.W.A. must consent, that the Commissioner must approve construction procedures and that a satisfactory allocation of cost between the three parties must be agreed upon. Since W.M.A.T.A. has not obtained the requisite accords as of the present date, there is no authority by which it could start to construct any facilities in the proposed corridor. Accordingly, if I-66 were not now to be built, the reconveyance provisions of §§ 33.1-90 and -90.1 would govern disposition of the property.
REPORT OF THE ATTORNEY GENERAL

HIGHWAYS—"Once A Highway, Always A Highway" Until Vacated Or Abandoned As Prescribed By Statute.

BOARDS OF SUPERVISORS—Highways—Statutory abandonment may only be accomplished by official action of governing body of county.

COUNTIES, CITIES AND TOWNS—Authority—Procedure for statutory abandonment of roads, streets and alleys.


April 1, 1976

THE HONORABLE GEORGE R. ST. JOHN
County Attorney for Albemarle County

This is in response to your recent letter wherein you advise that, as a result of the enactment of the Byrd Road Act, ch. 415, [1932] Acts of Assembly 872, many of the Albemarle County roads then in existence were taken into the State Secondary System. Your inquiry concerns those Albemarle County roads that were not taken into the System, certain of which are now locatable, but have grown up in trees and brush and obviously have not been used for decades. Your specific questions are as follows:

1. "Whether such old county roads are in fact still public ways over which the public has the right of travel;
2. "Whether, regardless of the public's rights in these roads, adjoining private owners still have the right to use these old roads as ingress and egress to the nearest public road and, if so, whether this right is in the nature of a public right or a private easement;
3. "Whether with respect to such old roads, which are not being used by anyone for ingress or egress, the County Board of Supervisors now has the power to officially abandon these old roads and extinguish any public rights therein."

I shall answer your questions seriatim:

1. The Supreme Court of Virginia has held that the ancient maxim of common law, "once a highway, always a highway," controls in this State unless and until the highway has been vacated or abandoned in the manner prescribed by statute or by nonuser. Moody v. Lindsey, 202 Va. 1, 115 S.E.2d 894 (1960); Emond v. Green, 189 Va. 23, 52 S.E.2d 169 (1949); Basic City v. Bell, 114 Va. 157, 76 S.E. 336 (1912).

     Sections 33.1-156 through 33.1-167 of the Code of Virginia (1950), as amended, provide the statutory authority and procedures for the abandonment of roads not in the State Secondary System. A statutory abandonment may only be accomplished by official action of the governing body of the county or by the circuit court of the county on appeal. Nonuser will not cause an abandonment of a public road unless it is coupled with affirmative evidence of an intent to abandon the road. Moody v. Lindsey, supra; Basic City v. Bell, supra. In addition, "mere failure of the public authorities to keep a road in repair, like mere nonuser, does not constitute an abandonment." Moody, 202 Va. at 7, 115 S.E.2d at 898.

     In my opinion, Moody is apposite to the inquiry you pose. In that case, a railroad crossing had been abandoned in accordance with statutory procedure in 1913. The remainder of the road was never accepted into the State Secondary System and was not used after 1913. The Supreme Court held that this remaining road was still a public highway and the public was entitled to use it. Accordingly, I conclude that a road, which is not in the Secondary System and has not been officially abandoned, remains a public right of way over which the public has the right of travel.
2. Commensurate with the opinion expressed in (1) above, if the roads remain public rights of way, I am of the view that private adjoining owners have a public right to use these roads as ingress and egress to another public road. Conversely, if the roads have been abandoned in one of the manners previously described, they are no longer public roads and the foregoing right of adjoining landowners has been extinguished. Section 33.1-163 of the Code provides that in the case of abandonment of any section of road under the provisions of §§ 33.1-156 to -167 of the Code, such section of road shall cease to be a public road. The Supreme Court of Virginia has held that citizens have no vested rights in a public road and once a road has been abandoned, the “interest of the Commonwealth in these roads and bridges as a way for public travel, and the interests of the persons who use them, have been extinguished.” Louisa County v. VEPCO, 213 Va. 407, 411, 192 S.E.2d 768, 771 (1972). Accord, Smith v. Board of Supervisors, 201 Va. 87, 109 S.E.2d 501 (1959). Further, when a highway is abandoned, “the land used for that purpose immediately becomes discharged of the servitude and the absolute title and right of exclusive possession thereto reverts to the owner of the fee, without further action by the public or highway authorities.” Bond v. Green, 189 Va. at 32, 52 S.E.2d at 173. Louisa County v. VEPCO, supra.

In summary, I conclude that, if the roads have been abandoned, private adjoining owners do not have the right to use these roads as ingress and egress to the nearest public road, except to the extent that the fee has remained in and the title reverted to them as abutting landowners, since abandonment extinguishes all public rights to the use of these roads.

3. As previously noted, §§ 33.1-156 to -167 of the Code prescribe the procedures and standards under which the governing body of a county may abandon roads not in the State Secondary System. Section 33.1-157 provides that:

“When in heretofore and hereafter laying out, constructing or maintaining sections of roads, a part of a road has been or is straightened or the location of a part thereof altered and a section of the road is deemed by the governing body of the county... no longer necessary for public use... the governing body by proceeding as hereinafter prescribed may abandon the section of the road no longer deemed necessary for public use....”

The grounds for abandonment in § 33.1-157 are clarified by § 33.1-161 which provides in the disjunctive that, if the governing body is satisfied either (1) that no public necessity exists for the continuance of the road or (2) that the public welfare may be served best by the road’s abandonment, it may issue an order abandoning the road as a public road, causing the road to cease being a public road. An alternative procedure is provided under § 33.1-164, which states that when any road “is altered and a new road, which serves the same citizens as the old road, is constructed in lieu thereof and approved by the governing body” the old road may be abandoned by the governing body.

In addition, there is a general grant of police power to counties under § 15.1-510 of the Code and, pursuant to § 15.1-522, boards of supervisors, with certain exceptions, are generally vested with the same powers and authority which councils of cities and towns possess by virtue of the Virginia Constitution and Acts of the General Assembly. It can be argued, therefore, that § 15.1-364, which grants cities and towns the authority to vacate streets and alleys upon motion of such governing body or on application of any person after posting proper notice, would also be applicable to the roads about which you inquire. Under § 15.1-364, the governing body is required to appoint viewers who will view the street and report in writing whether in their opinion any inconvenience and, if at , what
inconvenience would result in discontinuing the road. After notifying the land proprietors affected by the proposed vacation and after considering the written report and other evidence, the governing body may vacate such roads. This concept is not abrogated by the provisions of §§ 33.1-156 to -167 since § 33.1-167 specifically provides that none of such sections shall affect the provisions of Chapter 10, Title 15.1 of the Code, which includes § 15.1-364.

Consequently, I am of the opinion that, if the Board of Supervisors is satisfied that one of the previously discussed statutory grounds for abandonment of a road defined in § 33.1-157 exists and, further, if the Board complies with the notice and hearing requirements enumerated in Article 12, Chapter 1, Title 33.1 of the Code, they have the power to officially abandon any roads which are not being used by anyone for ingress or egress and to extinguish any public rights therein. As to those roads defined in § 33.1-164, the Board may officially abandon the roads and extinguish the public rights therein by following the alternate procedure provided in that section. Further, I am of the opinion that, if the Board complies with the notice and procedural requirements of § 15.1-364, they have the power to officially vacate any roads, the vacation having the same effect as abandonment under §§ 33.1-156 to -167 of the Code, thus extinguishing any public rights therein.

HIGHWAYS—Standards For Acceptance Of Roads Into State Secondary System For Maintenance-Distinction between subdivision roads and rural roads.

COUNTIES—Highways—Standards for acceptance of roads into State Secondary System for maintenance—Subdivision roads; rural roads.

July 22, 1975

THE HONORABLE A. W. GARNETT
County Attorney for Spotsylvania County

This is in response to your recent letter in which you inquire as to the eligibility of a certain road in your County for acceptance as a "rural road" into the State Secondary System. This road was built to serve a tract of land which had been divided into lots or parcels for the purpose of transfer of ownership. The lots are a minimum of five acres, and they do not fall within the definition of subdivision as set out in the Spotsylvania County Subdivision Regulations, adopted October 24, 1961. The road in question was built to equal the State's standards for "rural secondary roads," and both the County Board of Supervisors and duly appointed road viewers have recommended its inclusion in the State Secondary System.

The primary authority for the establishment, alteration or change of a road in the Secondary System, is derived from §§ 33.1-229 to -346, of the Code of Virginia (1950), as amended. (I assume that this development came into being subsequent to July 1, 1958, thus making § 33.1-72 of the Code inapplicable.) These sections authorize the local road authorities, in their own discretion, to establish new roads in the Secondary System, but circumscribe their powers by the requirement that the State Highway and Transportation Commissioner be made a party to any such proceedings. In this regard, § 33.1-229 of the Code states:

“...provided further, that no expenditure by the State shall be required upon any new roads so established or any old road the location of which is altered or changed by the local road authorities, except as may be approved by the Commissioner...”
REPORT OF THE ATTORNEY GENERAL

In view of this provision, it is my opinion that, although local authorities can designate a road as part of the State Secondary System, the Commissioner's acquiescence in this designation is necessary for the expenditure of any State Highway Department funds on such road. There is no implication that such acquiescence or approval is mandatory upon the recommendation of either the County Board of Supervisors or the County Road Viewers. See Report of the Attorney General (1945-46) at 137.

Accordingly, the eligibility of the subject road for State maintenance funds can be ascertained only by reference to the existing policy of the Commissioner of Highways and Transportation. I am informed that it has been his long-standing policy that consideration of a street for inclusion in the State Secondary System for maintenance purposes be based upon two different sets of criteria, the applicability of which is dependent upon whether such street be a subdivision street or a "rural addition." As you know, this distinction is drawn in order to determine whether State funds will be applied to the improvement of streets and roads in order for them to meet the system's standards. Within certain monetary and mileage restrictions, State funds can be expended to enable a "rural addition" to meet required acceptable standards after inclusion in the System for maintenance. Minutes of State Highway Commission, 19 March 1964.

Generally, in order for a road to be considered for addition to the System as a rural road, it must be necessary to the public convenience, but must not have been built by a developer or speculator to enhance the sale of real estate for profit. Thus, a rural road may be eligible, not only for regular maintenance payments, but for funds to improve overall capacity and quality. In contrast, subdivision streets must meet the established criteria for the System before acceptance for maintenance, and no State funds will be expended to improve those streets to acceptable standards. Minutes of the State Highway Commission, 29 October 1959. For the purposes of this policy, the Commissioner has defined subdivision as:

"...the division of a lot, tract, or parcel of land into two or more lots, plats, sites or other division of land for the purpose, whether immediate or future, of sale or of building development." A Secondary System Manual, effective 1 July 1949.

The manifest rationale for the distinction between subdivision roads and rural roads is to preclude the use of State funds to underwrite residential development for profit, but to allow State improvement of roads in cases of public necessity where any private benefit will be only incidental.

Accordingly, I am of the opinion that the street which you describe may be made part of the Secondary System by action of the Board of Supervisors, but is eligible for State funds as a rural road only upon a determination that the division of land in which it lies is not a subdivision as defined by the State Highway and Transportation Commissioner. It is irrelevant for this purpose that the division is not a subdivision within the meaning of the County ordinance. This determination is properly within the discretion of the Commissioner. This conclusion in no way limits the County's authority to designate the subject street as part of the Secondary System or to expend its own funds to improve road to Department standards, if allowed by law. See Opinion to the Honorable C. G. Moore, dated December 5, 1974, copy of which is enclosed.

HIGHWAYS—Subdivision Ordinance—Board of supervisors may include amendment concerning improvement of streets.

BOARDS OF SUPERVISORS—Subdivision Ordinance May Include Amendment Concerning Improvement Of Streets.
COUNTIES—Authority—May not require developer to pay a capital cost fee in lieu of dedication of land for roadways.

HIGHWAYS—County May Not Require Developer To Pay A Capital Cost Fee In Lieu Of Dedication Of Land For Roadways.

ORDNANCES—Board Of Supervisors May Include Amendment In Subdivision Ordinance Concerning Improvement Of Streets.

June 1, 1976

THE HONORABLE O’CONOR G. ASHBY
Acting County Attorney for Spotsylvania County

I am responding to your inquiries concerning the legality of a certain amendment to a subdivision ordinance adopted by the county board of supervisors which contains the following language:

"Before approving a subdivision plat the Board of Supervisors will consider whether existing public road or roads that will serve the development are adequate for the resulting increase in traffic. In the event that, in the Board of Supervisors opinion, such road or roads will be inadequate the Board of Supervisors will require assurance, satisfactory to it, that they will be made adequate to accommodate the resulting traffic, as a condition precedent to approval of the plat."

You also inquire whether the county can require a developer to pay a capital cost fee in lieu of dedication of roads.

Section 15.1-466 of the Code of Virginia (1950), as amended, provides, in pertinent part, that "[a] subdivision ordinance may include...reasonable regulations and provisions that apply to or provide:

* * *

"(c) For the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage;

* * *

"(e) For the extent to which and the manner in which streets shall be graded, graveled or otherwise improved...."

While the above-quoted provisions do not speak in terms of an "increase in traffic" or of accommodating "the resulting traffic," I am of the opinion that they adequately support the amendment in question, especially § 15.1-466(e) which speaks of "the extent to which and the manner in which streets shall be...improved."

With regard to the mandatory capital cost fee in lieu of dedication of roads, I am unable to find any authority, either expressed or implied, which grants a county the power to impose such a fee. Indeed, the lack of such power is necessarily implied from § 15.1-466(j) which limits the county to requiring a developer to pay "his pro rata share of the cost of providing [certain] reasonable and necessary sewerage and drainage facilities...."

Your second inquiry, therefore, is answered in the negative.

HOSPITAL AUTHORITY—Authority Has Power To Provide And Maintain Continuous Professional Medical Services—May contract with professional corporation.

PHYSICIANS—Relationship Between Professional And Recipient Of His Services Remains Unchanged By Introduction Of Professional Corporation.
THE HONORABLE NORMAN SISISKY
Member, House of Delegates

This is in response to your recent inquiry about the capacity of the Petersburg Hospital Authority to contract with a Virginia professional corporation, organized pursuant to the provisions of §§ 13.1-542 to -556 of the Code of Virginia (1950), as amended, for the performance of medical services at Petersburg General Hospital. The Petersburg Hospital Authority, as you indicated, is a public corporate body organized under the provisions of §§ 32-212 to -275.3. Section 32-236 recites the general powers of a hospital authority as follows:

"An authority shall constitute a public body and a body corporate and politic with perpetual succession, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter. It may sue and be sued and have a seal with power to alter same at pleasure."

Section 32-240 specifically addresses the delivery of professional medical services by a hospital authority:

"An authority shall have power to provide and maintain continuous resident physician and interne medical services; to appoint an administrator, a superintendent or matron, and necessary assistants, and any and all other employees deemed necessary or advisable and fix their compensation, and to remove such appointees." (Emphasis added.)

Under State law, the traditional relationship between the professional and the recipient of his services remains unchanged by the introduction of the professional corporation. See § 13.1-547. Because of this and in light of the general powers of a hospital authority, I am of the opinion that such an authority may contract with a professional corporation to provide and maintain the delivery of medical services.

HOSPITALS—Counties Authorized To Establish, Construct And Lease.

BOARDS OF SUPERVISORS—County May Construct Hospital, Lease It To Nonprofit Charitable Corporation Whose Directors Are Appointed By Board.

BONDS—General Obligation Bond Issue Approved By Voters To Construct And Equip Hospital In County.

CHARITABLE INSTITUTIONS—County May Construct Hospital, Lease It To Nonprofit Charitable Corporation Whose Directors Are Appointed By Board Of Supervisors.

CONTRACTS—Lease Arrangement To Establish Hospital Is Permitted Function Of County Government.

COUNTIES—Hospitals—Counties authorized to establish, construct and lease.

DILLON'S RULE—Counties Authorized To Establish And Construct Hospital—Implies power to lease.

GENERAL ASSEMBLY—Bonds—Issuance of by counties governed by §§ 15.1-185 and 15.1-227.
LEASES—County Not Required To Submit Proposed Lease To Public Hearing, Advertise It For Competitive Bids Or Obtain Approval Of Circuit Court.

PUBLIC FINANCE ACT—Counties—Authorized to implement those projects for which bonds can be issued for public purposes—Establishment of hospital.

April 29, 1976

THE HONORABLE STEVEN F. GIBSON
Commonwealth’s Attorney for Buchanan County

I am responding to your inquiry concerning certain steps in the establishment of a hospital for Buchanan County. I understand from your request that:

"...The voters of Buchanan County recently approved a general obligation bond issue of up to eight million dollars for the purpose of constructing and equipping a hospital in the County. The County, after completion of the hospital, proposes to lease the hospital and surrounding land to a nonstock, nonprofit, charitable corporation, whose directors are appointed by the County Board of Supervisors. It is anticipated the lease will produce revenues which will be used (even though not pledged) by the County to offset principal and interest payments on the bonds. It is proposed that either the County or the charitable corporation will enter into contracts with a private corporation for the management of the hospital. The private corporation, which is in the business of managing the operation of hospitals, will receive a fee related to gross revenues of the hospital, in the neighborhood of $160,000 per year for the management of the hospital."

You present the following questions in connection with these facts:

"1. May the governing body of a county construct a hospital for the purpose of leasing it to a nonprofit corporation and derive revenues from the leasing and, if so, what is the authority under state law for such an arrangement?

"2. If such a leasing arrangement is permissible, must the governing body hold a public hearing before awarding the lease, must it be advertised for competitive bids, or may the governing body negotiate the arrangement, and must the lease be submitted for approval to the circuit court?

"3. Are the bonds issued for public purposes, and in accordance with Article X, Section 10, of the Constitution of Virginia, even though it is intended that a private corporation will manage the operation of the hospital and derive a profit from the arrangement?"

I will answer your questions seriatim:

1. Counties are authorized by § 32-130 of the Code of Virginia (1950), as amended, to "establish" hospitals. The Supreme Court of Virginia has ruled that a grant of authority "to establish" by the General Assembly constitutes a very broad power as to limitation on its exercise. See Button v. State Corporation Commission, 105 Va. 634 (1906). The authority given thus extends beyond the power merely to construct a hospital and should be read to include continuing maintenance and operation of the hospital for the benefit of the citizens of the county. Even within the constraints of Dillon’s Rule, it would appear that such an extensive grant of authority would necessarily imply the lesser power to lease the property to a commission or corporation established by the Board of Supervisors for the
purpose of establishing day-to-day policy for the hospital, and of recovering
the monies expended on the hospital as a consequence of the bond issue.
The power to enter into a lease such as you describe is also specifically
given to counties by those sections of the Public Finance Act which enable
local governments to implement those projects for which bonds can be issued
under the Act. Establishment of a hospital is such a project. See
§ 15.1-172(h). Pertinent to your question are the following powers granted
by § 15.1-175:

“(a) To acquire, construct, reconstruct, improve, extend, enlarge,
equip, maintain, repair and operate any project which is located within
or partly within and partly without the municipality;

* * *

“(g) To acquire, hold and dispose of real and personal property in
the exercise of its powers and the performance of its duties under this
chapter;

“(h) To make and enter into all contracts and agreements necessary
or incidental to the performance of its duties and the execution of its
powers under this chapter;

“(i) To do all things necessary or convenient to carry out the powers
given in this chapter and to carry out any project;

* * *

“(k) To fix and collect... rents... for the services and facilities
furnished by or for the use of or in connection with any revenue-
producing undertaking, subject to and in accordance with such agree-
ments with holders of bonds as may be made as hereinafter provided.”

These powers are conferred on counties by § 15.1-185. Lest the breadth of
these powers be narrowed by reference to other laws, the General Assembly
provided further in § 15.1-227 that:

“Insofar as the provisions of this chapter are inconsistent with the
provisions of any law, the provisions of this chapter shall be controlling.
The powers conferred by this chapter shall be in addition and supple-
mental to the powers conferred by any other law; and bonds, interim
certificates or other obligations may be issued hereunder for any project
notwithstanding that any other law may provide for the issuance of
bonds for like purposes and without regard to the requirements, re-
strictions or other provisions contained in any other law. Bonds may
be issued under this chapter notwithstanding any debt or other limita-
tion prescribed by any other law, and the mode and method of pro-
cedure for the issuance of bonds under this chapter need not conform
to the provisions of any other law.”

The lease arrangement you contemplate is a contract which is convenient
to the establishment of a hospital and as such is a permitted function of
the county government.
The express grants of power in §§ 32-130, 15.1-175 and 15.1-227 to do
such things as are necessary, convenient or incidental to establishing
the hospital makes inapplicable to your question the Opinions of this Office
found in the Report of the Attorney General (1972-1973) at 118 and in the

2. The broad grants of authority, cited in answer to your first question,
contain no provisions for submitting the proposed lease to a public hearing,
advertising it for competitive bids or obtaining the approval of the circuit
court. I am accordingly of the opinion such steps need not be taken for
the County Board to negotiate a valid lease.

3. The provisions of both § 32-130 and the Public Finance Act indicate
that the bonds are issued for a public purpose when they are issued for the purpose of establishing a hospital in the county. See also *Pivkey v. Grubb's Ex'or.*, 122 Va. 91 (1917). Article X, Section 10, of the Constitution of Virginia (1971) does not prohibit the contraction of debt for public purposes despite the fact that a private corporation may derive an incidental profit from the arrangement. *Almond v. Day*, 197 Va. 782 (1956). Accordingly, I am of the opinion that bonds issued as you describe are for public purposes and in accordance with Article X, Section 10, of the Constitution.

**INDUSTRIAL COMMISSION—Administrative Fund For Operating Commission—Tax under proposed amendment.**

**WORKMEN'S COMPENSATION ACT—Administrative Fund For Operating Industrial Commission—Tax under proposed amendment.**

*The Honorable Robert P. Joyner*
Commissioner, Industrial Commission of Virginia

March 4, 1976

This is in response to your letter of February 25, 1976, in which you requested my opinion as to the following:

"Section 65.1-129 establishes an administrative fund for the purpose of operating the Industrial Commission. This fund is created by a tax of not more than 2½% of the workmen's compensation insurance premiums received by the various insurance companies and a tax on self-insured employers which would equal the same amount had they purchased insurance. Section 65.1-136 directs the Comptroller to place the funds so received in a special fund.

"House Bill 909, as amended, which has passed the House of Delegates and is now before the State Senate, amends this section to provide:

"...If the receipts shall exceed the expenditures for any year and a surplus accrue in the fund in excess of one year's budgeted expenditures, the Commission shall authorize a credit for the ensuing years as provided by § 65.1-137...." (New language underscored.)

"Section 65.1-137 has also been amended to read in full:

"'If it be ascertained that the tax collected exceeds the total chargeable against the maintenance fund under the provisions of this Act, the Industrial Commission shall authorize a corresponding credit upon the collection for any year or make refunds of taxes collected in such amounts as are necessary to maintain a fund balance not exceeding one year's budgeted expenditures.' (New language underscored.)

"My question is: Do the provisions of this bill in its present form (1) require the Industrial Commission to suspend the imposition of the administrative fund tax if on the effective date of this bill, should it become an act, the Commission has to its credit funds in excess of the ensuing year's budgeted expenditures, and (2) under the same conditions as set out in bracket (1) above, would the Commission be required to refund any monies in excess of the ensuing year's budgeted expenditures."
Referring to the proposed amended language of § 65.1-137, the operative phraseology is that "...the Industrial Commission shall authorize a corresponding credit upon the collection for any year or make refunds of taxes collected in such amounts as are necessary to maintain a fund balance not exceeding one year’s budgeted expenditures." (Emphasis added.) Because House Bill 909 contains no language indicating the time frame within which the Industrial Commission shall reduce the fund balance to an amount “not exceeding one year’s budgeted expenditures,” it is my opinion that the Commission would have to take action to reduce the balance to such amount on the effective date of the bill. Since the Commission would be mandated to accomplish this by two apparently alternative methods, i.e., by authorizing “a corresponding credit upon the collection [of taxes on workman’s compensation insurance premiums received by the various insurance companies and on self-insured employers which would equal the same amount had they purchased insurance] for any year” or by making “refunds of taxes,” I further conclude that, if the fund balance exceeds one year’s budgeted expenditures to such a degree that the use of one of the alternative methods of reducing such fund balance would not be sufficient to reduce the fund balance to the amount required, the Commission has no alternative but to utilize both methods concurrently.

INDUSTRIAL DEVELOPMENT—County Authority May Spend Funds On A Building To House New Bank—Industrial Development and Revenue Bond Act.

BANKING AND FINANCE—“Commercial Enterprise”—Bank is, within meaning of § 15.1-1375—Industrial Development and Revenue Bond Act.


THE HONORABLE ROBERT C. MCLAUGHLIN
Commonwealth’s Attorney for Franklin County

This is in response to your inquiry whether the Industrial Development and Revenue Bond Act, §§ 15.1-1373 to -1390 of the Code of Virginia (1950), as amended, authorizes the Franklin County Industrial Development Authority to build or acquire a structure to house a new bank.

Section 15.1-1375 of the Act provides, in pertinent part, that:

“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 be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity.”

The word “enterprise,” in addition to meaning “an industry for the manufacturing, processing, assembling, storing, warehousing, distributing, or
selling any products," is defined in § 15.1-1374(j) to include "such other businesses as will be in the furtherance of the public purposes" set forth in § 15.1-1375. Section 15.1-1375 also provides that the Act "shall be liberally construed in conformity with these intentions."

This Office has determined in prior opinions that retail activities can be financed under the Act. See Opinion of the Attorney General to the Honorable William M. Dudley, Member, House of Delegates, dated December 21, 1973, and found in Report of the Attorney General (1973-1974) at 185; and Opinion to the Honorable William H. Hodges, Member, Senate of Virginia, dated October 21, 1971, and found in Report of the Attorney General (1971-1972) at 223. It should be noted that the Commission to Study Industrial Financing, in its Report to the Governor and the General Assembly of Virginia in 1974 (Senate Document No. 11), specifically referred to industrial authority financing of business at the retail level as a "possible misuse" of the statutory authority, and recommended an amendment to the legislation which would delete the "commercial enterprise" language presently in § 15.1-1375, and the entire definition of "enterprise" in § 15.1-1374(j). A bill, which carried out this recommendation, was introduced in the General Assembly, but it did not pass.

In light of the broad statement of purpose contained in § 15.1-1375 and the legislative direction that the Act be liberally construed, I am constrained to hold that a bank would be a "commercial enterprise" within the meaning of § 15.1-1375.

Accordingly, I am of the opinion that the Act authorizes the Franklin County Industrial Development Authority to expend funds on a building to be used for banking purposes.

INDUSTRIAL DEVELOPMENT—Residency Requirement For Membership On Industrial Development Authority Of Stafford County—Maintains townhouse in Arlington County for business convenience; residence in Stafford County.

BURDEN OF PROOF—Change Of Domicile—Burden of proving change is on party alleging it.

ELECTIONS—Domicile For Voting Purposes Must Be Decided Upon Facts In Each Case And Intention Of Applicant.

PUBLIC OFFICERS—Director Of Industrial Authority—Residence requirements.

RESIDENCE—"Residence" For Purposes Of Holding Office Is Equated With Domicile.

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

March 31, 1976

I am responding to the following inquiry submitted by you on behalf of the Stafford County Industrial Development Authority:

"It has been the Attorney General's opinion that residency in the political subdivision creating the Authority is a requisite for membership in that Authority. We have a peculiar situation with one member, in that he appears to have two residences. This person maintains a townhouse in the County of Arlington, Virginia, as a convenience for business, staying there about half of his time. He has owned this home for five years. This individual participates in no community activities in Arlington. He also maintains a residence in Stafford County, which
he has owned for about eight years. He spends approximately half of his time in Stafford County, which includes most every weekend. He is a registered voter and is active in community groups in Stafford County. This individual is retired from the Military and maintains a business office in Washington, D. C. He considers his permanent residence to be in Stafford County, has the heavier monetary investment in that property and, in addition, owns one other parcel of real estate in Stafford County. I would appreciate the Attorney General's advice as to whether this person meets the implicit residency requirement of the Virginia Code for membership on the Industrial Development Authority of Stafford County."

As you indicate, it is the opinion of this Office that a director of an industrial development authority must reside in the political subdivision creating the authority. See Opinion to the Honorable Charles L. McCormick, III, Commonwealth's Attorney for Halifax County, dated March 18, 1971, and found in Report of the Attorney General (1970-1971) at 208. "Residence" for purposes of holding office has been equated by the Supreme Court of Virginia with domicile. Kegley v. Johnson, 207 Va. 54, 147 S.E.2d 735 (1966). Domicile is composed of two elements, physical residence in a geographical location and an intention to remain in that location. Dotson v. Commonwealth, 192 Va. 565, 66 S.E.2d 490 (1951).

I enclose herewith an Opinion of this Office to the Honorable Frank R. Watkins, General Registrar of the City of Suffolk, dated September 20, 1971, and found in Report of the Attorney General (1971-1972) at 167, relating to domiciliary determinations. Domicile is an intent which should be measured by various objective criteria, such as payment of taxes, which either confirm or rebut an individual's stated subjective intent. This Office is not in a position to make any definitive ruling on an individual's domiciliary intent. I would point out, however, that the burden of proving a change of domicile is on the party alleging it. Solely on the basis of the facts presented, it cannot be stated that the domicile of the individual in question is not Stafford County.

INSURANCE—Attorney Prohibited From Receiving Compensation In Connection With Issuance Of Title Insurance—Not unconstitutionally deprived of any compensation.

CONSTITUTIONAL LAW—Equal Protection Of Law Not Violated Through Exemption Of Federally Insured Lenders From State Regulation—Regulated by federal statute.

INSURANCE—Ownership Of Stock In Title Insurance Companies—Legal services rendered in real estate settlement—Issuance of title insurance —Attorneys.

REAL PROPERTY—Title Insurance—Portion of law relating to ownership of stock in title insurance company is not unconstitutionally vague.

August 26, 1975

THE HONORABLE THOMAS J. ROTHROCK
Member, House of Delegates

This is in reply to your letter, with enclosures, requesting my opinion of the constitutionality of § 38.1-733.1 of the Code of Virginia (1950), as amended, which reads as follows:

"A. No person or entity selling real property, or performing services
as a real estate agent, attorney or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement, nor shall any title insurance company, agency or agent make any such payment. The provision of this section shall not apply to federally insured lenders, holding companies to which they belong, or subsidiaries of such lenders or holding companies.

"C. No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency, or agent. For purposes of this section, and in addition to any other statutory or regulatory requirements, a bona fide title insurance company, agency or agent is defined to be a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies or binders and endorsements."

I have summarized the substance of the questions raised by your enclosed letter as follows: (1) is an attorney thereby deprived of compensation without due process? (2) is that portion of the law relating to ownership of stock in a title insurance company unconstitutionally vague? and (3) is there a denial of equal protection of the law since the statute does not apply to federally insured lenders? I will answer the questions seriatim: (1) It is my opinion that the statute does not prohibit payment of compensation to an attorney for the performance of legal services rendered in connection with a real estate settlement. Rather, an attorney is simply prohibited from receiving compensation in connection with the issuance of title insurance. Accordingly, he is not unconstitutionally deprived of any compensation. (2) The language of the statute with respect to ownership of stock in title insurance companies is quite clear. Questions whether a title insurance company is widely or closely held, whether the attorney is also an officer or director, whether the stock ownership by the attorney is 100% or less and whether the stock is owned by friends or relatives of an attorney are immaterial with respect to the application of the statute. This answer is given without regard, however, to the application of the Code of Professional Responsibility. See, e.g., Legal Ethics Opinions Nos. 174 and 174-A, which are attached hereto for your convenience. The answer to question number (2) is in the negative. (3) There is no denial of equal protection of law through the exemption of federally insured lenders from the application of § 38.1-733.1. Such institutions are similarly regulated pursuant to 12 U.S.C.A. § 2601 (Supp. 1, 1975). It is, therefore, entirely reasonable to exempt them from State regulation.

INSURANCE—Medical Malpractice—Proposed joint underwriting association to maintain availability of such insurance to health care providers.

CONSTITUTIONAL LAW—Medical Malpractice Insurance Under Proposed Joint Underwriting Association—Due process of law.

INSURANCE—Regulated Under Police Power Of State.

October 24, 1975

THE HONORABLE JOHN G. DAY
Commissioner of Insurance
State Corporation Commission

This is in response to your letter of October 2, 1975, in which you make
inquiries concerning a proposed joint underwriting association (JUA) the purpose of which would be to maintain the availability of medical malpractice insurance to health care providers. You describe the JUA thus:

"The JUA would be composed of all personal liability carriers licensed to write premiums within the Commonwealth. It would exercise its powers upon a determination that adequate insurance coverage is not sufficiently available in the free market with respect to any category of health care provider. The rates charged for insurance issued by the JUA would be designed to be self-supporting. In addition, the JUA would provide for a rate stabilization fund—which would be funded by policyholders of the JUA.

"In the event the rates and stabilization fund were inadequate to pay losses, each member of the JUA would shoulder these losses in proportion to the premiums actually written by that member in Virginia. The members of the JUA could make up these contributions either retrospectively through the rate process or through policy surcharges or both, subject to the approval of the State Corporation Commission.

Your specific inquiries are: (1) whether the described JUA meets State and federal constitutional standards, and (2) whether the further inclusion of accident and sickness carriers in the JUA would be constitutional.

Your questions about constitutionality concern the scope of permissible regulation of the insurance business under the police power of the State. The police power is an attribute of sovereignty, and it existed before there were any organic laws constituting governments. New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). It extends to all great public needs and it may be employed for whatever will serve the public welfare. Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911). The use of the police power for the regulation of the insurance business is particularly apt because of the special relationship government has historically had with that business. Osborn v. Ozlin, 310 U.S. 53, 65 (1940). Virginia courts have long recognized that insurance is so affected with a public interest that it may be subject to reasonable regulation under the police power. Aetna Insurance Co. v. Commonwealth, 160 Va. 698, 169 S.E. 859 (1933).

The legislature, in using the police power, has considerable discretion in determining what will be in the public interest, although its exercise of the power is subject to review of the courts. Bowman v. Virginia State Entomologist, 128 Va. 351, 368, 105 S.E. 141, 147 (1920). Because of the conclusive nature of the legislative determination of the public interest, courts must assume, however, that the legislature has used its discretion properly unless there has been some violation of a constitutional provision. Moore v. Moore, 147 Va. 460, 137 S.E. 488 (1927).

There is no precise standard with respect to exercise of the police power that will serve to predict what the result will be in every instance of judicial review. A presumption in favor of legislative acts exists, however, and, in examining legislation for possible violations of constitutional prohibitions or rights, the courts will ask whether there is a relationship between the regulatory scheme and the public purpose to be served or the evil to be remedied. If the answer is affirmative, the exercise of the police power will generally be sustained. Etheredge v. Norfolk, 148 Va. 795, 139 S.E. 508 (1927).

One aspect of the described JUA might invite a constitutional challenge based on due process provisions of the State and federal constitutions. It is the mandatory inclusion of all personal liability carriers licensed to write premiums within the State. Such a JUA membership requirement would effectively draft all those carriers to write this kind of coverage whether or not they are doing so now.

Nearly thirty years ago, the California General Assembly enacted a
compulsory assigned risk statute which enabled the insurance commissioner of that State to require all automobile liability carriers to join a plan for the equitable apportionment among them of applicants who were in good faith entitled to have that insurance but were nevertheless unable to procure coverage through the free market. When California insurance companies challenged this law as a violation of due process, the United States Supreme Court sustained the legislation and held that the insurance business so affected the public welfare that the State could exercise its police power to require the service of local needs without that action being violative of due process. California State Automobile Association Inter-Insurance Bureau v. Maloney, 341 U.S. 105 (1951). The proposed JUA membership is similar to such an assigned risk plan and would be, in my opinion, a reasonable exercise of the police power within already recognized bounds for such regulatory activity.

The other aspect of JUA that could present a constitutional issue is the method for apportioning losses resulting from unanticipated recoveries under outstanding policies of the JUA. Such a procedure may raise a claim of taking property without due process of law. Under normal circumstances recoveries in medical malpractice matters would be paid from premiums; however, in extreme situations after other funds were exhausted, it would require JUA members to cover unanticipated losses temporarily with full recoupment and recovery subsequently available from the health care providers served by the JUA. This method of handling losses would not, in my opinion, constitute an actual taking of property without due process of law forbidden by our State and federal constitutions. California State Automobile Association Inter-Insurance Bureau, supra.

As to your second inquiry, if the General Assembly were to determine that the cost of medical malpractice insurance influenced the overall cost of medical care and that the inclusion of these carriers would help contain the costs of health care, there would exist the type of substantial relationship between the regulatory scheme and the problem to be remedied that courts inquire about when they scrutinize the exercise of the police power. Because of the broad authority of the State to regulate the insurance business, such an extension of membership would, in my opinion, be constitutionally permissible. See Osborn, supra, and the cases therein cited.
"The judgment rate of interest shall be eight per centum per annum."

This statute was passed by the 1975 session of the Virginia General Assembly, becoming effective June 1, 1975, and was intended to accord with a 1974 amendment to § 8-223 of the Code. I would view this latter section as having provided for a judgment rate of 8% since it was so amended effective July 1, 1974. In any case, I interpret your first question to be whether the increase of the judgment rate to 8% has any effect on judgments rendered prior to the effective date of the pertinent amendment.

It is my opinion that such a legislative amendment operates prospectively only and has no effect on prior judgments. My authority for this position is § 1-16 of the Code which reads as follows:

“No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.”


This Opinion is distinguishable from one I am this day issuing to the Honorable Harold B. Singleton, Chief Judge, Twenty-Fourth Judicial District, Juvenile and Domestic Relations District Court, concerning the effect of the legislative change in the age of majority from 21 to 18 on support payments made pursuant to court order. The primary distinction is that pursuant to § 20-108 of the Code the court maintains continuing jurisdiction over support orders. It should also be noted that the Virginia Supreme Court has said that the age of majority is a “status” as opposed to a “vested right.” Meredith v. Meredith, 216 Va. 636, 222 S.E.2d 511 (1976).

Your second question is what rate of interest applies after judgment on commercial paper which on its face carries an interest rate of less than 8%. I interpret the law of Virginia to be that the allowance of interest on a judgment based upon a contract should be at the same rate, if legal, as provided for by the contract. The Pittson Co. v. O'Hara, 191 Va. 886, 63 S.E.2d 34 (1951); McVeigh v. Howard, 87 Va. 599, 13 S.E. 31 (1891); Strayer v. Long, 83 Va. 715, 3 S.E. 372 (1887); Roberts v. Cocke, 69 Va. 207 (1877); Boswell v. Big View Pocohontas Coal Co., 217 F. 822 (W.D. Va. 1914); Schofield v. Palmer, 134 F. 753 (W.D. Va. 1904); see generally 10 Michie's Jurisprudence, Interest, § 8 (1950). In my opinion this result is consistent with Code § 8-3.122(4). I am aware that there is dictum in the case of City of Danville v. Chesapeake & O. Ry. Co., 34 F.Supp. 620, 639 (W.D. Va. 1940) which can be read to reach a contrary result, but to the extent that it can be so read I do not believe it correctly states the Virginia law.
JAILS—Damage By State Prisoner To County Jail—Commonwealth not liable for repairs.

May 10, 1976

THE HONORABLE RICHARD C. GRIZZARD
Commonwealth’s Attorney for Southampton County

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

“I have a state prisoner who was sentenced to six months in jail under a state warrant. While serving the six months in Southampton County jail the prisoner did considerable damage to one of the cells in the jail. Please advise me if the state is liable for the repairs to the Southampton County jail.”

I am aware of no statute which would render the Commonwealth liable for the repairs to the Southampton County Jail. Section 53-179 of the Code of Virginia (1950), as amended, does provide for reimbursement by the Commonwealth to the county for a proportionate share of certain expenses incident to the operation of a county jail. In my opinion, therefore, the Commonwealth is not liable for the repairs to the jail but, if the damage resulted in expenditures within the scope of § 53-179 of the Code, the county may routinely seek reimbursement pursuant to that section.

JUDGES—Judicial Retirement System—Transfer to of city’s prior contributions to local retirement system.

RETIREMENT SYSTEM—Judicial Retirement System—Transfer to of city’s prior contributions to local retirement system.

STATUTES—Interpretation By Agency Charged With Its Administration Is Entitled To Great Weight.

May 10, 1976

THE HONORABLE BEVERLY T. FITZPATRICK, Chief Judge
City of Roanoke General District Court

This is in response to your request for my opinion relating to your membership in the Judicial Retirement System established by §§ 51-160 to -180 of the Code of Virginia (1950), as amended. You state that prior to July 1, 1973, you were a member of the employees retirement system of the City of Roanoke and that you requested membership in the Judicial Retirement System effective July 1, 1973. You inquire whether the City of Roanoke must transfer its prior contributions to the local retirement system to the Judicial Retirement System on your behalf.

Section 51-176.1(a) (2) provides:

“Any judge of a district court who is not a member of the Judicial Retirement System on June 30, 1973, but who is a judge of a court not of record and a participant in a local retirement system on that date may elect to become a member of the Judicial Retirement System. Any judge who so elects may transfer from such local system as prior service his creditable service in such local system in the capacity of a judge or trial justice, in which event the locality operating such system shall transfer to the retirement system all funds credited to the account of such judge, whether contributed by such judge or by the locality.”

(Emphasis added.)
This section applies to the facts about which you inquire. It requires that the local retirement system transfer all funds credited to your account when you elect membership in the Judicial Retirement System. The requirement of transfer, however, applies only to funds credited to the account of a transferring judge and not to other funds which the locality may have contributed to its retirement system.

The Virginia Supplemental Retirement System administratively interprets the foregoing section to mean that if a locality's contributions to its retirement system are lumped into a single fund and are not allocable to individual members, such employer funds are not “credited to the account of such judge”, and they need not be transferred to the Judicial Retirement System. This interpretation of a statute by the agency charged with its administration is entitled to great weight. See Commonwealth v. Research Analysis 214 Va. 161, 198 S.E.2d 622 (1973). The consequence of the foregoing is that, if the City of Roanoke sends the Judicial Retirement System all sums actually allocated to your credit, and indicates that there are no other funds then so allocable, the System will accept such transfer as fulfilling the requirements of § 51-176.1(a)(2).

You indicate that Roanoke's contributions to its local retirement system were at a higher rate than normally made to the Judicial Retirement System. The legislative history of the Judicial Retirement Act does not reflect an intention that transferred sums pay the precise cost of the service credited or that all judges would have the same amount transferred. The purpose of the transfer appears to be to prevent a member from receiving a local benefit based upon the same service for which he would receive a state benefit under the Judicial Retirement System.

Your final inquiry is about the status of judges who were not members of local retirement systems. Section 51-176.1(a)(3) provides for their membership in the Judicial Retirement System but makes no provision for crediting prior service. In 1973, § 51-163 was amended to permit certain judges without prior credit to purchase it at a cost of 5 percent of current salary for each year of service plus 2 percent interest. Judges of city courts not of record were included in the foregoing provision in 1975. There is no charge against the locality served by such a judge.

JUDGES—May Not Serve Both As Elected Member Of City Council And Substitute Judge For Same Jurisdiction.

JUDGES—Judicial Ethics—Individual may not serve both as elected member of city council and substitute judge for same jurisdiction.

PUBLIC OFFICERS—Compatibility—Canons of Judicial Conduct—Judge may not serve both as elected member of city council and substitute judge for same jurisdiction.

VIRGINIA STATE BAR—Judicial Ethics Committee Held That Substitute Judge Should Resign Before Seeking Election To Non-judicial Office.

January 20, 1976

The Honorable W. Alan Maust
Commonwealth's Attorney for the City of Hampton

You request my opinion whether an individual may be both an elected member of city council and a substitute judge for the same jurisdiction. The Canons of Judicial Conduct of the Commonwealth of Virginia adopted July 1, 1973, by the Supreme Court of Virginia, provide in Canon 7 that a judge may not act as a leader or hold any office in a political organization; make speeches for political organizations or candidates or publicly
endorse a candidate for public office; and shall resign when he becomes a candidate either in a party primary or in a general election for a public office. Further, Canon 7 is not among those Canons specifically listed as not applicable to substitute judges by Canon 8(D). In view of the provisions of Canon 7, I am of the opinion that an individual may not serve both as an elected member of city council and a substitute judge for the same jurisdiction, and your inquiry is answered in the negative.

A similar issue was addressed in Opinion No. 11 of the Committee of Judicial Ethics of the Virginia State Bar, dated April 16, 1967, which held that a substitute judge should resign before seeking election to a non-judicial office. A copy of that Opinion is attached for your review. It is apparent that the Supreme Court and the Bar of the Commonwealth have for some time disapproved of substitute judges seeking election to non-judicial office, due to the potential for impropriety.

January 15, 1976

THE HONORABLE JOSEPH A. JOHNSON  
Member, House of Delegates

This is in reply to your recent letter wherein you stated that the resident judge of the Circuit Court of the City of Bristol, which along with the Counties of Washington and Smyth comprises the Twenty-eighth Judicial District, has tendered his resignation effective February 1, 1976. Prior to July 1, 1973, the City of Bristol maintained both a corporation court and a circuit court. The judge of the Corporation Court was a resident of Bristol while the Circuit Court was presided over by a judge for what was then the Twenty-third Circuit, comprised of the City of Bristol and the Counties of Washington and Smyth, who did not live in Bristol. You inquired whether the successor to the judge who is resigning must be a resident of the City of Bristol or whether he may be a resident of Washington or Smyth County.

Section 17-120(b) of the Code of Virginia (1950), as amended, provides as follows:

"Notwithstanding any other provisions of this article there shall be a sufficient number of judges to serve in each circuit so that on July one, nineteen hundred seventy-three, and thereafter, there shall be at least one of such designated as a resident judge, residing in each existing circuit and who shall be primarily responsible for the courts in such existing circuit. Whenever an additional judge is created for, or a vacancy occurs, in a circuit, the judge so elected or appointed shall be a resident of that portion of an existing circuit which maintained a court of record having both criminal and civil jurisdiction prior to July one, nineteen hundred seventy-three. "For the purposes of this subsection, an 'existing circuit' is defined as a circuit, corporation or hustings court that existed prior to July one, nineteen hundred seventy-three.""

As stated above, the City of Bristol, prior to July 1, 1973, together with the Counties of Washington and Smyth, comprised the Twenty-third Circuit. In addition to being part of a circuit, Bristol possessed a corporation court which had jurisdiction over both civil and criminal matters. The City of Bristol was, therefore, as defined by § 17-120(b), a "portion of an existing
circuit which maintained a court of record having both criminal and civil jurisdiction prior to July one, nineteen hundred seventy-three.” Since Bristol does fall within the foregoing statutory language, I am of the opinion that the person who succeeds the judge of the circuit court who has tendered his resignation must also be a resident of that city. Otherwise Bristol would be without a resident judge in contravention of the mandate set forth in § 17-120(b).

JUDGES—Retirement Not Mandatory At Age Seventy If Appointed Prior to July 1, 1970.

DEFINITIONS—“Judge” Has Statutorily Defined Meaning.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Retirement Of Judge Seventy Years Old—Permitted to serve now as long as under law in effect prior to July 1, 1970.

RETIREMENT SYSTEM—Judges—Retirement not mandatory at age seventy if appointed prior to July 1, 1970.

February 18, 1976

THE HONORABLE HAROLD B. SINGLETON, Chief Judge
Juvenile and Domestic Relations District Court
Twenty-Fourth Judicial District

You have inquired whether you are eligible to complete your term as judge of the Juvenile and Domestic Relations District Court for the Twenty-Fourth Judicial District. On August 1, 1964, you were appointed as county judge for Amherst County. On September 1, 1967, you were appointed as judge of Fifth Regional Juvenile and Domestic Relations Court, and on July 1, 1973, you became judge of the Juvenile and Domestic Relations District Court for Amherst, Campbell, and Nelson Counties and the City of Waynesboro. On April 19, 1976, you will be seventy years of age. You are in good health mentally and physically and would like to continue to serve as judge of the Juvenile and Domestic Relations District Court for the Twenty-Fourth Judicial District until your term expires on December 31, 1979.

Sections 51-160 to -180, Code of Virginia (1950), as amended, create a retirement system for the judiciary of the Commonwealth. Section 51-162(a)(ii) provides that membership in the system shall consist of all judges who, immediately prior to July 1, 1970, are in service and members of previous systems. Section 51-161(4) defines the term “member” to mean any person included in the membership of the system as provided in § 51-162 or elsewhere in §§ 51-160 to -180. Section 51-167(a) provides:

“Any member who attains seventy years of age shall be retired twenty days after the convening of the next regular session of the General Assembly; provided, however, that any member who was a judge immediately prior to July one, nineteen hundred seventy, may serve as long as he would have been permitted under the law in effect immediately prior to July one, nineteen hundred seventy.” (Emphasis added.)

The term “judge,” as used in §§ 51-160 to -180, has a statutorily defined meaning. When §§ 51-160 to -180 were originally enacted in 1970, it was defined by § 51-161(3) to mean, inter alia, “any judge of a regional juvenile and domestic relations, county, or county juvenile and domestic relations court of the Commonwealth.” Chapter 708, [1972] Acts of Assembly 963, amended § 51-161(3) by substituting the word “district” for the words
“regional juvenile and domestic relations, county, or county juvenile and domestic relations” with the result that § 51-161(3) now defines the term judge to include “any judge of a district court of the Commonwealth” and makes no mention of a judge of a regional juvenile and domestic relations court. Because the principal purpose of Chapter 708 of the 1972 Acts was to amend the Code by adding §§ 16.1-1.1 to -1.52 to provide for the establishment of a system of district courts at the court not of record level, the reference in § 51-161(3) to a “district” court must be construed in light of the provisions of §§ 16.1-1.1 to -1.52. Section 16.1-69.5(d) defines the term “district courts” to include juvenile and domestic relations district courts. Section 16.1-69.5(f) provides that the terms “juvenile and domestic relations courts” and “regional juvenile and domestic relations court” shall be deemed to refer to juvenile and domestic relations district courts. In light of these definitions, it is clear that, for purposes of §§ 51-160 to -180, a judge of a regional juvenile and domestic relations court is a “judge” as that term is defined by § 51-161(3).

Immediately prior to July 1, 1970, you were a judge of the Fifth Regional Juvenile and Domestic Relations Court. I am, therefore, of the opinion that you are not subject to the mandatory retirement age established by § 51-167(a), but are entitled to serve as long as you would have been permitted under the law in effect immediately prior to July 1, 1970. Section 51-29.19 was in effect at that time, having been added to the Code effective March 13, 1968, by Chapter 202, [1968] Acts of Assembly 284, and was repealed effective July 1, 1970, by Chapter 779, [1970] Acts of Assembly 1667. It provided as follows:

“Any former county judge who has been appointed judge of any regional juvenile and domestic relations court and as a consequence of such appointment has been required to resign as such county judge shall be permitted to receive service credit under the Trial Justices’ Retirement System and to retire as though his tenure as county judge had been unbroken, provided that his service as judge has remained unbroken, and provided such judge shall pay to the Trial Justices’ Retirement Fund such amount as he would have been required to pay had he continued to serve as county judge between the time of his resignation and the effective date of this act.”

I assume that your resignation as county judge was “a consequence” of your appointment as judge of the Fifth Regional Juvenile and Domestic Relations Court, that your service as judge has remained unbroken, and that you satisfied the requirement of § 51-29.19 relating to payments to the Trial Justices’ Retirement Fund. If so, § 51-29.19 permitted you to retire as though your tenure as county judge had remained unbroken, in which case your retirement would have been governed by the provisions of §§ 51-29.8 to -29.19. Prior to repeal by Chapter 779, [1970] Acts of Assembly 1667, §§ 51-29.8 to -29.19 did not establish a mandatory retirement age for judges. Therefore, I am of the opinion that you are eligible to complete your term as judge of the Juvenile and Domestic Relations Court for the Twenty-Fourth Judicial District.

JUDGES—Salary Supplement Paid To District Court Judge By A Town May Be Eliminated.

COUNTIES, CITIES AND TOWNS—Town Cannot Supplement Salaries Of Circuit And District Court Personnel—Statutory authorization for cities and counties but not towns.

JUDGES—Town Cannot Supplement Salaries Of Circuit And District Court Personnel—Statutory authorization for cities and counties but not towns.
REPORT OF THE ATTORNEY GENERAL

SALARIES—Judges—Salary supplement paid to district court judge by a town may be eliminated.

December 2, 1975

THE HONORABLE HUBERT D. BENNETT
Executive Secretary
Supreme Court of Virginia

I have received your letter referring to my Opinion to you dated July 12, 1974, and inquiring whether a salary supplement paid to a district court judge by a town may be reduced or eliminated notwithstanding the provisions of Article VI, Section 9, of the Constitution of Virginia (1971) and §§ 14.1-33, 14.1-38, 16.1-69.13 and 16.1-69.46, Code of Virginia (1950), as amended. The Opinion to which you refer concluded that towns could not supplement the salaries of circuit and district court judges and other court personnel because there was no statute authorizing town supplements.

Article VI, Section 9, provides, in pertinent part:

"All justices of the Supreme Court and all judges of other courts of record shall be commissioned by the Governor. They shall receive such salaries and allowances as shall be prescribed by the General Assembly, which shall be apportioned between the Commonwealth and its cities and counties in the manner provided by law. Unless expressly prohibited or limited by the General Assembly, cities and counties shall be permitted to supplement from local funds the salaries of any judges serving within their geographical boundaries. The salary of any justice or judge shall not be diminished during his term of office."

Sections 14.1-33 and 14.1-38 are expressly limited in application to circuit court judges and do not appear to affect the payment of salaries or supplements to district court judges. Section 16.1-69.13 provides that "[n]othing in [Chapter 4.1 of Title 16.1] shall be construed to impose any new limitation on or reduction in the compensation or benefits of any judge in office on July one, nineteen hundred seventy-three, for the duration of his term of office, and for each additional consecutive term thereafter, but not longer than July one, nineteen hundred eighty." Section 16.1-69.46 provides that any salary payment required by §§ 16.1-69.13 and 16.1-69.44 shall be payable by the State.

Whether Article VI, Section 9, applies to salary supplements has not been decided by this office, although the issue was discussed in an Opinion to the Honorable Calvin W. Fowler, Member, House of Delegates, dated May 29, 1975, copy of which is attached. In that Opinion I concluded that § 14.1-38 prohibited the reduction or elimination of a circuit court judge's salary supplement during his existing term, but not as of the first day of a new term of office for the same or a different judge. Nor has this office ruled whether § 16.1-69.13 prohibits the reduction or elimination of a salary supplement paid to a district court judge. Assuming, without deciding, that either or both of these statutory provisions apply to supplements paid to district court judges, their application must of necessity be limited to supplements lawfully paid under other provisions of law. Neither provision could have been intended to require the continuance of an unauthorized act, and the payment of a supplement by a town is not authorized.

Accordingly, I am of the opinion that a supplement paid to a district court judge by a town is not within the purview of provisions of law, constitutional or statutory, prohibiting the reduction of salary supplements to judges, and that such supplements should no longer be paid.
JUDGMENTS—Section 8-380 Provides For Recording Payment Or Discharge In Whole Or In Part.


June 22, 1976

THE HONORABLE GLORIA H. MORGAN, Clerk
Circuit Court for the City of Suffolk

This is in response to your request for my opinion whether § 55-66.4 of the Code of Virginia (1950), as amended, applies to partial releases of judgments.

Section 55-66.4, which is found in Article 2, Chapter 4 of Title 55, relating to deeds of trust, provides in pertinent part:

"It shall be lawful for any such lienor to make a marginal release or record a certificate of partial satisfaction of any one or more of the separate pieces or parcels of property covered by such lien. It shall also be lawful for any such lienor to make a marginal release or record a certificate of partial satisfaction of any part of the real estate covered by such lien if a plat of such part or a deed of such part is recorded in the clerk's office and a cross reference is made in the marginal release or certificate of partial satisfaction to the book and page where the plat or deed of such part is recorded..."

This section dealing with the partial release of deeds of trust has, in my opinion, no application to partial releases of judgments; it is § 8-380 which provides for recording "[t]he fact of payment or discharge, either in whole or in part of any judgment..."

JURIES—Elected Town Officials Are Not Constitutional Officers Exempt From Jury Duty.

CONSTITUTIONAL OFFICERS—Town Official—Status as is not in itself grounds for exemption from jury duty.

COUNTIES, CITIES AND TOWNS—Constitutional Officers Enumerated In Constitution For Counties And Cities But Not For Towns—Jury duty.

November 10, 1975

THE HONORABLE FRANK D. HARRIS
Commonwealth's Attorney for Mecklenburg County

This is in response to your recent letter in which you make the following inquiries:

"1. Do elected town officials fall under the classification of constitutional officers so as to exempt them from jury duty?

"2. If town officials are not classified as constitutional officers, are they otherwise exempt from serving on jury duty?"

I shall answer your questions seriatim:

1. The Constitution of Virginia enumerates certain constitutional officers for counties and cities (see Article VII, Section 4) but enumerates no such officers for towns. Therefore, the answer to your first question is in the negative.

2. The General Assembly has provided in § 8-208.6 of the Code of Vir-
Virginia (1950), as amended, for exemptions from jury duty. Section 8-208.6 creates specific exemptions for police and justices of the peace in towns; for the keeper of a town jail; and for regularly employed members of the fire department of any political subdivision. It does not provide a general exemption for town officials. I am of the opinion, therefore, that a person's status as a "town official" is not in itself grounds for exemption from jury duty.

JURISDICTION—Federal/State; Whether Federal Jurisdiction Is Exclusive Or Proprietary—Local personal property tax.

COMMISSIONERS OF REVENUE—Taxation—Ad valorem personal property tax on Federal enclaves.

COUNTIES—Authority To Tax Personal Property On Federal Enclaves.


TAXATION—Personal Property—Federal areas—Counties may not impose tax on.

TAXATION—Personal Property—Motor vehicles owned by Federal employees living within Federal reservations.

April 29, 1976

The Honorable Robert F. Ripley, Jr.
Commonwealth's Attorney for York County

This is in response to your recent request for an Opinion concerning the problem of taxation of certain personal property located on specified federal enclaves within York County. In particular, your questions are as follows:

"1. Does the federal government now have exclusive jurisdiction, legislative, executive and judicial, over the aforementioned Coast Guard Reserve Training Center, Cheatham Naval Supply Annex, and the main portion of Naval Weapon Stations, Yorktown; and, if so, by what means was such jurisdiction acquired?

"2. If the federal government does not now have exclusive jurisdiction over these latter three areas, can the York County Commissioner of Revenue proceed to assess the ad valorem personal property tax upon the owners of those items of tangible personal property located therein which are leased to an agency of the federal government, pursuant to Section 58-831.1 of the Code?"

In answer to your first question, my Office has recently completed a comprehensive survey conducted for the purpose of determining the status of federal/state jurisdiction on federally owned property the relevant results of which are as follows:

1. The Naval Weapons Station contains approximately 10,900 acres and is located primarily in York County as well as in James City County and the City of Newport News. All of this property, except approximately 506 acres referred to below, was acquired by the United States in 1918. Such acquisition was consented to by the Commonwealth of Virginia, and exclusive jurisdiction over such property was ceded to the United States by the Commonwealth, pursuant to Chapter 382, [1918] Acts of Assembly 568. The remaining parcel comprising the Naval Weapons Station, containing 505.9 acres, was acquired by the United States in 1952. At the time of such acquisition, the conditional consent of the Commonwealth of Virginia
to such acquisition was granted by § 7.1-15, Code of Virginia (1950), as amended (formerly § 7-19), which section ceded concurrent jurisdiction in the United States only as to crimes and offenses and the regulation of motor vehicle traffic. In addition, 40 U.S.C. § 255 (1940), requires that any cession of jurisdiction by a state be accepted by the appropriate official of the United States. The United States has never accepted this partial cession of jurisdiction, and in lieu thereof a Deed of Cession, dated April 1, 1953, was entered into between the Commonwealth of Virginia and the United States Department of the Navy, pursuant to § 7.1-21 of the Code (formerly § 7-24), which Deed of Cession cedes exclusive jurisdiction to the United States over said parcel of land. Such Deed of Cession is recorded in the Clerk’s Office, Circuit Court of York County, in Deed Book 18, page 64. This is the Deed of Cession referred to in paragraph 4 of your letter. It is my opinion, therefore, that all of the property comprising the Naval Weapons Station is held by the United States in exclusive jurisdiction.

2. The Naval Supply Center-Cheatham Annex, comprising approximately 2800 acres, was acquired by condemnation proceedings of the federal government in 1944. At the time of such acquisition § 7.1-15 of the Code ceded partial jurisdiction to the United States as referred to above. Since this partial jurisdiction has not been accepted by the United States Department of the Navy, as required by 40 U.S.C. § 255 (1940), the United States exercises only proprietary jurisdiction over this area.

3. The land comprising the Coast Guard Reserve Training Center, comprising approximately 150 acres, was originally acquired by the United States Department of the Navy in 1918. The Commonwealth of Virginia consented to such acquisition and ceded exclusive jurisdiction thereover, pursuant to Chapter 382, [1918] Acts of Assembly 568. This property was subsequently transferred to the Coast Guard by the Department of the Navy, and the exclusive jurisdictional status of that property automatically transferred to the Coast Guard at that time. It is my opinion, therefore, that the United States has exclusive jurisdiction over this property.

As to the Naval Weapons Station and the Coast Guard Reserve Training Center, over which the United States exercises exclusive legislative, executive and judicial jurisdiction, it is clear, as pointed out in your letter, that personal property located on such enclaves is totally exempt from any personal property taxes of the Commonwealth of Virginia or York County. See Reports of the Attorney General (1960-1961) at 304; (1959-1960) at 304.

As to the Naval Supply Center-Cheatham Annex, over which the United States exercises only proprietary jurisdiction, the Commonwealth of Virginia exercises exclusive legislative, executive and judicial jurisdiction. In addition, this property was acquired by the United States pursuant to the conditional consent of the Commonwealth of Virginia under § 7.1-15 of the Code. That section specifically reserves in the Commonwealth the jurisdiction and power to tax all property real and personal located thereon, not belonging to the United States, and provides that for such purposes of taxation the lands shall be deemed to be a part of the county or city in which they are situated. It is my opinion, therefore, that § 58-831.1 of the Code does authorize the York County Commissioner of Revenue to assess an ad valorem personal property tax upon the owners of any items of tangible personal property which are located on such federal enclave and which are owned by someone other than the federal government and are leased to an agency of the federal government. This is in accord with a similar Opinion of this Office to the Honorable W. D. Reams, Jr., Commonwealth’s Attorney of Culpeper County, dated March 28, 1963, and found in the Report of the Attorney General (1962-1963) at 272, a copy of which is enclosed for your reference.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Appointment And Promotion Of Employees Of Court Service Units.

COURTS—Minimum Standards—No distinction between State-operated and locally-operated court service units.

COURTS—Procedure For Appointment And Promotion Of Employees Of Court Service Units Of Juvenile And Domestic Relations District Courts.

JUDGES—Procedure For Appointment And Promotion Of Employees Of Court Service Units Of Juvenile And Domestic Relations District Courts.

October 24, 1975

THE HONORABLE HAROLD B. SINGLETON, Chief Judge
Twenty-Fourth Judicial District

This is in response to your inquiry concerning the appropriate procedure to be followed in the appointment and promotion of personnel of the court service units of Juvenile and Domestic Relations District Courts. You indicated in your letter that a Counselor III in the City of Waynesboro was recently promoted to Supervisor I vacating the position of Counselor III. This Counselor III vacancy was duly advertised, but you noted that the vacancy was filled by the court service unit director without consulting you. I have been advised subsequent to your letter that the Counselor III position in question was filled by promotion of a person who had previously been a Counselor II in the same court service unit. Your question is whether you should have named the individual to fill the position of Counselor III or whether the director had the authority to fill this position without seeking your advice and consent.

Section 16.1-203, Code of Virginia (1950), as amended, which authorizes the Department of Corrections to develop social service units for Juvenile and Domestic Relations District Courts, provides, in pertinent part, as follows:

"No person shall be assigned to or discharged from the state-operated social service staff of juvenile and domestic relations district court except as provided therein [§§ 2.1-110 to 2.1-116], nor without the prior mutual approval of the judge thereof and the Director...."

Section 16.1-205(1) provides, with respect to State social service units, that the judge or judges of the Juvenile and Domestic Relations District Court "...may from a list of eligibles certified by the Director appoint one or more suitable persons as probation officers and related social service personnel in accordance with established qualifications and regulations."

Reading §§ 16.1-203 and 16.1-205(1) together, persons assigned or appointed as probation officers or to related social service positions in court service units should be selected by the judge or judges of the Juvenile and Domestic Relations District Court from a list of eligibles certified by the Director of the Department of Corrections. This interpretation satisfies the requirement of § 16.1-203 that no persons shall be assigned to such positions "without the prior mutual approval of the judge thereof and the Director" and the requirement of § 16.1-205 that the judge or judges are entitled to appoint such personnel from a list of eligibles certified by the Director. The foregoing procedure should be utilized when new personnel are brought into a court service unit to fill vacancies or new positions. Your question, however, has reference not to the appointment or assignment of new personnel to a court service unit, but to the promotion within the unit of personnel already assigned to the unit.
The Minimum Standards for Probation and Related Court Services in Juvenile and Domestic Relations District Courts, adopted by the State Board of Welfare and Institutions (now Department of Corrections) in June, 1973, are helpful in considering your inquiry as to responsibility for promotions within a court service unit. I have previously held in an Opinion to the Honorable Jack F. Davis, Director, Department of Corrections, dated October 9, 1974, copy of which is attached, that the State Board of Corrections has not only the right, but also the duty, to ensure that its Minimum Standards are complied with by court service units whether operated by the Commonwealth or by the locality. The Standards provide, at page B-1, that the court service unit director is ultimately responsible for the development and adequate functioning of probation and related social services in each unit. It is stated on page C-2 that salary increments within each class title, for example Counselor I, shall be based on merit. It is the duty of the court service unit director and his supervisors to conduct periodic merit evaluations of court service unit personnel. It is further provided on page C-2 that the percentages of counselor positions in any court service unit shall be as follows: Counselor I from 20 to 30 percent; Counselor II from 40 to 60 percent; and Counselor III from 20 to 30 percent. A District Court service unit director is required to ensure that all persons employed by his court service unit meet the job qualification standards for the positions described in the Standards, and he is required to certify this fact to such officer or agency as shall be designated by the State Director of Court Services.

Because the Standards provide that the court service unit director is ultimately responsible for the adequate functioning of his unit, has the responsibility of conducting periodic merit evaluations of his personnel, and is required to certify that all persons employed by his unit meet the job qualification standards for the position as described in the Standards, I am of the opinion that, while it might be appropriate for a court service unit director to seek advice from the judges in his District prior to making a promotion within a court service unit, it is not required by law that the consent of the judges in a District be obtained prior to such promotion. If, however, a position is to be filled by an individual not presently in the court service unit, the judge of the Juvenile and Domestic Relations District Court is entitled to make the selection from a list of eligibles certified by the Director of the Department of Corrections.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Criminal Warrants Filed With Clerk Of Circuit Court.

CLERKS—Filing Of Criminal Warrants With Clerk Of Circuit Court By District Court.

CRIMINAL PROCEDURE—Filing Of Criminal Warrants With Clerk Of Circuit Court By District Court.

DEFINITIONS—District Courts—Juvenile and domestic relations district courts included within term.

FEES—For Filing And Indexing All Papers In Criminal Actions In A District Court.

JUVENILES—Proceedings Against Juveniles In Juvenile And Domestic Relations Courts Are Not Criminal In Nature.

WARRANTS—Filing Of Criminal Warrants With Clerk Of Circuit Court By District Court.
You have inquired whether § 14.1-123(6), Code of Virginia (1950), as amended, would apply to the various criminal matters tried by juvenile and domestic relations district courts and, if so, whether the requirements of § 19.2-345 would also apply as to the filing of these criminal warrants with the Clerk of the Circuit Court.

Section 14.1-123(6) provides that the fee “for filing and indexing all papers connected with any criminal action in a district court” shall be “two dollars, which when collected shall be transmitted to the clerk of the circuit court with such papers in the manner prescribed by § 19.2-345, when such papers are required by law to be transmitted to a circuit court.” (Emphasis added.) Section 19.2-345 provides that “every district court shall make return of the warrants in all criminal cases finally disposed of . . . to the clerk of the circuit court of the county or city within which such district court is located.” (Emphasis added.) Section 16.1-69.5(d) provides that unless the context should otherwise require, the term “district courts” shall be construed to include juvenile and domestic relations district courts.

Being unaware of any contextual reason requiring the term “district court,” as used in either § 14.1-123(6) or § 19.2-345, to be construed as excluding juvenile and domestic relations district courts, I am of the opinion that each of your inquiries should be answered in the affirmative. It should be noted, however, that proceedings against juveniles in juvenile and domestic relations courts are not criminal in nature. See Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973). As to such cases §§ 14.1-123(6) and 19.2-345 would, of course, be inapplicable.
The appointive members of the Commission shall, together with the ex officio members, constitute the Commission, and the powers of the Commission shall be vested and exercised by the members in office from time to time. The judge of the juvenile and domestic relations court or the judge acting in juvenile matters in each participating political subdivision shall ex officio be a member of the Commission."

Together the appointive members and the judges as ex officio members constitute the membership of the Commission. In order to answer your question whether the judges as ex officio members have full voting rights, it is necessary to consider the definition of "ex officio." This term is defined in Black's Law Dictionary 661 (4th ed. 1951), as follows:

"From office; by virtue of the office; without any warrant or appointment than that resulting from the holding of a particular office."

Those juvenile and domestic relations district court judges who are members of the Crater Juvenile Detention Home Commission are members of such Commission by virtue of their office. I am able to find no provision in the Code which gives to ex officio members of a juvenile detention home commission any greater or lesser voting rights than appointive members. In the absence of any statutory provision to the contrary, it is my opinion that the ex officio members of the Crater Juvenile Detention Home Commission have the same voting rights as the appointive members.

Your second question is whether the ex officio members of the Commission must be counted for purposes of determining whether a quorum is present. The third paragraph of §16.1-202.4 provides, in pertinent part, as follows with respect to a quorum for the Commission:

"A majority of the members in office shall constitute a quorum."

Ex officio members of the Crater Juvenile Detention Home Commission are members in office as are appointive members. The Code makes no distinction between appointive members and ex officio members for purposes of determining a quorum. I am, therefore, of the opinion that all members of the Crater Juvenile Detention Home Commission, including ex officio members, must be counted for purposes of determining a quorum.

February 6, 1976

The Honorable Jack F. Davis
Director, Department of Corrections

This is in response to your letter in which you inquired whether judges of juvenile and domestic relations district courts have the authority to
require directors of court service units or their designees to collect and disburse nonsupport monies.

Pursuant to § 20-67, Code of Virginia (1950), as amended, exclusive and original jurisdiction in nonsupport cases is vested in juvenile and domestic relations district courts. Section 20-79(c) provides that, in any suit for divorce or for maintenance and support or in any divorce decree, final decree for maintenance and support, or subsequent decree in any such suit, the circuit court may “...transfer to the juvenile and domestic relations district court all matters pertaining to support and maintenance for the spouse, maintenance, support, care and custody of the child or children.”

In *Warner v. Commonwealth*, 212 Va. 623, 186 S.E.2d 76 (1972), the Supreme Court noted that § 20-79(c) evidences the fact that juvenile and domestic relations district courts are particularly well-equipped to supervise the collection of support payments.

Section 20-86, which is concerned with the duties of probation officers in desertion and nonsupport cases, requires such officers to determine facts in relation to the antecedent history and environment of persons committed to their charge so as to enable them to determine what corrective measures will be proper, to exercise constant supervision over the conduct of such persons and their families, to make reports to the court whenever deemed necessary or when required so to do, and to make every effort to encourage and stimulate such persons to a reformation and to effect a reconciliation between estranged couples. This section does not impose a duty upon probation officers to collect and disburse nonsupport monies.

Section 16.1-208 is also concerned with the powers, duties, and functions of probation officers. Prior to 1974, this section provided, in pertinent part, as follows:

“The judge of the juvenile court in any county may, in his discretion, provide that support payments be made to and disbursed by the chief probation officer, when bonded as provided by § 16.1-16, who shall in that event keep the accounts relating to such support payments.”

The foregoing paragraph was deleted in its entirety by the 1974 Session of the General Assembly. Ch. 464, [1974] Acts of Assembly 865. See also § 20-76, which formerly had reference to support payments made “through the court or probation officer,” and which was repealed in its entirety. *Id.*

The 1974 Session of the General Assembly enacted § 63.1-279 specifically providing for the collection and disbursement of support payments. This section reads as follows:

“Whenever, as a result of any action brought pursuant to this chapter, support money is paid by the person or persons responsible for support, such payment shall be paid to the clerk of the juvenile and domestic relations district court. The clerk shall then issue payment to the State Department of Welfare. The clerk of the juvenile and domestic relations district court shall make monthly reviews of nonsupport cases. It shall be the clerk’s obligation to notify the person responsible for support when such person is in arrears of payment. The person in arrears shall have no more than five days after the clerk’s notification to pay the arrears.

“The clerk shall report at the end of each month all persons in arrears in support payments to the child support investigation and enforcement unit within the department.”

It is my opinion that the actions of the 1974 Session of the General Assembly, in removing all responsibilities from probation officers with respect to collection and disbursement of support monies and in specifically placing these duties on clerks of the juvenile and domestic relations district courts,
evidence a clear intent concerning the division of responsibilities between probation officers of the court service units and court clerks. I conclude, therefore, that a juvenile and domestic relations district court judge may not order a probation officer of his court service unit to collect and disburse support monies. Such duties lie with the clerk of a juvenile and domestic relations district court pursuant to legislative mandate.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Payment For Psychiatric Examination Of Adult Before The Court.

COSTS—Payment For Psychiatric Examination Of Adult Before Juvenile And Domestic Relations District Court.

CRIMINAL PROCEDURE—Payment For Psychiatric Examination Of Adult Before Juvenile And Domestic Relations District Court.

DEFINITIONS—“Court”—Juvenile and domestic relations district court is a court within meaning of § 19.2-332.

December 4, 1975

THE HONORABLE BEVERLY B. BOWERS
Judge, Twenty-Sixth Judicial District

This is in response to your recent letter regarding the payment of a psychiatrist who is ordered to examine an adult coming before a juvenile and domestic relations district court pursuant to § 16.1-190, Code of Virginia (1950), as amended. Specifically, you ask under what statutory provision such psychiatrist may be paid and if payment is to be made in accordance with the rates referred to in § 16.1-190.

The aforementioned section provides, in pertinent part, as follows:

"The court may cause any person within its jurisdiction under the provisions of this law to be examined and treated by a physician, or psychiatrist, or examined by a clinical psychologist; and upon the written recommendation of the physician or psychiatrist the court shall have the power to send any such person to a State mental hospital for observation. Whenever the parent or other person responsible for the care and support of the child is financially unable to pay the cost of such examination as ordered by the court, such costs may be paid according to rates adopted by the State Board, from funds appropriated in the general appropriation act for the Department from criminal costs." (Emphasis added.)

Thus, § 16.1-190 specifically provides for the method by which a physician, psychiatrist, or clinical psychologist, who examines a child on the order of a juvenile and domestic relations district court, is to be paid. With respect to an adult, however, § 16.1-190 authorizes examination, but sets forth no method for payment.

Pursuant to § 16.1-158(5), (7), and (8), a juvenile and domestic relations district court has jurisdiction over certain offenses committed by adults. Inasmuch as all these offenses are criminal in nature, § 19.2-332 provides a method by which a physician, psychiatrist, or clinical psychologist performing a mental examination of an adult before a juvenile and domestic relations district court may be paid. This section provides, in pertinent part, as follows:

"Whenever in a criminal case an officer or other person renders any service required by law for which no specific compensation is provided, or whenever any other service has been rendered pursuant to request
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or prior approval of the court, the court shall allow therefor such sum as it deems reasonable, including mileage at a rate provided by law, 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."

It should be noted that a juvenile and domestic relations district court is a "court" within the meaning of § 19.2-332. Section 19.2-5 defines "court" as it appears in Title 19.2 as follows:

"The word 'court' as used in this title, unless otherwise clearly indicated by the context in which it appears, shall mean and include any court vested with appropriate jurisdiction under the Constitution and laws of this Commonwealth."

I am, therefore, of the opinion that, when a juvenile and domestic relations district court orders the mental examination of an adult coming before such court, the physician, psychiatrist, or clinical psychologist performing the examination may be paid pursuant to § 19.2-332 and in an amount deemed reasonable by the court.

October 9, 1975

THE HONORABLE ROBERT F. WARD, Judge
Pittsylvania Juvenile and Domestic Relations District Court

This is in response to your recent letter in which you requested my opinion concerning certain rules and regulations adopted by the State Board of Corrections and applicable to the use of criminal funds for physical, psychiatric, and psychological examinations ordered by a juvenile and domestic relations district court upon persons coming within its jurisdiction. The rules and regulations to which you refer were adopted by the Board on June 12, 1975, pursuant to § 16.1-190, Code of Virginia (1950), as amended. You asked three questions which I will answer seriatim.

Your first question is whether the Board has the right to impose the requirements of the items designated 2 and 3 of the Procedure for Use of Criminal Funds for Examination. Item 2 of the Procedure provides as follows:

"There shall be certification by the responsible judge that the parent or other person responsible for the care and support of the child is financially unable to pay the cost of such examinations, with documentation of efforts made to obtain such payment."

Item 3 of the Procedure provides:
"There shall be a brief statement signed by the responsible judge indicating circumstances surrounding decision to request examination and why referral was made for assessment."

Section 16.1-190 provides in the first paragraph thereof as follows:

"The court may cause any person within its jurisdiction under the provisions of this law to be examined and treated by a physician, or psychiatrist, or examined by a clinical psychologist; and upon the written recommendation of the physician or psychiatrist the court shall have the power to send any such person to a state mental hospital for observation. Whenever the parent or other person responsible for the care and support of the child is financially unable to pay the costs of such examination as ordered by the court, such costs may be paid according to rates adopted by the State Board, from funds appropriated in the general appropriation act for the Department from criminal costs." (Emphasis added.)

Section 16.1-190 authorizes a juvenile and domestic relations district court judge to order that a person coming before him be examined and treated by a physician or a psychiatrist or examined by a clinical psychologist. The Commonwealth becomes responsible for payment for such examination ordered by the court only when the parent or other person responsible for the care and support of the child is financially unable to pay the costs of the examination. Payment to the physician, psychiatrist, or psychologist involved will be according to rates adopted by the Board of Corrections.

Inasmuch as § 16.1-190 requires a determination that the parents of a child or other person responsible for the child's care and support are unable to pay for such examination prior to the Commonwealth's paying for the examination, I am of the opinion that a court must make a determination that the parents or guardians of a child are unable to pay as a condition precedent to payment by the Department of Corrections. Whether the determination is made by the court, or by court personnel under the supervision of the court, certification should be over the signature of the judge ordering the examination.

The last clause of item 2 requires the court ordering an examination to submit "documentation of efforts made to obtain such payment" from the parent or other person responsible for care and support of the child concerned. Because the Code places primary responsibility of payment for the examination on the parents or guardians, every effort should be made to obtain payment from these sources before a voucher is submitted to the Department of Corrections. I am, however, unable to find any statutory support for the requirement that a court submit documentation of its efforts to obtain payment. Therefore, I am of the opinion a court cannot be required to submit such documentation.

Item 3 of the procedure requires the court ordering examination to submit a brief statement signed by the responsible judge indicating the circumstances surrounding his decision to request an examination and why referral was made for assessment. As I am sure you are aware, examination of all persons coming before a juvenile and domestic relations district court would involve a considerable expenditure on the part of the Commonwealth, and the Department of Corrections is required to account for all overruns in the Criminal Fund Account. By means of the policy expressed in item 3, the Board of Corrections sought to preclude any abuse of the examinations authorized by § 16.1-190. Section 16.1-190, however, states: "The court may cause any person within its jurisdiction under the provisions of this law to be examined...." This section places no conditions on the right of a court to order an examination, nor does this section give the Board any authority to regulate the circumstances under which such
examinations should be made other than to adopt a rate schedule for such examinations. I am, therefore, of the opinion that it is discretionary with the court whether such examination should be ordered and that a court ordering examination is not required to submit any justification.

Your second question is whether the Department of Corrections may legally refuse to pay vouchers authorized by a court, but which do not comply with the Procedure for Use of Criminal Funds for Examination. For the reasons previously stated, I am of the opinion that the Department may refuse to pay a voucher which does not include a certificate that the parent or other person responsible for the care and support of the child is financially unable to pay the costs of the examination. For the same reasons, the Department may not refuse to pay a voucher which does not include documentation of efforts made to obtain payment from the parents or other responsible person or a voucher which does not contain a justification for the examination.

Your third question is whether the court is obligated to institute the proceeding to determine the capability of the parent or other person to pay for the services rendered to the child or whether this obligation rests somewhere else. As previously indicated, I am of the opinion that the court is obligated to make this determination. Such determination could be made by court personnel under the supervision of the court, but the certification of inability to pay should be over the signature of the responsible judge.


CRIMINAL PROCEDURE—Juvenile And Domestic Relations Court Adjudication Not Considered Conviction For Crime.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Juvenile Not Dealt With As Felon Or Misdemeanant—Civil, not criminal, proceedings.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—No Authority To Order That Child Sentenced Under § 16.1-177.1 Serve Time In Adult Facility Of Department Of Corrections.

JUVENILES—Juvenile And Domestic Relations District Court Law Does Not Deal With Charges Involving Juveniles As Either “Felonies” Or “Misdemeanors.”

JUVENILES—May Not Be Confined With Adults When Sentenced To Jail Under § 16.1-177.1.

March 10, 1976

The Honorable J. Elwood Clements
Sheriff of Arlington County

This is in response to your recent letter in which you asked whether a juvenile who has been sentenced to jail by a Juvenile and Domestic Relations District Court pursuant to § 16.1-177.1 of the Code of Virginia (1950), as amended, may be confined in a correctional field unit of the Division of Adult Services of the Department of Corrections. You indicated that you have been advised by the Department of Corrections that the Division of Adult Services will not accept juveniles unless they have been certified to a circuit court and tried as adults. As a result, you are being required to house juveniles sentenced under § 16.1-177.1 until the completion of their sentences.
Section 16.1-177.1 contemplates the utilization of an adult disposition when a child 15 years of age or older is charged with an offense which "if committed by an adult, would be a misdemeanor or a felony." In such cases, a Juvenile and Domestic Relations District Court may try the child and impose the penalties, which are authorized to be imposed on adults for such violations, not to exceed 12 months in jail. See Opinion of the Attorney General to the Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated January 2, 1976, a copy of which is attached. A juvenile sentenced pursuant to § 16.1-177.1 is not convicted of a felony or a misdemeanor. See Opinion of the Attorney General to the Honorable Joseph H. Campbell, supra. He has merely been given an adult disposition on a juvenile charge, and such juvenile would not be subject to any of the attendant civil disabilities that are attached to a felony conviction. See Report of the Attorney General (1974-1975) at 228.

I have held on several occasions that the dispositional alternative authorized by § 16.1-177.1 is limited by § 16.1-196. See Report of the Attorney General (1974-1975) at 227; (1973-1974) at 216. Section 16-1-196 provides as follows with respect to the incarceration of juveniles:

"No person known or alleged to be under the age of eighteen years shall be transported or conveyed in a police patrol wagon, or confined in any police station, prison, jail or lockup, or be transported or detained in association with criminals or vicious or dissolute persons; except that a child fifteen years of age or older may, with the consent of the judge, clerk or the juvenile probation officer, or as otherwise provided for in § 16.1-197, be placed in a jail or other place of detention for adults in a room or ward entirely separate from adults; provided, however, this provision shall not be applicable to persons tried and convicted as adults in a circuit court in accordance with the applicable provisions of law."

The sole exceptions to § 16.1-196 are those contained in § 16.1-197, which relate primarily to pre-trial detention, and the case where a child is certified to a circuit court for trial as an adult. I reaffirm, therefore, my earlier Opinions in which I held that a child sentenced by a Juvenile and Domestic Relations District Court pursuant to § 16.1-177.1 may not be confined in a prison, jail, or a lockup unless he is confined in a "room or ward entirely separate from adults."

I am advised by the Division of Adult Services of the Department of Corrections that the Division has no facilities for segregating juveniles from adults as required by § 16.1-196. Consequently, I am of the opinion that the advice given to you by the Department of Corrections, that the Division of Adult Services can only accept those juveniles who have been certified to circuit courts under §§ 16.1-176 or 16.1-176.2 and tried as adults, is correct.

JUVENILES—Confinement With Adult Prisoners Prohibited By § 16.1-196.

JAILS—Juveniles Must Be Placed In Room Of Ward Entirely Separate From Adults.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—May Not Order That Child Tried As Juvenile Be Confined With Adults.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—May Not Place Child In Detention Home As Final Disposition.

JUVENILES—Juvenile And Domestic Relations District Court Law Does Not Deal With Charges Involving Juveniles As Either "Felonies" Or "Misdemeanors."
REPORT OF THE ATTORNEY GENERAL

JUVENILES—Not Subject To Civil Disabilities Attached To Felony Conviction—Section 16.1-179.

JUVENILES—Placement In Detention Home As Final Disposition Prohibited By § 16.1-199.

JUVENILES—Tried In Juvenile Courts Are Not To Be Confined With Adults Even When Sentenced Under § 16.1-177.1.

April 7, 1976

THE HONORABLE CHARLES H. LEAVITT
Sheriff of the City of Norfolk

This is in response to your recent letter in which you inquired concerning the incarceration of juveniles in the Norfolk City Jail. Your letter and the enclosure have specific reference to the conditions under which a juvenile sentenced to a jail term by a juvenile and domestic relations district court pursuant to § 16.1-177.1, Code of Virginia (1950), as amended, may be confined. I shall answer your questions seriatim:

Your first question is whether a juvenile, sentenced to a jail term by a juvenile and domestic relations district court pursuant to § 16.1-177.1, may be confined in an adult dormitory in your jail. Section 16.1-177.1 contemplates the utilization of an adult disposition when a child 15 years of age or older is charged with an offense which, "if committed by an adult, would be a misdemeanor or a felony." In such cases, a juvenile and domestic relations district court may try the child and impose the penalties, which are authorized to be imposed on adults for such violations, not to exceed 12 months in jail. I have previously held, in Opinions to the Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated January 2, 1976, copy of which is enclosed, and to the Honorable Edwin A. Henry, Chief Judge, Juvenile and Domestic Relations District Court of Norfolk, dated October 9, 1974, and found in Report of the Attorney General (1974-1975) at 235, that a juvenile sentenced pursuant to § 16.1-177.1 is not convicted of a felony or a misdemeanor. He has merely been given an adult disposition on a juvenile charge, and such juvenile would not be subject to any of the attendant civil disabilities that are attached to a felony conviction. See Report of the Attorney General (1974-1975) at 228. Section 16.1-177.1 does not refer to the method of confinement of a juvenile offender, but is merely concerned with the penalty that may be imposed upon him.

Section 16.1-196, however, does have reference to the manner in which juveniles are confined. This Office has consistently held that a child sentenced to jail under § 16.1-177.1 must be placed in a "room or ward entirely separate from adults." See Opinion of the Attorney General to the Honorable J. Elwood Clements, Sheriff, Arlington County, dated March 10, 1976, copy of which is enclosed; Report of the Attorney General (1974-1975) at 227; (1973-1974) at 216; (1969-1970) at 157; (1960-1961) at 179. The only exceptions to § 16.1-196 are those found in § 16.1-197, which relate primarily to pretrial detention and the situation where a child is certified to a circuit court and tried as an adult. I am, therefore, or the opinion that it would be unlawful for you to confine juveniles, sentenced pursuant to § 16.1-177.1, in an adult dormitory of your jail.

Your second question is whether there is anything a judge of a juvenile and domestic relations district court can write on a mittimus or commitment order which would authorize a sheriff to confine a juvenile with adult prisoners. Section 16.1-196 prohibits the integration of juveniles sentenced to jail under § 16.1-177.1 with adult prisoners. No statute authorizes juvenile judges to order that juvenile offenders be incarcerated with adult prisoners. Therefore, I am of the opinion that a juvenile judge is not authorized, by means of notations on a mittimus or commitment order to...
REPORT OF THE ATTORNEY GENERAL

legitimize the commingling in jail with adults of juveniles sentenced under § 16.1-177.1.

Your third question is whether a juvenile sentenced to jail by a juvenile and domestic relations district court may be transferred to a detention home with the approval of the juvenile judge. Detention homes have the function of temporarily detaining children prior to the dispositional phase of a juvenile proceeding. See § 16.1-199(a). Paragraph (a) of § 16.1-199 specifically provides, in relevant part, as follows:

“A child shall not, in any event, be committed to a detention home as a matter of final disposition.”

Based on the foregoing statutory authority, I am of the opinion that a child sentenced to jail by a juvenile and domestic relations district court may not be transferred to a detention home, even with the approval of the juvenile judge.

JUVENILES—Destruction Of Records When Child Reaches Twenty-one.

AMENDMENTS—Despite Lowering Of Age Of Majority, Juvenile Records Cannot Be Destroyed Until Child Reaches Twenty-one.

CONFLICT OF LAWS—Age Limitation—Despite lowering of age of majority, juvenile records cannot be destroyed until child reaches twenty-one.

CRIMINAL PROCEDURE—Destruction Of Juvenile Records When Child Reaches Twenty-one.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Destruction Of Records When Child Reaches Twenty-one.

RECORDS—Destruction Of Juvenile Records When Child Reaches Twenty-one.

December 3, 1975

THE HONORABLE HAROLD B. SINGLETON, Judge
Twenty-Fourth Judicial District

This is in response to your recent letter in which you inquired whether the files, papers, and records connected with juvenile proceedings may be destroyed when the child, to whom such information relates, reaches the age of eighteen or whether such information may be destroyed only when the child reaches the age of twenty-one. You pointed out that § 16.1-193, Code of Virginia (1950), as amended, provides for the destruction of files, papers, and records connected with any proceeding in a juvenile and domestic relations district court upon order of the court when the child involved has attained the age of twenty-one. You further noted that the age of majority in Virginia has been reduced to eighteen years of age. See § 1-13.42.

In an official Opinion to the Honorable Charles L. Waddell, Member, Senate of Virginia, dated March 4, 1975, a copy of which is enclosed, I considered an analogous situation. The question there concerned the duration of a commitment to the State Department of Corrections by a juvenile and domestic relations district court under § 16.1-178(3). Section 16.1-180 provides that commitments shall be for an indeterminate period, but no child shall be held after having attained the age of twenty-one years. Therefore, the question to which I addressed myself was whether the lowering of the age of majority superseded the language of § 16.1-180 so
as to provide for the termination of a commitment to the State Board of Corrections upon a child’s reaching the age of eighteen years. It was my conclusion that § 16.1-180 prevailed and that a juvenile could be detained until he attained the age of twenty-one years. This determination was based upon § 16.1-142 which provides that Chapter 8 of Title 16.1 is controlling in the event of conflict with any other provision of law, and upon the fact that the General Assembly had the opportunity to amend § 16.1-180, but failed to do so, thereby indicating a legislative intent to allow commitment until the age of twenty-one years is attained.

The rationale which supported my Opinion to Senator Waddell has application to the question which you have asked. Since the age of majority was reduced by the 1972 Session of the General Assembly, the General Assembly has not seen fit to reduce the age, required by § 16.1-193 for the destruction of records, to eighteen. Inasmuch as juveniles may be held in State custody until they attain the age of twenty-one years, there is a sound reason why the General Assembly has not chosen to permit the destruction of files, papers, and records supporting such convictions until the age of twenty-one years has been reached. I am, therefore, of the opinion that the specific provision of § 16.1-193 must prevail and be given effect with respect to the destruction of juvenile records.

JUVENILES—Juvenile And Domestic Relations District Court Law Does Not Deal With Charges Involving Juveniles As Either “Felonies” Or “Misdemeanors.”

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT—Juvenile Not Dealt With As Felon Or Misdemeanant—Civil, not criminal, proceedings.

CRIMINAL PROCEDURE—Juvenile And Domestic Relations Court Adjudication Not Considered Conviction For Crime.

January 2, 1976

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth’s Attorney for the City of Norfolk

This is in response to your letter in which you inquired whether a juvenile fourteen years of age or younger has the capacity to commit a felony and may be tried on a petition alleging a felony, or whether § 16.1-177.1, Code of Virginia (1950), as amended, requires a felony petition to be automatically reduced to a misdemeanor when the juvenile is fourteen years of age or younger.

A child fourteen years of age or younger cannot, when charged with an offense which if committed by an adult could be punishable by confinement in the penitentiary, be transferred to a circuit court for appropriate criminal proceedings. See § 16.1-176(g). Section 16.1-177.1 would have no application to such a child. This section contemplates the utilization of an adult disposition when a child fifteen years of age or older is charged with an offense which, “if committed by an adult, would be a misdemeanor or a felony.” In such cases, a Juvenile and Domestic Relations District Court may try the child and impose the penalties, which are authorized to be imposed on adults for such violations, not to exceed twelve months in jail.

When a child fourteen years of age or younger comes within the jurisdiction of a Juvenile and Domestic Relations District Court, the court may utilize any of the dispositional alternatives set forth by § 16.1-178. As I have previously advised in an Opinion to the Honorable Edwin A. Henry, Chief Judge, Juvenile and Domestic Relations District Court for the City of Norfolk, dated October 9, 1974, a copy of which is enclosed, juvenile law
does not deal with charges involving juveniles as either “felonies” or “misdemeanors.” That terminology is seldom used in juvenile law, except for purposes of analogy. Indeed, such terminology is inappropriate in juvenile proceedings because the Supreme Court of Virginia has held that such proceedings are civil in nature. See Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973). A juvenile is not charged with a crime or convicted of a criminal offense. See § 16.1-179. Even though a juvenile may have committed acts which would have been felonious if committed by an adult, he is, nevertheless, brought before a Juvenile and Domestic Relations District Court on a petition stating the facts which allegedly bring the child within the purview of the juvenile law. See § 16.1-165(6).

Because juvenile offenses are not designated as “felonies” or “misdemeanors,” I am of the opinion that there is no necessity for any reduction of charge when a juvenile is brought before a Juvenile and Domestic Relations District Court with respect to conduct which would have been a felony if committed by an adult. The petition in such cases should merely state the facts which allegedly bring the child within the jurisdiction of the court. An adjudication of not innocent would find such child guilty of a delinquent act.

**JUVENILES—Juvenile And Domestic Relations District Court Law Does Not Deal With Charges Involving Juveniles As Either “Feloniess” Or “Misdemeanors”—Right to vote.**

**ELECTIONS—Effect Of Juvenile Adjudication On Right To Vote.**

**JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Effect On Child Of Treatment As Juvenile Or As Adult—Right to vote.**

**JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Juvenile Not Dealt With As Felon Or Misdemeanant—Civil, not criminal, proceedings.**

**REGISTRARS—Effect Of Juvenile Adjudication On Right To Vote.**

May 24, 1976

**THE HONORABLE ELIZABETH B. STONE**

Assistant Registrar for Henry County

This is in response to your letter of April 28, 1976, in which you asked the following question:

“If a child is convicted of a felony in a juvenile and domestic relations district court and the case was not certified to a circuit court, would this person answer the question checked on the enclosed Voter Registration form ‘Yes’ or ‘No’? Please explain.”

The question to which you have reference, from the Virginia Voter Registration Application, is as follows: “Have you ever been convicted of a felony?”

I have previously held that juvenile offenses are not designated as “felonies” or “misdemeanors.” See Report of the Attorney General (1974-1975) at 235; and Opinion to the Honorable Joseph H. Campbell, Commonwealth’s Attorney for the City of Norfolk, dated January 2, 1976, a copy of which is enclosed. The terms “misdemeanor” and “felony” have little relevance in juvenile law except for purposes of analogy. In fact, the Supreme Court of Virginia has held that juvenile proceedings are civil in nature. See Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973).

Even though a juvenile may have committed acts which would have been
felonious if committed by an adult, he is, nevertheless, brought before a juvine and domestic relations district court on a petition stating facts allegedly bringing the child within the purview of the juvenile law. See § 16.1-165(6), Code of Virginia (1950), as amended. Section 16.1-179, which provides as follows, has particular reference to your inquiry:

"Except as otherwise provided, no adjudication or judgment upon the status of any child under the provisions of this law shall operate to impose any of the disabilities ordinarily imposed by conviction for a crime, nor shall any such child be denominated a criminal by reason of any such adjudication, nor shall such adjudication be denominated a conviction.

"The disposition made of a child or minor or any evidence given in court concerning him shall not operate to disqualify the child in any future civil service application or appointment or military or naval enlistment."

Because juvenile proceedings are not criminal in nature and § 16.1-179 specifically provides that juvenile adjudications shall not be denominated as convictions, I am of the opinion that a person who may have been found not innocent by a juvenile and domestic relations district court of an offense which would have been a felony if committed by an adult may properly respond in the negative to the question whether he has ever been convicted of a felony.

I have previously addressed myself to the question of loss of civil rights by a juvenile whose case is certified to a circuit court. See Report of the Attorney General (1974-1975) at 234. In the foregoing Opinion, I held that, if the circuit court elects to treat the child as a juvenile under § 16.1-177, § 16.1-179 would be operative, and none of the civil disabilities attaching to a criminal conviction would apply to that determination and disposition by the circuit court. It was my opinion, on the other hand, that, if the circuit court elects to treat the child as an adult, the conviction is not a judgment under the provisions of the juvenile and domestic relations district court law, and the convicted child should be treated as a convicted adult for all purposes, including the loss of those civil rights which goes with a felony conviction.

JUVENILES—Juvenile Who Escapes Has Right To Appeal Order Decreeing Return To Custody Of Department Of Corrections.

APPEAL—Juvenile Who Escapes Has Right To Appeal Order Decreeing Return To Custody Of Department Of Corrections.

September 25, 1975

The Honorable Edwin A. Henry, Chief Judge
Norfolk Juvenile and Domestic Relations District Court
Fourth Judicial District

This is in reply to your recent letter in which you inquired whether a juvenile who has escaped from the custody of the Department of Corrections has a right to appeal the order of a juvenile and domestic relations district court that decrees return to that custody. You posed the following factual situation: A sixteen year old girl is committed by a juvenile and domestic relations district court to an indeterminate stay in the custody of the Department of Corrections. She escapes and returns to the city from which she was committed. Six weeks later she is apprehended and brought before the juvenile court on petition alleging that she has escaped from the Department of Corrections. The judge imposes no formal penalty, but enters
an order directing that she be returned to the custody of the Department of Corrections.

Section 16.1-214, of the Code of Virginia (1950), as amended, provides in part:

"From any final order or judgment of the juvenile court affecting the rights or interests of any person under the age of eighteen years coming within its jurisdiction, an appeal may be taken within ten days by any person aggrieved to the circuit, corporation, or hustings court having equity jurisdiction of such city or county."

It is my opinion that the order returning the juvenile to the Department of Corrections is a final order of the juvenile court affecting the rights and interests of the juvenile in question. It is, therefore, appealable by the aggrieved juvenile.

JUVENILES—May Be Held In Contempt Of Court For Disobeying Order To Attend School.

CRIMINAL PROCEDURE—Contempt—Power of Juvenile and Domestic Relations District Court to hold juvenile in contempt for disobeying order to attend school.

DISTRICT COURTS—Contempt Power Of—Juveniles.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Contempt Power Of—Juveniles.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Truancy; Dispositional Alternatives For.

June 24, 1976

THE HONORABLE JOSEPH H. CAMPBELL
Commonwealth's Attorney for the City of Norfolk

This is in response to your recent letter in which you inquired whether a juvenile may be held in contempt by a juvenile and domestic relations district court for disobeying an order of such court directing the juvenile to attend school on a regular basis. You further inquired whether the juvenile could be punished for the contempt pursuant to § 16.1-177.1, Code of Virginia (1950), as amended.

Section 16.1-158(1) (h) gives juvenile and domestic relations district courts jurisdiction over all cases, matters, and proceedings involving the custody, support, control, or disposition of children who are required by law or their parents or custodians to attend school and are willfully and habitually truant therefrom. Although juvenile and domestic relations district courts have jurisdiction over truants, commitment to the State Board of Corrections is not a dispositional alternative which is available in the case of truants. Section 16.1-178(4) authorizes commitment to the State Board of Corrections only of those children coming within the purview of the court pursuant to § 16.1-158(1) (g) and (i). Even when a child is adjudicated a truant, sentence is suspended, and the child is placed on probation, such child may not be committed to the State Board of Corrections for probation violation. In the case of probation violation, a court may pronounce whatever sentence might have been originally imposed, but it cannot pronounce a sentence which was originally not a lawful dispositional alternative. See § 16.1-188 and Opinion of the Attorney General (1973-1974) at 203, which sets forth a number of dispositional alternatives.
available to juvenile and domestic relations district courts in cases of truancy.

Your inquiry envisions the situation where a juvenile is given a lawful order by a juvenile and domestic relations district court to attend school and thereafter violates such order. Section 18.2-456(5) provides that courts and judges may issue attachments for contempt and punish summarily for “[d]isobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court.” In the cases of Laing v. Commonwealth, 205 Va. 511, 137 S.E.2d 896 (1964), and Board of Supervisors v. Bazile, 195 Va. 739, 80 S.E.2d 566 (1954), it was held that willful disobedience to any lawful order of a court was contemptuous under the predecessor statutes of § 18.2-456. Contempt in district courts is punishable by a fine not to exceed $50 or imprisonment not to exceed ten days. See § 18.2-458. Section 16.1-69.5 states that the term “district court” includes a juvenile and domestic relations district court.

The Juvenile and Domestic Relations District Court Law provides for the jailing of a child by such court as a final disposition only as permitted by § 16.1-177.1 which provides as follows:

“If a child fifteen years of age or over is charged with an offense which, if committed by an adult, would be a misdemeanor or a felony, and the court deems that such child cannot be adequately controlled or induced to lead a correct life by use of the various disciplinary and corrective measures available to the court under this law, then the court may, in such cases, try such child and impose the penalties which are authorized to be imposed on adults for such violations, not to exceed twelve months in jail.”

Before a juvenile may be jailed under § 16.1-177.1, he must be “charged with an offense which, if committed by an adult, would be a misdemeanor or a felony.” In Baltimore and Ohio Railroad Company v. City of Wheeling, 54 Va. (13 Gratt.) 40 (1855), it was said:

“A contempt of court is in the nature of a criminal offense; and the proceeding for its punishment is in the nature of a criminal proceeding.”

Based on the foregoing authority, I am of the opinion that a child charged with contempt in a juvenile and domestic relations district court may be sentenced pursuant to § 16.1-177.1. Such sentence would, however, be subject to the restrictions of § 16.1-196. In no case, may a child of fourteen years of age or younger be confined in jail, and a child of fifteen years of age or older may be confined in jail only “in a room or ward entirely separate from adults.” Such sentence would also be subject to § 18.2-458 which establishes the maximum punishment which a district court, including a juvenile and domestic relations district court, is authorized to adjudge for contempt.

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JUVENILES—When Sentenced Under § 16.1-177.1, And Attains Age Eighteen, § 16.1-196 No Longer Restricts Confinement.


THE HONORABLE J. ELWOOD CLEMENTS
Sheriff of Arlington County

This is in response to your recent letter concerning a juvenile, sentenced by a juvenile and domestic relations district court pursuant to § 16.1-177.1,
Code of Virginia (1950), as amended, to a jail sentence, who attains the age of eighteen years while incarcerated. You ask two questions. First, could the sheriff place the eighteen year old prisoner, who was sentenced as a juvenile in the general population with other adult prisoners in the local detention center? Second, would such prisoner be eligible to be transferred to a correctional field unit or other facility of the Division of Adult Services of the Department of Corrections?

You will recall that in my Opinion to you of March 10, 1976, I held that a child sentenced by a juvenile and domestic relations district court pursuant to § 16.1-177.1 may not be confined in a prison, jail, or a lockup unless he is confined in a “room or ward entirely separate from adults.” See also Report of the Attorney General (1974-1975) at 227; (1973-1974) at 216; (1969-1970) at 157; (1960-1961) at 179. The result reached by the foregoing Opinions is based on § 16.1-196 which provides, in pertinent part, as follows:

“No person known or alleged to be under the age of eighteen years shall be transported or conveyed in a police patrol wagon, or confined in any police station, prison, jail or lockup, or be transported or detained in association with criminals or vicious or dissolute persons; except that a child fifteen years of age or older may, with the consent of the judge, clerk or the juvenile probation officer, or as otherwise provided for in § 16.1-197, be placed in a jail or other place of detention for adults in a room or ward entirely separate from adults; provided, however, this provision shall not be applicable to persons tried and convicted as adults in a circuit court in accordance with the applicable provisions of law.”

My Opinion of March 10, 1976, to you was concerned only with confinement of a juvenile sentenced pursuant to § 16.1-177.1. It had no application (nor do any of the other Opinions cited herein) to the confinement of an offender sentenced as a juvenile under § 16.1-177.1, but who later attains the age of eighteen years while still incarcerated. In an Opinion, subsequent to my Opinion to you, I stated that § 16.1-177.1 does not refer to the method of confinement of a juvenile offender, but is merely concerned with the penalties that may be imposed upon him. See Opinion to the Honorable Charles H. Leavitt, Sheriff, City of Norfolk, dated April 7, 1976, a copy of which is enclosed.

It is § 16.1-196 which has reference to the manner in which juveniles are confined, and this section has no application to an eighteen year old prisoner even though such prisoner may have been sentenced as a juvenile under § 16.1-177.1. In addition, I find no other statute which restricts the confinement of eighteen year old prisoners. I am, therefore, of the opinion that, when a person sentenced under § 16.1-177.1 attains the age of eighteen years, he may be confined in the same manner as other adult prisoners.

Your second question was whether prisoners sentenced under § 16.1-177.1 who attain the age of eighteen years are eligible for transfer to the Division of Adult Services of the Department of Corrections. As I previously indicated, such prisoners may be confined in the same manner as other adult prisoners. Section 53-135.1 provides that the Director of the Department of Corrections has, with certain exceptions not applicable, the power to transfer jail inmates, whose sentences are final, to any state farm, training school or correctional field unit. Thus, I am of the opinion that § 53-135.1 is applicable to a juvenile sentenced under § 16.1-177.1, who attains the age of eighteen years.
CONTRACTS—Authority Of Cities, Towns And Counties To Enter Into Contracts For Library Service.

COUNTIES, CITIES AND TOWNS—Authority To Enter Into Contracts For Library Service.

July 10, 1975

THE HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of June 23, 1975, in which you inquire whether Loudoun County may contract for library services with the board of trustees of a private, nonprofit library. The library is "open to the public," charges no fee for use of its facilities, and was created by a deed of gift stating that the land was to be used as a site for "a public library for the benefit of the citizens of the Town of Purcellville and the County of Loudoun." In light of your reference to the library's board of trustees, I assume that the library is not owned by a public corporation.

Section 42.1-34 of the Code of Virginia (1950), as amended, provides in pertinent part as follows:

"Any city, town or county shall have the power to enter into contracts with adjacent cities, counties, towns, or state-supported institutions of higher learning to receive or to provide library service on such terms and conditions as shall be mutually acceptable, or they may contract for a library service with a library not owned by a public corporation but maintained for free public use."

Based on the facts as specified in your letter, I am aware of no reason why the described library would not constitute a "library not owned by a public corporation but maintained for free public use." Accordingly, I am of the opinion that it would be lawful for the County to contract with the library for the provision of services to its citizens.

LIBRARIES—State Law Library—Supreme Court can restrict public use of.

SUPREME COURT OF VIRGINIA—State Law Library—Supreme Court can restrict public use of.

LIBRARIES—State Law Library—Section 42.1-64 is similar to restrictions placed on use of its Law Library by Supreme Court of United States.

February 25, 1976

THE HONORABLE GERALD L. BALILES
Member, House of Delegates

I am in receipt of your letter of February 20, 1976, which requests my opinion on the following question:

"Is the Library policy of the Commonwealth, as it is stated in Chapter 3 of Title 42.1 of the Code of Virginia (1950), as amended, applicable to the use of the law libraries, especially the Supreme Court Law Library, as outlined in Chapter 4 of Title 42.1 of the Code? Restated, the question is: does the Supreme Court possess the power to control all aspects of the Law Library's management and, if so, to what extent can the Court restrict public use of the Library?"

Chapter 4 of Title 42.1 of the Code of Virginia (1950), as amended,
§§ 42.1-60 to -70, entitled "Law Libraries" sets forth the policy of the Commonwealth regarding the establishment, administration and use of law libraries including the State Law Library at Richmond. The provisions of Chapter 4 are separate and distinct from the policies set forth in Chapter 3 of Title 42.1 which applies to other public libraries. Consequently, the first part of your inquiry is answered in the negative.

With regard to the second part of your inquiry, §§ 42.1-60 and 42.1-63 provide that the Supreme Court shall manage and regulate the maintenance of the State Law Library. Further, § 42.1-64 provides who may use such Library and states:

"The Governor and other State officers at the seat of government, the Reporter of the Supreme Court of Appeals, members of the General Assembly during the session thereof, judges of courts, and practicing attorneys in good standing, and such other persons as the Supreme Court of Appeals shall designate, shall have the use of the State Law Library, under such rules and regulations as the Court shall make."

I am unaware of any rule or regulation of the Court allowing general public use of the Law Library.

I would note for your information (1) that the administration of the Law Library and specifically § 42.1-64 is clearly within the provisions of Article VI, Section 4, of the Constitution of Virginia (1971) dealing with the administration of the judicial system and (2) that § 42.1-64 is very similar to the restrictions placed upon the use of its Law Library by the Supreme Court of the United States. See Rule 2 of the Rules of the Supreme Court of the United States (1971).

LIENS—Statutory Lien For Delinquent Charges Attaches Only To Such Properties That Use The Sewer And Water System.

FEES—Delinquent Sewer And Water Service Fees Become Lien Against Property For Which Charge Imposed.

SANITARY DISTRICTS—Authority—Can levy taxes, set service charges, or both, to finance their operations—Unpaid service charges become lien against property for which charge imposed.

SEWAGE DISPOSAL SYSTEM—Statutory Lien For Delinquent Charges Attaches Only To Such Properties That Use The Sewer and Water System.

WATER AND SEWERAGE SYSTEMS—Statutory Lien For Delinquent Charges Attaches Only To Such Properties That Use The Sewer And Water System.

April 28, 1976

THE HONORABLE WILLIAM H. HARRIS
County Attorney for Stafford County

I am responding to your inquiry whether a lien filed against a developer pursuant to § 21-118.4(e), Code of Virginia (1950), as amended, to secure payment of delinquent sewer and water service fees should be filed against the developer's entire 250-acre tract or only against the 85 acres that are developed and using the services. I understand from your request that the fees arise solely from use of the sewer and water service, and were not connection fees or costs to be shared by the developer for installation of lines.

Sanitary districts can levy taxes, set service charges, or both, to finance
their operations. See §§ 21-118(6), 21-118.4(e), 21-118.6 and 21-119 of the Code. Section 21-118.4(e) provides that sanitary districts shall have the power to set and collect service charges. That section further specifies that any unpaid service charges shall become a lien against "the real property on which the use of any such system was made and for which the charge was imposed." Accordingly, I am of the opinion that the statutory lien for service charges attaches only to such properties that use the service, which in this case you identify as the 85 acres which are developed and using the water and sewer system.

LOANS—Bank Which Elects To Impose Less Than Authorized 2% Service Charge On 90 Day Loan, May Not Within Succeeding 360 Days Impose Another Service Charge On Renewal Of Loan.

BANKING AND FINANCE—Bank Which Elects To Impose Less Than Authorized 2% Service Charge On 90 Day Loan, May Not Within Succeeding 360 Days Impose Another Service Charge On Renewal Of Loan.

INTEREST—Bank Which Elects To Impose Less Than Authorized 2% Service Charge On 90 Day Loan, May Not Within Succeeding 360 Days Impose Another Service Charge On Renewal Of Loan.

THE HONORABLE FREDERICK T. GRAY
Member, Senate of Virginia

This is in reply to your recent inquiry concerning § 6.1-330.41 of the Code of Virginia (1950), as amended, which provides, in pertinent part, that "a bank may impose a service charge not exceeding two per centum of the amount of the loan. Such service charge shall not be imposed on any renewal or extension, except after the passage of three hundred sixty days since the prior imposition." You ask whether a bank may impose a portion of the service charge initially and collect the balance over the term of the loan on the basis of the number of days the loan is outstanding. For example, if a bank makes a $1000.00 loan for 90 days, may it impose a $5.00 service charge for the original term of the loan and another $5.00 service charge if the note is renewed in full at maturity for an additional 90 days, etc.? I am of the opinion that the language "[s]uch service charge" in the last sentence of § 6.1-330.41 refers to the service charge imposed pursuant to the preceding sentence regardless whether it is for the full amount authorized or less. Therefore, if a bank elects to impose less than the authorized 2% service charge on a 90 day loan, it may not, within the succeeding 360 days, impose another service charge on a renewal of that loan.

LOANS—State Education Assistance Authority May Not Make Interest-free Loan To Virginia Education Loan Authority For Operating Expenses And/Or Interest Payment Reserve.

APPROPRIATIONS—State Education Assistance Authority—Strict limitations imposed on use of appropriations.

CONSTITUTION—Credit Clause—Virginia Education Loan Authority's authority to borrow—Neither full faith and credit of Commonwealth nor taxing power is pledged to payment.

STATE EDUCATION ASSISTANCE AUTHORITY—Strict Limitations Imposed On Use Of Its Appropriations—Aid to Virginia students attending institutions of higher education.
REPORT OF THE ATTORNEY GENERAL

March 31, 1976

THE HONORABLE CHARLES W. HILL, Director
State Education Assistance Authority

This is in response to the following inquiry:

"Is there any legal impediment to the State Education Assistance Authority making an interest-free loan from its trust fund to the Virginia Education Loan Authority to be used by the latter either for operating expenses and/or interest payment reserve?"

The Virginia Education Loan Authority (VELA) is governed by §§ 23-38.30 to -38.44, Code of Virginia (1950), as amended. Section 23-38.33(c) grants to the VELA the power to borrow money for its purposes. Therefore, in my opinion the Virginia Education Loan Authority does have the authority to borrow money both for its operational needs and to fund an interest payment reserve. It is also my opinion, however, that the State Education Assistance Authority does not have the power to make an interest-free loan from its trust fund to the VELA for such purposes.

The State Education Assistance Authority was created by the General Assembly in 1960 to aid Virginia students attending institutions of higher education by insuring a percentage of individual loans made to them thus allowing a lower interest rate on such loans. Strict limitations are imposed on the State Education Assistance Authority in the use of its appropriation. In this regard § 9 of Chapter 494, [1960] Acts of Assembly 770, provided:

"The appropriation made to the Authority under this act shall be used exclusively for the purpose of acquiring contingent or vested rights in obligations which it may acquire under this act."

This limitation was relaxed to an extent by an amendment to § 9, Chapter 421, [1962] Acts of Assembly 681, which added the following language:

"[S]uch appropriations, payments, revenue and interest as well as other income received in connection with such obligations is hereby established as a trust fund. Such fund shall be used for the purposes of the Authority other than maintenance and operation."

Also, § 9-b(1) of the 1962 amendment granted the Authority power to invest and reinvest such trust funds, but limited such investments to those securities in which domestic life insurance companies could invest.

Sections 38.1-192 and 38.1-193 of the Code authorize investments by domestic life insurance companies in notes of the Commonwealth of Virginia and/or its political subdivisions, but limits such investments to instances where the full faith and credit of the State is behind the loan or the note is to be paid directly from tax revenues. Since § 23-38.33(c), which authorizes VELA's authority to borrow in anticipation of the issuance of bonds, provides that neither the full faith and credit of the Commonwealth nor the taxing power is pledged to payment, the VELA note would not, in my opinion, be a proper investment under § 9-b(1), Chapter 421, [1962] Acts of Assembly 682. For the foregoing reasons, your inquiry must be answered in the affirmative.


LOTTERIES—Essential Elements Of Illegal Lottery Are Prize, Chance And Consideration.
REPORT OF THE ATTORNEY GENERAL

STATUTES—Gambling Statutes Are Criminal And Must Be Strictly Construed.

CHARITABLE ORGANIZATIONS—Bingo Games, Raffles May Be Conducted By—Bass fishing contest.

May 3, 1976

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

This is in response to your request for an Opinion concerning whether a bass fishing contest would be an illegal lottery under Virginia Anti-Gambling Laws. You enclosed a copy of the entry blank for such contest which indicates that a prospective contestant is required to pay an entry fee to participate in the contest and that a monetary prize is given to the person who catches the largest fish during the year. You also indicate that the contest is being conducted by a private, nonprofit fishing club and that you understand that a considerable amount of skill is required to be a successful bass fisherman.

It has long been the law in Virginia that the essential elements of an illegal lottery are prize, chance and consideration. See *Maughs v. Porter*, 157 Va. 415, 161 S.E. 242 (1931). In the situation about which you inquire, it is clear that the elements of prize and consideration are present. It would appear, however, that winning the prize will depend upon more than mere chance, since it does require skill to be a successful bass fisherman, and the determination of the winner is based on the efforts and ability of the fishermen participating in the contest. Inasmuch as the gambling statutes are criminal, and must be strictly construed, I am of the opinion that this contest does not constitute an illegal lottery under Virginia law.

I would call your attention to § 18.2-333, Code of Virginia (1950), as amended, which specifically exempts from the statutory gambling prohibitions contests of speed or skill. It would appear that a bass fishing contest might come within the exemption of that section. I would also call your attention to § 18.2-335 which allows certain specified organizations to conduct bingo games and raffles, these organizations being primarily of a nonprofit, charitable nature. It is possible that the organization in question might qualify for a permit under that section, in which case such contest, even if construed to be a lottery, would be considered exempt.

LOTTERIES—Bingo—Political party committees not eligible for permit.

August 20, 1975

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

This is in reply to your recent letter wherein you inquire whether funds from the conduct of raffle or bingo games by a city or county political committee, assuming that such committee has applied for and obtained a permit from the governing body of the proper jurisdiction pursuant to the provisions of § 18.1-340, Code of Virginia (1950), as amended, may be used for the benefit of the committee and for general election campaign activities. The provisions of § 18.1-340(a) are made inapplicable to organizations specified in § 18.1-340(b). Organizations therein described include the following:

"A corporation, trust, church, association, community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, literary, community or educational purposes." (Emphasis added.)
A city or county political committee is an association organized for political purposes as distinguished from being organized exclusively for community or educational purposes, and does not fall within the definition and purpose of the other organizations set forth in that section. I am of the opinion, therefore, that such a political committee cannot qualify pursuant to the provisions of § 18.1-340 as an organization which may conduct raffles or bingo games. Consequently, it is unnecessary to respond to your inquiry respecting disposition of any funds derived from the described activity.

LOTTERIES—Bingo—Proceeds may not be used to pay expenses to conventions.

LOTTERIES—Bingo—Prohibitions on use of proceeds—Yacht Club.

July 31, 1975

THE HONORABLE CHARLES R. HAUGH
Commonwealth’s Attorney for Albemarle County

This is in reply to your recent letter wherein you state that a local civic improvement club and service organization desires to conduct a bingo game pursuant to the provisions of § 18.1-340 of the Code of Virginia (1950), as amended. You further state that the club plans to utilize the proceeds for community betterment projects as well as for its convention fund, which is used to pay the expenses of delegates from the local organization to State, National, and International conventions. You then inquire whether use of the proceeds for such convention purposes is violative of § 18.1-340.

The provisions of § 18.1-340(a) are made inapplicable to organizations specified in § 18.1-340(b) provided “that no part of the gross receipts derived from such activity inures directly or indirectly to the benefit of any private shareholder, member, agent, or employee of any such... organization.” In an Opinion to the Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated September 11, 1974, copy of which is enclosed, this Office ruled that the utilization of proceeds from the operation of bingo games for the maintenance and general benefit of a yacht club was a use of the proceeds in a manner to benefit the members of the club which violated the prohibition in § 18.1-340(b). Consistent with that ruling, I am of the opinion that use of proceeds from bingo games for convention purposes by club members also contravenes the aforesaid prohibition.

MAGISTRATES—Compatibility Of Offices—If magistrate’s husband accepts position of deputy sheriff, magistrate may not serve out remainder of term and is not eligible for re-appointment.

MAGISTRATES—Duties Of Are Incompatible With Those Of A Deputy Sheriff.

PUBLIC OFFICERS—Compatibility—Acceptance of an incompatible office vacates any other office which officer may hold.

PUBLIC OFFICERS—Compatibility—If magistrate’s husband accepts position of deputy sheriff, magistrate may not serve out remainder of term and is not eligible for re-appointment.

SHERIFFS—Compatibility—If magistrate’s husband accepts position of deputy sheriff, magistrate may not serve out remainder of term and is not eligible for reappointment.
REPORT OF THE ATTORNEY GENERAL

December 19, 1975

THE HONORABLE M. R. REAMY
Commonwealth’s Attorney for Spotsylvania County

This is in reply to your letter wherein you asked the following:
(1) Whether a magistrate’s husband may accept a position as a deputy sheriff of Spotsylvania County while she is a magistrate.
(2) Whether the magistrate may serve out the remainder of her term if her husband is employed as a deputy sheriff.
(3) Whether the magistrate would be eligible for reappointment upon the expiration of her term if her husband is employed as a deputy sheriff.

Section 19.2-37 Code of Virginia (1950), as amended, to which you referred, provides, in pertinent part, as follows:

“Any person may be appointed to the office of magistrate under this title subject to the limitations of Chapter 4 (§ 2.1-30 et seq.) of Title 2.1 of the Code and of this section.

“A person shall be eligible for appointment to the office of magistrate under the provisions of this title: (a) if such person or his spouse is not a law-enforcement officer or otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof; (b) if such person or his spouse is not a clerk, deputy or assistant clerk, or employee of any such clerk of a court not of record or police department or sheriff’s office in any county or city with respect to appointment to the office of magistrate of such county or city....” (Emphasis added.)

The provisions of § 19.2-37 expressly make ineligible for the office of magistrate an individual whose spouse is an employee of a sheriff’s office. In an Opinion to the Honorable Carter R. Allen, Commonwealth’s Attorney for the City of Waynesboro, dated February 13, 1959, found in Report of the Attorney General (1958-1959) at 156, it was ruled that the duties of a magistrate are incompatible with those of a deputy sheriff. Acceptance of an incompatible office vacates any other office which the officer may hold. Shell v. Cousins, 77 Va. 328 (1883).

Assumption of the position of deputy sheriff by the magistrate’s spouse would constitute the acceptance of an incompatible office and would violate the mandate of § 19.2-37. Such acceptance would operate as a surrender by the magistrate of her office and, therefore, she could not continue in office and serve out the remainder of her term. Pursuant to § 19.2-37 she would not be eligible for reappointment as long as her spouse was a deputy sheriff. Although § 19.2-30 provides that justices of the peace in office on December 31, 1973, may continue in office and shall be eligible for future appointment, notwithstanding the provisions of § 19.2-37, this “grandfather” clause would not be applicable to any case where the magistrate’s husband accepts a position as deputy sheriff after December 31, 1973.

This Opinion is consistent with an Opinion to the Honorable George C. Rawlings, Jr., Member, House of Delegates, dated August 22, 1967, and found in Report of the Attorney General (1967-1968) at 250-51, in which § 39-7, containing provisions similar to those in § 19.2-37, was interpreted.

MAGISTRATES—Compatibility Of Offices—Should not serve as city councilman.

PUBLIC OFFICERS—Compatibility—Magistrate should not serve as city councilman.
REPORT OF THE ATTORNEY GENERAL

January 2, 1976

THE HONORABLE RAYMOND C. ROBERTSON
Commonwealth's Attorney for the City of Staunton

This is in reply to your recent letter wherein you inquired whether a magistrate may serve as a city councilman in the same city in which he serves as magistrate. Section 19.2-17, Code of Virginia (1950), as amended, which prescribes eligibility for appointment to the office of magistrate, does not prohibit a magistrate from serving as a city councilman. This Office has previously ruled that a justice of the peace may serve as a city councilman. See Opinion to the Honorable Paul Shupe, Secretary and Treasurer, Newport News Justices of the Peace Association, dated December 4, 1969, and found in the Report of the Attorney General (1969-1970) at 150. This Opinion was consistent with earlier Opinions in which it had been ruled that a justice of the peace might lawfully serve as a town councilman. See Opinion to the Honorable Robert P. Good, Justice of the Peace, Shenandoah, dated June 16, 1953, and found in Report of the Attorney General (1952-1953) at 134; and Opinion to the Honorable A. F. Dize, Mayor, Cape Charles, dated April 30, 1932, and found in Report of the Attorney General (1931-1932) at 142.

In an Opinion to the Honorable John N. Lampros, Commonwealth's Attorney for the County of Roanoke, dated April 14, 1975, a copy of which is enclosed, it was ruled, however, that a magistrate should not serve on a county political committee. The Opinion referred to Canon 7, Canons of Judicial Conduct, which prohibits a judge from engaging in political activity. It was pointed out that, although Canon 7 was not expressly inclusive of magistrates, the reasoning behind the proscription was applicable to them. The purpose of Canon 7 is to maintain the independence of judges as well as to insulate them from possible bias in performing their judicial function. A magistrate is a judicial officer. See § 19.2-119. The prohibition in Canon 7 reflects a strong public policy against a judicial officer's engaging in political activity. Such activity by a judicial officer is incompatible with his office and for that reason, in my opinion, although there is no statutory bar to a magistrate's serving as a city councilman, he should not do so.

MAGISTRATES—Jurisdiction—May not exercise in newly created cities if elected in county—Justice of peace continuing in office pursuant to § 19.1-378.

JUSTICE OF PEACE—Continuing In Office Pursuant to § 19.1-378; May Not Exercise Jurisdiction In Newly Created Cities If Elected In County.

July 22, 1975

THE HONORABLE HUBERT D. BENNETT
Executive Secretary
Supreme Court of Virginia

This is in reply to your recent letter wherein you asked whether justices of the peace who are continuing in office as magistrates for the remainder of the term for which they were elected in Prince William County, as authorized in § 19.1-378 of the Code of Virginia (1950), as amended, may exercise jurisdiction in the newly created cities of Manassas and Manassas Park. These cities were created pursuant to the provisions of Chapter 22 of Title 15.1.

Section 19.1-393, provides that, with exceptions not applicable here, a magistrate shall exercise the powers conferred by Title 19.1 in the judicial
district for which he is appointed. The cities of Manassas and Manassas Park, of course, are still within the same judicial district as Prince William County although they are not now a part of the County. Because § 19.1-393 only refers to magistrates who have been appointed, I construe it to refer only to magistrates who have been appointed pursuant to the provisions of § 19.1-383 and not to justices of the peace who have chosen to continue in office pursuant to the provisions of § 19.1-378.

In my opinion, the magistrates elected in Prince William County may not exercise jurisdiction in the newly created cities. See § 19.1-393. Section 19.1-382 provides that there shall be at least one magistrate appointed for each county and city. Pursuant to the provisions of this section, a magistrate must be appointed for the City of Manassas and for the City of Manassas Park. Cf. Chapter 22, Title 15.1 of the Code.

MAGISTRATES—May Not Be Employee Of Federal Government.

FEDERAL EMPLOYEES—Compatibility—May not be magistrate.

FEDERAL EMPLOYEES—Sections 2.1-31 to -34 Specify Instances Where Federal Employees May Also Hold Office In Commonwealth.

PUBLIC OFFICERS—Conflict Of Interest—Magistrate may not be employee of Federal government.

May 7, 1976

THE HONORABLE CHARLES L. WADDELL
Member, Senate of Virginia

This is in reply to your recent letter wherein you inquired whether an employee of the federal government is eligible to hold the office of special magistrate. In an Opinion to the Honorable Sidney A. Allen, Justice of the Peace for Roanoke County, dated January 23, 1968, and found in Report of the Attorney General (1967-1968) at 215, it was held that pursuant to the provisions of § 2.1-30 of the Code of Virginia (1950), as amended, a justice of the peace was ineligible to hold office while serving as an employee of the Veterans Administration. That Opinion referred to earlier Opinions in which it was ruled that employees of the federal government were prohibited from serving as justices of the peace. Section 2.1-30 has not been amended since issuance of the Allen Opinion. Exceptions to § 2.1-30, found in §§ 2.1-31 to -34, are not applicable to the situation which you present. In my opinion, therefore, an employee of the federal government is ineligible to hold the office of special magistrate.

You also inquired what State offices may be held by employees of the federal government. Sections 2.1-31 to -34, copies of which are enclosed, specify instances in which federal employees may also hold office in the Commonwealth.

MAGISTRATES—May Not Serve As Mayor Of Town In Certain Instances.

COUNTIES, CITIES AND TOWNS—Compatibility Of Office—Magistrate should not serve as mayor of town.

COURTS—Constitutionality Of Mayor's Courts Or Courts Of Limited Jurisdiction.

JUDGES—Judicial Ethics—Individual may not serve both as elected member of city council and substitute judge for same jurisdiction.
MAGISTRATES—Compatibility Of Offices—Should not serve as city coun-
cilman.

MAGISTRATES—Should Not Seek Office Of Mayor Of Town During His Term As Magistrate.

PUBLIC OFFICERS—Commonwealth's Public Policy Against Combining Judicial And Political Functions.

PUBLIC OFFICERS—Compatibility—Canons of Judicial Conduct—Judge may not serve both as elected member of city council and substitute judge for same jurisdiction.

PUBLIC OFFICERS—Compatibility—Magistrate may not serve as mayor of town in certain instances.

PUBLIC OFFICERS—Compatibility—Magistrate should not serve as city councilman.

February 5, 1976

THE HONORABLE JAMES T. EDMUNDS
Member, Senate of Virginia

This is in reply to your letter wherein you inquired whether a magistrate might hold the office of mayor of a town.

In an Opinion to the Honorable Erwin S. Solomon, Commonwealth's Attorney for Bath County, dated November 29, 1972, and found in the Report of the Attorney General (1972-1973) at 456-58, it was ruled that mayor's courts might not be proper under Ward v. Village of Monroeville, 409 U.S. 57 (1972), if the mayor who was presiding as town judge had sufficient and substantial connections with the financial affairs of the town so as to prevent him from being an impartial judicial officer when presiding over offenses from which a portion of the town income might be derived.

Moreover, in an Opinion to the Honorable Raymond C. Robertson, Commonwealth's Attorney for the City of Staunton, dated January 2, 1976, a copy of which is enclosed, Canon 7 of the Canons of Judicial Conduct, which prohibits a judge from engaging in political activity, was cited in answering an inquiry relative to a magistrate's serving as a city councilman. It was pointed out that a magistrate is a judicial officer and that, although Canon 7 is not expressly inclusive of magistrates, the reasoning behind the proscription of the Canon is applicable to them and reflects a strong public policy against a judicial officer's engaging in political activity. In the Robertson Opinion, I ruled that a magistrate should not serve as a city councilman.

Consistent with the interpretation given Ward, supra, a magistrate may not hold the office of mayor of a town if he has sufficient and substantial connections with the affairs of the town so as to prevent him from being an impartial judicial officer in cases where a portion of the town income might be derived therefrom. Even if Ward, supra, is not controlling, although there is no statutory bar to a magistrate's serving as mayor of a town, he should not do so in light of the Commonwealth's public policy against combining judicial and political functions.

You also inquired whether a magistrate may seek the office of mayor during his term as a magistrate. In view of the foregoing, I am of the opinion that he should not do so inasmuch as his engaging in political activity in seeking the office of mayor would be inconsistent with his duties as a judicial officer.
MAGISTRATES—Must Reside In City For Which Appointed.

MAGISTRATES—May Issue Warrants Anywhere In Judicial District If Arrested Person Brought Before Him.

MAGISTRATES—May Issue Warrants In Both The City And County—Same judicial district.

WARRANTS—Magistrate May Issue Warrants Anywhere In Judicial District If Arrested Person Brought Before Him.

February 26, 1976

THE HONORABLE J. THOMPSON WYATT
Commonwealth's Attorney for the City of Petersburg

This is in reply to your recent letter wherein you inquired whether a magistrate appointed for the City of Petersburg must reside within the city limits. You pointed out that the magistrate now resides in the County of Dinwiddie and that both Petersburg and Dinwiddie County are in the Eleventh Judicial Circuit.

Section 19.2-37 of the Code of Virginia (1950), as amended, provides that a person appointed to the office of magistrate must be a resident of the county or city for which he is appointed to serve. The section further provides that the residency provision contained in the section shall not be a bar to the reappointment of any magistrate in office on July 1, 1973, provided that he is otherwise eligible. In my opinion, the magistrate for the City of Petersburg must reside in the City unless he resided in the County of Dinwiddie prior to July 1, 1973, and was a magistrate at that time.

You also inquired whether he would have authority to write warrants in both the City and the County. Section 19.2-44 provides that a magistrate shall exercise the powers conferred upon him by Title 19.2 in the judicial district for which he is appointed. In an Opinion to the Honorable Andrew G. Conlyn, Judge, General District Courts, Thirteenth Judicial District, dated December 30, 1975, copy of which is enclosed, it was ruled that a magistrate may issue warrants anywhere in the judicial district as long as the arrested person is brought before him. Pursuant to § 19.2-44, as construed in the foregoing Opinion, the magistrate may issue warrants in both the City and the County.

MAGISTRATES—Not Necessary That Magistrates Be Appointed In County Or City In Same Judicial District In Order To Act As Substitute.

MAGISTRATES—Need Not Be Physically Present In City Or County To Issue Warrant For Arrest In County Or City In Same Judicial District.

December 30, 1975

THE HONORABLE ANDREW G. CONLYN, Judge
General District Courts
Thirteenth Judicial Circuit

This is in reply to your recent letter wherein you pointed out that § 19.2-34 Code of Virginia (1950), as amended, provides that there shall be at least one magistrate appointed for each county and city and that § 19.2-44 provides that a magistrate shall exercise the powers conferred by Title 19.2 only in the judicial district for which he is appointed, except as provided in § 19.2-44.1. Section 19.2-44.1 provides as follows:

"When, due to death, sickness, vacation or inability to serve under
the provisions of § 19.2-37, a magistrate is not available in a county or city, the chief judge of the circuit having jurisdiction over the district may appoint one or more magistrates or substitute magistrates from any adjoining county or city within the judicial district to serve until such time as a duly appointed magistrate or substitute magistrate is again available to serve in such city or county."

You then inquired whether a duly appointed magistrate for one county or city is prohibited from serving in another county or city in the same district unless he has been specifically appointed to serve that county or city by the chief circuit judge pursuant to the provisions of § 19.2-44.1. In my opinion, § 19.2-44 authorizes a magistrate for one county or city to exercise his powers in any other county or city in that district, and it is not necessary that such magistrate be appointed pursuant to the provisions of § 19.2-44.1 by the chief circuit judge to serve in other counties or cities in the district. Section 19.2-44.1 merely provides specifically for the exercise of authority by a magistrate in another county or city in cases of death, sickness, vacation or inability to serve when appointed so to act by the chief circuit court judge.

You also inquired whether a magistrate appointed by a chief circuit judge pursuant to the provisions of § 19.2-44.1 to serve as a substitute magistrate for a county in the same district must be physically present in such county to issue warrants. Section 19.2-82 provides that a person arrested without a warrant "shall be brought forthwith before an officer authorized to issue criminal warrants in the county or city where the arrest is made." I construe the words, "in the county or city where the arrest is made," as referring to the authority of the officer rather than his physical location. The section merely requires that an arrested person be brought before an officer having jurisdiction in the county or city in which the arrest is made and does not require such officer to be actually present in that county or city. In my opinion, therefore, it is not necessary that a magistrate appointed pursuant to the provisions of § 19.2-44.1 appear physically in the county or city in which he is acting as a magistrate in order to issue warrants for arrests made in that locality.

MARINE RESOURCES COMMISSION—Authority To Place Pilings And Make Repairs To Existing Pier Extending Over Public Oyster Grounds—Riparian lands of American Oil Company.

MARINE RESOURCES COMMISSION—Permit Not Required To Make Repairs To Existing Pier Extending Over Public Oyster Grounds—Riparian lands of American Oil Company.

OYSTERS—Authority To Place Pilings And Make Repairs To Existing Pier Extending Over Public Oyster Grounds—Riparian lands of American Oil Company.

WATER AND WATERCOURSES—Authority To Place Pilings And Make Repairs To Existing Pier Extending Over Public Oyster Grounds—Riparian lands of American Oil Company.

September 29, 1975

THE HONORABLE GEORGE W. GRAYSON
Member, House of Delegates

This is in response to your recent letter in which you ask whether the Marine Resources Commission may, pursuant to its authority to grant permits for subaqueous encroachments upon State-owned bottoms, con-
tained in § 62.1-3, Code of Virginia (1950), as amended, authorize placement of one or more pilings upon public oyster grounds in the York River. It is my understanding that the proposed construction of pilings will be associated with repairs, maintenance and structural improvements to an existing pier structure which extends from the riparian lands of the American Oil Company at Yorktown. It is my further understanding that the existing pier presently extends over public oyster grounds and that existing pier support pilings encroach upon the same public oyster grounds.

The natural public oyster grounds of the Commonwealth are afforded special protection in Article XI, Section 3, of the Constitution of Virginia (1971), as follows:

"The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth, subject to such regulations and restriction as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise."

Virginia law has long recognized the common law right of a riparian landowner to construct a pier or wharf opposite his riparian lands, subject to reasonable State regulation. Taylor v. Commonwealth, 102 Va. 759 (1904). This common law riparian right was codified as a portion of § 62-139 of the Code which provided:

"Any person owning land upon a watercourse may erect a wharf on the same, or a pier or bulkhead, in such water course opposite his land, provided, navigation be not obstructed, nor the private rights of any person be otherwise injured thereby..." (Emphasis added.)

This statutory right has been subsequently modified in the Code, as amended, so as to limit its authorization to noncommercial piers of riparian owners. See §§ 62.1-164 and 62.1-3(10). The general rule is that statutes are prospective in the absence of an express provision by the legislature. Burton v. Seifert Plastic Relief Co., 108 Va. 338 (1908). The existing American Oil Company pier was constructed over public oyster grounds in 1954 pursuant to authority of § 62-139, the previously applicable statute. In an unreported opinion to the Honorable Thomas B. Stanley, Governor of Virginia, dated September 17, 1954, a copy of which is enclosed, Attorney General J. Lindsay Almond, Jr., concluded that the construction of a riparian owner's pier in public oyster grounds, pursuant to authority conferred by § 62-139 quoted above, did not conflict with the provisions of then Section 175 of the Constitution, now set forth as Article XI, Section 3. I concur in that opinion.

I further conclude that the authority conferred upon riparian owners by common law and statute, authorizing the construction of piers in waters opposite riparian lands, necessarily includes the right to repair and maintain such piers. The proposed encroachments upon State-owned bottoms in this instance involves construction of pilings entirely within the confines of the existing pier for purposes of repairing and maintaining that pier. Accordingly, I would advise that the proposed construction is authorized by the common law and statutory rights of riparian owners referred to above and, is not in violation of the provisions of Article XI, Section 3, of the Constitution. Taylor v. Commonwealth, supra; §§ 62.1-164 and 62.1-3(10) of the Code.

Inasmuch as § 62.1-3 of the Code requires issuance of a Marine Resources Commission permit for subaqueous encroachments only in the instance where such encroachments are not otherwise statutorily authorized, I am further of the opinion, in view of the statutory and common law authority conferred
upon riparian owners to construct and maintain piers, that the proposed construction of pilings in this instance does not require issuance of a Marine Resources Commission permit.

MARINE RESOURCES COMMISSION—Sales Tax On “Royalties” Assessed In Issuing Permits For Removal Of State-owned Subaqueous Bottom Lands.

DEFINITIONS—“Sale” As Used In Sales And Use Tax Statutes.

DEFINITIONS—“Tangible Personal Property” As Used In Sales And Use Tax Statutes.

REAL ESTATE—Subaqueous Bottom Land Is Real Estate At Moment Right To Remove It Arises.

TAXATION—Sales Tax—If transfer of title or possession occurs before realty has been severed to become tangible personal property, transaction not subject to.


WATER AND WATERCOURSES—Subaqueous Bottom Lands—Removal to facilitate navigation or other purposes not using material removed; not taxable sale.

WATER AND WATERCOURSES—Subaqueous Bottom Lands—Sales tax on “royalties” assessed in issuing permits for removal of such State-owned land.

February 20, 1976

THE HONORABLE JAMES E. DOUGLAS, JR.
Commissioner
Marine Resources Commission

This is in reply to your letter wherein you ask whether the Marine Resources Commission is required by law to collect sales tax on the “royalties” assessed in connection with the issuance of permits authorizing the removal of State-owned subaqueous bottom lands. Pursuant to § 62.1-3, Code of Virginia (1950), as amended, the Commission is required to assess a “royalty” of at least ten cents, but not to exceed thirty cents, per cubic yard of bottom land removed. It is my understanding that under some circumstances the permittee requesting the right to remove bottom makes no use of the bottom material removed; in other instances the request for permit authority to remove bottom is for the specific purpose of obtaining commercial use.

Section 58-441.1 to -441.51 provide for the imposition, assessment and collection of sales and use taxes upon sales of tangible personal property. Section 58-441.2(b) defines the term “sale” to mean “any transfer of title or possession, or both...in any manner or by any means whatsoever, of tangible personal property and any rendition of a taxable service for a consideration...” Section 58-441.3(1) defines tangible personal property to mean and include “personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses.”

The sales tax does not apply to transfers of title to or possession of real property. Only after a part of the realty has been severed, does it become tangible personal property and, if a transfer of title or possession occurs before that moment, the transaction is not subject to the sales tax.
It is clear from the facts of your inquiry that the bottom material about which you inquire is real estate at the moment the right to remove it arises. In instances where removal of the material is for the use of the removing party, the “royalty” charged per cubic yard of material removed constitutes consideration for the transfer of a right to remove real property which is not taxable. In instances where the removal is accomplished to facilitate navigation or for other purposes not contemplating reuse of the material removed, I am likewise of the opinion that no taxable sale occurs.

MARRIAGE AND DIVORCE—Divorce Decree Of Circuit Court Ratified, Confirmed, And Incorporated By Reference A Private Custody And Support Agreement.

SUPPORT ACT—Divorce Decree Of Circuit Court Ratified, Confirmed, And Incorporated By Reference A Private Custody And Support Agreement.

THE HONORABLE ROBERT F. WARD, Judge
Pittsylvania Juvenile and Domestic Relations District Court

This is in reply to your recent letter in which you asked whether § 20-79(a), Code of Virginia (1950), as amended, divests your court of jurisdiction in support and custody matters when a circuit court in a divorce proceeding has entered a decree wherein a private agreement concerning custody and support is filed with the papers or is ratified, confirmed, and incorporated by reference.

Section 20-109.1 of the Code permits a circuit court to incorporate a private agreement on support and custody matters into its decree dissolving a marriage or a decree of divorce, whether from bonds of matrimony or from bed and board. This section provides that, if a circuit court affirms, ratifies, and incorporates into its decree any valid agreement between the parties, or provisions thereof, concerning these matters, such affirmation, ratification, and incorporation in the decree shall for all purposes cause such an agreement or provision thereof to be a term of the decree and enforceable in the same manner as any other provision thereof. If, therefore, any circuit court ratifies and confirms and incorporates by reference in its decree a private separation agreement concerning custody and support, § 20-79(a) would divest your court of jurisdiction of further custody and support matters until such time as the circuit court refers these matters to you pursuant to § 20-113.

You cite the case of Eaton v. Eaton, 215 Va. 824 (1975), in which the Supreme Court of Virginia seemed to differentiate between a property settlement and support agreement which had been “filed with the papers in this cause” as opposed to being ratified, confirmed, and incorporated. A reading of that decision indicates that the decree granting divorce from bed and board in April of 1971 provided that a copy of a property settlement and support agreement “be filed with the papers in this cause.” When a decree of divorce from the bonds of matrimony was entered in March of 1972, the provisions of the property settlement and support agreement of April, 1971, were altered. The essence of your question would seem to be an interpretation of the language “be filed with the papers in this cause.” It is my opinion that, in order for the provisions of § 20-109.1 to apply, the circuit court, in dissolving a marriage or decree of divorce, must include the words “affirm, ratify, and incorporate” or words of similar import in its decree before the provisions of this section will apply. Therefore, the language that the property settlement be “filed with the papers in this cause,” standing alone, would not have the effect of causing the private
agreement concerning custody and support to become a term of the final decree and would not divest your court of jurisdiction in such matters.

In your letter you refer me to the recent case of *Oedekoven v. Oedekoven*, 538 P.2d 1292 (Wyo. 1975). In that case, the defendant was held in contempt of Court for not making certain payments as set out in an agreement between the parties. In reversing the judgment, the Wyoming Supreme Court held that, where the lower court simply ratifies and confirms the private agreement, such action amount to no more than judicial approval of the agreement, and cannot be construed as a command to pay. Consequently, the Court held there was no contempt as no order of the Court had been violated. Section 20-109.1 deals with this very matter by providing that “[w]here the court affirms, ratifies and incorporates in its decree such agreement or provision thereof, it shall be deemed for all purposes to be a term of the decree, and enforceable in the same manner as any provision of such decree.” (Emphasis added.)

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**MAYOR**—Assigning Mayoral Duties To Council Members During Temporary Absence—Actual vacancy in office.

**CHARTERS**—Constitution Of 1971 Prevails Over Town Charter—Filling vacancy in office of Mayor.

**CHARTERS**—Vacancy Left By Mayor’s Death—Filling of governed by town charter.

**CONSTITUTION**—Prohibits Election Or Appointment By A Local Governing Body Of One Of Its Members To Any Office.

**ELECTIONS**—Town Council Without Authority To Call Special Election To Fill Vacancy In Office Of Mayor, Absent Specific Charter Provisions.

**PUBLIC OFFICERS**—Member Of Council Ineligible To Serve As Mayor But His Actions Valid Under *De Facto* Officer Doctrine.

**TOWNS**—Vacancy In Office Of Mayor—Prohibition against member of council being appointed.

April 29, 1976

**THE HONORABLE JAMES T. EDMUNDS**
Member, Senate of Virginia

I am responding to your inquiries concerning a vacancy in the office of mayor in the Town of Kenbridge. The facts, as I understand them to be, are that the prior mayor died in office several months ago and the town council appointed another member of the council, the vice mayor, as acting mayor. The town charter provides that “[a] vacancy in the office of the mayor may be filled by the council from the electors of said town.”

You raise the following questions:

1. Can the council appoint one of its own members as mayor in light of Article VII, Section 6, of the Constitution of Virginia?
2. Are the actions of the acting mayor valid in view of Article VII, Section 6, of the Constitution?
3. Can the council appoint one of its own members to act as mayor temporarily and, if so, for how long?
4. Must the council appoint a nonmember mayor, or can it call a special election?

I will respond to your questions *seriatim*:

1. Article VII, Section 6, of the Constitution of Virginia (1971) provides in pertinent part that:
REPORT OF THE ATTORNEY GENERAL

"... No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law."

This section prohibits the election or appointment by a local governing body of one of its members to any office, with certain exceptions not relevant to your inquiry. It is one of the most stringent provisions of its kind among State constitutions, and is derived from Sections 113 and 121 of the prior Constitution, which were codified in § 15.1-800 of the Code. This Office has held that the position of town mayor is one of the offices within the purview of the statute. See Opinion to the Honorable Paul B. Ebert, Commonwealth's Attorney for Prince William County, dated May 8, 1967, and found in Report of the Attorney General (1966-1967) at 316.

Many charters granted prior to the 1971 Constitution do contain provisions contrary to this prohibition; such provisions were validly enacted because Section 117 of the prior Constitution gave to the General Assembly exclusive charter-making powers "without regard to, and unaffected by any of the provisions of this [local government] article." See Section 117(b), Constitution of Virginia (1902). The Virginia Supreme Court, for example, has ruled that this language empowered the General Assembly to grant a charter specifying different reapportionment dates from those required by Section 121 of the same Article, Davis v. Dusch, 205 Va. 676 (1964); and that the provisions of Section 117 were so broad that they would prevail over conflicting constitutional provisions located outside of the local government article as well, Pierce v. Dennis, 205 Va. 478 (1964). The 1971 constitutional revision, however, deleted the exclusivity language of Section 117 and transferred the prohibition against dual officeholding to a position of greater prominence in Article VII, Section 6. This change suggests that, while the preemption of constitutional provisions outside of the local government article by Article VII, Section 2, continues, the same preemption no longer obtains within the local government article. Consequently, I am of the opinion that the prohibitions of Article VII, Section 6, do control all General Assembly legislation in the local government area, whether general or special.

The Supreme Court of Virginia has ruled, even within the constraints of the prior Constitution, that local government offices were subject to prohibitions upon dual officeholding set forth outside of the local government article of that Constitution. Richmond v. Lynch, 106 Va. 324 (1907). Thus, under the 1971 Constitution, the prohibitions of Article VII, Section 6, now prevail over town charter provisions allowing appointment of council members to a mayoral vacancy. Your first inquiry is answered in the negative.

2. Although the mayor is holding office in contravention of the Constitution, his actions would be valid under the de facto officer doctrine. See Report of the Attorney General (1972-1973) at 515; Owen v. Reynolds, 172 Va. 304 (1939); Griffin's Executor v. Cunningham, 61 Va. (20 Gratt.) 31 (1870). Of course, once the failure of qualification is known, the vice mayor can no longer act as mayor.

3. Assigning mayoral duties to council members during the temporary absence or disability of the mayor is a common practice. It is statutorily authorized by § 15.1-827, which allows appointment of a president pro tempore in the absence of the mayor. So long as the absence or disability does not become an actual vacancy, this practice does not violate Article VII, Section 6, since the council members cannot be said to "hold" the office. The determination whether an individual is acting during an "absence or disability" or is filling a vacancy must be made on the facts of each individual case. It is clear, however, that when a mayor dies, the office becomes vacant, and must be filled according to the provisions of § 24.1-76 in the
absence of express charter provisions to the contrary. Accordingly, the answer to this question is in the negative.

4. Filling of the vacancy left by the prior mayor's death is governed by the town charter, which provides, in pertinent part, that "[a] vacancy in the office of the mayor may be filled by the council from the electors of said town." The council, therefore, fills the vacancy by appointment since the vacancy occurred during a term and is still existing due to the invalidity of the council's appointment of the vice mayor to fill the position. Absent specific charter provisions, of which I am unaware, I know of no authority which allows the town council to call a special election.

MEDICAL COLLEGE OF VIRGINIA—Contract Between Hospital And Virginia Hospital Laundry, Inc. For Twenty Years, Not New Activity Within Meaning Of § 189.

CONTRACTS—Continuation Of Laundry Service Which Medical College Of Virginia Hospital Has Been Receiving, Not New Activity Within Meaning Of § 189—Neither legislative nor gubernatorial authorization required.

MEDICAL COLLEGE OF VIRGINIA—Laundry Services Procured Through Facilities Of Virginia Correctional Center For Women.

STATE AGENCIES—Utility And Laundry Services Provided By One State Agency To Another Subject To Regulations Approved By Governor—Nonstock, nonprofit corporation providing laundry services is not State agency.

March 5, 1976

THE HONORABLE OWEN B. PICKETT
Member, House of Delegates

This is in response to your recent request for my opinion whether an October 1, 1974, laundry services contract between the Medical College of Virginia Hospitals (MCVH) and Virginia Hospital Laundry, Inc., (VHL) violates Chapter 681, §§ 189 and 202, [1974] Acts of Assembly 1438, 1442. This contract provides that MCVH will utilize VHL's laundry services exclusively for a term which is in excess of twenty years. MCVH intends to discontinue use of laundry services currently being provided at the Correctional Center for Women in Goochland County, Virginia. Section 189 provides:

"No State agency shall begin any new activity that will call for future additional capital outlay or that will require an increase in subsequent general or special fund operating expenses without first obtaining the authorization of the General Assembly. However, the Governor may in writing authorize new activities within the amounts and general purposes of the appropriations authorized by this act, provided that he shall report such new activities to the General Assembly at its next session for such action as it may deem proper." (Emphasis added.)

MCVH has historically been receiving laundry services from the Correctional Center for Women (previously the State Industrial Farm for Women). The contract about which you inquire relates to the provision of the same services by VHL. Because the contract provides for continuation of laundry service which MCVH had been previously receiving, I am of the opinion that it does not constitute a new activity within the meaning of
§ 189. Neither legislative nor gubernatorial authorization, therefore, was required under that section.

Your second inquiry relates to § 202 which provides:

"Utility and laundry services provided by one State agency to another shall be subject to charges and regulations approved by the Governor."

VHL is a nonstock, nonprofit corporation formed for the purpose of providing laundry services to MCVH and other area hospitals. Because VHL is not a State agency, § 202 is inapplicable to its services.

MENTAL HEALTH AND MENTAL RETARDATION—Board Member May Not Serve More Than Two Successive Terms But May Be Appointed Once Any Intervening Period Has Elapsed.

March 5, 1976

THE HONORABLE WILLIAM S. ALLERTON, Commissioner
Department of Mental Health and Mental Retardation

This is in reply to your recent request for an opinion concerning how long a person who has served two consecutive terms on a community mental health and mental retardation services board must remain off the board before he can be reappointed.

Section 37.1-196 of the Code of Virginia (1950), as amended, provides, in pertinent part, that:

"No person shall be eligible to serve more than two successive three-year terms; provided that persons heretofore or hereafter appointed to fill vacancies may serve two additional successive terms."

The prohibition set forth in this section is against more than two successive terms and, consequently, there is no bar to an individual's appointment to the board once any intervening period of time has elapsed subsequent to the end of his initial terms of service. Cf. § 63.1-39.

MENTALLY ILL—Commitment—Director of facility may detain person pursuant to order of temporary detention—Involuntary commitment proceeding.

MENTAL HYGIENE AND HOSPITALS—Authority Of Superintendent Over Voluntary Patients.

May 28, 1976

THE HONORABLE BEVERLY T. FITZPATRICK
Chief Judge, City of Roanoke General District Court

This is in response to your letter requesting my opinion whether the director of a facility for the treatment of the mentally ill has the authority to detain a person against his wishes where the person has consented in writing, pursuant to § 37.1-67.1 of the Code of Virginia (1950), as amended, to voluntary admission and a minimum period of treatment of 72 hours.

Section 37.1-67.1 of the Code, which was enacted in 1974, provides, among other things, that when a person against whom involuntary commitment proceedings have been instituted is initially brought before a justice, the justice shall:

"...[I]nform him of his right to make application for voluntary
admission and treatment as provided for in § 37.1-65 prior to any [involuntary commitment] hearing...and shall afford such person an opportunity for voluntary admission. The justice shall hold a preliminary hearing to ascertain if such person is then willing and capable of seeking voluntary admission and treatment. If the person requests or accepts voluntary admission and treatment, the justice shall require the person to sign an application for voluntary admission and minimum period of treatment. The form of which shall be approved by the Attorney General and such person shall be subject to the transportation provisions as provided in § 37.1-71...."

Prior to the enactment of § 37.1-67.1, I ruled that the director of a facility had no authority, by virtue of § 37.1-65, to detain a person who had been admitted voluntarily pursuant to that statute after that person had effectively revoked his consent to hospitalization. See Report of the Attorney General (1971-1972) at 263. Since the person in question in the instant case was also admitted voluntarily pursuant to § 37.1-65, I am of the opinion that the director has no statutory authority to detain that person after he has effectively revoked his consent to hospitalization.

Section 37.1-67.1 also provides, however, that:

"...Any such justice may on his own motion based on probable cause issue [a temporary detention] order as to any person fourteen years or older...reliably reported to him to be mentally ill and in need of hospitalization. The officer executing the order of temporary detention may do so without having the order in his possession. Whenever the alleged mentally ill person cannot be conveniently brought before any justice forthwith, the officer executing the order of temporary detention shall place such person in some convenient and willing institution or other willing place approved by the Board for a period not to exceed forty-eight hours prior to hearing:...."

Based upon that statutory language, I am of the opinion that the person in question may be detained, pursuant to an order of temporary detention, so as to place him within forty-eight hours before a justice with respect to an involuntary commitment proceeding.

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MINORS—Section 32-137(6) Permits Minors To Obtain Treatment Or Tests For Venereal And Other Infectious Diseases Without Parents’ Consent.

HEALTH—Information And Reports On Persons With Venereal Diseases Furnished To Health Officers Shall Be Inaccessible To Public; § 32-101—Parents of minors in same category as general public.

VIRGINIA FREEDOM OF INFORMATION ACT—Parents Of Minors In Same Category As General Public—Section 32-137(6) permits minors to obtain treatment or tests for venereal and other infectious diseases without parents’ consent.

July 24, 1975

THE HONORABLE FRANK W. NOLEN
Member, Senate of Virginia

This is in reply to your recent inquiry about which section of the Code of Virginia requires or permits the Health Department to withhold information regarding treatment for venereal disease from parents who call the Health Department to ask whether their child has received such treatment. Section 32-137(6) of the Code of Virginia (1950), as amended, provides in pertinent part as follows:
"Any person under the age of eighteen years may consent to medical or health services needed to determine the presence of or to treat venereal disease, or any infectious or contagious diseases reportable under the laws of the Commonwealth of Virginia."

This statute permits minors to obtain treatment or tests for venereal and other infections or contagious diseases without their parents' consent and, by implication, without their knowledge. Records of these events kept by the local health departments are public records but they are not necessarily accessible to citizens generally.

The Virginia Freedom of Information Act favors as a general policy that public records be open to inspection and copying by any citizen of the Commonwealth. It does not afford disclosure to telephone inquirers. See § 2.1-342 of the Code. The General Assembly has legislated exceptions to the coverage of the Act both within the Act and elsewhere in the Code. In 1975 the General Assembly amended the exception on medical and scholastic records found in the Virginia Freedom of Information Act. Section 2.1-342, as recently amended, provides in pertinent part as follows:

"(a) Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this State during the regular office hours of the custodian of such records. . . . (Emphasis added.)

"(b) The following records are excluded from the provisions of this Chapter:  *  *  *

"(3) State income tax returns, medical and mental records, scholastic records and personnel records, except that such access shall not be denied to the person who is the subject thereof, and medical and mental records, except that such records can be personally reviewed by a physician of the subject person's choice. Where the person who is the subject of scholastic or medical and mental records is under the age of eighteen, his right of access may be asserted only by his parent or guardian, except in instances where the person who is the subject thereof is an emancipated minor or a student in a state-supported institution of higher education." (Emphasis added.)

This section would seem to permit the inspection of certain minors' medical records in local health departments by their parents. It is still necessary, however, to examine State law for any statutory authority on the subject of such records which may exist outside the Virginia Freedom of Information Act.

Section 32-101 of the Code provides as follows:

"All information and reports concerning persons infected with venereal diseases furnished to health officers shall be filed by them until finally disposed of by burning, but they shall be kept inaccessible to the public except insofar as publicity may attend the performance of the duties imposed by the laws of the State." (Emphasis added.)

This statute constitutes a further exception to the coverage of the Virginia Freedom of Information Act. Because § 32-137(6) of the Code enables minors to be diagnosed or treated for venereal diseases without parental approval, the General Assembly has placed the parents in question in the same category as members of the general public. With respect to their access to records of such diagnoses or treatments, § 32-101 of the Code is applicable. Consequently, parents of minors so diagnosed or treated may not obtain information relating thereto from the Health Department.
REPORT OF THE ATTORNEY GENERAL

MINORS—Special Work Permit—Requirements for issuance of.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Work Permit Issued To Minor—Requirements for.

VIRGINIA CHILD LABOR LAW—Memorandum Form Reciting Authority Of Court To Issue Work Permit To Minor.

July 23, 1975

THE HONORABLE ROBERT F. WARD, Judge
Pittsylvania Juvenile and Domestic Relations District Court

Your inquiry of July 2, 1975, requests my opinion regarding a proposed memorandum form to be used in your court for prospective employers in connection with the issuance of special work permits under § 16.1-158(6) of the Code of Virginia (1950), as amended. The proposed memorandum reads as follows:

"Section 16.1-158(6), Code of Virginia (1950), provides that where a child over whom the court has jurisdiction (e.g., under 18 years of age) is not qualified to obtain a work permit under other provisions of law, the court may, in the sound judicial discretion of the judge, grant a special work permit to such child.

"The Code permits only that the special work permit may lower the age requirements for a specific job, and this only where the employer is not engaged in interstate commerce. A special work permit does not permit increased hours of work nor dangerous machinery/hazardous occupations exceptions to employment regulations affecting minors.

"The statutory criteria of judicial discretion is the best interest of the child and concerns itself with financial need, academic standing, physical condition and emotional maturity.

"The undersigned employer, by signature hereof, acknowledges that he is familiar with the requirements of the Virginia Child Labor Law, and with this memorandum and that they conform to the employment requirements, hours of work, and permitted occupation for the proposed employment of a minor named ________________________.""
MOBILE HOMES—Taxation—Placed on permanent foundation is no longer “mobile home”—Taxed as real property.

TAXATION—Assessment Erroneous—Mobile home license levy must be refunded; placed on permanent foundation is no longer “mobile home”—Taxed as real property.

TAXATION—Mobile Home Placed On Permanent Foundation Is No Longer “Mobile Home”—Taxed as real property.

UNIFORM STATEWIDE BUILDING CODE—Mobile Homes—Placement on permanent foundation prohibited.

August 1, 1975

THE HONORABLE H. MARTIN ROBERTSON
Commonwealth's Attorney for Prince George County

This is in response to your recent letter requesting my opinion on the following questions:

“1. Does either § 36-71 of the Code of Virginia (1950), as amended, or Section 401 of the 1974 Accumulative Supplement to the Virginia Uniform Statewide Building Code or any other State law or regulation prohibit the placement of a mobile home, manufactured on or after January 1, 1972, on a permanent foundation?

“2. If the answer to Question 1 is 'yes,' and inasmuch as the mobile home was placed on a permanent foundation after § 36-71 became law, shall the County assess the mobile home as personal property or as real estate?

“3. If the real estate levy upon the mobile home in 1974 was erroneous or the imposition of the 1975 mobile home license was erroneous, must the erroneous levy be refunded?”

You state in your letter that the above questions arose from the following factual situation:

“In 1972, a person placed a mobile home on a parcel of land. The mobile home was manufactured in 1972. There appears on the mobile home a decal stipulating that it meets American National Standards Institute Standard 119.1. In addition, there is a decal on the mobile home which stipulates that the mobile home was manufactured in accordance with the safety standards-industrialized building units adopted by the State Corporation Commission in accordance with § 36-70, et seq., of the Code of Virginia (1950), as amended.”

“Since placing the mobile home on the lot, the owner, without proper permits, has performed the following tasks:

“1. Constructed an A-frame roof on the mobile home;

“2. Constructed an addition 12 feet by 28 feet. (It appears that the addition was constructed in accordance with the ‘One and Two Family Dwelling Code,’ 1971 Edition, of the Virginia Uniform Statewide Building Code); and

“3. Placed the mobile home on a permanent foundation, which foundation was constructed in accordance with the ‘One and Two Family Dwelling Code,’ 1971 Edition, cited above.

“In 1974 the mobile home was assessed as real property and the taxes thereon were paid by the owner. For the tax year 1975 the owner has obtained the required mobile home license and annual permit as required by Chapter 19 of the County Code. A mobile home license was not obtained in 1974 because (1) Chapter 19 of the County Code at that time stipulated that where land and the mobile home were
owned by the mobile home occupant it was exempt from the license tax; and (2) it was assessed and taxed as realty.”

In response to your first question, Section 202-1, Stabilizing System, of the Virginia Industrialized Building Unit and Mobile Home Safety Regulations (1974 Edition), promulgated by the State Corporation Commission, provides, in part, that:

“Mobile homes shall not be permanently anchored to foundations. Further, if a mobile home is to be used at one location for a protracted period, a system of stabilizing devices conforming to accepted engineering practice shall be used.” (Emphasis added.)

The Office of Building Inspection in a locality may enforce the regulations promulgated by the State Corporation Commission under the authority of the Virginia Industrialized Building Unit and Mobile Home Safety Act. See § 36-81 of the Code of Virginia (1950), as amended, and § 103-1 of the Virginia Industrialized Building Unit and Mobile Home Safety Regulations. I am, therefore, of the opinion that the answer to your first question is in the affirmative. A mobile home, manufactured on or after January 1, 1972, may not be placed on a permanent foundation. See Opinion of the Attorney General to the Honorable Lawrence H. Hoover, Jr., County Attorney for Rockingham County, dated April 24, 1975, a copy of which is enclosed.

In response to your second question, although the answer to your first question is in the affirmative, since the mobile home you refer to has been placed on a permanent foundation with rooms added, all constructed in accordance with the provisions of the Uniform Statewide Building Code (One and Two Family Dwelling Code), I am of the opinion that the “mobile home” has become so inextricably attached to real property that it no longer falls within the definitions of “mobile home” or “trailer” as set forth in §§ 36-71 or 35-64.3, respectively, of the Code of Virginia and that it must be taxed as real property. See Opinion of the Attorney General to the Honorable John A. B. Davies, Commissioner of Revenue for the County of Culpeper, dated February 14, 1975, a copy of which is enclosed.

In response to your third question, § 58-1141 of the Code provides that any person assessed by the commissioner of the revenue with a local license tax may apply to the commissioner of the revenue who made the assessment for a correction thereof. Section 58-1142 of the Code further provides that, if the commissioner of the revenue is satisfied that he has erroneously assessed such applicant with such a levy, he shall correct such assessment, and sets forth the procedures by which he does so. Based upon the foregoing, it is my opinion that, upon proper application of the owner of the “mobile home”, the erroneous 1975 mobile home license levy must be refunded.

MOTOR VEHICLES—Air Pollution Control System Required By § 46.1-301.1 On All 1973 And Later Models—Applies to 1973 model with replaced motor.

DEFINITIONS—“Motor Vehicle” Defined In § 46.1-1(15); “Vehicle” Defined In § 46.1-1(34)—Air pollution control system.

July 29, 1975

The Honorable Raymond R. Robrecht
Member, House of Delegates

This is in reply to your recent letter in which you request my opinion whether § 46.1-301.1 of the Code of Virginia (1950), as amended, applies to a 1973, or later, model automobile body in which a motor manufactured prior to 1973 without air pollution controls is used.
Section 46.1-301.1 of the Code states, in part, the following:

“(a) No motor vehicle registered in this State and manufactured for the model year nineteen hundred seventy-three or for subsequent model years shall be operated on the highways of this State unless it is equipped with an air pollution control system or device, or combination of such systems or devices, such as a crankcase emission control system or device, exhaust emission control system or device, fuel evaporative emission control system or device, or other air pollution control system or device which has been installed in accordance with federal laws and regulations.

“(b) It shall be unlawful for any person to operate a motor vehicle, as herein described, on the highways of this State with the pollution control system or device removed or otherwise rendered inoperable.”

The word “vehicle” is defined in § 46.1-1(34) of the Code to mean: “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.” A “motor vehicle” is defined in § 46.1-1(15) of the Code essentially as a “vehicle as herein defined which is self-propelled or designed for self-propulsion.” I interpret § 46.1-301.1 of the Code to mean that any motor vehicle registered in this State and manufactured for the model year 1973, or a subsequent model year, must be equipped with the required air pollution control system if it is operated on the highways of this State.

The model year is based on the body design. The identification number, which designates the identification of a motor vehicle on any certificate of title issued in this State, is found on the body of the vehicle and not on the motor. Thus, changing the motor does not change the identification of the motor vehicle. A motor vehicle manufactured for the model year 1973 retains its original identity, including the model year, even if its motor is replaced. When these facts are considered in conjunction with the quoted language from § 46.1-301.1 of the Code, supra, it is my opinion that this statute applies to the “model year nineteen hundred seventy-three or for subsequent model years” regardless of whether the motor is replaced. Accordingly, your question is answered in the affirmative.

MOTOR VEHICLES—Appeal From Finding Of “Unreasonable Refusal” Of Blood Or Breath Test—Same as appeal of misdemeanor conviction under § 18.1-55.1(p)—Right to jury trial.

CRIMINAL PROCEDURE—Appeal From Finding Of “Unreasonable Refusal” Of Blood Or Breath Test—Same as appeal of misdemeanor conviction under § 18.1-55.1(p)—Right to jury trial.

July 3, 1975

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

This is in reply to your recent letter from which I quote the following:

“A motorist appeals to the Circuit Court from a revocation of his operator's license for ninety days by the District Court for unreasonable refusal to take a blood test by breath or blood analysis pursuant to § 18.1-55.1 of the Code of Virginia (1950), as amended.

“Considering the decision in Deaner v. Commonwealth, 210 Va. 285, the express language of § 18.1-55.1(m) and (n) of the Code, the express language of Federal and State Constitutions relative to criminal
trials, and numerous United States Supreme Court cases, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 20 L Ed 2d 491, among other authorities, is the appellant entitled upon demand to a jury trial on his appeal?"

In the *Deaner* case, which you cite, the Supreme Court of Virginia ruled that the blood test prescribed by § 18.1-55.1 of the Code is part of a civil rather than a criminal proceeding. The constitutional right to a jury trial relates only to criminal prosecutions. U.S. Const. amend. VI; Article I, Section 8, of the Virginia Constitution (1971). It follows that there is no *constitutional* right to a jury trial in a civil proceeding to determine the question of "unreasonable refusal." By the same token, *Duncan* and the other cases dealing with criminal prosecutions are inapplicable.

Nonetheless, the cited constitutional sections and cases are not in themselves dispositive of your question. I believe the answer lies in the statutory requirements of § 18.1-55.1 of the Code. It is true that paragraphs (m) and (n) thereof indicate a finding by the court. Paragraph (m) states: "The court shall determine the reasonableness of such refusal." I interpret this sentence, however, to refer to the court not of record in which the proceeding is brought. In respect to the procedure in cases of an appeal from a finding of "unreasonable refusal," paragraph (p) of § 18.1-55.1 of the Code states: "The procedure for appeal and trial shall be the same as provided by law for misdemeanors." Since a defendant has the statutory right under § 16.1-136 of the Code to a jury trial on appeal of a conviction for a misdemeanor, it is my opinion that § 18.1-55.1(p) of the Code grants the defendant the same right on appeal from a finding of "unreasonable refusal." Accordingly, your question is answered in the affirmative.

**MOTOR VEHICLES—Appeal Of Drunk Driving Conviction After Failure To Comply With Probation Order Under § 18.2-271.1—Circuit Court may convict or proceed under VASAP program—Entitlement to jury trial applies only to charge of drunk driving.**

**ALCOHOL SAFETY ACTION PROGRAM—Assignment To VASAP Program Is Civil Proceeding—Defendant has no right to jury trial.**

**ALCOHOL SAFETY ACTION PROGRAM—Drunk Driving Conviction Under § 18.2-271.1 Not Necessary Before Entering Probation Program.**

**CRIMINAL PROCEDURE—Appeal Of Drunk Driving Conviction After Failure To Comply With Probation Order Under § 18.2-271.1—Circuit Court may convict or proceed under VASAP program—Entitlement to jury trial applies only to charge of drunk driving.**

December 11, 1975

**The Honorable Robert F. Ward**

Judge, Twenty-second Judicial District
Pittsylvania Juvenile and Domestic Relations District Court

This is in reply to your letter dated December 3, 1975, from which I quote the following:

"Judge F. Nelson Light of the General District Court of Pittsylvania County and I are considering the adopting of a VASAP Program in Pittsylvania County and we have naturally discussed this matter with our Circuit Court Judge. This discussion resulted in a question which I feel must be posed to you for a definitive answer.

"In a jurisdiction wherein the VASAP Program has been adopted and in a proper case a VASAP disposition is used by a District Court and the defendant, after beginning the Program, fails to complete it and
is brought back into Court for imposition of sentence, and upon imposition of sentence notes an appeal therefrom, what is the position of this case in the Circuit Court on appeal in the following instances, to-wit:

“1. At the time of disposition of the matter in District Court sentence was imposed and suspended upon the condition of completion of the VASAP alternative.

“2. A finding of guilty or not innocent in the case of a juvenile was made and the matter continued for completion of the VASAP Program.

“3. Upon the hearing of evidence, no finding of guilt or innocence was made but a continuance given of sufficient duration to permit the defendant to enter and complete the VASAP Program.

“In each of the above cases, it must be additionally assumed that a period of more than thirty days has elapsed from the determination made in the District Court until the default in the completion of the Program occurs.”

Section 18.2-271.1 of the Code of Virginia (1950), as amended, which authorizes the VASAP procedure, states, in part, the following:

“(a) Upon the trial of any person for a violation of § 18.2-266, or any ordinance of a county, city or town similar to the provisions thereof, and upon motion of the defendant, the court may order probation to the defendant, on condition that he be assigned to a driver education program, and, in the discretion of the court, to an alcohol treatment or rehabilitation program, or both such programs. Such trial may be continued for a period up to one year and during such time of continuance the court may:

“(1) Require the defendant to cooperate in any investigation conducted by any probation officer assigned to the case or such other person working in a driver education program.

“(b) If the court finds that the defendant is not eligible for probation or violates any of the provisions of probation, the court shall dispose of the case as if no probation had been ordered. If the court finds that the defendant has complied with its probation order, such compliance may be accepted by the court in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271, upon payment of all fines and costs, if any, as required by law.

This statute offers the trial court an alternative to a disposition pursuant to § 18.2-268 of the Code. Upon motion of the defendant the court may place him on probation on condition that he be assigned to a driver education program and, in the discretion of the court, to an alcohol treatment or rehabilitation program, or both such programs. If a defendant who is placed on probation in accordance with this statute violates any of the provisions of such probation, the court shall dispose of the case as if no probation had been ordered.

In my Opinion of October 16, 1975, to the Honorable Duncan C. Gibb, Twenty-sixth Judicial Circuit, copy of which is enclosed, I concluded that the language “upon the trial,” as used in § 18.2-271.1 of the Code, includes the reception of evidence and “a judicial examination,” but not a conviction prior to placing the defendant in the driver alcohol program. The situations described in instances numbered 1 and 2 of the given facts indicate convictions prior to placing the defendant in the VASAP program. As provided in § 18.2-271 of the Code, a conviction for driving under the influence of intoxicants “shall of itself operate to deprive the person so convicted or found not innocent of the right to drive.” Such conviction would be inconsistent with the purposes of the VASAP program under § 18.2-271.1 of the Code, which permits a court to accept compliance with its probation order in lieu of a conviction.
The situation given in instance numbered 3 describes the correct procedure under this statute. If a general district court finds that the defendant has violated any of the provisions of probation ordered under § 18.2-271.1 of the Code, paragraph (b) thereof states mandatorily that "the court shall dispose of the case as if no probation had been ordered." In any case of such violation of probation, if the defendant is found guilty of driving under the influence of intoxicants, the defendant has ten days to appeal his conviction to the circuit court, as prescribed in § 16.1-132 of the Code. The appeal shall be heard *de novo* as provided in § 16.1-136 of the Code.

In any such appeal, in my opinion, the circuit court would have the same authority as the general district court had at the initial trial to place the defendant on probation and to assign him to a VASAP program. If the defendant were placed in such program by order of the circuit court, the provisions of § 18.2-271.1 of the Code would apply. The only difference in the position of the case in the circuit court is that the defendant has the right to a trial by jury on the criminal charge of driving under the influence. As to assignment to the VASAP program, which may occur only upon motion of the defendant, the proceeding prescribed by § 18.2-271.1 is civil in nature, and the defendant has no right to a jury trial. Such right extends only to trial on appeal of the criminal charge.

MOTOR VEHICLES—Bicycles With Helper Motor—Limited to less than one brake horsepower which produce speeds up to maximum of twenty miles per hour.

DEFINITIONS—Bicycles With Helper Motor—Limited to less than one brake horsepower which produce speeds up to maximum of twenty miles per hour.

October 2, 1975

THE HONORABLE EVELYN M. HAILEY
Member, House of Delegates

This is in reply to your recent letter, in which you enclosed brochures on two advertised makes of "motorized bicycles" and present the question included in the paragraph which I quote as follows:

"Question: Does the bill we passed, S.B. 811, really permit these machines, see enclosed brochure, to pass as 'chicken-powered' bicycles? The dealer told me the larger one was a 'two brake horsepower' that builds up to thirty-four miles per hour."

Senate Bill 811, to which you refer, was enacted into law by Chapter 426, [1975] Acts of Assembly 732. Especially relevant is the part now embodied in § 46.1-1(1a) of the Code of Virginia (1950), as amended, which I quote as follows:

"'Bicycle.'—'Bicycle' shall include pedal bicycles with helper motors rated less than one brake horsepower, which produce only ordinary pedaling speeds up to a maximum of twenty miles per hour, provided such bicycles so equipped shall not be operated upon any highway or public vehicular area of this State by any person under the age of sixteen years."

This statute limits the helper motor used on a pedal bicycle to *less than one* brake horsepower, which produces only an ordinary pedaling speed up to a *maximum of twenty* miles per hour. Any machine equipped with a motor capable of producing *as much or more* than one brake horsepower,
or less than one brake horsepower but which may propel the machine at a rate of speed in excess of twenty miles per hour, does not fall within the definition found in § 46.1-1(1a). Such a machine qualifies as a motorcycle and subjects any owner, operator, or rider to the applicable laws and regulations requiring registration, inspection, insurance, license to operate and protective helmets, as well as to any other requirements of law pertaining to the operation and use of motorcycles on the highways.

The information given in the brochures is not sufficient to provide a basis for determining the legality of the machines pictured, although they resemble motorcycles in appearance. The information furnished you by the dealer that one of the machines has a two brake horsepower motor that delivers up to thirty-four miles per hour, however, is sufficient to disqualify that machine as a “bicycle” under the statutory definition in § 46.1-1(1a). Such a machine is clearly identifiable as a motorcycle and of the class of motorcycles (seven horsepower or less rating) for which § 46.1-172.02 of the Code requires vendors to provide written statements to every vendee regarding registration and license requirements.

MOTOR VEHICLES—Clerks—Authorized to furnish Division of Motor Vehicles information on judgments arising out of motor vehicle accident liability.

CLERKS—Authorized To Furnish Division Of Motor Vehicles Information On Judgments Arising Out Of Motor Vehicle Accident Liability.

JUDGMENTS—Clerks—Authorized to furnish Division of Motor Vehicles information on judgments arising out of motor vehicle accident liability.

RECORDS—Clerks—Authorized to furnish Division of Motor Vehicles information on judgments arising out of motor vehicle accident liability.

SECRECY OF INFORMATION—Clerks—Authorized to furnish Division of Motor Vehicles information on judgments arising out of motor vehicle accident liability.

VIRGINIA FREEDOM OF INFORMATION ACT—Clerks—Authorized to furnish Division of Motor Vehicles information on judgments arising out of motor vehicle accident liability.

May 10, 1976

THE HONORABLE ALVIN W. FRINKS, Clerk
Circuit Court for the City of Alexandria

This is in reply to your recent letter in which you request my opinion whether you have the authority or the right under State law to research your records and furnish the Division of Motor Vehicles information concerning certain judgments.

Section 46.1-412 of the Code of Virginia (1950), as amended, provides that 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... (c) [t]here is rendered a judgment for damages the rendering and nonpayment of which under the terms of this title require the Commissioner to suspend the operator’s or chauffeur’s license and registration in the name of the judgment debtor.” Section 46.1-413 of the Code requires that the clerk forward an abstract of every “judgment for damages against a person as described in subdivision (c) of § 46.1-412” to the Commissioner upon the request of the judgment creditor or his attorney within thirty days after such judgment has become final. Section 46.1-442 of the Code requires the Commissioner to suspend the operator’s or chauffeur’s license
and all registration certificates and registration plates of any person who has failed for a period of thirty days to satisfy any such judgment. The suspension remains in effect until the judgment is satisfied and the person gives proof of his financial responsibility in the future, as stipulated in § 46.1-459 of the Code.

There are instances in which the Division needs additional information from court records to determine the status of a given judgment. This occurs when such information is not available from the parties directly involved. One such situation arises from the fact that §§ 8-396 and 8-397 of the Code set a limit of twenty years from the date of the judgment within which an execution shall issue or any scire facias or action may be brought on such judgment, except that when the scire facias or action is against a personal representative of a decedent it must be brought within five years of his qualification. It is necessary that the Division obtain knowledge whether the judgment has terminated at the end of any such period or whether it has been revived and extended through the writ of scire facias for an additional period. This information usually may be obtained only from the court records maintained by the clerk. In light of the named statutory requirements directing the clerks of court to furnish the judgment records indicated to the Division and further requiring the Division to take the prescribed action, it is my opinion that the named clerks of court are authorized to research their records and to furnish the Division of Motor Vehicles legal information pertaining to such judgments. Your question is answered in the affirmative.

MOTOR VEHICLES—Criminal Procedure—Jury trial on appeal from finding of “unreasonable refusal” under § 18.2-268.

CIVIL PROCEDURE—Commonwealth May Not Appeal Adverse Decision Of Circuit Court—Refusal to take blood or breath test.

CIVIL PROCEDURE—Preponderance Of Evidence Is Sufficient—Refusal to take blood or breath test.

CONSTITUTIONAL LAW—No Constitutional Right To Refuse To Testify In Civil Proceeding To Determine Unreasonable Refusal To Take Blood Or Breath Test.

CRIMINAL PROCEDURE—Motor Vehicles—Jury trial on appeal from finding of “unreasonable refusal” under § 18.2-268.

MOTOR VEHICLES—Implied Consent Law—Blood test is part of civil rather than criminal proceeding.

WITNESSES—Commonwealth May Call Defendant As Witness In Civil Proceeding To Determine Question Of Unreasonable Refusal To Take Blood Or Breath Test.

December 5, 1975

THE HONORABLE ROBERT C. MCLAUGHLIN
Commonwealth’s Attorney for Franklin County

This is in reply to your letter requesting an official opinion from which I quote the following:

“In light of your Opinion of July 3, 1975, to the Honorable George S. Cummins, Commonwealth’s Attorney for Nottoway County, concerning the fact that an accused is entitled to a jury trial on a charge of unreasonable refusal to take a blood test or a breath analysis, would you
define whether the burden of proof for the Commonwealth is 'beyond a reasonable doubt' or a 'preponderance of the evidence'.

"Also, may the Commonwealth call the defendant to the stand.

"Finally, may the Commonwealth appeal an adverse decision of a circuit court jury."

The Opinion of July 3, 1975, to the Honorable George S. Cummins, Commonwealth's Attorney for Nottoway County, to which you refer, expresses the view that § 18.1-55.1(p), now § 18.2-268(p) of the Code of Virginia (1950), as amended, grants a defendant the statutory right to a jury trial on appeal from a finding of "unreasonable refusal." That section states: "The procedure for appeal and trial shall be the same as provided by law for misdemeanors." Section 16.1-136 of the Code grants a defendant the right to a jury trial on appeal of a conviction for a misdemeanor.

In Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969), the Supreme Court of Virginia ruled that the blood test prescribed by the Implied Consent Law is part of a civil rather than a criminal proceeding. The Court further stated that a civil proceeding is not converted into a criminal action merely because certain procedural steps are the same as in a misdemeanor case. In civil cases the rule is that a "preponderance of the evidence" is sufficient. In any trial on a charge of unreasonable refusal, therefore, it is my opinion that a "preponderance of the evidence" is sufficient to sustain the burden of the Commonwealth. Section 18.2-268 of the Code, which controls the procedure at any such trial, provides that the declaration of refusal or the certificate of the committing justice, as the case may be, "shall be prima facie evidence that the defendant refused to submit to the taking of a sample of his blood or breath."

The constitutional prohibition against compelling a person "to be a witness against himself" relates only to criminal cases. U.S. Const. amend. V; Article I, Section 8, Constitution of Virginia (1971). It follows that there is no constitutional right to refuse to testify in a civil proceeding to determine the question of unreasonable refusal to take the blood or breath test. The question whether the Commonwealth may call the defendant to the stand is, therefore, answered in the affirmative.

Your final question, as to whether the Commonwealth may appeal, is answered in the negative. This result is dictated by paragraph (p) of § 18.2-268 of the Code which makes the procedure for appeal "the same as provided by law for misdemeanors."

MOTOR VEHICLES—Driving While Intoxicated—Section 18.2-271.1 not applicable to Virginia citizen convicted in North Carolina.

CRIMINAL PROCEDURE—Driving While Intoxicated—Section 18.2-271.1 not applicable to Virginia citizen convicted in North Carolina.

MOTOR VEHICLES—Revocation Of Driver's License Of Virginia Resident Convicted In Another State Of Driving While Intoxicated.

August 16, 1975

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

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

"...can a citizen of Virginia who is convicted in a Court in North Carolina for driving under the influence invoke the privileges set forth in Section 18.2-271.1 and come under the ASAP program rather than automatically losing his privilege to drive in Virginia?"
Section 18.2-271.1 of the Code of Virginia (1950), as amended, provides for the probation, education and rehabilitation of persons charged with driving while intoxicated. Subparagraph (b) thereof provides that "[i]f the court finds that the defendant has complied with its probation order, such compliance may be accepted by the court in lieu of a conviction...." The application of these provisions, however, is expressly conditioned by the language in subparagraph (a) which states that the court may order probation "[u]pon the trial of any person for a violation of § 18.2-266...."

This reference to § 18.2-266 is to be construed, by reason of clause 2 of Chapter 601, [1975] Acts of Assembly 1262, as a reference to § 18.1-54 of the Code.

Section 18.1-54 provides that it is unlawful for any person to operate a motor vehicle while under the influence of intoxicants. In view of the common-law rule, a discussion of which may be found in 5 M.J. Criminal Procedure § 10 at 334 (1949), that a state's criminal law has no force beyond its boundaries, the only acts made unlawful by this section are acts committed in Virginia. The trial specified in § 18.2-271.1, then, is a trial in Virginia for an offense committed in Virginia. Accordingly, the provisions of § 18.2-271.1 are not applicable in the case of a trial in North Carolina for an offense committed in that state. Your inquiry is, therefore, answered in the negative inasmuch as §§ 46.1-417 and 46.1-466 require the Commissioner of the Division of Motor Vehicles to revoke the driver's license of a Virginia resident upon receipt of a report that such individual has been convicted in another state of an offense substantially the same as that specified in § 18.1-54.

MOTOR VEHICLES—Drunk Driving Charges—Person assigned to alcohol education and rehabilitation—No requirement for payment of costs.

COSTS—Alcohol Education And Rehabilitation Program—Person assigned to; not required to pay.

CRIMINAL PROCEDURE—Motor Vehicles—Drunk driving charges—Person assigned to alcohol education and rehabilitation—No requirement for payment of costs.

FINES AND COSTS—As Used In § 18.2-271.1 These Words Refer To Convictions For Related Offenses, Not Drunk Driving.

May 26, 1976

THE HONORABLE STUART B. FALLEN, Clerk
Circuit Court of Charlotte County

This is in reply to your recent letter in which you inquire whether a person assigned to an alcohol education and rehabilitation program under § 18.2-271.1 of the Code of Virginia (1950), as amended, is required to pay court costs prior to assignment to such program.

Section 18.2-271.1 of the Code, which authorizes a court to assign a person charged with operating a motor vehicle while under the influence of intoxicants to a driver education program and, in the discretion of the court, to an alcohol treatment or rehabilitation program, provides that the court may require the defendant "to pay a fee not to exceed one hundred fifty dollars." Such fees must be forwarded by the clerk to be deposited in the State treasury for expenditure by the Highway Safety Division for the maintenance of the activities set out in this section. There is no requirement that "costs" be assessed or paid as would be the case in a criminal conviction.

The only reference to "costs" in § 18.2-271.1 of the Code is found in
paragraph (b) thereof, which states that compliance with the court's order "may be accepted by the court in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271, upon the payment of all fines and costs, if any, as required by law." (Emphasis added.) If it had been the intent of the legislators that fines and costs be assessed in such cases, the General Assembly would hardly have employed such conditional language. The power accorded the trial court in § 19.2-305 of the Code, that a defendant may be required to pay a fine and costs imposed at the time of being placed on probation as a condition of such probation, is predicated upon a suspension of sentence after conviction, as stipulated in § 19.2-303 of the Code. Compliance "in lieu of a conviction" constitutes a unique disposition of the case, and I do not find any statute which prescribes a fine or the payment of costs under such conditions. In my Opinion to the Honorable T. B. Kingsbury, III, Judge for Southampton County General District Court, dated March 2, 1976, copy of which is enclosed, I expressed the view that the language "fines and costs, if any," in the context of § 18.2-271.1 of the Code refers to fines and costs, if any, which may have been imposed against the defendant on his conviction for a related offense. Accordingly, your question is answered in the negative.

MOTOR VEHICLES—Drunk Driving Charges—Proceeding under § 18.2-271.1—"Fines and costs" not intended to imply conviction for drunk driving; refers to convictions for related offenses.

CRIMINAL PROCEDURE—Motor Vehicles—Drunk driving charges—Proceeding under § 18.2-271.1—"Fines and costs" not intended to imply conviction for drunk driving; refers to convictions for related offenses.

FINES AND COSTS—As Used In § 18.2-271.1 These Words Refer To Convictions For Related Offenses, Not Drunk Driving.

March 2, 1976

THE HONORABLE T. B. KINGSBURY, III, Judge
Southampton County General District Court

This is in reply to your recent letter relating to the disposition of a drunk driving charge pursuant to § 18.2-271.1 of the Code of Virginia (1950), as amended, from which I quote the following:

"Fines and costs are provided for by § 18.2-270 of the Code of Virginia (1950), as amended, upon a conviction for a violation of § 18.2-266. A conviction under this latter section is a prerequisite to the operation of both §§ 18.2-270 and 18.2-271. Accordingly, in § 18.2-271.1(b), I shall appreciate your advising me of the meaning of the words 'upon payment of all fines and costs, if any,' which follow the words '§ 18.2-271.'"

Paragraph (b) of § 18.2-271.1 of the Code, which contains the phraseology to which you refer, reads as follows:

"If the court finds that the defendant is not eligible for probation or violates any of the provisions of probation, the court shall dispose of the case as if no probation had been ordered. If the court finds that the defendant has complied with its probation order, such compliance may be accepted by the court in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271, upon payment of all fines and costs, if any, as required by law."

This reference to "fines and costs" has caused some confusion whether
there could be a conviction for operating a motor vehicle while under the influence of intoxicants without the attendant revocation of operator's license. For the reasons stated in my Opinion to you of January 7, 1976, and other related Opinions, I have concluded it was not the legislative intent that § 18.2-271.1 should authorize a conviction. I might add that House Bill No. 1662 of the 1975 Session of the General Assembly, which provided for the enactment of § 18.2-271.1, originally provided for a conviction for the violation of § 18.2-266, or similar county, city or town ordinance. The General Assembly deleted all reference to the term conviction, however, and inserted the words “upon the trial” in lieu of “upon a conviction.”

In my opinion, therefore, the language in question was not intended to imply a conviction for driving under the influence of intoxicants but was intended to direct the payment of all fines and costs, if any, which may have been imposed against the defendant by any requirement of law, i.e., conviction for related offense, prior to accepting compliance with the court's probation order “in lieu of a conviction under § 18.2-266.”

MOTOR VEHICLES—Drunk Driving Charges—Proceeding under § 18.2-271.1—Section does not permit VASAP probation by defendant convicted of driving while under influence of intoxicants.

CRIMINAL PROCEDURE—Motor Vehicles—Drunk driving charges—Proceeding under § 18.2-271.1—Section does not permit VASAP probation by defendant convicted of driving while under influence of intoxicants.

THE HONORABLE T. B. KINGSBURY, III, Judge
Southampton County General District Court

This is in reply to your recent letter in which you request my advice whether § 18.2-271.1 of the Code of Virginia (1950), as amended, permits a court to proceed as outlined in the following:

“Section 18.2-271.1(b) allows the Court to accept compliance with probation provisions under § 18.2-271.1 ‘in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271, upon payment of all fines and costs, if any, as required by law.’ (Emphasis added.)

“This Court proposes to find defendants, who have complied with VASAP probation, guilty of driving under the influence but will accept this compliance in lieu of requirements of § 18.2-271.

“We propose to set forth on abstract that compliance is so accepted and license is not to be forfeited. I am advised, however, that the Division of Motor Vehicles upon receiving an abstract of conviction will revoke the defendant’s license.”

Considering the language “in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271” in light of other parts of § 18.2-271.1 and related sections of the Code, I construe the word “or” to have been used conjunctively, that is, with the meaning of “and,” so as to require the happening of both contingencies mentioned. The requirements specified in § 18.2-271 for depriving a convicted person of the right to drive or operate any motor vehicle are self-executing upon conviction of such person for operating a motor vehicle while under the influence of intoxicants. Commonwealth v. Ellett, 174 Va. 403, 4 S.E. 2d 762 (1939). Such result would not be consistent with the provisions of § 18.2-271.1 of the Code for continuing the trial for a period of up to one year to permit the defendant to comply with the court's order to attend driver training and alcohol treatment or rehabilitation programs nor with the provision in paragraph
(b) thereof that the court may accept such compliance “in lieu of a conviction.” A consistent view is expressed in my Opinion of October 16, 1975, to the Honorable Duncan C. Gibb, Judge, Twenty-sixth Judicial Circuit, to which you refer, and my Opinion of December 11, 1975, to the Honorable Robert F. Ward, Judge, Twenty-second Judicial District, copy of which is enclosed.

I find nothing in § 18.2-271.1 to indicate an intent to amend the existing statutes relating to driving under the influence of intoxicants. No complementary amendments were made in §§ 18.2-266 through 18.2-273, relating to driving or operating motor vehicles while under the influence of intoxicants, or in the statutes found in Title 46.1 of the Code requiring the revocation or suspension of licenses upon conviction for such offense. Consequently, these statutes continue in full force and effect, and a conviction for driving under the influence of intoxicants requires the revocation or suspension of licenses stipulated in §§ 18.2-271, 46.1-417, 46.1-418, 46.1-421 and related statutes. I conclude that § 18.2-271.1 does not permit a court to accept compliance with VASAP probation by a defendant who is convicted of operating under the influence of intoxicants in lieu of compliance with the requirements of § 18.2-271, and the question raised is answered in the negative.

MOTOR VEHICLES—Drunk Driving Charges—Section 18.2-271 does not permit court to accept post-conviction compliance with its probation order in lieu of revocation or suspension of license.

CRIMINAL PROCEDURE—Motor Vehicles—Drunk driving conviction—Division required to revoke license under § 46.1-417, et seq.

February 4, 1976

THE HONORABLE J. R. ZEPKIN
Judge for Ninth Judicial District Court

This is in reply to your letter of January 23, 1976, from which I quote the following:

“I enclose copies of correspondence between the undersigned and the Division of Motor Vehicles raising a question with regard to § 18.2-271.1.

“If you look at subparagraph (b) of this section, you will note the language ‘such compliance may be accepted by the court in lieu of a conviction under § 18.2-266 OR THE REQUIREMENTS SPECIFIED IN § 18.2-271. . . ’ (Emphasis added.)

“It appears that the only requirements under § 18.2-271 are the suspension of an operator’s license upon conviction.

“The question I would pose to you is if the judgment of the court is a finding that the defendant is guilty of driving while under the influence under § 18.2-266 and further finding that the defendant has complied with a probation order entered under § 18.2-271.1, which compliance is accepted in lieu of the requirements specified under § 18.2-271, is the Division of Motor Vehicles then either required or does it have any discretionary authority to then suspend the operator’s license of such defendant for any period of time?”

In enacting § 18.2-271.1 of the Code of Virginia (1950), as amended, the General Assembly made no complementary changes in existing §§ 18.2-266 through 18.2-273 of the Code, relating to driving under the influence of intoxicants, or in the statutes found in Title 46.1 of the Code requiring the revocation or suspension of licenses upon conviction for such offense.
Considering the intent of § 18.2-271.1 in light of these related statutes, I have concluded that this section does not permit a court to accept post-conviction compliance with its probation order in lieu of the requirements specified in § 18.2-271. Such compliance should be accepted only in lieu of a conviction under § 18.2-266. Whenever there is a conviction for driving under the influence of intoxicants, § 18.2-271 becomes self-executing. In this connection I enclose a copy of my Opinion to the Honorable T. B. Kingsbury, III, Judge for Southampton County General District Court, dated January 7, 1976.

In light of the foregoing it is my opinion that the Division of Motor Vehicles is required to take the revocation and suspension action specified in §§ 46.1-417, 46.1-418, 46.1-421 and related statutes upon receiving a record of any person’s conviction for such violation. These are all mandatory statutes which do not give the Division discretionary authority except to determine the identity of the defendant.

MOTOR VEHICLES—Drunk Driving Conviction Under § 18.2-271.1 Not Necessary Before Entering Probation Program—Record of satisfactory completion must be preserved by court.

ALCOHOL SAFETY ACTION PROGRAM—Drunk Driving Conviction Under § 18.2-271.1 Not Necessary Before Entering Probation Program.

CRIMINAL PROCEDURE—Drunk Driving Conviction Under § 18.2-271.1 Not Necessary Before Entering Probation Program—Record of satisfactory completion must be preserved by court.

October 16, 1975

THE HONORABLE DUNCAN C. GIBB
Judge, Twenty-sixth Judicial Circuit

This is in reply to your recent letter in which you request my opinion as to the interpretation and implementation of § 18.2-271.1 of the Code of Virginia (1950), as amended, in respect to the matters outlined in your letter as follows:

“I am advised that some courts make no record of the charge of driving under the influence if the person completes satisfactorily the probation program, while others send a record to Richmond with a notification that the driver has completed satisfactorily the program.

“Also, the statute is silent on whether the driver must be tried and convicted before entering the program.”

There is no specific provision in § 18.2-271.1 of the Code for recording the charge of driving under the influence of intoxicants in those cases in which the court orders probation for the defendant, on condition that he be assigned to a driver alcohol education program, and the defendant satisfactorily completes such probation program. Section 16.1-138 of the Code, however, states: “All papers in criminal proceedings which are not required to be returned to a court of record shall be properly indexed, filed and preserved in the trial court, as public records for a period of twenty years, after which they may be destroyed.” Further, § 46.1-412 of the Code requires that every court or the clerk thereof “shall keep a full record” of every case in which a person is charged with a violation of any law of this State pertaining to the operator or the operation of a motor vehicle. As stated in paragraph (b) of § 18.2-271.1, “[i]f the court finds that the defendant has complied with its probation order, such compliance may be accepted by the court in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271, upon payment of all fines and costs,
if any, as required by law.” In my opinion, a record of the court’s acceptance of compliance with its probation order in lieu of a conviction and all related papers in the case should be preserved as required by §§ 16.1-138 and 46.1-412 of the Code. Because of the requirements of § 18.2-271.1, such records are needed for consideration in the event of similar charges against such person in the future, either in the same or in another court, as well as for audit purposes in respect to the statutory fee, not to exceed one hundred fifty dollars, or other fines and costs, if any, as required by law.

I might add that, effective October one, nineteen hundred seventy-five, any police officer making an arrest for the offense of driving under the influence of intoxicants is required by the provisions of §§ 19.2-390 and 18.2-270 of the Code to make a report to the Central Criminal Records Exchange in Richmond, Virginia. See enclosed copy of Opinion dated August 21, 1975, to the Honorable Harold W. Burgess, Superintendent, Department of State Police.

You also inquire whether a person charged with driving while intoxicated must be “tried and convicted” before entering the program authorized under § 18.2-271.1. This provision authorizes the court to take the action indicated “[u]pon the trial of any person for a violation of § 18.2-266, or any ordinance of a county, city or town similar to the provisions thereof.” The language “upon the trial” clearly includes the reception of evidence, as well as “a judicial examination,” as stated in my Opinion dated July 9, 1975, to the Honorable William S. Burroughs, Jr., Commonwealth’s Attorney for Arlington County, copy of which is enclosed. It is not the intent of this section, however, that the defendant be convicted before entering such program. I base this on the procedural language in paragraph (a) authorizing a continuance for a period up to one year, during which the defendant is placed on probation and required to cooperate in the driver alcohol education program, as well as the provision of paragraph (b) authorizing the court to accept such compliance “in lieu of a conviction.” Further, under § 18.2-271 of the Code, a conviction for driving under the influence of intoxicants “shall of itself operate to deprive the person so convicted or found not innocent of the right to drive.” The latter consequence would not be consistent with the major thrust of § 18.2-271.1 permitting the court to accept compliance with the probation order “in lieu of a conviction.”

MOTOR VEHICLES—Electrical Devices For Checking Speed—“Moving Radar” may be calibrated against speedometer of vehicle in which mounted—No new legislation needed.

October 6, 1975

THE HONORABLE CONSTANTINE A. SPANOULIS, Judge
General District Court for the City of Virginia Beach

This is in reply to your recent letter from which I quote the following:

“Title 46.1-198 of the Code of Virginia (1950), as amended, relates to ‘Checking on Speed with Electrical Devices; etc. . . .’ Recently the State Police have begun using a new radar unit commonly referred to as a ‘Moving Radar’ unit. The unit is stated to be effective both from a stationary position and while mounted in a vehicle which is in fact moving. It is stated that it would be capable of verifying the speed of the vehicle in which it is mounted and of any other vehicle which may come into its beam.

“The Court is familiar with the change in legislation permitting the use of certificates with regard to the accuracy of any radio microwave
or other electrical device used to check speed. The question in this particular incidence is whether an officer may himself, without the aid of any additional vehicle or officer, test the accuracy of a Radar Unit against the speed of his own vehicle, which vehicle would appear to have been properly calibrated and certified. The Court would like to inquire as to whether the procedure is found to be proper and legal and also whether there need be any additional legislation necessary to authorize the use of a self contained, self calibrating moving radar unit as apparently is being used at this time in the foregoing manner."

Section 46.1-198 of the Code of Virginia (1950), as amended, to which you refer, authorizes the checking of speed with radio microwaves and other electrical devices, and states: "The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue." With respect to this portion of the statute the Supreme Court of Virginia, in the case of Howell v. Commonwealth, 213 Va. 590, 591, 194 S.E. 2d 758, 759 (1973), ruled that this section makes the results of radar speed checks prima facie evidence of speed. The Howell case, like several antecedent cases, dealt with the use of a certificate, in lieu of oral testimony, to establish the accuracy of the radar device.

The tests for accuracy of the "moving radar," regularly used, are several in number and they are performed before and after each use of the device to apprehend a violator. According to information furnished by the Department of State Police, the tests consist of the use of the following:

1. Internal calibration system which indicates whether the machine parts are working properly;
2. A thirty-five mile per hour tuning fork with radar set in a "stationary mode";
3. A sixty-five mile per hour tuning fork with radar set in a "stationary mode";
4. Both such tuning forks with radar set in a "moving mode" with speed selector set at forty miles per hour; and
5. Speedometer comparisons with radar set in "verify mode" at speeds of fifty, sixty and seventy-five miles per hour.

Item numbered (5) relates directly to your first question. The "moving radar" is capable of determining the speed of the police car in which it is used when set in the "verify mode." By using the moving radar device in a police car, the speedometer of which has been calibrated and found to be accurate, the officer may verify the accuracy of the radar device by comparing the speed shown on the radar screen with the speed shown by the speedometer of the vehicle in which it is mounted.

Since the arresting officer performs the tests for accuracy of the radar equipment with his own vehicle, he is in a position to testify as to its accuracy from his own knowledge, and no certificate is necessary. This test appears comparable to a test in which another officer drives his vehicle through the radar beam and has the advantages of the additional tests made by means of the tuning forks. In my opinion, this procedure is proper and legal under existing law, and no additional legislation is necessary to authorize the use of such moving radar device or the manner of testing it for accuracy.

MOTOR VEHICLES—Emergency Siren Tape—Use illegal except by authorized personnel.

CRIMES—Motor Vehicles—Emergency siren tape—Use illegal except by authorized personnel.
This is in reply to your recent letter from which I quote the following:

"I am enclosing a copy of advertising brochures being circulated in Virginia. According to the brochures, prerecorded tapes containing the sounds of sirens are being sold and instructions for mounting and wiring a loud speaker behind the grill of a car are made available. These tapes can be used in conventional stereo tape players found in many motor vehicles.

"It is our understanding that larger electronic supply stores are also advertising these tapes for sale.

"I shall appreciate your opinion as to whether the use of such an emergency siren tape by those not authorized to use regular sirens is prohibited by statute."

The brochures which you furnished offer to make available to the general public for emergency use an "emergency siren tape" that "can be played in any 8 track car tape player for emergency car use" or on "portable tape players to be used on motorcycles or even bicycles for emergency travel or attention." The brochures leave no doubt that the sound produced by such tapes is comparable to that produced by a siren used on the vehicles of police, ambulance and other emergency personnel.

Section 46.1-284 of the Code of Virginia (1950), as amended, makes it "unlawful for any vehicle to be equipped with or for any person to use upon any vehicle any siren or exhaust, compression or spark plug whistle or horn except as may be authorized in this title." It further makes it "unlawful for any vehicle to be equipped with or for any person to use any warning device while upon a highway or any way open to public travel that is not of a type that has been approved by the Superintendent." An exception is made for an alarm system "provided the device is installed so as to prohibit actuation of the system by the driver while the vehicle is in motion." Section 46.1-285 of the Code authorizes the use of sirens on police, fire, ambulance and rescue vehicles and certain vehicles used by State forest wardens. It is also noted that subsection 15.2 of the Virginia Official Inspection Manual requires Inspection Stations to reject any vehicle equipped with a siren unless it is a fire or police vehicle, an ambulance or a rescue vehicle, or a publicly owned vehicle used by State forest wardens.

The named statutes and regulation clearly restrict the use of sirens or warning devices to specified vehicles used in police, fire fighting or other emergency operations. The siren tape used as outlined in the brochures, in my opinion, qualifies as a "warning device" prohibited by § 46.1-284 of the Code for use upon the highways except by the specified emergency vehicles. Your question, therefore, is answered in the affirmative.
This is in reply to your recent letter from which I quote the following:

"We have considerable difficulty, as I am sure do many other courts, with the nonappearance by persons from the District of Columbia, Maryland, and other states under the Interstate Compact who have been issued traffic summonses by either the County or State Police. In conversation with some of the local police and one of the police officials, there appears to be a difference of opinion and understanding of the provisions of § 46.1-179.2 of the Code of Virginia (1950), as amended, particularly with reference to paragraph (c). Paragraph (c) of this section reads in part, "upon the failure of any nonresident to comply with the terms of a traffic citation, the arresting officer shall obtain a warrant for arrest and shall report this fact to the Division of Motor Vehicles.' The question I have is what warrant is referred to in this section? Does this section refer to obtaining a warrant for failure to appear as would be done in the case of a resident of Virginia or does this section merely refer to obtaining a warrant for the offense charged in the citation?"

Section 46.1-179.2 of the Code provides in paragraph (a) thereof that, with exceptions noted in paragraph (b), 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." It further provides that such motorist shall not be required to post collateral or bond to secure appearance for trial, but that the officer shall accept such motorist's personal recognizance that he will comply with the terms of the citation. Paragraph (c), to which you refer, prescribes the procedure to be followed when any such nonresident fails to comply with the terms of his traffic citation.

A warrant charging the failure of the nonresident to comply with the terms of his traffic citation would constitute an appropriate procedure to formalize and verify the charge of noncompliance so that the Division of Motor Vehicles may refer to this fact in reporting such noncompliance to the appropriate reciprocating state, as required by § 46.1-179.3 of the Code. This section requires the Division to "transmit a certified copy of the report to the official in charge of the issuance of licenses in the reciprocating state in which the nonresident resides or by which he is licensed." Consequently, I conclude that the warrant referred to in paragraph (c) of § 46.1-179.2 is the warrant of arrest for failure of the nonresident to comply with the terms of his traffic citation. It is similar to the warrant for violating a written promise to appear, as prescribed in § 46.1-178.1 of the Code for residents of this State. It would not be a warrant charging the violation described in the traffic citation, as this would be superfluous and unnecessary. See Tate v. Lamb, 195 Va. 1005, 1010, 81 S.E. 2d 743, 746 (1954)."
This is in reply to your recent letter in which you inquire whether, while awaiting disposition of forfeiture proceedings, local authorities may lawfully store seized automobiles on property owned and controlled by the respective local government rather than on the premises of commercial establishments.

The Code of Virginia (1950), as amended, contains several provisions expressly relating to the seizure and forfeiture of motor vehicles, including §§ 4-56, 18.1-103, 18.1-107.1, 18.1-346, 29-144.3, 46.1-191.2, 46.1-306, 46.1-351.1 and 46.1-351.2 None of the enumerated statutes, however, specifies the manner in which a seized vehicle is to be stored pending disposition of the forfeiture proceeding. Typical in this respect is § 46.1-351.1, which provides, in relevant part, that the police officer seizing a motor vehicle "shall deliver the same to the sheriff." No provision is made to guide the sheriff in storing the property.

In view of this absence of a statutorily defined duty, I am of the opinion that it would not be unlawful for appropriate local authorities to store seized vehicles on property owned by the local government. For an opinion consistent with this view, issued by the predecessor in office to the Honorable John F. Ewell, Commonwealth's Attorney for Warren County, dated June 25, 1965, I direct your attention to page 187 of the Report of the Attorney General (1964-1965).

MOTOR VEHICLES—Limitations On Making "U Turn"—Illegal where left turn prohibited and "No left turn" sign is in place.

CRIMES—Motor Vehicles—Making "U Turn" illegal where left turn prohibited and "No left turn" sign is in place.

This is in reply to your recent letter from which I quote the following:

"Several Traffic Engineers, Traffic Law Enforcement Officers, and Fire Officials have requested information from this Division pertaining to 'No U Turn' regulations. If a 'No Left Turn' regulation is instituted and a sign is installed, does this also mean that a 'U Turn' would be illegal?"

The term "U Turn" is defined in the American Heritage Dictionary of the English Language to mean: "A turn, as by a vehicle, completely reversing the direction of travel." Limitations upon turning so as to proceed in the opposite direction, although the term "U Turn" is not used, are found in § 46.1-214 of the Code of Virginia (1950), as amended, which reads as follows:

"(a) The driver of a vehicle within business districts, cities or towns shall not turn such vehicle so as to proceed in the opposite direction except at an intersection of highways.

(b) No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to or near the crest of a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from any direction within 500 feet."
Section 46.1-173 of the Code provides that the State Highway Commission may "classify, designate and mark State highways and provide a uniform system of marking and signing such highways under the jurisdiction of this State and such system of marking and signing shall correlate with and so far as possible conform to the system adopted in other states." This section requires any driver of a motor vehicle to "obey and comply with the requirements of road signs erected upon the authority of the State Highway Commission or subject to the provisions of §§ 33-35, 33-36, 33-115 by local authorities in cities and towns." The State Highway Department has adopted the same signs and symbols to indicate locations where "U Turns" are prohibited as prescribed by the U.S. Department of Transportation in its Manual on Uniform Traffic Control Devices, 1971, at 2B-16.

In light of the related statutes and the regulations of the State Highway Department, it is clear that any lawful "U-Turn" must be made by means of a series of left turns. While left turns do not involve a "U Turn," all "U Turns" must involve a left turn. I conclude that a "U Turn" would be illegal at any location where left turns are prohibited and where an appropriate "No Left Turn" sign is in place, which sign has been installed by the Highway Department or the local authorities as provided by law.

MOTOR VEHICLES—Local License Fees—Imposed where owner is resident—Personal property taxes assessed where vehicle regularly garaged or parked.

MOTOR VEHICLES—Taxation—First determine whether vehicle operated by common carrier.

TAXATION—Motor Vehicles—Local license fees—Imposed where owner is resident—Personal property taxes assessed where vehicle regularly garaged or parked.

July 10, 1975

THE HONORABLE EDWIN W. BEALE, JR.
Treasurer for the City of Franklin

This is in reply to your recent letter from which I quote the following:

"Question has arisen whether the City of Franklin may charge a truck owner for his motor vehicle license and personal property taxes based upon the authority of § 46.1-65 of the Code of Virginia (1950), as amended, as modified by § 46.1-66(a)(6) of the Code, where the following facts apply:

"Truck owner is a corporation with its principal office in the City of Suffolk; several trucks owned by it are kept more than three days and nights a week in the City of Franklin. The corporation has State Corporation Commission tags and has an ICC permit, although the trucks used in and about the City of Franklin may only be used to spot trailers between the City of Franklin and Isle of Wight County.

"Does § 46.1-66(a)(6) of the Code prohibit the City of Franklin from charging license fees and personal property taxes on the tractors and trailers kept in the City?"

Section 46.1-66 of the Code of Virginia (1950), as amended, in subsection (a)(6), states the following:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(6) The motor vehicle, trailer or semitrailer is operated by a com-
mon carrier of persons or property operating between cities and towns in this State and not in intracity transportation or between cities and towns on the one hand and points and places without cities and towns on the other and not in intra-city transportation."

In order to determine the applicability of the quoted language to a given situation, it first must be determined whether or not the vehicle is operated by a common carrier. State Corporation Commission tags and ICC permits are issued to contract carriers as well as to common carriers. Based on the identification of the owner furnished this office by telephone on July 10, 1975, it has been determined from the records in the State Corporation Commission that the vehicles in question are not operated by a common carrier within the meaning of § 46.1-66(a)(6) of the Code. Accordingly, your specific question is answered in the negative.

Although the quoted language from subsection (a)(6) of § 46.1-66 of the Code relating to common carriers does not apply to the given situation, subsection (a)(1) of this statute does apply. The latter states as follows:

"(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."

This leaves the place of residency of the owner of a vehicle the ultimate deciding factor in any instance in which the county, city or town of which the owner is a resident imposes a license fee pursuant to these sections. A similar view was expressed in an opinion to the Honorable Morris E. Mason, County Attorney for Chesterfield County, dated April 1, 1975, copy of which is enclosed. If, under the given facts, the City of Suffolk imposes a license fee pursuant to § 46.1-65 of the Code, the City of Franklin is precluded by § 46.1-66 (a)(1) of the Code, quoted above, from imposing a similar license fee.

In respect to the assessment of personal property taxes on motor vehicles, § 58-834 of the Code provides that the situs shall be the county, district, town or city where the vehicle is normally garaged or parked. Assuming from the given facts that the vehicles in question are regularly garaged or parked in the City of Franklin, that is the proper situs for the assessment of personal property taxes.

MOTOR VEHICLES—Mandatory Sentencing Provision In Special Statutes Such As § 46.1-387.8—Not invalidated by provision for suspension of sentence in general statute such as § 19.2-303 unless plain indication of intent to repeal.

CRIMINAL PROCEDURE—Mandatory Sentencing Provision In Special Statutes Such As § 46.1-387.8—Not invalidated by provision for suspension of sentence in general statute such as § 19.2-303 unless plain indication of intent to repeal.

STATUTES—Mandatory Sentencing Provision In Special Statutes Such As § 46.1-387.8—Not invalidated by provision for suspension of sentence in general statute such as § 19.2-303 unless plain indication of intent to repeal.

February 26, 1976

THE HONORABLE JOHN N. LAMPROS
Commonwealth's Attorney for Roanoke County

This is in reply to your letter of recent date from which I quote the following:
"Section 19.2-303 of the Code of Virginia (1950), as amended, provides that:

'... the Court, may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the accused on probation.'

"This section was enacted subsequent to many other mandatory sentencing sections, such as the Habitual Offender punishment sections set out in § 46.1-387.8.

"The issue raised is whether § 19.2-303 allows the Court to suspend mandatory sentences as provided in various criminal or motor vehicular statutes."

Section 46.1-387.8 of the Code of Virginia (1950), as amended, provides that a person who operates a motor vehicle after being adjudged an habitual offender "shall be punished by confinement in the penitentiary not less than one nor more than five years and no portion of such sentence shall be suspended," except in emergencies requiring such operation of a motor vehicle to save life or limb. Section 19.2-303 of the Code, like § 53-272 which authorizes suspension of imposition or execution of sentence, is a general statute. Unless there is a plain indication of an intent that a general act shall repeal a special act, the special act will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly, so that the two are to be deemed to stand together, one as the general law of the land, and the other as the law of the particular case. 17 M.J. Statutes § 100 (1951); City of South Norfolk v. Dail, 187 Va. 495, 47 S.E. 2d 405 (1948). Section 19.2-303 does not repeal any special act such as § 46.1-387.8 prohibiting the suspension of sentence in specific instances. Moreover, Rule 3A:25 of Rules of Supreme Court states: "After conviction, whether with or without jury, the court may, unless prohibited by statute, place the accused on probation or suspend his sentence in whole or in part." (Emphasis added.)

In light of the foregoing authorities, it is my opinion that the special requirement of § 46.1-387.8 that no portion of the sentence shall be suspended is not invalidated by § 19.2-303. Thus your inquiry is answered in the negative. A consistent view is expressed in my Opinion to the Honorable Peter K. Babalas, Member, Senate of Virginia, dated June 13, 1975, and found in the Report of the Attorney General (1974-1975) at 284.

MOTOR VEHICLES—Motorcycle Not Designed To Draw Farm Machinery Not A Farm Tractor Under § 46.1-1(7)—May be exempt from registration and license under § 46.1-45(a).

MOTOR VEHICLES—Motorcycle Operators And Passengers Thereon Shall Wear Protective Helmets—No exemption for motorcycle used on farm.

September 16, 1975
wear a protective helmet and permitting a passenger to ride on the motorcycle with no protective helmet. The defendant claimed that he was riding the cycle from the field where his combine was parked to his home to get his farm truck. The officer was present and observed the operation.

Section 46.1-1(14) of the Code defines the term "motorcycle" to mean:

"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 "farm tractor" is defined in § 46.1-1(7) to mean:

"Every motor vehicle designed and used as a farm, agricultural or horticultural implement for drawing plows, mowing machines and other farm, agricultural or horticultural machinery and implements including self-propelled mowers designed and used for mowing lawns."

The purpose of the exception in § 46.1-1(14), hereinabove quoted, is to exclude from the definition of the term "motorcycle" a "farm tractor" as defined in § 46.1-1(7). The latter section describes a "farm tractor" as a motor vehicle "designed and used" as a farm, agricultural or horticultural implement for drawing plows and other farm machinery. The word "designed," as used in § 46.1-1(7), means planned or constructed for the purpose of drawing plows, mowing machines or other farm, agricultural or horticultural machines or implements. See Triplett v. Commonwealth, 212 Va. 649, 652, 186 S.E. 2d 16, 18 (1972).

The vehicle used by the defendant in the given facts was an ordinary motorcycle, designed and used for transportation purposes and not designed to draw farm machinery. It was, therefore, not a farm tractor but a motorcycle.

Notwithstanding the foregoing, there are certain conditions under which any motor vehicle may be exempt from registration and licensing because of its being used only for agricultural or horticultural purposes within prescribed statutory limitations. This point was not discussed in the Opinion to the Honorable Curtis A. Sumpter, Commonwealth's Attorney for Floyd County, dated January 15, 1973, and found in the Report of the Attorney General (1972-1973) at 283, which related only to operation on the highways. Section 46.1-45(a) of the Code states, in relevant part, the following:

"No person shall be required to obtain the registration certificate, license plates and decals or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, . . . for any motor vehicle . . . 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, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs."

A motorcycle is defined in § 46.1-1(14), supra, as a "motor vehicle." If a motorcycle is used only for agricultural or horticultural purposes within the confines of the language quoted herein from § 46.1-45(a), I am of the
opinion that it would be exempt from the requirement to obtain registration and license plates. Section 46.1-352 of the Code states: "No person shall be required to obtain a driver's license for the purpose of driving or operating any farm tractor or farm machinery or vehicle defined in § 46.1-45, temporarily drawn, moved or propelled on the highways." Whether the circumstances in the situation you present fall within any exemption under these statutes would be a matter for the trier of fact. There is no exemption from the requirement found in § 46.1-172 of the Code that motorcycle "operators and passengers thereon, if any, shall wear protective helmets."

MOTOR VEHICLES—Operator's License—Revoked for one year where resident of Virginia is convicted of drunk driving in a North Carolina court—Limited driving permit issued by North Carolina not valid in Virginia.

MOTOR VEHICLES—Operator's License—Virginia resident convicted in North Carolina of driving while intoxicated—Termination date of North Carolina revocation controls length of Virginia revocation.

MOTOR VEHICLES—Operator's License—Virginia revocation is not to punish Virginia resident for North Carolina offense but to promote safety on Virginia highways—No issue involving full faith and credit is raised.

August 26, 1975

THE HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your recent letter in which you describe a factual situation as follows:

"A is a resident of Virginia holding a valid Virginia operator's license. A is charged and convicted in North Carolina of driving under the influence, but the Court in its Order directs that A shall be allowed to drive from his place of residence to his place of employment. A's place of employment is in North Carolina and his residence is some four miles from the State line in Virginia. A surrenders his Virginia's operator's license to the Court in North Carolina which carries a revocation period of one year. Later A gets an order of revocation from the Virginia Division of Motor Vehicles also suspending his permit for one year...and further the Virginia revocation begins only when he has surrendered his license to the Division of Motor Vehicles."

You inquire (1) whether Virginia can give "full faith and credit" to that portion of the North Carolina order which revokes the individual's driving privilege for one year and not to that portion which grants the individual a limited driving privilege, and (2) how such an individual can surrender his operator's license to the Virginia Division of Motor Vehicles if he has already surrendered it to the North Carolina court.

With respect to your first question, I note that § 46.1-417 of the Code of Virginia (1950), as amended, requires the Commissioner of the Division of Motor Vehicles to revoke the license of any person upon receiving a record of that individual's conviction for violating the provisions of § 18.1-54, which statute makes it unlawful to drive while intoxicated. In addition, § 46.1-466(a) of the Code provides:

"The Commissioner shall suspend or revoke the license and registration certificate and plates of any resident of this State upon receiving notice of his conviction, in a court of competent jurisdiction of this
As stated in the Opinion of this office issued to the Honorable C. H. Lamb, Commissioner, Division of Motor Vehicles, dated October 6, 1969, and found in the Report of the Attorney General (1969-1970) at 185, "it is the conviction and attendant revocation which govern the applicability of § 46.1-466." Furthermore, notwithstanding the provision for issuance of limited driving privileges, North Carolina law provides for revocation of an operator's license upon a first conviction for driving while intoxicated. Accordingly, I am of the opinion that the granting of a limited driving privilege to a Virginia resident convicted in North Carolina of driving while intoxicated does not relieve the Commissioner of the Division of Motor Vehicles of his duty under § 46.1-466 to revoke that individual's privilege to drive in the Commonwealth. I am also of the opinion that, since the purpose of the Virginia revocation is not to punish the Virginia resident for his North Carolina offense but is to promote safety on the highways of the Commonwealth, no issue involving full faith and credit is raised. See Scott v. Commonwealth, 191 Va. 73, 80, 60 S.E. 2d 14, 17 (1950).

With respect to your second question, an individual obviously cannot surrender an operator's license which he no longer possesses or controls. Nevertheless, in view of the provision in § 46.1-466(a), hereinabove quoted, that no revocation thereunder shall continue for a longer period in Virginia than in the jurisdiction wherein the offense occurred, I am of the opinion that the date on which the North Carolina revocation terminates, rather than the date on which the licensee surrenders his license to the Division of Motor Vehicles, controls the length of the Virginia revocation. To insure compliance with this section, the licensee should supply the Division of Motor Vehicles with evidence of the North Carolina termination date.
remittance directly to the State Treasurer by the clerk of the district court receiving such fee rather than being remitted through or by the clerk of the circuit court.

This statute provides, in paragraph (a) thereof, that, upon the trial of any person for operating a motor vehicle while under the influence of intoxicants, "the court may order probation to the defendant, on condition that he be assigned to a driver education program, and, in the discretion of the court, to an alcohol treatment or rehabilitation program, or both such programs." It further provides that the court may: "Require the defendant moving for probation under the provisions of this section to pay a fee not to exceed one hundred fifty dollars, which amount shall be forwarded by the clerk to be deposited with the State Treasurer." The fees are required to be "kept in a separate fund in the State Treasury for expenditure by the Highway Safety Division, for the maintenance of the provisions set out in this section, for which such funds as may come to the State are hereby appropriated."

There is nothing in the quoted language or elsewhere in this statute to indicate that such fees collected by a district court clerk should be remitted through the clerk of the circuit court or that any commission should be deducted. I do not construe §16.1-69.48 of the Code, relating to the disposition of fees and fines collected, as including the "fee not to exceed one hundred fifty dollars" prescribed in the language quoted from §18.2-271.1. The "clerk" mentioned in the quoted language undoubtedly means the clerk of the district court in which the statutory proceeding occurs. The words "which amount" refer to the full amount of the fee the defendant is required to pay. It is my opinion that the entire fee collected by the clerk must be forwarded directly by such clerk to the State Treasurer. Accordingly, your question is answered in the affirmative.

MOTOR VEHICLES—Person Whose Operator's License Is Revoked—May not legally operate a "motorized bicycle" during period of revocation.

DEFINITIONS—Bicycles With Helper Motor—Person whose operator's license is revoked—May not legally operate a "motorized bicycle" during period of revocation.

The Honorable G. Warthen Downs
Substitute Judge for Henrico County General District Court

This is in reply to your recent letter from which I quote the following:

"There has recently been offered for sale to the public a motorized bicycle, such as the 'motorbecane,' which advertises that no operator's license is required for its operation on public roads. I respectfully request your opinion as to whether or not a person who has had his operator's license revoked can legally operate one of these motorized bicycles on public highways while he is within the period of his revocation."

The 1975 Session of the General Assembly, by Chapter 426, [1975] Acts of Assembly 731, amended § 46.1-1 of the Code of Virginia (1950), as amended, by adding paragraph (1a) defining the term "bicycle" to include "pedal bicycles with helper motors rated less than one brake horsepower, which produce only ordinary pedaling speeds up to a maximum of twenty miles per hour." The amendment also excluded from the definition of the term "motor vehicle" in paragraph (15) of the same section "any device herein defined as a bicycle." Likewise, paragraph (34) of § 46.1-1 excepted
"bicycles" from the term "vehicle," as therein defined. No operator's license is required to operate a device which qualifies as a "bicycle" under this section.

Your question is not whether a person is required to obtain a license to operate a "motorized bicycle" but whether a person who has had his operator's license revoked may thereafter lawfully operate such a bicycle on the public highways during the period of his license revocation. The law draws a line between the two situations. Apropos to your question, § 46.1-350 of the Code states, in relevant part, the following:

"Except as otherwise provided in §§ 46.1-352.1 and 46.1-387.8 as amended, no person, resident or nonresident, whose operator's or chauffeur's license or instruction permit or privilege to drive a motor vehicle has been suspended or revoked... shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in this State unless and until the period of such suspension or revocation shall have terminated."

The exceptions found in §§ 46.1-352.1 and 46.1-387.8 of the Code relate solely to a "farm tractor" used for agricultural purposes within the specific limitation of these sections. The language quoted from § 46.1-350, supra, forbids a person whose license to drive is suspended or revoked to operate any motor vehicle "or any self-propelled machinery or equipment." (Emphasis added.) The emphasized language clearly includes a self-propelled bicycle. In my opinion, therefore, a person whose license to drive is suspended or revoked cannot legally operate a motorized bicycle on the public highways during such period of suspension or revocation.

MOTOR VEHICLES—Privilege Of Members Of General Assembly, Clerks, Assistants And Lieutenant Governor—Traffic summons prohibited during specified period.

ARREST—Privilege Of Members Of General Assembly, Clerks, Assistants And Lieutenant Governor—Traffic summons prohibited during specified period.

CONSTITUTION—General Assembly Members—Immune from arrest during session.

CRIMINAL PROCEDURE—Privilege Of Members Of General Assembly, Clerks, Assistants And Lieutenant Governor—Traffic summons prohibited during specified period.

GENERAL ASSEMBLY—Arrest Of Members—Immune during session.

GENERAL ASSEMBLY—Members Not Immune From Civil Process.

LIEUTENANT GOVERNOR—Privilege Of—Traffic summons prohibited during specified period.

March 2, 1976

The Honorable John A. Dezio
Commonwealth's Attorney for Albemarle County

This is in reply to your recent letter in which you refer to § 30-6 of the Code of Virginia (1950), as amended, and request my opinion whether this section prohibits the Virginia State Police or other authorized police officers from issuing a traffic summons to a member of the General Assembly, the clerks thereof or their assistants, or the Lieutenant Governor during the specified exempted period of time.
Sections 30-6 and 30-7 of the Code respectively, read as follows:

"§ 30-6. Privilege of members, clerks, assistants and Lieutenant Governor from arrest.—During the session of the General Assembly, and for five days before and after the session, a member of the General Assembly, the clerks thereof and their assistants shall be privileged from being taken into custody or imprisoned under any process except as provided in § 30-7; nor shall such persons for such periods of time be subject to process as a witness in any case, civil or criminal. The provisions of this section shall be applicable to the Lieutenant Governor during his attendance at sessions of the General Assembly and while going to and from such sessions.

"§ 30-7. Qualifications of privilege from arrest.—No member of the General Assembly and no clerk thereof or his assistants nor the Lieutenant Governor shall be privileged from arrest or imprisonment for treason, felony or breach of the peace."

These statutes implement Article IV, Section 9, of the Constitution of Virginia (1971), which provides, in relevant part, that “[m]embers of the General Assembly shall, in all cases except treason, felony, or breach of the peace; . . . .”

It is clear from the foregoing statutory and constitutional provisions that the named persons are privileged from arrest or imprisonment during the stated period, except “for treason, felony or breach of the peace.” None of the named exceptions are ordinarily involved in a traffic summons. The authority for issuing a traffic summons is found in § 46.1-178 of the Code. This section provides that “[w]henever any person is arrested, including an arrest on a warrant, for a violation of any provision of this title punishable as a misdemeanor the arresting officer shall, except as otherwise provided in § 46.1-179 . . . issue a summons.” A summons is authorized only upon the arrest of a person under the stated conditions. Since an arrest is prohibited except for treason, felony or breach of the peace, assuming none of these excepted offenses are involved, it is my opinion that the privileged persons are immune from arrest during the period specified in the cited constitutional and statutory provisions. Accordingly, your question is answered in the affirmative.

I find nothing in either the Constitution or the Code, however, which would prevent the arrest of any of the privileged persons permanently. The arrest for a traffic violation committed during the period in question could be made after the expiration of such period if made within one year of the date of the offense as prescribed in § 19.2-8 of the Code. The purpose of the privilege is to avoid disrupting the legislative processes during a session of the General Assembly and for the stated period before and after such session. For related Opinions, see Reports of the Attorney General (1971-1972) at 215 and (1965-1966) at 136.

MOTOR VEHICLES—Radar Detector—Requirements of § 46.1-198.1 come within police power of State.

CRIMINAL LAW—Unlawful Use Of Radar Detector Not Grounds For Confiscating And Destroying Device.

FORFEITURES—Absence Of Statutory Provisions For—Unlawful use of radar detector not grounds for confiscating and destroying device.

MOTOR VEHICLES—Forfeitures—Absence of statutory provision for—Unlawful use of radar detector not grounds for confiscating and destroying device.
REPORT OF THE ATTORNEY GENERAL

January 22, 1976

THE HONORABLE JOHN F. EAKIN, Judge
Botetourt County General District Court

This is in reply to your recent letter with which you enclosed brochures relating to "radar" and "radar detecting devices," and raise the questions whether § 46.1-198.1 of the Code of Virginia (1950), as amended, is constitutional and, if so, in case of a conviction, whether the Court should dispose of the radar detecting device by returning it to the owner or by forfeiture to the Commonwealth.

Section 46.1-198 of the Code provides that the speed of any motor vehicle "may be checked by the use of radio microwaves or other electrical device." This section has been held constitutional and in all respects a valid enactment. Dooley v. Commonwealth, 198 Va. 32, 92 S.E.2d 348 (1956). Section 46.1-198.1 of the Code makes it unlawful to operate a motor vehicle upon the highways when such vehicle is equipped with any device or mechanism to detect the emission of radio microwaves employed by police to measure the speed of motor vehicles upon the highways.

Should the use of such radar detecting equipment be permitted, the value of radar as a means of determining the speed of motor vehicles on the highways would be seriously diminished, if not nullified. Since the State has the power to use radar, such activity being recognized by Dooley, herein-above cited, it follows that it has the power to make and enforce rules controlling the use of radar detectors. Section 46.1-198.1 is applicable to all persons uniformly under the same conditions. A statute is deemed constitutional if this can be reasonably done without violence to accepted rules of statutory interpretation. See Kohlberg v. Virginia Real Estate Commission, 212 Va. 237, 183 S.E.2d 170 (1971). In my opinion, the requirements of § 46.1-198.1 come within the police power of the Commonwealth. Accordingly, your first question is answered in the affirmative.

In respect to your other question, there is no provision of law for the forfeiture of devices described in § 46.1-198.1 of the Code. In the absence of any such statute, I find no authority for a forfeiture to the Commonwealth. This question is covered in my Opinion of November 19, 1975, to the Honorable David G. Simpson, Judge, Frederick-Winchester General District Court, copy of which is enclosed. I am of the opinion, therefore, that this type of device must be returned to its owner.

MOTOR VEHICLES—Radar Detector—Unlawful use in violation of § 46.1-198.1 not grounds for confiscating and destroying such device.

CRIMINAL LAW—Unlawful Use Of Radar Detector Not Grounds For Confiscating And Destroying Device.

FORFEITURES—Absence Of Statutory Provisions For—Unlawful use of radar detector not grounds for confiscating and destroying device.

MOTOR VEHICLES—Forfeitures—Absence of statutory provision for—Unlawful use of radar detector not grounds for confiscating and destroying device.

November 19, 1975

THE HONORABLE DAVID G. SIMPSON, Judge
Frederick-Winchester General District Court

This is in reply to your recent letter from which I quote the following:

"Section 46.1-198.1 of the Code of Virginia (1950), as amended,
prohibits the operation of a motor vehicle upon the highways of this State when such vehicle is equipped with any device or mechanism to detect the emission of radio microwaves in the electro-magnetic spectrum.

"I write to inquire whether or not, upon conviction under this section, it is proper for the Court to order the device in question confiscated and destroyed?"

Section 46.1-198.1 of the Code makes it unlawful for any person to operate a motor vehicle upon the highways of the Commonwealth when such vehicle is equipped with any device or mechanism to detect the emission of radio microwaves employed by police to measure the speed of motor vehicles. It is not only unlawful to use any such device or mechanism in a motor vehicle upon a highway, it is also unlawful to sell such devices or mechanisms in this Commonwealth. The presence of any such prohibited device or mechanism in a vehicle on a highway in this State constitutes *prima facie* evidence of a violation.

There are a number of statutes authorizing the forfeiture of specified property used in the commission of certain violations of law. Several such statutes, including §§ 46.1-191.2, 46.1-306, 46.1-351.1 and 46.1-351.2, authorize the seizure and forfeiture of motor vehicles for certain violations of law. There is no provision of law, however, whereby a device or mechanism described in § 46.1-198.1 of the Code can be forfeited to the Commonwealth. The confiscation and destruction of such device or mechanism would be tantamount to the imposition of such forfeiture. In light of the fact that the General Assembly has provided expressly for forfeitures in some cases, it is my opinion that in the absence of such a provision there is no authority for a forfeiture. A consistent view is expressed in an Opinion to the Honorable Eugene A. Link, Commonwealth's Attorney for the City of Danville, dated January 11, 1963, and found in the Report of the Attorney General (1962-1963) at 187 and in an Opinion to the Honorable J. Wilton Hope, Jr., Commonwealth's Attorney for Elizabeth City County, dated April 18, 1950, and found in the Report of the Attorney General (1949-1950) at 79. Your question, therefore, is answered in the negative.

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**MOTOR VEHICLES—Regulation Of Parking By Cities And Towns.**

**CITIES—Part-time City Employees Who Are Not Members Of City Police Department May Issue Citations For Violations Of Local Parking Regulations.**

**CITIES AND TOWNS—May Regulate Parking On Streets.**

**CITIES AND TOWNS—Part-time Employees Who Are Not Members Of Police Department May Issue Citations For Violations Of Local Parking Regulations.**

**POLICE—Parking Citations—Part-time city employees who are not members of city police department may issue citations for violations of local parking regulations.**

**TOWNS—Authority Of Council To Adopt Ordinance Regulating Parking.**

March 17, 1976

The Honorable William L. Person, Jr.
Commonwealth's Attorney for the County of James City and City of Williamsburg

You have asked my opinion concerning the authority of part-time employees of the City of Williamsburg to issue citations for violations of local
parking ordinances. These employees, who are hired to monitor parking throughout the city, are not members of the Williamsburg Police Department.

The authority of a city to regulate the parking of automobiles within its jurisdiction is granted in § 46.1-252, Code of Virginia (1950), as amended, the relevant portion of which provides as follows:

"The council or other governing body of any city or town may, by a general ordinance, provide for the regulation of parking within its limits, including the right to install and maintain parking meters and to require the deposit therein of a coin of a denomination to be prescribed in such ordinance and to determine the time during which a vehicle may be parked and may authorize the city manager, the director of public safety, the chief of police or other designated officer within the city or town to put the regulations into effect, including specifically the right and authority to classify vehicles with reference to parking and to designate the time, place and manner such vehicles may be allowed to park on city or town streets; and may delegate to the appropriate administrative official or officials the authority to make and enforce such additional rules and regulations as parking conditions may require and may prescribe penalties for failure to conform thereto."

(Emphasis added.)


Significantly, the statute does not limit the class of officials to whom such authority may be delegated. It is my opinion, therefore, that the City of Williamsburg may authorize part-time employees who are not members of the city's police department to enforce local parking regulations by issuing citations for violations thereof.

MOTOR VEHICLES—School Bus—Speed limit—Forty-five miles per hour if neither taking on nor discharging children between points of origin and destination—Otherwise thirty-five miles per hour.

September 29, 1975

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

This is in reply to your letter of September 15, 1975, from which I quote the following:

"Virginia Code Section 46.1-193(1)(d) establishes the maximum speed limit for school buses as follows:

"Thirty-five miles per hour or the minimum speed allowable, whichever is greater, on any highway other than an interstate highway, if the vehicle is being used as a school bus carrying children, and forty-five miles per hour on interstate highways; provided, however, that for any vehicle which neither takes on nor discharges children between
its point of origin and point of destination, the speed limit shall be forty-five miles per hour.

"Differences of opinion apparently exist among State Troopers with reference to the interpretation to be accorded the proviso of the paragraph in certain situations: At the end of the day, some school buses take on passengers at one school and then proceed directly to a second school to pick up additional children. From the second school, the buses then proceed along their appointed routes, discharging passengers as they go. Is the speed limit for the buses forty-five miles per hour between the two schools and thirty-five miles per hour thereafter, or is it thirty-five miles per hour throughout?"

The proviso increasing the speed limit to forty-five miles per hour for any vehicle "which neither takes on nor discharges children between its point of origin and point of destination" was added by Chapter 608, [1972] Acts of Assembly 753. The purpose is to permit the highway speed of forty-five miles per hour for school buses which neither take on nor discharge children between point of origin and point of destination.

The word "destination," when used in the context of travel, is defined in The American Heritage Dictionary of the English Language 358 (Fourth Printing 1969, 1970) as "[t]he place or point to which someone or something is going or directed." In the given situation the school bus takes on passengers at one school and proceeds directly to a second school for the stated purpose of taking on additional children. No children are taken on or discharged between the two schools. When the school bus leaves the first school, its "point of origin," it proceeds directly to the second school. The second school is the place or point to which the school bus "is going or directed." Hence, the second school qualifies as the "point of destination" within the quoted definition.

In my opinion, therefore, the speed limit for such buses between the two schools is forty-five miles per hour. Proceeding from the second school, the buses discharge passengers along the way and, consequently, they do not come within the statutory proviso for buses which neither take on nor discharge children between point of origin and point of destination. Accordingly, on that segment of travel proceeding from the second school they are bound by the thirty-five mile speed limitation.

MOTOR VEHICLES—Seizure And Forfeiture Upon Conviction Of Owner For Racing—Convicted husband's interest in jointly owned vehicle may be forfeited.

July 24, 1975

The Honorable Kermit L. Racey, Judge
General District Court of Shenandoah County

This is in reply to your recent letter from which I quote the following:

"I solicit the opinion of your office in regard to the following matter: where a motor vehicle is owned jointly by husband and wife, and the husband only is convicted of racing pursuant to § 46.1-191 of the Code of Virginia (1950), as amended. May the husband's interest in the jointly owned motor vehicle be forfeited pursuant to § 46.1-191.2 of the Code, where the racing is proved to have been prearranged, organized and having consisted of a planned speed competition?"

Section 46.1-191.2 of the Code of Virginia (1950), as amended, states, in relevant part, the following:

"If the owner of a motor vehicle is convicted of racing such vehicle
in a prearranged, organized and planned speed competition in violation of § 46.1-191, or is present in such vehicle which is being operated by another in violation of § 46.1-191, and knowingly consents thereto, then such vehicle shall be seized and disposed of as directed in §§ 46.1-351.1 and 46.1-351.2.”

Section 46.1-68.1 of the Code authorizes the Division of Motor Vehicles upon receiving proper application to issue a certificate of title for a motor vehicle in the names of husband and wife jointly. The same section provides that nothing therein shall “be construed to grant immunity from enforcement of any liability of any person owning such vehicle, as one of two joint owners, to the extent of his interest in the vehicle, during the joint lives of the owners thereof.” Accordingly, your question is answered in the affirmative.

MOTOR VEHICLES—Uniform Demerit Point System—Driving without valid Virginia license—Suspension after accumulation of twelve points not automatic.

MOTOR VEHICLES—Uniform Demerit Point System—Failure to attend scheduled interview or driver improvement clinic.

July 22, 1975

THE HONORABLE JOSEPH E. HESS, Judge
Buena Vista General District and Juvenile and Domestic Relations District Courts

This is in reply to your recent letter from which I quote the following:

“I have two inquiries ... as follows: Six points have been assigned for driving without an operator’s license, a violation of § 46.1-349 of the Code of Virginia (1950), as amended. Are six points assigned, upon conviction, to a driver who has a valid license from another state, but who should have had a Virginia operator’s license on account of his residence and employment in this State?

“In addition, I should like to know whether or not a driver who has accumulated fourteen points within a period of one year, but who has not yet had a group interview, personal interview or license probation is able to retain his license pending the outcome of his appearance and progress through these administrative steps, or since his point total is above twelve, will his license be automatically suspended?”

Section 46.1-514.6 of the Code of Virginia (1950), as amended, prescribes that the Commissioner of the Division of Motor Vehicles shall assign six demerit points for serious traffic offenses. The Commissioner, in Rule 3.1 (d), Rules and Regulations of the Virginia Driver Improvement Act, has determined that six demerit points shall be assigned for a conviction of driving without a valid license in violation of § 46.1-349 of the Code. Under that section of the Code, if a person does not have a valid Virginia license and is not expressly exempted by §§ 46.1-352 through 46.1-356, even though he possesses a valid license from another state, he may still be convicted of driving without a valid license. Accordingly, in determining whether to assess demerit points it is my opinion that it is immaterial whether a person has a valid driver’s license from another state if he is convicted under § 46.1-349 of the Code.

In respect to your other inquiry, § 46.1-514.10(b) of the Code provides that the Division’s failure to schedule a group interview shall not be grounds for waiving any other provision of this chapter. Section 46.1-514.11
of the Code requires that whenever the driving record of a person shows an accumulation of at least twelve demerit points based on convictions, or findings of not innocent in the case of a juvenile, for traffic offenses committed within a period of twelve consecutive months, "the Commissioner shall direct such person to appear for a personal interview." At the personal interview, a driver improvement analyst examines such person "for the purpose of identifying his basic reasons for failing to respond to the motor vehicle laws" and evaluates the problems contributing to his continued reckless or negligent driving habits. The analyst then recommends to the Commissioner either that he suspend the person's license and place him on probation or that he place him immediately on probation and require him to attend a driver improvement clinic. There is no provision for the automatic suspension of a person's license on the basis of an accumulation of demerit points before such person has been directed to appear for a personal interview. If a person who is directed to attend a scheduled interview or driver improvement clinic should fail to attend, the Commissioner is required by § 46.1-514.16 of the Code to suspend such person's license or privilege to drive until he complies. The Commissioner may cancel such suspension "for good cause shown."

MOTOR VEHICLES—Weight—Federally owned vehicles subject to State's vehicle weight law.

HIGHWAYS—Weights Of Motor Vehicles—Federally owned vehicles subject to State's vehicle weight law.

September 15, 1975

THE HONORABLE DAVID G. SIMPSON, Judge
Frederick-Winchester General District Court

This is in reply to your recent letter concerning a case, currently pending in your Court, involving a tractor and trailer owned by the Tennessee Valley Authority and allegedly driven on a highway in Virginia in violation of the applicable vehicle weight limit. You inquire whether, in view of Kentucky ex rel. Hancock v. Ruckelshaus, 362 F. Supp. 360 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974), cert. granted, 420 U.S. 971 (Sept. 6, 1974) (No. 74-220), the opinion expressed by Francis C. Lee, former Assistant Attorney General, in a letter dated December 13, 1954, to Colonel C. W. Woodson, Jr., former Superintendent of the Department of State Police, "is still applicable."

The letter to which you refer concerned the authority of the Commonwealth of Virginia to regulate the size and weight of federally owned vehicles traveling over the highways of Virginia. The following view was expressed therein:

"It is well established that the State has jurisdiction over its highways and possesses the power to promulgate and enforce reasonable regulations in times of emergency or where such regulations conflict for their use. Speed, weight and size limitations are within the reasonable exercise of the sovereign power of the State in protecting the roads as well as in the promotion of safety for the traveling public."

"Without attempting to express an opinion as to the effect of such regulations in times of emergency or where such regulations conflict with federal laws or regulations, it may be said with reasonable certainty that the size and weight laws of the State are applicable to motor vehicles owned by the federal government."

"I am aware of no federal law or regulation on the subject of weights or sizes with respect to motor vehicles which would in any way con-
flict with the provisions of the Virginia weight laws so as to make the enforcement thereof an interference with an essential operation of the federal government."

In Kentucky, supra, the Attorney General of the Commonwealth of Kentucky sought to compel the Tennessee Valley Authority, among others, to apply for and obtain from the Kentucky Air Pollution Control Commission permits to operate air contaminating equipment. In affirming summary judgment awarded TVA in the trial court, the Court of Appeals construed § 118 of the Clean Air Act, as amended, 42 U.S.C. § 1857 (1970), as requiring TVA to comply with standards of air quality and emissions but not with the administrative regulations of the Commission.

Subsequent to Mr. Lee's letter, however, the United States District Court for the Western District of Virginia decided Commonwealth v. Stiff, 144 F. Supp. 169 (W.D. Va. 1956), which case involved the criminal prosecution of an employee of the United States government for allegedly operating a federally owned vehicle in violation of a Virginia statute prescribing maximum weights for vehicles driven on the highways of the Commonwealth. In Stiff the Court indicated that an individual is not immune from this State's vehicle weight law simply by reason of the fact that the vehicle in question is owned by the federal government and operated in the course of official business. In view of the Court's decision in this case, the factual dissimilarity of Kentucky, supra, and the fact that I am aware of no federal statute or regulation in conflict with § 46.1-339 of the Code of Virginia (1950), as amended, which statute currently prescribes maximum weights for vehicles operated on Virginia's highways, I am of the opinion that federally owned and operated vehicles are subject to this State's vehicle weight law, and that Mr. Lee's opinion remains valid in this respect.

MOTOR VEHICLES—Weight Laws—Police officers other than State Police may enforce; Highway Department special police may not.

ARREST—Weight Laws—Police officers other than State Police may enforce; Highway Department special police may not.

HIGHWAYS—Weight Laws—Police officers other than State Police may enforce; Highway Department special police may not.

POLICE—Weight Laws—Police officers other than State Police may enforce; Highway Department special police may not.

October 20, 1975

THE HONORABLE WAYNE A. WHITHAM
Secretary of Transportation and Public Safety

This is in reply to your letter concerning the necessity of using State Police at the permanent weighing stations located on the interstate and primary highways of the Commonwealth. I quote from your letter as follows:

"It occurs to me that the enforcement of the laws at the weigh stations might be handled by the regular employees of the Department of Highways and Transportation if they are given adequate training, thus releasing our troopers for other duty. My cursory reading of the statutes indicates that the law requires the trooper to be on hand. I would like to know if my conclusion is correct, or if it would be possible under present law to authorize a representative of the Department of Highways and Transportation to make arrests and weigh vehicles under this provision of the law. If this is not possible, what revisions in § 46.1-342 do you deem necessary?"
Section 46.1-342 of the Code of Virginia (1950), as amended, empowers “any officer authorized to make arrests and weigh vehicles under the provisions of this chapter” to hold under the specified circumstances certain vehicles involved in weight violations. Section 46.1-347 provides, in part, that “[a]ny 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.” With respect to identification of those officers who are authorized to enforce Title 46.1 and to make arrests under Chapter 4 thereof, § 46.1-6 provides, in part, as follows:

“They are hereby authorized to hold under the specified circumstances certain vehicles involved in weight violations. Section 46.1-347 provides, in part, that “[a]ny 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.” With respect to identification of those officers who are authorized to enforce Title 46.1 and to make arrests under Chapter 4 thereof, § 46.1-6 provides, in part, as follows:

“Every county, city, town or other political subdivision of the State, as well as the State authorities and law enforcement officers, shall enforce the provisions of chapters 1 through 4 (§§ 46.1-1 through 46.1-347) of this title through the agency of any peace or police officer, sheriff or deputy...”

Accordingly, I am of the opinion that police officers other than State Police are authorized to make arrests and to weigh and detain vehicles at weighing stations in connection with §§ 46.1-342 and 46.1-347.

With respect to the possible appointment of employees of the Department of Highways and Transportation as police officers, I note that § 33.1-21 authorizes the State Highway and Transportation Commission to appoint any or all of its employees as special policemen. This section makes clear, however, that the police function of such appointees is limited to enforcement of the rules and regulations promulgated by the Commission. Inasmuch as vehicle weight limits are statutorily prescribed rather than administratively set by the Commission, I am of the opinion that Highway Department employees appointed as special police pursuant to § 33.1-21 are not thereby authorized to make arrests and to weigh and detain vehicles in connection with §§ 46.1-342 and 46.1-347. Employees of the Department of Highways and Transportation appointed as special police officers pursuant to § 33.1-21 could lawfully exercise the powers in question were the General Assembly to amend §§ 46.1-342, 46.1-347 and 33.1-21 expressly to so provide.

Section 15.1-144 authorizes the circuit court of any county to appoint “suitable and discreet persons” as special policemen for so much of such county as is not located within an incorporated town. This section further provides that persons “so appointed shall be conservators of the peace in their respective counties.” Pursuant to § 15.1-152, “[t]he 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.” Accordingly, individuals appointed as special policemen pursuant to § 15.1-144 may, at appropriate locations, make arrests and weigh and detain vehicles in connection with §§ 46.1-342 and 46.1-347.

With respect to the appointment of employees of the Department of Highways and Transportation as special policemen, however, the provisions of § 33.1-21 control. In view of the fact that the General Assembly has specifically authorized the State Highway and Transportation Commission to appoint any or all of its employees as special policemen and has narrowly defined the police function of such appointees, I am of the opinion that the circuit court of a county, acting pursuant to § 15.1-144, may not appoint Highway Department employees as special policemen. I conclude, therefore, Highway Department employees serving as special policemen must be appointed pursuant to § 33.1-21 and, in the absence of amendments to §§ 33.1-21, 46.1-342 and 46.1-347, such appointees may not exercise the powers in question.
REPORT OF THE ATTORNEY GENERAL

ORDINANCES—Subdivision—Constitutionality of county ordinance creating exception to general definition of “subdivision.”

COUNTIES, CITIES AND TOWNS—Subdivision—Exception to general definition is within powers delegated to localities for subdivision regulation under State law.

DEFINITIONS—“Subdivision”—Reasonableness of county’s exception to general definition.

VIRGINIA LAND SUBDIVISION ACT—Portion Of Police Power Of State Delegated To Each Locality In Determining Regulation of Subdivisions.

THE HONORABLE CHARLES B. FOLEY
Commonwealth’s Attorney for Fauquier County

This is in reply to your recent letter wherein you inquire regarding the constitutionality of a provision of the Fauquier County Subdivision Ordinance which creates an exception to the general definition of “subdivision” and exempts from regulation certain divisions of land as follows:

“(4) An exception is made to the definition of ‘subdivision’ for the following:

“(a) The division of a lot or parcel for the purpose of gift or sale to any member of the owner’s immediate family. Only one such exception will be allowed per family member, and shall not be for the purpose of circumvention of the requirements of this ordinance. For the purpose of this exception, a member of the immediate family is defined as any person who is a natural or legally defined offspring, spouse, or parent of the owner(s).”

Section 15.1-465, Code of Virginia (1950), as amended, requires all counties and municipalities to adopt subdivision ordinances and provides, further, that the word “subdivision” as used in any such ordinance shall have the meaning set forth in § 15.1-430(1) of the Code. Section 15.1-430(1) provides:

“(1) ‘Subdivision,’ unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided.”

(Emphasis added.)

The foregoing provisions require all localities to regulate the subdivision of land but delegate to each locality the power to define the term “subdivision”, and thereby determine what subdivisions of land shall be regulated by its subdivision ordinance. Board of Supervisors v. Land Co., 204 Va. 380 (1963). Accordingly, the creation of an exception to the definition of the term “subdivision” is within the broad powers delegated to localities for subdivision regulation under State law.

The remaining question is, therefore, has the county, in this instance, exercised its delegated authority properly and in accordance with constitutional principle. The answer as to whether the county has so acted in defining the term “subdivision” is dependent upon the reasonableness of the definition. Board of Supervisors v. Land Co., supra. In that regard the Virginia Supreme Court has stated:
The legislature, in enacting the Virginia Land Subdivision Act, delegated to each locality a portion of the police power of the state, to be exercised by it in determining what subdivisions would be controlled, and how they should be regulated. The legislature left much to the discretion of the locality in making such determination, relying upon the local governing body's knowledge of local conditions and the needs of its individual community.

"The test as to whether the local body has used this power and discretion properly is, has it acted reasonably? Unless there is a clear abuse of power, the judgment of the local legislative body will prevail. West Brothers Brick Co. v. Alexandria, 169 Va. 271, 283, 192 S.E. 881; Board of Supervisors v. Carper, supra, 200 Va. at 660.

Whether a locality has acted reasonably in defining the term "subdivision", is an ordinance adopted pursuant to the Act, must depend upon the circumstances found to exist in the particular locality." 204 Va. at 383. (Emphasis added.)

Accordingly, I am of the opinion that the County is granted broad discretion in determining the types of subdivisions of land which are to be subject to the requirements of its subdivision ordinance and that, unless the exception about which you inquire is shown by appropriate evidence to be unreasonable, it will be upheld as valid. Board of Supervisors v. Land Co., supra.

ORDINANCES—Zoning—Conflict between State law and local ordinances—More stringent requirement prevails.

CONFLICT OF LAWS—Conflict Between State Law And Local Ordinances—More stringent requirement prevails for zoning authority.

COUNTIES, CITIES AND TOWNS—Conflict Between State Law And Local Ordinances—More stringent requirement prevails for zoning authority.

DILLON'S RULE—Limits Authority Of Local Governments To Powers And Functions Statutorily Established.

ZONING—Conflict Between State Law And Local Ordinances—More stringent requirement prevails.

July 23, 1975

THE HONORABLE THOMAS J. SURFACE
Commonwealth's Attorney for Craig County

This is in reply to your recent letter regarding county zoning ordinances conflicting with State statutes in the area of land use. Appropriate response to your inquiry depends upon the meaning of the term "conflict" as used in your letter of inquiry. The authority of counties to enact zoning ordinances and the permissible scope of such zoning ordinances are set forth in §§ 15.1-486, 15.1-489, 15.1-490 and 15.1-491, Code of Virginia (1950), as amended. Inasmuch as the authority granted to localities therein is delegated, any local zoning ordinance regulating activities as matters outside the scope of such authority would be invalid as an unlawful exercise of governmental power. Accordingly, provisions of State law would, in my opinion, control in defining the appropriate scope of local zoning ordinances. This conclusion is in accord with the familiar Dillon's Rule, followed in Virginia, to the effect that authority of local government shall be narrowly
construed as encompassing only such authority as is conferred by statute either expressly or by necessary implication.

To the extent that "conflict" connotes the imposition, by local zoning ordinance, of a higher standard than that prescribed by State law, with respect to matters within the permissible scope of local zoning authority, § 15.1-498 provides:

"Whenever the regulations made under authority of this article require a greater width or size of yards, courts or other open spaces, require a lower height of building or less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this article shall govern. Whenever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, require a lower height of building or a less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are required by the regulations made under authority of this article, the provisions of such statute or local ordinance or regulation shall govern."

Accordingly, where State law and local zoning ordinances impose different standards on land use, I am of the opinion that local zoning ordinances will control over State law where the zoning ordinances impose a higher standard; and where State law imposes a higher standard than local ordinances the State law will control. In short, the more stringent requirement will prevail as to matters with respect to which zoning authority has been delegated to Virginia counties.

PARDON, PROBATION AND PAROLE—Computation Of Eligibility In Cases Of Consecutive Sentences.

CRIMES—Computation Of Parole Eligibility Date.

CRIMINAL PROCEDURE—Parole—Computation of eligibility in cases of consecutive sentences.

March 24, 1976

THE HONORABLE PLEASANT C. SHIELDS
Chairman, Virginia Parole Board

This is in reply to your recent letter wherein you inquired as to the proper method of computing parole eligibility in the following circumstances:

"The Defendant is arrested on a charge of burglary on January 1, 1971, is subsequently convicted and sentenced to a term of five years. On January 1, 1973, he is released on parole. On July 1, 1974, he is rearrested, having been charged with robbery and is subsequently convicted and sentenced to a term of eleven years. Thereafter, his parole is revoked."

Section 53-251 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"(1) Except as herein otherwise provided, every person convicted of a felony, and sentenced and committed under the laws of this Commonwealth to any State correctional institution shall be eligible for parole after serving one-fourth of the term of imprisonment imposed,
or after serving twelve years of the term of imprisonment imposed if
one-fourth of the term of imprisonment imposed is more than twelve
years. In case of terms of imprisonment to be served consecutively, the
total time imposed shall constitute the term of the imprisonment; in the
case of terms of imprisonment to be served concurrently, the longest
term imposed shall be the term of imprisonment.” (Emphasis added.)

In an Opinion to the Honorable Otis L. Brown, Director, Department of
Welfare and Institutions, dated June 15, 1972, and found in Report of the
Attorney General (1971-1972) at 112-113, it was ruled that, in cases where
consecutive sentences are to be served, the parole eligibility date is deter-
mined from the total of such sentences. In the example you cite, the de-
fendant received sentences which run consecutively. Consistent with the
foregoing Opinion, the defendant's parole eligibility date is computed as
follows to be July 1, 1976:

I. Arrest Date 1/1/71
   Date Paroled 1/1/73
   Time served to be counted toward parole eligibility on all sentences 2 years

II. Re-arrest date 7/1/74
   Needed to serve to reach eligibility on both
   sentences
   Parole eligibility date not taking into account any credit 7/1/78
   Less: Credit for eligibility time already served (I above) 2 years
   Eligibility date 7/1/76

PARK AUTHORITIES—Act Does Not Require A Park Authority To Be
Reestablished In Order To Admit Additional Political Subdivisions.

PARK AUTHORITIES—May Establish Conditions For Admitting Addi-
tional Political Subdivisions—Cannot join merely by resolution of their
governing bodies.

PARK AUTHORITIES—Change To Proportional Representation Must Be
Through Concurrent Resolutions Adopted By All Participating Political
Subdivisions.

PARK AUTHORITIES—Political Subdivisions Which Create Or Join An
Authority Need Not Be Contiguous To One Another Nor Adjacent To A Regional Park.

August 8, 1975

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

This is in reply to your recent letter in which you ask certain questions
pertaining to park authorities, and the Northern Virginia Regional Park
Authority in particular. These questions are restated as follows:
1. Must a park authority, which has been created pursuant to the Park
Authorities Act [Chapter 27, of Title 15.1 of the Code of Virginia (1950),
as amended] be reestablished in order to admit additional political sub-
divisions as new members of the authority? If not, is any formal consent by the authority required for their admission?

2. If reestablishment or consent is not required, can new political subdivisions join merely by appropriate resolution of their governing bodies?

3. Can the Northern Virginia Regional Park Authority restructure its membership to provide for proportional representation by jurisdiction based on population?

4. Can a political subdivision, not adjacent to either the geographical boundary of a member political subdivision of the Northern Virginia Regional Park Authority or a regional park, join the authority?

I shall answer these questions seriatim:

1. I find no provision in the Park Authorities Act which requires a park authority to be reestablished in order to admit additional political subdivisions. Section 15.1-1230A of the Code of Virginia (1950), as amended, provides, in pertinent part, that "any political subdivision not having joined in the original incorporation may join in the authority...." A park authority, however, has the power, pursuant to § 15.1-1232(b) to adopt bylaws for the regulation of its affairs and the conduct of its business. Through its bylaws, a park authority may establish the conditions under which additional political subdivisions may be admitted to the authority.

2. In view of the foregoing, your second inquiry is answered in the negative.

3. Section 15.1-1231 provides, in part, that "[t]he powers of each authority created hereunder shall be exercised by not less than six members, comprising not less than two members, but always an even number, from each participating political subdivision, appointed by the governing body thereof." This section clearly implies that representation of each participating political subdivision need not be equal in number, and that such representation could be based upon population. The concurrent resolutions, adopted for the purpose of establishing the Northern Virginia Regional Park Authority, provide that each participating political subdivision shall have two members. These resolutions make no mention of, nor have the effect of permitting, proportional representation. Section 15.1-1231 provides not only that authority members be appointed by their respective governing bodies, but also that their compensation and expenses may be paid by the appointing jurisdictions. Consequently, should a change to proportional representation now be desired, it must be accomplished through concurrent resolutions adopted by all participating political subdivisions.

4. The Park Authorities Act contains no requirement that political subdivisions, which create or join an authority, be contiguous to one another. See Report of the Attorney General (1972-1973) at 304. Nor does the Act require that a political subdivision be adjacent to a regional park in order to join an authority. This question, therefore, is answered in the affirmative.

PARK AUTHORITIES—May Charge Nonresidents For Use Of Its Facility; Exempt Residents Of Fairfax County—County contributes to park authority.


August 26, 1975

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

In your recent letter you inquire whether the Fairfax Park Authority may charge nonresidents of Fairfax County a fee for the use of its facilities.
Section 15.1-1234 of the Code of Virginia (1950), as amended, provides as follows:

"The [park] authority is hereby authorized to fix and revise from time to time rates, fees and other charges for the use of and for the services furnished or to be furnished by any park."

This section clearly authorizes a park authority to charge fees for the use of its facilities. The question remains whether the fees may be assessed in such a way as to exempt residents of Fairfax County.

Equal protection of the law is not violated when citizens are placed in different categories, provided the classification rests upon some ground of difference having a fair and substantial relation to the object of the rule. Kahn v. Shevin, 416 U.S. 351 (1974); Fredericksburg v. Sanitary Grocery Co., 168 Va. 57 (1937). Pursuant to § 15.1-1236, Fairfax County can contract with the Authority for park services, and additionally can make contributions to the Authority. In such circumstances the residents of Fairfax would be making a contribution to the operation and maintenance of the Authority's facilities through the payment of local taxes. Nonresidents of Fairfax, on the other hand, would not be making a similar contribution.

I am advised that Fairfax County does in fact make contributions to the Authority. In this situation, a reasonable basis would exist, for placing residents of Fairfax in one category and nonresidents in another. It is my opinion, therefore, that the Fairfax Park Authority may charge fees for the use of its facilities and that, in light of the foregoing circumstances, the residents of Fairfax County may be exempted from the payment of such fees.

PENINSULA TRANSPORTATION DISTRICT COMMISSION—Administrative Budget Not Required Pursuant To § 15.1-1357(c) After Commission Funds Its Entire Expenses From Its Operations.

August 12, 1975

THE HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

I have received your recent letter inquiring whether the Peninsula Transportation District Commission should continue to retain its administrative budget pursuant to § 15.1-1357(c) after June 30, 1975. The commission entered into an agreement with the Citizens Rapid Transit Company on March 31, 1975, and began to operate a transit system in the cities of Newport News and Hampton on April 1, 1975. The commission will not request an allocation of funds from the General Assembly or the cities of Newport News and Hampton for the fiscal year beginning July 1, 1975, and expects to fund its entire expenses, administrative and operating, from its operations or from federal assistance programs.

Section 15.1-1357(c) provides that the administrative expenses of the commission shall be borne by the component governments until such time as it enters into contracts or agreements with the component governments to provide transit facilities and service. The commission is required to submit its administrative budget to the governing bodies of the component counties or cities and its administrative expenses are allocable among such localities on the basis of population. The budget is limited solely to the administrative expenses and cannot include any funds for construction or acquisition of transportation facilities or the performing of transportation service.
Section 15.1-1357(c) is designed to provide funding for the administrative expenses of the commission pending its commencement of actual transit operations pursuant to contractual agreements with the affected jurisdictions, at which time the agreements providing for the acquisition and operation of the transit system are expected to provide funding for both the administrative and operating expenses. Since the commission expects to fund its administrative expenses in the 1975-1976 fiscal year from operating revenues and federal assistance, it has no administrative expenses for which funding by the component cities is needed. Accordingly, I am of the opinion that the commission should not retain a separate administrative budget pursuant to § 15.1-1357(c) after June 30, 1975, and that expenses previously funded by Newport News and Hampton should be paid in the future from the operating and other revenues of the commission.

PERSONNEL ACT—Employees Relying On Erroneous Calculations Took Unearned Annual Leave—Ways to correct situation.

COLLEGES AND UNIVERSITIES—Employees Relying On Erroneous Calculations Took Unearned Annual Leave—Ways to correct situation.

STATE EMPLOYEES—Wages—Agency may not withhold wages without authorization.

November 18, 1975

THE HONORABLE FRANK L. HEREFORD, JR.
President, University of Virginia

This is in reply to your recent letter in which you state that erroneous calculations as to the amount of annual leave accrued by some employees resulted in instances in which employees, in reliance on the erroneous calculations, took annual leave which had not been earned. This deficiency can be recouped by crediting leave earned in the future against that which was improperly taken. You inquire as to the propriety of two alternative ways to correct the situation.

Question 1: “May the University permit the accrual of annual leave to employees during a pay period in which they were absent for one or more days on leave erroneously granted in excess of their accumulated leave?”

This question arises because of language in Rule 10.6(b) of the Rules for Administration of the Personnel Act of 1942 which states, in pertinent part, that “[n]o annual leave credit shall be provided for service less than a full semi-monthly pay period....” This means that where an employee is absent or suspended, or on leave without pay, he would not accrue annual leave during the pay period in question. I see no reason why this rule should be applied to prevent an employee who takes leave in the described circumstances from accruing leave during the pay period in which the leave was taken. The employee took authorized leave, even if it was authorized by mistake.

Question 2: “May the University dock the pay of employees who owe the University for excess leave, without obtaining written authorization from each employee? May this be done if such written authorization is obtained?”

In a prior opinion of the Attorney General, it was ruled that pursuant to § 40.1-29 of the Code of Virginia (1950), as amended, a State agency could
not withhold a portion of an employee's wages to satisfy a debt due the agency unless so authorized by the employee in writing. See Report of the Attorney General (1971-1972) at 373, a copy of which is enclosed.

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PLANNING COMMISSIONS—Employee Of Department Of Highways And Transportation May Be Appointed To.

HIGHWAYS AND TRANSPORTATION, DEPARTMENT OF—Employee Of May Be Appointed To Local Planning Commission.

PLANNING COMMISSIONS—Qualifications For Membership On Local Planning Commission Set Forth In § 15.1-437.

STATE EMPLOYEES—Employee Of Department Of Highways And Transportation May Be Appointed To Local Planning Commission.

February 20, 1976

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

This is in reply to your inquiry whether an employee of the Department of Highways and Transportation may be appointed to serve on a local planning commission.

The qualifications for membership on a local planning commission are set forth in § 15.1-437 of the Code of Virginia (1950), as amended. Nowhere in this section is there a provision which makes employees of the Department of Highways and Transportation ineligible to serve on such a commission. Furthermore, I can find no other statute containing any relevant prohibition. Accordingly, I am of the opinion that an employee of the Department of Highways and Transportation who meets the qualifications set forth in § 15.1-437 may be appointed to serve on a local planning commission.

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POLICE—Washington Metropolitan Area Transit Authority—Employees appointed as special policemen must reside in Virginia.

POLICE—Washington Metropolitan Area Transit Authority—Metro Transit Police qualifications do not include residency requirements for members serving in Virginia.

October 7, 1975

THE HONORABLE JOSEPH C. GWALTNEY, Clerk
Circuit Court of Arlington County

This is in reply to your letter in which you state that the Washington Metropolitan Area Transit Authority (WMATA) wishes to have some of its employees, who do not reside in the Commonwealth of Virginia, appointed as special police officers to provide police protection in connection with the Authority's facilities located in the Commonwealth. You inquire whether, in view of Chapter 576, [1974] Acts of Assembly 1095, such individuals may be so appointed. Inherent in your inquiry is a question as to the correlation between Chapter 576 and §§ 15.1-144, 15.1-145 and 19.2-17 of the Code of Virginia (1950), as amended, which provide for appointment of policemen by circuit courts.

Chapter 576 completely revised paragraph 76 of Title III of the Washington Metropolitan Area Transit Regulation Compact, which paragraph
relates to the Authority's police security. Prior to its revision, paragraph 76 made no provision for a regular police force for WMATA but authorized the Board of Directors to employ watchmen, guards and investigators to provide for the protection of its property, personnel and passengers. These employees were vested with no specific police power; however, authority was extended to allow them to act as special police in a particular jurisdiction if specifically authorized by that jurisdiction. The 1974 revision expressly authorizes the Authority "to establish and maintain a regular police force, to be known as the Metro Transit Police, to provide protection for its patrons, personnel, property and Transit facilities." Subparagraph (f) of the revised paragraph provides that the Authority shall "fix and provide" for the qualification and appointment of members of such police force. I can find no other section in the Code or the Compact that further qualifies these appointments. Accordingly, I am of the opinion that the Authority, acting pursuant to Chapter 576, is authorized to promulgate qualifications and standards for members of the Metro Transit Police which do not include residency requirements for those members serving in Virginia.

With respect to the appointment of special police officers, § 15.1-144 of the Code authorizes the circuit court of any county to appoint special policemen for so much of such county as is not embraced within an incorporated town. This Section further provides that any persons so appointed "shall be conservators of the peace in their respective counties." Additional provisions with respect to the powers and duties of such special policemen are found in §§ 15.1-152 and 15.1-153. Section 15.1-145 provides, in part, however, that any individual appointed as a policeman pursuant to § 15.1-144 shall reside in the Commonwealth during his tenure of office.

In addition, § 19.2-17 states, in part, the following:

"Any court or judge mentioned in § 19.2-13 may also appoint, for the places mentioned in that section, one or more citizens as policeman or policemen with the same powers and duties as are vested in special policemen in counties under the provisions of Article 3 (§§ 15.1-144 et seq.) of Chapter 3 of Title 15.1, except that they shall not have authority to execute civil process."

Section 19.2-13 authorizes the circuit court of any county or city to appoint special conservators of the peace "[u]pon the application of the owner, proprietor or authorized custodian of any place within the Commonwealth and the showing of a necessity for the security of property or the peace...." In view of §§ 1-18 and 1-20 of the Code, defining Virginia citizenship, and the reference in § 19.2-17 to "citizens," I am of the opinion that policemen appointed pursuant to § 19.2-17 are subject to a residency requirement similar to that imposed upon special policemen appointed pursuant to § 15.1-144.

Notwithstanding the provisions for establishment of the Metro Transit Police, I can find nothing in the Code or the Compact which abrogates or restricts the authority of circuit courts to appoint specified employees of the Authority as special policemen pursuant to § 15.1-144, or as policemen pursuant to § 19.2-17, or which changes the qualification requirements for such appointees. I note in this respect that subparagraph (a) of revised paragraph 76 states, in part, "[n]othing contained herein shall either relieve any Signatory or political subdivision or agency thereof from its duty to provide police, fire and other public safety service and protection or limit, restrict or interfere with the jurisdiction of or the performance of duties by the existing police, fire and other public safety agencies." I am of the opinion, therefore, that if the Authority wishes certain individuals to be appointed as special police officers pursuant to
§ 15.1-144, or as policemen pursuant to § 19.2-17, and not as Metro Transit Police pursuant to the Compact, they must reside in Virginia during their tenure of office.

POLICE OFFICERS—Arrest By Law-enforcement Officer Who Identifies Himself By Badge Of Office Not Vitiated By Officer Not Being In Uniform.

LAW ENFORCEMENT OFFICERS—Arrest By Officer Who Identifies Himself By Badge Of Office Not Vitiated By Officer Not Being In Uniform.

SHERIFFS—Arrest By Officer Who Identifies Himself By Badge Of Office Not Vitiated By Officer Not Being In Uniform.

UNIFORMS—Arrest By Law-enforcement Officer Who Identifies Himself By Badge Of Office Not Vitiated By Officer Not Being In Uniform.

December 23, 1975

THE HONORABLE ROBERT C. MCLAUGHLIN
Commonwealth's Attorney for Franklin County

You request my opinion as to the effect and purpose of § 19.2-78, Code of Virginia (1950), as amended.

The predecessors of § 19.2-78 were §§ 19.1-95 and 19.1-96 of the Code. These sections provided, essentially, that law-enforcement officers, except sheriffs, in order to obtain any fee for an arrest, must have been dressed in a uniform which would clearly show to a casual observer that the individual was a police officer. Where this requirement was not complied with, § 19.1-96 of the Code provided that the individual was not to receive any fee, mileage, attendance, pay or any other charge, compensation or reward which inured to his benefit directly or indirectly.

When the 1975 Session of the General Assembly recodified these sections in Title 19.2, ch. 495, [1975] Acts of Assembly 846, §§ 19.1-95 and 19.1-96 were combined and the language relevant to the collection of fees was omitted, thereby repealing the requirement of wearing a uniform in order to collect any authorized fee, mileage, attendance, pay or any other charge, compensation or reward.

You further inquire as to the effect of an officer being out of uniform on an arrest in a criminal case. Section 19.2-78 specifically states that no arrest, search or seizure is rendered unlawful by an officer not being in the uniform he customarily wears in the performance of his duties. Moreover, § 19.2-81 of the Code provides that a law-enforcement officer may make arrests without warrants of any persons who commit a misdemeanor in his presence, or any person whom he has reasonable grounds to suspect of having committed a felony not in his presence, providing he is in uniform or displaying a badge of office. Section 19.2-78 and 19.2-81 are pari materia and should be construed with reference to each other. It is my opinion, therefore, that as long as an arresting officer identifies himself by a badge of office the fact that he is not in uniform does not vitiate the arrest.

POLICE OFFICERS—May Carry A Blackjack.

CONSERVATORS OF THE PEACE—Police Officer Is Deemed To Be—May carry a blackjack.

WEAPONS—Police Officer May Carry A Blackjack.
REPORT OF THE ATTORNEY GENERAL

November 7, 1975

THE HONORABLE ROBERT M. YACOBI, Judge
Juvenile and Domestic Relations District Court
Seventh Judicial District

This is in response to your letter of September 15, 1975, which is quoted below:

“This is to inquire of you whether or not § 18.2-308 is inclusive and allows a police officer to carry a blackjack or whether 18.2-311 is exclusive and prohibits a police officer from carrying a blackjack since police officers are not included in the definition of conservators of the peace.”

Basically, your inquiry is whether a police officer can carry a blackjack under the Commonwealth’s revised criminal code which became effective October 1, 1975. Section 18.2-308 of the Code of Virginia (1950), as amended, prohibits the carrying of certain weapons in a concealed manner but, since a blackjack is not listed among the enumerated weapons in this section, I am of the opinion that § 18.2-308 does not apply to your inquiry.

Section 18.2-311 provides:

“If any person sell or barter, or exhibit for sale or for barter, or give or furnish, or cause to be sold, bartered, given or furnished, or has in his possession, or under his control, with the intent of selling, bartering, giving or furnishing, any blackjack, brass or metal knucks, switchblade knife or like weapons, such person shall be guilty of a Class 4 misdemeanor. The having in one’s possession of any such weapon shall be prima facie evidence, except in the case of a conservator of the peace, of his intent to sell, barter, give or furnish the same.”

(Emphasis added.)

Under § 18.2-311, it is unlawful for any person to sell, etc., present for sale, or cause the sale of certain prohibited weapons, including blackjacks, or to possess such weapons with intent to sell them. A police officer, however, has been deemed by the Virginia Supreme Court to be a conservator of the peace, Jordan v. Commonwealth, 207 Va. 591, 595, 151 S.E.2d 390 (1966), and consequently comes within the exception to the presumption. Thus, I am of the opinion that a police officer is not prohibited by § 18.2-311 from carrying a blackjack and, if he does, such carrying would not be presumed to be with an unlawful purpose. Of course, a police officer is barred from carrying a blackjack with the intent to sell, barter, give or furnish it to another.

PRISONERS—Compensation Of Inmates For Work Related Injuries—Section not operative because of lack of funding.

APPROPRIATIONS—No Money Shall Be Paid Out Of State Treasury Except By Appropriations By Law—Compensation of inmates for work related injuries not funded.

THE HONORABLE JACK F. DAVIS
Director, Department of Corrections

This is in reply to your recent letter regarding the application of § 53-222.1 of the Code of Virginia (1950), as amended, which relates to compensation of inmates for injuries sustained while performing work assign-
ments. You ask for an interpretation of this section because of difficulties encountered by the Board of Corrections in processing inmate claims for disabilities arising from injuries received while incarcerated in the Virginia penal system. As you point out in your letter of inquiry, this section was repealed by Chapter 266, [1975] Acts of Assembly 456, effective June 1, 1975. Therefore, the Board of Corrections need only concern itself with processing such claims for injuries as occurred prior to that date.

I am advised that the General Assembly did not make funding available in the current Appropriations Act for the payment of any claims under § 53-222.1. Article X, Section 7, of the Constitution of Virginia (1971) reads in pertinent part, as follows:

"... No money shall be paid out of the State treasury except in pursuance of appropriations made by law...

Section 2.1-224 provides:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law."

An appropriation of public funds, as the term is used in the foregoing constitutional and statutory provisions, is a segregation of a definite sum of money for an express purpose in such manner that the executive officers of government are authorized to use that money and no more for the purpose specified and no other. See generally Commonwealth v. Ferries Co., 120 Va. 827, 92 S.E. 804 (1917). See also Opinion of the Attorney General to the Honorable R. E. Huff, Administrator of the County of Augusta, dated April 4, 1975, copy of which is attached. In the present case, there was no appropriation for payment of such claims. I am, therefore, of the opinion that § 53-222.1 was not operative before its repeal and claims filed pursuant thereto cannot be satisfied.

PRISONERS—Per Diem Costs To Incarcerate—Counties which do not maintain jails; prisoners housed elsewhere—Reimbursement of share of per diem rate by State and credit therefor.

COUNTIES, CITIES AND TOWNS—Counties Housing Prisoners From Other Counties—Right of claim under § 53-142 of Code.

COUNTIES, CITIES AND TOWNS—Counties Which Do Not Maintain Jails; Prisoners Housed Elsewhere—Reimbursement of share of per diem rate by State and credit therefor.

JAILS—Counties Housing Prisoners From Other Counties—Right of claim under § 53-142 of Code.

JAILS—Counties Which Do Not Maintain Jails; Prisoners Housed Elsewhere—Reimbursement of share of per diem rate by State and credit therefor.

SHERIFFS—Per Diem Costs To Incarcerate—Counties which do not maintain jails; prisoners housed elsewhere, should collect reasonable costs from county whose prisoners are kept.

March 11, 1976

The Honorable Philip P. Purrington, Jr.
Commonwealth's Attorney for Lancaster County

I have received your recent letter, from which I quote:
"Pursuant to Section 53-142 of the Code, the Circuit Court transferred prisoners, being held for transfer to the State Penal System, from the Lancaster County jail to the Northumberland County jail.

"Query 1: Under Section 53-182 of the Code, is the "pay for prisoners .." a county liability or a Commonwealth liability?

"Query 2: Which of the two counties has the right of claim under Section 53-142 of the Code?

"Query 3: Which of the two counties has the right of claim under Section 53-179 of the Code?

In answer to your first question, the "pay for prisoners" to be collected by the sheriff under § 53-182 is clearly a county liability under the facts you present. The language of the statute is precise in directing the sheriff of a county wherein a jail is located to "collect from the counties . . .", for which a prisoner is held, the reasonable costs as determined by the governing body of his county. A similar conclusion was reached in an Opinion to the Honorable Kenneth B. Rollins, Member, House of Delegates, dated July 26, 1974, and found in the Report of the Attorney General (1974-1975) at 320-321, which involved county housing of town prisoners.

With regard to your second question, the county in whose jail the prisoners are housed has the right of claim under § 53-142 of the Code which states as follows, in relevant part:

"In any case should it become necessary or expedient for the safekeeping of any prisoner, or for good cause, a court or the judge thereof in vacation may commit such prisoner to a jail other than that located in his county or city; and the sheriff or sergeant in making his account for the board of such prisoner or prisoners shall include such prisoner or prisoners in such account, as if such prisoner or prisoners had actually been committed from his county or city, and the judge of the circuit . . . court of the county or city in which such jail is located, shall certify such account to the Comptroller. . . ." (Emphasis added.)

In answer to your third inquiry, this office has ruled, in an Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated December 5, 1974, and found in the Report of the Attorney General (1974-1975) at 319, that the language of § 53-179 provides for reimbursement to counties and does not limit that reimbursement to the county confining the prisoner. As a result, either county, but not both, may seek reimbursement. Lancaster County may seek reimbursement directly from the Commonwealth for its share of the per diem costs as established by its arrangement with Northumberland, since that locality would have been paid in full for the service. Alternatively, if Northumberland County obtains reimbursement from the Commonwealth, Lancaster County would be entitled to credit on its account with that jurisdiction.

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PRISONERS—Workmen's Compensation Act—Prisoners confined to county jail who voluntarily work on county property in compliance with § 53-165 are not "employees" within meaning of § 65.1-4.

WORKMEN'S COMPENSATION ACT—Prisoners Confined To County Jail Who Voluntarily Work On County Property In Compliance With § 53-165 Are Not "Employees" Within Meaning of § 65.1-4.

THE HONORABLE LAWRENCE H. HOOVER, JR.
County Attorney for Rockingham County

This is in response to your recent letter wherein you inquire whether prisoners confined to the Rockingham County Jail who voluntarily work on
county property in exchange for sentence credit, pursuant to an order by
the Rockingham County Circuit Court and in compliance with § 53-165 of
the Code of Virginia (1950), as amended, are “employees” within the mean-
ing of § 65.1-4 of the Code.

Section 65.1-4 of the Code defines “employee” in part as one “. . . in the
service of another under any contract of hire . . . ” Although the statutory
definition of an “employee” necessarily varies from state to state, the con-
sensus of reported decisions does not include prisoners within the term
“employee.” See, e.g., Lawson v. Travelers’ Insurance Co., 37 Ga. 85, 139
S.E. 96 (1927); Miller v. City of Boise, 70 Id. 137, 212 P.2d 654 (1949);
Greene’s Case, 280 Mass. 506, 182 N.E. 857 (1932); Murray County v.
Hood, 163 Okla. 167, 21 P.2d 754 (1933); Goff v. Union County, et al., 26
N.J. Misc. 135 (Workmen’s Compensation Bureau), 57 A.2d 480 (1948).

“[F]inancial consideration is a cardinal legal requirement” for creation of
the status of employer and employee. Goff v. Union County, et al., supra.
The crux of the above cited decisions is that prisoners have no such valid con-
tract of service for hire. In Virginia the Industrial Commission has ruled
that prisoners assigned to road gangs are not “employees” under the Work-
men’s Compensation Act despite the existence of some financial compensa-
tion. Hull v. Wise County Board of Supervisors, 7 O.I.C. 111 (1925); see
also Stanley v. Commonwealth of Virginia, Department of Highways, 52

Although the Workmen’s Compensation Act is to be liberally construed
in favor of the workman, the provisions of the Act cannot be extended by
liberal construction beyond its intended scope. See Rust Engineering Co. v.
Ramsey, 194 Va. 975, 76 S.E.2d 195 (1953); Van Geuder v. Commonwealth,
192 Va. 548, 65 S.E.2d 565 (1951). That the General Assembly did not in-
tend to include prisoners within the provisions of the Workmen’s Com-
pensation Act is evident by the enactment, in 1974, of § 53-222.1 of the
Code. That section provided for compensation of prisoners in certain cases
for accidental injury or death while in the performance of their work or
assigned duties. Although this provision was subsequently repealed, there
were no correlative changes in the Workmen’s Compensation Act which
would bring prisoners within its coverage.

I am of the opinion, therefore, that prisoners working on county property
are not “employees” within the scope of § 65.1-4 of the Code.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Nonlicensed
Individual May Be Partner In Practice Requiring License But Letter-
head Must Show He Is Not Licensed—Architect, professional engineer,
land surveyor.

October 2, 1975

THE HONORABLE RUTH J. HERRINK, Director
Department of Professional and Occupational Regulation

This is in response to your letter in which you inquire:

“Is it permissible for a nonlicensed individual to be a partner in a
partnership, the practice of which requires a license as an architect,
professional engineer or land surveyor, provided the nonlicensed indi-
nual does not perform work for which a license is required or repre-
sent himself to the public as being licensed?”

Section IV of the Rules and Regulations of the Virginia State Board of
Architects, Professional Engineers and Land Surveyors provides, in perti-
nent part:
"The practice of architecture, engineering and land surveying shall be carried on only by individuals who are certified or registered by the Board. Such persons may conduct their practices in the organizational form of sole proprietorships or partnerships [or] as a Professional Association (Chapter 25 of Title 54, Code of Virginia) or a Professional Corporation, according to Chapter 7 of Title 131, Code of Virginia.

"Any individual, partnership, Professional Association or Professional Corporation may practice or offer to practice in architecture, professional engineering, special branch of professional engineering or land surveying when the individual, a partner, an associate or director of a Professional Association or director of a Professional Corporation is registered in each professional discipline practiced or offered." (Emphasis added.)

Subsection B of Section VI of the Rules and Regulations further provides that "[w]hen the firm name does not include the names of every partner . . . the firm letterhead and title block must indicate the professional service being offered and its letterhead must also list the names of all partners . . . ." Finally, § 54-1.14 of the Code of Virginia (1950), as amended, prohibits unlicensed individuals from practicing, or holding themselves out as being licensed to practice, any profession or occupation for which a license is required.

In light of the foregoing Rules and Regulations and § 54-1.14, I am of the opinion that a nonlicensed individual may be a partner in a partnership the practice of which requires a license and that, because the Rules and Regulations would require such individual’s name to be listed on the letterhead, it would be necessary for his name to appear in a manner which clearly indicates that he is not licensed to practice the particular profession or occupation in question.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Real Estate Brokers And Salesmen—Cash rebates to buyers prohibited.

GENERAL ASSEMBLY—Virginia Real Estate Commission Directed To Adopt Rule Prohibiting Cash Rebates, Without Any Change From Former Code Section.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Real Estate Commission—Authority to make rules and regulations.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Real Estate Commission—Suspension or revocation of broker’s license—Cash rebates prohibited.

REAL ESTATE—Rebates To Buyer At Settlement Prohibited.

VIRGINIA REAL ESTATE COMMISSION—General Assembly Directed Commission To Adopt Rule Prohibiting Rebates, Without Any Change From Former Code Section.

April 29, 1976

THE HONORABLE ROBERT E. HARRIS
Member, House of Delegates

This is in response to your letter in which you request my opinion as to the following question: "Does P.O.R. 9-200(24) of the Rules and Regulations of the Virginia Real Estate Commission prohibit a real estate broker
from offering on an announced and nondiscriminatory basis, [re]payments of [a percentage portion of] the sale price of real estate sold through a multiple-listing service? If the rule prohibits such payments, is the rule a valid exercise of the powers reposed in the Commission by statute?"

In the letter attached to your opinion request, the following specific factual situation is presented:

"... A broker has listed a property [for sale with a Multiple Listing Service], and [another broker] makes the sale. In such instances it is the listing broker's contract with the seller which governs the commission rate, and that contract also establishes the proportion of the commission which is to go to the selling broker. . . . Because [in the selling broker’s opinion] . . . the rates specified by other brokers are higher than those necessary to permit [the selling broker] to provide [his] services at a reasonable profit, [he] wishes to ‘waive’ part of the commission to which [he is] entitled in sales in which [he is] the selling broker. The way in which [he] decided to accomplish this was by offering a ‘2%/ Cash Rebate’ at settlement to the buyer, which would have the effect of reducing the effective selling price of the house by 2%/ . . . ."

Section 54-1.10 of the Code of Virginia (1950), as amended, provides, inter alia, that regulatory boards shall have the following powers, among others:

"(e) To promulgate rules and regulations necessary effectively to administer the regulatory system administered by such regulatory board and not in conflict with the purposes and intent of this chapter.

(g) To revoke, suspend or fail to renew a certificate or license which it has authority to issue for just causes as are enumerated in appropriate rules and regulations of any such board."

Section 54-1.4 of the Code defines "regulatory board" as "... any board or commission established by approval of the General Assembly or referenced in § 54-864, the Virginia Collection Agency Board and the Board for Commercial Driver Training Schools." Section 54-864 of the Code specifically references the Virginia Real Estate Commission. P.O.R. 9-200 of the Rules and Regulations of the Virginia Real Estate Commission provides the following ground for suspension or revocation of licenses:

"(24) The offer, payment, or rebate of any valuable consideration to any prospective purchaser or seller of real property as an inducement to purchase or obtain a listing to sell real estate, which offer, payment or rebate shall be contingent upon the purchase, sale, or listing of such property."

P.O.R. 9-200(24) is the same as former Code § 54-762(24).

It is my opinion that P.O.R. 9-200(24) of the Rules and Regulations of the Virginia Real Estate Commission prohibits a real estate broker from offering payments of the sale price of real estate sold, whether through a Multiple Listing Service or not, to the purchaser of such real estate in the form of a rebate of a percentage amount of the purchase price. I am further of the opinion that P.O.R. 9-200(24) is a valid exercise of the powers granted to the Virginia Real Estate Commission pursuant to § 54-1.10 of the Code. It should also be noted that the General Assembly directed the Virginia Real Estate Commission to adopt, without any change, former § 54-762(24) as a rule and regulation of the Commission. See Chapter 534, [1974] Acts of Assembly 1018. The Commission complied with this mandate when it adopted P.O.R. 9-200(24).
PUBLIC DEFENDERS—Cost Of Taxed Against Adult Convicted In Juvenile And Domestic Relations District Court; Not Taxed Against Juvenile.

FEES—Collected Under § 14.1-123(6) By Juvenile And Domestic Relations District Court.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Costs Of Public Defenders Taxed Against Adult; Not Taxed Against Juvenile.

July 23, 1975

THE HONORABLE KENNETH N. WHITEHURST, JR., Chief Judge
Juvenile and Domestic Relations District Court for the City of Virginia Beach

In your recent letter requesting my opinion with respect to § 19.1-32.3(g) of the Code of Virginia (1950), as amended, you state:

"In your opinion to the Honorable Charles H. Smith, Jr. dated March 5, 1974, you have held that Juvenile and Domestic Relations District Court clerks do not have to collect costs since matters relative to children were not considered crimes. Therefore, the only time in which costs in the Juvenile and Domestic Relations District Court would be assessed would be crimes under Section 158.1 subsection (5), (6), (7), (8) and (9). I would assume, therefore, from your opinion that it would not be necessary for the Court to collect the costs of a public defender in any case in which the defendant is a juvenile."

Section 19.1-32.3(g) provides that:

"In any case in which a public defender or his assistant represents a poor person charged with an offense and such person is convicted, such sum as would have been allowed a court-appointed attorney as compensation and as reasonable expenses shall be taxed against the person defended as a part of the costs of the prosecution, and, if collected, shall be paid to the Commonwealth. An abstract of such costs shall be docketed in the judgment docket and execution lien book of the court."

In the Opinion to the Honorable Charles H. Smith, Jr., Judge Juvenile and Domestic Relations District Court for Washington County, dated March 5, 1974, and found in the Report of the Attorney General (1973-1974) at 214, which you cite, I ruled that the applicable provisions of §§ 14.1-123 and 16.1-158, regarding collection of fees from persons charged with crimes, would not be applicable in juvenile and domestic relations district courts except in cases of adults tried for crimes. The reasoning in the Opinion was that the jurisdictional basis for cases in which the defendant is a juvenile is not predicated upon criminal jurisdiction since such proceeding is civil in nature. The same reasoning is applicable here. A juvenile is not a “person charged with an offense” nor a person “convicted” within the meaning of § 19.1-32.3(g). Your inquiry is, therefore, answered in the affirmative.

The cost of a public defender would, of course, be taxed against an adult charged with a crime and subsequently convicted in the juvenile and domestic relations district court. This does not mean that the court must have a “judgment docket and execution lien book” since I find no statutory requirement for the keeping of such a book. If the cost so taxed cannot be collected, information to that effect should be forwarded to the circuit court for docketing in the judgment docket and execution lien book of that court in accordance with § 19.1-320.
PUBLIC OFFICERS—Compatibility Of Office—Chairman of Culpeper County Highway Safety Commission may not serve as member of Culpeper County Board of Zoning Appeals.

DEFINITIONS—Courts Have Not Defined “Public Office” In Manner Which Will Meet Every Situation.

ZONING—Member Of Board Of Zoning Appeals Shall Hold No Other Public Office Except On Local Planning Or Zoning Commission.

December 10, 1975

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

This is in reply to your inquiry whether the chairman of the Culpeper County Highway Safety Commission may serve as a member of the Culpeper County Board of Zoning Appeals.

Section 15.1-494 of the Code of Virginia (1950), as amended, provides, in pertinent part, that members of a board of zoning appeals “shall hold no other public office in the county or municipality except that one may be a member of the local planning or zoning commission.” As stated in a previous opinion of this Office, “[t]he courts have been reluctant to define the term 'public office' in a manner which will meet every situation.” Report of the Attorney General (1962-1963) at 213. “Generally, a public officer holds a position to which he is required by law to be elected or appointed, who has a designation or title given him by law and who exercises functions concerning the public, assigned to him by law. (Citation omitted.) It is not necessary that the position of trust shall have a fixed tenure nor is it necessary for a compensation to be attached to the position.” Id.

County highway safety commissions are mandated by § 2.1-64.19 of the Code. That section provides that the members of the commission shall be appointed by the governing body of the county. The commission is “charged with the responsibility for recommending to the governing body plans for the formulation of a highway safety program for the county . . . and thereafter with the responsibility for a periodic review of the operation and effect of such program.” Section 2.1-64.19 of the Code.

In light of the foregoing, I am of the opinion that the chairman of the Culpeper County Highway Safety Commission holds a public office. Therefore, your inquiry is answered in the negative.

REAL ESTATE—Vacation Of Plat—Only owners of lots shown on plat need sign instrument of vacation of that plat.

January 26, 1976

THE HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

I am responding to your inquiry whether an instrument of vacation entered into pursuant to § 15.1-482(a) of the Code of Virginia (1950), as amended, must contain signatures of all owners of an interest in lots shown on plats directly adjacent to, but separate from, the plat which is the subject of the proposed vacation.

The facts, as you have stated them, are that a 240-acre parcel of land was split into three parts, each of which was recorded on a separate plat. The first plat was recorded almost two years earlier than the second and third plats. Together the three plats constitute three sections of a single residential development and are denominated as sections one, two and three,
respectively. Each plat was separately reviewed and approved by the county wherein the land is located. It is now proposed that a part of section three be vacated, and signatures of all owners of an interest in lots in section three have been obtained. The question is whether § 15.1-482(a) requires signatures to be obtained from owners of interests in lots in sections one and two as well.

One of the alternative methods provided by § 15.1-482 for vacation of a plat, or some portion thereof, is filing with the clerk an instrument of vacation signed by the governing body and “all the owners of lots shown on said plat.” See § 15.1-482(a). (Emphasis added.) In this instance, there are three separate plats, only one of which, section three, is proposed to be vacated. I am of the opinion that pursuant to § 15.1-482(a) only the owners of lots shown on the section three plat need sign the instrument of vacation of that plat.

REAL ESTATE BROKERS—“Commingling” As Used In Rules And Regulations Of Virginia Real Estate Commission And As Applied To Escrow Accounts Maintained By Brokers.

DEFINITIONS—“Commingling” As Used In Rules and Regulations Of Virginia Real Estate Commission And As Applied To Escrow Accounts Maintained By Brokers.

February 25, 1976

THE HONORABLE RAY L. GARLAND
Member, House of Delegates

This is in response to your recent letter requesting my interpretation of the word “commingling” as used in POR 9-200(23) of the Rules and Regulations of the Virginia Real Estate Commission (1975) and as applied to escrow accounts maintained by real estate brokers.

POR 9-200(23) provides:

“The Commission may upon its own motion and shall upon the verified complaint in writing of any person . . . investigate the actions of any real estate broker or real estate salesman . . . and shall have the power to suspend or to revoke any license issued under the provisions of Chapter 18, Title 54, or Rules and Regulations of the Commission, at any time when the licensee has by false or fraudulent representation obtained a license, or when the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

* * *

“(23) Commingling funds of any persons by a broker or his agents with those of his own or of his corporation, firm or association or failure to deposit such funds in an insured depository.”

“Commingling,” as defined in Webster’s New International Dictionary (2nd ed. 1952), means “to mingle together; blend.” As commonly defined with regard to the legal profession, “commingling occurs when a client’s money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney’s personal or business expenses or subjected to the claims of his creditors.” 7A Words & Phrases 81 (1975 Pocket Part). Since real estate brokers are held to an equally high degree of fiduciary duty, in my opinion the above-cited definition should be followed for the purposes of applying POR 9-220(23). The practice mandated by
this regulation involves the maintenance of separate bank accounts for those funds necessary to the operation of a real estate brokerage firm and for those funds, such as interest money deposits or property management security deposits, held in escrow by a broker for the benefit of his clients.

REAL ESTATE BROKERS—Employee Of Corporation Exempt From Licensure As Real Estate Salesman Or Broker.

DEFINITIONS—Real Estate Salesman Or Broker—Employee of corporation exempt from licensure under § 54-734.

October 29, 1975

THE HONORABLE JACK F. DEPOY
Commonwealth's Attorney for Rockingham County

This is in response to your recent letter in which you ask:

"Would an individual employed by a corporation to sell the homes built by the corporation for sale, be a regular employee of the corporation within the scope of the exceptions provided for under § 54-734 of the Code of Virginia?"

Section 54-732 of the Code of Virginia (1950), as amended, provides as follows:

"One act for a compensation or valuable consideration of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or leasing, or renting, or offering to rent real estate except as specifically excepted in this chapter, shall constitute the person, firm, partnership, copartnership, association or corporation, performing, offering or attempting to perform any of the acts enumerated herein, a real estate broker or real estate salesman within the meaning of this chapter." (Emphasis added.)

Section 54-734 of the Code provides, in pertinent part:

"The provisions of this chapter shall not apply to any person, partnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as and incident to, the management of such property and the investment thereon;...." (Emphasis added.)

I am of the opinion that the individual in question would fall within the exemption from licensure as a real estate salesman or broker set forth in § 54-734 of the Code.

REAL ESTATE BROKERS—Operating As ABC, Inc., Are Also Sole Stockholders In Title Insurance Company—Not violation of § 38.1-733.1 absent any kickback, rebate, commission or other payment to ABC, Inc.

INSURANCE—Title Insurance Company—Real estate brokers are also sole stockholders in—Not violation of § 38.1-733.1 absent any kickback, rebate, commission or other payment.
This is in response to your recent letter requesting my opinion as to the following:

"FACTS:

"Henry Jones and James Smith are licensed real estate brokers operating as ABC, INC.

"Henry Jones and James Smith are also sole stockholders in XYZ Title Insurance Agency, Inc.

"All settlements in which ABC, Inc., is the broker utilize XYZ as the title insurance agency. However, ABC, Inc. and XYZ Title Insurance Agency have separate accounting and separate employees. Also, revenues of the two corporations are never commingled.

"QUERY:

"Assuming that the two corporations use the same business premises, does this violate § 38.1-733.1 [of the Code of Virginia (1950), as amended]?

Section 38.1-733.1 of the Code provides:

"A. No person or entity selling real property, or performing services as a real estate agent, attorney or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement; nor shall any title insurance company, agency or agent make any such payment. . . .

"B. Any person or entity violating the provisions of this section shall be guilty of a misdemeanor and subject to a fine of not more than one thousand dollars or imprisonment for not more than six months, or both, in the discretion of the court.

"C. No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency, or agent. For purposes of this section, and in addition to any other statutory or regulatory requirements, a bona fide title insurance company, agency or agent is defined to be a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies or binders and endorsements." (Emphasis added.)

Because § 38.1-733.1 provides a criminal penalty for violation of its provisions, it must be strictly construed. In the factual situation outlined in your letter, you do not state that there is any "kickback, rebate, commission or other payment" being paid to ABC, Inc. The only nexus between ABC, Inc., and XYZ Title Insurance Agency, Inc., set forth in your letter of inquiry is common stock ownership which is permitted under § 38.1-733.1(C). Absent any "kickback, rebate, commission or other payment" as provided in § 38.1-733.1(A), I am of the opinion that there would be no violation of § 38.1-733.1.

This opinion is based upon the factual circumstances which you detailed and I express no opinion whether the situation presented might violate some other provision of law, such as the Virginia Antitrust Act, §§ 59.1-9.1 to -9.18 of the Code of Virginia (1950), as amended.
REPORT OF THE ATTORNEY GENERAL

RECORDATION—Affidavit Describing Events Of Historical Interest Is Not A Recordable Instrument.

CLERKS—Not Permitted To Record Any Writing Simply Because It Is Offered For Recordation—Affidavit describing events of historical interest.

February 18, 1976

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

You have inquired as to the recordability of an affidavit of an historical consultant for the Mason County Bicentennial Commission, which affidavit describes certain events deemed to be of historical interest. Section 55-106, Code of Virginia (1950), as amended, imposes a duty on the Clerk to record any writing that "is to be or may be recorded" and is properly signed and acknowledged. A Clerk is not permitted to record any writing simply because it is offered for recordation. See Report of the Attorney General (1968-1969) at 40. I am unaware of any statute authorizing the recordation of an affidavit that only recites information of an historical nature. Accordingly, I am of the opinion that the affidavit about which you inquire is not a recordable instrument.

RECORDATION—Copy Of Petition Of Debtor In Bankruptcy Is Not A Recordable Instrument.

BANKRUPTCY—Copy Of Petition Of Debtor In Bankruptcy Is Not A Recordable Instrument.

CLERKS—Not Permitted To Record Writing Presented, Simply Because Holder Desires It Recorded.

CLERKS—Recordation Of Writings—Duty to record does not extend to all writings.

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

January 16, 1976

THE HONORABLE RUDOLPH L. SHAVER, Clerk
Circuit Court of Augusta County

You have inquired whether a copy of a petition of a debtor in bankruptcy should be recorded. Section 55-106, Code of Virginia (1950), as amended, imposes a duty on the Clerk to record any writing that "is to be or may be recorded" and is properly signed and acknowledged. A Clerk is not permitted to record any other writing that is presented, simply because the holder desires it to be recorded. See Report of the Attorney General (1968-1969) at 40. Section 55-141 authorizes the recordation of certain decrees and orders in bankruptcy. I am, however, unaware of a statute authorizing the recordation of a copy of a petition in bankruptcy. Accordingly, I am of the opinion that a copy of a petition of a debtor in bankruptcy is not a recordable instrument.

RECORDATION—Seal Of Corporation Need Not Be Affixed To Instrument For It To Be Properly Acknowledged And Recorded.
CLERKS—Recordation—Not required to pass on sufficiency of execution of deeds.

CLERKS—Recordation Of Writings—Duty to record does not extend to all writings.

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

February 3, 1976

THE HONORABLE OWEN B. PICKETT
Member, House of Delegates

Your recent letter inquired whether an instrument executed by a corporation must have affixed thereto a corporate seal in order for the instrument to be admitted to record by a clerk of a court of record, if the instrument is properly acknowledged and is otherwise in proper form and content to be recorded.

Section 55-106, Code of Virginia (1950), as amended, requires a clerk to admit to record any writing that "is to be or may be recorded" and is properly acknowledged. See Report of the Attorney General (1968-1969) at 40. Section 55-120 sets forth the manner in which any writing that purports to have been signed in behalf of or by authority of any corporation may be acknowledged for the admission of such writing to record. It does not require that the seal of a corporation be affixed to a writing in order for the writing to be properly acknowledged. See Report of the Attorney General (1965-1966) at 40. I am, therefore, of the opinion that your inquiry must be answered in the negative.

RECORDS—Required By § 15.1-135.1 That Law Enforcement Agencies Maintain Records.

COMMONWEALTH ATTORNEYS—Procedures For Retention And Destruction Of Records.

COUNTIES, CITIES AND TOWNS—State Library Board Responsible For Determining Which Local Records Have Significant Historical Value—Retention; destruction schedule.

DEFINITIONS—"Arrest Records"; "Investigative Records"; "Public Record".

LAW ENFORCEMENT OFFICERS—Agencies Required To Maintain Certain Records By § 15.1-135.1.

POLICE—Destruction Of Records Required To Be Maintained By § 15.1-135.1.

RECORDS—Destruction Of Records Required To Be Maintained By § 15.1-135.1.

SHERIFFS—Procedure For Destruction Of Records Required To Be Maintained By § 15.1-135.1.

STATE LIBRARY BOARD—Responsible For Determining Which Local Records Have Significant Historical Value—Retention; destruction schedule.

VIRGINIA FREEDOM OF INFORMATION ACT—Records Required To Be Maintained By Sheriffs And Chiefs Of Police Under § 15.1-135.1(A) Exempt From.
This is in reply to your recent letter in which you asked whether there is any State law that requires the Portsmouth Police Department to maintain records of crimes and specific offense reports and, if so, how long such records and reports must be maintained. You also inquired as to the procedure which should be utilized in destroying such records at such time as destruction is permissible.

Section 15.1-135.1(A), Code of Virginia (1950), as amended, provides, in part, as follows with respect to the records to be maintained by sheriffs and chiefs of police:

"It shall be the duty of the sheriff or chief of police of every county, city, or town to insure, in addition to other records required by law, the maintenance of adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law enforcement agency."

The records required to be maintained by this section are exempt from the provisions of the Virginia Freedom of Information Act (§§ 2.1-340 to -346).

Your inquiry has specific reference to "records of crimes and specific offense reports," which I assume relates to the definitions of "arrest records" and "investigative records." "Arrest records" are defined in §15.1-135.1(B) (2) as follows:

"...a compilation of information, centrally maintained in law enforcement custody, of any arrest or temporary detention of an individual, including the identity of the person arrested or detained, the nature of the arrest or detention, the charge, if any, and the final disposition or present status of each charge of arrest included in the record."

"Investigative records" are defined in § 15.1-135.1(B) (3) as follows:

"...the reports of any systematic inquiries or examinations into criminal or suspected criminal acts which have been committed, are being committed, or are about to be committed."

Section 42.1-23.1 defines "public record" as "a record which an official is required by State or local law to maintain." In light of § 15.1-135.1, the records about which you are concerned are public records. Such records, however, apart from their exemption under the Virginia Freedom of Information Act, must be maintained confidentially, pursuant to Department of Justice Regulations on Criminal Justice Information Systems found in 40 Fed. Reg. 22114 (1975), if the Portsmouth Police Department has funded its criminal history record information system in whole or in part with funds made available by the Law Enforcement Assistance Administration.

You will recall that, in an Opinion to you dated September 29, 1975, I ruled that your Office must comply with § 42.1-23.1 in the destruction of its records. This section provides in pertinent part, as follows:

"The State Library Board shall formulate and execute a program to inventory, schedule, and microfilm official records of counties and cities which it determines have permanent value and to provide safe storage for microfilm copies of such records, and to give advice and assistance to local officials in their programs for creating, preserving, filing and making available public records in their custody."

Based on the foregoing section, I advised you that you should communicate with the Archives Division of the State Library for assistance in determining which of your records have permanent value. You were advised further
that, once the State Library had determined which of your records were of no permanent value, you could then destroy all such records which had no enduring legal significance. Records of permanent value or enduring legal significance should be retained.

The procedure to be followed with respect to the records of the Portsmouth Police Department is similar to the foregoing procedure. The Police Department should communicate with the State Library with respect to disposition of the records required to be kept by § 15.1-135.1. If the State Library Board determines that any of such records have permanent value, it will establish a program to inventory, schedule and microfilm them and provide safe storage for the microfilm copies thereof. If the State Library Board determines that the records of the Portsmouth Police Department have no permanent value, they may be destroyed (1) if they are no longer “necessary for the efficient operation” of the Portsmouth Police Department [§ 15.1-135.1(A)] and (2) if they have no enduring legal significance. In considering whether arrest and investigative records have enduring legal significance, it should be noted that such records may be necessary in the defense of suits brought against officers of the Department for torts, such as false arrest and false imprisonment, and pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Section 8-24 provides that actions for personal injuries “...shall be brought within two years next after the right to bring the same shall have accrued” and that actions pursuant to 42 U.S.C. § 1983 “... shall be brought within one year next after the right to bring the same shall have accrued.”

I am, therefore, of the opinion that the Portsmouth Police Department is required by § 15.1-135.1 to maintain arrest and investigative records. Such records may be destroyed when and if the State Library has determined they have no permanent value, if they are no longer necessary for the efficient operation of the Portsmouth Police Department, and if they have no enduring legal significance. Because of the confidential and sensitive nature of such records, their destruction should be accomplished in a secure manner.

REDISTRICTING—Effect On Existing School Board And Planning Commission Members.

COUNTIES—Redistricting Under Urban County Executive Form Of Government—Effect on existing school board and planning commission members.

ELECTIONS—Redistricting—Effect on existing school board and planning commission members.

PLANNING COMMISSIONS—Members Appointed To Represent Particular District—Actual residence in district is precondition.

PLANNING COMMISSIONS—Redistricting—Effect on existing members.

PUBLIC OFFICERS—De Facto Officers—Official acts valid until improper composition of board established.

SCHOOLS—School Boards—Effect of redistricting.

December 18, 1975

THE HONORABLE FREDERIC LEE RUCK
County Attorney for Fairfax County

Your recent letter raises the following questions concerning the redistricting of Fairfax County which is due to take effect on January 1, 1976:
1. What effect will redistricting have on the existing school board members?
2. What effect will redistricting have on the existing planning commission members?
3. What is the effect on a planning commission member who as a result of the reapportionment and redistricting no longer resides in the district she was appointed to represent?

I will respond to your questions *seriatim*:

1-2. Fairfax County is organized under the urban county executive form of government. Pursuant to the requirements of § 15.1-787, Code of Virginia (1950), as amended, each of its eight magisterial districts is represented on the county school board and planning commission by a resident of that district. Three additional members of the school board and planning commission are selected at large.

The incumbent eight district members of both bodies were appointed to represent districts that will cease to exist as of January 1, 1976, due to redistricting. Accordingly, their offices likewise will vacate by force of law as of that date. See Opinions of this Office to the Honorable Robert E. Brown, Commonwealth's Attorney for King George County, dated June 3, 1971, to the Honorable Virgil H. Goode, Commonwealth's Attorney for Franklin County, dated June 17, 1971, and to the Honorable Andrew J. Ellis, Commonwealth's Attorney for Hanover County, dated June 14, 1971, and found in Report of the Attorney General (1970-1971) at 87, 323 and 326, respectively.

Until the board of supervisors appoints school board and planning commission members to represent them, the eight new districts that have been created by redistricting will be unrepresented on the two bodies. Prior official acts of school boards or planning commissions constituted of members who inadvertently continue in office despite the vacation of their offices by redistricting are valid under the *de facto* officer doctrine. See Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated March 6, 1975, copy of which is attached.

Since the at-large members of the school board and planning commission represent the entire county, their terms of office are undisturbed by the redistricting; as indicated, however, the effect of redistricting on school board and planning commission members who represent magisterial districts of the county is that their offices are vacated as of the effective date of redistricting.

3. Although planning commission members are appointed for a term of years pursuant to § 15.1-437, they are also appointed to represent a particular district pursuant to § 15.1-787. Actual residence in that district is a precondition to representation of the district on the planning commission. When a member ceases to reside in the district she was appointed to represent, the office is vacated and a resident of the district must be appointed to sit on the planning commission in her stead.

I am of the opinion, therefore, that a planning commission member whose residence has moved outside of the district she was appointed to represent can no longer hold office as the member from that district; there is nothing, however, to prevent her reappointment as the member from whichever newly created district she now resides in or as one of the at-large members should a vacancy arise in any of the at-large positions.

REDISTRICTING—Effect On Existing School Board, Planning Commission, Social Services Board, Library Board, Community Mental Health And Mental Retardation Services Board Members.

BOARDS OF SUPERVISORS—Redistricting—Effect on various county boards.
COUNTIES—Members Of Various County Boards—When may continue to serve after town becomes city—Actions of boards not subject to challenge because nonresidents are members.

COUNTIES—Planning Commission Member Is Officer Of County; Office Not Vacated Upon Town Where He Resides Becoming City.

COUNTIES, CITIES AND TOWNS—Redistricting—Effect on county boards of transition of towns to cities.

ELECTIONS—Redistricting—Effect on existing members of various boards and commissions.

LIBRARIES—Board Member—Town of residence becoming city as affecting power to continue serving in county.

MENTAL HEALTH AND MENTAL RETARDATION—Board Member—Town of residence becoming city as affecting power to continue serving in county.

PLANNING COMMISSIONS—Member—Town of residence becoming city as affecting power to continue serving in county.

PUBLIC OFFICERS—Determination As To Whether A Person Within Definition—Indicia that creation of an office was intended.

PUBLIC OFFICERS—Members Of Planning Commission, Community Mental Health And Mental Retardation Services Board, Library Board And Social Services Board Are County Officers.

SCHOOLS—Board Members—Terms governed by § 22-68.

SCHOOLS—School Boards—Effect of redistricting.

SOCIAL SERVICES BOARD—Member—Town of residence becoming city as affecting power to continue serving in county.

December 18, 1975

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

This is in reply to your inquiry concerning the effect of a change in certain municipal governments on existing boards within Prince William County. You have indicated that the towns of Manassas and Manassas Park recently became cities of the second class, following which the Board of Supervisors redistricted the county, eliminating one magisterial district and creating another in its place. You also indicate that some appointed members of county boards, in particular the Planning Commission, the Social Services Board, the Library Board, and the Community Mental Health and Mental Retardation Services Board, have resided and continue to reside within what is now one or the other of the two new cities. You then ask:

"Considering these facts, what is the legal effect, if any, on the actions of boards whose members are appointed by the Board of County Supervisors, where at least one member of each board resides either in the City of Manassas or in Manassas Park? Can such nonresidents of the County serve on these boards? Are the actions of such boards subject to challenge on the ground that a nonresident serves as a member?"
Section 15.1-995 of the Code of Virginia (1950), as amended, provides as follows:

"Any county officer . . . who resides in the county or in any town therein, and has an established home therein, which homesite has become or hereafter becomes a part of a city since such officer's . . . appointment, shall not vacate his office by reason of his residence in such city, but shall continue to hold such office so long as he shall be successively . . . appointed to the office held by him at the time of such transition. Any such officer shall for such purposes be deemed to be a resident of the magisterial district wherein the homesite before becoming a part of a city was. The provisions of this section shall not be applicable to members of the school board of such county, who shall be governed by § 22-68."

If the members of the various boards are county officers, § 15.1-995 would control. This Office has previously concluded that members of a county planning commission are officers of the county. See Report of the Attorney General (1973-1974) at 295. This Office has not had occasion, however, to determine whether the members of the other boards about whom you inquire are likewise county officers.

Generally speaking, a public office is a position created by law with specified duties which involve an exercise of a portion of the sovereign power. Important indicia that the creation of an office was intended are the requirement of an oath, the fixing of a term of office, and a grant of authority conferred by law. See Report of the Attorney General (1968-1969) at 201. Members of a community mental health and mental retardation services board are appointed for a fixed term of office; may be removed only for cause; and are granted general authority with respect to the administration of mental health and mental retardation services and facilities. See §§ 37.1-195 to -198. Members of a library board are appointed for fixed terms; may be removed for misconduct or neglect of duty; control the expenditures of all monies credited to the library fund; and are authorized to adopt rules and regulations for the government of the free public library system. See § 42.1-35. Members of a social services board are appointed for fixed terms; may be removed for cause; are required to take the usual oath of office; and are granted broad authority with respect to matters pertaining to the social welfare of the citizens of the area served by them. See §§ 63.1-38 to -58.1. By applying the definition of public office to the specific statutory grants of power, it is my opinion that members of the Community Mental Health and Mental Retardation Services Board, Library Board, and Social Services Board are county officers within the contemplation of § 15.1-995.

This Office has previously ruled that § 15.1-995 not only expressly authorizes appointed officers, in the circumstances you describe, to remain in their present offices but also permits them to be reappointed to as many successive terms as may otherwise be allowed by law. See Report of the Attorney General (1971-1972) at 238, and Report of the Attorney General (1973-1974) at 13. You will note that this authorization does not apply to school board members who are governed by § 22-68 of the Code. Pursuant to § 15.1-995, I conclude, therefore, that the board members about whom you inquire may continue to serve on the respective county boards, subject to the qualification hereinbelow stated, and that actions taken by these boards are not subject to challenge on the ground that such nonresidents serve as members.

If any board member was originally appointed to represent a district which has been changed by redistricting, his office will vacate by operation of law on the effective date of redistricting. See Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated December 18, 1975, a copy of which is enclosed. The change of district brought about
by redistricting would also render inapplicable the privilege accorded such officer by § 15.1-995 since the magisterial district wherein the officer's home-site lies would no longer exist and the officer, therefore, could not be successively appointed to the office to which he was originally appointed. I am of the opinion that any such officer would be ineligible by reason of non-residence to continue in office.

REFERENDUM—Petition For Referendum On Mixed Beverages Or Sunday Closing Law Need Not Be Circulated By And Sworn To By Registered Voter As Must Petitions For Candidates For Office.

ALCOHOLIC BEVERAGE CONTROL LAWS—Petition For Referendum On Mixed Beverages Need Not Be Circulated And Sworn To As Must Petitions For Candidates For Office.

REFERENDUM—Form Petition For Blue Law Referendum.

SUNDAY CLOSING LAW—Petition For Referendum On—Need not be circulated and sworn to as must petitions for candidates for office.

July 9, 1975

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

Your letter of June 26, 1975, inquires whether a petition for a referendum, either on mixed beverages pursuant to § 4-98.12 of the Code of Virginia (1950), as amended, or on the Sunday closing law (Blue Law) pursuant to § 15.1-29.5 of the Code, must be circulated and sworn to "as contemplated by § 24.1-168 dealing with petitions for candidates for office."

Section 24.1-168 states that:

"The name of any candidate for any office other than a party nominee nominated by such method as his political party has chosen for nominating candidates shall not be printed upon any official ballots provided for the election, unless he shall file along with his notice 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."

As you point out, this requirement is applicable to petitions of candidacy for office. See also § 24.1-185 applicable to candidates in party primary nominating processes. An affidavit on any petition assists in insuring its validity and thus may be desirable as a matter of policy. See, e.g., form petition for Blue Law referendum approved by this Office in Opinion to the Honorable Adelard L. Brault, Member, Senate of Virginia, and found in Report of the Attorney General (1973-1974) at 344. Absent a statutory requirement, however, a petition need not be circulated by and sworn to by a registered voter. Since neither § 4-98.12 nor § 15.1-29.5 mandate such a requirement, I am of the opinion that your inquiry should be answered in the negative.

REFUGEES—Eligibility Of Vietnamese And Cambodian Refugees Living In Virginia For Reduced Tuition.
REPORT OF THE ATTORNEY GENERAL

COLLEGES AND UNIVERSITIES—Eligibility For Reduced Tuition—Vietnamese and Cambodian refugees living in Virginia.

SCHOOLS—Residence For Purpose Of Reduced Tuition—Vietnamese and Cambodian refugees living in Virginia.

October 15, 1975

THE HONORABLE DANA B. HAMEL, Chancellor
Virginia Community College System

This is in response to your letter of September 12, 1975, requesting an opinion whether Vietnamese and Cambodian refugees holding paroled alien status and living in Virginia are eligible for reduced tuition privileges at State colleges and universities.

Section 23-7 of the Code of Virginia (1950), as amended, provides in pertinent part that:

"[n]o person shall be entitled to . . . reduced tuition charges, or any other privilege accorded only to domiciliaries, residents or citizens of Virginia, in the State institutions of higher learning unless such person is and has been domiciled in Virginia for a period of at least one year prior to the commencement of the term, semester or quarter for which any such privilege or reduced tuition charge is sought." (Emphasis added.)

Under this statute, a Vietnamese or Cambodian refugee, as any other person who seeks reduced tuition privileges in Virginia, must be and have been domiciled in Virginia for the year immediately preceding the commencement of the term for which the privilege is sought.

In your letter you note that some of the refugees who desire reduced tuition privileges are over the age of eighteen. You also note that many such refugees, whether adults or minors, reside with sponsoring families who are Virginia domiciliaries. This is to advise that the rule for determining a person’s domicile depends on whether the person has reached adult status. In Virginia the age of majority is eighteen. See § 1-13.42 of the Code.

In the case of an adult, the person can acquire a domicile by choice, that is, his domicile is governed by his residence and intent. Generally, it is said that in order to acquire a domicile of choice one must abide in a particular place with the intention to make it one’s home permanently or indefinitely. See Howe v. Howe, 179 Va. 111, 18 S.E.2d 294 (1942). Section 23-7 specifically defines domicile as presence in Virginia “with the unqualified intention of remaining permanently in Virginia after leaving [the institution of higher education one is attending].” Thus, the domicile of an adult is determined by his residence and intent and not by the domicile of the person or persons with whom he may be living. A refugee having paroled alien status and who is living in Virginia is under no legal disability which would preclude him from acquiring the requisite domiciliary intent. He would, therefore, become eligible for reduced tuition one year from the date he acquired such intent, provided his intent does not change in the interim.

Unless he is emancipated, domicile is assigned or attributed to a minor by operation of law, independent of his residence or intention. Generally, the domicile of a minor child is said to be that of his parents. See 25 Am. Jur.2d Domicil § 63 at 45-46 (1966). The situations of the Vietnamese and Cambodian children in question vary. Some are residing in Virginia with their parents who are also refugees. Their domiciliary status is, therefore, that of their parents. Others are orphans or are separated from parents still residing in Cambodia or Vietnam. These children may have adopted parents, guardians, or other persons having care and custody of them who
are Virginia domiciliaries. In such instances, the domicile of the Cambodian
or Vietnamese minor may be that of the guardian or person having care and
custody of the child. The date that the Virginia domicile is acquired would
be that date on which the child comes under the care and custody of the
Virginia domiciliary. The Cambodian or Vietnamese minor in such circum-
stances would, therefore, be eligible for reduced tuition subsequent to the
expiration of the required one-year period.

RESIDENTIAL GROUND RENT ACT—Real Property, Not Personalty.

DEEDS—Agreement Creating Residential Ground Rent Must Be Included
In Deed Or Other Instrument Of Transfer.

DEFINITIONS—Residential Ground Rent; Obligor; Obligee.

LIENS—Residential Ground Rent Constitutes Lien Against Real Estate.

June 14, 1976

THE HONORABLE CARRINGTON WILLIAMS
Member, House of Delegates

This is in response to your letter in which you requested my opinion
whether the residential ground rent provided by § 55-79.01, Code of Virginia
(1950), as amended, constitutes real or personal property.

Section 55-79.01 of the Code defines “residential ground rent” as follows:

“[A] rent or charge paid for the use of land, whether or not title
thereto is transferred to the user, or a lease of land, for personal resi-
dential purposes, (i) which is assignable by the obligor without the
obligee’s consent, (ii) which is for a term in excess of fifteen years,
including any rights of renewal at the option of the obligor, (iii)
where the obligor has a present or future right to terminate such
ground rent and to acquire the entire interest of the obligee in the land
by the payment of a determined or determinable amount, and (iv)
where the obligee’s interest in the land is primarily a security interest
to protect his right to be paid the rent or charge.” (Emphasis added.)

An “obligor” is defined as “one or more individuals who are obligated to
pay a residential ground rent” and an “obligee” is defined as “any person
or entity to whom a residential ground rent is owed.” See 55-79.01, B and
C. “A residential ground rent shall constitute a lien against the real estate
from the time it is recorded, in a like manner as would a deed of trust or
mortgage.” See § 55-79.04. Any agreement creating a residential ground rent
must be included in the deed or other instrument of transfer. See 55-79.02(iii).
Furthermore, the obligor has the right, any time after three years from the
date of the agreement, to redeem the land from the ground rent. See
§ 55-79.05.

Traditionally, ground rent has been treated as “a perpetual rent reserved
to himself and his heirs, by the grantor [obligee] of land in fee simple, out
of the land conveyed.” 11 M.J. Landlord and Tenant § 65 (1950). A ground
rent has been “held to be real estate and subject to all of its incidents. It
descends, on the death of the owner, to his heir or his devisee, and is subject
to curtesy and dower.” See Willis v. Commonwealth, 97 Va. 667, 670 (1899).
“[S]uch rents are in law realty and not personalty....” Id.

I find nothing in the Residential Ground Rent Act, §§ 55-79.01 to -79.06,
which alters the foregoing analysis as to the legal status of ground rent:
accordingly, I am of the opinion that ground rent constitutes real property
and not personalty.
REPORT OF THE ATTORNEY GENERAL

SALARIES—Absent Written, Signed Authorization From Employee, Or A Collective Bargaining Agreement Specifically Allowing Such Deductions, Employer May Not Deduct From Salary Any Expenses Incurred By Employee In Course Of Employment And Billed To Employer.

COLLECTIVE BARGAINING—Absent Written, Signed Authorization From Employee, Or A Collective Bargaining Agreement Specifically Allowing Such Deductions, Employer May Not Deduct From Salary Any Expenses Incurred By Employee In Course Of Employment And Billed To Employer.

PAYROLL DEDUCTIONS—Absent Written, Signed Authorization From Employee, Or A Collective Bargaining Agreement Specifically Allowing Such Deductions, Employer May Not Deduct From Salary Any Expenses Incurred By Employee In Course Of Employment And Billed To Employer.

September 8, 1975

THE HONORABLE RALPH L. (BILL) AXSELLE, JR.
Member, House of Delegates

This is in response to your recent letter in which you posed the following question:

"Would you please advise if it would be proper under §40.1-29 for an employer to deduct from an employee's payroll check any cost for overload fines, damage to cargo, wrecker bills, or other expenses incurred by the employee in the course of his employment and billed to the employer without the written permission of the employee in the absence of a collective bargaining agreement specifically allowing such payroll deductions.

Section 40.1-29 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"(c) No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee."

I am of the opinion that, absent a written and signed authorization from the employee in question, such deductions as you mention in your letter would be in violation of §40.1-29.

SANITARY DISTRICTS—Bonds—Modification of terms by mutual agreement not applicable to sanitary districts.

BOARDS OF SUPERVISORS—Authority—May require owners of properties to connect to water lines and purchase water from sanitary district.

BONDS—Modification Of Terms Of Bond By Mutual Agreement Not Applicable To Sanitary Districts.

PUBLIC SERVICE CORPORATIONS—Subject To Local Taxation.

SANITARY DISTRICTS—Water And Sewer Systems—May provide and charge for, but may not charge property owners who do not connect to system.
TAXATION—Sanitary Districts Are Special Taxing Districts—Authority to levy and collect tax on all property.

TAXATION—Local Taxation Includes Real And Tangible Personal Property, Merchant's Capital, Tangible Personal Property Of Public Service Corporations.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts Are Special Taxing Districts—Authority to levy and collect tax on all property.

April 29, 1976

THE HONORABLE LEONARD F. JONES
Commonwealth’s Attorney for Fluvanna County

I am responding to your inquiries relative to the Fork Union Sanitary District established in Fluvanna County in 1966. It is my understanding from your letter that the Sanitary District borrowed $340,000 in 1969 and that the Sanitary District is currently unable to repay its indebtedness and is looking for additional sources of income. In this connection you ask the following questions:

"1. If the holder of the bond agrees, may the terms of the bond be changed?
   "2. May the Board of Supervisors now require the owners of all properties within 250 feet of the water lines to connect thereto and purchase water from the Sanitary District?
   "3. May the Board give the property owners within the prescribed distance the option of connecting to the line or paying a specified sum as an availability charge?
   "4. Must the Board require all property owners within the prescribed distance to purchase water or pay an availability charge before it can levy a tax on the property in the district subject to local taxation?
   "5. If the Board determines that it is necessary to levy a tax, may the tax be levied on all property in the district, including real and personal property, merchant's capital, and public utilities, or any one or more of these?"

I will respond to your questions seriatim:

1. It is not uncommon for provisions to be inserted in bonds permitting modification of the terms of the bond by mutual agreement. Such provisions are permitted by § 15.1-199 of the Code of Virginia (1950), as amended, in local government bonds issued pursuant to the Public Finance Act, Chapter 5, Title 15.1 of the Code. Sanitary districts, however, have only those powers with respect to their bonds as are set forth in the statutes authorizing the issuance of said bonds. See Marsh v. Gainesville-Haymarket Sanitary District, 214 Va. 83, 197 S.E.2d 329 (1973). The statutory authority for sanitary district bonds is found in § 21-130 of the Code. That section provides, in pertinent part, that such bonds:

   "... [S]hall bear interest at a rate not exceeding six per centum per annum, payable semi-annually, both principal and interest to be payable at such place or places as may be determined by the governing body, and shall be payable not exceeding thirty-four years from the date thereof, but may, in the discretion of the governing body, be made redeemable at such time or times within such period or periods and upon such notice as the governing body may prescribe and stipulate upon the face of the bond when issued."

It is evident that, while this statute leaves the governing body of the sanitary district considerable discretion as to times of payment and redemp-
tion, such terms are to be fixed on the face of the bond when issued. Section 21-130 does not contain any language authorizing change of the terms in any way similar to that in § 15.1-199 which is applicable to general obligation local government bonds. Section 15.1-199, by definition, does not apply to sanitary districts. I am of the opinion, therefore, that the making of such a distinction in the Public Finance Act, coupled with the absence of any authority in § 21-130 to vary the terms of the bonds, dictates that the answer to your first question be in the negative.

2. Section 21-118(4) gives the sanitary district the power:

"To require owners or tenants of any property, in the district to connect with any such system or systems, and to contract with the owners or tenants for such connections."

The same power is given at § 21-118.4(d). Since both authorizing statutes speak of requiring owners of any property "in the district" to connect with the system, I am of the opinion that the answer to your second question is in the affirmative.

3. I understand from further discussion with you on this question that you conceive the availability charge referred to in question three to mean that a property owner would be required to pay the monthly minimum user charge established by ordinance for all users, even if he were not connected to the lines and actually using the system. Sanitary districts are special taxing districts (see § 21-119) and have the power to levy and collect an annual tax upon all property in the sanitary district subject to local taxation in order to pay the expenses incident to construction, maintenance or operation of water and sewer systems in such sanitary district. See § 21-118(6). Sanitary districts are likewise empowered by the General Assembly to fix and prescribe user charges for the use of this system. See § 21-118.4(e). The Board may employ either or both of these statutory powers. In the event that it applies a tax, such tax must be levied upon all of the property in the district. See Opinion to the Honorable William M. McClenny, Commonwealth's Attorney for Amherst County, dated February 10, 1956, and found in the Report of the Attorney General (1955-1956) at 173.

Under the proposed arrangement in your question three, those property owners who had connected to the system would be paying only a user charge and those property owners who invoke their option not to connect to the system would be paying a specified minimum charge, regardless whether they use the system. This latter charge would in reality be a tax. In such circumstances, the sanitary district would have effectively levied a tax upon those landowners who were not using the system without levying a similar tax upon those who were. In my opinion, such an arrangement would not be lawful. Accordingly, the answer to your third question is in the negative.

4. Section 21-118(4) gives sanitary districts the power to levy and collect annual taxes upon all property in the sanitary district subject to local taxation to pay the charges incident to maintenance and operation of a water supply and sewage system. The statute does not require hookup or use of the system as a precondition to levying the tax. I am of the opinion, therefore, that the answer to your fourth question is in the negative.

5. The taxable object of the sanitary district's power is "all the property in such sanitary district subject to local taxation." Sections 58-9 and 58-10 set forth the property subject to local taxation which includes all taxable real and tangible personal property, merchant's capital, and the tangible personal property of public service corporations. Accordingly, I am of the opinion that the tax can be levied upon real and personal property, merchant's capital, and the tangible personal property of public service corporations.
SCHOOLS—Budget Estimates—City Council without authority to freeze teachers' salaries, but may establish total expenditure for “Instruction” classification at level having practical effect of freezing school employee compensation.

CITIES—Appropriations—Schools—Limitations on reducing specific items.

SALARIES—Authority Of Governing Board To Impose Salary Freeze On Teachers.

SCHOOLS—Authority—May not switch funds from one major classification to another; may switch funds within major classifications.

SCHOOLS—Budget Estimates—Governing body may appropriate lump sum or designate major categories; may not fund or refuse individual line items.

July 1, 1975

THE HONORABLE MADISON E. MARYE
Member, Senate of Virginia

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

“The Galax City Council decided, effective February 24, 1975, to freeze salary increases for all City employees. Both City Council and Galax School Board have indicated that this salary freeze is applicable to school employees. The question...is whether or not the Galax School Board has to also freeze the salaries of its employees.”

Subsequently, you submitted additional correspondence which indicated that the School Board in freezing the salaries of its employees had not acted on a belief that Council’s action was binding on the Board. Although the facts, as presented to me, indicate no reason to question the validity of any salary freeze adopted under the circumstances you describe, your request still presents, in the abstract, the question of the authority of the governing board to impose a salary freeze on teachers.

It is well settled that § 22-127 of the Code of Virginia (1950), as amended, restricts appropriations for school purposes to either a lump sum appropriation or one designating the sums appropriated under the major classifications prescribed by the Board of Education. See Report of the Attorney General (1967-1968) at 19. The governing body may not fund individual line items in the school board budget while refusing to fund others, nor may it alter individual line items, either by way of an increase or a reduction. It may, however, fund by major classification and may increase or decrease the appropriations for major classifications. See Report of the Attorney General (1971-1972) at 332.

Teachers' salaries are a component part of the major classification entitled “Instruction.” While, as indicated above, the governing body may increase, decrease or leave unaltered the school board's budget request for the “Instruction” classification, it may not dictate specific salary levels since they would be line items within a major classification. The school board, however, would have authority to freeze its employees' salaries. Thus, I am of the opinion that a city council is without authority to freeze teachers' salaries or to require the school board to submit a budget which freezes such salaries. Through the exercise of its authority to determine the levels of funding for the major classifications in the budget, a city council may nonetheless establish the total expenditure for “Instruction” at a level which would have the practical effect of freezing school employee compensation.
SCHOOLS—Continuing Contract Legislation Is Remedial In Nature And Should Be Strictly Construed.

SCHOOLS—Contracts—Teacher lacking fourteen days of full year's credit must be issued continuing contract for fifth school year.

SCHOOLS—School Boards—May permit teachers to combine half years to constitute a full year's service.

SCHOOLS—Teachers—Eligibility for continuing contracts.

SCHOOLS—Teachers—Probationary requirement refers to school years, not calendar years.

March 1, 1976

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

This is in reply to your letter of January 21, 1976, in which you present the following question:

"If a teacher were employed on September 11, 1972, for the school year 1972-73, which was not a full year lacking fourteen days for a full year's credit, and the same teacher was employed each school year thereafter, when should this teacher be issued a continuing contract in compliance with Section 22-217.3, Code of Virginia?"

Section 22-217.3, Code of Virginia (1950), as amended, 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. . . ."

The three year probationary requirement of § 22-217.3 refers to school years as opposed to calendar years. See Report of the Attorney General (1974-75) at 380. The school year for teachers is defined in the Regulations of the Board of Education of the Commonwealth of Virginia (1975) as a minimum of 180 days of teaching a year and 10 days engaged in non-teaching duties. The 180 day minimum school year is also mandated by § 22-5 of the Code.

I have previously issued opinions to the effect that the continuing contract legislation is remedial in nature and should be strictly construed. See Reports of the Attorney General (1972-73) at 348, and (1974-75) at 377. In a similar situation, I have also ruled that a teacher who renders service for one half of the school year may not be given credit for a full year's service. See Report of the Attorney General (1974-75) at 380. This principle would also apply to any teacher who has not completed the minimum school year as defined in the Regulations of the Board of Education.

As to when a contract should be issued, § 22-217.4 of the Code provides, in pertinent part, that "[t]eachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service. . . ." The word "shall" in § 22-217.4 imposes a mandatory requirement on the school board to issue a continuing contract at the completion of three years. Such contracts are issued in April of each year to be effective the beginning of the ensuing school year. If by the beginning of such ensuing school year the teacher will have completed three years of service then such teacher is entitled to a continuing contract. In this regard, I have previously opined that partial years may be combined to constitute the requisite period. See Report of the Attorney General (1974-75) at 380.
I am of the opinion, therefore, that a continuing contract must be issued under § 22-217.3 to the individual in question for the fifth school year since, under normal circumstances, that will be the first opportunity to issue the individual a contract after completion of three years of probationary service.

SCHOOLS—Deferred Compensation Plan—School division is political subdivision for purposes of establishing.

POLITICAL SUBDIVISIONS—Criteria For Juristic Entity.


SCHOOLS—School Boards—Authority to participate in annuity plan for teachers.

April 12, 1976

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

You inquire whether the Virginia Beach School Board may adopt a local deferred compensation plan under the Government Employees Deferred Compensation Plan Act, §§ 51-111.67:14 to 51-111.67:21 of the Code of Virginia (1950), as amended.

Section 51-111.67:18 of the Act provides that “any county, municipality or other political subdivision of the State may by ordinance” adopt an approved deferred compensation plan. Since school employees are employees of the school board and not the city, the answer turns on whether a school board is a political subdivision within the meaning of the statute. While “political subdivision” is not defined within Article 10 of Chapter 3.2, it is defined elsewhere in Title 51. Section 51-111.2(i) of the Code provides:

“The term ‘political subdivision’ includes an instrumentality of the State, or one or more of its political subdivisions, or of the State and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the State or a political subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the State or a political subdivision.”

An organization is a juristic entity if it may sue and be sued in its own name, hold and convey real and personal property, enter into contracts, and hire, supervise and discharge its own employees. Report of the Attorney General (1973-1974) at 461. These are among the powers of a city school board. See §§ 22-94 and 22-97 of the Code. See also 78 C.J.S. Schools and School Districts § 24 at 656 (1952). Accordingly, I am of the opinion that, for the purposes of establishing a deferred compensation plan under § 51-111.67:18 of the Code, a school division is a political subdivision and as such may adopt a deferred compensation plan pursuant to the Act. Such plan must, however, meet the remaining statutory criteria including approval by the Deferred Compensation Commission prior to implementation. See §§ 51-111.67:17 and 51-111.67:19.

While school boards may adopt plans as provided in the Act, there is no requirement that the Act serve as the exclusive means of doing so. Section 51-111.67:20 provides that programs established pursuant to the Act shall serve in addition to others. This Office has ruled previously that a school board, acting pursuant to its general powers to establish conditions of employment, may arrange for the purchase of annuities either through
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reduction of salary or by diversion of increase in salary. Report of the Attorney General (1961-1962) at 217. Consequently, a school board may elect between these alternative courses of action.

SCHOOLS—Establishment Of School System In Former Town of Manassas, Now City, Separate Entity From County.

SCHOOLS—School Board Members—City Council appoints for former town, now city—Wards.

SCHOOLS—State Board Of Education Must Designate Former Town, Now City, As Separate School Division—Consolidation of school divisions permitted.

July 23, 1975

THE HONORABLE WILLIAM R. MURPHY
Member, House of Delegates

This is in reply to your letter raising several questions regarding the establishment of a school system in the former Town of Manassas which has acquired city status, thus becoming an entity separate from Prince William County.

After noting that the City plans to provide school services by contract with the County at least until January 1, 1976, you present the following questions which I will answer seriatim.

"1. Must it have a school board prior to that date and, if so, when?"

Answer 1. The City of Manassas becomes a school division upon designation as such by the State Board of Education, pursuant to § 22-30 of the Code of Virginia (1950), as amended. Thereupon, the council of the City shall appoint the school board as set forth in § 22-89. These are mandatory requirements and there is no provision for them to be waived by a city. It should be observed that experience has indicated that a city, even though contracting with a county for school services, will nevertheless need a school board to oversee school affairs, particularly in the area of planning.

"2. If it must have a school board before January 1, 1976, must it have a superintendent of schools as well?"

Answer 2. Similarly there is no provision which would dispense with the requirement of § 22-32 that a superintendent of schools be appointed. Your letter reflects a concern that the city not be burdened with unnecessary officers who would have no obligations until a later date. Without reaching the question of the extent of utilization of a superintendent of schools in the described circumstances, any problems in this regard can be ameliorated by sharing a superintendent with another school division as provided in § 22-32, or by appointing a part-time superintendent as provided by regulations of the State Board of Education.

"3. Can the [State Board of Education] agree with the County and City to permit [the creation of] a school division including Prince William County and the City of Manassas until January 1, 1976, or even some later date, if appropriate?"

Answer 3. Yes. Section 22-30 of the Code permits the State Board of Education upon the request of the school boards of the county and city affected, concurred in by their respective governing bodies, to consolidate school divisions.
"4. If the City of Manassas does not constitute a separate school division automatically, what steps are necessary to accomplish the establishment of such a separate school division?"

Answer 4. As indicated in answer to your first question, the State Board of Education must designate the City as a separate school division.

"5. How would the School Board of the City be organized once designated a separate school division?"

Answer 5. Absent obtaining a charter from the General Assembly, Title 15.1, Chapters 16 and 22 of the Code, would be applicable. Section 15.1-999 requires a city council to establish wards in the city at its first meeting or as soon thereafter as practicable. If the order of the court established wards, the council may adopt or amend that determination. I am of the opinion that Council, in its exercise of its authority to apportion into wards, may exercise all the powers conferred in Chapter 1.1 of Title 15.1, including apportionment into a single ward. Council then proceeds to appoint school board members pursuant to § 22-89. The school board comes into existence with the transition to city status, §§ 22-94 and 22-100.1, and council appoints the members to the board rather than creating the board.

"6. Do the requirements of Section 22-89 and the other sections referred to above require the appointment of three (3) trustees for each ward of the City of Manassas?"

Answer 6. Section 22-89 requires the appointment of three school trustees from each ward. As noted above, there could be only one ward. An exception as to composition would result in the case of a city and county functioning as one school system pursuant to § 22-99 of the Code or in the case of a division composed of a city and county as provided in § 22-100.3. Sections 22-99 and 22-100.3 contain different provisions for the establishment and composition of school boards.

THE HONORABLE BENJAMIN L. PINCKARD
Commissioner of the Revenue for Franklin County

I am replying to your recent letter wherein you state that your request for a list of the students at a local college registering cars on campus was...
declined on the basis of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (hereinafter the "Buckley Amendment"). The list would be used in assessing the personal property tax. You inquire whether the Buckley Amendment prohibits releasing this information and, if so, what other avenues are available to collect such data.

Submission of the data you requested has always been voluntary. Educational institutions, unlike operators of apartment houses, trailer courts, marinas, and airports, are not required to file at the request of the commissioner of the revenue a list of tenants or persons renting space. See § 58-863 of the Code of Virginia (1950), as amended.

The Buckley Amendment conditions federal aid to educational institutions upon compliance with various restrictions on access to or release of education records. The broad definition given "education record" compels me to conclude that automobile registration data would be within the purview of the statute. However, certain items, if properly designated as "directory information" pursuant to § 1232(g)(a)(5) may be released without consent. The examples of directory information included in the statute does not appear to be exhaustive, so automobile registration data could be designated in the future by the institution as an item of directory information. The determination of what information is to be treated as directory information rests with the educational institution.

If the county, city, or town in which the owner resides does not impose a license fee under § 46.1-65 of the Code, your county could institute that charge and require an applicant to produce satisfactory evidence that personal property taxes have been paid. See Report of the Attorney General (1974-75) at 290.

SCHOOLS—Funds—Board of Supervisors or County Administrator may not usurp School Board's discretion in expenditure of school funds, but Central Purchasing Agent may issue purchase orders for approved requisitions.

November 14, 1975

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

This is in reply to your recent letter which stated:

"An opinion is requested...whether a Central Purchasing Agent properly established by the county under the provisions of §§ 15.1-127 and 15.1-117(12) of the Code of Virginia (1950), as amended, can properly issue and sign purchase orders obligating School Fund monies when purchases are made under the cited authorities and when such purchases are made on the basis of requisitions submitted by the properly designated school official which cite a fund limitation and appropriation line item and other detail and certify the funds are available."

While the County Administrator or Board of Supervisors may not usurp the School Board's discretion in the expenditure of school funds, Board of Supervisors v. County School Board, 182 Va. 266 (1944), the issuance of purchase orders pursuant to proper requisition is essentially a ministerial function. Regulations promulgated by the governing board, authorizing the purchasing agent to sign and issue purchase orders for the school system upon receipt of properly approved requisitions and certification of available funds would be valid. Accordingly, your question is answered in the affirmative.
This is in response to your request for interpretation of the "no loss" provision of Item 573(c)(3) of the Appropriations Act, ch. 681, [1974] Acts of Assembly 1354. You note that the State Board of Education has announced a reduction in basic school aid funds brought about by the fact that average daily membership (ADM) on a statewide basis has exceeded preliminary estimates. You further note that this reduction when coupled with the 5% reduction in appropriations announced by the Governor in September has the effect of placing some localities in the position of receiving less money than in the last year of the previous biennium. You then inquire whether the "no loss" provision requires that, before a locality may receive funding below that level, there is an obligation on the part of the State to first reduce the basic aid of other localities to the levels established by the "no loss" clause before reducing any locality to a lesser level.

Item 573(c)(3) of the Act reads as follows:

"No loss provision. No locality shall receive from the total of Paragraphs (b) (1), (b) (5) and (c) (2) of this Item and Item 574 during either year of the current biennium a lesser amount than it received for the last year of the previous biennium from the State-fund appropriations for Basic School Aid, Supplemental Basic School Aid, Driver Education, Teacher Sick Leave, and Maintaining Libraries and Other Teaching Materials in Public Free Schools; provided, however, that this loss guarantee will not be applicable to the extent there is a loss of pupils in ADM during either year of the current biennium."

The reference to a loss of pupils in ADM refers to a loss in enrollment by an individual school division; the budget contains funds to supplement those localities who would otherwise receive less than in the last year of the prior biennium.

Item 573(c)(5) of the Act provides, in pertinent part:

"In the event the Statewide number of pupils in ADM exceeds the number estimated as the basis for this appropriation, each State share and required local share shall be reduced proportionately so this appropriation will not be exceeded."

In reducing the State's share of basic school aid pursuant to item (c)(5), there is no requirement that any consideration be given to the position of individual school divisions in reference to the "no loss" provision of item (c)(3). As to determining the proper application of the various provisions of the Act, it is appropriate to make the adjustments described in (c)(5) first, with the calculations and supplements prescribed in (c)(3) being made independently. The September reduction in appropriations, to which you refer, was made pursuant to § 166 of the Act. Since § 166 does not incorporate the "no loss" provision as a restriction on the authority to reduce appropriations, I am of the opinion that your question must be answered in the negative.
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SCHOOLS—Hearing Required To Revoke Right Of Student To Attend Public Schools After Expelled From Private School.

EVIDENCE—Mere Speculation Or Undefined Fears Not Adequate Standard Of Evidence To Deny Student Right To Attend Public Schools.

SCHOOLS—School Boards—Authority to maintain order and discipline in schools.

SCHOOLS—Regulation Of Conduct Of Public School Pupils While Not In Attendance.

SCHOOLS—School Boards—May deny right of attendance in public schools as result of off-campus conduct—Appropriate action depends on facts of each case.

July 8, 1975

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

This is in response to your recent inquiry whether a school board must admit to the public schools a student who was expelled from a private school for conduct in violation of the rules of the private school and for which criminal warrants have been issued. Additionally, you have stated that there is no specific rule of the school board which prohibits off-campus conduct of this nature.

Regulation of conduct of public school pupils while not in attendance is not the specific subject of any statute. Section 22-72(2) of the Code of Virginia (1950), as amended, does allow the school board to make local regulations for conduct and discipline of students, “which shall include their conduct going to and returning from school...” School authorities are not without authority to impose reasonable disciplinary measures in the absence of written regulations. The basis for this authority is found in the inherent power of school authorities to maintain order and discipline in the schools. Pleasants v. Commonwealth, 214 Va. 646, 649 (1973).

In order to revoke the right of a student to attend the public schools a hearing would be required. Goss v. Lopez, 95 S. Ct. 729 (1975). If the result of the hearing is to establish facts showing that the student’s presence would be disruptive of the school system or present a threat of danger or harm to individuals at school, then the student could be denied the right to attend. It should be noted that these elements would need to be established by adequate evidence, and that mere speculation or undefined fears would not constitute an adequate standard. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The answer to your question is that the board may deny the right of attendance in the public schools as the result of off-campus conduct, but whether such action is appropriate depends on the facts of each case in light of the foregoing standards.

SCHOOLS—Liability Insurance—As § 15.1-506.1 does not differentiate between full time and part-time employees, part-time teachers may be insured by school board, but student teacher is not employee.

EMPLOYEES—Liability Insurance—As § 15.1-506.1 does not differentiate between full time and part-time employees, part-time teachers may be insured by school board, but student teacher is not employee.

INSURANCE—Liability—As § 15.1-506.1 does not differentiate between full time and part-time employees, part-time teachers may be insured by school board, but student teacher is not employee.
January 13, 1976

THE HONORABLE GEORGE H. HEILIG, JR.
Member, House of Delegates

This is in response to your recent letter in which you refer to § 15.1-506.1 of the Code of Virginia (1950), as amended, which allows localities to provide liability insurance "for certain or all of its officers and employees," and you inquire whether student teachers or part-time teachers qualify for coverage under the statute.

Section 15.1-506.1 does not define an employee. The definition of the term employee is frequently delineated by statute and may vary in scope with the purposes of the legislation. For instance, the definition of an employee for tax purposes may be quite different than in the application of the wage and hour or the workmen's compensation laws. At common law, an employee was a "servant," and there was no requirement that the employee receive compensation, only that he be subject to the employer's direction. Still, in modern practice the element of compensation has become so customary as to make it difficult not to regard it as an essential element of the employment relationship.

Since § 15.1-506.1 does not differentiate between full-time and part-time employees, part-time teachers may be insured by a school board. In the absence of any relevant statutory definition, I am unable to conclude that a student teacher is an employee of a school board. Consequently, there is no statutory grant of authority to a school board to purchase liability insurance on behalf of a student teacher. In the typical case a student teacher remains enrolled in college, does not receive compensation for services rendered, and remains under the ultimate control of the college in the performance of his duties.

SCHOOLS—Naval Weapons Station—Boundary line between city and county transverses Naval Reservation—Children may attend schools in either locality.

SCHOOLS—Residence in County and City—Election of parents controlling.

March 4, 1976

THE HONORABLE GEORGE W. GRAYSON
Member, House of Delegates

In a recent letter, you describe the Naval Weapons Station at Yorktown, Virginia, as lying within both York County and the City of Newport News. You inquire whether the boundary line which transverses the Naval Reservation determines the school system which children residing on the Station may attend without charge.

Section 22-218 of the Code of Virginia (1950), as amended, which enunciates the criteria for free admission to the public schools, states in pertinent part:

"The public schools in each county, city and town operating as a separate school division shall be free to each person, who is not less than six years of age, having reached their sixth birthday on or before December thirty-first of the school year, and who has not reached twenty years of age, residing in such county, city or town. . . . Every such person shall be deemed to reside in a county, city or town when: . . . (3) he or she is living with such parent or person on a military or naval reservation located wholly or partly within the geographical boundaries of such county, city or town." (Emphasis added.)
The emphasized language indicates that a child on a military or naval installation may attend without charge the public schools in any locality of which the reservation is a part. This conclusion is consistent with Opinions of this Office which have held that parents whose residential properties are bisected by jurisdictional boundaries may elect to send their children to the schools of either locality. See Reports of the Attorney General (1965-1966) at 253 and (1955-1956) at 213.

SCHOOLS—Release Of Scholastic Data To Parents Of Students Over Eighteen—Privacy Act.

PRIVACY ACT—State And Federal—Dissemination of personal information held by governmental agencies—Scholastic information to parents.

SCHOOLS—Suspension Of Student—Facts must be reported to parent or guardian even if student over eighteen.

VIRGINIA FREEDOM OF INFORMATION ACT—Scholastic Records Excluded From Public Access—Guaranteed access to student; access not prohibited to parents.

May 28, 1976

THE HONORABLE C. RICHARD CRANWELL
Member, House of Delegates

I am responding to your recent inquiry whether there is any statutory prohibition against the release of scholastic data, including grades, attendance records and notification of suspension from school, to parents of students over the age of 18. You state that these students reside with their parents who provide all of their support.

The Virginia Freedom of Information Act, §§ 2.1-340 to -346 of the Code of Virginia (1950), as amended, excludes scholastic records from public access, but guarantees access to the person who is the subject thereof. The Act further provides that, if the subject is under the age of 18, the right of access may be exercised only by his parent or guardian unless the student is emancipated or attends a State institution of higher education. [See § 2.1-342(b)(3)]. While guaranteeing a right of access to a student over the age of 18, the Act does not prohibit the release of scholastic information to other parties, including parents. See Report of the Attorney General (1973-1974) at 454. Section 22-275.26 of the Code also places limitations on access to scholastic records. Access to any written records concerning a particular student is permitted parents or guardians, however, and no provision in § 22-275.26 terminates this right of access after the student reaches the age of majority. With particular regard to notification of suspension, I note that § 22-230.1 of the Code requires that the principal or teacher responsible for a suspension report the facts of the case, in writing, to the parent or guardian of the student. The statute does not relieve the principal or teacher of this duty where the student is over the age of 18.

The Privacy Protection Act of 1976, Chapter 597, [1976] Acts of Assembly, which will take effect on July 1, 1976, as §§ 2.1-377 to -386 of the Code, establishes administrative requirements for the dissemination of personal information held by governmental agencies. Scholastic information would be within the definition of "personal information" found at § 2.1-379(1). This Act provides that an agency shall "disseminate only that personal information permitted or required by law." [See § 2.1-380(1)]. Sections 22-275.26 and 22-230.1 of the Code, which are described herein,
permit or require dissemination of scholastic information to parents. These statutes, therefore, confer upon parents the authority for regular access to personal information about their children.

In your letter you refer to the federal Privacy Act of 1974, Public Law 73-579, which is found at 5 U.S.C. § 552(a). With the exception of § 7 of that Act (dealing with use of social security account numbers), this law is applicable only to federal agencies. The Buckley Bill, to which you also refer, found at 20 U.S.C. § 1232(g), conditions federal aid to educational agencies or institutions upon adherence to certain policies regarding release of educational records. Section 1232(g) (b) (1) (H) of that law, however, permits release of education records without written consent of the student to parents of students claimed as dependents for federal income tax purposes.

In summary, no State or federal statute prohibits release of scholastic information to parents of a dependent student, even when that student is over the age of 18.

SCHOOLS—Renting Building When Not Used; Drinking Alcoholic Beverages In School Buildings.

ALCOHOLIC BEVERAGE CONTROL LAWS—School Building Rented To Civic Or Social Club—Drinking of alcoholic beverages—Banquet license.

DEFINITIONS—“Alcohol” And “Alcoholic Beverages” Defined By Statute.

DEFINITIONS—“Special Event” At School Building Rented To Civic Or Social Club—Drinking of alcoholic beverages.

SCHOOLS—Renting Building When Not Used; Board’s Liability For Accidents; Liability Insurance.

SCHOOLS—School Boards—Under no obligation to permit use of school buildings for activities involving other than school purposes.

February 26, 1976

THE HONORABLE PAUL W. MANNS
Member, Senate of Virginia

This is in response to your letter in which you pose the following factual situation:

“It is my understanding that various civic and social clubs have, in the past, used the King George County public school buildings to hold dances at which alcoholic beverages were consumed by those in attendance. One club officer was allegedly told by an ABC official that consumption of alcohol was legal if a banquet license was obtained.”

Based on the above facts you ask my opinion on three questions, the first of which is:

“1. Is it legal to drink alcohol in school buildings?”

“Alcohol” and “alcoholic beverages” are both defined in § 4-2 of the Code of Virginia (1950), as amended. The term “alcohol” relates to grain alcohol, and “alcoholic beverages” includes alcohol, spirits, wine and beer.

King George County School Board holds legal title to the public school buildings in the county and is charged with the duty of operating public schools therein. The general powers and duties of school boards are set
forth in § 22-72. Sections 22-164 and 22-164.1 pertain to the use of school property for other than school purposes. Under the first of these statutes, it is provided that the use of school buildings and grounds “out of school hours during the school term, or in vacation” may be permitted “for any legal assembly” or for voting places “in any primary, regular or special election.” The second statute authorizes a board to permit the use of “such portions of the school property under their [the board’s] control as will not impair the efficiency of the schools” upon such terms and conditions as the board deems proper. If the school board permitted the use of the property pursuant to its authority under §§ 22-164, -164.1, and the permitted use embraced an activity to which the general public was invited, the property would constitute a “public place” as defined in § 4-2, and it would be unlawful to drink alcoholic beverages on such occasion by virtue of § 4-78.

While the drinking of alcoholic beverages in school buildings is not lawful under the foregoing circumstances, it appears to be possible for the Board to permit the use of the property under §§ 22-164, -164.1 for a private function limited in attendance to members and invited guests of a particular group, association or organization. See Kellam v. School Board, 202 Va. 252 (1960); Report of the Attorney General (1953-1954) at 189, copy of which is enclosed. If during such use the portion of the school property permitted to be used is a “private place” and the use is not “during school hours or school or student activities,” it would not, with one exception, be unlawful to possess or to consume alcoholic beverages. The exception is that, if food or refreshments are furnished for compensation at such private function, it would be unlawful under § 4-61 for alcoholic beverages to be kept upon the premises. This exception may possibly be overcome by the person in charge of the private function obtaining a banquet license from the ABC Board as authorized by § 4-25(p). If this is done, wine and beer could be sold or given away at the function, and “brown bagging” would be permitted under § 4-89(j).

A public function might also be permissible if it is within the definition of “special event” and a banquet license is obtained. “Special event” is defined in § 4-2(23a) as follows:

“Special event” shall mean an event sponsored by a duly organized nonprofit corporation or association and conducted for an athletic, charitable, civic, educational, political or religious purpose.”

Thus, the exemption in § 4-89(j) would apply not only to a private banquet, but also to a public “special event.”

Your second question is:

“2. If it is legal, how would this affect the legal liability of the School Board should anything happen to the buildings as the direct result of use by the clubs?”

In Kellam, supra, the Virginia Supreme Court held that in the operation and maintenance of a school building a school board acts as a governmental agency or arm of the State and is immune from liability for tortious personal injury negligently inflicted. In that case the court concluded that the school board was immune from liability for personal injuries sustained by a patron at a concert given by a lessee of a high school auditorium and caused by the alleged unsafe condition of a passageway in the building. See also Crabbe v. School Board, 209 Va. 356 (1968). In view of the Supreme Court's holdings that a school board is not liable for personal injuries arising out of the leasing of school buildings, it is my opinion that the board would likewise be immune from liability for damages to the building itself. Section 22-164 provides that the board shall adopt rules and regulations necessary to protect school property, and § 22-164.2 provides that in
any permit the board may require the lessee to return the property so used in good condition as when leased, normal wear and tear excepted.

Your third question is:

"3. Can the Board prohibit the use of the buildings if they so desire?"

The authority granted the Board under §§ 22-164, -164.1, -164.2 is discretionary and not mandatory. The Board is under no obligation to permit the use of school buildings for activities involving other than school purposes. It is my opinion, therefore, that the Board may prohibit the use of the school buildings for such purposes if it so desires. Should the Board decide to exercise its authority so as to permit the use of school buildings, its decisions should be applied uniformly. See National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973).

SCHOOLS—School Board May Not Adopt School Term Of Less Than 180 Days Without Proportionate Reduction In State Funding.

DEFINITIONS—“Or” Normally Used In Disjunctive Sense; Different Construction Permissible To Effectuate Intention Of Legislature.

SCHOOLS—Accreditation—Loss of, if school uses four day school week.

January 23, 1976

THE HONORABLE B. RANDOLPH BOYD
Commonwealth's Attorney for Charles City County

In your recent letter, you note that the Charles City County School Board is facing a financial deficit for this school year. You then state:

“One of the methods being contemplated by the School Board to remedy this deficit is the use of a four day school week for the balance of the 1975-76 school year. No reduction would be made in the number of hours of instruction; the number of hours would simply be spread over four days instead of five days with anticipated savings in the areas of heating and transportation costs.”

“I would appreciate it if you would render an opinion as to whether or not the County School Board can implement such a four day week without a concurrent reduction in the amount of State support for the County's school system.”

Section 22-5 of the Code of Virginia (1950), as amended, provides:

“The school board of each county and city in the State is empowered to maintain the public free schools of such county and city for a period of at least nine months or one hundred and eighty teaching days in each school year; provided, however, that if the length of the term of any school be reduced, the amount paid by the State shall, unless otherwise provided by law, be reduced in the same proportion as the length of the term has been reduced from nine months.” (Emphasis added.)

While “or” is normally used in a disjunctive sense, a different construction is permissible to effectuate the obvious intention of the legislature. South East Public Service Co. v. State Corp. Commission, 165 Va. 116 (1935). “Or” may be used in the sense of “to wit” or “that is to say,” in explanation of what precedes it. A. Sutherland, Statutory Construction § 21.14 (4th ed. 1972); 30 Words and Phrases, Or, 135-37 (1972). In this usage, it introduces a synonym for the preceding term.

Prior to the enactment of the 1950 Code, the substance of § 22-5 was contained in the following provisions of the 1942 Code:
"§ 611. An efficient system of public schools of a minimum school term of one hundred and eighty school days, shall be established and maintained in all of the cities and counties of the State; exceptions to such required minimum term may be permitted in accordance with the provisions of section six hundred and forty-seven."

"§ 647. No State money shall be paid for the public schools in any county until evidence is filed with the State Board of Education, signed by the superintendent of schools and the clerk of the board, certifying that the schools of said county have been kept in operation for at least nine months, or a less period satisfactory to the State Board of Education, or that arrangements have been made which will secure the keeping of them in operation for that length of time; provided the school board of any county may, by and with the consent of the State Board of Education, provide for and maintain a standard seven and one-half months term, with six school days per week, instead of a term of nine months of five days per week, in one or more schools."

Following the original enactment of these two sections in 1928, the number of school days in § 611 had always been consistent with the number of months in § 647 necessary to avoid diminution of State aid. In 1928, these provisions required 140 school days and seven months (Ch. 471, [1928] Acts of Assembly 1186); in 1930, 160 school days and eight months (Ch. 412, [1930] Acts of Assembly 878); in 1940, 180 school days and nine months (Ch. 182, [1940] Acts of Assembly 285). These amendments reflect the understanding of the General Assembly that a nine month school term consists of five school days per week or a total of 180 school days. The consolidated form of these provisions exists in § 22-5 and reflects no departure from this intent.

In light of the foregoing, I am of the opinion that the Charles City County School Board may not adopt a school term of less than 180 days without a proportionate reduction in State funding. It should be noted that this proposal might also result in the loss of accreditation under regulations adopted by the State Board of Education. See Standards for Accrediting Secondary Schools in Virginia (1974); Standards for Accrediting Elementary Schools in Virginia (1969).

SCHOOLS—School Boards—Authority to waive tuition payments for non-resident students whose parents are school division teachers.

COUNTIES, CITIES AND TOWNS—Compensating Teachers And Specifying Conditions Of Employment Are Valid Governmental Purposes.

EDUCATIONAL INSTITUTIONS—Compensating Teachers And Specifying Conditions Of Employment Are Valid Governmental Purposes.

EDUCATIONAL INSTITUTIONS—Employee Scholarships—Conditions under which permitted.

SCHOOLS—School Boards—May provide benefit to teachers who reside outside school division which teachers residing in division already enjoy.

SCHOOLS—School Boards—Power to allow children (Virginia residents) who reside outside school division, to attend local school tuition free.

July 31, 1975

The Honorable William H. Harris
County Attorney for Stafford County

This is in response to your recent letter requesting my opinion whether a county school board has the authority to adopt a rule waiving tuition
payments for nonresident students whose parents are school division teachers and whether such a rule would discriminate unlawfully against teachers who are residents of the county or against other nonresident or resident county employees.

Section 22-218 of the Code of Virginia (1950), as amended, provides that the public schools in each county, city or town operating as a separate school division shall be free to persons between the ages of six and twenty residing in such county, city or town. Section 22-219 of the Code, however, authorizes school boards "to make regulations whereby persons other than those defined in § 22-218 who are residents of the State of Virginia may attend [local schools], and may charge tuition for the attendance of such persons in such schools...." In an Opinion to the Honorable David F. Thornton, Member, Senate of Virginia, dated October 25, 1974, and found in the Report of the Attorney General (1973-1974) at 305, I ruled that § 22-219 authorizes, but does not require, a school board to charge tuition for persons permitted to attend school under this provision. A school board thus has the power to allow children who reside outside of the school division, but who are Virginia residents, to attend a local school tuition free.

Assuming that the above rule allowing children of teachers who reside outside of the school division to attend school tuition free is applicable only to Virginia residents, whether such a regulation is lawful depends whether it is reasonably related to a valid governmental purpose. It is well settled that a governmental body may classify persons for the purposes of legislation and adopt laws or rules applicable only to one class and not to another, provided such classifications are reasonably related to a valid governmental purpose and are not clearly arbitrary and capricious. See Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973); McIntosh v. Commonwealth, 213 Va. 330, 191 S.E.2d 791 (1972).

Pursuant to § 22-72(5) of the Code, a county school board has the authority to compensate teachers and to specify the conditions of employment. See Opinion to the Honorable L. Victor McFall, Commonwealth's Attorney for Dickenson County, dated April 30, 1970, and found in the Report of the Attorney General (1969-1970) at 233. In this case, the above rule would appear to have the purpose of providing a benefit to teachers who reside outside of the school division to encourage them to teach or to continue to teach in the school division. The benefit is one which teachers who reside in the school division already enjoy.

Compensating teachers and specifying the conditions of employment are clearly valid governmental purposes and the above regulation appears reasonably related to those purposes. See Opinion to the Honorable T. Marshall Hahn, Jr., President, Virginia Polytechnic Institute and State University, dated December 8, 1970, and found in the Report of the Attorney General (1970-1971) at 118, and Opinion to the Honorable James L. Bugg, Jr., President, Old Dominion University, dated December 8, 1970, and found in the Report of the Attorney General (1970-1971) at 119, which ruled that the boards of visitors of State universities, as an exercise of their power to specify conditions of employment, may award scholarships to faculty and staff dependents. I am of the opinion, therefore, that the rule in question is valid.

SCHOOLS—School Boards—Bound by contracts.

SCHOOLS—School Boards—Circumstances allowing severance of teacher's contract at any time.

SCHOOLS—School Boards—No "law" authorizes discontinuance of position due to decline in State appropriations.
THE HONORABLE THOMAS B. INGE, JR.
Commonwealth’s Attorney for Lunenburg County

This is in response to your recent letter in which you inquire “...whether the school board could legally terminate personnel (professional and non-professional) who are under contract due to the shortage of funds brought about by the 5% reduction of state funds directed by Governor Godwin.” You enclosed sample copies of the contracts currently in force for professional personnel, school secretaries, and other school employees. None of these contracts contains any language which would allow the board to terminate services due to a reduction in revenues.

It is settled law that a school board is bound by its contracts. See, 16 M. J. Schools § 14 (1951). Thus, when a decrease in revenues requires a decrease in expenditures, any economies have to be made in areas in which the board has not incurred prior contractual commitments.

The contract for professional personnel submitted with your letter does contain language to the effect that the contract does not bar “discontinuance” of a position as “provided by law.” There is no “law,” however, which authorizes discontinuance of a position due to a decline in State appropriations. The contract itself could have provided for this eventuality but its provisions do not do so. See Report of the Attorney General (1972-1973) at 341, which upheld the effectiveness of contract language providing for termination due to a decline in enrollment.

SCHOOLS—“Sick Leave Bank”—Portsmouth Sick Leave Pay Policy allowing teacher's sick leave pay to be paid to another without regard to circumstances of contributing teacher violates State Board of Education Regulations.

SCHOOLS—Local Schools Must Comply With State Board Of Education Regulations To Receive State Aid.

SCHOOLS—Sick Pay Benefits, Unlike Vacation Pay, Do Not Accrue To Teacher As Of Right.

July 9, 1975

THE HONORABLE WILLARD J. MOODY
Member, Senate of Virginia

This is in response to your recent letter requesting an opinion whether it would be legal for the Portsmouth School Board to adopt a “sick leave bank” policy for teachers. Under this policy, the School Board and the Portsmouth Education Association would establish a “sick leave bank” in which teachers may participate voluntarily by donating one day of sick leave earned during the current year. A participant in the bank who is ill for longer than 20 days and who has depleted all his accumulated sick leave days, may draw up to 45 days of sick leave from the bank each year.

School boards have the power to provide for the payment of teachers. See § 22-72 and § 22-97 of the Code of Virginia (1950), as amended. Pursuant to its power to pay teachers, it can adopt rules providing for sick leave pay for its teachers.

This power is qualified by the authority of the State Board of Education to adopt regulations for the conduct of public schools, see 22-19 of the Code. In order to receive State aid, local schools must comply with the State Board of Education regulations. See Appropriations Act of 1974, Acts of Assembly, 1974, Chap. 681, Item #573, providing that school aid funds
are to be “apportioned to the public schools by the Board of Education under rules and regulations promulgated by it” to effect the provisions stated in that item.

The “basic operation cost” standard used for determining State aid to school divisions includes provision for teacher sick leave. Ibid, Item 373, a. 3. The Board of Education has promulgated regulations regarding the use of State funds for sick leave. The provisions of these regulations indicate an intent to establish a sick leave pay program for the benefit of a teacher who actually cannot work due to illness. See Regulations of the Board of Education of the Commonwealth of Virginia (1973), “State Sick Leave Plan for Teachers,” Regulation X, which states that State sick leave funds cannot be used for employment of substitutes for teachers unless such regular teacher is actually sick and cannot report for work or when absence is due to illness or death of a member of the teacher’s immediate family.

The sick pay benefits contemplated under the regulations do not accrue to the teacher as of right regardless whether the teacher is ill or not. A local school board may, for example, adopt local regulations providing for the submission of a doctor’s certificate in case of absence due to illness. Ibid, Regulation XI. Moreover, unlike vacation pay, accumulated sick leave terminates upon the expiration of a teacher’s employment. Ibid, Regulation VIII. Therefore, a local sick leave pay policy which allows a teacher’s sick leave pay to be paid to another without regard to the personal circumstance of the contributing teacher, would, in my opinion, be in violation of the Board of Education Regulations and would thus affect the school division’s eligibility for State aid.

SCHOOLS—Standards Of Quality—Not mathematically precise.

APPROPRIATIONS—Governor’s Authority To Reduce Appropriations In Event Of Shortfall In Estimate Of General Fund Revenues Applies To Basic School Aid Fund.

EDUCATION—Standards Of Quality—Obligation of localities to comply with; new cost apportioned by law must be considered.

GENERAL ASSEMBLY—Cost Of Standards Of Quality—Educational needs and fiscal realities taken into consideration.

GOVERNOR—Authority To Reduce Appropriations In Event Of Shortfall In Estimate Of General Fund Revenues Applies To Basic School Aid Fund.

December 18, 1975

THE HONORABLE CHARLES L. WADDELL
Member, Senate of Virginia

This is in reply to your letter in which you present a number of questions relative to maintaining the Standards of Quality when the Governor orders budget cuts pursuant to the authority conferred upon him by § 166 of the Appropriations Act of 1974, ch. 681, [1974] Acts of Assembly 1429.

Question 1. “Can the Governor cut the education funds to the point that the remaining State share plus the local portion fails to fund the prescribed standards of quality?”

This question is answered in the negative. It must be noted that the Standards of Quality mandated by the Constitution are not mathematically precise. Rather, they are established by the General Assembly within broad
but not undefined limits, taking into consideration educational needs and fiscal realities. In addition, the General Assembly may apportion their cost between the State and the localities in such a fashion as to require localities to provide the funding necessary to maintain the Standards of Quality.

Question 2. "For the purpose of determining the standard of quality funding point in question 1 is local funding in excess of the minimum set by the General Assembly included? (A yes answer would seem to discourage local government from making an extra effort, to improve education since the Governor could, in effect, take that local money thru further cuts in State aid.)"

Again, the answer is in the negative, although the General Assembly could theoretically include such excess funding in its allocation formula. Most school districts in practice spend more than the amount required to meet the Standards of Quality. The basic school aid formula also embodies an "ability to pay" factor for the benefit of those school districts that are unable, by reasonable means, to provide funding at the level required to meet the Standards.

Question 3. "If the answer to question 1 is yes, may a school district act unilaterally to reduce the standards of quality to the level of educational services which the remaining funds can purchase?"

Although the answer to your first question was in the negative, it should be noted that § 3 of ch. 316, [1974] Acts of Assembly 491, provides that required services and programs are to be reduced proportionate to the funding provided by the General Assembly, but also provides for approval of the State Board of Education in a number of instances. The locality's authority to make unilateral changes would be circumscribed by the requirement for approval of the Board of Education.

Question 4. "Given the Article VIII, Section 1 goal to 'seek to insure that an educational program of high quality is established and continually maintained' as well as the thrust of Article VIII, Section 2... can the Governor use any education fund cutting powers without first exhausting other alternatives?"

Question 5. "Given the General Assembly's ultimate Constitutional responsibility in this area, can the Governor implement the aforementioned funding cut without first seeking the approval of that body?"

The answers to the foregoing two questions are grounded in the fact that the General Assembly, in prescribing the Standards of Quality, in § 166 of the Appropriations Act, authorized the Governor to order necessary funding cuts without first seeking legislative approval or exhausting other alternatives. This issue was discussed in an Opinion to the Honorable Mills E. Godwin, Jr., Governor of Virginia, dated September 26, 1975, a copy of which is enclosed. Where the legislature, in the exercise of its authority to prescribe the Standards of Quality, sets such Standards in the context of available funds, the constitutional requirement of Article VIII, Section 1, that the General Assembly "seek" to establish and maintain a quality program does not require exhaustion of other alternatives before funding for education may be reduced by executive action taken in accordance with legislative command. Of course, if the General Assembly so desired, it could in the future condition any such cuts on prior legislative approval or exhaustion of all other sources.
SCHOOLS—Student, Eighteen Or Over, May Establish Domicile Different From His Parents; Entitled To Free Public Education.

MINORS—Age Of Majority Established At Eighteen By § 1-13.42.

RESIDENCE—Domicile Of Choice Of Student Eighteen Or Over Entails Factual Determination In Each Case.

SCHOOLS—School Children—Residency—Determination of for purpose of free tuition.

November 6, 1975

THE HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

This is in reply to your recent letter in which you inquire whether a student, 18 years of age or over, may establish domicile in a jurisdiction different from that of his parents, and thereby be entitled to free public education in that jurisdiction.

I am of the opinion that your question should be answered in the affirmative. I have previously ruled that students are entitled to free public school attendance in the jurisdiction of their domicile. See Report of the Attorney General (1972-1973) at 348, a copy of which is enclosed. Section 1-13.42 of the Code of Virginia (1950), as amended, establishes the age of majority at eighteen. A student having reached the age of eighteen would have the ability and right to establish a domicile apart from that of his parents. Whether a separate domicile of choice has been established would entail a factual determination in each case.

SCHOOLS—Students—Expulsion and suspension—High school and vocational school.

SCHOOLS—“Homebound Teachers” Not Provided For Expelled Students.

SCHOOLS—Visiting Teacher’s Duties Prescribed By Local School Division—Homebound classes for expelled students.

November 10, 1975

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates

This is in reply to your recent letter in which you present two questions arising out of the expulsion of a student from a public high school.

Question 1. When a student is expelled from a public high school, is there a requirement that the visiting teacher provide homebound classes?

Section 22-230.3 of the Code of Virginia (1950), as amended, states that:

"Whenever a student under the age of eighteen years is expelled by a school board from a public school, the school board shall notify the visiting teacher or other appropriate officer or employee of the school division . . . or any other public agency or agencies in the county or city where such student resides which can provide appropriate services to such student. Such visiting teacher . . . or other agency shall provide such counseling, treatment or other services to such student as it renders and shall submit reports on the progress of the student to the school board when requested by the school board until the student is readmitted to a school or reaches the age of eighteen years."
In my opinion, the statutory requirement that certain persons, including the visiting teacher, are to provide their services to an expelled student means that the visiting teacher is required to provide homebound classes in whatever manner those services would be provided in a case where the student were precluded from attending school because of physical disability. The duties of a visiting teacher are prescribed by his local school division. Therefore, in a school division where visiting teachers do not provide homebound classes to anyone, there would be no duty to do so in the case of an expelled student. The prevailing practice in Virginia is to utilize special teachers known as "homebound teachers" to provide the instruction to which you refer. Section 22-230.3 applies to visiting teachers (or the officer or employee who performs that function), but does not include homebound teachers among the list of those who provide services to expelled students.

Question 2. When a student is expelled from the high school, does the School Board also have the authority at that time to expel the student from a vocational school?

Generally, if a student commits an act for which his expulsion from high school is proper, the school board would not be precluded by law from concurrently expelling him from a vocational school which is under the authority of that board.

SCHOOLS—Teacher May Be Represented By Attorney, Or Advisor Of His Choice Not An Attorney, At Hearing Before School Board Because Of Pending Dismissal—Whether unauthorized practice of law depends on facts of each case.

DEFINITIONS—Terms "Counsel," "Attorney," And "Lawyer" Used Synonymously.

DEFINITIONS—Unauthorized Practice Of Law.

August 28, 1975

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

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

"Section 22-217.7 provides that in a case where a teacher requests a hearing before the School Board because of pending dismissal of that teacher, the teacher 'may appear with or without counsel and be heard, presenting testimony of witnesses and other evidence.'

"My question is does the phrase 'with or without counsel' mean a practicing attorney or someone who is not a practicing attorney? Specifically, may a teacher be represented at such a hearing by a representative of a Uniserv Unit associated with the Virginia Education Association and purporting to represent in some capacities members of a local education association?"

It is my opinion that the statute, in conferring a right to assistance of counsel, refers only to assistance of a duly licensed attorney at law. It is customary for the term "counsel," "attorney," and "lawyer" to be used synonymously.

Although the statute confers a right to counsel, the parties would be free to agree to allow the teacher to be represented by an advisor of his choice, including one who is not an attorney. Therefore, § 22-217.7 would not preclude a teacher from appearing with an advisor who was not an attorney. As you note in your letter, representation by a non-lawyer would raise the question whether such representation constituted the unauthorized practice

"I(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal,—judicial, administrative, or executive,—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and *bona fide* employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings."

The unauthorized practice of law is a misdemeanor. Section 54-44 of the Code of Virginia (1950), as amended.

Whether a non-attorney who serves as an adviser to or representative of a teacher at a dismissal hearing before the school board is engaged in the unauthorized practice of law will depend on the facts of each case. It would be appropriate to refer such questions to the Unauthorized Practice of Law Committee of the Virginia State Bar for disposition. The Committee's authority to render advisory opinions in this regard derives from Part 4, paragraphs 9 and 10, of the Rules of the Supreme Court.

SCHOOLS—Teacher, Member Of Board Of Supervisors—Salaries from both.

BOARDS OF SUPERVISORS—Teacher, Member Of Board—Salaries from both.

SALARIES—Teacher, Member Of Board Of Supervisors—Salaries from both.

SCHOOLS—Conflict Of Interests—Teacher may also serve on board of supervisors.

May 10, 1976

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

In your recent letter, you transmit the following questions:

"1. Culpeper County Public Schools System has a teacher who is a member of the Board of Supervisors. This person was a teacher prior to being elected to the Board of Supervisors. Questions arise as to pay as follows:

"(a) May this person be paid from both sources (Supervisors' fund and School Board fund) when away from school serving in the capacity of a Supervisor for that particular day?

"(b) If the answer to (a) above is NO, does this teacher have a choice of which check to draw as he puts in his day as a County employee?

"2. May the School Board deduct monies for all time this teacher is away from his job as a teacher while serving as a member of the Culpeper County Board of Supervisors?"

Employees of the school board are not disqualified from serving as
members of the board of supervisors for the same county. See Reports of
at 435. The expenditure of funds for salaries for teachers is, pursuant to
§§ 22-72(5) and 22-203 of the Code of Virginia (1950), as amended, under
the control of the school board, while the compensation of members of the
board of supervisors is established by the board itself, subject to the

I am aware of no constitutional or statutory provision prohibiting receipt
of salary by an employee of the school board during periods of service as
a member of the board of supervisors. In an analogous situation, this
Office has held that a faculty member at a state-supported institution of
higher education was not prohibited from receiving his salary from the
institution while serving as a member of the General Assembly. See Report
of the Attorney General (1969-1970) at 138. The school board could, as a
policy matter, require that its employee take leave without pay for absences
necessitated by the employee's service on the board of supervisors. The
board of supervisors, however, is without authority to withhold the salary
of the school board employee, or to reduce the compensation of this super-
visor below that paid the other members of the board.

SCHOOLS—Transportation—City may not subsidize bus transportation of
private school children except for handicapped children.

SCHOOLS—Transportation Of Handicapped Children To Private Schools.

DILLON'S RULE—Limits Authority Of Local Governments To Powers
And Functions Statutorily Established.

September 25, 1975

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in response to your recent letter requesting an opinion whether a
city may subsidize bus transportation of private school children.

With the exception of § 22-10.11 of the Code of Virginia (1950), as
amended, providing that a school board, in its discretion, may provide
transportation or funds for transportation of a handicapped child attending
a private nonsectarian school for the handicapped where the local school
division is unable to provide appropriate special education for that child,
there is no statutory authority for localities to provide for the transporta-
tion of students enrolled in private schools. See Opinions of the Attorney
General to the Honorable Adelard L. Brault, Member, Senate of Virginia,
dated January 24, 1974, and found in the Report of the Attorney General
(1973-1974) at 314, and the Honorable James E. Jarrell, Jr., Common-
wealth's Attorney for Spotsylvania County, dated December 29, 1970,
22-72.1 and 22-97.1 of the Code of Virginia authorizing county and city
school boards, in their discretion, to provide for the transportation of pupils
refers to the transportation of public school children.

Accordingly, under the time-honored Dillon Rule, which limits the au-
thority of counties, cities and towns to those powers and functions statu-
torily established, see Opinion to the Honorable Douglas S. Mitchell, Com-
monwealth's Attorney for King and Queen County, dated June 7, 1974, and
found in the Report of the Attorney General (1973-1974) at 362, I am
of the opinion that, except for handicapped children falling within the
provisions of § 22-10.11, a city may not subsidize bus transportation of
private school children.
SEARCH AND SEIZURE—City Not Liable For Damage Done To Premises During Execution Of Search Warrant.

CITIES—Not Liable For Damage Done To Premises During Execution Of Search Warrant.

COUNTIES, CITIES AND TOWNS—In Absence Of Specific Authority Conferred By Statute Or Charter, Municipal Officers Have No Power To Waive City's Immunity From Liability For Activities Involving Governmental Functions.

VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT—Liability Of Tenant To Landlord Concerns Rights Of Private Parties—Damage done by police to door of tenant's dwelling in execution of search warrant.

August 1, 1975

THE HONORABLE EDWIN W. BEALE, JR.
Treasurer for the City of Franklin

This is in reply to your recent letter in which you inquired as to the liability of the City of Franklin to a landlord for damage done by city police to a door of a tenant's dwelling during execution of a lawful search warrant; you also asked whether the landlord's recourse would be against the tenant who was in charge of the premises and carrying on the illegal activity.

Unless made so by statute, a city is not liable in damages for the legal and proper exercise of a power conferred by law, such as lawful execution of a search warrant by police officers. See 63 C.J.S. Municipal Corporations § 753 (1950). Furthermore, even where officers employ excessive force or perform their duty in a negligent manner, a city is not liable under Virginia law in the absence of a statute imposing liability, because a city is immune from liability in performing the governmental function of operating a police force. Bryant v. Mullins, 341 F.Supp. 1282 (W.D. Va. 1972); see Fenon v. City of Norfolk, 203 Va. 551, 125 S.E.2d 808 (1962).

I can find no statute or provision in the charter of the City of Franklin either imposing liability on the City under the circumstances related in your inquiry or authorizing the City to pay such claims. I am of the opinion, therefore, that in the absence of such specific authority conferred by statute or charter, municipal officers have no power to waive a city's immunity from liability with respect to activities involving the exercise of its governmental functions. As to the liability of the tenant to his landlord, I express no opinion inasmuch as this issue concerns the rights of private parties only.

SECRECY OF INFORMATION—Income Tax Return—Authority of Tax Department to release copy of joint return to spouse who had not signed return.

TAXATION—Income Tax Return—Authority of Tax Department to release copy of joint return to spouse who had not signed return.

May 21, 1976

THE HONORABLE WYATT B. DURRETTE, JR.
Member, House of Delegates

This is in response to your letter inquiring as follows:

"I am writing to seek an opinion from your office regarding an interpretation of Section 58-46 of the Code of Virginia. This section of the Code addresses 'Secrecy of Information'. 
The question presented is whether or not the Department of Taxation can release copies of income tax returns to Taxpayer B given that Taxpayer A filed a Virginia State Income Tax Return using the form for 'married, filing joint', listing the social security number of Taxpayer B (spouse), but without the signature of Taxpayer B."

With exceptions irrelevant for present purposes, § 58-46, Code of Virginia (1950), as amended, provides that it shall be unlawful for the State Tax Commissioner “to divulge any information acquired by him in respect of the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties.” In this context, the word “divulge” refers to making information available to those without such information. Thus, § 58-46 does not, in my opinion, prohibit the release of a copy of an income tax return to the person, firm or corporation that filed the return.

The income tax return about which you inquire was the joint return of a married couple, but was signed only by one spouse. There is no evidence that the non-signing spouse authorized the filing of this return or had knowledge of its contents. Under these circumstances, I am of the opinion that § 58-46 prohibits the release of the return to the non-signing spouse. Section 58-46 would not, however, prohibit the State Tax Commissioner from sending the return to the person who signed it with the request that his or her spouse also sign the return.

SHERIFFS—City Of Second Class May Not Appoint City Sheriff Without Overlapping Duties With County Sheriff.

CITIES—Distinction Between Cities Of First And Second Class—Title 15.1, Chapters 22 and 23.

ELECTIONS—Poquoson—City sheriff would offer for election only in city.

SHERIFFS—County Sheriff Retains Same Rights, Privileges And Duties In City As In Town Before It Became City Of Second Class.

SHERIFFS—Voters Of City Of Second Class Entitled To Vote For Sheriff Of County In Which City Is Located.

SHERIFFS—Whether Duty Imposed By § 53-168.1 Upon Every “Sheriff” Is Responsibility Of County Sheriff Or City Sheriff.

SHERIFFS AND SERGEANTS—Amendment Changed “City Sergeant” To “City Sheriff” With Same Power And Duties.

October 9, 1975

THE HONORABLE ROBERT F. RIPLEY, JR.
Commonwealth’s Attorney for York County

Your letter of September 19, 1975, requests my opinion whether Poquoson, which is now a city of the second class, may appoint a city sheriff who would be independent of the sheriff of York County, without any overlapping duties.

Two recent Opinions of this Office are responsive to your inquiry, i.e., to the Honorable Joseph M. Kuczko, Commonwealth's Attorney for the County of Wise and the City of Norton, dated June 16, 1975, and to the Honorable John H. Martin, Sheriff, City of Falls Church, dated August 25, 1975, copies of which I enclose.

As reflected in these Opinions, upon the transition of a town to a city of the second class, the town sergeant assumes the duties and responsibili-
ties of a city sergeant, now designated as city sheriff. The sheriff of the county continues "to exercise and have the same rights and privileges, perform the same duties, have the same jurisdiction, and receive the same fees therefor in such city as [he] did in such town before such municipality became a city..." See § 15.1-994 of the Code of Virginia (1950), as amended. Only when a city of the second class becomes a city of the first class would the sheriff of the county cease to have jurisdiction. See Chapter 23, Title 15.1 of the Code. Your inquiry is, therefore, answered in the negative. The Sheriff of York County would offer for election, in November 1975, in both Poquoson and the County. See §§ 15.1-944 and 24.1-86. The former town sergeant of Poquoson, if there was one, will continue in office as city sheriff and serve until his successor is elected in the general election of November 1977 and is qualified. Such election would be conducted only in Poquoson. See §§ 15.1-989, 15.1-991 and 24.1-86. If Poquoson did not have a town sergeant then the Circuit Court should appoint a city sheriff who would hold office in accordance with the provisions of § 15.1-998.

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SHERIFFS—Duties Of Sheriff And High Constable Coincide—Service of civil process not exclusively within jurisdiction of high constable.

PROCESS—Service Of Civil Process—Duties of sheriff and high constable coincide.

November 25, 1975

THE HONORABLE JOHN R. NEWHART
Sheriff for the City of Chesapeake

You request my opinion whether the Sheriff of the City of Chesapeake is required to serve civil processes, warrants, summonses and notices from or returnable to the General District Court of the City of Chesapeake in light of § 20.11 of the Chesapeake City Charter which states that the high constable shall execute all such civil processes.

In an Opinion to the Honorable Fred E. Martin, Judge, Norfolk General District Court dated July 21, 1975, I ruled, under § 129 of the Norfolk City Charter, which provides that the high constable is to execute all civil processes and is to have the same powers, duties and authority with respect to the execution of these papers as the city sergeant (now city sheriff), that the duties of the high constable and the city sheriff coincided. This Opinion is applicable to your inquiry because the charter of the City of Chesapeake also states that the high constable is to have the same powers, duties and authority for the execution of civil processes as the city sheriff. I conclude, therefore, that the service of civil process is not exclusively within the jurisdiction of the high constable. Since I am of the opinion that you are also required to serve these documents, your question is answered in the affirmative.

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SHERIFFS—Fees—Allowable for services in circuit and district courts.

DISTRICT COURTS—Fees—Separate sheriff's fee not collected in.

FEES—Sheriff's Fees Allowable For Services In Circuit And District Courts.


SHERIFFS—Fees—Not separately accounted for but remitted as a court fee.
The Honorable Joseph S. James  
Auditor of Public Accounts

You request my opinion whether a district court should collect an additional $1.00 fee beginning June 1, 1975, in order for the $1.25 filing fee provided by § 16.1-115, Code of Virginia (1950), as amended, to be paid. You further inquire whether the total $1.25 filing fee provided by § 16.1-115 is to be payable to the clerk from the $3.25 fee as provided by § 14.1-125 of the Code which is collectable until October 1, 1975. You next inquire whether a separate $1.25 sheriff’s fee is to be included in the $5.00 fee provided by Chapter 591, [1975] Acts of Assembly 1235. I will respond to your questions seriatim.

As I stated in my Opinion to you of July 23, 1975, § 16.1-115 of the Code provides that the clerk's fee for filing and indexing papers is to be $1.25. Section 14.1-125 provides that the fee in civil cases is to be $3.25 which is to include the fee prescribed by § 16.1-115. It is clear, therefore, that the total $1.25 filing fee is to be allocated from the $3.25 court fee provided in § 14.1-125 until October 1, 1975. This result obtains because the language of § 14.1-125 clearly states that the fee in civil cases is to be $3.25 which shall include the fee prescribed by § 16.1-115. I am of the opinion, therefore, that district courts should not collect an additional $1.00 fee beginning June 1, 1975, to pay the circuit court clerk the fee provided by § 16.1-115.

Your second inquiry deals with the collection of sheriff's fees after October 1, 1975. I stated in my Opinion to you of July 30, 1975, that § 14.1-105 as amended by Chapter 591, [1975] Acts of Assembly 1235, provides that the fees for sheriffs and clerks are allowable only for services provided by such officers in the circuit courts. Chapter 591 also amended § 14.1-125 to provide that, after October 1, 1975, the fee in civil cases for services performed by the judges or clerks of district courts or magistrates is to be $5.00. I concluded in an Opinion to the Honorable Fred E. Martin, Judge of the Norfolk General District Court, dated July 21, 1975, that the $5.00 fee provided by § 14.1-125 encompasses the $1.25 sheriff's fee formerly collected by the sheriff.

This conclusion should not be construed to mean that the $1.25 fee for sheriffs should be separately accounted for. Section 14.1-105 clearly states that sheriff's fees are to be collected only for services rendered in circuit courts. Therefore, I am of the opinion that a separate sheriff's fee should not be collected in district courts and that the balance of the $5.00 fee provided by § 14.1-125, after deducting the clerk's filing fee, when applicable, should be remitted as a court fee in accordance with § 16.1-69.48, Code of Virginia (1950), as amended. It should be noted, however, that § 14.1-125 provides that magistrates who are exempted from its provisions, by §§ 19.1-395 (19.2-46 after October 1, 1975) and 14.1-44.5, may retain the $1.50 portion of the $5.00 fee allocated to them.

Sheriffs—Fees—Arrest and mileage fees provided by § 14.1-111 no longer assessable in district courts.

FEES—Arrest And Mileage Fees For Sheriffs Provided By § 14.1-111 No Longer Assessable In District Courts.

District Courts—Sheriff's Fees—Arrest and mileage fees provided by § 14.1-111 no longer assessable in district courts.
You request my opinion whether arrest and mileage fees are assessable by the Sheriff’s office in cases pending in the General District Court of Westmoreland County.

Section 14.1-105, Code of Virginia (1950), as amended, provides for the fees of sheriffs generally and contains the proviso that these fees are to be allowed only for services provided in circuit courts. Section 14.1-111 of the Code provides for fees of sheriffs in criminal cases coming before or pending in circuit courts. This latter section specifically provides for an arrest fee in the case of a misdemeanor or felony and for mileage fees for transporting prisoners to jail. Section 14.1-111, as it existed before the 1975 session of the General Assembly, did not distinguish between fees to be collected in the general district courts and in circuit courts. I am of the opinion, therefore, that the 1975 session of the General Assembly, by specifically making the fees contained in § 14.1-111 applicable only to criminal cases in circuit courts, eliminated sheriffs’ arrest and mileage fees in general district courts.

SHERIFFS—Fees—Sheriff may not charge fee under § 14.1-105 for levying execution in general district courts.

DISTRICT COURTS—Sheriffs May Not Charge Fee For Any Activity Relative To Process Or Writs Issued By General District Courts.

FEES—Sheriffs May Not Charge Fee For Any Activity Relative To Process Or Writs Issued By General District Courts.

You request my opinion whether the Sheriff of the City of Norfolk may charge $3.00 for a levy under an execution from the Norfolk General District Court.

Section 14.1-105, Code of Virginia (1950), as amended, provides for the fees of sheriffs generally, and paragraph (a) of that section specifically provides for a $3.00 fee for levying an execution. The section also contains a proviso to the effect that the fees enumerated in the section are to be allowed only for services provided in circuit courts. I am of the opinion, therefore, that the Sheriff of the City of Norfolk may not charge a $3.00 fee for levying an execution in the General District Court.

You further inquire whether there is any fee chargeable by the Sheriff for any activity relative to process or writs issued by the General District Court.

Section 14.1-111 of the Code provides for sheriffs’ fees in criminal cases in circuit courts. Section 14.1-111, as it existed before the 1975 Session of the General Assembly, did not distinguish between fees to be collected in general district courts and in circuit courts. I am of the opinion, however, that the 1975 Session of the General Assembly, by specifically making the fees contained in § 14.1-111 applicable only to criminal cases in circuit courts, eliminated the fees enumerated in the section in general district courts. Consequently, I conclude that the fees set forth in §§ 14.1-105 and 14.1-111 are not collectible by the Sheriff for service rendered the General District Court. Your question is answered in the negative.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS—Process Of General District Court Outside Sheriff's Jurisdiction To Be Served By Sheriff Without Fee.

COUNTIES, CITIES AND TOWNS—Process Of General District Court Outside Sheriff's Jurisdiction To Be Served By Sheriff Without Fee.

DISTRICT COURTS—Process Of General District Court Outside Sheriff’s Jurisdiction To Be Served By Sheriff Without Fee.

FEES—Process Of General District Court Outside Sheriff’s Jurisdiction To Be Served By Sheriff Without Fee.

June 8, 1976

THE HONORABLE FRED E. MARTIN, JR., Judge
Norfolk General District Court

This is in reply to your letter in which you inquire whether process directed outside of Norfolk from that City's General District Court should be served at no fee by the sheriff of jurisdictions outside of Norfolk. You suggest that this appears to be the case from amendments to §§ 14.1-105 and 14.1-105.1 of the Code of Virginia (1950), as amended.

Section 14.1-105 was amended by Chapter 591, [1975] Acts of Assembly 1235, to provide that fees of sheriffs "shall be allowable only for services provided by such officers in the circuit courts." Section 14.1-105.1 of the Code, which authorizes any city having an office of high constable to establish fees for the service of process by such officer, was amended by Chapter 310, [1976] Acts of Assembly 349, to provide that "[s]uch high constable shall execute all processes, warrants, summonses and notices in civil cases before the general district court of such city to the exclusion of the sheriff of such city." (Emphasis added.) This latter amendment was enacted as emergency legislation in force from its passage.

In an Opinion to the Honorable John R. Newhart, Sheriff, City of Chesapeake, dated June 17, 1974, and found in the Report of the Attorney General (1973-1974) at 323-25, a copy of which is enclosed, I indicated that several opinions of the Supreme Court of Virginia enumerate duties of the office of sheriff. One such case, Narrows Grocery Company, Inc. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933), holds that a sheriff has a mandatory duty of service of process. Although § 14.1-105.1 provides that the high constable of any city having such official shall serve process in civil cases before the general district court of such city to the exclusion of the sheriff of such city, I am constrained to hold that this provision does not relieve a sheriff of his duty to serve without fee process directed to him from a general district court outside his jurisdiction. It is my opinion, therefore, that, in the absence of a specific statutory or charter provision authorizing a particular locality to direct that process received from outside its jurisdiction shall be served by its high constable to the exclusion of its sheriff, process of the Norfolk General District Court directed outside of Norfolk must be served at no fee by the sheriff of the receiving jurisdiction.

SHERIFFS—Required To Provide Security For All Courthouses And Courtrooms In His Jurisdiction.

COURTS—General District Courts Previously Designated Civil And Police Courts Then Municipal Courts—City sergeants.

SHERIFFS—Voters Of City Of Second Class Entitled To Vote For Sheriff Of County In Which City Is Located.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS—Whether Duty Imposed By § 53-168.1 Upon Every “Sheriff” Is Responsibility Of County Sheriff Or City Sheriff.

SHERIFFS AND SERGEANTS—Amendment Changed “City Sergeant” To “City Sheriff” With Same Power And Duties.

August 25, 1975

THE HONORABLE JOHN H. MARTIN
Sheriff for the City of Falls Church

This is in response to your inquiry whether § 53-168.1, Code of Virginia (1950), as amended, is applicable to you, as the Sheriff of the City of Falls Church; specifically, you ask whether you have the statutory duty to provide courtroom security for the Falls Church General District Court.

Section 53-168.1 provides 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 ensure that the courthouse and courtrooms within his jurisdiction are secure from violence and disruption. A list of such designations shall be forwarded to the Director of the Law Enforcement Officers Training Commission.”

In an Opinion to the Honorable S. R. Royall, Sheriff of Nottoway County, dated December 13, 1972, and found in Report to the Attorney General (1972-1973) at 361, I ruled that a sheriff must, pursuant to § 53-168.1, provide courtroom security for every courthouse and courtroom within his jurisdiction and that the language of § 53-168.1 does not provide for any exception. See also Report of the Attorney General (1972-1973) at 231.

The City of Falls Church is served by you as sheriff and is also served by the Sheriff of Fairfax County. See § 15.1-994, which provides that, in cities of the second class, the sheriff of the county of which the city is a part shall have the same rights, privileges, and duties in such city as he did in the town before such municipality became a city. This section further provides that the qualified voters of a city of the second class are entitled to vote for the sheriff of the county in which the city is located.

See also § 15.1-989 which provides that, when a town becomes a city of the second class, the town sergeant shall be the city sergeant. An amendment of the 1971 Extra Session of the General Assembly deleted the reference to “city sergeant” and substituted therefor “city sheriff.” Section 15.1-991 provided that, at the next general election after a city or town is declared a city of the second class, there should be an election for city sergeant. An amendment to the 1971 Extra Session also changed this reference to “city sheriff.” Cf. §§ 15.1-796 and 15.1-796.1 which abolished the office of city sergeant, effective July 1, 1971, and declared that city sergeants should continue in office as “city sheriffs” with the same power and duties “as were conferred by law upon city sergeants” prior to July 1, 1971.

In an Opinion to the Honorable Joseph M. Kuczko, Commonwealth’s Attorney for the County of Wise and the City of Norton, dated June 16, 1975, a copy of which is attached, I held that the change from city sergeant to city sheriff was semantic only and did not change the power, duties or responsibilities previously imposed on city sergeants.

The question thus remains whether the duty imposed by § 53-168.1 upon every “sheriff” is the responsibility of the county sheriff or the city sheriff—formerly city sergeant.

I am of the opinion that the General Assembly intended that the Sheriff
of Falls Church provide courtroom security for the Falls Church General District Court. I base this answer on the historical relationship between the Falls Church General District Court and the Sheriff of the City of Falls Church. The Charter of the City of Falls Church, which is found in Chapter 323, [1950] Acts of Assembly 501, created the office of civil and police justice and the office of city sergeant. The city sergeant was an officer of the civil and police court. In 1956, the civil and police courts in cities were redesignated municipal courts. Sections 16.1-5 and 16.1-55. City sergeants continued as officers of these courts. In 1971, city sergeants, as hereinabove stated, were redesignated as city sheriffs with their preexisting powers and duties. Sections 15.1-796 and 15.1-796.1. The next change occurred in 1972 when the municipal courts of the Commonwealth became general district courts. Section 16.1-69.8(b). Throughout, the officer now designated the Sheriff of Falls Church has been an officer of the court now designated the Falls Church General District Court. Consequently, he rather than the Sheriff of Fairfax County has the responsibility to provide for its security.


COURTS—Sheriff May Collect Commission Provided By § 14.1-109 In Either Circuit Court Or District Court.


December 30, 1975

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


Section 14.1-109 of the Code was amended by Chapter 386, [1964] Acts of Assembly 592. This section states that “an officer receiving payment under an execution or other process in money, or selling goods,” is to receive, as a commission, a certain percentage of the proceeds of the sale.

Section 14.1-105 of the Code was amended by Chapter 591, [1975] Acts of Assembly 1235. This section enumerates the fees to be charged by a sheriff for various services he performs. This section also specifically states that the fees it lists are allowable only for services provided in circuit courts.

Although § 14.1-105 provides, in paragraph (8), for a three dollar fee for levying an execution, I am of the opinion that the commission on collections contained in § 14.1-109 of the Code is separate and distinct from that fee and is in addition to it. The final proviso contained in § 14.1-105 clearly applies only to the fees listed in that section and is not made applicable to any commission provided for elsewhere in the Code. Thus, a sheriff may collect the commission provided by § 14.1-109 of the Code in either a circuit court or a district court.

SHERIFFS—Sheriff Of Buckingham County Does Not Have Authority To Serve Process On Persons Committed To Prince Edward County Jails By Buckingham County Courts.

CRIMINAL PROCEDURE—Sheriff Of Buckingham County Does Not Have Authority To Serve Process On Persons Committed To Prince Edward County Jails By Buckingham County Courts.
SUPREME COURT OF VIRGINIA—Rule 3A:4(d)(1)—Limits sheriff's authority to execute process to his own jurisdiction.

WARRANTS—Sheriff Of Buckingham County Does Not Have Authority To Serve Process On Persons Committed To Prince Edward County Jails By Buckingham County Courts.

October 21, 1975

THE HONORABLE GARNETT A. SHUMAKER, JR. 
Sheriff of Buckingham County

This is in reply to the recent letter in which you asked if the Sheriff of Buckingham County has the authority to serve process on persons committed to the Prince Edward County Jail by Buckingham County courts. You pointed out that Buckingham County has no jail of its own and regularly uses the Prince Edward County Jail. Subsequent to your letter you informed this Office that you are particularly concerned with the service of criminal warrants.

General provisions for the service of criminal process are found in §§ 19.2-76 and 15.1-79, Code of Virginia (1950), as amended, and Rule 3A:4(d)(1) of the Rules of the Supreme Court of Virginia. Section 19.2-76 provides in part: "An officer may execute within his jurisdiction a warrant or summons issued anywhere in the State...." (Emphasis added.) Section 15.1-79 states that "[e]very 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...." (Emphasis added.) Rule 3A:4(d)(1) of the Rules of the Virginia Supreme Court provides as follows: "The warrant or summons may be executed anywhere in the State by an officer authorized by law to execute a warrant in the place where the warrant or summons is executed."

The foregoing Code sections and Rule limit a sheriff's authority to execute process to his own jurisdiction. There are certain sections in the Code that do authorize a sheriff to serve legal process outside his jurisdiction. These exceptions, however, apply only to limited factual situations, not relevant to your inquiry. It is my opinion, therefore, that the Sheriff of Buckingham County would not be authorized to serve warrants on any persons being held in the Prince Edward County Jail. The fact that these persons were committed to that jail by Buckingham County courts would have no effect on this determination.

STATE WATER CONTROL BOARD—Groundwater Act Of 1973—Administration; enforcement; exceptions; grandfather clause.

DEFINITIONS—Groundwater Act Of 1973—"Date" declared critical groundwater area.

DEFINITIONS—Groundwater Act Of 1973—Phrase "in an amount not exceeding fifty thousand gallons a day" in § 62.1-44.87 refers only to exemption for any single industrial or commercial purpose.

DEFINITIONS—Groundwater Act Of 1973—Two or more wells under single ownership—Grandfather clause.

WATER—Groundwater Act Of 1973—Exemptions—"Purpose" made of water; not "person" making withdrawal.
The following is in reply to your recent inquiry relative to the Groundwater Act of 1973 which letter reads, in pertinent part, as follows:

"[I]t is requested that you provide the Board with your formal opinion in answer to these questions:

1. With regard to § 62.1-44.87 (the 'Exception Clause'):
   a. Does the phrase 'in an amount not exceeding fifty thousand gallons a day' refer to all three stated exceptions (i.e., agricultural and livestock watering, human consumption or domestic purposes, and any single industrial or commercial purpose) or only to the last stated exception (i.e., any single industrial or commercial purpose)?
   b. In light of the answer to a above, how is the withdrawal of water by a municipality for mixed domestic, industrial, and commercial purposes treated under this exception provision?

2. With regard to § 62.1-44.93 (the 'Grandfather Clause'):
   a. Is the Board, when it issues certificates of groundwater right, required (1) to issue certificates containing only a daily maximum withdrawal limitation based on the extent of beneficial use of groundwater on the date of critical groundwater designation or any given date two years prior to the date of designation, or (2) issue a certificate containing, in addition to the daily maximum, a monthly or yearly average limitation based on the maximum average usage during any given month or year within the two year period?
   b. When the Board issues a certificate of groundwater right, under § 62.1-44.99, to a person owning and operating more than one well in a single designated critical groundwater area, is the beneficial use, in terms of § 62.1-44.93(a), of that person considered in terms of the total groundwater withdrawal by that person or in terms of the withdrawal through each well; that is, is the Board obligated to issue a separate certificate for each well, or is the Board allowed to consider the combined use of all the wells of each applicant?"

Prior to addressing your specific inquiries, I believe a brief discussion of the scope, purpose and operation of the Groundwater Act of 1973 (Act) would be helpful.

The policy of the State regarding its groundwater resources is stated in § 62.1-44.84 of the Code of Virginia (1950), as amended, as follows:

"It is the policy of the Commonwealth of Virginia and the purpose of this law to recognize and declare that the right to reasonable control of all groundwater resources within this State belongs to the public and that in order to conserve, protect and beneficially utilize the groundwater of this State and to ensure the preservation of the public welfare, safety and health, it is essential that provision be made for control of groundwater resources."

The administration and enforcement of the Act lies jointly with the State Water Control Board and the State Health Department. See § 62.1-44.86. With the exception of the information requirements of the Act contained in § 62.1-44.90, the Act is not automatically applicable statewide. Before the regulatory provisions of the Act become effective, an area must first be declared a "critical groundwater area" by the Board after public hearing.
See § 62.1-44.96. Once a critical groundwater area has been declared, any person intending to acquire or enlarge a use of groundwater within such area must first receive from the Board a permit before constructing, rehabilitating, altering or extending a well. See § 62.1-44.100.

Certain uses of groundwater in critical groundwater area are completely exempted from regulation under the Act. These are the use or supplying of groundwater for agricultural and livestock watering purposes, for human consumption or domestic purposes, or for any single industrial or commercial purpose in an amount not exceeding fifty thousand gallons a day. See § 62.1-44.87. In addition to the exempted uses, the use of groundwater on the date of critical groundwater designation is "grandfathered" to the extent of that beneficial use on the date of critical groundwater area designation or on any date within two years prior to such date. See § 62.1-44.93. Persons with "grandfathered" uses must, however, register their use and obtain a certificate of groundwater right. See § 62.1-44.99.

With the foregoing in mind, I will answer your specific questions seriatim:

(1) Your first question may be answered by a literal application of the language used in the statute. Section 62.1-44.87, inter alia, exempts from the certificate, permit and registration requirements of the Act, the "... use or supplying of groundwater for agricultural and livestock watering purposes, for human consumption or domestic purposes, or for any single industrial or commercial purpose in an amount not exceeding fifty thousand gallons a day..." (Emphasis added.) As can be seen from the foregoing, the exemption for industrial and commercial purposes, unlike those for agricultural, livestock watering, human consumption or domestic purposes, is expressly qualified as a "single" such purpose. This is a clear reference to the fifty thousand gallon limitation. Had the legislature intended the fifty thousand gallon limitation to apply to agricultural, livestock watering, human consumption or domestic purposes, it would have so indicated by referring to a "single" such purpose, as it did in the case of industrial and commercial purposes. The exemptions for agricultural, livestock watering, human consumption or domestic purposes, are in the plural, phrased in general terms, and not indicative of the intent to impose the fifty thousand gallon limitation. I am of the opinion, therefore, that the phrase "in an amount not exceeding fifty thousand gallons a day" as contained in § 62.1-44.87 refers only to the exemption for any single industrial or commercial purpose.

(2) In response to your second inquiry, I direct your attention to the fact that § 62.1-44.87 in setting forth the exemptions to the certificate, permit and registration requirements of the Act, speaks in terms of the "purpose" that is made of the water, and not the "person" making the withdrawal. The applicability of the fifty thousand gallon limitation, therefore, will depend on the use being made of the water, not the identity of the person making the withdrawal. Accordingly, where a municipality withdraws water for mixed domestic, industrial and commercial purposes, the exemption under § 62.1-44.87 applies to all withdrawals for domestic purposes, and to each single industrial or commercial purpose not exceeding fifty thousand gallons per day. Withdrawals for any single industrial or commercial purpose exceeding fifty thousand gallons per day are subject to the requirements of the Act. In the issuance of permits and certificates of groundwater right for such mixed purposes, therefore, the certificates and permits should identify the purpose or purposes not exempted, and provide for the regulation of only that quantity of water subject to the requirements of the Act.

(3) As with the answer to your first inquiry, the answer to your third question may be found in a literal application of the language used in the statute. Section 62.1-44.93(a) provides as follows:
“There is hereby recognized and preserved the right of persons within critical groundwater areas to continue to apply groundwater to beneficial uses to the extent of their beneficial uses on the date such area is declared a critical groundwater area or on any date within two years prior to such date. (Emphasis added.)

The issue raised by your inquiry is whether the word “date” as used in § 62.1-44.93(a) means a given day, month or year, or a given day, month or year plus the average of a number of given days, months or years. The word “date” is clearly intended by the statute to mean only one given “day” of the month. This is evident by virtue of the fact that the statute refers to the “...date such area is declared a critical groundwater area...” (Emphasis added.) The statute makes no distinction between the word “date” as used in reference to the date of critical groundwater designation and as it refers to any date within two years prior to such date. No authority exists on the face of the statute which would authorize the Board to establish a monthly or yearly average limitation, in addition to a daily maximum limitation. According, I am of the opinion that when issuing certificates of groundwater right pursuant to § 62.1-44.99, the Board may issue certificates containing only a daily maximum withdrawal limitation based on the extent of beneficial use of groundwater on the date of critical groundwater designation or on any date within two years prior to such date.

(4) The issue presented by your final question is whether, under the rights preserved in § 62.1-44.93(a), a registrant for a certificate of groundwater right pursuant to § 62.1-44.99 seeking to register two or more wells under single ownership is “grandfathered” to the extent of his total pumpage from all wells on one given day during the specified period, or “grandfathered” to the extent of the combined total of his pumpage from each well on each well’s day of maximum pumpage during said period. This issue is of practical importance for, depending upon the method used, a considerable difference in the amount of groundwater rightfully claimed as “grandfathered” may be computed. This would be the case particularly where the wells were pumped at substantially different rates on different days. If the registrant were to claim the pumpage for each of his individual wells based on each well’s day of maximum pumpage, the result would be the “grandfathering” of a greater quantity of water than had ever actually been pumped by that person on one given day.

In answering your inquiry, I would direct your attention to my response to your third question, where I held that the word “date” as used in § 62.1-44.93(a) referred to a single day of the month within the specified period. Further, I would point out that the statute, in referring to the right preserved, speaks in terms of the person using the well, rather than the individual well itself. The obvious conclusion from the foregoing is that the right “grandfathered” by § 62.1-44.93(a) is based upon the maximum beneficial use of the groundwater on one given day by the person within the specified period regardless of the number of wells pumped by him. To permit a registrant to select a separate day of maximum pumpage for each well owned by him, and claim the total pumped by all of his wells would be contrary to the statutory mandate that one given day be selected in determining the extent of beneficial use. In addition, such a construction would be improper in that it would be using the pumpage of the individual well, rather than the beneficial use by the person, as the basis for computing the right “grandfathered.”

In reaching the foregoing conclusion, I am not unmindful that § 62.1-44.99(b) provides for the registration of each well. This provision, however, is clearly not substantive in nature, but merely sets forth the procedure by which the right recognized by § 62.1-44.93 may be perfected. This is evident from the fact that § 62.1-44.99(a) provides in part that “...any
person claiming any right to use groundwater under § 62.1-44.93, is entitled to file with the Board a registration statement. . . ." (Emphasis added.) The right, therefore, is granted and determined by § 62.1-44.93, not § 62.1-44.99. I am, therefore, of the opinion that the Board must consider the total withdrawal of a registrant on one given day within the specified period, regardless of the number of wells claimed. The Board may issue separate certificates for each well, provided the total amount "grandfathered" does not exceed the amount actually withdrawn by the registrant on the date of critical groundwater designation, or any date within two years prior to such date.

STATUTES—Prohibition Against Special Legislation—Classification not prohibited when reasonable and appropriate.

AMENDMENTS—Determination Of Boundary Lines By Waterways—Constitutionality of amendments.

ANNEXATION—Determination Of Boundary Lines By Waterways—Constitutionality of amendments.

CONSTITUTION—Determination Of Boundary Lines By Waterways—Constitutionality of amendments.

COUNTIES, CITIES AND TOWNS—Determination Of Boundary Lines By Waterways—Constitutionality of amendments.

DEFINITIONS—“Special Legislation”—Concept and parameters.

June 29, 1976

THE HONORABLE RUSSELL I. TOWNSEND, JR.
Member, Senate of Virginia

This is in response to your recent request for my opinion whether House Bills 888 and 1010, enacted by the 1976 General Assembly, violate the applicable provisions of the Constitution of Virginia (1971). These bills amend existing law pertaining to the determination of boundary lines, and the latter relates to annexation proceedings.

Until July 1, 1976, § 15.1-1031 of the Code of Virginia (1950), as amended, enlarges the boundaries of counties, cities and towns bordering on the Chesapeake Bay or the Atlantic Ocean to include wharves, piers, docks and many other structures which extend into those parts of the Bay and Ocean lying within Virginia’s territorial jurisdiction. After July 1, House Bill 888 will broaden § 15.1-1031 to encompass counties, cities, and towns bordering the Elizabeth River and other tidal tributaries.

Sections 15.1-1032 to -1058 constitute the statutory framework for annexation proceedings. Section 15.1-1041 enumerates the various decisions an annexation court may render after its hearing. It does not provide specific guidelines for fixing boundary lines in the event annexation is awarded.

Effective July 1, 1976, House Bill 1010 will create a new section 15.1-1041.1, providing for boundary line decisions whenever waterways form the boundaries of affected localities. This section will provide for the establishment of boundary lines along the centerline of rivers and creeks, and for the setting of boundaries by metes and bounds along bays and lakes. New section 15.1-1041.1 will also provide as follows:

“The General Assembly hereby establishes (1) that where any city is bisected by a river or any branch thereof then such river or branch
shall lie within the boundaries of such city to the extent that there are portions of such city on both opposite shores of such river or branch; and (2) where any river in the Commonwealth is bordered on both sides by cities of a population of 100,000 or more, according to the last official enumeration of the U. S. Bureau of the Census at the time of the passage of this act, then, to the extent that said cities' borders along said river are in opposition, including the border across any branch as provided in (1) above, the boundaries of said cities shall be the centerline of said river and said cities shall be contiguous one to the other, notwithstanding any judicial decree to the contrary entered prior to the date of this act; provided, however, nothing in this paragraph shall apply to that body of water known as Hampton Roads located between Norfolk, Portsmouth and Suffolk on the south and Newport News and Hampton on the north."

This language purports to establish the boundaries of certain cities, despite prior annexation decrees to the contrary.

You inquire as to the constitutionality of the stated amendments. I am of the opinion that none of the provisions of House Bills 888 and 1010 present material constitutional issues except the quoted portion of House Bill 1010. This portion, however, deserves further analysis in light of Article VII, Section 2, and Article IV, Section 14, of the Virginia Constitution and the decided Virginia cases.

Article VII, Section 2, requires that the General Assembly "...provide by general law for the ...change of boundaries, consolidation and dissolution of counties, cities [and] towns," and that "no...special act shall be adopted which provides for the extension or contraction of boundaries of any county, city or town." The issue presented by your inquiry is whether the quoted portion of House Bill 1010 constitutes prohibited special legislation by virtue of its application only to cities bisected by rivers and cities of 100,000 or more separated by rivers, or the exclusion for Hampton Roads.

The Article VII, Section 2, prohibition against special legislation was carried over from Section 102 of the Constitution of 1902. Under the former document, a series of Supreme Court decisions developed, which define the concept of special legislation and establish its parameters. These principles apply with equal force under the present Constitution.

The purpose of the quoted constitutional prohibition is to prevent legislative determination, by special act, or what amount of territory should be annexed to a city, or how its limits should be contracted. City of Portsmouth v. City of Chesapeake, 205 Va. 259, 136 S.E.2d 817 (1964). Historically, the Virginia Supreme Court has regarded this constitutional limitation as "second to no other provision of the Constitution in value and importance." Town of Narrows v. Board of Supervisors, 128 Va. 572, 105 S.E. 82 (1920).

The concept of special legislation embodied in Article VII, Section 2, is also found in Article IV, Section 14. Since there is no conflict between these sections, see e.g., Pierce v. Dennis, 205 Va. 478, 138 S.E.2d 6 (1964), decisions under Article IV, Section 14, are relevant to your inquiry. These decisions establish that a law is special in the constitutional sense when it arbitrarily separates some persons, places or things from those upon which, but for such separation, it would operate. Standard Drug Co. v. General Electric Co., 202 Va. 367, 117 S.E.2d 289 (1960), and cases cited therein.

Constitutional prohibitions against special legislation, however, do not prohibit classification as long as it is reasonable and appropriate to the occasion. County Bd. of Supervisors v. American Trailer Co., 193 Va. 72, 78 S.E.2d 115 (1951). Reasonableness is primarily a question for the legislature and, if any state of facts can be reasonably conceived that would sustain an Act, it will be assumed that such state of facts existed when the law was enacted. Avery v. Beale, 195 Va. 690, 80 S.E.2d. 584
In the present case, the quoted portion of House Bill 1010 clearly classifies certain cities and provides separate treatment for them. Its purpose is to provide for urban boundary lines with respect to rivers. In so doing, its application is restricted to cities bisected by rivers and cities separated from other cities by rivers. Viewed in the context of its purpose, this portion of the classification is clearly reasonable, and I am of the opinion that no constitutional violation exists by virtue thereof.

House Bill 1010, however, classifies the cities to which it applies further. It does not apply to all cities separated from one another by rivers. It only applies to cities of a population of 100,000 or more which are separated by rivers. This raises the issue whether a population classification in conjunction with other factors is reasonable in light of the purpose of the Act. The Virginia Supreme Court has recognized that classifications based on population in conjunction with other factors are valid unless the resulting combination bears no relation to the subject matter of the Act, or if it is clear that the additional elements are used to limit an otherwise general statute to a particular community. City of Newport News v. Elizabeth City County, 189 Va. 825, 55 S.E.2d 56 (1949); Ex Parte Settle, 114 Va. 715, 77 S.E. 496 (1913); D. Sands, Sutherland Statutory Construction § 40.09 (4th ed. 1973).

In the present instance, I have difficulty perceiving the necessity for a population minimum considered by itself. I am unable to conclude, however, that the combined factors of population and riverfront location are being used to limit an otherwise general statute to a particular community. I am, therefore, of the opinion that the population factor does not invalidate this Bill.

The final aspect of House Bill 1010 which requires constitutional analysis is the fact that it expressly excludes Hampton Roads from its operation. The Virginia Supreme Court has recognized that an act may be general in form but special in application by virtue of its exclusions. In Bray v. County Bd., supra, and in County Bd. of Supervisors v. American Trailer Co., supra, the Court recognized that the test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. In the present case, the relevant portion of House Bill 1010 permits centerline boundaries in rivers. Bay and Ocean boundaries are necessarily and properly determined differently, by metes and bounds. Hampton Roads is excluded only from the centerline treatment accorded rivers. In my opinion this is a reasonable classification. Hampton Roads is not a river. The problems of establishing boundaries with respect to it are more closely analogous to those involving bays and oceans. As a consequence, this exclusion does not invalidate the classification.

For the foregoing reasons, I am of the opinion that House Bills 888 and 1010 are constitutional.

STREETS—Town Not Responsible For Maintenance Of Dedicated But Unaccepted Streets And Alleys.

STREETS—Town Responsible For Maintenance When Street Accepted—Acceptance of a dedication may be express or implied.

TOWNS—Responsible For Maintenance When Street Accepted—Acceptance of a dedication may be express or implied.
You have requested an opinion relating to certain streets and alleys within the Town of Front Royal that have been platted in old subdivision plats but have not been accepted into the Town's street system.

Your first question is whether the Town is "responsible for the maintenance of said dedicated but unaccepted streets and alleys..." Although the streets and alleys may have been dedicated the procedure is not complete at that point, "...and the street or alley does not become a highway until established or accepted by competent authority." *Payne v. Godwin*, 147 Va. 1019, 1026, 133 S.E. 481, 483 (1926). The statutes relating to subdivisions are in conformity with this concept. While under § 15.1-478, Code of Virginia (1950), as amended, recordation of a subdivision plat transfers the fee simple ownership in streets and alleys shown thereon to the locality, and § 15.1-889 enables a municipality to exercise control over such streets and alleys, nevertheless, § 15.1-479 provides that there is no obligation created upon the locality to construct or maintain those streets and alleys. There must be some affirmative action by the locality beyond the recording of the subdivision plat in order to create an obligation upon the locality. Accordingly, it is my opinion that, since there has been no overt act of acceptance by competent authority of these streets and alleys, there is no responsibility for their maintenance by the Town.

Your second question is: "If the town enters to protect said streets, to maintain them or take other action against parties in said streets, is the town deemed to have accepted said streets within the system..." and to be responsible for their improvement and maintenance?

"Acceptance of a dedication may be express or implied." *City of Norfolk v. Meredith*, 204 Va. 485, 491, 132 S.E.2d 431, 435 (1963). Any express acceptance must be by ordinance or resolution. See §§ 15.1-13, 14(1), 368 and 889. "Acceptance of a dedication of a road will be implied only where the public has treated it as a public road, under circumstances which would render it unjust to permit the land owner to reclaim it." *Body v. Skeen*, 208 Va. 749, 752, 160 S.E.2d 751, 753-54 (1968). Implied acceptance may be evidenced by use and occupation by the public authorities of the dedicated area within a reasonable time after the offer. *Greenco Corp. v. City of Virginia Beach*, 214 Va. 201, 198 S.E.2d 496 (1973); *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919). The actions contemplated by your question would constitute such use and occupation if performed by authorized public officials acting within the scope of their authority.

In light of the foregoing, it is my opinion that, when the street is accepted, the public authorities not only have control and jurisdiction over it, but are responsible for its maintenance, since individual members of the public have no property rights in the roadway. See *State Highway Comm'r v. Howard*, 213 Va. 731, 195 S.E.2d 880 (1973); *Fugate v. Nettleton*, 213 Va. 26, 189 S.E.2d 377 (1972).

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**SUPPORT ACT—Attorney’s Fee Under § 20-70—No statutory authority for fee under § 20-61; criminal statute.**

**ATTORNEYS—Fees Allowed For Representing Spouse In Petitioning For Support Under § 20-70—No statutory authority for fee under § 20-61; criminal statute.**
REPORT OF THE ATTORNEY GENERAL

COMMONWEALTH ATTORNEYS—Prosecute Proceeding Under § 20-61 Of Person Guilty Of Failure To Provide Support And Maintenance.

CRIMINAL PROCEDURE—Commonwealth's Attorney Prosecutes Proceeding Under § 20-61 Of Person Guilty Of Failure To Provide Support And Maintenance.

FEES—Support Cases—Fees allowed for representing spouse in petitioning for support under § 20-70—No statutory authority for fee under § 20-61; criminal statute.

SUPPORT ACT—Failure To Provide Support And Maintenance Is Misdemeanor Under § 20-61.

October 30, 1975

THE HONORABLE HAROLD B. SINGLETON, Chief Judge
Twenty-Fourth Judicial District
Juvenile and Domestic Relations District Court

Your recent letter requests my opinion as follows:

"As you know Chapter 5 of Article 20 of the Code is the desertion and non-support section. Section 20-61 provides the penalty for non-support. Section 20-64 provides how the proceedings are instituted. Section 20-71 provides for temporary orders for support and Section 20-71.1 provides for attorneys fees under Section 20-71.

"I frequently have attorneys request that fees be awarded for representing an aggrieved party who has been deserted and non-supported. I have refused to do so unless it comes under Section 20-71, that is before the trial under Section 20-61.

"Would you please clarify for me Section 20-71 as to whether or not I may award attorneys fees under Section 20-61 or does it apply only when the person is asking for temporary support?"

Section 20-71 of the Code of Virginia (1950), as amended, provides that:

"At any time before the trial, upon motion of the complainant, with notice to the defendant, the court may enter such temporary order as seems just, providing for the support of the neglected spouse or children, or both, pendente lite, and may punish for violation of the order as for contempt."

Section 20-71.1 specifically allows attorney's fees to be awarded an attorney who represents the spouse in petitioning for support under § 20-70. I know of no statutory authorization for the award of an attorney's fee for a proceeding under § 20-61. Section 20-61 does not provide for support, but is a criminal statute and states that whoever fails to properly provide for support and maintenance shall be guilty of a misdemeanor and subject to confinement and/or a fine, or a forfeiture of an amount not exceeding $1,000.00 which can be paid in whole or in part to the spouse. Any proceeding pursuant to § 20-61 would be prosecuted by the Commonwealth's Attorney.

SUPPORT ACT—Court Maintains Continuing Jurisdiction Over.

SUPPORT ACT—Court Order Incorporating Therein Agreement Concerning Child Support Construed Under Principles Of Contract Law In Effect When Agreement Made.
REPORT OF THE ATTORNEY GENERAL

SUPPORT ACT—Parent—Duty limited by statute to age of majority, except for child under mental or physical incapacity.

AMENDMENTS—Retrospective Effect Of Statute Not At Issue Where Child Support Rights Do Not Vest.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Jurisdiction To Enforce Child Support Limited To Age Of Majority.

MINORS—Age Of Majority Is “Status” As Opposed To “Vested Right.”

June 14, 1976

The Honorable Harold B. Singleton, Chief Judge
Twenty-Fourth Judicial District
Juvenile and Domestic Relations District Court

This is in reply to your letter by which you request my opinion concerning the cessation of support payments. You state that on January 11, 1968, an order was entered pursuant to § 20-72 of the Code of Virginia (1950), as amended, requiring a man to pay to a woman the sum of $20.00 per week for the support of a daughter born of their bigamous marriage. The order did not expressly state when support payments would cease. There was no agreement between the parties concerning support of their daughter. On July 1, 1972, the statute which changed the age of majority from 21 to 18 became effective. The daughter in question became 18 on May 10, 1976. Does the man’s obligation to pay support payments terminate when the child becomes 18 or when the child becomes 21?

The Supreme Court of Virginia has recently decided two cases which concern the duty of child support in divorce cases where judicial orders were entered pursuant to §§ 20-103 and 20-107 of the Code. Despite the fact that divorce is not an element of the situation you present, these cases are applicable to that situation. The authority of a court to enter an order, pursuant to §§ 20-71 and 20-72, providing for the support of minor children in cases where no marriage existed, is the substantive equivalent of the authority granted a court by §§ 20-103 and 20-107. The two cases are: Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975); and Meredith v. Meredith, 216 Va. 636, 222 S.E.2d 511 (1976).

In Eaton, the order which provided for support was entered subsequent to the effective date of § 1-13.42, which changed the age of majority from 21 to 18. The Supreme Court stated that jurisdiction in divorce suits is controlled entirely by statute, and that the jurisdiction of the court is eliminated ipso facto when the child reaches his majority. The Court further held that such event terminated, by operation of law, the prospective effect of the decree. Eaton at 827.

In the situation presented, however, the order was entered prior to the effective date of § 1-13.42. The law applicable at that time authorized a court to enter an order providing for support of a child until the child was 21. The issue thus presented is whether § 1-13.42 operates retrospectively upon such an order to terminate the responsibility for support when the child becomes 18.

In Meredith, the support order was entered prior to the effective date of § 1-13.42. The lower court had held that the child was vested with the legal right to be supported by the father until he attains the age of 21, marries, dies or otherwise becomes emancipated. This decision was evidently based upon § 1-16 of the Code, which provides, in pertinent part, that no new law shall be construed to affect “any right accrued, or claim arising before the new law takes effect....” The Supreme Court reversed this decision, however, holding that “majority or minority is a status rather than a vested right and is subject to change by the legislature, and that...
the court had no power to require child support beyond the age of 18. . . .”
Meredith at 638.

In view of the foregoing authorities, I am of the opinion that the court has no jurisdiction to enforce the order for child support in the situation you present after the time that the child became 18. As I ruled in a prior Opinion to the Honorable Thomas W. Moss, Jr., Member, House of Delegates, dated July 17, 1972, and found in the Report of the Attorney General (1972-1973) at 263, a copy of which is attached, “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.” Further, if any such order incorporates therein an agreement between the parties concerning child support, that agreement must be construed in accordance with principles of contract law in effect at the time the agreement was made, and such agreement may be construed to require support after the child becomes 18. See Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974).

SUPPORT ACT—Nonsupport—Sentence suspended for indefinite period of time—Limitation on authority to revoke suspension.

CONFLICT OF LAWS—Criminal Nonsupport Actions—Sections 20-80 and 16.1-188.

CRIMINAL PROCEDURE—Nonsupport—Sentence suspended for indefinite period of time—Limitation on authority to revoke suspension—Proceeding for contempt of court.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Revoke cation Of Suspended Sentence—When Court may suspend.

July 21, 1975

THE HONORABLE E. PRESTON GRISsom, Judge
Chesapeake Juvenile and Domestic Relations District Court

This is in reply to your letter from which I quote the following:

“I wish to inquire if in your opinion a support order suspending imposition of sentence entered under Chapter 5, Title 20, Code of Virginia (1950), as amended, is enforceable after the first anniversary date of the entry of the order. More specifically, the issue may be phrased as whether the application of Section 20-74 is modified or limited by the provisions of Section 16.1-188 for lack of a definite period of suspension.”

The situation to which you refer deals with criminal nonsupport actions which provide a maximum confinement of twelve months. Although § 20-74 provides that an order of support shall remain in full force and effect until annulled by the court of original jurisdiction, the real problem you raise is the enforceability of that order for longer than the maximum period for which the defendant might originally have been sentenced.

I would view the conflict as one between §§ 20-80 and 16.1-188 rather than § 20-74. Section 20-80 outlines the actions which the court may take if a defendant violates the conditions governing suspension of his sentence, and provides that the court may annul suspension of sentence “at any time the court may be satisfied by information and due proof that the defendant has violated the terms of such order.” Section 16.1-188 involves the general jurisdiction of the Juvenile and Domestic Relations District Court to revoke suspension of sentence or probation if a person is found guilty of
violating the conditions of the suspension or probation. It provides that
"if no probation period or period of suspension has been prescribed, then
[the suspended sentence may be revoked only] within the maximum period
for which the defendant might originally have been sentenced to be
imprisoned." Thus, § 16.1-188 terminates the jurisdiction of the court
after the expiration of the maximum period for which the defendant
might originally have been sentenced in cases where no period of suspen-
sion has been designated. See Report of the Attorney General (1956-1957)
at 152. Since this language is a limitation on the jurisdiction of the court
to act, the provision of § 20-80, "at any time," must, in my opinion, be
construed as being subject to the jurisdictional limitation imposed by
§ 16.1-188.
This conclusion does not mean that the Court has no recourse if the
anniversary date of such an order has passed. A proceeding for contempt
of court based on the original order would be appropriate. The Court
would also have jurisdiction to find a new offense of nonsupport and impose
a new sentence thereon.

SUPPORT ACT—Order Of Support Is Lien Upon Real Or Personal Prop-
erty Of Person Charged With Nonsupport.

LIENS—Order Of Support Is Lien Upon Real Or Personal Property Of
Person Charged With Nonsupport.

WELFARE—Order Of Support Is Lien Upon Real Or Personal Property
Of Person Charged With Nonsupport.

October 28, 1975

THE HONORABLE HAROLD B. SINGLETION, Chief Judge
Juvenile and Domestic Relations District Court
Twenty-Fourth Judicial District

This is in reply to your recent letter in which you ask whether an order
for support or forfeiture under § 20-61 of the Code of Virginia (1950), as
amended, or an order of support under §§ 63.1-275 to -290 of the Code would
be a lien upon the real and/or personal property of the person charged
with nonsupport.

I am of the opinion that neither an order of support or forfeiture under
§ 20-61, nor an order of support under any of the other sections to which
you have referred, would constitute a lien upon the real or personal
property of the person charged with nonsupport. Chapters 13 and 14 of
Title 63.1, §§ 63.1-249 to -289.2, are the statutory procedures for converting
such orders and forfeitures into liens in cases involving public assistance
recipients. Such intent, for example, is evidenced by § 63.1-249 of the
Code which provides:

"Common-law and statutory procedures governing the remedies for
enforcement of support for financially dependent minor children by
responsible persons have not proven sufficiently effective or efficient
to cope with the increasing incidence of financial dependency. The
increasing workload of courts and the Commonwealth's attorneys has
made such remedies uncertain, slow and inadequate, thereby resulting
in a growing burden on the financial resources of the State, which is
constrained to provide public assistance grants for basic maintenance
requirements when responsible persons fail to meet their primary
obligation. The Commonwealth of Virginia, therefore, exercising its
police and sovereign power, declares that the common-law and statu-
tory remedies pertaining to family desertion and nonsupport of minor
dependent children shall be augmented by additional remedies di-
rected to the real and personal property resources of the responsible
persons. In order to render resources more immediately available to
meet the needs of minor children, it is the legislative intent that the
remedies herein provided are in addition to, and not in lieu of, existing
law. It is declared to be the public policy of this State that this
chapter and chapter 14 (§ 63.1-275 et seq.) be construed and adminis-
tered to the end that children shall be maintained from the resources
of responsible persons, thereby relieving, at least in part, the burden
presently borne by the general citizenry through welfare programs."

The statutory framework allows liens to be asserted by the State Depart-
ment of Welfare and executed by it pursuant to the provisions of Chapters
13 and 14. Such liens could operate against both the real and personal
property of persons charged and convicted of nonsupport under § 20-61
and §§ 63.1-275 to -290.

TAXATION—Assessments—Automobile garaged in Florida from October
until May; not taxable in Virginia, car not here on January first.
MOTOR VEHICLES—Taxation—Taxable only in a single jurisdiction.
TAXATION—Assessments—Florida does not impose tangible personal prop-
erty tax—Not taxable in Virginia; automobile not here on January first.
TAXATION—Motor Vehicles, Travel Trailers, Boats, Airplanes—Situs; per-
sonal property.
TAXATION—Personal Property—Date upon which situs is determined.

March 4, 1976

THE HONORABLE LOIS B. CHENAULT
Commissioner of the Revenue for Hanover County

I have received your recent letter from which I quote:

"In 1975 a personal property assessment was made on an automobile
owned by a property owner here in Hanover County for which a Han-
over County car tag had been purchased.

"Recently I have been informed by the owner of the automobile that
from October 15 until May he resides in the State of Florida and the
car is garaged there during that period of time. Upon his return to
Virginia he buys State and County car licenses.

"After contacting the State Department of Taxation I have been
advised that Florida does not impose a tangible personal property tax.

"My question is: Since this automobile is not garaged in Hanover on
January 1 and is in Florida more than six months of the year is the
owner liable to Hanover County for personal property tax?"

Section 58-834, Code of Virginia (1950), as amended, provides that the
situs for purposes of assessment of motor vehicles as personal property
"shall be the county, district, town or city where the vehicle is normally
garaged . . . or parked." In determining such situs, it is immaterial whether
the motor vehicle is registered or licensed within or without Virginia. See
Report of the Attorney General (1973-1974) at 385. The test is the normal
location for garaging or parking the vehicle, with normality of location to

On January the first, the automobile about which you inquire is garaged or parked at the owner's residence in Florida. Its location there, at that time, cannot be considered abnormal in light of the fact that the automobile has been garaged or parked at the Florida residence since October 15 and will continue to be garaged or parked there until May. A necessary corollary is that, as of January the first, the automobile is not normally garaged or parked in Hanover County, Virginia. In view of the foregoing, it is my opinion that your inquiry must be answered in the negative.

TAXATION—Assessments—Extension of time for filing application for taxation on basis of use assessment.

May 24, 1976

THE HONORABLE MORRIS E. MASON, Attorney
Acting County Attorney for Chesterfield County

You have recently inquired whether the County of Chesterfield may, pursuant to § 58-769.8, Code of Virginia (1950), as amended, extend the time for filing applications for taxation on the basis of a use assessment. You advise that the County has been on an annual assessment program since 1956, and that it has not adopted a resolution pursuant to § 58-769.2. Section 58-769.8 provides, in part:

"Property owners must submit an application for taxation on the basis of a use assessment to the local assessing officer at least sixty days preceding the tax year for which such taxation is sought; provided, however, that in any year in which a general reassessment is being made the property owner may submit such application until thirty days have elapsed after his notice of increase in assessment is mailed in accordance with § 58-792.01, or sixty days preceding the tax year, whichever is later.

"§ 1. The governing body of any county which had an annual assessment of all real estate in the year nineteen hundred seventy-five under § 58-769.2 may extend the deadline for filing applications for use assessment until May one, nineteen hundred seventy-six; and the governing body of every city employing a calendar tax year shall extend the deadline for filing applications for use assessment until May one, nineteen hundred seventy-six." (Emphasis added.)

Because the County of Chesterfield has not used a general reassessment of real estate program since 1956, and because its annual assessment of real estate in 1975 was not under § 58-769.2, I am of the opinion that § 58-769.8 does not authorize the County to extend the time for filing applications for assessment on the basis of use rather than fair market value. Your inquiry is, therefore, answered in the negative.

TAXATION—Assessments—Real estate of Randolph-Macon Lambda Chi Fraternity Corporation.

COLLEGES AND UNIVERSITIES—Tax Assessments; Exemption—Randolph-Macon College owns both land and building—Leased to fraternity.

TAXATION—Property Tax—Social fraternity house not tax exempt.
This is in response to your request for my opinion concerning real estate assessments against Randolph-Macon Lambda Chi Alpha Fraternity Corporation (hereinafter “fraternity”). Taxes have been assessed against the building on the land since 1969, but no taxes have been assessed against the land. Randolph-Macon College (hereinafter “college”) is the owner of both the land and the building. The land is leased by the fraternity for $1 per year. Although the college owns the building, consideration for the leasing of the building is found in that the fraternity is primarily responsible for the mortgage payment.

If a tax is assessable, it is owed by either the college or the fraternity. The college is exempt from taxation on the land and building “so long as such property is primarily used for literary, scientific, or educational purposes or purposes incidental thereto.” Article X, Section 6(a) (4), of the Constitution of Virginia (1971); § 58-12(4) of the Code of Virginia (1950), as amended. The question whether the rental by the college to the fraternity of property on which students are housed is “incidental” to the main purposes of the college is a question of fact. Unless it is “incidental”, the property is taxable to the college. See Washington County v. Sullins College Corp., 211 Va. 591, 179 S.E.2d 630 (1971); Hanover v. Trustees of Randolph-Macon College, 203 Va. 613, 125 S.E.2d 812 (1962). In this instance, however, the purpose would appear to be “incidental” and the property exempt from taxation as to the college.

The exemption available under § 58-12(4) can be lost if the property exempted is a “source of revenue or profit.” See § 58-14. This phrase has been construed to require a substantial net profit remaining after deducting from gross income all proper expenses. See Norfolk v. Nansemond Supervisors, 168 Va. 606, 192 S.E. 588 (1937); Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1933). On this basis, the land and building leased by the fraternity is taxable to the college only if the rental results in a substantial net profit. This is a question of fact which must be resolved by you as commissioner of the revenue.

If it is found that the college is exempt as to both land and building under § 58-12(4), the fraternity is liable for all taxes assessable on this property pursuant to § 58-758 of the Code of Virginia (1950), as amended, which provides:

“. . . [T]he term ‘taxable real estate’ shall include a leasehold interest in every case in which land or improvements, or both, as the case may be, are exempt from assessment for taxation to the owner.”

See Shaia v. City of Richmond, 207 Va. 885, 153 S.E.2d 257 (1967); Report of the Attorney General (1972-1973) at 428. Prior Opinions of this Office hold that fraternities of this type are not exempt. See Reports of the Attorney General (1971-1972) at 415 and (1969-1970) at 261. Based on the foregoing considerations, it is my opinion that the fraternity is liable for all assessed taxes since the inception of the lease, on both the land and the building, unless it can be shown that the college is liable pursuant to § 58-14.

TAXATION—Assessments—Special land use assessment; definition of “parcel” of land.

COMMISSIONERS OF REVENUE—Contiguous Pieces Of Property Owned By Same Person May Be Combined And Entered On Land Book As One Parcel Upon Request Of Owner.
DEFINITIONS—“Parcel” Of Land For Special Land Use Assessment.

TAXATION—Land Use Assessments—Person owning several contiguous parcels of real estate may make one application for assessment if parcels are jointly assessed on land book.

February 18, 1976

THE HONORABLE ALICE JANE CHILDS
Commissioner of Revenue for Fauquier County

This is in response to your requests for my opinion relating to land use taxation of which the first inquiry is as follows:

“A taxpayer bought five contiguous one-acre tracts of land that were in a subdivision. Do these qualify for the special land use assessment?”

Section 58-769.7 of the Code of Virginia (1950), as amended, provides that in order for a parcel of real estate to qualify for land use taxation on the basis of agricultural, horticultural or open space use, it must consist of a minimum of five acres and must meet the use classification requirements of § 58-769.5. The issue raised by your inquiry is whether five contiguous one-acre tracts of land owned by the same taxpayer constitute one parcel of land within the meaning of § 58-769.7, or whether they constitute five separate parcels.

While the Virginia Supreme Court has not had occasion to define the term “parcel” within this context, courts in other jurisdictions have done so under similar circumstances. In United States ex rel. Tennessee Valley Authority v. Easements And Rights Over Certain Land In Hamilton County, Tennessee, 259 F. Supp. 377 (D.C. Tenn. 1966), the court held that the term “parcel” as used with reference to land generally means a contiguous quantity of land in the possession of one owner. In Gutherie v. Haun, 159 Or. 50, 76 P.2d 292 (1938), the court held that several lots in the same block, contiguous to each other and owned by the same person, were deemed one “parcel” of land within the meaning of a statute requiring that the value of each “parcel” of land attached be set down in an assessment roll. See Miller v. Burke, 6 Daly (N.Y.) 171 (1875), where the court held that the term “parcel” means a number of tracts put up together. In that case an auctioneer agreed to charge a fee of $25 for each parcel sold, and a number of lots of land were put up and sold for a gross sum. The court held that the sale constituted a sale of a “parcel” within the meaning of the agreement, and the auctioneer was not entitled to a separate fee for each lot sold. Based on the foregoing authorities, I am of the opinion that five contiguous one-acre tracts of land owned by the same owner constitutes a “parcel” of land within the meaning of § 58-769.7.

Although it does not control the result, my Opinion to the Honorable Lawrence R. Ambrogi, Commonwealth’s Attorney for Frederick County, dated April 9, 1975, and found in the Report of the Attorney General (1974-75) at 456, is consistent with the foregoing interpretation. That Opinion holds that whether a separate application is required for each parcel of land for which special land use taxation is sought depends on how the parcels are assessed on the land books. On the facts of your inquiry an application should be filed for the entire parcel composed of five tracts if that parcel is so assessed on the land books. Contiguous pieces of property which are owned by the same person or persons may be combined by the commissioner of revenue and entered on the land book as one parcel upon the request of the owner. See Report of the Attorney General (1958-59) at 277.

Your next inquiry is as follows:
“A large tract of land is subdivided into 10 acre tracts. Part of the subdivision is forest while the other portion is cleared land. It is the intention of the new owners to keep their 10 acre tracts under land use. It is my understanding that the forest land would not qualify as they do not contain 20 acres and my question is, would the smaller tracts, that were formerly under the special assessment for forest land as a large tract, be subject to the rollback taxes since they no longer qualify?”

Section 58-769.10 provides for roll-back taxes, “when real estate qualifies for assessment and taxation on the basis of use . . . and the use by which it qualified changes to a nonqualifying use . . . .” Although § 58-769.7 imposes minimum acreage requirements as well as use requirements in order for land to qualify for land use taxation, see also § 58-769.8, a change in acreage or a severance of a qualified parcel so that a portion thereof no longer meets minimum acreage requirements will not subject the land to roll-back taxes so long as a qualifying use continues. If the new owners continue to use their land for forest purposes as is provided by § 58-769.5(c), the land will not be subject to roll-back taxes, although it will not qualify for land use taxation in future years because of the minimum acreage requirement.

Your last inquiry is as follows:

“A taxpayer applied for land use under forest land on eight contiguous tracts containing a total of 92 acres; no tract contained as much as 20 acres; therefore, he was told that his land would not qualify under forest land as he did not have any 20 acre tracts. In 1975 he consolidated these eight tracts by survey into four contiguous tracts containing 11.0992 acres, 60.4806 acres, 10.0966 acres and 10.3657 acres. They are all forest land except for approximately 5 acres of one of the 10 acre tracts. My question is: Does all this land qualify for land use under forestry except for the 5 acres that qualifies as agriculture land?”

In my response to your first inquiry, I indicated that contiguous tracts of land held by one owner constituted one “parcel” for purposes of § 58-769.7. This result obtains regardless whether the owner has consolidated the tracts by survey or otherwise. Based on the foregoing, I am of the opinion that the forest land about which you inquire qualified for land use taxation both before and after its consolidation by survey.

TAXATION—Assessments At 100% Of Fair Market Value—Validity of county’s assessment.

April 13, 1976

THE HONORABLE WARREN E. BARRY
Member, House of Delegates

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

“I am somewhat concerned by the fact that Fairfax County may be assessing property in violation of the law. Last year the Legislature enacted an amendment to Section 58-112.1 and 58-760, which dictated that assessment would be made at 100% of the fair market value beginning January 1, 1976; and the true rate of taxation would be adjusted downward so that any increase in taxation would not exceed 8% without the local governing body conducting public hearings on the matter.”
“Enclosed are two tax bills, or notices of assessment, from a constituent in Fairfax County showing an increase in the assessment which took place between February 8, 1973, and February 19, 1976, that would dictate an increase in the tax by some 36.4%. This was accomplished without the benefit of a public hearing, and in my opinion is in violation of the now existing law.

“I would very much appreciate it if you would review the matter and provide me with an opinion as to whether the County is acting within the limits of the law. If not, I would appreciate a suggestion relative to the recourse that this or any other citizen affected might take.”

I am unaware of any Code provision or case law establishing a percentage limitation on the extent to which the amount of an individual assessment may be increased without a public hearing having been conducted on the matter. Section 58-785.1 does establish an eight percent limit on the increase “in the total amount of the real estate tax collected” that may result from any annual assessment or general reassessment of real property by a county without such county either reducing its rate to produce no more than one hundred and eight per cent of the previous year's real estate tax levy or conducting public hearings to determine the necessity of a rate higher than the otherwise-required reduced rate. The public hearing provision of § 58-785.1 has no applicability, however, to an increase in the assessment of a particular parcel of property. Thus, in the absence of information as to the total amount of real estate taxes annually collected by Fairfax County, I am not able to determine whether the County has complied with the provisions of § 58-785.1.

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TAXATION—Delinquent Real Estate—When clerk may accept payment of delinquent taxes.

February 5, 1976

THE HONORABLE V. A. ETHERIDGE
Treasurer for the City of Virginia Beach

You have inquired whether your office should accept payments for taxes assessed during the current and three immediately preceding years against real estate that is subject to a proceeding instituted under Article 8, Chapter 21, Title 58, Code of Virginia (1950), as amended. You advise that a lien for such taxes has not been filed in the appropriate clerk's office.

Section 58-978 requires the treasurer to make out annually a list of real estate, other than real estate improperly placed on the land book or not ascertainable, which is delinquent for the nonpayment of the taxes and levies thereon. Section 58-983(b) provides that, if the taxes and levies on the real estate so listed 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 or other office in which such liens are customarily recorded.” Until a lien has been recorded in such office, the treasurer is required by §§ 58-989, -990 to continue to collect the unpaid taxes and levies on real estate listed as delinquent.

Article 8, Chapter 21, Title 58 of the Code, §§ 58-1117.1 to -1117.11, sets forth procedures for the judicial sale of real estate on which county, city, district or town taxes are delinquent. Such real estate may be sold when any taxes thereon are delinquent on December thirty-one following the third anniversary of the date on which they have become due. See § 58-1117.1. Section 58-1117.10 gives the owner of real estate described in any bill of equity filed pursuant to Article 8 the right to redeem such real estate prior
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to the date set for judicial sale thereof "by paying into court all taxes, penalties and interest due with respect to such real estate, together with all costs including costs of publication and a reasonable attorney's fee set by the court."

Your letter describes a situation in which the taxes on certain real estate have been delinquent for a period slightly in excess of six years, and distinguishes between the taxes for the first three years of delinquency, with respect to which a lien has been recorded in the appropriate clerk's office, and the taxes for the remaining years of delinquency, with respect to which a lien has not been recorded. It is clear that once a lien for delinquent taxes on real estate has been recorded under § 58-983, payments for such taxes should not be accepted by the treasurer. See Report of the Attorney General (1972-1973) at 443. The treasurer, however, is required by § 58-990 to continue his efforts to collect the delinquent taxes on real estate for which no lien has been recorded. He is not relieved of his obligation to do so by the fact that a proceeding has been instituted under Article 8 for the sale of the real estate on which the taxes are delinquent. I am, therefore, of the opinion that your inquiry should be answered in the affirmative.

TAXATION—Delinquent Tax Liens—Enforceable twenty years from date taxes are first delinquent.

The Honorable J. E. Crockett, Clerk
Circuit Court of Wythe County

This is in response to your recent request for my opinion whether delinquent tax liens are enforceable twenty years from the date the taxes first become delinquent or twenty years from the date they are recorded in the clerk's office.

Section 58-979 of the Code of Virginia (1950), as amended, provides that real estate becomes delinquent "if all taxes on it are not paid when due; provided that in any locality which requires the payment of such taxes in installments, real estate shall be delinquent if all taxes on it are not paid by the date the last installment is due." Section 58-767 creates a lien on the real estate for the payment of taxes and levies assessed thereon, and provides:

"No lien upon real estate for taxes and levies due and payable to the Commonwealth or any political subdivision thereof which has been, or shall hereafter become, delinquent for twenty or more years shall be enforced in any proceeding at law or in equity and such lien shall be deemed to have expired and to be barred and cancelled after such time." (Emphasis added.)

Under this section, the twenty year period begins to run when the taxes are first delinquent, which means when they are first due and unpaid.

TAXATION—Dog License Tax Revenues Imposed By County Ordinance May Be Paid Into General Fund Of County Treasury.

COUNTIES—Dog License Tax Revenues—Disposition of.

DOG LAWS—Ordinance Imposing Dog License Tax Upon All Dogs In County; Appointment Of Dog Warden—Tax paid into general fund of county treasury.

ORDINANCES—Dog License Tax; Appointment Of Dog Warden—Tax paid into general fund of county treasury.
TAXATION—Dog License Tax Revenues—Disposition of.

August 7, 1975

THE HONORABLE WILLIAM J. McGHEE
County Attorney for Montgomery County

This is in reply to your recent letter wherein you ask: (1) whether dog license tax revenues, imposed by a Montgomery County ordinance, may be paid directly into the general fund of the County treasury; and (2) whether, if dog license taxes may be paid into the general fund, the County is bound by the provisions of § 29-209 of the Code of Virginia (1950), as amended, respecting disposition of dog license taxes.

Your letter indicates that the Montgomery County Board of Supervisors has, pursuant to § 29-184.2, appointed a dog warden and deputy dog wardens and has enacted an ordinance imposing a dog license tax upon all dogs in the County. Section 29-184.8 provides that, upon appointment of a county dog warden and passage of a dog license ordinance, dog license tax revenues may be paid directly into the general fund of the county treasury. Accordingly, I am of the opinion that dog license tax revenues imposed by a Montgomery County dog license tax ordinance may be paid into the general fund of the county treasury.

With respect to your second inquiry, I direct your attention to the provisions of § 29-184.2(c), governing disposition of revenues from dog license taxes collected under a county dog license tax ordinance:

“(c) In such county the amount of the dog license tax, which in no event shall be more than five dollars per dog, shall be fixed by ordinance adopted by the governing body of such county, and thereafter the tax imposed under § 29-184 shall not apply therein. The funds collected for dog license taxes shall be paid into a special fund and may be disposed of as provided in this section and in §§ 29-205 and 29-209, except that the county treasurer shall not be required to remit any portion of such funds to the State Treasurer nor shall the governing body be required to supplement the salary of the game warden. The county shall pay the salaries and expenses of the dog warden and deputy dog wardens from such special fund, except that in those counties authorized to place funds collected from dog licenses into the general fund the county shall pay such salaries and expenses from the general fund. Any sum remaining may be transferred, in whole or in part, to the general fund of the county at the end of the fiscal year.” (Emphasis added.)

The above statute provides that even those counties which have not taken advantage of the option of payment directly into the general fund under § 29-184,8, but have retained a special dog license tax fund, may, after paying from the special fund the dog warden’s salary and expenses, transfer the remainder to the general fund in lieu of disposition under § 29-209. I am, therefore, of the opinion that counties which have followed the option of payment directly or indirectly into the general fund are not bound by the dictates of § 29-209 in disposing of dog license tax revenues.

TAXATION—Exemption—Real property of Woodmen of World exempt if used for charitable purposes.

REAL PROPERTY—Taxation—Property of Woodmen of World exempt if used for charitable purposes.

TAXATION—Exemption—Moose Lodge—Depends upon predominant activities of corporation.
TAXATION—Exemption—Moose Lodge, essentially social club, not exempt.

TAXATION—Exemption—Real estate of Woodmen of the World not exempt.

December 30, 1975

THE HONORABLE FREDERICK H. CREEKMORE
Member, House of Delegates

This is in response to your request for my opinion whether real estate owned by trustees of a local chapter of Woodmen of the World is exempt from local real property taxation.

Article X, Section 6, of the Constitution of Virginia (1971), provides property tax exemptions. In addition to the other exemptions authorized by this section, subsection 6(f) provides that all property exempt from taxation on the effective date of the section continues to be exempt until otherwise provided by the General Assembly. Section 183(f) of the former Constitution exempted “[b]uildings with the land they actually occupy... belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes...” Pursuant to the foregoing authority, § 58-12(6) of the Code of Virginia (1950), as amended, exempts “[b]uildings with the land they actually occupy, and the furniture and furnishings therein belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes.”

My prior Opinion to the Honorable J. Monroe Burke, Jr., Commissioner of Revenue for Warren County, dated February 28, 1974, and found in the Report of the Attorney General (1973-1974) at 361, held that lodge buildings owned by a Moose Lodge which were operated primarily for benevolent or charitable purposes were exempt from real property taxation. A prior Opinion of this Office found in the Report of the Attorney General (1968-1969) at 229, had held that a Moose Lodge which was essentially a social club was not exempt from property taxation. In an Opinion to the Honorable Billy K. Muse, Commissioner of Revenue for Roanoke County, dated September 29, 1970, and found in the Report of the Attorney General (1970-1971) at 363, I held that property owned by the trustees of Maple Camp 66, Woodmen of the World, was not exempt where it was affiliated with the Woodmen of the World Life Insurance Society.

Based on the foregoing, I am of the opinion that lodge buildings owned by Woodmen of the World are exempt from local real property taxation if the organization is organized and operated primarily as a benevolent or charitable association. If it is operated essentially as a social club or if it is affiliated with the Woodmen of the World Life Insurance Society, the property is not entitled to an exemption. Final determination of the taxability of the local chapter about which you inquire depends upon the application of the foregoing principles to the specific circumstances of the lodge’s operation about which you inquire and on which this office has no information.

TAXATION—Exemption Of Real Estate Taxes On Property Of Certain Elderly Persons.

COUNTIES, CITIES AND TOWNS—Exemption Of Real Estate Taxes On Property Of Certain Elderly Persons—Amount of land, income and net worth criteria may be specified by ordinance.
ORDINANCES—Exemption Of Real Estate Taxes On Property Of Certain Elderly Persons—Amount of land, income and net worth criteria may be specified by.

May 24, 1976

THE HONORABLE LAWRENCE H. HOOVER, JR.
County Attorney for Rockingham County

This is in response to your recent letter, from which I quote:

"Rockingham County has just recently adopted an ordinance pursuant to Section 58-760.1 of the Code of Virginia, allowing an exemption of real estate taxes on property of certain elderly persons. Under Paragraph 1a of this Section, the value of land in excess of once acre on which the dwelling is situated is considered in determining the net combined financial worth for purposes of qualification; however, it is not clear whether the exemption from tax applies to land in excess of one acre or is limited to one acre. Would you please advise as to whether the County Ordinance may allow the exemption to apply to the total tract of land on which the applicant's dwelling is situated if such land is in excess of one acre, provided the applicant otherwise satisfies the total combined income and combined net worth criteria of the ordinance?"

Section 58-760.1, Code of Virginia (1950), as amended, provides, in part:

"(a) The governing body of any county, city or town may, by ordinance, provide for the exemption from, or deferral of, taxation of real estate, or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe, owned by, and occupied as the sole dwelling of a person or persons not less than sixty-five years of age; subject to the following restrictions and conditions:

"(1) That the total combined income during the immediately preceding calendar year from all sources of the owners of the dwelling living therein and of the owners' relatives living in the dwelling does not exceed ten thousand dollars, provided that the first four thousand dollars of income of each relative, other than spouse, of the owner, or owners, who is living in the dwelling shall not be included in such total, and further provided that the county, city or town may by ordinance specify lower income figures.

"(1a) That the net combined financial worth, including equitable interests, as of the thirty-first day of December of the immediately preceding calendar year, of the owners, and of the spouse of any owner, excluding the value of the dwelling and the land, not exceeding one acre, upon which it is situated does not exceed thirty-five thousand dollars; provided, however, that the county, city or town ordinance may specify lower net worth figures." (Emphasis added.)

Subsections (a) (1) and (a) (1a) of § 58-760.1 condition the exemption from, or deferral of, taxation of real estate owned by, and occupied as the sole dwelling of, a person or persons not less than sixty-five years of age upon the financial status of the owners of the dwelling living therein and certain other persons. The exclusion from "net combined financial worth" of "the value of the dwelling and the land, not exceeding one acre" has nothing to do with the amount of real estate owned or occupied by financially-qualified elderly persons for which an exemption from or deferral of taxation may be provided. The first sentence of § 58-760.1 (a) indicates that the determination of such amount, whether all or only a portion, is left to the governing body of the county, city or town. Thus, the ordinance adopted by Rockingham County pursuant to § 58-760.1 may exempt the
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total tract or any part of the land on which the applicant’s dwelling is situated even if such land is in excess of one acre, provided the applicant satisfies the total combined income and combined net worth criteria of the ordinance.

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TAXATION—Exemptions—Child Day Care Center of Winchester.

BURDEN OF PROOF—On Party Claiming Tax Exemption—Child Day Care Center of Winchester.

CONSTITUTION—Institution Of Learning—Meaning not broadened by revised Constitution.

TAXATION—Exemptions—Property primarily used for custodial or babysitting services not tax exempt.

TAXATION—Exemptions—What property used for educational purposes not taxable.

May 11, 1976

THE HONORABLE JULIAN K. ARMEL, SR.
Commissioner of the Revenue for the City of Winchester

You have inquired whether property owned by the Child Day Care Center of Winchester, Virginia, [hereinafter referred to as “Center”] is exempt from taxation.

The information submitted with your inquiry consists of an advertisement indicating that the Center offers, inter alia, “professionally administered educational programs” for children “ages 2 thru kindergarten,” and a copy of the articles of incorporation of the Amalgamated Regional Health and Welfare Fund, Inc., indicating that it is a nonstock, nonprofit corporation organized and operated under the laws of Maryland as a means of “establishing Child Care Centers for children of employees who are working in the clothing industry and are covered by Collective Bargaining Agreements between their Employers and the Baltimore Regional Joint Board, Amalgamated Clothing Workers of America.”

Property tax exemptions are provided by and pursuant to Article X, Section 6, of the revised Virginia Constitution. Section 6(a) (4) provides an exemption for property owned “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.” It continues an exemption previously provided by Section 183(d) of the 1902 Virginia Constitution for property owned by “incorporated colleges or other incorporated institutions of learning, not conducted for profit,” and “primarily used for literary, scientific or educational purposes or purposes incidental thereto.” See Report of the Attorney General (1971-1972) at 392; and Report of the Attorney General (1970-1971) at 365.

At a minimum, an “institution of learning,” within the meaning of either Article X, Section 6(a) (4), of the revised Constitution or Section 183(d) of the 1902 Constitution, must have a faculty, a student body and prescribed courses of study. See Report of the Attorney General (1971-1972) at 81 (context requires that this Opinion’s reference to “Section 183(f) of the Old Virginia Constitution” be read as a reference to Section 183(d) of that Constitution); and Report of the Attorney General (1968-1969) at 228. Whether the Center has these attributes cannot be determined with reference restricted to its advertised features and the articles of incorporation of what is apparently its sponsoring organization. The features advertised do include “professionally administered educational programs,” which suggests that the Center has some sort of faculty and student body,
if not prescribed, as distinguished from elective, courses of study. The mere suggestion, however, of some or all of the attributes necessary for classification as an “institution of learning” is an insufficient basis for determining whether property is constitutionally entitled to a tax exemption. Facts as to the Center's actual organization and operation are required.

By telephone, you advised that the Center is a recently constructed facility which opened to the public only in January of this year. Given such a recent opening, it is understandable that all the facts necessary for determining whether the Center enjoys a property tax exemption have yet to be developed. Until such facts are forthcoming, I am of the opinion that the property in question is presumptively taxable under Article X, Section 1, of the 1971 Virginia Constitution. The burden of rebutting this presumption is properly placed upon the party claiming the exemption, the Center in this case.

If further factual development shows that the Center has the attributes necessary for classification as an institution of learning, a determination must be made as to whether its property is “primarily used for literary, scientific, or educational purposes or purposes incidental thereto.” This determination is inherently factual in nature and is, therefore, best made at the local level. Property primarily used in providing services of a custodial or babysitting nature would not, in my opinion, qualify for a property tax exemption.

TAXATION—Exemptions—Recording deed of trust by Mannboro Medical Center, Ltd. not exempt unless grantee qualifies for exemption.

DEED OF TRUST—Recordation Tax—Must be deed conveying property to tax exempt entity to be exempt from.

TAXATION—Exemptions—Deed conveying property to non-profit, non-stock hospital corporation.

TAXATION—Exemptions—Qualification of grantor of deed for federal exemption under Internal Revenue Code is irrelevant to recordation tax.

May 12, 1976

THE HONORABLE R. E. FLIPPIN, Clerk
Circuit Court of Amelia County

This is in response to your recent request for my opinion whether The Mannboro Medical Center, Ltd., is exempt from taxes imposed on the privilege of recording deeds and deeds of trust pursuant to § 58-54 and § 58-55 of the Code of Virginia (1950) as amended. You state that The Mannboro Medical Center, Ltd., is a non-stock, nonprofit corporation formed to acquire and operate a medical facility and to provide primary care for outpatients in Amelia County, Virginia. The District Director of the Internal Revenue Service has determined that this organization is exempt from federal corporate income and certain other federal taxes under § 509(a)(2) of the Internal Revenue Code of 1954.

Section 58-64 makes the taxes imposed by § 58-54 and § 58-55 inapplicable to “any deed conveying property to any non-stock corporation organized exclusively for the purpose of owning and/or operating a hospital or hospitals not for pecuniary profit.” (Emphasis added.) I am further advised that your question involves the conveyance of a deed of trust by the Center. Although the section purports to exempt deeds of trust from recordation taxes, qualifying deeds of trust must be deeds conveying the property to the stated entity, and not deeds given by such entity conveying the property in trust to a nonexempt grantee. Therefore, the deed of trust
about which you inquire is not exempt unless the grantee qualifies for exemption. Qualification of the grantor for a federal exemption under § 509(a)(2) of the Internal Revenue Code is irrelevant to this issue.

TAXATION—Floatation Docks, Severable From Real Estate Are Personal Property.

REAL ESTATE—Floatation Docks, Severable From Real Estate Are Personal Property.

June 14, 1976

THE HONORABLE BENJAMIN L. PINCKARD
Commissioner of the Revenue of Franklin County

This is in response to your recent request for my opinion whether floatation docks, constructed of styrofoam and treated wood material, should be considered personal or real property. The docks are sold directly to customers or installed by a firm; they are movable and consequently are often removed from property when a landowner sells his real estate. Section 58-829 of the Code of Virginia (1950), as amended, provides in part:

"Tangible personal property having been segregated by law for local taxation only, the classification hereunder, except as otherwise provided by law, shall be as follows:

* * *

"(14) The aggregate value of all ships . . . and all other floating property . . . used for business or pleasure. . . ." (Emphasis added.)

Based on this statute and the fact of severability of such docks from real estate with no ensuing damage, it is my opinion that they should be treated as personal property.

TAXATION—Four Percent Local Sales Tax On Motor Fuel—Metro bus operating deficit.

HIGHWAYS—Four Percent Local Sales Tax On Motor Fuel For Benefit Of Transportation Districts.

MOTOR VEHICLES—Four Percent Local Sales Tax On Fuels For Benefit Of Transportation Districts.

ORDINANCES—Compatibility Of Draft Model Ordinance To Legislation Authorizing Four Percent Local Fuel Tax.

June 17, 1976

THE HONORABLE OMER L. HIRST
Member, Senate of Virginia

This is in response to your recent inquiry regarding the compatibility of a draft model ordinance to Chapter 770, [1976] Acts of Assembly, which authorizes the implementation, collection and distribution of a 4% local fuel tax. The proposed ordinance provides as follows:

"BE IT ORDAINED BY THE (COUNCIL OR BOARD) OF (CITY OR COUNTY):

Section ........................................ Levy; tax rate; local fuel tax.

Pursuant to Title 58, Chapter 8.1, § 58-441.5:1, Va. Code Ann., a local fuel tax at the rate of four per centum (4%), to provide revenue for roads and other transportation purposes, is hereby levied on the retail sales price of fuels which are subject to tax under Chapters 13 and 14 of Title 58. It shall be subject to all provisions of Chapter 8.1, Title 58, Va. Code Ann., and all the amendments thereto.
Section Administration, collection and distribution of local fuel tax.

Pursuant to Title 58, Chapter 8.1, § 58-441.52, Va. Code Ann., the local fuel tax levied pursuant to Title 58, Chapter 8.1, § 58-441.5:1 shall be administered, collected and distributed by the State Tax Commissioner in the manner prescribed by § 58-441.52. Upon receipt of the tax moneys, the Northern Virginia Transportation Commission (hereinafter "NVTC") shall apply them first toward the METRO bus operating deficit obligation of (insert name of City or County), which (insert name of City or County), has agreed to pay pursuant to Title 15.1, Chapter 32, § 1359, Va. Code Ann. If after discharge of said METRO bus operating deficit, there are tax moneys in excess of that deficit remaining from the total amount of the credit account established for (name of City or County) by the State Comptroller, then such excess shall be paid to (name of City or County) by NVTC for use, first in honoring any obligation for METRORAIL capital costs including debt service, and second for any road, street, or bridge facility within (name of City or County) which is funded in whole or in part by (name of City or County).

This section shall become effective July 1, 1976.

Chapter 770 of the 1976 Acts amends the Code of Virginia to add §§ 58-441.5:1 and 58-441.52. The former section provides for the imposition of a four percent tax on the retail sales price of motor fuel; the latter provides for the central collection and disbursement of the proceeds of this levy.

Specifically the Act delineates certain identifiable steps in the process between collection and use of these funds:

1. Levy—the governing bodies of counties and cities of multi-member transportation districts created prior to January 1, 1973, are authorized by § 58-441.5:1 to levy the four percent tax on the retail sales price of motor fuels.

2. Collection—the Department of Taxation is required by § 58-441.5:1 to collect the tax imposed.

3. Establishment of Accounts—the Comptroller is required by § 58-441.52 to establish an account to the credit of each local jurisdiction collecting such tax; this section provides that "...the basis for such credit shall be the transportation district in which the sales are made."

4. Payment—Section 58-441.52 requires the Comptroller to draw a warrant "in favor of the Transportation District entitled to such sales tax moneys."

5. Expenditures—Section 58-441.52 requires that "[t]he moneys paid to the transportation districts shall be used for roads and other transportation purposes, as determined by the local governing bodies for a uniform use within the multi-member transportation district."

I perceive several subsidiary issues which must be resolved with respect to this process prior to addressing your inquiry:

1. What is the significance of the provision in § 58-441.52 that the basis of the credit (to the account of each jurisdiction) shall be the transportation district?

2. To what extent do the funds collected within each locality retain their identity after payment to the district?

3. What standards should be applied in determining a "uniform use" within the meaning of this Act?

I will answer these questions seriatim:

1. I am aware that there is an interpretation of the account provisions of § 58-441.52 which would require the maintenance of separate accounts for each jurisdiction levying this tax. The primary basis for such an interpretation would appear to be the use of the word "each" as a modifier
of the words “counties and cities” with respect to credits to accounts therefor. I do not concur in this construction for two reasons. First, the section requires the creation of “a special fund.” (Emphasis added.) Second, the sentence concerning the “basis of the credit” to each account has the apparent function of qualifying or elaborating on the preceding sentence through which the account concept is established. This being the case, it is my opinion that the nature of the account must be established within the context of the requirement that the basis of the credit to the account is to be the transportation district in which the sales were made. The only meaningful interpretation of this requirement is that it directs one district account in the names of all of the component jurisdictions. Consequently, I see no inherent requirement that there be a separate accounting of the funds collected within each jurisdiction. The single account concept is completely in harmony with the concept that the transportation district is the elemental unit in this revenue process.

2. It is my opinion that the Act clearly establishes the primacy of the transportation district over the individual component governments. Within this framework, however, the district is clearly intended to reflect and effectuate the collective will of its component parts. These characteristics are readily shown by the following features:

a. no locality may levy the subject tax unless it is a member of a multimember transportation district;

b. no localities within any such district may levy the tax unless all localities act affirmatively on such levy;

c. the moneys paid into the State Treasury must be sent directly to the “district entitled to such sales tax moneys. . . .” (Emphasis added.);

d. the moneys must be applied to a “uniform use within the multi-member transportation district”; and

e. a unitary account is required.

These elements demonstrate a consistent theme which manifests an intent that, for purposes of actual use, the individual components are not entitled to a dollar-for-dollar return on the moneys collected within their boundaries. Consequently, for the purposes of this Act, there is no need that the funds retain their identity as local funds beyond the point of collection. If, however, the localities wish to credit each other with the amount of such collection toward the satisfaction of their mutual obligations (such as their obligations to the capital costs of Metrorail), I see nothing which would prohibit separate accounting for this purpose. I differentiate, however, between this type of credit and a mandated expenditure of funds related solely to the monetary obligations of each locality.

3. Black's Law Dictionary 1700 (4th ed. 1968) defines “uniform” as “. . . [c]onforming to one rule, mode or unvarying standard; not different at different times or places; applicable to all places or divisions of a country.” This definition provides only the most general of guides in ascertaining the uniformity of a proposed use of these revenues. Clearly, the first element of uniformity as required by the Act is that it be the product of a consensus among the local governing bodies. Beyond that, it appears that a variety of methods are available to select projects which will provide a uniform benefit to all components.

For example, the model ordinance proposes that the first two priorities of the five jurisdictions comprising the Northern Virginia Transportation District are their financial obligations toward the operating deficits of the Metro bus system and the capital costs of the Metrorail system. I understand that these are financial obligations which are borne, to varying extents, by all component jurisdictions and which have been established by contract among them. To the extent that the localities have manifested a common purpose in these endeavors and to the extent that mutuality of
contract can be equated with uniformity, there is a persuasive argument that application of these revenues for this purpose will confer a uniform benefit on all component jurisdictions. I surmise that there is statistical information available which would demonstrate the basis for the values which the localities have placed upon this project and which would, therefore, demonstrate the uniform benefit which it confers. Further, I believe that were a question to arise in this regard, there is some justification for inferring the General Assembly's approval as to this particular disposition of these funds from the circumstances that were contemporaneous with the legislation's enactment.

I am further of the opinion that uniformity does not envisage a correlation between the revenues collected in each locality and actual local transportation oriented obligations. Once a project or use is determined to provide a uniform benefit, it is my opinion that it retains this characteristic without regard to the ability of the component jurisdictions to contribute to it. Accordingly, it is my opinion that the provision of the model ordinance, which allows for the excess of each locality's collection, beyond its obligation for Metro, to revert to the localities for discretionary use for roads, is not compatible with the uniformity requirement of the law. This proposal does not provide the safeguard that such funds will uniformly benefit all members of the district nor does it allow for a consensus of any specificity among such members.

Indeed, it would appear that there is an inherent difficulty in achieving a uniform application of funds for road purposes. This is due not only to the diverse nature of the district's components, but the multiple system of roads in the State. There is no historical, economic, or political precedent which would allow for an evaluation of all road mileage in a certain region by one standard measure. In the Northern Virginia Transportation District alone there are at least six separate road systems:

1. The Interstate System;
2. the State system of primary highways;
3. the State system of secondary highways;
4. urban highways within Alexandria, Falls Church and Fairfax City;
5. city streets, not part of urban system; and
6. the Arlington County road system.

The Act provides no guide as to the solution to this difficulty, nor, in fact, does it address the inherent problem that the localities enjoy varying jurisdictional relationships as to the roads within their geographical boundaries. Also, as you are aware, transportation districts are not generally established to expend money on roads within their boundaries. Accordingly, I would suggest that any local expenditures for roads must be within the existing funding framework of the localities and the State. It is my opinion that the subject of the expenditure must be determined by consensus among the district components based upon some standard of need and benefit of district-wide applicability. This does not necessarily mean that each locality is prohibited from benefiting from the levy in proportion to the funds it contributes, but only that such benefit must be within the framework of uses which demonstrably provide a uniform benefit to all areas of the district.

Finally, inasmuch as the district concept predominates, I suggest that an ordinance, insofar as it relates to expenditure, is an inappropriate expression of will at this particular stage of the process. A resolution by each component jurisdiction directed to the district commission would appear to be the proper method of expressing local intent. Then, if the consensus of the district dictates expenditure of such funds through the localities, an ordinance would be in order with respect to such expenditure.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Income Tax—Applicable to person who maintains a place of abode in Virginia nursing home.

DEFINITIONS—Resident For Income Tax Purposes—Maintains place of abode in Virginia nursing home.

The Honorable Carrington Williams
Member, House of Delegates

This is in response to your recent request for my opinion concerning the responsibility of an individual to file Virginia Income Tax Returns because of her maintenance of a "place of abode" in this State pursuant to § 58-151.02(e)(1)(i) of the Code of Virginia (1950), as amended. The individual about whom you inquire is a 96-year old woman who has been living in a Virginia nursing home since 1970. Prior to 1970, she had lived all her life in New York. Her move to Virginia occurred because her doctor recommended that she be placed in a nursing home. A suitable home was, and is, unavailable in New York. She has two daughters currently residing in Virginia. Her presence in the Virginia nursing home near her daughters is expected to continue until a suitable vacancy occurs in a New York nursing home. She still corresponds with nursing homes in New York. She retains a New York address, receives social security checks there, maintains bank accounts in New York, files New York Income Tax returns, and pays New York taxes on income derived from two trusts established under the will of her late husband.

The individual about whom you inquire is required to file a Virginia Income Tax return and to pay the tax on her Virginia taxable income if she is a resident of this State. See §§ 58-151.062(a)(1) and 58-151.013. Section 58-151.02(e)(1)(i) states that the term "resident" includes for present purposes:

"... every person domiciled in this State at any time during the taxable year and every other person who, for an aggregate of more than one hundred eighty-three days of the taxable year, maintained his place of abode within this State, whether domiciled in this State or not."

You ask whether an individual in the described situation has maintained her "place of abode" in Virginia such that she is classified as a resident for Virginia Income Tax purposes.

Section 58-151.02(e)(1)(i) defines the term "resident" both in terms of domicile and abode. The term "domicile" encompasses the concept of permanent residency. See State Planters Bank v. Commonwealth, 174 Va. 289, 294, 6 S.E.2d 629, 631 (1940). The concept of "place of abode," however, encompasses more than permanent residence or domicile. Otherwise, § 58-151.02(e)(1)(i) would be redundant and a statute must be construed so that no part will be superfluous. 2A Sands, Sutherland Statutory Construction § 46.06 (1973). The language of § 58-151.02(e)(1)(i) further suggests that a "place of abode" may be temporary because of the requirement of a minimum of 183 days thereof.

The term "resident" may encompass persons with temporary places of abode. See Hiles v. Hiles, 164 Va. 131, 178 S.E. 913 (1935); Cooper's Adm'r. v. Commonwealth, 121 Va. 338, 344, 93 S.E. 680, 681 (1917). An "abode" is defined in 25 Am. Jur. 2d Domicil § 8 (1966), as follows:

"The term 'abode' is generally considered to have a meaning different from domicile. It is used in a more restricted sense to denote a place where a person is actually living. An abode is something less permanent with respect to occupancy than is a domicil. Thus, a person may have several abodes while being permitted to have only one domicil."
The Virginia Court has not construed the term “place of abode” in the context of § 58-151.02(e)(1)(i). The Supreme Court of Maryland, however, has construed a nearly identical statute on several occasions. In Wood v. Tawes, 28 A.2d 850, 853 (Md. 1942), the Court held that an apartment in Maryland constituted a “place of abode” for a District of Columbia employee who had a residence in New Jersey to which he frequently returned. The Court concluded that maintenance of a place of abode must involve at least a sufficient residence within the state to bring the individual within the taxing jurisdiction but that, subject to such qualification, the state has the power to impose a tax on individuals on the basis of income gained outside the jurisdiction. See also Comptroller of the Treasury v. Lenderking, 303 A.2d, 402, 404 (Md. 1973).

On the basis of the cited authorities, the individual about whom you inquire has acquired a “place of abode” within the State of Virginia. Although she may return to New York if future circumstances permit, she has maintained physical presence in this State for five years. I am of the opinion, therefore, that she is a “resident” of Virginia within the meaning of § 58-151.02(e)(1)(i).

TAXATION—Inheritance Tax Deductions—Debts actually paid out of estate may be deducted.

October 17, 1975

THE HONORABLE L. CLEAVES MANNING
Member, House of Delegates

I have received your letter inquiring whether expenses of an estate are deductible for purposes of the Virginia inheritance tax imposed by Chapter 5 of Title 58, Code of Virginia (1950), as amended (§ 58-152 to 58-217.14), under certain circumstances involving the estate of a person who dies intestate leaving a widow and two children. Your specific inquiries are as follows:

“(1) Where the sole assets of the estate consist of survivorship property reportable on Schedule G of Form 44, all of which passes to the widow, in the amount of $15,000, and expenses of the estate reported on Schedule A in the amount of $5,000, may these expenses be deducted in computing the net estate?

“(2) Where the assets of the estate consist of survivorship property (reported on Schedule G) all passing to the widow, in the amount of $15,000 and tangible and intangible personal property (reported on Schedules E and F) aggregating $5,000, and expenses of the estate reported on Schedule A in the amount of $5,000, may these expenses be deducted proportionately from the survivorship property and the personal property, or must all of the expenses be deducted from the personal property?

“(3) Where the assets of the estate consist of survivorship property (reported on Schedule G), all passing to the widow, in the amount of $15,000, and tangible and intangible property (reported on Schedules E and F) aggregating $2,500, and expenses of the estate reported on Schedule A in the amount of $5,000, may all the expenses be deducted by apportioning them between the survivorship property and the personal property or is the amount of the expenses which are deductible limited to the amount of non-survivorship property?”

Section 58-152 imposes an inheritance tax “upon the shares of the respec-
tive beneficiaries in all property within the jurisdiction of this Commonwealth, real, personal and mixed, and any interest therein, which shall pass:

“(1) By will or by the laws regulating descents and distributions;

“(5) By virtue of the fact that it is held by the decedent and another as joint tenants or tenants by the entireties, with the right of survivorship . . .”

No statute expressly provides for the deduction of funeral or administration expenses in determining the shares of the beneficiaries, but Schedule A of the Virginia Inheritance Tax Return recognizes and allows a deduction for certain debts of the decedent, funeral expenses, administration expenses, taxes and costs. Schedule A provides, however, that “[d]eductions may include only such items as are payable out of funds of the estate . . .” The Department of Taxation advises that the purpose of this limitation is to prevent the survivor, in the case of jointly owned property, from receiving the benefit of a deduction without being subject to a corresponding obligation to pay the expense from the survivorship assets. Such assets are exempt from claims of the decedent’s creditors. See Vasilion v. Vasilion, 192 Va. 735 (1951). If the deduction were allowed, the survivor could receive the property free of creditor’s claims and refuse to pay the funeral or administrative expenses, thereby avoiding tax on funds actually received. In recognition of the fact that, if the survivor actually pays the expenses of administration, the value of the property enjoyable by such survivor is decreased to that extent, the Department of Taxation permits their deduction in every case in which the expenses were paid by the survivor. Their administrative practice is just in application and is not in conflict with any statutory provision. In my opinion, therefore, this is a valid method of determining the inheritance tax liability. The answer to your first inquiry is that the $5,000 deduction will be allowed only if the widow actually paid the expenses.

Your second inquiry presents a different situation in that the surviving children of the deceased are entitled under § 64.1-11 to two-thirds of the surplus personalty and, if the expenses are deducted in determining the surplus personalty, the children will take nothing. The personalty, however, is an asset of the estate which passes into the control of the administrator and is subject to the debts of the decedent and funeral and administrative expenses except as provided by § 64.1-127. It is the duty of the personal representative to pay the debts of the decedent and said expenses in accordance with the priorities established by § 64.1-157, and if the debts and expenses equal or exceed the amount of property passing to the administrator there will be no surplus available for distribution to the children. In such case, there will be no taxable share of the estate passing to the children, and no inheritance tax will be levied other than upon the property passing to the widow by the right of survivorship. Accordingly, the answer to your second inquiry is that the expenses in the amount of $5,000 are deductible from the personalty, leaving no surplus available for distribution to the children and resulting in taxation of $15,000 as the widow’s share of the taxable estate.

Application of the foregoing principles resolves your third inquiry by requiring the deduction of the expenses to the extent of $2,500 from the personalty leaving nothing for the children. The remaining $2,500 of expenses are deductible from the $15,000 passing to the widow by right of survivorship if, and only if, the widow pays these remaining expenses.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Land Use—Rezoning of property disqualifies exemption of land only if use of land is changed.

ZONING—Land Use—Rezoning of property disqualifies tax exemption only if use of land is changed.

December 19, 1975

THE HONORABLE E. O. RUDOLPH, JR.
Commissioner of Revenue for Frederick County

This is in response to your request for my opinion whether a country-wide rezoning, without the request of a property owner whose property qualifies for land use taxation, disqualifies the property for such land use taxation when the zoning changes from a less intensive to a more intensive classification.

Section 58-769.6 of the Code of Virginia (1950), as amended, authorizes localities, which have adopted a land-use plan, to enact ordinances which provide for the assessment and taxation of agricultural, horticultural, forest and open space land according to its use value. Section 58-769.7 sets forth some of the criteria which must be met before land may qualify for land use taxation under an ordinance adopted pursuant to § 58-769.6. In addition to other requirements, § 58-769.7 requires that the property meet the use criteria set forth in § 58-769.5.

It is clear from the foregoing sections that the use of the land rather than its zoning classification is the basis for qualification for land use taxation. Section 58-769.10 further affirms this view by stating that, when the use changes to a nonqualifying use, the property may be subjected to rollback taxes. In many instances, however, zoning changes do not terminate pre-existing uses. Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958). See Note, 102 U.Pa. L. Rev. 91, 92 (1953). If under an amended zoning ordinance, an existing qualifying use is permitted to continue or a qualifying use is permissible despite the fact that nonqualifying uses are also permissible, qualifying land is still entitled to land use taxation.

TAXATION—Land Use Assessments—Forest land assessed according to use value only pursuant to § 58-769.4.

COUNTIES—Real Estate—Forest land assessed according to use value only pursuant to § 58-769.4.

DEFINITIONS—Forest Land Includes Underlying Land And Standing Timber And Trees Thereon.

ORDINANCES—Localities Adopting Fiscal Year Assessments Must Pass Ordinance.

PUBLIC SERVICE CORPORATIONS—Locality May Not Increase Nominal Tax Rate On Unconverted Property Prior To January 1, 1977.

REAL ESTATE—Forest Land Assessed According To Use Value Only Pursuant To § 58-769.4.

TAXATION—Change In Ownership Will Not Require Additional Application For Land Use Assessment Unless Change In Use Or Acreage Also Occurs.

TAXATION—Horticulture Products (Trees, Shrubs, Boxwoods) Assessed As Real Estate For Land Use Taxation.

TAXATION—Public Service Corporation Property—In localities adopting fiscal year assessments.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Real Estate—One hundred percentum fair market value assessments pursuant to § 58-760 not required prior to January 1, 1977.

February 23, 1976

THE HONORABLE RUSSELL I. TOWNSEND, JR.
Member, Senate of Virginia

This is in response to your requests for my opinion relating to land use taxation and assessment of real estate by localities which assess on a fiscal year basis.

Your first inquiry is as follows:

"In accordance with Article 1.1 Title 58, Code of Virginia, Sections 58-769 through 58-769.16, inclusive, is the value of the standing timber trees included in range of values suggested by the State Land Evaluation Advisory Committee? And, if so, should they be?"

In my Opinion to the Honorable R. S. Burruss, Jr., Member, Senate of Virginia, dated May 21, 1975, and found in the Report of the Attorney General (1974-1975) at 492, I held that the value of timber standing on land classified as real estate devoted to forest use should be assessed on a land use basis as well as the real estate itself. Section 58-769.11 requires that the State Land Evaluation Advisory Committee determine and publish a range of suggested values for land classified for forest use. Under this section, the value of the standing trees should be included in the range of values suggested by the Committee. To implement this requirement, the Division of Forestry of the Department of Conservation and Economic Development has computed a range of present values for standing timber. To these values, the Division has added $7.00 for the cost of seedlings. No allowance has been made for site preparation and no distinction has been made between the use value of a mature stand of timber and cut over woodland. The resulting values are published by the Committee in accordance with the requirements of § 58-769.11.

Your next inquiry is as follows:

"What is the application of 58-760, as amended, concerning the 100 per cent assessment as the same would apply to a locality which, in accordance with State laws and local charters, has adopted an annual assessment program and has adopted a fiscal year assessment date of July 1 in accordance with 58-851.7; i.e., what would be the effective date that the said locality would spread the 100 per cent assessment on its Land Book? And, when would the State Corporation Commission be required to furnish the assessments at 100 per cent on Public Service properties to the locality?"

As a result of Senate Bill 597 introduced in the 1975 Session of the General Assembly, § 58-760 was amended to require that, beginning January 1, 1976, all general reassessments or annual assessments of real estate must be made at 100 percent fair market value. In my Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated July 8, 1975, a copy of which is enclosed, I held that the requirement of assessment at 100 percent fair market value will apply for the first time to those boards of assessors or annual assessors which begin the reassessment process on or after January 1, 1976, with the necessary result that the first effective tax day for the change on the land books will be January 1, 1977. Section 58-851.6 authorizes counties, cities, and towns to levy real estate taxes on a fiscal year basis of July 1 to June 30, and further provides that, except as authorized in § 58-851.7, all real estate in such a locality shall be assessed as of January 1 prior to such fiscal year. Section 58-851.7 provides that when a locality adopts fiscal year assessments, it may provide that real
estate other than public service corporation property be assessed as of the first day of July. In localities adopting fiscal year assessments, public service corporation property must continue to be assessed at its value as of January 1 prior to such assessment date. Under these sections, the locality would spread the 100 percent assessment on its land book as of July 1 if its ordinance so provides. Public service corporation property, however, will continue to be assessed at its value as of January 1 prior to such assessment date. If no ordinance under § 58-851.7 has been adopted, the locality must continue to assess as of January 1 prior to such fiscal year as provided by § 58-796.6. In either event, the State Corporation Commission must assess public service corporation property at its value on January 1 prior to such fiscal year. Public service corporation values will be published in August for application by the locality as of the effective date of its assessment as hereinafter provided.

You further inquire as follows:

“Would horticulture products—trees, shrubs, boxwoods, etc.—under 58-758 be assessed as real estate for the purpose of taxation?”

Under §§ 58-769.4 to -769.15-1, real estate devoted to horticultural use may be assessed by the localities at a special land use rate under an ordinance adopted pursuant to § 58-769.6. If the locality adopts such an ordinance, real estate devoted to horticultural use is entitled to special assessment. The term real estate devoted to horticultural use is defined by § 58-769.5(b) to include “grapes, nuts, and berries; vegetables; nursery and floral products under uniform standards prescribed by the Commissioner of Agriculture and Commerce.” Under such standards, trees, shrubs, and boxwoods are assessed as real estate for the purpose of land use taxation.

Your final inquiry is as follows:

“In accordance with 58-769.4 through 58-769.16, inclusive, if ownership of a property (or any portion thereof) changes while such property is assessed under an approved Land Use Assessment application, is the new owner required to file and/or refile for Land Use Assessment in order for the “Roll Back Lien” to be applicable?”

Section 58-769.8 provides that property owners must submit an application for land use assessment by November 1 preceding the tax year for which such taxation is sought. Once filed, an application remains valid unless the use or acreage of the previously-approved land changes. Although the locality may require a property owner to revalidate his previously-approved application annually, the application for prior years remains valid for future years unless the use or acreage of the land previously approved changes. Section 58-769.8 specifically provides that “[c]ontinuation of valuation, assessment and taxation under an ordinance adopted pursuant to this article shall depend on continuance of the real estate in the use for which classification is granted and compliance with the other requirements of this article and the ordinance and not upon continuance in the same owner of title to the land.” (Emphasis added.) Accordingly, I am of the opinion that a change in ownership will not require an additional application unless a change in use or acreage also occurs.

TAXATION—Land Use Tax Program—Eligibility for; changed opinion of tax assessor does not change date application must be filed by.

COMMISSIONERS OF REVENUE—Assessment Of Real Property On Basis Of Use—Application cannot be accepted after November one for succeeding tax year.
TAXATION—Real Estate—Application for assessment and taxation on basis of use cannot be accepted after November one for succeeding tax year.

January 29, 1976

THE HONORABLE H. MARTIN ROBERTSON
Commonwealth's Attorney for Prince George County

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

"Prior to November 1, 1975, . . . [the] . . . supervisor of the land use tax program for Prince George County, on the basis of information received from the tax assessor, advised a property owner that his property was not eligible for the land use tax program.

"Subsequent to November 1, 1975, . . . [the supervisor] . . . was informed that the property was indeed eligible for taxation under the land use value tax program.

"On the basis of these facts, I would respectfully request your opinion as to whether or not an application can be accepted by the County for the property hereinabove described for the tax year 1976."

Section 58-769.6, Code of Virginia (1950), as amended, authorizes any county, city or town in the Commonwealth which has adopted a land-use plan to adopt an ordinance to provide for the use value assessment and taxation of certain real estate devoted to agricultural, horticultural, forest, or open-space uses. Section 58-769.8 provides, in part:

"Property owners must submit an application for taxation on the basis of a use assessment to the local assessing officer by November one preceding the tax year for which such taxation is sought."

In an Opinion to the Honorable Ivan Mapp, Commissioner of the Revenue for the City of Virginia Beach, dated March 30, 1973, and found in the Report of the Attorney General (1972-1973) at 421, § 58-769.8 was construed to preclude the acceptance of applications for use assessment for any tax year after the deadline of November one of the preceding year. Section 58-769.8 has been modified slightly since that Opinion was issued, but the November first deadline for submitting an application for taxation on the basis of a use assessment has not been changed. The statute contains no provision permitting a local assessing officer to accept an application after the deadline. Therefore, I am of the opinion that an application cannot be accepted, even under the circumstances described in your letter, in the absence of further statutory amendment by the General Assembly.

TAXATION—Late Payment Penalty On Real Property Tax Assessed By Commissioner Of Revenue After December 5—Assessment made in 1974 but omitted from land book in 1975.

COMMISSIONERS OF REVENUE—Omitted Lands Must Be Placed On Land Book Upon Discovery Of Omission—Penalties for late payment cannot be waived.

COMMISSIONERS OF REVENUE—Penalty On Omitted Real Property Taxes Under § 58-1165 May Not Be Waived.

February 27, 1976

THE HONORABLE E. P. GREEVER
Treasurer for Tazewell County

This is in response to your recent request for my opinion regarding application of a late payment penalty to a real property tax which has been as-
sessed by the commissioner of revenue after December 5. You state that an assessment properly made in 1974 was omitted from the land book in 1975. The omission was not discovered until after December 5, when the property owner inquired about a 1975 tax bill. The commissioner of revenue then made a late assessment. You ask whether he may waive the penalty applicable to late payment of the taxes.

Section 58-1165 of the Code of Virginia (1950), as amended, provides that the Commissioner of Revenue must place all omitted lands on the land book upon discovering their omission and assess the tax, plus any penalties and interest due under § 58-1164 for the years covered by the statute. Section 58-963 imposes a separate general penalty for failure to pay county, city, or town taxes before December 5. This section was amended by the 1975 Session of the Virginia General Assembly to provide in part:

"No penalty shall be imposed for any assessment or reassessment, other than an assessment of omitted taxes or levies pursuant to §§ 58-1164 or 58-1165, made after November fifth of the year for which the tax is imposed, if such assessment or reassessment is made thereafter through no fault of the taxpayer, and if such assessment is paid within thirty days after the notice thereof is mailed." (Emphasis added.)

It is clear from your inquiry that the taxes and penalties about which you inquire are omitted taxes under § 58-1165 and, therefore, do not fall within the provisions of § 58-963 as amended. For the foregoing reasons, I am of the opinion that the penalty may not be waived under § 58-963.

TAXATION—License—Retail or wholesale merchant's license; Piggly Wiggly warehouse.

June 9, 1976

THE HONORABLE C. L. MARCUM
Commissioner of Revenue for the City of Norton

This is in response to your letter inquiring as follows:

"We have a Piggly Wiggly store located within the City of Norton. The owners of this retail outlet also have five or six other retail stores in the area. We collect a retail merchant's license on this retail store. They also have a warehouse that supplies the local stores and the other stores in Wise and Lee County. We collect a wholesale merchants license on the goods that they sell to their employees. My question is: Should Piggly Wiggly be paying a wholesale merchants license on the merchandise that they sell or bill out to their other stores?"

The relevant provision of the Norton City Code provides that "[a]ll merchants who sell to other persons, firms or corporations for resale or who sell to industrial buyers shall be deemed to be wholesale merchants." Thus, the answer to your inquiry depends on whether the Piggly Wiggly warehouse sells to other persons, firms or corporations for resale or to industrial buyers. If the warehouse is owned and operated by the same legal entity that owns and operates the Piggly Wiggly retail stores described in your letter and if it restricts its sales to such stores, your inquiry should be answered in the negative. If, on the other hand, the warehouse is a separate legal entity selling to the Piggly Wiggly retail stores, or if it sells either to other retail stores or to industrial buyers, your inquiry should be answered in the affirmative.
REPORT OF THE ATTORNEY GENERAL

TAXATION—License Tax—Authority of county to impose tax on trailer lot, park or camp—Not on property but on privilege of parking.

MOTOR VEHICLES—Trailer Lot, Park Or Camp—Authority of county to impose license tax.

ORDINANCES—Authority Of County To Impose License Tax On Trailer Lot, Park Or Camp—Not double taxation; on privilege of parking, not on real estate.

TRAILER CAMPS—Authority Of County To Impose License Tax—Not double taxation; on privilege of parking, not on real estate.

January 16, 1976

THE HONORABLE ELLIS D. MEREDITH
Treasurer for Montgomery County

Your recent letter inquired as to the legality of an annual license tax of $24.00 per trailer lot, used or intended to be used as such, imposed by an ordinance adopted by the governing body of Montgomery County on the operator or owner of any trailer park or trailer camp, or person parking a trailer in an individual lot not in a trailer camp or park.

Section 35-64.1, Code of Virginia (1950), as amended, authorizes the governing body of any political subdivision in this State to levy, and to provide for the assessment and collection of, license taxes upon the operation of trailer camps and trailer parks and the parking of individual trailers on individual lots not in trailer parks or camps. Section 35-64.5 provides, in part:

"Nothing in this article shall be construed as exempting any trailer park or trailer camp operator or person parking a trailer in an individual lot not in a trailer camp or park from the payment of any license or tax imposed by existing law, and the governing body of any such political subdivision is hereby authorized to impose an annual license on the operator or owner of any such trailer park or trailer camp or person parking a trailer in an individual lot not in a trailer camp or park of not less than five dollars nor more than fifty dollars per trailer lot used or intended to be used as such.

* * *

The license so imposed by the governing body on such trailer park or trailer park operators or person parking a trailer in an individual lot not in a trailer camp or park is to be uniform in its application, and the amount thereof to be fixed by an ordinance duly adopted by said governing body." (Emphasis added.)

Based on the above-quoted statutory provision, I am of the opinion that the annual license tax in question is legal. The license tax is not imposed on property but on the privileges of operating a trailer park or camp and parking an individual trailer in an individual lot not in a trailer camp or park. It therefore does not constitute double taxation of a lot owner who is paying real estate taxes on the lot. See Opinion to the Honorable Edward E. Willey, Member, Senate of Virginia, dated September 10, 1974, and found in the Report of the Attorney General (1974-1975) at 485.

TAXATION—License Tax On Photographers—State and local—Liable only to locality in which he has regular place of business, but liable for $5 additional State license fee for places other than that locality.
THE HONORABLE J. H. RYALS  
Commissioner of Revenue for the City of Emporia

This is in response to your recent request for my opinion relating to State and local license taxation of a photographer whose regular place of business is in another Virginia locality, but who does occasional work in Emporia. You first ask whether the City of Emporia may levy a local license tax against such a photographer. Section 58-266.5 of the Code of Virginia (1950), as amended, provides that the situs for such local license taxation is the locality in which the person so engaged has a definite place of business or maintains his office. When a person engaged in a licensable business, trade, occupation or calling has a definite place of business or maintains his office in a Virginia locality, other Virginia localities may not impose local license taxes upon him for the privilege of conducting such business within their boundaries.

You next ask whether Emporia should levy a State license tax in the amount of five dollars upon such a photographer. Section 58-393 of the Code provides, in pertinent part, that such a photographer must pay a State license tax in the locality in which he has his regular place of business "and he shall pay an additional sum of five dollars for each county or city in which he operates other than that in which he has his regular place of business." Based on the foregoing, you should levy the additional State license tax on this photographer.

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TAXATION—Local Business License—Ready-mix concrete dealer classified as manufacturer.

TAXATION—Sales And Use—Manufacturer's exemption applicable to concrete mixer-truck.

THE HONORABLE ROBERT C. MCLAUGHLIN  
Commonwealth's Attorney for Franklin County

This is in response to your recent request for my opinion whether a ready-mix concrete dealer having a place of business in the town of Rocky Mount should be classified as a manufacturer or as a wholesale merchant for purposes of the town business license tax.

Section 10-68 of the Rocky Mount Town Code imposes a tax on persons engaged in the business of manufacturing cement and cement products. Section 10-78 imposes a tax on wholesale merchants engaged in the business of selling lumber, paint and construction materials. Section 10-1 defines "wholesale merchants" to include merchants selling to others for resale, and merchants selling to institutional, commercial or industrial users.

In an Opinion to the Honorable William B. Hopkins, Member, Senate of Virginia, dated September 5, 1974, a copy of which is enclosed, I held that the production of ready-mix concrete is a manufacturing operation for purposes of the Virginia Retail Sales and Use Tax Act, §§ 58-441.1 to -441.51 of the Code of Virginia (1950), as amended. Although classification of taxpayers for State sales and use tax purposes does not universally control their classification for local business license purposes, there are no provisions either in the Virginia Retail Sales and Use Tax Act or the referenced sections of the Rocky Mount Town Code which would require a different result in this case. Accordingly, I am of the opinion that the ready-mix concrete dealer about whom you inquire should be classified as a manufacturer for local business license tax purposes.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Local License—Situs for licensing subcontractors.

CONTRACTORS—Situs For Licensing Subcontractors.

TAXATION—Local License—Firm having place of business within Virginia taxable only by locality of place of business, not taxable elsewhere even though no license tax imposed by locality of place of business.

June 24, 1976

The Honorable D. B. Hanel
Commissioner of Revenue for the City of Martinsville

I have received your recent letter from which I quote:

“A question has arisen as to situs for licensing subcontractors. The Nationwide Homes Manufacturing are subcontracting their various areas of work on their prefabricated homes. This Company is informing these individuals to buy a State License in their County and they will not have to buy the City license. This probably would be true if they were doing other work than that for Nationwide Homes.

“We believe that since Nationwide Homes is the only work which they are doing this City is to be considered as the Contractors’ main office and for this reason both City and State license should be bought here.

“We respectfully request an opinion.”

For purposes of this Opinion, I assume that each of the subcontractors referred to in your letter is a “contractor” within the meaning of § 58-297, Code of Virginia (1950), as amended, and is neither an agent nor an employee of Nationwide Homes Manufacturing. Section 58-298 provides, in part:

“Every contractor . . . shall, on the first day of January in each year, procure from the commissioner of the revenue for the city or county in which he has his office a license to carry on the business of a contractor . . . provided, that if such contractor . . . has no office in this State, then he shall procure such license from the commissioner of the revenue for the city or county where he conducts his business.” (Emphasis added.)

Section 58-299, which establishes the situs, for local license tax purposes, of a “contractor” within the meaning of § 58-297 (see Report of the Attorney General (1974-1975) at 465), provides, in part:

“When a contractor . . . shall have paid the . . . State license . . . [required by § 58-298] . . . 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.” (Emphasis added.)

The circumstance that the subcontractors about which you inquire may be working exclusively for Nationwide Homes Manufacturing is, in my opinion, irrelevant to a determination of where their offices are located.
or where their businesses are conducted. Each such subcontractor is required by § 58-298 to procure a State license from you only if (1) he has his office in the City of Martinsville or (2) he has no office in Virginia but he conducts his business in the City of Martinsville. If each such subcontractor has paid the State license required by § 58-298 to a jurisdiction other than to the City of Martinsville, and any local license required by the city, town or county in which his principal office or any branch office or offices may be located, and has no office in Martinsville the City may not require a local license of him unless the amount of business he does in Martinsville in any year exceeds twenty-five thousand dollars. Under the facts presented, the City of Martinsville is not justified in considering the principal office or any branch office of Nationwide Homes Manufacturing to be the office of any such subcontractor.

TAXATION—Local Retail Meal Tax—Cannot impose on blind persons operating vending stands under jurisdiction of Commission for Visually Handicapped.

VISUALLY HANDICAPPED, COMMISSION FOR—Local Retail Meal Tax—Cannot impose on blind persons operating vending stands under jurisdiction of Commission.

TAXATION—Sales—Local tax on restaurant meals authorized by charter and not prohibited by § 58-441.49(a).

October 15, 1975

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

I have received your recent letter from which I quote:

"Does subsection (b) of section 63.1-164, Code of Virginia (1950) as amended, exempt blind persons operating vending stands and other business enterprises under the jurisdiction of the Virginia Commission for the Visually Handicapped from collecting from their customers, where they would otherwise be required by ordinance to do so, a local tax on meals imposed as permitted by Section 58-441.49(a) of the Virginia Retail Sales and Use Tax Act?"

This office previously held by an Opinion to you dated June 18, 1975, that the City of Alexandria had the authority to impose a one percent tax on the sales price of meals served in restaurants located within the city. Section 63.1-164, found in Article 1, Chapter 8, Title 63.1, provides for the operation of business enterprises by blind persons under the supervision of the Virginia Commission for the Visually Handicapped. Section 63.1-164(b) provides:

"Blind persons operating vending stands and other business enterprises under the jurisdiction of the Commission shall not be liable for the collection and remittance of any State or local retail sales taxes imposed or authorized by chapter 8.1 (§ 58-441.1 et seq.) of Title 58 except the tax which is actually collected or collectible from the purchaser under the Virginia Retail Sales and Use Tax Act."

This statute is designed to relieve blind persons operating vending stands under the jurisdiction of the Commission from collecting and remitting State and local retail sales taxes "imposed or authorized" by the Virginia Retail Sales and Use Tax Act other than "the tax which is actually collected or collectible from the purchaser under the . . . Act." The Act
imposes a State retail sales tax (§ 58-441.4) and authorizes cities and counties to impose a local retail sales tax (§58-441.49(b)). Section 58-441.49(a) prohibits a local general sales tax except to the extent authorized by §58-441.49(b). Section 58-441.49(a) expressly excludes from this prohibition “local excise taxes on cigarettes, local admissions taxes, local taxes on transient room rentals and meals, and consumer utility taxes to the extent authorized by law. . . .” This provision is merely an exception to the prohibition and not a grant of power to impose a tax. See Opinion to you dated June 18, 1975, and Report of the Attorney General (1972-1973) at 378.

The Alexandria tax is a “local tax on . . . meals” within the purview of §58-441.49(a) which is excluded from the general prohibition and, in the context of 63.1-164(b), is “authorized by chapter 8.1 (§58-441.1 et seq.) of Title 58.” Blind persons otherwise within §63.1-164(b) are therefore not liable for its collection unless it falls within the exception to that statute. The exception is “the tax which is actually collected or collectible from the purchaser under the Virginia Retail Sales and Use Tax Act.” (Emphasis added.) The only sales taxes collected or collectible from the purchaser under the Act are the taxes levied by §58-441.4 and pursuant to §58-441.49(b). See §58-441.18. Since the Alexandria meal tax is not collectible from the purchaser under the Act, in my opinion blind persons operating vending stands and other business enterprises under the jurisdiction of the Commission are exempted from the collection and remittance of such tax by §63.1-164(b).

TAXATION—Personal Property—Taxable situs of boat should be place where it is normally docked, or residence of owner.

June 4, 1976

The Honorable Lois B. Chenault
Commissioner of the Revenue for Hanover County

This is in response to your letter inquiring as follows:

“A resident of Hanover County stored his boat at the Virginia State Fairgrounds in Henrico County from November 26, 1975 to . . . [April 19, 1976]. He . . . [brought] the boat to his home in this county . . . [on April 20th] and will keep it here until the latter part of November at which time he will put it in storage again. The taxpayer moved to Hanover in October 1975 and prior to that date the boat was kept at the home of his father in Henrico.

“My question: Is the taxpayer liable to the County of Hanover or to the County of Henrico for 1976 personal property tax on the boat?”

For purposes of this opinion, I assume that the boat is docked while located in Hanover County.

Section 58-834, Code of Virginia (1950), as amended, provides that the situs for taxation of boats as personal property shall be the county, city or town where the boat is normally docked. If the boat is not normally docked in a particular jurisdiction, the situs for taxation is the residence of the owner. See Opinion to the Honorable Robert H. Waldo, Commissioner of the Revenue for the City of Chesapeake, dated November 20, 1975, a copy of which is enclosed. In an Opinion to the Honorable Billy K. Muse, Commissioner of the Revenue for Roanoke County, dated December 12, 1973, and found in Report of the Attorney General (1973-1974) at 384, I concluded that the situs for taxation of a boat which was physically present in Franklin County from March to November and was stored during the remainder of each year in Roanoke County was subject to
taxation by Franklin County because the boat was "normally" docked in that jurisdiction. The rationale supporting this conclusion is applicable under the facts of the instant case. Since Hanover County is the only county in which the boat will be "docked" during 1976, or alternatively because it is the residence of the owner, I am of the opinion that its owner is liable to Hanover County for 1976 personal property taxes on the boat.

TAXATION—Personal Property—Taxable situs of boats should be the place where boats are normally docked.

COMMISSIONERS OF REVENUE—Allowed To Examine Records Outside His Jurisdiction For Proper Tax Information.

TAXATION—Personal Property—Taxable situs of boats turns upon facts in each case.

November 20, 1975

The Honorable Robert H. Waldo
Commissioner of Revenue for the City of Chesapeake

I have received your letter inquiring as follows:

"(1) Does a documented vessel, of over five tons burden, acquire situs by the residency of its owner, or its physical location on January 1?

"(2) Since the United States Custom House is in the City of Norfolk (where boats for a large area are registered), does § 58-865 preclude me from using those documents, since they are not in my city?"

Section 58-834, Code of Virginia (1950), as amended, provides that the situs for taxation of boats as personal property shall be the county, city, or town where the boat is normally docked. In an Opinion to the Honorable W. C. Andrews, Jr., Commissioner of Revenue for the City of Newport News, dated August 10, 1972, and found in Report of the Attorney General (1971-1972) at 410, I concluded that the situs for taxation of a pleasure boat was at the domicile of the owner since it had not acquired a tax situs elsewhere. If, however, a pleasure boat is docked at a particular location within or without the Commonwealth on a permanent basis, it acquires a tax situs at such location, notwithstanding that its owner's domicile is elsewhere. See Report of the Attorney General (1973-1974) at 384. Accordingly, the answer turns upon the facts in each case.

If you find that a particular boat is normally docked within your jurisdiction it is subject to taxation therein even though its owner's domicile or residence is not within your city. Likewise, if a boat is not normally docked in a particular jurisdiction, it is then taxed in the jurisdiction in which the owner resides. The event of documentation and the displacement of the boat are irrelevant to the determination of tax situs, except insofar as the forms may provide the residence address of the owner. The fact that as of the date of assessment the boat is not in Virginia waters is also irrelevant, as § 58-829(14) separately classifies "[t]he aggregate value of all ships, tugboats, barges, boats or other craft of five tons burthen or over and all other floating property, not required to be assessed by the State Corporation Commission, used for business or pleasure, together with their tackle, rigging, furniture and all else that pertains to them or of any share or interest therein, though such boats or other watercraft or any one of them may not be at the time of the assessment in the waters of the State."

The answer to your second inquiry is that § 58-865 requires a commissioner of revenue to either examine the records in his jurisdiction regarding
registration of certain vessels, or ascertain their value from any other source accessible to him. This statute, therefore, in no way prohibits you from examining records located outside of your jurisdiction and utilizing the information you obtain to make proper tax assessments.

TAXATION—Property Conveyed From Husband And Wife To Thomas Jefferson Soil And Water Conservation District By Deed Of Gift For Open Space And Wildlife Refuge—Burden of proof on party claiming tax exemption.

BURDEN OF PROOF—Taxation—On party claiming exemption.

COMMISSIONERS OF REVENUE—Deed Of Gift—Real estate should continue to be listed on land book in name of donors and taxed until tax exemption proved by donors.

DEEDS—Ambiguities In Deed Of Gift Must Be Construed Most Strongly Against Donors And In Favor Of Donee.

REAL ESTATE—Open Space And Wildlife Refuge Deed Of Gift—Burden of proof on party claiming tax exemption.

April 30, 1976

THE HONORABLE GEORGE R. ST. JOHN
County Attorney for Albemarle County

You have inquired as to the tax status of a certain parcel of property conveyed from a husband and wife to the Thomas Jefferson Soil and Water Conservation District by a deed of gift reciting, in part, as follows:

"That for and in consideration of the DONORS' wish that the land conveyed hereby be kept as an Open Space and Wildlife Refuge, and in further consideration of its acceptance by the DONEE for that purpose, as is evidenced by the DONEE'S acceptance and recordation of this deed, the DONORS hereby grant and convey unto the DONEE...

...[the parcel of property in question]...

* * *

"This conveyance is made with the following agreement between the parties also as a part of the consideration for this conveyance;

1. Wherever the term "Open Space and Wildlife Refuge" is used in this instrument, it is to be construed liberally and uses which would be included within this description would be normal agricultural purposes grazing, wildlife plantings, tree planting, tree harvesting by selective research and instruction in such matters, and outdoor recreation of a simple nature without capital improvements; but the term would exclude residences except for that of the manager, commercial uses, and public hunting. Any combination of the permitted uses would also be permitted.

2. If for any reason, at any time, the DONEE should find itself unable to continue to keep this tract of land as an Open Space and Wildlife Refuge, the DONEE will convey said land to the Nature Conservancy to be kept by the Nature Conservancy for said purposes and not to be exchanged by it for other land.

3. It being acknowledged by the parties that the maintenance of this property may be a problem to the DONEE, the DONORS, for the lifetime of the survivor of them, agree to live upon the property and be responsible for maintaining it as an Open Space and Wildlife Refuge and, to the best of their ability, to keep it in good
condition, or else to get someone else to do so, with the understand-
ing that any income derived from the property will be used in the
upkeep.

4. Because the present house on the property may be difficult for the
DONORS to live in in the future on account of many steps, the
DONORS reserve the right to adding more suitable residence for
their use to become a part of the property."

I assume for purposes of this Opinion that the Thomas Jefferson Soil
and Water Conservation District was organized under the provisions of
Chapter 1, Title 21, Code of Virginia (1950), as amended.

Section 58-796, Code of Virginia, provides that the “owner of real estate”
on the first day of January shall be assessed for the real estate taxes for
the year beginning on that date. The Virginia Supreme Court has consis-
tently construed the word “owner,” as used in § 58-796, to include “any
person who has the usufruct, control or occupation of the land, whether
his interest in it is an absolute fee, or an estate less than a fee.” City of
Richmond v. McKenny, 194 Va. 427, 73 S.E.2d 414 (1952); see also Banks
v. County of Norfolk, 191 Va. 463, 62 S.E.2d 46 (1950); and Powers v. Richmond, 122 Va. 328, 94 S.E. 803 (1918). Thus, the relevant inquiry is
whether the deed in question reserves to the donors the “usufruct, control
or occupation” of the parcel of property conveyed to the Thomas Jefferson
Soil and Water Conservation District. If so, the donors are the owners of
the property for § 58-796 purposes, and are assessable for the annual taxes
on such property. If not, the property is owned by the Thomas Jefferson
Soil and Water Conservation District, a governmental subdivision of Vir-
ginia pursuant to § 21-53, and would therefore be exempt from taxation
under Article X, Section 6(a)(1), of the Virginia Constitution.

If not in conflict with some principle of law or rule of property, the
donors’ intention, as expressed in the deed, controls the nature of the
property interest reserved. Fitzgerald v. Fitzgerald, 194 Va. 925, 76 S.E.2d
204 (1953). Ambiguities in the instrument must be construed most strongly
against the donors and in favor of the donee. Painter v. Alexandria Water
Company, 202 Va. 431, 117 S.E.2d 674 (1961). The circumstances existing
at the time the deed was executed may be considered in determining intent.
Seventeen, Inc. v. Pilot Life Insurance Co., 215 Va. 74, 205 S.E.2d 648
(1974).

In the instant case, the intent of the donors is less than clearly expressed
by the language used in the deed. It is uncertain, for example, whether the
donors’ right to continue living on the property was intended to include
the right to exclude others from the property, or whether the Thomas Jeffer-
son Soil and Water Conservation District was intended to have the right,
under any circumstances, to authorize others to occupy or possess any part
of the property. The “occupation” of property that has been established
by the Virginia Supreme Court as a standard for determining the person as-
sessable for the annual taxes on such property is, in my opinion, of an
exclusive nature, including both the right to occupy or possess and the
right to exclude others from occupying or possessing.

Furthermore, the prefatory clause of the above-quoted, third-numbered
paragraph of the deed—“It being acknowledged by the parties that the
maintenance of this property may be a problem to the DONEE,” raises
the question whether there is a covenant to maintain, which would be a
burden to the donors and a benefit to the donee, or a life estate, which would
be a benefit to the donors and a burden to the donee. The intended balance
between these burdens and benefits is not obvious from the face of the
deed. Further, the retention of the right to add, for the donors’ use, a more
suitable residence on the property raises the question whether the donors
intended to reserve a life estate in the house on the property and its
curtailage, but not in the entire parcel. See White v. Avery, 302 S.W.2d 88
in a small house situated on 120 acres of land did not amount to the granting of a life estate in the 120 acres, but the grantee should be accorded the right to live in the house and to use so much of the ground adjacent thereto as is reasonably necessary for domestic purposes during her lifetime.

In light of these ambiguities, the question whether the deed effectively reserves the “usufruct, control or occupation” of the property to the donors should be determined, at least in part, with reference to extrinsic circumstances of which this office has no knowledge. In my opinion, the burden of proving that the property in question is exempt from taxation is properly placed upon the party claiming such exemption. Until this burden is met to the reasonable satisfaction of the Commissioner of Revenue, the property in question should continue to be listed on the land book in the name of the donors, and be taxed accordingly.

February 20, 1976
THE HONORABLE ORBY L. CANTRELL
Member, House of Delegates

This is in response to your recent request for my opinion whether House Bill No. 574, the proposed Virginia Coal Mining Tax Act, would violate Article X, Section 4, of the Constitution of Virginia (1971), if enacted by the 1976 Session of the Virginia General Assembly. For the reasons set forth herein, it would not violate that provision.

Article X, Section 4, provides:

“Real estate, coal and other mineral lands, and tangible personal property . . . are hereby segregated for, and made subject to, local taxation only.”

This Section is the successor to Sections 171 and 172 of the Constitution of 1902, as amended in 1928. It was intended to merge these two former Sections into a single provision without changing their substance. The Constitution of Virginia, Report of the Commission on Constitutional Revision, (hereafter CCR Report) at 300.01. See also 57 Va. L. Rev. 1618, 1625 (1971). The present language “coal and other mineral lands” is identical to that of former Section 172, as amended in 1928, which provided:

“Coal and other mineral lands shall be assessed and reassessed for local taxation . . .”

The same phraseology appeared in Section 172 of the Constitution of 1902 prior to the 1928 amendment. The provision segregating tangible personal property likewise was carried forward from the 1902 Constitution.
It is clear from the foregoing provisions that Virginia has historically segregated to the localities the power to levy property taxes on real estate, including "coal and other mineral lands," and on tangible personal property. The draftsmen of the present Constitution considered, and rejected, a partial departure from that policy when they framed Article X, Section 4:

"Consideration was given to recommending the amendment of present section 171 to except real estate and tangible personal property of public service corporations from constitutional segregation for local taxation and to provide that the General Assembly shall segregate such property for either state or local taxation. Though such an amendment has much merit, it would represent a marked departure from one of the basic principles of taxation in Virginia, and the Commission determined not to recommend it in this revision."

Like its predecessors, Article X, Section 4, makes no specific allocation of any type of property to the state for taxation. See Roanoke v. Michael's Bakery Corp., 180 Va. 132, 21 S.E.2d 788 (1942); Fallon Florist v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950).

Although the Virginia Supreme Court has never had occasion to construe the phrase "coal and other mineral lands" under circumstances relevant to the present inquiry, it is clear that the phrase was intended to segregate to the localities the sole power to levy real property taxes on "coal" and on "other mineral lands." Under the applicable doctrine of ejusdem generis, the use of the word "other" makes it clear that "coal lands" are one type of a broader category of "mineral lands" which are segregated solely for local taxation. See generally Commonwealth v. Progressive Community Club, 215 Va. 732, 213 S.E.2d 759 (1975) (relating the word "college" to the term "other institution of learning" in the phrase "college or other institution of learning"); Kohlberg v. Virginia Real Estate Commission, 212 Va. 237, 183 S.E.2d 170 (1971); Sellers v. Bles, 178 Va. 49, 92 S.E.2d 486 (1958). Resolution of the present inquiry, therefore, depends upon whether the proposed Virginia Coal Mining Tax is a property tax on "coal lands," or a tax on "tangible personal property." If not, it does not violate Article X, Section 4.

Characterization of the tax provision is governed by the decided Virginia cases. The Virginia Supreme Court has historically recognized, and differentiated between, license or privilege taxes on the one hand, and property taxes on the other. See Fallon Florist v. City of Roanoke, supra; Town of Ashland v. Board of Supervisors, 202 Va. 409, 117 S.E.2d 679 (1961); Langston v. City of Danville, 190 Va. 692, 44 S.E.2d 101 (1949); Commonwealth v. Whiting Oil Co., 167 Va. 73, 187 S.E. 498 (1936); Hunton v. Commonwealth, 166 Va. 229, 183 S.E. 873 (1936); Commonwealth v. Bibles Grocery Co., 153 Va. 935, 151 S.E. 293 (1930); Bradley v. City of Richmond, 110 Va. 521, 66 S.E. 872 (1910).

In Town of Ashland v. Board of Supervisors, supra, the Virginia Supreme Court held a tax on the operation of a motor vehicle to be a license or privilege tax, and not a property tax. In Hunton v. Commonwealth, supra, the Court said:

"We think the fundamental weakness in petitioner's case is his theory that any tax which affects property in any way, directly or indirectly, is a tax on that property. This argument is not sound and has been expressly repudiated by this court.

* * * *

"The owner of an automobile in Virginia pays a tax for the privilege of operating his car. In a sense this tax affects the car, but it is universally conceded that this is a license or privilege tax and not a tax on the property concerned, to-wit, the automobile."
"Certainly it cannot be successfully contended that an owner is required to obtain a license for his vehicle if it is stored in a garage and not operated on the streets and highways. Such a vehicle is subject to a personal property tax, but not a license tax, unless he exercises the privilege of operating it upon the streets and highways."

The imposition section of House Bill No. 574, the Virginia Coal Mining Tax Act, provides as follows:

"§ 58-757.32. Imposition of tax.—There is hereby levied and imposed, in addition to all other taxes and fees of every kind now imposed by law, a license or privilege tax, at the rate of four percentum of the gross receipts, upon every operator, for the privilege of mining coal in this state."

It is clear from the foregoing language that House Bill No. 574 taxes the privilege of mining, and not the coal lands or the coal which is mined. The measure of the tax is the operator's gross receipts. If an operator does not engage in mining, he pays no tax. If this were a property tax, he would have to pay it, regardless of his use or non-use of the property. Such considerations led the Virginia Supreme Court to hold in Hunton, supra, that a similar tax was a license or privilege tax, and not a property tax. As the Court there stated, the mere fact that the tax affects property does not make it a property tax. In the last analysis, the tax proposed under House Bill No. 574 is as much a state license or privilege tax as are numerous others which are already on the books. See generally §§ 58-239 to 404.01.

I take note of my opinion to the Honorable R. V. Presley, Commissioner of Revenue of Buchanan County, dated October 26, 1972, and found in the Report of the Attorney General (1972-1973) at 445, which held that a local severance tax imposed on coal pursuant to § 58-774 and imposed in lieu of other, mandatory real property taxes, was a property tax and not a license or privilege tax. That Opinion stated:

"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 alternative procedure for determining the value of mineral lands under development."

The proposed State Coal Mining Tax differs fundamentally from the local severance taxes in lieu of other property taxes which are authorized by § 58-774. House Bill No. 574 taxes "the privilege of mining coal in this state," while § 58-774 authorizes the localities to impose "a severance tax on all coal and gases extracted from the land . . . ." The State proposes to tax the privilege; the localities now tax the coal itself. Because of the Article X, Section 1, requirement that "all property . . . shall be taxed," the local coal tax must be construed to be a property tax. See Report of the Attorney General (1974-1975) at 474. Otherwise, no local property tax would be levied on the coal, and the portion of the local tax burden which should have been borne by the owners of coal lands would have to be borne by other landowners in the locality. This result would present obvious problems under the uniformity provisions of Article X, Section 1.

In summary, the Article X, Section 4, prohibition against State level real and personal property taxes on coal lands and coal does not apply to the license or privilege tax contemplated under House Bill No. 574 and, consequently, this legislation is constitutionally valid.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Real Estate—Improvements to real property by lessee are assessed to the lessor as real estate—Bank's vault door.

BANKING AND FINANCE—Taxation—Improvements to real property by lessee are assessed to lessor as real estate—Bank's vault door.

October 15, 1975

THE HONORABLE VICTOR J. SMITH
Commissioner of Revenue for the City of Harrisonburg

I have received your letter inquiring whether certain improvements to real property are taxable to the lessor as real estate or should be considered personalty owned by the lessee. The property consists of a bank's vault door, night depository and drive-in teller window. The bank leased the land and a one-story bank building to be erected thereon by the lessor under a lease providing as follows, in pertinent part:

"16. Lessor acknowledges and agrees that all personal property and fixtures brought upon the premises by Lessee and more particularly, without limiting the generality of the foregoing, all trade fixtures, night depository units, signs, drive-in teller units, and the vault door shall remain the absolute personal property of Lessee. Personal property, fixtures and equipment placed in the premises by Lessee or any assignee or sublessee shall not become a part of the demised premises even if nailed or screwed or otherwise fastened to the premises, but shall retain their status of personality and may be removed by Lessee at any time."

After entering into possession of the land, the bank, as tenant, installed the vault door, night depository and drive-in teller window in the building during the course of its construction. When the property was appraised for purposes of real estate assessment and taxation, the lessor contended that the aforementioned items were not part of the real estate and should not be taxed as such, but that they were personal property owned by the bank.

Tangible personal property is exempt from taxation to a bank unless it is leased to the bank's customers or other lessees and, if the property is personalty owned by the bank, no tax will be assessable with respect thereto. See § 58-484, Code of Virginia (1950), as amended, and Report of the Attorney General (1973-1974) at 373.

Whether a tenant's interest in a building or other structure erected by him may be subjected to a property tax as a separate unit apart from the land is a question which turns upon the statutory law of each state. See Annot., 154 A.L.R. 1309 (1945). In the Commonwealth of Virginia Improvements added to the land by a lessee are assessed to the owner of the land. See Report of the Attorney General (1968-1969) at 224. There is no general provision for separating the lessee's improvements from the lessor's land, although §§ 58-773.1, 58-774 and 58-804(f) provide for assessment of real property to separate owners under circumstances not applicable to the facts under consideration. In Andrews v. Auditor, 69 Va. (28 Gratt.) 115 (1877), the Court stated the general rule at 127-28 as follows:

"... It was insisted by the learned attorney general, that under our system for the assessment and collection of taxes prescribed by the statute, the assessor is directed to value 'the land with the improvements thereon;' and that the state will look to the value of the land only for taxes upon the value of both land and improvements. That in providing for the public revenues, the state cannot take notice of the private contracts of parties which fixes the title of the land in one person and the buildings erected thereon in another, but that the owner of the land must, for the purposes of taxation, be regarded as
the owner of the buildings also. This view, in its general application is certainly correct. Undoubtedly where the buildings erected on the land are themselves the subject of taxation, the state will take no notice of private contracts which sever the ownership of the land from that of the buildings; and will hold the owner of the land responsible for the taxes on both."

The Court next concluded that this rule was inapplicable where the buildings were exempt from taxation to their owner, as in the case involving buildings owned by the United States. Since a bank's real estate is taxable to the bank pursuant to § 58-484, that exception to the general rule has no application to these facts.

Improvements such as those under consideration which are incorporated into the structure of a building are fixtures and become a part of the real estate for tax purposes regardless of the reservation of title by the lessee. See Report of the Attorney General (1973-1974) at 368. The fact that the lease reserves title in the lessee and permits their removal does not constitute evidence of an intent to remove them [see Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550 (1970)] and does not bind a taxing authority. See San Diego Trust & Sav. Bank v. San Diego County, 105 P.2d 94 (Cal. 1940), cert. denied, 312 U.S. 679 (1941).

In consideration of the foregoing, I am of the opinion that the vault door, night depository, and drive-in teller window should be assessed to the lessor as part of the real property.

TAXATION—Real Estate—One hundred percentum fair market value assessments pursuant to § 58-760 not required prior to January 1, 1977.

BOARDS OF SUPERVISORS—Real Property Assessments—No authority to change assessed value or ratio of assessment.

TAXATION—Real Property—Boards of Supervisors cannot change ratio or assessed value.

July 30, 1975

The Honorable Edward A. Natt
County Attorney for Roanoke County

I have received your recent letter from which I quote:

"The 1975 General Assembly adopted an amendment to Section 58-760 which, in effect, provided that all general reassessments or annual assessments conducted after January 1, 1976 shall be made at 100% of the fair market value of the property with certain exceptions relating to property assessed by the State Corporation Commission.

"The Board of Supervisors of Roanoke County authorized and directed that a general reassessment be conducted in Roanoke County during the calendar year 1974 to be effective January 1, 1975. All property in Roanoke County was appraised at fair market value and an assessment of 40% of appraised value was placed on all property and such was indicated on the land books of the County.

"The Board of Supervisors has indicated a desire to make the assessment on all real estate in Roanoke County at 100% of appraised value with an appropriate reduction in the real estate tax rate. Inasmuch as the general reassessment indicated the appraised value of all real estate to be the fair market value of all property, I would respectfully request your opinion as to whether or not the Board of Supervisors may, by resolution provide for the change in assessment value of all property so that the assessment value equals 100% of appraised
value without the necessity of conducting another general reassessment. If this procedure is not proper, I would request your opinion as to what procedure short of a general reassessment may be followed in order to place the assessment value of all property in Roanoke County at 100% of appraised value commencing January 1, 1976."

A county board of supervisors has no power to change the assessment of real property as ascertained by a board of assessors during a general reassessment. See §§ 58-759 and 58-763, Code of Virginia (1950), as amended, and Report of the Attorney General (1963-1964) at 17. Nor can a board of equalization make a uniform percentage increase in every item of the general reassessment made by the board of assessors. City of Lynchburg v. Taylor, 156 Va. 53 (1931). A board of supervisors has no power to raise or lower the ratio of assessment of real property. See Report of the Attorney General (1973-1974) at 395-96. Accordingly, I am of the opinion that the Roanoke County Board of Supervisors has no authority to increase the ratio of assessments as determined by the board of assessors in the 1974 general reassessment.

I am not aware of any method whereby the ratio can be changed other than by requiring another general reassessment pursuant to § 58-784.3 or by adopting one of the annual reassessment methods permitted by §§ 58-769 to -769.3. Due to the fact that the nominal tax rate increase permitted on certain public service property by § 58-514.2 cannot be made effective prior to the January 1, 1977, assessment date, the county may wish to postpone any change to 100% of fair market value until such date. See Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated July 8, 1975, a copy of which I enclose.

TAXATION—Real Estate—One hundred percentum fair market value assessments pursuant to § 58-760 not required prior to January 1, 1977.

PUBLIC SERVICE CORPORATIONS—Locality May Not Increase Nominal Tax Rate On Unconverted Property Prior To January 1, 1977.

TAXATION—Public Service Corporation Property—Locality may not increase nominal tax rate on unconverted property prior to January 1, 1977.

July 8, 1975

THE HONORABLE FREDERIC LEE RUCK
County Attorney for Fairfax County

I have received your recent letter from which I quote:

"I understand that a question has arisen concerning the provisions of Senate Bill 597 requiring real estate assessments to be made at 100 percent of fair market value, enacted in the 1975 session of the General Assembly. The amendment to section 58-760 states:

"Beginning January 1, 1976, all general reassessments or annual assessments . . . of real estate, shall be made at one hundred per centum fair market value. . . .


"Real estate assessments are required to be made on January 1 of each year. §§ 58-864, 58-796, and 15.1-766, Va. Code Ann. Fairfax County presently assesses real estate at forty percent of appraised fair market value. We are aware that nothing in the law prohibits assessments at one hundred percent of fair market value but unless
public service corporation property in the process of equalization can be taxed as a separate category of property, and at an effective rate comparable to that applicable to other real estate, a question remains as to the fiscal efficacy of such action. § 58-512.1, Va. Code Ann. Therefore, we would like to know what in your opinion is the first affected assessment date under all the provisions of S.B. 597.”

Senate Bill 597 was enacted as Chapter 620, [1975] Acts of Assembly 1291, to amend §§ 58-512.1, 58-514.2 and 58-760, Code of Virginia (1950), as amended. Section 58-760 was amended by adding a new paragraph, in pertinent part, as follows:

“Beginning January one, nineteen hundred seventy-six, all general reassessments or annual assessments in those localities which have annual assessments of real estate, except that referred to in § 58-512.1, shall be made at one hundred per centum fair market value and when the local assessment of a county or city is less than one hundred per centum the State Corporation Commission shall certify public service corporation property to such county or city on the basis of the latest local assessment ratio as determined by the most recently published findings of the Department of Taxation.”

Section 58-512.1 was amended by adding the following:

“B. Notwithstanding any provision of subsection A, when the local assessment of property in any taxing district is made as provided in § 58-760 the State Corporation Commission shall certify its assessment of public service corporation property which has been assessed at such local ratio as provided in subsection A to such taxing district for imposition of the local tax rate. All public service corporation property in the process of equalization over a twenty-year period as provided in subsection A is hereby defined as a separate item of taxation and shall be identified as a separate category of property for local taxation. Such property in the process of equalization shall, for such period as provided for in subsection A continue to be assessed at forty per centum of the fair market value.”

Section 58-514.2 was amended by deleting language authorizing a different tax rate for the assessed value of any class of property taxed as tangible personal property before January 1, 1966, and adding a provision that “property in process of equalization as provided for in § 58-512.1 shall continue to be assessed at forty per centum of fair market value and taxed at the nominal rate applicable to public service corporation property for the taxable year immediately preceding the year such locality assesses pursuant to § 58-760; provided, however, that any county, city or town shall adjust any such nominal rate, if the effective rate for such public service corporation property is less than the effective tax rate applicable for other than public service corporation property in that locality so that the effective rate on such category of public service corporation property is equal to the effective tax rate for other than public service corporation property.”

Senate Bill 597 was proposed by the Revenue Resources and Economic Commission in its Report to the Governor and General Assembly (Senate Document No. 13, Exhibit 1 (1974)). As introduced, the bill would have amended § 58-760 to provide that “[b]eginning January one, nineteen hundred seventy-six, all assessments of real estate shall be made at one hundred percent fair market value.” (Emphasis added.) In addition, the bill would have amended § 58-512.1 to provide for the taxation of property in the process of equalization “at the nominal rate applicable to public service property for the taxable year nineteen hundred seventy-five. . . .”
There could be no question as to the effective date of the change to 100 percent assessments and of the requirement that the unequalized public service corporation property be taxed at a nominal rate equal to or greater than the rate for the tax year 1975, as provided in the original bill. Since real property is assessed as of January 1 of each year pursuant to §§ 58-4 and 58-796 (except for fiscal tax year localities acting pursuant to § 58-851.7 and special charter provisions that assess as of July 1) the original bill would clearly have required that the changes be effective January 1, 1976, (and July 1, 1976, for fiscal tax year localities) because it referred to "assessments," a word that in the context could only have reference to the valuation at which property must be placed on the land books beginning January 1, 1976. See Transco Corp. v. Prince William County, 210 Va. 550, 554-55 (1970), and cases cited therein. The preparation of the land books is a function of the commissioner of revenue, but he cannot change the value of real estate as ascertained at a general reassessment, except to make additions for subsequent improvements, adjustments for easements, and other minor adjustments. See §§ 58-763 and 58-810, et seq. Implementation of the 100 percent mandate would have required that a board of assessors be convened in each locality that had not adopted one of the annual reassessment programs which allow reassessments on an annual basis by a commissioner of revenue, director of finance, real estate assessor or continuing board of assessors (see, e.g., § 58-769, et seq., § 58-776.1, et seq.) unless the locality was in the process of conducting a general reassessment during 1975 to be placed on the land books as of January 1, 1976. Although the bill could have authorized the commissioners of revenue to make a uniform percentage change in the value of each parcel of property as ascertained at the previous general reassessment, no such provision was incorporated; and it would have been necessary to convene a board of assessors in most of the counties and some of the cities to make the necessary changes, the cost of which would have been borne at the local level. See § 58-788.

Whether for these or other reasons of which I am unaware, the bill as originally introduced was amended by making two significant changes. The words "assessments of real estate" in § 58-760 were deleted and "general reassessments or annual assessments in those localities which have annual assessments of real estate" was inserted. The language referring to the nominal rate applicable to public service corporation property for the taxable year 1975 was deleted and § 58-514.2 was amended to provide for the taxation of public service corporation property at the nominal rate applicable "for the taxable year immediately preceding the year such locality assesses pursuant to § 58-760 . . ." (or an increased rate if necessary to equalize the effective rate on public service property with all other property). The bill as enacted speaks to those persons conducting general reassessments or annual assessments (reassessments), and not to the commissioners of revenue, and it requires that "beginning [January 1, 1976] all general reassessments or annual assessments . . . shall be made at [100%] fair market value. . . ." Since the powers of a board of assessors expire on December 31 of the year of a general reassessment (§ 58-792), and the statute speaks prospectively to such boards, it does not, in my opinion, control the actions of 1975 boards which were already in existence at the time of its passage. Accordingly, it will apply for the first time to those boards of assessors or annual assessors which begin the reassessment process on or after January 1, 1976, with the necessary result that the first effective tax day for the change on the land books will be January 1, 1977. The provisions of §§ 58-512.1 and 58-514.2 are expressly related to and dependent upon the implementation of § 58-760 and, accordingly, these provisions will likewise become effective for the first time with assessments to be made as of January 1, 1977. A locality that voluntarily changes to 100 percent assessments during 1975 to be placed on the land books as of
January 1, 1976, does not do so “pursuant to § 58-760” as provided by § 58-514.2 and will not be able to increase the nominal tax rate applicable to public service corporation property for the tax year 1976 as provided therein absent subsequent enabling legislation.

TAXATION—Real Estate Assessments—Commissioner of Revenue may remove land from land book when erroneously entered—Relief to be granted to taxpayer.

COMMISSIONERS OF REVENUE—Authority—Correction of past assessments erroneously made—Relief to be granted to taxpayer.

December 2, 1975

THE HONORABLE LEE T. KEYES
Commissioner of Revenue for Loudoun County

This is in response to your request for my opinion whether you may remove a tract of land from the county land book when the tract has been erroneously included on the land book and the parcel does not exist. You further ask whether there is any relief for the person, erroneously named as the owner of the property, who has paid the taxes for previous years.

Section 58-809 of the Code of Virginia (1950), as amended, provides that every commissioner, in making out his land book, must correct any mistake made in any entry therein. If you are satisfied that the inclusion of the parcel in question is a mistake, you may remove it under the authority of this section.

Section 58-1141 authorizes the commissioner of revenue to correct erroneous real estate assessments when the errors to be corrected were made by the commissioner. Under this section, an aggrieved person must apply to the commissioner within five years from December 31st of the year in which the assessment was made for a correction thereof. If the commissioner made the error which resulted in the erroneous assessments about which you inquire, the assessments may be corrected within the five-year period under the authority of this section. If the commissioner of the revenue did not make the error in question, § 58-1145 authorizes the person erroneously assessed to apply to a court for relief within two years from December 31st of the year in which the assessment was made.

November 13, 1975

THE HONORABLE D. B. HANEL
Commissioner of Revenue for the City of Martinsville

This is in response to your recent request for my opinion regarding the proper procedure for correction of assessments of real property deemed erroneous by a taxpayer. You state that, in 1968, real property belonging to the First National Bank of Martinsville was appraised by State assessors. In 1970 it was reassessed as part of a quadrennial assessment in the City of Martinsville. In 1974 the property was again reassessed and the bank contested this reassessment before the board of assessors. The board found that there was an error in the estimated cubic footage of the property and corrected the assessment. The bank is now requesting a refund of taxes for the years 1970 through 1973. You ask which section of the Code of Virginia applies to the request for the refund of such taxes.

Section 58-776 of the Code of Virginia (1950), as amended, authorizes a
general reassessment of real estate every four years as occurred in Martinsville in 1974. Nothing in this section, however, authorizes the 1974 assessors to take any action with respect to assessments for prior years. For these years, correction of erroneous assessments is governed by § 58-1145. This section provides that an aggrieved taxpayer may apply to the circuit court for relief from an erroneous assessment, within two years from December 31 of the year in which the assessment is made. I am of the opinion that the taxpayer may apply for such relief for any assessments made within the stated period of time.

TAXATION—Real Estate Repossessed By Farmers Home Administration—Exempt from taxation from date of acquisition by United States to date sold to person without tax-exempt status.

CLERKS—Real Property—Whether in fact conveyed to United States determined by records in clerk's office.

COMMISSIONERS OF REVENUE—Land Book Should Show Repossessed Property Changed From Taxable To Tax-exempt Until Sold By United States.

FEDERAL PROPERTY—Repossession Of Housing By FHA—Penalties and interest on delinquent taxes constitute lien on property.

LIENS—Delinquent Taxes, Penalties And Interest Constitute Lien On Housing Repossessed By FHA—Lien remains in effect until satisfied.

TAXATION—Delinquent Real Property—Low-income housing repossessed by FHA, leaving taxes, penalties and interest unpaid.

TAXATION—Exemption Of United States From Real Property Taxation Does Not Limit Methods To Enforce Payment Of Delinquent Taxes—Housing repossessed by FHA.

May 24, 1976

THE HONORABLE LOUISE C. WILLIAMS
Treasurer for New Kent County

This is in response to your letter posing a series of questions dealing with the collection of taxes, penalties and interest on certain housing in New Kent County. The housing was sold to people in low-income brackets, with financing provided by the Farmers Home Administration, United States Department of Agriculture ("FHA"). The FHA has now repossessed leaving the taxes unpaid. These taxes are assessed in the name of each individual who "owned" a house as of the first day of January in the year in which the house was repossessed by the FHA. You have advised that, for each parcel of property repossessed by the FHA, there is a deed on record conveying such property to the United States of America. The FHA Supervisor for New Kent County has informed you that the federal government does not pay penalties and interest accruing on delinquent real property taxes, but you are unaware of any authority obviating the necessity of such payments.

Your questions will be answered in the order posed:

1. Do I accept payment from FHA for tax only and, if so, how do I relieve myself of the penalties involved since I am charged with them after December 5th?

I assume the penalties referred to accrued prior to repossession of the property by the FHA. The penalties, together with the delinquent taxes
upon which they accrue and applicable interest, constitute a lien on the property. See §§ 58-762 and 58-1023, Code of Virginia (1950), as amended. Under the circumstances described in your letter, the United States apparently acquired the property subject to such lien. The lien remains in effect until satisfied. Accordingly, while you may accept payment from FHA for taxes only, any unpaid penalty or interest shall continue to constitute a valid lien.

2. Do I have the authority to place these houses on the delinquent sales list after 3 years and sell them just like any other property which is three years delinquent?

If any taxes on the property are delinquent on December 31 following the third anniversary of the date on which such taxes have become due, the property may be sold for tax-collection purposes. See § 58-1117.1. The fact that the United States enjoys an exemption from real property taxation does not limit the availability of methods to enforce payment of delinquent taxes.

3. Do I have the right to rent this type of property in order to collect the taxes?

Section 58-1003 provides, in part, that “[a]ny real estate in the county or corporation belonging to the person or estate assessed with the taxes or levies due on such real estate may be rented or leased by the treasurer, . . . privately or at public outcry, after due publication. . . .” (Emphasis added.) Because the real estate about which you inquire no longer belongs to the person assessed with taxes on such real estate, § 58-1003 does not authorize the rental of the real estate in order to collect delinquent taxes. Your inquiry is therefore answered in the negative.

4. Can these properties be removed from the land books and no taxes collected when a letter from a FHA Supervisor requests that they be so removed?

Once the properties in question have been conveyed to the United States of America, and subject to the limitation of § 58-807 that the land book shall not be altered after a copy thereof has been delivered to the local treasurer, the land book should reflect the fact that the status of the properties has changed from taxable to tax exempt and will continue to be tax-exempt until sold by the United States. See Report of the Attorney General (1967-1968) at 112.

Whether the properties have in fact been conveyed to the United States should be determined by reference to the records in the clerk's office rather than any letter from the FHA Supervisor.

5. In the event that foreclosure takes place and property is deeded to FHA, prior to resale do real estate taxes continue to run against these properties?

No. See Opinion to the Honorable John F. Deekens, Treasurer of Amelia County, dated May 4, 1976, a copy of which is enclosed.

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TAXATION—Real Estate Repossessed By Farmers Home Administration—Exempt from taxation from date of acquisition by United States to date sold to person without tax-exempt status.

COMMISSIONERS OF REVENUE—Tax Rolls Should Reflect Status Of Property Changed From Taxable To Tax-exempt—Continues to be tax-exempt until sold by United States.

TAXATION—Real Property Acquired Then Sold By United States—Portion of year taxable.
May 4, 1976

THE HONORABLE JOHN F. DEEKENS
Treasurer of Amelia County

You have inquired whether certain real estate in Amelia County that has been repossessed by the Farmers Home Administration, United States Department of Agriculture, must be removed from your “tax rolls” until such time as it is resold and, if so, whether the taxes on such realty must be exonerated for the portion of year or years that it is deleted from your records. You advise that there is a deed on record conveying the property in question to the United States government.

The real property about which you inquire is exempt from taxation for the period beginning with the date of its acquisition by the United States and ending with the date of its sale to a person without benefit of a tax-exempt status. See Opinion to the Honorable Philip H. Miller, County Attorney for Augusta County, dated February 27, 1976, a copy of which is enclosed. Its owner on the first day of January in the year in which the property was acquired by the United States is entitled to relief from the payment of the taxes on such property for “that portion of the year . . . from and after the date upon which the title shall be vested in the United States.” Section 58-818 of the Code of Virginia (1950), as amended. Subject to the § 58-807 limitation that the land book shall not be altered after a copy thereof has been delivered to the local treasurer, your “tax rolls” should reflect the fact that the status of the property in question has changed from taxable to tax-exempt and will continue to be tax-exempt until sold by the United States. See Report of the Attorney General (1967-1968) at 112.

TAXATION—Real Estate Taxes—For 1971 are enforceable against estate of life tenant.

August 22, 1975

THE HONORABLE D. PAGE ELMORE
Treasurer of Accomack County

This is in response to your recent request for my opinion whether real estate taxes for the year 1971 may be assessed against a remainderman when a life tenant was living on January 1 of that year and died June 10, 1971.

Section 58-796 of the Code of Virginia (1950), as amended, provides that real estate shall be assessed for each year against the owner thereof on January 1 of such year. Section 58-1024, as amended, effective July 1, 1973, does allow taxes assessed against a life tenant to be enforced against the interest of a remainderman. Prior to July 1, 1973, however, taxes which attached during life tenancies in existence on January 1 were enforceable only against the life tenant because the underlying statutes created no such liability on the remainder estate, with certain exceptions not applicable to Accomack County. See Opinion to the Honorable John F. Deekens, Treasurer for Amelia County, dated April 18, 1975, a copy of which is enclosed. Though there are statutes which do require apportionment of taxes, for example, § 58-818, I am aware of no provision which would have required apportionment of the taxes for the year 1971 between the life tenant and the remainderman because of the death of the life tenant. Based on the foregoing, it is my opinion that the taxes for the year 1971 are enforceable against the estate of the life tenant, but not against the property in the hands of the remainderman.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Real Property Acquired Then Sold By United States—Portion of year taxable.

DEEDS—Date Property Conveyed To Or From United States, Not Date Of Recordation, Is Date Of Delivery.

REAL PROPERTY—Acquired Then Sold By United States—Portion of year taxable.

February 27, 1976

THE HONORABLE PHILIP H. MILLER
County Attorney for Augusta County

You recently inquired as to the taxability of certain real property in Augusta County which, during one calendar year, was acquired and then sold by an agency of the United States. I assume that owners of the property in question, other than the United States, were not entitled to an exemption from real property taxation. I further assume that any owner entitled to relief from real property taxation has taken the steps necessary to obtain such relief.

Section 58-796, Code of Virginia (1950), as amended, provides that the owner of real estate on January the first shall be assessed for the taxes on such real estate for the year beginning on that day. Under § 58-818, any taxpayer whose real property is acquired by the United States is relieved from the payment of taxes on his property "for that portion of the year in which the property shall be so ... acquired from and after the date upon which the title shall be vested in the United States." Section 58-16.1 provides for the immediate taxability on a prorated basis of property sold by a person with a tax-exempt status to a person without such a status.

Based on the foregoing, I am of the opinion that for the calendar year of its acquisition and sale by the United States, the property in question was taxable for the period from January 1st to the date on which it was acquired by the United States and for the period from the date on which it was sold by the United States to December 31st. It should be noted that the date on which the property was conveyed to or from the United States is the date of delivery of the deed of conveyance rather than the date of recordation of such deed.

TAXATION—Recordation—Agreement and Assignment of Rent; contract on sale of duplex; loan from seller—Basis for tax.

June 28, 1976

THE HONORABLE CARL W. HENRICH, Clerk
Circuit Court for the City of Charlottesville

This is in response to your request for my opinion concerning recordation taxes on an "Agreement and Assignment of Rent." This agreement arose out of the sale and purchase, by contract, of land located in Albemarle County. In this contract of sale, which was not recorded, the buyers agreed, as consideration for the property, to pay a deposit, assume an existing mortgage not owned by the seller and pay the remaining balance of the purchase price, approximately $12,300, in cash. The sales contract further stipulated that this cash was to be derived from the sale of a duplex then owned by the buyers located in the City of Charlottesville. If, however, the buyers were unable to sell the duplex within a specified time, the seller agreed to:

"... finance the balance of approximately $12,300.00 for one year or until said duplex is sold, whichever occurs first. ... At the end of one year if this loan has not been repaid then Seller agrees to convert said loan to an installment loan. ..."
"Should it be necessary to obtain the above loan or loans from Seller, the Buyers agree to give Seller a valid second lien [on the land purchased from the seller] ... and also Buyers agree to execute and deliver to Seller a Real Estate Agreement and Assignment of Rents [on the buyers’ Charlottesville duplex]...."

The buyers were forced to obtain the loan from the seller; consequently, the “Real Estate Agreement and Assignment of Rent” contract on the Charlottesville duplex was executed. In an attempt to protect its interest in the duplex, the seller desired to record the assignment contract in Charlottesville.

Section 58-58 of the Code of Virginia (1950), as amended, provides that a recording tax shall be assessed as follows:

"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..."

The contract in question, even though one of assignment, falls within this section for it deals with real property, the buyers’ Charlottesville duplex. See Report of the Attorney General (1972-1973) at 434; (1966-1967) at 297; (1955-1956) at 217. Therefore, unless this contract is exempted, a recordation tax must be assessed. Section 58-60 provides the only exemption which could be applicable in this case. This exemption is for supplemental writings when the original writing has been recorded. Without considering whether the agreement in question is supplemental to the contract relating to the sale of the property in Albemarle County, the exemption clearly does not apply in this instance since that contract for the Albemarle property, the “original” contract, has not been admitted to record and no tax has been paid as required by § 58-60.

Since the contract of assignment is not exempt, a recordation tax must be assessed on “the consideration or value contracted for” as required by § 58-58. By the terms of the contract of sale for the Albemarle property, the buyers agreed to make an assignment of rent on their Charlottesville property if it became necessary for the seller to finance the cash payment the buyers by contract agreed to make. Therefore, in my opinion the amount of any loan made in exchange for the assignment of rents including both principal and interest is the “consideration and value contracted for” (see Report of the Attorney General (1969-1970 at 281) and subject to a tax of fifteen cents on every hundred dollars or fraction thereof.

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TAXATION—Recordation—Applicable to condemnation orders under § 25-46.27; not to court orders under § 33.1-129.

CONDEMNATION—Court Order Entered Under Virginia General Condemnation Act Recorded In Deed Book, Subject To Taxation.

HIGHWAYS—Certificate Filed In Lieu Of Condemnation—Vests title to property in State.

TAXATION—Former Federal Documentary Stamp Tax Continued As State Recordation Tax.

September 11, 1975

THE HONORABLE C. E. KING, JR., Clerk
Circuit Court of Gloucester County

I have received your letter inquiring whether the tax imposed by § 58-54.1, Code of Virginia (1950), as amended, applies to the recordation of
court orders pursuant to § 25-46.27 in proceedings under the Virginia General Condemnation Act (§ 25-46.1, et seq.) and court orders pursuant to § 33.1-129 confirming indefeasible title in the Commonwealth following an agreement between the former landowner and the State Highway and Transportation Commissioner.

Section 33.1-119, et seq., provides authority for the State Highway and Transportation Commissioner to acquire possession and title to property prior to or during the pendency of ordinary condemnation proceedings upon the recordation of a certificate of taking in the clerk's office which operates to vest in the Commonwealth all right, title and interest of the owner in the property. See Norfolk S.R.R. v. American Oil Co., 214 Va. 194 (1975). This title, however, is defeasible until the Commissioner and the owner have reached an agreement as to compensation for the property pursuant to § 33.1-129, or until such compensation has been determined by condemnation proceedings. See § 33.1-122. If an agreement is reached prior to the institution of ordinary condemnation proceedings, the Commissioner files a copy of the agreement and his petition reciting the agreement and seeking a court order confirming absolute and indefeasible title to the property in the Commonwealth, which order is recorded in the deed book. See § 33.1-129. If condemnation proceedings are pending at the time of such agreement, the Commissioner makes a motion for dismissal reciting the agreement and a similar order is entered and recorded. See § 33.1-129. The Commissioner may elect not to proceed under the provisions of § 33.1-119, et seq., and instead institute an ordinary condemnation proceeding under the Virginia General Condemnation Act, § 25-46.1, et seq., in which case the court's order is recorded at the conclusion of such proceeding in the deed book pursuant to § 25-46.27.

Section 58-54.1 imposes a tax "on each deed, instrument, or writing by which any lands, tenements or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest exceeds one hundred dollars. . . ." This tax was adopted coincident with the repeal of § 4361, Internal Revenue Code of 1954, as amended, (26 U.S.C.A., § 4361) and was designed to continue the former federal documentary stamp tax as a State recordation tax. See Report of the Attorney General (1970-1971) at 379. The quoted imposition language of § 58-54.1 is identical to that formerly contained in § 4361 insofar as is pertinent to your inquiry.

The State Tax Commissioner instructed the clerks of circuit courts by letter dated May 23, 1968, a copy of which I enclose, that the tax applied to "(5) A conveyance of realty by or pursuant to a judgment or decree in a condemnation proceeding under the power of eminent domain, or a conveyance of such property under threat of imminence of such proceeding." This administrative interpretation of the statute is the same as that contained in the treasury regulation promulgated under § 4361 (Treas. Reg. § 47.4361-2(a)(5) (1962)) and is entitled to be given great weight in ascertaining the proper scope of § 58-54.1. See Commonwealth v. Progressive Community Club, 215 Va. 732 (1975).

A court order entered pursuant to the Virginia General Condemnation Act is a "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 . . ." within § 25-46.27 is, in my opinion, subject to the tax. A court order pursuant to § 33.1-129, however, does not convey or vest title in the Commonwealth, but merely confirms as indefeasible the defeasible title acquired upon the recordation of the certificate under § 33.1-122. See § 33.1-129. The recordation of the certificate vests title in the Commonwealth. See Report of the Attorney General (1972-1973) at 217-19. Accordingly, I am of opinion that the § 58-54.1 tax is not applicable
to a § 33.1-129 order, but should be paid upon the recordation of the § 33.1-122 certificate.

TAXATION—Recordation—Applicable to deed being transferred to purchaser by title holder upon value of property when no consideration involved—Section 58-54.1 tax not applicable.

DEEDS—Recordation—Tax based upon value of property when no consideration involved—Applicable to deed being transferred to purchaser by title holder.

TAXATION—Recordation—When transfer of real estate not subject to tax.

October 15, 1975

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

I have received your recent letter from which I quote:

"Purchaser of real estate paid the entire consideration and recording costs of deed. Title was taken in the name of Shore Title Company, a Corporation, which had no interest in the property, but was for purchaser's convenience acting as a straw man or nominee. Now the purchaser wishes the Shore Title Company to convey the property back to him and there will be no consideration passing.

"The question has been raised as to whether or not the purchaser must now pay the recording tax imposed by section 58-54 due on the deed from Shore Title Company to the actual purchaser and also whether the additional tax imposed by section 58-54.1 is due."

Section 58-54 imposes a tax upon the recordation of "every deed, except a deed exempt from taxation by law." The tax is computed upon "the consideration of the deed or the actual value of the property conveyed, whichever is greater." Where there is no consideration for the transfer, the actual value of the property conveyed is the measure of the tax. See Opinion to the Honorable Rudolph L. Shaver, Clerk of the Circuit Court of Augusta County, dated July 8, 1974, a copy of which is enclosed. The tax imposed by § 58-54 is not a tax upon property or its transfer, but is a tax on the civil privilege of availing oneself of the benefits and advantages of the registration laws of the Commonwealth. Pocahontas Collieries Co. v. Commonwealth, 113 Va. 108, 73 S.E. 446 (1912). This tax applies to a deed conveying property from a settlor to a trustee (see Shaver Opinion, supra) and from a trustee to a beneficiary. See Report of the Attorney General (1972-1973) at 431 and Opinions cited therein. Although exemptions from the tax imposed by § 58-54 are provided by §§ 58-61 and 58-64, none is applicable to the facts under consideration. Accordingly, I am of the opinion that the tax imposed by § 58-54 is applicable and that the amount is determined by the actual value of the property as of the time of the conveyance.

Section 58-54.1 imposes a tax upon a deed "by which any lands, tenements or other realty sold shall be granted. . . ." (Emphasis added.) In the absence of consideration for the transfer, the tax does not apply. See Opinion to the Honorable Walter M. Edmonds, Clerk of the Circuit Court of the City of Portsmouth, dated May 28, 1975, a copy of which is enclosed, and Opinions cited therein. Your recitation of the facts indicates that there was no consideration for the deed, and, therefore, the tax imposed by § 58-54.1 does not apply.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation Of Amended Deed Of Trust Is Taxable—Agreement to extend due date for payment of notes.

DEED OF TRUST—Recordation Of Amended Deed Of Trust Is Taxable—Agreement to extend due date for payment of notes.

RECORDATION—Amended Deed Of Trust Is Taxable—Agreement to extend due date for payment of notes.

March 31, 1976

THE HONORABLE H. C. DEJARNETTE, Clerk
Circuit Court of Orange County

You have inquired whether a certain instrument offered for recordation in your office is subject to the tax imposed by § 58-55, Code of Virginia (1950), as amended, or whether it is exempt from such tax pursuant to § 58-60. The instrument in question, self-described as an “Amended Deed of Trust” and dated February 20, 1976, refers to a properly recorded deed of trust, dated May 31, 1974, securing a debt of $138,000.00 represented by four “Deed of Trust Notes” payable no later than February 28, 1975. It then recites as follows:

"WHEREAS, the said Deed of Trust was to mature on February 28, 1975, and the Beneficiary on the said Notes extended the payment dates on Note No. 1 . . . and Note No. 2 . . . as more specifically described in the said instrument until the 30th day of April, 1976,

"Now, THEREFORE, this Amended Deed of Trust WITNESSETH:

"In consideration of the premises aforesaid and the sum of One Dollar ($1.00), cash in hand paid, the parties hereto agree that the payment of Note No. 1 and Note No. 2 of the aforesaid Deed of Trust as hereinabove described is hereby extended to the 30th day of April, 1976, but in all other respects, the terms and conditions of the Deed of Trust . . . shall remain unchanged and in full force and effect."

Both § 58-55 and § 58-60 are limited in applicability to instruments conveying property as security for the payment of an indebtedness. Because the instrument about which you inquire does not convey or purport to convey property, in trust or otherwise, it is neither subject to the tax imposed by § 58-55 nor exempt from recordation taxes pursuant to § 58-60. The instrument in question constitutes, in substance, an agreement to extend the due date for payment of two of the four notes secured by the deed of trust dated May 31, 1974. In my opinion, such an agreement or contract is sufficiently related to real property to be taxable, upon recordation, pursuant to § 58-58. Cf. Report of the Attorney General (1926-1927) at 249.

TAXATION—Recordation Of Deed Of Trust Securing Revolving Line Of Credit—Basis for computing tax.

DEED OF TRUST—Basis For Computing Tax For Recordation Of Deed Securing Revolving Line Of Credit.

RECORDATION—Deeds Of Trust Or Mortgages—Covenants do not cause amount secured by deed of trust to be unascertainable.

February 27, 1976

THE HONORABLE EDITH H. PAXTON, Clerk
Circuit Court of the City of Staunton

You have inquired as to the proper basis for computing the tax imposed by § 58-55, Code of Virginia (1950), as amended, upon the recordation of a
deed of trust given to secure the payment of a loan in the principal sum of $11,000.00 and to further secure additional sums advanced by the lender to the borrower provided that at any one time the total of all such additional sums and the balance due on the original loan does not exceed $11,000.00.

Section 58-55 provides, in 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. In any case in which the amount which may be secured under a deed of trust or mortgage is not ascertainable, the tax shall be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust or mortgage, but including the value of any realty required by the terms of the deed of trust or mortgage to be constructed thereon."

The deed of trust in question secures a revolving line of credit under which the dollar amount of the loan obligation could theoretically over the life of the deed of trust, although not at any one moment of time, be limitless. In this situation, the amount to be secured by the deed of trust is unascertainable. See Report of the Attorney General (1971-1972) at 322. Accordingly, I am of the opinion that the recordation tax should be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust.

TAXATION—Recordation Tax—Amount secured under deed of trust on loan not ascertainable; tax based on fair market value of property.

DEED OF TRUST—Recordation Tax—Amount secured under deed of trust on loan not ascertainable; tax based on fair market value of property.

January 20, 1976

THE HONORABLE GLORIA H. MORGAN, Clerk
Circuit Court of the City of Suffolk

In your recent letter you inquire as to the proper basis for computing the tax imposed by § 58-55, Code of Virginia (1950), as amended, upon a certain deed of trust offered for recordation in your office. The deed of trust states that:

"WHEREAS, the Grantors are indebted to the Beneficiary for money previously loaned for which the Grantors and others have executed and delivered to the Beneficiary the following instruments, to-wit: Note and Security Agreement of . . ., dated July 7, 1972, the amount of $40,500.00 payable as set forth therein, with an unpaid balance on said note $6,451.86 as of July 11, 1975; and

"WHEREAS, the Grantors have agreed to secure said debt and interest (together with any future advances) and the undertakings prescribed in said instruments and this Deed of Trust by the conveyance of the premises hereinbefore described:

"NOW, THEREFORE, in consideration of the aforesaid loan, the Grantors do hereby grant and convey to the Trustees, their successors and assigns, with GENERAL WARRANTY, . . . [a parcel of real property] . . . IN TRUST to secure to . . . [the beneficiary] . . . the payment of the debt and other undertakings, described in the hereinabove mentioned instruments."

Your letter indicates that the deed of trust is the only instrument relating to any loan transaction between the grantors and the beneficiary that has been offered for recordation in Virginia. Your inquiry is whether the re-
cordation tax imposed by § 58-55 "should be paid on the amount of $40,500.00, or on the amount of $6,451.86."

Section 58-55 provides, in 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. In any case in which the amount which may be secured under a deed of trust or mortgage is not ascertainable, the tax shall be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust or mortgage, but including the value of any realty required by the terms of the deed of trust or mortgage to be constructed thereon."

The deed of trust in question purports to secure not only money previously loaned but also "any future advances," which would presumably be made by the beneficiary in favor of the grantors. Since it is impossible to know at the time the deed of trust is offered for recordation whether future advances will be made and, if so, in what amounts, the amount which may be secured under the deed of trust is not ascertainable. Accordingly, I am of the opinion that the tax imposed by § 58-55 upon recordation of the deed of trust should be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust.

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 only if it states therein that it is a deed of gift.

DEEDS—Taxation—Deed of gift must so state therein to be exempt from recordation tax.

RECORDATION—Deed Of Gift Must So State Therein To Be Exempt From Tax.

April 20, 1976

THE HONORABLE CARL E. HENNRICH, Clerk
Circuit Court of the City of Charlottesville

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

"We enclose copy of a deed conveying property with nominal consideration from Thomas M. Bibb, Jr. and Janeth R. Slusher as tenants in common to Thomas M. Bibb, Jr. and Janeth S. Bibb as tenants by the entirety, the parties in the meantime having married. The attorney submitting the deed for recording states there is no gift involved and he refused to state in the deed that it is a deed of gift, as required by Code Section 58-61 to exempt the deed from recording taxes. He also refused to pay recording taxes. He cited your opinion of May 23, 1973, to James F. Tobey, Clerk of the Circuit Court for the City of Salem and the opinion of a former Attorney General to S. L. Farrar, Jr., Clerk of the Circuit Court of Amelia County, dated January 25, 1965, as authority for his position.

"We have been taxing every deed, except those specifically exempt, as provided in Section 58-54. Since Section 58-61 exempts deeds of gift when the deed ‘shall state therein that it is a deed of gift,’ and the attorney in this case refuses to so state, your opinion is requested as to whether the enclosed deed is subject to recording tax."

Section 58-60, Code of Virginia (1950), was amended by Chapter 250, [1972] Acts of Assembly 283, to specifically require that any deed of gift
exempt from the recordation tax "shall state therein that it is a deed of gift." Because the deed enclosed with your letter fails to so state, it is not within the scope of the exemption provided by § 58-60. The two Opinions cited by the attorney offering the deed for recordation are inapposite. The Opinion to the Honorable S. L. Farrar, Jr., Clerk of Circuit Court of Amelia County, dated January 25, 1965, and found in Report of the Attorney General (1964-1965) at 285, was issued prior to the 1972 amendment to § 58-60 that controls the disposition of the present inquiry. The Opinion to the Honorable James F. Tobey, Clerk, Circuit Court for the City of Salem, dated May 23, 1973, and found in Report of the Attorney General (1972-1973) at 436, proceeds on the assumption that the deed conveying property from a husband and wife as tenants by the entirety with right of survivorship to the same individuals as tenants in common stated therein that it was a deed of gift, an assumption that is contradicted by the facts in this instance.

Section 58-54 imposes a tax "[o]n every deed, except a deed exempt from taxation by law, which is admitted to record. . . ." Exemptions from this tax are provided by §§ 58-55.1, 58-56, 58-57, 58-61 and 58-64, none of which is applicable in to your inquiry. I am, therefore, of the opinion that deed about which you inquire is taxable upon recordation pursuant to § 58-54.

TAXATION—Recordation Tax—Deed of exchange transfers interest in one property from father to son, and interest in another property from son to father.

DEEDS—Taxation—Deed of exchange transfers interest in one property from father to son, and interest in another property from son to father.

REAL ESTATE—Deed of Exchange—Transfers interest in one property from father to son, and interest in another property from son to father.

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.

TAXATION—Recordation Tax—When transfer of real estate not subject to. May 13, 1976

THE HONORABLE D. L. PARRISH, JR., Clerk
Circuit Court of Goochland County

This is in response to your letter inquiring as follows:

"I have for recording a Deed of Exchange, a copy of which I am herewith enclosing, in which the Attorney advises the State Tax is $0.50. However I am told the property in Goochland County has been appraised at $116,000.00, and the Matthews County property at $10,000.00. It is my contention since both parties are owners of the property, the property in Goochland should be taxed on one-half of the value which is $58,000.00 less the value of the Matthews county property, which would be $48,000.00 on which the state and local tax would be charged. Since no money was passed between the parties would there be a Grantor tax?"

The deed of exchange about which you inquire recites that, by separate deeds, a parcel of property in Goochland County and a parcel of property in Mathews County were conveyed to a father and his son as joint tenants with right of survivorship, and that the father and son "desire to exchange between themselves a one-half interest in each respective parcel so that the said . . . [father] . . . will own in fee simple the entire said parcel lying in Mathews County, Virginia and the said . . . [son] . . . will own in
fee simple the entire parcel lying in Goochland County, Virginia." The deed further recites that "for and in consideration of the sum of TEN DOLLARS ($10.00), and of other good and valuable considerations, the receipt whereof is hereby acknowledged, and of the premises hereinabove set forth," the father and his wife convey to the son an undivided one-half interest in the Goochland County property, and that "for and in like consideration," the son and his wife convey to the father an undivided one-half interest in the Mathews County property.

A joint tenancy with rights of survivorship is severable by one joint tenant's unilateral transfer of his interest in the jointly-held property. See Leonard v. Boswell, 197 Va. 713, 721, 90 S.E.2d 872, 877-78 (1956) (dictum); and Virginia Coal & Iron Co. v. Hylton, 115 Va. 418, 421, 79 S.E. 337, 338 (1913) (dictum). Under § 55-5, Code of Virginia (1950), as amended, which provides that "[a]ll real estate shall as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as livery," and § 55-6, which provides, in relevant part, that "[a]ny interest in or claim to real estate, including easements in gross, may be disposed of by deed or will," a conveyance by a joint tenant to his cotenant, though not complying with the common law requirements of a release, operates to transfer his interest in the jointly-held property. See 2 Minor on Real Property (2 ed. Ribble) § 845. Thus, the deed of exchange about which you inquire operates to transfer an undivided one-half interest in the Goochland County property from the father to the son, and an undivided one-half interest in the Mathews County property from the son to the father. The effect of these transfers is to partition the two jointly-held parcels of property between the father and the son. I am, therefore, of the opinion that the recordation of the deed of exchange should result in the imposition of fifty cents tax pursuant to § 58-57. See Report of the Attorney General (1972-1973) at 436 (a deed or deeds by which a husband and wife convey one of the two parcels of property held by them as tenants by the entirety to the husband and the other parcel to the wife taxed as a deed or deeds of partition pursuant to § 58-57).

Section 58-54.1 imposes a tax upon a deed "by which any lands, tenements or other realty sold shall be granted. . . ." (Emphasis added.) In the absence of consideration for the transfer, this tax does not apply. See Report of the Attorney General (1974-1975) at 517. The substance of the transaction currently in question is that each transfer of an undivided one-half interest in real property constitutes consideration for the other. In effect, the father has sold his interest in the Goochland County property for his son's interest in the Mathews County property, and vice versa. Thus, the grantor's tax imposed by § 58-54.1 applies even though no money has passed hands between the parties. The amount of the tax must be determined by an application of actuarial principles and will vary depending on the ages of the father and the son.

TAXATION—Recordation Tax—Local tax on deed of trust conveying property located in two jurisdictions computed on portion of debt equal to value of property in each jurisdiction divided by total value of property conveyed.

TAXATION—Recordation—Tax for recording deed of trust should be computed in accordance with § 58-65.1.

July 25, 1975

THE HONORABLE C. M. GIBSON, Clerk
Circuit Court of the City of Hampton

This is in response to your recent request for my opinion relating to the local recordation tax due upon a deed of trust conveying properties located
REPORT OF THE ATTORNEY GENERAL

in two separate jurisdictions. You state that a deed of trust securing an obligation in the principal amount of $500,000 was first recorded in the City of Newport News where the conveyed property was valued at approximately $1 million. The deed was then offered for recordation in the City of Hampton where the conveyed property was valued at approximately $50,000. You state that the Clerk's Office of the City of Newport News collected the local recordation tax on the full $500,000. You ask whether the City of Hampton may collect a local recordation tax under § 58-65.1 of the Code of Virginia (1950), as amended, and how the amount should be computed.

Section 58-65 provides for a State recordation tax on deeds of trust. Section 58-62 provides that this tax is collected in the office of first recordation only. Section 58-65.1 permits cities to impose a local recordation tax in a stated amount, and further provides:

"... where a deed or other instrument conveys, covers or relates to property located in the county or city of first recordation and also to property located in another county or city, or in other counties or cities, the tax imposed under the authority of this section by the county or city of first recordation shall be computed only with respect to the property located in such county or city; and when such deed or other instrument is recorded in the other county or city, or in other counties or cities, the tax imposed by each of them under the authority of this section shall be computed only with respect to the property located in each of them, respectively."

The quoted language permits each city to base its local recordation tax on that part of the debt which bears the same ratio to the total debt that the value of the property located in that city bears to the value of all property conveyed by the deed of trust. Similarly, the city of second recordation may collect a tax based on the portion of the secured obligation which the value of the property located therein bears to the total value of the property so conveyed. See Report of the Attorney General (1963-1964) at 300-301. In the present case, the Cities of Hampton and Newport News are entitled to collect recordation taxes computed as follows:

Newport News: $1,000,000/$1,050,000 x $500,000 = $476,190 x tax rate = tax
Hampton: $50,000/$1,050,000 x $500,000 = $23,810 x tax rate = tax

TAXATION—Recordation Tax—Tenants in common transferred their interest by deed to themselves as joint tenants with right of survivorship—Deed does not specify deed of gift; not exempt.

DEEDS—Deed Of Gift Must So Specify To Be Exempt From Recordation Tax.

DEEDS—Devised To Life Tenant With Remainder In Fee Simple To Tenants In Common—Transfer of their interest by deed to themselves as joint tenants after life tenant's death, not exempt from recordation tax.

TAXATION—Recordation—When transfer of real estate not subject to tax.

June 15, 1976

THE HONORABLE MARIE G. FLANAGAN
Clerk, Circuit Court for Wythe County

This is in response to your request for my opinion concerning recordation taxes on a deed. The property deeded was originally devised to a life tenant.
with a remainder in fee simple in X and Y. The life tenant died. The tenants in common, X and Y, transferred their interest by deed to themselves as joint tenants with a right of survivorship. The parties declined to pay the recordation tax assessed claiming that the deed was tax exempt.

Section 58-54 of the Code of Virginia (1950), as amended, levies a tax as follows:

"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."

The only available exemption for this particular deed is found in § 58-61 of the Code of Virginia (1950), as amended. This section no longer exempts conveyances that are only a change in tenancy. Chapter 361, [1964] Acts of Assembly 571; Chapter 461, [1952] Acts of Assembly 744. Further amendments in 1970 and 1972 deleted all reference to deeds between specific related parties. Chapter 420, [1970] Acts of Assembly 639; Chapter 250, [1972] Acts of Assembly 283. Currently § 58-61 exempts a "deed of gift between 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." See Report of the Attorney General (1972-1973) at 436. The deed in question does not specify that it is a deed of gift and, therefore, it is not exempt. Other possible exemptions provided by §§ 58-55.1, 58-56, 58-57, 58-60, 58-61 and 58-64 of the Code of Virginia (1950), as amended, are not applicable to the present facts.

Based on the foregoing, it is my opinion that a recordation tax is assessable under § 58-54 on the "consideration of the deed or the actual value of the property conveyed, whichever is greater." See Report of the Attorney General (1974-1975) at 516 and 517. Since the deed in question recites only nominal consideration, the tax should be assessed against the actual value of whatever property is conveyed. The property conveyed in this case was the entire fee simple and, hence, its total value is taxable.

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TAXATION—Recordation Tax—Transfer of property from wholly-owned subsidiary to its parent corporation which had constructed plant thereon.

DEEDS—Recordation—Tax—Transfer of property from wholly-owned subsidiary to its parent corporation which had constructed plant thereon.

RECORDATION—Transfer Of Property From Wholly-owned Subsidiary To Its Parent Corporation—Tax based on consideration of deed or value of property, whichever greater.

TAXATION—Recordation—When tax is based on actual value of property conveyed.

TAXATION—Recordation—When transfer of real estate not subject to tax.

February 5, 1976

THE HONORABLE H. C. DEJARNETTE, Clerk
Circuit Court of Orange County

You have requested an opinion on the extent to which a proposed transfer of certain property from a wholly-owned subsidiary to its parent corporation would be subject to the recordation taxes imposed by §§ 58-54, 58-54.1, Code of Virginia (1950), as amended. In 1973, the subsidiary acquired, at a price of $115,250.00 and for the purpose of providing a site for the construction of a plant by its parent corporation, a tract of ap-
proximately 152 acres of land located in Orange County, Virginia. On this land, the parent corporation subsequently constructed a plant costing several million dollars. It is now proposed to have title to the land transferred from the subsidiary to the parent in a transaction that does not qualify for income tax treatment pursuant to Internal Revenue Code of 1954, §§ 331, 332, 333 or 337. Anticipating the transfer, you inquire whether the tax imposed by § 58-54 upon recordation of a deed transferring title from the subsidiary to the parent would be measured by the actual value of the approximately 152 acres of land or by the actual value of the land and the plant constructed thereon, and whether § 58-54.1 would apply to the transfer. I assume that the subsidiary would not receive any consideration for transferring to its parent corporation title to the land in question.

With exceptions that are inapplicable under the facts of the instant case, § 58-54 imposes a tax "[o]n every deed . . . which is admitted to record...." If no consideration is given for the deed, the tax imposed by § 58-54 should be computed upon the actual value of the property conveyed. See Report of the Attorney General (1974-1975) at 516. In this case, it appears that the plant erected by the parent corporation on the land acquired by the subsidiary has become attached to and a part of the real estate and would therefore follow the conveyance of the legal title to the realty. See Report of the Attorney General (1963-1964) at 301. I am, therefore, of the opinion that the proper measure for the recordation tax imposed by § 58-54 would be the actual value of the tract of land and the plant erected thereon.

Section 58-54.1 imposes a tax upon a deed "by which any lands, tenements or other realty sold shall be granted. . . ." (Emphasis added.) In the absence of consideration for the transfer, this tax does not apply. See Report of the Attorney General (1974-1975) at 517. Therefore, the tax imposed by § 58-54.1 would not be payable in this case.


COMMISSIONERS OF REVENUE—Erroneous Real Property Assessment—May be corrected pursuant to § 58-1142; refund limited to two years.

COMMISSIONERS OF REVENUE—Real Estate Assessment—Commissioner may correct assessment on property found to have less acreage than shown on deed, if plat is recorded.

ORDINANCES—Taxation—Alternative method of effecting refund of real estate taxes erroneously assessed.

TAXATION—Real Property—Erroneous assessment of real property tax may be corrected by commissioner of revenue—Two year refund limitation under § 58-1142.

TAXATION—Refund Subject To Seven-year Limitation.

TAXATION—Severance Tax Refund Of Taxes Erroneously Collected.

TREASURERS—Tax Refund—Circuit Court may order refund of amount erroneously charged; county treasurer required to refund.

THE HONORABLE LLOYD O. JONES
Treasurer for Charles City County

You have inquired whether the County of Charles City should refund any of the taxes paid on a certain tract of land and, if so, for how many years. The property in question was bought on the basis that it contained
100 acres “more or less” and was later surveyed and found to contain only 50 acres. I assume that the surveyor’s plat of the property has been recorded in the appropriate clerk’s office and that the commissioner of the revenue is satisfied as to its accuracy.

Any assessment of real estate taxes made by the commissioner of the revenue on the basis of an incorrect amount of acreage is erroneous. See Report of the Attorney General (1972-1973) at 85. If the taxpayer timely applies for a correction of the erroneous assessment, and if the commissioner of the revenue is satisfied that he has erroneously assessed such taxpayer, the commissioner shall correct such assessment. See §§ 58-1141, -1142, Code of Virginia (1950), as amended. Once the assessment has thus been corrected, the governing body is required by § 58-1142, upon the certificate of the commissioner with consent of the Commonwealth’s Attorney that such assessment was erroneous, to direct the county treasurer to refund to the taxpayer, subject to a two-year limitation, the amount of taxes erroneously paid on nonexistent acreage. See Report of the Attorney General (1974-1975) at 507. Because of the two-year limitation, any amount refunded during the current calendar year, may not include real estate taxes erroneously assessed and paid for calendar years prior to 1974.

An alternative method of effecting a refund is available if the governing body has, in accordance with the provisions of § 58-1152.1, passed an ordinance providing for the refund of any local levies or classes of levies where such payment has been determined by such governing body or by judicial action to be erroneous. See Report of the Attorney General (1972-1973) at 446. In that event, and in the event the commissioner of the revenue is satisfied that he has erroneously assessed the taxpayer with real estate taxes, § 58-1152.1 requires the commissioner to certify to the tax-collecting officer the amount erroneously assessed and, subject to a seven-year limitation, requires the tax-collecting officer to refund the amount erroneously paid, together with any penalties and interest paid thereon. As a result of the seven-year limitation, a refund made pursuant to § 58-1152.1 during the current calendar year may not include real estate taxes erroneously assessed and paid for calendar years prior to 1968.

In addition to any refund alternatives available under § 58-1142 or § 58-1152.1, the Circuit Court of the County of Charles City may, upon application by the taxpayer in accordance with the provisions of § 58-1145, correct an erroneous assessment and order a refund of the amount erroneously charged. See § 58-1148. In that event, the county treasurer is required by § 58-1150 to refund the amount specified in the order.

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**TAXATION—Secrecy Of Tax Matters**—Not violated by revealing to county treasurer previously-filed personal property return of taxpayer to determine taxpayer's liability.

**COMMISSIONERS OF REVENUE—Authority**—Transfer of personal property tax return to treasurer to collect disputed tax.

**TAXATION—Secrecy Of Information**—Prohibition in § 58-46 does not apply to act performed in line of duty under law.

**TREASURERS—Authority Of Commissioner Of Revenue To Transfer Personal Property Tax Return To Treasurer To Collect Disputed Tax.**

June 30, 1976

**The Honorable Frances A. Foster**
Treasurer for Rappahannock County

This is in response to your request for my opinion whether a county treasurer may inspect the previously-filed personal property return of a
taxpayer when there is a question concerning the taxpayer’s liability.

Section 58-46 of the Code of Virginia (1950), as amended, provides:

“... it shall be unlawful for ... any ... commissioner of the revenue, treasurer ... or any other ... local tax or revenue officer or employee to divulge any 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.”

The prohibition contained in § 58-46 does not apply to “any act performed or words spoken or published in the line of duty under law ...”. In your jurisdiction, personal property tax returns are filed with the commissioner of revenue. Under § 58-864, the commissioner is required to assess the fair market value of all nonexempt personal property. Section 58-958 requires the treasurer to collect all taxes payable into the treasury of the political subdivision he serves. In light of the complementary nature of these duties, the transfer of a personal property tax return to a treasurer by a commissioner in an attempt to collect a disputed tax is an “act performed or words spoken or published in the line of duty under the law. . .”. See Report of the Attorney General (1974-1975) at 524.

Your second question concerns whether a copy of the return can be sent to the taxpayer in order to prove to him that he filed the return and a tax was due. Since the purpose of § 58-46 is to protect the taxpayer from disclosure of confidential information to third parties, no violation of that section arises from sending a copy of the return back to him.

TAXATION—Tangible Personal Property—Cargo containers taxable in proportion to their average presence in locality.

COMMISSIONERS OF REVENUE—Authority To Tax Cargo Containers Owned By Foreign Shipping Line—Taxable in proportion to their average presence in locality.

DEFINITIONS—Cargo Containers Do Not Constitute Part Of The Vessel For Exception To Situs Provisions For Taxing.

August 8, 1975

THE HONORABLE GEORGE H. HEILIG, JR.
Member, House of Delegates

I have received your letter inquiring whether the Commissioner of Revenue of the City of Norfolk has the authority to assess tangible personal property taxes upon cargo containers owned by a foreign shipping line which are located in the city. The containers are permanent, reusable articles of transport equipment durably made of metal and equipped with doors for easy access to the goods carried inside. They are designed to facilitate the handling, loading, stowage aboard ship, carriage, unloading and delivery of large numbers of packages of goods contained within, thus minimizing the costs and risks of transporting each package individually.

Article X, Section 1, of the Constitution of Virginia (1971), provides that “[a]ll property, except as hereinafter provided, shall be taxed.” This mandate is not self-executing and legislation is necessary to carry it into effect. Prince William v. Thomason Park, 197 Va. 861, 867 (1956). Section 58-9, Code of Virginia (1950), as amended, provides that all taxable tangible personal property is segregated and made subject to local taxation, and § 58-864 requires each commissioner of revenue to ascertain and assess all personal property not exempt from taxation in his county or city, on the first day of January in each year, except as otherwise provided by law.
Section 2(1) of the Norfolk City Charter, Chapter 34, [1918] Acts of Assembly 33, authorizes the city to raise annually by taxes and assessments such sums as the council shall deem necessary for the purposes of the city, in such manner as the council shall deem expedient, and in accordance with the Constitution and laws of Virginia and the United States.

The foregoing provisions clearly justify the assessment of tangible personal property by the city. See East Coast Freight Lines v. City of Richmond, 194 Va. 517, 521 (1953). Cargo containers are tangible personal property and, unless exempted must be assessed and subjected to the Norfolk personal property tax, if they have acquired a tax situs within the city. Although certain exemptions from taxation are provided by and pursuant to Article X, Section 6, of the Virginia Constitution, I am not aware of any exemption applicable to the property under consideration.

Section 58-834 establishes the situs for the assessment of tangible personal property as “the county, district, town or city in which such property may be physically located on the first day of the tax year. . . .” This statute was interpreted in Hogan v. County of Norfolk, 198 Va. 733, 735 (1957), as follows:

“"The situs for taxation as used in this statute means something more than simply the place where the property is. It does not mean property which is casually there or incidentally there in the course of transit, but it does not necessarily involve the idea of permanent location like real property. It is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county.”

Section 58-834.1 provides an exception to the situs provisions but the exception is limited to “vessels” and has no application to cargo containers which do not constitute a part of the vessel.

In Sea-Land Service, Inc., v. County of Alameda, 528 P.2d 56 (Cal. 1974), the court found that the habitual presence of cargo containers created a taxable situs even though the identical containers were not there every day and none of the containers was continuously within the county. The court quoted from Braniff Airways v. Nebraska Board, 347 U.S. 590, 603 (1954), that “[p]roperty in transit may move so regularly and so continuously that part of it is always in the state. Then the fraction, but no more, may be taxed ad valorem.”

Although any particular container may be incidentally in Norfolk in the course of transit, the average presence rule applied in Braniff and Sea-Land is, in my opinion, equally applicable in Virginia, and accordingly containers may be taxed in Norfolk in proportion to their average presence in that city.

TAXATION—Tangible Personal Property—Motor vehicles owned by Rooftop of Virginia Community Action Program, not exempt.

MOTOR VEHICLES—Owned By Rooftop Of Virginia Community Action Program Are Not Tax Exempt Personal Property.

December 3, 1975

THE HONORABLE HENRY L. PUCKETT
Commissioner of Revenue for the City of Galax

I have received your letter inquiring whether personal property owned by Rooftop of Virginia Community Action Program, a Virginia nonstock, nonprofit corporation, is exempt from personal property taxation. The corporation owns two motor vehicles for which it seeks an exemption.
The corporation's purposes, as stated in its Articles of Incorporation, *inter alia*, are “[t]o promote the development of the social, economic, educational and spiritual life of the communities of Carroll County, Grayson County, and the City of Galax, Virginia” and “[t]o provide stimulation and incentive for [such] communities to mobilize their resources to combat poverty through community action program.”

Property tax exemptions are provided by §§ 58-12 to -12.42, Code of Virginia (1950), as amended, pursuant to Article X, Section 6, of the Constitution of Virginia (1971). None of the general exemptions provided by Section 6(a)(1) through Section 6(a)(5) of the Virginia Constitution is applicable to the corporation, nor has the General Assembly acted pursuant to Section 6(a)(6) to exempt its property. Section 6(f) provides that all property exempt on the effective date of the revised Constitution shall continue to be exempt until otherwise provided by the General Assembly. Exemptions continuing pursuant to this subsection are contained in § 58-12 of the Code. The only exemption arguably applicable to Rooftop is that found in § 58-12(6) for “benevolent or charitable association[s],” but it is limited to “[b]uildings with the land they actually occupy, and the furniture and furnishings therein . . . used exclusively for lodge purposes or meeting rooms by such association[s], . . .”

I am aware that one of the corporation’s objectives is to promote the spiritual life of the aforementioned communities, but I am unable to conclude that the essential purpose of the corporation is religious within the purview of the § 58-12(5) exemption for property owned by certain religious associations, nor can I find the necessary religious purpose to exempt the corporation as a “religious association” within § 58-12.24.

Though the corporation’s purposes are undoubtedly beneficial to the communities it was organized to serve, I am unable to discern any present personal property tax exemption applicable to the vehicles in question. I must, therefore, conclude that such vehicles are taxable.

**TAXATION—Total Combined Net Worth Test For Deferral Of Taxes Determined By § 58-760.1(a) (1a).**

COUNTIES, CITIES AND TOWNS—Localities May Provide For Deferral Of Taxation Of Persons Sixty-five Years Old If Owner And Relatives Living In Dwelling Have Specified Income And Combined Net Worth.

ORDINANCES—Localities May Provide For Deferral Of Taxation Of Persons Not Less Than Sixty-five Years Old If Owner And Relatives Living In Dwelling Have Specified Income And Combined Net Worth.

February 27, 1976

THE HONORABLE MARGARET Y. ANDERSON
Commissioner of Revenue for the City of Waynesboro

You have inquired whether an applicant for deferral of taxation under an ordinance adopted by the Waynesboro City Council pursuant to § 58-760.1, Code of Virginia (1950), as amended, must qualify by the “total combined net worth” of persons who are “owners of the dwelling living therein and the owner’s relatives living therein” as provided in § 58-760.1(a)(1) or as provided in § 58-760.1(a)(1a). I assume that the ordinance in question does not specify lower income and net worth figures than those set forth in §§ 58-760.1(a)(1) and -760.1(a)(1a).

Section 58-760.1 authorizes localities to provide by ordinance, subject to specified restrictions and conditions, for the exemption or deferral of taxation of real estate “owned by, and occupied as the sole dwelling of a person
or persons not less than sixty-five years of age." One of the restrictions on the provision of such exemption or deferral is, as specified in § 58-760.1(a)(1), "[t]hat the total combined income during the immediately preceding calendar year from all sources of the owners of the dwelling living therein and of the owners' relatives living in the dwelling does not exceed ten thousand dollars, provided that the first four thousand dollars of income of each relative, other than spouse of the owner, or owners, who is living in the dwelling shall not be included in such total, and further provided that the county, city or town may by ordinance specify lower income figures." (Emphasis added.) A separate and distinct restriction is specified in § 58-760.1(a)(1a) "[t]hat the net combined financial worth, including equitable interests, as of the thirty-first day of December of the immediately preceding calendar year, of the owners, and of the spouse of any owner, excluding the value of the dwelling and the land, not exceeding one acre, upon which it is situated does not exceed thirty-five thousand dollars; provided, however, that the county, city or town ordinance may specify lower net worth figures." (Emphasis added.)

Thus, a person or persons applying for tax relief under the ordinance in question must satisfy both the "total combined income" test established by § 58-760.1(a)(1) and the "net combined financial worth" test established by § 58-760.1(a)(1a). Section 58-760.1(a)(1) requires that "total combined income" be determined with reference to the income of those persons living in the dwelling who are either owners of the dwelling or relatives of such owners. Section 58-760.1(a)(1a) requires that "net combined financial worth" be determined with reference only to the net worth of the owners of the dwelling and of the spouse of any owner, and does not take into account the net worth of any relative living in the dwelling. The provisions of paragraph (a) (2) of § 58-760.1 merely set forth the procedures necessary to claim the exemption, and are not intended to alter the restrictions and conditions as set forth in paragraphs (a)(1) and (a)(1a). In view of the foregoing, it is my opinion that the "total combined net worth" is to be determined as provided in paragraph (a)(1a).

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TAXATION—Virginia Beach Can Adopt Fiscal Tax Year Despite Language Of §§ 58-796, -797.

COMMISSIONERS OF REVENUE—Assessments—Whether taxable property assessed as of first day of January or July.

TAXATION—Assessments—Whether taxable property assessed as of first day of January or July.

THE HONORABLE V. A. ETHERIDGE
Treasurer for the City of Virginia Beach

You have inquired whether the City of Virginia Beach could adopt a fiscal tax year under §§ 58-851.6-.8, Code of Virginia (1950), as amended, even though §§ 58-796, -797 have language that is not compatible with § 58-851, and, if so, whether the Clerk and the Commissioner would then change the ownership of property as of July 1st of each year instead of January 1st.

Section 58-851.6 provides, in part:

"Notwithstanding any other provision of law, special or general, to the contrary, the governing body of any county, city or town may by ordinance provide that taxes on real estate, tangible personal property and machinery and tools be levied and imposed on a fiscal year basis of July one to June thirty." (Emphasis added.)
The introductory clause emphasized in the above-quoted provision makes clear that nothing in the language of §§ 58-796, -797 would prevent the City of Virginia Beach from providing by ordinance for a fiscal tax year to begin on the first day of July and end on the following thirtieth day of June. I am, therefore, of the opinion that your first inquiry should be answered in the affirmative.

I assume that your second inquiry relates to the duty of each commissioner of the revenue under § 58-796 to assess the person owning real estate in the county or city, as the case may be, on the first day of January of each year for the taxes on real estate for the year beginning on that day. Section 58-851.6 provides, in part, that as to any locality which has adopted an ordinance requiring taxes to be levied and imposed on a fiscal year basis "all property shall be assessed as of January one, prior to such fiscal year unless otherwise specifically provided under § 58-851.7." Section 58-851.7 provides:

“When the fiscal tax year of any county, city or town begins on the first day of July and ends on the thirtieth day of June, the governing body of such county, city or town may provide that all taxable real estate or personal property and machinery and tools therein be assessed as of the first day of July of each year, any other provision of law, general and special, including the provisions of the charter of any city or town, to the contrary notwithstanding. In any such locality, public service corporation property shall continue to be assessed at its value as of January one, prior to such assessment date.”

Thus, the answer to your second inquiry depends upon whether the governing body of the City of Virginia Beach provides pursuant to § 58-851.7 that all taxable property be assessed as of the first day of July of each year. If so, the Commissioner of the Revenue for the City of Virginia Beach would be required to determine who owns real estate (other than public service corporation property) in the City on July the first and to assess such person for the taxes on real estate for the fiscal year beginning on that day. If not, the Commissioner must continue to assess the person owning real estate in the City on January the first for the real estate taxes for the year beginning on that day. In either case, the Commissioner can determine who owns real estate in the City as of the date on which the taxes on real estate are assessed from the records in the office of the Clerk for the Circuit Court of the City of Virginia Beach.

UNIFORM STATEWIDE BUILDING CODE—County And Town Both Have Building Inspectors—Town may not charge fees, issue permits or make building inspections on construction in county.

TOWNS—County And Town Both Have Building Inspectors—Town may not charge fees, issue permits or make building inspections on construction in county.

THE HONORABLE FRANK M. SLAYTON
Member, House of Delegates

This is in reply to your recent letter in which you requested my opinion whether a town, in the absence of any agreement or appropriate ordinances by both the town and a county, may properly charge fees, issue permits and make building inspections on buildings which are under construction and which are situated entirely within the county outside the town limits. You also advised in your letter that the town and the county have each established an office of building inspector to enforce the Uniform Statewide
Building Code in their respective jurisdictions.

Section 36-105 of the Code of Virginia (1950), as amended, reads, in pertinent part, as follows:

"Enforcement of the Building Code shall be the responsibility of the local building department. Whenever a county or municipality does not have such a building department, the local governing body shall enter into an agreement with the local governing body of another county or municipality or with some other agency, or a State agency approved by the State Board, for such enforcement. Fees may be levied by the local governing body in order to defray the cost of such enforcement." (Emphasis supplied.)

Because both the town and the county in question have established separate offices of building inspector to enforce the Uniform Statewide Building Code in their respective jurisdictions, § 36-105 is not applicable. I am of the opinion, therefore, that the town may not charge fees, issue permits and make building inspections on buildings which are under construction and which are situated entirely within the county.

UNIFORM STATEWIDE BUILDING CODE—Standards Prescribed For Construction Of Buildings—No authority to regulate operation of a business; gasoline station attendant.

HOUSING AUTHORITIES—Uniform Statewide Building Code Prescribes Standards For Construction Of Buildings—State Board of Housing lacks authority to regulate operation of a business; gasoline station attendant.

October 30, 1975

THE HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

This is in response to your recent letter in which you inquire whether the State Board of Housing may adopt, as part of the Uniform Statewide Building Code, a requirement that gasoline stations have a supervisor or attendant on duty at all times.

The State Board of Housing is by statute directed and empowered to adopt and promulgate a Uniform Statewide Building Code, which Code shall supersede the building codes and regulations of the counties, municipalities and State agencies. See § 36-98 of the Code of Virginia (1950), as amended. Section 36-99 of the Code provides that “[t]he Building Code shall prescribe standards to be complied with in the construction of buildings and structures, and the provisions thereof shall be such as to protect the health, safety and welfare of the residents of this State. . . .” (Emphasis added.)

Because § 36-99 speaks only of "standards to be complied with in the construction of buildings and structures," the Uniform Statewide Building Code cannot regulate the operation of a business. Obviously, a requirement that a gasoline station be manned pertains to the operation of the business and not the construction of the station. I am of the opinion, therefore, that the State Board of Housing is without authority to include as a provision of the Uniform Statewide Building Code that gasoline stations have a supervisor or attendant on duty at all times.

UNIFORM STATEWIDE BUILDING CODE—State Not Legally Obligated To Comply With.
COUNTIES, CITIES AND TOWNS—Ordinances—Localities cannot adopt ordinances requiring certain tradesmen to obtain local permits before working on State projects.

COUNTIES, CITIES AND TOWNS—Uniform Statewide Building Code Requirements—Not applicable to State.

ORDINANCES—Localities Have No Authority To Adopt Ordinances Requiring The State To Obtain Local Permits Before Constructing A Building Or To Comply With Building Code.

STATE AGENCIES—Ordinances—Localities cannot adopt ordinances obligating the State to comply with particular building code or to obtain building permits.

STATUTES—State Not Bound By Any Statute Unless In Express Terms Made To Extend To The State.

July 15, 1975

The Honorable William G. Broaddus
County Attorney for Henrico County

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

"1. Is the Commonwealth legally obligated to comply with the Uniform Statewide Building Code?

"2. If the Commonwealth is so obligated, do localities, through their building inspectors, have the authority to enforce the Code against the Commonwealth?

"3. If the Commonwealth is not so obligated, do localities have the authority to adopt ordinances which require the Commonwealth to comply with certain designated building codes, such as the National Electrical Code, with the further provision that the codes will be enforced by local inspectors?

"4. Do localities have the authority to adopt ordinances which require the Commonwealth to obtain local permits before constructing a building?

"5. Do localities have the authority to adopt ordinances which require certain tradesmen, such as electrical subcontractors, to obtain local permits or certificates before working on a State project?"

The State Board of Housing is empowered to adopt a Uniform Statewide Building Code which "shall prescribe standards to be complied with in the construction of buildings, and the provisions thereof shall be such as to protect the health, safety and welfare of the residents of this State." Sections 36-98 and 36-99 of the Code of Virginia (1950), as amended. Nowhere in the Code’s implementing legislation, §§ 36-97 through 36-119, is there any mention, direct or indirect, of the Code’s applicability to buildings owned or constructed by the Commonwealth. Section 36-97(7) defines “building regulations” as “any law, rule, resolution, regulation, ordinance or code, . . . heretofore or hereafter enacted or adopted by the State or any county or municipality, . . . relating to construction, . . . or use of structures and buildings and installation of equipment therein.” It is clear, however, that the references to regulations of “State agencies” and “the State” contained in §§ 36-98 and 36-97(7) do not apply to State buildings. Rather, the State regulations referred to in those sections are regulations applying to non-State buildings.

It is a well established rule of common law that the sovereign is not bound by any statute unless the same is in express terms made to extend to the sovereign. This common law rule is applicable to the Common-
wealth. See Report of the Attorney General, (1971-1972) at 103 and 106. I am of the opinion, therefore, that the State is excluded from the operation of a statute unless its provisions are made to apply to the State in express words. Id. Consequently, your first two questions are answered in the negative.

With regard to questions 3 through 5, in the absence of express authorization, localities cannot adopt ordinances obligating the Commonwealth to comply with the terms of a particular building code or to obtain building permits. Nor may localities adopt ordinances requiring certain tradesmen to obtain local permits or certificates before working on State projects. See Report of the Attorney General (1938-1939) at 180. The answer to questions numbered 3 through 5 are, therefore, in the negative. I would also note that the answers would be the same with regard to ordinances adopted prior to the adoption of the Uniform Statewide Building Code. Id.

UNIFORM STATEWIDE BUILDING CODE—Supersedes Building Codes And Regulations Of Counties, Municipalities And State Agencies (Aluminum Wiring), But Not Zoning Ordinances Or Other Land Use Controls.

GENERAL ASSEMBLY—“Building Regulations” Defined By Statute; Only General Assembly May Make Exceptions To Definition.

ORDINANCES—Authority Of Political Subdivisions To Ban Use Of Aluminum Wiring In Buildings Erected In County.

September 12, 1975

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

This is in response to your recent letter in which you request my opinion whether the County of Gloucester is empowered to adopt an ordinance banning the use of aluminum wiring for all buildings erected in the County.

The Virginia Uniform Statewide Building Code supersedes building codes and regulations of counties, municipalities and State agencies. See § 36-98 of the Code of Virginia (1950), as amended. The term “‘building regulations’ means any law, rule, resolution, regulation, ordinance or code, general or special . . . heretofore or hereafter enacted or adopted . . . relating to construction, reconstruction, alteration, conversion, repair, or use of structures and buildings.” See § 36-97(7). That term, however, does not include zoning ordinances or other land use controls.

An ordinance banning the use of aluminum wiring for all buildings erected in Gloucester County would fall within the definition of “building regulations” as defined in § 36-97(7) of the Code and would be superseded by the Uniform Statewide Building Code as to those buildings and structures covered by the Uniform Code. See § 36-103 of the Code and Report of the Attorney General (1973-1974) at 425. I am of the opinion, therefore, that the County does not have the authority to adopt such an ordinance.

UNIFORM STATEWIDE BUILDING CODE—Supersedes Ordinance Requiring Dead Bolt Locks To Be Installed In Doors Of Apartments.


July 30, 1975

THE HONORABLE WILLIAM L. COWHIG
Commonwealth's Attorney for the City of Alexandria

This is in reply to your recent request for my opinion whether the City of Alexandria may pass an ordinance requiring dead bolt locks to be installed
in the doors of apartment dwellings constructed before the enactment of the Uniform Statewide Building Code. You also posed the question whether such an ordinance could be retroactive to the date of the enactment of the Uniform Statewide Building Code. It is my opinion that such an ordinance would fall within the definition of "building regulations" as defined in § 36-97(7) of the Code of Virginia (1950), as amended, and would be superseded by the Uniform Statewide Building Code, which has no provision requiring such security devices as dead bolt locks. See Report of the Attorney General (1973-1974) at 426. Any such ordinance would therefore have no force and effect, either retroactively or prospectively.

UNIFORM STATEWIDE BUILDING CODE—Swimming Pool Safety Devices For Pools Built Prior To Adoption Of Code.

August 1, 1975

THE HONORABLE DONALD W. DEVINE
Commonwealth's Attorney for Loudoun County

This is in reply to your recent request for my opinion whether "the provisions of Section 429.83—'swimming pool safety devices'—of the Virginia Uniform Statewide Building Code must be enforced by the Building Inspections Department of Loudoun County for those swimming pools which were built prior to our adoption of said Building Code."

Prior to June 1, 1975, the Uniform Statewide Building Code did not apply to structures such as swimming pools. See Report of the Attorney General (1973-1974) at 423. The General Assembly at its 1975 Session amended § 36-99 of the Code of Virginia (1950), as amended, to cover structures. "Structure" is defined as "an assembly of materials forming a construction for occupancy or use including . . . swimming pools. . . ." See § 36-97(18).

Section 406.42 of the Uniform Statewide Building Code provides that "[e]xisting swimming pools may be continued without change, provided the safety requirements of section 429.83 are observed where required by the building official." (Emphasis added.) Section 429.83 of the Uniform Statewide Building Code contains requirements for swimming pool safety devices. It is my opinion, therefore, that the Building Inspections Department of Loudoun County, in its sound discretion, may enforce the safety requirements outlined in Section 429.83 of the Uniform Statewide Building Code with regard to swimming pools constructed prior to the adoption of such Code by Loudoun County.

UTILITIES—Charges Levied Upon Users Of Municipal Utility Are Considered Service Charges, Not Taxes.

COUNTIES, CITIES AND TOWNS—Rules Of Procedure For Reconsideration Of Defeated Ordinances.

NOTICES—Rules Of Procedure For Reconsideration Of Defeated Ordinances.

ORDINANCES—Rules Of Procedure For Reconsideration Of Defeated Ordinances.


November 6, 1975

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

You have requested my opinion concerning the following inquiries:
1. Would an increase in utility rates (such monies going into the general fund of Colonial Heights) be considered a tax or service charge?

2. In the event the above question is affirmative in regard to it being a tax, would it be necessary that any such ordinance raising the levy be enacted at the time of the adoption of the general fund budget (reference section 6.1 and section 6.2 City Charter Colonial Heights)?

3. Can such ordinance be enacted to be retroactive to the beginning of the fiscal year?

You advise that an ordinance to accomplish the rate increase was defeated after proper notice and hearing pursuant to the city charter and inquire further:

4. If an ordinance, as stated above, has been defeated and duly recorded in the minutes of Council:

   a. Would introduction of an ordinance carrying the same text and in this case the same number, be considered an introduction of a new proposed ordinance?
   
   b. Would Council be required to advertise the proposed revenue producing ordinance and a public hearing held before such proposed ordinance could be acted upon?

   c. Would the proposed ordinance have to be carried over to the second meeting of Council separated by six days; and one of such meeting being a regular meeting (reference section 4.10 Colonial Heights City Charter) before action could be taken upon its passage.

Charges levied upon the users of a municipal utility, although they inure to the profit or compensation of the local government, are usually considered service charges and not taxes. Louisville & Jefferson County Metropolitan Sewer District v. Joseph E. Seagram & Sons, 307 Ky. 413, 211 S.W.2d 122 (1948); Niles v. Union Ice Corp., 133 Ohio St. 169, 12 N.E.2d 483 (1938); Grafton v. Holt, 58 W.Va. 182, 52 S.E. 21 (1905). See Virginia-Western Power Co. v. City of Clifton Forge, 125 Va. 469, 99 S.E. 722 cert. den., 251 U.S. 557 (1919). On the basis of the information supplied in your inquiry, I see no reason to classify the Colonial Heights utility rate increase any differently. Accordingly, I am of the opinion that the increase you refer to in question 1 is a service charge and that questions 2 and 3 need not be addressed.

Local governing bodies often enact rules of procedure which provide for reconsideration of ordinances. Such rules usually provide that an ordinance which has been defeated can be reconsidered if a motion to that effect passes at or before the next ensuing regular meeting of the governing body. In such circumstances, the reconsidered ordinance is not treated as a new ordinance, and regular notice and hearing requirements do not apply.

You inquire in question 4 whether an ordinance which fails of adoption must be accorded the notice and hearing procedures required for all other ordinances when it is reintroduced. Since you do not indicate that the ordinance is being brought back pursuant to reconsideration procedures, the answer is in the affirmative. The city council can introduce and vote upon the same ordinance as often as it desires absent any procedural requirement to the contrary.

I am of the opinion, therefore, that the reintroduced ordinance you describe in question 4 should be treated as a newly proposed ordinance, subject to all of the notice, hearing and dual reading procedural requirements of the city charter that applied when it was first considered.
REPORT OF THE ATTORNEY GENERAL

VETERANS—Hunting And Fishing License For Resident Disabled Veterans Whether Rating Temporary Or Permanent.

GAME AND INLAND FISHERIES—Hunting And Fishing License For Resident Disabled Veterans Whether Rating Temporary Or Permanent.

VETERANS—Special License Plates And Parking Decals For Disabled Veterans Whether Rating Temporary Or Permanent.

WAR VETERANS’ CLAIMS, DIVISION OF—War Veterans’ Benefits Are Remedial—Given liberal interpretation.

May 5, 1976

THE HONORABLE HARRY F. CARPER, JR., Director
Division of War Veterans’ Claims

You have requested my opinion regarding Chapters 234 and 410, [1976] Acts of Assembly. Chapter 234 amends the Code of Virginia (1950), as amended, by adding § 29-52.2 and provides that “[a]ny resident veteran who has a one hundred per centum service connected disability as certified by the Veteran’s Administration . . .” may, upon payment of a $1.00 annual fee, receive a hunting and fishing license. Chapter 410 amends and reenacts §§ 46.1-104.1 and 46.1-149.1 of the Code and provides for special parking decals and special license plates for veterans who are “one hundred per centum disabled as certified by the Veteran’s Administration.” No annual registration fee is to be charged for these special decals and plates.

You state that the Veteran’s Administration rates veterans 100 percent disabled on both a permanent basis as well as a temporary basis. Examples of temporary ratings granted are as follows:

“(1) A 100% temporary rating is provided a veteran who is hospitalized for his primary service connected disability or disabilities in excess of 21 days from that date to the remainder of his hospitalization.

“(2) A 100% evaluation may be provided a veteran who is hospitalized for his service connected disabilities and surgery is performed. This rating is granted from the hospitalization date to the end of the month of discharge.

“(3) A 100% rating may be granted during a Post Hospital Convalescent Period not to exceed a total of 6 months.

“(4) An evaluation of 100% may be provided a veteran who is rated 60% or more for his service connected condition where this disability prevents him from pursuing any occupation. Multiple disabilities are considered in this category. The veteran is required to report annually his occupational status.

“(5) A temporary rating of 100% may be assigned for up to a one year period following his or her discharge from service as the veteran’s condition has reached an unstabilized state. The veteran will be examined by the Veteran’s Administration within one year and an evaluation assigned from the end of the one year from the date he was separated from the service.”

The question raised is whether the privileges granted by the current amendments in question are applicable to veterans who are rated 100 percent disabled on a temporary basis.

I have previously opined that provisions of law relating to war veterans’ benefits are remedial in nature and should be given a liberal interpretation. See Report of the Attorney General (1972-1973) at 506 and 507. The amendments in question do not distinguish between those veterans who are rated 100 percent disabled on a temporary basis versus a permanent basis. The privileges granted, however, are annual and are not granted for life. Construing the legislation in the manner required, I am of the opinion that
the provisions of Chapters 234 and 410 are applicable to any veteran rated 100 per centum disabled regardless whether that rating is on a temporary or permanent basis.

VIRGINIA CONFLICT OF INTERESTS ACT—Officer As Defined In § 2.1-348(d) Includes Members Of Governmental Or Advisory Agency.

DEFINITIONS—“Officer” As Defined In § 2.1-348(d) Includes Members Of Governmental Or Advisory Agency.

PUBLIC OFFICERS—Conflict Of Interest—Officer as defined in § 2.1-348(d).

January 12, 1976

THE HONORABLE RUSSELL I. TOWNSEND, JR.
Member, Senate of Virginia

This is in reply to your inquiry whether the term “officer” as defined in § 2.1-348(d) of the Code of Virginia (1950), as amended, includes members of a governmental or advisory agency.

Section 2.1-348(d) defines “officer” as “any person appointed or elected to any governmental or advisory agency, and who shall be deemed an officer of such agency, whether or not such person receives compensation or other emolument of office, but as to §§ 2.1-351, 2.1-352 and 2.1-353 shall not include any member of the General Assembly of Virginia.” I am of the opinion that the foregoing definition of “officer” includes members of governmental and advisory agencies, e.g., boards of supervisors and planning commissions, as well as other officers of such agencies. This interpretation is further compelled by § 2.1-352 which provides, inter alia, that any officer or employee of a governmental agency who knows that he has a material financial interest in a transaction, not of general application, shall disclose such interest and disqualify himself from participating in any action thereon. This section also provides that “[i]f disqualifications in accordance with this section leaves less than the number required by law to act, the remaining member or members shall have authority to act for the agency...” (Emphasis added.)

VIRGINIA FREEDOM OF INFORMATION ACT—Administrative Committees Composed Of Faculty And Administrative Personnel Of University To Study And Advise On Problems Relating To University Community Not Required To Hold Open Meetings.

AMENDMENTS—Virginia Freedom Of Information Act—Section 2.1-341(a) would have to be amended to require that meetings of University Administrative Committees be open to public.

VIRGINIA FREEDOM OF INFORMATION ACT—Exemption Of University’s Administrative Committees From Holding Open Meetings Not Based On Exemption Afforded Boards Of Visitors.

VIRGINIA FREEDOM OF INFORMATION ACT—General Professional Advisory Committee Established By State Council Of Higher Education; Serves In Advisory Capacity—Subject to Act.

April 12, 1976

THE HONORABLE JAMES B. MURRAY
Member, House of Delegates

This is in reply to your letter in which you ask whether administrative committees, composed of faculty and administrative personnel of the Uni-
University of Virginia, appointed by the President of the University to study and advise on problems relating to the University community, are required by the provisions of the Virginia Freedom of Information Act to meet in public. You inquire more specifically as follows:

"1) Are the administrative committees protected from the requirements of the Freedom of Information Act by virtue of the exemptions granted the Board of Visitors by that Act?

"2) If so, are the committees, like the board, required to announce their actions after each meeting, with members of the committees available to discuss the actions, and are the official minutes of the committees required to be available to the public not more than three working days after such meetings, with the exception of actions excluded by the Act?

"3) What changes in the Freedom of Information Act would be necessary to open the committee meetings?"

In setting forth the types of entities required to meet in public the Freedom of Information Act provides as follows in § 2.1-341(a), Code of Virginia (1950), as amended:

"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, of any authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; and other organizations, corporations or agencies in the State, supported wholly or principally by public funds. . . ." (Emphasis added.)

An administrative committee of the type described above is not an "authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State" within the meaning of § 2.1-341(a). Accordingly, unless such a committee constitutes an "organization . . . supported wholly or principally by public funds," the committee is not included within the scope of § 2.1-341(a) and is, therefore, not subject to the open meeting requirements of the Freedom of Information Act.

I have previously ruled that the General Professional Advisory Committee (GPAC), a committee composed of university presidents, established by the Council on Higher Education to serve the Council as an advisory arm on a continuing basis, is an "organization" required to hold open meetings under § 2.1-341(a). See Opinion to the Honorable Lawrence Douglas Wilder, Member, Senate of Virginia, dated April 21, 1975, and found in the Report of the Attorney General (1974-1975) at 584. The facts there revealed that GPAC is the creature of the Council, a public body subject to the Act, having been created to advise the Council relative to its official functions which must, of course, be exercised in open meetings. In the present circumstances, on the other hand, the committees in question are established by the University President to advise the President, an administrative official as distinguished from a public body.

Moreover, the administrative committees of the University are composed largely of faculty and staff personnel who are the employees of the institution. By contrast, GPAC is composed of university presidents who, except for their service as advisors to the Council on Higher Education, are independent of the Council and certainly have no relationship of employment with it. The degree of independence of the members of an advisory committee is an important criterion in determining whether any such entity constitutes an "organization" within the meaning of § 2.1-341(a). In this instance, the administrative committees are essentially internal mechanisms rather than separate organizations.
For these reasons, I am of the opinion that administrative committees of the University of Virginia are not required to hold open meetings in compliance with the provisions of the Freedom of Information Act. It is apparent, however, that the foregoing conclusion is not based upon the exemption afforded boards of visitors under § 2.1-345. Accordingly, I must respond to your first numbered inquiry in the negative.

With respect to your inquiry numbered (2), since the exemption of university administrative committees is not by virtue of § 2.1-345, such committees are not required to comply with procedural steps outlined in § 2.1-345.

In response to your final inquiry, requiring that meetings of university administrative committees be open to the public would, in my view, necessitate specific amendment of the provisions of § 2.1-341(a) to include such committees as public bodies subject to the requirements of the Act.

VIRGINIA FREEDOM OF INFORMATION ACT—Boards Of Visitors Of State Colleges Exempt From Some Requirements Of Act.

COLLEGES AND UNIVERSITIES—Boards Of Visitors Exempt From Some Requirements Of Freedom Of Information Act.

DEFINITIONS—“Actions” And “Actions Taken” As Used In Freedom Of Information Act.

NOTICES—Freedom Of Information Act—Public prior notice of meeting of boards of visitors of State colleges.

December 29, 1975

THE HONORABLE GEORGE W. GRAYSON
Member, House of Delegates

This is in response to your recent letter wherein you inquire as follows:

"... Under the Virginia Freedom of Information Act,
"1. Does a Board of Visitors of a State College have authority to refuse to give public prior notice of intent to meet either in regular or special session?
"2. Is any action taken at a meeting held without such advance notice valid?
"3. What are the definitions of the terms ‘actions’ and ‘actions taken’ as used in § 2.1-345(5)? Do the terms encompass both votes taken and/or decisions reached by such Board?
"4. Is a Board of Visitors exempt from the requirement to disclose votes taken or decisions reached in any meeting on any subject, and, if so, on what subjects and under what circumstances?"

I shall respond to your inquiries seriatim.

Pursuant to the provisions of § 2.1-345(5), Code of Virginia (1950), as amended, boards of visitors of State-supported colleges and universities are exempt from the requirements of the Freedom of Information Act, except that immediately following their meetings boards must announce actions taken (except actions covered by § 2.1-344), remain for discussion of actions taken, and make available within three days the minutes of board meetings. Accordingly, the only explicit requirements imposed upon boards of visitors are contained in § 2.1-345(5). There is no requirement of notice prior to board meetings in § 2.1-345(5). The provision of § 2.1-345(5) requiring announcement of board actions immediately following board meetings, however, implicitly requires that those who may wish to attend the post-meeting announcements have some form of notice as
to the time and place of board meetings, otherwise the requirement of post-meeting announcements would serve no purpose.

Since § 2.1-345(5) serves primarily to exempt boards of visitors from requirements of the Freedom of Information Act, any notice requirement which is found implicit therein cannot reasonably be interpreted to require more than is required of governmental bodies and agencies which are subject to the Act. Section 2.1-343 requires of governmental bodies subject to the Act prior notice of meetings only to those individuals requesting such notice. There is no requirement of general public notice. I am, therefore, of the opinion that § 2.1-345(5) requires that boards of visitors give prior notice of meetings only to those individuals specifically requesting the same.

As to your second inquiry, I am of the opinion that the failure of a board of visitors to give notice of its meetings would have no effect upon the validity of actions taken at such meetings. Section 2.1-344(c) provides that certain actions taken in an executive or closed meeting shall not become effective unless a vote is subsequently taken in an open meeting. This is the only direct sanction provided for in the Freedom of Information Act but, as previously mentioned, the provisions of the Act are not applicable to boards of visitors. Section 2.1-346 provides that persons denied the rights and privileges conferred by the Act may proceed to enforce them by mandamus or injunction in a court of record. In view of my answer to your first inquiry, it is my further opinion that the provisions of § 2.1-346 would be available regarding the requirement of notice.

With respect to your third inquiry, as I have indicated, § 2.1-345(5) exempts boards of visitors of State-supported colleges and universities from the provisions of the Act, requiring instead that following their meetings they announce publicly all actions taken, except those actions relating to subjects excluded by the provisions of § 2.1-344. The word "actions" as used in this context would, in my opinion, include any resolution, rule, regulation or motion passed or agreed upon by the members of the board apart from § 2.1-344 matters. See Report of the Attorney General (1973-1974) at 454.

With respect to your fourth question, § 2.1-345(5) specifically states that all actions of the board, except those actions relating to matters covered in § 2.1-344, must be announced following board meetings. I am, therefore, of the opinion that boards of visitors are not required to announce actions taken in meetings relating to those matters within the purview of § 2.1-344(a)(1)-(6).

VIRGINIA FREEDOM OF INFORMATION ACT—Citizen Entitled To Obtain During Regular Business Hours. Information From Official Records On Matters Before City Council.

RECORDS—Freedom Of Information Act—No requirement that custodian of records supply information to citizen other than that contained in official records.

VIRGINIA FREEDOM OF INFORMATION ACT—No Requirement That Custodian Of Records Supply Information To Citizen Other Than That Contained In Official Records.

November 18, 1975

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

You request my opinion regarding the requirements of the Freedom of Information Act as follows:
"When is a citizen entitled to obtain information relating to matters that are before the Lynchburg City Council?"

Section 2.1-342(a), Code of Virginia (1950), as amended, provides:

"Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this State 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 and magazines with circulation in this State, and representatives of radio and television stations broadcasting in or into this State; provided, that the custodian of such records shall take all necessary precautions for their preservation and safekeeping." (Emphasis added.)

Citizens may, therefore, review and copy official records relating to matters before Council during the regular business hours of the office or agency responsible for maintaining such records. It should be noted, however, that the provisions of § 2.1-342(a) require only disclosure of records. There is no requirement that the custodian of such records prepare or supply information other than that which is contained in official records maintained by such offices.

VIRGINIA FREEDOM OF INFORMATION ACT—City Manager's Distribution Of Letter To All Members Of City Council In Executive Meeting, Without Discussion, Not Violation—Letter is official record subject to public disclosure requirements.

VIRGINIA FREEDOM OF INFORMATION ACT—Closed Meetings—May discuss only the subject for which session held.

August 25, 1975

THE HONORABLE GLENN B. McCLANAN
Member, House of Delegates

Your recent letter, together with enclosure, requests my opinion regarding an inquiry arising under the Virginia Freedom of Information Act, Chapter 21, Title 2.1, Code of Virginia (1950), as amended. In your letter you ask:

"Is it permissible under the provisions of the Virginia Freedom of Information Act for a city manager to distribute to all the members of the city council a letter whose subject matter would not be permitted for discussion during an executive session? Further, does the Virginia Freedom of Information Act apply equally to written and oral communications?"

The Virginia Freedom of Information Act guarantees, to the public, certain rights relative to the conduct of public business by governmental bodies, agencies and institutions. The Act focuses upon the transaction of public business by governmental bodies at two critical points. First, the Act addresses record keeping, guaranteeing in § 2.1-342(a) that all official records, except as provided in the Act itself or other provisions of law, shall be open to public inspection. Secondly, the Act addresses meetings of public bodies, providing in § 2.1-343 that all "meetings" shall be open to the public except as provided by specific statutory exception. There is, in my view, no provision of the Freedom of Information Act which would prohibit the City Manager's transmittal of a letter to Council by mail or hand delivery in a public meeting. A letter so distributed would
constitute an official record of the Office of the City Manager and as such would be subject to the public disclosure requirements of § 2.1-342(a).

The remaining question is, therefore, whether distribution of a letter during an executive meeting is in violation of the Act. The constraints placed upon governmental bodies meeting in executive session are, first, that no matter be discussed which is not authorized by the Act as appropriate for executive discussion and, secondly, that executive discussion be limited to those appropriate subjects announced by the governmental body, in public, prior to the executive meeting as required by § 2.1-344(b). See Report of the Attorney General (1972-1973) at 488. Your letter indicates that, following the distribution of the letter, there was no discussion or decision by Council during the executive meeting relative to the subject matter of the letter. Accordingly, I am of the opinion that distribution of a letter during an executive meeting without discussion does not constitute a violation of the Act. The letter, however, would constitute an official record of the Office of the City Manager subject to disclosure under § 2.1-342(a), irrespective of the fact that it was distributed in an executive meeting and was marked confidential.

VIRGINIA FREEDOM OF INFORMATION ACT—Council Meeting Held Without Notice Of Time And Place, No Minutes Kept, Violates Act.

COUNTRIES, CITIES AND TOWNS—Council Meeting Held Without Notice Of Time And Place, No Minutes Kept, Violates Freedom Of Information Act.

DEFINITIONS—“Meeting” As Defined In Freedom Of Information Act.

November 5, 1975

THE HONORABLE A. JOSEPH CANADA, JR.
Member, Senate of Virginia

This is in response to your recent letter in which you ask whether a recent gathering of six members of the Virginia Beach City Council was in violation of the Freedom of Information Act. Your letter indicates that the Council members met, at approximately 11:00 p.m. on Sunday, September 21, 1975, with the City Manager, a representative of the Commonwealth Attorney’s Office and several citizens, at the home of a Council member. You further indicate that the purpose of the meeting was to discuss recently publicized allegations that the City Police Department maintained secret files on certain local businessmen. It is my understanding that no minutes of the meeting were recorded, and that certain individuals and organizations which had previously requested notice of each meeting of Council were not notified of the meeting in question.

Section 2.1-343, Code of Virginia (1950), as amended, provides:

“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. Minutes shall be recorded at all public meetings. Information as to the time and place of each meeting shall be furnished to any citizen of this State who requests such information.” (Emphasis added.)

“Meeting” is defined in § 2.1-341(a) to include any gathering of the membership of any governmental body, whether formal or informal, at which matters relating to the official function of the governmental body are discussed. The gathering of the members of Council for the foregoing purpose clearly constituted a “meeting” within the meaning of § 2.1-341(a) and, therefore, had to be held in compliance with the requirements of § 2.1-343. See Report of the Attorney General (1973-1974) at 458. Inasmuch as no
minutes of such meeting were kept and those individuals and organizations having previously requested notice of each Council meeting were not so notified, I am of the opinion that the meeting violated the provisions of § 2.1-343.

VIRGINIA FREEDOM OF INFORMATION ACT—Disclosure—Notes made by official of Division of Personnel as review of federal government report are “official records” under Act, subject to disclosure.


December 31, 1975

THE HONORABLE RALPH L. “BILL” AXSELL, JR.
Member, House of Delegates

This is in reply to your recent letter in which you ask whether the Virginia Freedom of Information Act requires disclosure of notes made by an official of the Division of Personnel as a part of his review of a federal government report relative to operations and policies of the Division of Personnel.

Section 2.1-342(a), Code of Virginia (1950), as amended, requires that State agencies disclose all “official records” except those specifically exempted under § 2.1-342(b)(1)-(6) or other provisions of law. “Official records,” as defined in § 2.1-341(b), include “all written or printed . . . papers, letters, documents . . . reports or other material, regardless of physical form or characteristics, made and received in pursuance of law by the public officers of the State . . . in the transaction of public business.” The notes of an official of the Division of Personnel regarding a report dealing with the operations and policies of the Division would, in my view, constitute an official record as defined by the provisions of § 2.1-341(b). I find none of the specific exceptions set forth in § 2.1-342(b)(1)-(6) applicable to the records in question. Accordingly, I am of the opinion that the notes hereinabove described are required to be disclosed pursuant to the provisions of § 2.1-342(a).

VIRGINIA FREEDOM OF INFORMATION ACT—Executive Or Closed Meetings—Three member committee may meet in closed session to discuss acquisition of county office building—Must comply with § 2.1-344.

BOARDS OF SUPERVISORS—Executive Or Closed Meetings—Three member committee may meet in closed session to discuss acquisition of county office building—Must comply with § 2.1-344.

DEFINITIONS—“Meeting”—Three member committee of board of supervisors is not “study committee” under Freedom of Information Act.

DEFINITIONS—“Study Committee”—Three member committee under Freedom of Information Act is not.

March 19, 1976

THE HONORABLE WILLIAM N. ALEXANDER, II
Commonwealth’s Attorney for Franklin County

This is in response to your recent letter wherein you inquire whether a committee appointed by the county Board of Supervisors, composed of three
of the Board’s regular members, may meet in executive session for purposes of negotiating and discussing the proposed acquisition of a building to house county offices. You note in your letter that pursuant to § 2.1-344 (a) (2) of the Code of Virginia (1950), as amended, it appears that the full membership of the Board of Supervisors would be authorized to meet in closed session for the purpose in question. This section reads:

“(a) Executive or closed meetings may be held only for the following purposes:

“(2) Discussion or consideration of the condition, acquisition or use of real property for public purpose, or of the disposition of publicly held property.”

Your inquiry then relates to whether a three member committee of the Board may discuss the same matters in a closed session.

Section 2.1-341(a) provides guidance regarding the kinds of meetings or gatherings of public officials which are intended to be subject to the provisions of the Freedom of Information Act. The aforementioned statute defines the term “meeting” as follows:

“(a) ‘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, of any authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; and other organizations, corporations or agencies in the State, supported wholly or principally by public funds. Nothing in this chapter shall be construed as to define a meeting as a chance meeting of two or more members of a public body, or as an informal assemblage of the constituent membership at which matters relating to the exercise of official functions are not discussed.” (Emphasis added.)

Considering this statutory language in its entirety, I am of the view that a gathering of two or more members of a governing body, for the purpose of discussing official business or functions of that body, constitutes a “meeting” within the terms of § 2.1-341(a), and that such meeting is subject to the same provisions as gatherings of the full membership of a governmental body at which official business is considered. I am of the opinion, therefore, that the three member committee composed of Board members may meet in closed session, pursuant to the provisions of § 2.1-344(a) (2), for discussion of the acquisition of a county office building.

The provisions of § 2.1-345(7) do not alter my opinion. This subsection provides that the provisions of the Freedom of Information Act are not applicable to study commissions or study committees appointed by governing bodies and reads as follows:

“(7) Study commissions or study committees appointed by the governing bodies of counties, cities and towns; provided, however, that final votes shall be taken in open meetings and provided, further, that no such committee or commission appointed by such governing bodies, the membership of which includes more than one member of a three member governing body or includes more than two members of a governing body having four or more members, shall be deemed to be study commissions or study committees under the provisions of this section.”

The committee about which you inquire does not come within the definition of a study committee in that it is composed of more than two members
of the seven member governing body of Franklin County. Accordingly, the committee in question is not exempt from the provisions of the Act, and must comply with the provisions of § 2.1-344.


ORDINANCES—Freedom Of Information Act—Localities cannot adopt ordinances that would exempt them from Act.


RECORDS—Conciliation Agreements—Effected by Human Rights Commission are “official records” under Freedom of Information Act.


October 10, 1975

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your recent letter in which you ask my opinion regarding the following inquiry submitted by the City Attorney of Alexandria:

"The City Council of the City of Alexandria established a Human Rights Commission and provided procedures for enforcing the City's Human Rights Code in City Ordinance No. 2011. As part of the enforcement procedure the Human Rights Administrator for the City is responsible for investigating complaints and proposing conciliation agreements, § 18A-16 provides, in part:

'... Each complaint shall be held in confidence by the human rights administrator unless or until the complainant (person aggrieved) and the respondent consent to its being made public, or until the time a hearing procedure such as described in section 18A-21 has begun.'

"In addition, § 18A-18 provides, in part:

'... Conciliation agreements may be made public but such public disclosure shall not reveal the identities of the parties involved except at the request of all of the persons accused.'

"I would appreciate an opinion ... on the following questions:

"1. Is it permissible for the human rights administrator to keep the complaint confidential in accordance with the ordinance as quoted above? In considering this question I would ask that you keep in mind that the City's Code contains the threat of criminal prosecution (§ 18A-24) and the human rights administrator's investigation may be significant for any future action by the Commission leading to prosecution.

"2. Is it permissible for the human rights administrator and the Commission to keep confidential the identities of the parties to a con-
ciliation agreement signed by the parties and the human rights administrator in accordance with the portion of § 18A-18 quoted above?"
REPORT OF THE ATTORNEY GENERAL

March 17, 1976

THE HONORABLE ROBERT B. FOX
Commonwealth’s Attorney for Westmoreland County

This is in reply to your recent letter wherein you ask whether the records disclosure exemption provided in § 2.1-342(b)(4), Code of Virginia (1950), as amended, applies to records of the County Board of Supervisors or records of the County Administrator employed by the Board of Supervisors.

Section 2.1-342(b)(4) provides in relevant portion:

“(b) The following records are excluded from the provisions of this chapter:

“(4) Memoranda, working papers and correspondence held by members of the General Assembly or by the office of the Governor or Lieutenant Governor, Attorney General or the mayor or other chief executive officer of any political subdivision of the State or the president or other chief executive officer of any state-supported institutions of higher education.” (Emphasis added.)

The County Administrator is clearly the chief executive officer of a county as is the mayor of a city or town. In view of the above-quoted statutory language, I am of the opinion that the exemption from the records disclosure requirements of the Freedom of Information Act, contained in § 2.1-342(b)(4), is applicable to the memoranda, working papers, and correspondence of the County Administrator. This exemption, however, does not apply to similar records held by the County Board of Supervisors.

VIRGINIA FREEDOM OF INFORMATION ACT—Salaries Of President, Other Officials And Employees Of College Not Required To Be Publicly Disclosed—Salary Of President obtainable from Appropriations Act.

APPROPRIATIONS—Salary Of President Of College Set Forth In Appropriations Act.

July 24, 1975

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

This is in reply to your recent letter in which you ask whether, pursuant to the Virginia Freedom of Information Act, records of the salaries of the President and other officials and employees of Madison College are required to be disclosed publicly upon request.

The Freedom of Information Act, in § 2.1-342(a), Code of Virginia (1950), as amended, requires public disclosure of all official records of State and local governmental bodies, agencies and institutions, except those records specifically exempted by the provisions of §§ 2.1-342(b)(1)-(6) or other applicable statutes. Section 2.1-342(b)(3) exempts certain records from disclosure as follows:

“(3) State income tax returns, medical and mental records, scholastic records and personnel records, except that such access shall not be denied to the person who is the subject thereof. . . .” (Emphasis added.)

Upon consideration of the above exception to the disclosure rule, it is apparent that the purpose of that exception is to avoid disclosure of personal information concerning identifiable officers or employees of public agencies or institutions.
As applied to personnel records specifically, § 2.1-342(b)(3) would exempt from required disclosure any record containing information regarding the employment status of identifiable individual officers or employees of an institution of higher education. The records about which you inquire contain information revealing the salaries of identifiable individuals and are, therefore, among those records intended to be protected. This view of the personnel records exception is consistent with other provisions of the Freedom of Information Act dealing with personnel matters. For example, § 2.1-344(a)(1) authorizes departure from the open meeting requirements of the Act by governmental bodies, agencies and institutions, authorizing closed meetings where discussions will involve “employment, assignment, appointment, promotion, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body.” (Emphasis added.)

In view of the foregoing, I am of the opinion that, pursuant to the provisions of § 2.1-342(b)(3), the records of the salaries of officials and employees of Madison College are not required to be publicly disclosed; I would note, however, that, with regard to the salary of the President of the College, such information is set forth in the current Appropriations Act and may be obtained from that source.

VIRGINIA FREEDOM OF INFORMATION ACT—School Trustee Electoral Board Violated Act By Not Voting To Enter Executive Session Nor Afterward Voting To Affirm Action In That Session.

PUBLIC OFFICERS—School Trustee Electoral Board—'De Facto Officers—Official acts valid until improper composition of board established.

SCHOOLS—Improper Election Of Member Of School Trustee Electoral Board Would Not Invalidate Subsequent School Board Actions, Nor His Official Actions Until He Is Notified Of The Illegality Of His Election.

SCHOOLS—School Trustee Electoral Board Violated Freedom Of Information Act—Did not vote to enter executive session nor afterward vote to affirm action in that session.

VIRGINIA FREEDOM OF INFORMATION ACT—Rights And Privileges May Be Enforced By Petition For Mandamus Or Injunction.

THE HONORABLE GERALD G. POINDEXTER
Attorney for Surry County

This is in reply to your letter from which I quote as follows:

“Recently, after proper advertisement in a newspaper of general circulation as is required by Code Section 22-62, as amended, the Surry County School Trustee Electoral Board met at the date and time stated in the notice to fill a vacancy existing on the Surry County School Board. In response to the notice, a number of citizens appeared, one of whom presented the School Trustee Electoral Board chairman with a petition requesting the appointment to the school board of a named individual; the petition contained more than one hundred names of voters from the election district in which the vacancy existed. The chairman accepted the petition without comment and, without motion, he and the other four members of the Board left their respective seats and retired to a back room of the building where the meeting proceeded, out of the presence of the citizens. After some thirty minutes, the Board members reappeared and the chairman announcing that the
vacancy had been filled with the appointment of someone other than that person for whom the petition had been presented. There was no motion to return to open session and no further votes were taken.

* * *

"Query? (1) Does the conduct of the School Trustee Board, assuming the circumstances described above, violate the Virginia Freedom of Information Act, particularly § 2.1-344, subsections b. and c.?; (2) if violations of the Act have occurred, would the appointment of the new school board member be subject to being set aside by a court action initiated under § 2.1-346 of the Act? (3) are the subsequent actions of the School Board of Surry County subject to contest as a result of the improper procedure employed in appointing its newest member?; and (4), if so, under what circumstances?"

The Virginia Freedom of Information Act, in § 2.1-344(b) and (c), Code of Virginia (1950), as amended, requires that public bodies adhere to certain prescribed procedures when meeting in closed or executive session. Section 2.1-344(b) requires that, prior to any closed meeting, the public body vote affirmatively, in open session, upon a motion to meet in executive session, which motion shall state specifically the purpose or purposes for which the closed meeting is to be held. Section 2.1-344(c) provides:

"(c) No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion."

Since, according to the facts presented, the School Trustee Electoral Board did not vote affirmatively to enter executive session and, further, did not following such executive meeting vote to affirm its action in executive session, I am of the opinion that the Board violated the provisions of § 2.1-344(b) and (c). I would, therefore, answer your first inquiry in the affirmative.

In response to your second inquiry, § 2.1-346 provides that any person alleging denial of the rights and privileges conferred by the Act may enforce such rights and privileges by petition for mandamus or injunction in the appropriate court of record. I am, therefore, of the opinion that the action of the School Trustee Electoral Board, in selecting the newest member of the School Board, if found by the court to be in violation of the requirements of the Act, would be subject to being set aside by court injunction entered pursuant to § 2.1-346.

In response to your third and fourth inquiries, I call to your attention my Opinions to the Honorable Joseph E. Spruill, Jr., Commonwealth’s Attorney for Essex County, dated June 22, 1973, and to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated March 6, 1975, and found in Reports of the Attorney General (1972-73) at 515 and (1974-75) at 419, respectively, copies of which are enclosed. It was held in these Opinions that public officers improperly selected are de facto officers and as such their official actions are valid until such time as they have notice of the legal defect in their election. 15 M.J. Public Officers § 58 (1951). Accordingly, the improper election of its newest member would not invalidate subsequent School Board actions nor would it invalidate official actions of the improperly elected Board member until such time as he is notified of the illegality of his election.

VIRGINIA FREEDOM OF INFORMATION ACT—Warrant And Arrest Records Maintained By Sheriff’s Office Are “Official Records” Subject To Public Disclosure Upon Request.
SHERIFFS—Warrant And Arrest Records Are “Official Records” Subject To Public Disclosure Upon Request.

July 21, 1975

THE HONORABLE JAMES T. EDMUNDS
Member, Senate of Virginia

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

“Please give me your formal opinion as to whether or not warrant and arrest records are among those official records designated by the Virginia Freedom of Information Act as being available to the public.”

After seeking clarification of your letter I understand the term “warrant records” to mean the actual executed arrest warrants currently held in the Sheriff’s office or copies thereof. By the term “arrest records” I understand you to refer to any record which may be maintained in the Sheriff’s office which would indicate chronologically the name of an individual who has been arrested pursuant to an arrest warrant, the charge or charges for which the individual was arrested, the date of his arrest, and other routine information including age and address of the individual arrested.

The Freedom of Information Act, in § 2.1-342(a), Code of Virginia (1950), as amended, requires that the “official records” of public bodies and agencies of the State or the political subdivisions thereof shall be subject to disclosure, upon request by any citizen of this State, except as provided in §§ 2.1-342(b)(1)-(6), or other applicable statutes.

The records you describe, if maintained by the Sheriff’s office, are clearly “official records” within the meaning of § 2.1-341(b). I find none of the exceptions to disclosure set forth in §§ 2.1-343(b)(1)-(6) applicable to the records in question, inasmuch as the described records do not relate to criminal investigations, reports submitted to the State police or local police in confidence, or the imprisonment of individuals in a penal institution, exempted from disclosure requirements under § 2.1-342(b)(1). Furthermore, I am aware of no other statute which would provide an exception from required disclosure with respect to the records in question. I would note, however, particularly with respect to your inquiry regarding “arrest records,” as defined herein, that the Freedom of Information Act requires only disclosure of records which are, in fact, maintained by public officers of the State and its political subdivisions in the normal course of public business. There is no requirement that public agencies or officers gather information or produce records not regularly maintained as a part of their public function.

I am, therefore, of the opinion that the warrant and arrest records, as defined herein, are subject to public disclosure, upon request, as provided in § 2.1-342(a), provided that such records are, in fact, maintained by the Sheriff’s office.

VIRGINIA MINIMUM WAGE ACT—Counties, Cities And Towns Not “Employers” As Defined By Act; Provisions Of Act Not Applicable To Political Subdivisions.

COUNTIES, CITIES AND TOWNS—Minimum Wage Act Not Applicable To.

DEFINITIONS—“Employer” Under Virginia Minimum Wage Act.
This is in reply to your inquiry whether the Virginia Minimum Wage Act, §§ 40.1-28.8 through 40.1-28.12 of the Code of Virginia (1950), as amended, applies to counties, cities and towns.

The Act provides that "[e]very employer shall pay to each of his employees wages at a rate not less than two dollars per hour." See § 40.1-28.10. Section 40.1-28.9A defines "employer" as "any individual, partnership, association, corporation, business trust, or any person or groups of persons acting directly or indirectly in the interest of an employer in relation to any employee." Counties, cities and towns are political subdivisions of the State. They are not individuals, partnerships, associations, corporations, business trusts or persons. I am of the opinion, therefore, that counties, cities and towns are not "employers" as defined by the Act. Since the provisions of the Act are not applicable to political subdivisions, your inquiry is answered in the negative.

WAGES—Money Withheld By Employer At Request Of Employee—Payroll deductions for political action fund.

BOARDS OF SUPERVISORS—Payroll Deductions For Political Action Fund Of Employee's Choice.


SCHOOLS—Payroll Deductions For Political Action Fund Of Employee's Choice.

STATUTES—Federal Statute Prohibits State Or Local Officer Or Employee To Coerce, Command Or Advise State Or Local Officer Or Employee To Contribute For Political Purposes.

STATUTES—Payroll Deductions For Political Action Fund Of Employee's Choice Not Prohibited By Constitution Or Code.

WAGES—Neither Board Of Supervisors Nor School Board Required To Withhold Any Amounts For Purposes Not Mandated By Statute—Political action fund.

PAYROLL DEDUCTIONS—For Political Action Fund Of Employee's Choice Not Prohibited By Constitution Or Code.

I am replying to your recent letter which posed the following question:

"If a School Board (or Board of Supervisors) voluntarily agrees to permit its employees to designate in writing a specific voluntary payroll deduction for political action to a specific political action fund of the employee's choice, is such an agreement in violation of the Constitution or any statute of Virginia?"

No present provisions of either the Virginia Constitution or Code prohibits the assignment of wages by employees of School Boards or Boards of
Supervisors to a political action fund. There is likewise no provision which requires these employers to withhold any amounts for purposes not mandated by statute. A School Board or Board of Supervisors may exercise wide discretion in deciding what classes of requests for assignments, if any, it will honor, by adopting reasonable, objective standards for this determination. *Local 660 v. City of Charlotte*, 461 F.2d 676 (4th Cir. 1975).

Although your question specifies a voluntary payroll deduction, I would call your attention to a federal statute, 5 U.S.C. § 1502 (1966), which provides that a State or local officer or employee may not "directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes."

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WATER—Virginia Public Water Supply Law—Protection of public health and guaranteeing of supply of pure water.

HEALTH—Virginia Public Water Supply Law—Protection of public health and guaranteeing of supply of pure water.

SCHOOLS—Waterworks Regulations Adopted By State Board Of Health Apply To Construction Of Well For County School Building.

May 6, 1976

The Honorable Martin J. McGetrick
Commonwealth’s Attorney for Madison County

This letter is in response to your recent inquiry concerning regulations promulgated by the State Board of Health under the Virginia Public Water Supply Law, which is codified as Chapter 4 of Title 62.1 of the Code of Virginia (1950), as amended. The specific issue you raise concerns the construction of § 62.1-47 of the Code, which provides as follows:

"The Board may adopt rules and regulations governing waterworks, water supplies and pure water, subject to the provisions of chapter 1.1 (§ 9-6.1 et seq.) of Title 9 of the Code of Virginia. Such rules and regulations shall be designed to protect the public health and guarantee a supply of pure water in relation to such matters. Except for the purposes stated, said rules and regulations shall not apply to structural design, location and construction of waterworks established by counties or under authorities created by counties unless requested by resolution of the governing bodies thereof.” (Emphasis added.)

Your questions are: (1) does the final sentence of § 62.1-47 of the Code mean that the waterworks regulations adopted in 1974 by the State Board of Health would not apply to the construction of a well for a county school building, and (2) do the words "except for the purposes stated" refer to the protection of public health and the guaranteeing of a supply of pure water, as set forth in the second sentence of that section?

Section 62.1-47 authorizes the Board of Health to make rules for waterworks, water supplies and pure water in order to protect the public health and to guarantee a supply of pure water. Water supply is defined to include water taken into waterworks from, among other things, wells. See § 62.1-45(b) of the Code. Waterworks is defined to include, among other things, all structures and appliances used in connection with the collection of water for the use of more than 25 individuals. See § 62.1-45(a). From the foregoing, it is clear that the Board of Health may regulate the well to which you refer, which is defined to be a waterworks under § 62.1-45(a), if the water provided will be used by more than 25 individuals. The clear
purpose of the second sentence of § 62.1-47 is to prohibit regulation of the design and construction of waterworks where such regulation is not reasonably related to the protection of the public health and to the guaranteeing of a supply of pure water. Thus, the answer to your first question is in the negative and to your second question in the affirmative.

WATER AND SEWER AUTHORITIES—Local Water And Sewer Authority May Install And Maintain Fire Hydrants As Part Of Its Water System.

WATER AND SEWER AUTHORITIES—Local Water And Sewer Authority May Include In Rates For Water Service, Cost Of Installing And Maintaining Fire Hydrants.

COUNTIES, CITIES AND TOWNS—Not Obligated To Reimburse Water And Sewer Authority For Cost Of Installing And Maintaining Fire Hydrants.

August 1, 1975

THE HONORABLE GEORGE R. ST. JOHN
County Attorney for Albemarle County

Your recent letter inquires:

“1. Whether a local water and sewer authority can lawfully install and maintain fireplugs within its assigned project area?

“2. Whether, if a water and sewer authority can do this, it must then be reimbursed for the expense thereof by the county, rather than simply charging its customers an additional sum for this service?”

The Virginia Water and Sewer Authorities Act, Chapter 28, Title 15.1, of the Code of Virginia (1950), as amended, empowers county and municipal water and sewer authorities, created thereunder, to construct and maintain complete water systems as provided in § 15.1-1250(f). The term “water system,” as defined in § 15.1-1240(g), includes:

“... all plants, systems, facilities or properties used or useful ... in connection with the supply or distribution of water ... including water supply systems, water distribution systems, reservoirs, wells, intakes, mains, laterals, pumping stations, standpipes, filtration plants, purification plants, hydrants, meters, valves and equipment. ...

(Emphasis added.)

I am, therefore, of the opinion that a local water and sewer authority may install and maintain fire hydrants as a part of its water system.

With respect to your second inquiry, I would direct your attention to § 15.1-1260 authorizing water and sewer authorities to collect fees and charges for services they provide:

“The authority is hereby authorized to fix and revise from time to time rates, fees and other charges for the use of and for the services furnished or to be furnished by any water system, sewer system, sewage disposal system, or garbage and refuse collection and disposal system owned, operated or maintained by the authority. ...”

“The rates for water, including fire protection, and sewer service, including disposal, respectively, shall be sufficient to cover the expenses necessary or properly attributable to the furnishing of the class of services for which charges are made. ...” (Emphasis added.)

In light of the foregoing statutory language, I further conclude that local water and sewer authorities may include in rates for water service reason-
able amounts attributable to the cost of installing and maintaining fire hydrants.

Your letter notes the provisions of Chapter 2 of Title 27, of the Code authorizing counties and municipalities to establish fire departments (§ 27-6.1) and to purchase and maintain fire-fighting equipment (§ 27-15.2); these provisions of Title 27, c. 2 do not, however, obligate a county or municipality to reimburse a water and sewer authority for expenditures incurred in the installation and maintenance of fire hydrants.

WATER AND SEWERAGE SYSTEMS—Private Sewer And Water Companies Regulated As Public Utilities Have No Authority To Require Individuals To Make Connections.

WATER AND SEWER AUTHORITIES—Authority To Require Residents To Connect To New Sewer Lines.

WATER AND SEWER AUTHORITIES—Connection Fees—May establish reasonable rates for connection.

WATER AND SEWER AUTHORITIES—Rates—SCC review only at time of charter issuance; no continuing requirement under § 15.1-1260 that rates fixed by authority be subject to SCC approval.

WATER AND SEWERAGE SYSTEMS—Connection Fees—May establish reasonable rates for connection.

STATE CORPORATION COMMISSION—Water And Sewer Authority Rates Subject To SCC Jurisdiction Only At Time Of Charter Issuance; No Continuing Requirement Under § 15.1-1260 That Rates Fixed By Authority Be Subject To SCC Approval.

January 6, 1976

THE HONORABLE VIRGIL H. GOODE, JR.
Member, Senate of Virginia

This is in response to your request for an opinion regarding the circumstances under which an individual property or home owner can be compelled to connect onto a public water and/or sewage system. On the basis of your telephone conversation with a member of my staff, it is understood that your request deals with three specific entities: a municipal water and sewage department, a water and sewer authority and a private company rendering water and sewer service as a regulated public utility.

In the case of sewer and water service provided by a municipal corporation, the relevant statutes are §§ 15.1-875 and 15.1-876 of the Code of Virginia (1950), as amended, relating to water supplies and facilities and sewage disposal services, respectively. Section 15.1-875 provides, in pertinent part, that a municipal corporation:

"... may require the connection of premises with facilities provided for furnishing water; may charge and collect compensation for water thus furnished; and may provide penalties for the unauthorized use thereof."

Section 15.1-876 states that a municipality, within its corporate limits:

"... may . . . require the connection of premises with facilities provided for [sewage disposal]; may charge and collect compensation for such services; and provide penalties for the unauthorized use of such facilities."

In light of the foregoing statutory language, it is clear that, in the case
of a municipal water and/or sewer system, there is express authority to require the connection of "premises." This term would include a private home and, since no exceptions are made, I conclude that the connection may be required even where the individual home owner already has an adequate and safe water supply and sewage facility. See In Sanitation Commission v. Craft, 196 Va. 1140 (1955).

In the case of a water and sewer authority, § 15.1-1261 provides that the owner, tenant or occupant of each lot or parcel of land abutting a water main, water system or sanitary sewer shall, if so required by the rules and regulations of the water and sewer authority, with the concurrence of the local government, connect any building upon such parcel of land with such water main or sanitary sewer and shall cease to use any other source of water supply for domestic use or any other method for the disposal of sewage, sewage waste or other polluting matter. Here again, the requirement to connect to the public system is clear and unqualified. I conclude, therefore, that an individual property and home owner may be compelled to connect to a water and sewer authority system even though such individual has an adequate and safe water supply and sewage facility. The constitutionality of enforced sewage and water connections under § 15.1-1261 was upheld in Farquhar v. Board of Supervisors, 196 Va. 54, 70 (1954).

In the case of private sewer and water companies regulated as public utilities, the pertinent statutes are found in Article 6, Chapter 10 of Title 56 of the Code. Section 56-261 requires every water and sewer company regulated as a public utility to furnish at all times and at a reasonable charge a supply of water, a system of distribution or disposal, and services and facilities incidental to such supply, distribution or disposal sufficient and adequate to the protection of the public health of the community. The remaining sections in Article 6 relate primarily to the enforcement of this obligation. No provision in Article 6 makes any reference to forced connections onto a water and sewer system provided by a private company regulated as a public utility. Thus, I conclude that such companies have no authority to require individuals to make connections.

You further request my opinion regarding any standards governing the costs of water and sewer connections in cases where the entity providing the service has the authority to require the connection. In the case of a water and sewer authority, § 15.1-1261 simply provides that the connecting charge shall be "reasonable." Section 15.1-1260 provides that the aggregate sum of all fees and charges for the use of and for services furnished by any water or sewer system shall provide funds sufficient to defray operating costs, pay the principal of, and the interest on, the revenue bonds as the same shall become due, and provide a margin of safety for making such payments. A reasonable inference, therefore, is that all charges assessed by a sewer and water authority are to be cost-based, although not necessarily limited precisely to actual costs because of the requirement that the funds collected provide a margin of safety for meeting the obligations of the authority. Section 15.1-1260 further provides that the rates, fees and charges fixed by the authority shall be subject to the jurisdiction of the State Corporation Commission (SCC). The Supreme Court of Virginia, however, in Myers v. Moore, 204 Va. 409 (1963), held that water and sewer authority rates are subject to SCC jurisdiction only at the time of charter issuance and that there is no continuing requirement under § 15.1-1260 that the rates fixed by the authority be subject to SCC approval. Id. at 412.

In the case of water and sewer connections required by municipal corporations under §§ 15.1-875 and 15.1-876, there are no standards provided to determine the charges which may be assessed for such connections other than the implicit general requirement of reasonableness which is present in all such provisions of law.
WELFARE—Responsibilities Of District Fiscal Officer Where Welfare Department Serves Two Or More Political Jurisdictions.

CONFLICT OF LAWS—Resolution Passed By Greensville Board Of Supervisors Conflicts With Mandate Of § 63.1-47.1.

WELFARE AND INSTITUTIONS—District Welfare Board District Fiscal Officer—Responsibilities.

August 7, 1975

The Honorable H. Benjamin Vincent
Commonwealth's Attorney for Greensville County and the City of Emporia

This is in reply to your recent inquiry concerning the validity of a resolution passed by the Greensville Board of Supervisors on June 17, 1975. That resolution recommends to the Greensville-Emporia Department of Welfare that it submit the cost of the county welfare program to the county treasurer and the cost of the city welfare program to the city treasurer for payment by these individuals respectively, with administrative costs to be handled as in the past. The effective date of the resolution was July 1, 1975. You request an opinion concerning the validity of this action in view of §§ 63.1-44, 63.1-47.1, 63.1-92 and 63.1-120 of the Code of Virginia (1950), as amended.

I refer you to a prior opinion to the Honorable William L. Lukhard, Director, Department of Welfare and Institutions, dated October 9, 1973, and found in the Report of the Attorney General (1973-1974) at 470, a copy of which is attached. This opinion states that, when two or more political jurisdictions have combined to form a welfare district, as in the case of Greensville and Emporia, § 63.1-47.1 mandates that there be a district fiscal officer, who shall be the treasurer of one of the participating counties and/or cities. The opinion further concludes that the sections you have cited require the district fiscal officer to be responsible for the fiscal affairs of that district, including receipt of reimbursements from the State and disbursements of funds to recipients. I am of the opinion that the resolution passed by the Greensville Board of Supervisors conflicts with these provisions in recommending that payments for each of the political jurisdictions composing the joint welfare district be paid by the respective treasurers of such jurisdictions and, therefore, it is without legal effect.

WELFARE—Unreported Recovery By Welfare Recipient On Tort Claims Constitutes Failure To Notify Local Department Of Change In Circumstances, If Willful.

TORTS—Unreported Recovery By Welfare Recipient On Tort Claims Constitutes Failure To Notify Local Department Of Change In Circumstances, If Willful.

WELFARE—“Willful” Failure To Report Recovery By Welfare Recipient On Tort Claims Is Factual Issue To Be Determined By Court.

March 4, 1976

The Honorable Coy W. Kiser, Jr., Judge
General District Court for Amherst and Nelson Counties
and the City of Waynesboro

This is in reply to your recent letter in which you ask whether the unreported recovery by a welfare recipient on two tort claims constitutes a failure to notify a local department of social services of a change in circum-
stances, as set forth in § 63.1-112 of the Code of Virginia (1950), as amended.

I am of the opinion that, when a recovery on a tort claim is actually available to the recipients, it must be reported to the local department of social services. Section 63.1-112 states that any receipt of property or income by any person who is included within a recipient's grant, or for whom money is being paid under a recipient's grant, shall be reported immediately by the recipient to the local board. Neither the law nor the regulations promulgated thereunder by the Department of Welfare make any exception to that requirement in instances when a recipient receives a recovery on a tort claim. The regulations do provide that, when income is "actually available" to a recipient, it must be reported to the local department. The State Board has chosen not to adopt the theory that a recovery in tort would merely make that person "whole" again and should not be considered as income to that person.

A similar governmental policy was upheld in the State of New York where it was challenged in the case of Snell v. Wyman, 281 F.Supp. 853, 862 (S.D. N.Y. 1968), aff'd., 393 U.S. 323 (1969). See also the case of Langs v. Harder, 165 Conn. 490, 388 A.2d 458 (1973), cert. denied, 416 U.S. 994 (1974), when the plaintiff claimed that the defendant welfare commissioner should not have stopped making payments for the support of her minor child after the child became the beneficiary of a cash settlement of a tort claim for certain personal injuries he had sustained. In Langs the court upheld the administrative regulations developed by the department, stating that the settlement fund was a "resource" available to the child, and ruled against the "make whole" argument.

I point out that, to constitute a violation of § 63.1-112, there must be a "willful" failure to comply with the provisions found in that section and this question, of course, raises a factual issue to be determined by the court.

WELFARE BOARD—Authority For Management Of Welfare Program Vested In Local Welfare Board.

APPROPRIATIONS—Line Item Appropriation By Board Of Supervisors—Power does not extend to line items in welfare board budget.

BOARDS OF SUPERVISORS—Authority—Line item appropriation by board of supervisors of compensation for local welfare employees prohibited.

GENERAL ASSEMBLY—Intended Board Of Supervisors To Establish Overall Welfare Personnel Budget, But Fixing Of Individual Salaries Left To Welfare Board.

SALARIES—Welfare Board Has Authority To Hire Employees, Fix Their Salaries And Salary Increments.

March 15, 1976

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

I am responding to your inquiry whether §§ 63.1-11 and 63.1-66 of the Code of Virginia (1950), as amended, prohibit line item appropriation by a county board of supervisors of compensation for local welfare employees. To fund the local administration of its welfare programs, the Virginia General Assembly provided in § 63.1-54 that the local board of welfare submit annually to the board of supervisors a budget "containing an estimate and supporting data setting forth the amount of money needed to carry out the provisions of . . . [the Welfare] title." The board of
supervisors is then directed in § 63.1-91 to “each year appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance and to provide services, including cost of administration, under the provisions of this law.” A large portion of the funds so appropriated, and ultimately expended, by the county are then reimbursed to the county fiscal officer by the Commissioner of Welfare out of available federal and State funds. See § 63.1-92. The General Assembly also directed that custody of the welfare program funds be given to the local board of supervisors, and that such funds be “dispensed as authorized by such county . . . board.” See § 63.1-51.

Authority for management of the welfare program is vested, however, in the local welfare board, see § 63.1-50, and in the State Commissioner of Welfare, see § 63.1-4. Within the compensation plan established by the Commissioner, the local welfare board is empowered to fix the compensation of its employees. See § 63.1-66. This last cited section further directs that the county “shall” pay the compensation fixed by the welfare board. Read together with § 63.1-91, § 63.1-66 manifests an intent by the General Assembly to have overall welfare personnel budget appropriations established by the board of supervisors, but to leave the fixing of individual salaries within that appropriation to the welfare board. The board of supervisors should, of course, examine individual welfare employee compensation to the extent necessary to appropriate a sum adequate to pay salaries in the compensation range set for each employee by the State Board of Welfare Compensation Plan. See Opinion to the Honorable Madison E. Marye, Member, Senate of Virginia, dated December 12, 1975, copy of which is enclosed.

In denying line item appropriation control over the county school board to the board of supervisors in Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, 28 S.E.2d 698 (1944), the Supreme Court of Virginia held:

". . . It would be illogical to make the School Board solely responsible for the efficient conduct of the school system, and then give another board control over the expenditures to be made by the School Board. The school boards, because of the duties placed upon them by law, know accurately its personnel, its mode and manner of operation and the importance of the various parts of the system. This information, the board of supervisors do not have. If the board of supervisors has control of the various items of the budget, it could exercise a large amount of control over the operation of the school system, and there would be a serious division of authority, which it would not seem the legislature would have intended."

The relationship in this respect between local welfare boards and their boards of supervisors is too similar to that between local school boards and their boards of supervisors to escape the Court's analysis. Accordingly, I am of the opinion that the appropriation power of the board of supervisors does not extend to line items in the welfare board budget.

Section 63.1-11 does empower the Director of the Department of Welfare to hire such personnel as are necessary to administer his Department, and to set their compensation within the State Compensation Plan, but this section does not concern the compensation of local welfare board employees. As a consequence, it is not relevant to your inquiry.

WELFARE BOARD—Board Of Supervisors Member Shall Serve On.

BOARDS OF SUPERVISORS—Authority.—May suspend or remove members of local welfare board only for cause; change of mind does not constitute cause for removal.
PUBLIC OFFICERS—Improper Composition Of Board Established—Members can no longer function as *de facto* officers; future official acts by them would be invalid.

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.

WELFARE—Composition Of Local Board—Members ineligible to serve after two consecutive terms, but continue to serve as *de facto* officers despite ineligibility.

WELFARE BOARD—Improper Composition Of Board Established—Members can no longer function as *de facto* officers; future official acts by them would be invalid.

WELFARE BOARD—Not Properly Constituted Since No Member Of Was Also Member Of Board Of Supervisors.

April 12, 1976

THE HONORABLE BUDDY H. WALLEN
Commonwealth’s Attorney for Dickenson County

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

"Dickenson County consists of five (5) Magisterial districts; by resolution adopted March 6, 1974, the Board of Supervisors, pursuant to the above statute, increased the number of members of the Local Welfare Board from three (3) to five (5) members with one member being chosen from each of the county’s districts.

"Section 63.1-40 requires that one of those members shall also be a member of the local Board of Supervisors and the representative from Willis District, [Member A], was appointed as the Supervisor on the Board of Welfare. In the November general election, [Member A] chose not to seek reelection, thus leaving vacant the Board of Supervisors position on the local Board of Welfare.

"On November 5, 1975, it was resolved by the Board of Supervisors to appoint [Mr. X] to fill a vacancy on the Welfare Board. You will note the resolution does not indicate in which district the vacancy exists nor who is to be replaced nor what the term of [Mr. X’s] service would be. It was later learned that [Member B], of the Welfare Board from Sandlick District, had resigned and that [Mr. X] was to fill that vacancy. [Member B’s] term did not expire until 1977.

"On January 7, 1976, the Board of Supervisors amended the appointment of [Mr. X] to a term of two (2) months, November and December, 1975. [Mr. Y], a member of the Board of Supervisors, was appointed to the Board of Welfare as the replacement of [Mr. X]. [Mr. Y] represents Sandlick District on the Board of Supervisors, and thus fulfilled the statutory requirement of having a member of the Board of Supervisors on the Board of Welfare.

"On January 16, 1976, [Mr. Z] was appointed to the Board of Welfare to fill the vacancy created in Willis District when [Member A] chose not to seek reelection to the Board of Supervisors.

"After these events transpired, the Chairman of the Local Board of Welfare refused to recognize the appointment of [Mr. Y] to the Board of Welfare, and recognized [Mr. X] as the lawful member from Sandlick District. Thus this meeting was held without a member of the Board of Supervisors participating.

"My questions for your opinion are these:

"1. Was the replacement of [Mr. X] by [Mr. Y] valid in view of
the fact that the appointment of [Mr. X] by resolution contained no period of appointment and no reference as to which 'vacancy' he was to fill, and in view of the statutory requirement that 'the governing body in making appointments shall so arrange the membership that all times one member of the local Board of each county shall also be a member of the board of supervisors'.

"2. Were the actions of the local board of welfare taken at the meeting in which no member of the Board of Supervisors was allowed to participate valid?

"3. Was the action of the chairman of the Board of Welfare in refusing to recognize the validity of the appointment of [Mr. Y] by the Board of Supervisors, grounds for the Chairman's removal."

As I understand the facts presented, on November 5, 1975, the Board of Supervisors appointed Mr. X, whom you have told me is a resident of Sandlick District, to serve the balance of the term of Member B, the representative of Sandlick District on the local welfare board. This appointment was proper because it satisfied the applicable criteria, under § 63.1-40 (ninth sent.) and the resolution of March 6, 1974, for a properly-constituted board of welfare, i.e., one representative from each magisterial district and one such representative also a supervisor.

On January 7, 1976, the Board of Supervisors "amended the appointment of Mr. X to a term of two (2) months, November and December, 1975." Since the term of the Sandlick District representative would not expire until 1977, this amendment had the purported effect of removing Mr. X from office prior to the expiration of his lawful term. The Board is authorized, however, to suspend or remove members of the local welfare board only for cause. See § 63.1-45 of the Code. A reading of the resolution of January 7, 1976, discloses no cause for removing Mr. X from office; rather, that resolution only discloses that the Board had changed its mind concerning whom it wished to represent Sandlick District on the board of welfare. I am of the opinion that such a change of mind by the Board does not constitute cause for removing Mr. X and that Mr. X is still a lawful member of the local board. The accompanying appointment of Mr. Y was, therefore, unlawful because no vacancy, for which he was qualified, existed on that date.

Since January 16, 1976, when Mr. Z was appointed to fill the vacancy on the local board of welfare created in the Willis District seat, the local board has not been properly constituted since no member of the local board of welfare was also a member of the Board of Supervisors.

I would, therefore, answer your questions as follows: (1) The purported replacement of Mr. X by Mr. Y on January 7, 1976, was invalid because the amendment of the term of Mr. X effected the removal of Mr. X without cause, as required by § 63.1-45; (2) The actions taken by the local board of welfare at its January 16, 1976, meeting were done by members serving as de facto officers of the local board and, therefore, their official acts would be valid. See Opinion to the Honorable Joseph E. Spruill, Jr., Commonwealth's Attorney for Essex County, dated June 22, 1973, and found in Report of the Attorney General (1972-1973) at 515. Of course, now that the improper composition of the Board has been established, these members can no longer function as de facto officers, and any future official acts by them would be invalid. 15 M.J. Public Officers § 58 (1950); (3) The action of the chairman of the board of welfare in refusing to recognize the validity of the appointment of Mr. Y was proper because the appointment of Mr. Y was invalid. Accordingly, such action does not constitute cause for removal under § 63.1-45, and the chairman may continue as a member of the board.

Two alternative approaches that are available, among others, to constitute properly the local board of welfare are:
One of the current members might resign and a new member, who resides in the same magisterial district and is a member of the Board of Supervisors, could be appointed in his place. The Board of Supervisors could pass a resolution by which it rescinds its determination of March 6, 1974, that membership on the local board of welfare by a member of the Board of Supervisors is necessary, in which case the local board of welfare, as presently established, would be properly constituted. See § 63.1-40 (ninth sent.) of the Code.

WELFARE BOARD—Hiring Of Welfare Department Employees In Traditional Form Counties Expressly Delegated To Local Board Of Welfare.

BOARDS OF SUPERVISORS—Authority—Hiring of welfare department employees in traditional form counties expressly delegated to local board of welfare.

COUNTIES—Traditional Form Counties Expressly Prohibited From Establishing Personnel Classification And Compensation Plans For Welfare Employees—Statewide merit system plan as prerequisite to receiving federal welfare grant funds.

PERSONNEL ACT—Board Of Supervisors Required To Devise Personnel Classification, Implying Authority To Hire County Personnel, But Power To Hire Welfare Department Employees In Traditional Form Counties Expressly Delegated To Local Board Of Welfare.

SALARIES—Welfare Board Has Authority To Hire Employees, Fix Their Salaries And Salary Increments.

STATE MERIT SYSTEM PLAN—Adopted As Prerequisite To Receiving Federal Welfare Grant Funds.

WELFARE—Federal Welfare Grant Funds—Statewide merit system plan for welfare employees.

December 12, 1975

THE HONORABLE MADISON E. MARYE
Member, Senate of Virginia

This is in response to your inquiry whether a county board of supervisors has the authority to disapprove increased salary levels that are proposed for welfare department employees in the budget presented to the county by the local board of welfare.

The board of supervisors of Montgomery County has no express grant of power to hire employees. The authority of Virginia counties is not limited to expressly granted powers, however. They also have those powers necessarily implied in the express powers. City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684 (1958). Section 15.1-7.1 of the Code of Virginia (1950), as amended, requires the board of supervisors to devise a personnel classification and pay plan for all employees. Sections 15.1-160 and -162 mandate that the board adopt an annual budget based upon estimates of those officials charged with daily administration of county affairs. Such a budget commonly includes personnel costs. Necessarily implied in these express powers is the authority to hire county personnel.

The power to hire welfare department employees in traditional form counties, however, has been expressly delegated by the General Assembly to the local board of welfare. See § 63.1-60. Also delegated to this board is the power to fix the salaries of welfare employees, § 63.1-66, and to dis-
charge such employees. See § 63.1-61. The personnel standards and compensation plan for board employees are established in a State merit system plan adopted by the State Board of Welfare. See §§ 63.1-61, -87. Traditional form counties are expressly prohibited from establishing personnel classification and compensation plans for welfare employees by § 15.1-7.1. This statewide merit system plan has been adopted as a prerequisite to receiving federal welfare grant funds. See, e.g., 42 U.S.C. 602(a) (5) (1974). I conclude, therefore, that the local board of welfare has been statutorily directed to establish the salaries of its employees.

The board of supervisors is likewise directed by the General Assembly to pay the salaries of local welfare employees and to appropriate sufficient sums to pay for the costs of certain programs, including the cost of administration. See §§ 63.1-55, -66 and -91. A refusal by the board of supervisors to appropriate such monies can result in a withholding of other State funds designated for such county until the nonappropriated deficit is satisfied. See § 63.1-92.1.

The statutory direction in § 63.1-66 to the board of supervisors to pay the salaries fixed by the local welfare board for its employees contains an important qualification. The board must pay such compensation as is "... fixed by the local [welfare] board ... within the compensation plan provided in the merit system plan." This compensation plan is found in the Manual of Procedure, Volume I, of the State Board of Welfare at §§ 404.1 through 404.8. It establishes minimum and maximum salary levels for each position in the welfare department ranging over nine salary steps. The local board is to pick any five, six or seven steps in every grade, and that range will establish the pay scale for each particular position.

Section 404.1 provides in pertinent part:

"The Compensation Plan sets forth a basic State Compensation Schedule composed of salary grades with minimum and maximum rates and intervening steps for each class of position in the Classification Plan. The salary grade for each class is based on such factors as the nature of the work to be performed, the level of responsibility carried, the number and nature of public contacts, the amount of supervision received and exercised and the requirements of education and experience. ... Each grade provides for an entrance rate and increments based on merit and length of service. No person may receive less than the minimum nor more than the maximum of the range applicable to the class of position he holds." (Emphasis added.)

The only mandatory feature of this compensation plan is that no employee may be paid less than the minimum nor more than the maximum of the salary range adopted for his position by the local board. This requirement is paralleled in § 63.1-26 of the Code, which provides that:

"The Board shall establish minimum entrance and performance standards for the personnel employed by the Commissioner, local boards and local superintendents in the administration of the succeeding chapters of this title and make necessary rules and regulations to maintain such entrance and performance standards, including such rules and regulations as may be embraced in the development of a system of personnel administration meeting requirements of the federal Department of Health, Education and Welfare under appropriate federal legislation relating to programs administered by the Board; provided, however, the grievance procedure promulgated by the Governor under § 2.1-114 shall apply to the personnel employed by the Commissioner and personnel employed by local boards and local superintendents, unless the local governing body elects to include employees of local welfare departments and local welfare boards under the grievance procedure adopted pursuant to § 15.1-7.1."
In both the area of compensation and the area of personnel qualification and performance standards, the State Board of Welfare has chosen to adopt minimum requirements in order to create the uniform State personnel classification and pay plan prerequisite to federal funding. So long as these minimums are met, the requirements of the federal welfare administration are satisfied.

The State Compensation Plan also addresses salary increments for local welfare employees. Section 404.2(D) provides:

"Salary Increments—Salary grades provided in this plan are based on the belief that each class of position has a minimum value and a maximum value and the assumption that an employee engaged in the same duties over a period of time should become more valuable to the agency. In order to give recognition to an employee for his increased value, each local board shall adopt and implement a plan for salary increments which takes into consideration length of employment in the position and the quality of services performed. The plan agreed upon and any subsequent changes shall be reported to the Personnel Director. Such a plan is of value not only in retaining competent employees and recruiting new personnel but is useful as an administrative tool for determining budget estimates for personnel services.

"A plan for salary increments should clearly define the criteria to be used as a basis for approving salary increases and the interval of time between increases. Increases should not be automatically granted but should be used as a recognition of efficient and meritorious service. It is sound personnel practice to provide for an increase at the end of the successfully completed probationary period and it is recommended that thereafter increases be granted annually until the maximum of the range is reached."

While this section does direct the local welfare board to adopt a plan for awarding salary increments, it does not direct salary increments per se, for the reason that such increments commonly result from the convergence of many factors, such as increased value of the employee, passage of time and meritorious service. The plan should serve, however, if wisely constructed and implemented, as a sound basis for increased personnel budget requests by the local welfare board.

The amount of the incremental increase must likewise be uniform in order to comply with federal funding requirements. To this end, the State Compensation Plan provides that "[e]ach grade provides for an entrance rate and increments based on merit and length of service." (§ 404.1, supra.) This description of the salary steps between minimum and maximum in a given range as "increments based on merit and length of service" indicates that the State Plan requires salary increments above the minimum to conform to the levels of pay established by the Plan.

I am of the opinion, therefore, that the county board of supervisors must pay the minimum salary chosen by the local welfare board from time to time for each welfare department position from the salary range contained in the State Compensation Plan and I am further of the opinion that salary increments, when granted, must be in the amounts specified in the State Plan.

WITNESSES—Exclusion Of Witnesses Is Within Discretion Of Court—Chief investigation officer.

AMENDMENTS—Exclusion Of Witnesses—1975 amendment simply cured previous objection.

CONFLICT OF LAWS—Exclusion Of Witnesses—Sections 8-211.1 and 19.1-246.
REPORT OF THE ATTORNEY GENERAL

COURTS—Exclusion Of Witnesses Is Within Discretion Of Court—Chief investigation officer.

CRIMINAL PROCEDURE—Exclusion Of Witnesses Is Within Discretion Of Court—Chief investigation officer.

July 18, 1975

The Honorable James M. Lumpkin, Judge
Circuit Court of the City of Richmond, Division I

I quote from your recent letter as follows:

"In Jefferson v. Commonwealth, 212 Va. 255, 183 S.E.2d 134 (1971), the Supreme Court of Virginia held that so much of § 8-211.1 as requires the exclusion of every witness 'whose presence is not necessary to the proceedings' was void for indefiniteness. The Court in its reasoning concluded in part that the exclusion of the chief investigatory officer might 'thwart the legislative intent by applying too strictly the mandatory requirements of that section.' 212 Va. 256. The 1975 amendment deleted the above-mentioned phrase from § 8-211.1.

'Section 8-211.1 as amended would seem to require the exclusion of all witnesses except the defendant himself upon defendant's motion to exclude. Nevertheless, it is the understanding of this court that the Supreme Court in Jefferson interpreted § 8-211.1 as being consistent with § 19.1-246 (Cum. Supp. 1975) which leaves to the discretion of the court whether a witness should be excluded.

'The question is whether the 1975 amendment requires the exclusion of the chief investigation officer upon the defendant's motion to exclude witnesses or whether the exclusion of witnesses still remains discretionary with the court.'"

Section 8-211.1 of the Code of Virginia (1950), as amended by Chapter 652 of the 1975 Acts of Assembly, provides that:

"In the trial of every case, civil or criminal, the court, whether a court of record or a court not of record, may upon its own motion and shall upon the motion of any party, require the exclusion of every witness provided, that in every civil case, each named party who is an individual and one officer or agent of each party which is a corporation or association shall be exempt from the rule of this section as a matter of right; and provided, further, that in every criminal case, each defendant who is an individual and one officer or agent of each defendant which is a corporation or association shall be exempt from the rule of this section as a matter of right."

The statute would appear to be mandatory and in direct conflict with § 19.1-246 which provides:

"In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

This letter provision has been construed to be applicable to witnesses. See Yorke v. Commonwealth, 212 Va. 776 (1972). In Yorke the Supreme Court held that "neither the accused nor the Commonwealth, as a matter of right, is entitled to have the witnesses separated as this is a matter within the sound discretion of the court. . ." It is basic statutory construction that, whenever possible, statutes must be construed in pari materia and should
not be construed so as to conflict. When legislators amend a statute, it must be presumed that they acted with full knowledge of and in reference to the existing law upon the same subject, and the construction placed upon it by the courts. 17 M.J. Statutes §§ 40, 86 (1951).

I am of the opinion that in amending § 8-211.1, the legislature did not intend to change the existing law, but merely conformed the statute to meet the Supreme Court's determination that it was void for indefiniteness. It must be presumed that the legislature was aware of § 19.1-246, and the Supreme Court's interpretation placed upon it in Yorke. The legislative intent is further manifested by the fact that during the same legislative session which amended § 8-211.1, the General Assembly enacted § 19.2-266 retaining therein the language presently found in § 19.1-246.

In short, the Court held void for indefiniteness so much of § 8-211.1 as required the exclusion of witnesses. The 1975 amendment to § 8-211.1 simply cured the objection. Thus under the surviving portion of that section and under § 19.1-246 as construed in Yorke, the exclusion of witnesses rests within the sound discretion of the trial judge. Any other construction would require an invalidation of § 19.1-246, which became law, as recodified on March 22, 1975, prior to § 8-211.1's being signed into law on March 24, 1975.

I am of the opinion, therefore, in response to your inquiry, that § 8-211.1 does not require the exclusion of witnesses, but that this matter rests within the discretion of the court. Such discretion should be exercised in light of the principle set forth in Yorke, namely that a motion to exclude should be granted "in the absence of some showing of good reason for its denial." Id. at 777.

WORKMEN'S COMPENSATION ACT—Employee Of Washington Metropolitan Area Transit Authority [WMATA]—Whether Virginia or District of Columbia law applies to injured employee.

April 13, 1976

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

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

"The question has arisen as to what law applies when an employee of the Washington Metropolitan Area Transit Authority [WMATA], who is a Virginia resident, is injured on the job and thereby becomes eligible for Workmen's Compensation. . . ."

"I would like the opinion of your office as to whether the . . . [District of Columbia's] Workmen's Compensation Act, and not Virginia's, would apply to Virginia residents injured on the job with WMATA under all circumstances. For example, would it apply to a bus driver injured while operating his bus on a route from Springfield to Tyson's Corner? If the answer in your opinion is no, would it apply to a Virginia driver injured in Virginia while operating his bus between Springfield and downtown Washington? If the answer to this second question is no, would it apply to a Virginia driver injured in the District while operating his bus on a route that originates in Virginia?"

The provisions of Chapter 18 of Title 33, U. S. Code, (Longshoremen's and Harbor Workers' Compensation Act, adopted by Washington, D. C., 36-501, D. C. Code) shall apply in respect to the "injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every
person carrying on any employment in the District of Columbia and the term 'employee' shall be held to mean every employee of any such person."

The Washington Metropolitan Area Transit Authority is a quasi-public corporation which operates a consolidated series of transit routes radiating from the District of Columbia into two adjacent states, Virginia and Maryland. Its headquarters and principal base of operations are in the District of Columbia, from which it directs the day-to-day operations of the Authority. I am not aware of any other contacts with the Commonwealth except its route structure and the fact that some of its employees reside in the Commonwealth and may work wholly within the confines of the Commonwealth.

Section 65.1-23 of the Code of Virginia (1950), as amended, provides in pertinent part:

"Every employer and employee, except as herein stated, shall be conclusively presumed to have accepted the provisions of this Act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, except in the case of an executive officer, who shall have given prior to any accident resulting in injury or death notice to the contrary. . ." (Emphasis added.)

Section 65.1-40 of the Code provides that "[t]he rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act . . . shall exclude all other rights and remedies of such employee, his personal representative . . . at common law or otherwise, on account of such injury, loss of service or death." (Emphasis added.) Section 65.1-3 of the Code defines "employers" in part as "any individual, firm, association or corporation . . . using the service of another for pay." Section 65.1-4 of the Code defines "employee" in pertinent part as "every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer. . . ."

WMATA is, for the purposes of the foregoing statutory language, an employer under the Virginia Workmen's Compensation Act since it "uses the service of another for pay" within the Commonwealth in the course of its transit operations. The fact that WMATA's principal place of business is in the District of Columbia and its contractual relationships with its employers are established there does not affect this determination. The interest of the Commonwealth in affording remedies for injuries resulting from employment activity within its boundaries permits an injured employee of WMATA to claim compensation under the Virginia Act. See *Collins v. American Business, Inc.*, 350 U.S. 528, 76 S.Ct. 528 (1956); *Industrial Commission of Wisconsin v. McCarty*, 330 U.S. 622, 67 S.Ct. 886 (1947); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n.*, 306 U.S. 493, 59 S.Ct. 629 (1939); *cf. Home Indemnity Co. of New York v. Poladian*, 270 F.2d 156 (4th Cir. 1959). Thus, an employee of WMATA may select Virginia as the benefit State if his injury occurs in the Commonwealth. *Collins v. American Buslines, Inc.*, supra.

On the other hand, it is equally clear that the provisions of the District of Columbia's Workmen's Compensation statute would also apply to an injury sustained by an employee of WMATA in Virginia because of the District's legitimate concern arising out of employer-employee contract entered into in that jurisdiction. See *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801 (1947); *Alaska Packers Ass'n v. Industrial Accident Comm'n.*, 294 U.S. 532, 55 S.Ct. 518 (1935).

It is my opinion, therefore, that an employee of WMATA, without regard to his place of residence, may seek relief for injury occurring in Virginia
within the scope of his employment under the Workmen's Compensation Acts of either Virginia or the District of Columbia.

Section 65.1-61 of the Code permits compensation under the Virginia Workmen's Compensation Act for injuries occurring outside the State only in the following circumstances:

"(1) The contract of employment was made in this State;

"(2) The employer’s place of business is in this State; and

"(3) The residence of the employee is in this State;

"Provided the contract of employment was not expressly for service exclusively outside of the State."

Consequently, as to employment injuries occurring in the District of Columbia affecting Virginia residents employed by WMATA, the District of Columbia's Workmen's Compensation Act would be the sole source of relief for such employees.

ZONING—Adoption Of Land Use Plan Will Not Affect Validity Or Require Amendment Of Existing County Zoning Ordinance.

CONFLICT OF LAWS—Zoning Ordinance Inconsistent With Land Use Plan; Zoning Ordinance Controls.

ORDINANCES—Adoption Of Land Use Plan Will Not Affect Validity Or Require Amendment Of Existing County Zoning Ordinance.

PLANNING COMMISSIONS—Adoption Of Land Use Plan Will Not Affect Validity Or Require Amendment Of Existing County Zoning Ordinance.

October 10, 1975

THE HONORABLE THOMAS J. SURFACE
Commonwealth's Attorney for Craig County

This is in reply to your letter enclosing the following inquiry submitted by the Secretary of the Craig County Planning Commission:

"... I have been requested to ask you to solicit a ruling from the State Attorney General ... regarding the status of the present County Zoning Ordinance if a Land Use Plan is adopted for Craig County. The Commission would like a clear interpretation as to the relationship between the County Zoning Ordinance and the Land Use Plan for Craig County. The Commission would also like to have a ruling on which would have precedence the present Craig County Zoning Ordinance or the Craig County Land Use Plan once it was adopted."

Pursuant to Chapter 641, [1975] Acts of Assembly 1313, every county and municipality is required to create a local planning commission by July 1, 1976. Chapter 641 also provides that local planning commissions shall prepare a comprehensive plan which shall be adopted by the county or municipal governing body by July 1, 1980. See §§ 15.1-427.1, 15.1-446.1. Section 15.1-429 provides as follows:

"Upon the effective date of this chapter, planning commissions, by whatever name designated, and boards of zoning appeals heretofore established shall continue to operate as though created under the terms of this chapter. All actions lawfully taken by such commissions and boards are hereby validated and continued in effect until amended or repealed in accordance with this chapter. ...." (Emphasis added.)

Your letter indicates that Craig County presently has a planning commis-
sion and has previously enacted a zoning ordinance. Preparation and recommendation of zoning ordinances is one of the lawful functions of planning commissions. See § 15.1-493. Inasmuch as § 15.1-429 clearly validates and continues all lawful actions taken by local planning commissions previously established, it is clear that Chapter 641, requiring the establishment of local planning commissions where they do not exist and requiring such commissions to prepare comprehensive land use plans, was not intended to affect existing lawfully enacted zoning ordinances. Section 15.1-447, which was rewritten as a part of Chapter 641, provides that preparation of a comprehensive land use plan may include preparation of a zoning ordinance as one means of implementing the comprehensive land use plan. Accordingly, adoption of a comprehensive land use plan, pursuant to the requirements of § 15.1-446.1 does not require adoption of a new or amended zoning ordinance. I am, therefore, of the opinion that adoption by the County of a comprehensive land use plan will in no way affect the validity or require the amendment of the existing county zoning ordinance.

With respect to your inquiry regarding the relationship of an adopted comprehensive land use plan and a county zoning ordinance I would refer you to the recent decision of the Virginia Supreme Court in Board of Supervisors of Fairfax County v. Altman, 215 Va. 434 (1975), wherein the Court noted:

“We note here that a comprehensive or master plan does not have the status of a zoning ordinance. It is advisory only and serves as a guide to a zoning body.” 215 Va. at 441.

As to your question regarding which takes precedence, the comprehensive land use plan as adopted by a local governing body or the provisions of a zoning ordinance, in cases where the two are inconsistent, the referenced language in Altman, supra, is controlling; accordingly, I am of the opinion that an adopted comprehensive land use plan serves as an advisory tool in zoning matters and that, where a zoning ordinance is inconsistent with such comprehensive plan, the zoning ordinance controls.

ZONING—Creation Of “Adult Communities”—Whether valid exercise of zoning authority of localities.

COUNTIES, CITIES AND TOWNS—Zoning—Creation of “adult communities;” whether valid exercise of zoning authority of localities.

MINORS—Age Restriction Not Included In Virginia Fair Housing Law—Creation of “adult communities.”

ORDINANCES—Zoning Ordinance Must Reasonably Relate To Promotion Of Public Health, Safety Or Welfare.

VIRGINIA FAIR HOUSING LAW—Age Restriction Not Included In—“Adult communities;” whether valid exercise of zoning authority of localities.

July 23, 1975

THE HONORABLE CARRINGTON WILLIAMS
Member, House of Delegates

You have requested my opinion whether governing bodies in Northern Virginia may rezone parcels of land to provide for planned development districts consisting of “adult communities;” these adult communities would be created by zoning provisions which would fix the minimum age of pur-
chasers and further restrict permanent residents therein to persons 18 years of age or older.

Section 55-79.52, Code of Virginia (1950), as amended, provides, in pertinent part, that "no restraint on alienation shall discriminate or be used to discriminate on the basis of religious conviction, race, color, sex, or national origin." There is no provision in the above quoted statute barring discrimination on the basis of age; nor can I find any age restriction in the Virginia Fair Housing Law, contained in §§ 36-86 to -96 of the Code. The issue, therefore, is whether zoning by local jurisdictions for the creation of "adult communities" as described herein is a valid exercise of the zoning authority delegated to localities by statute.

Comprehensive zoning powers have been statutorily delegated to counties and municipalities in Title 15.1, Chapter 11, Article 8, of the Code. See §§ 15.1-486, 15.1-489, and 15.1-491. The generally applicable legal principles by which the validity of zoning ordinances is tested have been frequently enunciated by the Virginia Supreme Court and are as follows:

(1) zoning ordinances shall have as their appropriate purpose the promotion of the public safety, health and welfare; (2) if the demonstrated purpose of a zoning ordinance is reasonably shown to relate to promotion of the public health, safety or welfare the ordinance shall be sustained as valid; (3) the validity of any particular ordinance is presumed, and the burden is upon the party attacking the ordinance to establish its invalidity; (4) where presumptive reasonableness is challenged by appropriate evidence of unreasonableness, the presumption of reasonableness is not absolute and must be met by evidence of reasonableness; (5) if evidence of the reasonableness is sufficient to make the question fairly debatable, the ordinance must be sustained. Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, (1975); Fairfax County v. Snell Corp., 214 Va. 655 (1974); Board of Supervisors v. Carper, 200 Va. 653 (1959); Board of Supervisors of Fairfax County v. Davis, 200 Va. 316 (1959).

Your letter notes that the "obvious effect of this restriction . . . is that such a community would produce far less a burden on the school and traffic systems than a community without such restrictions." Whether factual evidence supporting this view can be reasonably demonstrated will depend upon the circumstances as shown to exist in communities affected by such zoning provisions. I would note, however, that the availability of public facilities and services to support population density has been recognized as an appropriate consideration in the design and application of zoning ordinance provisions. Board of Supervisors of Fairfax County v. Allman, supra; § 15.1-489 (6) of the Code.

I am, therefore, of the opinion that, though a zoning ordinance providing for "adult communities" as outlined above is not per se illegal, its validity will depend upon whether such ordinance can be shown to reasonably promote the public health, safety or welfare within the legal parameters set forth above.

ZONING—Notice And Hearing Requirements For Granting Exceptions And Variances By Board Of Zoning Appeals—Individual notice to affected property owners.

August 7, 1975

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

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

"A member of the Fredericksburg Board of Zoning Appeals has
asked me to request your official opinion as to the proper interpretation of § 15.1-496 of the Code of Virginia and its incorporation of the Notice Requirements of § 15.1-431.

"More specifically, the primary question is whether the Notice Requirements of § 15.1-431 require only publication . . . or whether those requirements necessitate written notice to adjacent property owners of the party requesting a variance."

Section 15.1-496 of the Code of Virginia (1950), as amended, to which you refer, provides:

"Applications for special exceptions and variances may be made by any property owner, tenant, government official, department, board or bureau. Such application shall be made to the zoning administrator in accordance with rules adopted by the board. . . . No such special exceptions or variances shall be authorized except after notice and hearing as required by § 15.1-431. . . ." (Emphasis added.)

The provisions of § 15.1-431, incorporated by reference in § 15.1-496, prescribe notice and hearing requirements for local planning commissions and local governing bodies in the recommendation of and adoption of comprehensive plans, zoning ordinances, subdivision ordinances, and amendments thereto as follows:

"The local commission shall not recommend nor the governing body adopt any plan, ordinance or amendment until notice of intention so to do has been published once a week for two successive weeks in some newspaper published or having general circulation in such county or municipality; provided, that such notice for both the local commission and the governing body may be published concurrently. Such notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than six days nor more than twenty-one days after the second advertisement shall appear in such newspaper. . . ."

"When a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or less parcels of land, then, in addition to the advertising as above required, written notice shall be given by the local commission at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. . . ." (Emphasis added.)

The provisions of § 15.1-495, setting forth the powers of boards of zoning appeals, are helpful in interpreting the meaning of § 15.1-496 and its incorporation by reference of the provisions of § 15.1-431. Several subsections of § 15.1-495 incorporate by reference, as does § 15.1-496, the notice and hearing requirements of § 15.1-431. Subsection (b), authorizing the granting of variances, subsection (c) authorizing review of decisions of the zoning administrator, and subsection (f), authorizing the granting of special exceptions, all provide that the respective powers thereby granted shall not be exercised except "after notice and hearing as required by § 15.1-431."

The language used in the foregoing provisions of § 15.1-495 is, in fact, the identical language employed in § 15.1-496. Section 15.1-495(d) provides, on the other hand, that with respect to interpretations of the district map, where there is uncertainty as to the location of a district boundary:

". . . After notice to the owners of the property affected by any such question, and after public hearing with notice as required by § 15.1-431, the board may interpret the map. . . ." (Emphasis added.)
Section 15.1-495(d), therefore, requires compliance with the notice and hearing requirements of § 15.1-431 and, in addition, individual notice to affected property owners. The specific requirement of individual notice to affected property owners in § 15.1-495(d) would be superfluous if the incorporation of notice and hearing requirements of § 15.1-431 is interpreted to refer to not only the public notice requirement by advertisement but the individual written notice to adjacent and abutting property owners. Inasmuch as statutes are normally construed so as to give meaning to every provision thereof, the reference in § 15.1-495(d) to the notice and hearing requirements of § 15.1-431 must be interpreted to refer only to the public notice by newspaper advertisement. Applying this interpretation to the identical language in § 15.1-496, that statute would require only the newspaper publication notice.

Moreover, it should be noted that the individual written notice requirements of § 15.1-431 are applicable, in that statute, only to proposed amendments of a zoning ordinance or rezoning. Section 15.1-495(e) clearly states that the powers conferred upon boards of zoning appeals, including their powers to grant variances and special exceptions, should not be construed so as to authorize rezoning. In view of the foregoing, I am of the opinion that § 15.1-496, which incorporates the notice and the hearing requirements of § 15.1-431 as a prerequisite to the granting of any variance or special exception, requires only the public notice by newspaper publication specified in the latter section.

February 19, 1976

THE HONORABLE LAWRENCE R. AMBROGI
Commonwealth's Attorney for Frederick County
require the Frederick County Commissioner of the Revenue to assess or reassess the property in a town when the town authorities adopt a zoning ordinance?"

Section 58-772.1 provides, in part:

"The commissioner of the revenue shall also assess or reassess, as required, any lot, tract, piece or parcel of land which has been rezoned, reclassified or as to which any exception has been made, by the zoning authorities of the county." (Emphasis added.)

The use of the prefix re- as part of the words emphasized in the above-quoted provision of § 58-772.1 reflects a legislative intent to require the assessment or reassessment of only those lots, tracts, pieces or parcels of land that have been zoned or classified more than once. Since real estate in Stephens City has never before been zoned, I am of the opinion that the Commissioner of the Revenue for Frederick County is not required by § 58-772.1 to assess or reassess such real estate if the town council adopts the zoning ordinance described in your letter.

"(2) If the residential property in a commercial district is reassessed to a higher value as a result of the adoption of the zoning ordinance in question, can commercial property in a residential zone continue to be assessed at the same higher commercial value when it becomes a non-conforming use?"

My answer to your first inquiry makes clear that the property in Stephens City should not be assessed or reassessed as a result of the adoption of the zoning ordinance in question. I would point out, however, that whenever such property is assessed or reassessed there should be no causal connection between the valuation of residential property located in a district zoned for commercial use and the valuation of commercial property located in a district zoned for residential use. In either case, the property should be assessed or reassessed in relation to its fair market value. See Article X, Section 2, Constitution of Virginia (1971); and Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958).
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